IN THE SUPREME COURT OF MISSOURI

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

SUBSTITUTE SECOND 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

BY: /s/ Michael Blotevogel_____
Roy C. Dripps #29789
Charles W. Armbruster III #40027
Michael T. Blotevogel #55030
51 Executive Plaza Ct.
Maryville, IL 62062
Phone: 800/917-1529
Fax: 800/927-1529
royd@adwblaw.com
charlesa@adwblaw.com
mikeb@adwblaw.com
Attorneys for Plaintiff/Respondent/Cross-Appellant

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Response to Cottrell's Jurisdictional Statement

Cottrell acknowledges this Court's jurisdiction. But Cottrell uses this section to ask for re-transfer. This Court has already rejected Cottrell's position. As noted by Plaintiff in his application, the issues raised by the Court of Appeals' opinion go well beyond what happened with one part of an auto transport trailer. The questions of general interest or importance, calling either for reexamination of existing law or analysis of whether the opinion below is contrary to previous decisions, include whether strict liability product defect, strict liability failure to warn, and negligence will continue to be treated in Missouri as separate and distinct theories of liability, or if they will now be deemed "intertwined." Cottrell's contention otherwise is contradicted by Section I.C. of its Argument, in which Cottrell asks this Court to reverse decades of Missouri jurisprudence and hold that these theories are no longer distinct. Cottrell realizes that if these theories are distinct, then there is no support for reversing a strict liability failure to warn verdict due to an alleged error with the verdict director on a negligence claim. Further, the Court of Appeals' opinion was contrary to Missouri authority holding that one of the benefits of submitting cases to juries on multiple theories, with multiple verdict directors, is that the jury's effort will not be wasted, and the jury's verdict will be respected, should error be found on one, but not all, of the theories submitted. Finally, the Court of Appeals' opinion granted relief that was not specifically sought in Cottrell's Points Relied On below, and that was not supported by authority below. This Court's decision will determine whether litigants can rely on the Points Relied On and the cited authorities to determine what is at issue in appeals.

Statement of Facts

Evidence and Allegations Regarding Auto Handling

Plaintiff's allegations against Auto Handling Corporation ("AHC") went beyond negligent maintenance and included negligence in inspecting, repairing and warning about the dangers associated with the Cottrell automobile transport trailer ("rig"). Pl. Br. at 7-8, citing Appendix A17-19, Legal File ("LF") 42-44.

Plaintiff's evidence as to AHC is fully set forth in his opening brief. *See, e.g.,* Pl. Br. at 15-17 and citations therein. AHC's brief notes some work on the rig was done at terminals where the mechanics were employed by Jack Cooper Transport ("JCT"), Plaintiff's employer, and it generally attempts to downplay the work done at terminals staffed by AHC mechanics. But AHC's attorney admitted in his opening statement 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. The rig 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. Plaintiff first obtained the rig from Oklahoma City in 2004. Transcript 1155.

The undisputed testimony was that the maintenance records did not show any repair to the idler. Transcript 827. Plaintiff described a 31-page gap in the maintenance records. Transcript 1426-1428; Exhibit 35.

AHC cites Plaintiff's testimony regarding his familiarity with the maintenance records. AHC Br. at 8. However, no one from AHC or JCT testified regarding those companies' record-keeping practices, and there was no testimony explaining why the repair was not documented as a JCT repair, or why there appeared to be a 31-page gap. Transcript, *generally*.

Plaintiff testified he was familiar with the maintenance that was done on the rig from 2004 through at least his injury in 2007 Transcript 1159. He testified that while it was theoretically possible that someone other than AHC or a JCT-affiliated company could work on the rig if it broke down on the road, to his knowledge, all work on this rig until he was injured was done by AHC, JCT, or another JCT affiliate. Transcript 1159-1160; *see also* Transcript 1160 ("Q. To your knowledge had anyone ever done any work on this idler who wasn't affiliated with Jack Cooper? A. No. Not whatsoever.").

Plaintiff testified there was at least one occasion where AHC did not create paperwork documenting its work on this rig. Transcript 1160-1161. He testified that if there were undocumented repairs, they would most likely have been done by AHC. *Id.*

Allegations Against Cottrell

Plaintiff's allegations against Cottrell went beyond allegations of strict liability product defect, and included allegations of negligence (not just "negligent product defect"), and strict liability failure to warn. Plaintiff's First Brief at 3-7, citing Appendix A10-15, LF 35-40.

The allegations for strict liability failure to warn were **not** that no warnings were provided. The allegations were more specific:

(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;

Appendix A-10, LF 35, par. 9.

Failure to Warn Evidence

Cottrell's expert, Dr. Sandra Metzler, admitted no warnings specific to idler failure were given. Transcript 1912-13. She admitted these warnings should be given because idlers inevitably break. *Id.* She agreed Cottrell should warn users of the risk of idlers breaking if breaking is reasonably foreseeable. Transcript 1906.

Plaintiff testified there were no warnings: (1) advising him not to use idlers in the location of the idler on which he was injured (Transcript 1154); (2) advising him not to compress the suspension more than two inches (Transcript 2015-2016); or (3) advising him that idlers could break, become bent up, or become twisted (Transcript 1218).

Dr. Metzler 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 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.

Plaintiff testified he knew what he needed to know to drive the rigs. Transcript 1400. But as far as securing vehicles on the rigs, 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.

After Plaintiff's incident, once he realized the idler was broken, he was able to safely secure the vehicle using a different idler. Transcript 1161-1162.

Plaintiff could not say if he read the decals on this specific rig. Transcript 1254-1256 ("I can't say I did, I can't say I didn't."). Cottrell claims, "Later, the plaintiff stated affirmatively that he did not read it," (Cottrell Br. 9), but the "it" he was referring to was the owner's manual, not the decal. *See* Transcript 1256 (stating "the testimony today" only shows "it basically states, don't overtighten your chains"); *see also* Transcript 1121-1123, 1124-1127 (testimony by Cottrell's Elwood Feldman from earlier that day that in 1994, he could not explain what "don't overtighten" means).

Cottrell omits the evidence that Plaintiff was never given the owner's manual; it was not in his rig. Transcript 1147-1148, 1253-1254.

The decals included an instruction to inspect chains, ratchets & tie down bar before use. Cottrell Exhibit 170. Plaintiff complied with that warning – he inspected the

rig on July 3, 2007 for broken or loose idlers, or chains, but he had no idea the idler was damaged. Transcript 1150-1151.

The decals included a warning not to "over tighten chains while loading." Cottrell Exhibit 170. Plaintiff testified he never overtightened the vehicles. Transcript 1145, 1148-1149. He did not know what the owner's manual's authors meant by "overtighten," but he did not believe he overtightened on July 3, 2007. Transcript 1400-1401.

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

Larry Lockhart, who was a car-hauler for a different employer than Plaintiff's employer, testified he also never received a Cottrell owner's manual. Transcript 1525. He testified there were no warnings on the Cottrell rigs. Transcript 1525.

Evidence of Defects Present When Cottrell Sold the Rig

Cottrell suggests the sole defect was an idler repair with an inadequate weld. However, Plaintiff presented ample evidence of defects that were present when Cottrell sold the rig, including the chain and ratchet system design, the idler system design, and the original Cottrell MIG weld, which did not give sufficient penetration to secure the component, as well as evidence pertaining to negligence and failure to warn. *See* Plaintiff's First Brief at 9-15 and citations therein. As to the idler repair, Plaintiff's evidence indicated an attempt to repair the defective Cottrell weld had been inadequate, contributing to the failure of the idler. Transcript 673, 675, 761, 763-764, 781.

Cottrell's Proposed Negligence Instruction, and Objections to Plaintiff's Negligence Instruction

Cottrell's proposed verdict director for negligence (Cottrell's No. 14), which cited MAI 25.09, would have required Plaintiff to prove that the idler, a steel part welded to the rig, "generated excessive force during operation." LF 160. It would also have exonerated Cottrell had the jury found that idler was not designed by Cottrell, or that Cottrell had used ordinary care to design it, even if the jury found that Cottrell designed the overall chain and ratchet system, and failed to use ordinary care to design that system. *Id.* It also required Plaintiff to show he sustained damage "as a direct result" of Cottrell's negligence. *Id.* Plaintiff made several objections, noting these issues and that Cottrell's submission ignored most of Plaintiff's allegations. Transcript 2048-2069, 2120-2129. The trial court submitted a modified version of Plaintiff's proposed negligence instruction. LF 297. Plaintiff noted MAI 17.02 has not been limited to automobile cases, that MAI 17.02 has been identified as the appropriate instruction when there are multiple allegations of ordinary negligence, and that the pleadings and the evidence indicated Cottrell's negligence went beyond its design of the specific rig. Transcript 2050-51, 2052, 2055-56, 2064, 2122-29.

Cottrell did not object that the negligence instruction needed to require a finding that it manufactured the product. Transcript 2048-2069, 2120-2129. Cottrell did not object that the instruction encompassed post-sale conduct. *Id.* Cottrell did make a "failure to plead" objection to the reference to the failure to warn Plaintiff's employer, but Plaintiff noted that allegation was pled. Transcript 2125.

Cottrell's Recognition of the Distinction Between Strict Liability and Negligence at Trial

Cottrell submitted separate verdict directors for strict liability and negligence. LF154, 160.

Cottrell's verdict form allowed the jury to make separate findings and allocations of fault on these claims. LF199-202.

Cottrell never submitted an instruction stating a finding for it on strict liability precluded consideration of negligence, or requiring the jury to apportion fault in the same manner across the claims. LF142-203. Cottrell did not ask the Court to send the jury back to deliberate further because of any alleged inconsistency in the verdict. Transcript 2272.

Neither Cottrell's motion for directed verdict nor its arguments in support claimed that Plaintiff's negligence claim should be stricken because it was redundant with the strict liability claim. LF217-234, Transcript 1611-1626, Supplemental Transcript 3-4.

Argument

The jury's strict liability failure to warn verdict as to Cottrell must be affirmed because Cottrell has not identified any errors with the instructions submitted on that theory, or in the evidence presented for it. Cottrell has also failed to cite any authority suggesting that any error with an instruction on a separate theory, negligence, would require reversal on a theory where there has not been error.

Cottrell claims in subpoint C of its Point I that "Missouri has long adhered to a fallacy in declaring that there is a difference between strict liability design defect claims and negligent design defect claims." Cottrell Br. at 27. This admission that Missouri

recognizes the difference is fatal to Cottrell's Point I, and it shows that the jury's verdict on strict liability failure to warn can stand even if its negligence verdict is reversed due to Points III and IV – if Missouri recognizes these are distinct claims, a jury is entitled to make distinct findings on them.

The jury's verdict on the failure to warn claim was consistent with evidence that there were no specific warnings regarding the dangers identified in the evidence, or how to avoid them. Plaintiff's evidence of specific warnings that were not given was undisputed. The presumption under Missouri law is that a warning that was not given would have been heeded. That presumption is deemed sufficient to create a prima facie case, which precludes JNOV.

A plaintiff is prohibited from offering speculative and self-serving testimony that they would have behaved differently had a better warning been issued. The only situations where a defendant has avoided liability is where a plaintiff affirmatively testifies that no warning would have changed their behavior. No such admissions were made here. The only specific warning identified by Cottrell on the rig or in the owner's manual, which Plaintiff did not have, was "do not overtighten." That warning is so vague that the author of the Cottrell owner's manual could not explain its meaning. Whether Plaintiff saw a vague warning on this rig about "do not overtighten" has no bearing on whether he would have heeded more specific and helpful warnings. And even if he did not see it, Plaintiff testified he made sure he did not "overtighten."

Cottrell's claims that strict liability subsumes negligence, or that strict liability and negligent should not be distinct, were not made at trial, and are therefore waived.

Negligence and strict liability are and should be distinct theories of liability. Negligence ensures a manufacturer will exercise ordinary care to make a product as safe as possible, even if the failure to so would not make it unreasonably dangerous; it's the equivalent of requiring a student who could get a "D" without trying to exercise ordinary care to do better. Strict liability ensures a manufacturer will not sell a product that is unreasonably dangerous, where ordinary care is not sufficient to make the product reasonably safe. It holds that an "F" is unacceptable, no matter how sincere the effort.

Cottrell's modification claim fails because Plaintiff's evidence showed multiple defects with Cottrell's original design, including with the chain and ratchet system, the idler system, and the original weld on the idler, caused the injury. Injuries can have multiple causes. Cottrell's own expert contended she could not state what caused the idler to fail. A third party's inability to fix the mess created by a defect with the product does not relieve the manufacturer of liability.

Plaintiff is entitled to a new trial against Cottrell as to punitive damages and strict liability because the trial court erred by making a blanket ruling excluding evidence of thousands of injuries caused by Cottrell's system.

A retrial of negligence is required only if the directed verdict in favor of AHC is reversed. Reversal of the directed verdict is warranted because Plaintiff had evidence that AHC failed to repair the defect with the original Cottrell weld, failed to inspect the rig sufficiently in the 3+ years after Cottrell sold the rig, and failed to warn Plaintiff regarding the idler or the dangers of Cottrell's system. A negligence claim as to AHC would be submitted under MAI 17.02. Moreover, the trial court was correct in submitting

Plaintiff's negligence claim against Cottrell based on MAI 17.02, because that was the only submitted instruction that fully incorporated Plaintiff's pleadings and evidence as to Cottrell. Cottrell is not claiming error in the pleadings or the evidence in its appeal. Further, if this Court finds an alternative instruction would have incorporated the same pleadings and evidence submitted by Plaintiff's instruction, any error would be harmless.

Standard of Review for JNOV

The standard of review defeats most of Cottrell's Points. "To determine whether the evidence was sufficient to support the jury's verdict, an appellate court views the evidence in the light most favorable to the verdict and the plaintiff is given the benefit of all reasonable inferences." *Keveney v. Missouri Military Acad.*, 304 S.W.3d 98, 104 (Mo. 2010). "Conflicting evidence and inferences are disregarded. *Id.* The jury's verdict will be reversed only if there is a complete absence of probative facts to support the jury's conclusion. *Id.*

The application of that standard resolves the factual disputes in Plaintiff's favor.

I. Cottrell's Point I Should Be Denied

A. Cottrell Has Waived the Argument, and It Invited the Error

Cottrell submitted separate verdict directors for strict liability and negligence. LF154, 160. Cottrell's verdict form allowed the jury to make separate and independent findings on strict liability and negligence. LF199-202.

Cottrell's Point I is therefore precluded because it invited the alleged error. *See Pierson v. Kirkpatrick*, 357 S.W.3d 293, 299 (Mo. App. 2012), quoting *Lau v. Pugh*, 299

S.W.3d 740, 757 (Mo.App.2009) ("The general rule of law is that a party may not invite error and then complain on appeal that the error invited was in fact made.' ").

Furthermore, Cottrell did not move to compel Plaintiff to elect remedies. This also waives any claim of error. *Steinberg v. Fleischer*, 706 S.W.2d 901, 907 (1986). If Plaintiff could submit this case and was entitled to an award under multiple findings, then it was appropriate for the jury to make separate findings.

In moving for a directed verdict, Cottrell never claimed Plaintiff's negligence theory was subsumed by the strict liability theory. LF217-234, Transcript 1611-1626, Supplemental Transcript 3-4. This also waives any claim of error. *See Howard v. City of Kansas City*, 332 S.W.3d 772, 790-791 (Mo. banc 2011) ("Because the City did not argue against the submissibility of future damages in its motion for directed verdict, it has failed to preserve the issue for appeal."); *Bailey v. Hawthorn Bank*, 382 S.W.3d 84, 100 (Mo.App. 2012) ("On appeal, the Bank makes a variety of arguments that were never raised in its motion for directed verdict. … But because the Bank raised these arguments for the first time in its motion for judgment notwithstanding the verdict, it has failed to preserve these issues for appeal …"); *Marquis Financial Services of Indiana Inc. v. Peet*, 365 S.W.3d 256, 259 (Mo.App. 2012) ("A party cannot save a defective motion for directed verdict by making specific allegations in the motion for JNOV."); *Johnson v. Allstate Indem. Co.*, 278 S.W.3d 228, 233 (Mo.App. 2009) (argument first raised in motion for JNOV not preserved); *Pope v. Pope*, 179 S.W.3d 442 (Mo.App. 2005) (motion for JNOV too late to assert specific grounds raised on appeal); *Savory v.*

Hensick, 143 S.W.3d 712, 719 (Mo.App. 2004) (error not raised in motion for directed verdict cannot be basis for JNOV or appeal).

Finally, Cottrell did not ask the Court to send the jury back to deliberate further because of the alleged inconsistency in the verdict. Transcript 2272. This also leads to a waiver of this Point.

> We now hold that a claim that a verdict is inconsistent to the point of being self-destructive must be presented to the trial court before the jury is discharged. Otherwise the claim of inconsistency will be held to have been waived. The reason is that, if the point is raised as soon as the verdict is returned, any error is capable of correction by ordering the jury to return for further deliberation. Our holding is in accord with the usual rule that the trial court must be given the opportunity to correct error while correction is still possible.

Douglass v. Safire, 712 S.W.2d 373, 374 (Mo. banc 1986)

Cottrell cannot complain over alleged errors it invited and/or waived. *See also* MAI, page ix, pocket part (amendments to Rules 55.27(g)(2), 78.07(a) and Rule 84.13(a), effective in 2012, "… require that allegations of error … be presented to and expressly decided by the trial court in order to preserve those issues for appellate review. …**THIS IS A MAJOR CHANGE IN THE MISSOURI PROCEDURAL REQUIREMENTS FOR PRESERVATION OF ERROR ON APPEAL**.").

B. The Jury's Finding for Cottrell on Strict Liability Product Defect Did Not Preclude the Jury Finding for Plaintiff on Negligence

Cottrell claims in its subpoint C that "Missouri has long adhered to a fallacy in declaring that there is a difference between strict liability design defect claims and negligent design defect claims." Cottrell Br. at 27. This admission is fatal to Cottrell's Point I – if Missouri recognizes these are distinct claims, a jury is entitled to make distinct findings on them. Further, the jury found for Plaintiff on strict liability failure to warn. Plaintiff's Appendix A4.

A jury can find a manufacturer negligent after finding for that manufacturer on strict liability. *See Rinker v. Ford Motor Co*., 567 S.W.2d 655, 660 (Mo. App. 1978) ("… no legal inconsistency" because "[t]hey are separate and distinct theories of liability."). Cottrell claims the jury found "there was no defect," (Aplt. Br. at 21), but the basis for the jury's findings "is at best a matter of speculation and conjecture," and the presumption is that the jurors followed the court's instructions, which allowed the separate findings. *Rinker*, 567 S.W.2d at 660.

Instruction 7 allowed Cottrell to avoid strict liability even if the trailer had a defective condition; Cottrell could have avoided strict liability if the defect was not unreasonably dangerous, or if the trailer was used in a manner not reasonably anticipated. LF294. However, neither Instruction 10 (LF297), nor MAI 25.09, nor Cottrell's instruction 14 (LF160) required the jury to find the product was unreasonably dangerous, or that the trailer was used in a manner reasonably anticipated, to find Cottrell negligent. As such, there is no inconsistency between the jury's findings.

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, because product defect and failure to warn claims are "distinct theories aimed at protecting consumers from dangers that arise in different ways." *Moore v. Ford Motor Co.*, 332 S.W.3d 749, 757, 764-65 (Mo. banc 2011).

In *Palmer v. Hobart Corp.*, 849 S.W.2d 135, 142 (Mo. App. 1993), the court rejected a manufacturer's argument that a jury verdict for it on strict liability precluded a verdict against it on failure to warn. The court noted, "[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." *Id.* It noted the instructions allowed the jury to reach separate findings. *Id.*

As *Palmer* indicates, the jury's verdict should be construed "liberally so that it may be given effect where possible." *Palmer* also shows that the proper method to determine whether the jury's findings are consistent is an examination of the verdict directing instructions.

As Cottrell admits in section C of its Point I, Missouri recognizes "an important distinction" between negligence and strict liability. *Blevins v. Cushman Motors*, 551 S.W.2d 602, 607-08 (Mo. banc 1977). The duty in negligence cases is based on the reasonably anticipated harm from the acts or omissions; strict liability is based in part on the reasonably anticipated use of the product, not the harm it may cause. *Id.* "… [I]n strict liability we are talking about the condition (dangerousness) of an article which is

designed in a particular way, while in negligence we are talking about the reasonableness of the manufacturer's actions in designing and selling the article as he did." *Id.*

Consistent with *Blevins*, a jury may find a product was dangerous but not unreasonably dangerous, yet still find the manufacturer's actions regarding that danger were not reasonable.

In *Randall v. Warnaco, Inc., Hirsch-Weis Div.*, 677 F.2d 1226 (8th Cir. 1982), the court rejected the proposition that a finding for a manufacturer on strict liability precluded a finding against it on negligence. *Id.* at 1228. "Our analysis of the law of the case as embodied in the jury instructions, however, demonstrates that the strict liability theory did not necessarily subsume the negligence claim." *Id.* at 1231."[T]he basis for the jury's determination that Randall had failed to prove her strict liability theory remains unknown ... the jury may have rejected Randall's claim without considering whether the product was defective in fact." *Id.* It noted that modification might have prompted the jury's strict liability verdict;"Sakellson's modification of the product, however, need not bar recovery under Randall's negligence theory." *Id.*

"Strict liability may present a broader theory of recovery in some cases … It does not necessarily follow, however, that a determination that a particular defendant is not strictly liable carries with it an implicit finding that his conduct was not negligent." *Id.*, n.5. "**Because negligence focuses on the conduct of the defendant and strict liability on the condition of the product, it becomes conceptually impossible to say that a verdict for the defendant in a strict liability count always disposes of plaintiff's**

negligence claim based on the same alleged defect ..." *Id.* (emphasis added). It permitted retrial of the plaintiff's negligence claims. *Id.*, n.6.

Randall shows that Missouri negligence claims "focus[] on the conduct of the defendant," whereas strict liability focuses "on the condition of the product." Thus, it is "conceptually impossible" to say that the verdict for Cottrell on the strict liability count disposed of Plaintiff's negligence claim. *See also Sterner v. U.S. Plywood-Champion Paper, Inc.*, 519 F.2d 1352, 1354-1355 (8th Cir. 1975) (jury's verdicts as to negligence and strict liability not inconsistent); *Wagner v. International Harvester Co.*, 611 F.2d 224 (8th Cir. 1979); *Bjerk v. Universal Engineering Corp.*, 552 F.2d 1314 (8th Cir. 1977).

Rinker noted, "… where several claims are joined for trial, consistency among the verdicts disposing of the several issues is not required." 567 S.W.2d at 659, citing *Page v. Hamilton*, 329 S.W.2d 758, 764-767(10, 11), (12, 13) (Mo.1959). *Page* stated, "We believe the better rule to be that where separate causes of actions are joined under the permissive authority of section 509.460 and tried together, a general verdict will not be held to be fatally defective for inconsistency unless there is error in the pleading, proof or submission of the actions." *Page*, 329 S.W.2d at 767. Here, Cottrell's appeal does not claim error in the pleading or proof. As shown above, the submission of negligence on Cottrell's instruction 14 or another version of MAI 25.09 would not have precluded different findings by the jury on these two theories.

Page reversed an award of a new trial where the jury's findings ***were*** inconsistent, noting separate findings would have been permitted in separate trials, with neither verdict set aside. *Id.* at 767-768.

The jury could reasonably simultaneously find for Cottrell on strict liability and for Plaintiff on negligence. As such, retrial, let alone JNOV, is precluded. Further, there is no reason the strict liability verdict should control over the negligence verdict – if Cottrell's position that strict liability claims are always easier for plaintiffs to prove than negligence claims was correct (it is not), that would mean Plaintiff prevailed on the harder claim, suggesting the jury's finding on strict liability was in error.

C. Cottrell's Cases Are Distinguishable and Not Based on Missouri Law

Cottrell cites no decision involving Missouri law, and none where there was a difference in the allegations of strict liability and negligence. In *Jaurequi v. John Deere Co.*, 971 F.Supp. 416 (E.D. Mo. 1997), the allegations of strict liability and negligence were identical. *Id.* at 419. Here, the allegations were not identical. *Compare* LF35 *with* LF37-38. *Jaurequi* cited *Peitzmeier v. Hennessy Indus., Ind.*, 97 F.3d 293, 296 n. 2 (8th Cir. 1996) for the statement that negligence claims have a higher threshold of proof. 971 F.Supp. at 431. But in *Peitzmeier*, Nebraska law applied. 97 F.3d at 298. And, the Peitzmeiers had abandoned their negligence claims. *Id.* at 296, n.2.

Cottrell cites *Miller v. Yazoo Mfg. Co.*, 26 F.3d 81, 84 (8th Cir. 1994), but *Miller* simply held that a jury's finding that a user was 100% at fault provided "a complete defense to a strict liability action," not a negligence action. The only claim at issue in *Miller* was strict liability.

Cottrell cites *Witt v. Norfe, Inc.*, 725 F.2d 1277 (11th Cir. 1984), but *Witt* did not grant JNOV. *Id.* at 1279. *Witt* was applying Florida law, which no longer requires a finding that a defect is unreasonably dangerous for strict liability. *Id.* at 1279. *Witt*

recognized that the verdicts would not be inconsistent in states where unreasonable dangerousness was an element of strict liability. *Id.*, citing *Greiten v. LaDow*, 235 N.W.2d 677, 685 (Wis. 1975). Here, Missouri requires the defect be unreasonably dangerous to impose strict liability. Mo. Rev. Stat. 537.760.

Cottrell cites *Boekamp v. General Motors, LLC*, 2013 WL 5807627 (Cal. App. 2013), which did not grant JNOV, involved a strict liability consumer expectation test, and had identical allegations of negligence and strict liability. *Id.* at *1-2. Missouri has rejected the consumer expectations test. *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 65 (Mo. banc 1999). Here, the allegations were not identical. *Boekamp* recognized inconsistency depends on the instructions and evidence, because "'negligence and strict products liability are not identical doctrines.'" *Id.* at *5, citing *Oxford v. Foster Wheeler LLC*, 177 Cal.App.4th 700, 718 (2009).

Cottrell cites *Oxford*, but it did not grant JNOV, and it recognized inconsistency depends on the instructions and the evidence; "Neither doctrine entirely subsumes the other." 177 Cal.App. at 718.

Cottrell cites *Oja v. Howmedica, Inc.*, 111 F.3d 782 (10th Cir. 1997), which did not grant JNOV, and which applied Colorado law, where a plaintiff would have to show a product defect (but not that the defect was unreasonably dangerous) in support of either claim. *Id.* at 791.

In short, Cottrell's cases do not rely on Missouri law, often involved identical allegations for negligence and strict liability, and often did not grant JNOV. Plaintiff's

authority, by contrast, consists of Missouri cases in which the courts upheld the jury's right to make distinct findings on the various theories.

D. Cottrell's Instruction Arguments Are Without Merit

Plaintiff will fully respond to Cottrell's MAI 25.09 discussion in his response to Points III and IV. As noted therein, plaintiffs get to decide what theories to submit their cases under, and Plaintiff's negligence claims involved more than negligent product design. As such, MAI 25.09 did not apply to all of Plaintiff's allegations; MAI 17.02 did.

Cottrell's suggestion, based on *Sandage v. Bankhead Enterprises, Inc.*, 177 F.3d 670 (8th Cir. 1999), that a manufacturer has met its duty of ordinary care when it designs products that are free of latent defects and concealed dangers does not help Cottrell here. There was evidence these defects (excessive forces required, improper idler design, an idler on the bottom of the rig on the brink of failure) were latent and concealed. *See Stanley v. Cottrell*, 2013 WL 466232, *6 (E.D. Mo.), ("*Sandage* is too dissimilar to require a finding of summary judgment. The alleged open and obviousness of the danger should be left to the factfinder to decide."). Furthermore, the case *Sandage* relied on for Cottrell's proposition, *Stevens v. Durbin-Durco, Inc.*, 377 S.W.2d 343 (Mo. 1964), was authored approximately 20 years before Missouri adopted comparative fault. *See, e.g., Thompson v. Brown & Williamson Tobacco Corp.,* 207 S.W.3d 76, 106 (Mo. App. 2006) (open and obviousness of danger is jury question).

Cottrell did not object at trial that Instruction 10 needed to require a finding that Cottrell designed the product, so this argument is waived. Moreover, it was undisputed that Cottrell sold the trailer. "It is not erroneous to omit undisputed elements from an

instruction." *Biermann v. Gus Shaffar Ford, Inc.*, 805 S.W.2d 314, 320 (Mo. App. 1991). Further, "an instruction is not erroneous when a finding of the essential element is necessarily implied from the other findings required." *Id*. The instruction necessarily implied that Cottrell manufactured and design the trailer and its securement systems.

Instruction 10 was not erroneous by failing to require a finding that the product was unreasonably dangerous; neither Cottrell's proposed instruction (LF160) nor MAI 25.09 require that finding, either.

The element of whether a manufacturer negligently failed to warn about the defect or hazard is optional within MAI 25.09; it is not a required element of negligence.

Cottrell's contention that Plaintiff failed to present evidence of any causative defect lacks any merit. As noted in the Statement of Facts in both of his briefs, Plaintiff had ample testimony that Cottrell's negligence was a cause of his injuries, and that element was in Instruction 10. LF297. Plaintiff also prevailed on a strict liability failure to warn theory, which required a finding of causation. LF300.

E. Missouri Should Continue to Recognize that Strict Liability and Negligence Are Distinct Concepts; Cottrell's Position Has Been Waived, As It Is Being Argued for the First Time Here

Cottrell, to justify its request that this Court break from decades of precedent and obliterate the distinctions between strict liability and negligence, notes that the Restatement (Third) of Torts: Products Liability requires plaintiffs to choose between negligence and strict liability. This argument was waived. Below, Cottrell tried to argue there was no distinction, generally or in this case. This argument is also the subject of

waiver and invited error for the reasons listed in Section I.A., *supra*. *See Dieser v. St. Anthony's Med. Ctr.*, 498 S.W.3d 419, 432 (Mo. banc 2016), quoting *State v. Davis*, 348 S.W.3d 768, 770 (Mo.banc 2011) (" 'An issue that was never presented to or decided by the trial court is not preserved for appellate review.'"); *see also id.*, quoting *Davis*, 348 S.W.3d at 770 (" ' [A] party seeking the correction of error must stand or fall on the record made in the trial court[;] thus it follows that only those objections or grounds of objection which were urged in the trial court, without change and without addition, will be considered on appeal.'").

This Court has already rejected litigants' arguments that it should adopt the Third Restatement, holding that adopting that approach would be inconsistent with the actions of the Missouri Legislature. *See Rodriguez*, 996 S.W.2d at 65 ("Like the statute on physician-patient privilege, any change must come from the legislature."); *id.*, citing *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371, 377-78 (Mo. banc 1986) ("By codifying section 402A from the Restatement (Second), unadorned by any definitions, the legislature tacitly adopted the *Nesselrode* approach, and now, to judicially define the terms "defect" and "unreasonably dangerous" appears to be inconsistent with legislative intent."); *id.* ("This Court again declines the invitation to adopt the reasonable alternative design/risk-utility theory.").

The Missouri and Eighth Circuit cases cited in Plaintiff's Section I.B., *supra*, fully explain why Missouri has long treated strict liability, which focuses on the end result, and negligence, which focuses on the process, as distinct concepts. Quite simply, a product may be unreasonably dangerous, notwithstanding the exercise of ordinary care. On the

other hand, even though a product may not be unreasonably dangerous, the exercise of ordinary care could have made the product safer. Finally, a product may be unreasonably dangerous simply because it lacked adequate warnings. Negligence and strict liability are and should be distinct theories of liability. Negligence ensures a manufacturer will exercise ordinary care to make a product as safe as possible, even if the failure to so would not make it unreasonably dangerous; it's the equivalent of requiring a student who could get a "D" without trying to exercise ordinary care to do better. Strict liability ensures a manufacturer will not sell a product that is unreasonably dangerous, where ordinary care is not sufficient to make the product reasonably safe. It holds that an "F" is unacceptable, no matter how sincere the effort.

Cottrell notes that in *Moore*, this Court recognized that "… negligence and strict liability theories are separate and distinct," even though "the same operative facts may support recovery under either theory, particularly in a failure to warn case." 332 S.W.3d at 764. 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, even though the operative facts were the same, because product defect and failure to warn claims are "distinct theories aimed at protecting consumers from dangers that arise in different ways." *Id.* at 757, 764-65. *Moore* recognizes that allowing recovery under multiple theories protects consumers. Cottrell does not explain why this Court should reverse precedent and lessen these protections.

Cottrell cites *Jablonski v. Ford Motor Co.*, 2011 IL 110096, 955 N.E.2d 1138 (Ill. 2011), and suggests Illinois no longer recognizes a distinction between negligence and strict liability. That would not justify breaking from decades of Missouri precedent and ignoring legislative intent, even if that were correct. And it is not correct. The only claim at issue in *Jablonski* was a negligence claim, so *Jablonski*'s offhand references to statements by commentators regarding any overlap between negligence and strict liability are *dicta*. *Id.* at par. 6. Moreover, *Jablonski* held the risk-utility test would be encompassed within an Illinois negligent-product-design claim. *Id.* at par. 130. And Illinois also allows strict liability to be proven by the consumer expectations test. *Guvenoz v. Target Corp.*, 2015 IL App (1st) 133940, ¶ 95, 30 N.E.3d 404, 423. This Court has refused to adopt either test, holding both, and any other theory supported by the evidence, can be encompassed within the phrase "unreasonably dangerous." *Newman v. Ford Motor Co.*, 975 S.W.2d 147, 154 (Mo.banc 1998). *Guvenoz*, which is more recent than *Jablonski*, recognizes that Illinois plaintiffs may still recover under strict liability or negligence. 30 N.E.3d at 422 ("While the focus in a strict liability claim is primarily on the condition of the product, a defendant's fault is at issue in a negligence claim, in addition to the product's condition."). *Guvenoz* suggests an Illinois plaintiff may have to prove the product was not reasonably safe ***and*** that the defendant was at fault to show negligence. *Id.* However, that is inconsistent with Missouri law.

Contrary to Cottrell's suggestion, *Hopfer* shows that Missouri ***does*** have a "standard" in strict liability design defect cases, which is whether the end result of a manufacturer's conduct created an unreasonably dangerous product; all issues other than

the end result are irrelevant to strict liability claims. *Hopfer v. Neenah Foundry, Inc.*, 477 S.W.3d 116, 129 (Mo. App. 2015) ("The lone relevant inquiry for the jury … was whether the grates were unreasonably dangerous, and therefore defective based solely on the condition of the grates. Neenah's conduct, standard of care, and fault in the manufacturing process is not a relevant consideration for the jury in Hopfer's strict products liability claim."). This distinction does not "rely on a fiction," as Cottrell suggests, but was relied on in *Hopfer* and in other cases to preclude the parties from putting on evidence that goes solely to fault, and not the final condition of the product, such as evidence regarding the testing a manufacturer did or did not conduct. *Id.* at 128-30. *See also id.* at 130, n. 7 ("Evidence of whether Neenah conducted FMEA testing might very well be relevant and admissible for a jury's consideration on a claim of negligence, which Hopfer did not pursue against Neenah at trial.").

Cottrell's suggestion that the parties must introduce reasons for a design in a strict liability case is contrary to *Hopfer* and Missouri precedent. Furthermore, the risk-utility test relied on in other jurisdictions still focuses on the product's risks and benefits, not conduct, and whether better alternatives were available at the time of manufacture. *Newman*, 975 S.W.2d at 152-54. The consumer-expectations test still focuses on whether the product was dangerous beyond what would be expected by the ordinary consumer who purchases it, not conduct. *Rodriguez*, 996 S.W.2d at 64-65.

Cottrell's concerns that Missouri litigants will introduce evidence only relevant to negligence, then drop the claim at the last minute, were not realized here. Here, Plaintiff submitted three separate claims to the jury. Further, the remedy for what Cottrell calls

"gamesmanship" would be a motion to strike and a request for a limiting or a withdrawal instruction, not a reversal of decades of Missouri precedent, and the contravention of legislative intent. MAI 34.02.

Cottrell claims the contract-specifications defense shows Missouri already analyzes a manufacturer's conduct in strict liability cases. But that defense was not raised here, and Cottrell is not claiming evidence was improperly excluded. Further, *Hopfer* notes that what is being examined for purposes of that defense is whether the end-result of the product conformed to the non-defendant designer's specifications. 477 S.W.3d at 125. Evidence of whether the defendant had input into the design may be relevant, but not evidence as to the reasons for that design. *Id.* at 121. *Hopfer* upheld the exclusion of testing evidence that would have been relevant only to negligence, even as it affirmed the submission of that defense to a strict liability claim. 477 S.W.3d at 125-30.

Other courts throughout the country recognize that maintaining a distinction between negligence and strict liability is both logical and consistent with public policy. *See Insolia v. Philip Morris Inc.*, 216 F.3d 596, 604-605 (7th Cir. 2000) (negligence claim revolved around conduct, was "independent of their strict liability claim regarding the final result."); *Hansen v. Cessna Aircraft Co.*, 578 F.2d 679, 684-685 (7th Cir. 1978) (jury may determine product was not "unreasonably dangerous" because it did not pose some "extraordinary danger," while determining that danger could have been resolved but for defendant's negligence); *id.* at 685 (allowing recovery for strict liability or negligence is consistent with the goal of making recovery easier for plaintiffs in products liability cases); *Toner for Toner v. Lederle Laboratories, a Div. of American Cyanamid*

Co., 828 F.2d 510, 513 (9th Cir. 1987) (rejecting inconsistent verdicts argument); *Morden v. Continental AG*, 235 Wis.2d 325, 354-355 (2000) ("In a negligence action, … it is not necessary to show that the condition of the product reached the level of unreasonable dangerousness. ... the plaintiff's required proof appears less onerous at first glance."); *id.* at 355 (strict liability focuses on condition of product, negligence focuses on defendant's conduct); *Sharp ex rel. Gordon v. Case Corp.*, 227 Wis.2d 1, 17-18 (1999) (a product may be designed with a lack of ordinary care, resulting in injury, even though it is not "unreasonably dangerous"; "We look in the ordinary negligence case not only to the result of the defendant's action, but rather to his conduct in attaining that result.") (citations omitted).

II. Cottrell's Point II should be denied

The jury's failure to warn verdict must be upheld because Plaintiff not only had evidence, but it was undisputed, that Cottrell did not warn Plaintiff of any of the various defects identified in the evidence, such as (1) the high failure rate of the idlers, (2) other accidents involving broken idlers, or (3) other accidents involving the chain and ratchet system. Cottrell did not warn Plaintiff that (4) the suspension of vehicles only needed to be compressed one and a half to two inches, or (5) that he needed to look at the bottom of the weld for inadequate weld penetration, nor did it instruct Plaintiff (6) how he could view that weld on the bottom, or (7) 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.

Cottrell misstates the law regarding what a plaintiff must show to make a submissible case on a failure to warn claim. Plaintiff's 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 v. Synergy Gas Corp.*, 883 S.W.2d 10, 14 (Mo. 1994). 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.*

In *Moore*, this 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. This Court held that a plaintiff is **prohibited** from offering speculative and self-serving testimony that they would have behaved differently before the accident had a better warning been issued. *Id.* at 762-763. This Court rejected an argument similar to that raised by Cottrell here, that any evidence the plaintiff had adequate knowledge could somehow keep the jury from considering the claim. "'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.* at 762, quoting *Duke v. Gulf & W. Mfg. Co.*, 660 S.W.2d 404, 418 (Mo.App. 1983).

Further, "it is not enough that the injured party had a general awareness of a danger, but a defendant must show that the plaintiff had knowledge 'of the *specific danger* arising out of the precise defects asserted.'" *Thompson*, 207 S.W.3d at 102, quoting *Duke*, 660 S.W.2d at 418 (emphasis in *Duke*). "A general knowledge of the danger of machinery with moving parts or a general awareness that if part of the body were to become caught in the moving parts of the machinery it would cause injury is insufficient" to allow a defendant to obtain judgment as a matter of law on a failure to warn claim. *Palmer*, 849 S.W.2d at 140. Here, because there was evidence the plaintiffs did not know of the specific risks identified in the evidence, the heeding presumption was properly applied; "Such a presumption would make a prima facie case that had Ford given the Moores an adequate warning, the Moores would have heeded it." *Moore*, 332 S.W.3d at 762. This Court has held that testimony regarding whether the plaintiff looked for warnings, or would have heeded them, created jury issues. *Moore,* 332 S.W.3d at 763. *See also Winter v. Novartis Pharm. Corp.*, 739 F.3d 405, 408 (8th Cir. 2014) (applying Missouri law to a warning claim: "Absolute certainty is not required to prove a causal connection between a defendant's acts or omissions and the plaintiff's injuries.").

Cottrell's expert admitted no warnings specific to idler failure were given. Transcript 1912-13. She admitted these warnings should be given because idlers inevitably break. *Id.* She agreed Cottrell should warn users of the risk of idlers breaking if breaking is reasonably foreseeable. Transcript 1906.

Plaintiff testified there were no warnings: (1) advising him not to use idlers in the location of the idler on which he was injured (Transcript 1154); (2) advising him not to

compress the suspension more than two inches (Transcript 2015-2016); or (3) advising him that idlers could break, become bent up, or become twisted (Transcript 1218).

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 reports Plaintiff presented 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.

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

Plaintiff testified he knew what he needed to know to drive the rigs. Transcript 1400. But as far as securing vehicles on the rigs, 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.

After Plaintiff's incident, once he realized the idler was broken, he was able to safely secure the vehicle using a different idler. Transcript 1161-1162. This shows that if Plaintiff had been warned before the accident, he would have changed his behavior to avoid his injury.

Larry Lockhart, who was a car-hauler for a different employer than Plaintiff's employer, testified that, just like Plaintiff, he never received a Cottrell owner's manual. Transcript 1525. He testified there were no warnings on the Cottrell rigs. Transcript 1525.

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

Cottrell's Point rests on the assumption that if a plaintiff does not read a decal referring to an owner's manual that is not provided, and that does not include useful warnings or instructions in any event, the plaintiff is precluded from claiming more specific warnings on the product could have prevented the injury. Cottrell cites *Johnson v. Medtronic, Inc.*, 365 S.W.3d 226 (Mo. App. 2012), but there, "the end user, … admitted that he had the opportunity to read the label … and the instruction manual but that he did not do so **and that the label and the instructions adequately communicated** that the SYNC button had to be pushed before each synchronized attempt." *Id.* at 235 (emphasis added). Thus, it was not just that the user unequivocally testified that he ignored a warning; there, the user testified that if he read the warning that was given, he would have known how to alter his behavior to avoid the injury.

Here, there was no such admission as to any of those issues.

First, there was no admission that Plaintiff had the opportunity to read the instruction manual but did not do so. In fact, the evidence was that Plaintiff had not had the opportunity to read the owner's manual. Plaintiff was never given the owner's manual; it was not in his rig. Transcript 1147-1148, 1253-1254.

Second, Plaintiff did not admit that he did not read the decals on this rig. Plaintiff could not say if he read the decals on this specific rig. Transcript 1254-1256 ("I can't say I did, I can't say I didn't."). Cottrell claims, "Later, the plaintiff stated affirmatively that he did not read it," (Cottrell Br. 9), but the "it" he was referring to was the owner's manual, not the decal. *See* Transcript 1256 (stating "the testimony today" only shows "it basically states, don't overtighten your chains"); *see also* Transcript 1121-1123, 1124-1127 (testimony read into evidence earlier that morning by Cottrell's Elwood Feldman that in 1994, he could not explain what "don't overtighten" means). As noted *supra*, that manual was not in Plaintiff's rig. *See also* Transcript 1254-56 (Plaintiff testifying, "No, I did not" in reference to the owner's manual, because it was not in his rig).

Third, and perhaps most importantly, there was no admission by Plaintiff that the decals or the owner's manual would have adequately communicated the information Plaintiff needed to avoid his injuries. The evidence showed the decals and the manual did not communicate any warning, much less a warning or instruction regarding the risks identified in the evidence, such as (1) compressing the suspension no more than two inches, (2) the risks of idler failure, (3) the need to go underneath the rig because idler failure on the bottom would not otherwise be visible, (4) how to inspect an idler to determine if idler failure was likely or (5) the general dangers with the chain and ratchet system. Thus, Plaintiff did not know of these risks, and would not have known them from the decals or if the manual had been provided to him. If Plaintiff had been given this information, he would known exactly how much to suppress the suspension, he would

have known to try and avoid using idlers on the bottom of the rig, and he would have known how to inspect an idler to determine if it was on the brink of failure.

The only specific "warning" Cottrell identifies is an instruction, "do not overtighten." But Feldman, Cottrell's manager, the author of the manual that contained the "do not overtighten" language, once admitted he could not specify what "do not overtighten" means. Transcript 1121-1127. "The Restatement recognizes that a product may be rendered unreasonably dangerous and therefore actionable because of the absence of a warning concerning use or misuse, or because the warning that has been given is informationally deficient." *Nesselrode*, 707 S.W.2d at 382.

Furthermore, Plaintiff testified that regardless of whether he saw these particular decals, he knew not to "overtighten," and he thought he had complied with that instruction on the date of his accident. Plaintiff testified he never overtightened the vehicles. Transcript 1145, 1148-1149. He did not know what the owner's manual's authors meant by "overtighten," but he did not believe he overtightened on July 3, 2007. Transcript 1400-1401.

The decals included an instruction to inspect chains, ratchets & tie down bar before use. Cottrell Exhibit 170. But Plaintiff complied with that instruction as well – he inspected the rig on July 3, 2007 for broken or loose idlers, or chains, but he had no idea the idler was damaged. Transcript 1150-1151.

Thus, Plaintiff attempted to comply with the only specific instructions Cottrell identifies, and there was ample evidence of other warnings that Cottrell did not provide to Plaintiff. As such, Plaintiff had a prima facie case.

Johnson stated, "While an argument that the manual or label could have been better placed or designed to reach a user might defeat Medtronic's causation argument, no such argument is made here." *Id.* at 236. Here, there was ample evidence there was no label providing any useful information to Plaintiff. The evidence indicated Cottrell could have done a far better job to create warnings and instructions pertaining to appropriate compression of the suspension, excessive forces, the risk of idlers breaking from the bottom, and other dangers identified in the evidence. The mere fact that a user ignored one warning does not preclude a failure to warn claim. *See, e.g., Winter*, 739 F.3d at 409 (applying Missouri law and distinguishing *Medtronic*).

Further, the only specific statement Cottrell points to, "do not overtighten," is more of an instruction than a warning. This Court has stated, "A number of courts have held there is a distinction between instructions and warnings." *Nesselrode*, 707 S.W.2d at 384. "Warnings signal danger while instructions serve principally with information necessary to make proper and efficient use of the product." *Id.* at 384-85. "In this case, plaintiffs presented ample evidence to support a finding that Beech's maintenance instructions did not constitute a warning and did not signal the danger that inehered in these actuators." *Id.* at 385. In holding the plaintiff had sufficient evidence for a strict liability failure to warn theory, this Court stated, "We simply cannot say that as a matter of law plaintiffs failed to meet their burden of producing sufficient evidence showing that the actuators were unreasonably dangerous when used without knowledge of the hazardous propensities of the product's design features." *Id.*

Any evidence that Plaintiff ignored a decal that provided no specific warning was irrelevant, and insufficient to overcome the presumption that an adequate warning will be heeded. *See, e.g.*, *Jones v. Coleman Corp.*, 183 S.W.3d 600, 608-09 (Mo. App. 2005).

Cottrell argues the jury concluded Plaintiff was at 100 percent fault regarding whether the product "caused plaintiff's injuries" but the 100 percent allocation was on a separate product defect claim, not the failure to warn claim. LF320. These claims are distinct under Missouri law, as noted in Point I. *See, e.g., Moore*, 332 S.W.3d at 757 (product defect and failure to warn claims are "distinct theories aimed at protecting consumers from dangers that arise in different ways."). The jury was well within its rights to allocate fault differently across three distinct claims, and there is no basis to hold its findings on one claim trump its findings on another. *See Rinker*, 567 S.W.2d at 660 "("What prompted the jury to act as it did in this case is at best a matter of speculation and conjecture."). What is beyond dispute is that on the failure to warn claim, the jury found Cottrell 49 percent at fault. LF321.

Cottrell cites *Klugesherz v. American Honda Motor Co.*, 929 S.W.2d 811 (Mo. App. 1996), but there, "Plaintiff concedes that he does not contend that Brian would have heeded any warning" and "that additional warnings wouldn't have changed his mind." *Id.* at 814, 816. Plaintiff did not make any such concession in this case. There, the victim's parents forbade the victim from using the product, such that a warning from the manufacturer that it was not suitable for someone the victim's age was unnecessary. *Id.* Here, no one told Plaintiff not to use the Cottrell rig under any circumstances. Thus, *Klugesherz* indicates that if a plaintiff's witnesses affirmatively and unequivocally state

additional warnings would not have made a difference, the rebuttable presumption that a warning would be heeded can be overcome. Here, Plaintiff made no such admissions.

III. Cottrell's Point III should be denied

Standard of Review

While this issue is reviewed *de novo*, "Review is conducted in the light most favorable to the submission of the instruction, and if the instruction is supportable by any theory, then its submission is proper." *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752, 766 (Mo. banc 2010). *See also Douglas v. St. Louis Cold Drawn, Inc.*, 439 S.W.3d 775, 779 (Mo. App. 2014) ("… we view the evidence most favorably to the instruction and disregard contrary evidence."); *id.*, quoting *Howard*, 332 S.W.3d at 790 (Mo. banc 2011). ("We will reverse the verdict 'only if the party claiming instructional error establishes that the instruction … misdirected, misled, or confused the jury.…'").

A. Judgment should be entered on the strict liability failure to warn claim, as Plaintiff is also seeking a new trial on negligence. Cottrell's Points III and IV do not claim any error with the negligence verdict director misdirected, misled or confused the jury on the strict liability failure to warn claim, nor does Cottrell cite authority holding a new trial on a claim is required because of an alleged error with the verdict director on a separate claim

Plaintiff is seeking a new trial on negligence because a directed verdict was improperly entered for AHC. If Plaintiff obtains that relief, Cottrell would also be entitled to a retrial of the negligence claim, as some of its fault may be reapportioned to AHC.

But 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, so a new trial as to AHC on negligence will not impact the strict liability claims.

Cottrell claims in its Section I.C that "Missouri has long adhered to a fallacy in declaring that there is a difference between strict liability design defect claims and negligent design defect claims." Cottrell Br. at 27. This admission is fatal to any suggestion that Points III or IV, even if granted, would require a retrial of the failure to warn claim – if Missouri recognizes these are distinct claims, a jury is entitled to make distinct findings on them.

Cottrell's Points III and IV do not claim any error with the negligence verdict director misdirected, misled or confused the jury on the strict liability failure to warn claim. Cottrell has requested JNOV on the strict liability failure to warn claims, but Cottrell has not claimed error in relation to the verdict director, instructions, or evidence pertaining to the strict liability failure to warn claim.

Cottrell cites no authority suggesting litigants must retry all issues when a party has not identified any error in its points relied on regarding the verdict director or damages awarded on one theory (failure to warn), and is instead claiming an error in the verdict director for a separate theory (negligence).

Thus, even if this Court grants Plaintiff's Point as to AHC, or grants Cottrell's Points III or IV, the proper outcome is remand with an instruction that judgment be entered on the strict liability failure to warn verdict. 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); *Freese v. Kellison*, 482 S.W.2d 538 (Mo.App. 1972) (same); *Anderson v. Mantel*, 171 S.W.3d 774, 785 (Mo.App. S.D. 2005) (amending one paragraph of a judgment, otherwise affirming); *id.* at 781, quoting *In re Marriage of Reese*, 155 S.W.3d 862, 876 (Mo.App. S.D.2005) ("We are obligated under rule 84.14 to finally dispose of a case on appeal, unless justice otherwise requires, and to 'give such judgment as the court ought to give.'"); *Jokisch v. Life & Cas. Ins. Co.*

of Tenn., 424 S.W.2d 111, 117 (Mo.App. 1967) (citing V.A.M.S. 512.160, holding verdict in abeyance, and deciding there no need to retry issues of agency or damages: "The defendant has raised no issue concerning the amount of plaintiff's verdict, so the damage issue need not be retried."); *Trien v. Croasdale Const. Co., Inc.*, 874 S.W.2d 478, 481-82 (Mo.App. 1994) (affirming $99,000.00 judgment to the extent of $49,500.00, to avoid a double recovery).

Plaintiff is entitled to the greatest amount recoverable under any single theory of liability that is not the subject of error. *See 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.").

Furthermore, the public policy of giving the jury's verdict effect wherever possible favors affirming the failure to warn verdict. *See Palmer*, 849 S.W.2d at 142, citing *White v. Otten*, 810 S.W.2d 704, 705 (Mo.App.1991) (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."). Here, the jurors committed more than two weeks to this trial. Transcript. Because their intent on the failure to warn claim is clear, and there is no error as to that claim, an affirmance of that verdict is necessary to avoid an unnecessary retrial of that claim.

The strict liability failure to warn claim was submitted with a verdict director based on MAI 25.05. None of the points relied on by the parties claimed any error with the failure to warn verdict director or the damages awarded. No party other than Plaintiff

has alleged an error with regard to the evidentiary rulings, and Plaintiff is not requesting a new trial of the failure to warn claim. Further, Cottrell has not cited any case holding that an error, if any, in the verdict director on one theory requires retrial of a separate theory on which the parties agree the jury was properly instructed. Cottrell's post-trial argument and its points relied on regarding the strict liability failure to warn claim is that it is entitled to JNOV, not a new trial based on any alleged error with the negligence verdict director. Cottrell's failure to make the argument in its post-trial motion, by itself, should preclude it from obtaining this relief now. *See* Rule 78.01(a). Cottrell should also be precluded from this kind of relief because it did not specifically request it in any of its points relied on. *See Thummel v. King*, 570 S.W.2d 679, 686 (Mo. 1978) ("Perhaps the most important objective of the requirement relative to the points relied on is the threshold function of giving notice to the party opponent of the precise matters which must be contended with and answered."). *Thummel* explains the unfairness of granting a reversal on an argument not raised in the points relied on: "It is not the function of the appellate court to serve as advocate for any party to an appeal. That is the function of counsel. It would be unfair to the parties if it were otherwise." *Id.* "In addition to being inherently unfair to the other party to the appeal, it is unfair to parties in other cases awaiting disposition because it takes from them appellate time and resources which should be devoted to expeditious resolution of their appeals." *Id.*

Further, Cottrell has not cited any authority suggesting it could obtain a new trial on the failure to warn claim because of an alleged error with the verdict director for negligence. This also should preclude reversal. "If the point is one for which precedent is

appropriate and available, it is the obligation of appellant to cite it if he expects to prevail. We suggest that if the point is one for which it is believed that precedent for or against it is unavailable, counsel would be well advised to specifically so state under the point in question, explaining why citations are unavailable." *Id.* at 687. S*ee also Piatt v. Indiana Lumbermen's Mut. Ins. Co.*, 461 S.W.3d 788, 794 (Mo. 2015) ("The brief … does not mention this claim in its points relied on and fails to sufficiently develop the argument for this Court's review. The Court will not consider it. *See* Rule 84.04(e); *Thummel* ….").

Public policy favors avoiding a retrial of the strict liability failure to warn claim. "Retrials are burdensome. There has been in recent years a trend away from reversal for error in instruction, unless there is a substantial indication of prejudice. This trend appears both in civil and in criminal cases." *Fowler v. Park Corp.*, 673 S.W.2d 749, 757 (Mo. banc 1984).

In *Palmer*, the court rejected a manufacturer's argument that a jury verdict for it on strict liability product defect precluded a verdict against it on failure to warn. "[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." 849 S.W.2d at 142. It noted the instructions allowed the jury to reach separate findings. *Id.* Construing "the verdict liberally so that it may be given effect where possible" warrants requiring the entry of judgment on the failure to warn verdict, which was a separate finding by the jury.

In *Rinker*, the court rejected claims that the jury's verdicts on negligence and strict liability claims were inconsistent, stating there was "… no legal inconsistency" because

"[t]hey are separate and distinct theories of liability." 567 S.W.2d at 660. It stated that the basis for the jury's findings "is at best a matter of speculation and conjecture," and the presumption is that the jurors followed the court's instructions, which allowed the separate findings. *Id. Rinker* noted, "… where several claims are joined for trial, consistency among the verdicts disposing of the several issues is not required." 567 S.W.2d at 659, citing *Page*, 329 S.W.2d at 764-767.

The Court of Appeal's statement that the alleged error with the negligence verdict director "undoubtedly affected the jury's deliberations, potentially on both claims," (Op. at 10, n.6) is contrary to the principle that instructions are viewed as a whole, and that jurors are presumed to follow the instructions they are given. "This Court presumes that the jury follows the instructions given by the trial court." *Dieser*, 498 S.W.3d at 435, citing *State v. McFadden*, 369 S.W.3d 727, 752 (Mo.banc 2012) and *Graves v. Atchison–Holt Elec. Co-op.*, 886 S.W.2d 1, 4 (Mo.App.1994). "The fact that Mr. Dieser's counsel used the term 'never event' once in closing argument is insufficient to overcome the presumption that the jury followed the standard of care instruction given by the trial court." *Id.* at 435-436.

Here, the jury was given a specific verdict director as to the strict liability failure to warn claim, and no party has claimed error with respect to it. The finding that a separate verdict director on the negligence claim "undoubtedly affected the jury's deliberations" requires a finding that the jurors ignored the trial court's instructions on the strict liability failure to warn claim, while simultaneously following its instructions on the negligence claim. Missouri courts have previously rejected such an argument.

> Moreover, defendants speculate that the punitive-damage verdict directors are not limited to the activities and emissions for which they are responsible. But this argument ignores the explicit limitation that existed in the compensatory-damage verdict directors that limited defendants' liability to negligence during the respective partnership periods. **The punitive-damage verdict directors referenced their corresponding compensatory-damage verdict director, and the jury received those instructions at the same time. Further, the jury was told to only consider the defendants' liability for punitive damages after concluding that they bore responsibility for actual damages. And, of course, we view the questions of error and prejudice by considering the instructions as a whole, not by parsing the separate phrasing of each instruction.** Defendants point to nothing in the record, by way or argument or a question from the jury, that would cause us to conclude that the jury considered conduct for which the defendants bore no responsibility in assessing punitive damages. We deny this contention as well.

Blanks v. Fluor Corp., 450 S.W.3d 308, 405 (Mo.App. E.D. 2014) (emphasis added)

See also Wilson v. River Market Venture, I, L.P., 996 S.W.2d 687, 697 & n.4 (Mo.App. W.D. 1999) (converse instruction, submitted without objection, cured any prejudice from erroneous verdict director; "…we find that there is no basis, other than speculation, to conclude that the error in submission as to Recon affected the verdict as to

River Market, or that the submissions as to the two defendants, considered together, confused the jury, and requires a retrial as to River Market and Recon.").

One of the salutary purposes of allowing a party to submit multiple theories to a jury is that a retrial may be avoided even if there is an error associated with the submission of one of the theories. *Mathes v. Sher Express, L.L.C.*, 200 S.W.3d 97 (Mo.App. W.D. 2006) approved a verdict form requiring separate findings on strict liability and negligence. It stated, "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." *Id.* at 107. Here, the Opinion only found error in one of the verdict directing theories. As such, a retrial of the strict liability failure to warn claim can and should be avoided. *See also Bailey v. Hawthorn Bank*, 382 S.W.3d 84, 101, n.13 (Mo. App. W.D. 2012) (any error in submission of promissory estoppel claim was harmless, where jury found for plaintiff on an alternative theory); *Host v. BNSF Railway Company*, 460 S.W.3d 87, 99 (Mo. App. W.D. 2015) (any error in submitting a plaintiff's general theory of negligence in a Federal Employers' Liability Act case was harmless, because the plaintiff also prevailed on a theory of negligence *per se*); *Ford v. GACS, Inc.*, 265 F.3d 670 (8th Cir. 2001) (Missouri law: "Because we hold that the products liability claim was properly submitted to the jury and the verdict is supported by the evidence, we need not reach GACS's argument concerning the negligence claim. The products liability finding supports the damages award, regardless of the outcome on the negligence claim.").

The MAI recognize these are distinct claims by setting forth three separate instructions for strict liability product defect, strict liability failure to warn, and product liability negligence. *See* MAI 25.04, 25.05 and 25.09.

The Court of Appeals cited two cases supporting reversal of all claims. Op. at 10, n.6, citing *P.S. v. Psychiatric Coverage, Ltd.*, 887 S.W.2d 622, 628 (Mo. App. E.D. 1994) and *Overlap. Inc. v. A.G. Edwards & Sons, Inc.*, 318 S.W.3d 219, 228, n.10 (Mo. App. W.D. 2010). Neither decision is on point. In *P.S.*, the jury made one assessment of comparative fault between the parties. *Id.* at 624. Thus, there would be no way to determine how the jury would assess fault but/for an improper verdict director. But here, the jury made separate and different assessments of fault on the strict liability and negligence claims. The jury not only was instructed to evaluate these claims separately and differently, it did so. In *Overlap*, a new trial was granted on all issues "Because the juror nondisclosure occurred from the inception of the proceeding, [and] it tainted the entire proceeding." 318 S.W.3d at 228, n.10. But Cottrell does not claim the jury panel was corrupted, or that evidence was improperly admitted. Instead, Cottrell claims the verdict director on negligence was improper, but it does not claim there were any improprieties with the verdict director on the strict liability failure to warn theory. Thus, if these theories are considered distinct, there is no basis for holding that an error in the negligence verdict director would require retrial of the failure to warn claim.

Cottrell may note there was evidence common to these theories. But while there will often be evidence common to multiple theories, no precedent has been cited where

error as to the verdict director on one theory required reversal of a verdict on another theory with a proper verdict director.

Cottrell's Point I.C recognizes there is no doubt that under Missouri law, these theories are distinct. *See Hopfer*, 477 S.W.3d at 128, 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*, 551 S.W.2d at 608 ("… 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*, 707 S.W.2d at 375 and 382-83.

A jury may properly return distinct verdicts based on strict liability failure to warn, strict liability product defect, and negligence. 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." 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).

Thus, while there will often be an overlap in the evidence on these claims, Missouri courts have long held these claims are distinct (which Cottrell recognizes in its Section I.C), and that a jury is entitled to make separate findings as to each claim. The Court of Appeals' suggestion that these claims are intertwined is contrary to this precedent. Here, where the jury was given separate verdict directors for the strict liability failure to warn and negligence claims, and entered separate and distinct verdicts on the two theories, there is no basis to assume the jury ignored the verdict director for strict liability failure to warn, and instead looked to the verdict director for negligence, when it entered its verdict on the strict liability failure to warn claim. Construing "the verdict liberally so that it may be given effect where possible" warrants requiring the entry of judgment on the failure to warn verdict.

B. Cottrell and Plaintiff Are Bound by the Jury's Damage Award

The jury found the total amount of Plaintiff's damages arising from the July 3, 2007 accident alleging the broken idler, disregarding any fault on the part of Plaintiff, to be $2,091,513.45. Plaintiff's Appendix, A4. Cottrell and Plaintiff fully litigated the issue of damages, and neither party is alleging error regarding damages in this appeal. As such, the doctrine of issue preclusion should preclude Cottrell and Plaintiff from re-litigating this issue. *Newton v. Ford Motor Co.*, 282 S.W.3d 825, 833-35 (Mo. 2009) (Wolff, J.,

concurring). The factors that govern whether it is appropriate to preclude re-litigation of an issue decided in a former proceeding include:

> (1) whether the issue decided in the prior adjudication was identical with the issue presented in the present action;
>
> (2) whether the prior adjudication resulted in a judgment on the merits;
>
> (3) whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication ...

Id., quoting *Oates v. Safeco Ins. Co. of America*, 583 S.W.2d 713, 719 (Mo. banc 1979)

This Court has also considered, " 'whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit....'" *Id.*, quoting *Oates*, 583 S.W.2d at 719.

In *Newton*, the concurring opinion noted that this Court did not decide the issue of issue preclusion, but stated, "there seems little doubt the doctrine applies." *Id.* at 834. It noted: "(1) the issue of damages is the same; (2) there was an adjudication on the merits; and (3) the parties to be bound … are the same. There is nothing in this record to suggest that applying the doctrine would be unfair." *Id.*

The concurring opinion noted, "The modern doctrine of issue preclusion can be used to promote judicial economy by confining the issues in the new trial to those that need to be tried and to avoid re-trying matters that ought to be considered settled by the first trial and judgment." *Id.* at 834-35.

Here, the issue of damages is the same. Here, there was an adjudication on the merits. Here, Plaintiff and Cottrell are the same parties who were present when damages

were evaluated by a jury in 2013. Here, there is nothing in this record to suggest that applying the doctrine to Plaintiff and Cottrell would be unfair. As such, Plaintiff and Cottrell should be bound by the jury's finding that Plaintiff's damages are $2,091,513.45. *See also Grissom v. Handley*, 410 S.W.2d 681, 691 (Mo.App. 1966), citing Rule 83.13(c) and Mo. Rev. Stat. 512.160(3) ("No quarrel was made with the amount of the verdict nor with any proceeding or instruction relating to plaintiff's damages. … The judgment is reversed and the cause remanded for a new trial on the issue of liability only.").

Plaintiff recognizes that AHC is not bound by the 2013 judgment, because there is no judgment that binds it. *Id.* at 834.

C. Cottrell Has Waived Many of its Objections

At trial, Cottrell did not object that Instruction 10 lacked a requirement that Cottrell made the product, that it required the inclusion of the bracketed failure to warn language, that it must be limited to prior to the time of sale, or that it improperly submitted evidentiary details. As such, these arguments are waived. *See* Rule 70.03 ("Counsel shall make specific objections to instructions considered erroneous."); MAI, p. ix, Pocket Part (objections not raised in trial court are waived). Specific arguments to the instructions must be made before the instructions are submitted, or they are waived. *Douglas v. St. Louis Cold Drawn, Inc.*, 439 S.W.3d 775, 780 (Mo. App. 2014), quoting *Berra v. Danter*, 299 S.W.3d 690, 702 (Mo.App. 2009) ("Accordingly, to preserve a claim of instructional error, a party 'must make *specific* objections to the giving or failure to give instructions **before the jury retires** to consider its verdict [and] the objections and grounds therefore must be stated *distinctly* on the record, and the objections must

also be raised in the motion for new trial."). *See also id.* ("'[a] point on appeal must be based upon the theory voiced in the objection at trial[,] and an appellant cannot expand or change on appeal the objection as made.'") (citation omitted). "'[W]e will not convict a trial court of error on an issue that it had no chance to decide.'" *Id.* (citation omitted)."To the extent that [defendant] alleges on appeal errors that he did not raise in his objections to the trial court, those errors are not preserved on appeal." *Id. See also Shannon v. Wal-Mart Stores, Inc.*, 974 S.W.2d 588, 592 (Mo.App. 1998) (party "preserves nothing for review" if its objection to instruction at trial is not identical to objection raised in appeal).

D. MAI 17.02 is not limited to automobile accidents; MAI 17.02 was the appropriate verdict director because Plaintiff's claims went beyond claims of negligent design of the subject rig

Plaintiff's negligence claim included but was not limited to Cottrell's negligence in the design of this rig, and it included claims of Cottrell's ordinary negligence. LF36-38. The Court of Appeals suggested the four allegations that were ultimately submitted could be classified as negligent design defect or negligent failure to warn claims. Op. at 7-8. But MAI 25.09 limits the jury's consideration to the specific product; in other words, Cottrell's conduct prior to making this rig in 2003. Cottrell Appendix A9. In fact, in its briefing, Cottrell claims Instruction 10 is erroneous because not every sub-allegation is limited to the product. This proves Plaintiff's point that Cottrell's position would prevent the jury from considering theories he pled and evidence he presented.

Instruction 10's allegation (a), that Cottrell "failed to review and analyze injury and testing data" (LF297, Cottrell's Appendix A8) and allegation (c), that Cottrell "failed

to share industry reports and injury data with plaintiff's employer," (*Id.*), pertained to evidence that these omissions by Cottrell had been occurring since the 1970s. *See* Pl. Br. at 9-10 and 12-13 and citations therein. This is why MAI 17.02 was appropriate.

MAI 17.02 is not limited to automobile cases; it is the appropriate instruction, with modifications, when there is a negligence theory not fully addressed by another MAI.

> The MAI 17.00 series appertains to motor vehicle negligence. There is no MAI paradigm for the submission of toxic tort negligence. Actionable negligence nevertheless is proven by the existence of a legal duty, failure to perform that duty, and injury caused by the neglect. .... MAI 17.02 articulates those essential elements of the negligence cause of action and suffices as the construct for the submission of the toxic tort the petitions plead and the evidence proves. A modification of that form was apt for the submission of each of the negligence causes of action proven by the plaintiffs.

Elam v. Alcolac, Inc., 765 S.W.2d 42, 203-04 (Mo. App. 1988)

See also Joyce v. Nash, 630 S.W.2d 219, 223 & n. 1 (Mo. App. 1982) (MAI 17.02 appropriate where plaintiffs stated defendant negligently locked them in a business compound; "MAI 17.02-Verdict Directing-Multiple Acts of Negligence used to submit the Joyce causes of action for negligence, properly formulated, suits the theory of recovery under the evidence and the pleadings."); *Trident Group, LLC v. Mississippi Valley Roofing, Inc.*, 279 S.W.3d 192, 199 (Mo. App. 2009) (MAI 17.02 appropriate in action against roofing company).

Because Plaintiff's theories included ordinary negligence, MAI 17.02 was proper. *See Rooney v. Lloyd Metal Products Company*, 458 S.W.2d 561, 571(11) (Mo. 1970), *quoted in Brittain v. Clark*, 462 S.W.2d 153, 157 n. 7 (Mo. App. 1970) ("MAI 17.02 is the one form to follow when 'submitting multiple negligent acts.'"). MAI 17.02 was properly submitted **here**; it is irrelevant that counsel did not submit it in another case. There is no authority rejecting its use in products cases.

Thus, MAI 17.02 will be appropriate for the negligence allegations against AHC.

Rule 70.02 requires the submission of the MAI that is "applicable in a particular case." Instruction 10 (LF297) was consistent with the pleadings and the evidence. MAI 25.09, as exemplified by Cottrell's MAI 25.09 instruction, containing one allegation of negligence, would have required omitting most of Plaintiff's theories of negligence. *Compare* LF160 *with* LF36-38. Submitting MAI 25.09 would have defeated Plaintiff's right to choose the theory of recovery on which to submit his case. *See Adams v. Badgett,* 114 S.W.3d 432, 436 (Mo. App. 2003). "A party is entitled to choose the theory of recovery on which to submit his case to the jury." *Id.*, citing *Yoos v. Jewish Hospital of St. Louis,* 645 S.W.2d 177, 191 (Mo. App. 1982); *Certa v. Associated Building Center, Inc.,* 560 S.W.2d 593, 596 (Mo. App. 1977). "And, a party is entitled to a verdict-directing instruction predicated on his theory of the case, if that theory is supported by the evidence." *Id.*, citing *Williams v. Christian,* 520 S.W.2d 139, 141 (Mo. App. 1974); *Yoos,* 645 S.W.2d at 191; *Certa,* 560 S.W.2d at 596. *See also Williams*, 520 S.W.2d at 146 (reversal required based on "the principle that a party is entitled to go to the jury on his theory of the case…"); *Coleman v. Meritt*, 292 S.W.3d 339, 343 (Mo. App. 2009) ("Dr.

Stoecker's desire to manage Plaintiff's case against Dr. Meritt conflicts with Plaintiff's right to submit any pleaded theory supported by the trial evidence, and if so supported, **any** MAI–compliant verdict director.") (emphasis added).

Plaintiff's theory went beyond negligent product design and included ordinary negligence. LF36-38. Because MAI 25.09 does not encompass the allegations of negligence in Instruction 10, MAI 17.02 was required. *See Nagaragadde v. Pandurangi*, 216 S.W.3d 241, 245-46 (Mo. App. 2007) (rejecting contention that MAI 22.07 should have been submitted instead of MAI 17.01;"Even in a situation where the evidence could support two theories of recovery to which two separate MAI instructions would be applicable, the plaintiff has the right to elect the theory on which to submit her case and to select the appropriate MAI verdict director.).

Cottrell was not entitled to define Plaintiff's theory of liability, and it was Plaintiff's right to select the appropriate MAI. *See Certa*, 560 S.W.2d at 596 ("It is clear that the same evidence could be such as to support two potential theories of recovery to which two separate MAI instructions would be applicable. As long as there was sufficient evidence to support him, plaintiff is entitled to choose the theory of recovery on which to submit his case to the jury, and to select the appropriate MAI accordingly."); *id.* ("Therefore, in determining the appropriate verdict directing instruction in this case, both the plaintiffs' theory of recovery and the evidence offered at trial must be considered.").

Cottrell refers to a 1990 Committee Comment but here, Plaintiff alleged more than negligent product design. "Committee Comments, of course, are advisory not

mandatory." *Sall v. Ellfeldt*, 662 S.W.2d 517, 524 (Mo. App. 1983). And, Committee Comments cannot override case law allowing plaintiffs to define their case theories.

The trial court did not err in refusing to use Cottrell's MAI 25.09 instruction (LF160) because it did not conform to Rule 70.02 in that it did not conform to MAI 25.09, was not "applicable" to the case and did not "fairly submit[ted] the issues."

Cottrell's paragraph First did not conform to MAI 25.09, and it submitted an improper issue to the jury. It required the jury to find that Cottrell designed the chain and ratchet system **and** the idler. LF160. But MAI 25.09 refers to the "product," and the product was the trailer (which contained the system and the idler), not the chain and ratchet system or the idler. *See, e.g.,* LF294. There was no dispute that Cottrell designed the trailer. Plaintiff was not required to show that Cottrell sold the idler.

Cottrell's paragraph Second asked the jury to treat the product as "the chain and ratchet system and idler" rather than the trailer. LF160. Cottrell's statement of the alleged defect ("the chain and ratchet system **and** idler on the car hauling trailer generated excessive force during operation and was prone to idlers breaking during use") was confusing and inconsistent with the evidence. The chain and ratchet system did not generate excessive force on its own, and the idler did not generate any force; the idler could not withstand the forces caused by the use of the chain and ratchet system because it was not enclosed on both sides.

Cottrell's Paragraph Third would have allowed Cottrell to escape liability if the jury found Cottrell negligent in its design of the chain and ratchet system or its design of

the idler, but not negligent in the design of both. LF160. Negligence in the design of either would have been sufficient.

Cottrell's Paragraph Fourth would have allowed Cottrell to avoid liability unless the jury found that Plaintiff was damaged "as a direct result" of Cottrell's negligence. LF160. The "direct result" language is contrary to Missouri law. *See Eagleburger v. Emerson Elec. Co.,* 794 S.W.2d 210, 223-25 (Mo. App. 1990).

Because Cottrell's MAI 25.09 instruction was not "applicable" and did not "fairly submit[ted] the issues," Rule 70.02(b) did not require its submission.

Cottrell cites *Abbott v. Mo. Gas Energy*, 375 S.W.3d 104, 109 (Mo. App. 2012) to suggest the refusal to submit an applicable MAI is presumptive error. But here, Cottrell's MAI was not applicable.

As noted *supra*, where multiple MAIs can apply, the plaintiff is entitled to choose the MAI. Moreover, the statement in *Abbott* is limited to a MAI "which does not need modification under the facts in the particular case." 375 S.W.3d at 109. Here, MAI 25.09 would have required substantial modification to include Plaintiff's allegations.

Any authority Cottrell may cite regarding error in modifying a MAI is inapposite, because Plaintiff did not submit a modified MAI 25.09 instruction.

E. Instruction 10 Correctly Stated the Law

Cottrell contends its only duty was with regard to the condition of the product at the time of sale (Cottrell Br. 36). But that is true only as to the strict liability claims. The statute Cottrell cites refers to claims seeking damages "on a theory that the defendant is strictly liable for such damages..." Mo. Ann. Stat. § 537.760 (West). "In negligence, the

duty owed is based on the forseeability of the harm that is a likely result from manufacturers' acts or omissions." *Spuhl*, 795 S.W.2d at 577, citing *Blevins*, 551 S.W.2d at 607[4]. On a negligence claim, a defendant owes a plaintiff a duty where it is reasonably foreseeable that its acts or omissions would cause an injury. *L.A.C. v. Ward Parkway Shopping Center Co.*, 75 S.W.3d 247, 257 (Mo. banc 2002), quoting *Madden v. C & K Barbecue Carryout, Inc.*, 758 S.W.2d 59, 62 (Mo. banc 1988) ("'The touchstone for the creation of a duty is foreseeability. 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.'"); *Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc.*, 700 S.W.2d 426, 431-433 (Mo. banc 1985) (citations omitted); *Wolfmeyer v. Otis Elevator Co.,* 262 S.W.2d 18, 23 (Mo.1953) and *Simonian v. Gevers Heating & Air Conditioning, Inc.*, 957 S.W.2d 472, 476 (Mo. App. 1997).

Cottrell's "failure to plead" objection pertained to the allegation regarding failure to warn the employer. Transcript 2125-2126. After Plaintiff identified the allegation, Cottrell conceded, "They have made this allegation we didn't share injury reports." *Id.* Cottrell's proposed instruction included the issue of "excessive force during operation." LF160. The theories in Instruction 10 were explicitly referenced in the Amended Petition. *Compare* LF297 *with* LF37-38, pars. 10(a), (c), (e), and (j). The jury heard evidence on all of these points.

Cottrell did not object to Instruction 10 for not being limited in time. The argument is waived. Moreover, Cottrell's proposed instruction was not limited in time. LF160. Cottrell's failure to submit such an instruction waives the argument. *See Savory*,

143 S.W.3d at 719. MAI 25.09 refers to a failure "to use ordinary care," without any limitation to the time of sale or otherwise.

Cottrell claims Instruction 10 is erroneous because not every sub-allegation is limited to the product. This proves Plaintiff's point that MAI 25.09 would prevent the jury from considering theories he pled and evidence he presented. As shown *supra*, there is no reason every sub-allegation has to be limited to the product on a negligence claim.

Instruction 10, contrary to Cottrell's suggestion, required a finding that the negligence was a cause of Plaintiff's damage, which meant the jury had to find Cottrell's negligence made the product more dangerous, caused Plaintiff's employer to require use of the product, or led to Plaintiff's employer not warning him about it. LF297.

Contrary to Cottrell's contention, Instruction 10 correctly stated the law. 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).

Cottrell's arguments about "no duty" are vague enough to compel Plaintiff to note Cottrell also had a 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.

Cottrell does not identify any evidence regarding whether Cottrell shared industry reports and industry data after the product was manufactured. Thus, any error in not including a time limitation would be harmless. Further, in *Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155, 173 (Mo. App. 1997), the court held that evidence of a manufacturer's post-sale fail to recall a product was admissible, suggesting a manufacture has some post-sale duties.

F. Cottrell Was Not Unfairly Prejudiced on Any Claim by Instruction 10

Cottrell gives away Points III and IV when it argues, "nothing precludes using MAI 25.09 to submit a claim based on multiple acts of negligence." Aplt. Br. at 37. If Plaintiff could have presented his theories under either Instruction 10 or MAI 25.09, then Cottrell was not prejudiced. If he could not have, he was entitled to use the MAI that encompassed those theories.

Because MAI 25.09 did not encompass Plaintiff's theories, MAI 17.02 was appropriate. If MAI 25.09 encompassed the same theories as Instruction 10, then Cottrell was not prejudiced. The use of MAI 17.02 does not create prejudicial error. *See, e.g.*, *Royster v. Pittman*, 691 S.W.2d 305, 308-09 (Mo.App. 1985) (use of MAI 17.02 "did not result in prejudicial error," where the standard of care and definition of negligence correctly stated applicable law).

The Court of Appeals held that Instruction 10 was prejudicial because it submitted evidentiary details. Op. at 8. But Cottrell did not make that argument in its briefing below, nor does it make that argument in Point III or Point IV. Cottrell takes the opposite approach in Point IV, erroneously claiming Instruction 10 created a roving commission.

Cottrell did not object to Instruction 10 for failing to require a finding that it manufactured the product. That argument is waived. Furthermore, the jury found Cottrell made the product by its failure to warn verdict, which required that finding. LF300. Moreover, there was no dispute Cottrell made the product. "It is not erroneous to omit undisputed elements from an instruction." *Biermann*, 805 S.W.2d at 320 (Mo. App. 1991). Moreover, "an instruction is not erroneous when a finding of the essential element is necessarily implied from the other findings required." *Id.* Instruction 10 necessarily implied that Cottrell manufactured and design the trailer and its securement systems. LF297.

Cottrell claims Instruction 10 was erroneous because it did not require the jury to find the product was defective, defined under Missouri law as unreasonably dangerous. But negligence does not hinge on the product being unreasonably dangerous, but on the

conduct of the manufacturer. Notably, Cottrell's proposed instruction also did not require a finding that the product was unreasonably dangerous. LF160. All MAI 25.09 asks the jury to determine is if the product matches a description of the "alleged defect or hazard," without requiring it to determine that defect or hazard made the product unreasonably dangerous. Cottrell's Appendix A9. Instead, the jury merely needs to find that the defendant "failed to use ordinary care." *Id.*

Instruction 10, contrary to Cottrell's suggestion, did require the jury to find that Cottrell failed to exercise ordinary care, by requiring a finding of negligence. LF 297, Cottrell's Appendix A8.

Instruction 10, contrary to Cottrell's suggestion, did require the jury to find that Cottrell's negligence caused or directly contributed to cause damage to plaintiff. LF 297, Cottrell's Appendix A8. Thus, it did connect the allegations of negligence to the accident.

Cottrell's argument that it would have prevailed had MAI 25.09 been submitted, because of the strict liability verdict, is pure speculation because strict liability focuses on the end result (the product), while negligence focuses on the process; under Missouri law, these are distinct claims. *See* Response to Point I.

MAI 25.04 and MAI 25.09 require separate findings and contain different elements. Even under Cottrell's submissions, a jury could have found for Plaintiff on negligence had it determined Cottrell failed to use ordinary care while designing the chain and ratchet system on the trailer because it "generated excessive force during operation," but found for Cottrell on strict liability if it determined this generation of excessive force did not render the product "unreasonably dangerous." LF154, 160.

Cottrell's contention that the jury's findings of fault on strict liability carry over to the other claims makes no sense. As noted in the response to Point I, Cottrell submitted verdict forms allowing the jurors to allocate fault differently for all claims.

Cottrell did not object to Instruction 10 for not being limited to the time of sale. The argument is waived. Moreover, Cottrell's proposed instruction did not limit the jury's consideration to that time. LF160. Cottrell's failure to submit such an instruction waives the argument. *See Savory*, 143 S.W.3d at 719. MAI 25.09 refers to an alleged defect, but it does not require the jury to determine that defect existed at the time of sale.

Cottrell's contention that Instruction 10 obscured inconsistency between the claims against Cottrell and AHC is without merit. Instruction 10 referred to defects existing with Cottrell's original design, and it required the jury to find that Cottrell's negligence "directly caused or directly contributed to cause damage to plaintiff." LF297. Thus, the jury had to find Cottrell was a cause of Plaintiff's injuries, notwithstanding evidence of AHC's negligence.

Under Instruction 10 or MAI 25.09, Plaintiff was not required to show that Cottrell's negligence was the sole or exclusive cause of his injuries. *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). *See also* Response to Point V, *infra*.

Cottrell's Missouri authority on its inconsistent claims argument involved the submission of survival and wrongful death claims that by statute could not be submitted simultaneously. *See Wallace v. Bounds*, 369 S.W.2d 138, 141 (Mo. 1963) (quoting Mo. Rev. Stat. 537.020, limited to claims "other than those resulting in death."). Cottrell's other authority does not seem germane. *Briner v. General Motors Corp.*, 461 S.W.2d 99 (Ky. 1970). AHC was granted a directed verdict, further undercutting this argument.

IV. Cottrell's Point IV Should Be Denied

Plaintiff incorporates all of his arguments from Point III, *supra*.

The "roving" objections that are the focus of Point IV were waived. The "roving commission" objections that were made at trial do not pertain to the final version of Instruction 10 submitted to the jury. Some of these objections involve other instructions entirely; other objections were resolved at the instruction conference through modification of the proposed instruction. *Compare* Transcript 2026-2027 *with* Transcript 2028-2029 (changing reference to "the trailer" to "the car hauling trailer with the chain and ratchet system and idler"); *compare* Transcript 2037, line 24 through Transcript 2038, line 2 *with* Transcript 2038, lines 3 through 8 (same); *compare* Transcript 2055 *with* Transcript 2059-2060 (removing reference to "non-manual systems").

Within the conference, the remaining objection to the reference to a failure to review and analyze injury testing or data in Instruction 10 as "vague," after discussion, was reframed as an objection that there was insufficient evidence to support it. Transcript 2062-2063.

In addition to waiver, Cottrell's "roving commission" objection is without merit. The jury heard ample evidence regarding the "injury and testing data," industry reports" and "injury data" at issue. The jury asked for those exhibits. Transcript 2217-2233. Cottrell cites *Klotz v. St. Anthony's Medical Center*, 311 S.W.3d 752 (Mo. banc 2010), which ***rejected*** arguments that an instruction referring to "added risk of infection" created a "roving commission." "Nevertheless, it is clear based on a review of the record that the phrase 'added risk of infection' was explained thoroughly by the expert testimony at trial." *Id.* at 767."Where the testimony in a case explains a phrase used in the verdict director, there is no 'roving commission.'" *Id.* Because multiple witnesses discussed the issue, the court rejected the argument. "The expert testimony sufficiently explained the phrase 'added risk of infection,' and this phrase was understandable to a jury without further definition." *Id.*

Per *Klotz*, the instruction was not overly vague. Further specification would have been inappropriate. *See Edgerton v. Morrison*, 280 S.W.3d 62, 66 (Mo. 2009) (rejecting roving commission argument, where expert testimony lent context to instructions; "This view is consistent with the basic premise of Missouri Approved Instructions, which is to submit only ultimate issues and avoid evidentiary detail in instructions.").

Further, the submission did not improperly require the jury to find detailed evidentiary facts. In *Trident*, the court rejected similar and seemingly contradictory arguments about roving commissions and overly detailed submissions:

> Contrary to Defendant's assertion, mention of BOCA codes in the instructions did not require the jury to find detailed evidentiary facts. ...

> Here, the jury had been informed of the subject matter of the applicable BOCA codes during Gray's testimony, which concerned securing the roof covering, manufacturer's installation requirements, proper fastening procedures, and conditions necessary for using existing roof covering as base for new roof covering. Therefore, the description of the codes was not necessary and no prejudice resulted from their submission.

Trident, 279 S.W.3d at 199-200

Cottrell's remaining arguments as to limitations in time, to the product, etc., were addressed in the response to Point III, *supra*.

V. Cottrell's Point V should be denied

The applicable statute states that an unforeseeable modification would only allow Cottrell to escape liability on the product defect claim, **not** the failure to warn claim:

> As used in sections 537.760 to 537.765, the term **"products liability claim"** means a claim or portion of a claim in which the plaintiff seeks relief in the form of damages on a theory that the defendant is strictly liable for such damages because:
>
> (1) The defendant, wherever situated in the chain of commerce, transferred a product in the course of his business; and
>
> (2) The product was used in a manner reasonably anticipated; and
>
> (3) **Either or both of the following**:
>
> (a) The product was then in a defective condition unreasonably dangerous when put to a reasonably anticipated

> use, and the plaintiff was damaged as a direct result of such defective condition as existed when the product was sold; or
>
> (b) **The product was then unreasonably dangerous when put to a reasonably anticipated use without knowledge of its characteristics, and the plaintiff was damaged as a direct result of the product being sold without an adequate warning**.

Mo. Ann. Stat. § 537.760 (West) (emphasis added).

Thus, Plaintiff need not show he was damaged as a result of a "defective condition as existed when the product was sold" for the failure to warn claim, but only for the product defect claim. For the failure to warn claim, he need only show he was damaged as a result "of the product being sold without an adequate warning." This distinction alone could explain the different verdicts on these claims. There was no suggestion at trial that AHC or anyone other than Cottrell somehow caused the lack of adequate warnings.

Further, Cottrell's argument that strict liability is not absolute liability has no application here, where Plaintiff's evidence showed there were defects with Cottrell's rig, as originally designed, in terms of the chain and ratchet system, the idler system, and the original weld of the idler. Cottrell cites Dr. Micklow's testimony indicating there was a poor weld. However, he also testified Plaintiff's injuries resulted largely due to defects with the Cottrell chain and ratchet system, which caused excessive forces to be placed on an idler system that was defective because it was not enclosed. Pl. Br. at 9-12 and

citations therein. He testified any improper repair was a repair of a defective Cottrell weld that had inadequate penetration, and that portions of the defective Cottrell weld remained where the failure occurred. *Id.*

Cottrell's expert testified she could not give any opinion as to why the idler failed. Transcript 1865-1867. This concession precludes Cottrell claiming it is entitled to JNOV.

Cottrell claims Plaintiff's arguments as to AHC are inconsistent with his claims against Cottrell. But at trial, Plaintiff referred to photographs showing what AHC did was "a negligent repair of Cottrell's MIG weld." LF425. And Plaintiff never claimed the negligent repair was the sole cause of his injury; to the contrary, his expert and other witnesses testified at length that defects with Cottrell's rig, as sold, were also causes of the injury. Pl. Br. at 9-12 and citations therein.

Cottrell cannot escape liability by claiming a third party did not sufficiently repair a defect with its design. Plaintiff's evidence showed there were multiple defects at the time of manufacture, originating with the original design, prior to sale, that were still present when he was injured.

Plaintiff had substantial evidence that defects with the Cottrell trailer, prior to any modification, were causes of his accident. There was evidence of additional potential causes, and the claims against AHC and Cottrell were not inconsistent because there can be multiple causes of an injury. *See Sw. Bell Tel. Co. v. Ahrens Contracting, Inc.*, 366 S.W.3d 602, 608 (Mo.App. E.D. 2012), quoting *Kircher v. Purina Mills, Inc.,* 775 S.W.2d 115, 117 (Mo. banc 1989); ("The plaintiff need not exclude all other potential causes of the damage or prove 'an absolutely positive causal connection.'"); *Green*, 391

S.W.2d at 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*, 24 S.W.3d at 78 (same); *Callahan*, 863 S.W.2d at 861 (injuries can have multiple causes). Moreover, AHC was not a party at the time of verdict.

Even if the evidence that there had been an attempt to repair the defective Cottrell weld, and that this attempt was a cause of the accident, were undisputed (in fact, it was disputed), that repair would not relieve Cottrell of liability on any theory, because it was foreseeable that someone would attempt to repair the defect. In denying summary judgment on negligence, as well as strict liability design defect, the Western District of Missouri noted, " '[t]he mere existence of an intervening act is not decisive. The intervening act must be a superseding cause that is independent of the original actor's negligence and severs the connection between the original actor's conduct and the plaintiff's injury as a matter of law. For an intervening act to relieve the original tortfeasor from liability, the act cannot be a foreseeable consequence of the original act of negligence.'" *CWC Commercial Warehousing, LLC v. Norcold, Inc.*, No. 6:15-CV-03312-MDH, 2016 WL 5886896, at *4 (W.D. Mo. Oct. 7, 2016), quoting *Buchholz v. Mosby–Year Book, Inc.*, 969 S.W.2d 860, 862 (Mo. App. 1998).

Here, Dr. Micklow testified repairs were foreseeable; records showed 55,000 idlers replaced in five years. Transcript 580, 622-623, 840-841. Multiple witnesses testified repairs and replacements occurred frequently, and that idler failure was common with Cottrell rigs. Pl. Br. at 10-12 and citations therein. Dr. Micklow testified that poor

weld quality near the bottom of the idler, where it is difficult to get underneath the idler, is what leads to many of the idler failures. Pl. Br. at 12 and citations therein. Thus, there was ample testimony that the original Cottrell design caused the failure, and that any attempted repair or replacement was foreseeable. A product modification does not preclude recovery against the manufacturer unless the jury finds, or the evidence is uncontroverted, that the modification was unforeseeable, and was the sole cause of the plaintiff's injury. *Sutherland v. Elpower Corp.*, 923 F.2d 1285, 1290 (8th Cir. 1991). *See also Carlisto v. General Motors Corp.*, 870 S.W.2d 505, 509 (Mo. App. 1994) (reversing summary judgment: "Under Missouri law, subsequent changes or alterations in a product do not relieve the manufacturer of strict liability if the changes were foreseeable and did not render the product unsafe."); *Gabler v. Robbins & Myers, Inc.*, 895 S.W.2d 79, 81 (Mo. App. E.D. 1995) (reversing summary judgment: "Subsequent changes or alterations in a product do not relieve the manufacturer of strict liability if the changes were foreseeable and did not render the product unsafe.").

"Where the evidence is conflicting, it is generally a question for the jury to determine whether the defect is traceable to the time the product left the manufacturing company." *Carlisto*, 870 S.W.2d at 509. As in *Carlisto*, where a genuine dispute regarding whether GM or an assembler was to blame precluded summary judgment (*id.* at 509-511), JNOV is precluded.

A product that is inadequately repaired was not altered, changed, or rendered unsafe by the inadequate repair; the attempted repair shows it was unsafe in its original condition. The product was not "altered" or "modified"; at most, someone else did an

inadequate job cleaning up Cottrell's mess. By analogy, a tortfeasor who causes an initial injury is liable for injuries caused by negligent attempts to treat that injury. *See, e.g., State ex rel. Baldwin v. Gaertner*, 613 S.W.2d 638, 640 (Mo. 1981) (" … the action of the initial tortfeasor is deemed to be the proximate cause of the subsequent aggravation …").

Further, there was conflicting evidence on whether there was a repair; it was not mentioned in the maintenance records. This too precludes JNOV.

Cottrell cites *Hill v. General Motors Corp.*, 637 S.W.2d 382 (Mo. App. E.D. 1982) but there, the petition did not plead any defects with the vehicle as originally designed, it claimed post-sale modifications caused the accident, and the plaintiff conceded there were no dangerous conditions at the time of manufacture. *Id.* at 384-385. Here, Plaintiff's pleadings and evidence showed defects in the product when it left Cottrell, and Plaintiff made no such concessions.

Cottrell cites *Jasinksi v. Ford Motor Co.*, 824 S.W.2d 454 (Mo. App. 1992) but there, the sole defect involved the transmission in a 15 year old car, and there was no evidence the car had its original transmission, and that it had not been altered. Here, Plaintiff has evidence of multiple defects that existed when Cottrell sold the trailer, including the chain and ratchet system, the idler system, and the original Cottrell weld.

Below, Cottrell cited *Williams v. Ford Motor Co.*, 2013 WL 3874751 (E.D. Mo. 2013). But in *Williams*, there was no evidence an original defect was a cause of the injury.

Multiple cases have rejected Cottrell's modification position. *See Gabler*, 895 S.W.2d at 81-82; *Vanskike v. ACF Indus., Inc.*, 665 F.2d 188, 195 (8th Cir. 1981); *Hales*

v. Green Colonial, Inc., 490 F.2d 1015, 1020-21 (8th Cir. 1971); *Leonard v. Bunton Co.*, 925 F.Supp. 637, 642-44 (E.D. Mo. 1996); *Cashel v. Littell Int'l, Inc.*, 2007 WL 4365744 (E.D. Mo.).

Plaintiff's Cross-Appeal

The directed verdict in favor of AHC must be reversed. AHC continues to claim it was disputed whether it negligently repaired the defective original Cottrell weld, or simply failed to ensure a complete repair of it in the 3+ years when its mechanics serviced the rig. Either way, the jury could have held AHC negligent. 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 made a detailed offer of proof at trial, and his first brief gave several specific examples of prior incidents that were improperly excluded.

I. The trial court erred in directing a verdict for AHC

Plaintiff had a submissible case against AHC regardless of who made the repair at issue, assuming one was made. AHC ignores Plaintiff's legal authority, which includes a presumption in favor of reversing the directed verdict. Pl. Br. at 33-34.

AHC continues to cite the statement in *Steward v. Goetz*, 945 S.W.2d 520, 528-29 (Mo.App. 1997) 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 this 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 "circumstantial evidence rule": "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).

AHC claims that Plaintiff did not allege AHC failed to warn him of dangers with this particular rig. But Plaintiff alleged AHC "failed to warn plaintiff of the problems with the ratchet systems on the rigs." LF 43, Plaintiff's Appendix A18, par. 9(f). A prior sub-allegation noted that those "problems" included "unsafe conditions with the ratchets thereon" because AHC "failed to properly inspect the rig plaintiff was using." LF 42, Plaintiff's Appendix A17, par. 9(b). Plaintiff also alleged AHC failed to notify him "of the number 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." LF 43, Plaintiff's Appendix A18, par. 9(h). These pleadings were sufficient. Further, AHC did not cite this alleged pleading deficiency in its motion for directed verdict. LF 235-40. Moreover, the jury heard ample evidence AHC failed to warn Plaintiff regarding the broken idler specifically, and the other issues associated with the idler system and chain and ratchet system more generally. AHC does not claim this evidence was admitted improperly.

A. Plaintiff Had Sufficient Evidence for His Failure to Warn Theory

AHC acknowledges Restatement (Second) of Torts § 388 (1965), comment c, which 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." *Id.*

However, AHC misreads this comment, suggesting there is no duty unless the "one who undertakes the repair of a chattel" knows that they created the defect. But the more natural and logical reading of this comment is that the duty exists if, as a result of the repair, one acquires "knowledge" of the defect, not that they actually created the defect. The repairer 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. *See, e.g., id.*, comment a (stating liability would exist for one who lends an automobile but "fails to disclose a defect of which he himself knows.").

Further, 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 incorrect. "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.

AHC devotes several pages to a discussion of *Westfall* and *Moody v. Martin Motor Co.*, 76 Ga. App. 456, 461 (1948), which it contends was cited by *Westfall*, but AHC's discussion confirms Plaintiff's point; if AHC knew its work had made the rig dangerous, it would be subject to liability under §§ 388 and 390; if it was negligent in repairing an already-existing defect on the rig, its liability would be "under the rules stated in §§ 395-398." AHC Br. at 15-16, citing *Moody*, 76 Ga. App. at 461. These Restatement sections do not limit liability to the component that was worked on, and instead refer to the "product" or the "chattel."

Further, AHC's liability extends not just to defects AHC knew, but to unsafe conditions AHC should have known about and did not repair.

> In order that a contractor may be subject to liability under the rule stated in this Section **it is not necessary that his negligence have changed the condition of the chattel for the worse**. **It is enough that the chattel because of his negligence is not in that safe condition in which a competent contractor would have put it and that it is used, or permitted to be used, in reliance upon the care and competent of the contractor.**

Restatement (Second) of Torts § 404, comment b (1965) (emphasis added); *see also* Restatement (Second) of Torts § 388(a) (supplier is subject to liability if the supplier "knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied").

AHC claims it did not have a duty to warn Plaintiff of problems with the ratchet systems and the number of persons injured by those systems, but it cites no authority to support its claim of no duty. Plaintiff's First Brief cited ample authority showing AHC did have such duties. Pl. Br. at 34-36, 38-40. AHC ignores much of it, and fails to successfully distinguish those authorities it did address. Further, AHC cites authority regarding its duty under a voluntary undertaking theory on pages 21-22 of its brief.

AHC claims Dr. Micklow did not offer any testimony that AHC knew of injuries associated with the chain and ratchet system. But Dr. Micklow testified this information was "readily available to anyone in the industry" well before 2003. Tr. 688. Thus, AHC either knew, or should have known, all of this information.

AHC claims there was no evidence AHC was within the car-hauling industry. But

its attorney admitted in his opening statement that JCT "is a car hauling company," that AHC's mechanics "maintain the car haul trailers that Jack Cooper uses to deliver new cars," and that "Auto Handling is a subsidiary company of Jack Cooper Transport Company." Transcript 392-393. Furthermore, 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, and that JCT and the terminals at which the AHC mechanics worked were within the car-hauling industry. *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 JCT, 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.

Thus, AHC clearly knew Cottrell idlers were routinely breaking, but did not warn Plaintiff of that fact. AHC argues 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 JCT knew, and JCT 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.

AHC attempts to argue that Street's testimony about an "enormous amount" of Cottrell idlers that were broken or repaired was overly vague. But 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 could have cross-examined Street on this testimony but its criticisms go to weight, and weighing evidence is inappropriate on a motion for directed verdict. Furthermore, AHC does not cite any authority suggesting Street had to identify some number greater than one in regard to broken Cottrell idlers that AHC knew about, nor does it even assert what the magic number would be.

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 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 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.

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 argues there was no evidence it had a duty to ensure the manual was present, but a jury could reasonably find its mechanics did not simply fail to ensure the manual was present between 2004 and 2007, but that they removed the manual. 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. Transcript 1147-1148, 1253-1254. Cottrell claimed the owner's manual contained information that could have prevented Plaintiff's injury.

AHC also owed a duty to Plaintiff because it undertook to inspect, maintain and repair his rig, and AHC also owed him a duty because it was reasonably foreseeable he would be injured by its acts or omissions, including its failure to warn him of the rig's dangers. *See* Plaintiff's Brief at 35, citing *L.A.C. v. Ward Parkway Shopping Center Co.*, 75 S.W.3d 247, 257 (Mo. banc 2002); *Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc.*, 700 S.W.2d 426, 431-433 (Mo. banc 1985) (citations omitted); *Wolfmeyer v. Otis Elevator Co.,* 262 S.W.2d 18, 23 (Mo.1953) and *Simonian v. Gevers Heating & Air Conditioning, Inc.*, 957 S.W.2d 472, 476 (Mo. App. 1997).

AHC does not attempt to distinguish the preceding cases. Thus, even if AHC's distinctions of *Polovich v. Sayers,* 412 S.W.2d 436 (Mo. 1967) and *Parra v. Building Erection Services*, 982 S.W.2d 278 (Mo. App. 1998) had merit, AHC still had a duty to Plaintiff.

Pollovich affirmed a verdict against a defendant who failed to fix defective brakes. 412 S.W.2d at 438. AHC argues *Pollovich* was not submitted on a failure to warn theory, but it was submitted on a negligence theory, and the court repeatedly noted the negligence was that 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 …").

AHC claims *Parra* can be ignored because AHC did not lease the trailer. But in *Parra*, 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.").

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.

B. Plaintiff Had Sufficient Evidence for His Failure to Inspect, Maintain or Repair Theory

The record contradicts AHC's contention that Plaintiff failed to produce evidence of when and where the weld was made. AHC claims 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* Plaintiff's Br. at 11-12, citing Transcript 603-605, 672-676, 761-764, 774-781, 837-838. An injury can have more than one cause, and proximate cause is typically an issue for the jury. *See* Plaintiff's Br. at 47 and cases cited therein.

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." Plaintiff's Br. at 9, citing Transcript 761-763; *see also* Transcript 763 ("Yes, there are visible weld defects with the weld itself."). 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.

Thus, contrary to AHC's position, Plaintiff had evidence that AHC knew or should have known that the original Cottrell MIG weld was defective (it had more than 3 years to discover the defect), and that it was reasonably foreseeable to AHC that it would fail.

AHC claims there was no evidence it undertook to inspect the welds on the rig's idlers. But in fact, the testimony was that the rigs received regular inspections based on mileage intervals, including annual Department of Transportation inspections, beyond

any repair work. Transcript 1023-1024. Street testified that for the idlers on the bottom of these rigs, "We can't go over the pit like the mechanics do. **They put them over the pits and they check things**." Transcript 1022 (emphasis added). Street testified that Plaintiff and the other JCT drivers "Absolutely" relied on the AHC mechanics to discover defects with idlers on the bottom of the rigs. Transcript 1023. Street testified the drivers relied on the AHC mechanics to discover problems the drivers couldn't see. Transcript 1024. And as noted *supra*, Dr. Micklow testified the defects with the weld were visible defects, if one could get into a space to see them. Transcript 761-763.

There was sufficient evidence AHC inspected, or should have inspected, the idlers on the bottom of the rigs. If the AHC mechanics chose not to inspect these idlers, when it was obvious the drivers could not discover them, that would be enough by itself to support a negligence claim.

AHC suggests the defective original Cottrell MIG weld had nothing to do with the accident. But Dr. Micklow testified at length that the original Cottrell weld was a contributing cause to the injury. *See* Pl. Br. at 12, citing Transcript 761-764, 781. That testimony is sufficient to create a submissible case. Further, it makes no sense to claim that the sole cause of an injury was a failure to repair the original defect; without the original defect, there would be nothing to attempt to repair.

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.

It was not Plaintiff's burden to show when the repair attempt was made. If JCT made an incomplete repair, that still means that for more than three years, AHC did

nothing to fully repair the **original** defect, regardless of how much time it had to discover the incomplete repair.

And if AHC made the incomplete repair, where the mechanics "left off the most important part" (Transcript 764), that would also support a negligence claim.

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. Plaintiff's Br. at 16, citing Transcript 1022-1024, 1146-1147. This evidence, by itself, created a submissible case. *See* Plaintiff's Br. at 47-48, citing *Fancher v. Southwest Missouri Truck Center, Inc.*, 618 S.W.2d 271 (Mo. App. 1981).

C. Plaintiff Had Sufficient Evidence for His Negligent Repair Theory

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

AHC suggests, without evidence, that perhaps a third party did the repair. But Plaintiff testified that he was familiar with the maintenance that was done on the rig from 2004 through at least his injury in 2007 Transcript 1159. He testified that while it was

theoretically possible that someone other than AHC or a JCT-affiliated company could work on the rig if it broke down on the road, to his knowledge, all work on this rig until he was injured was done by AHC, JCT, or another JCT affiliate. Transcript 1159-1160; *see also* Transcript 1160 ("Q. To your knowledge had anyone ever done any work on this idler who wasn't affiliated with Jack Cooper? A. No. Not whatsoever.").

Plaintiff is not required to exclude every possible alternate cause to avoid a directed verdict. *See Ahrens*, 366 S.W.3d at 608, quoting *Kircher,* 775 S.W.2d at 117 ("The plaintiff need not exclude all other potential causes of the damage or prove 'an absolutely positive causal connection.'"); *see also Coggins v. Laclede Gas Co.,* 37 S.W.3d 335, 339 (Mo.App. E.D.2000) (a plaintiff may prove causation by "reasonable inferences from proven fact or by circumstantial evidence.").

AHC attempts to downplay the work done on Plaintiff's rig at terminals staffed by AHC mechanics. But the rig was serviced at the terminals where AHC mechanics did the maintenance 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. Plaintiff first obtained the rig from Oklahoma City, where the AHC mechanics worked, in 2004. Transcript 1155.

The undisputed testimony was that the maintenance records did not show any repair to the idler. Transcript 827. Plaintiff described a 31-page gap in the maintenance records. Transcript 1426-1428; Exhibit 35. That testimony was admitted without objection. *Id.* Accordingly, AHC's 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.

No one from AHC or JCT testified regarding those companies' record-keeping practices, and there was no testimony explaining why the repair was not documented as a JCT repair, or why there appeared to be a 31-page gap. Transcript, *generally*.

Plaintiff testified there was at least one occasion where AHC did not create paperwork documenting its work on this rig. Transcript 1160-1161. He testified that if there were undocumented repairs, they would most likely have been done by AHC. *Id.* AHC downplays this testimony, claiming that happened on "only one occasion." But 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's argument that this happened on "only one occasion" goes to the weight of the evidence, which is a jury issue.

AHC cites testimony that Plaintiff was not aware of any work being done at Wentzville on the chain and ratchet system or the idlers, but it does not cite any testimony suggesting he was aware of such work being done at a terminal where the mechanics were employed by JCT.

In light of this testimony, Plaintiff has a submissible case. AHC is free to argue the weight of Plaintiff's evidence, that the majority of the work was done by JCT mechanics,

to explain why there are no documents showing JCT did the repair, and to explain how a 31-page gap in the sequencing for the maintenance records does not mean there are pages missing from those records, but those are issues for a jury to evaluate. AHC was the party that could have produced documents showing someone other than AHC did the repair, yet it failed to produce them.

AHC argues Plaintiff never asked the Wentzville mechanics to inspect and repair the chain and ratchet system or the idlers, and that the work done on Wentzville involved other parts of the rig, but Street testified the AHC mechanics regularly inspected the rigs at defined mileage intervals. Transcript 1023-1024.

AHC does not dispute Plaintiff's contention that a reasonable inference is that if there were documents that exonerated AHC by showing 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. AHC attempts to distinguish *Zahner*, but acknowledges it held there is no rule of law requiring a jury to ignore the destruction of evidence.

Here, in addition to everything else Plaintiff has identified, Plaintiff affirmatively testified that AHC mechanics were more likely to have done the repair, based on his personal experience that AHC, unlike JCT, did not always document its repairs. That evidence, by itself, precluded a directed verdict. And if AHC did not attempt the repair, that still means AHC failed to repair a defect that existed since 2003.

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.

II. The trial court erred in excluding evidence of accidents involving the chain and ratchet system that did not involve idler failure

Cottrell notes that admissibility of evidence is a matter of discretion, but a trial court abuses its discretion when it applies the wrong legal standard. *Stokes v. Nat'l Presto Indus., Inc.*, 168 S.W.3d 481, 484 (Mo. App. 2005). *Stokes* involved the same issue here, the exclusion of evidence of prior incidents. *Id.*

The trial court applied the wrong legal standard. It 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 the face of evidence that the excluded incidents were (1) of like character; (2) occurred under substantially the same circumstances; and (3) resulted from the same cause as that alleged to have caused the accident in question. *Peters v. General Motors Corp.*, 200 S.W.3d 1, 10 (Mo. App. 2006). 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.

The trial court, in excluding an entire category of evidence based on an improper legal standard, abused its discretion. Cottrell claims Plaintiff did not identify any particular evidentiary ruling, but Cottrell is incorrect. *See* Plaintiff's First Br. at 17-18, 23, citing Transcript 733-735, 748. On the transcript pages cited in Plaintiff's Brief, 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. After the offer of proof, the trial court stated, "Your offer of proof is overruled." Transcript 748.

Cottrell claims Plaintiff has not explained what evidence was improperly excluded, but Plaintiff's Brief noted the trial court categorically excluded all evidence, including testimony by his expert, that referred to previous accidents that did not involve broken idlers. *See* Plaintiff's Brief at 17-18, 23 and record citations therein. On the transcript pages cited in Plaintiff's Brief, 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 trial exhibits 43, 50, 51 and 53. Transcript 735.

Cottrell sets forth generalized statements regarding substantial similarity, without addressing Plaintiff's authority, which holds that in determining whether prior accidents are substantially similar, the trial court must consider what defect is in issue and the

purpose of the evidence. Plaintiff's Br. at 54-61. 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. *See* Plaintiff's Br. at 9-10, 12-13 and citations therein.

Cottrell claims "He does not point to any offer of proof …," but Plaintiff's brief cited an offer of proof that filled 34 transcript pages. *See* Plaintiff's Br. at 17-18, citing Transcript 714-748. 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. *See id*. 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.*; *see also* Plaintiff's Br. at 17-18 (summarizing Dr. Micklow's testimony).

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).

Cottrell complains that Plaintiff is not referring to a particular incident that was excluded, but that is simply incorrect – Plaintiff's brief cited 8 specific examples of incidents that were excluded even though they also involved components failing when a car-hauler was attempting to secure a vehicle. Pl. Br. at 19-23. Furthermore, the trial court excluded entire boxes worth of incidents based on an improper legal standard, rather than holding particular incidents were inadmissible. Transcript 734.

Cottrell simply ignores the arguments and authorities raised by Plaintiff on this issue. *See* Plaintiff's Br. at 54-67. Many of the cases holding this kind of evidence is admissible were cases involving the chain and ratchet system, including cases in which Cottrell was a defendant. Pl. Br. at 62-65 (citing the *Brdar*, *Torbit*, *Ford*, and *Pritchett* cases).

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).

Conclusion

For the foregoing reasons, 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.

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. If this Court does not reverse the directed verdict as to Auto Handling Corporation, Plaintiff requests that the Court affirm the judgment and the findings of fault against Cottrell as to Plaintiff's claims for negligence.

Respectfully submitted,

ARMBRUSTER, DRIPPS,
WINTERSCHEIDT & BLOTEVOGEL

BY: _/s/ Michael Blotevogel_____

Roy C. Dripps #29789
Charles W. Armbruster III #40027
Michael T. Blotevogel #55030
51 Executive Plaza Ct.
Maryville, IL 62062
Phone: 800/917-1529
Fax: 800/927-1529
mikeb@adwblaw.com

Attorneys for Plaintiff/Respondent/Cross-Appellant

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 25,142 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, signature block, 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 November 30, 2016, which will send a copy of the foregoing to all counsel of record.

/s/ Michael Blotevogel