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IN THE SUPREME COURT OF MISSOURI

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

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

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

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ARGUMENT

If the judgment as to Cottrell is not reversed outright, this appeal should be retransferred. The opinion of the Court of Appeals remanded this action to the trial court for retrial on all issues. In the absence of outright reversal, this is the only appropriate resolution of this case in which the issues and evidence are completely intertwined and relate to a single product and a single event.

The plaintiff's claims in this action all relate to one part of an automobile transport trailer called an idler, part of the system that secures the vehicles being shipped. The plaintiff presented two alternative and inconsistent theories at trial. He asserted that Auto Handling negligently repaired the idler long after it was sold so that a new, defective weld broke when the plaintiff was using it. Alternatively, in his product liability claim as to Cottrell, the plaintiff necessarily claimed that when he was injured, the idler was in the same condition as when the trailer was manufactured by Cottrell years earlier.

But these alternative and inconsistent theories were not submitted to the jury because the trial court granted a directed verdict to Auto Handling. Thus, the only defendant listed on the verdict form was Cottrell, and the responsibility of Auto Handling was not submitted.

In its opinion, the Court of Appeals reversed the directed verdict for Auto Handling, reversed the verdict against Cottrell, and remanded the action to the trial court for retrial on all issues. If the judgment against Cottrell is not reversed outright, this is the only appropriate result for this appeal so the relative fault, if any, of all parties may be considered at once.

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A. The judgment for product liability should be reversed.

Cottrell's Point I should be granted because a fundamental and fatal inconsistency permeates the plaintiff's evidence and theories of recovery. The only relationship between Cottrell and the plaintiff is that of a product manufacturer and a remote user. There is no privity or agreement between them, or other source of duty other than that of a manufacturer and a product user under Missouri law.

Thus, the only duty Cottrell owed the plaintiff under Missouri law -- either under negligence or strict liability -- was to design and manufacture a product that was reasonably safe at the time of sale in the year 2000. *See Morrison v. Kubota Tractor Corp.,* 891 S.W.2d 422 (Mo. App. 1994). There are no post-sale duties on manufacturers under Missouri law, and whether for negligence or strict liability, the plaintiff must prove that a condition existing before the sale in 2000, or conduct occurring before the sale, was negligent as to the product's condition at the time of sale and proximately caused this plaintiff's accident in 2007.

The plaintiff's evidence and arguments, however, prove the opposite of his required burden of showing that a condition existing ***at the time of sale*** proximately caused his accident. This inconsistency arose by attempting to sue Cottrell for a condition of the product or its alleged negligent conduct before the time of sale as causing his accident, and suing AHC and presenting evidence that AHC's conduct after the sale created an unsafe condition causing his accident.

The plaintiff blamed AHC's negligent weld in doing a repair as creating a dangerous condition that allegedly caused his accident. His brief states: "Dr. Micklow

testified Cottrell uses a MIG weld, not the weld used for the repair." Plaintiff's Substitute Brief at 49. The plaintiff states: "Evidence indicating AHC's employees caused a dangerous condition eliminates the need for additional proof as to notice." *Id.* The plaintiff states: "Dr. Micklow testified any repair was incomplete." *Id.* at 46. According to the plaintiff, AHC was negligent in that it "failed to inspect it to discover any negligent repair of that weld, and failed to repair the rig to correct the previous improper repair." *Id.*

The plaintiff's own evidence established thus that "AHC's employees caused a dangerous condition" by doing an improper weld on the piece that failed and did so using a completely different welding process than the MIG weld Cottrell used. This conduct creating a dangerous condition that "caused" the plaintiff's accident all occurred long after Cottrell sold the product and after its duties ceased at the time of sale.

1. There was no waiver by Cottrell.

The plaintiff's assertion that the issues in Cottrell's appeal were not raised in the trial court is nonsense. Cottrell's post-trial motions are replete with requests for the exact relief sought in this appeal, and for the same reasons. L.F. at 388-421.

The plaintiff is mistaken in claiming that this verdict "is inconsistent to the point of being self-destructive" that must be presented to the trial court before the jury is discharged, as the Court noted in *Douglass v. Safire,* 712 S.W.2d 373, 374 (Mo. banc 1986). In *Douglass*, a plaintiff obtained a verdict against two tortfeasors, and the jury found against one of the tortfeasors on his third-party claim against the other tortfeasor. *Id.* at 373. The Court held that these verdicts were not necessarily inconsistent because

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the jury could have rejected the third-party claim for reasons independent of the plaintiff's main claim. *Id.* at 375. In any event, the Court held that the asserted inconsistency did not require a new trial. *Id.*

But Cottrell does not seek a new trial under Point I, and it does not assert an inconsistency of the type mentioned in *Douglass*. Rather, as noted below, Cottrell is entitled to JNOV because the judgment in favor of the plaintiff depends on a defective product, and the judgment for Cottrell and against the plaintiff on strict liability shows that no defect caused the plaintiff any damages. This judgment, from which the plaintiff does not appeal, precludes any other finding under a properly submitted negligent design defect claim. Once the jury returned its verdict on Count I assessing Cottrell no fault and placing 100 percent fault on the plaintiff, this case was over. No judgment could be, or now can be, entered against Cottrell over the same injuries as to the same product. *See Jacobs v. Bonser,* 46 S.W.3d 41 (Mo. App. 2001).

The plaintiff asserts that the infirmity of the judgment in his favor should be overlooked because of invited error, but the plaintiff does not favor the Court with an explanation of why. He cites a judge-tried case in which a party was held not to be able to complain that the trial court failed to consider certain issues when the party clearly declared in his opening statement that those issues were not before the court. *See Pierson v. Kirkpatrick,* 357 S.W.3d 293, 299 (Mo. App. 2012). The plaintiff points to another judge-tried case in which a party was held to have waived a claim to certain damages when he clearly testified at trial that he was not seeking them. *See Lau v. Pugh,* 299

S.W.3d 740, 757 (Mo. App. 2009). The plaintiff does not point to any such acts of waiver by Cottrell.

The plaintiff's reference to election of remedies makes no sense. When a party has the right to pursue one of two inconsistent remedies and makes an election, institutes suit, and prosecutes it to final judgment, that party thereafter cannot pursue another and inconsistent remedy. The purpose of the election of remedies doctrine is to prevent double recovery for a single injury. Thus, a property owner can properly sue a thief for damages for conversion, or the property owner can seek replevin to get the property back, but the property owner cannot do both. *See Ellison v. Fry,* 437 S.W.3d 762, 776-777 (Mo. banc 2014). In this case, the plaintiff only sought one remedy -- damages -- and obtained only one judgment on his multiple theories of liability. Election of remedies is not implicated in this case.

2. Cottrell is not liable for negligent design.

In its opening brief, Cottrell suggested that the Court should reconsider whether to allow negligent design claims at all. The Court should join other states, as well as the drafters of the current Restatement, and eliminate the supposed distinction between strict liability and negligence in defective design and warning claims. This Court is the only forum in which to address this issue. Even if the Court rejects this suggestion, however, the plaintiff's claim for negligent failure to warn must fail in light of the facts of this case.

The plaintiff's argument on this point proceeds from a false assumption. He asserts that a claim for strict liability does not necessarily subsume a negligence claim.

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This may be true enough in the abstract, as far as it goes, but it ignores the entire basis of Cottrell's argument under Point I, and it does not apply here.

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

With the jury's finding that that product did not cause the accident, but rather that the plaintiff's conduct caused 100%, it was unnecessary even to consider whether Cottrell's conduct was negligent in causing a defective design. That is because the jury already found that the plaintiff's conduct caused the accident – 100% -- not the product. . If a defective condition of the product at the time of sale did not cause any portion of the claimed injuries , as the jury found, the manufacturer's conduct in creating that product could not have caused any portion of the claimed injuries either.

The causation aspect of a strict liability design defect claim is identical to the proximate causation aspect of a negligent design defect claim. *Bachtel v. Taser International, Inc.,* 2013 WL 317538, 7 (E.D. Mo. 2013) ("With respect to failure to warn claims based on negligence, Missouri law requires a plaintiff to make the same showing of proximate cause as under strict liability."). It would be inconsistent for the

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jury to find that the plaintiff's conduct proximately caused his accident 100% for strict liability design defect rather than the product and and also that Cottrell's conduct beyond the product -- for which no duties exist under Missouri law -- caused his accident. *See Hansen v. Isuzu Motors Ltd.,* 289 Fed. Appx. 621, 626 (4th Cir. 2008) ("The burden of proof for strict liability is lower than the burden of proof under negligence. Thus if plaintiff could not meet the lower standard, then it is clearly unreasonable to believe that he could have met the burden for his negligence claim.").

In response, the plaintiff cites *Rinker v. Ford Motor Co.,* 567 S.W.2d 655, 660 (Mo. App. 1978), which merely holds that there is no inconsistency between a finding against a manufacturer on a ***negligent failure to warn*** theory and a finding for the manufacturer on a strict liability theory. In that context, as the plaintiff notes, there are "separate and distinct theories of liability." Similarly, *Moore v. Ford Motor Co.,* 332 S.W.3d 749 (Mo. banc 2011), and *Palmer v. Hobart Corp.,* 849 S.W.2d 135 (Mo. App. 1993), involved claims of failure to warn.

The issue in this case, however, relates to a ***design defect strict liability*** claim and a ***negligent design defect*** claim. In this case, the trial court erred in entering judgment for the plaintiff and in denying JNOV because, as the jury found, there was no causative defect to support the claim of negligence. There was no design defect in the product causing the plaintiff's alleged injuries to support the claim of negligence in the design of the product.

Rinker, Moore, and *Palmer* have nothing to say about whether the plaintiff may recover on a ***negligent design defect*** claim in this case.

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The plaintiff's reliance on *Blevins v. Cushman Motors,* 551 S.W.2d 602 (Mo. banc 1977), is also misplaced. *Blevins* explains the greater burden on a plaintiff in a negligent design defect claim than in a strict liability design defect claim: "The article can have a degree of dangerousness which the law of strict liability will not tolerate even though the actions of the designer were entirely reasonable in view of what he knew at the time he planned and sold the manufactured article." *Id.* at 608.

Thus, negligence claims have a higher threshold of proof than strict liability claims. *Jaurequi v. John Deere Co.,* 971 F. Supp. 416, 431-432 (E.D. Mo. 1997). A plaintiff who cannot prevail on strict liability claims for defective design or for failure to warn cannot prevail on negligence claims based on the same design or the same failure to warn. *Id.* A plaintiff's failure to demonstrate a defect that caused the injury "will defeat a cause of action under either negligence, strict liability, or the implied warranty of merchantability." Restatement (Third) of Torts, Products Liability § 2 cmt. n (1998); *see Miller v. Yazoo Mfg. Co.,* 26 F.3d 81, 84 (8th Cir. 1994).

3. Cottrell is not liable for failure to warn.

Cottrell's Point II should also be granted. As with any other claim, in order to prevail on a claim of failure to warn, a plaintiff must establish proximate cause. *Johnson v. Medtronic, Inc.,* 365 S.W.3d 226, 232 (Mo. App. 2012). To do so, a plaintiff must show that a warning would have altered his or her behavior. *Id.* When the evidence shows that the plaintiff did not read the warning, the plaintiff cannot establish that any failure to warn caused the alleged injury. *Id.* at 233.

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Further, and as noted with respect to the claim of negligent design, the verdict on Count I assessing Cottrell no fault and placing 100 percent fault on the plaintiff also forecloses any claim of failure to warn. There is no duty to warn of product that did not injure the plaintiff.

The evidence precludes any recovery for failure to warn. It is undisputed that the rig at issue had at least two warning decals on it, both referring the reader to the rig's owner's manual, and one warning not to over-tighten the chains while loading. Tr. at 1859-1861; Exhibit 169; Exhibit 170. The warning stickers were in an area where the driver would be during the loading process, and the plaintiff "certainly had an opportunity to review" them. Tr. at 1860. After equivocating initially, the plaintiff testified clearly that he did not read the warnings: "No, I did not." Tr. at 1256. The plaintiff testified that he also never read the owner's manual mentioned in the warnings. Tr. at 1256, 1257.

The plaintiff is mistaken in relying on a pharmaceutical case, *Winter v. Novartis Pharmaceuticals Corp.,* 739 F.3d 405, 409 (8th Cir. 2014), for the proposition that the "mere fact that a user ignored one warning does not preclude a failure to warn claim." *Winter* involved a physician who did not read drug inserts containing warnings, but the Eighth Circuit noted that there was testimony that the doctor obtained pharmaceutical warnings through other means, including continuing medical education, review of medical literature, discussion with other physicians, and statements by the manufacturer's sales representative, none of which included warnings about risk at issue. *Id.* The evidence was that the manufacturer knew of the risk at issue "but instructed its sales force

not to mention the disease when making calls to physicians." *Id.* There is no similar evidence in this case. Further, pharmaceutical product liability cases, unlike this case, have recognized a limited exception to the non-recognition of a post-sale duty to warn. *See Schenebeck v. Sterling Drug, Inc.,* 423 F.2d 919, 922 (8th Cir. 1970).

The plaintiff notes that, 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. *See Tune v. Synergy Gas Corp.,* 883 S.W.2d 10, 14 (Mo. banc 1994). This presumption cannot aid this plaintiff, in light of the evidence that warnings were in place, but the plaintiff failed to read them.

B. Instruction 10 was reversible error.

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

It is undisputed that, instead of MAI 25.09, the trial court improperly accepted the plaintiff's invitation to submit the negligent design defect claim based on MAI 17.02, which appears in the MAI section titled "Verdict Directing - Motor Vehicles."

The plaintiff's argument boils down to the assertion that a plaintiff has the right to select the theories under which he or she wants to submit a case to a jury. This statement is true, but irrelevant to this instructional issue.

From this premise, the plaintiff concludes that "it was Plaintiff's right to select the appropriate MAI." Plaintiff's Substitute Second Brief at 53. This is simply false, and

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turns the logic of approved instructions on its head. Plaintiff's reasoning for not using the correct MAI is absurdly circular: "Because MAI 25.09 does not encompass the allegations of negligence in Instruction 10, MAI 17.02 was required." *Id.* This is also false. MAI 25.09 was not required to conform to the verdict director; the verdict director was required to conform to MAI 25.09.

Rule 70.02(b) directs that, whenever the Missouri Approved Instructions contain an instruction applicable in a particular case, "such instruction shall be given to the exclusion of any other instructions on the same subject." The law is well-settled that where an MAI instruction applies to the case, the use of such instruction is mandatory. *Abbott v. Missouri Gas Energy,* 375 S.W.3d 104, 108 (Mo. App. 2012). Mandatory directions must be followed, and the pattern instructions must be used as written to make the instructional system work and to preserve its integrity and very existence. *Id.* (quoting *Brown v. St. Louis Pub. Serv. Co.,* 421 S.W.2d 255, 258 (Mo. banc 1967)).

Varying from approved instructions is not permitted: "If counsel are permitted to 'improve' the approved instructions, even within the confines of specific precedents, the value of these instructions will be lost. Each such 'improvement' by one counsel will prompt an offsetting 'improvement' by his opponent and after a while the court will not be able to find the original with a divining rod." *Brown,* 421 S.W.2d at 258 (quoting prior cases).

The MAI itself, in the section "How To Use This Book," explicitly warns that varying from approved instructions will lead to error: "You may have the ability to improve an instruction in MAI but you do not have the authority to do it. Do not do it.

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The use of a provided MAI is mandatory. If you think the change of a word or phrase will make it a better instruction, do not do it. You will be falling into error if you do." *See Abbott,* 375 S.W.3d at 109. "Accordingly, where there is deviation from an applicable MAI instruction which does not need modification under the facts in the particular case, prejudicial error will be presumed unless it is made perfectly clear by the proponent of the instruction that no prejudice could have resulted from such deviation." *Brown,* 421 S.W.2d at 259; *see Abbott,* 375 S.W.3d at 109.

MAI 25.09 did not restrict the plaintiff from submitting his only proper legal theories to the jury. The plaintiff cites a host of cases, but none of them hold or even suggest that it would be proper to instruct a jury in a claim of negligent design defect on the basis of the MAI verdict director for motor vehicle accidents. To any extent that Instruction 10 (improperly based on MAI 17.02) set forth other proposed "theories" of liability (like failure "to review and analyze injury and testing data"), it was contrary to MAI 25.09 and should have been rejected.

The plaintiff's assertion of waiver on this point is baseless. Cottrell raised its objections to Instruction 10 clearly and specifically. Tr. at 2120-2129. The objections included that Instruction 10 did not contain the requirements of MAI 25.09 and did not tie any of the allegedly negligent acts to a defective product. As Cottrell's counsel objected during the instruction conference, "All they have done here in the abstract is say you didn't do this, you didn't do that, didn't test, didn't analyze. But at the end of the day the real issue is was the product defective? That's the real issue. That's the claim. This doesn't submit that, Your Honor." Tr. at 2122.

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In addition, Cottrell proposed a verdict director that exactly tracked MAI 25.09, requiring the jury to find that Cottrell designed the product and failed to use ordinary care to make it reasonably safe:

> On plaintiff Robert Johnson's claim of negligence with regard to the July 3, 2007 accident alleging a broken idler, you must assess a percentage of fault against defendant Cottrell if you believe:
>
> First, defendant Cottrell designed the chain and ratchet system and idler on car hauling trailer, and
>
> Second, the chain and ratchet system and idler on the car hauling trailer generated excessive force during operation, and
>
> Third, Cottrell failed to use ordinary care to design the chain and ratchet system and idler on the car hauling trailer to be reasonably safe, and
>
> Fourth, as a direct result of such failure, plaintiff sustained damage.

L.F. at 160.

The Court should contrast this proper proposed submission with Instruction 10, which was the verdict director used by the trial court at the request of the plaintiff:

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Jury Instruction No. 10

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

First, either

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

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

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

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

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> Second, defendant, in any one or more of the respects submitted in paragraph First, was thereby negligent; and
>
> Third, such negligence directly caused or directly contributed to cause damage to plaintiff.

L.F. at 297.

Cottrell was prejudiced by this instructional error, and the plaintiff has made no showing to the contrary. Instruction 10 did not require the jury to find that Cottrell designed the allegedly defective product, as required by MAI 25.09. Instruction 10 did not require the jury to find that Cottrell failed to use ordinary care to design the product to be reasonably safe, as required by MAI 25.09. Instruction 10 did not require the jury to find that, as a result of these actions, the plaintiff was damaged, as required by MAI 25.09. Cottrell was prejudiced by the failure to instruct the jury to make these required findings. *See Williams v. Enochs,* 742 S.W.2d 165, 168 (Mo. banc 1987).

The plaintiff's counsel were aware that MAI 25.09 was the proper verdict director to submit a product defect negligence claim. However, they are also aware that juries return verdicts in favor of Cottrell when properly instructed. *See* L.F. at 410-411; *Stanley v. Cottrell, Inc.,* 784 F.3d 454, 460 (8th Cir. 2015).

C. Instruction 10 was a roving commission.

Cottrell's Point IV should be granted due to instructional error. The plaintiff does not seriously contend that Instruction 10 was anything other than a roving commission. In an "argument" occupying less than three pages of his 92-page second brief, the

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plaintiff merely declares that Instruction 10 was not overly vague and that further specificity would have been inappropriate. Plaintiff's Substitute Second Brief at 62-64.

On its face, Instruction 10 failed to adequately specify the conduct on which the jury could base a finding of liability and failed to specify a time period during which any allegedly negligent conduct occurred. It is reversible error to give a jury a roving commission. *McNeill v. City of Kansas City,* 372 S.W.3d 906, 909 (Mo. App. 2012). "To avoid a roving commission, the trial court must instruct the jurors regarding the specific conduct that renders the defendant liable." *Id.* at 910. An instruction may also be considered a roving commission when it is too general or it is submitted in a broad, abstract way without any limitation to the facts and the law developed in the case. *Centerre Bank of Kansas City v. Angle,* 976 S.W.2d 608, 617 (Mo. App. 1998). The instruction must not leave the jury to "roam freely through the evidence and choose any facts which suit its fancy or its perception of logic to impose liability." *Klotz v. St. Anthony's Medical Ctr.,* 311 S.W.3d 752, 766 (Mo. banc 2010).

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

The instruction did not contain language that defined or explained the data and reports to which the it referred, at least to ensure that the jury knew it was limited to considering information ***relating to the product at issue***. These jurors were free to roam

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

D. The post-sale alteration of the product defeats the plaintiff's claims.

The plaintiff is mistaken in declaring that Cottrell's motion for directed verdict failed to mention the post-sale alteration. Indeed, this key issue was the first thing mentioned in the motion for directed verdict. L.F. at 218-219. Cottrell's Point V should be granted because the denial of a directed verdict or JNOV was in error.

The plaintiff's entire theory in this case is that he was injured because a weld broke, releasing tension. The undisputed evidence shows that the weld at issue was not part of the rig when Cottrell sold it. The allegations and evidence, including testimony from the plaintiff's expert, Dr. Micklow, show that the defective weld was done by someone else, not by Cottrell, and long after the time of sale.

This product alteration by a party other than Cottrell makes it improper to enter judgment against Cottrell on the plaintiff's negligence and failure-to-warn claims. *See Gomez v. Clark Equipment Co.,* 743 S.W.2d 429, 432 (Mo. App. 1987). When a plaintiff seeks recovery for strict liability in tort, a manufacturer can only be liable for defective products if the product reaches the user or consumer without substantial change in the condition in which it is sold. *Hill v. General Motors Corp.,* 637 S.W.2d 382, 384 (Mo. App. 1982). The defect must have existed at the time of manufacture. *Id.* Missouri does not impose a duty on the part of a manufacturer to anticipate or warn of dangerous

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alterations to its product. *Id.* at 385. The plaintiff must produce evidence that neither he nor any third person made alterations to the product that would create a defect that could be the proximate cause of the damages incurred. *Jasinski v. Ford Motor Co.,* 824 S.W.2d 454, 455 (Mo. App. 1992).

Thus, according to the plaintiff's own cited case, subsequent changes or alterations in a product relieve the manufacturer of strict liability if the changes render the product unsafe. *Carlisto v. General Motors Corp.,* 870 S.W.2d 505, 509 (Mo. App. 1994).

This point is illustrated by the recent case of *Williams v. Ford Motor Co.,* 2013 WL 3874751 (E.D. Mo. 2013), in which the plaintiffs sued Ford for design defect, claiming that a shift cable allowed a Ford Taurus to jump into drive, killing the plaintiffs' decedent. As in this case with the idler that failed after being welded after Cottrell sold the rig, in *Williams,* the engine and transmission had been removed post-sale and the shift cable was bent. Thus, the plaintiff could not recover: "Here, in contrast, plaintiffs have not shown that the Taurus was in substantially the same condition as when it left Ford's plant." *Id.* at *4. In this case, in suing both a maintenance company for creating a causative, defective condition -- a faulty weld after the sale -- and in suing Cottrell for a condition at the time of sale as creating a causative, defective condition, it was inevitable that plaintiff's proof for one claim would defeat the other.

The plaintiff in this case claimed -- indeed, he filled the trial record with evidence to prove -- that the allegedly inadequate weld was made after Cottrell sold the rig. L.F. at 425-426. His evidence was that this bad weld or repair caused his injury. The plaintiff did not attempt to present evidence that Cottrell was responsible for the repair or the

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defective weld. These facts preclude recovery against Cottrell under any theory. Thus, Cottrell was entitled to JNOV on both the negligence and failure to warn claims.

The plaintiff declares that section 537.760, RSMo, permits a claim arising from a defective condition that did not exist when the product was sold. This is nonsense. The statute permits a product liability claim only if a defendant "transferred a product in the course of his business" and the product "was ***then*** in a defective condition unreasonably dangerous when put to a reasonably anticipated use" as a result of the defective condition or as a direct result of the product being sold without an adequate warning. § 537.760.3, RSMo (emphasis added). On its face, the statute does not permit a claim for conditions that arise after sale.

E. The Court should reverse outright or remand for a new trial.

As noted, the plaintiff cannot recover against Cottrell, and the trial court erred in denying JNOV. Cottrell requests the Court to reverse the judgment outright. In the alternative, this appeal should be retransferred to the Court of Appeals or remanded for a new trial as ordered in the opinion of the Court of Appeals.

In its opinion, the Court of Appeals agreed with the plaintiff that a directed verdict should not have been entered in favor of Auto Handling, noting that the plaintiff "presented evidence of two different points at which the idler was compromised. One was that the original weld on the idler was faulty, leading over time to the idler breaking. The other was that someone eventually replaced the weld on the idler, but did so in a faulty manner. Johnson was entitled to present these two theories and it was up to the jury to determine whether one or both contributed to cause his accident." Opinion at 12.

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"Johnson's expert testified that Cottrell only used a type of weld called a MIG weld, and that the faulty weld was not a MIG weld." *Id.*

As to Cottrell, the plaintiff does not seriously dispute that the Court of Appeals was correct in reversing for instructional error. Indeed, the focus of the plaintiff's argument about the instruction is the scope of relief that should be provided on account of this prejudicial error.

The opinion of the Court of Appeals is correct that all of the plaintiff's claims as to Cottrell and Auto Handling are interrelated. By relieving the plaintiff of his burden of proving negligent design or manufacture at the time of sale, or a sale at all, the trial court's failure to use MAI 25.09 obscured the inconsistency between the plaintiff's claim against Auto Handling and his claim against Cottrell. As to Cottrell, the plaintiff had to prove that a design or manufacturing defect existed ***at the time Cottrell sold the trailer***. But, as the Court of Appeals found, the plaintiff presented evidence that Auto Handling improperly repaired a weld on the rig and in doing so created, ***after the sale,*** the condition that allegedly caused the plaintiff's injury. Had the jury been properly instructed, the plaintiff's evidence in support of his claim against Auto Handling would necessarily negate his claim against Cottrell by proving that Auto Handling's alleged conduct after the sale (not any alleged negligence by Cottrell) created the condition that caused the plaintiff's injuries.

Further, the Court of Appeals properly found that the plaintiff's verdict director on negligent design defect and failure to warn was "confusing and failed to direct the jury to

the ultimate facts" to the point that it gave the jury a roving commission to speculate on how Cottrell allegedly "failed to warn of dangers." Opinion at 8-9.

As a result of these errors, the opinion of the Court of Appeals remanded for a new trial on all issues: "We note that Instruction 10 [the defective verdict director] addressed only Johnson's claims of negligence, and not strict liability. One of Cottrell's arguments on appeal is that the verdicts were inconsistent because, according to some federal authority, the burden for establishing negligence is higher than for strict liability. Here, we do not reach that issue, but note only that Johnson's claims were intertwined, much of the evidence related to both his strict liability and negligence claims, and the infirm Instruction 10 undoubtedly affected the jury's deliberations, potentially on both claims. Thus, we reverse the jury's verdict on all claims and remand for a new trial." Opinion at 10 n.6 (citations omitted).

The opinion concludes: "The trial court erred in giving Instruction 10 because it was not based on the applicable MAI, and because its language was vague and invited a roving commission. Thus, we reverse the judgment and remand for a new trial on all of Johnson's claims against Cottrell. Further, the trial court's directed verdict in favor of AHC is reversed because Johnson put forth sufficient evidence from which the jury could find AHC responsible for the faulty weld." *Id.* at 15-16.

The holding the Court of Appeals was correct. "Where the issues and parties are inextricably intertwined, it is essential to include all parties in the new trial to avoid unfairness and disadvantage to any litigant." *Brines v. Cibis,* 784 S.W.2d 201, 204 (Mo. App. 1989). In such cases, to avoid prejudice to any of the parties on retrial, it is

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appropriate to remand for a new trial as to all issues and all parties. *See P.S. v. Psychiatric Coverage, Ltd.,* 887 S.W.2d 622, 628 (Mo. App. 1994).

In this case, the plaintiff's claims against Auto Handling and Cottrell could not be more clearly intertwined. Both claims arose from the alleged defectiveness of the idler. Both claims depended on a defect in the idler that either occurred when Auto Handling repaired it or existed when Cottrell sold the trailer. The parties, the trial court, and the jury should be allowed to evaluate the plaintiff's interrelated claims against all defendants in light of the evidence on remand.

Further, the plaintiff's claims against Cottrell are interrelated. All claims relate to the same idler. On the claim for strict products liability design defect, the jury rejected the plaintiff's arguments and properly found Cottrell's fault to be 0% and the plaintiff's fault to be 100%. L.F. at 317, 320.

The remaining two claims against Cottrell both included failure to warn. On the claim for negligent design defect and failure to warn, based on the defective Instruction 10, the jury found Cottrell's fault to be 55% and the plaintiff's fault to be 45%. L.F. at 317, 320-321. This verdict was reached in response to a verdict director that the Court of Appeals properly held to grant a roving commission as to how the defendant might have failed to warn. Opinion at 8-9.

On the claim for strict liability failure to warn, the jury found Cottrell's fault to be 49% and the plaintiff's fault to be 51%. L.F. at 317, 321. This was submitted via Instruction 13, ***the very next verdict director read by the trial court after the defective Instruction 10.*** L.F. at 300. After hearing Instruction 10 (which the Court of Appeals

held to be improper, confusing, and overly broad in submitting failure to warn), the jury was instructed by Instruction 13 to return a verdict for the plaintiff if "Cottrell did not give an adequate warning of the danger." L.F. at 300. The issue in both counts was whether Cottrell had failed to warn. The Court of Appeals was correct in holding that a new trial was required on all issues because "the infirm Instruction 10 undoubtedly affected the jury's deliberations, potentially on both claims." Opinion at 10 n.6.

The plaintiff has argued that his various theories of recovery are legally distinct, but he has done nothing to dispute that ***his particular claims*** were intertwined. The evidence at trial was relevant to all of his related claims against both Cottrell and Auto Handling. And the defective Instruction 10 certainly misinformed the jury about the issue of warnings, which also implicated the next verdict director, Instruction 13. If the judgment against Cottrell is not reversed outright, a remand for a new trial on all issues is the only proper result.

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CONCLUSION

For the foregoing reasons, the judgment should be reversed. In the alternative, this appeal should be retransferred to the Court of Appeals, or the judgment should be reversed and the cause remanded to the circuit court.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

A copy of this document was served on counsel of record through the Court's electronic notice system on December 22, 2016.

This brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 6,787, except the cover, the signature block, and this certificate.

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/s/ Jeffery T. McPherson