IN THE SUPREME COURT OF MISSOURI

DANNY BROCK,	)	
	)	
Plaintiff/Respondent,	)	
	)	
v.	)	Case No. SC97542
	)	
PETER DUNNE, in his capacity as Defendant Ad Litem for MARK EDWARDS, Deceased,	)	
	)	
Defendant/Appellant.	)	

Appeal from the Circuit Court of St. Louis County, Missouri
The Honorable Nancy Watkins McLaughlin, Circuit Judge

APPELLANT'S SUBSTITUTE BRIEF

APPELLANT REQUESTS ORAL ARGUMENT

EVANS & DIXON, L.L.C.
Brian R. Shank (#59955)
211 North Broadway, Suite 2500
St. Louis, MO 63102-2727
Phone: (314) 621-7755
Fax: (314) 621-3136
bshank@evans-dixon.com
Attorneys for Appellant

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

TABLE OF CONTENTS

TABLE OF AUTHORITIES vi

JURISDICTIONAL STATEMENT 1

STATEMENT OF FACTS 2

A. Nature of the Case 2

B. Evidence at Trial 4

1. Employment of Plaintiff and Edwards 4
2. The Black Brothers Laminating Machine 5
3. Edwards' Training on the Machine 6
4. JMC Practices and Procedures 6
5. Plaintiff's Training on the Machine 8
6. The Incident 9
7. Plaintiff's Prior Safety Incident Involving Pinch Points 10
8. Plaintiff's Wage Claim 11

POINTS RELIED ON 12

ARGUMENT 17

I. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTIONS FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE PLAINTIFF FAILED TO MAKE A SUBMISSIBLE CASE OF CO-EMPLOYEE LIABILITY UNDER THE COMMON LAW, IN THAT PLAINTIFF'S INJURY WAS REASONABLY FORESEEABLE TO JMC AND EDWARDS DID NOT OWE AN INDEPENDENT, PERSONAL DUTY OF CARE SEPARATE AND DISTINCT FROM JMC'S FIVE NONDELEGABLE DUTIES TO PROVIDE A SAFE PLACE TO WORK. 17

A. Whether Plaintiff made a submissible case is subject to *de novo* review and Plaintiff is not entitled to speculative or forced factual inferences. 17

B. Plaintiff has the burden of proving the existence of a personal legal duty owed by Defendant to Plaintiff separate and distinct from JMC's nondelegable duty to provide a safe place to work. 18

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

C. Plaintiff's injury was reasonably foreseeable to JMC, so Plaintiff failed to satisfy his burden of showing that Edwards breached a personal duty separate and distinct from JMC's five nondelegable duties. 21

II. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTIONS FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE PLAINTIFF FAILED TO MAKE A SUBMISSIBLE CASE UNDER SECTION 287.120.1 R.S.MO. AND DEFENDANT IS ENTITLED TO IMMUNITY, IN THAT THERE IS NO EVIDENCE EDWARDS ENGAGED IN AN AFFIRMATIVE NEGLIGENT ACT THAT PURPOSEFULLY AND DANGEROUSLY CAUSED OR INCREASED THE RISK OF INJURY TO PLAINTIFF. 28

A. Whether Plaintiff made a submissible case is reviewed *de novo*. 28

B. Edwards is entitled to immunity because he did not engage in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury. 29

1. The Evidence Does Not Establish That Edwards Performed An Affirmative Negligent Act. 32

2. Plaintiff Failed To Show That Edwards Purposefully Caused Or Increased The Risk Of Injury. 33

3. Plaintiff Failed To Show That Edwards Acted Dangerously. 36

4. Plaintiff Failed To Show That Edwards Caused Or Increased The Risk Of Injury. 37

III. THE TRIAL COURT ERRED IN REFUSING TO SUBMIT DEFENDANT'S INSTRUCTION D AND IN DENYING A NEW TRIAL BECAUSE IT COMMITTED REVERSIBLE INSTRUCTIONAL ERROR WHICH PREJUDICED DEFENDANT IN THAT THE JURY NEEDS TO BE INSTRUCTED THAT DEFENDANT IS NOT LIABLE FOR BREACHING JMC'S FIVE NONDELEGABLE DUTIES; THE INSTRUCTION CORRECTLY STATES THE LAW AND IS SUPPORTED BY SUBSTANTIAL EVIDENCE; AND WITHOUT THE INSTRUCTION, THE JURY WAS MISLED, MISDIRECTED, AND NOT ADVISED OF THE ULTIMATE FACTS NECESSARY TO FIND DEFENDANT LIABLE. 38

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

A. Claims of instructional error are generally reviewed *de novo*, but the refusal to give a proffered instruction may be reviewed for abuse of discretion. 38

B. The trial court abused its discretion in refusing Defendant's Instruction D. 39

IV. THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE AN OSHA REGULATION AND ALLOWING PLAINTIFF TO ELICIT TESTIMONY AND PRESENT ARGUMENT ABOUT THE OSHA REGULATION, AND IN DENYING A NEW TRIAL, BECAUSE PLAINTIFF FAILED TO ESTABLISH THAT THE OSHA PROVISION IS RELEVANT AND DEFENDANT WAS PREJUDICED, IN THAT ANY DUTY OF EDWARDS TO FOLLOW OSHA REGULATIONS RESULTS FROM HIS EMPLOYMENT BY JMC AND IS PART OF JMC'S NONDELEGABLE DUTIES TO PROVIDE A SAFE PLACE TO WORK; THERE IS NO CLAIM FOR NEGLIGENCE PER SE; AND TESTIMONY BY THE PRESIDENT OF JMC DOES NOT PROVE THE EXISTENCE OF ANY SEPARATE AND DISTINCT DUTY OF EDWARDS. 42

A. The court's evidentiary rulings are reviewed for an abuse of discretion. 42

B. The OSHA evidence is irrelevant and extremely prejudicial. 42

V. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO EXCLUDE THE TESTIMONY OF PLAINTIFF'S ECONOMIST, ADMITTING HER CALCULATIONS OF PLAINTIFF'S LOST WAGES, AND DENYING A NEW TRIAL, BECAUSE PLAINTIFF FAILED TO PROVE HIS CLAIM FOR LOST WAGES WITH REASONABLE CERTAINTY IN THAT ALL OF DR. SUMMARY'S WAGE CALCULATIONS ARE BASED ON THE UNSUPPORTED ASSUMPTION PROVIDED BY PLAINTIFF'S ATTORNEYS THAT PLAINTIFF WOULD HAVE BEEN EMPLOYED DIRECTLY BY JMC AND EARNING JMC WAGES INSTEAD OF CONTINUING TO WORK FOR PATRIOT PERSONNEL. 46

A. Abuse of discretion is the appropriate standard of review. 46

B. Plaintiff failed to satisfy his burden of proving with reasonable certainty Dr. Summary's assumption that Plaintiff would have been employed by JMC. 47

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

VI. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF JMC'S POST-INCIDENT MODIFICATIONS TO THE MACHINE AND THE CLEANING PROCEDURE BECAUSE THE EVIDENCE IS IRRELEVANT AND PREJUDICIAL TO EDWARDS, IN THAT PLAINTIFF ATTEMPTED TO USE THE EVIDENCE TO PROVE EDWARDS' NEGLIGENCE AND NOT FOR A PERMISSIBLE PURPOSE; THE CHANGES WERE MADE BY JMC AND NOT BY EDWARDS; AND THE PUBLIC POLICY FAVORING SAFETY IMPROVEMENTS IS DIRECTLY IMPLICATED WHEN EVIDENCE OF AN EMPLOYER'S POST-INCIDENT MODIFICATIONS IS USED TO SHOW THE NEGLIGENCE OF A CO-EMPLOYEE BEING DEFENDED BY THE EMPLOYER'S INSURANCE COMPANY. 51

A. The court's evidentiary rulings are reviewed for an abuse of discretion. 52

B. Evidence that JMC made changes to the machine and the cleaning procedure after the accident for the purpose of avoiding another accident is irrelevant to the case against Edwards and extremely prejudicial. 52

VII. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTIONS FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE PLAINTIFF FAILED TO MAKE A SUBMISSIBLE CASE, IN THAT PLAINTIFF'S INJURY WAS PROXIMATELY CAUSED BY HIS OWN INDEPENDENT, INTERVENING NEGLIGENT ACTS IN USING A LOOSE RAG TO POUR WATER OVER A KNOWN PINCH POINT, LETTING THE RAG GET PULLED INTO THE PINCH POINT, AND FAILING TO RELEASE THE RAG, AND NOT BY THE CONDUCT OF DEFENDANT. 55

A. Whether Plaintiff made a submissible case on proximate cause is subject to *de novo* review. 55

B. Edwards' conduct was not the proximate cause of Plaintiff's injury as a matter of law 55

VIII. THE TRIAL COURT ERRED IN EXCLUDING TESTIMONY ABOUT PLAINTIFF'S PRIOR SAFETY ACCIDENT ON ANOTHER JMC ROLLING LAMINATING MACHINE BECAUSE THE EVIDENCE IS RELEVANT TO SHOW PLAINTIFF'S NOTICE OF THE DANGER OF GETTING LOOSE FABRIC PULLED INTO PINCH POINTS AND TO SHOW WHY PLAINTIFF WAS UNLIKELY TO BE HIRED BY JMC, IN

THAT THE PRIOR ACCIDENT WAS ONE MONTH BEFORE THE SUBJECT ACCIDENT; EDWARDS SPECIFICALLY DISCUSSED THE DANGERS OF PINCH POINTS AND LOOSE CLOTHING WITH PLAINTIFF; AND PLAINTIFF OPENED THE DOOR BY ASKING JAPPA ABOUT THE PRIOR ACCIDENT. 57

A. Evidentiary rulings are reviewed for an abuse of discretion. 57

B. The court abused its discretion in finding that the two incidents were not similar enough to be relevant, especially for the limited purpose of showing Plaintiff's notice of the danger posed by pinch points and comparative fault. 58

IX. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A MISTRIAL AND IN DENYING A NEW TRIAL BECAUSE PLAINTIFF INJECTED THE IRRELEVANT AND PREJUDICIAL ISSUES OF DEFENDANT'S INSURANCE AND HOW A JUDGMENT WOULD BE PAID INTO THE CASE, IN THAT PLAINTIFF'S ATTORNEY VIOLATED THE TRIAL COURT'S RULING BY TELLING THE VENIRE PANEL THAT EDWARDS AND HIS ESTATE, FAMILY, AND FRIENDS WOULD NOT HAVE TO PAY ANY JUDGMENT DUE TO THE "UNIQUE POSTURE" OF THE CASE, AND PLAINTIFF'S ATTORNEY ALSO HIGHLIGHTED A VENIREPERSON'S COMMENT THAT HE WORKS FOR TRAVELERS INSURANCE AND SENDS CASES TO THE LAW FIRM OF DEFENDANT'S ATTORNEYS, THEREBY UNDULY EMPHASIZING THE ISSUE OF INSURANCE. 60

A. Abuse of discretion is the appropriate standard of review. 60

B. Mistrial was the only appropriate remedy where Plaintiff's attorney violated the trial court's ruling and injected Defendant's insurance into the case by telling the venire panel that Edwards and his estate, family, and friends would not have to pay the judgment and highlighted a Travelers attorney on the venire panel who referred cases to Defendant's attorney. 61

CONCLUSION 63

CERTIFICATE OF COMPLIANCE 65

CERTIFICATE OF SERVICE 66

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

TABLE OF AUTHORITIES

Cases

A.T. v. Newark Corp.,
2017 WL 57251 (E.D. Mo. 2017) 20

Abbott v. Bolton,
500 S.W.3d 288 (Mo. App. E.D. 2016) 13, 15, 40, 56

Bierman v. Violette,
SC96357 (Order Dated March 22, 2018) 27

Boyer v. Sinclair & Rush Inc.,
67 S.W.3d 627 (Mo. App. E.D. 2002) 18

Brown v. Roberson,
111 S.W.3d 422 (Mo. App. E.D. 2003) 31

Burns v. Smith,
214 S.W.3d 335 (Mo. 2007) .... passim

Cain v. Humes-Deal Co.,
49 S.W.2d 90 (Mo. banc 1932) 24

Carter v. Wright,
949 S.W.2d 157 (Mo. App. W.D. 1997) 13, 60

Conner v. Ogletree,
542 S.W.3d 315 (Mo. banc 2018) .... passim

D.R. Sherry Const., Ltd. v. Am. Family Mut. Ins. Co.,
316 S.W.3d 899 (Mo. 2010) 17

Dildine v. Frichtel,
890 S.W.2d 683, 685 (Mo. App. E.D. 1994) 36

Dodson v. Ferrara,
491 S.W.3d 542 (Mo. 2016) 17

Ellingsworth v. Vermeer Mfg. Co.,
2016 WL 7045603 (W.D. Mo. 2016) 12, 26, 30

Emerson v. Garvin Group, LLC,
399 S.W.3d 42 (Mo. App. E.D. 2013) 53

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

Erdman v. Condaire, Inc.,
97 S.W.3d 85 (Mo. App. E.D. 2002) 36

Ethridge v. Gallagher,
773 S.W.2d 207 (Mo. App. W.D. 1989) 16, 62

Fleshner v. Pepose Vision Inst., P.C.,
304 S.W.3d 81 (Mo. 2010)... 38

Fogerty v. Armstrong,
541 S.W.3d 544 (Mo. banc 2018) ....passim

Garza v. Valley Crest Landscape Maint., Inc.,
224 S.W.3d 61 (Mo. App. E.D. 2007) 30

Glaize Creek Sewer Dist. of Jefferson County v. Gorham,
335 S.W.3d 590 (Mo. App. E.D. 2011) 47

Graham v. Geisz,
149 S.W.3d 459 (Mo. App. E.D. 2004) 33, 34

Greer v. Continental Gaming Co.,
5 S.W.3d 559 (Mo. App. W.D. 1999) 14, 47

Groh v. Kohler,
148 S.W.3d 11 (Mo. App. W.D. 2004) 35, 36

Gunnett v. Girardier Building & Realty Co.,
70 S.W.3d 632 (Mo. App. E.D. 2002) 30, 34

Haley v. Byers Transp. Co.,
414 S.W.2d 777 (Mo. 1967)... 14, 49

Halsey v. Townsend Corp. of Indiana,
2017 WL 2189459 (E.D. Mo. 2017) 20

Hawkins v. St. Louis Rams, LLC,
2019 WL 367644 (E.D. Mo. Jan. 30, 2019).. 20, 29

Heffernan v. Reinhold,
73 S.W.3d 659 (Mo. App. E.D. 2002) 15, 57

Hervey v. Missouri Dept. of Corrections,
379 S.W.3d 156 (Mo. banc 2012) 38

Hobbs v. Harken,
969 S.W.2d 318 (Mo. App. W.D. 1998) 14, 47, 49

Host v. BNSF Ry. Co.,
460 S.W.3d 87 (Mo. App. W.D. 2015) 42

Interel, Inc., v. Sedgwick Claims Management Services,
204 S.W.3d 183 (Mo. App. E.D. 2006) 42

J.J.'s Bar & Grill, Inc. v. Time Warner Cable Midwest, LLC,
539 S.W.3d 849 (Mo. App. W.D. 2017) 14, 44

Johnson v. Auto Handling Corp.,
523 S.W.3d 452 (Mo. 2017) 17, 36

Kelley v. DeKalb Energy Co.,
865 S.W.2d 670 (Mo. banc 1993) 19

Krispy Kreme Doughnut Corp. v. Dir. of Revenue,
358 S.W.3d 48 (Mo. 2011) 32

Laut v. City of Arnold,
491 S.W. 3d 191 (Mo. banc 2016) 13, 34, 35

Marshall v. Kansas City,
296 S.W.2d 1 (Mo. 1956) 24, 32

McCaffery v. St. Louis Pub. Serv. Co.,
252 S.W.2d 361 (Mo. 1952) 16, 61

McComb v. Norfus,
541 S.W.3d 550 (Mo. banc 2018) .... passim

McGuire v. Seltsam,
138 S.W.3d 718 (Mo. 2004) 14, 47, 51

McTurman v. Bell,
398 S.W.2d 465 (Mo. App. S.D. 1965) 15, 56, 57

Murphy v. Graves,
294 S.W.2d 29 (Mo. 1956) 16, 61, 62, 63

Nolen v. Cunningham,
553 S.W.3d 437 (Mo. App. E.D. 2018) 12, 20, 24

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

Nolte v. Ford Motor Co.,
458 S.W.3d 368 (Mo. App. W.D. 2014) 52, 54

Nowlin ex rel. Carter v. Nichols,
163 S.W.3d 575 (Mo. App. W.D. 2005) 13, 30

Parr v. Breeden,
489 S.W.3d 774 (Mo. banc 2016) .... passim

Patrich v. Menorah Med. Ctr.,
636 S.W.2d 134 (Mo. App. W.D. 1982) 36

Peters v. Wady , Indus., Inc.,
489 S.W.3d 784 (Mo. banc 2016) .... passim

Ploch v. Hamai,
213 S.W.3d 135 (Mo. App. E.D. 2006) 13, 38, 39

Quinn v. Clayton Const. Co., Inc.,
111 S.W.3d 428 (Mo. App. E.D. 2003) 30, 31, 34, 37

Rader Family Ltd. P'ship, L.L.L.P. v. City of Columbia,
307 S.W.3d 243 (Mo. App. W.D. 2010) 14, 54

Rayman v. Abbott Ambulance, Inc.,
546 S.W.3d 12 (Mo. App. E.D. 2018) 15, 56

Raymond v. Raymond Corp.,
938 F.2d 1518 (1st Cir. 1991) 15, 54

Risher v. Golden,
182 S.W.3d 583 (Mo. App. E.D. 2005) 30, 33, 34

Romeo v. Jones,
144 S.W.3d 324 (Mo. App. E.D. 2004) 39

Simpson v. Johnson's Amoco Food Shop, Inc.,
36 S.W.3d 775 (Mo. App. E.D. 2001) 36, 46

Southers v. City of Farmington,
263 S.W.3d 603 (Mo. 2008) 58

Spear v. Heine Meine, Inc.,
343 S.W.2d 1 (Mo. 1961) 36

Spring v. Kansas City Area Transp. Auth.,
873 S.W.2d 224 (Mo. banc 1994) 39

St. Louis County v. River Bend Estates Homeowners' Ass'n,
408 S.W.3d 116 (Mo. 2013) 1, 2, 38

Stacy v. Truman Medical Center,
836 S.W.2d 911 (Mo. 1992) 15, 58

State ex rel. Evans v. Brown Builders Elec. Co., Inc.,
254 S.W.3d 31 (Mo. 2008) 28

State ex rel. Riordan v. Dierker,
956 S.W.2d 258 (Mo. 1997) 29

State ex rel. Taylor v. Wallace,
73 S.W.3d 620 (Mo. banc 2002) 12, 21, 29

State v. Robinson,
484 S.W.3d 862 (Mo. App. E.D. 2016) 39

Stegeman v. First Missouri Bank of Gasconade County,
722 S.W.2d 349 (Mo. App. E.D. 1987) 18

Steward v. Baywood Villages Condo. Ass'n,
134 S.W.3d 679 (Mo. App. E.D. 2004) 18

Steward v. Goetz,
945 S.W.2d 520 (Mo. App. E.D. 1997) 17

Throneberry v. Missouri State Highway Patrol,
526 S.W.3d 198 (Mo. App. W.D. 2017) 56

Tompkins v. Cervantes,
917 S.W.2d 186 (Mo. App. E.D. 1996) 15, 55

Vann v. Town Topic, Inc.,
780 S.W.2d 659 (Mo. App. W.D. 1989) 55

Vosevich v. Doro, Ltd.,
536 S.W.2d 752, 760 (Mo. App. 1976) 47

Washington by Washington v. Barnes Hosp.,
897 S.W.2d 611, 616 (Mo. 1995) 47

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

Wellcraft Marine v. Lyell,
960 S.W.2d 542 (Mo. App. W.D. 1998) 36

Wilson v. Kaufmann,
847 S.W.2d 840 (Mo. App. E.D. 1992) 4, 60

Statutes

R.S.Mo. § 287.120 .... passim

R.S.Mo. § 490.065 .... 14, 48

Rules

Mo. Sup. Ct. Rule 70.02 13

Regulations

29 C.F.R. § 1910.212 43

Other Authorities

McCormick on Evidence,
§ 200 at 848 (4th ed. 1992) 58

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

JURISDICTIONAL STATEMENT

This is an appeal from an Order entered by the Circuit Court of St. Louis County, Missouri on June 23, 2017 (App. A3), denying post-trial motions by Defendant-Appellant Peter Dunne, Defendant Ad Litem for Mark Edwards, deceased ("Defendant") for judgment notwithstanding the verdict and for a new trial. Defendant timely filed a Notice of Appeal on July 3, 2017. (LF 762.)

On September 11, 2018, the Court of Appeals, Eastern District, issued its Opinion affirming the Circuit Court's judgment. Defendant timely filed a Motion for Panel Rehearing or Rehearing En Banc and Alternative Motion for Transfer to the Supreme Court, which was denied in full on October 29, 2018. Defendant then timely filed an Application for Transfer in this Court on November 13, 2018. This Court granted Defendant's Application for Transfer on January 29, 2019.

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

STATEMENT OF FACTS

A. Nature of the Case

This is an action filed by Plaintiff Danny Brock against Mark Edwards and The Black Bros. Co. ("Black Brothers") in the Circuit Court of St. Louis County on January 16, 2015. (LF 031.) This case arises out of a workplace accident in which Plaintiff injured his left thumb while cleaning glue from the moving rollers of a laminating machine designed and manufactured by Black Brothers (the "machine") and owned by JMC Manufacturing Co. ("JMC"). (LF 031.) Plaintiff asserted product liability claims against Black Brothers and ultimately settled and dismissed his claims against Black Brothers on January 17, 2017. (LF 415.) Plaintiff received workers' compensation benefits from his employer, Patriot Personnel, as a result of the accident. (LF 199.)

In his petition, Plaintiff alleged that Mark Edwards was employed by JMC as a "supervisor/manager." (LF 031.) Plaintiff's sole claim against Edwards, Count III, alleges that Edwards "engaged in affirmative, purposeful, dangerous conduct" outside of the immunity provided by the Workers' Compensation Law in that Edwards "removed a safety device" from the machine, ordered Plaintiff to use the machine while in operation and with the guard removed, was aware of "the hazards of the machine and the removal of its safety guard" and failed to instruct or warn Plaintiff of the danger, and disregarded complaints "as to the unsafe condition" of the machine. (LF 035.)

After discovery, Defendant moved for summary judgment on the basis that there is no genuine issue of material fact that: (1) Edwards was discharging the nondelegable duties of his employer and not a personal duty separate and distinct from the employer's

nondelegable duties; and (2) Edwards is entitled to statutory immunity pursuant to the Workers' Compensation Law, R.S.Mo. § 287.120.1 (Cum. Supp. 2013). (LF 042.) While the parties briefed Defendant's summary judgment motion, this Court issued its opinions in *Peters v. Wady Indus., Inc.*, 489 S.W.3d 784 (Mo. banc 2016) and *Parr v. Breeden*, 489 S.W.3d 774 (Mo. banc 2016). *Peters* and *Parr* both involve common law claims for co-employee liability prior to the 2012 amendment of Section 287.120. Plaintiff and Defendant each advised the trial court of the *Peters* and *Parr* decisions and briefed their impact on this case. (LF 322, 383.) Also during the briefing of Defendant's motion for summary judgment, Edwards died on May 27, 2016. (LF 388.) The parties agreed to Peter Dunne's substitution as defendant ad litem pursuant to R.S.Mo. § 537.021. (LF 400.)

On July 11, 2016, the court entered a Memorandum and Order denying summary judgment. (LF 390; App. A8.) The court stated: "Although Edwards asserts that JMC also had an unwritten policy condoning the removal of the safety guards when cleaning the bottom rollers, the asserted existence of that policy is disputed and supported only by Edwards' own deposition testimony." (LF 394.) The court concluded: "On this record, the Court cannot say that Plaintiff will be unable to produce evidence sufficient to allow a reasonable trier of fact to find that Edwards engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury to Plaintiff." (LF 394.)

The case against Edwards was tried beginning on April 3, 2017. (LF 677.) Before trial, the parties extensively briefed and argued numerous motions in limine and a motion

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

by Defendant to exclude the testimony of Plaintiff's economist, Dr. Rebecca Summary. (LF 417-471, 483-638, 672-676.) At the close of the evidence, Defendant filed and argued a motion for directed verdict, which the court denied. (LF 639; Tr. 923.)

On April 7, 2017, the jury returned a 9-3 verdict in favor of Plaintiff and awarded total damages of $1,050,000.00. (LF 661, 677.) The jury apportioned ninety percent of the fault to Defendant and ten percent to Plaintiff. (LF 661.) The court reduced the verdict by the amount of Plaintiff's settlement with Black Brothers, then applied the jury's apportionment of fault and entered judgment against Defendant for $873,000.00. (LF 678.) Following trial, Defendant timely filed a motion for judgment notwithstanding the verdict (LF 679) and a motion for new trial (LF 693). The court heard and denied these motions on June 23, 2017. (LF 761.) This appeal followed.

After Defendant filed his Brief in the Court of Appeals, but before Plaintiff filed his Brief, this Court decided four co-employee cases all in favor of the defendant under the common law: *Conner v. Ogletree*, 542 S.W.3d 315 (Mo. banc 2018); *Evans v. Wilson* (consolidated with *Conner*); *McComb v. Norfus*, 541 S.W.3d 550 (Mo. banc 2018); and *Fogerty v. Armstrong*, 541 S.W.3d 544 (Mo. banc 2018). The parties discussed the impact of these cases in their subsequent briefs and at oral argument in the Court of Appeals.

B. Evidence at Trial

The following facts were established at trial.

1. Employment of Plaintiff and Edwards

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

Plaintiff began working for a temporary employment agency, Patriot Personnel, in 2012. (Tr. 595-96, 783; LF 801.) He was assigned by Patriot Personnel to work on the lamination line at JMC beginning in January 2013, pursuant to a standing agreement between JMC and Patriot Personnel. (Tr. 536, 596-97.) Plaintiff was employed by Patriot Personnel until after the accident on April 30, 2013. (Tr. 619-20.) During the four months Plaintiff worked at the JMC facility, he reported to Edwards, who gave Plaintiff explicit instructions on behalf of JMC about what to do and when to do it. (Tr. 600, 604.) Plaintiff relied on the instructions of his JMC supervisor, Edwards, about what to do and how to do it, including with respect to the machine at issue. (Tr. 605, 613, 651, 656, 745.)

Edwards, in turn, was employed directly by JMC since 2006 to supervise the lamination line. (LF 772.) Edwards was the sole lamination line supervisor at JMC. (LF 773.) As part of Edwards' job duties as lamination line supervisor, JMC delegated to him the task of establishing how the laminating machines would be used and cleaned. (Tr. 544.)

2. The Black Brothers Laminating Machine

JMC purchased the Black Brothers machine used in 2009. (LF 784.) JMC uses the machine to apply a heavy coating of glue on pieces of wood that are fed through the machine on moving rollers. (LF 783-84.) The machine has two rollers on the top side, above the wooden boards moving through the machine, and two more rollers on the bottom side. (Exhibit 10; Tr. 496; LF 778.) A metal grate sits above the bottom rollers horizontally. (Exhibit 10.) The grate is attached to the machine by hinges or rotating pins on one side. (Exhibit 10; Tr. 841.) This design allows the grate to be opened up on one

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

side and pivoted upward about the hinges to provide access to the rollers below. (Exhibit 10; LF 789-90; Tr. 841.) Edwards testified that various safety decals were on the machine at the time of the incident (LF 798; Exhibits I, 21.) Plaintiff does not remember whether the decals were on the machine at the time (Tr. 689) but does not deny they were there. (Tr. 690-91.) He did not see the decals. (Tr. 690.) Plaintiff relied on Edwards, his supervisor, to tell him the proper way to clean the machine. (Tr. 735.)

3. Edwards' Training on the Machine

Edwards was the sole JMC foreman in charge of the machine since early 2010. (LF 784.) In the spring of 2010, Edwards was trained on how to operate and clean glue spills from the machine by another JMC employee, Kyle Reed, who learned about the machine in conjunction with Edwards' supervisor, Mike Duser. (LF 784, 786, 790.) Edwards was specifically trained to clean glue spills that occur during a job by raising the hinged metal grate on one side with the rollers still turning. (LF 784, 786, 790.) Until Plaintiff's accident in 2013, every time the workers encountered a glue spill during a job, they cleaned up the glue by opening the grate on one side with the rollers turning. (LF 777, 785; Tr. 835.) No one ever complained to Edwards or anyone else about opening the grate with the rollers powered, and there were no other injuries while using the machine. (LF 808; Tr. 850.)

4. JMC Practices and Procedures

In his video deposition shown at trial, Edwards explained each step of the JMC procedure for cleaning glue off the bottom rollers of the machine during a job. (LF 777-78.) From 2010 through April 2013, if glue dripped onto the bottom rollers or the grate

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

during a job, the rollers were cleaned by having one person lift up one side of the hinged grate and hold it in place—still connected to the machine by its hinges—while a second person obtained a brush and a cup of water. (LF 777.) Lifting up the grate on one side provided access to the surface of the two rotating rollers underneath so that the glue could be removed. (LF 777.) The second person held the brush on the bottom side of the rubber roller while using his other hand to pour water on the top side of the roller where the glue was. (LF 777.) The grate itself may also have glue on it that needs to be removed. (LF 777.)

This cleaning procedure was to be performed with the two rollers powered on and rotating, and without ever touching the moving rollers. (LF 777-78.) It was an oral procedure at JMC and was not written down on paper. (Tr. 476-77, 608; LF 790, 799.) During Plaintiff's case, Edwards testified that in his opinion this procedure is the safest and best approach and can be done safely. (LF 776, 778-79.) Also during Plaintiff's case, JMC owner and president Jeffrey Jappa testified it was safe to clean the moving rollers with the grate lifted up on one side. (Tr. 562.) Jappa also testified on direct examination by Plaintiff that at JMC "we remove guards all of the time." (Tr. 469.) According to Jappa, turning off the machine first, before lifting back the guard on one side, was "not the procedure" used at JMC for cleaning glue spills during a job. (Tr. 502.)

JMC did have general, written safety rules which applied to all employees and all machines. (Exhibits 11, 13; Tr. 481-82; LF 795, 800.) The safety rules included directives such as: "Check pinch-point safeties on laminator daily before anyone is allowed to clean rollers;" "If you remove a mechanical guard temporarily, be sure to replace it before you

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

turn the machine on;" "Keep hands, hair, and clothing away from moving parts of any machines;" "Loose clothing and dangling jewelry should not be worn;" and "Watch your clothes around machinery...". (Exhibit 11.) JMC never provided a copy of the written rules to Edwards, or to Plaintiff. (Tr. 545-46, 605; LF 799.) JMC never told Edwards or Plaintiff they were expected to follow these written rules, and never disciplined Edwards or Plaintiff for not following them. (Tr. 545-46.) JMC never enforced these rules as to the lamination line. (Tr. 546, 857.)

In addition to these written rules, the employer depended on supervisors like Edwards to adapt the general rules to each particular machine. (Tr. 482.) Jappa (the JMC president) never told anyone at JMC not to clean the machine while the rollers were spinning, or that the grate should not be lifted. (Tr. 561.) According to Jappa, cleaning the rollers with the grate lifted up on one side did not violate any practice at JMC. (Tr. 561.) Cleaning the rollers with the grate lifted up on one side is how it was always done at JMC when cleaning a glue spill during a job on this machine. (LF 786; Tr. 835.)

5. Plaintiff's Training on the Machine

As supervisor at JMC, part of Edwards' job was to teach the cleaning procedure to the lamination line employees who reported to him. (LF 784-86, 790, 798.) Edwards taught Plaintiff exactly what to do to clean the machine at the end of a job (Tr. 607), and Plaintiff had operated and cleaned the machine at the end of jobs prior to the incident. (Tr. 606.) However, Plaintiff testified he had never cleaned the machine during a job, or seen others at JMC do so, prior to the incident. (Tr. 606-08.) By contrast, Edwards testified that he instructed Plaintiff on the JMC procedure for cleaning the machine when

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

glue spilled during a job and that Plaintiff had performed the cleaning procedure during jobs at least three times before the incident. (LF 785.)

6. The Incident

On the morning of April 30, 2013, Edwards was supervising Plaintiff. (LF 793.) Plaintiff and Edwards were feeding boards into the laminating machine and then walking around to the outfeed side to "catch" the boards as they exited the machine. (Tr. 609.) After some boards were fed through the machine, Edwards told Plaintiff there was glue on the bottom rollers that he needed to clean. (Tr. 610; LF 793.) Glue had also dripped onto the metal grate. (LF 790; Tr. 508-09.)

According to Plaintiff, Edwards directed him to use a rag from a nearby bucket of water to squeeze water onto the top of the roller while holding a brush underneath the roller to scrape away the glue. (Tr. 610, 614.) According to Edwards, he only told Plaintiff "we need to get it cleaned off," without mentioning the rag or the brush specifically. (LF 791.) Plaintiff was aware at the time that the two spinning rollers create a "pinch point" where they come together. (Tr. 644.) He also knew the machine was running and the rollers were turning, and knew his hand could be pulled into the pinch point. (Tr. 636, 644, 651.)

Edwards then lifted up one side of the hinged grate and held it upright, with the other side still connected to the machine by its hinges, while Plaintiff retrieved a wet rag from the bucket. (Tr. 610-11.) Plaintiff used his left hand to squeeze water from the rag onto the top of the roller, and wiped the glue off the underside of the roller using the brush in his right hand. (LF 791; Tr. 611, 613-14, 659.) Plaintiff was not able to see the

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

rollers while he squeezed the water, so he could not tell how close his rag was to the pinch point. (Tr. 650.) The way Plaintiff moved his hands was his decision, and Edwards did not control Plaintiff's movements. (Tr. 658-59.) Edwards did not tell Plaintiff he was doing anything wrong or try to stop him. (Tr. 612.) Almost immediately, the rag in Plaintiff's left hand got caught and pulled into the pinch point, pulling Plaintiff's thumb in with it. (Tr. 614; LF 791.) Plaintiff felt excruciating pain and removed his thumb from the rollers. (Tr. 617.) Someone from JMC called an ambulance, which took Plaintiff to the hospital. (Tr. 617-18.)

7. Plaintiff's Prior Safety Incident Involving Pinch Points

During Plaintiff's case, Jappa testified on direct examination that "at the time in question, Danny Brock was not on my radar screen as somebody that I would hire." (Tr. 518.) When Plaintiff's attorney asked Jappa "did you bring something to show us why that was," Jappa responded that Plaintiff had a prior "safety violation" in his personnel file. (Tr. 518.) Plaintiff's attorney then asked Jappa "what does that mean?" but interrupted Jappa's response and moved to strike the answer before he could answer the question. (Tr. 518-19.)

Edwards, in his video deposition, explained that Plaintiff was injured when a loose piece of clothing was pulled into a pinch point on another JMC laminating machine a little over a month before the incident involved in this case. (LF 804.) Following that incident, Edwards specifically discussed with Plaintiff the dangers of pinch points, the need to avoid wearing loose clothing near pinch points, and the importance of being aware of one's surroundings at work. (LF 804, 808.) The trial court sustained Plaintiff's

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

objection to playing this recorded testimony of Edwards at trial (LF 675) on the grounds that it is irrelevant and prejudicial. (Tr. 371-78.)

JMC laborer Aaron Reed testified that the second JMC laminating machine also has two sets of moving rollers, one on top and one on the bottom (Tr. 827), and they also form a pinch point. (Tr. 829.) Unlike the Black Brothers machine, the second JMC laminating machine did not have any guard over the pinch points in 2013. (Tr. 831.) Despite not having any guard around the pinch points, Reed cleaned glue spills on the second machine by pouring water onto the rollers while the machine is running. (Tr. 832-33.) Reed never injured himself cleaning the rollers, nor is he aware of anyone else who was injured besides Plaintiff. (Tr. 850.)

8. Plaintiff's Wage Claim

Plaintiff retained an economist, Rebecca Summary, to calculate the amount of Plaintiff's economic losses as a result of his thumb injury. (Tr. 757.) She calculated and displayed for the jury eight different wage scenarios with total dollar amounts ranging from $386,506 to $983,737. (Exhibit 85.) During deliberations, the jury requested to view Exhibit 85 specifically. (Tr. 1030.)

Dr. Summary was asked by Plaintiff's attorneys to assume that Plaintiff was employed directly by JMC (rather than by Patriot Personnel, the temporary employment agency) beginning on the day after the accident, and to base her calculations on the wages and benefits earned by JMC employees rather than Patriot Personnel employees. (Tr. 777, 781.) Dr. Summary did not provide any opinions about whether the JMC wages she used for her calculations reflected what Plaintiff could have earned in the relevant labor

market (*i.e.* his earning capacity) (Tr. 781-82), about Plaintiff's job skills or qualifications, about whether and to what extent he could work, or about the likelihood of Plaintiff being hired by JMC. (Tr. 780.)

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTIONS FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE PLAINTIFF FAILED TO MAKE A SUBMISSIBLE CASE OF CO-EMPLOYEE LIABILITY UNDER THE COMMON LAW, IN THAT PLAINTIFF'S INJURY WAS REASONABLY FORESEEABLE TO JMC AND EDWARDS DID NOT OWE AN INDEPENDENT, PERSONAL DUTY OF CARE SEPARATE AND DISTINCT FROM JMC'S FIVE NONDELEGABLE DUTIES TO PROVIDE A SAFE PLACE TO WORK.

Conner v. Ogletree, 542 S.W.3d 315 (Mo. banc 2018)

Peters v. Wady Indus., Inc., 489 S.W.3d 784 (Mo. banc 2016)

Fogerty v. Armstrong, 541 S.W.3d 544 (Mo. banc 2018)

Nolen v. Cunningham, 553 S.W.3d 437 (Mo. App. E.D. 2018)

II. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTIONS FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE PLAINTIFF FAILED TO MAKE A SUBMISSIBLE CASE UNDER SECTION 287.120.1 R.S.MO. AND DEFENDANT IS ENTITLED TO IMMUNITY, IN THAT THERE IS NO EVIDENCE EDWARDS ENGAGED IN AN AFFIRMATIVE NEGLIGENT ACT THAT PURPOSEFULLY AND DANGEROUSLY CAUSED OR INCREASED THE RISK OF INJURY TO PLAINTIFF.

R.S.Mo. § 287.120

State ex rel. Taylor v. Wallace, 73 S.W.3d 620 (Mo. banc 2002)

Ellingsworth v. Vermeer Mfg. Co., 2016 WL 7045603 (W.D. Mo. 2016)

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

Laut v. City of Arnold, 491 S.W. 3d 191 (Mo. banc 2016)

Nowlin ex rel. Carter v. Nichols, 163 S.W.3d 575 (Mo. App. W.D. 2005)

III. THE TRIAL COURT ERRED IN REFUSING TO SUBMIT DEFENDANT'S INSTRUCTION D AND IN DENYING A NEW TRIAL BECAUSE IT COMMITTED REVERSIBLE INSTRUCTIONAL ERROR WHICH PREJUDICED DEFENDANT IN THAT THE JURY NEEDS TO BE INSTRUCTED THAT DEFENDANT IS NOT LIABLE FOR BREACHING JMC'S FIVE NONDELEGABLE DUTIES; THE INSTRUCTION CORRECTLY STATES THE LAW AND IS SUPPORTED BY SUBSTANTIAL EVIDENCE; AND WITHOUT THE INSTRUCTION, THE JURY WAS MISLED, MISDIRECTED, AND NOT ADVISED OF THE ULTIMATE FACTS NECESSARY TO FIND DEFENDANT LIABLE.

Mo. Sup. Ct. Rule 70.02

McComb v. Norfus, 541 S.W.3d 550 (Mo. banc 2018)

Ploch v. Hamai, 213 S.W.3d 135 (Mo. App. E.D. 2006)

Abbott v. Bolton, 500 S.W.3d 288 (Mo. App. E.D. 2016)

IV. THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE AN OSHA REGULATION AND ALLOWING PLAINTIFF TO ELICIT TESTIMONY AND PRESENT ARGUMENT ABOUT THE OSHA REGULATION, AND IN DENYING A NEW TRIAL, BECAUSE PLAINTIFF FAILED TO ESTABLISH THAT THE OSHA PROVISION IS RELEVANT AND DEFENDANT WAS PREJUDICED, IN THAT ANY DUTY OF EDWARDS TO FOLLOW OSHA REGULATIONS RESULTS FROM HIS EMPLOYMENT BY JMC AND IS PART OF JMC'S NONDELEGABLE DUTIES TO PROVIDE A SAFE PLACE TO WORK; THERE IS NO CLAIM FOR NEGLIGENCE PER SE; AND TESTIMONY BY THE PRESIDENT OF JMC DOES NOT PROVE THE EXISTENCE OF ANY SEPARATE AND DISTINCT DUTY OF EDWARDS.

Parr v. Breeden, 489 S.W.3d 774 (Mo. 2016)

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

J.J.'s Bar & Grill, Inc. v. Time Warner Cable Midwest, LLC, 539 S.W.3d 849 (Mo. App. W.D. 2017)

V. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO EXCLUDE THE TESTIMONY OF PLAINTIFF'S ECONOMIST, ADMITTING HER CALCULATIONS OF PLAINTIFF'S LOST WAGES, AND DENYING A NEW TRIAL, BECAUSE PLAINTIFF FAILED TO PROVE HIS CLAIM FOR LOST WAGES WITH REASONABLE CERTAINTY IN THAT ALL OF DR. SUMMARY'S WAGE CALCULATIONS ARE BASED ON THE UNSUPPORTED ASSUMPTION PROVIDED BY PLAINTIFF'S ATTORNEYS THAT PLAINTIFF WOULD HAVE BEEN EMPLOYED DIRECTLY BY JMC AND EARNING JMC WAGES INSTEAD OF CONTINUING TO WORK FOR PATRIOT PERSONNEL.

R.S.Mo. § 490.065

Greer v. Continental Gaming Co., 5 S.W.3d 559 (Mo. App. W.D. 1999)

Haley v. Byers Transp. Co., 414 S.W.2d 777 (Mo. 1967)

McGuire v. Seltsam, 138 S.W.3d 718 (Mo. 2004)

Hobbs v. Harken, 969 S.W.2d 318 (Mo. App. W.D. 1998)

VI. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF JMC'S POST-INCIDENT MODIFICATIONS TO THE MACHINE AND THE CLEANING PROCEDURE BECAUSE THE EVIDENCE IS IRRELEVANT AND PREJUDICIAL TO EDWARDS, IN THAT PLAINTIFF ATTEMPTED TO USE THE EVIDENCE TO PROVE EDWARDS' NEGLIGENCE AND NOT FOR A PERMISSIBLE PURPOSE; THE CHANGES WERE MADE BY JMC AND NOT BY EDWARDS; AND THE PUBLIC POLICY FAVORING SAFETY IMPROVEMENTS IS DIRECTLY IMPLICATED WHEN EVIDENCE OF AN EMPLOYER'S POST-INCIDENT MODIFICATIONS IS USED TO SHOW THE NEGLIGENCE OF A CO-EMPLOYEE BEING DEFENDED BY THE EMPLOYER'S INSURANCE COMPANY.

Rader Family Ltd. P'ship, L.L.L.P. v. City of Columbia, 307 S.W.3d 243 (Mo. App. W.D. 2010)

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

Raymond v. Raymond Corp., 938 F.2d 1518, 1525 (1st Cir. 1991).

VII. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTIONS FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE PLAINTIFF FAILED TO MAKE A SUBMISSIBLE CASE, IN THAT PLAINTIFF'S INJURY WAS PROXIMATELY CAUSED BY HIS OWN INDEPENDENT, INTERVENING NEGLIGENT ACTS IN USING A LOOSE RAG TO POUR WATER OVER A KNOWN PINCH POINT, LETTING THE RAG GET PULLED INTO THE PINCH POINT, AND FAILING TO RELEASE THE RAG, AND NOT BY THE CONDUCT OF DEFENDANT.

McTurman v. Bell, 398 S.W.2d 465 (Mo. App. S.D. 1965)

Heffernan v. Reinhold, 73 S.W.3d 659 (Mo. App. E.D. 2002)

Rayman v. Abbott Ambulance, Inc., 546 S.W.3d 12 (Mo. App. E.D. 2018)

Tompkins v. Cervantes, 917 S.W.2d 186 (Mo. App. E.D. 1996)

VIII. THE TRIAL COURT ERRED IN EXCLUDING TESTIMONY ABOUT PLAINTIFF'S PRIOR SAFETY ACCIDENT ON ANOTHER JMC ROLLING LAMINATING MACHINE BECAUSE THE EVIDENCE IS RELEVANT TO SHOW PLAINTIFF'S NOTICE OF THE DANGER OF GETTING LOOSE FABRIC PULLED INTO PINCH POINTS AND TO SHOW WHY PLAINTIFF WAS UNLIKELY TO BE HIRED BY JMC, IN THAT THE PRIOR ACCIDENT WAS ONE MONTH BEFORE THE SUBJECT ACCIDENT; EDWARDS SPECIFICALLY DISCUSSED THE DANGERS OF PINCH POINTS AND LOOSE CLOTHING WITH PLAINTIFF; AND PLAINTIFF OPENED THE DOOR BY ASKING JAPPA ABOUT THE PRIOR ACCIDENT.

Stacy v. Truman Medical Center, 836 S.W.2d 911 (Mo. 1992)

IX. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A MISTRIAL AND IN DENYING A NEW TRIAL BECAUSE

PLAINTIFF INJECTED THE IRRELEVANT AND PREJUDICIAL ISSUES OF DEFENDANT'S INSURANCE AND HOW A JUDGMENT WOULD BE PAID INTO THE CASE, IN THAT PLAINTIFF'S ATTORNEY VIOLATED THE TRIAL COURT'S RULING BY TELLING THE VENIRE PANEL THAT EDWARDS AND HIS ESTATE, FAMILY, AND FRIENDS WOULD NOT HAVE TO PAY ANY JUDGMENT DUE TO THE "UNIQUE POSTURE" OF THE CASE, AND PLAINTIFF'S ATTORNEY ALSO HIGHLIGHTED A VENIREPERSON'S COMMENT THAT HE WORKS FOR TRAVELERS INSURANCE AND SENDS CASES TO THE LAW FIRM OF DEFENDANT'S ATTORNEYS, THEREBY UNDULY EMPHASIZING THE ISSUE OF INSURANCE.

Ethridge v. Gallagher, 773 S.W.2d 207 (Mo. App. W.D. 1989)

Murphy v. Graves, 294 S.W.2d 29 (Mo. 1956)

McCaffery v. St. Louis Pub. Serv. Co., 252 S.W.2d 361 (Mo. 1952)

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTIONS FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE PLAINTIFF FAILED TO MAKE A SUBMISSIBLE CASE OF CO-EMPLOYEE LIABILITY UNDER THE COMMON LAW, IN THAT PLAINTIFF'S INJURY WAS REASONABLY FORESEEABLE TO JMC AND EDWARDS DID NOT OWE AN INDEPENDENT, PERSONAL DUTY OF CARE SEPARATE AND DISTINCT FROM JMC'S FIVE NONDELEGABLE DUTIES TO PROVIDE A SAFE PLACE TO WORK.

A. Whether Plaintiff made a submissible case is subject to *de novo* review and Plaintiff is not entitled to speculative or forced factual inferences.

Review of the trial court's decision to grant or deny a motion for directed verdict depends on whether the plaintiff made a submissible case. *Johnson v. Auto Handling Corp.*, 523 S.W.3d 452, 459 (Mo. 2017) (internal quotation omitted). "Whether the plaintiff made a submissible case is a question of law subject to *de novo* review." *D.R. Sherry Const., Ltd. v. Am. Family Mut. Ins. Co.*, 316 S.W.3d 899, 904 (Mo. 2010).

"A case may not be submitted unless each and every fact essential to liability is predicated upon legal and substantial evidence." *Dodson v. Ferrara*, 491 S.W.3d 542, 551 (Mo. 2016). Although the court "views the evidence in a light most favorable to the plaintiff" and disregards evidence that is unfavorable to the verdict, mere speculation by the plaintiff is not enough to make a submissible case. *Johnson*, 523 S.W.3d at 459. The Court will "not supply missing evidence or give the plaintiff the benefit of unreasonable, speculative, or forced inferences." *Steward v. Goetz*, 945 S.W.2d 520, 528 (Mo. App. E.D. 1997). "A submissible case is not made if it solely depends on evidence which equally supports two inconsistent and contradictory inferences constituting ultimate and

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

determinative facts because liability is then left in the realm of speculation, conjecture and surmise." *Steward v. Baywood Villages Condo. Ass'n*, 134 S.W.3d 679, 682 (Mo. App. E.D. 2004). The standard of review for denial of a motion for judgment notwithstanding the verdict is essentially the same as for review of a denial of a motion for directed verdict. *Boyer v. Sinclair & Rush Inc.*, 67 S.W.3d 627, 632 (Mo. App. E.D. 2002). Defendant challenged the submissibility of Plaintiff's case in his motion for directed verdict (LF 645) and in his motion for judgment notwithstanding the verdict (LF 685), thereby preserving the issue for appeal.

B. Plaintiff has the burden of proving the existence of a personal legal duty owed by Defendant to Plaintiff separate and distinct from JMC's nondelegable duty to provide a safe place to work.

When one or more elements of a plaintiff's case are not supported by the evidence, a directed verdict or judgment notwithstanding the verdict is proper as a matter of law. *See, e.g., Stegeman v. First Missouri Bank of Gasconade County*, 722 S.W.2d 349, 352 (Mo. App. E.D. 1987). In a co-employee negligence case, just as in any action for negligence, the plaintiff must establish that: (1) the defendant owed a duty to the plaintiff; (2) the defendant failed to perform that duty; and (3) the defendant's breach was the proximate cause of the plaintiff's injury. *Parr*, 489 S.W.3d at 778. The element at issue in Point I is the breach of a duty owed by Defendant.

"To maintain a negligence action against a co-employee, a plaintiff must show that the co-employee breached a duty separate and distinct from the employer's nondelegable duty to provide a safe workspace for all employees." *Conner*, 542 S.W.3d at 319, quoting *Parr*, 489 S.W.3d at 782. "The scope of the employer's nondelegable duty is broad." *Id.*

at 322. "It is the duty of the master to exercise reasonable care, commensurate with the nature of the business, to protect his servant from the hazards incident to it." *Id.* (internal quotation omitted). An employer's nondelegable duties are continuing in nature, and include, but are not limited to, the following specific duties:

> 1. The duty to provide a safe place to work.
> 2. The duty to provide safe appliances, tools, and equipment for work.
> 3. The duty to give warning of dangers of which the employee might reasonably be expected to remain in ignorance.
> 4. The duty to provide a sufficient number of suitable fellow servants.
> 5. The duty to promulgate and enforce rules for the conduct of employees which would make the work safe.

Parr, 489 S.W.3d at 779, citing William L. Keeton, Prosser and Keeton on the Law of Torts, section 80 at 569 (5th ed. 1984); *Kelley v. DeKalb Energy Co.*, 865 S.W.2d 670, 672 (Mo. banc 1993). These duties are "merely…applications of the employer's broad duty to safeguard employees from reasonably foreseeable hazards in the workplace." *Conner*, 542 S.W.3d at 322. "The scope of the employer's duty to provide a safe workplace . . . is dependent on several factors, including the nature of the employer's work and the risks associated with the work." *Peters*, 489 S.W.3d at 795.

Importantly, the employer remains solely liable for any resulting injury even when it directs an employee to perform an act which falls within these nondelegable duties. *Id.* For example, a co-employee's failure to follow and enforce the employer's safety rules is

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

foreseeable as a matter of law and falls squarely within the employer's nondelegable duties. *Conner*, 542 S.W.3d at 318; *McComb*, 541 S.W.3d at 555; *Nolen v. Cunningham*, 553 S.W.3d 437, 442 (Mo. App. E.D. 2018); *Halsey v. Townsend Corp. of Indiana*, 2017 WL 2189459, at *2 (E.D. Mo. 2017) (the "duty to promulgate and enforce rules...that would maintain the safety of the workplace is a non-delegable duty of the employer" (internal quotation omitted)). Similarly, injuries "result[ing] from the tools furnished, the place of work, or the manner in which the work was being done…are attributed to a breach of the employer's nondelegable duty to provide a safe workplace." *Peters*, 489 S.W.3d at 796. In fact, "even if a supervisor directs an employee to continue working despite knowing of a danger to the employee's health or safety, that co-employee is not liable to the plaintiff." *Halsey*, 2017 WL 2189459, at *2, citing *A.T. v. Newark Corp.*, 2017 WL 57251, at *3 (E.D. Mo. 2017); *Peters*, 489 S.W.3d at 802.

Although no published Missouri cases have decided whether the nondelegable duty analysis applies to workplace incidents after August 28, 2012, federal cases applying Missouri law have consistently and persuasively held that it does. *See Hawkins v. St. Louis Rams, LLC*, 2019 WL 367644, at *4-5 (E.D. Mo. Jan. 30, 2019) ("[e]ssentially, there is now a two-part analysis"), citing and quoting *A.T.*, 2017 WL 57251, at *3 (same) and *Halsey*, 2017 WL 2189459, at *2 (same). As the Court of Appeals recognized in this case, abolishing the nondelegable duty doctrine for workplace injuries after August 28, 2012 "would lead to results wildly inconsistent with co-employee liability in Missouri historically." (App. A22.) Such an anomalous outcome is not at all supported by the plain language of Section 287.120 and clearly is not what the legislature intended when it re-

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

imposed (or more accurately, imposed for the first time) a co-employee's statutory immunity from suit in line with the test articulated by this Court in *State ex rel. Taylor v. Wallace*, 73 S.W.3d 620, 622 (Mo. banc 2002).

C. Plaintiff's injury was reasonably foreseeable to JMC, so Plaintiff failed to satisfy his burden of showing that Edwards breached a personal duty separate and distinct from JMC's five nondelegable duties.

A straightforward application of *Conner*, *Evans*, *McComb*, *Fogerty*, *Peters*, and *Parr* to the facts here requires reversal and a judgment for Defendant. Even assuming Plaintiff has satisfied the breach element, "the only thing that matters…is whether the duty the co-employee breached was part of the employer's duty to protect employees from reasonably foreseeable risks in the workplace. If so, the claim is barred. If not, the suit against the co-employee can proceed." *Conner*, 542 S.W.3d at 324 (emphasis added).

For example, in *Evans*, the co-employee was driving a forklift with a load of trusses hanging from one of the two prongs when he drove the forklift into the plaintiff's body and ran over his foot. *Id*. at 319. Although the coworker obviously created the hazard by striking the plaintiff with the forklift, this Court found he owed no duty "unrelated to employment" because injuries to employees "working on and around moving forklifts were reasonably foreseeable" to the employer. *Id*. at 328. This was not a "transitory risk" or detail of the work as the plaintiff had alleged, because a "transitory risk" is by definition a risk not reasonably foreseeable to the employer. *Id*. at 325. In accord is *Fogerty*, in which the coworker "chose to use the front loader in a manner with which he was both untrained and unfamiliar, and he put Fogerty in harm's way." *Fogerty*, 541 S.W.3d at 548. Nonetheless, despite the co-employee obviously creating the very risk

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

that caused the plaintiff's injury, this Court unanimously held that the defendant's negligence and the plaintiff's injury were foreseeable to the employer. As Judge Draper wrote in his concurring opinion: "The injuries Fogerty received, while regrettable, were from the tools furnished by Employer and due to the manner in which Employer's work was done; hence, this was all subsumed within Employer's nondelegable duties." *Id.* at 550.

The same is true here, and this case is not meaningfully different than *Conner*, *Evans*, *McComb*, *Fogerty*, *Peters*, and *Parr*. Injuries to laborers like Plaintiff working around the laminating machine were foreseeable to JMC, as the decals on the machine and the JMC safety rules illustrate. The nature of Plaintiff's work at JMC regularly involved working on and around heavy machinery with moving parts, like the laminating machine at issue here. Stated another way, working around machines with moving components, including rollers and pinch points, was unquestionably a hazard of Plaintiff's employment at JMC. Just as the risks associated with working around energized power lines were foreseeable to the employer in *Conner*, 542 S.W.3d at 327, here the risks related to working around the energized laminating machine—with its moving rollers, pinch point, and hinged metal grate that was designed so it could be lifted up on one side while the machine was running—were foreseeable to JMC. Moreover, the obviously foreseeable nature of Plaintiff's accident is bolstered by the undisputed fact that Plaintiff was injured about one month earlier when his clothing was pulled into another pinch point caused by moving rollers on another JMC laminating machine. (See Point VIII.)

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

Clearly, JMC could (and did) foresee that an employee cleaning the machine might be injured if precautions were not taken to ensure the machine was turned off and/or the grate was not raised up. This is why the JMC safety rules include directives such as: "Check pinch-point safeties on laminator daily before anyone is allowed to clean rollers;" "If you remove a mechanical guard temporarily, be sure to replace it before you turn the machine on;" "Keep hands, hair, and clothing away from moving parts of any machines;" "Loose clothing and dangling jewelry should not be worn;" and "Watch your clothes around machinery...". (Exhibit 11.) Under the circumstances, not only is it reasonable in theory that JMC could have foreseen Plaintiff's injury, the evidence shows that injuries caused by pinch points on machines were *actually foreseen* in practice by JMC. Nevertheless, it is undisputed that JMC failed to enforce its safety rules, and never even informed Plaintiff or Edwards that they existed. (Tr. 545-46, 605; LF 799.) But the duty to both promulgate and enforce rules to make the workplace safe falls solely on JMC and not upon Edwards, so Defendant cannot be liable for JMC's negligence.

Additionally, the glue cleaning procedure (*i.e.* cleaning glue from the rollers and grate with the rollers spinning and the grate lifted up on one side) was more than just foreseeable—it was *actually done this way for years*. Although glue spills during a job did not happen every time the machine was operated, <u>it is uncontroverted that when a mid-job glue spill occurred, it was *always* cleaned with the rollers spinning and the grate raised on one side</u>. (LF 777, 785-86; Tr. 835.) This is the procedure Edwards was taught by others at JMC, and how he, in turn, taught those who reported to him. (LF 784-86, 790, 798.) This was indisputably a normal part of the work at JMC. It was done this way

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

the entire time JMC owned the machine prior to the incident, and there is no evidence that anyone ever complained or questioned the practice, nor did anyone other than Plaintiff ever have a safety incident on this machine. (LF 808; Tr. 850.)

As the Court of Appeals recently recognized on remand from this Court in *Nolen*, events that have occurred many times in the past are necessarily foreseeable to the employer, and stand in stark contrast to the "sudden[]" and "unexpected[]" acts in *Cain v. Humes-Deal Co.*, 49 S.W.2d 90, 90 (Mo. banc 1932) and *Marshall v. Kansas City*, 296 S.W.2d 1, 3 (Mo. 1956). *Nolen*, 553 S.W.3d at 441. Furthermore, this Court clarified in *Peters* that even "[t]he conduct at issue in *Marshall*…would not have satisfied the post-*Taylor* 'something more' test" because it did not involve purposeful or inherently dangerous conduct. *Peters*, 489 S.W.3d at 798 (emphasis added).

Additionally, a close review of the facts in *Peters* demonstrates that reversal is required and Defendant is entitled to a judgment in his favor. In *Peters*, the plaintiff was an employee of a construction supply company who suffered serious injuries when a pile of dowel baskets fell from the back of a flatbed truck and crushed him. 489 S.W.3d at 787. The plaintiff filed suit against his project manager, alleging that the project manager was negligent in nine different ways: (1) allowing the baskets to be transported on a truck while stacked at a level that exceeded a safe height; (2) failing to ensure that the baskets were properly secured; (3) failing to provide sufficient help; (4) failing to provide adequately trained help; (5) failing to provide a proper area for the unloading of the baskets; (6) failing to heed warnings of employees about the baskets; (7) allowing the unsafe course to become standard operating procedure; (8) ordering and directing

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

plaintiff to load, stack, transport, and unload the baskets in an unsafe manner; and (9) ordering and directing plaintiff to load, stack, transport, and unload the baskets in an unsafe manner in violation of OSHA regulations. *Id*. at 799.

The project manager moved to dismiss on the basis that the petition only alleged conduct which would amount to the project manager's breach of one of the employer's nondelegable duties, as opposed to the breach of an independent duty owed by the project manager individually. *Id*. at 787. The trial court sustained the defendant's motion and dismissed the plaintiff's claims. *Id*. On appeal, this Court affirmed the trial court's dismissal, holding that the plaintiff's allegations of negligence against the project manager alleged the violation of only nondelegable duties owed by the employer. *Id*. at 799-800. The allegations did not support the plaintiff's contention that an unsafe work environment resulted from the project manager negligently carrying out the details of his work. Rather, the allegations pertained to the project manager, <u>in his supervisory role</u>, negligently carrying out the employer's nondelegable duty to provide a safe workplace. *Id*. at 799. Also, dismissal was appropriate because the allegations as to the unsafe stacking of the baskets went to the manner in which the work was being performed. "Because providing a safe method of work is encompassed in the employer's nondelegable duty to provide a safe workplace, such allegations are insufficient to establish [the project manager] owed a duty to [the plaintiff] independently of the master-servant relationship." *Id*. The allegations instead reflected "a classic case of a supervisory employee breaching the employer's non-delegable duty to provide a safe workplace." *Id*.

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

Likewise, the evidence in this case fails to establish that Edwards breached a personal duty of care owed to Plaintiff separate and distinct from JMC's nondelegable duties to provide a safe workplace. Edwards was the lamination line supervisor at JMC. He learned the JMC procedure at issue—how to clean glue off the bottom rollers of the machine if glue dripped during a job—from another JMC employee three years earlier, shortly after JMC acquired the machine. (LF 784.) It is undisputed that JMC delegated to Edwards the responsibility as supervisor to instruct the lamination line employees who reported to him on how to use and clean the machine. (LF 786.)

Plaintiff essentially alleges that Edwards was negligent because he followed an unsafe JMC practice—passed down to Edwards from his JMC supervisor—that required the workers to clean the glue with the machine powered on, the rollers moving, and the metal grate lifted up on one side. (LF 035.) However, this is nothing more than an allegation that JMC was negligent, or that Edwards was negligent in discharging JMC's nondelegable duties in his supervisory capacity. Plaintiff's real complaint is with JMC and not with Edwards. Similarly, Plaintiff claims Edwards, as supervisor, negligently failed to instruct or warn Plaintiff of the danger posed by the pinch point. (LF 035.) That is merely a restatement of JMC's third nondelegable duty, to warn workers of dangers about which they might reasonably be expected to remain in ignorance. *Ellingsworth v. Vermeer Mfg. Co.*, 2016 WL 7045603, at *6 (W.D. Mo. 2016) ("allegations of inadequate training or inadequate safety warnings also relate to the employer's general duty" and do not state a claim) (appeal pending); *Conner*, 542 S.W.3d at 327.

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

Moreover, no one other than Plaintiff ever had a safety incident on this machine (LF 808; Tr. 850) and there is no evidence that anyone ever reported any safety concerns or issues about this machine to Edwards or JMC. These facts make this case even *stronger* for Defendant than *Peters*, where the defendant prevailed even though he had "direct knowledge that his orders created a safety hazard." *Peters*, 489 S.W.3d at 802 (Judge Teitelman in dissent).[1] That is emphatically not the case here, where everything about Edwards' experience with this machine told him it was safe to clean it with the guard lifted and rollers spinning.

Taken together, the evidence fails to establish that Edwards breached a personal duty of care owed to Plaintiff that was separate and distinct from JMC's nondelegable duties to provide Plaintiff: a safe workplace; a safe laminating machine and tools (*e.g.* brush, rag, etc.); a sufficient number of coworkers; adequate warnings about the dangers posed by the pinch point and the hinged grate that could be raised while the rollers were spinning; and to both promulgate and enforce sufficient safety rules. Part of JMC's nondelegable duty to protect Plaintiff from reasonably foreseeable risks in the workplace includes a duty to provide a reasonably safe workplace and a duty to see that the tools and instrumentation of the workplace are used safely and properly. *Conner*, 542 S.W.3d at 321-22, 328 (citing cases); *see also Bierman v. Violette*, SC96357, granting transfer and retransferring to the Court of Appeals in light of *Conner*, *et al*. Nevertheless, Plaintiff

---

[1] These facts also distinguish *Burns v. Smith*, 214 S.W.3d 335, 340 (Mo. 2007), where the defendant's instruction to run the defectively-welded water tank "till it blows" was a "not-too-subtle admission that [the co-employee] was aware that the water tank was dangerous and would eventually explode."

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

fails to identify any other duty owed separately by Edwards. Instead, Plaintiff's trial strategy was to combine Edwards and JMC into one person in the minds of the jurors and then urge the jury to punish Edwards for the negligence of JMC. Plaintiff's clear strategy in this case is exactly what the law does not allow, and the verdict must be reversed.[2]

II. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTIONS FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE PLAINTIFF FAILED TO MAKE A SUBMISSIBLE CASE UNDER SECTION 287.120.1 R.S.MO. AND DEFENDANT IS ENTITLED TO IMMUNITY, IN THAT THERE IS NO EVIDENCE EDWARDS ENGAGED IN AN AFFIRMATIVE NEGLIGENT ACT THAT PURPOSEFULLY AND DANGEROUSLY CAUSED OR INCREASED THE RISK OF INJURY TO PLAINTIFF.

A. Whether Plaintiff made a submissible case is reviewed *de novo*.

As discussed in Point I, review of the trial court's decision to deny a motion for directed verdict depends on whether the plaintiff made a submissible case, which is a question of law subject to *de novo* review. At trial, Plaintiff recognized that he had the burden of proving the elements of Section 287.120.1. (Instruction 5, Plaintiff's verdict director, LF 655.) Statutory interpretation is purely an issue of law that the court reviews *de novo*, *State ex rel. Evans v. Brown Builders Elec. Co., Inc.*, 254 S.W.3d 31, 34 (Mo. 2008), and statutory exceptions must be construed narrowly. *Tipton v. Barton*, 747 S.W.2d 325, 330 (Mo. App. E.D. 1988). In interpreting Section 287.120.1—an exception to the general rule of no co-employee liability—this Court "must ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to

[2] This problem was exacerbated by the trial court's refusal to give Defendant's Instruction D, which would have informed the jury that the law requires it to find for Defendant if it concludes that JMC breached one of its nondelegable duties. See Point III, *infra*.

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

consider the words used in their plain and ordinary meaning." *State ex rel. Riordan v. Dierker*, 956 S.W.2d 258, 260 (Mo. 1997) (internal quotation omitted). Defendant preserved the issue by challenging the submissibility of Plaintiff's case under Section 287.120 in his motion for directed verdict (LF 639) and in his motion for judgment notwithstanding the verdict (LF 679).

B. Edwards is entitled to immunity because he did not engage in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury.

Since its enactment in 1925, the exclusivity provision of the Workers' Compensation Law has provided employers with immunity from claims by employees arising from workplace injuries that are compensable under the Workers' Compensation Law. *Peters*, 489 S.W.3d at 791. As currently amended, Section 287.120.1 extends the employer's immunity to co-employees unless "the employee engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury."

Although no published Missouri opinion has addressed the scope of immunity provided to co-employees under the current language of Section 287.120.1, this Court observed in *Peters* that the amended language of Section 287.120.1 "closely follows *Taylor's* refinement of the 'something more' test." *Peters*, 489 S.W.3d at 798 n.10, citing *Taylor*, 73 S.W.3d at 622. This observation reflects the intent of the 2012 amendment, which was clearly to *raise* the bar for co-employee liability over and above the common law requirements, not to somehow lessen or remove the barriers otherwise imposed by the common law. *See, e.g., Hawkins*, 2019 WL 367644 at *4-5.

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

Therefore, cases interpreting and applying *Taylor*'s refinement of the "something more" test are instructive in cases involving injuries after the 2012 effective date of the amendment to Section 287.120.1. *Ellingsworth*, 2016 WL 7045603, at *4; *see, e.g., Risher v. Golden*, 182 S.W.3d 583, 588-89 (Mo. App. E.D. 2005) (even "careless operation of… machinery is not ' something more' than a breach of a duty to maintain a safe working environment and is not an affirmative negligent act"); *Garza v. Valley Crest Landscape Maint., Inc.*,[3] 224 S.W.3d 61, 63 (Mo. App. E.D. 2007) ("mere allegations of negligence" are "not the kind of purposeful, affirmatively dangerous conduct that Missouri courts have recognized as moving a fellow employee outside the protection of the Workers' Compensation Law's exclusive remedy provisions"); *Quinn v. Clayton Const. Co., Inc.*, 111 S.W.3d 428, 432 (Mo. App. E.D. 2003).

For example, in *Nowlin ex rel. Carter v. Nichols*, 163 S.W.3d 575, 577 (Mo. App. W.D. 2005), abrogated on other grounds by *Burns v. Smith*, 214 S.W.3d 335 (Mo. 2007), the co-employee ordered the decedent to assist in extricating a bulldozer that was stuck in the mud. The co-employee then drove a second bulldozer uphill from the decedent and exited the second bulldozer while its motor was still running. *Id*. The second bulldozer rolled downhill, pinning the decedent between the two bulldozers. *Id*. The court stressed that an "affirmative negligent act is not synonymous with any negligent act, as the law requires a purposeful act 'directed' at a co-employee." *Id*. at 579, quoting *Gunnett v. Girardier Building & Realty Co.*, 70 S.W.3d 632, 641 (Mo. App. E.D. 2002) ("the

[3] The Court of Appeals recognized in *Garza* that many of the cases cited by Plaintiff were superseded by *Taylor* and, by extension, by the 2012 amendment to Section 287.120. *Garza*, 224 S.W.3d at 63.

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

touchstone of co-employee common-law liability is whether the negligence occurred in the performance of a non-delegable duty of the employer as opposed to arising out of an obligation owed to the injured employee"). Even though the co-employee clearly created the danger, and certainly caused or increased the risk of injury to the decedent by placing him downhill of the second bulldozer and allowing it to run without a driver in the cab, dismissal was still proper because the co-employee's conduct was "within the usual scope of employment" and he did not "engage in inherently dangerous conduct purposefully directed at" the decedent. *Id*. In accord are *Gunnett,* 70 S.W.3d at 643 (foreman who created danger by placing plywood under skylight hole in roof not liable to roofer who fell through the hole, even if negligent); *Quinn*, 111 S.W.3d at 433 (co-employees who threw angle iron from three-story roof directly in path of worker on ground below not liable for injured worker's injuries, despite allegations of failure to follow safety rules, failure to warn, and carelessly creating a risk of harm); and *Brown v. Roberson*, 111 S.W.3d 422, 424-25 (Mo. App. E.D. 2003) (co-employee not liable for injuries that occurred when overloaded tractor-trailer overturned, despite allegations of careless driving).

Here, Edwards' act of lifting the grate is far less dangerous or likely to injure someone than the acts discussed in *Nowlin* or *Quinn*, where the co-employees still prevailed. Since JMC acquired the machine, glue spills during a job were always cleaned by lifting up the grate with the rollers spinning. (LF 777, 786.) Nobody had ever been injured. (LF 808.) Nobody had ever told Edwards doing it this way was a problem, or violated a rule. (Tr. 545-46, 561.) Plaintiff had worked on this machine before (Tr. 606),

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

and knew it had a pinch point. (Tr. 644.) Edwards had no reason to expect, much less know or intend, that Plaintiff would dangle the rag over the pinch point and continue holding it as it was pulled between the rollers. At most, cleaning the machine while running and with the grate lifted up could be negligent operation of the machine, not a purposeful and dangerous affirmative act that itself caused or increased the risk of injury.

Additionally, Plaintiff failed to make a submissible case under Section 287.120.1 as a matter of statutory interpretation. When interpreting statutory language, the Court must strive to assign meaning to each word. *Krispy Kreme Doughnut Corp. v. Dir. of Revenue*, 358 S.W.3d 48, 52 (Mo. 2011). Section 287.120.1 contains four separate elements which must be interpreted narrowly and read together. In order to avoid immunity, there must be: (1) an affirmative negligent act; (2) that purposefully; (3) and dangerously; (4) caused or increased the risk of injury. A co-employee can only be liable if all the statutory requirements are satisfied, and there must be admissible evidence of each element in order to make a submissible case. Here, Plaintiff failed to make a submissible case on each element.

1. The Evidence Does Not Establish That Edwards Performed An Affirmative Negligent Act.

The only act of Edwards identified by Plaintiff is lifting up one side of the hinged metal grate. However, Edwards did not perform this act negligently, since Plaintiff was not injured when Edwards lifted up the side of the grate. Edwards did not, for example, injure Plaintiff in a "one-off" situation by lifting the grate, becoming distracted, and dropping the grate on Plaintiff's hand. An example of this situation is shown in *Marshall*,

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

296 S.W.2d at 2, where the co-employee violently shook a compressor hose to remove kinks, striking the plaintiff and causing him to fall and sustain an injury. However, this Court noted in *Peters* that *even this conduct* "would not have satisfied the post-*Taylor* 'something more' test" because it did not involve "purposefully nor inherently dangerous conduct on behalf of the co-employee." *Peters*, 489 S.W.3d at 798; *see, e.g., Graham v. Geisz*, 149 S.W.3d 459, 462 (Mo. App. E.D. 2004) (distinguishing cases and applying *Taylor* rule); *Risher*, 182 S.W.3d at 589 (careless operation of machinery is "not an affirmative negligent act"). Here, there is simply no direct connection between the act of Edwards in holding up one side of the grate and Plaintiff's injury from his thumb being pulled into the pinch point.

2. Plaintiff Failed To Show That Edwards Purposefully Caused Or Increased The Risk Of Injury.

As *Nowlin* teaches, this is not an ordinary negligence case, and Plaintiff cannot make a submissible case merely by showing facts which give rise to an inference of negligence. *Nowlin*, 163 S.W.3d at 579; *Parr*, 489 S.W.3d at 780-71. Rather, co-employee liability exists only under the narrow statutory exception to the general rule that a fellow employee is *not* liable for workplace accidents. To satisfy the exception, Plaintiff must show a particular, "purposeful[]" state of mind on Edwards' part. R.S.Mo. § 287.120.1.

Plaintiff argues without authority that "purposefully" merely means to do an act "on purpose," *i.e.* that defendant is liable if he intends to do the underlying act (here, lifting up one side of the grate) as opposed to "accidentally" lifting up the grate. (LF

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

726.) Plaintiff's proposed definition is incorrect. First, most negligent acts would meet this minimal definition, including those deemed non-actionable in *Gunnett*, *Quinn*, *Nowlin*, *Risher*, and *Graham*, among other cases. As such, Plaintiff's approach would transform what the legislature intended to be a narrow, limited exception into one that overtakes the general rule. Secondly, this Court has examined at length what "purposefully" means in a statute and expressly rejected Plaintiff's suggested definition. In *Laut v. City of Arnold*, 491 S.W. 3d 191, 199 (Mo. banc 2016), this Court emphasized that showing a "purposeful" violation of the Sunshine Law imposes "a far greater burden than required to prove a knowing violation," and certainly much more than a "mere intent to engage in the conduct resulting in the violation." *Id.* (internal quotation omitted). Rather, to show a purposeful violation, a plaintiff must show that the government "exhibit[ed] a conscious design, intent, or plan to violate the law and [did] so with awareness of the probable consequences." *Id.*

Applying the teaching of *Laut*, here there must be evidence that Edwards had a conscious plan to dangerously cause or increase the risk of injury to plaintiff, and that he did so with awareness of the probable consequences.[4] While this may indeed pose a somewhat[5] higher hurdle for plaintiffs to overcome, and certainly requires more than

[4] The trial court refused to give Defendant's corresponding definition instruction to the jury. (Instruction A, LF 664.)

[5] Despite Plaintiff's claims to the contrary, applying *Laut's* definition of "purposefully" does not transform Section 287.120 into an intentional tort. This Court in *Burns* had no trouble applying a standard very similar to the *Laut* formulation while still recognizing and preserving the distinction between intentional torts and conduct which purposefully and dangerously causes or increases the risk of harm. The Court can do the same here.

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

ordinary negligence, this is a policy matter upon which the legislature has chosen to speak and it is clearly within the legislature's prerogative to do so. Furthermore, a classic example of conduct by a supervisor sufficient to impose liability is found in *Burns*, where the coworker defendant placed a poorly-constructed weld over a corroded area of a water pressure tank despite his poor vision, and then told the plaintiff to run the defectively-welded water tank "till it blows." *Burns*, 214 S.W.3d at 336. This Court characterized the defendant's statement as a "not-too-subtle admission that plaintiff [sic] was aware that the water tank was dangerous and would eventually explode" and an instruction "to undertake an activity that defendant knew would result in a particularly dangerous event." *Id.* at 340; *see also Groh v. Kohler*, 148 S.W.3d 11, 16 (Mo. App. W.D. 2004), abrogated by *Burns*, 214 S.W.3d at 338-39 (supervisor was informed of malfunctioning machine but told plaintiff to "quit whining" and to "just deal with it"). Here, Plaintiff presented no such evidence at trial.

To the contrary, Edwards testified during Plaintiff's case that he did *not* believe it was dangerous to lift up one side of the hinged grate and clean the rollers as long as the operator paid attention to what he was doing and followed directions. (LF 776, 778-79.) This opinion was based in part on Edwards' history of cleaning the machine with the grate raised on one side and the machine running since early 2010 without incident. (LF 808.) In reviewing whether Plaintiff made a submissible case, he is "bound by the uncontradicted testimony" of his own witnesses, *Erdman v. Condaire, Inc.*, 97 S.W.3d 85, 91 (Mo. App. E.D. 2002), and testimony he elicited on direct examination of adverse witnesses such as Edwards and Jappa. *Simpson v. Johnson's Amoco Food Shop, Inc.*, 36

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

S.W.3d 775, 777 (Mo. App. E.D. 2001); *Dildine v. Frichtel*, 890 S.W.2d 683, 685 (Mo. App. E.D. 1994). Another lamination line worker similarly testified during Defendant's case that the JMC process for removing glue from the rollers during a job was not dangerous. (Tr. 847-48.) Moreover, it is uncontroverted that there had never been a prior injury on this machine in the four years JMC used it. (LF 808.) On review, courts may not ignore facts which are uncontroverted in the record. *Wellcraft Marine v. Lyell*, 960 S.W.2d 542, 544 (Mo. App. W.D. 1998); *Patrich v. Menorah Med. Ctr.*, 636 S.W.2d 134, 137 (Mo. App. W.D. 1982); *Spear v. Heine Meine, Inc.*, 343 S.W.2d 1, 7 (Mo. 1961).

Additionally, and unlike in *Peters*, *Burns*, and *Groh*, here there is no evidence that Edwards ever received any complaint or a specific warning (beyond the decals on the machine) that it was dangerous to lift the grate on one side for cleaning. Edwards was simply carrying out JMC's nondelegable duty to clean the machine safely, which was a common task. There is no evidence to support the notion that Edwards "purposefully" caused or increased the danger. Therefore Plaintiff failed to make a submissible case under Section 287.120.1.

3. Plaintiff Failed To Show That Edwards Acted Dangerously.

Again, Plaintiff attempts to ignore the teaching of *Nowlin*, 163 S.W.3d at 579, and gloss over the requirement that Edwards acted "dangerously." Yet as Plaintiff's own definition instruction instructs, "[a]n affirmative act that purposefully and dangerously caused or increased the risk of injury is one that created additional danger beyond that normally faced in the job-specific work environment." (LF 635, 658.)

Here, Plaintiff's job was to work on the lamination line. (Tr. 597.) It's what he did for fifty hours every week. (Tr. 601.) When glue spilled during a job, the rollers were *always* cleaned while they were rolling and with the hinged grate lifted on one side. (LF 777, 786.) That was standard practice at JMC, and it was done successfully by others aside from Plaintiff. (Tr. 847-48.) In fact, another lamination machine at JMC has a pinch point and does not have any guard covering it whatsoever, so cleaning the rollers on that machine *always* necessarily involves exposure to a pinch point. (Tr. 831.) There was no evidence that what Plaintiff was directed to do was beyond the danger normally faced in his work environment at JMC. Also see the discussion in Point I, *supra*.

4. Plaintiff Failed To Show That Edwards Caused Or Increased The Risk Of Injury.

The only thing that made April 30, 2013 different from any other day was the fact that Plaintiff chose to hold a loose, dangling rag so close to the pinch point that it was pulled into the rollers, and failed to release the rag before his thumb could be injured. Plaintiff conceded the way he moved his hand was his choice, not one directed by Edwards. (Tr. 658.) Edwards' act of lifting up part of the grate did not cause Plaintiff's injury, nor did it increase the risk of injury any more than throwing metal off a three-story roof into the path of a worker did in *Quinn* or exiting the cab of a running bulldozer on a hill did in *Nowlin*. This Court should follow those cases, and many others, and recognize that Plaintiff failed to make a submissible case and Defendant is entitled to immunity.

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

III. THE TRIAL COURT ERRED IN REFUSING TO SUBMIT DEFENDANT'S INSTRUCTION D AND IN DENYING A NEW TRIAL BECAUSE IT COMMITTED REVERSIBLE INSTRUCTIONAL ERROR WHICH PREJUDICED DEFENDANT IN THAT THE JURY NEEDS TO BE INSTRUCTED THAT DEFENDANT IS NOT LIABLE FOR BREACHING JMC'S FIVE NONDELEGABLE DUTIES; THE INSTRUCTION CORRECTLY STATES THE LAW AND IS SUPPORTED BY SUBSTANTIAL EVIDENCE; AND WITHOUT THE INSTRUCTION, THE JURY WAS MISLED, MISDIRECTED, AND NOT ADVISED OF THE ULTIMATE FACTS NECESSARY TO FIND DEFENDANT LIABLE.

A. Claims of instructional error are generally reviewed *de novo*, but the refusal to give a proffered instruction may be reviewed for abuse of discretion.

The Court reviews claims of instructional error *de novo* and will vacate a trial court's judgment when the error materially affects the merits of the action. *Hervey v. Missouri Dept. of Corrections*, 379 S.W.3d 156, 159 (Mo. banc 2012). However, a court's refusal to give an instruction may be reviewed for abuse of discretion. *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 97 (Mo. 2010); *but see* Rule 70.02(a) (instructions "*shall* be given or refused by the court according to the law and the evidence in the case," emphasis added); *Ploch v. Hamai*, 213 S.W.3d 135, 139 (Mo. App. E.D. 2006) (recognizing "conflict[]" with Rule 70.02). Also, the standard of review for the denial of a motion for a new trial is generally an abuse of discretion. *St. Louis County v. River Bend Estates Homeowners' Ass'n*, 408 S.W.3d 116, 134 (Mo. 2013). A court abuses its discretion when its ruling is clearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *Fleshner*, 304 S.W.3d at 97-98. Defendant asked the court to give Instruction D at the instruction conference (LF 952) and raised the point of error in his motion for new trial (LF 712), thereby preserving the issue for appeal.

B. The trial court abused its discretion in refusing Defendant's Instruction D.

"A party is entitled to an instruction on any theory supported by the evidence," *Romeo v. Jones*, 144 S.W.3d 324, 330 (Mo. App. E.D. 2004), as long as the instruction is a correct statement of the law. *Spring v. Kansas City Area Transp. Auth.,* 873 S.W.2d 224, 226 (Mo. banc 1994). An instruction "*must* be given where there is substantial evidence to support the issue submitted." *Ploch*, 213 S.W.3d at 139-40 (emphasis added).

Here, as discussed in Point I, Defendant is not liable if the duties breached were part of JMC's five nondelegable duties to provide a safe workplace, but the jury had no way to know this without an instruction. Since 1876, Missouri trial courts have had a "duty to instruct the jury on the law." *State v. Robinson*, 484 S.W.3d 862, 872-73 (Mo. App. E.D. 2016) (citing cases). The court also has a similar "duty to define and explain technical terms which the jury may otherwise misapply." *Id*. at 873.

Defendant's Instruction D states as follows:

> Your verdict must be for defendant if you believe:
>
> First, either:
>
> > JMC failed to provide a safe place to work, or failed to see that instrumentalities of the workplace are used safely, or
> >
> > JMC failed to provide safe appliances, tools, and equipment for work, or
> >
> > JMC failed to warn of dangers of which plaintiff might reasonably be expected to remain in ignorance, or
> >
> > JMC failed to provide a sufficient number of suitable fellow employees, or

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

> JMC failed to promulgate and enforce rules for the conduct of employees which would make the work safe, and
>
> Second, JMC, in any one or more of the respects submitted in paragraph First, was thereby negligent, and
>
> Third, as a direct result of such negligence of JMC, plaintiff sustained damage.

(App. A7; LF 667.)

The determination as to whether a co-employee's "personal duty exists depends on the particular facts and circumstances of each case." *Parr*, 489 S.W.3d at 782. As a result, it is necessary to determine "where the employer's non-delegable duty ends and the employee's independent duty begins." *Abbott v. Bolton*, 500 S.W.3d 288, 292 (Mo. App. E.D. 2016). Here, Defendant has always argued, and continues to maintain, that Plaintiff failed to make a submissible case for the reasons set forth in Points I and II, *supra*. As this Court noted in *McComb*, it would be "illogical" to "allow the jury to decide whether the co-employee's conduct fell within" the employer's nondelegable duties because that is a question of law for the court. *McComb*, 541 S.W.3d at 556. In *McComb*, the Court affirmed summary judgment for the co-employee, so it did not consider instructional issues. *McComb's* rationale strongly suggests that Plaintiff failed to make a submissible case.

Here, however, the trial court did not resolve the question of law about where JMC's duty ended and Edwards' independent duty began, but merely found that there were fact issues about this for the jury to decide. (LF 394.) Under the circumstances, the jury needs to be informed of the law, so it knows which ultimate facts it must find in

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

order to reach a verdict. To the extent that Plaintiff makes a submissible case, then the jury needs to be informed that it cannot hold Defendant liable for any breaches of JMC's nondelegable duties. Plaintiff's trial strategy encouraged the jury to combine Edwards and JMC together and find Edwards liable for the negligence of JMC in adopting a purportedly unsafe cleaning procedure.[6] This is exactly the situation prohibited by Section 287.120.1 and the post-*Taylor* cases, and it left the jury with a misleading and inaccurate understanding of the law. This was obviously very prejudicial to Defendant because it expanded the scope of conduct for which Defendant could be found liable, especially under the circumstances of this case, where Edwards died before trial and had no opportunity to explain (beyond what he was asked at his deposition) how and in what ways he acted as an agent of JMC in carrying out JMC's nondelegable duties.

Instruction D identifies JMC's five nondelegable duties and informs the jury that it must find for Defendant if it determines that JMC was negligent in satisfying those duties. Instruction D accurately states the law. Furthermore, Instruction D is supported by the substantial evidence in the record that Edwards, as supervisor, was discharging and attempting to carry out the nondelegable duties of JMC at the time of the accident, in the same manner as he always did. Therefore, to the extent Plaintiff made a submissible case, the trial court erred by not properly instructing the jury on the law in refusing to give Instruction D.

---

[6] In particular, Plaintiff played excerpts from a video deposition of Black Brothers president Jeffrey Simonton (Tr. 383), who testified over objection—while Black Brothers was still a defendant—that Edwards and JMC did not follow Black Brothers' recommended cleaning procedure. (LF 813-14.)

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

IV. THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE AN OSHA REGULATION AND ALLOWING PLAINTIFF TO ELICIT TESTIMONY AND PRESENT ARGUMENT ABOUT THE OSHA REGULATION, AND IN DENYING A NEW TRIAL, BECAUSE PLAINTIFF FAILED TO ESTABLISH THAT THE OSHA PROVISION IS RELEVANT AND DEFENDANT WAS PREJUDICED, IN THAT ANY DUTY OF EDWARDS TO FOLLOW OSHA REGULATIONS RESULTS FROM HIS EMPLOYMENT BY JMC AND IS PART OF JMC'S NONDELEGABLE DUTIES TO PROVIDE A SAFE PLACE TO WORK; THERE IS NO CLAIM FOR NEGLIGENCE PER SE; AND TESTIMONY BY THE PRESIDENT OF JMC DOES NOT PROVE THE EXISTENCE OF ANY SEPARATE AND DISTINCT DUTY OF EDWARDS.

A. The court's evidentiary rulings are reviewed for an abuse of discretion.

The standard of review of a trial court's evidentiary rulings is whether the trial court abused its discretion. *Interel, Inc., v. Sedgwick Claims Management Services*, 204 S.W.3d 183, 193 (Mo. App. E.D. 2006). The appellant bears the burden of showing the trial court abused its discretion and that the appellant has been prejudiced by the abuse. *Id*. Defendant timely objected to the OSHA evidence at trial (Tr. 488-92) and raised this claim of error in his motion for new trial (LF 702), so the issue is preserved for appeal.

B. The OSHA evidence is irrelevant and extremely prejudicial.

The proponent of a federal regulation "must present sufficient evidence of the <u>relevance and applicability</u> of the regulations at issue to allow their admission." *Host v. BNSF Ry. Co.*, 460 S.W.3d 87, 110 (Mo. App. W.D. 2015) (emphasis added). Unlike in an ordinary negligence case, where an applicable regulation might be relevant as some evidence of the standard of care, *see, e.g., id.*, regulations are not logically relevant in co-employee cases unless they impose or address some duty on the co-employee separate

and distinct from the employer's nondelegable duties to provide a safe workplace. *Parr*, 489 S.W.3d at 779-80.

Here, the court took judicial notice over Defendant's objection of 29 C.F.R. § 1910.212 and admitted a printout of its text into evidence. (Tr. 488-492; Exhibit 32.) Plaintiff's attorney was then allowed to ask JMC president Jappa, again over objection, for legal conclusions about whether JMC and Edwards are "governed by OSHA regulations" and "allowed to violate OSHA rules." (Tr. 492-93). Jappa explained that he "know[s] of OSHA" but is "not an expert," (Tr. 492) and that in his opinion the JMC machine Plaintiff was injured on did "not entirely" comply with the OSHA regulation. (Tr. 496, 497.) During closing argument, <u>Plaintiff's attorney was allowed to tell the jury over objection that Edwards "violated the law" when he "pulled that guard back," "violated this OSHA regulation," and did "what the OSHA regulation prohibits</u>." (Tr. 964-65). Then, in the next sentence after claiming that Edwards did "what the OSHA regulation prohibits," Plaintiff's attorney said "<u>Mark Edwards was negligent. That part is easy</u>." (Tr. 965.)

In *Parr*, this Court rejected a similar tactic. *Parr*, 489 S.W.3d at 779-80. There, the plaintiffs attempted to avoid summary judgment by arguing that the Federal Motor Carrier Safety Regulations imposed on the co-employees personally "the duty to ensure drivers were safe to operate commercial motor vehicles." *Id.* at 779. For support, the plaintiffs relied on admissions by the co-employees during their depositions "in which each testified that he or she had an ongoing duty to make sure that drivers for [the employer] were safe to operate commercial motor vehicles." *Id.* In rejecting the

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

plaintiffs' argument, this Court held that courts are not bound by "stipulations or concessions" of the parties (and Jappa is not a party or an agent of Edwards) as to the existence of a duty. *Id.*

Furthermore, even expert testimony (and Jappa was a lay witness only) "on issues of law is inadmissible because this testimony encroaches upon the duty of the court to instruct on the law." *J.J.'s Bar & Grill, Inc. v. Time Warner Cable Midwest, LLC*, 539 S.W.3d 849, 874 (Mo. App. W.D. 2017) (internal quotation omitted). This includes "opinions about the meaning of statutes or regulations, about whether those statutes or regulations impose legal duties on [the parties], and about the legal effect of those duties." *Id.* This is exactly the kind of testimony the court allowed Plaintiff's attorney to elicit from Jappa. (Tr. 492-497.)

Additionally, the Court in *Parr* characterized as "without merit" the plaintiffs' position "that federal regulations imposed a duty on the defendants separate and distinct from their employer's nondelegable duty to provide a safe workplace." *Id.* at 780. To the contrary, the Court noted that "the duty to follow and enforce these federal safety regulations results from the master-servant relationship and would be part of the employer's nondelegable duty to follow and enforce rules of conduct designed to keep employees safe." *Parr*, 489 S.W.3d at 781.

The OSHA regulation presents the same situation here. There was absolutely no admissible evidence that the regulation applied to the machine, or that it applied to Edwards in any respect, or that OSHA was involved with this accident. Indeed, to the extent the referenced OSHA provision applied at all, it would have applied *to the*

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

employer, JMC, and not to Edwards individually. Therefore, when Plaintiff's attorney was allowed to tell the jury over objection that *Edwards* "violated the law" and "violated this OSHA regulation" (Tr. 964-65), these were inaccurate and prejudicial statements, as any purported violation would actually be *JMC's* rather than Edwards'. This vividly illustrates Plaintiff's trial strategy, which was to make Edwards liable in the jury's mind for the nondelegable duties of JMC. This, of course, is exactly what the law prohibits. While Plaintiff suggests that the OSHA evidence is relevant to show the danger of Edwards' conduct (*i.e.* the breach element as in a traditional negligence case), the comments by his attorney show that Plaintiff's true purpose was to urge the jury directly to blame Edwards for JMC's claimed "violation" of OSHA requirements.

At a minimum, Plaintiff, as the proponent of the evidence, failed to meet his burden of showing its relevance. Furthermore, no OSHA violation or negligence per se claim was pled, so the evidence cannot be relevant on that basis. (LF 031.) The trial court abused its discretion in admitting the OSHA regulation, allowing Jappa to testify to legal conclusions where no foundation was laid to show he was qualified to offer such conclusions and where the legal conclusions are inadmissible in any event, and in allowing plaintiff's attorney to accuse Edwards in closing argument of violating the law. (Tr. 964-65). This testimony and argument was obviously prejudicial to Edwards because it misstates the law, states facts not in evidence, and allows the jury to impute JMC's negligence to Edwards—the very thing that *Conner*, *Evans*, *Fogerty*, *McComb*, *Peters*, *Parr* and decades of case law clearly disallows.

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

Plaintiff's attempted defense of the OSHA evidence is unavailing. Plaintiff argues the OSHA evidence is relevant to the "dangerously" element of Section 287.120.1 in the same way it might be relevant to the standard of care in a general negligence suit. In *Parr*, this Court has rejected Plaintiff's argument and illuminated the logical fallacy behind it. Also, Edwards was not asked about OSHA, and there is no evidence that Edwards ever saw or knew about this OSHA provision any more than Plaintiff did. In fact, Jappa testified during Plaintiff's case on direct examination that JMC supervisors "wouldn't know what [OSHA rules] were." (Tr. 493.) That testimony is uncontroverted, and Plaintiff is bound by it on appeal. *Simpson*, 36 S.W.3d at 777. As Plaintiff's definition instruction teaches, the focus should be on whether Edwards "created additional danger beyond that normally faced in the job-specific work environment" (LF 635, 658), not whether or not an OSHA rule was violated. Therefore, the Court abused its discretion by admitting the OSHA evidence, regulation, and argument, and Defendant was prejudiced as a result.

V. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO EXCLUDE THE TESTIMONY OF PLAINTIFF'S ECONOMIST, ADMITTING HER CALCULATIONS OF PLAINTIFF'S LOST WAGES, AND DENYING A NEW TRIAL, BECAUSE PLAINTIFF FAILED TO PROVE HIS CLAIM FOR LOST WAGES WITH REASONABLE CERTAINTY IN THAT ALL OF DR. SUMMARY'S WAGE CALCULATIONS ARE BASED ON THE UNSUPPORTED ASSUMPTION PROVIDED BY PLAINTIFF'S ATTORNEYS THAT PLAINTIFF WOULD HAVE BEEN EMPLOYED DIRECTLY BY JMC AND EARNING JMC WAGES INSTEAD OF CONTINUING TO WORK FOR PATRIOT PERSONNEL.

A. Abuse of discretion is the appropriate standard of review.

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

A trial court's decision to admit expert testimony is generally reviewed for an abuse of discretion. *Interel*, 204 S.W.3d at 193. The question of whether an expert's opinion is "based on and supported by sufficient facts or evidence to sustain the same is a question of law for the court." *Vosevich v. Doro, Ltd.*, 536 S.W.2d 752, 760 (Mo. App. 1976). "If a question exists as to whether the proffered opinion testimony of an expert is supported by a sufficient factual or scientific foundation, the question is one of admissibility." *Washington by Washington v. Barnes Hosp.*, 897 S.W.2d 611, 616 (Mo. 1995). Defendant moved to exclude Dr. Summary's testimony in a pre-trial motion (LF 468), objected and moved to strike her testimony at trial, renewed the objection before her chart was displayed for the jury (Tr. 752, 761), and claimed error in his motion for new trial (LF 698). Therefore, Defendant preserved the issue for appeal.

B. Plaintiff failed to satisfy his burden of proving with reasonable certainty Dr. Summary's assumption that Plaintiff would have been employed by JMC.

Plaintiff has the burden of proving a claim for lost wages or lost earning capacity with "reasonable certainty," and the basis for the opinion cannot be speculative in nature or "founded on mere assumption or surmise." *Hobbs v. Harken*, 969 S.W.2d 318, 323 (Mo. App. W.D. 1998); *McGuire v. Seltsam*, 138 S.W.3d 718, 722 (Mo. 2004) (reversible error to admit medical diagnosis "based upon speculation and conjecture"); *Greer v. Continental Gaming Co.*, 5 S.W.3d 559, 565-66 (Mo. App. W.D. 1999) (assumptions of plaintiff's economist were not supported by the evidence; allowing testimony about future lost wages was prejudicial error); *Glaize Creek Sewer Dist. of Jefferson County v. Gorham*, 335 S.W.3d 590, 594-95 (Mo. App. E.D. 2011) (expert's property valuation was

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

based upon "false premise" and "fundamentally unsupported" by the evidence). Furthermore, the facts or data upon which an expert bases her opinion "must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable." R.S.Mo. § 490.065.3.

Here, none of Dr. Summary's eight wage loss scenarios are calculated based on Plaintiff's wages from Patriot Personnel. (Tr. 777, 781.) In fact, she did not know how much Plaintiff had earned from Patriot Personnel or his wage rate at the time of the accident. (Tr. 776-77.) Instead, Dr. Summary was asked by Plaintiff's attorneys to assume that Plaintiff was employed directly by JMC beginning on the day after the accident, and to base her calculations on the assumption that Plaintiff would have earned either an average or a "high wage" of what lamination line workers directly employed by JMC earned, plus the JMC benefits package. (Tr. 777-78.) Crucially, Dr. Summary did not perform any analysis of whether the JMC wages she used for her calculations reflected Plaintiff's earning potential (Tr. 781-82), or job skills or qualifications (Tr. 780), or whether and to what extent he could work (*id.*), or the likelihood of Plaintiff being hired at JMC (*id.*), or even the frequency in which temporary workers are generally hired into permanent positions (*id.*). The sole basis for Dr. Summary's calculation of Plaintiff's claim for lost wages was the assumption—given to her by Plaintiff's attorneys—that Plaintiff would have gone to work for JMC immediately following the date of accident and remained there until retirement.

The "reasonable certainty" test for admission of evidence on lost wages "contemplates and demands something more than a showing of contingent or speculative

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

occurrences, possible or even probable developments, or conjecture, likelihood and probability." *Hobbs*, 969 S.W.2d at 323. In *Haley v. Byers Transp. Co.*, 414 S.W.2d 777, 781-82 (Mo. 1967), this Court demonstrated the line between factually supported evidence of future lost earnings and inadmissible "pure speculation." The Court explained that while a plaintiff is permitted to show "his actual pay and allowances, and what they would have been up to the date of trial had he remained" working for the same employer (in that case, the Air Force), "[a]nything further"—namely evidence of the plaintiff's "likelihood of promotion" in the Air Force—"would rest in pure speculation." *Id*. Therefore, testimony about a plaintiff's likelihood of future promotion, or a particular employer's promotion rate, is speculative and inadmissible. *Id*.

Here, the parties agree that Plaintiff was employed (and paid) by a temporary agency, Patriot Personnel, at all relevant times, and <u>never by JMC</u>. Patriot Personnel also paid Plaintiff's workers' compensation claim. Plaintiff did not offer evidence of his actual pay by Patriot Personnel and what that would have been but for his accident. Nor did Plaintiff attempt to present evidence of his *capacity* to earn in the future but for the accident. Instead, Plaintiff contends that reasonable certainty for the notion that he would have been hired by JMC exists by way of the deposition testimony of Edwards. Specifically, Edwards testified[7,8] that he "thought [Plaintiff] had a *chance*…of getting

[7] Plaintiff emphasizes that Edwards was deposed as the corporate designee of JMC as well as individually, but fails to explain why that distinction makes any difference. JMC is not a party to this case, but even if it were, and even if JMC were bound by the facts Edwards testified to, in no way would this convert the substance of Edwards' testimony (*i.e.* that he liked and would recommend Plaintiff for employment but did not make the hiring and firing decisions) into an admission that Plaintiff *was*, in fact, going to be hired

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

hired" and that he would *recommend* him to be hired. (LF 802.) However, Edwards also clarified that "ultimately it wasn't my decision. I can only give the people in the office what I thought and they made the ultimate choice….I don't do the hiring and firing." (LF 802.) By contrast, Jappa testified on direct examination during Plaintiff's case that "I hire and have the last say at JMC on every single hire" and "[a]t the time in question, Danny Brock was not on my radar screen as somebody that I would hire," in part because of a prior "safety violation." (Tr. 515, 518; *see also* Tr. 512-13.) These facts are uncontroverted.

As the proponent of the evidence, Plaintiff had the burden of proving with reasonable certainty, as opposed to speculating about "chances" or possibilities, the assumption that Plaintiff's earnings are reflected by what JMC employees earned rather than by what Patriot Personnel employees earned. This factual predicate underlies all of Dr. Summary's opinions and testimony, and she admittedly made no attempt to justify the wage amounts she utilized on any other basis, other than the fact that JMC employees averaged this amount and she was told to assume the same for Plaintiff. But Plaintiff's future hopes, intentions, or dreams come nowhere close to establishing Plaintiff's future wage claim with reasonable certainty. Moreover, there is no evidence that Dr. Summary's

---

by JMC. Moreover, Plaintiff deposed Jeffrey Jappa in 2016 and Jappa stated then that JMC had no intention of hiring Plaintiff, in part because he had another safety incident involving rollers and a pinch point in the four months he was a temporary worker at JMC. Jappa testified similarly at trial.

[8] Edwards also testified that Plaintiff was hard working, came to work on time, was willing to do what was asked of him, and seemed to be liked by other workers. (LF 801-02.) None of this establishes with reasonable certainty that Plaintiff would have been hired by JMC, especially in light of Edwards' clarification that "I don't do the hiring and firing." (LF 802.)

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

approach in this case, dictated as it was by Plaintiff's attorney and not her own decision or judgment, is of a type reasonably relied upon by other experts. Without the wage claim, Dr. Summary's testimony has no other relevance and should have been excluded. The court abused its discretion and misapplied the legal standard for claims of lost wages against the logic of the circumstances in this case.

When the trial court abuses its discretion in admitting expert testimony, the "appropriate question is whether the erroneously admitted evidence had any reasonable tendency to influence the verdict of the jury." *McGuire*, 138 S.W.3d at 722. Here, Defendant suffered tremendous prejudice because Exhibit 85 containing Dr. Summary's future wage scenarios was projected for jurors to see during her testimony and specifically requested by the jury during deliberations. (Tr. 1030.) Plaintiff did not offer evidence of his medical bills or other economic damages, so Dr. Summary's testimony and calculations were the only evidence the jury heard during the week-long trial to value the case in pecuniary terms. Also, in closing argument, Plaintiff's attorney displayed Exhibit 85 and referenced a specific scenario, stating "this one right here…. I think the evidence supports this one more so than really anything else." (Tr. 977.) Plaintiff's attorney encouraged jurors to request the exhibit so they could view it for themselves during their deliberation (Tr. 977), which the jury later did. (Tr. 1030.) Without question, Dr. Summary's testimony tended to influence the verdict. Therefore, the case must be reversed for a new trial if this Court concludes that Plaintiff made a submissible case.

VI. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF JMC'S POST-INCIDENT MODIFICATIONS TO THE MACHINE AND THE CLEANING PROCEDURE BECAUSE THE EVIDENCE IS IRRELEVANT

AND PREJUDICIAL TO EDWARDS, IN THAT PLAINTIFF ATTEMPTED TO USE THE EVIDENCE TO PROVE EDWARDS' NEGLIGENCE AND NOT FOR A PERMISSIBLE PURPOSE; THE CHANGES WERE MADE BY JMC AND NOT BY EDWARDS; AND THE PUBLIC POLICY FAVORING SAFETY IMPROVEMENTS IS DIRECTLY IMPLICATED WHEN EVIDENCE OF AN EMPLOYER'S POST-INCIDENT MODIFICATIONS IS USED TO SHOW THE NEGLIGENCE OF A CO-EMPLOYEE BEING DEFENDED BY THE EMPLOYER'S INSURANCE COMPANY.

A. The court's evidentiary rulings are reviewed for an abuse of discretion.

As discussed in Point IV, abuse of discretion is the standard of review of a trial court's evidentiary rulings. However, in reviewing whether the trial court abused its discretion, "it remains a question of law whether the trial court applied the correct legal standard in ruling on the admissibility of the evidence." *Nolte v. Ford Motor Co.*, 458 S.W.3d 368, 379 (Mo. App. W.D. 2014). "The party seeking to admit evidence bears the burden of establishing both its logical and its legal relevance." *Id*. at 382. Defendant preserved the issue by objecting to the admission of this evidence (Tr. 23-27, 505-07) and alleging error in his motion for new trial (LF 705).

B. Evidence that JMC made changes to the machine and the cleaning procedure after the accident for the purpose of avoiding another accident is irrelevant to the case against Edwards and extremely prejudicial.

After Plaintiff's accident, JMC added a lock that prevents the metal grate over the bottom rollers from being partially lifted while the machine is running and a vertical screen to the top rollers on the machine. (LF 792, 797.) The lock was added to prevent the Plaintiff's accident from happening again. (LF 797.) Also, the workers now generally (but not always) clean glue from the bottom rollers with the grate down. (Tr. 507-08.) Defendant objected to the relevance and the prejudicial tendency to mislead and confuse

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

the jury. (Tr. 23-27, 505.) Plaintiff argued the testimony is relevant to impeach his own witness, Jappa, about whether it was dangerous to lift the grate (Tr. 24, 26), and on whether it was "standard operating procedure" at JMC to lift up one side of the grate with the machine on at the time of Plaintiff's accident. (Tr. 505.) The feasibility of JMC modifying the machine after the accident is not at issue. (Tr. 509.)

The Court of Appeals held in *Emerson v. Garvin Group, LLC*, 399 S.W.3d 42, 44 (Mo. App. E.D. 2013) that the general rule precluding admission of evidence of subsequent remedial measures did not apply to actions taken by non-parties. In *Emerson*, the plaintiff slipped and fell at work when a third party contractor hired by the employer began waxing the floor and failed to warn or barricade the area, causing her to fall and injure her wrist. *Id*. at 43. The worker sued the contractor, and the trial court excluded as subsequent repair evidence the fact that the employer implemented a policy after the accident requiring the contractor to barricade its work areas. *Id*. at 44. The court acknowledged the "public policy favoring safety improvements and the fear that if safety improvements could be used as evidence of previous improper conditions, no one, after an accident, would make improvements." *Id*. However, since the remedial measure was taken by a non-party (the employer) that lacked any privity with the contractor defendant, the public policy concern was allegedly not implicated and the general rule was inapplicable. *Id*.

Here, in total contrast, the policy rationale for the general rule is absolutely implicated under the facts of this case. Here, Edwards was a JMC employee. He was provided a defense and would be indemnified by JMC's insurance carrier, Travelers. (Tr.

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

32, 442.) Under the circumstances, a judgment against Defendant does, quite literally, expose JMC's insurance company to liability, and JMC and workers like Edwards would be discouraged from making safety improvements to prevent future accidents. *Rader Family Ltd. P'ship, L.L.L.P. v. City of Columbia*, 307 S.W.3d 243, 248 (Mo. App. W.D. 2010). Additionally, whether *JMC* changed its safety practices would logically only go to *JMC's* nondelegable duties to provide a safe place to work, not any personal duty of care owed by Edwards. This evidence is simply irrelevant as to the claim against Defendant and poses a significant risk of confusing or misleading the jury. *See id.* (recognizing a second "primary reason" for the rule against admission of subsequent remedial measures is that "subsequent changes are irrelevant to proving the previous condition"); *Raymond v. Raymond Corp.*, 938 F.2d 1518, 1525 (1st Cir. 1991).

Evidence is "logically relevant only if it tends to prove or disprove a fact in issue." *Nolte*, 458 S.W.3d at 383 (internal quotation omitted). Plaintiff argues that JMC changing some procedures later on is evidence that Edwards acted "dangerously" when Plaintiff was injured. This does not follow logically, and is just another way of saying the later action by JMC proves Defendant's negligence—exactly what the rule does *not* allow. Nor are these subsequent changes somehow probative of the JMC procedures at the time of the incident, which were admittedly different. Even if they have some small probative value, that is outweighed by the significant undue prejudice to Defendant, who faces liability for acts of JMC that he does not control, and for which he cannot be liable under the law.

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

VII. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTIONS FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE PLAINTIFF FAILED TO MAKE A SUBMISSIBLE CASE, IN THAT PLAINTIFF'S INJURY WAS PROXIMATELY CAUSED BY HIS OWN INDEPENDENT, INTERVENING NEGLIGENT ACTS IN USING A LOOSE RAG TO POUR WATER OVER A KNOWN PINCH POINT, LETTING THE RAG GET PULLED INTO THE PINCH POINT, AND FAILING TO RELEASE THE RAG, AND NOT BY THE CONDUCT OF DEFENDANT.

A. Whether Plaintiff made a submissible case on proximate cause is subject to *de novo* review.

As discussed in Point I, review of the trial court's decision to deny a motion for directed verdict depends on whether the plaintiff made a submissible case, which is reviewed *de novo*. Although the existence of proximate cause is usually a jury question, proximate cause is lacking *as a matter of law* "when the evidence reveals the existence of an intervening cause which eclipses the role the defendant's conduct played in the plaintiff's injury." *Tompkins v. Cervantes*, 917 S.W.2d 186, 190 (Mo. App. E.D. 1996), (the decedent's own conduct was a superseding cause); *Vann v. Town Topic, Inc.,* 780 S.W.2d 659, 661-62 (Mo. App. W.D. 1989) (no proximate cause as a matter of law where the plaintiff "injected himself into the fray" and chose to "intervene in the melee"). Defendant challenged the submissibility of Plaintiff's case due to the absence of proximate cause in his motion for directed verdict (LF 647) and in his motion for judgment notwithstanding the verdict (LF 689), thereby preserving the issue for appeal.

B. Edwards' conduct was not the proximate cause of Plaintiff's injury as a matter of law.

Edwards merely raised one side of the hinged grate and held it. That action did not injure plaintiff. Under *Peters*, the direction to clean the machine should impose no

liability, but that also did not cause any injury. Workers at JMC have successfully cleaned rollers forming pinch points for many years without guards present, while the rollers were moving, and by applying water to the rolls. (Tr. 827, 829, 831; LF 777.) The one thing that made this cleaning different from all the others was Plaintiff's own conduct in placing his hand and the rag near the rollers while admittedly not looking at the pinch point. (Tr. 650.)

Whatever Edwards did, he simply set the stage; he did not cause the injury. Where a defendant merely brings about a state of affairs in which some independent act supersedes or severs the connection between the defendant's conduct and the plaintiff's injury, the plaintiff fails to establish proximate cause as a matter of law. *Rayman v. Abbott Ambulance, Inc.*, 546 S.W.3d 12, 19-20 (Mo. App. E.D. 2018). The test for proximate cause is whether the plaintiff's injury is "the natural and probable consequence of the defendant's negligence." *Throneberry v. Missouri State Highway Patrol*, 526 S.W.3d 198, 209 (Mo. App. W.D. 2017) (internal quotation omitted). "[P]ure speculation and conjecture" are insufficient." *Id.*

In *McTurman v. Bell*, 398 S.W.2d 465, 470 (Mo. App. S.D. 1965), the plaintiff got his hand caught in a moving wheel and sued his employer. In affirming the grant of a judgment notwithstanding the verdict, the court held: "We believe the act of appellant in sticking his hand on the cable in front of the pulley was a separate, independent, and intervening cause of his injury." *Id.* There, as here, the "plaintiff was at least as familiar with the conditions and probable result of his own act as was the defendant." *Id.* at 470-

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

71. As a result, the plaintiff had "no more right to recover than a man who voluntarily sticks his hand into a buzz saw, or his finger into a hornet's net [sic]." *Id.* at 471.

Similarly, here Plaintiff admitted that he controlled the movements of his hand in moving it close enough to the moving rollers that his rag could be caught in the pinch point. (Tr. 658-59.) Edwards did not do that. "It is not negligence to fail to anticipate that another will be negligent for one is entitled to assume and act upon the assumption that others will exercise due care for their own safety, in the absence of notice to the contrary." *Heffernan v. Reinhold*, 73 S.W.3d 659, 665 (Mo. App. E.D. 2002). Here, as in *Heffernan* and *McTurman*, Edwards was entitled to assume that Plaintiff would exercise due care for his own safety and Plaintiff was an intervening cause of his own injury. Therefore, Plaintiff failed to make a submissible case.

VIII. THE TRIAL COURT ERRED IN EXCLUDING TESTIMONY ABOUT PLAINTIFF'S PRIOR SAFETY ACCIDENT ON ANOTHER JMC ROLLING LAMINATING MACHINE BECAUSE THE EVIDENCE IS RELEVANT TO SHOW PLAINTIFF'S NOTICE OF THE DANGER OF GETTING LOOSE FABRIC PULLED INTO PINCH POINTS AND TO SHOW WHY PLAINTIFF WAS UNLIKELY TO BE HIRED BY JMC, IN THAT THE PRIOR ACCIDENT WAS ONE MONTH BEFORE THE SUBJECT ACCIDENT; EDWARDS SPECIFICALLY DISCUSSED THE DANGERS OF PINCH POINTS AND LOOSE CLOTHING WITH PLAINTIFF; AND PLAINTIFF OPENED THE DOOR BY ASKING JAPPA ABOUT THE PRIOR ACCIDENT.

A. Evidentiary rulings are reviewed for an abuse of discretion.

As discussed in Point IV, abuse of discretion is the standard of review of a trial court's evidentiary rulings. Defendant timely moved to admit evidence of Plaintiff's prior accident (Tr. 371-72), obtained a ruling sustaining Plaintiff's objection on the grounds of

relevance and prejudice (Tr. 378), and claimed error in his motion for new trial (LF 697), thus preserving the issue for appeal.

B. The court abused its discretion in finding that the two incidents were not similar enough to be relevant, especially for the limited purpose of showing Plaintiff's notice of the danger posed by pinch points and comparative fault.

The trial court excluded evidence about the circumstances of the previous accident and Plaintiff's notice of pinch point dangers because it believed the accidents were not similar and the risk of prejudice outweighed the probative value. (Tr. 378.) The court abused its discretion because a party's "knowledge or warning" of the type of accident in which plaintiff was injured "clearly aids the jury" in determining negligence. *Stacy v. Truman Medical Center*, 836 S.W.2d 911, 926 (Mo. 1992), abrogated on other grounds by *Southers v. City of Farmington*, 263 S.W.3d 603 (Mo. 2008) (emphasis added). Furthermore, when the prior accident is relevant for the purpose of showing notice to a party (rather than showing that the same accident occurred again), "the degree of similarity required…is less demanding." *Id.*, citing *McCormick on Evidence*, § 200 at 848 (4th ed. 1992) (emphasis added). "Since all that is required is that the previous injury or injuries be such as to call [the adverse party's] attention to the dangerous situation that resulted in the litigated accident, the similarity in the circumstances of the accidents can be considerably less than that which is demanded when the same evidence is used for one of the other valid purposes." *Id.* (emphasis added).

As shown in the Statement of Facts, the accidents were actually quite similar. Both involved rollers forming pinch points on JMC laminating machines and Plaintiff allowing loose cloth to get too close to, and ultimately pulled into, a pinch point. In both cases, an

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

extremity was pulled into the pinch point with the cloth, and Plaintiff was physically injured as a result. Also, both laminating machines use moving rollers to convey items through the machine and have pinch points where those rollers meet. The danger was the same, and the mechanism of injury was very similar, even though the accidents occurred on two different JMC laminating machines.

More importantly, it is uncontroverted that Edwards specifically warned Plaintiff about the danger of pinch points, the importance of keeping loose fabric away from them, and the need for Plaintiff to be more aware of his actions around machines at work. (LF 804, 808.) This conversation was only about <u>one month</u> before the subject accident (LF 804), and put Plaintiff on notice of the exact danger that later caused his thumb injury. Showing that Plaintiff possessed this very specific knowledge, which was personally given to him by Edwards only about one month before the accident, clearly would have aided the jury in deciding negligence and allocating fault. The prior incident involves the same workplace, the same two individuals, the same injury mechanism, a similar pinch point between two moving rollers, and the same general type of work (*i.e.* feeding boards through a laminating machine in a factory). As such, the jury was entitled to hear this evidence, which should have called Plaintiff's attention to the dangers of pinch points, and used him to be more careful.

Additionally, if the evidence was not already admissible, Plaintiff's attorney opened the door by asking Jappa "what does that mean?" when Jappa identified the prior "safety violation" as one reason why Plaintiff was unlikely to be hired by JMC. (Tr. 518-19.) The court erred by not allowing Jappa to answer that question, which would have

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

provided further foundation for Jappa's testimony that he had no intention of hiring Plaintiff on at JMC. Excluding this evidence prejudiced Defendant because the jury was deprived of learning facts crucial to evaluating Plaintiff's comparative fault and to provide an explanation for Jappa's testimony that JMC would not have hired Plaintiff. Therefore, the court abused its discretion and committed reversible error, and the case should be remanded for a new trial if this Court determines Plaintiff made a submissible case.

IX. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A MISTRIAL AND IN DENYING A NEW TRIAL BECAUSE PLAINTIFF INJECTED THE IRRELEVANT AND PREJUDICIAL ISSUES OF DEFENDANT'S INSURANCE AND HOW A JUDGMENT WOULD BE PAID INTO THE CASE, IN THAT PLAINTIFF'S ATTORNEY VIOLATED THE TRIAL COURT'S RULING BY TELLING THE VENIRE PANEL THAT EDWARDS AND HIS ESTATE, FAMILY, AND FRIENDS WOULD NOT HAVE TO PAY ANY JUDGMENT DUE TO THE "UNIQUE POSTURE" OF THE CASE, AND PLAINTIFF'S ATTORNEY ALSO HIGHLIGHTED A VENIREPERSON'S COMMENT THAT HE WORKS FOR TRAVELERS INSURANCE AND SENDS CASES TO THE LAW FIRM OF DEFENDANT'S ATTORNEYS, THEREBY UNDULY EMPHASIZING THE ISSUE OF INSURANCE.

A. Abuse of discretion is the appropriate standard of review.

This Court reviews a trial court's refusal to grant a mistrial due to the improper injection of insurance into the case for an abuse of discretion. *Wilson v. Kaufmann*, 847 S.W.2d 840, 851 (Mo. App. E.D. 1992). However, it is error to admit evidence that a defendant does or does not have insurance, *Carter v. Wright*, 949 S.W.2d 157, 162 (Mo. App. W.D. 1997), especially if the issue is injected into the case purposefully or in bad faith. *Wilson*, 847 S.W.2d at 851. Defendant preserved the issue by moving for a mistrial during voir dire (Tr. 69) and alleging error in his motion for a new trial (LF 693).

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

B. Mistrial was the only appropriate remedy where Plaintiff's attorney violated the trial court's ruling and injected Defendant's insurance into the case by telling the venire panel that Edwards and his estate, family, and friends would not have to pay the judgment and highlighted a Travelers attorney on the venire panel who referred cases to Defendant's attorney.

"How the defendant is to raise the money to pay a judgment has nothing to do with the determination of his negligence or the amount of plaintiff's damages" and should be excluded. *Murphy v. Graves*, 294 S.W.2d 29, 35 (Mo. 1956). Similarly, the "injection into a case of the fact that a litigant is covered by a policy of insurance is error, and often reversible error, unless the issues in the case make the fact of insurance relevant."*McCaffery v. St. Louis Pub. Serv. Co.*, 252 S.W.2d 361, 367 (Mo. 1952).

Here, Plaintiff's attorney stated as follows in voir dire:

> Now, the corollary to that, I want to be clear. We are not the—this case is not against Mark Edwards' family or his friends or his estate. All right?
>
> This case is only against the defendant ad litem per the court's order. So is there anybody here who would have any hesitation, even a little bit, if the facts supported, allowing at the end of the case a verdict in favor of Danny Brock? Anybody have any hesitation about that, given the posture? It's kind of a unique posture in the case. I don't see any hands. Thank you.

(Tr. 60.) The above statement came a few minutes after Venireperson Number 8 identified himself as an attorney who works for Travelers and sends cases to Evans & Dixon, the law firm of Defendant's attorneys. (Tr. 54-55.) Plaintiff's counsel then asked Venireperson Number 8 to repeat the name of his employer, Travelers, a second time, even though it had already been stated once orally and was also written in the venire list. (Tr. 54.) A short time after each of the above exchanges, Defendant moved for a mistrial

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

outside the hearing of the jury. (Tr. 69.) The court dismissed the panel, heard argument, and denied the motion. (Tr. 72-84.)

The court erred in denying a mistrial because Plaintiff's attorney told the panel expressly that neither Edwards, nor his family or friends, nor his estate would have to pay a judgment entered against Defendant. "To instill into the jurors' minds the idea that the defendant is not really interested in the outcome of the case, because, whatever may be the result, some one else will have to bear the loss, is very reprehensible, and, where it appears that such has been the adroit purpose and result, such conduct will meet with the punishment of a reversal." *Murphy*, 294 S.W.2d at 32.

That is exactly what happened here, where Plaintiff's attorney violated the court's specific pretrial ruling on this issue, barring Plaintiff from injecting insurance into the case and expressing the court's intent to mirror the statement made to the panel in *Ethridge v. Gallagher*, 773 S.W.2d 207, 208 (Mo. App. W.D. 1989). Before trial, the court held a hearing on Plaintiff's motion in limine to bar informing the jury that Edwards died, and Plaintiff's alternative position that in the event the jury was to be told of Edwards' death, that this opens the door for Plaintiff to tell the jury Defendant has insurance. (Tr. 5-13.) Defense counsel specifically warned the court that Plaintiff's attorney planned to inject insurance into the case by telling the panel that Edwards will not have to pay a judgment. (Tr. 11.) The court stated that "<u>courts have specifically reversed where lawyers have said to the jury, 'Go ahead and give a verdict and don't worry about where it's going to come from. Leave it to me to collect it from somebody.' And that's been reversible error</u>." (Tr. 12.) Accordingly, the court ruled: "I'm going to

stick to the language of the statute that says that the court has appointed Mr. Dunne to be known as the defendant ad litem, and Mr. Dunne acts in the capacity of legal representative of Mr. Edwards, period." Tr. 12; *Ethridge*, 773 S.W.2d at 213.

Despite the court's ruling, Plaintiff's attorney implicitly did what the court acknowledged to be reversible error by telling the panel not to worry about returning a verdict for Plaintiff because the money will not come from Edwards or his family, friends, or estate. These comments improperly inject insurance and/or the question of who would pay the judgment into the case where it has absolutely no relevance. The prejudice is exacerbated when considered in context with the exchange with Venireperson Number 8 about Travelers sending cases to Evans & Dixon. In denying a mistrial, the trial court incorrectly focused on the *accuracy* of the statement to the panel rather than on its relevance and prejudicial effect. (Tr. 76, 79, 83.) "It is the common experience of practicing attorneys that it is highly prejudicial to a defendant's case for the jury to be informed that any verdict returned against the defendant will not hurt him, but will be paid by an insurance company." *Murphy*, 294 S.W.2d at 32. This is essentialy what occurred here, and the court abused its discretion in denying a mistrial under the circumstances.

CONCLUSION

Under the common law, co-employee liability is only appropriate in "limited circumstances." *Conner*, 542 S.W.3d at 328 (Draper, J., concurring). The 2012 amendment to Section 287.120 raised the bar even higher. Here, Plaintiff's injury results from the tools furnished and the manner in which the work was being done, not some

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

unforeseeable act of Edwards, and certainly not an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury to Plaintiff.

It is undisputed that the employer, JMC, charged Edwards, the lamination line foreman, with carrying out JMC's nondelegable duty to provide a reasonably safe work environment. It is undisputed that when the accident occurred, the workers were using the same mid-job glue cleaning procedure that they used every time glue spilled during the work. This was the way it had always been done at JMC. It was how Edwards had been taught by other JMC employees, and how Edwards in turn taught his workers on the line. Simply put, Edwards was following the JMC procedure. Glue spills during a job were always cleaned this way, with no other incident or complaint. Cleaning up glue and working around moving machines was a natural part of Plaintiff's job and a normal hazard of Plaintiff's work at JMC. Plaintiff's real complaint is with JMC, not with Edwards, and the judgment below must be reversed.

For all of the foregoing reasons, Defendant is entitled to a judgment notwithstanding the verdict or, alternatively, a new trial. Therefore, Defendant requests this Court reverse the judgment of the trial court and either: (1) remand this case for entry of judgment in favor of Defendant; or, in the alternative, (2) remand this case for a new trial on all issues.

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

CERTIFICATE OF COMPLIANCE

Comes now Defendant-Appellant, pursuant to Rule 84.06(c), and hereby certifies the following to this Court:

(1) That the information required by Rule 55.03 has been included in the Substitute Brief.

(2) That the Substitute Brief and Appendix are being served by using the Court's electronic filing system pursuant to Rule 103.08.

(3) That the Substitute Brief complies with the limitation on length set out in Rule 84.06(b).

(4) That the Substitute Brief contains the following number of words, as determined by Microsoft Word: 18,262.

/s/ Brian R. Shank
Brian R. Shank (#59955)
211 N. Broadway, Suite 2500
St. Louis, Missouri 63102
(314) 621-7755
(314) 884-4466 (fax)
bshank@evans-dixon.com

Attorneys for Defendant-Appellant Peter Dunne, Defendant Ad Litem for Mark Edwards, Deceased

Electronically Filed - SUPREME COURT OF MISSOURI - March 12, 2019 - 09:00 AM

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 12, 2019, an electronic copy of the Substitute Brief and Appendix of Defendant-Appellant was filed with the Clerk of the Court for the Supreme Court of Missouri by using the Court's electronic filing system. The undersigned also certifies that the following participants in this case are registered electronic filing system users and that service of the Substitute Brief and Appendix will be accomplished by the Court's electronic filing system:

Patrick K. Bader (#62304)
Jacob C. Murov (#62478)
230 South Bemiston Ave., Suite 560
St. Louis, MO 63105
Phone: (314) 833-5063
Fax: (314) 833-5065

Attorneys for Plaintiff-Respondent Danny Brock

/s/ Brian R. Shank
Brian R. Shank (#59955)
211 N. Broadway, Suite 2500
St. Louis, Missouri 63102
(314) 621-7755
(314) 884-4466 (fax)
bshank@evans-dixon.com

Attorneys for Defendant-Appellant Peter Dunne, Defendant Ad Litem for Mark Edwards, Deceased