Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

IN THE SUPREME COURT OF MISSOURI

DANNY BROCK, *Plaintiff-Respondent*, v. PETER DUNNE, DEFENDANT AD LITEM FOR MARK EDWARDS, *Defendant-Appellant*.	No. SC97542

Original Proceeding from the 21st Judicial Circuit
Hon. Nancy Watkins McLaughlin, Presiding
Cause No. 15SL-CC00163

Transfer from the Missouri Court of Appeals, Eastern District
Cause No. ED 105739

SUBSTITUTE BRIEF OF RESPONDENT
DANNY BROCK

BADER & MUROV, LLC
Patrick K. Bader, #62304
Jacob C. Murov, #62478
230 South Bemiston Ave.
Suite 560
St. Louis, Missouri 63105
Phone: (314) 833-5063
Fax: (314) 833-5065
patrick@badermurovlaw.com
jacob@badermurovlaw.com

Attorneys for Plaintiff-Respondent Danny Brock

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

TABLE OF CONTENTS

STATEMENT OF FACTS 1

A. The April 30, 2013, incident. 1
B. Brock's resulting injuries. 2
C. Edwards' affirmative negligent act created an additional danger beyond that normally faced in the job-specific work environment. 2
D. Procedural history. 6

ARGUMENT 8

I. The trial court did not err in denying Defendant's Motion for Directed Verdict or JNOV because the common law duty analysis it seeks to impose is inapplicable in that this case arises under R.S.Mo. § 287.120.1 (2012) and, regardless, Edwards' affirmative negligent act, which created a danger not otherwise present in the job-specific work environment, was not reasonably foreseeable to employer JMC. 8

a. The trial court did not err in denying Defendant's motions because the common law duty analysis Defendant seeks to impose is unnecessary in this case arising under the 2012 version of § 287.120. 8

b. In the alternative, even if the pre-2012 "reasonable foreseeability" duty analysis was applicable, Brock established a legal duty because Edwards' affirmative negligent act, which created a danger not otherwise present in the job-specific work environment, was not reasonably foreseeable to JMC. 12

II. The trial court did not err in denying Defendant's Motion for Directed Verdict or JNOV because Brock made a submissible case of breach in that Edwards committed an affirmative negligent act in removing a safety guard and instructing Brock to clean high-speed rollers, thereby knowingly creating a life-threatening danger that otherwise did not exist in the job-specific workplace. 23

a. Edwards knowingly created an unnecessary danger, not otherwise present in the job-specific environment, by removing a safety guard from a running industrial machine and directing Brock to clean its exposed high-speed rollers, in violation of company rules, the machine's warnings, and Edwards' own common sense. 23

b. Brock was not required to prove intent to injure/endanger to make a submissible case of co-employee liability. 26

c. Even if Brock were required to prove intent, he overwhelmingly satisfied that burden because Edwards admitted that he knew he should not remove the guard but knowingly did so anyway. 31

III. The trial court did not abuse its discretion in refusing Defendant's Instruction D because legal duty is purely a question of law for the court, the proffered non-MAI instruction was unnecessary, and the instructions given, including on causation and standard of care, permitted Defendant to argue that it was his employer's actions that caused Brock's injury. 31

a. The Court did not abuse its discretion in refusing Defendant's Non-MAI Instruction D because the issue of duty is exclusively a matter of law for the Court. 32

b. Non-MAI Instruction D was unnecessary because the instructions given correctly stated the law, and Defendant has shown no prejudice because he was permitted to argue that JMC was responsible for Brock's injuries within the instructions given. . 33

IV. The trial court did not abuse its discretion in permitting evidence of the applicable OSHA machine guard regulation because it was relevant to the standard of care and was otherwise not prejudicial because it was cumulative of other admitted evidence. 34

a. The OSHA regulation was relevant to standard of care and breach. 35

b. Defendant's claim of error should also be denied because he cannot prove any prejudice since the OSHA regulation was clearly cumulative of other properly admitted evidence. 37

V. The trial court did not abuse its discretion in overruling Defendant's objections to the testimony of Brock's economic expert because there was ample evidence to support her calculations, and Defendant's criticisms go to the weight, not the admissibility, of her testimony…. 38

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

VI. The trial court did not abuse its discretion in admitting evidence of non-party JMC's installation of a switch on the subject safety guard after Brock's injury because it was not a "subsequent remedial measure" and was also independently admissible to impeach and rebut Defendant's proffered testimony. 43

a. Installation of the switch was not a subsequent remedial measure by a party. 43

b. The trial court also did not err in admitting this evidence because, even if it were a "subsequent remedial measure", it was admissible for impeachment and proving feasibility of cleaning the rollers with the safety guard in place, which was disputed. 45

c. Defendant's claim of error should also be rejected since it was waived, and Defendant has shown no prejudice. 46

VII. The trial court did not err in denying Defendant's Motions for Directed Verdict and JNOV because Brock made a submissible case on proximate cause in that Edward's conduct was, as he and others admitted, a substantial cause of Brock's injury.. 47

VIII. The trial court did not abuse its discretion in excluding evidence of Brock's shirt being caught in a conveyor belt on unrelated equipment because it was not relevant to comparative fault and no evidence was offered connecting it to Brock's employability. 49

a. The prior incident was irrelevant to the issue of comparative fault, as Edwards admitted, because it was not even remotely similar to Brock's injury event. 49

b. Defendant failed to offer any evidence connecting the prior incident to Brock's employability, and therefore, no claim of error was preserved. 50

IX. The trial court did not abuse its discretion in denying a motion for new trial because Brock's counsel did not mention or even insinuate the existence of liability insurance at any time during *voir dire,* and Defendant failed to preserve any allegation of error by failing to timely object or move for a mistrial. 51

a. Defendant did not preserve any such issue for appeal. 51

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

b. The trial court did not abuse its discretion in refusing a mistrial because there was no mention or insinuation of insurance by counsel and, contrary to Defendant's repeated assertion, the venire panel was not told who would (or would not) be required to pay any judgment. 52

CONCLUSION 55

CERTIFICATE OF COMPLIANCE 57

CERTIFICATE OF SERVICE 57

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

TABLE OF AUTHORITIES

CASES

Anderson v. Burlington N.R. Co.,
700 S.W.2d 469 (Mo. App. E.D. 1985) 46

Anderson v. Ken Kauffman & Sons Excavating, L.L.C.,
248 S.W.3d 101 (Mo. Ct. App. 2008) 33

Burnett v. Griffith,
769 S.W.2d 780 (Mo. 1989) 34

Burns v. Smith,
214 S.W.3d 335 (Mo. 2007) 15, 16, 19, 21, 23, 30, 35

Burrows v. Union Pacific Railroad Co.,
218 S.W.3d 527 (Mo. App. E.D. 2007) 43

Butts v. Express Pers. Servs.,
73 S.W.3d 825 (Mo. Ct. App. 2002) 53

Conner v. Ogletree,
542 S.W.3d 315 (Mo. 2018) 16, 17, 21, 26

Dieser v St. Anthony's Med. Ctr.,
498 S.W.3d 419 (Mo. 2016) 58

Dillman v. Missouri Highway & Transp. Comm'n,
973 S.W.2d 510 (Mo. App. E.D. 1998) 55

Doe v. McFarlane,
207 S.W.3d 52 (Mo. App. E.D. 2006) 46

Eagleburger v. Emerson Elec. Co.,
794 S.W.2d 219 (Mo. App. 1990) 53

Elliott v. State,
215 S.W.3d 88 (Mo. banc 2007) 46

Emerson v. Garvin Group, LLC,

399 S.W.3d 42 (Mo. App. E.D. 2013) 49, 50

Fogerty v. Armstrong,
541 S.W.3d 544 (Mo. 2018)........ 18, 27

Freight House Lofts Condo Ass'n v. VSI Meter Servs.,
402 S.W.3d 586 (Mo. Ct. App. 2013)........ 53

Giddens v. K.C. So. Ry.,
29 S.W.3d 813 (Mo. banc 2000)........ 14, 41, 42

Graczack v. City of St. Louis,
202 S.W.2d 775 (Mo. 1947)........ 18

Haley v. Byers Transportation Co.,
414 S.W.2d 777 (Mo. 1967)........ 46

Hedglin v. Stahl Specialty Co.,
903 S.W.2d 922 (Mo. Ct. App. 1995)........ 21, 36

Hickey v. Kan. C. S. R. Co.,
290 S.W.2d 58 (Mo. 1956)........ 52

Host v. BNSF Ry. Co.,
460 S.W.3d 87 (Mo. App. W.D. 2015)........ 42, 51, 52

Johnson v. Union Pac. R.R.,
146 S.W.3d 14 (Mo.App.E.D. 2004) 14

Laut v. City of Arnold,
491 S.W. 3d 191 (Mo. 2016)........ 36

Macon Cty. Emergency Servs. Bd. v. Macon Cty. Comm'n,
485 S.W.3d 353 (Mo. banc 2016)........ 33

Marshall v. Kansas City,
296 S.W.2d 1 (Mo. 1956)........ 19, 36

McComb v. Norfus,
541 S.W.3d 550 (Mo. 2018)........ 17, 20, 26

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

McCullough v. Commerce Bank,
349 S.W.3d 389 (Mo. Ct. App. 2011) 37

McGinnis v Northland Ready Mix, Inc.,
344 S.W.3d 804 (Mo. App. 2011) 58

McTurman v. Bell,
398 S.W.2d 465 (Mo. Ct. App. 1965) 54

Mickey v. BNSF Ry. Co.,
437 S.W.3d 207 (Mo. 2014) 48

Moore v. Ford Motor Co.,
332 S.W.3d 749 (Mo. 2011) 43, 49, 53

Moore v. Missouri Hwy. & Transp. Commn.,
527 S.W.3d 215 (Mo. App. E.D. 2017) 57

Murry v. Mercantile Bank, N.A.,
34 S.W.3d 193 (Mo. Ct. App. 2000) 35

Nolen v. Cunningham,
553 S.W.3d 437 (Mo. App. E.D. 2018) 16, 28

Nowlin ex rel. Carter v. Nichols,
163 S.W.3d 575 (Mo. App. W.D. 2005) 31

Parr v. Breeden,
489 S.W.3d 774 (Mo. 2016) 18, 38, 42

Pavia v. Childs,
951 S.W.2d 700 (Mo. Ct. App. 1997) 21, 35

Peters v. Wady Indus.,
489 S.W.3d 784 (Mo. 2016) 16, 29, 30, 35, 38

Quinn v. Clayco Constr. Co.,
111 S.W.3d 428 (Mo. App. E.D. 2003) 32

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

Ramsey v. Burlington N. & Santa Fe Ry.,
130 S.W.3d 646 (Mo.App.E.D. 2004) 14

Roberson v. Weston,
255 S.W.3d 15 (Mo. App. 2008).......... 59

Robinson v. Empiregas, Inc.,
906 S.W.2d 829 (Mo. App. S.D. 1995) 47

Rust v. Hammons,
929 S.W.2d 834 (Mo. App. 1996).......... 51, 52

Saint Louis Univ. v. Geary,
321 S.W.3d 282 (Mo. banc 2009) 43

Sampson v. Missouri Pacific Railroad Co.,
560 S.W.2d 573 (Mo. banc 1978) 46

Smith v. Brown & Williamson Tobacco Corp.,
No. WD65542, 2007 Mo. App. LEXIS 1144 (Ct. App. July 31, 2007) 34

St. John's Bank & Trust Co. v. Intag, Inc.,
938 S.W.2d 627 (Mo. App. E.D. 1997) 58

St. Louis Univ. v Geary,
321 SW3d 282 (Mo. 2009).......... 59

State ex rel. Plank v. Koehr,
831 S.W.2d 926 (Mo. 1992).......... 45

Tauchert v. Boatmen's Nat'l Bank,
849 S.W.2d 573 (Mo. 1993).......... 19, 21, 35

Taylor v. Associated Elec. Co-Op, Inc.,
818 S.W.2d 669 (Mo. App. 1991).......... 51

Taylor v. Republic Auto. Parts,
950 S.W.2d 318 (Mo. App.1997).......... 60

Templemire v. W&M Welding, Inc.,

No. WD74681, 2012 Mo. App. LEXIS 1639 (Ct. App. Dec. 26, 2012) 38, 40

Vanneman v. W. T. Grant Co.,
351 S.W.2d 729 (Mo. 1961).. 33

Williams v Trans States Airlines, Inc.,
281 S.W.3d 854 (Mo. App. E.D. 2009) 40

Workman v. Vader,
854 S.W.2d 560 (Mo. Ct. App. 1993).. 35

STATUTES

29 C.F.R. 1910.212.. 41

R.S.Mo. § 287.120 (2012) 14, 30, 33

OTHER AUTHORITY

M.A.I. 10.02 [2008 Revision] 34

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

STATEMENT OF FACTS

This co-employee liability action arises under R.S.Mo. § 287.120 (2012) for injuries Respondent Danny Brock suffered as a result of the affirmative negligent act of his co-employee, Mark Edwards.

A. The April 30, 2013, incident.

On April 30, 2013, Brock was working at JMC Manufacturing (JMC), an industrial fabricator and laminator of wood products. Tr. 453:4–6. That morning, he was assigned to work on a high-pressure laminating machine (Black Bros. machine) with his supervisor, Mark Edwards, along with two other coworkers, Kyle Reed and Al McKinney. LF 783 at 52:6–53:10, 53:25–54:5. The Black Bros. machine internally has two pairs of rollers (top and bottom), and glue is applied from the top pair of rollers to the material being laminated. LF 778 at 33:25–34:23; *see* Appendix at A1-A5. The bottom pair of rollers spin together to propel the material through the machine. LF 816 at 25:23-26:25. There is a safety guard that protects the pinch point created where the bottom rollers meet. LF 789 at 77:11–14; A1; A5 ("Outfeed Finger Guard").

Edwards was the foreman responsible for the lamination line. LF 772 at 9:9–12. On the date of incident, as Edwards was feeding a board into the machine, he saw that glue spilled on a bottom roller. LF 787 at 71:24–72:4. While the machine was still on and the rollers were moving, Edwards pulled the safety guard out of its protective position, exposing the bottom rollers' pinch point, and instructed Brock to grab a rag out of the bucket, put his hand directly over the pinch point, and clean the glue off the roller. LF 791 at 86:4–16, 87:8–13, 88:7–14, 793 at 93:13–15, 19–21; Tr. 610:11–25, 614:14–20.

When Edwards pulled the safety guard back, he looked at Brock and confirmed that Brock was doing what Edwards expected. LF 791 at 88:18–24. Edwards was standing right next to Brock, and Edwards never told Brock to stop or that Brock was being unsafe. LF 792 at 89:7–17, 92:17-21, 793 at 93:5–9. As Brock was using the rag to squeeze water over the top of the roller and using a brush to get the glue off from the bottom of roller, the rag got caught in the pinch point, causing his thumb to get crushed in the pinch point. Tr. 614:3–7, 14–17; LF 791 at 88:25, 792 at 89:1–2.

B. Brock's resulting injuries.

Brock fell to the ground and was in shock and excruciating pain. Tr. 617:11–25; LF 793 at 94:10–11. His thumb was hanging by the skin, and he was worried he was going to lose his thumb. Tr. 617:3–10. Brock was rushed by ambulance to the hospital. LF 793 at 94:1–9. As a result of his injury, Brock underwent three surgeries, including a fusion of his thumb joint. Tr. 405:12–15, 413:9–19. He sustained permanent nerve and structural damage in his thumb and has permanent pain and limitations on the use of his thumb and hand. Tr. 418:15–23, 429:18–23. His surgeon testified that he is permanently restricted from doing any heavy labor work. Tr. 428:16–23.

C. Edwards' affirmative negligent act created an additional danger beyond that normally faced in the job-specific work environment.

Both Edwards and employer JMC testified that the Black Bros. machine was perfectly safe. LF 798 at 114:10–13, 16–19. On the date Brock was injured, JMC provided the machine to its employees with the safety guard in place over the bottom rollers, and it stayed that way until Edwards pulled it out of its protective position. Tr.

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

497:25–498:1–4. Edwards acknowledged that safety guards should not be removed from an active machine and that he should not needlessly expose employees to pinch points. LF 774 at 20:17–23, 778 at 35:18–24.

Edwards admitted that he was aware of several safety rules at the time of incident prohibiting him from removing the safety guard or instructing Brock to clean the rollers while the machine was on. LF 775 at 22:3–8, 23:4–12, 778 at 35:18–24, 779 at 40:9–21. He acknowledged that JMC has safety rules that would have applied to him, and if those rules are not followed, then employees can get injured. LF 800 at 121:13–25, 122:9–12; Tr. 464:24–465:4. JMC safety rules state: "If you remove a mechanical guard temporarily, be sure to replace it before you turn the machine on." Tr. 484:4–12. JMC's President and Owner, Jeffrey Jappa, testified that, in removing the guard on the day of Brock's injury, Edwards violated JMC's written safety rules. Tr. 485:6–19.

There were also cleaning instructions and warnings attached to the machine at the time Brock was injured. Tr. 486:22–487:1, 8–13; *see* Appendix at A6. Edwards was familiar with these instructions. LF 805 at 144:6–25, 806 at 145:1–4. Consistent with JMC's safety rules, these Black Bros. instructions specifically stated: "DO NOT REMOVE INFEED TABLE, GUARDS, ETC. FROM RUNNING MACHINE" and "CAUTION: KEEP GUARDS IN PLACE WHEN MACHINE IS RUNNING". *See* Appendix at A6. Edwards admitted that, if these instructions were followed, Brock could not have been injured in the pinch point. LF 806 at 147:1–3. JMC's owner testified that Edwards also violated these instructions. Tr. 487:22–488:2.

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

Edwards acknowledged that the Black Bros. safety manual applicable to the subject laminating machine also indicates that the machine should be stopped if hands must be near rollers and further warns that all guards should be kept in protective position when the machine is running. LF 775 at 22:3–8, 23:4–12. The Black Bros. safety manual admonishes: "If wiping is necessary, rollers can be more quickly, easily and safely wiped while they are stopped." LF 776 at 27:3–9. Edwards, however, testified that he disagreed with these instructions. LF 775 at 23:1–17.

Additionally, Edwards was familiar with JMC's written lock-out and tag-out rule, which states that a machine must be locked out and tagged out if an employee is required to remove or bypass a guard or a safety device or when an employee is required to place himself in the point of operation or other potentially hazardous areas of equipment movement. LF 779 at 38:16–40:8. He testified that this JMC rule would have been applicable at the time Brock was injured, because he removed or bypassed a safety guard, and Brock was required to place himself in the point of operation or a hazardous area of moving equipment. LF 779 at 40:9–21.

JMC's internal work records from the months leading up to Brock's injury indicate that the Black Bros. machine was always shut down before it was cleaned. Tr. 577:22-579:19. Neither JMC Owner Jeffery Jappa nor anyone from JMC told Edwards to clean the machine "mid-job" (with the machine on and running) like he instructed Brock at the time of the incident. Tr. 472:24–473:9, 474:2–475:18. There is no written JMC rule that outlines or authorizes a "mid-job" cleaning. Tr. 476:21–477:2; LF 790 at 83:14–19. Jappa testified that Edwards did not have the authority to modify or violate

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

JMC's written rules. Tr. 481:1–12, 20-25. JMC also expects that its supervisors be knowledgeable about the warnings and instructions that are on the machines (Tr. 467:19–23), and JMC expected that Edwards knew the safe and proper way to use the machine (Tr. 470:7–9).

Jappa had never seen Edwards perform a "mid-job" clean where the guard was pulled back and employees cleaned the rollers while the machine was running. Tr. 477:3–8. Likewise, before the incident Brock had never cleaned the Black Bros. machine "mid-job" while the machine was running. Tr. 606:7–9. Each time Brock had previously cleaned the machine was at the end of the run when the machine was shut down. Tr. 606:10–17. He never saw anybody else do a "mid-job" clean or clean the bottom roller with the guard pulled back. Tr. 606:21–607:2.

Defendant called two coworkers in his case-in-chief, Aaron Reed and Kyle Reed. Aaron Reed testified that JMC's standard operating procedure is to clean the machine at the end of a job, when the machine is shut down and the rollers are off. Tr. 887:8-23. Although Defense counsel tried to elicit testimony from Kyle Reed that he had cleaned the machine "mid job" with the guard removed and rollers running, he was impeached with a prior inconsistent statement in which he admitted that he never cleaned the machine with the machine on and rollers moving. Tr. 914:3–915:4, 916:25–917:9. Kyle Reed also testified that JMC's rule that guards should be kept in place when the machine is running is a good, common-sense safety rule. Tr. 909:13–23.

JMC's owner made clear that it was Edwards' decision alone to pull the guard back and expose Brock to the pinch point. Tr. 477:9–13. Edwards concocted the "mid-

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

job" method on his own. Tr. 880:5-881:2. Edwards could have left the guard in place and still cleaned the glue on the bottom roller with the machine on. Tr. 509:2–12.

Jeffrey Simonton, Chief Operating Officer of Black Bros. Co., testified on behalf of his company about the operation of the subject machine. LF 812 at 9:1–2; 813 at 14:1–4. Consistent with Jappa's testimony, Simonton testified that Edwards violated the Black Bros. cleaning instructions attached to the machine. LF 824 at 58:20–59:1–20. Simonton explained that, by removing the guard while the machine was running, Edwards affirmatively increased the danger and created a hazard in the workplace that otherwise was not present. LF 824 at 60:5–12, 16. Consistent with Edwards' own testimony, Simonton also explained that if Edwards had not removed the guard, Brock would not have been exposed to the pinch point and, therefore, could not have gotten his thumb crushed in the rollers. LF 825 at 62:15–20.

D. Procedural history.

On January 16, 2015, Brock filed his petition for damages against Mark Edwards and Black Bros. Co. LF 031-36. Edwards passed away on May 27, 2016, and pursuant to R.S.Mo. § 537.021.1, the trial court ordered that Peter Dunne, Defendant *ad litem*, be substituted and named as a party defendant in place of Edwards. LF 400-01. On January 17, 2017, Brock dismissed his claims against Black Bros., with prejudice. LF 415-16.

Trial commenced on April 3, 2017 against Defendant ad litem. LF 677-78. Brock submitted evidence of his physical injuries, intangible damages, and economic damages, which, alone, ranged from $383,310—$980,541. Tr. 418:15–23, 428:16–23, 429:18–23; Ex. 85. After a five-day trial, on April 7, 2017, the jury returned a verdict awarding

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

Brock $1,050,000 in damages. LF 677-78. This amount was reduced by the jury's assessment of 10% of fault on the part of Brock and the $80,000 settlement from Black Bros. *Id.* The trial court entered judgment on the verdict in the amount of $873,000. *Id*. On May 5, 2017, Defendant *ad litem* filed a motion for new trial and JNOV. LF 762. The trial court denied the motions on June 23, 2017. LF 761. The Eastern District Court of Appeals issued a 44-page opinion affirming the judgement and subsequently denied Appellant's motion for rehearing. *See* Appendix at A9.

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

ARGUMENT

I. The trial court did not err in denying Defendant's Motion for Directed Verdict or JNOV because the common law duty analysis it seeks to impose is inapplicable in that this case arises under R.S.Mo. § 287.120.1 (2012) and, regardless, Edwards' affirmative negligent act, which created a danger not otherwise present in the job-specific work environment, was not reasonably foreseeable to employer JMC.

Standard of Review. The Court reviews denial of a motion for a directed verdict or JNOV for "whether there was sufficient evidence" to support the verdict. *Johnson v. Union Pac. R.R.*, 146 S.W.3d 14, 17 (Mo. App. E.D. 2004). "Granting a directed verdict is a drastic action that should be taken only when reasonable persons could not differ on the correct disposition of the case." *Ramsey v. Burlington N. & Santa Fe Ry.*, 130 S.W.3d 646, 651 (Mo. App. E.D. 2004). The Court views the evidence "in the light most favorable to the jury's conclusion" and will reverse "only if there are no probative facts to support the verdict." *Johnson*, 146 S.W.3d at 17. The Court must give Brock "the benefit of all reasonable inferences and disregard[] evidence and inferences that conflict with the verdict." *Giddens v. K.C. So. Ry.*, 29 S.W.3d 813, 818 (Mo. banc 2000).

a. The trial court did not err in denying Defendant's motions because the common law duty analysis Defendant seeks to impose is unnecessary in this case arising under the 2012 version of § 287.120.

Defendant, relying entirely on pre-2012-amendment case law, argues that Brock failed to present a submissible case of common law co-employee duty. However, the common law "reasonable foreseeability" test for co-employee legal duty is unnecessary in this case because in 2012 Missouri's legislature amended the Workers' Compensation

Act immunity provisions to narrow the universe of actionable co-employee negligence cases to only those involving an "affirmative negligent act that purposefully and dangerously caused or increased the risk of injury".

The small subset of negligence cases that meet the new statutory definition will, necessarily, always satisfy the reasonable foreseeability test since, as this Court has recognized, proof that an "affirmative negligent act" was committed by the defendant "***satisfies*** the concern that although there must be an independent duty to the injured co-employee, that duty cannot arise from a mere failure to correct an unsafe condition and must be separate and apart from the employer's non-delegable duty to provide a safe workplace." *Burns v. Smith*, 214 S.W.3d 335 (Mo. 2007) (emphasis added).

Of course, legal duty is always an element of the tort action and remains an issue for the courts in a 2012-amendment co-employee liability case. However, the statute so-narrowly limits the cases of actionable co-employee conduct that the issue of duty is now dramatically simplified (as the issue of legal duty is in most tort claims)[1]. Under the 2012 statute, the issue of co-employee legal duty can be determined by answering: (1) does the claim involve co-employees and (2) is there sufficient evidence to submit a claim to the jury that the defendant's conduct rose to the level of: "an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury". If the answer to both is in the affirmative, then the "reasonable foreseeability" test is

---

[1] For example, in cases involving a car accident the question of legal duty for the trial court typically is simply whether the defendant was driving a motor vehicle. If so, she had a legal duty to act with appropriate care, and the *ad nauseum* litigation over legal duty, as seen in co-employee liability cases from before the 2012 amendment, is avoided.

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

superfluous. To illustrate by syllogism:

(a) A common law co-employee duty always exists for (b) acts not reasonably foreseeable to the employer.

(c) "Affirmative negligent acts"[2] are never (b) reasonably foreseeable to the employer.[3]

Therefore:

(a) A common law co-employee duty always exists for (c) "affirmative negligent acts".

Thus, by its terms, the amended statute alleviates the need to apply a pre-2012 common law duty test, which has posed great difficulties in practical application and rendered terribly inconsistent results. *See e.g. Conner v. Ogletree,* 542 S.W.3d 315, n.1 (Mo. 2018) (recognizing that duty outcomes in common law co-employee cases "remain difficult to reconcile now"); *Id.* at 329-330 (Judge Draper's concurrence collecting cases); *see also Nolen v. Cunningham,* 553 S.W.3d 437, 441-42 (Mo. App. E.D. 2018) (observing the conflicting results in *Conner et al.* and recognizing that: "it may be

---

[2] "Affirmative negligent acts" is used as short hand for the complete statutory standard of care: "an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury", which closely tracks the language of the "something more" doctrine, including as stated in *Burns*. *See also Peters v. Wady Indus*., 489 S.W.3d 784, n. 10 (Mo. 2016) ("[t]he language of this [2012] amendment closely follows Taylor's refinement of the "something more" test").

[3] *Burns,* 214 S.W.3d at 338: "an affirmatively negligent act -- the "something more" -- can best be described as an affirmative act that creates additional danger beyond that normally faced in the job-specific work environment. This description **satisfies** the concern that …that duty … must be separate and apart from the employer's non-delegable duty to provide a safe workplace." (emphasis added).

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

difficult to apply the reasonable foreseeability standard in the way *Conner* instructs and still have the outcome square with the [Supreme] Court's reinterpretations of existing case law").

Alternatively, even if, hypothetically, conduct could satisfy the statutory language of an "affirmative negligent act" and, nonetheless, be reasonably foreseeable to the employer, use of the "reasonable foreseeability" duty test would still be improper. In such a case, the intent of the legislature – to impose liability for acts satisfying the statute's language – would be thwarted by the Court's imposition of the additional "reasonable foreseeability" requirement. Thus, though logically impossible as demonstrated above, the application of the common law reasonable foreseeability test to bar cases that otherwise satisfy the language of § 287.120 would be improper given the legislature's resounding affirmation of co-employee liability under the current statutory standard.

In its recent pre-2012-amendment co-employee liability opinions, this Court repeatedly and conspicuously recognized that the common law reasonable foreseeability analysis is <u>not</u> applicable in post-2012-amendment cases. *See McComb v. Norfus*, 541 S.W.3d 550, n. 4 (Mo. 2018) ("Because of this [2012 amendment], this Court's holding, as in *Peters*, is limited to injuries occurring before the 2012 amendments went into effect"); *see also Conner*, 542 S.W.3d at 321 ("*Parr* and *Peters*, however, look to the scope of that nondelegable duty to define the limits of a common law suit against a co-employee during the brief period (2005 to 2012) when such suits were permitted by Missouri's workers' compensation statutes"); *Id*. at 328 (Judge Draper concurrence) ("…

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

this Court's opinions regarding the application of the nondelegable duty doctrine in the co-employee liability cases handed down today are limited to actions against co-employees for injuries between 2005 and 2012 …"); *Fogerty v. Armstrong*, 541 S.W.3d 544, 549 (Mo. 2018). The only issue in those cases was the existence of legal duty in a co-employee case. Accordingly, the Court's distinction between those cases and post-2012-amendment cases confirms that the former "reasonable foreseeability" analysis is not applicable in the case at bar.

The trial court correctly held that Brock presented a submissible case of breach of the statutory immunity standard by defendant, which is, perforce, not reasonably foreseeable to the employer, and therefore, did not err in denying Defendant's motion for directed verdict or JNOV.

b. In the alternative, even if the pre-2012 "reasonable foreseeability" duty analysis was applicable, Brock established a legal duty because Edwards' affirmative negligent act, which created a danger not otherwise present in the job-specific work environment, was not reasonably foreseeable to JMC.

Under the common law, the determination as to whether a co-employee's "personal duty exists depends on the particular facts and circumstances of each case." *Parr v. Breeden*, 489 S.W.3d 774, 782 (Mo. 2016). "Employers are not insurers of the safety of employees." *Peters,* 489 S.W.3d at 795 (citing *Graczack v. City of St. Louis*, 202 S.W.2d 775, 777 (Mo. 1947)). "Except in the cases in which the employer is itself directing the work in hand, its obligation to protect its employees does not extend to protecting them from the transitory risks which are created by the negligence of a co-

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

employee carrying out the details of that work." *Id*. at 796. And, in the case at bar, there was "no evidence that the employer demanded, instructed, or suggested using Edwards's procedure of removing the safety guard to clean glue off of the rollers mid-operation." *See* Appendix at A9 p. 21-22.

Further, Missouri Courts have consistently and unequivocally found that it is not reasonably foreseeable to an employer that an employee will affirmatively create a hazard not otherwise present in the workplace, and in such cases, a personal common law duty arises. *Burns*, 214 S.W.3d at 338 (co-employee duty exists where defendant commits "an affirmative act that creates additional danger beyond that normally faced in the job-specific work environment"); *Tauchert v. Boatmen's Nat'l Bank,* 849 S.W.2d 573, 574 (Mo. 1993):

> [t]he **creation** of a hazardous condition is not merely a breach of an employer's duty to provide a safe place to work....Such acts constitute a breach of personal duty of care owed to plaintiff.

(emphasis added).

This Court has repeatedly anointed *Marshall v. Kansas City*, 296 S.W.2d 1 (Mo. 1956), as an "exemplary" case of co-employee duty. *Peters,* 489 S.W.3d at 795; *Conner*, 542 S.W.3d at 325. In *Marshall*, the Court held that a co-employee, who injured the plaintiff when he shook a hose while working for the sewer department, owed a personal duty of care because: "[The plaintiff's] injury came about by reason of [the co-employee's] negligent use of the hose and not because it was defective. Likewise, the place of work was not unsafe and the hazard was not brought about by the manner in which the work was being done; the danger came about by reason of the manner in which

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

[the co-employee] handled the hose." Of course, given the nature of its workplace, the sewer department was certainly aware of the tripping danger associated with a hose and could foresee that a hose would be pulled and shook to undo a kink, but a co-employee duty was imposed, nonetheless, because the defendant's use of the hose created an unsafe condition and, as such, that hazard was not reasonably foreseeable to the employer. *Id.*

Similarly, here, the evidence demonstrates that the lamination machine at issue was not defective or unsafe. LF 798 at 114:10–13, 16–19; Tr. 497:25–498:1–4. To the contrary, JMC provided a safe workplace and safe tools, including a machine with a safety guard that completely eliminated the risk of pinch point injuries. *Id.*; LF 818 at 33:17-23. The evidence in the light most favorable to Brock establishes that no one at JMC directed or authorized Edwards to remove the safety guard, but rather it was the company's standard operating procedure to clean the machine when a job was completed and the machine was shut down with its rollers off. Tr. 459:11–20, 466:20–25, 472:24–473:9, 474:2–475:18, 476:21–477:2, 579:3–19; 887:8–23. Moreover, Edwards' inexplicable act was entirely unnecessary, since the moving roller could have simply been cleaned with the safety guard left in place. Tr. 509:2–12. Thus, as in *Marshall*, here "the danger came about by reason of the manner in which [Edwards] handled the [machine]" and "not because it was defective". Edwards' affirmative act created an unnecessary hazard where one did not otherwise exist and, therefore, it was not reasonably foreseeable to JMC.

In *Conner, et al.*, this Court recognized that prior "something more" cases remain authoritative on the common law duty analysis. *McComb*, 541 S.W.3d at 557 n.8 (Mo.

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

2018) ("*Burns*, *Tauchert*, and *Hedglin* would yield the same results" and "[n]othing in this opinion is inconsistent with the outcomes in these previous cases"); *Conner*, 542 S.W.3d at 326 n.8 (Mo. 2018) (applying the foreseeability test in "*Burns*, *Tauchert*, *Marshall*, and *Pavia*, however, yields the same results"). Significantly, each of these "something more" cases confirm that when a co-employee supervisor creates an unsafe condition not otherwise present in the job-specific work environment, such conduct is not reasonably foreseeable to the employer. *See Tauchert*, 849 S.W.2d at 574 ("act of personally arranging the faulty hoist system for the elevator may constitute an affirmative negligent act outside the scope of his responsibility to provide a safe workplace"); *Pavia v. Childs,* 951 S.W.2d 700, 701 (Mo. Ct. App. 1997) (by using a forklift as a ladder, defendant "creat[ed] a hazardous condition beyond the responsibility of the employer to provide a safe workplace"); *Hedglin v. Stahl Specialty Co.*, 903 S.W.2d 922, 927 (Mo. Ct. App. 1995) (defendant "contrary to his obligation to assure [plaintiff] a safe workplace, personally arranged an extremely dangerous scheme to remove a screen or grate from the vat by hanging [plaintiff]" from above).

In the case at bar:

> …Edwards's actions were not reasonably foreseeable because, like the coemployees in *Tauchert*, *Pavia*, *Cain*, and *Marshall* and unlike the co-employees in *Connors*, *Fogerty*, *McComb*, and *Nolen*, Edwards purposefully performed affirmative negligent acts that created an additional danger that would not have been otherwise present in the workplace.

See Appendix at A9 p. 20.

This Court's definition of the "affirmative negligent act" language in *Burns* is particularly instructive. 214 S.W.3d at 336. As in the case at bar, this Court viewed the

evidence in *Burns* and reasonable inferences drawn therefrom in the light most favorable to the judgment holding the co-employee defendant liable. *Id*. at 335. There, the co-employee supervisor (the president of the company) welded a rusted water pressure tank, which exploded "a month or two" later and injured the plaintiff. *Id*. This Court rejected the supervisor's argument that he owed no personal duty to the plaintiff and found that "defendant's conduct constituted an affirmatively negligent act by creating an additional danger beyond that normally faced in his job-specific environment." *Id*. at 340.

This Court dismissed the supervisor's arguments that "it is a common industry practice to place welds over the rusted holes in repairing pressurized water tanks and that defendant had repaired other tanks in that same way" because the plaintiff presented evidence that, under the circumstances, the defendant's act violated workplace safety norms and "defendant intentionally directed the plaintiff to undertake an activity that defendant knew would result in a particularly dangerous event". *Id*. at 339-40.

Here, evidence of Edwards' affirmative negligent act is even more compelling than in *Burns*, particularly because Edwards freely acknowledged and admitted that he should not remove safety guards from running machines, but did so anyway, and directed Brock to clean the exposed moving rollers. LF 791 at 86:4–16, 87:8–13, 88:7–24, 793 at 93:13–21; Tr. 610:11–25. Edwards also did so despite being familiar with warnings on the Black Bros. machine prohibiting the removal of guards while the machine was running. LF 774 at 20:17–23, 778 at 35:18–24, 805 at 144:6–25, 806 at 145:1–4, 147:1–3. And, tragically, Edwards' decision to remove the guard was completely unnecessary, since the roller could have been cleaned the exact same way with the safety guard left in

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

place. Tr. 509:2–12. Thus, Edwards created an unnecessary life-threatening danger in an otherwise safe, employer-provided machine. LF 818 at 33:17-23, 824 at 60:5–16, 62:15–20. The result was not reasonably foreseeable to JMC because Edwards knowingly created an additional danger beyond that normally faced in the job-specific environment:

> [R]emoving a piece of equipment specifically intended to make the machine safer (thereby creating the danger that an employer has actively taken measures to prevent) and directing Brock to clean the rollers of the machine near the unguarded pinch point while the machine is running, is not reasonably foreseeable to an employer. For if these actions, under these circumstances, are reasonably foreseeable to an employer, it is difficult to imagine any act that would not fall within the employer's nondelegable duties … such a conclusion would render § 287.120, RSMo 2012 meaningless.

See Appendix at A9 p. 21.

Similar to the supervisor in *Burns,* here Defendant tried to avoid liability by presenting testimony that it was common practice to clean the machine "mid-job" as was done at the time of Brock's injury. However, there was substantial evidence to the contrary, including from JMC's owner, who confirmed that the company had no reason to anticipate Edwards' affirmative negligent act. *See Burns*, 214 S.W.3d at 335-36 (to the extent there is a conflict in the evidence, "this Court will view the evidence and reasonable inferences drawn therefrom in the light most favorable to the trial court's judgment"). In fact, the overwhelming evidence was that JMC specifically did <u>not</u> foresee or expect Edwards' action:

There is no written JMC rule that outlines or authorizes a "mid-job" clean (Tr. 476:21–477:2; LF 790 at 83:14–19), and JMC's owner Jappa testified that Edwards did not have the authority to modify or violate JMC's written rules (Tr. 481:1–12, 20-25).

Neither Jappa nor anyone from JMC told Edwards to clean the machine "mid-job" like he instructed Brock to do on the date of incident. Tr. 472:24–473:9, 474:2–475:18. To the contrary, JMC's rules and the manufacturer instructions attached to the machine specifically prohibited removing the guard from the running machine. Tr. 486:22–487:1, 8–13; *see* Appendix at A6. Jappa made clear that it was Edwards' decision, and his decision alone, to pull the guard back and expose Brock to the pinch point. Tr. 477:9–13. Edwards concocted the "mid-job" method by himself. Tr. 880:5-881:2.

JMC's internal work records from the months leading up to Brock's injury indicate that the Black Bros. machine was always shut down first and then cleaned up. Tr. 577:22-579:19. Jappa had never seen Edwards perform a mid-job clean where the guard was pulled back and employees cleaned the rollers while the machine was running. Tr. 477:3–8. Likewise, before the incident, Brock had never cleaned the Black Bros. machine "mid-job" while the machine was running. Tr. 606:7–17. Brock never saw anybody else do a "mid-job" clean or clean the bottom roller with the guard pulled back. Tr. 606:21–607:2.

Further, Defendant called two coworkers in his case-in-chief, Aaron Reed and Kyle Reed. Aaron Reed testified that JMC's standard operating procedure and the normal way the machine is cleaned is at the end of the job when the machine is shut down, which was also confirmed by company work/time records. 887:8–11, 17–23. Although defense counsel tried to elicit testimony from Kyle Reed that he had cleaned the machine with the guard removed and rollers running, he was impeached with a prior inconsistent statement

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

in which he admitted that he never cleaned the machine with the machine on and rollers moving. Tr. 914:3–915:4, 916:25–917:9.

Edwards admitted that, if he had not removed the safety guard provided by JMC, Brock would not have been exposed to the pinch point and, therefore, could not have been injured in it. LF 825 at 62:15–20. Thus, the Court of Appeals correctly held that Edwards' action was not reasonably foreseeable but, instead, "created additional danger beyond that normally faced in the job-specific work environment":

> Especially in a manufacturing setting like the one in this case, where JMC provided a presumptively safe machine for its employees to use in their work, we are hardpressed to find that an employer's nondelegable duties extend to the possibility that a supervisory employee – against both logic and an employer's instructions and the machine's warnings – would dangerously modify a machine.

See Appendix at A9 p. 21.

The facts in *Conner*, *McComb*, and *Fogerty*, are drastically different. None of those cases include evidence like the incriminating testimony and admissions of Edwards: that he knowingly removed a safety guard from an otherwise safe machine (LF 774 at 20:17–23, 778 at 35:18–24, 779 at 38:16–40:21); that he was familiar with but knowingly disregarded warnings against removing the safety guard (LF 775 at 22:3–8, 23:4–12, 778 at 35:18–24, 779 at 40:9–21); that his own common sense barred removal of the guard from a running machine (LF 774 at 20:17–23, 778 at 35:18–24); and, that, if he had not removed the safety guard provided by the employer, the plaintiff would not have been exposed to the pinch point danger and, therefore, could not have been injured in it (LF 800 at 121:13–25, 122:9–12, 806 at 147:1–3).

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

In *Conner*, the defendants did not create any hazard at all. Instead, the defendants unintentionally and unknowingly failed to deenergize an electric line, with which the plaintiff later came into contact. 542 S.W.3d at 318. Far from involving an affirmative act <u>creating</u> a hazard, this Court specifically observed that the supervisor defendant "mistakenly believed he had successfully de-energized the line and began working next to it." *Id*. By stark contrast, Edwards <u>created</u> a hazard by removing a guard and <u>knowingly</u> exposed Brock directly to it by instructing him to clean the moving rollers.

For *Conner* to be analogous, the defendant there would have had to intentionally energize an otherwise safe line, in violation of numerous known safety rules and without being directed to do so by his employer, and then direct the plaintiff to work on the line despite being fully aware of the danger. None of those facts are present in *Conner*, and as such, the risk at issue was reasonably foreseeable to the employer and fell within its nondelegable duties.

In *McComb*, where the plaintiff died while driving in unsafe road conditions, this Court observed: "[u]nlike the dangerous condition at issue in *Marshall*, the dangerous condition in this case – the slippery road conditions – was not created by Co-employees." 541 S.W.3d at 557. Again, by contrast, the unsafe condition that injured Brock was not created by either the employer's equipment or by any other external forces, like the weather. The uncontroverted evidence was that but-for Edwards' removing the guard, Brock could not have been injured in the pinch point. LF 806 at 147:1–3, 825 at 62:15–20; Tr. 471:22–472:6. Thus, Edwards' knowing decision to <u>create</u> a hazard in the workplace, unlike the co-employees in *McComb*, was not reasonably foreseeable to his

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

employer.

In *Fogerty*, no co-employee duty existed where the defendant negligently operated a front loader while installing a fountain. 541 S.W.3d at 548. "<u>[B]ecause Employer failed to provide a safe manner and means</u> to install the fountain, both Meyer's negligence in deciding how to do so and Fogerty's resulting injury were reasonably foreseeable to Employer". *Id*. (emphasis added). Here, by contrast, JMC <u>did</u> provide a safe manner and means to perform the work. JMC instituted rules that required that the safety guard be left in place and provided a safe, working machine, that had detailed cleaning instructions affixed thereto, which likewise prohibited the removal of a guard while the machine was running. LF 779 at 38:16–40:21, 798 at 114:10–13, 16–19, 800 at 121:13–25, 805 at 144:6–25, 806 at 145:1–4. Accordingly, it was Edwards' unilateral, affirmative negligent act that created the danger that injured Brock, not any unsafe condition of the employer's workplace.

Obviously, as acknowledged in the holding of *Fogerty*, it is reasonably foreseeable to an employer that when it institutes clear safety rules and directives, those will be followed by knowledgeable employees, and it is not ***<u>reasonably</u>*** foreseeable that an employee like Edwards will intentionally violate known safety rules to create an unnecessary danger that is otherwise not present in the workplace:

> Unlike the defendant-co-employees and employers in these [*Conner*, *et al.*] cases, Edwards did not solely fail to follow JMC's instructions, nor did JMC fail to provide sufficient equipment, training, or procedures required to keep the workplace safe. While Edwards did violate rules created by JMC that prohibited the removal of safety guards from machines while they were in operation, Edwards's actions also affirmatively created the hazardous condition that resulted in Brock's injury. JMC provided the laminating

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

> machine with the safety guard in place and with rules and instructions prohibiting removal of the guard while the machine was in operation. It has repeatedly been held that a co-employee's creation of a hazard or danger does not fall within the employer's duty to provide a safe workplace.

See Appendix at A9 p. 19.

In *Nolen*, 553 S.W.3d at 438, this Court entrusted application of its newly-defined reasonable foreseeability test to the Eastern District Court, which has since affirmed the judgement at bar applying that same test. In *Nolen*, the plaintiff sought to impose a co-employee common law duty by arguing that the defendants improperly "permit[ted] Plaintiff to mop the bleachers without first installing guardrails." *Id*. The Eastern District rejected that argument and found that the plaintiff's claims of negligence fell within the employer's non-delegable duties. *Id* at 442. Significantly, in complete contrast to the case at bar, the plaintiff in *Nolen* testified that he regularly mopped the bleachers without guardrails and did **not** dispute that "[i]t was the ordinary procedure to mop without guardrails when there were time constraints". *Id.* at 438-439.

Nolen illustrates the distinction – recognized in pre-2012 "something more" cases – between a generally unsafe jobsite and a co-employee's independent, affirmative creation of a hazard not otherwise present in the workplace. In *Nolen*, the defendants did not remove employer-installed safety guardrails while the plaintiff was actively mopping the bleachers and then instruct him to dangerously hang over on the edge of the bleachers to ring out his mop. That is what Edwards did – removed an employer-provided guard while the machine was on and instructed Brock to clean the exposed pinch point danger. Edwards created an unnecessary hazard, where the defendants in *Nolen* simply allowed

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

an already-existing workplace danger to persist, much like the defendant in *Peters*, 489 S.W.3d at 784. Moreover, unlike *Nolen*, here Defendant's own witnesses admitted that the employer's standard operating procedure was to clean the Black Bros. machine after it was shut down and the rollers were off. *See* Tr. 887:8-23. Thus, Edwards' conduct, unlike that at issue in *Nolen*, was not reasonably foreseeable to the employer because it unnecessarily and improperly created a hazard not otherwise present in the workplace.

Edwards created a workplace hazard in direct violation of applicable safety rules, machine warnings, and his own common sense. His conduct was not directed by his employer but, to the contrary, was prohibited by JMC. Such an affirmative negligent act is not reasonably foreseeable to the employer and does not fall within the employer's non-delegable duties. Accordingly, even if a pre-2012 common law duty analysis is applied, Edwards owed a legal duty, and the trial court did not err in denying Defendant's Motions for Directed Verdict or JNOV.

II. The trial court did not err in denying Defendant's Motion for Directed Verdict or JNOV because Brock made a submissible case of breach in that Edwards committed an affirmative negligent act in removing a safety guard and instructing Brock to clean high-speed rollers, thereby knowingly creating a life-threatening danger that otherwise did not exist in the job-specific workplace.

Standard of Review. *See* Point I.

a. Edwards knowingly created an unnecessary danger, not otherwise present in the job-specific environment, by removing a safety guard from a running industrial machine and directing Brock to clean its exposed high-speed rollers, in violation of company rules, the machine's warnings, and Edwards' own common

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

sense.

R.S.Mo. § 287.120.1 (2012) permits co-employee liability for "an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury". At trial, that language was given to the jury, verbatim, in the verdict director against Defendant (Appendix at A8), and Defendant **agreed** to the definitional jury instruction of the standard of care (Appendix at A7), which was taken directly from *Burns,* 214 S.W.3d at 338:

> An 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.

See also Peters, 489 S.W.3d at 798 n.10 ("[t]he language of this [2012] amendment closely follows *Taylor's* refinement of the "something more" test"); Tr. 948:11-950:17.[4]

Clearly there was sufficient evidence, as outlined above in Point I, Part b, from which a jury could find that such an act had been committed. In fact, Brock presented direct, uncontroverted evidence that "Edwards, by removing that guard while the machine was running, [] created a risk hazard in the workplace that otherwise should not have been present" and thereby "affirmatively increased the danger in the workplace". LF 824 at 60:5–12, 16.

In a thinly-veiled attempt to undermine the severity and life-threatening danger of

---

[4] Of course, it was Defendant's burden to plead and prove the affirmative defense of statutory immunity under R.S.Mo. § 287.120.1. *See Allen v. Titan Propane*, LLC, 484 S.W.3d 902, 905 (Mo. Ct. App. 2016) (statutory immunity is an affirmative defense which must be pled and proven by the defendant). Regardless, the jury was given the appropriate, agreed-upon statutory standard of care language and found that it was satisfied.

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

Edwards' actions, Defendant now attempts to recast his removal of a safety guard from a running industrial machine as the seemingly innocent "[l]ifting up [of] the grate on one side [to] provide[] access…". *See* Appellant's Substitute Brief at 7. Yet, Edwards' own testimony confirms that he understood the importance of the safety guard at issue and that he affirmatively created a danger in removing it. *See* LF 779 at 40:14-21 (Edwards admits that he removed a "guard or safety device" and Brock was required to place himself in the point of operation/hazardous area); LF 793 at 93:13-21 (Edwards admits that "he removed or altered a safety device" and then instructed Brock to clean the moving rollers); LF 808 at 154:18-23 (Edwards admits that if he "hadn't pulled the safety guard away" then the pinch point that injured Brock would not have been exposed). It would have been improper for the trial court to have taken the issue of breach away from the fact-finder under these circumstances. And, the jury must have found that Edwards "created additional danger beyond that normally faced in the job-specific work environment" since it found in Brock's favor.

Defendant's Point II relies principally on *Nowlin ex rel. Carter v. Nichols*, 163 S.W.3d 575, 577 (Mo. App. W.D. 2005), where the court found no co-employee duty existed arising from the negligent operation of a bulldozer. However, *Nowlin* only further illustrates the distinction between a generally unsafe workplace and a specific, affirmative negligent act that creates a new hazard directed at a co-worker. In *Nowlin*, the defendant: (1) did not direct any action at the plaintiff (he simply parked a piece of equipment in the plaintiff's proximity) and (2) did not create a new hazard where one did not already exist (there was already a risk that the plaintiff could be hit by moving

bulldozers given his location standing next to them). *Id.* By contrast, Edwards (1) directed his act specifically at Brock and no one else – he removed a guard, standing right next to Brock and told Brock to clean the exposed moving rollers – and (2) he created a danger which otherwise was not present – exposure to the life-threatening pinch point.

For the facts in *Nowlin* to be analogous with those at bar, the defendant would have had to create a danger – *e.g.* disable the brakes on the bulldozer or remove it's dead-man safety switch – such that it rolled from the location where it was parked when it otherwise could not have done so. That is what Edwards did – altered otherwise safe equipment to create a new hazard – and that is why Edwards' conduct rises to the level of an affirmative negligent act where that of the defendant in *Nowlin* did not. *See also Quinn v. Clayco Constr. Co.*, 111 S.W.3d 428, 433 (Mo. E.D. 2003) ("plaintiffs did not allege and there is no evidence that [defendants] engaged in an affirmative act directed at [plaintiff] that increased the risk of injury").

b. Brock was not required to prove intent to injure/endanger to make a submissible case of co-employee liability.

Despite not arguing any instructional error as to the verdict director or its consented standard of care definition (Tr. 948:11-950:17), Defendant nonetheless now seeks to impose additional requirements upon the element of breach, including a showing of a mental state of mind of Edwards to injure/endanger Brock. *See* Appellant's Substitute Brief at p. 33. However, to hold, as Defendant urges, that Brock was required to prove Edwards' state of mind or *mens rea* would violate: (a) the plain and explicit language of § 287.120.1; (b) established concepts of tort law; and, (c) decades of

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

"something more" case law upon which the current statutory language is based which, without exception, provides for a negligence cause of action.

i. The language of § 287.120.1 explicitly acknowledges a negligence cause of action. Defendant's argument is belied by the plain language of the statute, which unequivocally contemplates a negligence-based cause of action in requiring an "affirmative **negligent** act". R.S.Mo. § 287.120.1 (emphasis added). The full and logical effect of the statutory language is that Edwards is liable for his purposeful act (*i.e.* done on purpose, not accidentally) that caused or increased the risk of injury. To require that Edwards possess an intent to injure/endanger would ignore the very language of the statute by rendering the word "negligent" meaningless, in violation of tenets of statutory construction. *Macon Cty. Emergency Servs. Bd. v. Macon Cty. Comm'n*, 485 S.W.3d 353, 356 (Mo. banc 2016) (this Court will not insert new words into statutes and will presume that "each word, clause, sentence, and section of a statute" will be given meaning and that the legislature did not insert superfluous language"); *Anderson v. Ken Kauffman & Sons Excavating*, L.L.C., 248 S.W.3d 101, 108 (Mo. Ct. App. 2008) ("It is presumed that the legislature did not insert idle verbiage or superfluous language in a statute").

ii. To require a showing of intent would also deviate from established tort law principles. "The absence of malice is not a defense to actual or compensatory damages." *Vanneman v. W. T. Grant Co.*, 351 S.W.2d 729, 730 (Mo. 1961). Not even in a claim for an intentional tort is evidence of intent to harm required. *Id*. (reversing trial court based upon battery instruction requiring finding of malice). In fact, evidence of intent to harm or "actual malice" is not even required to make a submissible case for

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

punitive damages. *See e.g. Smith v. Brown & Williamson Tobacco Corp.,* No. WD65542, 2007 Mo. App. LEXIS 1144, at *168-69 (Ct. App. July 31, 2007) (punitive damages submissible where "although lacking specific intent to injure, the person's conduct or failure to act will naturally or probably result in injury") (emphasis added); M.A.I. 10.02.

Clearly, given its use of the word "negligent", the legislature did not intend to alter the common law co-employee negligence case to create a new, unknown-to-the-law cause of action requiring a showing of intent to harm/endanger for the recovery of compensatory damages. If the legislature had so-desired, it would have certainly used appropriate legal terminology reflecting that goal, such as "evil motive" or "actual malice", which the law in Missouri for decades has recognized as meaning the intent to harm. *See Burnett v. Griffith*, 769 S.W.2d 780, 786 (Mo. 1989) (recognizing degrees of malice).

Ironically, to hold that a co-employee liability plaintiff must show intent to harm/endanger as an element of his compensatory cause of action would impose a higher burden than the plaintiff, in the same case, would have to obtain punitive damages. Clearly, the legislature did not intend such an illogical result.

iii. Moreover, the co-employee law upon which the statute is based has never required a showing that the defendant hurt the plaintiff "on purpose" or had the intent to injure/endanger the plaintiff. The 2012 amendment to R.S.Mo. § 287.120.1 was undeniably meant to codify the "something more" standard, which had been

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

unintentionally eliminated in 2005.[5] The "affirmative negligent act" and "purposefully and dangerously" language in the amendment was obviously lifted, verbatim, from the litany of pre-2005 cases imposing a "something more" standard of care. *See e.g. Burns*, 214 S.W.3d at 338.

As such, the "something more" line of cases remains instructive on the definition of the statutory language. *Peters*, 489 S.W.3d at 798 n.10 ("[t]he language of this [2012] amendment closely follows *Taylor's* refinement of the "something more" test"). As those cases clearly illustrate, there has never been a need for a co-employee plaintiff to show that the defendant intended harm. To the contrary, this Court has rejected the idea that a submissible co-employee liability claim requires proof of harmful intent: "the notion of an 'affirmatively negligent act' certainly includes the commission of an intentional tort" but is not so limited and "can best be described as an affirmative act that creates additional danger beyond that normally faced in the job-specific work environment". *Burns*, 214 S.W.3d at 338; *see also e.g. Tauchert*, 849 S.W.2d at 574; *Murry v. Mercantile Bank, N.A.,* 34 S.W.3d 193, 197 (Mo. Ct. App. 2000) (supervisor ordered plaintiff to help move a 5,000 lbs. safe); *Pavia*, 951 S.W.2d at 701; *Workman v. Vader*, 854 S.W.2d 560, 564 (Mo. Ct. App. 1993) ("defendant personally had thrown packing debris on the floor together with a cardboard box atop the debris and thereafter failed to

[5] *See* HB 1540 Committee Comments, retrieved March 23, 2018, at: *https://house.mo.gov/billtracking/bills121/sumpdf/HB1540C.pdf* (explicitly recognizing legislature's intent to re-institute the "something more" standard of care).

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

remove it or warn of its presence"); *Hedglin*, 903 S.W.2d at 927; *Marshall*, 296 S.W.2d at 1.

Defendant fails to provide a single citation to a "something more" case requiring that a plaintiff prove malice or intent to harm/endanger to make a submissible case. Instead, in support of its novel approach and complete departure from decades of co-employee doctrine, Defendant cites a case interpreting Missouri's Sunshine Law. *See Laut v. City of Arnold*, 491 S.W. 3d 191, 199 (Mo. 2016). Clearly, *Laut* has nothing to do with co-employee liability and, as *Laut* itself recognizes, the case does not provide the conclusive legal definition for every use of the word "purposeful". *Id*. at n. 5 ("The Sunshine Law's definition of "knowing", therefore, varies from the definition of that word used in Missouri criminal statutes…"). Given the wording of the statute at issue in this case (R.S.Mo. § 287.120) and the context of its historical development, the definition given to the word "purposeful" in *Laut* for the Missouri Sunshine Law is inapplicable here.

Accordingly, in light of the explicit language of § 287.120.1, long-standing tort law principles, and the historical doctrine of co-employee liability, Edwards' liability was not contingent upon proof that he intentionally injured/endangered Brock, and the trial court properly denied Defendant's motion for directed verdict and for JNOV.

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

c. Even if Brock were required to prove intent, he overwhelmingly satisfied that burden because Edwards admitted that he knew he should not remove the guard but knowingly did so anyway.

Edwards himself admitted that: a supervisor should not remove a guard from a running machine (LF 774 at 20:17–23); he was aware of warnings on the Black Bros. machine prohibiting the removal of guards while the machine was running (LF 805 at 144:6–25, 806 at 145:1–4); with the machine on, he pulled the safety guard out of its protective position and instructed Brock to clean glue off the moving rollers (LF 791 at 86:4–16, 87:8–13, 88:7–14, 793 at 93:13–15, 19–21; Tr. 610:11–25, 614:14–20); and, Brock *could not* have been injured in the pinch point if the guard had not been removed (LF 806 at 147:1–3). Thus, to the extent it was required, there was clearly sufficient evidence from which a jury could find that Edwards' possessed intent to "cause[] or increase[] … the risk of injury" in knowingly removing safety equipment from a running industrial machine. LF 779 at 37:23–38:1; R.S.Mo. 287.120.1 (2012). Accordingly, the trial court properly denied Defendant's motion for directed verdict and for JNOV.

III. The trial court did not abuse its discretion in refusing Defendant's Instruction D because legal duty is purely a question of law for the court, the proffered non-MAI instruction was unnecessary, and the instructions given, including on causation and standard of care, permitted Defendant to argue that it was his employer's actions that caused Brock's injury.

Standard of Review. Refusal of a non-MAI instruction is reviewed for abuse of discretion. *McCullough v. Commerce Bank*, 349 S.W.3d 389, 396-97 (Mo. Ct. App. 2011). "A trial court will be found to have abused its discretion when a ruling is clearly

against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration [and] [e]ven then, [t]his Court will not reverse a verdict due to instructional error, including the refusal to give an instruction, unless the error is prejudicial, materially affecting the merits of the action." *Id*. at 396-97 (internal citations omitted). Moreover, to prove error in the refusal to give a non-MAI instruction, it is the Appellant's burden to prove that the instructions submitted "misstate the law so that a non-MAI instruction is *required*." *Templemire v. W&M Welding, Inc*, No. WD74681, 2012 Mo. App. LEXIS 1639, at *16-17 (Ct. App. Dec. 26, 2012) (emphasis original).

a. The Court did not abuse its discretion in refusing Defendant's Non-MAI Instruction D because the issue of duty is exclusively a matter of law for the Court.

In *Parr*, this Court rejected the same argument made by Defendant – that the jury should be instructed on the issue of non-delegable duties: "It is well-established that the existence of a duty is purely a question of law." 489 S.W.3d at 782; *see also Peters*, 489 S.W.3d at n.8 (rejecting and overruling *Leeper*'s holding that "whether a co-employee owed a duty is dependent on resolution of whether the injury was caused by the employer's breach of a nondelegable duty"). That ruling was reaffirmed in *McComb*, 541 S.W.3d at 556 ("It would be illogical to say a court may determine the employer had a nondelegable duty, but then allow the jury to decide whether the co-employee's conduct fell within that duty").

Defendant insists that the jury should have been given a non-MAI instruction providing an abstract statement of a non-party's (JMC) common law duties. This Court

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

in *Parr* and *McComb* rejected this precise argument. Legal duty was an issue for the trial court, only, and the court properly refused Defendant's Instruction D.

b. Non-MAI Instruction D was unnecessary because the instructions given correctly stated the law, and Defendant has shown no prejudice because he was permitted to argue that JMC was responsible for Brock's injuries within the instructions given.

Defendant ignores the fact that, in order to find in Brock's favor, the jury was required to find that Edwards engaged in an affirmative negligent act, and an affirmative negligent act never falls within the employer's duties. *See* Point I, Part a, *supra*. Thus, the proffered non-MAI instruction was unnecessary and superfluous to the instructions given, including the agreed-upon standard of care instruction.

Likewise, there is no merit to Defendant's argument that, without the proffered instruction, he was robbed of the ability to argue that Brock's injury was not his fault but was, instead, caused by JMC. To the contrary, within the frameworks of causation and breach, Defendant had ample opportunity to point the finger at JMC's conduct as the true cause of Brock's injury. In fact, Defendant did, throughout the case, make precisely that argument. *See e.g.* Tr. 251:1-257:2 (*voir dire*: "…anybody here who … might not like something that JMC the company did or its practices and somehow hold that against my client, hold that against the actions of Mark Edwards and somehow blame him…"); Tr. 1010:2-1011:18 (closing argument: "Here. It's instruction no. 8. Okay, an affirmative negligent act … He's not responsible for what the employer does. If you think that

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

something that JMC is not a safe practice, that doesn't mean you should return a verdict against Mark. JMC isn't being sued here. It's Mark that's being sued. …")

Under the agreed-upon standard of care definition ("created additional danger beyond that normally faced in the job-specific work environment"), the jury was permitted to find – and Defendant vehemently argued – that Edwards did not create a hazard beyond that normally faced in the job-specific work environment because the danger was common at JMC and/or the employer's responsibility. If the jury had accepted that contention, Defendant would not have been found liable. Thus, the jury was given ample opportunity under the given instructions to distinguish between the conduct of JMC and Edwards.

Notably, Defendant does not argue any error arising from the given verdict director (Appendix at A8) or the affirmative negligent act standard of care instruction (Appendix at A7), to which it consented (Tr. 948:11-950:17). Defendant does not even attempt to argue that the instructions given "misstate[d] the law so that a non-MAI instruction [was] *required.*" *Templemire*, 2012 Mo. App. LEXIS at *16-17. Accordingly, the trial court did not abuse its wide discretion in rejecting Defendant's Instruction D.

IV. The trial court did not abuse its discretion in permitting evidence of the applicable OSHA machine guard regulation because it was relevant to the standard of care and was otherwise not prejudicial because it was cumulative of other admitted evidence.

Standard of Review. This court gives "great deference to the trial court's evidentiary rulings and will reverse the trial court's decision on the admission of evidence

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

only if the court clearly abused its discretion." *Williams v Trans States Airlines, Inc.*, 281 S.W.3d 854, 872 (Mo. App. E.D. 2009). When reviewing for an abuse of discretion, this Court presumes the trial court's ruling is correct and reverses "only when the ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Id.* Even in the event of an abuse of discretion, the Court can reverse "only if the prejudice resulting from the improper admission of evidence is outcome-determinative." *Id.*

a. The OSHA regulation was relevant to standard of care and breach.

Defendant miscomprehends the relevance of the applicable OSHA regulation, which simply mirrors JMC's safety rules and the machine's cleaning instructions, requiring that "the point of operation of a machine whose operation exposes an employee to injury shall be guarded". 29 C.F.R. 1910.212. Evidence of that regulation, which occupied a snippet of the weeklong trial, was relevant to establish that JMC provided a safe, regulation-compliant machine, and that the danger that harmed Brock was, in fact, created by Edwards' "affirmative negligent act" in removing the safety guard.

This Court has held that "regulations offered as evidence of the standard of care owed by a party are competent evidence relevant to the question of negligence." *Giddens*, 29 S.W.3d at 821 (no error in permitting plaintiff's counsel to read and display to the jury OSHA regulations). Such regulations "promulgated pursuant to federal statutes may be judicially noticed and considered as evidence." *Id.* "A trial court may permit pertinent rules of this type to be read into evidence and a violation of the substance of pertinent

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

rules may be hypothesized as evidence supporting a jury finding of negligence." *Id.* (citation omitted); *see also Host v. BNSF Ry. Co.*, 460 S.W.3d 87, 109-110 (Mo. App. 2015) (not error to admit federal regulation or to permit a copy of the regulation to be viewed by the jury during deliberations).

Similar to *Giddens* and *Host*, Brock presented sufficient evidence on the relevance and applicability of the regulation at issue. JMC President Jappa testified that the OSHA regulation is a JMC workplace rule and a "common sense" rule. Tr. 495:11–21. He also testified that the OSHA regulation was consistent with both the machine's cleaning instructions and JMC's written safety rules. Tr. 496:2–7. Further, Jappa testified that no JMC supervisor is permitted to violate this OSHA regulation. Tr. 493:24–494:1.

Because the evidence showed that the OSHA regulation was applicable to the workplace, the regulation was relevant to the question of whether Edwards engaged in an "affirmative negligent act" in altering the machine. *Giddens*, 29 S.W.3d at 821. The OSHA regulation, particularly when combined with JMC's safety rules and the machine's cleaning instructions, was also relevant to refute Jappa's testimony that it was common to clean the machine without the safety guard in place.

Defendant's reliance on *Parr*, 489 S.W.3d 774, is confused. This Court in *Parr* addressed federal motor carrier regulations solely in the context of legal duty and held that such a regulation cannot, in-and-of-itself, create a personal common law co-employee duty. *Id*. In stark contrast to *Parr*, Brock did not use the OSHA regulation as evidence to impose a duty on Edwards. Rather, the regulation was relevant to the jury's determination of breach. Defendant fails to recognize that the court in *Parr*, relying on

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

Giddens, 29 S.W.3d at 821, confirmed that federal regulations may be admitted as evidence on the issue of <u>*breach*</u>. *Id*. at 780-781.

b. Defendant's claim of error should also be denied because he cannot prove any prejudice since the OSHA regulation was clearly cumulative of other properly admitted evidence.

The jury heard extensive evidence, without objection and from both parties, of JMC's internal written rules and the cleaning instructions attached to the machine. *See Moore v. Ford Motor Co.,* 332 S.W.3d 749, 768-69 (Mo. 2011) ("A party cannot be prejudiced by the admission of allegedly inadmissible evidence if the challenged evidence is merely cumulative to other evidence admitted without objection."); *Burrows v. Union Pacific Railroad Co.*, 218 S.W.3d 527, 537-38 (Mo. App. E.D. 2007). Jappa confirmed that the OSHA regulation mirrored the JMC rules and cleaning instructions. Tr. 496:2–7; Indeed, there is nothing in the OSHA regulation that was not already properly admitted into evidence, including from Edwards' own testimony. Edwards, himself, testified that a supervisor should not remove safety guards from an active machine. LF 774 at 20:17–23. In fact, Edwards admitted that Brock could not have been injured if Edwards had followed (like the OSHA regulation) JMC's written rules and the cleaning instructions. LF 806 at 147:1–3. "A complaining party is not entitled to assert prejudice if the challenged evidence is cumulative to other related admitted evidence." *Saint Louis Univ. v. Geary*, 321 S.W.3d 282, 292 (Mo. banc 2009). Evidence is cumulative if it reiterates the same point as other admitted evidence. *Id.* Accordingly, Defendant cannot show any prejudice from the admission of the OSHA regulation, and

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

Defendant's claim of error should be rejected.

V. The trial court did not abuse its discretion in overruling Defendant's objections to the testimony of Brock's economic expert because there was ample evidence to support her calculations, and Defendant's criticisms go to the weight, not the admissibility, of her testimony.

Standard of Review. *See* Point IV.

Contrary to Defendant's argument, Dr. Rebecca Summary's opinions and calculations (set forth in Ex. 85) were stated to a reasonable degree of professional economic certainty. Tr. 773:21–25. The undisputed medical evidence was that Brock is disabled from performing the same type of work he was doing at the time he was injured. LF 804 at 140:7-8; Tr. 428:16–23. Thus, there was substantial evidentiary support for Dr. Summary's testimony and methodology for calculating Brock's economic losses, including Brock's lost earning capacity.

Dr. Summary's calculations were particularly appropriate given Edwards' binding testimony, as corporate representative on behalf of JMC, about Brock's pre-injury employability. Tr. 772:19–773:20. Significantly, the parties entered a stipulation and told the jury that Edwards was designated by JMC under procedural rules to testify on behalf of JMC regarding certain deposition topics. Tr. 451:11–25. Edwards testified that he understood that he was testifying on behalf of JMC regarding Brock's employment at JMC. LF 800 at 122:22–25.

On behalf of JMC, Edwards testified that Brock was a good, hardworking employee, who demonstrated safety on the job, was willing to do what was asked of him, and met all company guidelines. LF 801 at 126:13–14, 127:14-24. JMC testified through

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

Edwards that Brock would have still been working for JMC had he not been injured. LF 802 at 129:12–14, 18-21. Edwards told Brock before the injury incident that Edwards would recommend that Brock be hired by JMC, as it is not uncommon for JMC to look to their better temp employees as a source of full-time regular duty. LF 802 at 131:11–21. At no time did JMC tell Patriot Personnel that it was dissatisfied with Brock. LF 801 at 128:22–25. It was JMC's intention to hire Brock as a full-time regular employee, JMC would have hired him, and it was JMC's intention to have Brock to continue to work on the lamination line. LF 802 at 129:22–24, 130:3-11, 15.

Contrary to Defendant's claim, Jappa's after-the-fact opinion about Brock's employability does not erase Edwards' binding testimony on behalf of the company. *State ex rel. Plank v. Koehr*, 831 S.W.2d 926, 929 (Mo. 1992) ("One purpose of Rule 57.03(b)(4) is to permit a party to take the deposition of an opposing corporation's representative at a time when the party taking the deposition knows that the statements made by the witness on the identified topics will be admissible against and binding on the corporate party."); *see also Payne v. Cornhusker Motor Lines, Inc.*, 177 S.W.3d 820, 838, (Mo. App. E.D. 2005) (holding that designated company representative's deposition testimony constituted admissions on behalf of company, regardless of whether defendant tried to claim that the questions asked of the corporate representative were beyond the scope of his knowledge and understanding). In fact, even Jappa testified that JMC never had any intention of firing Brock before he was injured. Tr. 511:6–9. Thus, Edwards' testimony on behalf of JMC, combined with Jappa's testimony, provides ample evidentiary support for Dr. Summary's opinions as to Brock's lost earning capacity.

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

Likewise, Brock himself testified that, before his injury, he saw his job at JMC as permanent and intended to make it his career. Tr. 599:10–25; 600:1–8.

In *Anderson v. Burlington N.R. Co.*, 700 S.W.2d 469, 476-77 (Mo. App. E.D. 1985), the defendant argued that the trial court erred in the admission of the economic expert's testimony regarding plaintiff's future wage loss because the calculations were based on speculative assumptions. *Id.* The appeals court rejected defendant's arguments and held that "[i]nevitably there is a degree of speculation to the determination of a fairly approximated present-value award compensating plaintiff for what he would have earned but for his injury, but we do not find such speculation, when based upon the use of facts in reasonable calculations, to be so purely conjectural as to improperly influence the jury's verdict as to damages." 700 S.W.2d at 477 (citing *Sampson v. Missouri Pacific Railroad Co., 560* S.W.2d 573, 589 (Mo. banc 1978)). Thus, "the relative weakness or strength of the factual underpinning of the expert's opinion goes to the weight and credibility, rather than admissibility." *Id.* (emphasis added).

Likewise, Defendant's criticisms of the bases of Dr. Summary's conclusions, including its claim that Brock would not have continued to work for JMC, go to the weight, not the admissibility, of her testimony. *See also Elliott v. State*, 215 S.W.3d 88, 95 (Mo. banc 2007); *Doe v. McFarlane*, 207 S.W.3d 52, 65 (Mo. App. E.D. 2006) ("As a rule, questions as to the sources and bases of the expert's opinion affect the weight, rather than the admissibility, of the opinion, and are properly left to the jury").

Defendant's reliance on *Haley v. Byers Transportation Co.,* 414 S.W.2d 777 (Mo. 1967) is unavailing. In *Haley*, the plaintiff did not even have an economic expert. Rather,

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

the plaintiff (an Airman) attempted to have an employee in the finance department at the Air Force Base testify regarding "trends" in Air Force pay as a basis for future wage loss. *Id.* at 781. The court excluded this testimony as speculative because the witness "knew nothing of plaintiff or of plaintiff's proficiency or service, nor had he brought any of plaintiff's records." *Id*; *see also Robinson v. Empiregas, Inc.* 906 S.W.2d 829, 842 (Mo. App. S.D. 1995) (overruling objection based on *Haley* and finding that: "the law requires only that the evidence, with such certainty as it permits, lay a foundation to enable the jury to make a fair and reasonable estimate") (citation omitted).

Unlike *Haley*, the jury in this case heard Edwards' binding testimony on behalf of JMC, Jappa's testimony, Brock's testimony reflecting his desire to have continued working at JMC but-for his injury, and the testimony of Brock's well-qualified economic expert, Dr. Summary, who is Professor of Economics and Chairperson of the Department of Economics and Finance at Southeast Missouri State University. Tr. 753:23–754:3. In contrast to the witness in *Haley*, who did not have any records of the plaintiff or foundational support, Dr. Summary reviewed and relied on numerous documents, including Brock's W-2s, payroll records from Patriot Personnel showing Brock's earnings, W-2s for Brock's coworkers at JMC who were working the lamination line, and information produced by JMC showing the annual cost of fringe benefits, including health insurance. Tr. 758:25–759:23, 763:8–12.

Moreover, Dr. Summary explicitly calculated Brock's lost <u>capacity to earn</u>, not his lost wages as was attempted in *Haley*. Missouri law makes clear that the measure of lost earning capacity is not necessarily limited to what Brock had earned from the same

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

employer or job at the time of his injury. *See Mickey v. BNSF Ry. Co.*, 437 S.W.3d 207, 214 (Mo. 2014) ("While lost earning capacity most often is shown by evidence of what the plaintiff had earned and was reasonably likely to earn at the job he had at the time of the injury, ***it need not be so limited***, for the plaintiff is not suing for lost back or front pay, or for 'time lost,' but for the loss of the capacity to earn.'") (emphasis added). Dr. Summary understood Brock was working as a temp employee at the time he was injured. Tr. 772:15–18. Consistent with Missouri law, she explained that, in calculating Brock's lost earning capacity based upon principles of economics, it is not necessarily limited to the exact job or precise amount of money that Brock would have been earning at the time he was injured. Tr. 758:6–18, 781:10–17. Dr. Summary testified that the assumptions she was asked to make, including that Brock would have remained in the same or similar occupation but for his injury, are customary in the field of forensic economics. Tr. 760:16–21. Therefore, based on the record evidence, combined with her education, training, and vast experience, Dr. Summary's testimony was admissible.

Defendant erroneously suggests that Dr. Summary did not review evidence of Brock's actual pay by Patriot Personnel and what that would have been but-for his injury. Appellant's Substitute Brief at p. 48. To the contrary, Dr. Summary testified that her review of the Patriot Personnel records showed Brock was on pace to make $25,000 in 2013, compared to the JMC coworker earnings for 2013 showing an average of $26,717. Tr. 763:24–764:13. For Brock's lost earning capacity, Dr. Summary used the W2s of JMC coworkers on the lamination line and did calculations based on (i) the average co-worker earnings, and (ii) the highest wage earner. Tr. 765:17–766:2. Given the nominal

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

difference between the Patriot Personnel and JMC records (which Defendant explored on cross-examination), combined with Edwards' testimony, there was ample evidentiary support for Dr. Summary's calculations.

Defendant also contends that he suffered prejudice because Dr. Summary's chart of calculations (Ex. 85) was shown to the jurors during her testimony and requested by the jury during deliberations. Appellant's Substitute Brief at p. 51. Dr. Summary testified that the chart would help explain her calculations to the jury. Tr. 761:4–10. Tellingly, Defendant did not object to its reference during closing argument or at the time it was requested during jury deliberations. Defendant cannot prove prejudice since the chart merely contained a representation of Dr. Summary's calculations, to which she testified at length and, therefore was cumulative of other admitted evidence. *Moore,* 332 S.W.3d at 768-69. Further, Defendant's failure to object to the jury's use during deliberations (Tr. 1030-31), waives any such argument on appeal.

VI. The trial court did not abuse its discretion in admitting evidence of non-party JMC's installation of a switch on the subject safety guard after Brock's injury because it was not a "subsequent remedial measure" and was also independently admissible to impeach and rebut Defendant's proffered testimony.

Standard of Review. *See* Point IV.

a. Installation of the switch was not a subsequent remedial measure by a party.

Defendant's claim of error should be rejected, because as made clear in *Emerson v. Garvin Group, LLC*, 399 S.W.3d 42 (Mo. App. E.D. 2013), the rule precluding evidence of subsequent remedial measures does not apply when, as here, those actions

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

are taken by a non-party. The undisputed evidence was that non-party JMC, not Edwards, modified the subject machine after Brock was injured. Specifically, JMC installed a switch (interlocking device) on the subject safety guard, such that if the guard is removed the machine will automatically shut down. LF 792 at 91:6–24, 797 at 109:17–110:10. Defendant has not cited a single Missouri case overruling or questioning *Emerson*, in which the employer's safety improvements undertaken as a result of the plaintiff-employee's injury were not inadmissible at trial since the employer was not a party. 399 S.W.3d at 46.

Defendant nonetheless argues that the public policy rationale for the subsequent remedial measure rule is implicated because liability of Edwards will allegedly expose JMC's *insurer* (Travelers) to payment of the judgment. Of course, even if such is true, Travelers knew that the insurance policy for which it was collecting expensive premium payments was broad enough to cover acts by more than one party (*e.g.* both JMC and its individual employees). But, more importantly, the purpose of the subsequent remedial measures rule is not to protect insurers from paying claims covered by their insurance agreements. The policy rationale for the subsequent remedial measures rule is simply not implicated here because JMC cannot, and will not, be subject to a judgement for the co-employee liability of Edwards. *See* R.S.Mo. § 287.120.1 (granting immunity to employers); *Emerson,* 399 S.W.3d at 46 ("…evidence of remedial measures taken by a non-party necessarily will not expose that party to liability, that party will not be discouraged from taking the remedial measure and the public policy in favor of safety improvements will be satisfied")

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

Ironically, Defendant belabored throughout trial that JMC was not a party and that, as a matter of law, JMC's actions could not expose Edwards to liability. The fact that JMC purchased a policy of insurance broad enough to cover co-employee liability claims against Edwards cannot be used to protect Edwards from his own liability, including as evidenced by his employer's subsequent admission in installing the switch that Edwards was acting dangerously and in violation of safety rules.

b. The trial court also did not err in admitting this evidence because, even if it were a "subsequent remedial measure", it was admissible for impeachment and proving feasibility of cleaning the rollers with the safety guard in place, which was disputed.

There are myriad admissible uses of "subsequent remedial measure" evidence. *See Host*, 460 S.W.3d 87, 106-09 (Mo. App. 2015)*; Rust v. Hammons*, 929 S.W.2d 834, 837-38 (Mo. App. 1996); *Taylor v. Associated Elec. Co-Op*, *Inc.*, 818 S.W.2d 669, 672 (Mo. App. 1991) (recognizing numerous exceptions to the subsequent remedial measure doctrine). Here, despite Edwards' binding testimony on behalf of JMC, Defendant vehemently argued throughout trial that Edwards' conduct in removing the safety guard was simply JMC's standard operating procedure. Defendant also aggressively blamed Brock for causing his own injuries, even suggesting that Edwards did nothing to expose Brock to the risk of an injury. Tr. 533:7–9, 13–17, 20. JMC President Jappa testified that it is "perfectly safe" to clean the rollers with the guard out of its protective position while the machine is running, and it does not violate any JMC practice. Tr. 561:21–23, 562:16–19.

Jappa also testified that the bottom rollers could not be cleaned without removing the safety guard. Tr. 507:13–18. However, that claim – meant to deflect blame from Edwards – was simply false. And, it was totally undermined by evidence that JMC subsequently installed of a switch on the guard, which ensured that the guard must be left in place during cleaning. Thus, evidence regarding the switch was offered for impeachment, to prove the feasibility of cleaning the rollers with the safety guard in place, and to rebut the claim that removing the guard during cleaning was JMC's standard operating procedure. *Hickey v. Kan. C. S. R. Co.*, 290 S.W.2d 58, 61-62 (Mo. 1956) ("In view of the statement made by defendant's counsel [that the intersection could not be made safer], plaintiff should be permitted to show by any competent evidence available that the railroad could have reconstructed the crossing so as to eliminate any hazard existing by virtue of its original construction, and we think of no better way to show that fact than proof that it actually was so reconstructed"); *see also Host*, 460 S.W.3d at 109; *Rust*, 929 S.W.2d at 837-38. The trial court was well within its broad discretion in admitting this evidence.

c. Defendant's claim of error should also be rejected since it was waived, and Defendant has shown no prejudice.

Defendant did not object to other evidence regarding the switch (interlocking device). Tr. 885:15–19. In fact, the jury heard evidence, without objection, regarding the switch through Defendant's own witness, Aaron Reed. Tr. Tr. 835:4–10; 891:14–892:12. Therefore, the evidence about which Defendant complains was cumulative of admitted

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

evidence, and Defendant cannot prove prejudice. *See Moore,* 332 S.W.3d at 768-69; *Eagleburger v. Emerson Elec. Co.*, 794 S.W.2d 219, 239-40 (Mo. App. 1990).

VII. The trial court did not err in denying Defendant's Motions for Directed Verdict and JNOV because Brock made a submissible case on proximate cause in that Edward's conduct was, as he and others admitted, a substantial cause of Brock's injury.

Standard of Review. *See* Point I.

Every witness with knowledge of the machine testified that Brock could not have been injured if Edwards had not removed the guard from its protective position. LF 806 at 147:1–3, 825 at 62:15–20; Tr. 471:22–472:6. Obviously, the creation of a dangerous condition is the proximate cause of an injury resulting from that very condition, particularly where the injury occurs just seconds after the condition is created.

The test for establishing proximate cause is simply "whether the negligence is an efficient cause which sets in motion the chain of circumstances leading to the plaintiff's injuries or damages." *Freight House Lofts Condo Ass'n v. VSI Meter Servs*., 402 S.W.3d 586, 599 (Mo. Ct. App. 2013) (internal quotation omitted). "A submissible case is made on th[e] issue [of proximate cause] if substantial evidence is presented that shows the injury is a natural and probable consequence of a defendant's negligence." *Butts v. Express Pers. Servs.,* 73 S.W.3d 825 (Mo. Ct. App. 2002).

Of course, "[a]bsolute certainty is not required to prove a causal connection between the defendant's actions and plaintiff's injury." *Freight House*, 402 S.W.3d at 599. "It is wholly permissible for the jury to infer causation from [the] circumstances." *Id*. "If

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

the logical conclusion from the evidence is that if certain things had been done certain results would not have occurred, and such results did occur, the evidence of causation is sufficient." *Id*.

In the case at bar, Edwards himself acknowledged that if he had not removed the guard then Brock's hand **could not** have gotten into the pinch point. LF 806 at 147:1–3. In addition, Edwards specifically told Brock, and no one else, to clean the rollers with the guard removed and the machine on at full speed. LF 791 at 86:4–16, 87:8–13, 88:7–10, 793 at 93:13–15; Tr. 610:11–25. Clearly, Edwards' actions were an "efficient cause" – if not the only cause – of Brock's injuries.

Defendant cites *McTurman v. Bell*, 398 S.W.2d 465, 470 (Mo. Ct. App. 1965), but fails to apprise the Court of its entire holding, which itself recognizes that an action by the plaintiff "taken at the direction of the employer" (*e.g.* Edwards' instruction to Brock to clean the dangerously exposed rollers) is not an "intervening cause" affecting proximate causation. Moreover, Defendant's overly narrow view of proximate cause would lead to absurd results. For example, under Defendant's tortured logic, no omission to act could ever be the proximate cause of a harm, since failing to act, in-and-of-itself, doesn't hurt anyone but merely "sets the stage". *See e.g.* Appellant's Substitute Brief at p. 55 ("Edwards merely raised the hinged grate and held it. That action did not injure plaintiff").

When the facts are viewed in the light most favorable to Brock, it is undeniable that a submissible case on the issue of proximate cause existed because Brock's injury was the "natural and probable consequence" of Edwards' inexplicable decision to remove

a machine's safety guard and instruct Brock to clean its moving rollers. Defendant was permitted to argue to the jury that Edwards' conduct was not the cause of Brock's injury, and the jury rightfully rejected that claim. The Court did not err in denying Defendant's Motions for Directed Verdict and JNOV

VIII. The trial court did not abuse its discretion in excluding evidence of Brock's shirt being caught in a conveyor belt on unrelated equipment because it was not relevant to comparative fault and no evidence was offered connecting it to Brock's employability.

Standard of Review. *See* Point IV.

a. The prior incident was irrelevant to the issue of comparative fault, as Edwards admitted, because it was not even remotely similar to Brock's injury event.

As the Court of Appeals recognized, "it is clear that the trial court appropriately considered the facts of both the prior accident and the accident that caused Brock's injury in this case before making its determination" to exclude such evidence:

> So I am going to allow Defendant Edwards' attorney to present evidence that Mr. Jappa stated that, because of a prior injury, he would be disinclined to hire the defendant [sic]. … However, the motion in limine stands with regard to the circumstances of that accident with regard to putting the plaintiff on notice that he needs to be careful around machines, because I don't see them as similar, and I see the prejudicial value as greatly outweighing the -- the prejudicial effect is greatly outweighing the probative value.

Tr. 378:11-23; Appendix at A9 p. 39.

Under Missouri law, "[e]vidence of similar facts, conditions, or occurrences is generally inadmissible unless conditions are demonstrated to be the same." *Dillman v. Missouri Highway & Transp. Comm'n*, 973 S.W.2d 510, 512 (Mo. App. E.D. 1998) (citation omitted). Here, the prior incident involved an entirely different piece of

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

equipment – a non-motorized conveyor belt – and Edwards' binding testimony, on behalf of JMC, also confirms that the prior incident was wholly irrelevant:

> Q. And as he described it, his shirt was caught in like a conveyer belt roller?
> A. It was a roller, yes.
>
> **Q. Now, when we say roller, is it substantially similar to the roller he got hurt on, the Black Brothers?**
> **A. No.**
>
> ****
> Q. And he stopped wearing loose clothing?
> A. Yes.
>
> **Q. Nothing about that event had anything to do with Danny's ultimate injury in April I take it?**
> **A. No, it did not.**

LF 804 138:18-139:20 (emphasis added).Thus, because Edwards and JMC admitted that the accidents were entirely dissimilar – involving different machines and significantly different circumstances – the trial Court was well within its broad discretion to exclude the unduly prejudicial evidence of the unrelated prior incident on the issue of comparative fault.

b. Defendant failed to offer any evidence connecting the prior incident to Brock's employability, and therefore, no claim of error was preserved.

After Edwards' deposition as the corporate representative of JMC, wherein he testified that Brock would still be working at the company if he had not been injured, Defendant attempted to concoct a new relevance to the prior incident in which Brock's shirt got caught in a conveyer belt. Defendant's counsel suggested at trial that the prior incident bore on Brock's employability (*i.e.* he would not have been hired by JMC as a

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

result of that prior incident and, therefore, would not have a corresponding loss of earning capacity).

As noted above, the Court ruled before trial that such evidence, had it been proffered, would have been admitted into evidence. However, Defendant failed to elicit any such testimony. To the contrary, JMC President Jappa never stated that the prior incident had any bearing on Brock's employability despite Defendant counsel's repeated and frustrated attempts to elicit same. *See* Tr. 573:9–574:5. As such, Defendant simply did not present the evidence it had hoped and has no adverse ruling from which to appeal. *See e.g. Moore v. Missouri Hwy. & Transp. Commn.*, 527 S.W.3d 215, 222 (Mo. App. E.D. 2017) (requiring offer of proof to preserve appeal).

IX. The trial court did not abuse its discretion in denying a motion for new trial because Brock's counsel did not mention or even insinuate the existence of liability insurance at any time during *voir dire,* and Defendant failed to preserve any allegation of error by failing to timely object or move for a mistrial.

Standard of Review: A mistrial is a drastic remedy, and the trial court's denial of a mistrial will only be reversed "where there has been a manifest abuse of discretion." *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 867 (Mo. 1993) (internal citation omitted). To establish a manifest abuse of discretion, "there must be a grievous error where prejudice cannot otherwise be removed." *Id.*

a. Defendant did not preserve any such issue for appeal.

Defendant failed to contemporaneously object or move for a mistrial at the time of the alleged error. Tr. 60. Notably, it was not until nine pages of transcript after the alleged

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

impropriety, and after Plaintiff's counsel moved on to other questions and engaged in further colloquy with the venire panel, that Defendant first objected and moved for a mistrial. Tr. 69.

It is well-settled that a party's failure to object and move for a mistrial at the time of the alleged impropriety constitutes a waiver of post-trial relief and appellate review. *St. John's Bank & Trust Co. v. Intag, Inc*., 938 S.W.2d 627, 630 (Mo. App. E.D. 1997); *McGinnis v Northland Ready Mix, Inc*., 344 S.W.3d 804, 815 (Mo. App. 2011). Thus, Defendant's claim of error should be rejected outright for failing to preserve any alleged error.

b. The trial court did not abuse its discretion in refusing a mistrial because there was no mention or insinuation of insurance by counsel and, contrary to Defendant's repeated assertion, the venire panel was not told who would (or would not) be required to pay any judgment.

Even if Defendant had timely objected or moved for a mistrial, the court did not abuse its discretion in denying Defendant's motion for a mistrial because Brock's attorney never mentioned, or even insinuated, the existence of insurance. The record, including the excerpt cited in Appellant's Substitute Brief (p. 61), makes clear that, when discussing the parties in the case, Brock's attorney merely identified for the panel who was being sued (defendant *ad litem*) and that the case was not against Edwards' family or his friends or estate. Tr. 60. Indeed, this was a highly appropriate and accurate statement in the context of identifying the parties, witnesses, and counsel to probe the panel for familiarity and/or bias. *See Dieser v St. Anthony's Med. Ctr.*, 498 SW3d 419, 436 (Mo.

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

2016) ("Counsel is afforded wide latitude in questioning the venire panel to determine preconceived prejudices which would prevent them from following the court's instructions") (internal quotation omitted).

Defendant boldly, and erroneously, asserts that Brock's attorney told the panel that "neither Edwards, nor his family or friends, nor his estate, would have to pay a judgment". Appellant's Substitute Brief at p. 62. The record confirms that no such statement was ever made. Tr. 60. Brock's attorney never injected or even insinuated the existence of insurance, and Defendant has provided no cite to the record showing otherwise. The trial court was in superior position to determine whether Brock's attorney's *voir dire* questioning was motivated by good faith and whether there was any prejudicial effect on the jury. *St. Louis Univ. v Geary*, 321 SW3d 282, 293-294 (Mo. 2009) (citation omitted). Defendant's claim of prejudice is without merit and entirely too speculative to require reversal of the trial court's broad discretion.

Defendant also attempts to manufacture prejudice by claiming that Brock's attorney highlighted an attorney on the panel. Defendant's claim, however, is belied by the record. One of the very first questions Brock's attorney asked during *voir dire* was whether any of the venirepersons knew any of the attorneys involved in the case. Tr. 53:9-13. This was a common and proper question. Venireperson Number 8 answered "yes" and explained that he knew Brock's attorney from the gym, and – unsolicited by counsel – further stated that he knew Defendant's attorney because he had referred cases to his firm in the past. Tr. 53-55. At no time did Defendant object to this question or the response. *Roberson v. Weston*, 255 S.W.3d 15, 19 (Mo. App. 2008) ("Without a timely

trial objection, [party] has waived or abandoned alleged trial court error in the manner in which the insurance question was asked.").

Defendant waited until 15 pages of transcript later, after *voir dire* had clearly moved to other discussions, to first raise an objection. Tr. 60. If Defendant genuinely had any issue with the questions of the panel or Venireperson Number 8, then he could and should have raised a timely objection or asked the court to discharge Venireperson Number 8 for cause. *McGinnis*, 344 S.W.3d at 815 (timely objection "affords the trial court the opportunity to invoke remedial measures or take corrective action to resolve error rather than relegating appellate courts to determine whether prejudice resulted.").

In *Taylor v. Republic Auto. Parts*, 950 S.W.2d 318, 321 (Mo. App.1997), the defendant sought a mistrial where the plaintiff's attorney in *voir dire* had repeated interactions with an insurance adjuster, including eliciting responses identifying his employer (State Farm), his work in adjusting insurance claims for decades, and his review of medical films in adjusting claims. The plaintiff's attorney also asked the general "insurance question". *Id.* When the same venireperson was asked: "by the nature of what you do, do you think you might be more inclined or sympathetic towards the defense in this matter?" Before he could respond, defense counsel objected, arguing the question was an improper reference to insurance, and moved for a mistrial for the injection of insurance. *Id.*

The court in *Taylor* affirmed the trial court's refusal to grant a mistrial because "not every reference to insurance constitutes reversible error or requires the discharge of a jury." 950 S.W.2d at 321. The *Taylor* court recognized that the "trial judge is in a much

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

better position than the appellate court to determine whether a reference to insurance was motivated by good or bad faith," and "[t]he trial court also is better able to judge the effect on the jury". *Id.* Accordingly, the court found "no manifest abuse of discretion by the trial court". *Id*.

Unlike *Taylor*, the colloquy about which Defendant complains in the case at bar was short and isolated. The venireperson's comment about referring cases to defense counsel was unsolicited and Brock's counsel made no further mention of it. Further, unlike the attorney in *Taylor*, Brock's counsel did not repeatedly ask the venireperson about the nature of his job, about defending claims, or about his bias. Thus, even more so than in *Taylor*, there was clearly no manifest abuse of discretion by the trial court in denying Defendant's motion for a mistrial.

Contrary to Defendant's bold assertion, Brock's attorney never told, or even implied that, the panel: "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." As in *Taylor*, the trial court was vested with broad discretion in the control of counsel's conduct during *voir dire* and it did not abuse that discretion.

CONCLUSION

This Court should affirm the judgment entered in this case.

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

Respectfully submitted,

BADER & MUROV, LLC

/s/ Patrick K. Bader

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

Attorneys for Plaintiff-Respondent Danny Brock

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

Electronically Filed - SUPREME COURT OF MISSOURI - April 15, 2019 - 11:52 AM

CERTIFICATE OF COMPLIANCE

I certify that this brief (1) includes the information required by Rule 55.03, (2) complies with the limitations contained in Rule 84.06(b), (3) contains 17,140 words, and is typed in Times New Roman 13-point font.

I certify that the electronic copy of this Brief has been scanned for viruses and that it is virus-free.

/s/ Patrick K. Bader

CERTIFICATE OF SERVICE

I certify that this document and the attached appendix was served on April 15, 2019, by electronic filing on all attorneys of record, who are registered users.

/s/ Patrick K. Bader