IN THE SUPREME COURT OF MISSOURI

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

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

APPELLANT'S SUBSTITUTE REPLY BRIEF

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RESPONSE TO PLAINTIFF'S STATEMENT OF FACTS

In order to ensure a clear record, it is necessary to respond to and correct some of the purported "facts" contained within Plaintiff's Statement of Facts and elsewhere throughout his Substitute Brief, as follows:

1. The hinged metal grate on the laminating machine was at no time "removed" or taken apart from the machine. Instead, when glue spilled during a job and while the machine was in use, Edwards raised the hinged metal grate on one side, with the rollers still turning and with the grate still connected to the machine, to provide access to the rollers below. (Exhibit 10; LF 784, 786, 789-90; Tr. 841.) The machine was designed by the manufacturer and sold to JMC with the same hinged-grate mechanism, and not altered by Edwards. (*Id*.)

2. When Plaintiff states at the top of page 3 that "Edwards acknowledged that safety guards should not be removed" from machines, this refers only to abstract questions asked of Edwards during his deposition about general principles involving generic, non-specific machines, and the questions were not about the laminating machine. (LF 774, 778.) As to the laminating machine at issue, Edwards testified in specific detail that his procedure for cleaning glue from the rollers during the work (as opposed to after finishing the job) is a safe, good way to perform the cleaning, and was always done safely for four years at JMC. (LF 775-79.)

3. Plaintiff also claims on page 3 that "Edwards admitted that he was aware of several safety rules *at the time of [the] incident* prohibiting him from removing the safety

guard or instructing Brock to clean the rollers while the machine was on" (emphasis added). This is not accurate and the cited references to the record do not support this assertion. Specifically, the "manual" referenced at LF 775 (deposition pp. 22-23) was only given to Edwards in preparation for his deposition, and he had never seen it before then. (LF 775 at p. 21:9-24.) The JMC safety rules (Exhibits 11 and 13) were never provided to Plaintiff or to Edwards. (Tr. 545-46, 605; LF 799.)

4. In the last paragraph on page 4, Plaintiff refers to "internal work records" from JMC and claims they show the laminating machine "was always shut down before it was cleaned." This is simply false. The referenced Exhibit V shows that Plaintiff worked on the machine a total of 14 times during the four months he worked at JMC. (Tr. 559-60.) Regarding Exhibit V, JMC owner and president Jeffrey Jappa testified that Exhibit V "would not say" whether or not a "mid-job clean" was performed during the times Plaintiff worked on the laminating machine. (Tr. 567.) Exhibit V would provide "no indication knowing what kind of cleaning" was performed either way, whether it was a cleaning performed at the end of the job or during a job. (Tr. 578.) Additionally, it is undisputed that until Plaintiff's accident in 2013, every time the workers encountered a glue spill during a job, they cleaned up the glue by opening the grate on one side with the rollers turning. (LF 777, 785; Tr. 835.) This was JMC's standard operating procedure. (Tr. 561, 574.)

5. Also in the last paragraph on page 4, Plaintiff claims that no one from JMC told Edwards to clean the laminating machine in the manner he instructed Plaintiff on the date of the accident. This is also false. It is undisputed that in the spring of 2010, Edwards

was trained on how to operate and clean glue spills from the machine by another JMC employee, Kyle Reed, who learned about the machine in conjunction with Edwards' supervisor, Mike Duser. (LF 784, 786, 790.) Edwards was specifically trained to clean glue spills that occur during a job by raising the hinged metal grate on one side with the rollers still turning. (LF 784, 786, 790.) Additionally, the references to the record cited by Plaintiff in no way support his contrary assertion, as Jappa repeatedly testified "I don't know" in response to questions from Plaintiff's counsel. (Tr. 472-475.)

6. Finally, at pages 5-6, Plaintiff argues that "Edwards concocted the 'mid-job' method on his own." Again, as shown above, this is inaccurate. In fact, in the reference cited by Plaintiff, the witness testified "I know nothing about that" when asked if Edwards "came up with" the procedure for the mid-job glue cleaning. (Tr. 880-81.)

ARGUMENT

I. The "reasonable foreseeability" test for the existence of a legal duty under the common law is not abrogated or otherwise eliminated by Section 287.120.1 and continues to apply to post-2012 accidents, and Plaintiff failed to make a submissible case because his injury was reasonably foreseeable to, and actually foreseen by, the employer, JMC.

A. Plaintiff's attempt to severely restrict, if not eliminate outright, the nondelegable duty doctrine is unsupported by the law and must be rejected.

Plaintiff concedes that the existence of a legal duty remains an essential element of post-2012 co-employee claims. *See* Plaintiff's Substitute Brief, p. 9. However, based on nothing more than a single sentence of dictum from *Burns v. Smith*, 214 S.W.3d 335, 338 (Mo. 2007) and a baldly-unsupported "syllogism," Plaintiff contends that the duty analysis articulated by this Court in *Conner v. Ogletree*, 542 S.W.3d 315 (Mo. banc 2018) and its companion cases no longer applies and has been replaced by the "affirmative negligent act" language of Section 287.120.1. No court has adopted[1] Plaintiff's interpretation, and no court has read the *Burns* dictum in the manner Plaintiff proposes. This Court should not be the first.

[1] Plaintiff inaccurately claims that the *Conner* quartet of cases "repeatedly and conspicuously recognized that the common law reasonable foreseeability analysis is not applicable in post-2012 amendment cases." *See* Plaintiff's Substitute Brief, pp. 11-12. That statement is plainly incorrect and exaggerated. The Court merely remarked that its holdings in those cases were limited to the facts presented, *i.e.* to injuries prior to the effective date of the 2012 amendment to Section 287.120.1. The Court did not—and had no reason to—interpret Section 287.120 in those cases, all of which were decided in favor of the co-employee defendants. As such, the Court left for another day some of the issues presented in this appeal.

Plaintiff's novel legal interpretation is incorrect and should be rejected for many reasons. First, Plaintiff fails to so much as cite the applicable legal test, must less make an attempt to satisfy that test. As the Court of Appeals below recognized, "[w]here the legislature intends to preempt a common law claim, it must do so clearly." *State ex rel. KCP & L Greater Missouri Operations Co. v. Cook*, 353 S.W.3d 14, 20 (Mo. App. W.D. 2011), quoting *State ex rel. Brown v. III Invs., Inc.*, 80 S.W.3d 855, 859–60 (Mo. App. W.D. 2002). "Unless a statute clearly abrogates the common law either expressly or by necessary implication, the common law rule remains valid." *Id*. Furthermore, the requirement of strict construction weighs *against* a finding of common law abrogation or preemption, and even if a close question exists, the decision should be weighed "in favor of retaining the common law." *Id*.

Here, there is no close question. Since at least 1931, the workers' compensation law has been an affirmative defense to a civil claim. *McCracken v. Wal-Mart Stores East, LP*, 298 S.W.3d 473, 478 (Mo. banc 2009), discussing *Kemper v. Gluck*, 39 S.W.2d 330, 333 (Mo. 1931). Section 287.120.1 "release[s] employers" from civil liability for accidents arising out of and in the course of an employee's employment. *Peters v. Wady Indus., Inc.*, 489 S.W.3d 784, 789-90 (Mo. banc 2016). In *Peters*, this Court also characterized Section 287.120.1 as providing "immunity" for employers. *Id*. at 789. The 2012 amendment to Section 287.120.1 simply extends the employers' release or immunity defense to co-employees, unless the plaintiff can satisfy a very narrow exception to the general rule of co-employee immunity.

Neither the 2012 amendment nor the full text of Section 287.120.1 says anything at all about the common law, much less demonstrates a clear intent to preempt it. Plaintiff points to no specific language used in the amendment to suggest an intent to abrogate or derogate the common law. In fact, as Plaintiff points out, the amendment specifically incorporates the common law of negligence by requiring a "negligent" act as one of the multiple elements of the exception. Also, Plaintiff admits that statutory immunity under Section 287.120.1 is an affirmative defense, *see* Plaintiff's Substitute Brief, p. 24 n. 4, which completely undercuts his newfound, contrary suggestion that the statute abrogates the common law and creates a new cause of action. In reality, Plaintiff's belated attempt on appeal to eliminate the common law is nothing more than a result-driven effort to avoid the obvious impact of the *Conner* analysis on this case, and is belied by Plaintiff's own Brief and the positions he took in the trial court. Plaintiff should not be allowed to shift back and forth between competing legal theories depending on the results of cases decided during the pendency of this appeal.

Importantly, this Court specifically counseled in *Peters* that the common law analysis is distinct from the statutory analysis. *Peters*, 489 S.W.3d at 792. Nevertheless, Plaintiff now asks the Court to eliminate this very distinction, yet offers no serious suggestion that the legislature actually intended this result by passing the 2012 amendment to Section 287.120.1. As a matter of fact, Plaintiff acknowledges that the amendment was "undeniably meant to codify the 'something more' standard, which had been unintentionally eliminated in 2005." *See* Plaintiff's Substitute Brief, pp. 28-29. By conceding that the 2012 amendment codifies the 'something more' standard, Plaintiff

necessarily concedes by implication that the nondelegable duty doctrine also survives the amendment. The very basis for the 'something more' doctrine under *State ex rel. Badami v. Gaertner*, 630 S.W.2d 175, 180 (Mo. App. E.D. 1982) and its progeny was a breach of 'something more' than the employer's nondelegable duties. *See Peters*, 489 S.W.3d at 792 (discussing the history of the 'something more' test). Clearly, as Plaintiff acknowledged to the trial court in 2017 before *Conner* was decided, the purpose of the amendment was to restore co-employee immunity in most cases, not to "create a new, previously-unknown-to-the-law co-employee cause of action." (LF 724.) As Plaintiff stated then, "[i]f the legislature had so desired, it would have certainly used appropriate legal terminology reflecting that goal." (*Id*.) Defendant agrees, and Plaintiff should be bound by his legal position below.

Additionally, Plaintiff offers no other convincing reason why an immunity statute should be read to abrogate, preempt, or derogate the common law duty analysis, and also completely ignores the unprecedented impact his interpretation would have on Missouri law. "[N]o Missouri case has ever imposed liability on a co-employee for negligent performance of an employer's non-delegable duties." *Hansen v. Ritter*, 375 S.W.3d 201, 218 (Mo. App. W.D. 2012) (emphasis added). Yet by ruling that all a plaintiff has to show is an "affirmative negligent act" and not the existence of an independent duty separate and distinct from the employer's nondelegable duties, the effect would be to eviscerate the nondelegable duty doctrine, which has existed in Missouri for at least 113 years. *See McGinnis v. Chicago, R.I. & P. Ry. Co.*, 98 S.W. 590, 592 (Mo. 1906) (acknowledging the rule). No court has ever adopted Plaintiff's position, which would

significantly *expand* rather than *narrow* the scope of co-employee liability, and, in the words of the Court of Appeals below, "lead to results wildly inconsistent with co-employee liability in Missouri historically." (App. A22.) This case can be resolved on a straightforward application of the *Conner* quartet of cases, and the Court should not and need not radically alter the landscape of business law in Missouri, especially without any indication whatsoever that the legislature somehow intended to *expand* co-employee liability by passing the 2012 amendment to Section 287.120.1.

Finally, while not binding on this Court, Plaintiff completely ignores the federal cases applying Missouri law on this issue, all of which have persuasively found that the "reasonable foreseeability" test still applies to accidents after 2012. *See* Defendant's Substitute Brief, p. 20, citing *Hawkins v. St. Louis Rams, LLC*, 2019 WL 367644, at *4-5 (E.D. Mo. Jan. 30, 2019), *A.T. v. Newark Corp.*, 2017 WL 57251, at *3 (E.D. Mo. 2017), and *Halsey v. Townsend Corp. of Indiana*, 2017 WL 2189459, at *2 (E.D. Mo. 2017). Plaintiff fails to discuss or distinguish these cases, and this Court should reach the same result.

B. Plaintiff's injury was reasonably foreseeable to JMC and Edwards did not owe an independent duty to Plaintiff as a matter of law.

In an attempt to obfuscate and avoid a straightforward application of the "reasonable foreseeability" test ("the only thing that matters" under *Conner*), Plaintiff instead proposes what amounts to a 'creation' test: if the co-employee actively created the hazard (an "affirmative act" in the language of the statute)—such as in *Marshall v.*

Kansas City, 296 S.W.2d 1 (Mo. 1956)—then the hazard must be *per se* unforeseeable and the co-employee is liable. *See* Plaintiff's Substitute Brief, pp. 12-23.

In addition to not satisfying Section 287.120.1, as discussed at Point II, Plaintiff's proposed test is inconsistent with the holding of *Conner* and the facts and holdings of *Fogerty v. Armstrong*, 541 S.W.3d 544 (Mo. banc 2018), *Evans* (consolidated with *Conner*), and *Peters*, and many earlier 'something more' cases. This Court could have, but obviously did *not* state in *Conner* that the only thing that matters is whether the co-employee created the risk. Such a test would effectively eliminate the nondelegable duty doctrine, which seems to be Plaintiff's aim, but which the Court should avoid for the reasons discussed above. Indeed, had mere 'creation of the risk' been the test, the plaintiffs' claims would have survived summary judgment in *Fogerty* and *Evans*, and dismissal in *Peters*. *See* Defendant's Substitute Brief, pp. 21-22 and 30-31 (citing additional cases).

Upon applying the correct "reasonable foreseeability" test to the undisputed facts, it becomes clear that Plaintiff failed to make a submissible case. The hinged metal grate on the laminating machine was specifically designed and built so it could be lifted up on one side while the machine was running. The decals on the machine and the operator's manual show that this can be done and that it was foreseen by the manufacturer and by JMC. When a mid-job glue spill occurred, it was *always* cleaned with the rollers spinning and the grate raised on one side. (LF 777, 785-86; Tr. 835.) Edwards was indeed taught this method by JMC after it acquired the machine, and he taught the same procedure to the workers who reported to him. (LF 784-86, 790, 798.) It was done this way the entire

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

Moreover, it remains uncontroverted that JMC actually foresaw in practice the twin hazards of getting "hands, hair, and clothing" caught in pinch points, and of lifting guards away from pinch points. (Exhibit 11.) JMC recognized these hazards on machines in general, and on laminating machines in particular. (*Id*.) Plaintiff and the Court of Appeals suggest it was unforeseeable to JMC that Edwards and Plaintiff would violate these rules, but they ignore the undisputed evidence that JMC failed to inform Plaintiff or Edwards that these written rules existed and also that these rules were violated every time glue spilled during a job. (Tr. 545-46, 605; LF 799.) Additionally, despite Plaintiff's repeated inaccurate claims to the contrary, Edwards did *not* testify that he thought he was doing something dangerous by lifting up one side of the hinged metal grate. To the contrary, both Edwards and Jappa testified that this procedure was a good approach and could be done safely. (LF 776, 778-79; Tr. 562.) Nothing about their experience suggested anything to the contrary.

The "scope of the employer's nondelegable duty is broad" and includes the duties to both promulgate and enforce the safety rules, among other duties. *Conner*, 542 S.W.3d at 322. Here, the undisputed facts show that JMC did neither. It is obviously reasonably foreseeable to JMC that its workers might violate safety rules which are never distributed or discussed with the laborers. But those duties fall squarely on JMC, not Edwards. Here, as with the employer in *Evans*, JMC had a duty to "take reasonable precautions to

protect" workers like Plaintiff from the risks of operating the laminating machine. *Id*. at 328. Additionally, JMC delegated to Edwards, the sole lamination line supervisor at JMC, the duty to direct the laborers on the correct method of work. Here, as in *Evans* and *Peters*, JMC cannot "evade liability for a breach of this nondelegable duty merely by assigning compliance with the duty to an employee" like Edwards. *Id*. at 322. Therefore, even if the Court accepts the notion that Edwards physically 'created' the risk in some sense as Plaintiff claims, it is undisputed that Edwards was acting as the lamination line supervisor and carrying out the employer's duties. In the eyes of the law, the true actor was the employer, JMC, and not Edwards personally. *Peters*, 489 S.W.3d at 799. Therefore, Plaintiff failed to make a submissible case, and the verdict must be reversed.

II. The applicable post-*Taylor* case law proves that Plaintiff failed to make a submissible case under Section 287.120 and Defendant is entitled to immunity, and Plaintiff's suggested definition of "purposefully" as an act "done on purpose, not accidentally" runs afoul of the case law and intent of the legislature.

The narrow statutory exception contained in the amended Section 287.120.1 clearly adds—rather than subtracts—additional hurdles beyond the common law that Plaintiff must overcome to make a submissible case under the exception. *Newark*, 2017 WL 57251, at *3; *Halsey*, 2017 WL 2189459, at *2. By its plain terms, it is also more than a "general negligence" statute. In particular, the parties agree that the 2012 amendment "closely follows" the test imposed by *State ex rel. Taylor v. Wallace*, 73 S.W.3d 620, 622 (Mo. banc 2002). (Plaintiff's Substitute Brief, pp. 24, 29.) But rather than striving to give meaning to each word of the statute and interpreting the statutory text in light of *Taylor* and the post-*Taylor* cases cited by Defendant, Plaintiff instead

collapses every required element into the same 'creation of the risk' test discussed above. In doing so, Plaintiff ignores the holding of *Taylor* itself, in which the co-employee clearly created the hazard by driving the trash truck into the mailbox and causing the plaintiff to fall, yet the Court found no liability. *Taylor*, 73 S.W.3d at 621. The same is also true in the *Brown*, *Garza*, *Quinn*, and *Risher* cases cited in Defendant's Substitute Brief at pp. 30-31, not to mention in *Evans* and in *Fogerty*.

Instead of applying the *Taylor* test, Plaintiff cites and stretches the observation in *Burns* that "the notion of an affirmatively negligent act… 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. However, the Court in *Burns* was not interpreting any statute, so it was not required to confront the word "purposefully" as the Court is here. And in fact, when the Court *does* mention in passing the idea of "purposeful, affirmatively dangerous conduct," it appears to link the idea of purposeful conduct with "the commission of an intentional tort." This dictum from *Burns* does not aid Plaintiff, and regardless, it only discusses the "affirmative negligent act" requirement on its own. Here, the statute requires far more, *i.e.* an affirmative negligent act "that purposefully and dangerously caused or increased the risk of injury."

Additionally, even under the language from *Burns*, Plaintiff ignores the undisputed evidence that Plaintiff worked in an industrial factory around laminating machines every day, and any time glue spilled during a job (as opposed to at the very end of the work during the clean-up phase), it was done by lifting up one end of the hinged metal grate with the rollers powered and spinning. As a matter of law, there is zero

evidence that Edwards created a danger beyond what Plaintiff and the other laborers faced at JMC every time that glue spilled during a job on the laminating machine. This was an industrial setting, and working with heavy machinery was plainly part and parcel of the daily job. The facts here are certainly *not* akin to a maintenance man being asked to move a 5,000 pound safe—which the court went out of its way to clarify was well outside of his normal job activities—*see Murry v. Mercantile Bank, N.A.*, 34 S.W.3d 193, 195 (Mo. App. E.D. 2000), or a "sudden[] and unexpected[]" one-time "jerking" of a compressor hose, *see Marshall*, 296 S.W.2d at 2. Regardless, this Court has already observed that the conduct in *Marshall* "would not have satisfied the post-*Taylor* 'something more' test" codified in the amended statute. *Peters*, 489 S.W.3d at 798 (emphasis added).

Next, Plaintiff continues to pursue a misinterpretation of the "purposefully" element. First, Plaintiff tries to remove the word "purposefully" from the statute altogether by replacing it with the lesser word "knowingly" to describe Edwards' conduct. (Plaintiff's Substitute Brief, pp. 23, 25.) As the Court has explained on more than one occasion, when a statute requires a showing of "purposeful" conduct, this is "a far greater burden than required to prove" knowing conduct. *Laut v. City of Arnold*, 491 S.W. 3d 191, 199 (Mo. banc 2016); *Spradlin v. City of Fulton*, 982 S.W.2d 255, 262 (Mo. banc 1998). "The word 'purposely' when taken in its ordinary and usual sense makes clear that more than a mere intent to engage in the conduct resulting in the violation is necessary." *Spradlin*, 982 S.W.2d at 262.

This Court's definition of "purposeful" in *Laut* and *Spradlin* comes directly from its "ordinary and usual meaning" derived from Black's Law Dictionary, *id*., and Plaintiff offers no principled reason why the Court should adopt a materially different definition here. Just like in *Spradlin*, to define "purposefully" as "merely requir[ing] engaging in the prohibited conduct," as Plaintiff suggests, would render the word "entirely meaningless." *Id.* Also, adopting Plaintiff's interpretation would open the flood gates and transform what the legislature intended to be a narrow exception into one that overtakes the general rule. Plaintiff's real problem is not with Defendant's interpretation of "purposeful"—which is grounded in this Court's case law and its dictionary definition—but with the plain language of the statute enacted by the legislature.

As a matter of statutory interpretation, the "purposefully" and "dangerously" elements modify the "caused or increased the risk of injury" requirement and not the "affirmative negligent act." Thus, in addition to the other elements, the affirmative act must "purposefully" do one of two things: cause the injury, or increase the risk of injury. Once again, Plaintiff focuses on the first possibility but ignores the second. Plaintiff suggests, inaccurately, that Defendant is asking the Court to interpret the statute to require proof that the co-employee intentionally caused the injury. That is simply not Defendant's position, as the statute does not go that far. But as the Court of Appeals correctly observed below, "there was no evidence presented that Edwards acted with intentions to harm Brock *or increase Brock's risk of injury*." (App. A38; emphasis added.)

In other words, Plaintiff failed to make a submissible case under *either method* of proving purposeful conduct by Edwards. Although Plaintiff cites testimony by Edwards that he generally thought supervisors should not "remove" guards from machines in the abstract, Plaintiff's Substitute Brief, p. 31, Plaintiff ignores the uncontroverted evidence that Edwards did *not* believe it was dangerous to lift this specific grate and clean the rollers as long as the operator paid attention to what he was doing and followed directions (LF 776, 778-79), that when glue drips during a job the rollers are *always* cleaned in this way (LF 777, 786), and there had never been a prior injury or safety complaint on this machine in the four years JMC used it (LF 808). Edwards emphatically testified that the process was safe, that it was taught to him by other JMC employees and he passed it on to his workers, and nobody at JMC had ever raised a safety concern about it. Under the circumstances, the facts here are more favorable to Defendant than the facts in *Burns* or *Peters* and compel a reversal of the judgment below.

III. Instruction D was necessary to avoid misleading the jury on the law.

McComb v. Norfus, 541 S.W.3d 550 (Mo. banc 2018) and *Parr v. Breeden*, 489 S.W.3d 774 (Mo. banc 2016) are not jury instruction cases, so neither resolves this Point. Defendant acknowledges the line in *McComb* that it would be "illogical" to "allow the jury to decide whether the co-employee's conduct fell within" the employer's nondelegable duties. *McComb*, 541 S.W.3d at 556. However, Plaintiff completely misunderstands the implication of this sentence, which is actually an indictment of the trial court here. In *McComb*, the Court justified its affirmance of summary judgment by saying the issue of where the nondelegable duty ends and the independent duty begins is

not a jury issue in the first place. Defendant agrees, which is why he vigorously pursued summary judgment. (LF 042 *et seq*.) Here, *McComb's* reasoning suggests the court should have granted summary judgment instead of punting the issue to the jury. In other words, Plaintiff failed to present any genuine issues of material fact.

But if a co-employee negligence case is to be tried, as it was here, the jury needs to be informed of the law so it can decide the facts in the face of a plaintiff's attempts to conflate the employer and the co-employee. Plaintiff does not contend that Instruction D misstates the law. Rather, citing no authority, Plaintiff argues Instruction D was unnecessary because Defendant was free to assign blame to non-parties such as JMC. (Substitute Brief, p. 33.) That is simply not the law, and Plaintiff misses the mark because under that standard, no defendant would ever be entitled to an instruction. As much as Plaintiff would like to (and did) hamstring Defendant at trial by limiting him to rebutting elements of Plaintiff's verdict director, the fact remains that Defendant is entitled to an instruction on any theory supported by the evidence. (*See* Defendant's Substitute Brief, p. 39, citing cases.) As discussed above, the elements of Plaintiff's verdict director simply do not incorporate and adequately inform the jury of the nondelegable duty doctrine and its impact on liability. Therefore, the trial court committed reversible instructional error.

IV. Plaintiff failed to show the OSHA evidence is relevant, and its admission was highly prejudicial to Defendant and not cumulative of other evidence.

Citing only FELA cases against railroads (*i.e.* the employer), Plaintiff argues the OSHA regulation and related testimony was admissible to show not the existence of a duty as in *Parr*, 489 S.W.3d at 781, but that Edwards violated the standard of care by

lifting the grate. However, this is a distinction without a difference because Plaintiff ignores the absence of any admissible evidence that the regulation applied to Edwards as opposed to JMC. There is also no admissible evidence that the regulation—which on its face seems to apply to any "machine… whose operation exposes an employee to injury" and vaguely requires only "conformity with any appropriate standards therefor"—was violated in this case by anyone, not to mention by Edwards. Also, as noted in *Parr*, the duty to follow and enforce federal safety regulations "results from the master-servant relationship and would be part of the employer's nondelegable duty to follow and enforce rules of conduct." *Id.* Therefore, the evidence is logically and legally irrelevant in a co-employee negligence suit. Also, Plaintiff fails to address the argument that Jeffrey Jappa's lay testimony about the regulation was nothing more than inadmissible legal conclusions and opinions utterly lacking in foundation. (Defendant's Substitute Brief, p. 44.)

Defendant was greatly prejudiced by Plaintiff's attorney telling the jury during closing argument that Edwards "violated the law," "violated this OSHA regulation," did "what the OSHA regulation prohibits," and was therefore negligent, despite there being zero competent evidence of this in the record, and despite this being (at best) part of JMC's nondelegable duties. (Tr. 965.) Plaintiff claims the OSHA evidence was cumulative, yet points to no other evidence in the case that Edwards (or JMC) violated any law or regulation. Obviously neither the JMC written rules nor the manufacturer's instructions rise to the level of federal "law" or "regulation," or have anything to do with governmental standards. That is what made the OSHA evidence powerful at trial, and is

why Plaintiff's attorney highlighted it repeatedly: in voir dire, opening statement (Tr. 323), his case-in-chief, and in closing argument. If anything, Plaintiff's suggestion that the OSHA evidence was cumulative of the JMC safety rules is one more reason why the court abused its discretion in allowing it, especially where Plaintiff used it to prejudice a deceased co-employee like Edwards and make him personally liable for the negligence of the employer.

V. Plaintiff's cases show that the testimony of his economist should have been excluded because the record lacks factual support for his claim of future lost earning capacity, and because challenges to the factual foundation for an expert's testimony go to admissibility and not the weight of the testimony.

Although Plaintiff cherry-picks the facts to try and salvage the foundation for Dr. Summary's testimony, it is apparent that Plaintiff's attorney himself supplied the missing factual links to bootstrap her opinions. In fact, Plaintiff's own cited case illustrates the missing testimony here. According to *Anderson v. Burlington Northern R. Co.*, 700 S.W.2d 469, 476 (Mo. App. E.D. 1985), cited at page 40 of Plaintiff's Substitute Brief, claims for lost earning capacity are "measured by the difference as of the time of trial between the value of plaintiff's services as they would have been in view of the injury and as they would have been had there been no injury." However, a "figure for loss of wages is not to be permitted when formed from speculation and conjecture, but only when established with reasonable certainty upon which substantial evidence must be introduced." *Id*. at 477. Significantly, in *Anderson*, the evidence was based on the difference between the economist's "personal knowledge" of what spray painters in

Missouri earn ("corroborated by another witness") and "the minimum wage at the time of trial for entry level work based on testimony by a rehabilitative counselor." *Id*.

Contrary to the economist in *Anderson*, Dr. Summary did not have any knowledge or conduct any research into what laborers in Missouri earn, what workers with Plaintiff's restrictions could earn, whether the figures she was asked to assume were valid representations of any particular field, or even whether the JMC wages reflected Plaintiff's earning potential. (Tr. 781-82.) And there was no corroborating testimony from any other witness, just the assumptions provided by Plaintiff's attorney, who effectively *made himself a witness* by supplying the wage assumptions. Dr. Summary simply performed math calculations and left the labor market analysis to Plaintiff's attorney. This manifest defect infects the very core of her testimony with exactly the kind of speculation and conjecture the courts prohibit, and goes well beyond nitpicking over the weight her testimony should be afforded. "If a question exists as to whether the proffered opinion testimony of an expert is supported by a sufficient factual or scientific foundation, the question is one of admissibility." *Washington by Washington v. Barnes Hosp.*, 897 S.W.2d 611, 616 (Mo. 1995).

Additionally, on the underlying facts, Plaintiff chose to call Jappa as a witness during his case, yet now wants to avoid his uncontroverted testimony that he—not Edwards—decided who to hire and he had no plans to hire Plaintiff before the accident. Edwards' testimony that he liked Plaintiff and would have been willing to recommend[2]

[2] Plaintiff represents to the Court that "JMC testified through Edwards that Brock would have still been working for JMC had he not been injured." (Substitute Brief, pp. 38-39.)

him to "the people in the office" who "made the ultimate choice" is entirely consistent with Jappa's testimony that "I hire and have the last say at JMC on every single hire" and "[a]t the time in question, Danny Brock was not on my radar screen as somebody that I would hire." (LF 802; Tr. 515, 518.) As discussed in Defendant's Substitute Brief at pages 35 and 46, Plaintiff is bound by this testimony. Plaintiff has the burden of proving his lost earning capacity claim with reasonable certainty, but failed to do so.

Finally, Defendant preserved its trial objection not just to Dr. Summary's chart of calculations, but to the entirety of her testimony, by objecting and moving to strike all of her testimony at the outset and renewing the objection before the chart was displayed for the jury. (Tr. 752, 761); *State v. Davis*, 533 S.W.3d 781, 786 (Mo. App. S.D. 2017). The chart was not cumulative of any other evidence. Plaintiff cites no authority for the proposition that Defendant had to restate its objections after the court overruled its initial objections, and that is not the law, so that suggestion should be rejected.

VI. Plaintiff's proffered reasons for the relevance of JMC's post-incident modifications are insufficient to avoid the policy rationale of *Emerson* and would actively discourage employers from acting to improve workplace safety, and the Point has not been waived.

Plaintiff's proffered reasons for the relevance of this evidence do not survive close scrutiny. First, Plaintiff claims Edwards' testimony about the changes made by JMC (not made by Edwards, who owed no duty to make any changes) to the machine after the incident are admissible to impeach his own witness, Jappa, about whether the machine

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That is not accurate. Edwards testified only that he "*would think*" Plaintiff would still be working at JMC and that he "*would have thought*" JMC would have hired Plaintiff. (LF 802.) However, it is uncontroverted that Plaintiff never worked as a JMC employee.

could be cleaned with the guard in place. Generally, a party cannot impeach its own witness. *Dement v. City of Bonne Terre*, 669 S.W.2d 278, 280 (Mo. App. E.D. 1984). Moreover, Jappa did not testify as absolutely as suggested by Plaintiff. Rather, he clarified that "it's a case-by-case situation" and "it depends." (Tr. 508.) Also, the key initial question is unclear about what time period is being asked about. (Tr. 507.) If any impeachment were relevant, it would have to be on what was possible at the time of the incident, using the cleaning procedure Edwards used, not what may be possible later on using a different method. The fact that JMC modified the machine and changed the cleaning procedure *after the accident* does not impeach the totality of Jappa's testimony and logically says nothing whatsoever about what the standard operating procedure was when the accident occurred, nor did Jappa's testimony have anything to do with the feasibility of modifying the machine.

If anything, this evidence of changes *made by JMC* is just one more example of Plaintiff's trial strategy of conflating Edwards with JMC and urging the jury to blame Edwards for JMC's negligence. Under the circumstances, such evidence is not relevant to the co-employee claim against Edwards and is highly prejudicial, especially where the jury is not advised of the nondelegable duty doctrine. Also, the Point has not been waived, as this evidence is not cumulative and there was no other evidence of the existence of the yellow, vertical screen or about *why* the changes were made (LF 792) and whether they would have prevented what happened in this incident (LF 797). *See Sec. Inv. Co. v. Hicks*, 444 S.W.2d 6, 9 (Mo. App. S.D. 1969).

Finally, Plaintiff asks this Court to affirm and extend *Emerson v. Garvin Group, LLC*, 399 S.W.3d 42, 44 (Mo. App. E.D. 2013) to a situation where the non-party taking the remedial action is in privity with the defendant and would end up bearing the cost of the defendant's liability. As *Emerson* and Plaintiff recognize, there is a strong public policy in favor of encouraging businesses and employers to make safety improvements over time, even if they may come in reaction to claims or lawsuits. To allow evidence against a co-employee of the employer's post-accident changes to the safety rules and procedures would absolutely discourage those employers from taking any action at all. Extending *Emerson* here would indeed thwart rather than advance any public policy purpose, with the net impact being workplaces which are slower to improve safety for fear of litigation against their employees, which everyone understands they end up paying for in the end. Therefore, the post-incident modifications should have been excluded.

VII. Plaintiff failed to show his injury was the natural and probable consequence of Edwards' alleged negligence and confuses causation in fact with proximate cause.

The majority of Plaintiff's analysis focuses on causation in fact, rather than the separate requirement of proximate cause. "Proximate cause is not causation in fact, but is a limitation the law imposes upon the right to recover for the consequences of a negligent act." *Heffernan v. Reinhold*, 73 S.W.3d 659, 664 (Mo. App. E.D. 2002). Without authority, Plaintiff claims proximate cause is "obvious" because the injury occurred "just seconds after" the condition was created. (Plaintiff's Substitute Brief, p. 47.) However, the same could be said in *McTurman v. Bell*, 398 S.W.2d 465, 470 (Mo. App. S.D. 1965) and most of the other cases cited by Defendant. (Defendant's Substitute Brief, pp. 56-57.)

More importantly, Plaintiff fails to acknowledge or address the impact of his own negligence as an efficient, intervening cause of his injury, which is the thrust of Defendant's argument. Except for Plaintiff, who managed to have two incidents involving injuries around pinch points in four months, JMC workers cleaned moving rollers around pinch points for years, without guards and without safety incidents. Nothing about Edwards' experience with the machine suggested that the *natural* and *probable* consequence of his actions would be Plaintiff placing the rag in his hand near the pinch point while he looked somewhere else. (Tr. 650.)

Like the plaintiff in *McTurman* and in *Vann v. Town Topic, Inc.*, 780 S.W.2d 659, 661-62 (Mo. App. W.D. 1989), here Plaintiff had every bit as much knowledge of the danger of pinch points as did Edwards, yet he injected himself into the situation by allowing the rag to get too close despite his full knowledge of what the consequences would be. In other words, the efficient cause of Plaintiff's injury was not Edwards' instruction to Plaintiff to clean the glue from the moving roller, but *Plaintiff's* unilateral decision about whether to place his hand and the rag, and where to look during the procedure. Certainly Edwards did not direct Plaintiff to place the rag or his hand (as opposed to the brush head) down close to the pinch point, yet this is the key injury-causing behavior. Those decisions were made by Plaintiff alone. Also, *Peters* teaches that the mere act of directing Plaintiff to clean the machine cannot impose liability on Edwards because that was done as part of the employer's nondelegable duties, so that alone is not enough to make a submissible case on proximate cause. Therefore, the judgment must be reversed.

VIII. Plaintiff ignores the considerably less demanding degree of similarity required to show notice to Plaintiff and misstates the evidence, and the Point was preserved.

Plaintiff correctly notes that his safety incident one month before the subject accident occurred on a roller on a different JMC laminating machine. However, there was no evidence that the prior incident happened on a "non-motorized conveyor belt" or "entirely different piece of equipment" as Plaintiff suggests. (Substitute Brief, pp. 49-50.) But more fundamentally, Plaintiff altogether ignores the key reason the evidence is relevant—the prior incident put Plaintiff on notice of almost the *exact* type of accident that occurred one month later—as well as the considerably lower standard required for admissibility when showing notice to Plaintiff. (Defendant's Substitute Brief, pp. 58-59.) Following the earlier incident, Plaintiff and Edwards specifically discussed the importance of not allowing items to be pulled into pinch points, yet that is exactly what happened again in the subject incident. In order to assess liability and comparative fault, the jury needed to know that Plaintiff was already on notice of this very similar if not exact type of hazard in this particular, job-specific work environment working on laminating machines. Without this evidence, Defendant was greatly prejudiced, especially since the thrust of Plaintiff's evidence was that he did not know any better and was just doing what the boss told him to do.

Instead of addressing the relevance of the notice to Plaintiff, he instead focuses on whether the incident was admissible on the issue of Plaintiff's future potential employability at JMC. (Substitute Brief, pp. 50-51.) This is only a secondary basis for the relevance, for the reasons discussed above. But even on that issue, Plaintiff ignores that

he opened the door by asking Jappa on direct and on redirect examination a long series of questions about whether Plaintiff would have ever been hired by JMC and why not. (Tr. 510-519, 572-573.) Jappa absolutely *did* identify the prior "safety violation" as one reason why he was unlikely to hire Plaintiff. (Tr. 518-19.) Indeed he was interrupted from continuing on to explain in more detail because Plaintiff's attorney moved to strike the answer to his own question. (*Id*.) This is another basis for prejudice to Defendant by excluding evidence of the prior safety incident, in that the entire testimony of Plaintiff's economist hinges upon the fanciful and factually false assumption that JMC would have hired Plaintiff but for this accident. Clearly, the Point is preserved for appeal and Defendant has shown significant undue prejudice. The trial court abused its discretion and committed reversible error.

IX. This Point was preserved and Defendant was severely prejudiced by the venire panel being told—contrary to the ruling of the trial court—that Edwards' estate, family, and friends would not have to pay any judgment.

Plaintiff's contention that Defendant failed to preserve this point by objecting too late is without merit. So as not to highlight the issue, counsel waited a few minutes (nine transcript pages out of a 49-page voir dire) to object and move for a mistrial. (Tr. 69.) Counsel explained his reasons for waiting, made the motion briefly, then took it up during a recess. (Tr. 72-84.) Plaintiff's two cases (Substitute Brief, p. 52) are inapposite because both involve situations where objections were made so late that the court could not take any corrective action. Understandably, under those circumstances, the objections came too late. However, both cases stand for the proposition that an objection is proper as

long as it gives the court and counsel sufficient time to cure the objection, which was plainly the case here. Also, in *Stucker v. Rose*, 949 S.W.2d 235, 238 (Mo. App. S.D. 1997), the court recognized that "other reasons" may exist to explain a delay in seeking remedial action. Here, the reason for the brief delay was to avoid highlighting to the jury the issues of insurance and who would pay the judgment—issues which the court had already barred discussion about. (Tr. 12.)

On the merits, the comment that "this case is not against Mark Edwards' family or his friends or his estate…. this case is only against the defendant ad litem per the court's order" may be factually accurate, but it violated the court's specific pretrial ruling that that the parties were to "stick to the language of the statute… period" (Tr. 12, 31), and instead had the effect of informing the panel that Edwards' family and estate would not have to pay a judgment. Not only is this irrelevant, it severely prejudiced Defendant by strongly implying that some other source *would* pay the judgment, thereby injecting insurance into the case unnecessarily and in violation of the court's earlier ruling. Plaintiff claims the statement was needed to find out whether anyone on the panel knew the parties, which is self-evidently false. He also says it was calculated to expose juror bias, but fails to explain why highlighting these facts in particular, with their attendant prejudice, was necessary after the court already made its carefully-balanced statement to the panel about the death of Edwards and appointment of the defendant ad litem. (Tr. 38.)

Additionally, this comment must be considered in conjunction with Plaintiff's counsel asking Venireperson Number 8 to identify his employer, Travelers Insurance, *for a second time*, and also highlighting *for a second time* the fact that he worked in the past

with Defendant's counsel. (Tr. 54-55.) The latter questions were separately objected to and preserved for the reasons discussed above, and the trial court had ample opportunity to take corrective action. Under the circumstances, the court abused its discretion by denying Defendant's motion for mistrial.

CONCLUSION

For all of the foregoing reasons, Plaintiff failed to make a submissible case of co-employee negligence and Defendant is entitled to a judgment notwithstanding the verdict. Alternatively, the court committed prejudicial instructional and evidentiary errors that require a new trial on all issues.

CERTIFICATE OF COMPLIANCE

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

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

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

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

(4) That the Substitute Brief contains the following number of words, as determined by Microsoft Word: 7,581.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 29, 2019, an electronic copy of the Substitute Reply Brief of Defendant-Appellant was filed with the Clerk of the Court for the Supreme Court of Missouri by using the Court's electronic filing system. The undersigned also certifies that the following participants in this case are registered electronic filing system users and that service of the Substitute Reply Brief will be accomplished by the Court's electronic filing system:

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