

APPEAL NO. SC89576

**IN THE SUPREME COURT
OF THE STATE OF MISSOURI**

GATEWAY FOAM INSULATORS, INC.,

Respondent,

v.

JOKERST PAVING & CONTRACTING, INC.,

Appellant.

**Appeal from the Circuit Court of Jefferson County, Missouri
The Honorable Gary P. Kramer
Division II**

AMENDED SUBSTITUTE BRIEF OF RESPONDENT

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Jurisdictional Statement

This action arises from a motor vehicle accident in which Gateway Foam Insulators, Inc.'s commercial foam rig vehicle was destroyed by Jokerst Paving & Contracting, Inc. After a bench trial, Gateway was awarded the reasonable value of its destroyed commercial vehicle, interest on a loan to replace the lost vehicle, hazardous chemical clean up costs, and lost profit damages from the lost use of the vehicle. Jokerst appealed the entire judgment.

The Eastern District Court of Appeals reversed the interest award and the award of Gateway's lost profits holding that Gateway could not receive both loss of use and the destroyed vehicle's reasonable value since its was replaced. The Eastern District Court of Appeals noted that this Court had left open the question in Ameristar Jet Charter, Inc. v. Dodson Int'l. Parts, Inc., 155 S.W.3d 50 (Mo. banc 2005) of whether or not Gateway could obtain both its loss of use damages and reasonable value of its foam rig.

On July 30, 2008, Gateway filed its motion for rehearing or, in the alternative motion for transfer in the Eastern District Court of Appeals. On August 25, 2008, Gateway's motion was denied. On September 9, 2008, Gateway filed its application for transfer to this Court, pursuant to Mo. Sup. Ct. R. 83.04, asserting that the case presented matters of general interest or importance, that it presented issues requiring the reexamination of existing law or that the opinion filed is contrary to a previous decision of an appellate court of this state. On

September 30, 2008, this Court sustained Gateway's application for transfer. Therefore, this appeal is within the general appellate jurisdiction of this Court pursuant to Mo. Const. Art. V, Sec. 10 and Missouri Supreme Court Rule 83.04 (2008).

Statement of Facts

Ron and Sue Vunesky, husband and wife, started Gateway Foam Insulators, Inc. in 1995, hereinafter referred to as "**Gateway**." (Tr. p. 26). Gateway installs a super energy efficient expanding foam product as an insulation material for new and existing buildings. (Tr. p. 26). Gateway's primary piece of equipment is a costly vehicular unit called a "foam rig." (Tr. p. 40).

Gateway's foam rig consists of a 22-foot box truck and various pieces of large and small equipment such as miscellaneous hand tools, a proportioner unit, spray guns, a 40kw generator, a lift gate, four 55 gallon drums of chemicals, a fuel tank generator, chemical pumps, a compressor muffler, custom electrical work, truck decals, a refrigerated air dryer, custom louver panels, a gap recirculation assembly, scuff jackets and hoses of various lengths (Tr. pp. 33-40; App. A 43-44). This specialized vehicular piece of equipment requires an extensive amount of time to build. (Tr. p. 42).

Sue Vunesky serves as Gateway's primary bookkeeper. (Tr. p. 26). Gateway's QuickBooks records contain the company's records for job bidding, sales, job scheduling, payment of invoices, income and expense, material costs, and equipment costs. (Tr. pp. 30 - 31, App. A 107-127). Gateway's average daily gross revenue, prior to the accident, was \$2,500.00. (Tr. p. 62).

By November 26, 2002, Gateway's business had grown to the extent that it needed and owned 2 foam rigs. (Tr. p. 42). Gateway used both rigs to "double up on the work" and perform jobs "twice as fast." (Id). On November 26, 2002, one of Gateway's two foam rigs was inoperable undergoing an equipment overhaul. (Tr. p. 41).

On November 26, 2002, an employee of Jokerst Paving & Contracting, Inc., hereinafter referred to as "**Jokerst**," while driving a Jokerst's company vehicle slammed into Gateway's foam rig. (Tr. p. 17 and 44). Gateway's driver, Terry Richardson, testified that he was familiar with the equipment and contents of the foam rig. (Tr. p. 16). Mr. Richardson testified that at the time of the accident Gateway's foam rig unit was fully loaded with all necessary equipment. (Tr. p. 17).

Immediately following the accident, Sue Vunesky was contacted by a deputy who requested that she fax Gateway's Material Safety Data Sheets to the fire department. (Tr. pp. 45, App. A 127-141). The Material Safety Data Sheets provide instructions on handling the foam rig's dangerous chemicals. (Tr. p. 48).

Environmental Restorations conducted a clean-up of the chemical spill at a cost of \$12,746.42 (Tr. pp. 76 and 79). Environmental Restorations filed suit in the Circuit Court of St. Louis County, State of Missouri to collect the cost of the clean up. (App. A 142-186). A default judgment was rendered against Gateway. (Id). The St. Louis County Circuit records were admitted at trial without objection. (Tr. p. 5). The admitted court records contained the affidavit of Environmental Restorations' Vice-President, Steve R. Wilhelm, attesting to the \$12,746.42 clean up cost. (Tr. p. 5; App. A 180).

Soon after the accident Jokerst took control and custody of the foam rig by hauling it to the Jokerst lot. (Tr. p. 105-106). Jokerst refused Gateway access to the foam rig and did not release the foam rig to Gateway until almost 2 years later in August 2004. (Tr. pp. 105-106). An inspection of the foam rig, upon its return to Gateway, revealed that the vehicle and all remaining equipment had been damaged beyond repair in the accident. (Tr. p. 106-107).

On August 30, 2004, Gateway filed suit against Jokerst. (App. A 3). On November 24, 2004, Jokerst filed its answer. (App. A 4). On March 16, 2006, Gateway filed its First Amend Petition. (App. A 8). On March 17, 2006, Jokerst filed its answer to Gateway's First Amended Petition. (App. A 11). On July 27, 2007, a bench trial was heard in front of the Honorable Gary P. Kramer. (App. A 16-18).

Jokerst's actions in refusing to return the destroyed foam rig to forced Gateway to build a replacement rig from scratch. (Tr. pp. 43 and 81). Gateway looked into purchasing a "turn-key" unit, but Gateway could not make the necessary payments due to a lack of resources. (Tr. pp. 43 and 82). Gateway's certified public accountant, Ms. Cindy Burke, confirmed that Gateway, at the time of the accident, did not have the resources to purchase a new truck. (Tr. p. 155). Ms. Burke testified that she was "intimately involved in their [Gateway's] lending and the they were actually mortgaging rental property they had to keep this property [Gateway] running." (Tr. p. 156).

To rebuild the lost unit, Gateway took out a bank "line of credit" loan to procure the necessary funds. (Tr. p. 43, App. A. 198-201). Due to Jokerst's negligence and subsequent actions, Gateway was forced to begin making payments upon the bank loan. (Tr. p. 150).

Gateway's certified public accountant testified that, as a result of Jokerst's negligence, the loan payments were a necessary cost incurred by Jokerst. (Id). Ms. Burke testified Gateway paid a total sum of \$11,723.82 as interest on the bank loan. (Tr. p. 154, App. A. 198-200). Thus, through a line of credit and hard work Gateway secured enough funds to "buy [a] truck and [some] major equipment." (Tr. p. 43). The remaining necessary equipment on the replacement foam rig was purchased as Gateway "had the money and could put it in the vehicle." (Id).

On November 26, 2002, Gateway had outstanding bids for work to be performed. (Tr. p. 56). Because of accident Gateway immediately "lost work" and "lost customers." (Tr. p. 64). Because of the accident Gateway postponed work for up to "six weeks." (Tr. p. 63). Gateway prepared an itemized list of its lost jobs which was admitted into evidence. (Tr. p. 58, App. A 187-188).

Gateway suffered a long term impact to its business as a result of the accident. (Tr. p. 64). Sue Vunesky summed up the economic destruction that the accident caused when she testified that Gateway "had to start over" and that "everything that we had worked for, for five years previous to build our company, just - we just got knocked down. We had to start from scratch and get going again. It was pretty difficult to do at that point because you - you kind of lose your momentum, and we had it rolling pretty good." (Tr. p. 64).

Gateway's Quickbook records reflect the companies steady growth prior to the accident and its decline after the accident. (Tr. p. 68-73). From 1996 to 2006 Gateway completed the following insulation jobs and generated the following gross revenues: 1996 -

45 completed insulation jobs with a gross revenue of \$84,239.55; 1997 - 80 completed insulation jobs with a gross revenue of \$149,919.63; 1998 - 98 completed insulation jobs with a gross revenue of \$ 226,728.95; 1999 - 100 completed insulation jobs with a gross revenue of \$351,972.60; 2000 - 153 completed insulation jobs with a gross revenue of \$335,343.10; 2001 - 160 completed insulation jobs with a gross revenue of \$528,037.70; 2002 -155 completed insulation jobs with a gross revenue of \$433,649.29; 2003 - 144 completed insulation jobs with a gross revenue of \$448,051.50; 2004 - 135 completed insulation jobs with a gross revenue of \$474,599.05; 2005 - 134 completed insulation jobs with a gross revenue of \$423,096.80; and 2006 - 112 completed insulation jobs with a gross revenue of \$371,976.00. (Tr. pp. 68 - 73, App. A 45-55).

Gateway's foam rig equipment expert, Larry Wilson, testified with regard to the reasonable value of the fully equipped foam rig at the time of the accident. (Tr. p. 110). Mr. Wilson's testimony was based upon his personal observation of the foam rig after the accident and upon the list of every item on the foam as compiled by the Vunesky's. (Tr. pp. 33 and 114, App. A 43-44). Mr. Wilson testified that Gateway's list was "consistent with what most contractors in this line of work should have on their vehicle to make a working unit." (Tr. p. 114). Mr. Wilson testified that the reasonable value of the foam rig vehicle at the time of the accident was "75, maybe 80,000 dollars." (Tr. p. 110).

Gateway eventually sold the foam rig as salvage, including the box component, for \$2,500.00. (Tr. p. 107). Ron Vunesky testified that the remaining "air compressor and generator" in their damaged condition were worth approximately \$4,000.00. On July 27,

2007, the trial court awarded judgment in favor of Gateway for the fair market value of the foam rig in the amount of \$68,500.00. (App. A 16).

Ms. Cindy Burke, Gateway's accountant since the company's inception, testified with regard to Gateway's lost profits from the foam rig's lost use. (Tr. p. 125). Ms. Burke testified that she reviewed materials containing actual facts and data related to Gateway's business, that said materials provided an adequate basis from which she could make her calculation and that she used accepted accounting methods in reaching her calculations. (Tr. p. 127). Ms. Burke testified that all of the materials, the facts, the data and testimony at trial provided her with a reasonably certain basis upon which she could make a rational estimate of Gateway's lost profits. (Tr. p. 127-128). Ms. Burke present numerous charts to explain her testimony. (Tr. p. 128, A. 189-194 and A 197).

Ms. Burke testified that Gateway experienced a significant rise in its gross revenues from 1996 to 2001. (Tr. p. 133; App. A 45-65, and A 189). Ms. Burke testified that Gateway's highest gross income year was 2001. (Tr. p. 131). Ms. Burke presented evidence that Gateway suffered a drastic decline in its gross revenues from 2002 to 2006. (Tr. p. 133). The accident, according to Ms. Burke, critically wounded Gateway's ability to perform at an optimal level and strangled Gateway's ability to execute jobs at "full-bore as they had intended before the accident." (Id).

In calculating Gateway's lost profits, Ms. Burke relied upon evidence regarding positive construction market conditions prior to and after the accident. (Tr. p. 136-138). Ms. Burke relied on the following positive market conditions: (1) construction industry growth;

(2) Gateway's advertising costs; (3) Gateway's business good will; (4) Gateway's addition of a second foam rig; and (5) Gateway's general business growth since its inception. (Id). (App. A. 190).

Ms. Burke testified that the highest growth years of residential building permits in the St. Louis region was "2004 and 2005." (Tr. p. 139, App. A 197). These years corresponded to the "general decline" in Gateway's gross revenue. (Tr. p. 139). Thus, Gateway's loss of its foam rig in the accident occurred during "one of the most profitable times [in] construction industry in this region." (Tr. pp. 134-135).

For her opinion, Ms. Burke relied on information generated by the U.S. Census bureau regarding new housing permits for the State of Missouri. (Tr. p. 137, App. A 197). For commercial building and construction, Ms. Burke testified that she relied upon U.S. Census statistics regarding "payroll information" and "pay records for commercial jobs specifically for each year." (Id). Ms. Burke looked at the years beginning in 2001 through 2006. (Id). Finally, Ms. Burke pointed out to the trial court that the U.S. Census reports of new building permits issued in years of 2003, 2004, and 2005 were considerably accurate in light of the fact that "all offices were reporting in those years" meaning that "every office in the St. Louis Metropolitan area [had] new building permits" for those years. (Tr. pp. 140-141, App. A. 197).

Ms. Burke testified that Gateway's spending of \$163,222.00 for advertising, between the years of 1996 to 2000, was a positive factor in building up "quite a bit of good will." (Tr. p. 138). Ms. Burke testified that as a result of Gateway's advertising expenditures the

company was beginning to find the “benefits of the advertising” as evidenced by Gateway’s revenue growth in 2001 and the fact that Gateway was becoming the “go to” company for foam insulation. (Tr. p. 138).

Ms. Burke testified that the accident damaged Gateway’s ability to meet the demand for the home insulation created by spending “\$150,000 dollars in advertising because they didn’t have the equipment.”(Tr. p. 143). Thus, the accident “opened a window of opportunity for someone else to go out and buy the equipment and take the jobs that they [Gateway] had cultivated.” (Id).

Ms. Burke also relied upon the following negative market conditions to balance out her calculations of Gateway’s lost profits: (1) the effect of September 11, 2001; (2) the effect of hurricane Katrina; (3) increased fuel prices; (4) increased building materials costs; and (5) additional competition in the foam insulation industry. (Tr. pp. 141-142).

Ms. Burke focused the Court’s attention to two types of profits - “net profit and gross profit.” (Tr. p. 135). Ms. Burke testified that gross lost profits are calculated by subtracting from gross revenues certain types of expenses. (Id). Ms. Burke testified that certain costs are fixed such as “rent, your telephone bill, your office salary” and “insurance.” (Tr. p. 155). Other costs are direct or variable, “which change, given whatever unit is out there or whatever you’re producing; your material costs, your incidentals; fuel, in this case.” (Id).

Ms. Burke calculated Gateway’s lost profits by deducting “variable” or “direct costs” from the company’s gross revenues. (Tr. p. 135, 144, 146-148 and 155, App. A 194). The “variable” deducted expenses were those directly related to the lost foam rig. (Id). Ms. Burke

explained to the Court, while using Gateway's highest grossing year of 2001, that categories 803, 805, 815, 825, 910, 944, 947.5 and the depreciation expense category of Gateway's profit and loss statements were variable costs directly related to the damaged unit. (Tr. p. 147, App. A 107-126 and 194). Ms. Burke testified that 50% of these expenses in 2001 were directly related to the destroyed foam rig. (Tr. p. 148).

Ms. Burke explained to the Court the process she used to calculate Gateway's lost gross income. (Tr. p. 149). Ms. Burke testified that she made the following calculation:

"the Census information and from the year-to-year in the Census show how the industry was increasing. From 2001 to 2002 it increased 18%. From 2002 to '03 it was six. From '3 to '4 it was six. Then I took their [Gateway's] best year, where they were hit in, and increased their sales by each of those amounts. Then I subtracted what they actually did to arrive at what they lost." (Tr. p. 149).

Relying upon her expertise, Gateway's accounting records, her extensive experience with Gateway's growth and her experience with Gateway's business decline after the accident, Ms. Burke testified that Gateway suffered a loss of profits as a result of the accident in a range from "\$120,000 on the down side" and "135 on the net." (Tr. p. 150). On July 27, 2007, the trial court awarded judgment in favor of Gateway for its lost profits in the amount of \$120,000.00. (App. A 16-18).

Jokerst's trial evidence consisted of its expert, Louis Naeger, a certified public account. (Tr. p. 167). Mr. Naeger based his testimony primarily upon Gateway's corporate tax returns for the years of 2001, 2002 and 2003. (Tr. p. 168). Mr. Neagar testified that he

based his opinions on one side of Gateway's two sided federal tax documents, because that was all he had before him. (Tr. pp. 164 and 172). Mr. Naeger agreed with Ms. Burke that certain variables, such as fixed costs, variable costs, market conditions, competition, [Gateway's] work force, [Gateway's] marketing program and the economic situation, would affect Gateway's receipts or expenses. (Tr. p. 169). Mr. Naegar agreed that Sue Vunesky's assessment that \$2,500.00 per day average gross revenue was "reasonable." (Tr. p. 170).

At trial Jokerst failed to make a request for findings of fact and conclusions of law on the record, before the introduction of evidence, as is required by Missouri Rule of Civil Procedure 73.01(c). Neither party submitted findings of fact and conclusions of law.

During closing arguments, Gateway's counsel cited to this Court's 2005 decision, referring to this Court's Ameristar remand, as the appropriate method of calculating lost profits. (Tr. p. 174). Further, Gateway's counsel pointed out to the trial court that this Court's 2005 decision, "analyzed...Eastern and Western District cases" to reach the conclusion that the trial court should "strive to...put the Plaintiffs back in as close position as they were in at the time of the accident and to compensate them for the damages subsequent to the accident." (Tr. p. 177). Thus, Gateway's counsel zeroed the trial court's attention to the applicable law governing Gateway's ability to recover damages for its lost profits, the lost reasonable value of its vehicle and the clean up costs as awarded in the trial court's judgment. (Id).

The trial court made extensive findings of fact. (App. A 16-18). Therefore, the trial court's judgment is based upon the court's own research, conclusions concerning the

evidence and the citations discussed by counsel at closing argument.

Neither party filed after trial motions. On August 22, 2007, Jokerst timely filed its Notice of Appeal. (App. A 59). On June 11, 2008, with all briefing completed the cause was argued and submitted to the Eastern District Court of Appeals. (App. A 61). On July 15, 2008, the Eastern District Court of Appeals handed down its signed majority opinion. (App. A 61).

On July 30, 2008, Gateway filed its motion for rehearing or, in the alternative motion for transfer in the Eastern District Court of Appeals. On August 25, 2008, Gateway's motion was denied. On September 9, 2008, Gateway filed its application for transfer to this Court, pursuant to Mo. Sup. Ct. R. 83.04, asserting that the case presented matters of general interest or importance, that the case presented issues requiring the reexamination of existing law or that the opinion filed is contrary to a previous decision of an appellate court of this state. On September 30, 2008, this Court sustained Gateway's application for transfer.

Argument

I. Overview of Gateway's Amended Substitute Brief on Appeal

Jokerst chose not to file a substitute brief with this Court. Jokerst's argues that the trial court made every mistake possible and got absolutely nothing correct. Pursuant to Supreme Court Rule 84.04(f) Gateway is required to respond to Jokerst's Points on Appeal, but is also allowed to provide any additional arguments required to support the trial court's decision. Gateway's substitute brief addresses the points raised by Jokerst within the overarching issues of general interest and importance facing this Court by its granting of transfer and the need to reexamine the current state of existing law.

Gateway's arguments were carefully weighed and deemed necessary to set forth the concise context of this case within the confines of current law following this Court's remand in Ameristar Jet Charter, Inc. v. Dodson Int'l.Parts, Inc., 155 S.W.3d 50 (Mo. banc 2005).

Gateway's Argument is divided into sections I - VI addressing the Points on Appeal raised by Jokerst as follows: (II) Contrary to Jokerst's Points I and II, the trial court correctly applied the law in awarding Gateway its lost profit damages; (III) Jokerst's Point III fails because the trial court correctly awarded Gateway its lost profit damages based upon the substantial and incontrovertible evidence; (IV) Jokerst's arguments in Points IV and V epitomizes the quagmire of Jokerst's position regarding the trial court's correct interest

award to Gateway; (V) The trial court correctly awarded Gateway the hazardous chemical clean up costs; and (VI) The trial court correctly awarded Gateway the reasonable value of its destroyed unique non-fungible commercial vehicle.

II. The trial court did not err in awarding Gateway its lost profit damages

Jokerst asserts in its first point that the trial court misapplied the law in awarding Gateway its lost profit damages because the foam rig was replaced and not repaired. (App. Br. 16); Orr v. Williams, 379 S.W. 2d 181(Mo. App.1964). Jokerst's argument fundamentally fails to consider that Orr provided for lost of use damages where the Defendant causes a delay in repairs. Additionally, Jokerst's first point fails to consider that the trial court's judgment, which did not state conclusions of law, follows after this Court's remand in Ameristar Jet Charter, Inc. v. Dodson Int'l.Parts, Inc., 155 S.W.3d 50 (Mo. banc 2005). Jokerst fails to consider the fundamental split in Missouri law regarding loss of use damages, the general trend in surrounding Supreme Courts lending support to the trial court's judgment following this Court's Ameristar remand and the general public policy supporting the trial court's damages judgment.

Jokerst asserts in its second point that the trial court erred in awarding Gateway lost profit damages because the foam rig could have been replaced in 2 or 3 weeks. (App. Br. 18). This argument overlooks the evidence adduced at trial that Gateway lacked the financial resources to purchase a "turn-key" unit, that Gateway lost substantial business revenue because of Jokerst's negligence, that Jokerst's negligence forced Gateway to build a replacement unit piecemeal as monies became available, and that Gateway was refused

access to the foam rig and did not recover the vehicle from Jokerst for almost 2 years. Thus, the various basis for Jokerst's Points I and II do not exist.

A. Standard of Review

Jokerst filed a written Request for Findings of Fact, Grounds For Decision and Method of Determining Facts, pursuant to Missouri Rule of Civil Procedure 73.01(c) (App. A 201). Jokerst failed to make said request on the record before the introduction of evidence. As such, the trial court recited the factual basis for its decision, but did not provide conclusions of law.

Therefore, this Court must presume that the circuit court's judgment to be correct and affirm the judgment unless there is no substantial evidence to support the judgment, the judgment is against the weight of the evidence, or the judgment erroneously declares or erroneously applies the law. Prudential Property And Casualty Ins. Co. v Cole, 586 S.W2d 433, 434 (Mo. App.1979).

This Court is "obliged to accept as true the evidence and permissible inferences which can be drawn, favorable to the prevailing party, and disregard the contradictory testimony." Id. This Court will affirm the judgment if "it can be supported on any theory of law in accordance with the evidence." Id. (Emphasis added).

B. The essential question presented by Jokerst's Points I and II

Jokerst's Points I and II pinpoint a quandary currently facing Missouri's courts that requires an answer to an underlying question raised by this Court's remand in Ameristar Jet

Charter, Inc. v. Dodson Int'l. Parts, Inc., 155 S.W.3d 50 (Mo. banc 2005). Does Missouri law, after Ameristar, allow the simultaneous recovery of both loss of use damages and the lost fair market value where the Plaintiff loses an unique non-fungible commercial vehicle?

1. Jokerst's reliance upon Orr is misguided

This Court's remand in Ameristar succinctly set out the factual basis, the legal basis and the parameters by which a trial court can award and calculate lost profits where an ongoing company suffers damages to an unique unit of its business. Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc., 155 S.W.3d 50, 56-57 (Mo. banc 2005).

Within the context of this Court's 2005 remand, Jokerst continues to assert that Orr v. Williams, 379 S.W.2d 181 (Mo. App. 1964) is controlling Missouri law regarding the availability of lost profit damages where a unique non-fungible commercial vehicle is destroyed and cannot be easily replaced, rented or repaired in the open market. (App. Br. P. 16).

Although it is true, that Orr allowed a party to recover lost profits where a vehicle was repaired. Orr at 189. The Orr court's reasoning, without further explanation, was based upon an archaic legal position as quoted in 25 C.J.S., *Damages*, § 83, p. 600. This ancient legal position has little relevance or foundation in Missouri. Further, Jokerst's continued reliance upon Orr is misguided and fails to recognize the importance of the Ameristar remand.

Jokerst's brief fails to mention that Orr allowed Hollis Orr to recover lost profits where there was substantial facts evidencing, as in the case at bar, that the damaged vehicle is unique, generally unavailable in the market and cannot be easily replaced. Orr v. Williams,

379 S.W.2d 181, 190 (Mo. App.1964).

Further, the Orr court noted that as a general rule in Missouri, loss of use damages are available to a plaintiff during a “period of time reasonably required to repair the damaged personal property, or during the period of a delay in making the repairs, if any, where such delay is occasioned by the Defendant.” Orr v. Williams, 379 S.W.2d 181, 189 (Mo. App.1964); Stallman v. Hill, 510 S.W.2d 796 (Mo. App.1974); *See e.g.* McFall v. Wells, 27 S.W.2d 497 (Mo. App.1930).

In its brief, Jokerst also fails to mention a critical fact found in Orr. Hollis Orr did not repair the destroyed “trailer,” but replaced the trailer with a specifically built unit necessary to serve his purposes. Orr at 186. Therefore, only a part of the destroyed tractor-trailer was repaired. This fact squarely presents the legal quandary brought by Gateway on transfer and now facing this Court after Ameristar.

In this case, Gateway’s foam rig was destroyed by Jokerst’s negligence. (Tr. p.106-107). Jokerst retained possession of the foam rig and refused Gateway access to the foam rig for almost 2 years. (Tr. p. 105-106). Because of Jokerst’s actions, Gateway was forced to replace the foam rig. (Tr. p. 43). Gateway could not purchase this unique vehicle, within 2 or 3 weeks as stressed by Jokerst, because the funds were simply not available. (Tr. p. 56).

Because of Gateway’s lack of funds the accident immediately impacted its ability to perform jobs. (Tr. p. 64). Gateway compiled a list of lost jobs, kept accurate track of their lost profits through their bookkeeping records and had to “start over” because of Jokerst’s negligence. (Tr. pp. 58, 64, 68-73, App. A. 187-187). The accident significantly impacted

Gateway's long term gross revenue and profits. (Tr. pp. 64 and 133; App. A 45-55; App. A 56). As a result, Gateway lost the fair market value of the foam rig and lost profits from the loss use of the foam rig caused by Jokerst's negligence and its delay in returning the vehicle.

As noted this Court should affirm the judgment if "it can be supported on any theory of law in accordance with the evidence." Prudential Property And Casualty Ins. Co. v Cole, 586 S.W2d 433, 434 (Mo. App.1979).

Even under the Orr analysis both aspects of Gateway's damages are fully compensable. Further, Ameristar is the next logical step from Orr. Without specific conclusions of law made by the trial court it must be presumed that the trial court considered the Orr decision within the confines of this Court's Ameristar remand. The Orr decision and this Court's Ameristar remand allowed the trial court to properly award and calculate Gateway's lost profits. Thus, the trial court correctly applied the law in awarding Gateway \$120,000.00 is lost profit damages.

2. This trial court took the step from Orr to Ameristar

In 2005 this Court clarified Missouri law regarding the proper method of awarding and calculating lost profit damages. Ameristar Jet Charter, Inc. v. Dodson Int'l.Parts, Inc., 155 S.W.3d 50 (Mo. banc 2005). In so ruling, this Court remanded the case for retrial with full knowledge that Ameristar's commercial aircraft was not repaired but was replaced. Ameristar at 53.

Ameristar's aircraft was damaged during an emergency landing at the Kansas City Downtown Airport. Id. Dodson was hired by Ameristar to transport the aircraft from the

crash site. Id. Ultimately, an insurance adjuster determined that the cost of repair to the aircraft was exceedingly high. Id. The insurer declared the aircraft a total loss, submitted a proof of loss to Ameristar and paid to Ameristar the \$1.5 million dollar policy limits representing what must be assumed to be the fair market value of the aircraft. Id.

Upon payment of the policy limits, the insurer sold the aircraft at auction to the Dodson. Ameristar Jet Charter, Inc., 2004 WL 76342 at *2 (Mo. App. 2004). Dodson eventually repaired the aircraft and offered it for sale to the Ameristar. Ameristar 155 S.W.3d at 53. Ameristar refused to purchase the repaired aircraft from Dodson and eventually, as in the case at bar, was forced to replace the aircraft. Id. Therefore, for all intent and purposes and from Ameristar's point of view the aircraft was totally destroyed.

Jokerst attempts to distinguish the Ameristar case from the matter presently before the Court by insisting that Ameristar was only leasing the aircraft. Yet, this Court's Ameristar decision repeatedly refers to Ameristar and Sierra collectively as "owner" of the aircraft Id. Thus, it appears from that Ameristar and Sierra were mutual owners of the destroyed aircraft. Id. Any distinguishment by Jokerst of Ameristar from the case at bar based upon a lease theory is therefore flawed and incorrect.

In Ameristar the issue of whether or not an injured party can obtain both the fair market value of a destroyed commercial vehicle and the loss of use for said vehicle was not directly before the Court. Gateway now squarely presented this issue to the trial court which properly awarded Gateway its lost profit damages.

3. Ameristar fully compensates a Plaintiff

As a general rule in Missouri, loss of use damages are available to a plaintiff during a “period of time reasonably required to repair the damaged personal property, or during the period of a delay in making the repairs, if any, where such delay is occasioned by the Defendant.” Orr v. Williams, 379 S.W.2d 181, 189 (Mo. App. 1964); Stallman v. Hill, 510 S.W.2d 796, 798 (Mo. App. 1974); *See e.g.* McFall v. Wells, 27 S.W.2d 497 (Mo. App. 1930).

In Ameristar this Court noted that “the goal of awarding damages is to compensate a party for a legally recognized loss.” Ameristar at 54; *citing* De Salme v. Union Elec. Light & Power Co., 102 S.W.2d 779, 782 (Mo. App. 1937); Sampson v. Mo. Pac. R. Co., 560 S.W.2d 573, 588 (Mo. banc 1978) (stating that the ultimate test for damages is whether the award will fairly and reasonably compensate the party for its injuries).

The general rule on the simultaneous recovery of loss of use damages and the fair market value of a vehicle, as stated in Orr, where the vehicle is unique and generally unavailable on the open market squares with this Court’s remand in Ameristar. As such, the trial court properly applied the law.

If this Court’s remand does not square with Orr, then significant confusion now exists which must be clarified by this Court. This confusion may be explained by an understanding the origins of Orr’s archaic rule as discussed in D. Dobbs, *Remedies* § 5.11 at 384-85 (1973). Dobbs states that one ancient root of the rule stems from a belief that a plaintiff lost its interest in the property upon its destruction. Id. Dobbs explains that this concept sounds “strange in modern ears” and is generally unaccepted for its assertion that the owner somehow passes title upon the property’s destruction. Id.

A second root rests upon an application of the law of conversion or trover. Id. This application presumed a plaintiff was made whole by the payment of interest on the value of the lost property during the time the plaintiff was deprived of the property's use. Id. This conversion or trover root has taken hold in Missouri, but its application does not help Jokerst. *See e.g. Stephen Burns, Inc., v. Trantham*, 305 S.W.2d 66, 70-71 (Mo. App. 1957) (holding that when property "having a use value is wrongfully taken ...[then] damages for loss of its use may be awarded"); *MFA Cooperative Ass'n of Mansfield v. Murray*, 365 S.W.2d 279, 289 (Mo. App. 1963). Additionally, the rule does not comport with modern economics in that interest alone will not, as in the case at bar, fully compensate the plaintiff for the total damages sustained.

A third root of Orr's distant rule is encompassed in the fear that an allowance of loss of use damages would open "the door to speculation." D. Dobbs, *Remedies* § 5.11 at 384-85 (1973). The speculation proposition is a fallacious argument. This Court has established rules protecting defendants from baseless claims for lost profits. Ameristar at 54. This Court requires a plaintiff to put forth evidence that provides an "adequate basis" to estimate "lost profits with reasonable certainty." Id. A plaintiff must prove "prospective or anticipated profits" by "more than mere speculation." Id. at 54-55.

Each of these roots has no logical function in modern society where unique commercial units are employed on a daily basis. The lack of a foundation for the rule can be found in the Orr Court's failure to provide a legal rationale or logical reasoning for its holding other than pointing to 25 C.J.S. *Damages*, § 83, pp. 600. Orr, 379 S.W.2d at 190.

Similarly the Eastern District Court of Appeals’ opinion, in the case at bar, provides no logical basis for its ruling other than citing to the out dated rule as found in Orr and in German v. Centaur Lime Co., 295 S.W. 475 (Mo. App. 1927). (App. A 66). The Eastern District did nod its head, with apparent dissatisfaction, in having to follow Missouri’s ancient rule noting that several other states have adopted a more modern view on loss of use damages. (App. A 66).

The seminal case reflecting the beginnings of the modern trend is Reynolds v. Bank of Am. Nat’l. Trust and Sav. Assoc., 345 P.2d 926 (Cal. 1959). (App. A 75-78). In Reynolds, the California Supreme Court correctly stated that there is “no logical or practical” basis for a Court to draw a distinctive line in awarding loss of use damages between those plaintiffs whose property is totally destroyed or those plaintiffs whose property is repairable. Reynolds v. Bank of Am. Nat’l. Trust and Sav. Assoc., 345 P.2d 926, 927 (Cal. 1959).

In both scenarios the plaintiff can only obtain full compensation for the proximately caused injuries, “upon proper pleading and proof,” with recovery of both the fair market value of the vehicle and loss of use. Id. (citing several authorities including, among others, the Kentucky Supreme Court, the Utah Supreme Court and the New Jersey Supreme Court as support for the Court’s holding).

In its holding the Reynolds Court stated, as Jokerst has pointed out in its reply, that other jurisdictions have refused to simultaneously permit both loss of use damages and the fair market value of the destroyed property. Id. at 927-28. The California Supreme Court noted that such refusal “appears to be the result of historical limitations upon the action of

trover at common law.” Id.

In modifying its existing law, the California Supreme Court looked to the Restatement of Torts § 927. Reynolds 345 P.2d at 927. The Missouri Supreme Court consistently refers to the Restatement of Torts and Restatement (Second) of Torts when reviewing, modifying or applying Missouri law. *See e.g.* Sides v. St. Anthony’s Medical Center, 258 S.W.3d 811, 815-18 (Mo. banc 2008); Harris v. Niehaus, 857 S.W.2d 222, 225 (Mo. banc 1993); Day v. Wells Fargo Guard Services, Co., 711 S.W.2d 503, 505 (Mo. banc 1986); Dillard v. Earnhart, 457 S.W.2d 666, 670-71 (Mo. 1970); and Dickinson v. Eden Theatre Co., 231 S.W.2d 609, 610 (Mo. 1950).

Thus, this Court remand in Ameristar is the next logical step from Orr. Gateway is not asking this Court, as argued by Jokerst, to follow the leader. This Court is the leader and has with its Ameristar remand stepped in line with the more modern rule allowing the simultaneous recovery of both loss of use damages and the lost fair market value of a unique vehicle where the same is unique and cannot be easily replaced or rented on the open market. Thus, the trial court properly applied the law under Orr following this Court’s 2005 remand.

4. Ameristar is in line with Missouri’s sister Supreme Courts

The trial court’s decision is in line with surrounding Supreme Court decisions of neighboring states. This Court’s remand in Ameristar now begs the question of whether or not a Plaintiff’s recovery is limited solely to the fair market value of its destroyed commercial vehicle where the vehicle was uniquely designed for plaintiff’s business purposes? The answer to the question is no according to numerous sister Supreme Courts

who now follow the modern theory of recovery as found in the Restatement (Second) of Torts § 927 (1979).

a. The Iowa Supreme Court

The Supreme Court of Iowa's decision in Long v. McAllister, 319 N.W.2d 256 (Iowa 1982) reflects the modern trend and shift in the law mirroring the Ameristar remand. (App. A 79-86). Before the Iowa Supreme Court was a factual situation strikingly similar to that at bar in that the plaintiff's vehicle had been damaged beyond repair. Long at 257.

The Long case provided the Iowa Court with an opportunity to review its long-standing rule that "loss of use damages are not allowed" where a "vehicle has been totally destroyed" or where the vehicle "cannot, by repair, be placed in as good condition as it was in before the injury." Id. The Iowa Court conducted its review "against the background 'that the principle underlying allowance of damages is that of compensation, the ultimate purpose being to place the injured party in as favorable a position as though no wrong had been committed.'" Id.

The Iowa Court noted that the rule denying a plaintiff loss of use and/or lost profit damages where a vehicle has been destroyed derives from the concept that "interest on the market value of the vehicle from the date of the accident theoretically pays the owner for the delay." Long at 259.

The Court stated that under certain facts, as in Gateway's case, the rule "plainly does not permit full compensation" and that "loss of use damages will be incurred as readily when a vehicle is totally destroyed or when it cannot be restored by repair to its prior condition as

when the vehicle can be restored by repair” Id. The Iowa Court observed that the “origin of the market value limitation lies in history rather than in logic” and that the old rule has additional footings in the antiquated “common law action of trover.” Long at 259-60; (*citing* D. Dobbs, *Remedies*, section 5.11 at 384-85 (1973)).

The Iowa Court recognized a “noticeable trend” developing in the law allowing an injured party to recoup loss of use damages in “destruction cases.” Id. at 260. (*citing* 15 other courts as a persuasive line of authorities for the modification of Iowa law including Supreme Courts decisions from Arkansas, California, Kansas, Kentucky, Maryland, North Carolina, and Wisconsin).

The Iowa Court found the limitation on loss of use damages in destruction cases illogical. Id. As such, the Court “modified” its existing law so that an injured party can recover “the difference between [the vehicle’s] reasonable market value before and after the injury, plus the reasonable value of the use of the vehicle for the time reasonably required to repair or replace it.” Id. at 261. The Iowa Supreme Court’s rule mimics the language, the legal reasoning, and logical drafting of the Restatement (Second) of Torts § 927 (1979). Id. (App. A 24-42). This modification is now consistently followed by the Iowa Court. Franke v. Junko, 366 N.W.2d 536, 541 (Iowa 1985); Papenheim v. Lovell, 530 N.W.2d 668, 671 (Iowa 1995) (*citing* 8 Am. Jur. 2d *Automobile and Highway Traffic* § 1128, at 317 (1975)).

b. The Nebraska Supreme Court

In 1986, the Supreme Court of Nebraska followed Iowa’s footsteps by modernizing its loss use damages law. Chlopek v. Schmall, 396 N.W.2d 103 (Neb. 1986). (App. A 87-95).

Prior to Chlopek the Nebraska Court consistently enforced an Orr type rule that restricted loss of use damages to factual scenarios where the vehicle was repaired. Id. at 108. The Nebraska Court noted that throughout its holdings it never “articulated any rationale for the limitation of damages to the market value of the vehicle immediately before the accident.” Id. (citing Long v. McCallister, 319 N.W.2d 256 (Iowa 1982); D. Dobbs, *Tangible Property - Damages, Destruction, and Retention* § 5.11 at 384-85 (1973).

As in Iowa, the Nebraska Court reiterated that a “number of jurisdictions” now allow for loss of use damages where a vehicle is totally destroyed. Id. at 110. (citing *Recovery for Loss of Use of Motor Vehicle Damaged or Destroyed*, 18 A.L.R.3d 497 (1968); Restatement (Second) Torts § 927 (1979). Nebraska adopted Iowa’s rule adding the caveat that loss of profits may be used to establish the loss of use value where, as in the case at bar, the property cannot be rented and is used for commercial or business purposes. Chlopek, at 110.

c. The Arkansas Supreme Court

The Arkansas Supreme Court faced a set of facts directly on point to the case at bar. Stevens v. Mid-Continent Investment Co., Inc., 517 S.W.2d 208 (Ark. 1974). (App. A 96-99). In Stevens, the plaintiff’s unique “west coast” trailer was destroyed in an collision. Id. at 208. After the destruction of its vehicle Stevens did not immediately purchase a new “considerably more expensive” trailer. Id. Stevens did order and receive a new specialized truck six (6) months after the accident. Id.

In modifying its existing law on loss of use damages the Arkansas Supreme Court stated that the denial of loss of use damages was “demonstrably unjust...especially where the

plaintiff customarily uses the vehicle in his business.” Id. at 209. The Supreme Court of Arkansas acknowledged that “an award [of lost profits] is essential if the injured person is to be made whole.” Id. The Arkansas Court’s modification limited the recovery for the loss of use damages to the “reasonableness of time required for replacement” and upon a showing of “unspeculative lost profits.” Id.

d. The Kansas Supreme Court.

In Peterson v. Bachar, 392 P.2d 853 (Kan. 1964) the Supreme Court of Kansas dealt with another fact pattern directly on point to the Gateway accident. (App. A 100-106). In Peterson, the plaintiff lost a commercial vehicle specifically designed to accommodate its tombstone selling business. Peterson at 854. The Kansas Court premised its modification of its loss of use law upon the general understanding that the rule on damages is meant to provide the plaintiff a “fair, reasonable, and adequate compensation for the injury inflicted.” Id. at 855. The Kansas Court held that recovery of loss of use damages are allowable, provided that same was computed with “reasonable certainty” and not based “on speculative and problematic loss of profits.” Id.

5. The trial court properly followed the split in Missouri law

The trial court’s judgment, following this Court’s Ameristar remand, is in line with several Missouri cases which have allowed loss of use damages where a plaintiff’s property was not repaired. Hanes v. Twin Gable Farm, Inc., 714 S.W.2d 667 (Mo. App. 1986); Smith v. Morgan Drive Away, Inc., 613 S.W.2d 469 (Mo. App. 1981); Weller v. Hayes Truck Lines, 197 S.W.2d 657 (Mo. 1946). These cases split from the rule as stated in Orr.

In Hanes, the plaintiff purchased a breeder bull which failed to sire calves and as a result was ultimately proved to be sterile. Hanes at 669. It is true that Hanes is a case based upon fraud, but this distinguishment is immaterial. Id. at 670-671. Because Hanes held that, as with the general rule on damages in a negligence case, the defendant was liable for all injuries which are the direct and natural consequence of the defendant's actions. Id.

The Hanes court makes no mention of whether or not the plaintiff repaired the sterile bull. Yet, the court stated that "plaintiff was clearly damaged by the failure of the sterile bull." Id. Thus, the court reversed the judgment and allowed the Plaintiff to obtain lost profit damages as well as the reasonable value of the sterile bull. Hanes at 670-71.

In Smith, the plaintiff sued for damages sustained to a mobile home which the defendant damaged during transport. Smith at 470. Contrary to Jokerst's arguments, plaintiffs in Smith "alleged both negligence and breach of the bailment contract and the evidence established facts which would have permitted recovery under either theory." Id. at 471. The court remanded the case for a determination of damages. Id. at 472.

The fact that the court remanded the matter for a determination of damages mirrors this Court's remand in Ameristar. Id. at 472. Jokerst cannot escape the fact that the Smith court held that the plaintiff, under count I, could recover damages for both loss of use of a mobile home and for the reasonable value of home as returned in its damaged condition. Id.

In Weller, the plaintiff's tractor-trailer was damaged by defendant's negligence in overloading the trailer with an excessive freight load. Weller at 662. The Weller Court makes no mention of whether or not the plaintiff's vehicle was repaired or replaced. Regardless, this

Court held that lost profit damages are the “natural, necessary and logical” consequences of the defendant’s wrongful act. Id. at 705.

Jokerst asserts that the Weller’s trailer was repaired. This assertion is a bare misreading of the case in that the language Jokerst reads into the opinion is from Antkol v. Barber, 143 N.E. 350, 352 (Mass. 1924). Id. at 663. Therefore, there is nothing in this Court’s Weller decision stating that the Plaintiff’s vehicle was repaired. Accordingly, this Court held that the total of “plaintiff’s loss” included “both injury to the trailer and loss of use.” Id.

The Ameristar remand directly contradicts and adds confusion to the law under the holding in Stallman v. Hill, 510 S.W.2d 796 (Mo. App. 1974). In Stallman, the court held that a party may recover lost profit damages for a reasonable period of time required to repair a damaged vehicle. Stallman at 798. The Stallman court succinctly noted that a defendant may not cause a delay in the plaintiff’s ability to make the necessary repairs. Id. Said contradiction and confusion in Ameristar exists because Ameristar was allowed to seek recovery for lost profit damages even though it had access to repair the lost property, voluntarily surrendered the property and then had an opportunity to reacquire the lost property after its repair. Ameristar at 53.

In this case Gateway’s foam rig was destroyed by Jokerst’s negligence. (Tr. p.106-107). Jokerst retained possession of the foam rig and refused Gateway access to the foam rig for almost 2 years. (Tr. p. 105-106). Because of Jokerst’s actions, Gateway was forced to replace the foam rig by purchasing a truck and the necessary equipment as funds became

available. (Tr. p. 43). The accident immediately impacted Gateway's ability to perform jobs. (Tr. p. 64). The accident significantly impacted Gateway's long term gross revenue and profits. (Tr. p. 64; Tr. p. 133; App. A 45-55; App. A 189). As a result of the accident, Gateway lost the fair market value of the foam rig and lost profits from the loss of the foam rig's use. Both aspects of Gateway's damages, under Ameristar and the above-referenced cases, are compensable.

Gateway is not asserting the above facts, that were adduced at trial, to garner sympathy of this Court. The evidence is the evidence. At trial, Jokerst did not present any evidence to the contrary. Further, Gateway doubts that this Court would rule on sympathy. Jokerst's apparent frustration stems from the certainty that it cannot avoid the split in Missouri authority as noted above. Additionally, Jokerst cannot dodge the fact that the trial court's judgment follows after this Court's Ameristar remand.

Counsel presented closing arguments at trial to support the award of Gateway's lost profit damages based upon this Court's 2005 decision. Thus, the circuit court properly applied the law based upon the substantial evidence and awarded Gateway its lost profit damages and the foam rig's fair market value.

6. The trial court can look to public policy

Public policy is always a relevant and significant plank when a trial court must decide opposing aspects of the law. The trial court did not provide conclusions of law to support its judgment, therefore it can be presumed that it looked to public policy in entering its damage awards to Gateway.

It is difficult to precisely define the term “public policy” In re Estate of Rahn, 291 S.W. 120, 122 (Mo. 1927). This Court has described the term as a principle which forbids others from doing that “which has a tendency to be injurious to the public welfare.” Id. Public policy can simply be said to be the “purpose” and “spirit” of the laws of a state as found in the “Constitution, statutes, or judicial decisions.” Id. at 123.

This Court has the “power and duty” to declare the public policy of this state. Schulte v. Missionaries of LaSalette Corp. of Mo., 352 S.W.2d 636, 639 (Mo. 1961). The lack of a statute or Constitutional provision is not fatal to this Court’s ability to announce public policy. Id. In determining Missouri’s public policy the Court may “look to authorities outside the state.” Id. This Court has recognized that the issue of public policy is in a constant state of flux and may be modified as recent trends in the law are developed. Brandt v. Medical Defense Assocs., 856 S.W.2d 667, 670 (Mo. banc 1993).

The trial court could find public policy grounds for simultaneously awarding loss of use damages and the reasonable value of a destroyed commercial in the authorities cited by Jokerst in its brief. In Stallman v. Hill, 510 S.W.2d 796, 798 (Mo. App. 1974) the Court held that a party may not cause any delay in the repair of a damaged vehicle. In Lewis v. Lawless Homes, Inc., 984 S.W.2d 583, 586 (Mo. App. 1999) the Court held that lost profits may be used to establish the value for the loss of use where a “similar piece” of damaged equipment cannot be rented. Both scenarios are relevant in this case.

The trial court could have looked to the public policy underlying the rule on awarding general damages as a basis for its judgment. Ameristar Jet Charter, Inc. v. Dodson Int’l Parts,

Inc., 155 S.W.3d 50, 54 (Mo. banc 2005) (stating that damages are awarded in negligence cases as a means to “fully compensate” the plaintiff, but at the same time to refrain from awarding the plaintiff “a windfall”).

The trial court’s simultaneous award to Gateway of its loss of use and reasonable value of its vehicle correlates to the public policy of the above-mentioned holdings from the Supreme Courts of Alaska, Arkansas, California, Iowa, Kansas, Kentucky, Nebraska, New Jersey, North Carolina, Montana, South Carolina, Utah, West Virginia, and Wisconsin. The trial court could have employed the rule as found in the Restatement (Second) of Torts § 927 (1979) to simultaneously award Gateway its loss of use damages and the reasonable value of its destroyed foam rig.

7. Hypothetical examples supporting the trial court’s judgment

a. The rental shop

Assume that John is the owner of a personal water craft rental business at the Lake of the Ozarks. John owns four (4) personal water craft vehicles which he rents for \$50.00 per hour. John owns one (1) unique custom 2-person water craft vehicle which he rents for \$100.00 per hour. This custom water craft vehicle cannot be rented at other local shops and was built for John by a custom builder located in California. The custom vehicle took 30 days to build.

A few days before the busy July 4th weekend a careless boater, Dave, loses control of his 32 foot boat and strikes John’s unique custom 2-person water craft vehicle. The collision destroys the custom vehicle.

Dave and John immediately exchange insurance information. John contacts Dave's insurance agent who advises that it may be a few days before an adjuster can take a look at the water craft vehicle. John explains that the coming weekend is his busiest time of the year and that he will lose a significant amount of money without that particular rental unit in his fleet. Dave's insurance carrier explains that the adjuster will get to his location as soon as possible. After a delay of couple of weeks the insurance adjuster finally determines that the water craft vehicle is totally destroyed.

John claims that he lost approximately \$3,500.00 in rental profits by not having that particular vehicle over the July 4th weekend. As evidence of his lost profits, John sends the adjuster a copy of his books over the last 5 years showing his profit and loss statements, expenditure records and receipts. The adjuster tells John that under Missouri law his loss of profits are not compensable. Disgruntled and upset John accepts the total loss check.

b. The farmer and his wife

Al and his wife Mary own a 520 acre farm in northern rural Missouri. Al is a licensed electrician. Mary is a school teacher. Al and Mary own 150 head of cattle which they raise on their farm. They keep meticulous records regarding their farming operation and watch how every dime is spent.

A year ago Al and Mary bought a new Ford F-250 pick-up truck and specially equipped the vehicle with a front grader and a round hay bale feeder installed onto its bed. The truck was equipped by an outfit in Nebraska. The grader is used to scrape a path in the snow through an open field while the hay bale feeder unrolls a hay bale in the cleared path.

Al and Mary also use the truck in the winter to get to a water trough, located on the back part of the farm, to break ice for watering the cows.

One day while driving the truck to town Al is struck from behind by a semi-trailer. The force of the collision causes Al to run off the road and into a large ditch. The collision completely destroys the grader and the round hay bale feeder. The truck itself appears to be repairable.

A few days later an insurance adjuster determines that the vehicle itself may be repairable. The adjuster informs the couple that a final determination of the truck's damages will have to be made by a special repair shop located 75 miles south of the accident scene. Al explains that he must have the truck repaired immediately and that he has called several local dealers who are unable to rent or replace the vehicle. Al contacts the outfit in Nebraska where he originally purchased the truck. The outfit can refit a new truck if one is supplied. Al cannot supply a new truck until such time as the adjuster makes a determination of whether or not the truck can be repaired. The insurance adjuster is unable to help Al with this situation, but does offer to put Al into a rental car during the time it takes to repair the vehicle so that Al can travel back and forth to his electrician job. Al accepts this offer.

Three weeks later the adjuster determines that the truck is in fact not repairable but is totaled and offers Al the fair market value for the truck. Al explains that during this interim he has paid a neighbor \$40.00 per day to transport hay to the cattle and break ice. Al advises that this extra farming cost will significantly impact his return on the cattle when he takes them to the sale barn in May. Al and Mary send the adjuster copies of their records reflecting

how deep the extra cost will impact their lost profits. The insurance adjuster denies any liability for Al and Mary's losses noting that Missouri law does not allow such a recovery.

c. Missouri's public policy

The above discussed hypothetical situations reflect the innate unfairness and injustice of Missouri law under the Orr rule with regard to commercial vehicles. These types of "mom and pop" operations, of which Gateway is one, are the types of situations that Missouri law should protect.

Missouri's sister Supreme Courts consistently point to the inequities of denying loss of use damages in factual scenarios similar to that now facing this Court. Even the cases relied upon by Jokerst emphasize the injustice regarding Missouri's loss of use damages rule. The split in Missouri authorities on loss of use damages accentuates the sound basis for the trial court's judgment in simultaneously awarding Gateway its loss of use damages and the reasonable value of its destroyed foam rig.

C. Conclusion

The trial court properly applied the law in awarding Gateway its lost profit damages following this Court's remand in Ameristar which follows the earlier Orr decision. The Ameristar remand definitively set the factual basis, the legal basis and the parameters by which the trial court awarded and calculated lost profits to an ongoing company that suffered damages to a unique unit of its business. Jokerst's reliance upon the archaic Orr rule is misguided in that it does not comply with Missouri's general rule on damages and does not provide grounds upon which the trial court could fully compensate Gateway. Missouri's

neighboring Supreme Courts modified their outdated laws to comport with a generally accepted rule of damages similar to that utilized by Missouri courts. These neighboring Supreme Court decisions affirms the trial court's careful consideration of the proper application of law in making its damage awards to Gateway. The trial court's simultaneous award to Gateway for its loss of use damages and the reasonable value of its destroyed foam rig follows Missouri precedent which directly contradicts the Orr rule. This trial court's judgment accurately reflects this Missouri's public policy statements as mentioned in the above cited cases. Therefore, this Court should deny Jokerst's Points on Appeal I and II and affirm the trial court's judgment awarding Gateway its lost profit damages in the amount of \$120,000.00.

III. Gateway presented overwhelming evidence of its lost profits

In point III Jokerst asserts that Gateway failed to present substantial evidence upon which the trial court could award Gateway its lost profits. (App. Br. p. 22). Jokerst must raise this point, which would be irrelevant under Orr, because it must face the fact that the trial court's award follows this Court's 2005 Ameristar remand.

At trial Gateway presented the testimony of its bookkeeper, its accountant and presented numerous business records substantiating its lost profits resulting from Jokerst's negligence. Jokerst presented no evidence in contradiction of the facts adduced by Gateway. Thus, should this Court overstep the discretion of the trial court in determining the credibility of the evidence?

A. Standard of Review

Jokerst filed a written Request for Findings of Fact, Grounds For Decision and Method of Determining Facts, pursuant to Missouri Rule of Civil Procedure 73.01(c) (App. A 201). Jokerst failed to make said request on the record before the introduction of evidence. As such, the trial court recited the factual basis for its decision, but did not provide conclusions of law.

Therefore, this Court must presume that the circuit court's judgment to be correct and

affirm the judgment unless there is no substantial evidence to support the judgment, the judgment is against the weight of the evidence, or the judgment erroneously declares or erroneously applies the law. Prudential Property And Casualty Ins. Co. v Cole, 586 S.W2d 433, 434 (Mo. App.1979).

This Court is “obliged to accept as true the evidence and permissible inferences which can be drawn, favorable to the prevailing party, and disregard the contradictory testimony.” Id. This Court will affirm the judgment if “it can be supported on any theory of law in accordance with the evidence.” Id. (Emphasis added).

B. The trial court properly evaluated the evidence of Gateway’s lost profits

Damages are awarded in negligence cases as a means to compensate a party. Ameristar Jet Charter, Inc. v. Dodson Int’l Parts, Inc., 155 S.W.3d 50, 54 (Mo. banc 2005). In awarding damages, the Court seeks to “fully compensate” the Plaintiff, but at the same time to refrain from awarding the Plaintiff “a windfall” Id. In reaching its judgment the trial court must determine whether an award is “fair and reasonable” based upon the evidence at trial. Id.

Missouri Courts award lost profit damages to an ongoing commercial business where the loss is “made reasonably certain by proof of actual facts, with present data for a rational estimate of their amount.” BMK Corp. v. The Clayton Corp., 226 S.W.3d 179, 195 (Mo. App. 2007). Proof of the businesses income, expenses and net profits for a reasonable time anterior is indispensable. Id.

In Ameristar, the Missouri Supreme Court resolved a then existing split among the

appellate courts regarding the criteria upon which a court awards lost profits and the proper calculation of those lost profits. Ameristar at 57-58.

A trial court's judgment for lost profits should be affirmed if the evidence provides an "adequate basis" to estimate the amount of "lost profits with reasonable certainty." Id. A Plaintiff must produce evidence at trial proving "prospective or anticipated profits" by "more than mere speculation." Id. at 54-55. But uncertainty in the Plaintiff's evidence with regard to the exact amount of lost profits "does not prevent recovery." Id. at 55.

In evaluating a claim for lost profits the trial court is in the best position to use "common experience" in judging whether the evidence "demonstrates that a substantial pecuniary loss has occurred" Id. at 54. In so doing, the trial court considers the fact that lost profits are of "a character that defies exact proof." Id. As such, it is reasonable for the trial court to award damages for lost profits based upon a "lesser degree of discretion." Id.

A trial court calculates its award of lost profit damages by deducting "variable expenses, not fixed expenses" from the Plaintiff's reasonably certain estimate of lost revenues. Ameristar at 56. Thus, the trial court must have evidence before it regarding the estimated lost revenue of the damaged unit and "all ascertainable variable expenses directly tied" to that damaged unit. Id. at 57.

Variable expenses are those expenses "tied directly to the unit of business or property damaged as a result of the defendant's actions." Id. Variable expenses may include, but are not limited to, the Plaintiff's costs for "fuel, maintenance, depreciation, interest, insurance, salaries and benefits for particular employees." Id.

Gateway's average daily gross revenue prior to the accident was \$2,500.00. (Tr. p. 62). On November 26, 2002, Gateway had outstanding jobs and immediately "lost work" and "customers" because the company "couldn't get to them." (Tr. p. 56 and 64). Gateway was forced to tell customers, seeking to have a job completed in "two weeks," that the company could not perform that customer's work for "six weeks." (Tr. p. 63). Gateway's trial exhibit 6 accurately reflects dates when Gateway could not get to its jobs. (Tr. p. 59, App. A. 187-188).

Trial exhibit 10 details Gateway's individual expense categories. (Tr. p. 74, App. A 107-126). Ms. Vunesky testified that several categories were expenses directly related to the destroyed foam rig. (Tr. pp. 73-74). Other categories in trial exhibit 10 reflects Gateway's overhead costs. (Tr. pp. 74-75).

Cindy Burke, Gateway's certified public accountant since the company's inception, calculated Gateway's profit losses resulting from Jokerst's negligence. (Tr. pp. 124-126 and 135). In formulating her opinion, Ms. Burke was present throughout the trial and reviewed Gateway's QuickBooks, tax returns, business records and other documents related to the case. (Tr. p. 127).

Ms. Burke used accepted accounting methods, examined materials containing actual facts and data related to Gateway's business providing an adequate basis to make her calculations. (Tr. p. 127). Ms. Burke made a rational estimate of Gateway's profit losses to a reasonably degree of certainty. (Tr. pp. 127-128). Several diagrams and charts, prepared to assist Ms. Burke with her testimony were admitted into evidence. (Tr. p. 128, App. A.

189-194 and 197).

Ms. Burke testified that trial exhibit 9 accurately reflected Gateway's gross sales from 1996 to 2006. (Tr. p. 130, App. A 45-56). She testified that Gateway's gross revenue steadily rose from 1996 to 2001. (Tr. p. 133). Gateway's highest grossing year was 2001. (Tr. p. 131). Ms. Burke confirmed that Gateway suffered a steady decline in gross revenue from 2002 to 2006 because Jokerst's negligence. (Tr. pp. 133-134, App. A. 189).

Gateway's gross revenue was lower in 2002, according to Ms. Burke, because Gateway "lost their truck at the end of November [and] didn't have income for the last six weeks of the year." (Tr. p. 131). Ms. Burke testified that Gateway never reached an optimal level of performance and could not go "full-bore as they had intended before the accident." (Tr. p. 133).

In formulating her opinion, Ms. Burke also relied upon U.S. Census statistics on housing permits to determine that Gateway suffered its most significant profit losses during construction boom years. (Tr. p. 139, App. A. 197). Ms. Burke testified that Gateway's significant advertising expenditures created industry good will that Gateway could not capitalize upon because of the lost foam rig. (Tr. p. 138).

In balancing her calculations, Ms. Burke also reviewed negative external market forces. (Tr. p. 141, App. A. 191). These negative external factors impacted Gateway's gross revenue in several ways, the most important being the fact that Gateway's loss of the foam rig opened a window of opportunity for direct competitors to enter the market and take established business from Gateway. (Tr. pp. 141-143).

Ms. Burke calculated Gateway's gross revenue, beginning with the year 2001, based upon the "same percentage" increases as reflected by "the Census Bureau" building permits. (Tr. p. 143). Based upon all the materials, her expertise, her 10 years experience with Gateway, the positive and negative factors, Ms. Burke concluded that Gateway would have reasonably reached a gross revenue level of \$870,000 by the year 2005. (Tr. p. 145 App. A. 192).

Ms. Burke explained to the court her method of calculating Gateway's lost gross revenue when she testified that she took:

"the Census information and from the year-to-year in the Census show how the industry was increasing. From 2001 to 2002 it increased 18 per cent. From 2002 to '03 it was six. From '3 to '4 it was six. Then I took their [Gateway's] best year, where they were hit in, and increased their sales by each of those amounts. Then I subtracted what they actually did to arrive at what they lost." (Tr. p. 149).

Ms. Burke drew the Court's attention to two types of profits - "net profit and gross profit." (Tr. p. 135). Ms. Burke testified that to generally calculate lost profits you must "take gross revenue and subtract expenses." (Tr. p. 135). To "arrive at gross profit you use "variable" or "direct costs" and to calculate net profit "you use all expenses and accrued variables." (Tr. p. 135).

Ms. Burke utilized a variable cost deduction method to calculate Gateway's lost profits. (Tr. pp. 154 - 155). Ms. Burke testified that direct or variable costs are those that "change, given whatever unit is out there or whatever you're producing; your material costs,

your incidentals; fuel, in this case.” (Tr. p. 155). Other costs are fixed such as “rent, your telephone bill, your office salary” and “insurance.” (Tr. p. 155).

Ms. Burke testified that Gateway’s variable costs are reflected in trial exhibit 10 as categories 803, 805, 815, 825, 910, 944, 947.5 and the depreciation expense category. (Tr. p. 147, App. A 107-126). Ms. Burke testified that 50% of those variable costs were directly related to the damaged foam rig. (Tr. p. 148).

After arriving at Gateway’s projected lost gross income, Ms. Burke testified that she deducted the variable costs from Gateway’s projected lost gross income. (Tr. pp. 149-150). Based upon her calculations, Ms. Burke testified that because of the Jokerst’s negligence Gateway suffered lost profits in a range from “\$120,000 on the down side” and “135 on the net.” (Tr. p. 150).

Jokerst’s sole witness regarding Gateway’s lost profit damages was a certified public accountant, Louis Naeger. Mr. Naegar agreed with Sue Vunesky’s testimony that Gateway earned an average daily gross revenue of \$2,500.00 per day. (Tr. p. 170). Further, Mr. Naegar agreed with Ms. Burke’s approach in calculating lost profits. (Tr. P. 169).

C. Conclusion

Gateway’s substantial evidence proved that it suffered significant lost profits. Thus, the trial court accepted the credibility of Gateway’s witnesses in reaching its conclusion that Gateway “lost business and profit.” (L.F. 16). This Court should accept as true the evidence and permissible inferences which can be drawn, favorable to the prevailing party, and disregard any contradictory testimony. The trial court’s judgment correctly follows the

evidence within the context of this Court's Ameristar remand following Orr. Therefore, this Court should deny Jokerst's Point III and affirm the trial court's award to Gateway for its lost profits of \$120,000.00.

IV. Jokerst's fourth and fifth points illustrate the current legal quandary

In its fourth point, Jokerst asserts that the trial court misapplied the law in awarding Gateway the interest it paid on a loan needed to replace the lost foam rig. (App. Br. 27). Jokerst claims that the award of interest goes beyond the proper measure of damages under Orr v. Williams, 379 S.W.2d 181, 189 (Mo. App. 1964). In its fifth point, Jokerst asserts that the trial court misapplied the law because Gateway's interest damages were special damages which must be specifically pled. (App. Br. 29). Jokerst's fourth and fifth points illustrate the confusion in Missouri law created by this Court's Ameristar remand.

A. Standard of Review

Jokerst filed a written Request for Findings of Fact, Grounds For Decision and Method of Determining Facts, pursuant to Missouri Rule of Civil Procedure 73.01(c) (App. A 201). Jokerst failed to make said request on the record before the introduction of evidence. As such, the trial court recited the factual basis for its decision, but did not provide conclusions of law.

Therefore, this Court must presume that the circuit court's judgment to be correct and affirm the judgment unless there is no substantial evidence to support the judgment, the judgment is against the weight of the evidence, or the judgment erroneously declares or

erroneously applies the law. Prudential Property And Casualty Ins. Co. v Cole, 586 S.W2d 433, 434 (Mo. App.1979).

This Court is “obliged to accept as true the evidence and permissible inferences which can be drawn, favorable to the prevailing party, and disregard the contradictory testimony.” Id. This Court will affirm the judgment if “it can be supported on any theory of law in accordance with the evidence.” Id. (Emphasis added).

B. Gateway’s general interest damages are recoverable under Orr

In relying upon the rule as stated in Orr, Jokerst must concede that the foundations of the rule are based upon the archaic notions of law as discussed in D. Dobbs, *Remedies* § 5.11 at 384-85 (1973). As noted above, D. Dobbs states one root of the rule was founded upon the principle that a plaintiff was made whole by the payment of interest on the value of the lost property during the time the plaintiff was deprived of the property’s use. Id.

Several other Supreme Courts, before modifying their laws, noted that this reasoning appeared behind their selective award of lost profit damages in total destruction cases. *See Reynolds v. Bank of Am. Nat’l.Trust and Sav. Assoc.*, 345 P.2d 926, 927 (Cal. 1959); Long v. McAllister, 319 N.W.2d 256, 259 (Iowa 1982); and Chlopek v. Schmall, 396 N.W.2d 103, 108 (Neb. 1986).

Jokerst cannot dispute that Missouri’s general rule on damages is to “compensate a party for a legally recognized loss.” Ameristar at 54. This general rule is meant to compensate the Plaintiff without providing a windfall. Id. Further, general damages are those which the law “would impute as the natural, necessary and logical consequence of the

defendant's wrongful act." Johnson v. Flex-O-Lite Mfg. Corp., 314 S.W.2d 75, 84 (Mo. 1958). Therefore, it appears that under Orr an interest award would be considered general damages and would be fully compensable.

Here the trial court awarded \$11,723.83 to Gateway for interest damages. (Tr. p. 154). The trial court correctly awarded Gateway \$68,500.00 for the reasonable value of its lost foam rig. Gateway has not found any Missouri cases stating what the interest rate would be to compensate a Plaintiff under the Orr rule. Thus, Gateway assumes that the legal rate of 9% per annum would apply under Orr rule. Mo. Rev. Stat. § 408.020 (2008). (App. A. 202). Therefore, not only did the trial court properly award interest damages to Gateway, but it miscalculated that amount which should have been \$22,615.71 for the 1,339 days from the date of accident to judgment.

To rebuild the lost unit, Gateway took out a bank "line of credit" loan to procure the necessary funds. (Tr. p. 43, App. A 198-200). Due to Jokerst's negligence and subsequent actions, Gateway was forced to begin making payments upon the bank loan. (Tr. p. 150). Gateway's certified public account testified that, as a result of Jokerst's negligence, the loan payments were a necessary cost incurred by Gateway. (Id). Ms. Burke testified Gateway paid a total sum of \$11,723.82 as interest on the bank loan. (Tr. p. 154).

Jokerst cannot argue that the Orr rule applies in denying Gateway its loss of use damages and argue that the Orr rule also applies in denying Gateway its lost interest on replacing the destroyed vehicle. Jokerst's arguments accentuates the confusion created by this Court's Ameristar remand and the current state of flux existing in Missouri's courts

regarding when to award lost profit damages.

C. Conclusion

Under Orr and the foundations upon which it has been applied, Gateway should recover the interest amount paid to acquire a replacement foam rig. Said interest amount under Orr is not a special damage but is a general damage which does not amount to a double recovery.

Admittedly, Jokerst and Gateway are now caught in the legal morass created by this Court's Ameristar remand. In this predicament, Gateway concedes that it may not recover its interest damages under the Ameristar remand because said interest would be a double recovery as pointed out by Jokerst. Therefore, if this Court should find that Orr is the prevailing law in Missouri then the trial court correctly applied the law and the \$11,723.82 interest award to Gateway should be affirmed and Jokerst's Points IV and V denied. But in the event that this Court should find that Ameristar is controlling, then Jokerst's Points IV and V should be sustained and Gateway should recover only the \$120,000.00 in lost profit damages along with the reasonable value of its commercial foam rig and the clean up costs.

V. The trial court properly applied the law in awarding the clean up costs

Jokerst comes before this Court in Point VI asserting that the trial court misapplied the law in awarding Gateway the hazardous chemical clean up costs. Essentially, Jokerst is asking this Court to side-step the trial court's broad discretion. The trial court had before it competent evidence in the certified copy of the St. Louis County Circuit Court file, the affidavit therein of Environmental Restoration's Vice-president and the invoice sent to Gateway. Does the trial court's award to Gateway of the clean up costs amount to an abuse of discretion, shock the sense of justice or indicate a lack of careful consideration?

A. Standard of Review

Jokerst filed a written Request for Findings of Fact, Grounds For Decision and Method of Determining Facts, pursuant to Missouri Rule of Civil Procedure 73.01(c) (App. A 201). Jokerst failed to make said request on the record before the introduction of evidence. As such, the trial court recited the factual basis for its decision, but did not provide conclusions of law.

Therefore, this Court must presume that the circuit court's judgment to be correct and affirm the judgment unless there is no substantial evidence to support the judgment, the judgment is against the weight of the evidence, or the judgment erroneously declares or

erroneously applies the law. Prudential Property And Casualty Ins. Co. v Cole, 586 S.W2d 433, 434 (Mo. App.1979).

This Court is “obliged to accept as true the evidence and permissible inferences which can be drawn, favorable to the prevailing party, and disregard the contradictory testimony.” Id. This Court will affirm the judgment if “it can be supported on any theory of law in accordance with the evidence.” Id. (Emphasis added).

B. The trial court has broad discretion in admitting and evaluating the evidence presented at trial

Every action involving a defendant’s negligence “must be decided on its own facts.” Daniels v. Senior Care, Inc., 21 S.W.3d 133, 138 (Mo. App. 2000). A trial court is vested with “broad discretion” with regard to the admission of evidence at trial. Haynes v. Edgerson, 240 S.W.3d 189, 196 (Mo. App. 2007). The trial court abuses its discretion where its ruling in admitting evidence at trial is “clearly against the logic of circumstances, is so arbitrary and unreasonable as to shock the sense of justice [or] indicates a lack of careful consideration.” Id. Even if the trial judge abuses his discretion, such an abuse does not require a reversal unless it is shown that the “party was prejudiced by the admission.” Id.

Missouri Revised Statute Section 490.130 (2008) states in part “copies from the record of proceedings of any court of this state, attested by the clerk thereof... shall be received as evidence of the acts or proceeding of such court in any court of this state.” (App. A. 203).

In this case, Environmental Restorations was summoned to the scene of the accident and conducted a clean-up of the dangerous chemical spill. (Tr. p. 7 and 76). On December 3,

2004, Environmental Restorations filed suit against the Gateway in the Circuit Court of St. Louis County, State of Missouri in order to recover the clean-up costs of \$12,746.42. (Tr. p. 79). The Circuit Court of St. Louis County proceedings are reflected in Gateway's trial exhibit 12, which was admitted into evidence without objection, as a certified court record pursuant to Mo. Rev. Stat. § 490.130. (Tr. p. 5, App. A 142-186).

Gateway's exhibit 12 contains the affidavit of Environmental Restorations Vice-President, Steve R. Wilhelm, attesting to the accurateness of the clean-up costs. (Tr. p. 5, App. A 180). The affidavit states that Mr. Wilhelm has "personal knowledge of the matters stated herein," that "Gateway Foam Insulators...after all offsets and credits due" is indebted to Environmental Restorations in the "principal balance...of \$12,746.72." App. A 180). Thus, the trial court could find this evidence reliable as to the reasonableness of the hazardous materials cleanup costs.

Ms. Vunesky testified that she had received Environmental Restorations' invoice and kept said record in Gateway's files in the ordinary and regular course of Gateway's business. (Tr. p. 77). The amount reflected in the invoice, admitted as exhibit 11, is identical to the principal amount as reflected in the affidavit of Mr. Wilhelm. (Tr. p. 79; App. A 195-196). Jokerst argues that the invoice was not a business record of Gateway. (App. Br. 32). This argument is irrelevant in that the trial court already had before it substantial competent evidence in the St. Louis County Circuit Court file.

Thus, the trial court had substantial credible evidence from which to determine the amount of the damages suffered by Gateway for the clean-up costs. Sue Vunesky's

testimony and the admission of exhibit 11 did not prejudice Jokerst, does not shock sense of justice and reflects careful consideration by the trial court.

Jokerst's assertion that the clean-up costs were a special damage is also without merit. Damages are recoverable where a defendant's negligence is the proximate cause of the damages. Daniels, at 138. An injury is proximately related to the Defendant's wrongful act where it is "the natural and probable consequence of the Defendant's negligence." Id. The clean-up costs were a natural, necessary and logical consequence which are directly and proximately related to Jokerst's negligence.

C. Conclusion

The trial court properly admitted evidence of the damages sustained by Gateway with regard to Environmental Restorations' clean-up costs. The trial court did not err in admitting Environmental Restorations' invoice because it already had before it substantial, reliable and credible evidence reflecting the amount owing and due from Gateway. Thus, the trial court properly determined that the cleanup damages were reasonable, necessary and proximately related to the Jokerst's negligence. Therefore, Jokerst's Point VI should be denied and the trial court's judgment awarding Gateway the clean-up costs should be affirmed.

VI. The trial court properly awarded damages of \$68,500.00 for the foam rig.

In Point VII, Jokerst asserts that the trial court lacked sufficient evidence to award Gateway the fair market value of its destroyed foam rig. (App. Br. 33). Jokerst presented no evidence at trial regarding the diminution in value of Gateway's lost foam rig. Gateway presented the testimony of Ron Vunesky, its driver Terry Richardson and its foam rig equipment expert Larry Wilson. Mr. Wilson relied upon reasonable data to formulate his opinion of the foam rig's worth prior to and after the accident. Should this Court now circumvent's the trial court's discretion in ascertaining the weight of that testimony and reverse the trial court's award to Gateway?

A. Standard of Review

Jokerst filed a written Request for Findings of Fact, Grounds For Decision and Method of Determining Facts, pursuant to Missouri Rule of Civil Procedure 73.01(c) (App. A 201). Jokerst failed to make said request on the record before the introduction of evidence. As such, the trial court recited the factual basis for its decision, but did not provide conclusions of law.

Therefore, this Court must presume that the circuit court's judgment to be correct and affirm the judgment unless there is no substantial evidence to support the judgment, the judgment is against the weight of the evidence, or the judgment erroneously declares or

erroneously applies the law. Prudential Property And Casualty Ins. Co. v Cole, 586 S.W2d 433, 434 (Mo. App.1979).

This Court is “obliged to accept as true the evidence and permissible inferences which can be drawn, favorable to the prevailing party, and disregard the contradictory testimony.” Id. This Court will affirm the judgment if “it can be supported on any theory of law in accordance with the evidence.” Id. (Emphasis added).

B. Gateway’s evidence established the foam rig’s diminution in value

Missouri’s general test to determine the amount of damages for actions related to “real or personal property” is the “diminution in value test i.e., the difference between the fair market value before and after the event causing the damage.” Tull v. Housing Auth. of the City of Columbia, 691 S.W.2d 940, 942 (Mo. App. 1982).

Gateway’s evidence at trial unequivocally established the fair market value of its lost property. Gateway’s employee, Terry Richardson, testified that he was intimately familiar with the equipment on Gateway’s foam rig unit. (Tr. p. 16). Mr. Richardson testified that at the time of the accident Gateway’s foam rig was fully loaded with all necessary equipment. (Tr. p. 17).

Gateway compiled a list of every equipment item on the truck on the day of the accident. (Tr. p. 3). Mr. Vunesky testified that he “managed the day to day operations of the foam crew” and was familiar with the equipment needed to operate a foam rig. (Tr. p. 104). Mr. Vunesky testified that exhibit 3 accurately reflected the equipment that would be found on the foam rig. (Tr. p. 104, App. A 43-44). The compiled equipment list was admitted into

evidence without objection. (Tr. p. 33). Mr. Vunesky testified that Gateway paid \$76,575.49 for all the items listed exhibit 3 including the foam rig's truck, equipment and miscellaneous items. (Tr. p. 40).

Following the accident, Gateway was allowed to examine the foam rig on one occasion. (Tr. p. 19). That inspection revealed that the equipment, chemicals, tools and the vehicle itself were unsalvageable and inoperable. (Tr. p. 20-22).

An owner of personal property "may testify, without qualification, as the reasonable market value of an item of personalty which has been destroyed." Dewitt v. Am. Family Mut. Ins. Co., 667 S.W.2d 700, 708 (Mo. 1984).

Mr. Vunesky testified that Gateway eventually sold the damaged truck for \$2,500.00 as salvage. (Tr. p. 107). Mr. Vunesky testified that the compressor and generator, after the accident, had a fair market value of \$4,000.00. (Tr. p. 107).

Mr. Larry Wilson was tendered, without objection, as Gateway's expert with regard to the reasonable value of both used and new foam rig equipment (Tr. pp. 110-111). Mr. Wilson testified that he was able to give an opinion with regard to the value of used foam rig equipment based upon his experience dealing with customers inquiring about the worth of used equipment. (Tr. p. 112). Mr. Wilson stated that the equipment listed in exhibit 3 were "consistent with what most contractors in this line of work should have on their vehicle to make a working unit." (Tr. p. 114). Mr. Wilson fully inspected Gateway's foam rig after the accident while it was being held by Jokerst at its lot. (Tr. p. 113). On that occasion, Mr. Wilson observed that all of the equipment left on the truck was destroyed and inoperable. (Tr.

pp. 116 - 117). Mr. Wilson testified that the fair market value of Gateway's foam rig at the time of accident, as outfitted in exhibit 3, would have been "75, maybe 80,000 dollars." (Tr. p. 110, App. A 43-44).

Jokerst's assertion that Mr. Wilson was required to testify to the value of each "particular item" fails to take into consideration Missouri's rule of evidence regarding expert testimony. The trial court has reasonable discretion in "deferring to the expert's assessment of what data is reasonably reliable." Scott v. SSM Healthcare of St. Louis, 70 S.W.3d 560, 571 (Mo. App. 2002). Thus, the trial court could reasonably rely upon Mr. Wilson's testimony with regard to the reliability of Gateway's witnesses, reliability of exhibit 3 and the fair market value of the items Gateway lost because of Jokerst's negligence.

C. Conclusion

Gateway's incontrovertible and substantial evidence unequivocally established the fair market value of Gateway's foam rig, equipment and tools. The trial court itself asserted this proposition when it told Jokerst's counsel, during closing argument, that Gateway's witnesses had established the fair market value. (Tr. pp. 180 and 182). Therefore, Jokerst's Point VII should be denied and the trial court's judgment awarding Gateway the reasonable value of its foam rig should be affirmed.

VII. Summation

Jokerst's shotgun approach attacks every aspect of the trial court's judgment. Jokerst asserts that the trial court misapplied the law or lacked evidence to award Gateway the reasonable value its lost foam rig, its lost profits, interest payments to acquire a new foam rig and Gateway's costs to clean up the chemical spill. Boiled down to its essence, Jokerst's has presented and this Court has accepted on transfer a single question regarding Missouri's loss of use damages law. All other issues raised by Jokerst fall under the umbrella of this paramount question. Can Gateway recover both its lost profit damages and the reasonable value of its unique foam rig under Orr following this Court's remand in Ameristar?

Gateway's evidence substantially proved that its foam rig was an uniquely specialized all-in-one operating unit used as a primary source for its income. Following the accident, Jokerst took control and custody of Gateway's foam rig for almost 2 years. During this interim Gateway was forced to replace the destroyed foam rig by piecemeal and lost substantial profits.

Gateway can recover both its lost profit damages and the reasonable value of its unique foam rig because the trial court properly applied the law to the substantial evidence. Gateway can recover its clean up costs because the trial court properly admitted evidence regarding those costs.

Gateway admits that confusion exists regarding the lost interest award. Jokerst's own arguments punctuate the flux in Missouri's loss of use damages. With that said, the award was proper if this Court finds the Orr rule controlling following its remand in Ameristar.

Respectfully Submitted,

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Affidavit of Service

STATE OF MISSOURI)
)
COUNTY OF LINCOLN) ss.

I MARK A. KRAGEL, hereby certify, being duly sworn, that on the ____ day of December, 2008, that two (2) copies and one (1) copy on cd-rom disc of the forgoing Respondent's Amended Substitute Brief and separately bound Amended Appendix were mailed by United States Mail, postage prepaid to:

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STATE OF MISSOURI)

) SS.:

COUNTY OF LINCOLN)

On this _____ day of December, 2008, before me, the undersigned Notary Public, appeared MARK A. KRAGEL, to me personally known, being of lawful age and first duly sworn upon his oath, states that he is the person who signed the foregoing Affidavit of Service and that the facts and information contained in the foregoing are true and correct according to his best knowledge, information and belief.

Subscribed and sworn to before me this _____ day of _____,
2008.

Notary Public

My Commission Expires:

Affidavit of Compliance

STATE OF MISSOURI)
)
COUNTY OF LINCOLN) ss.

COMES NOW, Mark A. Kragel, attorney for Respondent, and states to the Court as follows:

1. That Respondent's Amended Substitute Brief complies with the limitations set forth in Missouri Supreme Court Rule 84.06(b).
2. That the number of words in Respondent's Substitute Amended Brief is 15,861.
3. That the disk of Respondent's Substitute Brief has been scanned for viruses and is virus-free.

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COUNTY OF LINCOLN)

On this _____ day of December, 2008, before me, the undersigned Notary Public, appeared MARK A. KRAGEL, to me personally known, being of lawful age and first duly sworn upon his oath, states that he is the person who signed the foregoing Affidavit of Service and that the facts and information contained in the foregoing are true and correct according to his best knowledge, information and belief.

Subscribed and sworn to before me this _____ day of _____,
2008.

Notary Public

My Commission Expires: