IN THE MISSOURI SUPREME COURT
SC 87789

ERIC D. BURNS,
Plaintiff/Respondent,

vs.

LYNN M. SMITH,
Defendant/Appellant.

APPEAL FROM THE CIRCUIT COURT OF
ST. CLAIR COUNTY, MISSOURI
The Honorable William Roberts

SUBSTITUTE BRIEF OF RESPONDENT

Michael D. Holzknecht - #33978
Paul L. Redfearn - #27417
The Redfearn Law Firm, P.C.
1125 Grand Boulevard, Suite 1805
Kansas City, Missouri 64106
Telephone: (816) 421-5301
Facsimile: (816) 421-3785

Edward D. Robertson, Jr. #27183
Mary D. Winter #38328
Anthony L. DeWitt # 41612
Bartimus, Frickleton, Robertson & Gorny, P.C.
715 Swifts Highway
Jefferson City, MO 65109
(573) 659-4454
(573) 659-4460 (facsimile)

ATTORNEYS FOR RESPONDENT ERIC D. BURNS

Table of Contents

Table of Authorities 4

Jurisdictional Statement 7

Statement of Facts 8

A. Background 8

B. “Run it 'til it blows” 10

C. The Usual Hazards Of Driving A Cement Mixer Truck 11

D. The Exploding Tank And The Cause Of The Exploding Tank 12

E. The Evidence That A Reasonable Person Would Recognize That Attempting To Weld Over A Corroded, Rusted-Through Water Pressure Tank Was Hazardous. 13

1. Defendant Smith’s “Run It ‘Til It Blows” Statement. 13

2. Joe Fischer, defendant's expert witness 14

3. John Hamilton 15

4. Defendant Lynn Smith 15

5. Defendant's brother, Larry Smith 16

6. Plaintiff Eric Burns 16

7. Concession by Counsel 16

F. Plaintiff's Damages, Prejudgment Interest And The Trial Court's Judgment. 17

1. Plaintiff's Damages 17

2. Pre-Judgment Interest 18

3. The Trial Court's Judgment 19

ARGUMENT 21

I. THE TRIAL COURT DID NOT ERR IN DETERMINING THAT PLAINTIFF/RESPONDENT ERIC BURNS PLEADED AND PROVED "SOMETHING MORE" AS REQUIRED BY STATE EX REL. BADAMI V. GAERTNER AND STATE EX REL TAYLOR V. WALLACE TO ESTABLISH CO-EMPLOYEE LIABILITY. 21

A. Standard of Review 21

B. Introduction to the Argument 22

C. Overview of the "Something More" Standard 24

D. Respondent's Evidence of "Something More." 34

E. Appellant Obtained the Finding of Fact It Solicited 45

F. The Trial Court's Judgment Comports With The Standards Set in *Taylor*, *Groh*, *Logsdon*, *Tauchert* and Other Cases 47

G. *Taylor's* Standard is Workable, Proper, And Balances the Rights of Employees and Supervisors 51

H. Conclusion 55

II. THE TRIAL COURT'S DECISION CORRECTLY REJECTED APPELLANT'S CLAIM THAT THE SINE QUA NON OF CO-EMPLOYEE LIABILITY IS A FINDING THAT A REASONABLE PERSON WOULD

RECOGNIZE THAT WHAT OCCURRED WAS HAZARDOUS BEYOND THE USUAL REQUIREMENTS OF EMPLOYMENT. 56

A. Standard of Review 56

B. Respondent Presented Substantial Evidence Sufficient to Impose Liability on Defendant Smith 56

C. The Trial Court Did Not Apply An Engineering Standard of Care. 59

III. THE TRIAL COURT DID NOT ERR AND DEFENDANT WAS NOT PREJUDICED BY THE TRIAL COURT FOLLOWING EXISTING LAW AND AWARDING PREJUDGMENT INTEREST, ESPECIALLY WHERE DEFENDANT HAD ACTUAL KNOWLEDGE THAT PLAINTIFF WAS PURSUING THE CLAIM FOR PREJUDGMENT INTEREST 60

A. Standard of Review 60

B. *Call v. Heard* is Sound Law and This Court Need Not Overrule *Call*. 60

Conclusion 62

Certificate Of Compliance 64

CERTIFICATE OF SERVICE 65

Table of Authorities

Cases

Arnwine v. Trebel, 195 S.W.3d 467 (Mo. App. W.D. 2005) ..... passim

Biller v. Big John Tree Transplanter Mfg. & Truck Sales, Inc., 795 S.W.2d 630, 633 (Mo. App. W.D. 1990) 27

Brizendine v. Conrad, 71 S.W.3d 587 (Mo. banc 2002) 22

Burns v. Smith, 2006 WL 1449956..... 39, 57

Call v. Heard, 925 S.W.2d 840, 854 (Mo. banc 1996)..... 60

Chapman v. Sanders, 528 S.W.2d 462 (Mo. App. 1975) 54

Collier v. Roth, 515 S.W.2d 829 (Mo. App. 1974) 54

Craft v. Scaman, 715 S.W.2d 531, 537 (Mo. App. E.D. 1986) 31, 32, 35, 48

Dixon v. Director of Revenue, 118 S.W.3d 302, 304 (Mo. App. S.D. 2003). 21, 41

Felling v. Ritter, 876 S.W.2d 2 (Mo.App.1994) 50

Gardner v. Stout, 342 Mo. 1206, 119 S.W.2d 790, 792 (1938)..... 48, 53

Graham v. Geisz, 149 S.W.3d 459, 462 (Mo. App. E.D. 2004)..... 30, 35, 45, 56

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

Gunnett v. Girardier Bldg. and Realty Co., 70 S.W.3d 632, 635 (Mo.App. E.D.2002) ..... passim

Harris v. Mo. Dept. of Conservation, 895 S.W.2d 66, 71 (Mo.App.W.D. 1995) 22

Hedglin v. Stahl Specialty Co., 903 S.W.2d 922, 927 (Mo.App.1995 32, 41, 43, 50

Hurlock v. Park Lane Medical Ctr., Inc., 709 S.W.2d 872, 880 (Mo.App.1985) 21, 41

Jerry Bennett Masonry, Inc. v. Crossland Constr.Co., Inc., 171 S.W.3d 81, 82 (Mo.App.S.D. 2005)..... 22

Kelley v. DeKalb Energy Co.,, 865 S.W.2d 670, 672 (Mo. banc 1993).... 39, 50, 57

Lamar v. Ford Motor Co., 409 S.W.2d 100, 107 (Mo.1966) 48, 53

Lewis v. Gibbons, 80 S.W.3d 461 (Mo. banc 2002)..... 22

Logan v. Sho-Me Power Elec. Coop, 122 S.W.3d 670, 678 (Mo.App.S.D. 2003) ..... passim

Love v. Hardee's Food Sys., Inc., 16 S.W.3d 739, 742 (Mo.App.2000)..... 21

Lowrey v. Horvath, 689 S.W.2d 625, 627 (Mo. banc 1985)..... 32

Lyon v. McLaughlin, 960 S.W.2d 522, 526 (Mo. App. W.D. 1998)..... 30

Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976)..... 22, 23

Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976)..... 21, 22

Nowlin ex rel. Carter v. Nichols, 163 S.W.3d 575, 578-79 (Mo.App.2005).. 39, 57

Pavia v. Childs, 951 S.W.2d 700 (Mo. App. S.D. 1997) 33, 35, 41, 43

Pierce v. Platte-Clay Elec. Coop., Inc. 769 S.W.2d 769, 776 (Mo. banc 1989) .. 32

Schumacher v. Leslie, 360 Mo. 1238, 232 S.W.2d 913, 917 (Mo. banc 1950)... 48, 53

Sexton v. Jenkins & Assoc., 41 S.W.3d 1 (Mo.App.2000)..... 50, 52, 57

State ex rel. Badami v. Gaertner, 630 S.W.2d 175 (Mo. App. E.D. 1982)... passim

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

Sylcox v. Nat'l Lead Co., 225 Mo.App. 543, 38 S.W.2d 497, 502 (1931)25, 26, 48, 53

Tauchert v. Boatmen's Nat. Bank., 849 S.W.2d 573 (Mo. banc 1993) ..... passim

Workman v. Vader, 854 S.W.2d 560 (Mo. App. S.D. 1993) 33

Wright v. St. Louis Produce Mkt., *Inc.*, 43 S.W.3d 404, 415 (Mo.App.2001)39, 57

Zueck v. Oppenheimer Gateway Properties, Inc., 809 S.W.2d 384, 390 (Mo. banc 1991)..... 25

Statutes

§ 287.120.2 RSMo. (2005) 24

§ 287.150 RSMo 2000 55

§ 408.040, RSMo 2000 ..... 18, 61

§ 537.060, RSMo 2000 27

Rules

Rule 81.12(c)..... 18

Rule 84.04(f) 8

Treatises

Restatement (Second) Torts, § 323 38

Jurisdictional Statement

Respondent concurs in Appellant's Jurisdictional Statement.

Statement of Facts

Appellant's statement of facts fails to comport with Rule 84.04. Pursuant to Rule 84.04(f) Respondent provides a statement of facts supporting the trial court's judgment.

A. Background

The pressurized water tank that injured Plaintiff/Respondent Eric Burns (sometimes "Burns" or "Plaintiff" or "Respondent") exploded on April 7, 2000.

Kennon Ready-Mix, Inc., employed Burns as a concrete mixer truck driver prior to April 7, 2000. Defendant Lynn Smith (sometimes "Smith" or "Defendant" or "Appellant") supervised Burns and was his co-employee. (Legal File at 62, hereafter "L.F.__").

Water tanks on cement trucks are pressurized (and depressurized) as needed to permit the driver to change the mix at the job site and to clean the delivery chute when delivery of the concrete is completed. (Transcript at 389, hereafter Tr.__)

Sometime prior to April 7, 2000, Burns noticed that the 150-gallon water tank on the concrete mixer truck he was driving had begun spraying out water at several points when it was under pressure along a line approximately five, six or seven inches long. (L.F.62; Tr.394). The water tank was a salvage tank that had been cannibalized from a late 1970's model mixer truck that was sitting in the

company's yard and was no longer operational. (L.F.62; Tr.86-87; Tr.84)(App. A-2).

After noticing the leak, Burns drove the truck back to the Kennon plant and reported it to Defendant Smith. Smith told Burns to drive the truck over to the shop and he, defendant, would take care of it. (Tr.394). Smith attempted to patch the tank by welding over the rust and corrosion. (Tr.93).

Defendant Smith was not a certified welder, (Tr.90-91) and had never had any formal training in welding. (Tr.90). Defendant welded only an hour or so in a year's time, a few minutes here, a few minutes there, and did not consider himself an experienced welder. (Tr.91).

Defendant Smith was fifty-four years old. (Tr.54). When shown photographs of the irregular, multi-directional globs of weld he had placed on the tank (along the line of the explosion) and asked to explain why certain of these dobs of weld were in a direction different than the main line of the weld, he testified that he does not “see very good” and that he really needs glasses. He has never gotten prescription glasses, and instead buys two dollar reading glasses so he can read. He “has trouble when he tries to weld”. (Tr.72-73)(App. A-1).

Smith admitted that he had attempted the weld that eventually exploded. He characterized the affect of his inability to see as a “kind of a feeling in the dark thing” as he welded. (Tr.73-74) (L.F.62 ¶3).

Defendant Smith admitted he had not inspected the inside of the salvage tank prior to putting it on the truck Burns drove. Defendant had simply assumed that it was serviceable (Tr.82-83).

Further, Defendant attempted the weld:

(1) without checking the wall thickness of the pressure tank in the corroded area of his weld before attempting the weld. (Tr.97).

(2) without attempting to determine the material of which the tank was made (Tr.105);

(3) without knowing the extent of the rust on the inside of the tank (Tr.105);

(4) admitting that had he inspected the tank properly, he would not have attempted to make the weld (Tr.105);

(5) without knowing the make-up of the welding rod (Tr.105);

(6) without consulting any welding codes or standards (Tr.106);

(7) without pre-heating the welding site (Tr.106);

(8) without performing any cool down procedures on the welded site (Tr.106);

(9) with the welder set “too hot” (Tr.484).

B. “Run it 'til it blows”

It took just a few minutes for defendant to complete his “weld” on the tank. (Tr.93). Plaintiff was present when defendant tried the weld on the water tank.

(Tr.395). As plaintiff watched defendant attempting to weld the rusted tank, plaintiff was concerned that it was dangerous the way it was welded and expressed this concern to Smith. Defendant responded by directing plaintiff to continue operating the truck and to “run it 'till it blows”. (Tr.395-96). Smith, in his deposition denied making this statement (Tr.93). Smith subsequently filed an affidavit stating that although he did not recall making the statement, he acknowledged that if he did so, he would only be indicating that the tank should be used until it begins to leak again, not until it explodes. (Tr.114). The trial court, in its findings, chose not to believe defendant's subsequent explanation (L.F.62) and credited Burns’ testimony. (L.F.62).

Plaintiff testified he told his wife about defendant having welded the tank as he had; she told plaintiff he should quit his job. Plaintiff could not quit because then he would be unemployed. (Tr.334-35; Tr.396-97).

C. The Usual Hazards Of Driving A Cement Mixer Truck

Direct evidence established that the usual hazards associated with the job of driving a cement mixer truck are:

1. being involved in a motor vehicle accident with another vehicle while out driving the cement mixer truck; and

2. getting the driver's finger smashed in the chutes when the driver is putting them on; and

3. the driver could fall off the truck while he is washing it out.

(Tr.445).

Exposure to exploding salvaged water pressure tanks cannibalized from out-of-service equipment that have been welded over rusted-through corrosion was not among the usual hazards discussed in the evidence.

D. The Exploding Tank And The Cause Of The Exploding Tank

On April 7, 2000, the pressurized water tank exploded into plaintiff's right hip as he was getting into the truck. (L.F.62; Tr.401-402).

Defendant Smith agreed that when the tank ruptured, the rupture line went along the line that he had welded. (Tr.72). Defendant further agreed that the extent of the rust in the tank was a factor in the explosion (Tr.111), and that it was a mistake to have attempted to weld the tank, although, it was a mistake to defendant only in hindsight. (Tr.99).

Plaintiff's expert John Hamilton (without objection), used a photograph (App. A-3) of the ruptured tank to show the trial court the extensive corrosion and resulting material loss in the tank. (Tr.254-255). Hamilton showed the trial court, again without objection, that defendant's weld, in addition to having been done in an area that was corroded and rusted-through, was not uniform, had lots of splatter from having the heat setting wrong on the welder, and had occlusions where parts of the metal's sharp edges had been vaporized. (App. A-4). Mr. Hamilton testified, without objection, that this was a very poor weld (Tr.257-258), and agreed with

defendant's characterization that it was a mistake to have attempted to weld on this tank. (Tr.267).

Mr. Hamilton testified, again without objection, that a crack formed along defendant's weld and the tank exploded, and that the weld's inconsistencies and occlusions increased the risk of that explosion. (Tr.259-260).

Finally, Mr. Hamilton testified, without objection, that the defendant's weld was the cause of the explosion; and that defendant's weld increased the risk of the explosion of the tank. (Tr.261).

E. The Evidence That A Reasonable Person Would Recognize That Attempting To Weld Over A Corroded, Rusted-Through Water Pressure Tank Was Hazardous.

1. Defendant Smith's "Run It 'Til It Blows" Statement.

Defendant Smith directed Burns to run the "repaired" tank until it blew. (Tr.395).

2. Kim Burns' Testimony

Kim Burns testified that when plaintiff came home from work and told her that his boss had attempted to weld the tank, she was in disbelief and told him he needed to go get another job. (Tr.334)

2. Joe Fischer, defendant's expert witness

Joe Fischer, defendant's expert witness, testified that placing a weld on a corroded, rusted water pressure tank in the area of the rust increases the risk of the weld failing which could, in turn, result in an explosion. (Tr. 295).

Mr. Fischer also agreed that a weld that is placed over rust and corrosion creates a dangerous condition which would eventually fail (Tr.322), and that even before he saw the pictures of the welded-over-rust-tank which exploded in this case, he knew that a welded corroded leaking water pressure tank could explode. (Tr.282).

Mr. Fischer agreed that if a weld over corroded metal does not hold and instead an explosion originates from the site of the weld where the weld was applied over corroded metal, then the weld was an inadequate weld. (Tr.286-287).

Mr. Fischer, who owns a concrete company which grosses between $8,500,000 and $10,000,000 per year (Tr.283), testified that larger concrete companies, which tend to run newer equipment, would likely just have replaced the corroded, rusted-through tank (Tr.291), which would cost around $400 (Tr.284). Mr. Fischer testified that the reason for his company's policy and defendant's methods of attempting to weld over rusted, leaking water pressure tanks is "just, again, to be cost effective" (Tr.292), in other words to save the $400 cost of a replacement tank.

3. John Hamilton

In addition to the direct testimony of Mr. Hamilton *supra*, on causation, Mr. Hamilton also testified on cross examination that "where you need a certified welder is when you're welding something that – that's dangerous and can lead to harm." (Tr.269; Tr.90-91); and, Mr. Hamilton knew this even though he, like defendant, was not a certified welder and had only welded personal, small projects. (Tr.249).

4. Defendant Lynn Smith

Defendant knew it would not be proper to attempt to weld this water pressure tank if the metal was rusted to the extent that it was "just a honeycomb, something that you can't weld, something that won't hold". (Tr.91-92). This tank was rusted to the extent that it was "honeycombed" completely through the wall of the tank causing water and pressure to spray out, which is precisely where defendant applied the weld. (Tr.394-395). Defendant agreed that "honeycombed" metal means metal that is corroded and rusted to the extent that a weld on it will not hold. (Tr.481). He admitted that it was a mistake to have welded this tank, although, again, to him it was only a mistake in hindsight. (Tr.99).

Further, defendant instructing plaintiff to "run it 'till it blows" was direct evidence of defendant's actual knowledge of the danger of having welded the corroded tank in the area of the rust and corrosion (Tr.395). Defendant also

understood that if this weld failed, it exposed the workers to a risk of injury. (Tr.484).

5. Defendant's brother, Larry Smith

Larry Smith also agreed that one is not supposed to weld over metal that is "honeycombed" because that can be dangerous because the weld won't hold. (Tr.457-458).

Larry Smith also recognized that with limited experience and knowledge of welding, he would take things that require a lot of tensile strength to a professional welder. (Tr.158-159).

6. Plaintiff Eric Burns

Plaintiff was concerned that defendant's weld on the tank in the tank's condition was dangerous, and even expressed that concern to defendant (Tr.395-396), and to his (plaintiff's) wife. (Tr.396-397).

7. Concession by Counsel

During closing argument defendant's trial counsel conceded the presence of evidence in the record with respect to whether a reasonable person would have anticipated danger from the weld. That statement, while made in the attempt to discredit the Plaintiff's case follows:

> To get beyond negligence the plaintiffs also have to prove that this was hazardous -- let me read the quote here. "It is dangerous

> activity that a reasonable person would recognize as hazardous and beyond the usual requirements of the employment." There is no evidence that anyone other than Mr. Burns' half-hearted statement that he was concerned about the weld being dangerous and then being told by defendant to "run it 'till it blows" who drives a concrete truck or works in the concrete industry thought that there was any evidence before April 7, 2000, that this was dangerous or unreasonably hazardous beyond work." (Emphasis added).

(Tr.505).

F. Plaintiff's Damages, Prejudgment Interest And The Trial Court's Judgment

1. Plaintiff's Damages

Plaintiff was crippled for life as a result of the explosion. He was 30 years old at the time of his injury, with two young children and a wife. He had undergone three major hip replacement surgeries as of the date of the trial, and the evidence established that he would require several additional major hip replacements at ten to fifteen year intervals for the remainder of his life expectancy, which was forty-two more years. (Tr.216-217).

Dr. Krueger's economic loss report was admitted upon stipulation by defense counsel (Tr.210-211), and established that plaintiff's economic loss as a

result of his injuries exceeded $1,200,000, exclusive of past medical costs. (Tr.496). Past medical costs exceeded $150,000. (Tr.415-416).

2. Pre-Judgment Interest

Prior to entry of the Trial Court's judgment, a hearing was held on Plaintiff's Motion to Add Prejudgment Interest. (The transcript of that July 6, 2004, hearing has been filed with this Court to supplement the Record on Appeal, pursuant to Rule 81.12(c)).

All correspondence related to plaintiff's § 408.040, RSMo 2000, prejudgment interest demand letter were admitted without objection. (Supplemental Transcript, July 6, 2004, Hearing on Plaintiff's Motion to Add Pre-Judgment Interest, pp.6-9).

Appellant raises no issue in this appeal regarding the amount of prejudgment interest calculated and awarded by the trial court. Appellant likewise raises no issue in this appeal regarding plaintiff's compliance with the requirements of § 408.040, for an award of prejudgment interest. (App. Br. 34-37).

During the hearing on plaintiff's Motion to Add Prejudgment Interest, counsel for Appellant assured the trial court that it had the discretion to consider the evidence on the issue of prejudgment interest and to award it. (Supp.Tr.14-16).

3. The Trial Court's Judgment

On March 9, 2005, the trial court entered its Findings of Fact, Conclusions of Law and Judgment in favor of plaintiff and against defendant, and awarded plaintiff actual damages of $2,044,278.00, and added prejudgment interest in the amount of $673,437.52. (L.F.67). As noted by the trial court initially in its judgment, plaintiff's wife's claim for damages for loss of consortium had been previously dismissed, and plaintiff's claim for punitive damages against defendant had been abandoned prior to trial (L.F.61).

Prior to trial, defendant Smith had requested the trial court to include "findings of what constituted the 'affirmative act' by directing plaintiff to engage in dangerous activities 'that a reasonable person would recognize as hazardous and beyond the usual requirements of the employment' under ***Logan v. Sho-Me Power Elec. Coop***, 122 S.W.3d 670, 678 (Mo.App.S.D. 2003)". (L.F.33). The trial court specifically found that such "affirmative act" was the "Defendant's affirmative negligent acts of welding over the corrosion and rust on the water pressure tank, which caused or increased the risk of injury to plaintiff beyond the usual hazards of plaintiff's employment, and directing plaintiff to "run it 'till it blows", thereby subjecting plaintiff to such increased risk of injury". (Findings of Fact, Conclusions of Law, and Judgment, ¶ 21, L.F.64).

The trial court in its Conclusions of Law noted appellant's reference to ***Logan***, but distinguished ***Logan*** because "in ***Logan***, the defendant did not do anything to cause or increase the risk of decedent's injury (electrocution), and,

moreover, plaintiffs therein conceded that decedent's exposure to energized electric lines was a usual and necessary hazard of decedent's employment. Not so in this case." (Judgment, Conclusions of Law, ¶ 3, App. A-6; L.F.66, ¶ 3).

From this adverse judgment, the defendant appealed.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN DETERMINING THAT PLAINTIFF/RESPONDENT ERIC BURNS PLEADED AND PROVED "SOMETHING MORE" AS REQUIRED BY *STATE EX REL. BADAMI V. GAERTNER* AND *STATE EX REL TAYLOR V. WALLACE* TO ESTABLISH CO-EMPLOYEE LIABILITY.

A. Standard of Review

This is a judge tried case. ***Murphy v. Carron***, 536 S.W.2d 30, 32 (Mo. banc 1976) determines the standard of review. The trial court's judgment must be affirmed unless the judgment is 1) not supported by substantial evidence, 2) is against the weight of the evidence, or 3) it erroneously declares or applies the law. This Court must view the evidence and reasonable inferences drawn therefrom in the light most favorable to the trial court's judgment. ***Id***.; ***Dixon v. Director of Revenue***, 118 S.W.3d 302, 304 (Mo. App. S.D. 2003). "Substantial evidence is that which, if true, has probative force upon the issues, and from which the trier of fact can reasonably decide a case." ***Love v. Hardee's Food Sys., Inc.***, 16 S.W.3d 739, 742 (Mo.App.2000). (quoting ***Hurlock v. Park Lane Medical Ctr., Inc***., 709 S.W.2d 872, 880 (Mo.App.1985)). Whether evidence is substantial and whether any inferences drawn are reasonable is a question of law. ***Id.***

A judgment should be set aside as against the weight of the evidence only

with caution and with the firm belief that the trial court's judgment is wrong. ***Lewis v. Gibbons***, 80 S.W.3d 461 (Mo. banc 2002); ***Brizendine v. Conrad***, 71 S.W.3d 587 (Mo. banc 2002); ***Murphy v. Carron***, 536 S.W.2d 30 (Mo. banc 1976) See also

"[A]ll fact issues on which no specific findings are made shall be considered as having been found in accordance with the result reached." Rule 73.01(c) "In reviewing the evidence, the factual findings of the trial court are to be accorded great deference and are to be upheld if there is any evidence to support them." ***Jerry Bennett Masonry, Inc. v. Crossland Constr.Co., Inc.***, 171 S.W.3d 81, 82 (Mo.App.S.D. 2005) quoting ***Harris v. Mo. Dept. of Conservation***, 895 S.W.2d 66, 71 (Mo.App.W.D. 1995)(emphasis added).

Whether a legal duty exists is a question of law generally, and, specifically when the issue is whether the Plaintiff pleaded and proved "something more" this Court exercises *de novo* review. ***State ex rel. Taylor v. Wallace***, 73 S.W.3d 620 (Mo. banc 2002). While this court need not defer to the trial court's resolution of legal issues, and is not free to disregard uncontroverted evidence, this Court is required to defer to the trial court's resolution of conflicting evidence. ***Murphy v. Carron***.

B. Introduction to the Argument

Appellant's substitute brief is a multi-pronged attack on the judgment of the trial court and on this Court's decision in ***Taylor***. Appellant urges that the

exclusive remedy provisions of the Workers Compensation statute control where, as here, there is a co-employee's breach of duty to a co-worker injury. Appellant asks this Court to abandon ***Taylor*** because, Appellant argues, the case-by-case rule deprives defendants of "the benefits of the exclusive remedy and certain freedom from suit that was part of the bargain behind the statutory scheme [for Workers' Compensation]." (App. Br. at 38).

On review this Court will find, first, that there is substantial evidence in the record that supports the trial court's legal conclusions and factual findings in this matter. Properly applying the ***Murphy v. Carron*** standard, and giving the Respondent the benefit of all reasonable inferences from the facts adduced at trial, the Court will find that the trial court's judgment is supported by substantial evidence and is not against the weight of the evidence.

The Court will also find that, applying the ***Taylor*** standard, the facts of this case fall squarely on the liability side of the line announced in ***Taylor.*** Here, there is "the kind of purposeful, affirmatively dangerous conduct that Missouri courts have recognized as moving a fellow employee outside the protection of the Workers' Compensation Law's exclusive remedy provisions." ***Id.*** at 622.

Far from being the unworkable or unpredictable standard that Appellant claims ***Taylor*** is, an analysis of the cases since ***Taylor*** and the facts in this case will demonstrate that ***Taylor's*** case-by-case determination of when liability should attach is a practical balance of the employer and employee interests that is both

predictable and fundamentally fair while remaining true to the policies expressed over the years by Missouri's courts and its legislature.

C. Overview of the "Something More" Standard

Prior to the enactment of the Workers Compensation statute in 1925, an injured employee had only the common law to remedy his or her injuries. ***Gunnett v. Girardier Bldg. and Realty Co.***, 70 S.W.3d 632, 635 (Mo.App. E.D.2002). In 1925, the Missouri General Assembly enacted the Workers' Compensation Law. This legislative compromise offered employers immunity from civil lawsuits in exchange for a fixed compensation system. ***Id.*** The intent of the legislature was to "provide employees with rapid, definite and certain compensation for workplace injuries, and to place the burden of such losses on the industry." ***Id.*** at 636. The Workers' Compensation Law changed the relationship between employer and employee and made the employee's sole legal remedy for injuries arising out of and in the course of employment the Workers' Compensation Law. § 287.120.2 RSMo. (2005).

In this judge tried case, the trial court found Defendant/Appellant/co-employee Lynn Smith liable to Plaintiff/Respondent/co-employee Eric Burns for injuries sustained by Burns when Smith's jerry-rigged attempted fix of a pressurized water tank failed, the tank exploded and Burns received substantial injuries.

Thus, this case involves a claim of liability under tort principles brought by

an employee against a co-employee after injuries occurred in the work place. Missouri law provides that an injured employee may bring a common law negligence action against any "third party." ***Zueck v. Oppenheimer Gateway Properties, Inc.,*** 809 S.W.2d 384, 390 (Mo. banc 1991). "It has long been established ... that a co-employee is regarded as a 'third party' under [the] [W]orkers' [C]ompensation [L]aw, and amenable to an action at common law." ***Gunnett,*** 70 S.W.3d at 637 (*citing* ***Sylcox v. Nat'l Lead Co.***, 225 Mo.App. 543, 38 S.W.2d 497, 502 (1931)).

Missouri law is clear that an injured co-employee may sue his or her co-employee for common law negligence only if the injured co-employee alleges an affirmative, tortious act of the defendant/co-employee that constitutes "something more" than a failure to maintain a safe workplace.

Here, Plaintiff/employee alleged the necessary affirmative act and "something more" sufficient to bring this common law action. The Defendant/co-employee asserts, after judgment, that as a matter of law, the facts in this case do not give rise to the "something more" required by Missouri law to permit co-employee tort liability outside of Worker's Compensation.

Since the decision in ***State ex rel. Badami v. Gaertner***, 630 S.W.2d 175 (Mo. App. E.D. 1982), trial and appellate courts of this state have defined the meaning of the phrase "something more." This Court approved ***Badami*** as the law of Missouri twenty years after the fact in ***State ex rel. Taylor v. Wallace***, 73 S.W.3d 620 (Mo. banc 2002), concluding, as had ***Badami***, that no one-size-fits-all

definition of "something more" was possible. This case-by-case approach has developed reasonably determinable, but broad, parameters for the bench and bar, despite Appellant's protestations to the contrary. As will be shown, this case falls within the cases that permit a common law cause of action outside of Workers' Compensation to proceed to judgment.

***Badami/Taylor* Leave Common Law Duties and Liabilities in Effect Between Co-Employees**

Badami makes clear that the Workers' Compensation law did not vitiate the common law liability of third parties to injured workers.

> "Now there is no doubt that at common law one servant is liable to another for his own misfeasance, and there is nothing in the [Workers'] Compensation Act which destroys such liability, or in any way disturbs the common law relationship existing between co-employees."

Id. at 178, quoting ***Sylcox v. National Lead Co***., 38 S.W.2d 497, 502 (Mo. App. 1931).

***Badami/Taylor's* "Something More" Exists When A Co-Employee Undertakes (1) An Affirmative Act (2) Creating Additional Danger Beyond that Normally Faced in the Job-Specific Work Environment or Directs A Co-Employee to Encounter A Hazard (3) And the Co-Employee Owes A Duty Personally to the Injured Employee.**

(1) The Affirmative Act

The Workers' Compensation Act is in derogation of the common law. The Act's obligations and compensation scheme are imposed on both the company and the employee as an implied covenant in the employment contract between the two. § 537.060, RSMo 2000. An employer's duty to the employee is to provide a safe workplace. ***Taylor***, 73 S.W.3d at 621. Failure of a co-employee to fulfill the duty to provide a safe workplace does not subject the employer to liability beyond the compensation required by the Act. This is because the co-employee is but an agent of the employer; the co-employee's duty flows to the employer, not to his or her co-employees. ***Badami***, 630 S.W.2d at 178. As ***Badami*** makes plain, separate liability for failure to provide a safe workplace does not attach to the co-employee who violates *that* duty because the duty arises from implied contract, not general tort principles. The agent/co-employee is not in privity with the injured co-employee and "tort liability for breach of contractual obligations should be restricted to those in privity with the promisor." ***Id***. at 177. Moreover, the duty owed the employee by the employer is non-delegable. ***Id.*** at 179. And for this reason, the failure of the co-employee to perform the employer's non-delegable duty is a failure of the employer to discharge its duty, not a failure of the co-employee to discharge the co-employee's duty to the injured co-employee. ***Biller v. Big John Tree Transplanter Mfg. & Truck Sales, Inc.***, 795 S.W.2d 630, 633 (Mo. App. W.D. 1990).

If there is to be common law tort liability from one co-employee to another, it must arise from an independent duty owed from one employee to another. This

independent duty cannot arise from a mere failure to correct an unsafe condition; the duty must be separate and apart from the employer's non-delegable duty.

Badami/Taylor hold, therefore, that a duty upon which co-employee, common law tort liability rests must be based on an affirmative, negligent act. [1]

[1] This requirement of an affirmative duty is roughly analogous to the liability that attaches under an assumed duty scenario. Restatement (Second) Torts, § 323 likewise requires an assumed affirmative duty, and provides a legal framework for this Court's affirmative duty/"something more" jurisprudence. The Restatement provides:

> **One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if**
>
> **(a) his failure to exercise such care increases the risk of such harm, or**
>
> **(b) the harm is suffered because of the other's reliance upon the undertaking.+1**

Under the Restatement approach this affirmative act (the undertaking) results in liability "whether the harm to the other or his things results from the defendant's

Badami holds that this affirmative act is the "something more," that is, that a plaintiff must plead something more than a failure to fulfill the employer's duty to the plaintiff in order to state a common law cause of action. This is what ***Badami*** says:

> Charging the employee chosen to implement the employer's duty to provide a reasonably safe place to work merely with the general failure to fulfill that duty charges no actionable negligence. Something more must be charged.

Id. at 180. As noted, ***Badami*** – and ***Taylor*** – left the meaning of "something more" to further judicial development.

(2) *Creating Additional Danger Or Directing an Employee to Encounter a Hazard Beyond that Normally Faced in the Job-Specific Work Environment.*

As the case law has developed, "something more" has come to mean an (1) affirmative act by a co-employee that (2) changes the work environment from its expected or normal level of risk of injury to a more hazardous environment. The affirmative act occurs if the co-employee creates a hazard or directs another to work in the presence of a hazard. Under the cases, liability exists when the

---

negligent conduct in the manner of his performance of the undertaking, or from his failure to exercise reasonable care to complete it or to protect the other when he discontinues it." § 323, comment a.

> co-employee personally took part in the 'affirmative act' either by 1) ***creating*** a hazardous condition outside the scope of the responsibility to provide a safe workplace that violated a personal duty of care, ***Tauchert v. Boatmen's Nat. Bank***., 849 S.W.2d 573 (Mo. banc 1993), ***or*** 2) "***directing*** employees to engage in dangerous activity that a reasonable person would recognize as hazardous and beyond the usual requirements of the employment." ***Logan v. Sho-Me Power Elec. Co-op***., 122 S.W.3d 670, 678 (Mo. App. 2003)….

Graham v. Geisz, 149 S.W.3d 459, 462 (Mo. App. E.D. 2004)(emphasis added). *Accord*, ***Lyon v. McLaughlin***, 960 S.W.2d 522, 526 (Mo. App. W.D. 1998)("A co-employee loses this immunity only if he affirmatively causes or increases his fellow employee's risk of injury;" injury that occurs in course of performing "normal" duties, "does not constitute something more") and ***Groh v. Kohler***, 148 S.W.3d 11 (Mo. App. 2004)("common law liability pleaded because "Ms. Groh was effectively required by her supervisor and co-employee to perform an inherently dangerous act although the duties ascribed to her job were not inordinately dangerous").

(3) The Duty Must Be Owed to the Injured Co-Employee.

In addition to the affirmative act creating a more hazardous condition, the cases seem also to require that the "something more" be a duty owed specifically to the injured co-employee**.** ***Gunnett v. Girardier Building and Realty Co***., 70 S.W.3d 632 (Mo. App. E.D. 2002) attempts a pre-***Taylor*** synthesis of the cases

defining "something more" by their specific facts. Admitting that all of the cases do not fit within its definition, ***Gunnett*** nevertheless concludes that

> construing "something more" as a breach of a personal duty of care that the co-employee owes to the injured worker also comports with the foundational principle of common-law negligence actions -- that there must exist some duty on defendant's part owing to the plaintiff, the observance of which would have avoided the injury.

Id. at 639.[2] *Accord* ***Craft v. Scaman***, 715 S.W.2d 531, 537 (Mo. App. E.D. 1986)(duty that permits personal liability in co-employee exists where the co-employee or company officer "breaches a personal duty of care the officer owes to a fellow employee").

Under Missouri law, a common law duty exists where injury is reasonably foreseeable. "As a general proposition, a duty of care which is imposed by the law

---

[2] The Western District has adopted a disjunctive test that permits liability in a co-employee when an affirmative act increases the risk generally or breaches a duty owed specifically to the injured employee.

> The conduct of the co-employee must be an "affirmative negligent act," one that "affirmatively causes or increases his fellow employee's risk of injury," [citations omitted] ***or*** a "breach of [the] personal duty of care owed to the plaintiff." [citations omitted].

Groh v. Kohler, 148 S.W.3d 11 (Mo. App. 2004)(emphasis added).

of negligence arises out of circumstances in which there is a foreseeable likelihood that particular acts or omissions will cause harm or injury." ***Lowrey v. Horvath***, 689 S.W.2d 625, 627 (Mo. banc 1985).

The exact nature of the injury caused by the breach of duty need not be foreseeable. "In determining foreseeability for the purpose of defining duty, it is immaterial that the *precise* manner in which the injury occurred was neither foreseen nor foreseeable." ***Pierce v. Platte-Clay Elec. Coop., Inc.*** 769 S.W.2d 769, 776 (Mo. banc 1989)(emphasis original).

Application of the ***Badami/Taylor*** standard has resulted in a finding of co-employee liability in a number of settings remarkably similar to the facts of this case. *See* ***Hedglin v. Stahl Specialty Co.***, 903 S.W.2d 922, 927 (Mo.App.1995) (supervisor liable where supervisor personally arranged for employee to be dangled from tines of a forklift over a vat of scalding water into which employee fell and died); ***Craft v. Scaman***, 715 S.W.2d 531, 537-38 (Mo.App.1986) (president of fireworks company personally liable for employee's injuries where president personally held a board directly against spinning spool of fuse to prop it up and the fuse caught fire and burned employee operating the machine); ***Tauchert***, 849 S.W.2d at 574 (Mo. banc 1993) (foreman liable in negligence where employee was injured when an elevator hoist system that the foreman personally arranged failed); ***Groh v. Kohler***, 148 S.W.3d 11 (Mo. App. 2004)(where injured employee pleaded that co-employee knew of the defective nature of the band molding machine and purposefully and affirmatively ordered

her to continue to work on the machine, allegations were sufficient to assert common law cause of action outside Workers' Compensation); ***Arnwine v. Trebel***, 195 S.W.3d 467 (Mo. App. W.D. 2005)(where supervisor, rather than qualified maintenance personnel, performed maintenance on malfunctioning machine and directed injured worker to use the machine, supervisor could be personally liable); ***Pavia v. Childs***, 951 S.W.2d 700 (Mo. App. S.D. 1997)(where store manager operated fork lift and directed employee, a grocery store bagger, to stand on pallet and ride fork lift up fifteen feet to retrieve items stored in warehouse, manager personally liable for injures suffered by employee when employee fell); ***Workman v. Vader***, 854 S.W.2d 560 (Mo. App. S.D. 1993)(where co-employee threw cardboard box and packing debris on the floor behind the counter in the jewelry department, concealing packing debris and plaintiff pleaded cause of action against co-employee outside Workers' Compensation when she slipped, fell and was injured).

As will be shown below, in this case an affirmative act that creates an increased hazard beyond job-specific risks occurred as a result of a duty owed personally to Eric Burns. Indeed, the defendant Lynn Smith committed two affirmative acts; he both **created** the "hazardous condition outside the scope of the responsibility to provide a safe workplace that violated a personal duty of care." ***Tauchert.*** He also **directed** Eric Burns "to engage in a dangerous activity that a reasonable person would recognize as hazardous and beyond the usual requirements of the employment." ***Logan***.

Under these factual circumstances, the trial court correctly determined that Mr. Burns pleaded the requisite "something more." The trial court also correctly determined that, as a matter of law, Lynn Smith owed Mr. Burns a duty of care, that Lynn Smith breached that duty of care and that Mr. Burns was damaged as a result of Mr. Smith's negligent conduct.

D. Respondent's Evidence of "Something More."

1. Smith Committed an Affirmative Act

Appellant maintains that the acts of the defendant do not meet the standard announced in ***Taylor*** and the line of cases interpreting and extending ***Taylor***. Respondent – and the trial court – hold a different view.

First, substantial evidence shows the "purposeful, affirmatively negligent acts" by the defendant, Smith, as required by ***Taylor*** at 622. Smith undertook to attempt to repair a rusted and corroded, cannibalized, twenty-year-old, leaking 150-gallon pressurized water tank by welding it; he was not qualified by training or experience to perform the weld. The weld was sloppy and ineffective, largely because Smith could not see what he was doing. Smith testified that the bad welds he made inside the tank resulted because he does not "see very good" and had never gotten prescription glasses, preferring instead to buy two dollar reading glasses. For this reason, he "has trouble when he tries to weld". (Tr.72-73). He characterized his inability to see what he was welding as a "kind of a feeling in the dark thing". (Tr.73-74)(L.F.62 ¶3).

Second, the trial court expressly found:

> "The affirmative acts were: 'welding over the corrosion and rust on the water pressure tank, which caused or increased the risk of injury to plaintiff beyond the usual hazards of plaintiff's employment, and directing plaintiff to "run it 'till it blows" thereby subjecting plaintiff to such increased risk of injury.' "

(L.F.64).

This affirmative act is no different in either scope or legal effect for purposes of establishing co-employee liability than the cases holding that a failed fix attempted by a non-qualified co-employee is actionable under the common law. See ***Craft,*** 715 S.W.2d 531 (president of fireworks company personally liable when jerry-rigged board used to prop up fuse spool caused fuse to catch fire, burning employee); ***Tauchert***, 849 S.W.2d 574 (foreman liable where employee injured when jerry-rigged elevator hoist system devised by foreman personally failed); ***Arnwine,*** 195 S.W.3d 467 (unqualified supervisor performed maintenance on malfunctioning machine resulting in injury to co-employee); ***Pavia,*** 951 S.W.2d 700 (store manager rigged fork lift with wooden pallet to lift employee who fell and was injured).

2. Smith Created a Condition that Made Burns' Work More Dangerous.

As noted, ***Graham*** speaks in the disjunctive. Liability in a co-worker exists if the affirmative act 1) creat[es] a hazardous condition outside the scope of the

responsibility to provide a safe workplace that violated a personal duty of care, ***or*** 2) "direct[s] employees to engage in dangerous activity that a reasonable person would recognize as hazardous and beyond the usual requirements of the employment." ***Graham***, 149 S.W.3d at 462.

Defendant Smith's affirmative act in this case ***created*** a hazardous condition more hazardous than the normal hazards encountered by a cement truck driver.

Defendant Smith was not a certified welder. (Tr.90-91). Defendant had never had any formal training in welding. (Tr.90). Defendant welded only an hour or so in a year's time, and did not consider himself an experienced welder. (Tr.91). This is precisely the sort of affirmative act outside the responsibilities, training and experience of Mr. Smith that led to the imposition of liability in ***Arnwine***, 195 S.W.3d 467, where the co-employee attempted a repair that he was not qualified to undertake. It is also the sort of affirmative act that created co-employee liability in ***Tauchert***, where the co-employee jerry-rigged a faulty hoist system that caused injury to a fellow employee.

Mr. Burns testified, and the trial court credited the testimony, that Burns expressed concern about the tank having been welded. Defendant Smith told Burns "run it 'til it blows." (Tr.395).

This statement contains two important admissions: First, that the tank would fail; second, that when it failed it would "blow" – not a description of a

benign leak, but of a violent eruption of the tank under pressure. Each of these is sufficient to show the hazardous condition created by Smith.

Further, Mr. Smith's own expert, Mr. Fischer, testified:

"I believe that it – it wouldn't take a weld over rust, so.

Q. And that could create a dangerous condition, couldn't it, if you tried to rust over weld -- over corrosion and rust you tried to weld over that?

A. I believe that the weld would fail, yes."

Tr.322. Fischer further testified that a pressurized tank could explode if a weld opened up.

Q. "[Y]ou had no understanding that a corroded leaking water pressure tank could explode following a weld?

A. Well, I know that it's enough to open up the weld, so I would assume that an explosion of some sort would occur, yes."

(Tr.282).

Larry Smith, a cement truck driver at Kennon Ready-Mix (the company that employed Mr. Burns), testified:

Q. And you're not supposed to weld over metal that's honeycombed because that can be dangerous because the weld won't hold, is that right?

A. That's probably true.

(Tr.458).

Once Smith undertook the duty to fix the tank to which Burns was assigned, he accepted an obligation to perform the duty in a non-negligent manner. Cf. Restatement (Second) Torts, § 323. As shown, Smith decided to weld the tank:

(1) without attempting to determine the material of which the tank was made (Tr.105);

(2) without knowing the extent of the rust on the inside of the tank (Tr.105);

(3) admitting that had he inspected the tank properly, he would not have attempted to make the weld (Tr.105);

(4) without knowing the make-up of the welding rod (Tr.105);

(5) without consulting any welding codes or standards (Tr.106);

(6) without pre-heating the welding site (Tr.106);

(7) without performing any cool down procedures on the welded site (Tr.106);

(8) with the welder set, by Mr. Smith's admission, "too hot" (Tr.484).

Mr. Smith also testified that under his own safety standards, he would not weld a tank unless he had properly inspected it for "major deficiencies." (Tr.475). Yet here, Mr. Smith admitted that he did not inspect the inside of the tank to determine the extent of the rust. (Tr.105). And Mr. Smith testified that rust was the "cause of the explosion, not a contribution." (Tr.483).

This is substantial evidence of Smith's affirmative creation of a dangerous condition that made Burns' work more dangerous.

3. Smith directed Eric Burns "to engage in a dangerous activity that a reasonable person would recognize as hazardous and beyond the usual requirements of the employment."

This Court has never adopted a separate, reasonable person standard.[3] Nevertheless, Smith's Brief's argument concerning a lack of "substantial

---

[3] In its opinion, the Southern District noted that:

> A "reasonable person" characterization has been used, in some cases, to review directives given by supervisors to employees that required employees to engage in dangerous activities beyond the scope of their usual duties. *See,* e.g. ***Logan***, 122 S.W.3d at 678. *See also* ***Nowlin ex rel. Carter v. Nichols,*** 163 S.W.3d 575, 578-79 (Mo.App.2005); ***Groh v. Kohler***, 148 S.W.3d 11, 14 (Mo.App.2004); ***Wright v. St. Louis Produce Mkt.***, *Inc.*, 43 S.W.3d 404, 415 (Mo.App.2001); *Sexton*, 41 S.W.3d at 5. "Reasonable person" language is not found, however, in majority opinions of the Supreme Court that discuss actions brought against co-workers. *See* ***Tauchert v. Boatmen's Nat. Bank of St. Louis***, 849 S.W.2d 573 (Mo. banc 1993); *Kelley, supra*, and *Taylor*, *supra.*

Burns v. Smith, 2006 WL 1449956 at *4.

evidence" focuses nearly exclusively on this, the second, alternative prong of the disjunctive requirement that the affirmative act create a hazard for the injured employee. (App. Br. 31-34).

Reduced to its essence, Appellant asserts that the evidence showed that repaired-by-weld pressurized tanks are commonplace in the small cement delivery businesses. For this reason, Appellant's argument goes, no reasonable person who worked in a small cement business would recognize welded-over-rust-corrosion-and-honeycombed pressurized tanks as hazardous.

As noted earlier, this argument overlooks the evidence of the inherent danger in such tanks. It also ignores Smith's own directive to Burns – that he "run it 'til it blows." (Tr.395).

During closing argument, Smith's counsel recognized (but attempted to convince the court to discount because it was "half-hearted") the testimony of Eric Burns that the tank was dangerous. (Tr.505). But far more importantly, Smith's argument runs contrary to common sense, logic, and rudimentary understanding of the physics of gas under pressure.[4] Whether evidence is substantial and whether

---

[4] Boyle's law states that the pressure of a fixed mass of gas is inversely proportional to its volume if the temperature is constant**.** If pressure is increased, volume decreases. When pressure is decreased (by the opening of a large hole), large volumes of gas will seek equilibrium, producing decompression. See, e.g.,

any inferences drawn are reasonable is a question of law. ***Hurlock v. Park Lane Medical Ctr., Inc.***, 709 S.W.2d 872, 880 (Mo.App.1985). In making this determination, this Court must view the evidence and reasonable inferences drawn therefrom in the light most favorable to the trial court's judgment. ***Dixon v. Director of Revenue,*** 118 S.W.3d 302, 304 (Mo.App.S.D. 2003). It is a reasonable inference that if the tank is pressurized, and a large weld suddenly gives way, that some degree of explosive decompression will result. It is hard to reconcile the use of the language "run it till it blows," to anything except an overt acknowledgement that the natural consequence of the welds giving way was the tank "blowing."

Taken as a whole, this conduct meets the test of "***directing*** employees to engage in dangerous activity that a reasonable person would recognize as hazardous and beyond the usual requirements of the employment." ***Logan***, 122 S.W.3d at 678; ***Wright***, 43 S.W.3d 404; ***Pavia,*** 951 S.W.2d 700; ***Hedglin***, 903 S.W.2d 922. Defendant Smith directed Burns to work in the presence of the increased risk. As previously shown, there was substantial evidence that a welded-over-rust tank under pressure created a hazardous condition outside the normal conditions of the workplace.

Michael Blaber, The Gas Laws, available online at: http://wine1.sb.fsu.edu/chm1045/notes/Gases/GasLaw/Gases03.htm

And what were those normal risks? A cement truck driver is expected to encounter the normal risks that attend driving. A cement truck driver is expected to encounter the risks of finger injuries caused by cement truck unloading shoots. A cement truck driver faces the risk of falling from the truck when he cleans it. (Tr.445). A cement truck driver is not expected to encounter the risks of explosions from poorly welded pressurized water tanks any more than a bagger at a grocery store is expected to encounter the risks of being lifted 15 feet in the air on a forklift (***Pavia***); an elevator worker is expected to encounter jerry-rigged hoists (***Hedglin***); or a worker is expected to encounter the risk of machinery repaired by persons not qualified to perform the repairs. (***Arnwine***). The water tanks on cement trucks are designed to be free from welds created by non-certified, non-qualified and non-experienced welders and safe from explosion in their normal use.

4. Smith's Duty was a Duty Owed Personally to Burns

The duty violated by Smith was a personal duty of care owed to Burns. The defendant knew the tank was pressurized, knew that he couldn't determine whether the weld would hold or not and in spite of his inexperience, bad vision, and lack of certification, he made the weld. Moreover, Smith specifically directed Burns to accept the tank as welded as part of his job and to "run it 'til it blows."

As plaintiff Eric Burns watched Smith attempting to weld on the rusted, leaking water pressure tank, Burns expressed his concern to Smith that, the way it had been welded, it was dangerous. He expressed his concern about the weld to

Smith. (Smith's brief ignores this evidence.) Smith responded to Burns' concerns by directing him to continue operating the truck and to "run it 'till it blows." (Tr.395). The trial court made a specific factual finding about this statement (L.F.62) that Smith denied making.[5] (Tr.93)

Smith argues that this case is most like ***Gunnett***, ignoring, ***Arnwine, Pavia, Hedglin*** and ***Tauchert***.

In ***Gunnett***, a worker placed plywood on the wrong side of a skylight hole in a roof. Sometime later, Mr. Gunnett fell through the hole in the roof when he stepped on the plywood and was injured. The Eastern District affirmed the trial court's dismissal of the action because:

> Employers have a non-delegable duty to provide a safe workplace. Placing plywood over a skylight opening in a roof falls within the ambit of this duty. Whether the employee performing a non-delegable duty of the employer does so in a negligent manner is of no moment when determining whether the court or commission has jurisdiction over the matter. Here, defendant, in placing

[5] Smith subsequently filed an Affidavit stating that although he did not recall making the "run it 'till it blows" statement, he acknowledged that if he did so, he would only be indicating that the tank should be used until it begins to leak again, not until it explodes. (Tr.114). The trial court apparently chose not to believe defendant's subsequent explanation. (L.F. 62, ¶ 5).

> plywood over a skylight hole in the roof was discharging the employer's duty to provide a safe workplace. Any negligence which occurred while he performed this duty is the failure of the employer, not the defendant. As the failure is that of the employer, Gunnett's remedy is under the workers' compensation act.
>
> [As an additional reason to deny liability], [l]acking in this case is any allegation that defendant engaged in an affirmative act directed at Gunnett that increased the risk of injury. When defendant attached the plywood over the hole, there was no affirmative act directed toward Gunnett. Moreover, the defendant was not present at the time Gunnett fell onto and through the opening, nor did the defendant direct Gunnett to step onto the plywood.

Gunnett, 70 S.W.3d at 643. One of the normal hazards of a construction worker working on a rook is the possibility of a fall.

Gunnett and this case are not remotely similar, beyond the existence of an injured worker. Here, the defendant undertook an affirmative act that created a hazard to Mr. Burns beyond the normal hazards of the workplace. Defendant's affirmative act was not an act of simply carrying out the employer's duty to provide a safe workplace; it was an additional affirmative act that created a hazardous condition outside the normal hazards of the workplace. Defendant directed Mr. Burns to ignore the risk and perform his job. The duty that

defendant undertook was a duty owed personally to Mr. Burns. All of the elements absent in ***Gunnett*** are present in this case.

In summary, substantial evidence supports a conclusion that Smith, a co-employee, personally undertook an 'affirmative act'

> ***either*** … [by] 1) ***creating*** a hazardous condition outside the scope of the responsibility to provide a safe workplace that violated a personal duty of care, ***Tauchert v. Boatmen's Nat. Bank***., 849 S.W.2d 573 (Mo. banc 1993), ***or*** 2) "***directing*** employees to engage in dangerous activity that a reasonable person would recognize as hazardous and beyond the usual requirements of the employment." ***Logan v. Sho-Me Power Elec. Co-op.***, 122 S.W.3d 670, 678 (Mo. App. 2003)….

Graham v. Geisz, 149 S.W.3d 459, 462 (Mo. App. E.D. 2004)(emphasis added).

Further, substantial evidence showed that the duty was owed personally to Plaintiff Burns. All of the elements of Missouri law that permit co-employee liability outside Workers' Compensation are present in this case.

E. Appellant Obtained the Finding of Fact It Solicited

In attempting to make his argument that Burns was required to meet a "reasonable person" standard to make a submissible case, Appellant next asserts the failure of the trial court to make a specific finding of fact on this issue is fatal.

However, the wording of Appellant's request for a finding of fact on this standard shows that Appellant got what he requested in the findings of fact asked for.

Appellant requested the court to include a specific finding of "what constitutes the 'affirmative act' by directing plaintiff to engage in dangerous activities 'that a reasonable person would recognize as hazardous and beyond the usual hazards of the employment' under ***Logan v. Sho-Me Power Elec. Coop.***, 122 S.W.3d 670, 678 (Mo.App.S.D. 2003)." (L.F., 33)(emphasis added).

First, the request does not ask the Court to find whether any of the defendant's affirmative acts "would be recognized by a reasonable person as hazardous and beyond the usual requirements of the employment." Rather the request, by its very wording presupposes the hazardous condition. Smith simply asks the question: "What constitutes such affirmative acts?"

"What?" is the operative, interrogative (and indeed the only interrogative) put to the trial court by Appellant's request. As pointed out by plaintiff in his response to Defendant's Motion to Amend the Judgment, the trial court in its Findings of Fact Conclusions of Law and Judgment gave the defendant precisely the answer to the question it had asked:

> Q. "What were the acts…?"
>
> A. "The affirmative acts were: 'welding over the corrosion and rust on the water pressure tank, which caused or increased the risk of injury to plaintiff beyond the usual hazards of plaintiff's

employment, and directing plaintiff to "run it 'till it blows" thereby subjecting plaintiff to such increased risk of injury.'"

(L.F.64).

Second, appellant failed to comply with the Rule 78.07(c) requirement of a proper and timely-filed Motion to Amend the Judgment so as to give the trial court a chance to supplement the finding Appellant now contends was necessary. The trial court answered the question "what were the affirmative acts" that Appellant put to it. Appellant has no complaint on this appeal about an alleged failure of the trial court to make any allegedly requested findings. There was more than substantial evidence that a reasonable person would have recognized that this was a dangerous situation and was beyond the usual hazards of plaintiff's employment.

F. The Trial Court's Judgment Comports With The Standards Set in *Taylor, Groh, Logsdon, Tauchert* and Other Cases.

Both ***Tauchert v. Boatmens Nat. Bank***, 849 S.W.2d 573 (Mo. banc 1993) and ***State ex rel. Taylor v. Wallace,*** 73 S.W.3d 620 (Mo. banc 2002), are narrow, fact-specific cases which apply the standard first enunciated in ***State ex rel. Badami v. Gaertner***, 630 S.W.2d 175 (Mo. App. 1982) to determine whether a plaintiff properly stated a cause of action.

As previously noted, in ***Tauchert*** the defendant supervisor rigged a faulty hoist for an elevator and the plaintiff was injured when the elevator fell. Plaintiff

sued the supervisor and the defendant prevailed on summary judgment on the issue of co-employee immunity. This Court reversed.

> This Court finds the deposition testimony relied on to support summary judgment failed to remove the fact issue that active negligence by Ritz caused plaintiff's injury. The creation of a hazardous condition is not merely a breach of an employer's duty to provide a safe place to work. Defendant's alleged act of personally arranging the faulty hoist system for the elevator may constitute an affirmative negligent act outside the scope of his responsibility to provide a safe workplace for plaintiff. Such acts constitute a breach of personal duty of care owed to plaintiff. These actions may make an employee/supervisor liable for negligence and are not immune from liability under the workers' compensation act. ***Craft v. Scaman***, 715 S.W.2d 531, 537 (Mo.App.1986). Under the law in this state, defendant may be held liable to plaintiff for his injuries and is not protected by the provisions of § 287.120.1 RSMo 1986. ***Lamar v. Ford Motor Co.***, 409 S.W.2d 100, 107 (Mo.1966); ***Schumacher v. Leslie***, 360 Mo. 1238, 232 S.W.2d 913, 917 (Mo. banc 1950); ***Gardner v. Stout,*** 342 Mo. 1206, 119 S.W.2d 790, 792 (1938); ***Sylcox v. National Lead Co.***, 225 Mo.App. 543, 38 S.W.2d 497, 501-02 (1931). This Court thus reverses and remands.

Id. at 574.

Similarly, in ***State ex rel. Taylor v. Wallace***, 73 S.W.3d 620 (Mo. banc 2002), defendant sought a writ of prohibition from this Court when the Circuit Court of St. Louis refused to dismiss on the basis of exclusivity of remedy under Workers Compensation. The defendant in that action had taken the plaintiff with him while driving a trash truck for Browning Ferris Industries. The plaintiff charged that the defendant was liable under the "something more" standard where the driver hit a mailbox and caused the plaintiff to fall and suffer serious injuries. Specifically, Taylor alleged that the driver failed to keep a careful lookout, carelessly and negligently struck a mailbox and drove too close to a fixed object. ***Id***. at 622. This court said:

> Taken together, these claims amount to no more than the allegation that defendant negligently failed to discharge his duty to drive safely. This is not the kind of purposeful, affirmatively dangerous conduct that Missouri courts have recognized as moving a fellow employee outside the protection of the Workers' Compensation Law's exclusive remedy provisions. In other words, an allegation that an employee failed to drive safely in the course of his work and injured a fellow worker is not an allegation of "something more" than a failure to provide a safe working environment

Id. at 622.

In a footnote the Court invited the comparison of cases where liability was premised on mere negligence of co-workers with those where liability was found to exist on the basis of "something more." ***Id.*** at fn. 7. This Court said:

> *Compare* ***Sexton v. Jenkins & Assoc.***, 41 S.W.3d 1 (Mo.App.2000) (no liability for employees who designed and built elevator shaft railing); ***Felling v. Ritter***, 876 S.W.2d 2 (Mo.App.1994) (no liability for managers who failed to install "deadman's switch" on wire rewinding machine that would allegedly have prevented death of plaintiff); ***Kelley v. DeKalb Energy Co.,***, 865 S.W.2d 670, 672 (Mo. banc 1993)(no liability for various employees who allegedly misdesigned and misinstalled a dangerous "corn flamer") *with* ***Hedglin v. Stahl Specialty Co.***, 903 S.W.2d 922 (Mo.App.1995) (liability for supervisor who directed employee to venture onto a makeshift crane above a vat of scalding water); ***Tauchert***, 849 S.W.2d at 573 (liability for supervisor who allegedly designed and built a makeshift hoist, which caused an elevator to crash with an employee inside).

Id. Interestingly, these cited cases draw the distinction between <u>simple, negligent failures</u> and <u>affirmative acts</u> of negligence.

Contrary to the assertion of Appellant that ***Taylor*** presents an unworkable standard that needs to be abrogated, the Courts of Missouri have done exactly as this Court in ***Taylor*** instructed and have consistently found liability in situations

where the supervisor directly participates in creating the dangerous condition or where the supervisor directs the plaintiff to engage in behavior that is beyond the job's usual hazards.

G. *Taylor's* Standard is Workable, Proper, And Balances the Rights of Employees and Supervisors

Claiming that the current state of the law yields unpredictable and unwarranted results that strip employers of the benefit of the bargain of Workers Compensation laws, Appellant reserves to the end of Point I his attack on ***Taylor Tauchert***, ***Badami***, and their progeny, claiming that this Court should completely abrogate the rule and impose complete unfettered immunity for Missouri's workers, absent an intentional act. (App. Br. at 38).

Ignoring, for a moment, that this argument has been raised for the first time on appeal and has not been properly preserved, the argument simply attacks a decision that Missouri courts have apparently had little difficulty applying in favor of a rule of unanimity that would completely insulate negligent co-employees from liability for their affirmative acts of negligence.

Appellant notes that there have been "twelve or thirteen" cases that have "resulted in appellate opinions on this issue in fewer than five years." (App. Br. at 38). Given Missouri's appeal-by-right regime, this number is not high, but surprisingly low. From this point of departure, Appellant concludes that "defendants are deprived of the benefits of the exclusive remedy and certain

freedom from suit that was part of the bargain behind the statutory scheme." (App. Br. at 38).

*1. **Taylor**, **Tauchert** and their progeny provide a workable rule of law.*

Missouri's circuit court judges are properly analyzing cases involving the ***Taylor*** exception to the exclusive remedy provisions of Workers' Compensation. Indeed, the very trial judge who decided this case applied the ***Badami*** standard to the benefit of the defendant in ***Sexton v. Jenkins & Assoc. Inc.***, 41 S.W.3d 1 (Mo.App.W.D. 2000) dismissing Sexton's petition because the petition failed to plead the required "something more."

An analysis of the cases cited by the Appellant in his brief show that Missouri courts have developed a proper and predictable analytical framework that allows cases where the supervisor or co-employee directly participates in "the kind of purposeful, affirmatively dangerous conduct that Missouri courts have recognized as moving a fellow employee outside the protection of the Workers' Compensation Law's exclusive remedy provisions." ***Taylor***, 73 S.W.3d at 621-22. In addition, where the supervisor participates by direction, as where he directs "employees to engage in dangerous activity that a reasonable person would recognize as hazardous and beyond the usual requirements of the employment." ***Logan***, 122 S.W.3d at 678, that satisfies the ***Taylor*** requirement for "purposeful, affirmatively dangerous conduct." There is no confusion here; ***Taylor*** is sound law and the circuit and appellate courts are applying it with little difficulty.

2. The Statutory Scheme does not provide immunity for co-employees.

Appellant suggests that the immunity provided by statute to the employer and extended to the co-employees under ***Badami*** is statutory. Clearly, it is not. What was extended to the employee in ***Badami*** was the immunity of the employer, not immunity of the employee for negligent acts.

It is clear in this state that a co-employee is a "third person" within the meaning of § 287.150, RSMo. (2003) and that the co-employee may be sued by an injured co-employee for his negligence resulting in an injury. ***Badami,*** 630 S.W.2d at 177. ***Schumacher v. Leslie***, 360 Mo. 1238, 232 S.W.2d 913 (Mo. banc 1950); ***Gardner v. Stout,*** 119 S.W.2d 790 (1938); ***Lamar v. Ford Motor Co.,*** 409 S.W.2d 100 (Mo.1966); ***Sylcox v. National Lead Co***., 38 S.W.2d 497 (Mo. App. 1931).

In ***Badami***, however, the Eastern District examined whether a corporate president and a production manager – individuals who are clearly employees under the plain language of Chapter 287 – might be held liable for their *failures* to act to protect Lott, the plaintiff who had lost fingers in a shredding machine. The Eastern District first examined Missouri law and found that <u>the statute did not clearly prohibit co-employee common law liability</u>. It then examined law from several other states, including Wisconsin, and declared:

> Under present day industrial operations, to impose upon executive officers or supervisory personnel personal liability for an accident arising from a condition at a place of employment which a jury may

> find to be unsafe would **almost mandate** that the employer provide indemnity to such employees. That would effectively destroy the immunity provisions of the workmen's compensation law.

Badami, 630 S.W.2d at 180 (emphasis added).

The canons of statutory construction provide that when the language of a statute is unambiguous and conveys a plain and definite meaning, courts have no business foraging among rules of construction to look for or impose another meaning. ***Chapman v. Sanders,*** 528 S.W.2d 462 (Mo. App. 1975). Where a statute is clear, plain and unambiguous on its face, provisions or limitations not plainly written or necessarily implied from what is written may not be interpolated or intercalated thereon to effect some modification of or change in the right conferred by the statute; in such case the court must be guided by what the General Assembly says, not by what either the court or interested parties might surmise it perchance meant to say. ***Collier v. Roth,*** 515 S.W.2d 829 (Mo. App. 1974)

The statutes clearly provide that third parties may and should be held liable, providing a right to an employer to seek damages:

> Where a third person is liable to the employee or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employee or to the dependents against such third person, and the recovery by such employer shall not be limited to the amount

> payable as compensation to such employee or dependents, but such employer may recover any amount which such employee or his dependents would have been entitled to recover.

§ 287.150 RSMo 2000.

Had the legislature meant to exempt employees of the company from third party liability, it clearly would have so stated. It did not do so. For this reason Appellant's argument that absolute immunity should be extended and ***Taylor*** should be abrogated, fails.

The position taken by other states on this issue is of no import where Missouri courts are properly applying the standards set down by Missouri's General Assembly and this Court's interpretation of the statutes, which are Missouri-specific.

H. Conclusion

The trial court's judgment was supported by substantial evidence, did not erroneously declare or apply the law, and should be affirmed in all respects.

II. THE TRIAL COURT'S DECISION CORRECTLY REJECTED APPELLANT'S CLAIM THAT THE SINE QUA NON OF CO-EMPLOYEE LIABILITY IS A FINDING THAT A REASONABLE PERSON WOULD RECOGNIZE THAT WHAT OCCURRED WAS HAZARDOUS BEYOND THE USUAL REQUIREMENTS OF EMPLOYMENT.

A. Standard of Review

Respondent adopts the standard of review set out in Point I.

B. Respondent Presented Substantial Evidence Sufficient to Impose Liability on Defendant Smith

Appellant argues as though the sole standard for co-employee liability in Missouri is whether a reasonable person would have recognized that the affirmative act of welding a rusted, often pressurized, water tank created a hazardous condition beyond the hazards usually faced by a cement truck driver. This argument ignores ***Graham***'s disjunctive, which finds liability where a hazard is created or an employee is directed to accept an appreciated risk. It also ignores the fact that this Court has not concluded that the *sine qua non* of co-employee liability is directing a person to accept an appreciated risk. Indeed, the Southern

District expressly rejected Smith's argument in this regard in its opinion in this case.[6]

---

[6] The Southern District said:

> Defendant's Points I and II suggest that the standard for determining whether "something extra" occurred that would permit recovery from a co-worker is a finding that a reasonable person would recognize that what occurred was hazardous beyond the usual requirements of employment. A "reasonable person" characterization has been used, in some cases, to review directives given by supervisors to employees that required employees to engage in dangerous activities beyond the scope of their usual duties. *See,* e.g. ***Logan***, 122 S.W.3d at 678. *See also* ***Nowlin ex rel. Carter v. Nichols***, 163 S.W.3d 575, 578-79 (Mo.App.2005); ***Groh v. Kohler***, 148 S.W.3d 11, 14 (Mo.App.2004); ***Wright v. St. Louis Produce Mkt., Inc***., 43 S.W.3d 404, 415 (Mo.App.2001); ***Sexton***, 41 S.W.3d at 5. "Reasonable person" language is not found, however, in majority opinions of the Supreme Court that discuss actions brought against co-workers. *See* ***Tauchert v. Boatmen's Nat. Bank of St. Louis,*** 849 S.W.2d 573 (Mo. banc 1993); ***Kelley***, *supra,* and ***Taylor***, *supra.*

Burns v. Smith, 2006 WL 1459956 at *4.

Smith attempts to support his argument with a curious statement in his brief. "If this court assumes that the trial court's finding that a reasonable person would have recognized the increased risk from welding a water tank in order to patch a leak in it, that finding is not supported by substantial evidence and should be overturned as against the weight of the evidence." (App. Br. at 44).

The statement misstates both the evidence and the standard of liability. The gravamen of the evidence was not that there was "an increased risk from welding a water tank in order to patch a leak in it" (App. Br. Point II); rather, the increased risk resulted from welding a rusted-through water tank, without inspection of the inside of the tank, failing to weld the tank according to proper procedures, by a person qualified by neither experience nor training to perform the welds and directing that the person "run it 'til it blows."

Appellant's assertion is curious for another reason, as well. It is difficult to imagine a more reasonable inference from the evidence that welding, without seeing what was being welded, on a tank cannibalized from an out-of-service truck, by someone who was not certified to weld, and followed up by a direction to "run it till it blows" could be anything but hazardous when the tank was placed under the pressure under which it was meant to operate. Appellant's argument to the contrary is little more than an argument that trial courts should not apply logic and common sense to fact patterns.

C. The Trial Court Did Not Apply An Engineering Standard of Care

Next Appellant asserts that the standard of care applied by the trial court was an engineering standard. The record does not support this argument.

The trial court specifically declined to allow Plaintiff's engineering expert, Mr. Hamilton, to express his opinion, based upon a reasonable degree of engineering certainty, as to whether defendant had failed to exercise that degree of care that an ordinarily careful and prudent person would exercise under the same or similar circumstances. (Tr.266). It is clear that this case was not decided as an "engineering malpractice" case.

All the other evidence and testimony by Mr. Hamilton was received without objection by defense counsel, and therefore appellant likewise may not be heard to complain about any such evidence which was properly before the trial court in absence of any objection by defendant.

Finally, Appellant never tells the Court what the usual hazards of employment as a cement truck driver are. The evidence of the usual hazards came from Mr. Burns. Mr. Burns testified about the usual hazards; he did not include explosions from faulty welds used to fix rusted water tanks operated under pressure. (Tr.445).

Appellant's Point II should be denied.

III. THE TRIAL COURT DID NOT ERR AND DEFENDANT WAS NOT PREJUDICED BY THE TRIAL COURT FOLLOWING EXISTING LAW AND AWARDING PREJUDGMENT INTEREST, ESPECIALLY WHERE DEFENDANT HAD ACTUAL KNOWLEDGE THAT PLAINTIFF WAS PURSUING THE CLAIM FOR PREJUDGMENT INTEREST

A. Standard of Review.

Review of a decision to permit Plaintiff to amend pleadings to seek prejudgment interest is for abuse of discretion. ***Call v. Heard***, 925 S.W.2d 840, 854 (Mo. banc 1996).

Appellant has suggested that review is *de novo* because Appellant does not challenge the trial court's discretionary ruling, but rather, is asking for a change in the law. This does not change the standard of review.

B. *Call v. Heard* is Sound Law and This Court Need Not Overrule *Call*.

At the outset, it is important to note that Appellant conceded to the trial court that the trial court did indeed have the discretion to award prejudgment interest (Supplemental Tr.14). "I do agree that under the Missouri Supreme Court case ***Call v. Heard***, 925 S.W.2d 840 (Mo.banc 1996), the trial court has the discretion to reopen the case to allow plaintiff to admit additional evidence…" Indeed, ***Call*** states: "It is well settled that the trial court has the discretion to reopen the case to allow plaintiff to admit additional evidence." ***Id***. at 854.

On appeal, Smith challenges ***Call*** claiming that it promotes laxity and "that laxity is in direct contradiction to the generally-established rule of law that courts have power to decide only those questions which are presented by the parties in their pleadings." (App. Br. at 50).

Call holds that "a petition that included an open-ended prayer of relief, such as '... and for such other relief as the Court seems just and proper,' [is] a sufficient basis upon which to award prejudgment interest. ***Id.*** at 854.

Appellant appears to make something of a "notice" argument with respect to how defense counsel evaluate cases, and suggests that the failure to plead the requirement somehow deprives the defendant of notice that pre-judgment interest will be requested. This ignores the requirement, set forth in §408.040, RSMo 2000, for a certified letter setting out the amount of the demand. The very purpose of this letter is to provide notice to the defendant that a claim for prejudgment interest will be made if the statutory conditions are met. Smith does not deny that he received the letter or that the requirements of § 408.040 have been met.

Plaintiff's petition prayed for "such other and further relief the court may deem proper and just" (L.F.13). Section 408.040 has been satisfied. Prejudgment interest is due.

Appellant has provided no persuasive policy argument sufficient to change the settled law of Missouri. [7]

Point III should be denied.

Conclusion

Where the plaintiff's supervisor chose to weld over rust and corrosion on a cannibalized, twenty-year old, salvaged, rusted-through, leaking water pressure tank in order to save $400, and then directed plaintiff to “run it 'till it blows”, “something more” has been proven, and the trial court properly so found.

Respectfully, the judgment of the trial court should be affirmed.

Respectfully submitted,

Michael D. Holzknecht - #33978
Paul L. Redfearn - #27417
The Redfearn Law Firm, P.C.
1125 Grand Boulevard, Suite 1805
Kansas City, Missouri 64106
Telephone: (816) 421-5301
Facsimile: (816) 421-3785

Edward D. Robertson, Jr. #27183
Mary D. Winter #38328
Anthony L. DeWitt # 41612

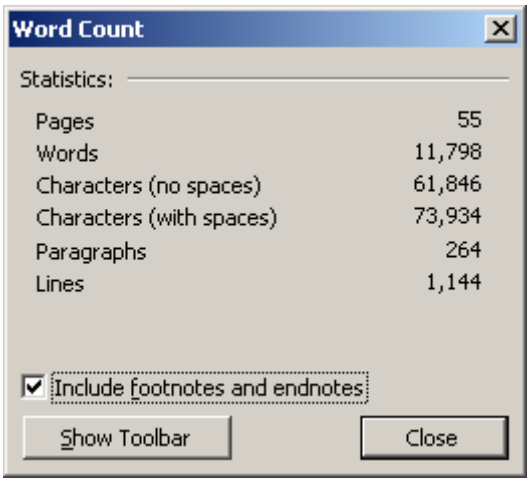
[7] Appellant also asserts that he was sandbagged on the issue of pre-judgment interest. This argument ignores the undisputed fact that Mr. Burns sent the required pre-judgment interest letter. That letter is enough to put defendant on notice.

Bartimus, Frickleton, Robertson &
Gorny, P.C.
715 Swifts Highway
Jefferson City, MO 65109
(573) 659-4454
(573) 659-4460 (facsimile)

ATTORNEYS FOR RESPONDENT

Certificate Of Compliance

Undersigned counsel hereby certifies that this brief complies with the requirements of Missouri Rule 84.06(c) in that beginning with the Table of Contents and concluding with the last sentence before the signature block the brief contains 11,798 words. The word count was derived from Microsoft Word.



Disks were prepared using Norton Anti-Virus and were scanned and certified as virus free.

Respectfully submitted,

_____

Edward D. Robertson, Jr. #27183
BARTIMUS, FRICKLETON,
ROBERTSON & GORNY, P.C.
715 Swifts Highway
Jefferson City, MO 65109
(573) 659-4454 (office)
(573) 659-4460 (fax)

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was sent by United States mail, postage pre-paid, this 12th day of September, 2006, to the following counsel of record:

M. Courtney Koger
Kutak Rock LLP
1010 Grand Blvd
Suite 500
Kansas City, MO 64016

ATTORNEYS FOR DEFENDANT/APPELLANT

_____