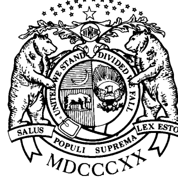

In the Missouri Court of Appeals
Eastern District
DIVISION FOUR

DANNY BROCK, Respondent, vs. PETER DUNNE, IN HIS CAPACITY AS DEFENDANT AD LITEM FOR MARK EDWARDS, DECEASED, Appellant.	))))))))))))	No. ED105739 Appeal from the Circuit Court of St. Louis County Cause No. 15SL-CC00163 Honorable Nancy Watkins McLaughlin Filed: September 11, 2018

OPINION

This appeal concerns a claim of negligence filed by an employee against a fellow employee. Danny Brock ("Brock") filed a petition in the Circuit Court of St. Louis County against his supervisor at the time of his injury, Mark Edwards ("Edwards"), claiming that Edwards's actions of removing a safety guard from a laminating machine and ordering Brock to clean the machine—while it was still running and without the safety guard equipped—constituted negligence, and that Brock suffered an injury as a result. After Brock filed his petition against Edwards, but before the trial began, Edwards passed away. Pursuant to § 537.021.1, RSMo 2012, the trial court ordered that Peter Dunne be substituted and named a party in place of Edwards as a defendant *ad litem* ("DAL"). After a trial, a jury verdict was issued in favor of Brock. Nonetheless, DAL claims on appeal that Brock failed to make a

submissible case for numerous reasons, including that he was immune from liability pursuant to § 287.120.1 of the Workers' Compensation Act.[1] The injury occurred on April 30, 2013. Consequently, § 287.120.1, RSMo 2012 was the effective statute that controls. Section 287.120.1 underwent significant changes when it was amended in 2012, including the express inclusion of "employees" in the immunity statute. After reviewing all of the parties' arguments, we find no error by the trial court, as Brock made a submissible case that satisfied the requirements for a negligence claim, including the finding that § 287.120.1 did not immunize DAL from Brock's negligence claim, as Edwards committed affirmative negligent acts that purposefully and dangerously caused Brock's injury. Thus, we affirm the judgment.

Factual and Procedural Background

This case stems from an injury that occurred on April 30, 2013. Brock was working at JMC Manufacturing ("JMC") at the time of the injury. Brock was assigned to work at JMC beginning in January of 2013 by a temporary employment agency, Patriot Personnel. On the morning of April 30, 2013, Brock was working on a lamination machine with the lamination line supervisor, Edwards, and two other co-workers when he was injured. While cleaning the lamination machine, Brock's hand was snatched and crushed by two rollers. This occurrence and Brock's resulting injury led to the litigation at issue on appeal.

A. The Laminating Machine

The laminating machine that injured Brock was produced by Black Brothers Co. ("Black Bros.") and owned by JMC. JMC used this machine to apply a heavy coating of glue to pieces of wood that are fed through the machine onto moving rollers. There are two rollers on the top side of the machine—above where wooden boards are moved through the machine—and two

[1] All references are to Mo. Rev. Stat. Cum. Supp. (2012), unless otherwise stated.

additional rollers on the bottom side, which transport the board through the machine. Glue is applied from the top pair of rollers to the material being laminated below it. Due to this process, glue will occasionally fall onto the bottom rollers. There is also a metal grate (i.e., the safety guard) attached to the machine by hinges, which can be lifted to provide access to the bottom rollers. The gap between the rollers create a "pinch point," where certain objects can become stuck if the safety guard is removed from the machine.

B. <u>The Incident</u>

On the morning of April 30, 2013, Edwards was feeding a board into the machine when he spotted glue on one of the bottom rollers. Edwards removed the safety guard while the machine was still powered on. According to Brock, Edwards then instructed Brock to grab a wet rag out of a bucket to squeeze water onto the roller with glue and use a brush underneath the roller to scrape the glue off of it; Edwards stated that he told Brock to clean the roller off, but without any specific instructions to accomplish the task. Once the safety guard was removed, the rollers and its "pinch points" were exposed and accessible to the workers. Brock followed Edwards's instructions to clean the roller. Brock claims that Edwards was standing right next to him during the process and never told him that he was doing anything unsafe or that he should stop attempting to clean the roller. As Brock was using the rag to squeeze water over the top side of the roller, and simultaneously scraping the glue on the bottom side of the roller with a brush, the rag was swallowed by the pinch point, which also pulled Brock's thumb into the pinch point and crushed it. Brock testified that he was in excruciating pain and that his thumb "was literally hanging by the skin." Brock was taken to the hospital by an ambulance soon after the injury occurred.

C. Ensuing Litigation

On January 16, 2015, Brock filed a petition in the Circuit Court of St. Louis County, seeking damages from Edwards and Black Bros. resulting from his workplace injury. Edwards passed away on May 27, 2016, and pursuant to § 537.021.1, the trial court ordered Peter Dunne to be substituted and named as a party in Edwards's place as a defendant *ad litem* (herein "DAL"). Eventually, Brock settled with Black Bros., and he dismissed his claims against the manufacturer of the lamination machine on January 17, 2017.

Brock and DAL proceeded to trial on April 3, 2017. After a five-day trial, the jury returned a verdict of $1,050,000 in total damages. The jury was instructed on comparative negligence and assigned ninety percent of fault to DAL and ten percent of fault to Brock. The trial court reduced the $1,050,000 verdict by the amount of Brock's settlement with Black Bros. ($80,000) and then reduced the remaining damages by ten percent (the percentage of fault attributable to Brock). The trial court entered a judgment on the verdict in the amount of $873,000. DAL then filed motions for a new trial and judgement notwithstanding the verdict ("JNOV"), which the trial court denied on June 23, 2017. This appeal follows.

DISCUSSION

A. General Rules of Statutory Interpretation

The judiciary's role is to enforce the laws enacted by the General Assembly and effectuate the legislature's intent. *Doe v. McCulloch*, 542 S.W.3d 354, 362 (Mo. App. E.D. 2017). First, we look to the plain language of the statute; "[w]hen the words are clear, there is nothing to construe beyond applying the plain meaning of the law." *Bateman v. Rinehart*, 391 S.W.3d 441, 446 (Mo. banc 2013). However, we will rely on rules of statutory construction to resolve any ambiguities if the legislative intent is undeterminable from the plain meaning of the

statutory language. *BASF Corp. v. Dir. of Revenue*, 392 S.W.3d 438, 444 (Mo. banc 2012). Additionally, this Court will not insert new words into statutes, and we presume that "each word, clause, sentence, and section of a statute" will be given meaning and that the legislature did not insert superfluous language. *Macon Cty. Emergency Servs. Bd. v. Macon Cty. Comm'n*, 485 S.W.3d 353, 356 (Mo. banc 2016).

B. Section 287.120.1 after the 2012 Amendment

The relevant portion of § 287.120.1 reads:

> Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident or occupational disease arising out of and in the course of the employee's employment. ***Any employee of such employer shall not be liable for any injury or death for which compensation is recoverable under this chapter and every employer and employees of such employer*** shall be released from all other liability whatsoever, whether to the employee or any other person, ***except that an employee shall not be released from liability for injury or death if the employee engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury***. The term "accident" as used in this section shall include, but not be limited to, injury or death of the employee caused by the unprovoked violence or assault against the employee by any person.

§ 287.120 (emphasis added to denote additional, new language in the 2012 amendment).

<u>A Brief History of § 287.120.1 and the Workers' Compensation Act</u>

Our Court held in *State ex. rel Badami v. Gaertner*, 630 S.W.2d 175, 180 (Mo. App. E.D. 1982) (en banc) that an employee "has immunity under the workmen's compensation law where his negligence is based upon a general non-delegable duty of the employer," but "he does not have immunity where he does an affirmative act causing or increasing the risk of injury." Rather, for an employee to bring a negligence claim against a fellow co-employee, our Court found "[s]omething extra [was] required beyond a breach of his duty of general supervision and

safety." *Id.* at 179. This has been commonly referred to as the "something more" test.[2] As the Supreme Court of Missouri has observed, "as initially articulated" in *State ex rel. Badami*, the "something more" test "closely followed the common law." *Peters v. Wady Indus., Inc.*, 489 S.W.3d 784, 797 (Mo. banc 2016). Although the test has evolved since its inception, the standard for satisfying the "something more" test "has not proven susceptible of reliable definition, and Missouri courts have essentially applied the rule on a case by case basis…." *State ex rel. Larkin v. Oxenhandler*, 159 S.W.3d 417, 421 (Mo. App. W.D. 2005). In 2002, the Supreme Court of Missouri stated that "[a] simple allegation of negligent driving by a co-employee … [was] not 'something more' than an allegation of a breach of the duty to maintain a safe working

[2] We note that Missouri courts' interpretation of § 287.120.1 shifted following amendments to the Workers' Compensation Act in 2005; as a result, the "something more" test was temporarily in disuse following those amendments. However, the change in interpretation of law for injuries occurring between 2005 and 2012 was not a response to any obvious change in the Workers' Compensation Act itself. Initially, in *Robinson v. Hooker*, the Western District found that § 287.120.1, RSMo 2005 did not provide any immunity to co-employees, concluding that an employee "retains a common law right of action against co-employees." *Robinson v. Hooker*, 323 S.W.3d 418, 425 (Mo. App. W.D. 2010).The Western District reached this conclusion by noting that § 287.800 called for strict construction of the Workers' Compensation Act, while the Act had called for liberal construction during the period that Missouri courts applied the "something more" test to evade immunity provided to co-employees under § 287.120.1. *Id.* at 422–23. Subsequently, Missouri courts followed this conclusion and analyzed co-employee negligence claims under the common law, without regard to § 287.120.1, for injuries occurring between the 2005 amendments and the 2012 amendments to the Workers' Compensation Act. Nonetheless, in *Peters v. Wady Indus., Inc.*, 489 S.W.3d 784 (Mo. banc 2016), although the Supreme Court of Missouri agreed that the Western District reached the correct conclusion in *Robinson*, it found the change to the Act's language was immaterial, stating:

> Accordingly, although *Robinson* correctly held that co-employees were not entitled to immunity under section 287.120.1, RSMo Supp. 2005, co-employee immunity was not eliminated as a result of the change from liberal to strict construction of the workers' compensation law. Rather, prior to the 2012 amendments, co-employees were ***never*** entitled to immunity under the plain language of section 287.120.
>
> *Peters*, 489 S.W.3d at 792 n.6 (emphasis added).

The Court further noted that "[d]espite the plain language of the exclusivity provisions [of the Workers' Compensation Act], Missouri courts have previously held that, in limited circumstances, an employer's immunity under the workers' compensation law extends to co-employees," referencing *State ex rel. Taylor v. Wallace,* 73 S.W.3d 620, 622–23 (Mo. banc 2002) and *State ex rel. Badami*, 630 S.W.2d at 180 as specific examples. *Id.* at 790–91. The Court elaborated that the interpretation that the Act extended immunity to co-employees "was inconsistent with established workers' compensation law precedent and resulted in the adoption of a standard not supported under any construction of the workers' compensation law's exclusivity provisions." *Id.* at 791. Thus, any reference to cases applying the "something more" test merely reflects how Missouri courts interpreted § 287.120.1 at that time.

environment." *State ex rel. Taylor v. Wallace,* 73 S.W.3d 620, 622–23 (Mo. banc 2002), overruled on other grounds by *McCracken v. Wal-Mart Stores E., LP*, 298 S.W.3d 473 (Mo. banc 2009). The Court reasoned that a mere allegation that a co-employee drove negligently "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." *Id.* at 622. Later, in *Peters*, the Court highlighted how the "post-*Taylor* 'something more' test" deviated from the common law to provide more immunity to employees, explaining that although cases such as *Marshall v. Kansas City*, 296 S.W.2d 1 (Mo. 1956), and *Logsdon v. Duncan*, 293 S.W.2d 944, 948 (Mo. 1956) satisfied the common law test and allowed a co-employee to bring a negligence claim against another co-employee, "*Marshall* and *Logsdon* would not have satisfied the post-*Taylor* 'something more' test as neither case involved purposefully nor inherently dangerous conduct on behalf of the co-employee." *Peters*, 489 S.W.3d at 789.[3]

<u>Common Law, the "Something More" Test, and § 287.120.1, RSMo 2012</u>

The 2012 amendment to § 287.120.1 "provides immunity to co-employees except when 'the employee engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury.'" *Id*. at 793 (quoting § 287.120.1, RSMo 2012).[4] The legislature's choice of words carve out an exception that is largely consistent with Missouri courts'

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[3] "In *Marshall*, the plaintiff was injured when his co-employee shook a compressor hose to remove the kinks and caused the plaintiff to trip," and the injury "came about by reason of [the co-employee's] negligent use of the hose and not because it was defective." *Peters*, 489 S.W.3d at 796 (citing *Marshall*, 296 S.W.2d at 2−3). In *Logsdon*, the Supreme Court of Missouri found that "a co-employee breached a personal duty to a fellow employee when he negligently removed debris on a roof by 'punch[ing] and dislodg[ing] the debris from behind the chimney with a board,' which caused a brick to fall and strike the fellow employee below." *Id*. at 798 (quoting *Logsdon*, 293 S.W.2d at 948).

[4] "Before the legislature's 2012 modification, [§287.120.1] did not mention co-employee liability and such persons were liable to the full extent they would otherwise be under the common law." *Sherman v. Tyson Foods, Inc*., 17-06031-CV-SJ-GAF, 2017 WL 5957769, at *3 (W.D. Mo. Sept. 18, 2017) (citing *Peters*, 489 S.W.3d at 792–93).

application of the post-*Taylor* "something more" test for injuries occurring pre-2005. *See Burns v. Smith*, 214 S.W.3d 335, 337−38 (Mo. banc 2007) ("[T]he notion of an 'affirmatively negligent act' certainly includes the commission of an intentional tort, and this Court has also described it in terms of 'purposeful, affirmatively dangerous conduct.'"); *McComb v. Norfus*, 541 S.W.3d 550, 558 (Mo. banc 2018) (Draper, J., dissenting) ("[T]hese cases set forth affirmative acts and purposeful conduct consistent with the 'something more' doctrine [as applied post-*Taylor*]."); *see also State ex rel. Taylor*, 73 S.W.3d at 622 (explaining that Missouri courts have shielded co-employees from liability unless they engaged in "purposeful, affirmatively dangerous conduct"); *Peters*, 489 S.W.3d at 798 n.10 ("The language of [the 2012 amendment to § 287.120.1] closely follows *State ex rel. Taylor*' s refinement of the 'something more' test … [but t]he affirmative negligent act standard codified in the 2012 amendment is not before this Court.").

More specifically, Missouri courts have noted that the language used in the 2012 amendment is similar to that used by our State's courts in applying the "something more" test in co-employee negligence cases after the Supreme Court of Missouri handed down *State ex rel. Taylor*, but prior to cases in which § 287.120.1, RSMo 2005 was the effective statute. *Peters*, 489 S.W.3d at 798 n.10 (citing *Taylor*, 73 S.W.3d at 622). However, without inserting language into the statute, we cannot find that the 2012 amendment to § 287.120.1 is a wholesale adoption of the "something more" test. *See Peters*, 489 S.W.3d at 792 ("In construing a statute, courts cannot add statutory language where it does not exist; rather, courts must interpret the statutory language as written by the legislature."). For example, in *Burns*, our Supreme Court noted that the co-employee defendant's knowledge that his instructions to the co-employee plaintiff would increase his risk of danger "surely" was sufficient to satisfy the "something more" test:

> In the case at hand, the most compelling evidence that establishes the "something more" element is that defendant instructed plaintiff to "run it till it blows," which

> was a not-too-subtle admission that plaintiff was aware that the water tank was dangerous and would eventually explode. By those words, defendant intentionally directed the plaintiff to undertake an activity that defendant knew would result in a particularly dangerous event. Whether, on other facts, the act of negligently welding an excessively corroded water tank would have been sufficient, in and of itself, to satisfy the "something more" requirement need not be determined, because here, defendant's instruction to "run it till it blows" surely did so.

Burns, 214 S.W.3d at 340. Thus, the Court found the defendant's intentional direction of his co-employee plaintiff "to undertake an activity that the defendant ***knew*** would result in a particularly dangerous event" was "the most compelling evidence" for establishing that the "something more" test was satisfied. *Id.* However, as § 287.120.1, RSMo 2012 is written, there is nothing to suggest that a co-employee's awareness of the danger is a factor in determining if the co-employee defendant is immune from liability. Accordingly, Missouri cases applying the post-*Taylor* "something more" test may prove instructive in resolving issues under the test set forth by the 2012 amendment; however, these cases will only be useful to the extent that their application is consistent with the language of § 287.120.1, RSMo 2012. *Conner v. Ogletree*, 542 S.W.3d 315, 326 (Mo. banc 2018).[5]

Common Law and § 287.120.1, RSMo 2012

The applicability of the common law in light of the 2012 amendment is a point of contention between the parties. As DAL notes in his appellant's brief, "[t]he element at issue in Point I is the breach of a duty owed by [Edwards]." DAL contends that Edwards must have had a duty separate and distinct from his employer's nondelegable duties to be susceptible to any liability for Brock's injury. At common law, an employee is liable to a third person, including a co-employee, when he or she breaches a duty owed independently of any master-servant

[5] The Supreme Court of Missouri addressed two cases in this opinion: *Conner v. Ogletree* (No. SC 95995) and *Evans v. Wilson and Barret*, (No. SC 95997). For simplicity, and because our discussion of the cases are limited to the legal principles articulated in the opinion, we will refer to the case as "*Conner*."

relationship. *Peters*, 489 S.W.3d at 794–95. Contrarily, Brock concludes that the "common law co-employee duty test is inapplicable to this case because [the] 2012 Missouri's [sic] legislature amended the Workers' Compensation Act to preempt common law suits against co-employees."

After considering all of the relevant statutes and caselaw, we find that the 2012 amendment to § 287.120.1 did not abrogate the common law. Before addressing how our interpretation of the law applies in the case before us, we will explain how this conclusion was reached. Brock contends that the "common law co-employee duty test is inapplicable because [the 2012 amendment to § 287.120.1] preempt[s] common law suits against co-employees," thereby making the scope of an employer's nondelegable duties irrelevant. If we were to adopt this interpretation, the application of § 287.120.1 would lead to results wildly inconsistent with co-employee liability in Missouri historically. *Hansen v. Ritter,* 375 S.W.3d 201, 218 (Mo. App. W.D. 2012) (citing *Kelso v. W.A. Ross Constr. Co.,* 85 S.W.2d 527, 534 (Mo. banc 1935) (explaining that in the last fifty plus years, "no Missouri case has ever imposed liability on a co-employee for negligent performance of an employer's non-delegable duties"). This supports our conclusion that the legislature did not intend to abrogate the common law (or obviate the requirement that an employee's actions fall outside the scope of an employer's nondelegable duty to maintain a safe workplace).

Recently, our Supreme Court noted that the language included in the 2012 amendment to § 287.120.1 (specifically, "affirmative negligent act that purposefully and dangerously caused or increased the risk of injury") closely resembles the post-*Taylor* "something more" test. *See Peters*, 489 S.W.3d at 798 n.10. Our conclusion that the 2012 amendment did not supersede common law claims is further supported by the historical application of the "something more" test and the amendment's clear commonalities with Missouri's common law. As our Supreme

Court noted in *Conner*, the "something more" test required the Court to "discern whether the risk at issue was reasonably foreseeable to the employer and, therefore, within the employer's nondelegable duty to provide a reasonably safe workplace." *Conner*, 542 S.W.3d at 326. Similarly, in *Peters*, the Court explained "[t]he court in *Badami* created a 'something more' test as a means of providing immunity to co-employees under the workers' compensation law when the co-employee was discharging the employer's nondelegable duty to provide a safe workplace." *Peters*, 489 S.W.3d at 796; *see also Carman v. Wieland*, 406 S.W.3d 70, 77 (Mo. App. E.D. 2013) ("Construing 'something more' as a breach of a personal duty of care that one employee owes to another comports with the foundational principle of common-law negligence actions—that the defendant owed some duty to the plaintiff, the observance of which would have avoided the injury."). *Peters* also noted that *Badami*'s ultimate conclusion "accurately reflect[ed] the common law regarding a co-employee's duty." *Peters*, 489 S.W.3d at 797; *see also Carman*, 406 S.W.3d at 77. "*Badami*'s 'something more' test simply restated the pre-existing common law regarding co-employee liability to fellow workers for breach of the employer's non-delegable duties." *Carman*, 406 S.W.3d at 77.

We also find that the plain language of the statute suggests the amendment did not create a cause of action that abrogated the common law; it simply provided a means for a co-employee to avoid liability for a claim not considered by the statute. When a statute does not clearly and unambiguously create a cause of action, Missouri courts will not find that a common law claim has been abrogated:

> Where the legislature intends to preempt a common law claim, it must do so clearly. Unless a statute clearly abrogates the common law either expressly or by necessary implication, the common law rule remains valid. A statutory right of action shall not be deemed to supersede and displace remedies otherwise available at common law in the absence of language to that effect unless the statutory remedy fully comprehends and envelops the remedies provided by common law. We strictly

> construe a statute when existing common law rights are affected, and if a close question exists, we weigh our decision in favor of retaining the common law.

State ex rel. KCP & L Greater Missouri Operations Co. v. Cook, 353 S.W.3d 14, 20–21 (Mo. App. W.D. 2011) (quoting *State ex rel. Brown v. III Invs., Inc*., 80 S.W.3d 855, 859–60 (Mo. App. W.D. 2002)). In the case before us, the legislature's intent to abrogate is not obvious from the language used in the 2012 amendment; in fact, we find a more natural reading of the statute to express that the legislature did not intend to abrogate the common law. Of great importance is the fact that the language only refers to when an employee is either ***released*** or ***not released*** from liability. Contrarily, the statute clearly imposes liability on employers for certain injuries suffered by their employees in certain circumstances. Note the affirmative language used in the statute: "Every employer subject to the provisions of this chapter ***shall be liable***, irrespective of negligence … [for] personal injury or death of the employee by accident or occupational disease arising out of and in the course of the employee's employment." Section 287.120.1, RSMo 2012.

Although not binding, we note that, in reviewing the statute as amended in 2012, federal courts have reached the same conclusion: "[t]he statutory exception [created by the amended language] appears only to deny immunity to the co-employee … the statute does not create an independent cause of action against a co-employee, [and thus,] the Court must look to the common law to determine whether a cause of action has been alleged." *Halsey v. Townsend Corp. of Indiana*, 1:17 CV 4 SNLJ, 2017 WL 2189459, at *2 (E.D. Mo. May 18, 2017); *see also Sherman v. Tyson Foods, Inc*., 17-06031-CV-SJ-GAF, 2017 WL 5957769, at *3 (W.D. Mo. Sept. 18, 2017) ("[T]he legislature's 2012 modification [to § 287.120] … excludes co-employees from liability under the Workers' Compensation Act, and purports to limit [though not eliminate] co-employees' potential for liability under the common law.").

Under the post-*Taylor* "something more" test, "[a]n employee may sue a fellow employee only for '[1] affirmative negligent acts [2] outside the scope of an employer's responsibility to provide a safe workplace.'" *Piatt v. Indiana Lumbermen's Mut. Ins. Co*., 461 S.W.3d 788, 794 (Mo. banc 2015) (quoting *State ex rel. Taylor,* 73 S.W.3d at 621–22). The first part of that test—the "affirmative negligent acts" requirement—is covered by the language added to § 287.120.1 in 2012. However, we do not find that the language used in the amendment requires that such acts are committed "outside the scope of an employer's responsibility to provide a safe workplace." There is no statutory language that refers to the duties of the employer or employee; we believe such a requirement would require the insertion of words not included by the General Assembly, which is beyond the judiciary's authority. *Doe v. McCulloch*, 542 S.W.3d at 362. However, we do not read the amendment as a creation of a new cause of action; we read the amended language to expressly provide immunity to employees when the statute is applicable, as it provides "… employees of such employer ***shall be released from all other liability*** whatsoever ... except that an employee ***shall not be released from liability*** for injury or death if the employee engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury." Section 287.120.1, RSMo 2012 (emphasis added). This interpretation, in conjunction with the common law requirement that an employee owes a duty to fellow co-employees if it is beyond the scope of an employer's nondelegable duties, is consistent with Missouri courts' application of the post-*Taylor* "something more" test. Accordingly, we proceed to the parties' arguments concerning Point I and address it on the merits.

C. <u>Point I – The Trial Court's Finding that Edwards Owed a Duty to Brock</u>

In any negligence action, including one based upon co-employee liability, "the plaintiff must establish that (1) the defendant had a duty to the plaintiff; (2) the defendant failed to perform that duty; and (3) the defendant's breach was the proximate cause of the plaintiff's injury." *Peters*, 489 S.W.3d at 793. "[U]nder common law, co-employees are liable to their fellow employees for breaches of a duty owed independently of the master-servant relationship—that is, a duty separate and distinct from the employer's nondelegable duties...." *Id.* at 796. Missouri courts have charged employers with, at minimum, the following nondelegable duties:

1. The duty to provide a safe workplace.
2. The duty to provide safe appliances, tools, and equipment for work.
3. The duty to warn employees of dangers of which he or she "might reasonably be expected to remain in ignorance."
4. The duty to provide a sufficient number of suitable fellow servants.
5. The duty to promulgate and enforce rules regarding employees' conduct to make the workplace safe.

McComb, 541 S.W.3d at 554.

As is the case with most common law duties, an employer's nondelegable duty is limited to injuries that are reasonably foreseeable. *Conner*, 542 S.W.3d at 322. Missouri courts have labeled "a workplace risk that [is] not reasonably foreseeable to the employer," as a "transitory risk." *Id*. at 325 n.7.[6] Transitory risks fall outside the scope of an employer's nondelegable duty

[6] We note that on March 6, 2018, the Supreme Court of Missouri disposed of four cases by handing down three opinions: *Conner*, 542 S.W.3d at 315, *McComb*, 541 S.W.3d at 550, and *Fogerty v. Armstrong*, 541 S.W.3d 544 (Mo. banc 2018). All three cases involved co-employee liability under § 287.120. In these three opinions, the Court emphasized that an employer's nondelegable duty to provide a safe workplace is "limited to those risks that were reasonably foreseeable to the employer." *See Conner*, 542 S.W.3d at 332. The Court also noted that due to the statutory amendment of § 287.120 in 2012, the Court's holdings dealing with injuries occurring between 2005 and 2012, were "limited to injuries occurring before the 2012 amendments went into effect." *See McComb*, 541 S.W.3d

to maintain a reasonably safe workplace. *Id*. "The determination of the scope of an employer's duty is indistinguishable from the determination of the existence of a duty, which is clearly a question of law." *McComb*, 541 S.W.3d at 554. Thus, Brock could only make a submissible case against Edwards if he established that Edwards owed him a duty independent of his employer's nondelegable duties.

Brock was therefore required to show that (1) Edwards owed him a personal duty of care, separate and distinct from his employer's nondelegable duties, which is an essential element of a negligence claim against a fellow co-employee; and (2) Edwards engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury, thereby preventing Edwards from being shielded from liability under the immunity of § 287.120.1. Brock's negligence claim is based on Edwards's actions of removing the safeguard from the laminating machine, thereby exposing its pinch points, and Edwards's instructions to Brock to clean the roller with said pinch points exposed while the machine was running. Several factors lead us to conclude that Edwards's actions were unforeseeable to JMC: the lamination machine at issue was not defective or unsafe with the safeguard properly equipped; JMC's safety rules mandate that if an employee "remove[s] a mechanical guard temporarily," he or she must "replace it before [he or she] turn[s] the machine on"; the laminating machine had cleaning instructions attached to it, and they clearly cautioned users against operating the machine with

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at 554 n.4; *see also Conner*, 542 S.W.3d at 319, 324; *see also Peters*, 489 S.W.3d at 793 ("[T]his Court's holding that the exclusivity provisions of the workers' compensation law provide no immunity to co-employees is limited to injuries occurring before the 2012 amendments."). Although discussion as to "transitory risks" and reasonable foreseeability became most prominent in Missouri after *Peters* and the three Supreme Court cases handed down on March 6, 2018, all of which concerned injuries predating the 2012 amendment (which is the focus of the present case), we find that such terminology remains relevant under the amended statute. In *Conner*, the Supreme Court of Missouri noted that "cases applying the 'something more' test … properly discern whether the risk at issue was reasonably foreseeable to the employer, and, therefore, within the employer's nondelegable duty to provide a reasonably safe workplace." *Conner*, 542 S.W.3d at 326.

the safety guard removed, for example, stating, "CAUTION: KEEP GUARDS IN PLACE WHEN MACHINE IS RUNNING."

Despite the fact that, in *Peters*, the Supreme Court of Missouri found that the "something more" test inaccurately stated the common law for an employer's nondelegable duties, "the Court emphasized that cases applying the 'something more' test can still prove instructive in a common law analysis … because those cases properly discern whether the risk at issue was reasonably foreseeable to the employer and, therefore, within the employer's nondelegable duty to provide a reasonably safe workplace. *Conner*, 542 S.W.3d at 326 (citing *Peters*, 489 S.W.3d at 797). Our Supreme Court recently reiterated in *Conner* that an employer's nondelegable duties are "not unlimited," but rather, are "limited to those risks that were reasonably foreseeable to the employer." *Id.* at 322. In *Conner,* the Court cited two cases, *Cain v. Humes–Deal Co.,* 49 S.W.2d 90, 90 (Mo. banc 1932) and *Marshall,* 296 S.W.2d at 3, as examples of employees performing negligent acts that were not reasonably foreseeable to their employers, and thus fell outside of the employers' nondelegable duties. *Id.* at 322−23, 325. Specifically, the co-employee in *Cain* struck the floor of an unfinished building with a shovel, sending a loose nail into the plaintiff's eye, while the co-employee in *Marshall* injured the plaintiff when he "suddenly and unexpectedly" jerked a hose that the plaintiff was walking over. The Court in *Conner* explained that the co-employees' negligent actions in both *Cain* and *Marshall* were so unforeseeable that the employers' nondelegable duties did not extend to them. *Id.* at 325. From our vantage point, the situation in the present case—an experienced supervisor removing a safety guard from a machine while it was mid-operation, in violation of employer-provided safety rules and a posted warning against doing so on the machine itself, and then directing a subordinate to clean the machine—is much less foreseeable than the situations in both *Cain* and *Marshall,* where the co-

employees performed sudden, unexpected negligent acts that injured the plaintiffs. While the Supreme Court of Missouri specifically stated in *Peters,* 489 S.W.3d at 798 that cases such as *Marshall* would not have satisfied the post-*Taylor* "something more" test because the conduct at issue was not purposeful or inherently dangerous, we find that Edwards's actions in this case do cross that threshold. *See* our discussion of Edwards's purposeful and dangerous conduct *infra* Point II.

We also note that the facts of this case are distinguishable from recent cases (that did not apply the 2012 amended version of § 287.120) such as *Conner*, *McComb*, *Fogerty v. Armstrong*, 541 S.W.3d 544 (Mo. banc 2018), and *Nolen v. Cunningham,* 2018 WL 3352766 (Mo. App. E.D. July 10, 2018), where the actions of the defendant-co-employee were found to be reasonably foreseeable, and thus fell within the employer's nondelegable duties. *Conner* consolidated two similar cases. *Conner,* 542 S.W.3d at 327–28. In the first case, the plaintiff was assigned to discontinue a transformer bank for his employer, a public utility company; this included severing an electrical power line from the transformer. *Id.* at 318. The employer's rules required that its employees follow procedures to ensure that power lines were de-energized before commencing work on the lines. *Id.* The plaintiff's co-employees did not de-energize the line pursuant to the employer's rules, despite telling the plaintiff that the line had been properly de-energized, and the plaintiff was injured when he attempted to sever the still-energized line. *Id.* The Court determined that it was reasonably foreseeable to the employer that an employee would fail to follow its promulgated rules and would not properly ensure the power lines were de-energized before work began, and that an injury to another employee could result. *Id.* at 327–28. In the second case decided in *Conner*, the plaintiff alleged he was injured when he was struck by a fork-lift being driven by a co-employee who did not know how to operate it. *Id.* at 319. The

Court determined it was reasonably foreseeable to an employer that failing to properly train an employee to operate the equipment needed to perform his work could result in an injury. *Id.* at 328. Thus, the Court determined in both cases that the plaintiffs' injuries were the result of a breach of the employer's nondelegable duty to provide a safe workplace. *Id.* at 327−28. Similarly, in *Fogerty*, the Court found that it was reasonably foreseeable that the defendant-co-employee would injure another employee when he was instructed to operate a front-loader even though he was untrained in how to do so. *Fogerty,* 541 S.W.3d at 548.

In *McComb*, the plaintiff was the wife of a delivery driver who was killed while driving his route in a winter storm. *McComb,* 541 S.W.3d at 553. The driver had informed his supervisors of the dangerous road conditions, but was told to stay on the road to complete his deliveries. *Id.* The Court found that the dangerous (hazardous) condition that contributed to the driver's death was the icy, slippery roads, which were not created by the defendant-co-employees. *Id.* at 557. The Court further found that it was reasonably foreseeable that a supervisor would be negligent in directing a delivery driver to stay on the roads during dangerous weather conditions, and was therefore a breach of the employer's nondelegable duties. *Id.*

Finally, in *Nolen*, the plaintiff was injured when he fell off of the bleachers he was mopping. Although the employer had provided guardrails to address the known risk of falling off bleachers, the plaintiff's supervisor told him there was not enough time to put them up and he should mop without them. *Nolen,* 2018 WL 3352766 at *1. The plaintiff contended that by providing the guardrails, the employer had fulfilled its duty to provide a safe workplace and the co-employees' failure to utilize the guardrails was a breach of the co-employees' separate and distinct duty that arose when they "creat[ed] the hazardous condition which directly resulted in

[plaintiff's] injuries." *Id.* at *4. However, because the failure of employees to follow an employer's safety measures is reasonably foreseeable, and, in *Nolen*, had actually occurred many times, our Court found the risk to be within the employer's nondelegable duties. *Id.* at *4.

Both we and the Supreme Court of Missouri have acknowledged that the employer's nondelegable duties are not unlimited, but instead, are limited to those risks that are reasonably foreseeable to the employer. *Conner,* 542 S.W.3d at 322; *McComb,* 541 S.W.3d at 556; *Fogerty,* 541 S.W.3d at 548; *Nolen,* 2018 WL 3352766 at *2. In those cases, it was determined that the actions at issue were within the employer's nondelegable duties because (a) the co-employee's failure to follow employer-created rules was reasonably foreseeable and/or (b) the employer's failure to provide the necessary equipment, training, and procedures breached the employer's duty to provide a safe workplace. Unlike the defendant-co-employees and employers in these cases, Edwards did not solely fail to follow JMC's instructions, nor did JMC fail to provide sufficient equipment, training, or procedures required to keep the workplace safe.

While Edwards did violate rules created by JMC that prohibited the removal of safety guards from machines while they were in operation, Edwards's actions also affirmatively created the hazardous condition that resulted in Brock's injury. JMC provided the laminating machine with the safety guard in place and with rules and instructions prohibiting removal of the guard while the machine was in operation. It has repeatedly been held that a co-employee's creation of a hazard or danger does not fall within the employer's duty to provide a safe workplace. *See Tauchert v. Boatsmen's Nat. Bank of St. Louis,* 849 S.W.2d 573, 574 (Mo. banc 1993) ("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."); *Pavia v. Childs,* 951 S.W.2d 700, 701–02 (Mo. App. S.D. 1997) (finding that a supervising co-employee's actions were outside the employer's nondelegable duties where the co-employee "creat[ed] a hazardous condition" by constructing a makeshift elevator by inserting the forks of a fork-lift under a wooden pallet and directing the plaintiff to stand on the pallet while it was lifted 15 feet above the ground so that plaintiff could retrieve items from an elevated shelf).

We find that Edwards's actions were not reasonably foreseeable because, like the co-employees in *Tauchert*, *Pavia*, *Cain*, and *Marshall* and unlike the co-employees in *Connors*, *Fogerty*, *McComb*, and *Nolen*, Edwards purposefully performed affirmative negligent acts that created an additional danger that would not have been otherwise present in the workplace. *Burns,* 214 S.W.3d at 338 (explaining that a co-employee's actions satisfy the "something more" test, and thus fall outside the employer's nondelegable duties, when the co-employee "creates additional danger beyond that normally faced in the job-specific work environment"); *see also Conner,* 542 S.W.3d at 326 (noting that *Peters,* 489 S.W.3d at 796–97 held that cases applying the "something more" test are still instructive because they "properly discern whether the risk at issue was reasonably foreseeable to the employer and, therefore, within the employer's nondelegable duty to provide a reasonably safe workplace").

It is clear from the language of § 287.120, RSMo 2012 (specifically, "an employee shall not be released from liability") that the legislature intended that co-employees not receive immunity in all instances. Once again, we presume that "every word, clause, sentence, and provision of a statute must have effect" and that "the legislature did not insert superfluous language in a statute." *Saint Charles Cty. v. Dir. of Revenue,* 407 S.W.3d 576, 578 (Mo. banc

2013). When reading § 287.120, RSMo 2012 in combination with binding precedent dictating that an employer's nondelegable duties are not unlimited, we believe that the actions of Edwards, (a properly trained and experienced supervisor), particularly, removing a piece of equipment specifically intended to make the machine safer (thereby creating the danger that an employer has actively taken measures to prevent) and directing Brock to clean the rollers of the machine near the unguarded pinch point while the machine is running, is not reasonably foreseeable to an employer. For if these actions, under these circumstances, are reasonably foreseeable to an employer, it is difficult to imagine any act that would not fall within the employer's nondelegable duties and would not release an employee from liability; such a conclusion would render § 287.120, RSMo 2012 meaningless. *See Edwards v. Gerstein,* 237 S.W.3d 580, 581 (Mo. banc 2007) ("When interpreting statutes, courts do not presume that the legislature has enacted a meaningless provision."). Especially in a manufacturing setting like the one in this case, where JMC provided a presumptively safe machine for its employees to use in their work, we are hard-pressed to find that an employer's nondelegable duties extend to the possibility that a supervisory employee—against both logic and an employer's instructions and the machine's warnings—would dangerously modify a machine. Consequently, we find that Edwards had an independent personal duty of care towards Brock that fell outside the scope of JMC's nondelegable duties.

In sum, Edwards modified a machine by removing the safety guard on the laminating machine—which by all accounts was perfectly safe to clean when the guard was properly utilized—and by doing so, contravened both his employer's rules requiring that safety guards on the machine are properly in place while the machine is running as well as the warnings clearly furnished by the machine's manufacturer. "Except in the cases in which the master is himself directing the work in hand, his obligation to protect his servants does not extend to protecting

them from the transitory risks which are created by the negligence of the servants themselves in carrying out the details of that work." *Peters*, 489 S.W.3d at 795–96. In the present case, there was no evidence that the employer demanded, instructed, or suggested using Edwards's procedure of removing the safety guard to clean glue off of the rollers mid-operation. In fact, the evidence suggests that JMC attempted to prevent such actions by their employees by mandating that the safety guard may only be removed from the machine while the machine is powered off.

Thus, in contravention of JMC policy and the lamination machine's obvious warnings against removing the safety device, Edwards—an experienced JMC employee working as the "lamination supervisor" in charge of the lamination line—altered an otherwise safe laminating machine by removing the ***safety*** guard that was designed to prevent the very injury that occurred here. Edwards even acknowledged in his deposition testimony (which was heard by the jury) "that a supervisor should not remove … safety devices from [active] manufacturing machines." Rather than JMC failing to provide adequate equipment, training, and procedures to make the workplace safe or Edwards simply failing to follow JMC's promulgated rules, Edwards personally created the dangerous condition that led to Brock's injury. Consistent with both *Conner,* 542 S.W.3d at 322−23, 325 and *Peters,* 489 S.W.3d at 798, we find that Edwards's actions were not reasonably foreseeable to JMC and fall outside the scope of JMC's nondelegable duties. Instead, Edwards's actions constituted a breach of an independent duty that he personally owed to Brock. Point I is denied.

D. Point II – Evidence that Brock's Claim Supported Every Element of § 287.120.1

In Point II, DAL asserts that his motion for directed verdict and/or JNOV was erroneously denied because there was "no evidence Edwards engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury to [Brock]." DAL

presents four reasons why he believes Brock failed to make a submissible case: (1) the evidence did not establish that Edwards performed an "affirmative negligent act"; (2) Brock failed to show that Edwards "purposefully" caused or increased the risk of injury; (3) Brock failed to show that Edwards acted "dangerously"; and (4) Brock failed to show that Edwards caused or increased the risk of injury.

DAL contends that the use of the word "purposefully" means Brock was required to show Edwards "had a conscious plan to dangerously cause or increase the risk of injury to [Brock], and that he did so with awareness of the probable consequences." Conversely, Brock asserts that the language merely requires that the defendant act purposefully (i.e., the action was not the result of a mistake or an inadvertent act), and the plaintiff is not required to show the defendant's mental state under § 287.120.1.

Evidence of an "Affirmative Negligent Act"

In the present case, DAL contends, "[t]he only act of Edwards identified by [Brock] is lifting the metal grate." DAL concedes Edwards directed Brock to clean the rollers while the machine was on, but he argues, without support, that "an affirmative negligent act must be a ***physical*** act, not a direction or statement." (emphasis in original). DAL claims that his position is consistent with *Peters*, 489 S.W.3d at 800, "which [DAL argues] affirmed a dismissal despite allegations the co-employee 'ordered and directed' the plaintiff to perform the specific unsafe practice that caused the accident." This is patently misleading. In *Peters*, the dismissal was not based on the plaintiff's failure to show an "affirmative" act; the case was dismissed because the plaintiffs "failed to allege that [the defendant] owed a duty independently of [his employer's] nondelegable duty to provide a safe work place." *Id.* Moreover, Missouri courts have found that a superior directing a co-employee to perform a task constitutes an "affirmative act." *Murry v.*

Mercantile Bank, N.A., 34 S.W.3d 193, 197 (Mo. App. E.D. 2000); *see also Arnwine v. Trebel*, 195 S.W.3d 467, 477 (Mo .App. W.D. 2006); *see also Logan v. Sho-Me Power Elec. Co-op.*, 122 S.W.3d 670, 678 (Mo. App. S.D. 2003) ("[S]upervisors personally took part in the 'affirmative act' by directing employees to engage in dangerous activity."). Thus, although Edwards directing Brock to perform an allegedly unsafe task is not a "physical act," it still qualifies as an "affirmative act" upon which liability can be found under § 287.120.1.

Edwards performed the affirmative negligent actions of removing the safety guard from the machine and directing a co-employee to clean the machine while it was running. "Consistent with the *Badami/Taylor* line of cases, the notion of an affirmatively negligent act—the "something more"—can best be described as an affirmative act that ***creates additional danger*** beyond that normally faced in the job-specific work environment." *Burns*, 214 S.W.3d at 338 (emphasis added). In the present case, there was sufficient evidence that Edwards removed the safety guard from a machine and directed Brock to clean the machine while the safety guard was removed and the machine was operating. These two actions—especially when viewed collectively—amount to an affirmative negligent act.

Evidence that Edwards Acted "Purposefully" Within the Meaning of § 287.120.1

DAL contends that the use of the word "purposefully" means Brock was required to show DAL "had a conscious plan to dangerously cause or increase the risk of injury to [Brock], and that he did so with awareness of the probable consequences." Further, DAL suggests that under § 287.120.1, a plaintiff "must show a particular, purposeful state of mind." Brock, however, asserts that the language merely requires that the employee-defendant act purposefully (i.e., the failure to act is not the basis of the plaintiff's claim and the action was not inadvertent or the

result of a mistake), and the plaintiff is not required to show the defendant's mental state under § 287.120.1.

Although there is no evidence that Edwards acted with the purpose or intention to injure Brock, he directed his subordinate co-employee to encounter a danger beyond the usual hazards of employment. *Id*. at 339. It is uncontroverted that Edwards intentionally removed the safety guard and purposefully directed Brock to clean the rollers while the machine was in operation. The evidence revealed that JMC provided the machine to its employees with the safety guard properly in place. Additionally, JMC provided safety rules for operating the machine which read: "If you remove a mechanical guard temporarily, be sure to replace it before you turn the machine on." The machine itself also carried a conspicuous and explicit warning, which read: "DO NOT REMOVE INFEED TABLE, GUARDS, ETC. FROM RUNNING MACHINE" and "CAUTION: KEEP GUARDS IN PLACE WHEN MACHINE IS RUNNING".

There is sufficient evidence that Edwards ***created an additional danger*** to Brock beyond what he would normally face in the work environment, as Edwards's removal of the safety guard exposed Brock to a risk of an injury that could not occur otherwise. For example, Jeffrey Simonton, the Chief Operating Officer of Black Bros., testified that risks of injury by the machine's pinch points could be "basically eliminated" if used by trained employees in the proper manner. He further testified that cleaning the machine with the safety guard on was "one of the ways that you can help eliminate the risk of pinch points when using or cleaning [the] machine." Mr. Simonton's testimony suggests that Edwards's decision to remove the safety guard and order Brock to clean the machine mid-operation created an additional danger to Brock. Moreover, even Edwards testified that, if the machine's operating instructions were followed, it would have been impossible for Brock to have gotten his thumb caught in the pinch point.

There is no dispute that Edwards removed the safety device from the machine. There is no dispute that Edwards intended for Brock to clean the rollers without the safety device in place while the machine was mid-operation. Although there was no evidence presented that Edwards acted with intentions to harm Brock or increase Brock's risk of injury, such evidence is not necessary under § 287.120.1. Effectively, DAL argues that an employee must commit an intentional tort to remove his or her cloak of immunity under § 287.120.1. Using DAL's interpretation of the statute, there would be no reason for the legislature to describe an act as "negligent"; if a person commits an affirmative act with the intention of causing or increasing the risk of injury to another person, and said affirmative act results in another's injury, then it would be more appropriate to describe his or her behavior as an intentional tort or a criminal offense than a negligent act. Although an "intentional tort" falls within the category of "affirmatively negligent acts," the scope of that category extends beyond intentional torts. *See Burns*, 214 S.W.3d at 338 ("[T]he notion of an 'affirmatively negligent act' certainly includes the commission of an intentional tort, and this Court has also described it in terms of 'purposeful, affirmatively dangerous conduct.'").

Based on the foregoing, we find that Brock provided sufficient evidence for a jury to conclude that Edwards acted purposefully by intentionally removing the safety guard from the machine and directing Edwards to clean the rollers while the machine was on and the safety guard was removed.

<u>Evidence that Edwards Acted Dangerously and/or Caused Brock's Injury</u>

As noted above, there is sufficient evidence that Edwards acted dangerously, as it is undisputed that he removed the grate and directed Brock to clean the machine while it was in operation without the presence of the safety guard. Evidence was also presented to show that, if

the safety guard had been in place, Brock could not have been injured by the pinch point. Moreover, the cause and effect between Edwards's actions and Brock's injury are obvious. Thus, we disagree with Edwards's arguments that he neither acted dangerously nor caused Brock's injury.

Conclusion on Point II

After reviewing the record, we find that there is sufficient evidence for a reasonable jury to conclude that Edwards (1) committed an affirmative negligent act (or acts); (2) purposefully removed the safety guard and purposefully instructed Brock to clean the rollers while the machine was turned on and Edwards's affirmatively dangerous actions created additional danger beyond what Brock would normally face (i.e., cleaning the rollers while the machine was off or the safety guard was in place); (3) caused, at least in part, Brock's injury by committing these acts; and (4) Brock suffered damages as a result of Edwards's actions. Accordingly, we deny DAL's Point II.

E. Point III – Instructional Error

Standard of Review

We review a party's assertion that the trial court erred in refusing to submit a non-MAI instruction using an abuse of discretion standard. *McCullough v. Commerce Bank*, 349 S.W.3d 389, 396 (Mo. App. W.D. 2011), as modified (Aug. 30, 2011). Moreover, an instructional error only warrants reversal if the error was prejudicial and materially affected the merits of the action. *Id*. at 397.

Analysis on Point III

DAL argues that the trial court erred in refusing to submit his proffered instruction ("Instruction D") and in denying his motion for a new trial, because "it committed reversible

instructional error which prejudiced [him] in that the jury needs to know that [a defendant co-employee] is not liable for breaching [one of his or her employer's] five nondelegable duties; the instruction correctly states the law and is supported by substantial evidence; and without the instruction, the jury was misled, misdirected, and not advised of the ultimate facts necessary to find [him] liable." DAL's contention that the trial court erred by failing to submit a pure question of law to the jury is without merit. *Parr v. Breeden*, 489 S.W.3d 774, 782 (Mo. banc 2016) (explaining "the issue in the present case is whether defendants owed their co-employee a duty that was separate and distinct from their employerss nondelegable duties," and "[i]t is well-established that the existence of a duty is ***purely a question of law***") (emphasis added); *see also McComb*, 541 S.W.3d at 555 ("The determination of the scope of an employer's duty is indistinguishable from the determination of the existence of a duty, which is clearly a question of law."). "[T]he question of whether a duty existed between [a] plaintiff and defendant is purely a question of law," and it is a threshold question for the court. *McComb*, 541 S.W.3d at 554; *Abbott v. Bolton*, 500 S.W.3d 288, 293 (Mo. App. E.D. 2016).

Thus, DAL's assertion that the jury was not provided with the "ultimate facts necessary to find [him] liable" is inaccurate. The trial court did not abuse its discretion by failing to submit DAL's proposed jury instruction requiring the jury to address a question of law to return a verdict in Brock's favor. Point III is denied.

F. <u>Points IV, V, VI, and VIII – DAL's Evidentiary Challenges</u>

DAL's Points IV, V, VI, and VIII each concern alleged errors committed by the trial court regarding evidentiary rulings. All four points are subject to the same standard of review. Accordingly, we will address Appellant's seventh and ninth points on appeal after addressing all four points concerning evidentiary challenges.

Standard of Review

"The admissibility of evidence lies within the sound discretion of the trial court and will not be disturbed absent abuse of discretion." *Mitchell v. Kardesch,* 313 S.W.3d 667, 674–75 (Mo. banc 2010). We will find an abuse of discretion exists only when the court's ruling "is clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration." *Wilson v. Union Pac. R.R. Co.,* 509 S.W.3d 862, 874 (Mo. App. E.D. 2017). It cannot be said that the trial court abused its discretion if reasonable persons can differ about the propriety of the action taken by the court. *Williams v. Trans States Airlines, Inc.,* 281 S.W.3d 854, 872 (Mo. App. E.D. 2009). When an abuse of discretion has occurred, our Court will reverse the trial court only if the resulting prejudice from the improper admission or exclusion of evidence is outcome-determinative. *Stephenson v. Countryside Townhomes, LLC,* 437 S.W.3d 380, 389–90 (Mo. App. E.D. 2014).

Point IV – Admission of the OSHA Regulation

In DAL's fourth point on appeal, he argues that the trial court abused its discretion by taking judicial notice of and admitting into evidence 29 C.F.R. § 1910.212, an OSHA regulation. Specifically, DAL contends that the regulation was irrelevant to the issue of co-employee liability and that the resulting prejudice was outcome-determinative because the admission of the regulation allowed Brock to misstate the law and state facts not in evidence, thereby allowing the jury to impute JMC's negligence to Edwards.

Analysis on Point IV

Rules and regulations promulgated pursuant to federal statutes may be judicially noticed and considered as evidence. *Giddens v. Kansas City S. Ry. Co.,* 29 S.W.3d 813, 821 (Mo. banc

2000). "In fact, OSHA regulations offered as evidence of the standard of care owed by a party are competent evidence relevant to the question of negligence." *Id*. Subject to traditional principles of relevance, federal regulations may be offered in negligence cases to establish the standard of care or that the standard of care was violated. *Host v. BNSF Railway Co.,* 460 S.W.3d 87, 109−10 (Mo. App. W.D. 2015); *Parr,* 489 S.W.3d at 780.

In this case, the trial court admitted 29 C.F.R. § 1910.212 into evidence over DAL's objection that the OSHA regulation was irrelevant. That OSHA regulation governs "[g]eneral requirements for all machines" and specifically states that "[o]ne or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks." 29 C.F.R. § 1910.212(a). On appeal, DAL primarily relies on *Parr* in support of his argument that, without exception, federal regulations "are not relevant in co-employee cases." DAL's use of *Parr* in this regard is an overextension of what the Supreme Court of Missouri actually held in that case. Specifically, the Court did not deem federal regulations irrelevant in co-employee negligence cases, but instead only reasoned that federal regulations admitted into evidence in that case were alone insufficient to impose a duty on a co-employee that was separate and distinct from the employer's nondelegable duty to provide a safe workplace. *Parr,* 489 S.W.3d at 780−82.While 29 C.F.R. § 1910.212 may alone be insufficient to establish that Edwards had a separate and distinct duty from JMC's nondelegable ones, it is relevant to whether Edwards breached a duty not within JMC's nondelegable duties.

In regards to whether Edwards breached a duty separate and distinct from JMC's nondelegable duties, 29 C.F.R. § 1910.212 was relevant because it established that machines, such as the one Brock was injured by, can be dangerous if operated or cleaned without a guard in

place and that it was it was more likely and foreseeable that an injury would occur without the use of a guard. The trial court did not abuse its discretion in this case because the regulation was used to demonstrate that Edwards's affirmative negligent act of purposefully removing the laminating machine's guard dangerously increased the risk of harm to Brock. As the trial court correctly made the legal determination that Edwards owed a separate and distinct duty to Brock, *see Parr,* 489 S.W.3d at 782, the court did not abuse its discretion in deciding to admit 29 C.F.R. § 1910.212 as evidence supporting Edwards's breach of that duty.

Further, even if the trial court abused its discretion by admitting 29 C.F.R. § 1910.212 into evidence, DAL has failed to show that he was prejudiced. "A complaining party is not entitled to assert prejudice if the challenged evidence is cumulative to other related admitted evidence." *Saint Louis Univ. v. Geary,* 321 S.W.3d 282, 292 (Mo. banc 2009). Evidence is cumulative if it reiterates the same point as other admitted evidence. *Id.* Here, 29 C.F.R. § 1910.212 was cumulative of JMC's own rules, which were admitted into evidence. JMC's owner and president, Jeffrey Jappa ("Jappa"), stated during his testimony that JMC's rules and cleaning instructions mirrored the OSHA regulation, and that no JMC employee is permitted to violate that or any other OSHA regulation. As 29 C.F.R. § 1910.212 was cumulative of other admitted evidence, DAL cannot show he was prejudiced even if the trial court abused its discretion.

Because 29 C.F.R. § 1910.212 was relevant to demonstrate that Edwards breached a duty not within JMC's nondelegable duties, the trial court did not abuse its discretion in admitting the regulation. And, even if the trial court did abuse its discretion by admitting the regulation, DAL was not prejudiced because the regulation itself was cumulative of other evidence. Point IV is denied.

Point V – Admission of Dr. Rebecca Summary's Expert Testimony

In DAL's fifth point, he argues that the trial court abused its discretion by denying his motion to exclude the testimony of Brock's expert economist, Dr. Rebecca Summary, in admitting Dr. Summary's calculations of Brock's lost wages, and in denying his motion for a new trial. Specifically, DAL contends that Dr. Summary's calculations were improperly admitted into evidence because they were based on the unsupported assumption that Brock would have been employed directly by JMC and earning JMC wages instead of continuing to be employed by Patriot Personnel. DAL claims that Brock therefore failed to prove his claim for lost wages with reasonable certainty. To effectively evaluate this point, we must first determine (a) whether the trial court abused its discretion in admitting Dr. Summary's testimony and calculations using JMC employee earnings, and then (b) whether Brock proved his lost earning capacity with reasonable certainty.

Analysis on Point V

a. Dr. Summary's Expert Testimony

"The standard for the admission of expert testimony in civil cases is set forth by section 490.065." *J.J.'s Bar and Grill, Inc. v. Time Warner Cable Midwest, LLC,* 539 S.W.3d 849, 871 (Mo. App. W.D. 2017). The version of § 490.065.3 effective at the time of trial stated that "[t]he facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable."[7]

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[7] Section 490.065, RSMo. 2000.

In this case, Brock's expert economist, Dr. Summary, testified on her calculations estimating Brock's lost wages from the time of the injury to the time of trial and Brock's future lost earning capacity. It is uncontested that Dr. Summary is an expert qualified to testify on the calculation of lost wages and lost earning capacity and that Dr. Summary used reliable principles and methods in her calculations. Rather, DAL argues Dr. Summary's calculations were improperly based, in part, on JMC employee earnings. While Dr. Summary used the average earnings of Patriot Personnel employees for her calculations of Brock's lost wages from the time of injury to the time of trial, she used the average earnings of JMC employees for her calculations of Brock's lost earning capacity (i.e., his estimated ***future*** lost wages). DAL argues that Dr. Summary's use of JMC earnings in her calculation of Brock's lost earning capacity was incorrect because the assumption that JMC would hire Brock when he became eligible was unsupported and uncertain.

Although there is uncertainty that JMC would have hired Brock when he became eligible, Brock presented testimony by Edwards (his supervisor) stating that JMC preferred to hire qualified temp employees (such as those from Patriot Personnel) and that he would have recommended that JMC hire Brock prior to the incident. Brock thus presented evidence supporting that he likely would have been hired by JMC. Although Jappa, JMC's president, offered conflicting testimony by stating he would be less inclined to hire Brock because of a previous accident, it is for the jury to decide the weight given to the testimony provided by Edwards, Jappa, and Dr. Summary. *See Doe v. McFarlane,* 207 S.W.3d 52, 62 (Mo. App. E.D. 2006) ("As a rule, questions as to the sources and bases of the expert's opinion affect the weight, rather than the admissibility, of the opinion, and are properly left to the jury."). "Only in cases where the sources relied on by the expert are so slight as to be fundamentally unsupported,

should the opinion be excluded because testimony with that little weight would not assist the jury." *Id.* Therefore, because Brock presented evidence of the possibility that he would have been hired by JMC if the accident had not occurred, we find that the trial court did not abuse its discretion, as Dr. Summary's calculations of Brock's lost earning capacity reasonably relied on JMC employee earnings.

b. Lost Earning Capacity

Evidence of the value of lost wages or lost earning capacity must be reasonably certain and not based on speculation, and must provide the jury with a basis for a reasonable estimate of the amount of loss. *LaRose v. Washington Univ.,* 154 S.W.3d 365, 371−72 (Mo. App. E.D. 2004). "While lost earning capacity most often is shown by evidence of what the plaintiff had earned and was reasonably likely to earn at the job he had at the time of the injury, it need not be so limited, for the plaintiff is not suing for lost back or front pay, or for 'time lost,' but for the loss of the capacity to earn." *Mickey v. BNSF Ry. Co.,* 437 S.W.3d 207, 214 (Mo. banc 2014). We also note that "the modern emphasis on the requirement that damages be shown with certainty is on the fact of damages and not on the particularized amount." *Penzel Constr. Co., Inc. v. Jackson R-2 Dist.,* 544 S.W.3d 214, 236 (Mo. App. E.D. 2017). Additionally, when the plaintiff's loss "is of character which defies exact proof, a lesser degree of certainty as to the amount of loss is required." *Id.*; *see also Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc.*, 155 S.W.3d 50, 55 (Mo. banc 2005) ("[A plaintiff] must establish the fact of damages with reasonable certainty, but it is not always possible to establish the amount of damages with the same degree of certainty.").

Finding that the trial court did not abuse its discretion in admitting Dr. Summary's testimony and calculations into evidence, we also find that Brock proved his lost earning

capacity to a degree of reasonable certainty. Dr. Summary used JMC employee earnings when she calculated Brock's lost earning capacity, despite the uncertainty that JMC would have eventually hired Brock for full-time employment. Dr. Summary testified at trial that the average earnings for Patriot Personnel employees was $26,717, and that the range of earnings for JMC employees was between $17,000 and $33,000. The fact that the earnings of Patriot Personnel and JMC are similar support that Brock proved the amount of his lost earning capacity with reasonable certainty, regardless of whether he would have continued to work for Patriot Personnel or would have been hired by JMC. In a situation like this, where it is impossible to truly determine what Brock's career path would have been absent his injury, we find that the use of the JMC employee earnings (the range of which encompasses average Patriot Personnel earnings) to calculate Brock's lost earning capacity did so to a sufficient degree of reasonable certainty. *See Penzel,* 544 S.W.3d at 236.

We therefore find that the trial court did not abuse its discretion in admitting Dr. Summary's calculations into evidence, and that Brock satisfied his burden to prove his lost earning capacity with reasonable certainty. Point V is denied.

Point VI – Admission of JMC's Post-Incident Modifications

In his sixth point, DAL argues that the trial court abused its discretion by admitting evidence of JMC's post-incident modifications to the laminating machine and cleaning procedure because that evidence was irrelevant and prejudicial. Specifically, DAL asserts that Brock was impermissibly allowed to use the evidence to prove Edwards's negligence and that the public policy favoring safety improvements is directly implicated when evidence of an employer's post-incident modifications is used to show that a co-employee was negligent.

Analysis on Point VI

Evidence of subsequent remedial measures is generally inadmissible in negligence actions to prove negligence or culpable conduct related to the injury. *Emerson v. Garvin Grp., LLC,* 399 S.W.3d 42, 44 (Mo. App. E.D. 2013). The two primary reasons why evidence of subsequent remedial measures is inadmissible to show negligence are: (1) "if precautions taken could be used as evidence of previous improper conditions, no one, after an accident, would make improvements," and (2) "subsequent changes are irrelevant to establish what the previous condition was." *Boggs ex rel. Boggs v. Lay,* 164 S.W.3d 4, 21 (Mo. App. E.D. 2005); *Rader Family Ltd. P'ship, L.L.L.P. v. City of Columbia,* 307 S.W.3d 243, 248 (Mo. App. W.D. 2010). Exclusion of evidence of subsequent remedial measures is not required when offered for purposes other than proving negligence, such as impeachment, or, if controverted, proving ownership, control, or feasibility of precautionary measures. *Rader Family Ltd. P'ship, L.L.L.P.,* 307 S.W.3d at 248. Further, this Court has held that evidence of subsequent remedial measures implemented by a non-party is admissible because the non-party "will not be discouraged from taking the remedial measure and the public policy in favor of safety improvements will be satisfied." *Emerson,* 399 S.W.3d at 46.

In this case, DAL argues that the trial court abused its discretion by admitting evidence of subsequent remedial measures taken by JMC; specifically, JMC installed an interlocking switch device on the laminating machine's safety guard so that the machine would automatically shut off if the guard is removed. DAL argues that the subsequent remedial measure should not have been admitted into evidence because it was irrelevant and, even though JMC is a technically a non-party in this action, the public policy concern is still present due to Edwards being indemnified by JMC's insurer. Citing *Emerson,* DAL contends that "a judgment against [DAL]

does, quite literally, expose JMC to liability (under its insurance policy) and JMC would be discouraged from making safety improvements to prevent future accidents." Even if this assertion was true, the evidence of JMC's subsequent remedial measures was relevant and was not used to show Edwards's negligence in this case. Rather, the evidence was relevantly used (a) to impeach Jappa's testimony that it was safe to remove the guard of the laminating machine during operation to clean it and (b) to prove the feasibility of a precautionary measure that stopped the machine when the guard was removed to clean the rollers. Because the evidence of JMC's subsequent remedial measures was used to impeach a witness's testimony and to show the feasibility of precautionary measures (and not to prove Edwards's negligence), the evidence would be admissible even if JMC were a party. *See Rader Family Ltd. P'ship, L.L.L.P.,* 307 S.W.3d at 248.

Because evidence of JMC's subsequent remedial measures was used to impeach and to prove the feasibility of precautionary measures, we find that the trial court did not abuse its discretion in admitting evidence of the subsequent remedial measures. Point VI is denied.

Point VIII – Exclusion of Testimony Regarding Brock's Prior Safety Accident

In DAL's eighth point, he contends that the trial court abused its discretion by excluding testimony about Brock's prior safety accident on another machine. Specifically, he argues that evidence of Brock's prior accident was relevant to the issue of comparative fault, to show Brock had notice of the danger of getting loose fabric pulled into pinch points, and to show why it was unlikely JMC would hire Brock. Additionally, DAL claims that Brock opened the door to admit that evidence by asking Jappa about the prior accident.

<u>Analysis on Point VIII</u>

Trial courts are provided wide discretion in determining the admissibility of evidence of similar occurrences. *Johnson v. Auto Handling Corp.,* 523 S.W.3d 452, 468 (Mo. banc 2017). Evidence of a prior accident is admissible if the prior accident is of a like character, occurred under substantially the same circumstances, and resulted from the same cause as the accident that caused the injury in question. *Govreau v. Nu-Way Concrete Forms, Inc.,* 73 S.W.3d 737, 742 (Mo. App. E.D. 2002). "The similarity of the accident at issue and the previous incident must be sufficiently close to avoid undue prejudice and confusion." *Stokes v. Nat'l Presto Indus., Inc.,* 168 S.W.3d 481, 484 (Mo. App. W.D. 2005). Evaluation of whether evidence of similar occurrences is relevant and whether the circumstances bear sufficient resemblance to those that caused the injury at issue is within the trial court's wide discretion. *Govreau,* 73 S.W.3d at 742. Evidence of previous accidents may be relevant to prove (1) the existence of a particular physical condition or defect; (2) that the defect or dangerous situation caused the injury; (3) the risk a party's conduct created; and (4) notice of the danger. *Steele v. Evenflo Co., Inc.,* 147 S.W.3d 781, 793 (Mo. App. E.D. 2004).

In this case, DAL asserts that the trial court abused its discretion in excluding evidence of Brock's previous accident; DAL argues the trial court erroneously found that the prior accident was not sufficiently similar. While it is true that "where the evidence is sought to be admitted on the issue of notice, the similarity in the circumstances of the accidents need not be completely symmetrical," *see Johnson,* 523 S.W.3d at 468, we find that the trial court's determination was not an abuse of discretion. Brock's prior accident involved the loose-fitting shirt he was wearing getting caught in a conveyer belt roller. Contrastingly, Brock's injury in this case occurred when Edwards instructed Brock to clean the rollers of the laminating machine while it was in

operation, the rag Brock was using to clean the rollers of the machine got caught in the machine's pinch point, and his hand was pulled into the pinch point. In Edwards's testimony presented at trial, he stated that the machines involved in the respective accidents were unalike and that the accidents were unrelated.

Upon review of the trial transcript, it is clear that the trial court appropriately considered the facts of both the prior accident and the accident that caused Brock's injury in this case before making its determination. The trial court explained that it did not find the accidents were sufficiently similar, and that "the prejudicial effect … greatly outweigh[ed] the probative value" in regards to the circumstances of the previous accident being used to show comparative fault and that Brock was put on notice of the machine's dangerous pinch points. Because the accidents were so dissimilar, as the accidents involved different machines and significantly different circumstances, we find that the trial court was within its discretion to find that the accidents were not sufficiently similar and to exclude evidence of Brock's prior accident for the purpose of demonstrating comparative fault. Point VIII is denied.

G. Point VII – Brock's Alleged Negligence Was Not an Independent, Intervening Cause

"A court may decide the question of proximate cause when the evidence reveals the existence of an intervening cause that eclipses the role the defendant's conduct played in the [plaintiff's] injury." *Wilmes v. Consumers Oil Co. of Maryville*, 473 S.W.3d 705, 724 (Mo. App. W.D. 2015). "An efficient, intervening cause is a new and independent force which so interrupts the chain of events that it becomes the responsible, direct, proximate and immediate cause of the injury, but it may not consist of merely an act of concurring or contributing negligence." *Rayman v. Abbott Ambulance, Inc.,* 546 S.W.3d 12, 19 (Mo. App. E.D. 2018).

> [T]he practical test of proximate cause is whether the negligence is an efficient cause which sets in motion the chain of circumstances leading to the plaintiff's

> injuries or damages. The test is not whether a reasonably prudent person would have foreseen the particular injury, but whether, after the occurrences, the injury appears to be the reasonable and probable consequence of the act or omission of the defendant.

Wagner v. Bondex Int'l, Inc., 368 S.W.3d 340, 354 (Mo. App. W.D. 2012). "From the essential meaning of proximate cause arises the principle that in order for an act to constitute the proximate cause of an injury, some injury, if not the precise one in question, must have been reasonably foreseeable." *Wilmes*, 473 S.W.3d at 722.

An injury is reasonably foreseeable if the defendant "knew or should have known there was an appreciable chance ***some*** injury would result." *Id.* (emphasis added). Moreover, the defendant's negligence need not be the sole cause of injury to establish proximate cause. *Id.* at 722−23. Effectively, "proximate cause limits a defendant's liability to injuries that are 'the natural and probable consequences of a defendant's actions'; damages that are 'surprising, unexpected, or freakish' cannot be recovered.'" *Poage v. Crane Co*., 523 S.W.3d 496, 513 (Mo. App. E.D. 2017) (quoting *Sanders v. Ahmed*, 364 S.W.3d 195, 210 (Mo. banc 2012)).

In DAL's seventh point on appeal, he contends that Brock's injuries were not proximately caused by Edwards's actions because Brock acted negligently in cleaning the machine and this negligent conduct constitutes an independent, intervening cause of Brock's injury. DAL reasons that Edwards "merely raised [the] grate and held it," and "[w]hatever Edwards did, he simply set the stage; he did not cause the injury." As aforementioned, Edwards's negligence also includes him directing Brock to clean the machine mid-operation. We also find it foreseeable that ***some*** injury would result from Brock cleaning the machine while it was running and without the guard in place. Brock's alleged negligence of carelessly using a rag in cleaning the machine is relevant to the question of whether Brock was partially at fault for the injury, but his alleged actions are insufficient to constitute an unforeseeable and independent intervening

cause. "An intervening cause will not preclude liability if it is itself a foreseeable and natural product of the original negligence," and "it will not do so if it constitutes an act of the plaintiff himself which is a foreseeable consequence of the original act of negligence, for the foreseeable negligence of the plaintiff is viewed as concurring or contributory negligence." *Wilson v. Image Flooring, LLC*, 400 S.W.3d 386, 398–99 (Mo. App. W.D. 2013). Brock's actions, which were done at Edwards's instruction, were not so new and independent to form the proximate cause of Brock's injuries; rather, they were a foreseeable consequence of Edwards's commands. Point VII is denied.

H. <u>Point IX – Injection of Insurance and Mistrial</u>

In DAL's final point on appeal, he argues the trial court erred in denying his motion for a mistrial because Brock "injected the irrelevant and prejudicial issue of [DAL's] insurance into the case" during voir dire. DAL also claims that Brock's attorney "highlighted a venireperson's comment that he works for Travelers Insurance and sends cases to the law firm of DAL's attorneys, thereby unduly emphasizing the issue of insurance."

<u>Standard of Review</u>

A mistrial is a "drastic remedy" that is only warranted in exceptional circumstances. *Delacroix v. Doncasters, Inc.,* 407 S.W.3d 13, 24 (Mo. App. E.D. 2013). The trial court is afforded great discretion in determining whether a mistrial should be granted; we will reverse the court's denial of a motion for mistrial only if the denial constitutes a "manifest abuse of discretion." *Id*. "The trial court is in a better position to determine the prejudicial effect, if any, of improper evidence and to determine whether any prejudice that results can be ameliorated by less drastic means tha[n] declaring a mistrial." *In re Cozart*, 433 S.W.3d 483, 486 (Mo. App. E.D. 2014).

"Generally, it is improper to inject the issue of the existence of liability insurance into an action for damages." *Wheeler ex rel. Wheeler v. Phenix*, 335 S.W.3d 504, 514 (Mo. App. S.D. 2011). To determine whether a mistrial is warranted due to the improper injection of insurance, the following procedure should be followed by the trial court:

> When determining whether a mistrial is required, the trial court should focus on whether the question is asked in good faith. If an insurance question is asked not in good faith, but for the purpose of injecting insurance coverage into the minds of the jurors, the ensuing prejudicial effect deprives the defendant of his right to a fair trial. If the mention of insurance was in good faith, the trial court must decide if the improper highlighting of insurance prejudiced the jury. The trial court is in a superior position than an appellate court to determine if a question was motivated by good or bad faith or if there was any prejudicial effect on the jury.

Saint Louis Univ., 321 S.W.3d at 293–94.

<u>Analysis on Point IX</u>

In DAL's ninth and final point on appeal, he claims that "the trial court erred in denying his motion for mistrial and in denying a new trial because [Brock] injected the irrelevant and prejudicial issue of [DAL's] insurance into the case." DAL further contends that this alleged injection of insurance was made purposefully and in bad faith. In the present case, during voir dire, Brock's attorney made the following statement to the venire panel:

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

Brock contends his counsel's statement was not made in bad faith, and that his counsel never injected or even insinuated the existence of insurance. Rather, he explains that the statement was made to merely identify the parties and who was being sued (the defendant *ad litem*), and such

clarification was "a highly appropriate and accurate statement in the context of identifying the parties, witnesses, and counsel to probe the panel for familiarity and/or bias." First, we note that it is arguable whether Brock's counsel even insinuated that liability insurance existed. Regardless, attorneys are granted wide latitude in questioning a venire panel during voir dire to determine if any potential jurors "harbor bias or prejudice against either party which would make them unfit to serve as jurors." *Dieser v. St. Anthony's Med. Ctr.*, 498 S.W.3d 419, 436 (Mo. banc 2016).

The trial court is in a much better position than our Court to assess whether Brock's counsel injected the issue of insurance in bad faith and whether it had a prejudicial effect on the jury. *Rider v. The Young Men's Christian Ass'n of Greater Kansas City*, 460 S.W.3d 378, 391 (Mo. App. W.D. 2015). "For these reasons, the decision of whether to grant a mistrial when such a situation arises is one that is left to the sound discretion of the trial court, and only where a manifest abuse of discretion occurs will the appellate court disturb this decision." *Id.* (quoting *Taylor v. Republic Automotive Parts, Inc.*, 950 S.W.2d 318, 321 (Mo. App. W.D. 1997)). To the extent insurance coverage was implied, we find nothing to suggest the trial court abused its discretion by denying DAL's motion for mistrial; the reference was made in passing and never emphasized. Even if it may be implied that Brock's counsel was attempting to introduce evidence of liability insurance into the case, we find it unlikely that the jury would have inferred the existence of liability insurance from the statements made, which do not mention "insurance." Rather, Brock's counsel states that the case "is not against" Edwards, his family, friends or estate. Accordingly, we do not find this alleged injection of insurance to be prejudicial. "[N]ot every reference to insurance warrants reversal," and "[t]he party alleging the references [to insurance] constitute reversible error must demonstrate that it was prejudiced by the references."

Payne v. Fiesta Corp., 543 S.W.3d 109, 124 (Mo. App. E.D. 2018). DAL has failed to make such a demonstration. Thus, Point IX is denied.

CONCLUSION

We find that Edwards committed an affirmative negligent act that purposefully and dangerously injured Brock, thereby preventing Edwards (or DAL) from invoking § 287.120.1, RSMo 2012 to shield himself from Brock's negligence claim. We further find that Edwards owed Brock a separate and distinct duty to not create an additional danger that would not otherwise exist (i.e., a duty to not modify an otherwise safe machine and order an employee to use said machine in contravention of JMC's rules and the machine's manufacturer's instructions). We also find that there was sufficient evidence to find that Edwards breached this duty and as a result of that breach, caused Brock's injury. Additionally, we do not find the trial court abused its discretion on any of its evidentiary rulings as discussed in Points IV, V, VI, and VIII. Lastly, we find that Brock's alleged negligence was not an independent, intervening cause of Brock's injury (Point VII), and that the trial court did not err or abuse its discretion in denying DAL's motion for mistrial based on Brock's alleged improper injection of the issue of insurance (Point IX). Based on the foregoing, we find that Brock made a submissible negligence claim and affirm the judgment of the trial court.

Colleen Dolan, J.

James M. Dowd, P.J., concurs.
Mary K. Hoff, J., concurs.