UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

BROCK SIMPSON,	
***Plaintiff*,**	
vs.	**Case No.: 4:17-CV-00731-NKL**
MAGNUM PIERING, INC.,	
***Defendants*.**	

PLAINTIFF'S SUGGESTIONS IN SUPPORT OF HIS
MOTION FOR PARTIAL SUMMARY JUDGMENT

COMES NOW Plaintiff Brock Simpson, and, pursuant to Fed. R. Civ. P. 56 and Local Rule 56.1, moves this Court to grant partial summary judgment in Plaintiff's favor and against Defendant Magnum Piering, Inc. ("Magnum") because there is no genuine issue of material fact as to certain elements of Plaintiff's claims of strict liability and negligence against Defendant.

I. INTRODUCTION

The uncontroverted evidence shows that Magnum designed, manufactured, and sold the subject Magnum MP6000K Hydraulic Ram Kit ("Ram") in the course of its business. Even Defendant's experts agree that the subject Ram was the "[actual] MP6000K ram kit … used by Mr. Simpson on the day he was injured". (*See* Plaintiff's Statement of Uncontroverted Facts ("SUF") at ¶ 41, 49). Defendant's experts also agree that, "when the welds fail, the ram kit is allowed to rotate, bend the spacer pipe, disengage the safety bolt from the collar tube, and allow the ram to fall to the ground." (*See* Plaintiff's SUF at ¶ 46).

The uncontroverted evidence shows that the subject Ram was defectively manufactured, because (i) the Shoe was not manufactured in accordance with Magnum's specifications, (ii) the

outer weld surface was not chamfered as required by Magnum's specifications, (iii) the inner and outer weldments do not meet the size requirements of Magnum's own specifications, (iv) the inner and outer weldments do not meet the size the minimum size requirements of the American Welding Society, (v) the undersized defective inner and outer weldments fractured, allowing the bottom plate to deform, the Ram to tilt forward, bend the pier and spacer pipe, overload the safety bolt and strip the threads, and break free of the bracket, and (vi) the subject Ram struck and injured Mr. Simpson, resulting in extensive medical and surgical treatment for which he was charged in excess of $120,000. (*See* Plfs. SUF at ¶¶ 41-47, 49).

The uncontroverted evidence shows that the defective inner and outer weldments failed at only 4,200 PSI, *i.e.*, 3,300 PSI less than the Ram's maximum pressure rating of 7,500 PSI. (Plfs. SUF at ¶¶ 7, 31). Even disregarding Plaintiff's testimony, the uncontroverted evidence shows that the defective inner and outer weldments failed at less than 5,000 PSI, *i.e.*, at least 2,500 PSI less than the Ram's maximum pressure rating of 7,500 PSI. (Plfs. SUF at ¶¶ 7, 38-39).

The uncontroverted evidence also shows that B.J. Dwyer failed to warn Plaintiff of the dangers associated with the use of the Ram, that no instruction manuals were provided Magnum's equipment, and that the subject Ram contained no warnings, caution labels, or instructions. (*See* Plfs. SUF at ¶¶ 21-23, 25-27). As such, Magnum failed to warn of the dangers associated with the use of its equipment, including the subject Ram.

Based on the uncontroverted evidence presented in Plaintiff's motion and supporting exhibits, Plaintiff is entitled to partial summary judgment on his claims of strict liability and negligence against Defendant. The only jury issues should be causation and damages. With regards to Plaintiff's strict liability claims, the only jury issues should be whether the defective undersized weldments (1) rendered the Ram unreasonably dangerous, and (2) directly caused or

directly contributed to cause damage to Plaintiff. With regards to Plaintiff's claim of negligent manufacture, design, or failure to warn, the only jury issues should be (1) whether Defendant failed to use ordinary care in designing or manufacturing the defective Ram, or in failing to adequately warn of the dangers associated with the defective Ram, and (2) whether Defendant's negligence directly caused or directly contributed to cause damage to Plaintiff.

II. STATEMENT OF UNCONTROVERTED FACTS

A. Dwyer Companies, Magnum Piering, Inc., Magnum Geo-Solutions

1. In 1987, Brian Dwyer formed Dwyer Companies, which is now the parent company of Magnum Piering, Inc. ("Magnum") and Magnum Geo-Solutions. (Ex. B, Brian Dwyer Depo. at 12: 14-17; Ex. D, Perko Depo. at 8: 8-25, 9: 1-4).

2. In the late 1980s, Dwyer Companies transitioned from concrete piering to steel piering. The benefit of steel piering is that you can simultaneously drive steel piers and lift the foundation. (Ex. B, Brian Dwyer Depo. at 8: 19-25, 9: 1-13, 10: 6-12).

3. The Magnum piering system was invented and patented by Dondeville M. Rippe on November 24, 1987, U.S. Patent No. 4,708,528 (the "Magnum Patent"), and purchased by the Murphy family out of St. Louis around 1987, under the name Magnum Piering, Inc. Around 1999, Dwyer Companies purchased Magnum Piering, Inc. and the rights to the Magnum Patent. (Ex. B, Brian Dwyer Depo. at 10: 13-25, 11: 1-25, 12: 1-9).

4. Brian Dwyer's son, B.J. Dwyer, is Magnum's sales manager. Dr. Howard Perko, Ph.D., P.E., is the managing member of Magnum Geo-Solutions, and the director of engineering for Magnum Piering, Inc. and Magnum Geo-Solutions. (Ex. A, B.J. Dwyer Depo. at 6: 16-25, 7: 1-22, 8: 19-23; Ex. B, Brian Dwyer Depo. at 13: 1-9).

5. Among other products, Magnum manufactures, distributes, and sells MP6000K, MP6100K, MP7000K, and MP7100K Hydraulic Ram Kits, all of which are based on the Magnum Patent. Magnum Geo-Solutions performs much of the engineering support related to Magnum Piering, Inc.'s products. (Ex. B, Brian Dwyer Depo. at 13: 17-25, 14: 1-6; Ex. D, Perko Depo. at 9: 1-25, 10: 1).

6. The MP6000K Hydraulic Ram Kit ("Ram") is a 167 lb. machine comprised of a blue hydraulic ram, two aluminum rails, and a shoe. (Ex. B, Brian Dwyer Depo. at 18: 11-12, 23-25; Ex. N, MP6000K Specifications – MP000771 – Redacted).

7. The Magnum MP6000K Hydraulic Ram Kit is rated for a maximum pressure of 7,500 PSI, or thirty-two tons. While the Ram's cylinder has a burst rating of 15,000 PSI, Magnum established a maximum pressure rating of 7,500 PSI based on its experience. (Ex. D, Perko Depo. at 31: 16-22, 33: 15-25, 34: 1-5; Ex. D-1, Perko Depo. Ex. 8 at p. 4).

8. On one end (*i.e.*, the top) of the Ram is a blue hydraulic ram with handles on each side, a cylindric piston with a 22" stroke that is threaded at the end, and two hydraulic fittings that connect to hoses which supply hydraulic fluid. (Ex. B, Brian Dwyer Depo. at 18: 11-19, 19: 18-25, 20: 1, 10-25, 21: 1; Ex. D, Perko Depo. at 32: 18-24).

9. The hydraulic ram has two 36" aluminum rails that are mounted to each side of its base, and at the other end of the aluminum rails (*i.e.*, the bottom of the Ram), there is a steel shoe ("Shoe") that is used to mount the Ram to a bracket. (Ex. B, Brian Dwyer Depo. at 18: 20-25).

10. Magnum purchases hydraulic rams, and manufactures Nose Adapters that screw onto the threaded end of the cylinders. Nose Adapters are designed to be installed two different ways – one side is designed to fit piers with quarter inch thick walls, and the other side is designed to fit piers with eighth inch thick walls. (*Id.* at 20: 2-8, 24: 17-22).

11. The Shoe has a plate underneath (the "Bottom Plate") with a circular hole that's small enough to prevent the bracket tube from passing through, but large enough to allow piers to pass through it. (Ex. B, Brian Dwyer Depo. at 23: 3-8; Perko Depo at 54: 13-18).

12. Piering can be done inside or outside of a foundation. When performing a piering job inside of a foundation, the steps are as follows: (i) cut the floor, get a shovel and dig, (ii) chip away the footing in order to install the bracket as close as possible to the foundation wall, (iii) mount the bracket, which is done by drilling holes into the footing, putting the wedge bolts in, putting the bracket on, bolting the bracket to the wedge bolts, and putting the nuts onto the wedge bolts, (iv) mount the Ram to the bracket, which is done by standing the Ram up and pushing it against the bracket until it feels snug, reaching down and putting the safety bolt in, tightening the safety bolt by hand until it's snug, then tightening the safety bolt with a crescent wrench or impact wrench. (Ex. B, Brian Dwyer Depo. at 49: 17-25, 51: 3-14, 52: 5-24).

13. Once the Ram is mounted to the bracket: (i) the Ram's cylinder is retracted, (ii) a 36" pier is inserted into the bracket collar tube, (iii) the Ram's cylinder is fully extended to drive the first pier into the ground, (iv) the Ram's cylinder is retracted, (v) an 18" spacer pipe (or push pipe) is inserted into the top of the pier, (vi) the Ram's cylinder is extended another 14" to finish driving the pier into the ground, and (vii) the process is repeated until 5,000 PSI has been reached, or until the foundation starts to lift. (Ex. B, Brian Dwyer Depo. at 40: 23-25, 41: 1-3, 10-25, 42: 1-2, 52: 25, 53: 1-7; Ex. A, B.J. Dwyer Depo. at 30: 21-25, 31: 1-10, 33: 14-25, 34: 1-22).

14. Magnum instructs that every pier is to be driven to 5,000 PSI. (Ex. A, B.J. Dwyer Depo. at 33: 23-25, 34: 1-22).

15. The Magnum piering system was designed to prevent any misalignments. When the Ram is attached properly to the bracket, the bracket tube has very little possibility of the pier being at an angle and can only apply a concentric load to a pier. (Ex. D, Perko Depo. at 51: 12-18).

16. Dr. Howard Perko, Ph.D., P.E., testified that, when the Ram is properly attached to the bracket and the safety bolt is installed, he doesn't know of "any possible way that [there] could be a misalignment. … **anything beyond that would be speculation --**" (Ex. D, Perko Depo. at 52: 17-25) (emphasis added).

17. However, the Ram can be operated without a safety bolt. A safety bolt not being attached would allow the Ram to come loose, but should not create misalignment in and of itself. (Ex. B, Brian Dwyer Depo. at 30: 10-25, 31: 1-2; Ex. D, Perko Depo. at 51: 21-25, 52: 1).

18. Magnum is unaware of any other incident in which the hydraulic ram, the aluminum rails, the Nose Adapter, or the Shoe, have failed during operation. (Ex. B, Brian Dwyer Depo. at 26: 16-21).

19. Magnum is unaware of any other incident in which a pier or push pipe has bent during operation, a Ram has broken free of a bracket during operation, or somebody has been injured while operating Magnum equipment. (Ex. B, Brian Dwyer Depo. at 26: 22-25, 27: 1-5, 28: 1-25, 29: 1-10, 14-25, 30: 1-9; Ex. A, B.J. Dwyer Depo. at 27: 12-24; Ex. D, Perko Depo. at 53: 18-25, 55: 20-24).

B. K.C. Quality Foundation Repair, LLC

20. Since at least 2010, Brock Simpson and Mike Gilmore have worked as independent contractors for KC Quality Foundation Repair, LLC ("KC Quality"), a foundation

repair company owned by Kody Quick. (Ex. E, Quick Depo. at 7: 23-25, 8: 1-16, 9: 16-21, 11: 10-17, 25, 12: 1-3, 19: 17-20).

21. Around June 23, 2011, B.J. Dwyer delivered KC Quality's first purchase of Magnum equipment to Kansas City, where he spent two days training Kody Quick, Brock Simpson, and Mike Gilmore, on how to use Magnum equipment to install piers. (Ex. A, B.J. Dwyer Depo. at 23: 8-25, 24: 1-5; Ex. A-2, B.J. Dwyer Depo. Ex. 3 at p. 22 (pages 2-21 and 27 omitted); Ex. E, Quick Depo. at 67: 25, 68: 1-8, 78: 10-12, 124: 11-14; Ex. F, Simpson Depo. at 25: 18-25, 19: 1-2; 124: 8-15; Ex. C, Gilmore Depo. at 10: 18-25, 11: 1-7, 85: 3-8).

22. KC Quality purchased their first four Rams from Magnum on September 29, 2011, November 1, 2011, and November 3, 2011. With the exception of a hydraulic pump, KC Quality has never purchased piering equipment from any company other than Magnum Piering, Inc. (Ex. E, Quick Depo. at 133: 4-13; Ex. A, B.J. Dwyer Depo. at 36: 18-25, 37: 1-14; Ex. A-1, B.J. Dwyer Depo. Ex. 2 at pp. 1-2; Ex. L, MP00562).

23. KC Quality has always purchased and used the same equipment B.J. Dwyer trained them to use. The Rams come fully assembled from Magnum, and nobody at KC Quality has ever assembled a Ram. (Ex. E, Quick Depo. at 125: 25, 126: 1-2, 133: 25, 134: 1-3, 5-19, 22; Ex. C, Gilmore Depo. at 72: 9-17).

24. The subject Ram, pier, bracket, and spacer pipe (*i.e.*, push pipe), were not (and could not have been) altered or modified in any manner that was a proximate cause of the subject occurrence or Plaintiff's injuries or damages. (Ex. M, Defendant's Second Supplemental Responses to Plaintiff's First Interrogatories, No. 14).

25. During their initial training session, B.J. Dwyer did not (i) use PSI logs, (ii) create a steel push pier observation record, (iii) create a record of the depth or the pressure of the piers,

(iv) obtain a geotechnical report, (v) perform soil tests or hire a soil expert, or (vi) test the moisture of the soil. (Ex. E, Quick Depo. at 128: 10-24, 129: 12-15, 130: 11-13; Ex. C, Gilmore Depo. at 86: 1-2, 6-9, 13-23, 87: 2-4, 7-12; Ex. F, Simpson Depo. at 124: 16-23, 126: 2-7).

26. B.J. Dwyer never trained or instructed Mr. Quick, Mr. Simpson, or Mr. Gilmore (i) to perform inspections or maintenance on the Rams, (ii) to use PSI logs, (iii) to create a steel push pier observation record, (iv) to create a record of the depth or pressure of the piers, (v) to perform soil testing or hire a soil expert, (vi) that you should lower the maximum PSI to below 5,000 if the soil is wet, (vii) not to stand in front of the Ram because it was dangerous, (viii) that Nose Adapters are reversible, or (ix) as to the lifetime of a Ram or any of its components. (Ex. E, Quick Depo. at 126: 12-25, 127: 1, 3-25, 128: 1-9, 13-15, 19-20, 129: 2-4, 6-9, 11, 21-22, 24-25, 130: 1-3, 8-10, 14-17, 142: 22-24, 143: 1; Ex. C, Gilmore Depo. at 67: 5-13, 19-25, 68: 1-2, 84: 16-25, 86: 10-12, 24-25, 87: 1, 13-19, 20-25; Ex. F, Simpson Depo. at 54: 9-18, 22, 25, 55: 1-7, 10-24, 57: 3-14, 18-22).

27. No instruction manuals are provided with Magnum equipment, there are no warnings on Magnum equipment, and nobody at Magnum (including B.J. Dwyer) ever warned Mr. Quick, Mr. Simpson, or Mr. Gilmore that (i) welds on Ram Shoes manufactured prior to June 1, 2012 might not meet Magnum's own specifications or the minimum size requirements of the American Welding Society, (ii) a Ram used to drive less than 1,000 piers could fail during normal operation and cause injury, (iii) a Ram that is less than a year old could fail during normal operation and cause injury, (iv) a Ram could fail during normal operation if the soil is wet and cause injury, (v) the failure to replace a Ram or its components that was used for less than a year could cause a Ram to fail during normal operation and cause injury, (vi) not using a PSI log could cause a Ram to fail during normal operation and cause injury, (vii) a Ram could

break free of a bracket during normal operation if you used the wrong size Nose Adapter, (viii) a Ram operated by only one person could fail during normal operation and cause injury, or (ix) it is dangerous to stand in front of a Ram. (Ex. E, Quick Depo. at 126: 3-8, 129: 25, 130: 1-3, 21-25, 131: 1-14, 18-22, 139: 17-20, 22-25, 140: 1-2, 4-8, 11-16, 20-24, 141: 1, 142: 16-19, 21, 143: 2-6, 8, 146: 4-12; Ex. C, Gilmore Depo. at 85: 9-11; Ex. A, B.J. Dwyer Depo. at 39: 23-25, 40: 1-24).

C. The June 1, 2012 Failure of the Defective Weldments on the Ram's Shoe

28. On June 1, 2012, Brock Simpson, Mike Gilmore, and Ryan Yorgensen, were performing a residential piering job at 3800 SW Harbor Circle, Lee's Summit, Missouri. (Ex. C, Gilmore Depo. at 17: 6-9, 25, 19: 1-22; Ex. F, Simpson Depo. at 46: 16-25, 47: 1).

29. Mr. Simpson was on one side of an unfinished basement driving piers with a Magnum Ram, and Mr. Gilmore and Mr. Yorgensen were on the other side, separated from Mr. Simpson by a wall. (Ex. C, Gilmore Depo. at 25: 11-19; Ex. F, Simpson Depo. at 78: 11-16, 128: 8-11).

30. Mr. Simpson had (i) installed the bracket using nine bolts on each side, (ii) extended the cylinder to raise the Ram until the middle bolt hole on the bracket was matched up to the hole in the Shoe, (iii) tightened the safety bolt and secured the Ram to the bracket, (iv) made sure there were no leaks, and (v) started driving piers. (Ex. F, Simpson Depo. at 52: 17-25, 65: 3-15).

31. The last thing Mr. Simpson remembers before waking up face down in the corner of the basement, is that the gauge on the hydraulic pump was at 4,200 PSI. (*Id*. at 61: 12-24, 68: 8-10).

32. When he woke up, Mr. Simpson didn't know what had happened. He reached up and felt his face, and his nose was completely flat against his face; when he tried to straighten it out, it went back just like jello. (*Id*. at 61: 14-19).

33. Mr. Simpson saw blood all around him, and when he bit down, his jaw was so misaligned that he realized he wasn't dreaming. (*Id*. at 61: 20-24).

34. Mr. Gilmore heard a very loud pop and a thud, like someone hitting concrete as hard as they could with a sledgehammer, and it took him about 10 seconds to get out of the hole he was in and make his way into the room where Mr. Simpson had been piering. (Ex. C, Gilmore Depo. at 34: 10-22, 35: 13-25, 36: 1-4).

35. When Mr. Gilmore entered the next room, he saw Mr. Simpson hunched over with his hands on his thighs, looking very confused. The Ram was leaned over on the ground, when it should have been straight up against the wall. (*Id*. at 36: 5-25, 37: 1-25, 38: 1-4).

36. The next day, when Mr. Gilmore returned, he saw that the spacer pipe and the top of the pier were both bent away from the foundation wall, and the spacer pipe was barely hanging on to the top of the push pier. (*Id*. at 43: 11-25, 44: 1-25, 45: 1-21, 46: 3-11).

37. About a foot of the pier was left above the bracket, the bracket was undamaged, and the safety bolt was still in the Shoe. (*Id*. at 45: 25, 46: 1-2, 47: 6-11, 71: 15-23).

38. Mr. Gilmore cut the top of the bent pier off, put a new pier in, and, using a different Ram, drove the pier a few more inches until he hit 5,000 PSI, then he stopped. When Mr. Gilmore started driving the final pier, the pressure was between 4,000 and 5,000 PSI. (Ex. C, Gilmore Depo. at 49: 4-19, 50: 11-16, 25, 51: 1-4).

39. After the job was finished, Mr. Gilmore transported the Ram that injured Mr. Simpson (in one piece with the Shoe intact) back to KC Quality's shop, where he placed it on a

pallet by itself in the far back of KC Quality's shop, which is locked, and it was never used again. (Ex. C, Gilmore Depo. at 51: 10-19, 63: 1-12, 71: 24-25, 72: 1-6; Ex. E, Quick Depo. at 56: 1-23)

40. Nobody has ever broken into KC Quality's shop and messed with its piering equipment. In Mr. Quick's opinion, there is a zero percent chance that somebody broke into his shop and replaced the broken Magnum Ram that injured Mr. Simpson with another broken Magnum Ram. (Ex. E, Quick Depo. at 143: 15-20, 24-25, 144: 1, 3).

41. Patrick Lombard, P.E., of Briem Engineering, performed a failure analysis of the "[actual] MP6000K ram kit … used by Mr. Simpson on the day he was injured". (Ex. J, CMC 10/22/18 Report at p. 7; Ex. G, Briem 8/22/18 Report at p. 3 – "the subject Ram Kit was identified by Mr. Quick as the one in use when the incident occurred on June 1, 2012.").

42. Magnum has two versions of Ram Shoe specifications that were in effect from April 25, 2006 to November 13, 2017. Both versions of the Ram Shoe specifications are dated 4/25/06 and identified as MP6003, Rev. 1 (jointly referred to as the "Shoe Specifications"). (Ex. H, Briem 11/20/18 Addendum at p. 1; Ex. N, pp. 1-3 – MP6003 Ram Shoe Specifications – MP000810, 875-76 – Redacted).

43. The inner and outer weldments on the Ram's Shoe do not meet Magnum's Shoe Specifications of 0.250 inches. The inner fillet weld measures 0.105 to 0.215 inches, the failed portion of the inner filled weld measures only 0.105 inches, and the outer weldment measures only 0.082 inches penetration. (Ex. G, Briem 8/22/18 Report at pp. 2, Ex. H, Briem 11/20/18 Addendum at pp. 1-3).

44. Magnum's published specifications for the Magnum Hydraulic Piering System also require all weldments to "conform to the requirements of the American Welding Society

'Structural Welding Code AWS D1.1,' and all applicable revisions." (Ex. K, Typical Specification, Part 2 – Material, § 2.08 Weldments).

45. The inner and outer weldments on the Ram's Shoe do not meet the American Welding Society's ("AWS") minimum size specifications of 5/16 (0.312) inches. The outer weldment does not conform to Magnum's Shoe Specifications because it is not chamfered and because it is not a fillet weld. The outer weldment is similar to a closed square butt joint, which is not a prequalified weld type of the AWS, D1.1 Structural Welding Code. (Ex. G, Briem 8/22/18 Report at pp. 1-2, 4, 12, 15; Ex. H, Briem 11/20/18 Addendum at p. 1).

46. The inner and outer weldments on the Ram's Shoe fractured, allowing the bottom plate to deform, the Ram to tilt forward, bend the pier and spacer pipe, overload the safety bolt and strip the threads, and break free of the bracket and strike and injure Mr. Simpson. (Ex. G, Briem 8/22/18 Report at p. 2; Ex. J, CMC 10/22/18 Report at p. 9; Ex. I, Briem 11/20/18 Report at p. 4 – "It is noted that CMC Professional Services agrees with Briem Engineering that when the welds fail, the ram kit is allowed to rotate, bend the spacer pipe, disengage the safety bolt from the collar tube, and allow the ram to fall to the ground.").

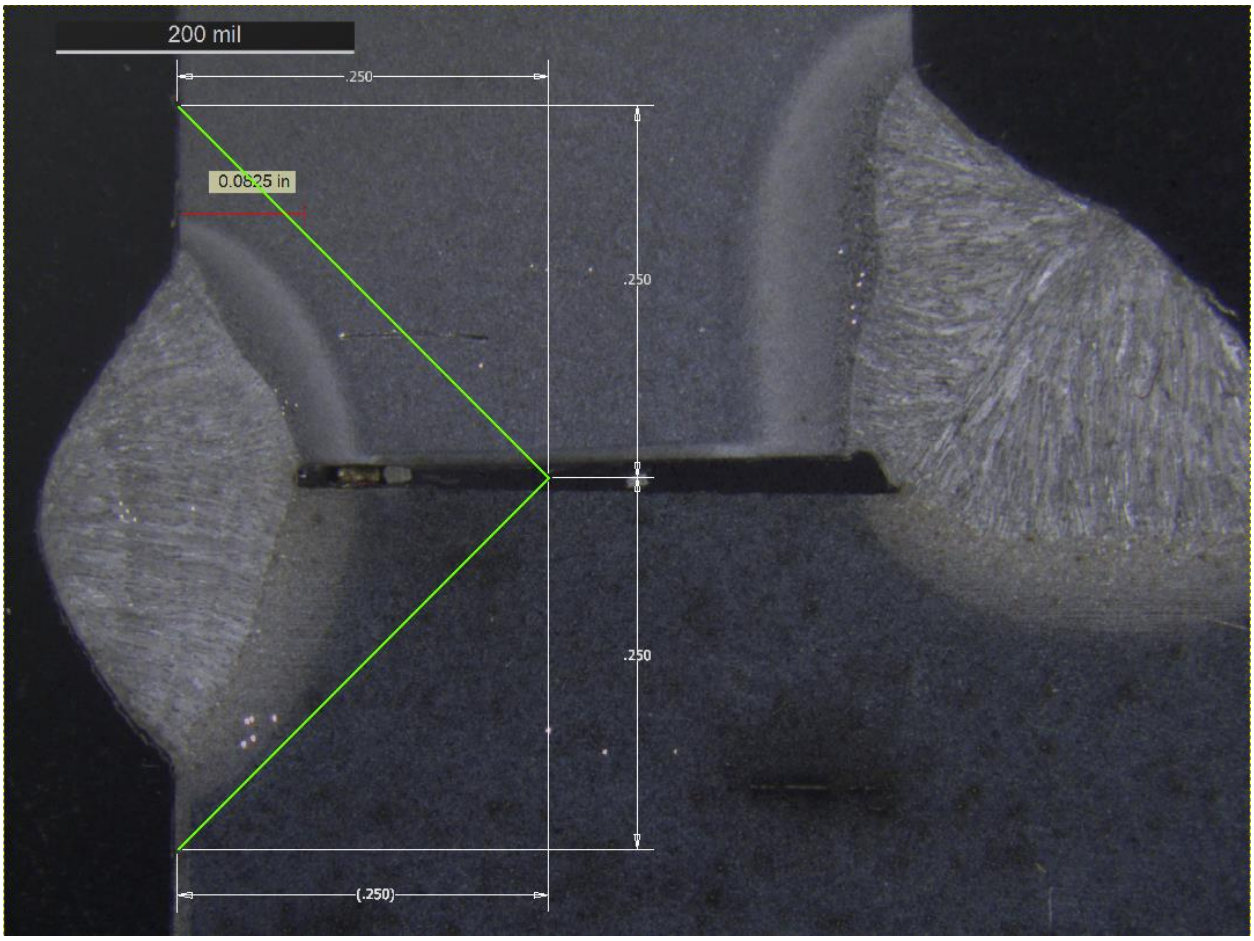
47. As a result of Mr. Simpson's facial injuries, he underwent extensive medical and surgical treatment, for which he was charged in excess of $120,000. (Doc. 84, Ex. A to Notice of Svc. of Bus. Records at pp. 5-6, 9, 12-13, 17-21, 24, 27-28, 32-34).

48. Neither Plaintiff, nor any third party, was negligent in any manner that was a proximate cause of the subject occurrence or Plaintiff's injuries or damages. (Ex. M, Defendant's Second Supplemental Responses to Plaintiff's First Interrogatories, No. 13).

49. Photographs of the "[actual] MP6000K ram kit … used by Mr. Simpson on the day he was injured" (Ex. J, CMC 10/22/18 Report at p. 7; Ex. G, Briem 8/22/18 Report at p. 3 –

"the subject Ram Kit was identified by Mr. Quick as the one in use when the incident occurred on June 1, 2012."), including photographs of the Shoe and defective weldments, are set forth below:

(Ex. G, Briem 8/22/18 Report, photos 1-6, 13).



(Ex. I, Briem 11/20/18 Report, photo 2).

III. ARGUMENTS AND AUTHORITIES

A. Standard for Summary Judgment

Pursuant to Fed. R. Civ. P. 56(a), "a party may move for summary judgment, identifying … the part of each claim … on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." While the initial burden is on the moving party, "the movant is entitled to summary judgment if the nonmoving party 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Loomis v. Wing Enterprises, Inc.*, No. 2:11-cv-4184-NKL (W.D. Mo. Jan. 22, 2013) (*quoting Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23) (1986)).

B. Strict Liability – Product Defect / Failure to Warn

Plaintiff has alleged that Defendant "failed to use [ordinary care] … in the manufacture, design, testing, instructions and warnings of Magnum products, … and in the training, support and/or assistance in the use of Magnum Products, …" (*See* Petition at ¶ 30). Plaintiff has further alleged that,

> As a direct and proximate result of Defendant's sale and/or distribution of the Magnum products at issue, which were in a defective condition unreasonably dangerous for its reasonably anticipated use; the negligent manufacture, design, testing, instructions and/or warnings of the Magnum products at issue; and/or the negligent training, support and/or assistance in the use of the Magnum products at issue; Plaintiff Brock Simpson has been caused to suffer injuries and damages in excess of $25,000, …

(Petition at ¶ 31). As recognized by Defendant, Plaintiff's claims encompass both theories of strict liability claims recognized by Missouri law, *i.e.*, product defect, and failure to warn. (*See* Doc. 96 at 5, "Magnum shall address both causes of action.").

In order for Plaintiff to prevail on his claims of strict liability – product defect, he must prove the following elements:

> ***First*, defendant Magnum sold the MP6000K Hydraulic Ram Kit ("Ram") in the course of said defendant's business, and**
>
> ***Second*, the Ram was then in a defective condition** unreasonably dangerous **when put to a reasonably anticipated use, and**
>
> ***Third*, the Ram was used in a manner reasonably anticipated, and**
>
> ***Fourth*, such defective condition as existed when the Ram was sold** directly caused or directly contributed to cause damage to Plaintiff Brock Simpson.

(*See* M.A.I. 25.04) (emphasis added).[1]

In order for Plaintiff to prevail on his claims of strict liability – failure to warn, he must prove the following elements:

> ***First*, defendant Magnum sold the MP6000K Hydraulic Ram Kit ("Ram") in the course of said defendant's business, and**
>
> ***Second*, the Ram was** then unreasonably dangerous when **put to a reasonably anticipated use without knowledge of its characteristics, and**
>
> ***Third*, defendant Magnum did not give an adequate warning of the danger, and**
>
> ***Fourth*, the Ram was used in a manner reasonably anticipated, and**
>
> ***Fifth*, the sale of the Ram without an adequate warning** directly caused or directly contributed to cause damage to Plaintiff Brock Simpson.

(*See* M.A.I. 25.05) (emphasis added).

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[1] Plaintiff submits that he is entitled to summary judgment on the bolded portions of each of his claims, with the underlined portions to be decided by the jury.

With regards to the first element of each of Plaintiff's strict liability claims – Defendant cannot, in good faith, dispute that it sold the subject Magnum MP6000K Hydraulic Ram Kit in the course of its business. (*See* Plfs. SUF at ¶¶ 5-11, 21-23, 39-44, 49). KC Quality purchased its first four Magnum MP6000K Hydraulic Ram Kits on September 29, 2011, November 1, 2011, and November 3, 2011, and, with the exception of one hydraulic pump, KC Quality has never purchased piering equipment from any company other than Magnum Piering, Inc. (Plfs. SUF at ¶ 22). In fact, KC Quality has always purchased and used the same equipment that B.J. Dwyer trained it to use. (Plfs. SUF at ¶ 23). Rams come fully assembled from Magnum, and nobody at KC Quality has ever had to assemble a Ram. (*Id.*). Additionally, Defendant does not dispute that the Ram was not (and could not have been) altered or modified in any manner that was a proximate cause of the subject occurrence or Plaintiff's injuries or damages. (Plfs. SUF at ¶ 24).

Defendant also does not dispute that the Ram Shoe was not manufactured in accordance with Magnum's own size specifications or those of the American Welding Society's requirements. The uncontroverted evidence shows that (i) the outer weld surface was not chamfered as required by Magnum's specifications, (ii) the inner and outer weldments do not meet the size requirements of Magnum's own specifications, (iii) the inner and outer weldments do not meet the size the minimum size requirements of the American Welding Society, (iv) the undersized defective inner and outer weldments fractured, allowing the bottom plate to deform, the Ram to tilt forward, bend the pier and spacer pipe, overload the safety bolt and strip the threads, and break free of the bracket, and (v) the subject Ram struck and injured Mr. Simpson, resulting in extensive medical and surgical treatment for which he was charged in excess of $120,000. (*See* Plfs. SUF at ¶¶ 41-47, 49).

The uncontroverted evidence shows that the defective inner and outer weldments failed at only 4,200 PSI, *i.e.*, 3,300 PSI less than the Ram's maximum pressure rating of 7,500 PSI. (Plfs. SUF at ¶¶ 7, 31). Even disregarding Plaintiff's testimony (although there is no evidence to the contrary), the uncontroverted evidence shows that the defective inner and outer weldments failed at less than 5,000 PSI, *i.e.*, at least 2,500 PSI less than the Ram's maximum pressure rating of 7,500 PSI. (Plfs. SUF at ¶¶ 7, 38-39). The uncontroverted evidence also shows that B.J. Dwyer failed to warn Plaintiff of the dangers associated with the use of the Ram, that no instruction manuals were provided Magnum's equipment, and that the subject Ram contained no warnings, caution labels, or instructions. (*See* Plfs. SUF at ¶¶ 21-23, 25-27).

In this case, Defendant does not, and cannot in good faith, contradict the direct evidence offered by Plaintiff. Tellingly, Defendant's experts do not dispute that the weldments on the Ram Shoe do not comply with Magnum's own specifications, with the minimum size requirements of the American Welding Society, or that they are undersized and defective. The undersized weldments on the subject Ram Shoe do not conform to Magnum's own standards, making them defective. Under any standard, the defective undersized weldments clearly amount to a "manufacturing defect".

> [A] manufacturing defect occurs when "something goes wrong in the manufacturing process and the product is not in its intended condition." The product is evaluated against the producers' own standards, and compared to like products.

Richcreek v. General Motors Corp., 908 S.W.2d 772, 776 (Mo. App. W.D. 1995) (citations omitted).

> **In many situations the nature of the alleged defect is clear.** Imperfect material, **a defective weld,** or some physical damage in the product **exemplify the usual claim. Proof of such defects may be demonstrated by direct evidence**, by reasonable inferences which may be drawn from the circumstances or by exclusion of other causes.

Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 170 (1979) (emphasis added) (citations omitted).

As such, Plaintiff is entitled to partial summary judgment on the First element of his claim for strict liability – product defect under M.A.I. 25.04. Plaintiff is also entitled to partial summary judgment on the Third element, because the uncontroverted evidence shows that he operated the subject Ram in a manner reasonably anticipated. (*Compare* Plfs. SUF at ¶¶ 12(iii)-(iv) & 13(i)-(v) with ¶ 30(i)-(v)). For instance, even if Defendant is allowed to tell the jury about all of its wildly speculative theories of defense (all of which are in direct contradiction to the actual evidence), none of Defendant's theories change the fact that the undersized defective weldments on the Ram Shoe fractured when Plaintiff was installing piers in a residential foundation, *i.e.*, when the Ram was being used for the exact purpose for which it was designed, manufactured, and sold. Plaintiff is also entitled to partial summary judgment that the Ram was defective, and that said defective conditions existed when the Ram was sold, *i.e.*, most of the Second element, and the first half of the Fourth element. The only jury issues should be: (1) whether the defective condition rendered the Ram unreasonably dangerous, and (2) whether the defective condition directly caused or directly contributed to cause damage to Plaintiff.

Plaintiff is also entitled to partial summary judgment as to the First, Third, and Fourth elements of his claim for strict liability – failure to warn under M.A.I. 25.05. Plaintiff is also entitled to partial summary judgment that Plaintiff's use of the Ram was reasonably anticipated without knowledge of its characteristics, and that Defendant sold the Ram without adequate warning (*i.e.*, no warnings whatsoever), *i.e.*, the second half of the Second Element, and the first half of the Fifth element. The only jury issues should be: (1) whether Defendant's failure to give an adequate warning rendered the Ram unreasonably dangerous, and (2) whether Defendant's

failure to give an adequate warning directly caused or directly contributed to cause damage to Plaintiff.

C. Negligent Manufacture, Design, or Failure to Warn

In order for Plaintiff to prevail on his claim of negligent manufacture, design, or failure to warn, he must prove the following elements:

> ***First*, defendant Magnum designed and manufactured the MP6000K Hydraulic Ram Kit ("Ram") in the course of defendant's business, and**
>
> ***Second*, either:**
>
> **the outer weld surface of the Ram Shoe was not chamfered in accordance with Magnum's specifications, or**
>
> **the weldments on the Ram Shoe do not meet Magnum's size specifications or the minimum size requirements of the American Welding Society, or**
>
> **the undersized weldments failed at 4,200 PSI, which is 3,300 PSI less than the Ram's maximum pressure rating of 7,500 PSI, and**
>
> *Third*, in any one or more of the respects submitted in paragraph Second, defendant Magnum failed to use ordinary care to either design or manufacture the Ram to be reasonably safe, or to adequately warn of the risk of harm, and
>
> *Fourth*, such failure directly caused or directly contributed to cause damage to plaintiff Brock Simpson.

(*See* M.A.I. 25.09) (emphasis added).

As discussed in § III(B), *supra*, the uncontroverted evidence shows that Defendant designed, manufactured, and sold the Ram in the course of its business, and that the Ram was not (and could not have been) altered or modified in any manner that was a proximate cause of the subject occurrence or Plaintiff's injuries or damages. (*See* Plfs. SUF at ¶¶ 5-11, 21-24, 39-44, 49). Additionally, the uncontroverted evidence shows that the Ram Shoe was not manufactured

in accordance with its own specifications or the minimum size requirements of the American Welding Society. The outer weld surface was not chamfered, the inner and outer weldments do not comply with Magnum's own size specifications or those of the American Welding Society, and the undersized defective inner and outer weldments fractured, allowing the bottom plate to deform, the Ram to tilt forward, bend the pier and spacer pipe, overload the safety bolt and strip the threads, and break free of the bracket, striking and injuring Mr. Simpson. (*See* Plfs. SUF at ¶¶ 41-47, 49).

As such, Plaintiff is entitled to partial summary judgment as to the First and Second elements of his claim for negligent manufacture, design, or failure to warn under M.A.I. 25.09. The only jury issues should be (1) whether, in any one or more of the respects in paragraph Second, Defendant failed to use ordinary care, and (2) whether Defendant's failure directly caused or directly contributed to cause damage to Plaintiff.

WHEREFORE, Plaintiff Brock Simpson moves this Court to grant partial summary judgment in Plaintiff's favor and against Defendant as to certain elements of Plaintiff's claims of strict liability and negligence against Defendant, and for such other and further relief as the Court deems just and proper.

Dated: December 21, 2018

Respectfully submitted,

/s/ Bill Kenney

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CERTIFICATE OF SERVICE

I hereby certify that, on December 21, 2018, the foregoing document was electronically filed with the Court's Electronic Filing System and will be served electronically on all registered attorneys of record. I further certify that a copy of Plaintiff's statement of facts were sent in Microsoft Word format to counsel for Defendant, as follows:

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