IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

KECHI TOWNSHIP and EMPLOYERS MUTUAL CASUALTY COMPANY, Plaintiff, v. FREIGHTLINER, LLC n/k/a DAIMLER TRUCKS NORTH AMERICA LLC, Defendant.	)	**CIVIL ACTION** No. 10-1051

ORDER

This case comes before the court on Daimler's motion to exclude Kechi's evidence on damages. (Docs. 169 and 170). Daimler's motion is granted in part and denied in part for the reasons herein.

Kechi has offered evidence from James Day, its shop supervisor, to support its claim for damages as to the real estate, heavy equipment, and all other shop equipment. The court will address each group of items in turn.

Real Estate

Daimler contends that this evidence is inadmissible because Day is not an expert on real estate valuation, which Day has already admitted. Kechi responds that it is not offering Day as an expert witness. Rather, Kechi asserts that as the owner of the property Day can testify as to the value of the real estate. Kechi cites several cases in its brief including the general rule that "an owner, because of his ownership, is presumed to have special knowledge of the property and may testify as to its value." United States v. Sowards, 370 F.2d 87 (10th Cir. 1966).

Daimler does not dispute this rule as a general proposition. But it is clear from Kechi's submissions and Day's testimony that he is not being offered even as a Rule 701 witness on the value of the real estate before and after the fire, as the jury will be instructed. Rather, Day will only base his testimony on an appraisal that was done by Jess Anderson, an insurance adjuster whose qualifications are unknown. But more to the point, Day's testimony regarding Anderson's opinions clearly is hearsay. Daimler's motion to exclude Day's testimony as to the value of the real estate is granted.

Alternatively, Kechi asserts that it will call Anderson. Daimler objects to this alternative as it was not given notice of this witness. Anderson will presumably be tendered as an expert and would testify pursuant to Rule 702. Kechi had an obligation to disclose its expert witnesses several months ago and did not disclose Anderson. Moreover, Anderson was not disclosed in Kechi's final witness disclosure. Therefore, Anderson will not be permitted to testify.[1]

Heavy Equipment

Daimler asserts that Day's opinions should be excluded because he was not disclosed as an expert witness[2] and the testimony of the value of the heavy equipment destroyed in the fire is technical and

[1] Kechi previously objected to two expert witnesses disclosed on Daimler's final witness list because they had not been disclosed as expert witnesses by the discovery deadline. The court granted Kechi's motion to exclude the testimony as these witnesses because Kechi did not have proper disclosure. (Doc. 163).

[2] Daimler does not object to Kechi's position that an owner may testify as to the value of their personal property. As a corporate representative, Day is acting as the owner of the property that was destroyed in the fire. Ultimate Chemical Co. v. Surface Trans. Int'l, Inc., 232 Kan. 727, 658 P.2d 1008 (Kan. 1983).

specialized knowledge which may only be offered pursuant to Rule 702. The court disagrees.

Kansas law provides, and the court will instruct, that the measure of damages to personal property is the difference between its fair and reasonable market value immediately before and immediately after the damage. Warren v. Heartland Auto. Servs., Inc., 36 Kan. App.2d 758, 760 (2006). As discussed previously, an owner may testify about the value of his personal property because he has special knowledge. Day has testified that he has more than thirty years experience in heavy equipment. Day also attends auctions and reads magazines which list the value of heavy equipment. Day has also received an offer to purchase at least one of the pieces of heavy equipment which was owned by Kechi. Day's knowledge is based on his employment with Kechi and the day to day operation of the heavy equipment.

Daimler cites James River Ins. Co. V. Rapid Funding, LLC., 658 F.3d 1207 (10th Cir. 2011), for the proposition that an owner offering technical opinions cannot be admitted under Rule 701. James River, however, discusses the valuation of business real property and not personal property destroyed in a fire - a big distinction. The court has already determined that Day may not offer testimony on the real estate.

Day's testimony may be somewhat specialized due to the fact that an average juror probably is not familiar with the value of heavy equipment. However, the testimony is not expert testimony in its true form because Day is offering his opinion of its value as the owner of the property. Thus, his testimony is admissible under Rule 701. Day,

however, must testify as to the market value prior to the fire and not simply the replacement cost of the heavy equipment (with the exception of the Gator, which was essentially new when it was destroyed). In other words, Day's testimony must conform to Kansas law.

All Other Property

As to the other property destroyed in the fire, Daimler moves to exclude this testimony on the basis that Day will testify as to the property's replacement cost and not its market value. Kechi contends that replacement cost evidence is proper and cites Kansas Power & Light Co. v. Thatcher, 14 Kan. App. 2d 613 (Kan. App. 1990). Thatcher, however, is clearly distinguishable. In Thatcher, both parties essentially agreed that replacement cost was the proper valuation.[3] This rule is only applicable when the property has no market value prior to the loss. There has been no evidence that items destroyed by the fire had no market value prior to the fire. After reviewing the list of items offered by Kechi, the court believes that all of the items had a market value prior to the fire. Therefore, replacement cost evidence will not be admissible unless, as already noted, a particular item was new at the time of the fire.

So again, Day may testify as to the value of the items destroyed but only if his testimony is in accordance with Kansas law.

IT IS SO ORDERED.

Dated this 16th day of January 2012, at Wichita, Kansas.

s/ Monti Belot
Monti L. Belot
UNITED STATES DISTRICT JUDGE

[3] There is no such agreement in this case.

FILED
United States Court of Appeals
Tenth Circuit

November 13, 2014

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

KECHI TOWNSHIP; EMPLOYERS MUTUAL CASUALTY COMPANY,

Plaintiffs-Appellants/Cross-Appellees,

v.

FREIGHTLINER, LLC, n/k/a Daimler Trucks North America, LLC,

Defendant-Appellee/Cross-Appellant.

Nos. 12-3118, 12-3134
(D.C. No. 6:10-CV-01051-MLB)
(D. Kan.)

ORDER AND JUDGMENT[*]

Before **GORSUCH**, **HOLLOWAY**,[**] and **HOLMES**, Circuit Judges.

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[*] This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

[**] The late Honorable William J. Holloway, Jr., United States Senior Circuit Judge, participated as a panel member when oral argument was heard in this case but passed away before having an opportunity to vote on or otherwise participate in the consideration of this order and judgment. "The practice of this court permits the remaining two panel judges if in agreement to act as a quorum in resolving the appeal." *United States v. Wiles*, 106 F.3d 1516, 1516 n.* (10th Cir. 1997); *see also* 28 U.S.C. § 46(d) (permitting a circuit court to adopt procedure allowing for the disposition of an appeal where a remaining quorum of

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After a fire destroyed its machine shop, Kechi Township ("Kechi") sued Freightliner, LLC ("Freightliner") in a products liability action, alleging that Freightliner's defective design of a truck ("the truck" or "the subject truck")[1] caused the conflagration. A jury found Freightliner liable and awarded damages. Both parties appeal. Kechi appeals on the ground that the district court improperly excluded evidence from the jury's damages calculation. For its part, Freightliner raises two issues: (1) its motion for judgment as a matter of law ("JMOL") was improperly denied, and (2) expert testimony was improperly admitted. Having jurisdiction under 28 U.S.C. § 1291, we affirm the district court's orders denying Freightliner's motion for JMOL, allowing Kechi's expert witnesses to testify, and barring Kechi's lay witnesses from testifying as to damages.

I

At around 12:15 a.m. on December 19, 2007, a fire started at Kechi's machine shop. The fire destroyed the shop and all of its contents, including the following pieces of heavy equipment: the subject truck, a John Deere motor

[**](...continued)
panel agrees on the disposition). The remaining panel members have acted as a quorum with respect to this order and judgment.

[1] The parties both refer to the vehicle as a "dump truck." At trial, there was testimony that it was used for "dirt hauling, gravel hauling, and general hauling purposes." Aplt. App. at 246 (Trial Tr., dated Jan. 11, 2012).

grader, a John Deere tractor, a John Deere mower, a John Deere Gator utility vehicle ("the Gator"), two Dixie Chopper mowers, an Allis Chalmers 345 wheel loader ("the wheel loader"), and a Chevy dump truck. After an investigation traced the fire to the subject truck, Kechi sued Freightliner based on the truck's allegedly defective design in Kansas state court. The case was later removed to federal district court on diversity grounds.

Prior to trial, Freightliner filed motions to exclude the testimony of Kechi's two expert witnesses: Don Birmingham, a fire-origin expert, and Jim Martin, a fire-causation expert. Freightliner argued that the experts never inspected any of the company's design drawings or specifications, that they performed inadequate research into the origin of the fire, and that they used an untrustworthy exemplar truck and battery in their investigations. After conducting a *Daubert*[2] hearing, the district court denied the motion to exclude Mr. Martin's testimony, finding that the absence of the specifications and the reliability of the exemplars were matters for the jury and that Mr. Martin was not obliged to rule out every possible explanation for the fire. The district court also largely denied the motion to exclude Mr. Birmingham's testimony, though it barred him from testifying as to the combustibility of the truck's insulation.

During trial, Kechi attempted to elicit from James Day, the man in charge

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[2] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

of the machine shop, testimony regarding the value of the real estate and personal property destroyed in the fire. Freightliner filed a motion to exclude Mr. Day's testimony on damages, urging the court to "disallow Mr. Day [from] testify[ing] as a lay witness [to] values of the various pieces of [personal] property and real property when such testimony is plainly expert testimony under federal law." Aplt. App. at 77 (Mot. & Supp. Mem. to Exclude Pls.' Damages Evidence, filed Jan. 16, 2012). The district court granted the motion with respect to the real property on the grounds that the testimony at issue was based entirely on an appraisal performed by a third party, and thus constituted hearsay.

After oscillating somewhat on the question of the personal property, the district court ultimately concluded that it would exclude from the jury's consideration damages testimony relating to any heavy equipment *other than* the Gator, the property in the Gator, and certain shop supplies and equipment, reasoning that Mr. Day had not demonstrated sufficient familiarity with the value of any of the other items. The court likewise declined to allow Lee Caster, who was apparently a trustee on the township board,[3] to testify to the value of the real estate, ruling that there were "certainly very valid ways to put on testimony as to the value of the building [but] that has not been done." *Id.* at 800 (Trial Tr.,

[3] From the briefing and transcript, it is not clear precisely what Mr. Caster's title was at the time he testified. It makes no difference to our analysis.

dated Jan. 17, 2012).[4]

During its deliberations, the jury had before it a verdict form that asked it to itemize damages with respect to only three different things: the Gator, the property in the Gator, and certain "shop supplies and equipment." *Id.* at 129 (Verdict, dated Jan. 19, 2012) (capitalization altered). The jury found Freightliner liable for the fire and awarded $21,000 in damages.

The jury's verdict rendered, Freightliner renewed an earlier-filed motion for JMOL pursuant to Federal Rule of Civil Procedure 50. The district court denied the motion, declining to "find as a matter of law that the evidence offered was overwhelmingly preponderant in favor of [Freightliner]." *Id.* at 201 (Order, filed March 29, 2012). Both parties appealed.

II

We first consider Freightliner's challenge to the district court's denial of its motion for JMOL. Such decisions are reviewed de novo, applying the same standard the district court did—namely, that "[a] party is entitled to judgment as a

[4] As the preceding summary indicates, the district court's basis (or bases) for excluding the testimony is unclear, as the court had earlier cited foundation and hearsay concerns, but much of the debate between the parties concerned the interplay between expert and lay opinion rules. Because the parties now focus on the latter, and because the district court's ruling can properly be affirmed on that ground, we limit our discussion to that issue. *See United States v. McGlothin*, 705 F.3d 1254, 1266 n.17 (10th Cir.) (reiterating that we are authorized to "affirm the district court's evidentiary rulings on any basis that finds support in the record"), *cert. denied*, --- U.S. ----, 133 S. Ct. 2406 (2013).

matter of law 'only if the evidence points but one way and is susceptible to no reasonable inferences which may support the opposing party's position.'" *Hysten v. Burlington N. Santa Fe Ry. Co.*, 530 F.3d 1260, 1269 (10th Cir. 2008) (quoting *Tyler v. RE/MAX Mountain States, Inc.*, 232 F.3d 808, 812 (10th Cir. 2000)).

With respect to the arguments concerning the admission of the expert testimony, "we review de novo the question of whether the district court applied the proper standard and actually performed its gatekeeper role in the first instance" and then "review the trial court's actual application of the standard in deciding whether to admit or exclude an expert's testimony for abuse of discretion." *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1223 (10th Cir. 2003). Freightliner questions the district court's actual application of the standard; it does not contend that the court used the wrong standard or failed to perform its gatekeeper role. Accordingly, we will reverse only if we find an abuse of discretion.

Lastly, we review the district court's exclusion of the damages testimony under an abuse-of-discretion standard. *See James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207, 1212 (10th Cir. 2011).

III

In overview, we hold that: (1) Freightliner's motion for JMOL was properly denied; (2) the district court did not abuse its discretion in admitting Kechi's expert testimony; and (3) the district court did not abuse its discretion in

excluding Kechi's damages testimony. Our holdings compel us to affirm each of the district court's challenged rulings.

A

The first issue presented is whether the district court correctly denied Freightliner's motion for JMOL. Under Kansas law,[5] strict liability for the sale or manufacture of a product is only imposed where the plaintiff shows that: "(1) the injury resulted from a condition of the product; (2) the condition was an unreasonably dangerous one; and (3) the condition existed at the time [the product] left the defendant's control." *Jenkins v. Amchem Prods., Inc.*, 886 P.2d 869, 886 (Kan. 1994) (quoting *Mays v. Ciba-Geigy Corp.*, 661 P.2d 348, 359 (Kan. 1983)) (internal quotation marks omitted). At trial, Kechi submitted evidence on two alleged design defects in the starter motor of the subject truck: (1) the use of a bus bar[6] or depopulation stud,[7] and (2) the use of a cap nut.[8] It

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[5] Throughout these proceedings, the parties have rightly agreed that Kansas law governs the substantive question of liability, and the district court applied that law. *See Elm Ridge Exploration Co. v. Engle*, 721 F.3d 1199, 1210 (10th Cir. 2013) ("A federal court sitting in diversity applies the substantive law of the state where it is located . . . .").

[6] According to trial testimony, a bus bar is a "wide electrical conductor." Aplt. App. at 512 (Trial Tr., dated Jan. 12, 2012).

[7] As with many of the technical details in this case, the relationship between the bus bar and the depopulation stud is unclear and is not illuminated by the briefing. At times, the two objects are discussed in the alternative. *See, e.g.*, Aplt. Opening Br. at 3 (discussing testimony "that the use of a busbar *or* depopulation stud . . . caused a loose connection . . . ." (emphasis added)). At

(continued...)

argued that both defects caused loose connections in the motor, which in turn caused the fire. As explained below, Kechi made each of the showings required by Kansas law, and the district court therefore properly denied Freightliner's motion for JMOL.

1

In regards to the first element—the causal connection between the defect and the injury—Freightliner submits that it was entitled to JMOL because Mr. Martin, Kechi's expert, attributed the ultimate cause of the fire to "a fault or short, and not the loose connection" in the subject truck's motor. Aplee. Opening Br. at 18. Freightliner also maintains that Kechi "failed to sufficiently eliminate other reasonable causes of the fire." *Id.* at 22.

a

Freightliner's suggestion that Mr. Martin's testimony does not sufficiently establish causation parses the legal standard more finely that the cases permit. In products liability actions in Kansas, "[p]roximate causation in a proper case may

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[7](...continued)
others, the depopulation stud is characterized as an element of the bus bar. *See, e.g.*, Aplt. App. at 545 ("I noticed the cap nut *on the bus bar depopulation stud* . . . ." (emphasis added)). For present purposes, the distinction is not germane. The important thing to remember is that the depopulation stud is associated with the bus bar, not the B+ terminal, a different component discussed shortly.

[8] There was evidence at trial that a cap nut (also referred to in places as a "capped nut") is a "closed-off nut," in contrast with an "open" or "uncapped nut." Aplt. App. at 1329 (Dep. of Michael Stohler, taken May 2, 2011).

be shown by circumstantial evidence." *Dieker v. Case Corp.*, 73 P.3d 133, 145–46 (Kan. 2003) (quoting *Farmers Ins. Co. v. Smith*, 549 P.2d 1026, 1033 (Kan. 1976)) (internal quotation marks omitted). A proximate cause is one "which in natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred." *Rhoten v. Dickson*, 223 P.3d 786, 801 (Kan. 2010) (quoting *Yount v. Deibert*, 147 P.3d 1065, 1070 (Kan. 2006)) (internal quotation marks omitted).

Mr. Martin testified that "[w]hen these connections get loose, we produce the resistance, we produce the heat, it begins to melt the insulation." Aplt. App. at 585. Asked on cross-examination whether the heat he held responsible for starting the fire "was *created* by a loose nut," he responded, "Two loose nuts." *Id.* at 613 (emphasis added). His other statements from the witness stand were entirely consistent with this theory. *See, e.g.*, *id.* at 589 (summarizing the chain of events leading to the fire). Freightliner homes in on a passage in Mr. Martin's testimony where he opined that the looseness "contributed to the heat that produced degradation of the insulation that ultimately resulted in the short" that consequently caused the fire. *Id.* at 620. Seen in the light of his other statements quoted above, as well as in the light of the overall thrust of his testimony, it is obvious that Mr. Martin was *not* saying that the looseness was but one of several causes, each of which could have independently produced the fire; rather, he was characterizing the looseness as the first event that kicked off a "natural and

continuous sequence, unbroken by an efficient intervening cause," which ultimately led to the fire. *Rhoten*, 223 P.3d at 801 (quoting *Yount*, 147 P.3d at 1070) (internal quotation marks omitted).

Fatally, Freightliner does not point to any *other* original cause highlighted by Mr. Martin, and a review of the record does not reveal one. It is certainly the case that, as Freightliner notes, Mr. Martin indicated that it was ultimately a short that sparked the flame. But Mr. Martin very clearly theorized that the short itself was caused by the loose connection. To claim that the short severed the causal connection between the looseness and the fire would turn causation analysis into an absurd, impracticable framework. If there is no causation here, it would be difficult to see how there would be causation when, say, an individual shoots someone, as a series of mechanical events occurs between the pulling of the trigger and the entry of the bullet. *Cf. Yount*, 147 P.3d at 1074 ("[A]lthough it cannot be said with absolute mathematical certainty that the defendants' activities caused the house fire, there certainly appears to be sufficient circumstantial evidence to create a question of fact concerning causation."). "It is quite proper to use expert testimony to prove the cause of a fire," *Smith*, 549 P.2d at 1033, and when a loose connection leads to a series of events that culminates in a fire, the loose connection is plainly the proximate cause of the fire, *see id.* at 1034.

b

Turning finally to Freightliner's contention that Kechi "failed to

sufficiently eliminate other reasonable causes of the fire," Aplee. Opening Br. at 22, the contention cannot be sustained. Mr. Birmingham, the fire-origin expert called by Kechi, testified that he follows a scientific approach in his work, which involves collecting data, developing a hypothesis, testing the hypothesis, and, if the hypothesis does not hold up, rejecting it and starting anew. His investigations typically begin with an inspection of the scene and an examination of the fire patterns.

Mr. Birmingham followed the same practice in investigating the Kechi machine-shop fire. While conducting his inspection, Mr. Birmingham's attention was drawn to the subject truck because of the unusual way in which it had been damaged by the fire. In total, he was at the scene for about two hours "looking for an area of origin" before he "finally focused in on this truck." Aplt. App. at 351. Because he suspected that the fire began around the starter area of the subject truck, he called Mr. Martin, the electrical engineer, to look into that possibility. During his testimony, Mr. Birmingham was asked what sort of burn patterns he would expect to see had the fire started in a trash can, as Freightliner speculated (and continues to speculate) may have happened. In that event, he responded, the fire damage would have been distributed throughout the structure in a different fashion, and the damage to the truck itself would have differed in terms of where it was most badly burned.

Mr. Birmingham's testimony more than sufficiently excluded potential

sources of the fire to get the question of causation to the jury. As noted, he followed a scientific process and offered a reasonable explanation as to why he traced the fire to the subject truck and not another source. If the jury was unpersuaded, it could have voted for no liability, but there was no reason for the district court to usurp its function and decide the matter itself on a motion for JMOL. *Cf. Smith*, 549 P.2d at 1034 (reversing the exclusion of expert testimony because "[b]y [the expert's] elimination of other possible causes for the fire it would appear that his conclusion was reasonable that the fire was the result of some defect in the mobile home's electrical system"). In summary, Freightliner's arguments on causation are meritless.

2

Turning to the second element—that "the condition was an unreasonably dangerous one," *Jenkins*, 886 P.2d at 886 (quoting *Mays*, 661 P.2d at 359) (internal quotation marks omitted)—Freightliner avers that Mr. Martin never testified that the use of a bus bar or cap nut is defective in all circumstances. It further avers that no evidence showed how the cap nut might have become loosened from the terminal and that, at any rate, Mr. Martin thought heat would not have resulted from such a loosening. Finally, Freightliner insists that the evidence in fact suggested that the connection was tight—as it was in the exemplar truck and exemplar cable that the experts used for comparison purposes. We are constrained by Kansas law to reject each of these contentions.

A product is unreasonably dangerous when it "is 'dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.'" *Delaney v. Deere & Co.*, 999 P.2d 930, 944 (Kan. 2000) (quoting Restatement (Second) of Torts § 402A cmt. i) (1965)).

At trial, the jury was read excerpts of the deposition testimony of Michael Stohler, a special investigator for Delco Remy ("Delco"), the company that manufactured the truck's starter. In one of those excerpted passages, Mr. Stohler testified that "every electrical connection" must be "secure[d] . . . correctly," or "bad things happen." Aplt. App. at 1292–93. He further testified that a loose connection in a motor like the subject truck's could create a situation in which it is "[p]retty intense, pretty hot for a relatively short period of time." *Id.* at 1293. Later in the deposition, Mr. Stohler was asked what danger arose from the use of a bus bar bracket or depopulation stud on B+ starter terminals, and he responded that "[s]parks fly." *Id.* at 1305. Mr. Martin confirmed all of these opinions in his own testimony. Specifically, he agreed that "[w]hen these connections get loose, we produce the resistance, we produce the heat, it begins to melt the insulation." *Id.* at 585. And he characterized as loose the connections at both the bus bar and the B+ terminal.

Putting this testimony together, the jury could reasonably have inferred that the loose connections in the starter posed the risk of causing a fire. It is beyond

peradventure that an ordinary consumer buying a dump truck does not expect it to burst into flames. *Cf. Betts v. Gen. Motors Corps.*, 689 P.2d 795, 799 (Kan. 1984) (holding that a jury could have properly found that a design defect was unreasonably dangerous where it led to the placement of a fuel tank in a part of the car where it later caused a fire when punctured in an accident). The "unreasonably dangerous" element was satisfied for JMOL purposes.[9]

3

The third element of strict products liability claims is that "the condition existed at the time [the product] left the defendant's control." *Jenkins*, 886 P.2d at 886 (quoting *Mays*, 661 P.2d at 359) (internal quotation marks omitted). On this element, Freightliner reads Mr. Martin's testimony as expressing the view that loose connections were likely not an issue when Freightliner first shipped the truck from its plant. Freightliner also attacks Mr. Martin's supposed view "that the nut magically backed off the stud" as "illogical." Aplee. Opening Br. at 13. It stresses that Freightliner shipped the truck as a chassis only and that the truck

[9] Freightliner makes much of the fact that Kechi "did not seek even the most basic of fact discovery" to ascertain whether the alleged defects were part of Freightliner's design. Aplee. Opening Br. at 23. However, it points to no legal obligation on the part of Kechi to do so. Kechi's discovery strategy is irrelevant to its satisfaction *vel non* of its burden of proof. It either presented sufficient evidence or it did not; it is of no significance where it did or did not get that evidence. Kechi got enough of it, and there was therefore sufficient evidence on the unreasonable dangerousness of the truck for Kechi to advance this element of its claim to the jury.

was repaired and modified a number of times, thus increasing the likelihood that no defect was present at the time the truck left Freightliner's control. Again, Freightliner's arguments do not justify reversing the district court's denial of the motion for JMOL.

At the deposition of Mr. Stohler (Delco's special investigator), an attorney read from a Delco bulletin instructing purchasers of its starters, "[D]o not install a bus bar bracket or de-population stud on the B plus starter terminals as these apply excess mechanical loads and create a safety hazard." Aplt. App. at 1300–01. Mr. Stohler was later asked if capped nuts could be used for B+ terminals on the subject truck model, and he responded that they should not because "they can bottom out on some type[s] of terminals so you couldn't get that tight connection." *Id.* at 1329. The problem with capped nuts, he explained, was that they can "be very deceiving as far as whether or not you have something tight." *Id.* at 1331. Mr. Stohler had this to say about who provided which parts: "[Delco] suppl[ies] . . . an interior nut on the solenoid, and we have an exterior, which they take off, put their cables on and then torque it back down. So we supply those nuts. Anything additional to that, they supply." *Id.* at 1327.[10]

[10] Freightliner interprets this testimony to mean "that Delco Remy is responsible for the nut on the B+ terminal, and not" Freightliner. Aplee. Reply Br. at 3. A juror might agree. Then again, he might not. Not that long after Mr. Stohler made this comment, he was asked, "If that had been a tight connection and a proper connection according to Delco standards . . . would there have been

(continued...)

Seeking clarification, the attorney later asked him,

> So you're not necessarily going to worry about what the wires look like that are connected to it because you're just selling the starter with the nut on it, and then it's up to the [purchaser] to make the connections and replace it and put the proper torque on it; is that correct?

Id. at 1345. Mr. Stohler agreed that it was.

None of this testimony is a paradigm of clarity. Reading the transcripts, it is often unclear which part of the starter is under discussion, and the witnesses were not always as responsive to the questions as one might have hoped. Nevertheless, the testimony, such as it is, survives a JMOL challenge. This is so because the evidence surveyed above provided a basis for the jury to find that (1) Freightliner improperly used a bus bar, and (2) Freightliner improperly used a capped nut in its starter. Kechi needed nothing more to surmount the motion for JMOL.

Though Freightliner makes much hay of Mr. Martin's view that the connection likely was not loose when Kechi purchased the subject truck, that view is irrelevant to Kechi's theory of liability. Kechi never argued that the connection was loose from the moment it acquired the truck. Its argument has

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[10](...continued)
any heat escaping that connection?" Aplt. App. at 1351. He responded, "[T]here'd be no problem with that connection." *Id.* Given that statement, and given the fact that his earlier remarks left open the possibility that Freightliner *could* have replaced the nut on the B+ terminal, a juror could have inferred that Freightliner, and not Delco, was responsible for the nut on the B+ terminal.

always rested on the supposition that the design defect *led to* the loose connection, and the loose connection in turn led to the fire. And that theory is entirely consistent with what the jury heard about capped nuts and bus bars. *See id.* at 1300–01 ("[D]o not install a bus bar bracket or de-population stud on the B plus starter terminals as these apply excess mechanical loads and create a safety hazard."); *id.* at 1329 (capped nuts "can bottom out on some type[s] of terminals so you couldn't get that tight connection"); *id.* at 1331 (capped nuts can "be very deceiving as far as whether or not you have something tight").

Freightliner's suggestion that Kechi's case rested on an "illogical" narrative whereby "the nut magically backed off the stud," Aplee. Opening Br. at 13, fares no better. If Freightliner means to say that the loosening of a connection over time is "illogical" and "magical," that is simply not so. *Cf. In re Rhoten*, 397 F. Supp. 2d 151, 165 (D. Mass. 2005) (finding negligence where a "failure to affix the proper locking device to . . . power cords . . . caused the *development of the loose connections*," which in turn caused an electrical fire (emphasis added)). In *Smith*, to be sure, the Kansas Supreme Court did hold that a directed verdict was properly granted against the plaintiffs when they had no evidence that loose electrical connections in a mobile home existed at the time the mobile home left the manufacturer's control. *See* 549 P.2d at 1035. But the court did so because the plaintiffs' expert "specifically testified that he looked for an[d] found no direct evidence of loose connections," but "simply inferred that somewhere in that

area there was a loose electrical connection," and provided no reason to think it was the fault of the manufacturer. *Id.* This is quite a different case. Kechi presented the testimony of two individuals, both thoroughly acquainted with the engineering of the starter at issue, both of whom found the connections loose, and both of whom provided reasons to trace the looseness back to the original design.[11]

Freightliner's speculations about what may have transpired after Kechi bought the subject truck likewise do nothing to shake the district court's JMOL ruling. Mr. Martin testified that the exemplar cable he inspected was "essentially . . . identical" to that in the subject truck, an opinion he formed after visually examining the two cables and noticing that the exemplar cable said "Freightliner" on it and had what Mr. Martin "believe[d] to be a Freightliner number" written on it as well. Aplt. App. at 569–70. The exemplar cable had the same configuration as the subject truck's cable, including the alleged design defects that led to the fire. Given this explanation, it was reasonable of Mr. Martin to rely upon the exemplar, and also reasonable of the jury to base its own inferences on his comparison. *Cf. Kerrigan v. Maxon Indus., Inc.*, 223

[11] Freightliner also relies upon *Jacobson v. Ford Motor Co.*, 427 P.2d 621 (Kan. 1967), for this point, but *Jacobson* dealt with an incomplete record, a car that had been involved in an accident, and no apparent evidence that the defect existed at the time it left the manufacturer's control, *see id.* at 623–24, none of which can be said here.

F. Supp. 2d 626, 642–43 (E.D. Pa. 2002) (permitting an expert witness to testify regarding an exemplar where it and the subject machine "were manufactured with the same specifications," even though one "was in a different condition, whether due to poor maintenance or to the accident or otherwise"). Mr. Martin's analysis of the exemplar tends to suggest that the defect accompanied the starter off Freightliner's lot.

Furthermore, on direct examination, Mr. Day, the man in charge of the machine shop, was asked "whether or not any large repairs were done to the truck" in the sense of anything "other than routine oil changes, things of that nature." Aplt. App. at 248. His response was definitive: "No. Other than the clutch being changed. Nothing else happened to it." *Id.* This testimony further supported Kechi's position that it acquired the subject truck with the defect. *Cf. Donegal Mut. Ins. v. White Consol. Indus., Inc.*, 852 N.E.2d 215, 227 (Ohio Ct. App. 2006) (finding sufficient evidence that a design defect was present when it left the manufacturer's control where the owner of the product testified that no repairs had been made to it).

Freightliner notes, however, that a third party modified the truck before it came into Kechi's possession and that the modifications "no doubt required re-routing of the wiring to accommodate the new features." Aplee. Opening Br. at 13. It would have been inappropriate for the district court to grant Freightliner's motion for JMOL on the basis of such a speculative assertion, when a jury could

just as reasonably infer from Kechi's evidence that the defect existed at the time Freightliner relinquished control of the subject truck. All of which is to say that there was sufficient evidence from which the jury could reasonably have inferred the correctness of Kechi's theory, and that was all it needed to survive the motion for JMOL. *See, e.g.*, *Bannister v. State Farm Mut. Auto. Ins. Co.*, 692 F.3d 1117, 1126 (10th Cir. 2012).

Freightliner maintains, ostensibly as a separate argument from its claims regarding the elements of strict products liability, that Kechi's case was impermissibly built upon the "stacking of inferences." Aplee. Opening Br. at 19. The inferences it discerns are (1) "that the design of the exemplar truck included a bus bar and cap nut"; (2) that the exemplar truck's design reflected that of the subject truck; and (3) "that a bus bar and cap nut [were] present at the time the truck left [Freightliner's] control." *Id.* at 20–21.

"[P]iling presumption and inference upon presumption and inference" is not allowed in Kansas, as "a burden of proof may not be met by mere conjecture." *McKenzie v. N.Y. Life Ins. Co.*, 112 P.2d 86, 90 (Kan. 1941). In an instructive passage, the *McKenzie* court recited the presumptions and inferences necessary to substantiate liability:

> To find otherwise the jury would be compelled to presume or infer, in the absence of any evidence on the matter, that the drinking glass had contained bromides; that Dr. McKenzie had taken bromides from it; that the dose was an *overdose*; that such overdose was taken *accidentally* and that such accidental

> overdose was the cause of death without regard to the acute and chronic disease of vital organs disclosed by the post-mortem examination . . . .

Id. It does not take much to see how inapplicable this language is to the case at bar. *McKenzie* mentions five inferences; each is necessary *in combination* to reach the result. *See id.* Here, the only inferences the jury would have to draw from the evidence to find the element satisfied would be either (1) that the identity of the exemplars with the subject truck parts suggests that the defects existed at the time the truck left Freightliner's control, *or* (2) that the testimony that Kechi never had significant repairs done suggests the same. Both are reasonable, and each is sufficient *standing alone*.

In recognition of the fact that it will often be difficult to prove with direct evidence the control element, the Kansas Supreme Court has declined to unsettle a jury verdict where the element was met purely on the basis of testimony that a defective part had not been tampered with after purchase. *See Dieker*, 73 P.3d at 147.[12] There is even less reason to do so in the present case, where the exemplar testimony militates in favor of the same result. Accordingly, all of the elements of strict products liability were sufficiently met for the jurors to cast their votes. We therefore affirm the district court's order denying Freightliner's motion for

[12] *Dieker* mentions other facts in its analysis, but none go to the question of whether the defect may have arisen later, which is the precise point at issue here. *See* 73 P.3d at 147.

JMOL.

B

The JMOL issue resolved, we next consider Freightliner's argument that Kechi's experts should not have been allowed to testify. Expert testimony in federal court is governed by Federal Rule of Evidence 702,[13] which provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Reliability is looked at in light of a number of non-exhaustive, "nondispositive factors: (1) whether the proffered theory can and has been tested; (2) whether the theory has been subject to peer review; (3) the known or potential rate of error; and (4) the general acceptance of a methodology in the relevant scientific community." *103 Investors I, L.P. v. Square D Co.*, 470 F.3d 985, 990 (10th Cir.

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[13] The parties correctly agree that federal law governs this question. *See Sims v. Great Am. Life Ins. Co.*, 469 F.3d 870, 879 (10th Cir. 2006) (noting that the doctrine of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), does not govern Federal Rules of Evidence that were passed by Congress as part of the original Rules); *see also* An Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub. L. No. 93-595, 88 Stat. 1926 (1975) (Congress enacting Rule 702); *Huss v. Gayden*, 571 F.3d 442, 452 (5th Cir. 2009) (noting that the Federal Rules of Evidence govern the admissibility of expert testimony in a diversity case); *US Salt, Inc. v. Broken Arrow, Inc.*, 563 F.3d 687, 691 (8th Cir. 2009) (same).

2006). We have emphasized that this framework is a "flexible" one, *United States v. Turner*, 285 F.3d 909, 912 n.4 (10th Cir. 2002), and have acknowledged a district's court's "broad discretion to consider a variety of other factors," *Dodge*, 328 F.3d at 1222.[14]

Freightliner challenges the reliability of both of Kechi's experts. As explained shortly, Mr. Birmingham's opinions were reliable because he followed a methodical, scientific process, and because his failure to interview two employees of the machine shop was not fatal in light of his thorough investigation of the scene and compelling reasons for tracing the fire to the subject truck. Similarly, Mr. Martin's opinions were reliable because he presented a detailed

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[14] In Kechi's view, Freightliner fails to argue the proper standard of review on this issue—abuse of discretion—and thereby waives any claim against the testimony of either witness. But in its first brief, Freightliner did indeed clearly and accurately state the proper standard of review. *See* Aplee. Opening Br. at 24 ("This Court reviews *de novo* whether the trial court properly performed its role as 'gatekeeper,' and reviews for an abuse of discretion the manner in which the role is performed."); *United States v. Allen*, 603 F.3d 1202, 1212 (10th Cir. 2010) (stating the same). Although Kechi takes Freightliner to task for not reiterating this same standard every time it articulates the district court's purported error, our law does not require such a strained, technical, impractical application of briefing standards. *See* Fed. R. App. P. 28(a)(8)(A) (providing that an appellant's argument section in its brief "must contain . . . appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies"). Freightliner properly alerted us to the appropriate standard of review and then explained the errors it believes constitute abuses of discretion. In so doing, it saved us the burden of "mak[ing] arguments for [it]," *United States v. Yelloweagle*, 643 F.3d 1275, 1284 (10th Cir. 2011), and thus did not waive anything on appeal as respects the standard of review governing this issue.

theory as to how the fire began, based on his extensive training, his diligent inspection of the scene and the subject truck, and his use of trustworthy exemplars. As a result, we affirm the district court's decision to allow both experts to testify.

1

It is Freightliner's position that Mr. Birmingham, the fire-origin expert, should not have been allowed to testify because he failed to investigate "numerous burn patterns throughout the building," and because he neglected to account for the possibility that the fire may have been started by a wood-burning stove in the shop or by the disposal of its ashes in a plastic container. Aplee. Opening Br. at 33. Along the same lines, Freightliner finds that Mr. Birmingham's decision not to interview two employees at the shop rendered his investigation into the fire fatally defective and violated the National Fire Protection Association's "NFPA 921" recommendations for fire investigations.

Freightliner's assertions regarding Mr. Birmingham's investigation are not borne out by the record. First, as Kechi rightly notes, Mr. Birmingham flatly and repeatedly stated that he *was* familiar with NFPA 921 and *did* follow it in his investigation. *See* Aplt. App. at 1147–48, 1180 (*Daubert* Hr'g Tr., dated Jan. 4, 2012). And there is no evidence to the contrary. Furthermore, even if the district court had questioned the credibility of this testimony (which it did not), that would not have been an appropriate reason to exclude it. *See Compton v. Subaru*

of Am., Inc., 82 F.3d 1513, 1520 (10th Cir. 1996) (holding that a district court properly allowed an expert to testify despite an "extremely low" opinion of his credibility because "the weight and credibility of [his] testimony were issues for the jury"), *overruled on other grounds by Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *see also Lapsley v. XTEK, Inc.*, 689 F.3d 802, 805 (7th Cir. 2012) ("A *Daubert* inquiry is not designed to have the district judge take the place of the jury to decide ultimate issues of credibility and accuracy."). Moreover, assuming *arguendo* that it could be demonstrated that Mr. Birmingham did not follow NFPA 921, it is far from evident that, in itself, this would compel exclusion. *See Russell v. Whirlpool Corp.*, 702 F.3d 450, 455 (8th Cir. 2012) (holding that while "NFPA 921 qualifies as 'a reliable method endorsed by a professional organization,'" it is not "the *only* reliable way to investigate a fire" (quoting *Fireman's Fund Ins. Co. v. Canon U.S.A., Inc.*, 394 F.3d 1054, 1058–59 (8th Cir. 2005)) (internal quotation marks omitted)).

Moreover, Mr. Birmingham's failure to speak with the two employees did not render his opinion unreliable under Rule 702. Mr. Birmingham had conducted over 1000 fire investigations prior to the hearing, more than two dozen of which concerned vehicles; he had worked in the field since 1979; and he had attended "numerous" training and certification seminars, Aplt. App. at 1146. At the *Daubert* hearing, Mr. Birmingham testified that after inspecting the area and the fire patterns, he "narrowed the area of origin down to" the subject truck. *Id.* at

1142. It was no abuse of discretion for the district court to find this investigation sufficiently reliable for Mr. Birmingham to appear before the jury.

Freightliner presents no authority holding that an expert is required to interview every potential source of information in order to pass the *Daubert* test. It is especially noteworthy that Mr. Birmingham indicated that he surveyed the fire patterns on the premises and "narrowed" the potential sources of the fire down to the subject truck, *id.*, as his wording suggests that he conducted a broad inspection of the shop and excluded other potential origins before arriving at his theory. That is exactly how an expert is supposed to operate. *See* Fed. R. Evid. 702 advisory committee's note (2000) (noting that a district court should ask "[w]hether the expert has adequately accounted for obvious alternative explanations" in evaluating reliability under Rule 702); *cf. In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1188 (10th Cir. 2009) (giving persuasive weight to advisory committee notes while interpreting the Federal Rules of Civil Procedure); *Martinez v. Sullivan*, 881 F.2d 921, 928 (10th Cir. 1989) (giving persuasive weight to advisory committee notes while interpreting the Federal Rules of Evidence); *cf. also Square D Co.*, 470 F.3d at 990–91 (determining that the district court did not abuse its discretion in excluding expert testimony where the expert fire investigator failed to discount another possible cause of the fire).

As Kechi fairly remarks, if Freightliner had concerns about the thoroughness of Mr. Birmingham's investigation, it could easily have expressed

those through cross-examination and closing argument. *Cf. Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1519 (10th Cir. 1995) (concluding that expert testimony was not impermissibly speculative in part because the other side "cross-examined [the] expert on the asserted weaknesses of [the expert's] assumptions and presented expert testimony in its favor. While the weaknesses in the data upon which [the] expert relied go to the weight the jury should have given her opinions, they did not render her testimony too speculative as a matter of law."). There was no abuse of discretion in admitting Mr. Birmingham's testimony.

2

Freightliner believes that testimony by Kechi's other expert, Mr. Martin—the electrical engineer who studied the fire's cause—was also admitted in error. In particular, Freightliner argues that because "Mr. Martin did not consult, review, or analyze a single design drawing relating to" the subject truck, he "possessed no knowledge of [Freightliner's] design process" and thus "should not have been allowed to offer any opinions" regarding the truck. Aplee. Opening Br. at 26. Freightliner targets Mr. Martin's testimony regarding the exemplar parts in particular, as he failed to personally examine the exemplar truck, which allegedly "was of unknown origin, unknown use, and unknown repair history." *Id.* at 27. Similarly, according to Freightliner, Mr. Martin had no assurance that the exemplar cable was identical to the one from the subject truck or that it was manufactured by the same company.

Freightliner finds further fault with Mr. Martin for flouting the recommendations advanced by NFPA 921—specifically, its instruction to exclude all potential causes of a given fire by process of elimination—which he did not heed when he "rest[ed] fully on the assumptions of Mr. Birmingham as to fire origin, and subsequently concerned himself and his opinions only with the incident truck." *Id.* at 29–30. Lastly, Freightliner takes issue with Mr. Martin's testimony at the hearing regarding how insulation in the truck spread the fire, as he "admitted that he was only *assuming* that the cables were insulated" with a flammable substance and had no actual knowledge on the issue. *Id.* at 30.

As with its grievances concerning Mr. Birmingham's reliability under Rule 702, Freightliner's problems with Mr. Martin's testimony all boil down to a complaint that he did not perform the investigation a different expert might have performed; the grievances do not shake the district court's reliability determination regarding the investigation Mr. Martin actually *did* perform. That investigation was unquestionably thorough. At the *Daubert* hearing, Mr. Martin recounted his forty-one years of experience in the field and his investigation of approximately 1200 fires, roughly 150 of them involving vehicles. He then presented a detailed theory as to how the fire began, with reference to highly specific components of both the exemplar engine and the destroyed truck's

engine, both of which he had spent considerable time studying.[15] The district court acted well within its discretion in finding his explanation sufficient to permit him to testify as an expert.

Freightliner's protestations notwithstanding, the law did not require Mr. Martin to consult design drawings in order to offer his opinion on the fire, given that he based his opinions on a perfectly plausible alternative method: extensive study of the subject truck's engine and comparison of that engine with an exemplar. *Cf. Bourelle v. Crown Equip. Corp.*, 220 F.3d 532, 536–37 (7th Cir. 2000) (affirming a district court that properly excluded expert testimony where the expert failed to prepare design drawings *and* failed to do anything else that would have rendered his opinion reliable under *Daubert*). Moreover, Mr. Martin offered a perfectly plausible explanation for why he felt no need to examine any design drawings—that is, because the physical evidence at the scene of the fire was sufficient in view of the fact that he understood "how the system is configured." Aplt. App. at 1205. To impose the narrow and confining

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[15] Mr. Martin's theory of the fire, as expressed at the *Daubert* hearing, was as follows: Mr. Birmingham directed him to the subject truck as the likely point of origin. While inspecting the area around the truck, Mr. Martin discovered that two of the terminals on one of the cables were welded together, suggesting the work of excessive heat. He also noticed that one of the nuts was loose, and he was aware that such looseness could produce heat. His inspection of the insulation at the scene and his comparison with the insulation of the exemplar cable indicated to him that the fire had spread through the insulation material.

requirement on an expert that Freightliner proposes would convert the "flexible" *Daubert* inquiry, *United States v. Baines*, 573 F.3d 979, 988 (10th Cir. 2009), into an overbearingly rigid one.

Freightliner's contentions regarding the exemplars are similarly unavailing. Mr. Martin explained that he relied upon the exemplar cable to form an opinion about the fire because it had a part number consistent with the part number of the subject truck's cable, because it said "Freightliner" on it, and because the cables had the same configuration. These are all good enough reasons for purposes of *Daubert*'s reliability inquiry. Of course Mr. Martin could not be 100% sure the cables were identical, but Rule 702 does not require "absolute certainty." *Gomez*, 50 F.3d at 1519 (quoting *Jones v. Otis Elevator Co.*, 861 F.2d 655, 662 (11th Cir. 1988)) (internal quotation marks omitted). All that is required is "that the method employed by the expert in reaching the conclusion is scientifically sound and that the opinion is based on facts that satisfy Rule 702's reliability requirements," *Goebel v. Denver & Rio Grande W. R.R. Co.*, 346 F.3d 987, 991 (10th Cir. 2003), and Mr. Martin's process with the exemplar cable met that standard.[16]

Freightliner's argument regarding Mr. Martin's supposed noncompliance

[16] Mr. Martin's comments at the *Daubert* hearing regarding the exemplar truck were not as extensive as those he offered about the exemplar cable. However, for his belief that the exemplar truck was the same model as the subject truck, he relied on his own visual inspection of the burned truck and the photographs, as well as the assurances of his colleague Mr. Birmingham—all reasonable sources for an expert.

with NFPA 921 is as fruitless as its similar argument with respect to Mr. Birmingham. Like Mr. Birmingham, Mr. Martin *did* swear that he followed the recommendations made in NFPA 921, *see* Aplt. App. at 1206–07; as with Mr. Birmingham, the district court had no evidence to the contrary; and, as discussed, NFPA 921 is not the be-all and end-all in the reliability of fire investigations, *see Russell*, 702 F.3d at 455 (noting that while "NFPA 921 qualifies as a reliable method endorsed by a professional organization," it is not "the *only* reliable way to investigate a fire" (citation omitted) (internal quotation marks omitted)).

Regarding Freightliner's argument that Mr. Martin failed to exclude other potential sources of the fire outside of the truck, and instead improperly deferred to his colleague Mr. Birmingham on that point, Freightliner makes no showing that such deference was improper. It is not unusual for courts to distinguish between expert testimony on a fire's cause and expert testimony on a fire's origin. *See, e.g.*, *Weisgram v. Marley Co.*, 169 F.3d 514, 519 (8th Cir. 1999) (permitting a fire investigator to testify about the origins of a fire, but not its cause). Kechi reasonably points out that Mr. Martin was only there for the former. *See* Aplt. App. at 1207 (Mr. Martin testifying at the *Daubert* hearing that Mr. Birmingham was the origin expert). As such, his charge was to ascertain how a fire might have started in the subject truck, not how it might have begun elsewhere in the shop. *See id.* at 1207–08 (Mr. Martin observing that Mr. Birmingham completed the origin investigation). Freightliner offers no authority suggesting that such a

division of labor is inappropriate, and we have no reason to suppose the district court abused its discretion in allowing it. *See, e.g.*, *Hartford Ins. Co. v. Gen. Elec. Co.*, 526 F. Supp. 2d 250, 255 (D.R.I. 2007) (discussing a case involving separate experts on fire cause and fire origin).

Freightliner next characterizes Mr. Martin's theory that the insulation spread the fire as overly speculative. Though expert testimony can properly be excluded as unreliable where it is based on "assumptions . . . that [are] not supported by the evidence," *Truck Ins. Exch. v. MagneTek, Inc.*, 360 F.3d 1206, 1213 (10th Cir. 2004), Mr. Martin's comments on the insulation were supported by his inspection of the incinerated insulation at the scene, his comparison of that insulation with the insulation in the exemplar cable, and his many years of experience studying fires that spread through insulation. The comments of Mr. Martin did not render his proffered testimony unreliable.[17] To conclude, we see no abuse of discretion in the district court's decision to permit Messrs.

[17] In its reply brief, Freightliner focuses on the district court's inconsistency in excluding Mr. Birmingham from discussing the insulation issue but then allowing Mr. Martin to explore the matter from the stand, "even though he admitted numerous times that he was not retained to offer origin opinions." Aplee. Reply Br. at 7. This is not an argument about Mr. Martin's qualifications to testify as an expert, but about what he said while so testifying. Furthermore, as an argument omitted from the opening brief and inadequately discussed in the reply brief, it is not properly presented to us. *See, e.g.*, *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) ("[W]e routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief.").

Birmingham and Martin to testify, and consequently affirm its orders allowing them to do so.

C

Our final issue concerns the district court's decision to exclude most of Kechi's damages evidence. Although this ruling presents a closer question, we nonetheless find that—as with the preceding issues—the district court acted properly in this regard. We therefore affirm its order.

1

Kechi offered its damages evidence in the form of lay opinion testimony by Messrs. Day and Caster. As a matter of federal law, lay opinion testimony is governed by Federal Rule of Evidence 701. That rule provides that

> [i]f a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. R. Evid. 701. Here, the dispute is over subsection (c), i.e., whether Kechi's damages evidence was actually expert testimony and thus inadmissible as lay testimony. We have explained that Rule 701(c) is covered by the *Erie* doctrine,[21] as it was added to the Rules by amendment under the Rules Enabling Act, 28

[21] *Erie R.R. Co.*, 304 U.S. at 78 ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any [diversity] case is the law of the state.").

U.S.C. § 2072, and was therefore not an act of Congress outside *Erie*'s scope. *See James River*, 658 F.3d at 1218. As such, in the event of a conflict between Rule 701(c) and a state evidentiary rule, the federal rule must yield to its state counterpart unless "application of the federal rule represents a valid exercise of the rulemaking authority." *Id.* (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 422 (2010) (Stevens, J., concurring)) (internal quotation marks omitted). Application of a federal rule is not such a valid exercise where it "abridge[s], enlarge[s] or modif[ies] *any* substantive right." *Id.* (quoting *Shady Grove*, 559 U.S. at 422 (Stevens, J., concurring)) (internal quotation marks omitted).

Our approach in the case at bar is as follows. We first inquire whether federal law supports excluding the damages testimony and conclude that, if applied, federal law would counsel in favor of upholding the district court's decision as a proper exercise of its discretion. We then turn to Kansas law. If state and federal law are consistent, the evidence could be subject to exclusion under either code. However, if Kansas law is demonstrably inconsistent with federal law such that it would point toward admission of the evidence, we would ask whether application of the federal rule affects a substantive right—and, if it would not, the federal rule would control, permitting exclusion of the damages testimony.

In this case, however, we are able to resolve the issue at the second step of

our analytical process because Kechi has failed to evince *any* conflict between state and federal law. Consequently, we refrain from opining on whether application of federal law affects a substantive right. We likewise abstain from predicting how the Kansas courts would construe the import of their state's law regarding the damages testimony at issue here. *Cf. Proctor & Gamble Co. v. Haugen*, 222 F.3d 1262, 1280 (10th Cir. 2000) (declining to weigh in on a question of state law in the absence of guidance from the state's highest court); *cf. also Royal Capital Dev., LLC v. Md. Cas. Co.*, 659 F.3d 1050, 1055 (11th Cir. 2011) (noting that "an authoritative statement from [a state] supreme court" concerning state law "is much better than a conjectural statement" from a federal court on state law). In other words, absent a showing by Kechi of a federal-state legal incongruity, we are content to operate on the premise that the two codes are consistent and would allow for the same outcome. Thus, crediting the district court's discretionary determination that the testimony of Messrs. Day and Caster was too complex to come in under Rule 701, we affirm its decision that Kechi was not permitted to introduce it.

2

Consistent with the framework discussed above, the first predicate question is whether the damages evidence—either as to the real estate or as to the heavy

equipment[18]—was properly excluded under federal law. In answering this question, we are guided by the settled principle that "[a] district court has broad discretion to [make decisions] under Rule 701." *United States v. Banks*, 761 F.3d

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[18] As indicated in the fact section *supra*, the jury was instructed to assess damages on only three items: (1) the Gator, (2) the property in the Gator, and (3) certain "shop supplies and equipment." Aplt. App. at 129 (capitalization altered). Presumably, since the district court allowed the jury to award damages on these three items, while excluding damages testimony as to the other heavy equipment and real estate and likewise omitting any instruction on either, it believed the evidence *was* proper on the three items. However, Freightliner makes a number of confusing statements that could be read to suggest that it understands the district court to have admitted *all* of Kechi's damages evidence (that is, not just the three items), and that it understands itself to be arguing chiefly for *reversal*. *See, e.g.*, Aplee. Opening Br. at 1 (framing the issue as "[w]hether the trial court improperly allowed Mr. Day to testify pursuant to [Federal Rule of Evidence] 701 as the alleged 'owner' of the damaged property"); *id.* at 38–39 ("Mr. Day was . . . *permitted* . . . to offer testimony relating to the heavy equipment and personal property that was damaged in the fire." (emphasis added)); *id.* at 39 ("[T]he Trial Court improperly allowed Mr. Day to testify as owner."); *id.* at 40 ("Mr. Day is not an owner of the property . . . , and his testimony *should have been* excluded." (emphasis added)). Elsewhere, Freightliner appears to acknowledge in passing that the district court excluded at least some of the testimony, but it is entirely unclear what testimony it believes was *admitted*. In sum, it is impossible to decipher Freightliner's account of the events at trial, though its brief is replete with mistaken suggestions that it largely lost on the damages question when, in fact, it largely won.

Given our institutional "preference for affirmance," *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011), Freightliner's apparent confusion over the district court's exclusion of most of the damages evidence does not affect our analysis of that decision. It is another matter, however, with respect to the evidence supporting the damages that were awarded. Because Freightliner would have to seek reversal if it wanted to question the admission of that evidence, and because it fails to make any specific argument to that effect, we will not make an argument on its behalf, *see Yelloweagle*, 643 F.3d at 1284, and will instead affirm the district court's award of damages. The discussion that follows above does not encompass the items on which damages were awarded.

1163, 1200 (10th Cir.) (quoting *United States v. Garcia*, 994 F.2d 1499, 1506 (10th Cir. 1993)) (internal quotation marks omitted), *cert. denied*, --- U.S. ----, 135 S. Ct. 308 (2014); *see United States v. Goodman*, 633 F.3d 963, 969 (10th Cir. 2011) (observing the district court's sound "discretion to exclude lay witness testimony for other reasons contemplated by the Federal Rules of Evidence, among them . . . Rule 701"); *Gust v. Jones*, 162 F.3d 587, 595 (10th Cir. 1998) ("[T]he admission of lay opinion testimony is within the sound discretion of the trial court."); *Getter v. Wal-Mart Stores, Inc.*, 66 F.3d 1119, 1124 (10th Cir. 1995) (underscoring the discretionary nature of the district court's "determination of a lay witness's qualification to testify" under Rule 701).

Our strong deference to such rulings is grounded in "the trial court's familiarity with the case and experience in evidentiary matters." *Elm Ridge Exploration Co.*, 721 F.3d at 1213 (quoting *Abraham v. BP Am. Prod. Co.*, 685 F.3d 1196, 1202 (10th Cir. 2012)) (internal quotation marks omitted). Thus, when assaying for abuse of discretion, we will not unsettle the district court's decision absent "a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Headwaters Res., Inc. v. Ill. Union Ins. Co.*, --- F.3d ----, 2014 WL 5315090, at *11 (10th Cir. 2014) (quoting *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997)) (internal quotation marks omitted).

In finding no abuse of discretion here, we are guided in part by our

reasoning in *James River*. By way of background, in *James River* we held that the district court committed reversible error when it allowed a landowner to testify to his property's value as a lay witness under Rule 701. We did so on the basis that this exercise would have required the landowner "to calculate a post-fire estimate of the pre-fire value of a dilapidated, condemned, 39-year old building." *James River*, 658 F.3d at 1214. Such calculations, we said, necessitated "[t]echnical judgment" and were based partly on the landowner's experience in real estate and his reliance "on a technical report by an outside expert." *Id.* at 1214–15. In other words, we reasoned, this was not a situation where the landowner's "opinions or inferences [did] not require any specialized knowledge and could be reached by any ordinary person." *Id.* at 1214 (quoting *LifeWise Master Funding v. Telebank*, 374 F.3d 917, 929 (10th Cir. 2004)) (internal quotation marks omitted). Importantly, we also noted that "the Federal Rules of Evidence generally consider landowner testimony about land value to be expert opinion." *Id.* at 1215.

To be sure, *James River* did not entirely foreclose the possibility of deeming property-value testimony admissible under Rule 701. We acknowledged the same in a footnote—*viz.*, that "[a]lthough . . . the Rule 702 advisory committee note point[s] to landowner testimony on value as being expert in nature, with proper foundation, it may *in the appropriate case* be admitted as lay opinion under Rule 701." *Id.* at 1215 n.1 (emphasis added) (citation omitted).

Yet, in no uncertain terms, we instructed that the district court's inquiry turns on the complexity of the property right at stake and, more specifically, on whether the "valuations [are] based on straightforward, common sense calculations." *Id.* at 1216 (internal quotation marks omitted).

Looking to *James River*, first of all, we are satisfied that the district court operated within a permissible range of discretion in finding that Mr. Day's proffered testimony regarding the heavy equipment at issue was too complex to qualify for admission under Rule 701. The machines involved in this case were large, specialized, expensive pieces of equipment, and Mr. Day's descriptions of them sufficiently show that his opinion of their worth was based upon his specialized, technical, professional experience working with them. *See, e.g.*, Aplt. App. at 315 (Mr. Day explaining his valuation of the lawn mowers with reference to the fact that they "were 25 horse, 60-inch cut. They're all hydrostat. They've got dual cooling on 'em. Dual oil filters."); *id.* at 316 (explaining his valuation of the tractor with reference to the fact that "it was a four-wheel drive, you know, farmers, four-wheel drive, they can put duals, it was equipped ready to put duals on the front and back if you needed to"); *see also* Aplt. Opening Br. at 10–11 (tallying up Mr. Day's estimates of the eight machines' values as in the several hundred thousand dollars range). In short, the district court did not abuse its discretion when it classified Mr. Day's testimony as grounded on technical knowledge of the sort possessed by an expert. By extension, the district court did

not abuse its discretion when it ruled that the damages testimony could not come in under the auspices of Federal Rule of Evidence 701.[19]

The testimony as to the valuation of the real estate—which would have been offered by Mr. Day and Mr. Caster—poses a slightly closer question.[20] Unlike the equipment, the real property does not seem to have been particularly complex. *See, e.g.*, Aplt. App. at 249 (Mr. Day describing the building as a "metal pole barn building with double truss wooden rafters. It was approximately 60 by 60 on the main part. And then we had an office on the east side that had a wall partition between it but it was attached and it was also a tin/wood structure."). Nonetheless, we do not believe the district court "exceeded the bounds of permissible choice in the circumstances," *Headwaters Res., Inc.*, 2014

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[19] In arguing that Mr. Day was qualified to testify to the value of the equipment under federal law as a lay opinion witness, Kechi emphasizes that Mr. Day was familiar with offers for the purchase of the wheel loader. It offers no caselaw to support its contention that this was sufficient to render him a competent lay witness. Furthermore, the argument deals with only one piece of equipment and does not surmount the bar set by *James River*, which counsels that the technical, specialized nature of an object strongly suggests that its valuation is the proper subject for expert testimony.

[20] In its initial order on this issue, the district court noted that *James River* dealt with real property and not personal property, which it characterized as "a *big* distinction." Aplt. App. at 94 (Order, filed Jan. 16, 2012). It did not cite any cases drawing such a categorical distinction, and *James River* is based in large measure on the complexity of the object being valued, and not at all on the legal status of the property. *See* 658 F.3d at 1214. As this very case proves, personal property can be just as complex—if not more so—than real estate. We therefore apply the same analysis to both the real and the personal property.

WL 5315090, at *11 (internal quotation marks omitted), by finding the building complex enough that its valuation qualified as a fitting subject of expert testimony. Notably, the *James River* opinion quoted approvingly from a Third Circuit case that held that

> [t]he prototypical example of the type of evidence contemplated by the adoption of Rule 701 relates to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences.

James River, 658 F.3d at 1214 (quoting *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1196 (3d Cir. 1995)) (internal quotation marks omitted). The valuation of the real estate (i.e., the machine shop), as simple as it may have been, was certainly more complicated than the valuation of the items in this list by an order of magnitude. Furthermore, as noted, *James River* emphasized that "the Federal Rules of Evidence generally consider landowner testimony about land value to be expert opinion." *Id.* at 1215. In addition, *James River* specifically highlighted the specialized knowledge required to estimate depreciation after a building is destroyed by fire, *see id.* at 1214 ("Technical judgment is required in choosing among different types of depreciation."), which is exactly the calculation Kechi's witnesses would have been required to make. Finally, Mr. Day indicated that he would be relying in part on an appraisal for his evaluation, much like the "technical report" relied upon by the witness in *James*

River, *id.* at 1215—yet another sign that his testimony was unfit for admission pursuant to Rule 701.

To summarize, we are satisfied that the district court properly exercised its discretion in concluding that the valuation testimony—both as to the heavy equipment and as to the real estate (i.e., the machine shop)—was too specialized to qualify as lay witness testimony. *See Goodman,* 633 F.3d at 969 (noting that even if other rationales might support the admission of testimony, "the district court *still has the discretion to exclude* [the] witness testimony" under Rule 701 (emphasis added)). We therefore will not disturb the district court's ultimate determination that this testimony could not be admitted under Rule 701.

3

Having concluded that federal law permits the exclusion of the damages testimony, we ask whether Kansas law interposes a conflict. As noted *supra*, however, Kechi has not attempted to argue that Kansas law dictates a different outcome. Reading its briefing very liberally, Kechi hints at a possible federal-state legal conflict, and the ensuing inquiry into the impact of the federal rule on substantive rights, when offering the conclusory remark that invoking federal law "would *abridge* [its] right to present the testimony of Jim Day, as evidence on the damages claim." Aplt. Opening Br. at 26. Even if our liberal construction is on target, Kechi's skeletal allusion is not enough. It is not a legally cognizable argument; rather, it is an unsubstantiated, unexplained, uncited assertion. As

such, we enjoy the discretion to disregard the assertion entirely and proceed on the premise that, for purposes of this case, Kansas law can be harmonized with federal law. We therefore affirm on that ground alone. *See, e.g.*, *Bronson*, 500 F.3d at 1104; *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 841 (10th Cir. 2005) (deeming several issues waived when the support for each consisted of "mere conclusory allegations with no citations to the record or any legal authority for support"); *United States v. Rodriguez-Aguirre*, 108 F.3d 1228, 1237 n.8 (10th Cir. 1997) (noting that the appellant bears the burden of tying all salient facts to his legal arguments).

In sum, to return to our starting matrix, it was not an abuse of the district court's discretion to find that the damages testimony could not come in under Federal Rule of Evidence 701, as it was specialized expert testimony that should have been offered pursuant to Rule 702, if offered at all. Because Kechi has not meaningfully argued that state law would permit the testimony, we conclude that the evidence, *under these circumstances*, was correctly deemed inadmissible. Accordingly, we hold that the district court did not err in precluding Messrs. Day and Caster from testifying as to damages.

IV

For the reasons presented above, we **AFFIRM** the district court's orders denying Freightliner's motion for JMOL, allowing Kechi's expert witnesses to

testify, and barring Kechi's lay witnesses from testifying as to damages.

Entered for the Court

JEROME A. HOLMES
Circuit Judge

(Rev. 3/3/08)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KECHI TOWNSHIP and EMPLOYERS, MUTUAL CASUALTY COMPANY Plaintiffs, v. FREIGHTLINER, LLC n/k/a DAIMLER TRUCKS NORTH AMERICA LLC, Defendant.	)	Case No. 10-1051-MLB-KGG

PRETRIAL ORDER

Pursuant to Fed. R. Civ. P. 16(e), a pretrial conference was held in this case before The Honorable Monti L. Belot, U.S. District Judge.

This pretrial order shall supersede all pleadings and control the subsequent course of this case. It shall not be modified except by consent of the parties and the court's approval, or by order of the court to prevent manifest injustice. *See* Fed. R. Civ. P. 16(d); D. Kan. Rule 16.2(c).

1. APPEARANCES.

The plaintiffs, Kechi Township and Employers Mutual Casualty Company, appeared at the pretrial conference through counsel, Kevin M. McMaster and Jennifer M. Hill of McDonald, Tinker, Skaer, Quinn & Herrington. The defendant, Freightliner, LLC n/k/a Daimler Trucks North America LLC, appeared through counsel, Kenneth R. Lang

and Matthew K. Holcomb of Hinkle Law Firm LLC.

2. NATURE OF THE CASE.

This is a product liability action involving claims of strict liability for defective design, negligent design, and breach of the implied warranty of fitness for a particular use.

3. PRELIMINARY MATTERS.

a. Subject Matter Jurisdiction. Subject matter jurisdiction is invoked under 28 U.S.C. § 1332 and is not disputed.

b. Personal Jurisdiction. The court's personal jurisdiction over the parties is not disputed.

c. Venue. The parties stipulate that venue properly rests with this court.

d. Governing Law. Subject to the court's determination of the law that applies to the case, the parties believe and agree that the substantive issues in this case are governed by the following law: Kansas substantive law, and more specifically, the Kansas Product Liability Act at K.S.A. 60-3301 et seq.

4. STIPULATIONS.

a. The following facts are uncontroverted:

1. In June of 2001, Kechi Township purchased a Model RL-70 2000 Freightliner truck, with vehicle identification number 1FY3HFBC9YHG94496.

2. On December 19, 2007, at or about 12:15 a.m., a fire occurred in Kechi

Township's shop building located at 900 East 69th Street North, Wichita, Kansas.

3. At the time of the fire, the Freightliner truck was parked inside the shop building.

4. On December 18, 2007, the day prior to the fire, the Freightliner truck was last operated at approximately 2:45 p.m. to 3:00 p.m. when it was parked inside the shop building by a Kechi Township employee.

5. Kechi Township employees used, among other things, a wood burning stove located inside of the shop building to heat the shop building.

6. The wood burning stove was operated on December 18, 2007.

7. The fire completely destroyed the Kechi Township shop, including all contents. None of the property could be salvaged.

b. The following documents constitute business records within the scope of Fed. R. Evid. 803(6) and may be introduced in evidence during trial without further foundation, subject to objections based solely on grounds of relevancy:

Not applicable.

c. Legible copies of exhibits may be used during trial in lieu of originals.

d. The parties have stipulated to the admission of the following trial exhibits:

1. Fire Investigative Report (FR-0001 to FR-0017), including all photographs.

2. Photographs of the fire, fire debris, and Kechi Township shop building premises

e. At trial, witnesses who are within the subpoena power of the court and who are officers, agents, or employees of the parties need not be formally subpoenaed to testify, provided that opposing counsel is given at least ten business days advance notice of the desired date of trial testimony. For purposes of this entire pretrial order, the calculation of "business days" does not include Saturday, Sunday, or any legal holiday as defined by Fed. R. Civ. P. 6(a)(4).

f. By no later than 6:30 p.m. each day of trial, counsel shall confer and exchange a good faith list of the witnesses who are expected to testify the next day of trial.

g. Witnesses listed by one party may be called by another party.

h. Exhibits listed by one party may be used by another party.

i. Authenticity and foundation of documents may be offered into evidence and no testimony as to foundation shall be required unless a party objecting to the admission of such document makes a written objection on the basis of foundation or authenticity no later than ten (10) days before trial.

j. Overlays, slide reproductions, and other forms of enlargements or enhancements that do not distort or destroy otherwise admissible exhibits are permitted without further foundation.

5. FACTUAL CONTENTIONS.

a. Plaintiff's Contentions.

Plaintiff Kechi Township purchased a Freightliner Model RL-70 2000 dump truck

for general use in its road maintenance and cemetery operations. While the dump truck never had any major malfunctions, it regularly had what could be described as difficulty starting. Kechi Township employees noted that the truck would sometimes stall or have difficulty starting. After several attempts the truck would eventually start and then operate normally.

On December 17, 2007, the truck was used during day time hours. It was moved into the Kechi Township shop around 3:00 p.m. The employees locked up the shop and left for the day. Later that evening the fire department was called to the scene. At the time of the arrival of the fire department, the township building was fully involved in fire and fire suppression efforts were only able to contain the fire from spreading to nearby structures. The building and all of its contents were totally destroyed.

Investigations by the Plaintiffs' experts revealed that the origin of the fire appeared to be in the engine compartment of the subject Frieghtliner truck. Investigation into the remaining evidence revealed a loose connection between the B+ terminal of the starter motor and the battery. Further, Freightliner used a depopulation stud or a bus bar to connect the B+ terminal to the other truck components, against the explicit instructions of the manuals for this model of starter, published by Delco Remy, the manufacturer of the start motor. Evidence from the investigation indicates also indicates that a "cap head" nut was used to make the connection at the B+ terminal. This type of nut was not sold with the starter and may not fully secure the connections made on the B+ terminal because it can bottom out before the connections are tight. None of the Kechi Township employees worked on the starter of the truck, nor was the truck ever serviced for problems in its starter.

Normal load currents passed through the connection at the B+ terminal regardless of whether the truck was turned on. Electrical currents, which passed through the loose connection crated more and more resistance over time and eventually produced extensive heat. At the time of the fire, Plaintiffs contend that combustibles near the loose connection were overheated. Most likely, the insulation on the associated cables and bus bar caught fire and ignited other materials around the starter motor.

Because there is no evidence that the "cap head" nut was replaced by Kechi Township or mechanics hired by Kechi, and because there is no evidence of the starter ever being repaired or replaced by anyone, the only reasonable conclusion is that when the Freightliner truck left Freightliner's control, it was defective. The use of the bus bar, in direct violation of the instructions from Delco Remy, created a potential hazard by not ensuring a tight connection at the B+ terminal. The use of a "cap head" nut created an additional hazard by increasing the likelihood of a loose connection at the B+ terminal. Loose connections result in increased resistance and consequently excessive heat escapes.

Plaintiff's experts researched whether the "cap head" nut was original to other Freightliner trucks by locating an exemplar truck. A truck was found and an identical nut had been employed in the manufacture of the exemplar truck. Therefore, Plaintiffs contend that the subject Freightliner truck was unreasonably dangerous at the time of its manufacture because it contained an inherently defective connection at a place in the engine that is always energized, thereby creating a potential safety hazard.

While the Sedgwick County Fire Department ruled that the cause of the fire was "undetermined", the Plaintiffs conducted extensive testing and believed there is sufficient and substantial evidence to support its experts' opinions on the cause and origin of the fire.

b. Defendant's Contentions.

Daimler Trucks North America LLC's Contentions:

Daimler manufactures commercial grade Freightliner trucks and manufactured the 2000 Model No. RL-70 Freightliner truck at issue in this case. Daimler is not liable to Plaintiffs for the damages sustained to the shop building and its content because there is no defect in the Freightliner truck**.** More specifically, Daimler is not liable for any alleged defect in the connection of the positive battery cable, the alternator output cable, and the cab power cable because no act or omission by Daimler resulted in said cables being attached in the manner in which they were. Plaintiff's defect allegations concern the attachment of the positive battery cable, the alternator output cable, and the cab power cable with the use of a bus bar and cap nut. However, the complained of bus bar and cap nut are not part of Daimler's design, nor are they parts that Daimler uses in any way. Furthermore, such parts were not part of the subject Freightliner when it left the possession or control of Daimler. Absent evidence of a defect, Plaintiffs' product liability claims fail.

Plaintiffs' damages, if any, were solely or partly the proximate result of its own negligence and/or contributory negligence, as no act or omission of Daimler was the proximate cause of Plaintiffs' alleged damages. Specifically, the fire was caused by Plaintiff Kechi Township's negligence in the use and operation of the wood burning stove, in that Plaintiff was negligent, through the actions of its employees, in removing hot ashes and coals from the wood burning stove and placing them in a plastic trash container. Plaintiffs have failed to rule out other potential causes of the fire as required by NFPA 921 which has been adopted by the federal courts as the scientific methodology for fire investigation. Furthermore, Plaintiff has failed to consider and eliminate causes associated with its own actions or inactions relating to the use of the wood burning stove . Plaintiff has also failed to rule out the acts or omissions of persons or entities other than

Daimler, which were not under the control of Daimler Specifically, post design and manufacture by Daimler, the incident truck was subject to substantial modification when a dump bed was installed by Midwest Truck Equipment, an independent third party not under the control of Daimler. To this extent, Plaintiffs' claims are also barred in whole or in part to the extent that it is determined the product at issue may have been materially changed or altered after leaving the manufacturer's possession.

Additionally, Plaintiffs' claims are not of the extent and nature as alleged, in that Plaintiffs' damages calculations are excessive, as Plaintiffs failed to properly research and calculate the fair market value of its equipment and bases its damages on replacement cost, and Plaintiffs cannot recover economic loss damages from Daimler. Plaintiff lacks privity of contract, and Plaintiffs did not provide notice of breach of warranty and/or notice of defect.

6. THEORIES OF RECOVERY.

1. List of Plaintiff's Theories of Recovery. Plaintiff asserts that it is entitled to recover upon the following alternative theories:

(1) Products liability - strict liability (Count I)

(2) Products liability - negligent design (Count II)

(3) Products liability - breach of warranty. (Count III)

2. Essential Elements of Plaintiff's First Theory of Recovery (i.e., strict liability). Subject to the court's determination of the law that applies to this case, Plaintiffs believe that in order to prevail on this theory of recovery, plaintiffs have the burden of proving the following essential elements:

(1) Defendant Daimler Trucks North America is engaged in the business of manufacturing Model RL-70 2000 Freightliner trucks.

(2) That the Freightliner truck was in a defective condition and unreasonably

dangerous to persons who might expect to use the product;

(3) That the Freightliner truck was defective in its design and such defects existed at the time the product left Defendant's hands;

(4) The Freightliner truck was expected to reach and did reach the hands of the Kechi Township without substantial change in the condition in which it was manufactured or sold.; and

(5) That the defect(s) in the Freightliner truck was the cause of or contributed to cause Plaintiffs' damages

c. Essential Elements of Plaintiff's Second Theory of Recovery (i.e., Negligent Design). Subject to the court's determination of the law that applies to this case, the plaintiffs believe that in order to prevail on this theory of recovery, Plaintiffs have the burden of proving the following essential elements:

(1) Daimler Trucks North America failed to use ordinary care in the design of the Freightliner truck and such failure to use ordinary care caused the Freightliner truck and starting motor to be defective in its design;

(2) The design was unreasonably unsafe for the use for which it was intended;

(3) Evidence of an alternative design may be considered to prove the design defect; and

(4) In showing a design defect, plaintiffs must use the consumer expectations test to show the product is both in a defective condition and dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchased it, with the

ordinary knowledge the community has as to its characteristics.

(5) Daimler Trucks North America owed a duty to Plaintiffs to exercise ordinary care in the design of the Freightliner and its starting motor, respectively;

(6) Daimler Trucks North America's failure to use ordinary care of the design of the Freightliner truck or the starting motor, respectively, was the proximate cause of Plaintiffs' damages;

(7) The defect in the Freightliner truck existed at the time it left the manufacturer's possession or control;

(8) Plaintiffs were damaged by Daimler Trucks North America's failure to use ordinary care in the design of the Freightliner truck or the starting motor, respectively.

d. Essential Elements of Plaintiff's Third Theory of Recovery (i.e., breach of warranty).

(1) The Freightliner truck was defective;

(2) The truck was defective when it left the manufacturer's control.

(3) The defect in the truck caused damages to Plaintiffs.

7. DEFENSES.

a. List of Defendant's Defenses and Affirmative Defenses. Defendant asserts the following defenses and affirmative defenses:

Defendant Daimler Trucks North America LLC's Defenses and Affirmative

Defenses:

1. Plaintiffs' Complaint fails, in whole or in part, to state a cause of action against Daimler upon which relief may be granted by the Court.

2. Plaintiffs' damages, if any, were solely or partly the proximate result of its own negligence and/or contributory negligence in its use and operation of the wood burning stove.

3. No act or omission of Daimler was the proximate cause of Plaintiffs' alleged damages.

4. Plaintiffs' damages, if any, were solely or partly the result of acts or omissions on the part of persons or entities other than Daimler, who were not under the control of Daimler. More specifically, Plaintiffs' damages were the result of its own acts in negligently operating the wood burning stove, and Plaintiffs' damages were caused by third parties outside the control of Daimler when the subject truck was negligently modified post design, manufacture, and sale by said parties to include the bus bar, depopulation stud, and cap nut complained of, including, but not limited to, the entity that installed the dump bed.

5. Plaintiffs' claims may be barred in whole or in part to the extent that it is determined the product at issue may have been materially changed or altered after leaving the manufacturer's possession including, but not limited to, when the subject truck was negligently modified post design, manufacture, and sale by a third party entity that installed the dump bed. The Freightliner truck was materially changed and altered by

third parties outside of Daimler's control when such parties installed the complained of bus bar and cap nut.

6. Plaintiffs' claims are not of the extent and nature as alleged.

7. Plaintiffs lacks privity of contract.

8. Plaintiffs did not provide notice of breach of warranty and/or notice of defect.

9. To the extent Plaintiffs allege circumstantial evidence of defect, Plaintiffs have failed to eliminate other reasonable causes of the fire, including, but not limited to, the Plaintiffs' own negligence in the use and operation of the wood burning stove and the possibility that the Freightliner truck was subject to modifications (including the installation of the complained of bus bar and cap nut) after it left Daimler's control and by third parties outside of Daimler's control. Plaintiffs also failed to rule out the possibility that the fire could have been caused by any of the other electrical items located in the building, including, but not limited to, the John Deere Gator.

10. Plaintiffs' electrical resistance heating theory is not supported by the evidence due to the duration of time the truck was parked with the ignition turned to the off position.

b. Essential Elements of Defendant's _____ [i.e., First, Second, etc.] Affirmative Defense (i.e., _____) [e.g., waiver]. Subject to the court's determination of the law that applies to this case, the defendant believes that, in order to prevail on this affirmative defense, defendant has the burden of proving the following

essential elements:

Essential Elements of Daimler Trucks North America LLC's Defenses:

1. Comparative Fault: PIK 4th 105.01.
   a. That Plaintiff Kechi Township was negligent by and through the actions of its employees in the unattended use and operation of the wood burning stove.
   b. That Plaintiff Kechi Township is at fault because it was negligent by and through the actions of its employees in the unattended use and operation of the wood burning stove, and its negligence in this respect caused and/or contributed to its damages.

2. Plaintiffs' damages, if any, were solely or partly the result of acts or omissions on the part of persons or entities other than Defendant, who were not under the control of Defendant, in that the subject truck was negligently modified post design, manufacture, and sale by third parties outside the control of Daimler when a dump bed was installed.

3. Plaintiffs' claims may be barred in whole or in part to the extent that it is determined the product at issue may have been materially changed or altered after leaving the manufacturer's possession, in that the subject truck was subject to material alternation post design, manufacture, and sale when a third party installed a dump bed on the incident truck.

4. Plaintiffs' damages are not of the nature or extent alleged, in that Plaintiffs failed to properly research and calculate the fair market value of its equipment and bases its damages on replacement cost, and Plaintiffs cannot recover economic loss damages from Daimler. PIK 4th 171.11; PIK 4th 171.20.

5. Plaintiffs did not provide notice of breach of warranty and/or notice of defect. K.S.A. § 84-2-607.

6. Plaintiffs have failed to eliminate other reasonable causes of Plaintiffs' damages and the fire, including, but not limited to, the Plaintiffs' own negligence in the use and operation of the wood burning stove and the possibility that the Freightliner truck was subject to modifications (including the installation of the complained of bus bar and cap nut) after it left Daimler's control and by third parties outside of Daimler's control. Plaintiffs were negligent in the use of the wood burning stove, they had a duty to use reasonable care in their operation of the wood burning stove, they breached that duty of care through their negligence in improperly disposing hot ashes, and this breach of duty

caused Plaintiffs' damages when it started the fire.

8. FACTUAL ISSUES.

One or more of the parties believe that the following material issues will need to be resolved at trial by the trier of fact if summary judgment is not granted:

1. Was there a defect in the Freightliner and did that defect exist at the time the Freightliner left the possession or control of the manufacturer?

2. Was the Freightliner truck materially changed or altered after leaving the manufacturer's possession?

3. Did individuals, entities, or conditions other than Daimler cause or contribute to any defective condition existing in the Freightliner, the fire, or Plaintiffs' alleged damages?

4. Were Plaintiff Kechi Township or other persons or entities negligent, fail to follow the language of manuals, instructions, warnings, advice, and guidelines provided regarding the Freightliner and/or its component parts, or otherwise fail to satisfy their duty as alleged in Freightliner's defenses and affirmative defenses, and did such actions or inactions cause or contribute to Plaintiffs' alleged damages?

5. Was the Freightliner materially changed or altered after leaving the manufacturer's possession or control?

6. Did Plaintiffs suffer damages as a result of Defendant's conduct and, if so, what are the nature and extent of those damages?

7. Did a valid and enforceable implied warranty apply to the Freightliner and/or any of its component parts and, if so, did Defendant breach any implied warranty and did such breach cause Plaintiffs' damages?

8. Is Defendant at fault for Plaintiffs' alleged damages and if so, to what extent is Defendant at fault for Plaintiffs' alleged damages?

9. Is Plaintiffs' electrical resistence heating theory supported by the evidence?

9. LEGAL ISSUES.

One or more of the parties believe that the following are the significant legal or evidentiary issues that will need to be resolved by the court in this case, whether on summary judgment motion or at trial:

1. Were Plaintiff Kechi Township or other persons or entities negligent, or otherwise fail to satisfy their duty as alleged in Freightliner's defenses and affirmative defenses, and do such actions or inactions limit Plaintiffs' claims and/or Defendant's liability?

2. Have Plaintiffs have stated a valid product liability claim against Daimler under the Kansas Product Liability Act, i.e., are Plaintiffs' claims proper for summary judgment in that Plaintiffs have failed to establish a defect in the Freightliner, that a defect caused Plaintiffs' damages, and that a defect was present in the truck at the time it left the manufacturer?

3. To what extent are Plaintiffs' claimed damages barred by principles of economic loss and privity of contract?

4. To what extent are Plaintiffs' claims barred or reduced through application of comparative fault?

5. Have Plaintiffs sufficiently eliminated other reasonable causes of the fire?

10. DAMAGES.

a. Plaintiff's Damages.

Premises	$155,781.20
Heavy Equipment	$326,579.39
Auto	$ 36,884.90
Deductibles	$ 700.00
TOTAL	$519,945.49

b. Defendant's Damages.

None claimed.

11. NON-MONETARY RELIEF REQUESTED, IF ANY.

None.

12. AMENDMENTS TO PLEADINGS.

None.

13. DISCOVERY.

Discovery was continued to April 15, 2011, by Court Order. Discovery is incomplete, in that Defendant seeks to take the deposition of former Kechi Township employee, Jacob Cox. The deposition can be arranged when the witness is located and will allow the parties the opportunity to evaluate the testimony that will be sought at trial.

Unopposed discovery may continue after the deadline for completion of discovery so long as it does not delay the briefing of or ruling on dispositive motions, or other pretrial preparations. Under these circumstances, the parties may conduct discovery beyond the deadline for completion of discovery if all parties are in agreement to do so, but the court will not be available to resolve any disputes that arise during the course of this extended discovery.

14. WITNESSES AND EXHIBITS.

a. Final Witness and Exhibit Disclosures Under Rule 26(a)(3). The parties' final witness and exhibit disclosures pursuant to Fed. R. Civ. P. 26(a)(3)(A) shall be filed no later than 21 days before trial. With regard to each witness disclosed under Fed. R. Civ. P. 26(a)(3)(A)(i), the disclosures also shall set forth the subject matter of the

expected testimony and a brief synopsis of the substance of the facts to which the witness is expected to testify. Witnesses expected to testify as experts shall be so designated. Witnesses and exhibits disclosed by one party may be called or offered by any other party. Witnesses and exhibits not so disclosed and exchanged as required by the court's order shall not be permitted to testify or be received in evidence, respectively, except by agreement of counsel or upon order of the court. The parties should bear in mind that seldom should anything be included in the final Rule 26(a)(3)(A) disclosures that has not previously appeared in the initial Rule 26(a)(1) disclosures or a timely Rule 26(e) supplement thereto; otherwise, the witness or exhibit probably will be excluded at trial. *See* Fed. R. Civ. P. 37(c)(1).

b. Objections. The parties shall file any objections under Fed. R. Civ. P. 26(a)(3)(B) no later than 14 days before trial. The court shall deem waived any objection not timely asserted, unless excused by the court for good cause shown.

c. Marking and Exchange of Exhibits. All exhibits shall be marked no later than 5 business days before trial. The parties shall exchange copies of exhibits at or before the time they are marked. The parties shall also prepare lists of their expected exhibits, in the form attached to this pretrial order, for use by the courtroom deputy clerk and the court reporter. In marking their exhibits, the parties shall use preassigned ranges of numbered exhibits. Exhibit Nos. 1-400 shall be reserved for plaintiff(s); Exhibit Nos. 401-800 shall be reserved for defendant(s); Exhibits 801 and higher shall be reserved for any third party. Each exhibit that the parties expect to offer shall be marked with an

exhibit sticker, placed in a three-ring notebook, and tabbed with a numbered tab that corresponds to the exhibit number. The parties shall prepare exhibit books in accordance with the requirements of the judge who will preside over trial. The parties shall contact the judge's courtroom deputy clerk to determine that judge's specific requirements.

d. Designations of Deposition Testimony.

(1) Written Depositions. Consistent with Fed. R. Civ. P. 26(a)(3)(A)(ii), any deposition testimony sought to be offered by a party other than to impeach a testifying witness shall be designated by page and line in a pleading filed no later than 21 days before trial. Any counter-designation in accordance with Fed. R. Civ. P. 32(a)(6), and any objections to the designations made by the offering party, shall be filed no later than 14 days before trial. Any objections to counter-designations shall be filed no later than 5 business days before trial. Before filing any objections, the parties shall have conferred in good faith to resolve the dispute among themselves. No later than 3 business days before trial, to facilitate the court's ruling on any objections to designations or counter-designations, the party seeking to offer the deposition testimony shall provide the trial judge a copy of each deposition transcript at issue. Each such transcript shall be marked with different colored highlighting. Red highlighting shall be used to identify the testimony that plaintiff(s) has designated, blue highlighting shall be used for defendant(s), yellow highlighting shall be used for any third party, and green highlighting shall be used to identify the objections to any designated testimony. After receiving and reviewing these highlighted transcripts, the court will issue its rulings

regarding any objections. The parties shall then file the portions of the depositions to be used at trial in accordance with D. Kan. Rule 32.1.

(2) Videotaped Depositions. The paragraph immediately above applies to videotaped depositions as well as written deposition transcripts. After the court issues its rulings on the objections to testimony to be presented by videotape or DVD, the court will set a deadline for the parties to submit the videotape or DVD edited to reflect the designations and the court's rulings on objections.

15. MOTIONS.

a. Pending Motions.

None.

b. Additional Pretrial Motions.

After the pretrial conference, the parties intend to file the following motions:

Plaintiffs' Motions:

1. Motions in Limine
2. Motion to Exclude EMC as a Named Party at the Time of Trial

Daimler Trucks North America LLC's Motions:

1. Motion for Summary Judgment;
2. Motion in Limine to Limit the Scope of Plaintiffs' Expert Testimony.

The dispositive motion deadline, as established in the scheduling order and any amendments, is **May 13, 2011**.

Consistent with the scheduling order filed earlier in this case, the arguments and authorities section of briefs or memoranda submitted in connection with all further motions or other pretrial matters shall not exceed 30 pages, absent an order of the court.

[Judge Belot has entered a standing order governing dispositive and non-dispositive motions, and a separate standing order governing when hard copies of electronically filed documents must be delivered to chambers. These standing orders can be found on the court's website: *http://www.ksd.uscourts.gov/chambers/mlb/Sorder.pdf* and *http://www.ksd.uscourts.gov/chambers/mlb/CMECFSO.pdf*, respectively.]

c. Motions Regarding Expert Testimony. All motions to exclude testimony of expert witnesses pursuant to Fed. R. Evid. 702-705, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), or similar case law, shall be filed by 28 days before trial [but, if such a motion as a practical matter will be case-dispositive, or if an evidentiary hearing on the motion is reasonably anticipated, then this deadline shall be set in accordance with the dispositive motion deadline stated above]. (*Alternative Language*: [Not applicable, i.e., the parties have stipulated that no expert witnesses will testify in this case.] [The parties have stipulated that no motions will be filed challenging the propriety of expert testimony.])

d. Motions in Limine. All motions in limine, other than those challenging the propriety of an expert witness, shall be filed no later than 14 days before trial. Briefs in opposition to such motions shall be filed within the time period required by D. Kan. Rule

6.1(d)(1), or at least 5 business days before trial, whichever is earlier. Reply briefs in support of motions in limine shall not be allowed without leave of court.

16. TRIAL.

a. This case is set for trial on the court's docket beginning on _____**, 200_, at _____**. Unless otherwise ordered, this is not a "special" or "No. 1" trial setting. Therefore, during the month preceding the trial docket setting, counsel should stay in contact with the trial judge's courtroom deputy to determine the day of the docket on which trial of the case actually will begin. [*Alternative language*: This case probably will not be set for trial until after all timely filed dispositive motions have been decided by the court.]

b. Trial will be by jury.

c. Estimated trial time is 5 days.

d. Trial will be in Wichita, Kansas, or such other place in the District of Kansas where the case may first be reached for trial.

e. Not all of the parties are willing to consent to the trial of this case being presided over by a U.S. Magistrate Judge, even on a backup basis if the assigned U.S. District Judge determines that his or her schedule will be unable to accommodate any trial date stated above.

f. Because of constraints on the judiciary's budget for the compensation of jurors, in any case in which the court is not notified of a settlement at least 1 full business day prior to the scheduled trial date, the costs of jury fees and expenses will be assessed

to the parties, or any of them, as the court may order. *See* D. Kan. Rule 40.3.

17. SETTLEMENT.

a. Status of Settlement Efforts.

The parties have not participated in mediation and have not been able to settle this matter through good faith attempts.

b. Mediation and/or Other Method of Alternative Dispute Resolution.

Mediation is not ordered; however, Plaintiffs intend to request mediation at the Pretrial Conference.

18. FURTHER PROCEEDINGS AND FILINGS.

a. Status and/or Limine Conference. Relatively close to the date of trial, the trial judge [probably] [may] [will] schedule [has scheduled] a status and/or limine conference [for **_____ ___, 20__, at _____**].

b. Trial Briefs. A party desiring to submit a trial brief shall comply with the requirements of D. Kan. Rule 7.6. The court does not require trial briefs but finds them helpful if the parties anticipate that unique or difficult issues will arise during trial.

c. Voir Dire. Due to substantially differing views among judges of this court concerning the extent to which counsel will be allowed to participate in voir dire, counsel are encouraged to contact the trial judge's law clerk or courtroom deputy (in accordance with the preference of the particular trial judge) to determine what, if anything, actually needs to be submitted by way of proposed voir dire questions. Generally, proposed voir dire questions only need to be submitted to address particularly unusual areas of

questioning, or questions that are likely to result in objections by the opposing party.

d. Jury Instructions.

(1) Requests for proposed instructions in jury cases shall be submitted in compliance with Fed. R. Civ. P. 51 and D. Kan. Rule 51.1. Under D. Kan. Rule 51.1, the parties and the attorneys have the joint responsibility to attempt to submit one agreed set of preliminary and final instructions that specifically focuses on the parties' factual contentions, the controverted essential elements of any claims or defenses, damages, and any other instructions unique to this case. In the event of disagreement, each party shall submit its own proposed instructions with a brief explanation, including legal authority as to why its proposed instruction is appropriate, or why its opponent's proposed instruction is inappropriate, or both. Counsel are encouraged to contact the trial judge's law clerk or courtroom deputy (in accordance with the preference of the particular trial judge) to determine that judge's so-called standard or stock instructions, e.g., concerning the jury's deliberations, the evaluation of witnesses' credibility, etc.; it is not necessary to submit such proposed jury instructions to the court.

(2) Proposed instructions in jury cases shall be filed no later than 3 business days before trial. Objections to any proposed instructions shall be filed no later than 1 business day before trial.

(3) In addition to filing the proposed jury instructions, the parties shall submit their proposed instructions (formatted in WordPerfect 9.0, or earlier version) as an attachment to an Internet e-mail sent to the e-mail address of the assigned trial judge

listed in paragraph II(E)(2)(c) of the *Administrative Procedures for Filing, Signing, and Verifying Pleadings and Papers by Electronic Means in Civil Cases*.

e. Proposed Findings of Fact and Conclusions of Law. If this case is tried to the court sitting without a jury, in order to better focus the presentation of evidence, the parties shall file preliminary sets of proposed findings of fact and conclusions of law no later than 5 business days before trial. In most cases, the trial judge will order the parties to file final sets of proposed findings after the trial transcript has been prepared.

Not applicable.

19. OTHER.

a. Conventionally Filed Documents. The following documents shall be served by mail and by fax or hand-delivery on the same date they are filed with the court if they are filed conventionally (i.e., not filed electronically): final witness and exhibit disclosures and objections; deposition designations, counter-designations, and objections; motions in limine and briefs in support of or in opposition to such motions; trial briefs; proposed voir dire questions and objections; proposed jury instructions and objections; and proposed findings of fact and conclusions of law. In addition, a party filing a trial brief conventionally shall deliver an extra copy to the trial judge's chambers at the time of filing.

b. Miscellaneous.

The court usually will hold a status conference approximately one week prior to trial. Out-of-town counsel may appear by telephone.

The courtroom is equipped with a television, VCR, Elmo, easel and projector screen for your use. Counsel wishing to use other equipment should contract Robert Moody at least 5 days prior to trial.

The courtroom number is 161. Directly across from the courtroom are two attorney/witness rooms for your use.

20. POSSIBLE ADJUSTMENT OF DEADLINES BY TRIAL JUDGE.

With regard to pleadings filed shortly before or during trial (e.g., motions in limine, trial briefs, proposed jury instructions, etc.), this pretrial order reflects the deadlines that the court applies as a norm in most cases. However, the parties should keep in mind that, as a practical matter, complete standardization of the court's pretrial orders is neither feasible nor desirable. Depending on the judge who will preside over trial, and what adjustments may be appropriate given the complexity of a particular case, different deadlines and settings may be ordered. Therefore, from the pretrial conference up to the date of trial, the parties must comply with any orders that might be entered by the trial judge, as well as that judge's trial guidelines and/or exhibit instructions as posted on the court's Internet website:

(http://www.ksd.uscourts.gov/chambers).

IT IS SO ORDERED.

Dated this 9th day of May, 2011, at Wichita, Kansas.

s/ Monti L. Belot
The Honorable Monti L. Belot
U. S. District Judge

APPROVED BY:

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SUMMARY OF DEADLINES AND SETTINGS	
Event	Deadline/Setting
Extended deadline to complete any remaining discovery (if applicable)	
Mediation/settlement conference (if applicable)	
Dispositive motions (e.g., summary judgment)	5/13/11
Motions challenging admissibility of expert testimony	
Trial	
Status and/or limine conference (if presently set)	
Final witness & exhibit disclosures	21 days before trial
Objections to final witness & exhibit disclosures	14 days before trial
Exhibits marked	5 business days before trial
Deposition testimony designated	21 days before trial
Objections to deposition designations, along with any counter-designations	14 days before trial
Objections to counter-designations of deposition testimony	5 business days before trial
Submission of disputed deposition designations to trial judge	3 business days before trial
Motions in limine	14 days before trial
Briefs in opposition to motions in limine	5 business days before trial, unless due earlier under D. Kan. Rule 6.1(d)(1)
Proposed jury instructions	3 business days before trial
Objections to proposed jury instructions	1 business day before trial
Preliminary sets of proposed findings of fact and conclusions of law in bench trials	5 business days before trial

(Revised 5/93)

[Add case caption]

EXHIBIT SHEET

Case No: _____ _____ Exhibits

No.	Description	I.D.	Off.	Adm.	Deposition or Witness