No. 126666

In the

Supreme Court of Illinois

FLETCHER McQUEEN,

Plaintiff-Appellant

vs.

PAN-OCEANIC ENGINEERING CO. INC., a corporation,

Defendant-Appellee.

On Leave to Appeal from the Appellate Court of Illinois,
First Judicial District, No. 1-19-0202.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Law Division, No. 2014 L 001050.
The Honorable **Bridget A. Mitchell**, Judge Presiding.

BRIEF OF PLAINTIFF-APPELLANT FLETCHER McQUEEN

MICHAEL W. RATHSACK
Attorney for Plaintiff-Appellant
10 South LaSalle Street
Suite 1420
Chicago, Illinois 60603
(312) 726-5433
mrathsack@rathsack.net

Of Counsel:

YAO O. DINIZULU
and
MICHAEL W. RATHSACK

ORAL ARGUMENT REQUESTED

COUNSEL PRESS · (866) 703-9373 PRINTED ON RECYCLED PAPER

TABLE OF CONTENTS AND STATEMENT OF POINTS AND AUTHORITIES

Statutes

II. Pan-Oceanic forfeited its post-verdict challenge to IPI 50.01. If the court deems the alleged error preserved, whether the instruction was accurate hinges on whether Pan-Oceanic can be independently liable. If Pan-Oceanic can be independently liable, the instruction was proper.

III. Pan-Oceanic's counsel did not tender IPI B21.02.02 and IPI 20.01.01 and did not object to their absence, thus forfeiting any error. Even if the Court elects to consider the alleged error, the absence of the instructions would not have caused prejudice because the evidence and liability were simple and there is no reason to assume the jury did not understand what Plaintiff had to prove.

NATURE OF THE CASE

Patten Industries loaded a Bobcat tractor on a trailer for Lavonta Green to transport to his employer, Pan-Oceanic. Concerned because it was on an angle, Green contacted his boss at Pan-Oceanic who instructed him to proceed. Green got on the expressway, only to have the tractor come loose. Green braked, lost control, and struck Fletcher McQueen's car. It developed that the load should have been centered and that braking was the wrong reaction: he should have coasted to a stop. Pan-Oceanic had not trained him that an unstable load could come loose or how to react if it did.

McQueen sued Green for negligent driving and Pan-Oceanic as his employer under *respondeat superior*. He also sued Pan-Oceanic directly for instructing Green to transport an unsafe load and failing to train him about the risks of an unsafe load or proper braking. Plaintiff also sought punitive damages based on the admission of Pan-Oceanic's president that it would be reckless not to train a driver how to respond in that situation.

The parties agreed to a bifurcated trial. In the first phase, the jury found for Green and against Pan-Oceanic and awarded compensatory damages. In the second phase, the jury awarded one million dollars in punitive damages against Pan-Oceanic.

The appellate court reversed in a divided opinion. The majority held that employee and employer liability are always tied together if the employer admits *respondeat superior* responsibility for its driver's fault. The court

acknowledged that the main support for that premise, *Gant v. L.U. Transport, Inc.*, 331 Ill.App.3d 924 (2002), did not address failure to train, but declined to treat failure to train differently from other direct negligence claims like negligent hiring or entrustment which are barred because they are derivative of the employee's fault. The majority also held that even though Pan-Oceanic did not tender two instructions, the trial judge had a duty to give them *sua sponte*, and that the judge should not have omitted a sentence in IPI 50.01 requiring the jury to find for Pan-Oceanic if it found for Green.

Justice Mikva dissented. She explained that Pan-Oceanic's fault in failing to train Green was not derivative of Green's alleged fault. Pan-Oceanic could therefore be guilty even if Green was not guilty. She relied on *Longnecker v. Loyola University Medical Center*, 383 Ill.App.3d 874 (2008), where the court allowed recovery against a hospital for failing to train a doctor to harvest a cadaver heart even though the jury found the doctor not guilty for his role in harvesting the heart. The dissent also concluded that Pan-Oceanic's failure to tender the instructions forfeited any error.

The opinion is in the Appendix.

No questions are raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

The issues presented for review are:

1) Pan-Oceanic admitted liability under *respondeat superior* for Green's fault. Did that admission bar Plaintiff's separate direct action against Pan-Oceanic for its fault in failing to train Green;

2) Plaintiff alleged direct fault against Pan-Oceanic. In light of that, did the court abuse its discretion when it removed the sentence of IPI 50.01 requiring the jury to find for Pan-Oceanic if it found for Green; and

3) Pan-Oceanic did not tender a burden of proof instruction or a willful and wanton issue instruction and did not object to their absence. Did the trial judge have a duty to draft and give those instructions *sua sponte*?

STATEMENT OF JURISDICTION

In the first phase, the jury found Green not guilty but found Pan-Oceanic guilty and awarded compensatory damages of $163,227.45. C1911; app. at A1. It answered special interrogatories finding Pan-Oceanic guilty of reckless conduct and Green not guilty of reckless conduct. C1913, C1915; App. at A2, A3. After the second or punitive phase, where it heard financial information, the jury awarded one million dollars in punitive damages. C1917. The court entered judgment. C1919; App. at A4.

The court denied Pan-Oceanic's posttrial motion on January 11, 2019, in a 12-page order. C2445-C2557; App. at A5. Defendant appealed. C2582.

The appellate court issued its Rule 23 order on August 23, 2020, reversing and remanding. App. at A18. No petition for rehearing was filed. The court granted a motion to publish and the decision issued on October 16, 2020. Petitioner filed his petition for leave to appeal within 35 days of that decision. The Court granted that petition and has jurisdiction pursuant to Rule 315.

STATEMENT OF FACTS

The accident

Pan-Oceanic employed Lavonta Green as a truck driver. R912, R917. Green drove to Patten Industries with an empty trailer to pick up a repaired Bobcat tractor and return it to Pan-Oceanic. R920, R922. After Patten loaded it, Green thought it looked crooked. R934-35. Green called Savinder (Savi) Singh, his boss at Pan-Oceanic, and told him the load did not look right. R945, R959-60. He demonstrated its angle on the trailer to the jury, using a piece of paper. R937.

He talked to Savi because he did not know if the load was safe. Savi then talked to Patten and next told Green just to be careful and to come back to Pan-Oceanic's yard. R960. Savi said it was okay to drive. R958, R965. Green drove the load because Singh told him it was okay. R965-66. If Savi had told him it was not safe, he would not have driven it. R868, R966. He listened to Savi for fear of losing his job. R990.

Green did not know that if the Bobcat was diagonal and it moved, the chains holding it in place could loosen. R945, R949. Nor did he know that a tractor not properly loaded could become unstable. No one at Pan-Oceanic taught him that. R955-56. Savi Singh agreed he never taught Green how to handle a load in distress. R1890. And Savi did not know the load had to be centered. R959.

No one told Green what could happen if a Bobcat was not loaded properly or the chains were not on properly. R955-56. He did not know an unstable load could cause a crash nor did he know the load had to be centered. R956, R959. Green confirmed it never occurred to him that he could lose control if a load was unstable because that never happened to him before. R849-50. He denied that Pan-Oceanic had monthly meetings about loading trailers. R993-94.

After driving away, Green saw in the rearview mirror that the Bobcat began to bounce four feet in the air. R970, R974. The chains had loosened. R985. He braked and the bouncing got worse and made him spin out. R972. He lost control when he braked (R974), describing it as starting to go crazy (R981). He braked only because the load was bouncing. R982. As Fletcher McQueen entered the expressway, the Pan-Oceanic truck struck his car. R1466.

A Pan-Oceanic employee who met Green after the accident told Green for the first time that a tractor loaded like that would bounce and that it had happened to that employee before. R988.

Pan-Oceanic's operation and training

Pan-Oceanic's president Gulzar Singh said the 6000-pound tractor sitting at a 30-degree angle would not be safe. R1572-73, R1586-87. If you lose control of the load, you can lose control of the truck. R1600-01. Gulzar also agreed a driver must know how to brake if a load feels unstable. R1583, R1601.

If the load gets loose, you must teach the driver what to do; otherwise, it is unsafe. R1601. The driver is not to brake normally. Instead, you take your foot off the gas and pull over without braking. R1584, R1601-02.

Green should have been trained for this; Savi was responsible for training. R1595-96, R1599. Gulzar said they had regular safety meetings and agreed that if Green did not have a chance to attend, that would be utter disregard for driver safety. R1747. Similarly, if a driver had not been informed how to handle an unstable load, that would be a reckless disregard of safety rules. R1600, R1678-79, R1748. Gulzar claimed Green was trained. R1679.

Savi had never experienced loss of control so he could not tell Green what to do. R1761. Savi had not been trained how to handle a load in distress or that became unstable. R1890-91. Savi agreed an improperly loaded machine can be unsafe. R1768. He believed Green was trained. R1867-69, R1883-84.

Patten's safety manager said Federal guidelines require that every driver be instructed in complying with regulations. R1100, R1121. He agreed an improperly loaded Bobcat could throw the trailer out of balance and cause the driver to lose control. R1150-51.

Bifurcation of the issues

By agreement, the court bifurcated the compensatory and punitive phases. R118-19. Defense counsel agreed to use special interrogatories asking whether Pan-Oceanic was guilty of reckless conduct, and a separate

instruction on punitive damages. R2067. Its counsel did that because he did not want punitive damages addressed until the jury first answered interrogatories determining whether Pan-Oceanic was guilty of willful conduct. R2078.

Financial information would not be addressed in the first phase. R338. The punitive damages instruction was to be given only after the jury answered the interrogatory asking whether Pan-Oceanic acted recklessly. R2173-74. Damages are not at issue and that evidence is therefore not included.

Closing argument

Closing argument is relevant because Pan-Oceanic's counsel admitted in the closing argument for the second phase that Pan-Oceanic was itself guilty of omissions. Its counsel told the jury: "Now, certainly there was an omission here." R2626-27, R2629. Defense counsel further admitted there may have been negligence and that maybe Singh should have sent someone over to make sure there was no problem. R2627. He added that Pan-Oceanic "may have omitted to get him as fully trained as he needed." R2629.

Defense counsel also argued in the initial phase that Green had driven the load because Patten assured him it was safe. R2368. He admitted it was Pan-Oceanic's responsibility to load the tractor, not Green's. R2391. His point was that Green could not be at fault if he accepted Patten's word that the load was safe. R2372-73. Counsel then asked the jury whether it was not reasonable for Green to rely on Patten. R2374. Finally, defense counsel told

the jury that after Green talked to his boss, the jury could not expect Green to do anything other than what he had done. R2372.

Plaintiff includes those statements because they are relevant to the argument that the jury found Green not guilty because he drove the truck in response to assurances from Singh and Patten that the load was safe.

Pan-Oceanic's counsel also told the jury that Green knew if he rejected the load, his boss would lose three hours driving to Patten's office and back. R2369-70. Pan-Oceanic's counsel later added: "They may have omitted to get him (Green) as fully trained as he needed, but they weren't reckless" and "They probably should have trained him some more, but reckless(?)" R2629.

Pan-Oceanic's counsel in closing did not address Verdict Form B allowing the jury to find for Green but against Pan-Oceanic and did not address the failure to train issue.

Trial

Once the trial court heard Plaintiff's rationale for treating the two defendants separately based on the direct allegations against Pan-Oceanic, it agreed the jury could treat Green and Pan-Oceanic separately. R2204. That raised the question of how IPI 50.01, an agency instruction, should be worded.

The form instruction for 50.01 looks like this:

50.01 Both Principal And Agent Sued--No Issue As To Agency

> The defendants are sued as principal and agent. The defendant [principal's name] is the principal and the defendant [agent's name] is [his] [its] agent. If you find that the defendant [agent's name] is liable, then you must find that the defendant [principal's name] is also liable. However, if you find that [agent's name] is not liable, then you must find that [principal's name] is not liable.

However, its Notes on Use provide that the last sentence is not to be given where the principal can be liable independently of the agent's acts. If Pan-Oceanic could be independently liable for failing to train Green, the last sentence had to be excluded.

The trial court noted the jury could find against Pan-Oceanic on a theory other than *respondeat superior* and (R2204) that they would consider how to handle it (R2206-07). It welcomed alternative instructions. R2207. Plaintiff tendered a modified IPI 50.01 at the next instruction conference, omitting the last sentence. C1792. Pan-Oceanic's counsel had no objection (R2321) and the court read that instruction without objection (R2474).

After the verdict, Pan-Oceanic for the first time argued that the court erred when it did not *sua sponte* give two instructions – IPI B21.02.02 and a modified version of IPI 20.01.01. The first says plaintiff has the burden of proof and the second sets out willful and wanton issues separately from negligence issues. Pan-Oceanic had not tendered either one.

The jury did receive the general burden of proof instruction (IPI 15.01 – C1790), the definition of willful conduct (IPI 14.01 – C1794), the charges

against Pan-Oceanic (IPI 20.01 – C1798), and verdict forms which included one allowing them to find for Green but against Pan-Oceanic (C1806). In the second phase, the jury further received IPI 35.02 explaining under what circumstances Pan-Oceanic could be liable for punitive damages (C1812), and IPI 35.01 setting out the factors to consider in setting the amount of such damages (C1811).

The jury returned a verdict in favor of Green and against Pan-Oceanic, awarding compensatory damages of $163,227.45, and it answered a special interrogatory finding Pan-Oceanic guilty of reckless conduct. C1911, C1913, C1915. After the punitive phase, the jury awarded one million dollars in punitive damages. C1917.

The circuit court issued a 12-page order denying the post-trial motion. C2445-C2557; App. at A5.

Appellate decision

The appellate court reversed. *McQueen v. Green*, 2020 IL App (1st) 190202; App. at A18. The majority held that an employer can never be separately liable for an employee's conduct if it admits *respondeat superior* responsibility, and that the judge should have *sua sponte* drafted and given the two instructions Pan-Oceanic had not tendered. Based on their holding that the employer could not be separately liable, the court found that the verdicts for Green but against Pan-Oceanic were inconsistent.

The majority began with IPI 50.01 which tells what to do when parties are sued as principal and agent. *Id.* at ¶ 37. The court acknowledged that the instruction's Notes on Use said its last sentence, directing the jury to find for the principal if it found for the agent, should be modified or stricken if the principal was potentially liable for its independent conduct. But the court said "both parties and the court" had labored under the misunderstanding that Green and Pan-Oceanic could be treated separately. *Id.* at ¶ 39. It concluded "their liability was tied together in this instance" and that the last sentence of 50.01 should therefore have been included.

The appellate court acknowledged that the direct negligence charge against Pan-Oceanic was framed in terms of failing to train Green and ordering or permitting him to take the load. *Id.* at ¶ 41. Relying on *Gant v. L.U. Transport, Inc.*, 331 Ill. App. 3d 924, 928 (2002), the court said that a plaintiff in a vehicle accident cannot maintain a claim for negligent hiring, negligent retention, or negligent entrustment against the driver's employer if the employer admitted responsibility for the employee's conduct under *respondeat superior*. *Id.* at ¶ 42. Plaintiff agrees that was *Gant's* holding but the charges against Pan-Oceanic were lack of training and wrongly telling Green to drive the load, not negligent hiring, retention, or entrustment.

The majority noted that negligent entrustment is derivative of employee negligence, meaning the employer is responsible for the employee's fault. *Id.* at ¶ 42. Therefore, it said alternative theories like negligent entrustment or

hiring become irrelevant. The court acknowledged that McQueen's claim was not based on the three theories *Gant* addressed. *Id.* at ¶ 43. It said no Illinois cases addressed treating negligent training differently from negligent entrustment (*id.* at ¶ 44), but it elected to treat negligent training the same as negligent entrustment.

The court rejected Plaintiff's reliance on *Longnecker v. Loyola University Medical Center*, 383 Ill. App. 3d 874 (2008) to distinguish failure to train from the three other types of fault. In *Longnecker,* the reviewing court rejected a hospital's contention that a defendant doctor had to be found professionally negligent before the hospital could be found institutionally at fault for failing to train him.

The majority reasoned that *Longnecker* did not apply because institutional negligence is subject to different rules than the negligence charge against Pan-Oceanic. To support that conclusion, it pointed to a statement in *Longnecker* that institutional negligence does not encompass a hospital's responsibility for the conduct of its medical professionals. The majority believed that was not the case (that a principal can be separately liable) where an employer admits liability under *respondeat superior*.[1] *Id.* at ¶ 45.

The court *sua sponte* looked to foreign cases for guidance and relied on two cases in concluding that an admission of *respondeat superior* liability

[1] As will be addressed in the argument, the court wrongly assumed that institutional conduct was not at issue. However, Pan-Oceanic's independent or institutional conduct was *the* issue.

(admitting liability for injuries caused by employee fault) bars "all direct negligence claims." *Id.* The majority did not address Plaintiff's explanation about independent principal liability and did not discuss the reasoning of the two foreign cases. As Plaintiff explains below, one of the two cases specifically rejected the claim Pan-Oceanic makes, that failure to train should be treated the same as negligent entrustment or hiring.

As to the two instructions not tendered by Pan-Oceanic, the court agreed Pan-Oceanic did not argue at trial that IPI B21.02.02 and IPI 20.01.01 should be given. And it agreed Pan-Oceanic was obligated to tender instructions it wanted, noting it "had ample opportunity to do so." *Id.* at ¶¶ 59, 63. But it also declared their absence significant. The court deemed their absence to be error but because it had already decided a new trial was required (*id.* at ¶ 58), this section appears to be *dicta*. It said the instruction's absence prevented a fair trial (*id.* at ¶ 65) but did not say that alone merited a new trial.

Justice Mikva dissented. She pointed out that *Gant* covered only derivative liability claims and said negligent training was not derivative of Green's fault. *Id.* at ¶ 71. Two bases for finding Pan-Oceanic separately liable were its failure to implement proper procedures for load placement and ordering Green to transport the load despite knowing it was unsafe. Neither was derivative of Green's fault and neither was dependent upon a finding that Green was at fault. Instead, the two claims rested solely on Pan-Oceanic's conduct. *Id.* at ¶ 72. Therefore, the two-issue rule applied.

As to the instructions, the dissent pointed out that the issue about the sentence omitted from IPI 50.01 was irrelevant if the jury properly found Green not guilty but Pan-Oceanic guilty. *Id.* at ¶ 74. And as to all three instructions, the dissent pointed out that this Court "has made it clear that '[a] party forfeits the right to challenge a jury instruction that was given at trial unless it makes a timely and specific objection to the instruction and tenders an alternative, remedial instruction to the trial court' ", citing *Mikolajczyk v. Ford*, 231 Ill. 2d 516, 557 (2008). *Id.* Because Pan-Oceanic forfeited the issue, the dissent said the absence of the instructions could not be a basis for a new trial.

ARGUMENT

I. Because Pan-Oceanic's fault in failing to train its employee was independent from rather than derivative of any employee fault, the jury properly found against Pan-Oceanic and in favor of its employee. The rule barring direct actions against employers who admit responsibility for an employee's fault under respondeat superior applies only where the employer's responsibility is derivative of the employee's fault. The rule does not apply to situations like this.

Standard of Review

Whether Defendant Pan-Oceanic could be independently liable for its own fault is a question of law. The standard of review for questions of law is *de novo*. *Krywin v. Chicago Transit Auth.*, 238 Ill. 2d 215, 226, 938 N.E.2d 440, 447 (2010); *A.B.A.T.E. of Illinois, Inc. v. Quinn*, 2011 IL 110611, ¶ 22, 957 N.E.2d 876, 881 (summary judgment presents a question of law and is thus reviewed under a *de novo* standard).

Argument

Pan-Oceanic's liability was not derivative of Green's fault.

The court in *Gant* applied the rule that an employer typically cannot be sued directly for injury caused by an employee where the employer admits responsibility under *respondeat superior* for the employee's fault. *Gant v. L.U. Transport, Inc.*, 331 Ill.App.3d 924, 770 N.E.2d 1155 (2002). Specifically, *Gant* held that a person injured by an employee could not maintain a direct action against the employer for negligent hiring, negligent retention, or negligent entrustment. The appellate court majority extended *Gant's* holding to claims

based on failure to train even though it admitted *Gant* did not address that claim, and the court did not provide a rationale for its unwarranted extension.

The root of the general rule lies in the fact that the employer's liability in those three situations is derivative of the employee's fault. The critical difference here is that Pan-Oceanic's fault was independent from rather than derivative of Green's fault. In fact, it was precisely because Pan-Oceanic was at fault for failing to train Green what to do when confronted with this situation that the jury found Green not guilty, i.e., not at fault. It found for Green because it believed a reasonable person in his position without training would not have acted differently.

The appellate court erred because it did not properly delineate the scope of Pan-Oceanic's *respondeat superior* liability and then compare that liability to its liability for its failure to train. If the court had done that, it would have recognized that Pan-Oceanic's failure to train was critically different from the types of employer-based claims addressed by *Gant*.

Under *respondeat superior*, an employee's wrongful conduct is imputed to the employer as the employee's principal. The employer's liability is thus entirely derivative of the employee's fault. *Sperl v. Henry*, 2018 IL 123132, ¶ 27, 124 N.E.3d 936, 943. As this Court has explained, when a party brings an action against a principal (referred to as the master in that opinion) based on negligent acts of the principal's agent, but does not charge the principal with independent wrongdoing, the principal's liability is by definition derivative

because it rests entirely on the doctrine of *respondeat superior*. *Moy v. County of Cook*, 159 Ill. 2d 519, 524, 640 N.E.2d 926, 928 (1994).

Explained another way, under *respondeat superior* an employer is vicariously liable for the tortious acts of its employees, including negligent or willful criminal acts, if the employee commits those acts in the course of employment and in furtherance of the employer's business. *Behrens v. California Cartage Co., Inc.*, 373 Ill. App. 3d 860, 863, 870 N.E.2d 848, 851 (2007).

Such *respondeat superior* liability was the gist of the first of Plaintiff's two claims against Pan-Oceanic. McQueen first charged Green with negligent driving and alleged Pan-Oceanic was liable under *respondeat superior* because it employed Green and he was in the course of his duties when he hit McQueen. It was undisputed that he was employed and in the course of his duties. That vicarious liability is by definition derivative, meaning Pan-Oceanic's liability as principal is based on the tortious conduct of Green as its employee. *Madden v. Paschen*, 395 Ill. App. 3d 362, 381, 916 N.E.2d 1203, 1218–19 (2009) (citing Black's Law Dictionary 934 (8th ed. 2004)). A principal's liability under *respondeat superior* is deemed derivative because the principal's liability does not depend on fault on the part of the principal. Put another way, the principal is not a tortfeasor. 2A C.J.S. Agency § 454. Like a derivative work which is defined as a work based upon preexisting work (17 U.S.C.A. § 101 (West)), a principal's liability in that situation is based on the employee's fault.

That rationale is seen in *Oakley Transp., Inc. v. Zurich Ins. Co.*, 271 Ill. App. 3d 716, 724–25, 648 N.E.2d 1099, 1105–06 (1995), where the court explored a claim of negligent supervision. The employer contended the employee's conduct was an intervening cause that exculpated the employer. The court explained that the gravamen of negligent supervision is that the supervisor acted unreasonably, and the supervisor's negligence allowed the party being supervised to commit a wrong against a third party. The employee's conduct causing the injury was not an intervening act of negligence. Rather, the negligence of the supervisor by definition was derivative of and thus tied to the employee's negligence. That meant the employer's liability hinged on the employee's liability – the employer could not be guilty unless the employee was at fault.

However, McQueen also charged Pan-Oceanic with allegations directed at its separate tortious conduct, independent of any tortious conduct on Green's part. Those charges included failing to train Green about the risks of an unsafe load, ordering him to bring the trailer with the Bobcat back to Pan-Oceanic despite the fact it knew or should have known the load was unsafe, and failing to train him about proper braking. C1798. The jury found in favor of Plaintiff and against Pan-Oceanic on those charges, independent of any *respondeat superior* responsibility. The appellate court majority erred in not recognizing the distinction between the two types of charges Plaintiff brought against Pan-

Oceanic, a distinction which allowed the jury to find Pan-Oceanic separately liable on the second charge.

Pan-Oceanic's failure to train Green was the legal cause of the accident.

The jury presumably found in favor of Green because they accepted his testimony that he did not know and was not taught that the tractor could become unstable if it was not properly loaded. R955-56. Savi Singh agreed he never taught Green how to handle a load in distress. R1890. Green did not know an unstable load could cause a crash or that a load had to be centered. R956, R959. He could not have been taught that because Pan-Oceanic did not have safety meetings.[2] R993-94. Further, Pan-Oceanic's counsel told the jury it could not expect Green to have done anything other than what he did after talking to his boss and Patten, i.e., drive the load back to Pan-Oceanic. And during argument in Phase II, its counsel admitted Green's boss should not have told him to drive the load. R2629.

In light of all that, it should not have come as a surprise to Pan-Oceanic when the jury blamed it for Green's decision to take the trailer on the road. R2372.

The jury also presumably believed Green when he said Pan-Oceanic had not trained him what to do if the load came loose. The jury learned that braking as he did was counterintuitively the opposite of what he should have

[2] Pan-Oceanic denied that but that was a question of fact for the jury.

done. Instead, the driver should take his foot off the brake and coast to a stop. To do otherwise results in loss of control. R972, R974, R981.

The jury presumably concluded the proper driver response to all that was not within the ken of a reasonable driver without training. Green did not do something a reasonably careful person would not have done and did not fail to do something a reasonably careful person would have done. IPI 10.01. Thus, even if Green's conduct contributed to cause the loss of control, the jury could and did find that he did not act negligently. That is analogous to the analysis used when determining whether a party's conduct was a proximate cause of an accident.

Proximate cause consists of legal cause and cause in fact. Conduct is a cause in fact if it is a material element and a substantial factor in bringing about the injury. That means that but for the conduct, the accident would not have occurred. Legal cause is a question of foreseeability. *Calloway v. Bovis Lend Lease, Inc.*, 2013 IL App (1st) 112746, ¶ 77, 995 N.E.2d 381, 405. In a case like this, even if the untrained driver is a cause in fact, the driver would not necessarily be a legal cause. One could find someone not negligent where that person through no fault of their own did not know how to react to a dangerous situation. Indeed, Pan-Oceanic admitted an employer may be liable for independent acts of willful conduct in training. Def. app. ct. br. at 20. That left Pan-Oceanic's fault as the independent and legal cause of this accident.

Illinois recognizes that employer liability is separate from respondeat superior liability.

The dissent agreed with Plaintiff and the trial court that an employee not trained to confront a situation can be found not guilty while at the same time the jury can find the employer guilty for failing to train the employee. Employer liability in that type of situation was affirmed in *Longnecker v. Loyola University Medical Center*, 383 Ill.App.3d 874, 887-88, 891 N.E.2d 954, 964-65 (2008).

There, a doctor had not properly checked to see whether a heart he harvested from a cadaver was suitable for transplant. The heart's shortcomings were not discovered until the cardiac surgeon took it from its delivery box to implant it after having already removed that patient's heart. The plaintiff charged the harvesting doctor with negligence for failing to examine the heart for suitability before sending it to the transplant hospital and charged the hospital with negligence for failing to train the harvesting doctor that his duties included checking the heart for suitability before sending it to be transplanted.

The appellate court affirmed the verdict against the hospital for not training the harvesting doctor even though the jury found the harvesting doctor not guilty. It rejected the hospital's argument that it could not be at fault unless the jury also found the harvesting doctor at fault. The liability of the individual acting at the scene and the liability of the entity charged with training that individual were deemed legally separate.

The majority here attempted to distinguish *Longnecker* by concluding that institutional negligence like that found against the hospital is subject to different rules than the negligence at issue here. In support, the court pointed to *Longnecker's* statement that institutional negligence does not encompass a hospital's responsibility for the conduct of its medical professionals. *Id.* at ¶ 45, quoting *Longnecker* at 894. However, the majority took that statement out of context. The *Longnecker* court's statement was correct, but it has nothing to do with this case and does not negate Pan-Oceanic's liability for its direct negligence.

When the *Longnecker* court referred to institutional negligence, it was referring to the kind of scenario seen by this jury. That court simply meant the hospital's institutional negligence (its failure to train) did not encompass its *respondeat superior* lability for its staff's fault but rather rested on different rules. That is Plaintiff's point. The hospital's own negligence in failing to train the doctor was separate from and rested on different rules than its vicarious liability for the conduct of its own staff. Here, Pan-Oceanic's direct or institutional misconduct in failing to train Green did not encompass, i.e., fell outside of, its *respondeat superior* lability for his fault. Institutional negligence is simply another term for direct negligence, i.e., a business entity's negligence that is not derivative of an employee's fault. See IPI 105.03.01 defining institutional duty.

That instruction's Notes on Use show that Plaintiff's reading of the instruction is correct. The Notes say the institution's duty involves its own management responsibility, i.e., a duty separate from employee fault. The Notes further say it does not apply where the institution's liability is instead based on vicarious liability for the professional negligence of its doctors and nurses. Here, Pan-Oceanic's institutional or direct negligence was its failure to train Green. The reality is that *Longnecker* was different only in that the harvesting doctor was no longer employed by the defendant hospital at the time of his conduct, but its reasoning is applicable, and the same result should occur.

In the trial court, Pan-Oceanic also relied on *Proctor v. Davis*, 291 Ill. App. 3d 265, 268, 682 N.E.2d 1203, 1206 (1997), for its contention that it did not have independent liability. It dropped that authority on appeal after Plaintiff showed that *Proctor* supports McQueen because it illustrates that a party with superior knowledge can be found guilty even though the subservient party is found not to have violated the standard of care. The jury there found a doctor not guilty for using a particular drug that had dangerous side effects but found the drug company liable because it did not inform the doctor of the drug's risks. The reasoning is analogous.

Pan-Oceanic also relied on *Nat'l R.R. Passenger Corp. v. Terracon Consultants, Inc.*, 2014 IL App (5th) 130257, ¶¶ 15-17, 13 N.E.3d 834, 839–40, a case with singular facts involving a train crossing accident. The employer

had not admitted *respondeat superior* responsibility so the negligent training count (not training how to cross railroad tracks) was deemed not duplicative of the count against the driver. The relevant part was the court's recognition that although Illinois courts have spoken of employee negligence where the plaintiff alleged that negligent hiring, training, or supervision led to the employer's direct liability, no Illinois case had held that the employee must be liable in tort for a direct cause of action to lie against that employer.

The legal concept of employer liability independent of employee fault where the employer's liability is not based on vicarious liability is not unique. That concept is seen in Section 1983 cases holding that a municipality can be liable for injuries caused by an officer even where the officer is not guilty. See, e.g., *Int'l Ground Transp. v. Mayor And City Council Of Ocean City, MD*, 475 F.3d 214, 220 (4th Cir. 2007). The concept includes the situation where a plaintiff charged a city with failure to train an officer. *Hopkins v. Andaya*, 958 F.2d 881, 888 (9th Cir. 1992) (city could be held liable for improper training even if officer was exonerated), overruled on other grounds, *Federman v. Cty. of Kern*, 61 F. App'x 438, 440 (9th Cir. 2003).

That employer fault must be explored separately to determine whether it can be independently responsible when its employee injures someone is also illustrated in *Neuhengen v. Glob. Experience Specialists, Inc.*, 2018 IL App (1st) 160322, ¶ 134, 109 N.E.3d 832, 863–64. Pan-Oceanic originally relied on that case, but its analysis supports Plaintiff because it approved an

independent action against the employer even though the employer admitted responsibility for its employee's negligence under *respondeat superior*.

The *Neuhengen* plaintiff's claim for willful and wanton conduct against defendant GES was based primarily on allegations of negligent hiring. Negligent hiring or retention requires a plaintiff to prove the employer knew or should have known the employee had a particular unfitness at the time of the hiring or retention and that the unfitness caused the injury. Under that theory "the proximate cause of the plaintiff's injury is the employer's negligence in hiring or retaining the employee, rather than the employee's wrongful act." *Id.* Therefore, the court reasoned that the employer's liability is technically separate from the employee's liability even where the claim against the employer was brought on a theory (negligent hiring) that *Gant* said was governed by the rules of vicarious liability.

The *Neuhengen* court pointed to three opinions similarly allowing a "willful and wanton count to be considered on its merits following the trial court's dismissal of the underlying negligence counts after an admission of *respondeat superior* liability." *Id.* at ¶¶ 120-122, including *Baumrucker v. Express Cab Dispatch, Inc.*, 2017 IL App (1st) 161278, 84 N.E.3d 482. *Neuhengen* pointed out that the fact the employers in those cases admitted *respondeat superior* responsibility did not foreclose the plaintiffs from asserting a separate charge against the employers for willful and wanton entrustment. The employer's alleged misconduct in those three cases was

deemed sufficiently different from the employee's conduct that it stood independently. Here, Pan-Oceanic's wrongdoing was not only qualitatively independent from Green's conduct, it also did not even require Green to be at fault as a prerequisite to being found liable for that misconduct.

Baumrucker in turn relied on *Lockett* where this Court held that a defendant-principal may be guilty of willful misconduct even though the tortfeasor-agent to whom it entrusted the instrumentality causing the injury may have been only negligent. *Lockett v. Bi-State Transit Auth.,* 94 Ill. 2d 66, 72–75, 445 N.E.2d 310, 313–14 (1983). *Lockett* reasoned that although the driver of the bus might have been only negligent in striking the decedent, the jury could have found the bus company guilty of willful and wanton misconduct because it allowed the employee to drive. Plaintiff's point is that *Lockett* recognized that an employer in some circumstances can be separately liable for its own conduct despite admitting legal responsibility for its employee's fault. That is analogous to Plaintiff's reasoning here.

Even if the more restrictive tort of negligent entrustment were at issue, there could still hypothetically exist an independent cause of action against the employer. For example, truck drivers must submit to a medical examination (*Hollywood Trucking, Inc. v. Watters*, 385 Ill. App. 3d 237, 238–396 (2008)) and the resulting medical certificate can go directly to the employer (*Levy v. Comm'n on Human Rights & Opportunities*, 236 Conn. 96, 99, 671 A.2d 349, 353 (1996)). Assume the examining doctor discovered and reported a health

issue like seizures that would make the driver unfit but for some reason sent the report only to the employer, leaving the driver unaware of his condition.

If there was an accident caused by a seizure, the employee could be found not guilty even though his medical condition caused the accident because he would not have known of the condition. That would mean his employer would not be liable under *respondeat superior*. But the employer could be directly liable for its negligent entrustment because it knew he was unfit to drive. That once again illustrates that the appellate court was wrong when it said admitting *respondeat superior* liability always preempts independent claims against the employer for its fault.

The authorities relied on by the majority are inapposite and one of them supports Plaintiff's position.

The majority did not address Plaintiff's reasoning underlying his claim that Pan-Oceanic was independently liable and it would not recognize Plaintiff's authorities as precedential or even persuasive. Instead, it *sua sponte* looked to two foreign cases, neither raised by Pan-Oceanic. The court relied on them for its conclusion that an employer's admission of *respondeat superior* liability for injuries caused by an employee's fault bars "all direct negligence claims." Op. at ¶ 44, citing *Greene v. Grams*, 384 F. Supp. 3d 100, 102 (D.D.C. 2019) and *Ferrer v. Okbamicael*, 2017 CO 14M, ¶ 2, 390 P.3d 836, 839. As promised in his description of the appellate opinion, Plaintiff will address the majority's error in relying on those cases.

The majority quoted those cases but did not discuss their reasoning. In *Greene*, the plaintiff alleged negligent hiring, training, and supervision where a driver ran a red light. The federal trial court for the District of Columbia pointed to Missouri's "*McHaffie*" rule, adopted by Maryland courts, barring direct negligence claims against employers where the employer concedes vicarious liability for the employee's fault. The rule the *Greene* court relied on arose in a case based on negligent hiring. In that Missouri case, the court said that because the employer conceded liability, it was unnecessary to admit the employee's poor driving record which would only inflame the jury. *Id.* at 103.

The plaintiff in *Greene* did not argue that negligent training should be treated differently from negligent hiring or retention because, unlike the latter two charges, liability for failure to train is not derivative of employee fault. That plaintiff likely made no such argument because plaintiff's counsel understood no one really needs training to stop for a red light, so that charge was never going to a jury. And the other two claims there were derivative of the employee's fault and thus covered by the general rule. The *Greene* court then cited a negligent hiring/retention case as a further basis for its conclusion, again relying on charges different from the failure to train charge at issue here.

Turning to *Ferrer*, the defendant driver was alleged to have been speeding and allowed to drive more hours than allowed by regulations. *Ferrer, supra* at ¶ 13. The *Ferrer* court pointed to the *McHaffie* rule, noting that the case on which *McHaffie* based its analysis involved negligent hiring and

retention (not negligent training) and that *McHaffie* alleged negligent hiring and supervision (not negligent training). *Id.* at ¶¶ 22, 23. The court noted that both of those charges (unlike negligent training) are derivative of the employee's fault. *Ferrer* held that direct negligence claims against an employer tethered to the employee's negligence are redundant. *Id.* at ¶ 26. Once again, that is not the situation here because the negligent training claim was not tethered to Green's negligence.

The *Ferrer* court continued, saying tortious conduct by an employee is a predicate to direct negligence claims. *Id.* at ¶¶ 28, 29. But it was still addressing only claims for negligent hiring, supervision, retention, or entrustment. Even if our analysis stops there, the discussion in that case up to that point is irrelevant because that plaintiff did not raise the distinction between derivative and nonderivative actions that Plaintiff makes here.

But it is the final part of that opinion, the part the majority overlooked, that is significant. The majority overlooked that *Ferrer* carefully distinguished derivative and nonderivative conduct just as Plaintiff has done here. The *Ferrer* court held that a situation like the one this Court faces constitutes an exception to situations where the "*respondeat superior*" principle of *Gant* applies. That court rejected the reasoning underlying the appellate court's holding that a principal can never be independently liable if it admits liability for its employee's negligence under *respondeat superior*. It warned parties

that it would not apply *respondeat superior* in every scenario where employer and employee liability were at issue. It held:

> We note the *McHaffie* rule does not apply where the plaintiff's injuries are not in fact caused by the employee's negligence. For example, if an employer is aware its vehicle has defective brakes yet allows an employee to use it and the defective brakes cause an accident, the rule would not apply. The unknowing employee was not negligent, and the employer could not be vicariously liable. "[T]he means of imposing liability on the owner would be through his own negligence of lending the car with bad brakes, i.e., negligent entrustment." (citations omitted). In that situation, the employer's own negligence is both the independent and direct cause of the plaintiff's injuries, unconnected to any negligent act of the employee. *Ferrer v. Okbamicael*, 2017 CO 14M, ¶ 34, 390 P.3d 836, 845–46.

That is precisely the scenario this Court faces. The *Ferrer* court's analysis on which the appellate majority pinned its conclusion thus not only does not support that conclusion but rather fatally contradicts the court's conclusion.

The bottom line is that the jury could find Green not guilty while at the same time find Pan-Oceanic guilty. Each verdict is supported by the law and the verdicts were therefore perfectly consistent.

Courts should look beyond the labels assigned to charges against an employer.

Plaintiff suggests the appellate court's confusion may have been the result of courts labeling certain kinds of conduct as conduct that necessarily invokes vicarious liability without considering the nature of that conduct. Rather than labeling negligent hiring, retention, and supervision as conduct

automatically invoking vicarious liability, it would be more accurate to say that *respondeat superior* applies to employers where their alleged fault is derivative of the employee's fault. Conversely, *respondeat superior* will not apply where the employer's responsibility is not derivative of the employee's fault.

The current expression of the rule risks applying form over substance, something courts usually disapprove. *Walstad v. Klink*, 2018 IL App (1st) 170070, ¶ 16, 105 N.E.3d 1016, 1021 (avoid elevating questions of form over substance); *In re Marriage of Kuyk*, 2015 IL App (2d) 140733, ¶ 9, 40 N.E.3d 822, 824 (labels given to pleadings do not control the court's review); *Nationstar Mortgage LLC v. Benavides*, 2020 IL App (2d) 190681, ¶ 18 (courts should not elevate form over substance). Such labeling may even be unnecessarily restrictive when it comes to conduct that *Gant* considered as barring direct charges against an employer, e.g., a negligent supervision charge might stand separately even if the employee was not at fault. A more accurate rule would better guide the trial courts.

II. Pan-Oceanic forfeited its post-verdict challenge to IPI 50.01. If the court deems the alleged error preserved, whether the instruction was accurate hinges on whether Pan-Oceanic can be independently liable. If Pan-Oceanic can be independently liable, the instruction was proper.

Standard of Review

Where a party challenges a court's decision to give or withhold an instruction, the standard of review is abuse of discretion. A court does not abuse its discretion so long as, "taken as a whole, the instructions fairly, fully,

and comprehensively apprised the jury of the relevant legal principles." *York v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 222 Ill. 2d 147, 203, 854 N.E.2d 635, 666 (2006). However, when the question is whether the instruction accurately conveyed the law, it presents a question of law and the standard of review is *de novo*. *Studt v. Sherman Health Sys.*, 2011 IL 108182, ¶ 13, 951 N.E.2d 1131, 1135. The latter is the situation here.

Argument

IPI 50.01 instructs a jury how to proceed if there is no issue about agency. If they find the agent liable, they must find the principal liable. If they find the agent not liable, they must find the principal not liable. However, its Notes on Use provide that its last sentence is not to be used where the principal can be liable independently of the agent's acts, as in this case. As explained above, the jury could find Pan-Oceanic liable for its failure to train Green and for instructing him to drive the load even if it found Green not guilty. Consequently, the instruction accurately stated the law. It would have been error to include the last sentence.

Pan-Oceanic also forfeited any error. Plaintiff tendered the modified IPI 50.01 without its last sentence. C1792. Pan-Oceanic's counsel said he had no objection, presumably because he recognized that the instruction as submitted was appropriate in light of the court's ruling that the jury could find Pan-Oceanic independently liable. R2321. The court read that instruction to the jury without objection. R2474. To preserve an objection to an instruction, the

party must object, specifically identifying the claimed defect. *Deal v. Byford*, 127 Ill. 2d 192, 202–03, 537 N.E.2d 267, 271 (1989); *Ladao v. Faits*, 2019 IL App (1st) 180610, ¶ 22, 126 N.E.3d 410, 417–18 (a party must object during the instruction conference or when the instructions are read).

In the same vein, Pan-Oceanic's counsel did not tender an alternative instruction containing the last sentence. In *Grunsten v. Malone*, 125 Ill. App. 3d 1068, 1075, 466 N.E.2d 1209, 1214 (1984), the plaintiff complained that the instructions did not mention one element of damages. The court held that the plaintiff's failure to tender an instruction as to that issue forfeited any error, and it reversed an order granting a new trial. That same rationale applies to Pan-Oceanic's failure to tender an instruction with the sentence it desired.

III. Pan-Oceanic's counsel did not tender IPI B21.02.02 and IPI 20.01.01 and did not object to their absence, thus forfeiting any error. Even if the Court elects to consider the alleged error, the absence of the instructions would not have caused prejudice because the evidence and liability were simple and there is no reason to assume the jury did not understand what Plaintiff had to prove.

Standard of Review

The standard of review is *de novo* for the reasons set out in Point II. The further foundational prerequisite for relief from alleged instructional error is that the appellant show it made a timely and specific objection and tendered an alternative instruction. *Mikolajczyk v. Ford Motor Co.*, 231 Ill. 2d 516, 557, 901 N.E.2d 329, 353 (2008). The dissent pointed out that this Court in

Mikolajczyk established that an objection and an alternative instruction are clear prerequisites to claiming error. Op. at ¶ 73.

Argument

Pan-Oceanic forfeited any error.

Only after the case was lost did Pan-Oceanic decide that two instructions it never tendered were imbued with great meaning. Only then did it claim the trial court on its own motion should have drafted and given IPI B21.02.02 and a modified version of IPI 20.01.01. IPI B21.02.02 says the plaintiff has the burden of proof and IPI 20.01.01 provides a framework for setting out the negligence and willful and wanton issues. App. at A75, A78. Pan-Oceanic did not tender either one so the court obviously could not give either one. It did give an issue instruction as to Pan-Oceanic, addressing all the charges. R2417-18; C1798.

It is undisputed that Pan-Oceanic did not preserve this alleged error. As to IPI B21.02.02, the majority noted: "At trial, Pan-Oceanic did not raise the argument that IPI Civil No. B21.02.02 should have been given." Opinion at ¶ 59. Defendant had tendered a different burden instruction (B21.02) which was clearly inappropriate. When Plaintiff's counsel objected, Defendant withdrew it and as the majority noted: "At no future point did defense counsel reassert the need for a burden of proof instruction or tender the instruction that Pan-Oceanic now states was proper." *Id.* "Oceanic should have tendered

its desired instruction in the trial court but did not, despite having had ample opportunity to do so." *Id.*

The same was true for IPI 20.01.01. The majority emphasized: "At trial, Pan-Oceanic did not raise the problem that there was no issues instruction for willful and wanton conduct." Op. at ¶ 62. The court added: "Again, Pan-Oceanic should have submitted its desired instruction at trial." Op. at ¶ 63.

And the majority acknowledged that Plaintiff's argument for forfeiture correctly stated the rule: a party must tender a proper instruction to preserve an issue for appeal. Op. at ¶ 59; *Mikolajczyk v. Ford Motor Co.*, 231 Ill. 2d 516, 557, 901 N.E.2d 329, 353 (2008).

The court further agreed ". . . it is not the duty of the trial court to prepare or amend instructions or to give an instruction on its own motion." *Id.* That last point by the court was in response to Pan-Oceanic's contention that the judge had an independent duty to draft and tender instructions. Pan-Oceanic had claimed the missing instructions were the court's responsibility. Def. app. ct. br. at 30. However, it is not a court's duty to prepare or tender instructions. *Williams v. Conner*, 228 Ill. App. 3d 350, 363, 591 N.E.2d 982, 990 (1992). Further, where a party fails to tender a required instruction, courts will presume the jury has been instructed as that party desired, so there is no error. *Grunsten v. Malone*, 125 Ill. App. 3d 1068, 1075, 466 N.E.2d 1209, 1214 (1984) (plaintiff' did not tender an instruction on certain damage issues).

There is no good reason to allow a party to argue post-verdict for instructions it did not tender.

A fair question is why courts should allow a party to sit by and allow an instruction process to occur without tendering an instruction, instead waiting to see the verdict before determining whether to raise a question about that instruction. That would give the party two bites of the apple. The party could see how the verdict came out before objecting or arguing that an instruction should have been given. If the jury found for the party who had not tendered an instruction, counsel would refrain from raising that point and instead keep the verdict. If that party lost, counsel would seek relief by arguing it was error for the court not to give the non-tendered instruction.

That should not be allowed for the same reason a party must move for a mistrial and obtain a ruling before the verdict is returned. Courts do not allow a party in that situation to wait to see the verdict and let that guide whether the party seeks a mistrial. *Burkhamer v. Krumske*, 2015 IL App (1st) 131863, ¶ 20, 34 N.E.3d 1167, 1171–72.

The plain error doctrine was not implicated.

Pan-Oceanic also argued plain error. Def. app. ct. br. at 30. The appellate court did not say it was relying on that doctrine or even refer to it. Indeed, the majority did not even make clear whether it believed Pan-Oceanic's omission of the two instructions by itself merited a new trial. It may have meant that Pan-Oceanic's instructional failure instead acted in conjunction

with what the court thought was error in allowing the jury to find Pan-Oceanic separately liable, to require a new trial. Op. at ¶ 65.

Plaintiff had explained that the plain error doctrine "is a limited and narrow exception to the general waiver rule." *York v. El-Ganzouri*, 353 Ill.App.3d 1, 817 N.E.2d 1179, 1189 (2004); aff'd, 222 Ill.2d 147 (2006). Such relief is exceedingly rare in civil cases and can be considered only where the proceedings "deprived the appellant of a fair trial and amounted to an affront to the judicial process". *Id.* This record does not show anything like that.

The rule finds its primary application in criminal cases. *Gillespie v. Chrysler Motors Corp.*, 135 Ill.2d 363, 553 N.E.2d 291, 297 (1990). The Court there acknowledged it had applied plain error in civil cases but emphasized it limited its application to situations where a closing argument was such that the litigant "cannot receive a fair trial and the judicial process stand without deterioration." Reversing an appellate finding of plain error, *Gillespie* said the reviewing court's analysis was faulty because courts are to "strictly apply the waiver doctrine unless the prejudicial error involves flagrant misconduct or behavior so inflammatory that the jury verdict is a product of biased compassion." *Id.* Pan-Oceanic showed nothing like that and consequently, if the appellate court meant to apply plain error, it was in error.

Defendant did not show prejudice.

Plaintiff's challenge to the viability of the appellate court's finding of error in the instructions does not end there. Instructional error allows reversal

only if the appellant also shows that the alleged error caused prejudice. *Carey v. J.R. Lazzara, Inc.*, 277 Ill.App.3d 902, 661 N.E.2d 413, 416 (1996); *Trimble v. Olympic Tavern, Inc.*, 239 Ill.App.3d 393, 606 N.E.2d 1276, 1282, (1993) (even where a party tendered an instruction the court should have allowed, a court should grant a new trial only if the appellant shows its absence caused serious prejudice).

To establish prejudice, the challenger must show a reasonable probability that but for the error, the result would have been different. That means the party must show "a reasonable probability, not just a mere possibility, of a different outcome." *Interest of D.M.*, 2020 IL App (1st) 200103, ¶ 30 (applying that definition even where there was a claim for ineffective assistance of counsel in a parental rights proceeding with personal rights of children involved). The court in *Ittersagen v. Advocate Health & Hosps. Corp.*, 2020 IL App (1st) 190778, ¶ 87, addressing evidentiary error, similarly explained substantial prejudice meant that absent the challenged remarks, the outcome would have been different.

Pan-Oceanic did not explain how its failure to tender the two instructions caused prejudice. The appellate court did take from Pan-Oceanic's brief its point that it is essential for jurors to receive a definition of the burden of proof. Op. at ¶ 60); Def. app. ct. br. at 31. But that was irrelevant because, as the opinion immediately acknowledged, the jury did receive that instruction. C1790 (definition instruction). The opinion continued to track Pan-Oceanic's

argument, saying that even where a jury is given the definition, not including a burden of proof instruction for the causes of action at issue (IPI 21.02 and its variants) results in the jury's findings being rendered through an improper scope of analysis. The court relied on *Powell v. Dean Foods Co.*, 2013 IL App (1st) 082513-B, ¶ 135, 7 N.E.3d 675, 710 for that holding, but *Powell* was much different.

First, *Powell* was more complex because it involved not only the typical burden to prove the defendant driver was negligent but also the need to prove the driver was the defendant's agent. This case was much simpler, indeed basic. It involved a garden-variety vehicle accident without any comparative. Surely the jury had no problem understanding what was going on – McQueen was proving it was Pan-Oceanic's fault. The outcome was going to be the same with or without B21.02.01.

That was different from *Powell* with its agency issues where the burden of proof was more nuanced. A description of who had the burden of proof might have been necessary there. By comparison, the liability aspect here was so simple that instructions were likely unnecessary. We say that based on the suggestion by Pan-Oceanic's counsel that it is often better in trials like this if the judge puts the instructions aside and explains the jury's duties in common sense language. R2208.

Equally significant, *Powell* did not involve forfeiture. Its comments on prejudice came in the context of the denial of a specific instruction on agency.

Unlike Pan-Oceanic, the defendant in *Powell* submitted an instruction explaining the burden of proof on agency. *Id.* at ¶ 129. There is no reason to believe the outcome in *Powell* would have been the same if the defendant had forfeited the issue as Pan-Oceanic did here by not tendering the instruction.

Finally, unlike *Powell*, the jury here was told who had the burden of proof. Pan-Oceanic's counsel began by arguing that Plaintiff had not carried his burden of proof. R2363-64. Counsel clarified what that meant: Fletcher McQueen had the burden of proof. R2391. If Plaintiff did not carry his burden of proof, the jury had to find for Defendants. R2364. Given that Plaintiff's counsel did not challenge that description of who had the burden and given the simple nature of the liability issue, the jury surely understood and accepted counsel's direction that Plaintiff had the burden of proof.

This Court addressed a somewhat similar scenario in *People v. Huckstead*, 91 Ill. 2d 536, 543–44, 440 N.E.2d 1248, 1251 (1982), where the defendant raised self-defense. The defendant claimed plain error on the ground the jury was not instructed that the State had to prove beyond a reasonable doubt that the defendant was not justified in using the force he used. His counsel had not objected to not having that instruction and did not tender it. In denying relief for that alleged error, the Court in addition to noting that the instructions as a whole explained self-defense, also pointed out that defense counsel had repeatedly emphasized to the jury that the State had the burden of proving the defendant's conduct was not justified. The court

found no reason to reverse because the jury heard the law. The same logic should apply here.

The fact that a counsel's description of who has the burden of proof can substitute for the actual instruction because it removes the likelihood of prejudice is also seen in the court's analysis in *People v. Cook*, 262 Ill. App. 3d 1005, 1018–19, 640 N.E.2d 274, 282–83 (1994), where the same self defense instruction was not given. *Cook* found plain error and ineffective assistance of counsel in what it described as a very close case, not only because it was a close case but also, relevant to this case, because counsel there did *not* apprise the jury of the State's burden of proof. If defendant's counsel had described who had the burden of proof, as was done here, the appellate outcome would likely have been the opposite. Counsel's description here about who had the burden of proof similarly militates against finding prejudice.

As to the second instruction Pan-Oceanic did not tender, IPI 20.01.01, Pan-Oceanic similarly did not explain how its absence caused prejudice. In its Phase I closing argument, its counsel apparently felt there was no need to distinguish between the negligence and the willful allegations because he did not do that. He simply told the jury it had to find whether the corporation's conduct rose to the level of willful conduct, what he called punitive damages. R2362. He told them to read the instruction defining willful conduct, without explaining what to look for. R2393-94. In its Phase II argument, its counsel again made no effort to distinguish among the various charges in the issues

instruction, apparently accepting that any of them could be deemed willful. R2625-30. If distinguishing among the charges, as 20.01.01 would have done, was so critical, surely its counsel would have made that distinction clear to the jury.

Further, without a proposed issues instruction from Pan-Oceanic, neither Plaintiff nor this Court can know what it would have looked like. That is so because the issues instruction is not a definitional instruction but rather a template. The parties insert its substantive elements. If the Court does not know what Pan-Oceanic would have inserted, it cannot tell whether the instruction's presence would have made a difference.

A trial court does not abuse its discretion so long as "taken as a whole, the instructions fairly, fully, and comprehensively apprised the jury of the relevant legal principles." *York v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 222 Ill. 2d 147, 203, 854 N.E.2d 635, 666 (2006). Between the arguments and the instructions tendered, the jury here was adequately instructed.

The exceptions to forfeiture are not applicable.

The rule that forfeiture is not a limitation on the courts should not excuse Pan-Oceanic's forfeiture because this case does not involve any of the factors identified as prerequisites for declining forfeiture. The case does not involve criminal or any other civil liberty issues, the ruling on the instructions will not affect the body of law on instructions, the result will not affect any

related criminal case, and no constitutional interests are involved. Those have all been identified as factors allowing courts to decline forfeiture.

This Court has explained why consideration of a forfeited issue would be inappropriate. For example, it refused to decline forfeiture in *Deal v. Byford*, 127 Ill. 2d 192, 200–01, 537 N.E.2d 267, 270 (1989). The Court enforced forfeiture with respect to points not raised in the petition for leave to appeal as well as instruction issues where the party did not tender an instruction. It reasoned that it would not "condone counsels' conduct and ignore procedural errors so that we might reach issues the parties have failed to properly preserve and now ask us to review."

The Court in that case pointed to *People v. Ward*, 113 Ill.2d 516 (1986) and to *People v. Anderson* (1986), 112 Ill.2d 39 (1986). In *Ward* and *Anderson,* the Court said it would consider forfeited issues if the facts presented good reason. *Ward, supra* at 522-23. The Court declined to do so in each case, noting that the validity of the conviction had been considered by the appellate court and that essentially the same questions were being raised and concluding that further review was consequently unnecessary.

Here, the instructional issue was carefully considered by the trial judge despite not being raised until posttrial. As courts have often noted, reviewing courts keep in mind that the trial judge had the benefit of hearing the witnesses and watching the jury and is thus in the best position to measure the effect of any evidentiary or instructional error. See, e.g., *Sikora v. Parikh*,

2018 IL App (1st) 172473, ¶ 71, 122 N.E.3d 327, 342 (trial court was in the best position to measure the prejudicial effect of comment and visual aid and whether that prejudice was ameliorated by the objection and curative instruction); *United States v. McKnight*, 665 F.3d 786, 792 (7th Cir. 2011) (judicial officer who observes witnesses, hears the substance and tone of arguments and watches the jury's reactions is in the best position to determine the need for cautionary instructions).

Courts sometimes also decline forfeiture in criminal cases where personal liberty is at stake, not an issue here. Declining forfeiture is similarly seen in cases involving involuntary psychiatric admission. In *re Amanda H.*, 2017 IL App (3d) 150164, ¶ 33, 79 N.E.3d 215, 225–26 (noting that important liberty interests were involved). Another court chose to address a forfeited issue where it was of a constitutional dimension and had been fully briefed. *Poullette v. Silverstein*, 328 Ill. App. 3d 791, 797, 767 N.E.2d 477, 481 (2002).

Forfeiture was also ignored in a case involving parental rights. The court said it would ignore the general rule of forfeiture in the interest of achieving a just result or maintaining a sound and uniform body of precedent. *In re P.J.*, 2018 IL App (3d) 170539, ¶ 11, 101 N.E.3d 194, 197. That court took the lead from this Court's statement to that effect in *Golden Rule Ins. Co. v. Schwartz*, 203 Ill. 2d 456, 463, 786 N.E.2d 1010, 1014–15 (2003). And in *Robert S.*, 213 Ill.2d 30, 57, 820 N.E.2d 424, 440 (2004), the Court considered an issue despite forfeiture because it could affect a party's criminal case. Additionally,

this Court declined forfeiture where a party failed to comply with Rule 19 providing for notice to the Attorney General in cases involving constitutionality. *Vill. of Lake Villa v. Stokovich*, 211 Ill. 2d 106, 118–19, 810 N.E.2d 13, 22 (2004).

Finally, in a case with parallels to this case, the Court in *Zaabel v. Konetski*, 209 Ill. 2d 127, 136, 807 N.E.2d 372, 377 (2004), concluded the interest of justice did not require it to search for arguments the party had made no attempt to provide. That mirrors this case where Pan-Oceanic made no attempt to provide what it now contends were crucial instructions.

Given that this case does not fit within the categories of cases where courts declined forfeiture and that the trial judge carefully considered all the issues as shown by her comprehensive posttrial order, this Court should apply forfeiture.

Pan-Oceanic's failure should not become a sword against Plaintiff.

A final reason to apply forfeiture is that this was not a situation where Plaintiff would have opposed the instructions if Pan-Oceanic had tendered them. Plaintiff gained no advantage from Pan-Oceanic's failure and he would have had no reason to object. They are form instructions used routinely. Further, as explained above, it is not evident that the absence of the two instructions could have caused prejudice to Pan-Oceanic. Plaintiff's point is that where a party had no role in causing the opponent's decision not to offer

the instructions and gained nothing from the opponent's election, it would be unfair to penalize that party for the other's decision.

CONCLUSION

For the reasons stated, Plaintiff-Appellant Fletcher McQueen requests that the appellate court opinion be reversed and that the verdict and judgment for Plaintiff be reinstated. In the alternative, Plaintiff-Appellant requests such other and further relief as may be deemed appropriate.

Respectfully submitted,

/s/ *Michael W. Rathsack*

Michael W. Rathsack
Attorney for Plaintiff-Appellant
10 South LaSalle St. - 1420
Chicago, Illinois 60603
(312) 726-5433
mrathsack@rathsack.net

Of counsel:

Yao O. Dinizulu
and
Michael W. Rathsack

CERTIFICATE OF COMPLIANCE

Under penalties as provided by law, pursuant to Section 1-109 of the Code of Civil Procedure, I certify that this document conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 11,285 words.

/s/ *Michael W. Rathsack*

MICHAEL W. RATHSACK
Attorney for Plaintiff-Appellant
10 South LaSalle St. - 1420
Chicago, Illinois 60603
(312) 726-5433
mrathsack@rathsack.net

APPENDIX

E-FILED
3/3/2021 2:54 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

TABLE OF CONTENTS TO THE APPENDIX

14L/050 McQueen, Fletcher v. Green, LaVonta
Pan-Oceanic Engineering Co, Inc.

VERDICT A

We, the jury, find for Fletcher McQueen and against Pan-Oceanic Engineering Co., Inc., and award punitive damages against Pan-Oceanic Engineering Co., Inc. as follows: 8301

$ 1,000,000.00

CC MMT

Foreperson

FILED
Law Div.-1606
MAY 12 2017 MT
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL

Judge Bridget A. Mitchell
MAY 12 2017 MT
Circuit Court – 2133

C 1917

A1

4L 1050 McQueen, Fletcher v. Green, Lavonta Van-Dreading Engineering Co, Inc.

SPECIAL INTERROGATORY #1

Do you find that Defendant Lavonta Green acted with reckless disregard for the safety of others?

YES _____

NO X

Foreperson

FILED
Law Div. - 1606
MAY 12 2017 MT
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL

Judge Bridget A. Mitchell
MAY 12 2017 MT
Circuit Court – 2133

C 1913

A2

14L1050 McQueen Fletcher v. Green, Lavonta
Pan-Oceanic Engineering Co, Inc.

SPECIAL INTERROGATORY #2

Do you find that Defendant Pan-Oceanic Engineering Co., Inc. acted with reckless disregard for the safety of others?

CC MMT

YES X

NO _____

Foreperson

FILED
Law Div.-1606
MAY 12 2017 MT
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL

Judge Bridget A. Mitchell
MAY 12 2017 MT
Circuit Court – 2133

C 1915

A3

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

CC MMT

FLETCHER MCQUEEN, Plaintiff	)	Case No. 2014 L 001050
v.	)	
LAVONTA M. GREEN, and PAN-OCEANIC ENGINEERING CO., INC., Defendant	)	

ORDER

This matter having come before the Court for trial, the jury having found in favor of Defendant Lavonta Green and against Plaintiff Fletcher McQueen and in favor of Plaintiff Fletcher McQueen and against Defendant Pan-Oceanic Engineering Co., Inc, It is Hereby Ordered: 9101 9108

Judgment is entered on the verdict in favor of the Plaintiff Fletcher McQueen and against Pan-Oceanic Engineering Co. Inc. of $163,227.45, for compensatory damages and costs.

On Special Interrogatory 1 on whether Defendant Lavonta Green's conduct was reckless, the jury answered "NO". On Special Interrogatory 2 on whether Pan-Oceanic Engineering Co., Inc., was reckless, the jury entered a verdict of "YES".

The jury deliberated and awarded a punitive damages verdict in favor of Plaintiff Fletcher McQueen and against Defendant Pan-Oceanic Engineering Co., Inc. $1,000,000.00. Judgment is hereby entered in the amount of $1,000,000.00 against Defendant Pan-Oceanic Engineering Co., Inc. 9101

The parties are given leave to retain their own exhibits.

42580

Dinizulu Law Group, Ltd
44300
221 North LaSalle Suite 1100
Chicago, IL 60601
312 384-1920

ENTERED 2133

Judge Bridget A. Mitchell

5/12/17
DATED

MAY 12 2017 MT

Circuit Court – 2133

C 1919

A4

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

FLETCHER McQUEEN, Plaintiff, v. LaVONTA M. GREEN and PAN-OCEANIC ENGINEERING CO., INC., Defendants.	)	Case No. 14 L 001050 Hon. Bridget A. Mitchell

Order

This matter coming before the court on Defendant, PAN-OCEANIC ENGINEERING CO., INC.'s, Post-Trial Motion seeking Judgment Notwithstanding the Verdict as to Counts II and III of Plaintiff's Complaint , a New Trial on all issues, Count III or as to punitive damages only and a Remittitur reducing the punitive damages award to an amount no greater than $25,000.00 (twenty-five thousand dollars), the matter having been fully briefed and parties having argued the motion before the court, It is Hereby Ordered:

I. Motion for Judgment Notwithstanding the Verdict

Defendant, Pan-Oceanic Engineering Co., (hereinafter Pan-Oceanic) moves for judgment notwithstanding the verdict contending that the evidence elicited at trial was "insufficient" to support Plaintiff's contention that Defendants' negligence proximately caused Plaintiff's injuries. Determining whether movant is entitled to judgment notwithstanding the verdict is a question of law which requires the court to determine whether there was sufficient evidence presented at trial to support the jury's findings. *Grove* at p.11. "A court may grant a motion for *j.n.o.v.* only when all the evidence, viewed in a manner most favorable to the nonmoving party, so

overwhelming favors the moving party that no contrary verdict could ever stand." *Taluzek v. Illinois Cent. Gulf R.R.* (1993) 255 Ill.App.3d 72, 626 N.E.2d 1367, 1372. "This is clearly a very difficult standard to meet, limiting the power of the [trial] court to reverse a jury verdict to extreme situations only." *Powell v. Dean Foods Co.* (2011) 1-08-2513 and 1-08-2554, 2013 IL App.1st -82513-B, 7 N.E.3d 675, 691.

Defendant relies on *Gant v. L.U. Transport, Inc.* (1st Dist. 2002) 331 Ill.App.3d 924, 770 N.E.2d 1155, contending that it is entitled to judgment notwithstanding the verdict as a matter of law as to Counts II and III of Plaintiff's Complaint. Defendant argues that because it has admitted agency, its liability under Counts II and III cannot exceed its employee's liability. This is the holding of *Gant*, that an employer's liability cannot exceed its employee's liability where liability was imposed on an employer for a derivative claim of negligent hiring, retention and entrustment. Unlike *Gant*, examination of allegations contained in Counts II and III of the instant case reveals that the negligence allegations and allegations of willful and wanton conduct against the employer focus on fault attributable solely to the employer for its own conduct rather than a derivative claim. These negligence allegations asserted against Defendant in Count II of Plaintiff's Complaint include the allegations of negligent training and negligent supervision of its employee, a separate tort against the Defendant employer that is not derivative in nature. Count III of Plaintiff's Complaint asserts Plaintiff's willful and wanton claim against Defendants. As noted in *Longnecker v. Loyola University Medical Center* (2008) 383 Ill.App.3d 874, 891 N.E.2d 954, the liability of the party providing direct action is separate from the party charged with training that individual.

Evidence was presented to the jury that Defendant, Pan-Oceanic, had not trained its driver, Defendant Green, how to brake properly and to avoid braking if the load on the trailer became loose. In addition, Savinder Singh, Pan-Oceanic's supervisor on the job, instructed Defendant Green to transport the load, even though Green had told Singh that Patten Industries had placed the skid steer "crooked" on the trailer and that the chains fastening the skid steer were loose. TTr 581. Defendant Green denied that Pan-Oceanic ever taught him that an improperly loaded trailer could become unstable. TTr 591. Nor did Pan-Oceanic inform Green as to what could happen if the chains didn't properly fasten the load. TTr 592. In addition, Defendant Green admitted that a load placed diagonally could loosen and that he saw or felt the skid steer bounce, signaling that the load was loose. (TTr 582,586-587, TTr 606)

The jury observed these witnesses, heard their testimony and weighed their credibility. It was reasonable for the jury to conclude that Pan-Oceanic's conduct contributed to causing the accident. Clearly, the jury has decided both liability and damages based on the evidence presented at trial.

Pan-Oceanic takes that position that its conduct was not willful and amounted to, at most, "classic carelessness". In *Doe v. Bishop of Chicago* 2017 IL App (1st) 162388, the Illinois Appellate Court recognized that "...under the facts of one case, willful and wanton misconduct may be only degrees more than ordinary negligence,..." . *Id.* Furthermore, *Doe* recognized that "the same set of facts could support a finding of negligence and an award for punitive damages." Examination of the evidence presented at trial demonstrates that the jury could reasonably find that some of Pan-Oceanic's actions rose to the level of willful and wanton conduct.

Issue instruction as to Count III

"The law is well-settled, that to preserve an issue for appellate review, a party must make the appropriate objections in the trial court or the issue will be deemed waived. " *Gausselin v. Commonwealth Edison Co.* (1994) 1-92-2939, 206 Ill.App.3d 1068, 631 N.E.2d 1246. In order to preserve an objection to a jury instruction, a party must properly object with specificity and tender a proper instruction to the court. *Auton v. Logan Landfill, Inc.* (1984) Nos. 59699, 60021, cons., 105 Ill.2d 817, 822. Pan-Oceanic, movant in the instant case, failed to tender an issue instruction as to Count III and has forfeited and/or waived any objection as to this issue.

Rule: Defendant's Motion for Judgment Notwithstanding the Verdict is Denied.

II. Motion for New Trial

Pan-Oceanic moves for a new trial on all issues or, on Count III only, or, alternatively, as to the punitive damages phase only. When considering a motion for a new trial, the "court will weigh the evidence and set aside the verdict and order a new trial, if the verdict is contrary to the manifest weight of the evidence." *Maple v. Gustafson, (citing Mizowek,* 64 Ill.2d at 310) (1992) 151 Ill.2d 445, 452, 603 N.E.2d 508. "A verdict is against the manifest weight of the evidence where the opposite conclusion is clearly evident or where the findings of the jury are unreasonable, arbitrary, and not based upon any of the evidence." *Id.* at 452. The court has the discretion to grant a new trial when a jury returns a verdict that is against the manifest weight of the evidence, awards excessive damages, or "for other reasons" was not fair to the moving party. *Grove Fresh Distributors, Inc. v. New England Apple Products Co.* (1991) 1991 U.S. Dist. Lexis 11912, 1191 WL 160958. In *Tierney v. Community Memorial General Hospital* (1994), factors the court considered when determining whether the verdict was excessive were: "(1) the permanency and extent of the injuries suffered; (2) the plaintiff's age; (3) the possibility of deterioration in the future; (4) the medical expenses incurred; (5) past and future lost wages; and (6) any restrictions that the injury may have placed on the daily activities of the plaintiff." *Tierney* (1994) 1-92-2262 at p.11.

Examination of the evidence produced at trial in the instant case demonstrates that Plaintiff has produced ample evidence to support the jury's award. Plaintiff, a 40 year old carpenter, told the jury about the force of the impact between the vehicles, which parts of his body came into contact with his car and the pain he experienced in his neck, knee and low back. He testified as to his time off work and his assignment to lighter duty when returning to work. Plaintiff McQueen testified that he was treated by three doctors after the accident and that treatment consisted of medication, physical therapy and injections. In addition, the jury heard Dr. Vargas, an anesthesiologist who focuses on interventional pain management, state that Plaintiff was suffering with cervical and lumbar radiculopathy and arthropathy of the lumbosacral spine as a result of the accident. Dr. Vargas testified that Plaintiff's medical treatment was reasonable and necessary and causally connected to the accident. "Reviewing courts rarely disturb jury awards" and "are neither trained or equipped to second-guess those judgments about the pain and suffering and familial losses incurred by other human beings. " *Barry v. Owens-Corning Fiberglass Corp.* (1996) 1-94-2193 at 14. Pan-Oceanic has not established that the jury's award was against the manifest weight of the evidence. The court cannot say that the jury's findings are unreasonable, arbitrary or not based on the evidence. The court has considered Defendant's request for a new trial on all issues, on Count III only, and, in the alternative, as to the punitive damages phase only and is denying Defendant's Request for a New Trial.

Pan-Oceanic contends that it is entitled to judgment notwithstanding the verdict as there is no causal connection between the occurrence and any negligent or willful and wanton misconduct on Defendant Pan-Oceanic's part. As in *Proctor v. Davis* (1997) 291 Ill.App.3d 265, 268 the party with superior knowledge (a drug company in *Proctor's* case) can be found liable even though subservient party is not held liable. A review of the evidence regarding Pan- Oceanic's knowledge that the skid steer was placed "crooked" on the trailer, Pan-Oceanic's lack of driver training and its instruction to the driver to proceed with the load support the jury's decision.

Verdicts and Answers to Special Interrogatories

Pan-Oceanic alleges that the jury's answer to special interrogatory #1, answering "no" to the question of whether Defendant Levonta Green acted with reckless disregard for the safety of others, is legally inconsistent with the verdicts in the case. Pan-Oceanic relies on *Eggimann v. Wise* (2nd Dist. 1963) 41 Ill. App.2d 471, 483-484 for the proposition that verdict finding defendant guilty of negligence, in effect, finds the defendant not guilty of willful and wanton conduct. However, in *Eggiman*, the issues were linked together requiring the jury to find for plaintiff on both the issues of negligence and willful and wanton conduct. As the Illinois Supreme Court recognized in *Churchill v. Norfolk & W. Ry. Co.* (1978) 73 IL 2d 127, 145-147, "We limitedly agree

with the rationale in *Eggiman* to the extent that negligence and willful misconduct are not synonymous. They are not, however, in every instance, mutually exclusive." This reasoning is consistent with the court's decision in *Doe v. Bishop of Chicago*, which recognized that the same facts could support findings of both negligence and willful and wanton misconduct.

Pan-Oceanic contends that the special interrogatories submitted to the jury were confusing and misleading because they used different language than the jury instruction defining "willful and wanton conduct". In addition, Plaintiff contends that the verdicts and answer to special interrogatory #2, asking whether Defendant Pan-Oceanic Engineering Co. Inc. acted with reckless disregard for the safety of others, are contrary to applicable law. "The purpose of a special interrogatory is to guard "the integrity of a general verdict in a civil jury trial."" *Blue v. Environmental Engineering, Inc.* (2003) 345 Ill.App.3d 455, 803 N.E. 2d 187, 192. "An "inconsistency" between the special finding and the general verdict exists only when special finding are clearly and absolutely irreconcilable with the general verdict." *Zois v. Piniarski* (1982) 107 Ill. App.3d 651, 437 N.E.2d 1251, 1251.

In the instant case, Pan-Oceanic did not object to the use of special interrogatories. Nor did it tender any alternative special interrogatories. (TrT 1574, lns 16-18) Defense counsel agreed with Plaintiff's proposal (TrT 1942, lns 5 and 11) and, during a jury instruction conference, acknowledged that all parties agreed to the form of the special interrogatories. (TrT 2038, lns 4-7) "The law is well-settled, that to preserve an issue for appellate review, a party must make the appropriate objections in the trial court or the issue will be deemed waived." *Gausselin v. Commonwealth Edison Co.* (1994) 1-92-2939, 206 Ill.App.3d 1068, 631 N.E.2d 1246, 1254. In the absence of any objection at trial, any objection to the Special Interrogatories was waived and/or forfeited by Defendant.

Jury Instructions

Pan-Oceanic claims that the trial court erred by failing to give certain jury instructions and by striking a sentence of IPI 50.01. Specifically, Defendant argues that the court erred in failing to instruct the jury as to the burden of proof in Counts II and III of Plaintiff's Complaint. However, Defendant neither objected nor tendered to the court a proper instruction on the burden of proof in Counts II and III of the Complaint. In order to preserve an objection to a jury instruction, a party must properly object with specificity and tender a proper instruction to the court. *Auton v. Logan Landfill, Inc.* (1984) Nos. 59699, 60021 cons., 105 Ill.2d 537, 475 N.E. 2d 817, 822. As stated in *Gausselin* , unless a party makes a specific objection before the trial court to preserve the issue for appellate review, the issue is waived. *Gausselin* Supra.

During the trial, the court discussed jury instructions with the parties on several occasions. On May 9, 2017 parties had their initial jury instruction conference. IPI 21.02 defining burden of proof was tendered by Plaintiff's counsel (TrT 1709, lns 18-23, TrT

1710, ln 3) Pan-Oceanic's counsel indicated that he wanted to tender a burden of proof instruction and the court reserved its ruling. Nonetheless, Defendant never tendered any additional burden of proof instructions to the court. Later, the court asked both parties to look through the instruction packet and determine if any instructions were missing. (TrT 2024)

On May 10, 2017 an additional jury instruction conference took place with the court reviewing jury instructions with the parties after the jury was excused for the day. At that time, the court noted that the instruction defining burden of proof was the only instruction on burden of proof tendered to the court. (TrT 2008, line 6) On May 11, 2017 the court, before reading the instructions to the jury, accepted an additional jury instruction tendered by Plaintiff's counsel and again reviewed all given instructions with trial counsel. (TrT 2044-2045, lns 4-13) (TrT 2046, lns 8-10) Additionally, the court asked the parties to look through their jury instruction packets to be sure the court read all given instructions to the jury. (TrT 2002, lns 11-15) IPI 21. 01, definition of burden of proof, Plaintiff's instruction #8, was given to the jury. (TrT 1937 – 1938) Without tendering any burden of proof instruction on the issues, Defendant has waived and/ or forfeited its objection that the court failed to give the burden of proof instruction as to Counts II and III of Plaintiff's Complaint.

Additionally, Pan-Oceanic, in its post-trial motion, claims that the trial court erred in striking a sentence from IPI 50.01. However, during trial, Defendant did not object to IPI 50.01, Plaintiff's instruction #16. (TrT 1935, lns 3-4) Without objecting at trial and tendering an alternative instruction, Defendant has waived this issue. *See Auton v. Logan Landfill, Inc.* (1984) Nos. 59699,60021 cons., Ill.2d 537, 475 N.E. 2d 817,822.

Pan-Oceanic also asserts that the court erred by failing to instruct the jury on Count III, the willful wanton count of Plaintiff's Complaint. Issue instructions on Counts I and II of Plaintiff's Complaint were tendered by Plaintiff to the court as Plaintiff's instructions #10 and #11. Defendant did not object to Plaintiff 's instructions and both instructions were given. (TrT 1940, lns 1- 21) Neither party submitted an issue instruction as to Count III of Plaintiff's Complaint. Again, without objecting at trial and tendering an alternative instruction, Defendant has waived this issue. *Id.* at 822.

It is important to note that the allegations of wrongful conduct asserted in Counts II and III of Plaintiff's Complaint were identical allegations with Count II alleging negligent conduct and Count III alleging willful and wanton conduct on Defendants' part. The parties in the instant case agreed to the special interrogatories which asked the jury to determine whether each Defendant's conduct was reckless, hence, rising to the level of willful and wanton conduct. Answering the special interrogatories required the jury to determine the issues raised in Count III of Plaintiff's Complaint, thus deciding whether any Defendants' conduct rose to the level of willful wanton conduct. This issue was discussed by the parties and no additional issue instruction was tendered by Defendants.

During closing arguments, both parties addressed the burden of proof. Plaintiff told the jury that he had the burden of proof on his claim and discussed Defendants' conduct; asking

the jury to decide on a more probably true than not basis whether Defendants' conduct was negligent. (TrT 1947, lns 19-22, TrT 1977-1978, lns 13-13, TrT 1958, lns 1-18) Moreover, reckless disregard was defined by Plaintiff. (TrT 1953, lns 22-23) In addition, Defendant's counsel noted that Defendants had the burden of proof with regard to their claim that Patten Industries was the sole proximate cause of the accident. (TrT 1990, lns 8, 9)

The Appellate Court, when examining the sufficiency of jury instructions, recognized that "it is not the duty of the trial court to prepare or amend instructions." *Williams v. Conner* (1992) 5-91-0154, 228 Ill. App.3d 350, 591 N.E.2d 982, 990. In evaluating the sufficiency of jury instructions, the " standard for determining an abuse of discretion is whether, taken as a whole, the instructions are sufficiently clear so as not to mislead and whether they fairly and correctly state the law." *Doe v. Bridgeforth* (2018) 2018 IL App 1701820, 2018 Lexis 112, 2018 WL 127647 . The Appellate Court reasoned that "a reviewing court ordinarily will not reverse a trial court for giving faulty instructions unless they clearly misled the jury and resulted in prejudice to the appellant." *Id.* In *Lounsbury v. Yorro* (1984) 124 Ill.App.3d 745, 464 N.E.2d 866, 869 the Appellate Court recognized that "Trial error warrants reversal only if the error prejudiced the appellant or unduly affected the outcome of the trial." The *Lounsbury* court reasoned that any prejudice arising from the court's restricting plaintiff's closing argument was harmless error as plaintiff was permitted to detail and explain to the jury what she was required to prove. As in *Lounsbury,* the parties were permitted to explain to the jury what they were required to prove. A careful examination of the jury instructions as a whole in the instant case demonstrates that the instructions were "sufficiently clear so as to not mislead" and "fairly and correctly stated the law." *Doe.* (2018) 2018 IL App 1701820.

Court Erred in Reinstructing Jury at Punitive Phase as to Definition of Willful and Wanton and as to Defendant's Duty to refrain from and Defendant's Liability for Willful Wanton Conduct

Pan-Oceanic, relying on *Pleasance v. City of Chicago*, contends that the court erred when instructing the jury at the punitive damages phase of the trial. *Pleasance* (2009) 396 N.E.2d 821, 920 N.E.2d 572. However, *Pleasance* is distinguishable from the instant case as it addresses the propriety of instructing the jury as to willful and wanton conduct where compensation for loss of society was the only issue at trial for the jury to determine. Unlike the instant case, *Pleasance* was not a bifurcated trial or a case where a willful and wanton instruction was warranted. Nor did *Pleasance* address the propriety of reading certain instructions more than once during a trial. Pan-Oceanic has offered no analogous legal authority in support of its contention. In the absence of any legal authority on this issue, Plaintiff's contention is rejected.

Admitting Photos of Plaintiff's Car and Allowing Photos in the Jury Room

Pan-Oceanic contends that the trial court erred when it denied, in part, Defendants' motion *in limine* 18 and allowed photos of Plaintiff's vehicle to be admitted into evidence and, over Defendants' objection, allowed the photos to go to jury room during the jury's deliberations. The court permitted the photos to be introduced to show the point of impact between the vehicles and prohibited the photos from being used to show causation of Plaintiff's injury. The court's ruling is consistent with the Appellate Court's decision in *DiCosola v. Bowman* (2003) 342 Ill.App.3d 530, 794 N.E.2d 875. Clearly, the "admission of photographs is a matter within the sound discretion of the trial court." *Gausselin v. Commonwealth Edison Co.* (1994) 1-92-2939, 260 Ill.App.3d 1068, 631 N.E 2d 1246, 1256.

Furthermore, the court's decision to send the photos, admitted into evidence, into the jury room was within the court's discretion as the "trial court has the discretion to permit all admitted evidence relevant to any material fact to go to the jury." *Estate of Oglesby v. Berg* (2011) 1-09-0639, 408 Ill. App. 3d 655, 659, 946 N.E.2d 414.

Evidentiary Rulings

While Defendants' counsel objected to the question that elicited Plaintiff's comments that he "would've been torn to bits" if struck on the right side of his vehicle, Defendant's attorney did not object to Plaintiff's response nor move to strike the Plaintiff's testimony. In *Gillespie v. Chrysler Motors Corp.* (1990) 135 Ill.2d 363, 553 N.E.2d 291, 299 the Illinois Supreme Court expressly states that the moving party must both object and move to strike the testimony at issue in order to preserve it's objection. Pan-Oceanic has waived and /or forfeited any objection on this issue by failing to preserve its objection.

Defendant contends that the court erred in excluding additional evidence from Gulzar Singh. Pan-Oceanic asserts that Gulzar Singh should have been allowed to offer rebuttal testimony that the skid steer's ignition had been modified prior to the accident so that only a "special key" (and not a "master key") could activate the machine. The testimony was barred as Defendant had made no disclosure on this issue prior to trial. Furthermore, this issue is not material as this evidence could have only been offered to impeach or rehabilitate Defendant Green who was found not guilty by the jury.

Pan-Oceanic claims that the court erred in excluding Savinder Singh's testimony about Singh's understanding as to whether a Patten employee was satisfied with the load's placement on the trailer. The court properly excluded this testimony as no foundation could be established for this evidence. For the same reason, the court excluded Gulzar Singh's testimony as to whether he believed a Patten employee had to personally view the load on the trailer to determine whether it was safe for travel. Defendant hasn't shown how it was prejudiced by these rulings. Nor has Defendant shown that a different verdict would have been reached had this evidence been allowed. Gulzar Singh offered substantial evidence in the case and

review of the entire record confirms that the court's exclusion of this evidence would not have changed the jury's verdict. When deciding *Taluzek v. Illinois Central Gulf Railroad* (1993) 255 Ill. App.3d 72, 626 N.E.2d 1367, 1375 the court recognized that "a party is not entitled to reversal based upon evidentiary rulings unless the error was substantially prejudicial and affected the outcome of the case." It noted that the trial judge's ruling as to the admissibility of evidence would not be overturned unless there was an abuse of discretion. *Id.* In *Simmons v. Garces* (2002) 198 Ill.2d 541, 763 N.E.2d 720, the Illinois Supreme Court relied on *Taluzek* for the proposition that the trial court's rulings would not be overturned "absent a clear abuse of discretion." 763 N.E.2d 720, 737. The *Simmons* Court held that the trial court had not abused its discretion when striking a witness' testimony reasoning that "Even if there was some error, it was harmless." *Id.* at 738. "An error is considered harmless when the jury would not have reached a different verdict because of significant evidence presented." *Neuhengen v. Global Experience Specialists, Inc.,et.al.* (2018) 2018 IL App (1st) 160322, 59.

The abuse of discretion analysis was also applied in *Jacobs v. Yellow Cab Affiliation, Inc.* (2017) 2017 IL App (1st) 151107, 73 N. E.3d 1220, 1236 the court noting that the abuse of discretion standard, "the most deferential standard of review available", does not permit a reviewing court to "substitute its own judgment or even determine whether the trial court exercised its discretion wisely." *Id. at 1236.* In *Neuhengen v. Global Experience Specialists, Inc. et.al.* (2018) 2018 IL App (1st) 160322 the court, echoed this analysis, stating "Reversal on appeal is not required unless an erroneous evidentiary ruling was substantially prejudicial, and the burden of establishing prejudice is on the party seeking reversal. " *Id.*

Cumulative Nature of All Errors Deprived Defendant of Due Process

Pan-Oceanic claims that "the court cannot say, when viewed cumulatively, the errors did not affect the verdict." (See Defendant's motion at para. P, p. 38) When determining whether the cumulative effect of trial errors deprive a party of a fair trial, the court's "concern is whether the plaintiff received a fair trial, one free of substantial prejudice." *Netto v. Goldenberg* (1994) 266 Ill.App.3d 174, 640 N.E.2d 948, 956. Reviewing the trial record, the court has determined that the "cumulative effect of any trial court errors did not deprive Pan-Oceanic of a fair trial.

Verdict on Punitive Count Was Excessive

(See discussion under Motion for Remittitur)

Rule: Defendant's Motion for a New Trial is Denied.

III. Motion for Remittitur

Pan-Oceanic moves for a remittitur on the punitive count of Plaintiff's claim, contending that the record does not support the verdict of $1million and seeks to reduce the award to $25,000, or, in the alternative, grant a conditional new trial. "Illinois courts have repeatedly held that the amount of damages to be assessed is peculiarly a question of fact for the jury to determine and that great weight must be given to the jury's decision." *Snelson v. Kamm* (2003) 204 Ill.2d 1, 36. The court may not reweigh the evidence or substitute its judgment for the jury's decision. *Supra*. A damages award will not be disturbed if "it falls within the flexible range of conclusions which can reasonably be supported by the facts, …" Id. at 74. Punitive damages serve "not to compensate the plaintiff but, rather to punish the defendant and to deter others from engaging in such conduct." *Blount v. Stroud* (2009) 395 Ill.App.3d 8, 915 N.E.2d 925. The jury, twelve citizens working together within the confines of the law, acts as the fact finder and is a crucial leveling and democratizing element in the law. The strength and credibility of the judicial system relies on the jury's determination of the facts. The jury in the instant case made finding of facts relying on the evidence present at trial and applying the law supplied to them in the jury instructions. The court cannot say that the jury's determination is against the manifest weight of the evidence or that its findings are unreasonable , arbitrary and not based up the evidence presented. Nor can the court conclude that an opposite conclusion is plainly evident.

A remittitur is permitted only in very limited circumstances; "Where a jury verdict falls outside the range of fair and reasonable compensation or results from passion or prejudice, or if it is so large that it shocks the judicial conscience, then a court has a duty to correct it by ordering a remittitur…with the plaintiff's consent." *Roach v. Union Pac. R.R.* (2014) 2104 IL. App. (1st) 132015, 19 N.E.3d 61,74.

In Illinois, punitive damages are analyzed by both a common law standard and a federal due process standard. The common law analysis requires that a jury's award of punitive damages not be reversed unless the damages awarded are "against the manifest weight of the evidence." *Blount* (2009) 395 Ill.App.3d 8, 22. The Illinois common law analysis focuses on the fact and circumstances of each case and allows consideration of factors such as " the nature and enormity of the wrong, the financial status of the defendant, and the potential liability of the defendant." *Blount* Id. Evidence was elicited during trial that Defendant, Pan-Oceanic, was told by its own driver that the skid steer "looked crooked" on the trailer and Defendant, Pan-Oceanic, nevertheless instructed its driver to transport the load. Evidence was presented that Defendant, Pan-Oceanic, had not trained its driver, Defendant Green, how to brake and to avoid braking if the load on the trailer became loose. Defendant , Green, Pan-Oceanic's driver, called Savinder Singh on the day of the accident telling him that Patten Industries had place the skid steer "crooked" on the trailer and that the chains fastening the skid steer were loose. TTr 581. Nevertheless, Savinder Singh, Pan-Oceanic's supervisor on the job, instructed Defendant Green to transport the load. TTr 594, 597. Defendant Green denied that Pan-Oceanic ever taught him that an improperly loaded trailer could become unstable. TTr 591. Nor did Pan-Oceanic inform Green as to what could happen if chains didn't properly fasten the load. TTr 592. Furthermore,

Gulzar Singh, president of Pan-Oceanic, acknowledged that is would be " a reckless disregard of safety rules" if its driver wasn't informed that an unstable load could cause a driver to lose control of a vehicle. (TTr 1304) In addition, he conceded that it would be an "utter disregard for safety " if a driver didn't have a chance to attend safety meetings.

With regard to Defendant's financial status, evidence of Pan-Oceanic's net worth of was properly adduced at trial. TTr 2149, lns 17-20, TTr 2150, lns 3-7, TTr 2158, lns 20-24. *Proctor v. Davis* (1997) 291 Ill.App.3d 265, 286. Gulzar Singh testified that Pan-Oceanic's retained earnings were in excess of $2 million annually for the years 2013 through 2015 with retained earnings of $2,474,700.14, for 2013, $2,690,284 for 2014 and $2,733,485 for 2015. While evidence was presented as to 3 years of Pan-Oceanic's retained earnings, the total net worth of the company was never identified. Based on 3 years of retained earnings, Pan-Oceanic has the ability to satisfy the punitive damages award of $1million in this case. With regard to Pan-Oceanic's potential liability, Plaintiff is the only person who was harmed as a result of this occurrence.

The constitutional analysis of punitive damages relies on the due process clause of the fourteenth amendment which "prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor" as an arbitrary deprivation of property. *Blount* (2009) 395 Ill App.3d 8, *24*. When determining whether the jury's award satisfies due process requirements, the court considers "(1) the degree of reprehensibility of the conduct; (2) the disparity between the harm or potential harm suffered by the plaintiff and the amount of punitive damages awarded; and (3) the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases." Id. at 24.

In determining the degree of reprehensibility, the court considers several factors including :

(1) whether harm was physical as opposed to economic; (2) whether the tortious conduct demonstrated an indifference or reckless disregard for safety; (3) whether the target of the conduct was financially vulnerable; (4) whether the conduct involved repeated actions or was an isolated incident; (5) whether the harm resulted from intentional malice or deceit or mere accident. *Int'l Union of Operating Engineers, Local 150 v. Lowe Excavating Co.,* (2006) 225 Ill. 2d 456, 469-470, 870 N.E.2d 303, 313.

Plaintiff in the instant case, Fletcher McQueen, suffered physical harm as opposed to economic injury. With regard to the second factor, the jury found that Defendant acted with reckless disregard for the safety of others. The third factor, plaintiff's financial vulnerability does not apply to this case. There was no evidence of any similar action by Pan-Oceanic. As to intentional malice, there was evidence that Pan-Oceanic failed to train its driver about transporting large and heavy pieces of equipment. Moreover, Gulzar Singh acknowledged that it would be " a reckless disregard of safety rules" if its driver wasn't informed that an unstable load could cause a driver to lose control of a vehicle.

When examining the harm suffered by the Plaintiff compared to amount of punitive damages awarded, the court recognized that the ratio of punitive damages to compensatory damages is approximately 6.13:1 well within the permissible range allowed in *BMW of N. Am. v. Gore* (1996) 517 U.S. 559,582, 116 S.Ct. 158, 1598-1604. (rejecting a punitive damage award 500 times the amount of compensatory damages but recognizing that a relatively low compensatory award may support a higher ration of punitive damages.) Illinois has relied on *BMW* as a guide in addressing punitive damages. *See. Int'l Union of Operating Engineers, Local 150 v. Lowe Excavating Co.,* (2006) 225 Ill.2d 456, 169-170, 870 N.E. 2d 303, 313. Note that in *Lowe*, the Illinois Supreme Court noted that a ratio of punitive damages to compensatory damages of 11:1 would be reasonable.

When analyzing the punitive damages award in relation to civil penalties imposed or authorized in comparable cases, Pan-Oceanic, noted the fines for violating provisions of the Federal Motor Carrier Safety Act, were limited to $10,000 for a driver and $25,000 for a carrier. However, even Defendant seems to question whether those provisions apply to the instant case. In *Gehrett v. Cherpler Corp.* , (2008) 379 Ill. App.3d 162, a consumer fraud case which awarded punitive damages, the court reasoned that this fourth criteria could not be applied as there were no civil penalties that applied to this action.

Employing both the common law analysis as well as the due process analysis in its examination of the evidence, the court has determined that Pan-Oceanic is not entitled to a remittitur. The jury, having had the opportunity to assess the witnesses' credibility and weigh the evidence presented at trial, has decided both liability and damages based on the evidence presented at trial.

Rule: Defendant's Motion for a Remittitur is Denied.

In conclusion, the court Order is as follows:
Defendant, Pan-Oceanic Engineering Co., Inc.'s Motion to Vacate and set aside the jury verdicts and judgment in this cause are DENIED;

It is Further Ordered:

1. That Defendant, Pan-Oceanic Engineering Co., Inc.'s, Motion for Judgment Notwithstanding the Verdict as to Count II is DENIED;
2. That Defendant, Pan-Oceanic Engineering Co., Inc.'s, Motion for Judgment Notwithstanding the Verdict as to Count III is DENIED;
3. That Defendant, Pan-Oceanic Engineering Co., Inc.'s, Motion for a New Trial as to Count II is DENIED;
4. That Defendant, Pan-Oceanic Engineering Co., Inc.'s, Motion for New Trial as to Count III is DENIED;

5. That Defendant, Pan-Oceanic Engineering Co., Inc.'s, Motion for New Trial as to punitive damages is DENIED;
6. That Defendant, Pam-Oceanic Engineering Co., Inc.'s Motion for a Remittitur and a Conditional New Trial is DENIED.

Judge Bridget A. Mitchell

JAN 11 2019

Circuit Court – 2133

Date

Judge

2020 IL App (1st) 190202

Appellate Court of Illinois, First District,
SIXTH DIVISION.

Fletcher MCQUEEN, Plaintiff-Appellee,
v.
Lavonta M. GREEN and Pan-Oceanic Engineering Company, Inc., a Corporation, Defendants
(Pan-Oceanic Engineering Company, Inc., Defendant-Appellant).

No. 1-19-0202
|
October 16, 2020

Appeal from the Circuit Court of Cook County. No. 14 L 1050, Honorable Bridget A. Mitchell, Judge Presiding.

Attorneys and Law Firms

Attorneys for Appellant: Daniel G. Suber, of Daniel G. Suber & Associates, of Chicago, for appellant.

Attorneys for Appellee: Michael W. Rathsack and Yao O. Dinizulu, both of Chicago, for appellee.

OPINION

JUSTICE CONNORS delivered the judgment of the court, with opinion.

***1** ¶ 1 After a jury trial, a verdict was entered against defendant Pan-Oceanic Engineering Company, Inc. (Pan-Oceanic), related to injuries suffered by plaintiff, Fletcher McQueen, as a result of a vehicular collision between plaintiff and Lavonta Green, who was an employee of Pan-Oceanic. Pan-Oceanic was ordered to pay $163,227.45 in compensatory damages and costs and $1 million in punitive damages. The jury did not find against Green. On appeal, Pan-Oceanic contends that it is entitled to a judgment *non obstante veredicto* (*n.o.v.*) or new trial based on faulty jury instructions and special interrogatories, inconsistent verdicts, and other issues. Finding that the verdicts were legally inconsistent and that the errors related to jury instructions prevented a fair trial, we reverse and remand for a new trial.

¶ 2 I. BACKGROUND

¶ 3 A. Complaint and Trial

¶ 4 Plaintiff's operative complaint, filed on March 8, 2017, alleged as follows. On August 17, 2012, Green—who worked for Pan-Oceanic—was assigned to pick up a skid steer from Patten Industries (Patten) and take it to a Pan-Oceanic site in Chicago. After agents for Patten loaded the skid steer onto Green's truck, Green observed that the load was crooked and "didn't look right." Green was nonetheless told to accept the load. While driving to the Pan-Oceanic site, Green lost control of his truck and struck plaintiff's vehicle, which injured plaintiff. Count I of the complaint alleged that Green was negligent. Count II alleged that

Pan-Oceanic was negligent and stated in part that Pan-Oceanic had failed to properly hire and train Green in various respects. Count III stated that Green and Pan-Oceanic each recklessly disregarded the safety of others, and it sought punitive damages. Defendants admitted that Green was an employee of Pan-Oceanic during the relevant times. There is no dispute that Pan-Oceanic admitted liability for Green under *respondeat superior*.

¶ 5 At trial, Green testified that he started working for Pan-Oceanic in March or April 2012. On the day of the collision, Green was driving a truck with an attached flatbed trailer. He went to Patten, located in Elmhurst, to pick up a skid steer that had been repaired. The usual procedure at Patten was that Green would load the machine onto the trailer himself. This time, however, someone from Patten had to load the skid steer using a telehandler (similar to a forklift) because the required key could not be found. After being loaded, the skid steer looked crooked. Green called his boss, "Salvi," and told him "it didn't look right" or "[i]t looked funny." Salvi then spoke to someone at Patten, who told Salvi "[i]t was all fine. He can drive it like that. It's safe." Salvi then told Green, "Be safe. Come to the yard." Green began driving and took the expressway to the Pan-Oceanic site. At one point, Green accelerated and observed in his rearview mirror that the trailer was bouncing. Green hit the brakes, whereupon he spun out, lost control, and hit plaintiff's vehicle.

***2** ¶ 6 Green did not know that a load could become unstable on the expressway if it was improperly loaded. No one at Pan-Oceanic had talked to Green about what could happen if a skid steer was improperly chained or loaded. Green also stated that he never had monthly foremen/superintendents' meetings that talked about loading tractors and trailers.

¶ 7 Plaintiff testified in part that Green spoke to him right after the collision, telling plaintiff that he hated driving the truck "because it had happened * * * two or three times before. It happened to somebody else." Plaintiff also testified about his injuries and medical care.

¶ 8 Gulzar Singh, president of Pan-Oceanic, testified as follows. Pan-Oceanic had monthly trainings for employees about loading and securing equipment, as well as weekly toolbox topic meetings and quarterly safety meetings for all employees. Employees were informed and trained that they could lose control of a load if it was unstable. If an employee were not so informed, that would be a reckless disregard of the safety rules. It would also be unsafe if drivers were not taught what to do if they lost control of a load. There were approximately 20 opportunities for Green to have a safety meeting, and if Green did not have a chance to have any safety meetings, that would be an utter disregard for the safety of Green and others on the road.

¶ 9 Savinder Singh, also known as Savi,[1] testified that he was a yard supervisor at Pan-Oceanic in August 2012 and instructed Green and other employees on various aspects of operating trucks. He testified as follows. Savi "told [Green] the basic way" to properly situate a load on a trailer, but Green "knew pretty much how to as well, and I've seen him." Also, Green was trained to properly load a piece of equipment on the back of a trailer. After 60 days on the job, Green seemed familiar with the procedure for loading and unloading a trailer. Savi had not personally been in a situation where a load became insecure and he lost control of a load. Also, Savi himself was not taught how to handle a load that was in distress.

[1] Savi was referred to as "Salvi" during Green's testimony.

¶ 10 Savi also testified about his conversation with Green and Patten on the day of the collision. Savi denied that Green told him that the load was crooked or diagonal. Instead, Green told Savi that the load looked funny, and Savi did not ask what Green meant by that. At the time of the call, Savi was multitasking. After speaking to someone at Patten, Savi told Green to let Patten load the equipment and make sure it was secure. Savi denied that he told Green it was safe to drive the load and noted that he regularly told Green to "drive safe."

¶ 11 Via a videotaped evidence deposition, one of plaintiff's treating doctors testified about plaintiff's injuries and treatment.

¶ 12 The parties agreed to bifurcate the proceedings. In the first phase, the jury would decide liability and compensatory damages. Depending on the answers to special interrogatories, the jury would consider punitive damages in a second phase.

¶ 13 At a jury instruction conference, the court and the parties discussed Illinois Pattern Jury Instructions, Civil, No. 50.01 (approved Dec. 8, 2011) (hereinafter IPI Civil), which applies when both the principal and agent are sued and there is no issue as to agency. The court noted that the last sentence of the instruction would read, "if you find that—and it will give Lavonta Green—is not liable, then you must find that Pan-Oceanic is not liable * * * if it's strictly responding superior." Defense counsel responded, "Exactly," but plaintiff's counsel disagreed and asserted that plaintiff had independent allegations against Pan-Oceanic. Plaintiff's counsel suggested IPI Civil No. 50.02, which applied when the principal was sued but not the agent. The court maintained that IPI Civil No. 50.01 was the proper instruction because the principal and agent were both parties. Plaintiff's counsel apologized. Upon inquiry, defense counsel confirmed that he did not object to IPI Civil No. 50.01.

***3** ¶ 14 The matter of Green's and Pan-Oceanic's liability being linked also came up during defense counsel's request for separate verdict forms for Green and Pan-Oceanic. Defense counsel stated that Green and Pan-Oceanic were sued separately and Green was a separate defendant. The following exchange ensued about whether separate forms were proper where Green was Pan-Oceanic's agent:

> "MR. BROWN [(PLAINTIFF'S COUNSEL)]: He's been sued individually and as agent for Pan-Oceanic.
>
> MR. SUBER [(DEFENSE COUNSEL)]: Well, he's been sued as an agent, but he's also been sued individually.
>
> THE COURT: In any event, you're going to tender separate verdict forms as to each defendant. We're going to [address] that. But that is my concern, if you're admitting, what you are, that Green is your agent at the time of the occurrence * * * there is no conceivable way that you can find against Green and not against Pan-Oceanic.
>
> MR. BROWN: Right.
>
> THE COURT: In theory, because there is this failure to adequately train and theory you can find [against] Pan-Oceanic, I guess, but not Green. I don't know. It seems to me they rise and fall together because you've admitted he's your agent. He's acting within his scope of his agency at the time of the occurrence."

¶ 15 The court and the parties later returned to IPI Civil No. 50.01, discussing as follows:

> "THE COURT: [N]ormally, I really think this is the way to go, this 50.01 * * *, but my concern is that Lavonta Green * * * is an agent of Pan-Oceanic. That is undisputed. So if you find against Lavonta, you find against Pan-Oceanic.
>
> MR. SUBER [(DEFENSE COUNSEL)]: And adversely.
>
> THE COURT: Right. By my * * * concern is we've got these separate allegations against Pan-Oceanic * * * in other words, it's conceivable—
>
> MR. BROWN [(PLAINTIFF'S COUNSEL)]: Yes, it is.
>
> THE COURT: It's conceivable that you could find against Pan-Oceanic on the second count for negligent acts that were acts that—on a theory other than responding as superior [*sic*]."

The court reserved ruling on IPI Civil No. 50.01. The court added that plaintiff would bring some alternative instructions and invited defense counsel to tender an alternative instruction as well.

¶ 16 The proposed special interrogatories asked whether Green and Pan-Oceanic acted with reckless disregard. The court noted that the terms reckless or willful and wanton needed to be defined. Plaintiff's counsel agreed and stated he would "absolutely include it and we will add it." The parties disagreed about how broadly or specifically the special interrogatories should be phrased.

¶ 17 Later, defense counsel tendered IPI Civil No. B21.02, pertaining to the burden of proof for negligence where there is one plaintiff and one defendant and contributory negligence is an issue. Plaintiff's counsel objected, and the trial court reserved its ruling.

¶ 18 Returning to the jury instructions the next day, plaintiff's counsel suggested using three verdict forms: (1) for plaintiff and against Green and Pan-Oceanic, (2) for plaintiff and against Pan-Oceanic but not Green, and (3) against plaintiff and for Green and Pan-Oceanic. Defense counsel reasserted that Green should be given his own verdict form because he was sued both as an individual and as an employee of Pan-Oceanic. The court stated it would "give it over defendants' objection because any allegations and negligence against Mr. Green * * * are related to his work as an employee of Pan Oceanic and agency is not disputed."

***4** ¶ 19 Defense counsel noted at one point that he thought there was an instruction that "any negligence of Pan Oceanic is negligence against * * * Green and vice versa." The court responded, "I think it's any negligence of Green, that Green is an agent of Pan Oceanic. * * * There were some separate allegations against Pan Oceanic in terms of * * * properly trained, failure to properly hire, and so forth." Defense counsel again asserted that there should be separate verdict forms for each defendant. The court stated, "In the sense that you've admitted agency, there's no conceivable way the jury could find for Green and against Pan Oceanic because you've admitted he's your agent."

¶ 20 In reviewing the jury instructions, the court noted that IPI Civil No. 50.01 would be given, and there was no objection. A brief discussion on an instruction for the burden of proof was held:

> "THE COURT: Defendants' 8, burden of proof, 21.01.
>
> MR. SUBER [(DEFENSE COUNSEL)]: The plaintiff has the burden of proof?
>
> THE COURT: Yes—No. When I say the party has the burden of proof on any proposition or use the expression if you find or if you decide."

The issues instructions for negligence were given over defendants' objection. The parties and the court had the following exchange about the special interrogatories, about which there had been continued disagreement about how broadly or specifically they should be worded:

> "MR. BROWN [(PLAINTIFF'S COUNSEL)]: It seems to me that if we just say broadly did you find that any of La Vonta Green's conduct was done in reckless disregard for the safety of others.
>
> THE COURT: I think that's perfect.
>
> MR. SUBER [(DEFENSE COUNSEL)]: That's great.
>
> MR. BROWN: So then I can argue everything, and we don't have to worry. And the same with Pan Oceanic.
>
> THE COURT: Perfect.
>
> MR. BROWN: Any of their conduct.
>
> THE COURT: Now we're in business.
>
> MR. SUBER: That's a great idea."

¶ 21 Subsequently, the parties presented their closing arguments to the jury. In his closing, plaintiff's counsel contended in part that it was reckless for Green to take the load on the road because the risks of harm to others were so great. Further, Pan-Oceanic did not care about what happened to drivers or the public. Plaintiff's counsel stated that, "for willful and wanton, we're not

asking for any money. There just has to be a finding." Counsel recited a definition for willful and wanton conduct and added that "[i]t has nothing to do with intentionality. It has to do with a higher degree of negligence that arises to recklessness."

¶ 22 As part of his closing, defense counsel explained the burden of proof, stating that it meant "that you have to be provided a certain quality of information * * * so that when you go back to that jury room and you make your decision you're not all collectively scratching your heads saying, Well, what did he mean by that and where is there evidence of this and where is there evidence of that." Defense counsel added that if the jury found, after considering the evidence, that plaintiff had not carried his burden of proof, then the jury must decide for defendants. Also, if the jury found that there were a lot of questions about plaintiff's proof, "then in order to be fair, you have to decide that there's not enough evidence or not enough quality of evidence, there's not enough quantity of evidence such that you could be fair to both parties. So that's the touchstone of your decision based on burden of proof." Turning to the details of the incident, defense counsel asserted that Patten was at fault. Further, Green did what any other person under the circumstances would be expected to do. Counsel also suggested that Savi Singh reasonably relied on Patten's assurances about the load. Even if Green was negligent, his conduct did not rise to a level of utter indifference or conscious disregard for the safety of others. There was never an intent to hurt anyone and never an intent "that would be reckless under these circumstances."

***5** ¶ 23 In rebuttal, plaintiff's counsel noted that defense counsel had not advanced a single defense about Pan-Oceanic's training or education of Green. Counsel also stated that it would be understandable if the jury found Green careless "and not in utter disregard," but "under no circumstances should Pan Oceanic be allowed to walk in this case."

¶ 24 After closing arguments, the jury was excused for the day, and the parties and the court went over the instructions a final time. The court wanted to "make sure we've got everything" and invited each side to go through the instructions and "see if you think anything is missing." The court went through each instruction. The court read the submitted version of IPI Civil No. 50.01 as follows: "Defendants are sued as principal and agent of Defendant. Pan Oceanic as principal defines [Green's] agent. If [Green] is liable, then you must find Pan Oceanic is also liable." Neither party objected. Turning to the issues instructions, the court told the parties to "[m]ake sure we've got both issues," and plaintiff's counsel noted that there was one issues instruction for Green and one for Pan-Oceanic. The court read the issues instructions to both parties. Defense counsel confirmed that the special interrogatories were "what we all agreed on as to form."

¶ 25 The next day, the court instructed the jury in part as follows:

> "When I say that a party has the burden of proof on any proposition, or use the expression 'if you find,' or 'if you decide,' I mean you must be persuaded, considering all the evidence in the case, that the position on which he has the burden of proof is more probably true than not true.
>
> The defendant Pan-Oceanic Engineering Company, Inc. is a corporation and can only act through its officers and employees. Any act or omission of an officer or employee within the scope of his employment is the action or omission of the defendant corporation.
>
> The defendants are sued as principal and agent. The defendant Pan-Oceanic Engineering Company, Inc., is the principal and the defendant Lavonta Green is its agent. If you find that the defendant Lavonta Green is liable, then you must find that the defendant Pan-Oceanic Engineering Company, Inc., is also liable.
>
> It was the duty of the defendants before and at the time of the occurrence to refrain from willful and wanton conduct which would endanger the safety of the plaintiff.
>
> When I use the expression 'willful and wanton conduct' I mean a course of action which shows an utter indifference to or conscious disregard for the safety of others.
>
> * * *

The plaintiff claims that he was injured and sustained damage and that the defendant Lavonta Green was negligent in one or more of the following respects:

a. Failed to acknowledge and/or understand the risks associated with hauling an improperly situated trailer on the rear of the skid steer he was operating;

b. Failed to properly secure the skid steer on the rear of the truck;

c. Operated the truck on the highway with an unsafe, improperly situated skid steer on it, when he knew, or should have known that it was unsafe for the others on the highway to do so;

d. Drove too fast for the conditions;

e. Failed to properly operate and control his vehicle given existing conditions;

f. Failed to keep the skid steer and the load under control;

g. Took the load on the highway when he knew or should have known the load should have been rejected by him given its unsafe condition;

***6** h. Improperly attempted to stop the truck while travelling down the highway;

The defendants, Lavonta Green and Pan-Oceanic Engineering Company, Inc. deny that defendant Lavonta Green was negligent in doing any of the things claimed by the plaintiff and deny that any claimed act or omission on the part of defendant Lavonta Green was a proximate cause of the plaintiff's claimed injuries. The defendants further deny that the plaintiff was injured or sustained damages to the extent claimed.

The plaintiff claims that he was injured and sustained damage, and that the defendant Pan-Oceanic Engineering Company, Inc. was negligent in one or more of the following respects:

a. Failed to train Lavonta Green about the risks of carrying an unsafe load;

b. Failed to train Lavonta Green in the hazards associated with driving an improperly situated load on the highway;

c. Failed to implement and/or follow proper policies and procedures regarding proper placement of a load;

d. Ordered and/or permitted Lavonta Green to take the load on the highway after Pan-Oceanic Engineering Company, Inc. knew, or should have known that it was in an unsafe state;

e. Accepted information from personnel at Patten Industries;

f. Failed to reject the load and prevent it from leaving Patten Industries;

g. Failed to train Lavonta Green regarding properly braking.

The defendant Pan-Oceanic Engineering Company, Inc. denies that it was negligent in doing any of the things claimed by the plaintiff and denies that any claimed act or omission on the part of the defendant was a proximate cause of the plaintiff's claimed injuries.

The defendant further denies that the plaintiff was injured or sustained damages to the extent claimed.

* * *

> If you find for [plaintiff] and against Lavonta Green and Pan-Oceanic Engineering Company, Inc., then you should use Verdict Form A.
>
> If you find for [plaintiff] and against Pan-Oceanic Engineering Company, Inc., but not against Lavonta Green, then you should use Verdict Form B.
>
> If you find for Lavonta Green and Pan-Oceanic Engineering Company, Inc., and against [plaintiff], then you should use Verdict Form C."

The jury was also given two special interrogatories, to which the jury had to answer "yes" or "no." The first asked, "Do you find that defendant Lavonta Green acted with reckless disregard for the safety of others?" The second asked, "Do you find that defendant Pan-Oceanic Engineering Company, Inc. acted with reckless disregard for the safety of others?"

¶ 26 After deliberating, the jury returned verdict form B, finding for plaintiff and against Pan-Oceanic, but not against Green. The jury awarded plaintiff $163,227.45 in compensatory damages. The jury answered "No" to the special interrogatory that asked whether Green acted with reckless disregard and answered "Yes" to the special interrogatory that asked whether Pan-Oceanic acted with reckless disregard.

¶ 27 The proceedings turned to the punitive damages phase, where Gulzar Singh testified about Pan-Oceanic's financial position. After the jury was instructed and deliberated, it returned a punitive damages award of $1 million against Pan-Oceanic.

¶ 28 B. Posttrial Proceedings

***7** ¶ 29 On August 14, 2017, Pan-Oceanic filed a posttrial motion that sought a judgment *n.o.v.* and new trial based on several alleged errors and asserted in part as follows. Because Pan-Oceanic admitted agency, its liability under the theories of negligent training, supervision, and entrustment could not exceed that of Green. So, the verdict in favor of Green meant that Pan-Oceanic could not be liable for negligence in training, supervising, or entrusting Green with the vehicle. Further, the court erred in striking the last sentence of IPI Civil No. 50.01, which would have advised the jury that if it found for Green on negligence, it must also find that Pan-Oceanic was not negligent. Also, the special interrogatories were confusing and misleading, in that they contained different language than the definition of willful and wanton conduct in the instructions. Further, the verdicts and answers to the special interrogatories were legally inconsistent, mutually exclusive, and contrary to the manifest weight of the evidence. Pan-Oceanic also asserted that the court failed to instruct the jury as to the burden of proof for the counts that alleged negligence against Pan-Oceanic and willful and wanton conduct against Green and Pan-Oceanic. And plaintiff failed to tender and the court failed to instruct the jury as to the issues in the willful and wanton count of the complaint, which would have set forth what specific acts constituted willful and wanton misconduct beyond ordinary negligence.

¶ 30 In response, plaintiff maintained in part that there was no error in the form of IPI Civil No. 50.01 that was given because plaintiff made an independent charge of negligence against Pan-Oceanic. That independent charge was based on Pan-Oceanic's direct conduct of failing to train Green and instructing him to proceed despite questions about the safety of the load. Plaintiff also asserted that the special interrogatories were proper and Pan-Oceanic waived any error based on the absence of instructions.

¶ 31 On January 11, 2019, the court entered a written order that denied Pan-Oceanic's posttrial motion. The court rejected Pan-Oceanic's argument that, because it admitted agency, its liability could not exceed that of Green. The allegations of negligence and willful and wanton conduct against Pan-Oceanic focused on fault attributable solely to Pan-Oceanic for its own conduct. The allegations of negligent training and supervision were a separate, nonderivative tort. Also, Pan-Oceanic waived its objection to IPI Civil No. 50.01 because it did not object at trial and tender an alternative instruction. The court also found that Pan-Oceanic forfeited and/or waived any objections to the absence of instructions related to the special interrogatories, the burden of proof, and the issues for willful and wanton conduct. The court noted that the parties' closing arguments addressed the burden of proof and the definition of reckless disregard.

¶ 32 Pan-Oceanic timely appealed.

¶ 33 II. ANALYSIS

¶ 34 Pan-Oceanic asserts that this court should enter a judgment *n.o.v.* or remand for a new trial based on several errors. We find the errors related to the jury instructions and special interrogatories to be dispositive and will address each error in turn.

¶ 35 A. IPI Civil No. 50.01

¶ 36 Pan-Oceanic contends that the trial court erred by omitting the last sentence of IPI Civil No. 50.01, which would have instructed the jury that if it found for Green, it must also find for Pan-Oceanic. Pan-Oceanic argues that because it admitted agency, plaintiff could not maintain an independent charge of negligence against it.

¶ 37 IPI Civil No. 50.01 states as follows:

> "The defendants are sued as principal and agent. The defendant [principal's name] is the principal and the defendant [agent's name] is [his] [its] agent. If you find that the defendant [agent's name] is liable, then you must find that the defendant [principal's name] is also liable. However, if you find that [agent's name] is not liable, then you must find that [principal's name] is not liable."

The instruction is proper when agency is not at issue (IPI Civil No. 50.01, Notes on Use), and agency was not at issue here. Further,

> "[i]f by the pleadings and evidence there is an issue of fact as to the liability of the principal for his own acts independent of acts of the agent, then a separate instruction appropriate to such independent basis of liability should also be used and the last sentence of this instruction should be modified or stricken accordingly." IPI Civil No. 50.01, Notes on Use.

***8** The instruction is not limited to tort cases. IPI Civil No. 50.01, Comment.

¶ 38 The version of IPI Civil No. 50.01 that was given at trial omitted the last sentence and stated:

> "The defendants are sued as principal and agent. The defendant Pan-Oceanic Engineering Company, Inc. is the principal and the defendant Lavonta Green is its agent. If you find that the defendant Lavonta Green is liable, then you must find that the defendant Pan-Oceanic Engineering Company, Inc., is also liable."

¶ 39 At various points below, both parties and the court seemed to have labored under the misunderstanding that Green and Pan-Oceanic could be treated separately. Yet, Illinois case law directs that their liability was tied together in this instance, and so the last sentence of IPI Civil No. 50.01 should have been included.

¶ 40 The function of jury instructions is to convey to the jury the correct principles of law that apply to the submitted evidence. *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 507, 264 Ill.Dec. 653, 771 N.E.2d 357 (2002). Jury instructions "must state the law fairly and distinctly and must not mislead the jury or prejudice a party." (Emphasis omitted.) *Id.* Whether the applicable law was conveyed accurately is a question of law that is reviewed *de novo*. *Studt v. Sherman Health Systems*, 2011 IL 108182, ¶ 13, 351 Ill.Dec. 467, 951 N.E.2d 1131. "A faulty jury instruction does not require reversal unless the error results in serious prejudice to the party's right to a fair trial." *Doe v. University of Chicago Medical Center*, 2014 IL App (1st) 121593, ¶ 87, 386 Ill.Dec. 140, 20 N.E.3d 1.

¶ 41 To review, count I of plaintiff's complaint asserted negligence against Green, and count II asserted negligence against Pan-Oceanic. Count III sought punitive damages against Green and Pan-Oceanic on the basis that their acts or omissions

demonstrated a reckless disregard for the safety of others. Pan-Oceanic admitted that Green was its employee. There is no dispute that Pan-Oceanic was liable for Green's torts under the theory of *respondeat superior.* See *Hoy v. Great Lakes Retail Services, Inc.*, 2016 IL App (1st) 150877, ¶ 24, 402 Ill.Dec. 465, 52 N.E.3d 386 (under theory of *respondeat superior*, employer may be liable for the torts of an employee when the employee commits the tort within the scope of his employment). At trial, negligence against Pan-Oceanic was framed in terms of failing to train Green in various respects and ordering and/or permitting Green to take the load, among other allegations.

¶ 42 In Illinois, a plaintiff who is injured in a motor vehicle accident cannot maintain a claim for negligent hiring, negligent retention, or negligent entrustment against an employer where the employer admits responsibility for the conduct of the employee under *respondeat superior*. *Gant v. L.U. Transport, Inc.*, 331 Ill. App. 3d 924, 928, 264 Ill.Dec. 459, 770 N.E.2d 1155 (2002). A negligent entrustment claim is derivative of the employee's negligence. *Id.* The employer is responsible for all of the fault attributed to the negligent employee, but only the fault attributed to the negligent employee. *Id.* at 929, 264 Ill.Dec. 459, 770 N.E.2d 1155. As such, once an employer admits responsibility for its employee's negligence, "then any liability alleged under an alternative theory, such as negligent entrustment or negligent hiring, becomes irrelevant and should properly be dismissed." *Neuhengen v. Global Experience Specialists, Inc.*, 2018 IL App (1st) 160322, ¶ 84, 424 Ill.Dec. 718, 109 N.E.3d 832 (citing *Neff v. Davenport Packing Co.*, 131 Ill. App. 2d 791, 792-93, 268 N.E.2d 574 (1971)). This principle applies even though claims such as negligent hiring and retention are based on the employer's negligence in hiring or retaining the employee and not the employee's wrongful act. *Gant*, 331 Ill. App. 3d at 927, 264 Ill.Dec. 459, 770 N.E.2d 1155.

***9** ¶ 43 Thus, once Pan-Oceanic admitted liability under *respondeat superior*, the jury should not have been permitted to find that Pan-Oceanic could be independently negligent. Plaintiff tries to avoid this outcome by asserting that the case did not go to the jury under negligent hiring, retention, or entrustment but only under the separate and distinct theory of negligent training, which is not derivative of the employee's negligence.

¶ 44 No Illinois cases have directly addressed whether negligent training should be treated differently than negligent entrustment. In *National R.R. Passenger Corp. v. Terracon Consultants, Inc.*, 2014 IL App (5th) 130257, ¶ 16, 383 Ill.Dec. 83, 13 N.E.3d 834, the court found that a negligent training claim could proceed where a defendant had not conceded responsibility under *respondeat superior* and had no liability under *respondeat superior*. But that does not answer the question of whether an employer could be independently liable for negligent training where the employer admits liability under *respondeat superior*. Looking elsewhere, jurisdictions that take the same approach as Illinois, disallowing direct negligence claims against the employer where the employer admits liability under *respondeat superior*, do not mention an exception for negligent training claims. See *Greene v. Grams*, 384 F. Supp. 3d 100, 104 (D.D.C. 2019) (direct negligence claims are barred once employer concedes vicarious liability for the negligence of its employee); *Ferrer v. Okbamicael*, 2017 CO 14M, 390 P.3d 836 (where the plaintiff asserted negligence against the employee and direct negligence claims against the employer that included negligent training and where employer admitted vicarious liability, all direct negligence claims against the employer were barred; collecting cases that bar direct negligence claims where the employer admits vicarious liability). We decline to treat negligent training differently from the other negligence claims that are barred once an employer admits liability under *respondeat superior*.

¶ 45 Also, plaintiff's reliance on *Longnecker v. Loyola University Medical Center*, 383 Ill. App. 3d 874, 322 Ill.Dec. 663, 891 N.E.2d 954 (2008), does not convince us that Pan-Oceanic could be independently negligent. In that case, the court rejected the claim that a doctor had to be professionally negligent before a hospital could be institutionally negligent. *Id.* at 894, 322 Ill.Dec. 663, 891 N.E.2d 954. Institutional negligence is subject to different rules than the negligence at issue here. The *Longnecker* court stated that institutional negligence "does not encompass, whatsoever, a hospital's responsibility for the conduct of its * * * medical professionals." (Internal quotation marks omitted.) *Id.* That is not the case when an employer admits liability under *respondeat superior*.

¶ 46 As the trial court noted at one point, the claims against Green and Pan-Oceanic had to rise and fall together. Pan-Oceanic could not be negligent unless Green was found negligent. The given version of IPI Civil No. 50.01 allowed the jury to find against Pan-Oceanic even if Green was not liable, which was an incorrect statement of the law.

¶ 47 The parties and the court initially agreed that the full version of IPI Civil No. 50.01 would be given. Yet, when going over the instructions a final time after closing arguments, the court read a version of IPI Civil No. 50.01 without the last sentence, and neither party objected. A party forfeits the right to challenge a jury instruction that was given at trial unless it makes a timely and specific objection to the instruction and tenders an alternative, remedial instruction to the trial court. *Mikolajczyk v. Ford Motor Co.*, 231 Ill. 2d 516, 557, 327 Ill.Dec. 1, 901 N.E.2d 329 (2008). Pan-Oceanic urges this court to find plain error. For the time being, we turn to the other key errors that occurred at trial before we consider whether plain error or another exception to forfeiture applies.

¶ 48 B. Language of Special Interrogatories

***10** ¶ 49 Pan-Oceanic contends that the language used in the special interrogatories was confusing, prejudicial, and inconsistent with the instructions about willful and wanton conduct. Pan-Oceanic notes that special interrogatory No. 2 asked whether Pan-Oceanic "acted with reckless disregard for the safety of others," but the word "reckless" was not used or defined anywhere in the instructions given during the compensatory phase of the trial. Pan-Oceanic argues that, even if it agreed to the wording of the special interrogatories, any such agreement did not relieve the trial court or plaintiff of the burden to avoid presenting the jury with language that is repetitive, confusing, or misleading.

¶ 50 A special interrogatory tests the general verdict against the jury's determination as to one or more issues of ultimate fact. *Simmons v. Garces*, 198 Ill. 2d 541, 555, 261 Ill.Dec. 471, 763 N.E.2d 720 (2002). "A special interrogatory is in proper form if (1) it relates to an ultimate issue of fact upon which the rights of the parties depend, and (2) an answer responsive thereto is inconsistent with some general verdict that might be returned." *Id.* Also, a special interrogatory should (1) consist of a single direct question; (2) not be prejudicial, repetitive, misleading, confusing, or ambiguous; and (3) use the same language or terms as the tendered instructions. *Smart v. City of Chicago*, 2013 IL App (1st) 120901, ¶ 32, 397 Ill.Dec. 891, 43 N.E.3d 532.

¶ 51 The special interrogatories submitted to the jury did not use the same language as the tendered instructions. "Reckless" was not defined or even used anywhere in the instructions. The definition of "willful and wanton conduct" did not include the term "reckless." The trial court noted at one point that "reckless" needed to be defined, but that never happened. Still, defense counsel agreed with the language of the special interrogatory, stating, "That's great," and "[t]hat's a great idea."

¶ 52 We are hesitant to find defense counsel's use of the term "reckless" in his closing argument to be a sufficient substitute for including the definition in the instructions. But see *Simmons*, 198 Ill. 2d at 565, 261 Ill.Dec. 471, 763 N.E.2d 720 (even though court did not define term "dehydration," which was used in special interrogatory, special interrogatory was proper where dehydration was extensively discussed and defined through expert testimony). In any event, a party cannot complain of an error that it induced the trial court to make or to which he consented. *Brax v. Kennedy*, 363 Ill. App. 3d 343, 350, 298 Ill.Dec. 994, 841 N.E.2d 137 (2005). Defense counsel endorsed the language of the special interrogatory, and he cannot now challenge that language on appeal. See *Price v. City of Chicago*, 2018 IL App (1st) 161599, ¶ 22, 420 Ill.Dec. 614, 97 N.E.3d 188 (the plaintiff waived any argument as to the form of the special interrogatory because the plaintiff agreed to its presentation to the jury).

¶ 53 C. Inconsistent Verdicts and Special Interrogatories

¶ 54 Although Pan-Oceanic waived any objection to the form of the special interrogatory, it did not waive its argument that the general verdict and answers to the special interrogatories were irreconcilable and legally inconsistent. See *La Pook v. City of Chicago*, 211 Ill. App. 3d 856, 864-65, 156 Ill.Dec. 232, 570 N.E.2d 708 (1991) (a party may waive an objection to the form of a special interrogatory by not specifically challenging it at the jury instructions conference, but not the question of whether the special interrogatory is inconsistent with the general verdict). Pan-Oceanic argues that the finding in special interrogatory No. 2 that it was reckless is inconsistent with the finding that Green was neither negligent nor reckless. Pan-Oceanic asserts

that Green's exoneration, combined with the assertion of *respondeat superior*, creates an absolute bar to liability against Pan-Oceanic. According to Pan-Oceanic, the verdicts are irreconcilably inconsistent, and a new trial is required.

***11** ¶ 55 Whether two verdicts are inconsistent is a question of law, and so a trial court's order granting or denying a new trial based on a claim of legally inconsistent verdicts is reviewed *de novo*. *Redmond v. Socha*, 216 Ill. 2d 622, 642, 297 Ill.Dec. 432, 837 N.E.2d 883 (2005). Per the jury's general verdict and answers to the special interrogatories, Pan-Oceanic was found to have acted with reckless disregard, and Green was absolved of liability. A party that acts with reckless disregard for the safety of others acts willfully and wantonly. *Baumrucker v. Express Cab Dispatch, Inc.*, 2017 IL App (1st) 161278, ¶ 35, 416 Ill.Dec. 500, 84 N.E.3d 482. Willful and wanton conduct is not an independent tort and is considered an aggravated form of negligence. *Neuhengen*, 2018 IL App (1st) 160322, ¶ 133, 424 Ill.Dec. 718, 109 N.E.3d 832.

¶ 56 As discussed above, Green's and Pan-Oceanic's liability had to rise and fall together because Pan-Oceanic admitted liability under *respondeat superior*. However, a principal may be found guilty of willful and wanton misconduct even though the agent was only negligent. *Lockett v. Bi-State Transit Authority*, 94 Ill. 2d 66, 73, 67 Ill.Dec. 830, 445 N.E.2d 310 (1983); see also *Neuhengen*, 2018 IL App (1st) 160322, ¶ 113, 424 Ill.Dec. 718, 109 N.E.3d 832 ("claims alleging willful and wanton conduct by an employer are not extinguished by an admission of *respondeat superior* liability for the actions of the employee"). The negligence of the employee is a prerequisite for finding the employer willful and wanton where the employer has admitted liability under *respondeat superior*. See *Johnson v. Kirkpatrick*, 11 Ill. App. 2d 214, 218, 136 N.E.2d 612 (1956) (jury acted inconsistently in finding driver not guilty of negligence and owner guilty of negligence, where owner's liability was premised on *respondeat superior*). Here, the jury's findings—that Green was not negligent but Pan-Oceanic acted with an aggravated form of negligence—were legally inconsistent. The trial court should have granted Pan-Oceanic's motion for a new trial for this reason. See *Redmond*, 216 Ill. 2d at 642, 297 Ill.Dec. 432, 837 N.E.2d 883 (legally inconsistent verdicts must be set aside and a new trial granted).

¶ 57 D. Missing Burden of Proof Instruction

¶ 58 The legally inconsistent verdicts are sufficient grounds for a new trial. But we will still address other errors with the jury instructions, keeping in mind that error also occurred with respect to IPI Civil No. 50.01. Pan-Oceanic asserts that the jury was not instructed as to the burden of proof, and so the jury was never instructed as to the necessary facts or elements of each cause of action that plaintiff had to prove. Pan-Oceanic contends that the trial court should have given a modified version of IPI Civil No. B21.02.02 as the burden of proof instruction. That instruction applies where there are alternative negligence and willful and wanton counts against a defendant.

¶ 59 At trial, Pan-Oceanic did not raise the argument that IPI Civil No. B21.02.02 should have been given. Defense counsel tendered IPI Civil No. B21.02, to which plaintiff objected and the court reserved its ruling. At no future point did defense counsel reassert the need for a burden of proof instruction or tender the instruction that Pan-Oceanic now states was proper. A party is required to tender a proper instruction, and it is not the duty of the trial court to prepare or amend instructions or to give an instruction on its own motion. *Williams v. Conner*, 228 Ill. App. 3d 350, 363, 169 Ill.Dec. 478, 591 N.E.2d 982 (1992). Further, a party who takes the position that the jury should have been instructed differently should have submitted that desired instruction to the trial judge. *Auton v. Logan Landfill, Inc.*, 105 Ill. 2d 537, 549, 86 Ill.Dec. 438, 475 N.E.2d 817 (1984). Pan-Oceanic should have tendered its desired instruction in the trial court but did not, despite having had ample opportunity to do so.

***12** ¶ 60 That oversight was significant. "[I]t is essential that jurors receive a definition or description of the applicable burden of proof." (Internal quotation marks omitted.) *Powell v. Dean Foods Co.*, 2013 IL App (1st) 082513-B, ¶, 379 Ill.Dec. 837, 7 N.E.3d 675 135 (opinion of McBride, J.). Without a burden of proof instruction, the jury was not told which party had to prove the specific elements of negligence and willful and wanton conduct. Even where the jury is given the general definition of the burden of proof via IPI Civil No. 21.01, as it was here, not including a burden of proof instruction for the causes of action at issue results in the "jury's deliberations, findings, and ultimate decision" being rendered "though an improper scope

of analysis." (Internal quotation marks omitted.) *Powell*, 2013 IL App (1st) 082513-B, ¶¶ 132, 135, 379 Ill.Dec. 837, 7 N.E.3d 675 (opinion of McBride, J.).

¶ 61 E. Missing Issues Instruction

¶ 62 Compounding the error was that the jury was not given an issues instruction for willful and wanton conduct. Pan-Oceanic maintains that the court should have given a modified version of IPI Civil No. 20.01.01, which delineates the issues where there are negligence and willful and wanton counts. At trial, Pan-Oceanic did not raise the problem that there was no issues instruction for willful and wanton conduct.

¶ 63 Again, Pan-Oceanic should have submitted its desired instruction at trial. See *Auton*, 105 Ill. 2d at 549, 86 Ill.Dec. 438, 475 N.E.2d 817. And like the missing burden of proof instruction, a missing issues instruction is no small matter. An issues instruction informs the jury of the plaintiff's claims and the defendant's responses. *Howat v. Donelson*, 305 Ill. App. 3d 183, 186, 238 Ill.Dec. 337, 711 N.E.2d 440 (1999). An issues instruction "must in a clear, concise[,] and comprehensive manner inform the jury as to what material facts must be found to recover or to defeat a recovery." (Internal quotation marks omitted.) *Id.* at 187, 238 Ill.Dec. 337, 711 N.E.2d 440. Further, an issues instruction tells the jury the points in controversy between the parties and simplifies their task of applying the law to the facts. IPI Civil No. 20.00, Introduction.

¶ 64 F. Effect of Faulty or Missing Instructions

¶ 65 We are faced with three faulty or missing instructions: the last sentence of IPI Civil No. 50.01, the burden of proof, and the issues for willful and wanton conduct. We do not view each instruction in isolation. Instructions should, in a concise and comprehensive manner, inform the jury of the issues presented, the principles of law to be applied, and the necessary facts to be proved to support its verdict. *Grover v. Commonwealth Plaza Condominium Ass'n*, 76 Ill. App. 3d 500, 508, 31 Ill.Dec. 896, 394 N.E.2d 1273 (1979). "The test is whether, taken as a whole and in series, the instructions are sufficiently clear so as not to mislead and whether they fairly and correctly state the law." *Williams*, 228 Ill. App. 3d at 364, 169 Ill.Dec. 478, 591 N.E.2d 982. While the legally inconsistent verdicts alone are cause for a new trial, the state of the jury instructions compels additional comment. See *Dillon*, 199 Ill. 2d at 505, 264 Ill.Dec. 653, 771 N.E.2d 357 (reviewing court may override considerations of waiver in furtherance of responsibility to provide a just result and maintain a sound and uniform body of precedent). Jurors are "laypersons who are not trained to separate issues and to disregard irrelevant matters. That is the purpose of jury instructions." *Id.* at 507, 264 Ill.Dec. 653, 771 N.E.2d 357. The jury here was given a woefully incomplete and inaccurate roadmap with which to weigh the evidence and arrive at a verdict. The attorneys' comments about the burden of proof and references to the issues in closing arguments were not a substitute for clear, concise, and accurate statements of the law that should have been included in the jury instructions. It places too large a burden on the jury to piece together statements in closing arguments as a substitute for jury instructions. In addition to the missing instructions, IPI Civil No. 50.01 as given was incorrect. The instructions, as a whole, did not fairly and correctly state the applicable law, which prevented a fair trial. We reverse and remand for a new trial. In light of our conclusion, we need not address Pan-Oceanic's other claims of error.

¶ 66 III. CONCLUSION

***13** ¶ 67 For the foregoing reasons, the judgment of the circuit court is reversed, and the matter is remanded for a new trial.

¶ 68 Reversed and remanded.

Justice Cunningham concurred in the judgment and opinion.

Presiding Justice Mikva dissented, with opinion.

¶ 69 PRESIDING JUSTICE MIKVA, dissenting:
¶ 70 I respectfully dissent. The majority relies on the doctrine announced in *Gant v. L.U. Transport, Inc.*, 331 Ill. App. 3d 924, 928, 264 Ill.Dec. 459, 770 N.E.2d 1155 (2002), to reverse and remand this case for a new trial because of inconsistent verdicts. In *Gant*, this court held that a plaintiff who is injured in a motor vehicle accident cannot maintain a claim for negligent hiring, negligent retention, or negligent entrustment against an employer where the employer admits responsibility for the conduct of its employee driver under the doctrine of *respondeat superior* because such claims are derivative of the employee's negligence. *Id.* As we reasoned in *Gant*, once an employer admits responsibility for its employee's negligence under one theory, then any liability alleged under an alternative theory that is also derivative of and dependent on the employee's negligence, such as negligent entrustment or negligent hiring, becomes irrelevant and should be dismissed. Because, under *Gant*, *respondeat superior* remains the only claim, the liability of the employer cannot exceed the negligence of the employee, and the claims rise and fall together. See *id.*

¶ 71 The holding in *Gant*, while it follows a rule that has been adopted in other jurisdictions, has never been endorsed by our supreme court and strikes me as being at odds with several well-reasoned decisions of this court, including *Longnecker v. Loyola University Medical Center*, 383 Ill. App. 3d 874, 322 Ill.Dec. 663, 891 N.E.2d 954 (2008) (holding a hospital could be liable for its own institutional negligence even where its employee doctor was not negligent) and *Neuhengen v. Global Experience Specialists, Inc.*, 2018 IL App (1st) 160322, ¶¶ 113, 127, 424 Ill.Dec. 718, 109 N.E.3d 832 (holding that "claims alleging willful and wanton conduct by an employer are not extinguished by an admission of *respondeat superior* liability for the actions of the employee"). Even assuming that the holding in *Gant* is one that we should follow, I believe the majority unnecessarily and unfairly extends application of the rule in that case beyond its principled parameters.

¶ 72 Here, the jury was instructed that, among the bases upon which it could find Pan-Oceanic liable, was if the company either "Failed to implement and/or follow proper policies and procedures regarding proper placement of a load" or "Ordered and/or permitted Lavonta Green to take the load on the highway after [Pan-Oceanic] knew, or should have known that it was in an unsafe state." Neither of these bases was derivative of Lavonta Green's negligence, nor was either of them dependent upon a finding that Mr. Green himself was negligent. Rather, both of these bases of liability rested entirely on the company's own negligence. I see no inconsistency in the jury's finding that Pan Oceanic was negligent—indeed that it acted willfully and wantonly—with its finding that Mr. Green was not negligent.

***14** ¶ 73 Section 2-1201(d) of the Code of Civil Procedure provides that,

> "[i]f several grounds of recovery are pleaded in support of the same claim, whether in the same or different counts, an entire verdict rendered for that claim shall not be set aside or reversed for the reason that any ground is defective, if one or more of the grounds is sufficient to sustain the verdict * * *." 735 ILCS 5/2-1201(d) (West 2016).

This is a codification of the common-law general verdict rule (see *Moore v. Jewel Tea Co.*, 46 Ill. 2d 288, 294, 263 N.E.2d 103 (1970)) or, as it is referred to by some courts, the "two issue rule" (see, *e.g.*, *Strino v. Premier Healthcare Associates, P.C.*, 365 Ill. App. 3d 895, 904, 302 Ill.Dec. 784, 850 N.E.2d 221 (2006)). Section 1201(d) expressly applies when several grounds of recovery are advanced at trial and even one is legally sound and supported by the evidence. 735 ILCS 5/2-1201(d) (West 2016)). By enacting it, the legislature clearly prioritized the upholding of jury verdicts, wherever possible, over the prejudice a losing party may have suffered as a result of a jury's consideration of a legally defective or insufficiently supported theory. Because I conclude that the jury's verdicts in this case were compatible under at least these two theories presented at trial, I would affirm.

¶ 74 While the majority reverses on the basis of inconsistent verdicts, it also notes that the jury instructions were deficient in several respects, one of which was that the jury was not instructed that if it found Mr. Green was not negligent it could not

go on to find that Pan-Oceanic was negligent. As the majority acknowledges, however, Pan-Oceanic failed to object to any of these instructions or offer alternative instructions. Our supreme court has made it clear that "[a] party forfeits the right to challenge a jury instruction that was given at trial unless it makes a timely and specific objection to the instruction and tenders an alternative, remedial instruction to the trial court." *Mikolajczyk v. Ford Motor Co.*, 231 Ill. 2d 516, 557, 327 Ill.Dec. 1, 901 N.E.2d 329 (2008). Thus, these instructions cannot provide a basis for reversal. Moreover, I believe that the version of IPI Civil No. 50.01 that was given at trial, and which omitted the last sentence of that pattern instruction, was correct because I believe that the jury could properly find, as it did, that Pan Oceanic was liable and Mr. Green was not.

All Citations

--- N.E.3d ----, 2020 IL App (1st) 190202, 2020 WL 6129160

DEFENDANT'S INDEX TO RECORD

Common Law Record

---

* Really, the Plaintiff's Second Amended Complaint. *See*, R.C355-360.

End of Common Law Record

Reports of Proceedings

Presented in Chronological Order

20.01.01 Issues Made By the Pleadings--Negligence and Willful and Wanton Counts

[1] The plaintiff's complaint consists of two counts. The issues to be decided by you under Count I of the complaint are as follows:

[2] The plaintiff claims that he was injured and sustained damage and that the defendant was negligent in one or more of the following respects:

> [Set forth in simple form without undue emphasis or repetition those allegations of the complaint as to negligence which have not been withdrawn or ruled out by the court and are supported by the evidence.]

[3] The plaintiff further claims that one or more of the foregoing was a proximate cause of his injuries.

[4] The defendant [denies that he did any of the things claimed by the plaintiff,] denies that he was negligent [in doing any of the things claimed by the plaintiff] [and denies that any claimed act or omission on the defendant's part was a proximate cause of the plaintiff's claimed injuries].

[5] The defendant claims that the plaintiff was contributorily negligent [in one or more of the following respects:]

> [*Set forth in simple form without undue emphasis or repetition those allegations of the answer as to the plaintiff's contributory negligence which have not been withdrawn or ruled out by the court and are supported by the evidence.*]

[6] The defendant further claims that one or more of the foregoing was [a] [the sole] proximate cause of the plaintiff's injuries.

[7] The plaintiff [denies that he did any of the things claimed by defendant,] denies that he was negligent [in doing any of the things claimed by defendant,] [to the extent claimed by defendant,] [and denies that any claimed act or omission on his part was a proximate cause of his claimed injuries].

[8] [The defendant also sets up the following affirmative defense(s):

Defendant (Defendant C) claims

> (here set forth in simple form without undue emphasis or repetition those affirmative defenses in the answer which have not been withdrawn or ruled out by the court and are supported by the evidence).]

[9] The plaintiff denies that [summarize affirmative defense(s)].

[10] [The defendant further denies that the plaintiff was injured or sustained damages (to the extent claimed).]

[11] Turning now to Count II of the complaint the issues to be decided by you under that Count are as follows:

[12] The plaintiff claims that he was injured and sustained damage and that the conduct of the defendant was willful and wanton in one or more of the following respects:

> [*Set forth in simple form without undue emphasis or repetition those allegations of the complaint as to willful and wanton conduct which have not been withdrawn or ruled out by the court and are supported by the evidence.*]

[13] The plaintiff further claims that one or more of the foregoing was a proximate cause of his injuries.

[14] The defendant [denies that he did any of the things claimed by the plaintiff,] denies that he was willful and wanton [in doing any of the things claimed by the plaintiff,] [denies that any claimed act or omission on the defendant's part was a proximate cause of the plaintiff's claimed injuries].

[15] [The defendant claims that the plaintiff was contributorily willful and wanton (in one or more of the following respects):

> (*Set forth in simple form without undue emphasis or repetition those allegations of the answer as to the plaintiff's contributory willful and wanton conduct which have not been withdrawn or ruled out by the court and are supported by the evidence.*)]

[16] [The defendant further claims that one or more of the foregoing was (a) (the sole) proximate cause of the plaintiff's injuries.]

[17] The plaintiff [denies that he did any of the things claimed by defendant,] [denies that he was willful and wanton] [in doing any of the things claimed by defendant,] [to the extent claimed by defendant,] [and denies that any claimed act or omission on his part was a proximate cause of his claimed injuries].

[18] [The defendant also sets up the following affirmative defense(s):

> (*Set forth in simple form without undue emphasis or repetition those affirmative defenses in the answer which have not been withdrawn or ruled out by the court and are supported by evidence*).]

[19] [The plaintiff denies that (summarize affirmative defense(s)).]

[20] The defendant further denies that the plaintiff was injured or sustained damages [to

the extent claimed].

Notes on Use

This instruction should be used where the case is submitted to the jury on charges of negligence in one or more counts, and on charges of willful and wanton conduct in another count or counts.

Poole v. City of Rolling Meadows, 167 Ill.2d 41, 656 N.E.2d 768, 212 Ill.Dec. 171 (1995), held that a plaintiff's contributory negligence is a damage-reducing factor if the defendant's willful and wanton conduct was "reckless," but not if it was "intentional." Therefore, if plaintiff's only claim is that defendant's conduct was the intentional form of willful and wanton, this instruction should not be used. If plaintiff claims intentional willful and wanton conduct in addition to other claims, this instruction should be modified accordingly.

Whether a plaintiff's contributory willful and wanton conduct bars the plaintiff's recovery or reduces the total amount of damages to which the plaintiff would otherwise be entitled was a question left open by the court in Poole. This instruction, with modifications, can be used whichever way the court rules on this issue.

All "special defenses" which must be pleaded under the notice requirements of §2-613(d) of the Illinois Civil Practice Law (735 ILCS 5/2-613(d)) are not necessarily "affirmative defenses" in the sense that they bar recovery. Although §2-613(d) (as amended in P.A. 84-624, effective 9/20/85) refers to contributory negligence as an "affirmative defense," it does not bar the cause of action, but mitigates damages and therefore is treated in paragraph [5] and not in paragraph [8].

Only affirmative defenses that bar recovery should be set forth under paragraphs [8] and [18] of this instruction. Other defenses that do not bar recovery, such as a claim that the plaintiff failed to mitigate damages, should be set forth in a separate paragraph, with the plaintiff's denials in a following paragraph.

B21.02.02 Burden of Proof on the Issues--One Plaintiff and One Defendant— Negligence and Willful and Wanton Counts

[1] The plaintiff has the burden of proving each of the following propositions in Count I of his complaint:

[2] First, that the defendant acted or failed to act in one of the ways claimed by the plaintiff as stated to you in these instructions and that in so acting, or failing to act, the defendant was negligent;

[3] Second, that [the plaintiff was injured] [and] [the plaintiff's property was damaged];

[4] Third, that the negligence of the defendant was a proximate cause of [the injury to the plaintiff] [and] [the damage to the plaintiff's property].

[5] In order to recover in this action on Count I, the plaintiff must prove all of the above propositions. If you find from your consideration of all the evidence that all of the propositions (First, Second, and Third) in Count I have been proved, then you must next consider the defendant's claim that the plaintiff was contributorily negligent as to Count I.

[6] As to that claim, the defendant has the burden of proving each of the following propositions:

[7] A: That the plaintiff acted or failed to act in one of the ways claimed by the defendant as stated to you in these instructions and that in so acting, or failing to act, the plaintiff was negligent;

[8] B: That the plaintiff's negligence was a proximate cause of [his injury] [and] [the damage to his property].

[9] If you find from your consideration of all the evidence that the plaintiff has proved all of the propositions required of the plaintiff (First, Second, and Third) in Count I, and if you find from your consideration of all the evidence that either of the propositions required of the defendant (A or B) has not been proved, then your verdict shall be for the plaintiff and you shall not reduce the plaintiff's damages.

[10] If you find from your consideration of all the evidence that one or more of the above propositions required of the plaintiff (First, Second, or Third) has not been proved, then your verdict shall be for the defendant.

[11] If you find from your consideration of all the evidence that the plaintiff has proved all of the propositions required of the plaintiff (First, Second, and Third) in Count I, and if you further find from your consideration of all the evidence that the defendant has proved both of the propositions required of the defendant (A and B) and that the plaintiff's negligence was greater

than 50% of the total proximate cause of the injury or damage for which recovery is sought, then your verdict shall be for the defendant.

[12] If you find from your consideration of all the evidence that the plaintiff has proved all of the propositions required of the plaintiff (First, Second, and Third) in Count I, and if you further find from your consideration of all the evidence that the defendant has proved both of the propositions required of the defendant (A and B) and that the plaintiff's negligence was 50% or less of the total proximate cause of the injury or damage for which recovery is sought, then your verdict shall be for the plaintiff and you shall reduce plaintiff's damages in the manner stated to you in these instructions.

[13] The plaintiff has the burden of proving each of the following propositions in Count II of his complaint:

[14] First, that the defendant acted or failed to act in one of the ways claimed by the plaintiff as stated to you in these instructions and that in so acting, or failing to act, the defendant was willful and wanton;

[15] Second, that [the plaintiff was injured] [and] [the plaintiff's property was damaged];

[16] Third, that the willful and wanton conduct of the defendant was a proximate cause of [the injury to the plaintiff] [and] [the damage to the plaintiff's property].

[17] If you find from your consideration of all the evidence that any of these propositions (First, Second, and Third) has not been proved, then your verdict shall be for the defendant as to Count II. But if, on the other hand, you find from your consideration of all the evidence that all the propositions (First, Second, and Third) in Count II have been proved, then you must next consider the defendant's claim that the plaintiff was contributorily willful and wanton as to Count II.

[18] As to that claim, defendant has the burden of proving each of the following propositions:

[19] A: That the plaintiff acted or failed to act in one of the ways claimed by the defendant as stated to you in these instructions and that in so acting, or failing to act, the plaintiff was willful and wanton;

[20] B: That the plaintiff's willful and wanton conduct was a proximate cause of [his injury] [and] [the damage to his property].

[21] If you find from your consideration of all the evidence that plaintiff has proved all of the propositions required of the plaintiff (First, Second, and Third) in Count II, and if you find from your consideration of all the evidence that either of the propositions required of the defendant (A or B) has not been proved, then your verdict shall be for the plaintiff [and you shall not reduce the plaintiff's damages].

[Alternative A]

[22]. [If you find from your consideration of all the evidence that the plaintiff has proved all of the propositions required of the plaintiff (First, Second, and Third) in Count II, and if you further find from your consideration of all the evidence that the defendant has proved both of the propositions required of the defendant (A and B) and that the plaintiff's willful and wanton conduct was greater than 50% of the total proximate cause of the injury or damage for which recovery is sought, then your verdict shall be for the defendant.]

[23]. [If you find from your consideration of all the evidence that the plaintiff has proved all of the propositions required of the plaintiff (First, Second, and Third) in Count II, and if you further find from your consideration of all the evidence that the defendant has proved both of the propositions required of the defendant (A and B) and that the plaintiff's willful and wanton conduct was 50% or less of the total proximate cause of the injury or damage for which recovery is sought, then your verdict shall be for the plaintiff and you shall reduce plaintiff's damages in the manner stated to you in these instructions.]

[Alternative B]

[24] [If you find from your consideration of all the evidence that the defendant has proved both of the propositions required of the defendant (A and B), then your verdict shall be for the defendant on Count II.]

Notes on Use

This instruction must be given with IPI 21.01, which defines the phrase "burden of proof." IPI B21.07 has been combined with this instruction, and therefore B21.07 should not be given when this instruction is used.

Poole v. City of Rolling Meadows, 167 Ill.2d 41, 656 N.E.2d 768, 212 Ill.Dec. 171 (1995), held that a plaintiff's contributory negligence is a damage-reducing factor if the defendant's willful and wanton conduct was "reckless," but not if it was "intentional." Therefore, if plaintiff's only claim is that defendant's conduct was the intentional form of willful and wanton, this instruction should not be used. If plaintiff claims intentional willful and wanton conduct in addition to other claims, this instruction should be modified accordingly.

Since the adoption of comparative fault, no Illinois case has yet decided the effect of a plaintiff's contributory willful and wanton conduct. If the trial court rules that the plaintiff's contributory willful and wanton conduct may be a damage reducing factor, then use Alternative A (paragraphs [22] and [23]). If the trial court determines that the plaintiff's contributory willful and wanton conduct may be a complete bar to the plaintiff's recovery, then use Alternative B (paragraph [24]).

If the case involves an affirmative defense (other than contributory negligence), a counterclaim, or third-party complaint, use IPI B21.03, B21.04, or B21.05 instead of this instruction. If the case involves not only an affirmative defense, but also a counterclaim, these basic instructions will have to be modified to fit the particular case.

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

FLETCHER McQUEEN,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 126666
	)	
PAN-OCEANIC ENGINEERING CO., INC.,	)	
	)	
Defendant-Appellee.	)	

The undersigned, being first duly sworn, deposes and states that on March 3, 2021, there was electronically filed and served upon the Clerk of the above court the Brief of Appellant. Service of the Brief will be accomplished by email as well as electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

Daniel G. Suber
Daniel G. Suber & Associates
77 West Washington St. – 1420
Chicago IL 60603
312-899-1811
team@suberlawgroup.com

Within five days of acceptance by the Court, the undersigned states that 13 paper copies of the Brief bearing the court's file-stamp will be sent to the above court.

/s/ Michael W. Rathsack
Michael W. Rathsack

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Michael W. Rathsack
Michael W. Rathsack