2023 IL App (2d) 210683
No. 2-21-0683
Opinion filed January 10, 2023

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

LOGAN BLAND,	)	Appeal from the Circuit Court
	)	of Kendall County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 15-L-94
	)	
Q-WEST, INC.,	)	Honorable
	)	Stephen L. Krentz,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE McLAREN delivered the judgment of the court, with opinion.
Justices Hutchinson and Jorgensen concurred in the judgment and opinion.

OPINION

¶ 1 Defendant, Q-West, Inc., appeals from the trial court's orders entering judgment on the jury's verdict in favor of plaintiff, Logan Bland, and denying its posttrial motion. We reverse and remand for a new trial.

¶ 2 I. BACKGROUND

¶ 3 Q Bar is a bar owned by Q-West and located in Plano. In the late night of November 13, 2015, and early morning of November 14, 2015, Bland was a patron of the bar with his friend, Kyle George. Both were regular patrons of Q Bar. Bland became intoxicated and was cut off from further alcoholic beverages. He then got into a dispute with George and had to be physically separated from him. Tiffany Finlayson, Q Bar's manager, had Bland removed to her office, where

he was told that he had to settle down if he wished to remain at the bar. After a few minutes, Bland was allowed to reenter the bar.

¶ 4 Within minutes, Bland and George began to argue again. They began pushing, and Bland fell to the floor. Three Q Bar employees tried to separate them and tried to keep George from kicking Bland. A fourth employee joined, and they attempted to remove Bland from the building, with one man on each of Bland's arms, one man holding his hoodie from the back, and one man leading the way to the door.

¶ 5 Bland resisted his removal, grabbing hold of a pillar before they reached the vestibule and stating that he was not going to leave. As three of the security employees tried to pull Bland from the pillar, they all fell through the door into the vestibule and down to the floor. Bland began kicking the employees as they tried to get to their feet and kicked one man in the throat and chin. As two employees pushed Bland's legs away to stop the kicking, Bland was somehow flipped from his back to his stomach, and his legs landed outside the threshold of the bar. Bland was subsequently moved back into the building, and 911 was called.

¶ 6 Police and paramedics responded. Bland wanted to sit up, and two officers moved him to a sitting position. Bland was uncooperative with paramedics, swearing at them as they tried to examine him and even trying to tear off a blood pressure cuff. Bland did not complain of any injury and flailed his arms around. He also moved his neck to the left and the right. Paramedics lifted Bland into a stair chair to get Bland down some stairs before they transferred him to a gurney in the ambulance. Bland had not been immobilized at any point. During the ride, Bland continued to swear and tear off the blood pressure cuff.

¶ 7 Bland was taken to Valley West Hospital, where he continued to verbally abuse the medical staff. During this time, he denied that his neck hurt and he was able to rotate his head and neck

and lift his arms over his head. Later that day, he was transferred to Central DuPage Hospital; it was there that Bland first complained of neck pain and said that he could not move his legs. Imaging done there showed that bones at C6 and C7 of his spine were out of alignment. The use of traction was ineffective in realigning the bones, so surgery followed. However, Bland's spinal injury was determined to likely be permanent, and he remains a quadriplegic.

¶ 8 Bland brought suit against Q-West and various medical providers. The medical providers had either settled with Bland or were voluntarily dismissed by Bland by the time trial began. A jury found in Bland's favor on his one-count complaint alleging negligence against Q-West and determined damages of over $51,000,000. The jury found Bland to be 20 percent contributorily negligent, thereby reducing his damage award to just over $41,000,000. The trial court denied Q-West's motion for a new trial or remittitur, and this appeal followed.

¶ 9 II. ANALYSIS

¶ 10 Q-West now contends that the trial court erred in entering judgment on the jury's verdict in favor of plaintiff and denying its motion for a new trial. This court grants great deference to decisions of trial judges in granting or denying motions for new trials. *Reidelberger v. Highland Body Shop, Inc.*, 83 Ill. 2d 545, 548 (1981). We review for an abuse of discretion a trial court's decision on a motion for a new trial. *Lacey v. Perrin*, 2015 IL App (2d) 141114, ¶ 56. In determining whether a trial court has abused its discretion, we will consider whether the jury's verdict was supported by the evidence and whether the losing party was denied a fair trial. *Reidelberger*, 83 Ill. 2d at 548. A verdict is considered to be against the manifest weight of the evidence only when the opposite result is clearly evident or where the jury's findings are unreasonable, arbitrary, and not based upon any of the evidence. *Inman v. Howe Freightways, Inc.*, 2019 IL App (1st) 172459, ¶ 85. A party is not entitled to a perfect trial but to a fair trial free of

substantial prejudice. *The Northern League of Professional Baseball Teams v. Gozdecki, Del Giudice, Americus & Farkas, LLP*, 2018 IL App (1st) 172407, ¶ 78.

¶ 11 Q-West first argues that the trial court erred by refusing to allow it to amend its affirmative defenses to include the defense of self-defense. Section 2-616 of the Code of Civil Procedure provides in part:

> "(a) At any time before final judgment amendments may be allowed on just and reasonable terms, introducing any party who ought to have been joined as plaintiff or defendant, dismissing any party, changing the cause of action or defense or adding new causes of action or defenses, and in any matter, either of form or substance, in any process, pleading, bill of particulars or proceedings, which may enable the plaintiff to sustain the claim for which it was intended to be brought or the defendant to make a defense or assert a cross claim.
>
> (b) ***
>
> (c) A pleading may be amended at any time, before or after judgment, to conform the pleadings to the proofs, upon terms as to costs and continuance that may be just." 735 ILCS 5/2-616(a),(c) (West 2020).

¶ 12 A trial court has broad discretion to allow or deny amendments and supplements to pleadings. *Johnson v. Abbott Laboratories, Inc.*, 238 Ill. App. 3d 898, 904 (1992). A trial court's denial of a motion to amend will not be regarded as prejudicial error unless there has been a manifest abuse of such discretion. *Id.* The proper exercise of discretion is determined by such factors as whether the amendment furthers the ends of justice, the ultimate efficacy of the claim, the previous opportunities to assert the claim, the timeliness of the amendment, and whether other parties are prejudiced or surprised by the amendment. *Id.* Reviewing courts also consider whether

the amendment concerns matters known to the pleader at the time the original pleading was filed and whether good reason for not filing is offered by the pleader. *Id.*

¶ 13 Q-West had filed a single affirmative defense to Bland's fifth amended complaint, alleging that Bland's "own negligent conduct in refusing to leave the premises when requested to do so was the sole proximate cause" of his injuries or, alternatively, that Bland's conduct exceeded 50 percent of the total proximate cause of his injuries. On June 18, 2021, four days before the start of trial, the trial court granted Q-West leave to file an amended answer to Bland's fifth ~~a~~mended complaint. The amended answer contained the single defense of contributory negligence that included specific allegations that Bland failed to drink responsibly and became intoxicated, failed and refused to leave when asked to do so, failed and refused to cooperate with Q-West employees, failed and refused to peacefully leave the bar when asked to do so, and physically and forcefully resisted attempts to escort him from the bar. No mention of self-defense was made.

¶ 14 On June 29, 2021, after resting his case the day before, Bland was granted leave, over Q-West's objection, to file his seventh amended complaint "to conform to the proofs now before the jury."[1] Bland dropped four of his original six specific claims of negligent actions and added five new claims. During the conference at which leave was granted to Bland, Q-West sought to file amended affirmative defenses to include a defense of self-defense based on videotaped deposition testimony of Brian O'Hara, one of the Q Bar security employees, who testified the day before that Bland had kicked him in the throat and chin. After hearing argument, the trial court concluded:

[1]In April 2021, the trial court denied Bland's motion for leave to file a sixth amended complaint.

> "This is a difficult decision, but it's a decision that has to be made. I'm finding that allowing the Defense to submit an amended affirmative defense at the close of Plaintiff's case under this fact scenario will work in prejudice on the Plaintiff significant enough to warrant a denial of Defendant's request to file that amended pleading.
>
> And I'm finding that to be the case because of the fact that this issue could have been potentially raised a very long time ago. It should have been raised before the trial began. It should have been raised last Friday when we did argue the additional affirmative defense issue. It wasn't raised then.
>
> Plaintiff put their [*sic*] case on, and now you are asking me to put the Plaintiff in a position where they now have to defend something that they were not aware they would need to defend when they put their case on. I think that is unfair and puts unfair prejudice against the Plaintiff."

¶ 15 The trial court put forth a reasoned explanation for its denial of Q-West's motion to amend. However, in the context of the court's prior decisions and the factors to be considered in such a ruling, we conclude that the court abused its discretion in denying the motion to amend. We first note that the court's denial of Q-West's motion to amend came less than 10 minutes after the court granted Bland's motion to amend his complaint to conform to the proofs, over Q-West's objection. While the court found that granting Q-West's motion would put Bland in a position where he would have to defend something that he was not aware that he would have to defend when he put on his case, the court allowed Bland to amend his complaint, including by adding the nebulous "Manhandled Logan Bland during the removal process," after Q-West had begun to put on its case.

¶ 16 "When the parties know of the facts giving rise to an affirmative defense prior to trial, and the trial court can reasonably conclude the defense, though not raised in the pleadings, was part of

the case *ab initio*, it may allow the pleadings to be raised by amendment, even after the plaintiff has presented his case." *Miller v. Pinnacle Door Co.*, 301 Ill. App. 3d 257, 261 (1998). In its December 2020 disclosure to Bland under Illinois Supreme Court Rule 213 (eff. Jan. 1, 2013)), Q-West disclosed that it expected Russell Kolins of the Kolins Security Group to testify and explain his opinion that "[t]he United States Department of Justice, 2009, allows for the use of reasonably necessary force for the defense of oneself or others." Further, Bland had disclosed as potential witnesses O'Hara and Alan Witmer, two of Q Bar's security personnel. Q Bar adopted them as potential witnesses in a blanket adoption paragraph. Both were deposed on June 15, 2021—six days before trial. In his evidence deposition (which was played to the jury before Q-West moved for leave to add the defense of self-defense), O'Hara testified that Bland was kicking both Witmer and him as they tried to get up off the floor. Bland kicked him in the throat and the bottom of the chin. Witmer also testified that Bland kicked at him and O'Hara after they all fell to the floor. Thus, Bland knew *before* trial that there was evidence that he attacked O'Hara and Witmer by kicking at them, striking O'Hara in the throat and chin. Q-West could have added a self-defense affirmative defense sooner; however, we cannot find that Bland was surprised or prejudiced by such a proposed amendment. Certainly, Bland was aware of the possibility of evidence of self-defense arising, and he still had the opportunity to call witnesses in rebuttal if such need arose.

¶ 17 The trial court abused its discretion not because it denied one motion to amend moments after it allowed the opposition's motion to amend. But, rather, the abuse occurred because the court granted Bland's motion to amend to include the claim that the Q Bar employees "[m]anhandled Logan Bland during the removal process" and then denied Q-West the ability to respond to the new claim. That new claim opened the door to a defense that the employees were only responding to Bland's aggression and attempting to protect themselves from his attacks. Therefore, we

conclude that the trial court erred in denying Q-West's motion to amend its affirmative defenses, and such error requires remand for a new trial.

¶ 18 Because we find that denying Q-West's motion to amend was error, we must also agree with (though need not analyze) Q-West's contention that the trial court erred in failing to instruct the jury on self-defense.

¶ 19 Q-West next argues that the trial court failed to properly instruct the jury on its affirmative defense of contributory negligence. Each party to a lawsuit has the right to have the jury clearly and fairly instructed on each theory that is supported by the evidence. *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 100 (1995). To justify an instruction, the record must contain some evidence to support the theory. *Mikolajczyk v. Ford Motor Co.*, 231 Ill. 2d 516, 549 (2008). The evidence need only be slight; a reviewing court may not reweigh it or determine if it should lead to a particular conclusion. *Leonardi*, 168 Ill. 2d at 100. It is within the trial court's discretion to determine what issues are raised by the evidence and whether an instruction should be given. *Mikolajczyk*, 231 Ill. 2d at 549. The test for determining the propriety of tendered instructions is whether the jury was fairly, fully, and comprehensively informed as to the relevant principles, considering the instructions in their entirety. *Leonardi*, 168 Ill. 2d 83 at 100.

¶ 20 As related above, the evidence showed that, after falling to the ground, Bland kicked at Witmer and O'Hara, connecting with O'Hara's throat and chin. It was at that point that Witmer and O'Hara pushed Bland's legs away, resulting in Bland being flipped onto his front side, allegedly causing the injury. Again, the existence of this evidence was known by Bland prior to the beginning of trial and was presented to the jury in both O'Hara's recorded evidence deposition and Witmer's live testimony. Q-West submitted its proposed jury instruction 7(a), which stated in relevant part:

"The Defendant claims that the Plaintiff was contributorily negligent in one or more of the following respects:

a. Failed to drink responsibly and became intoxicated:

b. Failed and refused to leave the Premises when asked to do so;

c. Failed and refused to cooperate with Q-West employees;

d. Failed and refused to peacefully leave the Premises when asked to do so;

e. Physically and forcefully resisted attempts by Q-West employees to escort him from the Premises.

f. Kicked at Q-West employees."

The court instead gave its own instruction based on Illinois Pattern Jury Instructions, Civil, No. 20.01 (approved Dec. 8, 2011), titled "Issues Made by the Pleadings (With Amended Affirmative Defense Allegations)," that listed all of Q-West's allegations from 7(a) *except* "Kicked at Q-West employees."

¶ 21 We find this failure to include in the jury instruction the claim that Bland "Kicked at Q-West employees" to be reversible error. Clearly, there was more than "some evidence" to support the theory that Bland's kicking at O'Hara and Witmer contributed to Bland's injury. Both O'Hara and Witmer testified that Bland kicked at them after they all fell to the floor as they tried to pull Bland from the pillar, and it was Bland's theory of the case that he was injured during this scuffle after they fell to the floor. We find feeble Bland's argument that one or more of the other allegations "captured" the allegation that he kicked at the employees. Becoming the aggressor and kicking at the employees (kicking one in the face and throat) goes well beyond refusing to cooperate or leave the premises and is even beyond forcefully resisting attempts to escort him out. Q-West had the right to have the jury instructed on this amply supported theory, and the trial court

abused its discretion in denying Q-West's proposed instruction.

¶ 22 Q-West next contends that the trial court erred in holding that it could not rely on the Rule 213 disclosures of Bland's medical expert as substantive evidence. Normally, a trial court's decision to admit or exclude evidence is a matter within the court's discretion and will not be overturned on appeal absent an abuse of that discretion. *In re Marriage of Daebel*, 404 Ill. App. 3d 473, 492 (2010). However, where such a decision is based entirely on an interpretation of law, our review entails a question of law, which we review *de novo*. *Id.*

¶ 23 In Bland's second supplemental answer to defendants' Rule 213(f)(3) interrogatories (filed when the medical providers were still defendants in the case), Bland stated that Dr. Sean Salehi was expected to testify that the "mechanism of [Bland's] injury *** is attributable to the combination of the conduct of the bar employees, the paramedics and the ER physician." Because of the actions of Bar's employees, Bland "was injured and has a permanent injury to his spinal cord." He also opined that the actions of the paramedics were "a direct, proximate and contributing cause of injury" to Bland. Their actions—including transferring Bland from the ground to the stair chair, moving the chair to the ambulance, and moving Bland from the chair to the gurney, all without immobilizing the cervical spine—"likely caused and contributed to the injury and compression to Logan Bland's spinal cord." Further, "[a]s a direct and proximate result of" their actions, Bland was "injured and lost the potential chance of survival/recovery and subsequently has a permanent injury to his spinal cord." Similarly, Salehi opined that the conduct of the emergency room doctor, Dr. Jason Foreman, "was a direct, proximate and contributing cause of injury." Foreman's actions "likely caused and contributed to the injury and compression to Logan Bland's spinal cord." This disclosure was signed by Bland's attorney.

¶ 24 At trial, Salehi testified that Bland's paralysis occurred before paramedics arrived at Q Bar and before Bland arrived at the hospital. The "immediate cause" of Bland's injury was "the fall." The actions of the paramedics and Foreman "could have exacerbated" Bland's condition. He "couldn't go beyond that word, could." The actions of the paramedics and Foreman "did not" cause Bland's injury.

¶ 25 Prior to trial, Q-West disclosed that it intended to rely on Salehi's causation opinion disclosed in the Rule 213(f)(3) interrogatories to support its sole proximate cause defense. The trial court allowed Q-West to impeach Salehi with the Rule 213(f)(3) disclosures but declined to admit the opinions contained in the disclosures as substantive evidence and barred Q-West from showing those opinions to the jury.

¶ 26 "Answers to interrogatories may be used in evidence to the same extent as a discovery deposition." Ill. S. Ct. R. 213(h) (eff. Jan. 1, 2018). Pursuant to Illinois Supreme Court Rule 212(a)(2) (eff. Oct. 1, 2020), discovery depositions may be used "as a former statement, pursuant to Illinois Rule of Evidence 801(d)(2)." Illinois Rule of Evidence 801(d)(2)(D) (eff. Oct. 15, 2015) provides that a statement is not hearsay and is thus admissible if it "is offered against a party and is *** (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Bland argues that Salehi, as an expert, is not his agent or servant and that, thus, the disclosures cannot be admitted as substantive evidence. However, the disclosure of Salehi's expected expert testimony was signed by Bland's attorney. The status of a party's attorney as an agent of the party cannot be disputed. See *Allen v. United States Fidelity & Guaranty Co.*, 269 Ill. 234, 241 (1915) ("Attorneys are deemed agents of their clients for the purpose of making admissions in all matters relating to the progress and trial of an action. Such admissions are treated as the admissions of the client."). Thus,

as Bland's attorney signed and filed the disclosure of Salehi's expected testimony, it was an admission on Bland's behalf and was admissible as substantive evidence of some other sole proximate cause of Bland's injury. The trial court erred in denying its use for that purpose.

¶ 27 This error also led to the trial court's error in refusing to instruct the jury regarding sole proximate cause. Q-West's proposed jury instruction No. 6 was based on Illinois Pattern Jury Instructions, Civil, No. 12.04 (approved Dec. 8, 2011) and stated:

> "More than one person may be to blame for causing an injury. If you decide that a [*sic*] the Defendant was negligent and that its negligence was a proximate cause of injury to the Plaintiff, it is not a defense that some third person who is not a party to the suit may also have been to blame. However, if you decide that the sole proximate cause of injury to the Plaintiff was the conduct of some person other than the Defendant, then your verdict should be for the defendant."

¶ 28 "A defendant has the right not only to rebut evidence tending to show that defendant's acts are negligent and the proximate cause of claimed injuries, but also has the right to endeavor to establish by competent evidence that the conduct of a third person, or some other causative factor, is the sole proximate cause of plaintiff's injuries." *Leonardi*, 168 Ill. 2d at 101. To justify an instruction, the record must contain some evidence, even slight evidence, to support the theory. *Mikolajczyk*, 231 Ill. 2d at 549; *Leonardi*, 168 Ill. 2d at 100. Had the disclosure of Salehi's expected testimony been properly admitted as substantive evidence, there would have been more than slight evidence that "the sole proximate cause of injury to the Plaintiff was the conduct of some person other than the Defendant." Salehi stated that the actions of the paramedics and Foreman were "a direct, proximate and contributing *cause* of injury" and that the actions "likely *caused* and contributed to the injury." (Emphases added.) The question of the cause of Bland's injury was then

a question for the jury to decide; the trial court's failure to so instruct the jury took that question away from the jury and denied Q-West a fair trial.

¶ 29 While we have determined that this case must be remanded for a new trial, we will address certain of Q-West's contentions regarding alleged error in Bland's closing arguments, as they may arise again on retrial.

¶ 30 Q-West contends that the trial court erred in allowing Bland's counsel to use during closing argument a "dummy" constructed of materials purchased from a Home Depot store as a demonstrative exhibit to illustrate his characterization of what occurred to Bland. Our supreme court has held that "[t]he place for demonstrative evidence and the time for demonstrative evidence is during the course of the trial and *prior to final argument*." (Emphasis added.) *Robinson v. Kathryn*, 23 Ill. App. 2d 5, 8 (1959). In *Robinson*, the plaintiff's attorney used the plaintiff himself during closing argument, "in an effort to demonstrate certain physical facts," "to engage in a demonstration of the manner in which he was seated and would be driving a motorcycle, and where his arms would be located, and how his arms would be affected by the approach of defendant's automobile from the rear or from the side." *Id.* Our supreme court held that, while counsel could properly employ demonstrations during closing argument, provided that the demonstrations are "reasonably sustained by the evidence," the use of the plaintiff as a demonstrative aid "would open the door to strange and completely unsound demonstrations which in the end would defeat the ends of justice for all litigants." *Id.* at 8-9.

¶ 31 We conclude that the use of this "dummy" in closing argument was unsound and should not have been allowed. There is no indication in the record of the actual materials used to construct the "dummy," but there is little doubt that items purchased from a home improvement store would make, at best, a crude representation of a human body. As it was not used as demonstrative

evidence at trial, where a witness could be questioned about its accuracy, there was no opportunity for Q-West to cross-examine the accuracy of the dummy's representation. Such a makeshift prop, being manipulated by counsel while he argues, would tend to be a distraction and of questionable value. While we cannot say that the trial court's decision to allow the dummy's use, by itself, would have been reversible error, we do conclude that the decision was erroneous.

¶ 32 Q-West next contends that Bland's counsel impermissibly argued that Q Bar's employee manual established Q-West's legal duty and that failure to follow the manual proved negligence. It is well established that a company's internal policies do not create a legal duty outside of the law's requirements. See, *e.g.*, *Rhodes v. Illinois Central Gulf R.R.*, 172 Ill. 2d 213, 238 (1996) ("Where the law does not impose a duty, one will not generally be created by a defendant's rules or internal guidelines. Rather, it is the law which, in the end, must say what is legally required."); *Gore v. Pilot Travel Centers, LLC*, 2019 IL App (3d) 210077, ¶ 18 ("A duty is not created by a defendant's self-imposed rules or guidelines.").

¶ 33 The record contains multiple references to the policy during closing arguments. "Instead of sending him home, which is what they're supposed to do and required to do under their rules, they leave him there." "That's a yellow flag, and for them, it's a red flag, because their rules say you got to get him out of there." "Their own policies say never use excessive force. You heard Mr. Carroll tell you if excessive force is used, it is not appropriate and not okay and it is negligent." "Their manual doesn't say send people home if they're overly intoxicated. It says send people home if they're intoxicated." "[H]e admitted to 911 he dragged him out. That's a direct violation of the rules." "So remember, we talked about the manual repeatedly. *** Remember, I said it was the duty of the defendant to act reasonably in one of those instructions. Right here, it says they have a duty and responsibility to take care of their guests, which included Logan Bland. So there's

no question they had a duty to him." These statements, and others like them, clearly misstate the law and were improper argument.

¶ 34 Q-West raises myriad other contentions of improper argument and other evidentiary issues, contending that the cumulative nature of these errors requires a new trial. However, as we have already determined that a new trial must be held, we need not address this contention of cumulative error. For the same reason, we need not address Q-West's contention that a remittitur should be entered.

¶ 35 III. CONCLUSION

¶ 36 For these reasons, the judgment of the circuit court of Kendall County is reversed, and the cause is remanded for a new trial.

¶ 37 Reversed and remanded.

***Bland v. Q-West, Inc.*, 2022 IL App (2d) 210683**

Decision Under Review:	Appeal from the Circuit Court of Kendall County, No. 15-L-94; the Hon. Stephen L. Krentz, Judge, presiding.
Attorneys for Appellant:	Robert M. Burke, Garrett L. Boehm Jr., and David M. Macksey, of Johnson & Bell, Ltd., of Chicago, for appellant.
Attorneys for Appellee:	Daniel K. Cetina, of Walsh, Knippen & Cetina, Chtrd., of Wheaton, John M. Power and Sara M. Davis, of Cogan & Power, P.C., and Michael W. Rathsack, both of Chicago, for appellee.