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.

REPLY 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

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I. Because Pan-Oceanic's fault in failing to train its employee was independent of any potential employee fault, the jury could properly find against Pan-Oceanic but 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. That was not the situation here.

[Reply to Def. br. at 6 -32.]

A. Pan-Oceanic's fault was independent of any driver fault.

Because Pan-Oceanic's conduct in failing to train its driver was intrinsically different and independent of any fault on the part of its driver,

the jury could find against Pan-Oceanic but for the driver. Pan-Oceanic's potential vicarious liability for its driver's fault, if any, was independent of its liability for its own fault. The distinction is that the former would be derivative of its driver's fault while the latter would not. Pan-Oceanic thus had two legally distinct tort exposures, allowing the jury to properly reach the verdict at issue. Indeed, Pan-Oceanic admitted in its appellate court brief that an employer may be liable for independent acts of willful conduct in training. Def. app. ct br. at 20, cited in Pl. app. ct. br. at 20.

Pan-Oceanic contends negligent training is part and parcel of negligent hiring, retention, and entrustment so that the rules governing those types of claims also apply to McQueen's claim. Def. br. at 7, 10. But the cases it cites do not say that. As Plaintiff explained at length in his main brief, negligent training presumes the employer has information the employee needs but does not know. Without that information, the employee may still be a cause in fact of an accident but he or she will not necessarily be a legal cause of the accident in which case the employee would not be at fault. Pl. main br. at 21. And if the employee is not at fault, the employer cannot be vicariously liable for that conduct, leaving only the potential for direct liability. Pan-Oceanic does not rebut that critical reasoning or the analysis in the cases from which that reasoning is drawn.

For the same reason, there will be no duplicative recovery. Def. br. at 14. The driver may be a cause in fact of the accident as Pan-Oceanic contends.

Indeed, there would likely be no accident if the driver was not a cause in fact. But because he or she was not the legal cause due to the fact they were not trained and thus not negligent, the only recovery can be against the employer.

B. Gant, Rogina, and Doe do not support Defendant's position.

Pan-Oceanic says *Gant* addressed this "exact" issue. Def. br. at 8; *Gant v. L.U. Transport, Inc.*, 331 Ill.App.3d 924 (2002). That conflicts with its admission to the contrary where its brief acknowledged the appellate court's statement that no Illinois cases have addressed whether negligent training should be treated differently than negligent entrustment. *McQueen v. Green*, 2020 IL App (1st) 190202, at ¶ 44; Def. br. at 17. And that court also acknowledged that McQueen's claim was not based on the three theories *Gant* addressed. *Id.* at ¶ 43.

Plaintiff explained *Gant's* factual and legal limitations without rebuttal. Pl. main br. at 16. In this same vein, Pan-Oceanic characterizes Plaintiff's argument as being that some claims of vicarious liability under *respondeat superior* may include claims relating to an employer's conduct. Def. br. at 8. That is backward. Plaintiff's position is that direct liability has nothing to do with vicarious liability.

Pan-Oceanic says *Rogina v. Midwest Flying Serv.*, 325 Ill. App. 588, 593–94, 60 N.E.2d 633, 635 (1945), stands for the proposition that an employer's fault cannot be a proximate cause if the employee is not negligent. Def. br. at 9 and again at 31. But *Rogina* is a negligent entrustment case, not

a negligent hiring case. The pilot was inexperienced in flying at night and the plaintiff alleged the employer should not have given him the plane to fly. The plaintiff failed to prove the pilot did anything wrong, and the pilot thus was not the legal cause of the accident. If the pilot did nothing negligent, then by definition the employer's negligence in entrusting the plane to the pilot could not have been a legal cause of the crash. There may be instances where negligent entrustment is independent of employee negligence, as will be addressed below, but that case was not one of them.

Pan-Oceanic contends this Court held in *Doe v. Coe* that negligent training is included within negligent hiring and retention. *Doe v. Coe*, 2019 IL 123521, 135 N.E.3d 1; Def. br. at 10. However, *Doe* did not address any of the issues in this appeal. The opinion specifically says the plaintiff alleged the defendant willfully and wantonly hired, supervised, and retained a youth service worker. It did not point to a charge of negligent training. Pan-Oceanic cites four paragraphs in that decision (11, 15, 33, 74) for its contention that *Doe* included negligent training as part of the other three exposures, but none of those paragraphs addresses anything other than the three types of claims initially described there.

The case's only reference to training was a statement that a supervisor, not the defendant alleged to have caused the injury, was trained or should have been trained. The plaintiff did not allege that the service worker was not trained: that would not even have made sense, as he was accused of molesting

children. The Court was not asked there to determine if negligent training fell under the other areas of employer fault. Nor does *Doe* hold that independent claims can arise against an employer only where the employee acts outside the scope of employment. Def. br. at 13.

Plaintiff did not "ignore" *Doe*. Def. br. at 11. Rather, the case is simply inapposite.

Pan-Oceanic continues in the same vein, attempting to liken negligent supervision to negligent hiring. Def. br. at 11. It says lack of supervision claims involve allowing an employee to commit "some wrong" and contends that is comparable to negligent training. But in negligent training, the employee does not commit some wrong; that is the key distinction between the two types of claim, as the dissent understood. It is true that an employer's negligent supervision cannot be divorced from the employee's negligent driving (Def. br. at 11), but that is not the case with negligent training claims where the employee may not be at fault.

C. Pan-Oceanic's driver was not a legal cause of the accident.

Plaintiff discussed the distinction between cause in fact and legal cause in his main brief at 21. Pan-Oceanic does not answer that critical section directly, but says the jury found that Green, its driver, did not proximately cause the accident. Def. br. at 15. And it says that failure to train by itself cannot cause an accident because without driver negligence, there is no causal nexus between Pan-Oceanic's fault and the accident.

As Plaintiff explained, the jury did not find that Green did not "cause" the accident. He obviously was a cause in fact; there was no other potential cause. Defendant dropped the comparative negligence charge. Rather, the jury found that Green was not a legal cause, presumably because he did not know and had no reason to know how to properly react to a loose load and thus was not negligent.

That left Pan-Oceanic as the legal cause as well as the cause in fact. Pan-Oceanic reasons that without "negligence by Green", there was no nexus between it and the accident. Def. br. at 15. That statement would only be correct if it said that without involvement by Green or without cause in fact by Green, there would be no employer fault, a much different statement. Pan-Oceanic continues to wrongly assume that negligence by its driver was the premise for its liability. It was instead potentially directly liable if its driver was a cause in fact because of Pan-Oceanic's fault, independent of any driver fault.

Continuing in that vein, Pan-Oceanic says the jury could have concluded that Pan-Oceanic did not train its driver but also that the lack of training did not cause the accident. Def. br. at 16. However, that would mean neither the driver nor Pan-Oceanic was a cause in fact. However, there was no other cause in fact. That left only an act of God, a theory not recognized by the courts. The verdict had to be premised on Pan-Oceanic's fault.

D. Greene and Ferrer, on which the appellate court relied, are inapposite.

Plaintiff in his main brief at 28 pointed out the appellate court's emphasis on *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, in rejecting the concept of an employer's independent direct liability for accidents caused by untrained employees. Pan-Oceanic says Plaintiff got it completely wrong in terms of the analysis in those cases. Def. br. beginning at 18.

However, Plaintiff correctly explained that *Greene* is dubious precedent because it relied on a case (*McHaffie*) that involved negligent hiring rather than failure to train. Pl. main br. at 29. In addition, the plaintiff there did not present the argument that the employer's direct fault should be treated separately from any vicarious liability. Pan-Oceanic says negligent training was "inherent" in *Greene*, where the driver ran a red light. Def. br. at 18. But as Plaintiff noted, there was no training involved there. Pan-Oceanic says running a red light is the "same allegation" as failing to train Green here about proper braking technique. Def. br. at 18-19. To the contrary, the difference between the two cases highlights Plaintiff's point.

Stopping for a signal is a statutory duty: no training is involved. The employer could never be liable outside of vicarious liability for its driver's legal fault in that situation. Here, no law told Pan-Oceanic's driver how to respond correctly in this unique situation. Rather, as explained at length in the main brief, proper driving procedure in this situation is actually counter-intuitive

and requires training. The natural response, braking, is wrong. Instead, the driver is to ease up on the gas and allow the truck to slow without braking. The clear legal duties in *Greene* were thus unlike those at issue in this case.

Turning to *Ferrer*, the other foundation the appellate court offered for its reversal, that court noted that the case on which *McHaffie* relied involved negligent hiring and retention (not negligent training) and that *McHaffie* alleged negligent hiring and supervision (not negligent training). *Id.* at ¶¶ 22, 23. Plaintiff accurately reported that in his main brief, contrary to Pan-Oceanic's complaint. The court noted that both those charges (unlike negligent training) are derivative of employee fault.

Pan-Oceanic is correct when it said the plaintiff in *Ferrer* alleged negligent training among other things. Def. br. at 19. But the court focused on other conduct like hiring and entrustment. *Id.* at ¶¶ 28, 29. As noted in the main brief, *Ferrer* held that direct negligence claims against an employer, tethered to the employee's negligence, are generally redundant. *Id.* at ¶ 26. Plaintiff disagrees, but that was not the key there. That court's reference to direct negligence claims tethered to employee negligence actually seems to refer to typical vicarious liability under *respondeat superior* or claims like negligent hiring. In any event, for purposes of the issue here, the key part of *Ferrer* was its critical disclaimer of the *McHaffie* rule. It stated the rule, that an employer is shielded from direct liability by *respondeat superior*, does *not* apply where the plaintiff's injuries are not caused by employee negligence. *Id.*

at ¶ 34; Pl. main br. at 31, quoting the entire paragraph. That is the situation in this case.

Pan-Oceanic says *Ferrer* is not apposite because that court's statement applies "only in cases where an employer knowingly directs an employee to use defective equipment." Def. br. at 20. That court's hypothetical did describe an employer aware of defective brakes who allowed an employee to use the vehicle, leading to an accident. It said there that the rule barring direct action would not apply against a knowing employer because the unknowing employee was not negligent, so the employer could not be vicariously liable. But the court's choice of a hypothetical did not limit its analysis to situations where the employer knowingly directs an employee to use defective equipment.[1] Its analysis logically applies any time the employee is not at fault, as in this case. As that court noted, the key is that the incident was not caused by employee fault but rather by employer fault of any sort.

E. Longnecker is persuasive applicable authority.

Plaintiff addressed *Longnecker v. Loyola University Medical Center*, 383 Ill.App.3d 874, 887-88, 891 N.E.2d 954, 964-65 (2008) at length in his. main brief at 22. The case stands for the proposition that a company's own negligence in failing to train someone who consequently injures another is

[1] McQueen actually alleged that Pan-Oceanic was at fault for reasons similar to *Ferrer's* example, claiming Pan-Oceanic instructed Green to transport an unsafe load. Defendant acknowledged that evidence at 22. That put a much different gloss on the charge that it permitted him to take the load.

separate from and rests on different rules than vicarious liability for the conduct of its staff. The logic applies regardless of whether the person who it should have trained was an employee at the time of the incident that caused the injury. Pan-Oceanic claims this is a new argument. Def. br. at 23. To the contrary, this is the same argument Plaintiff has made since the trial was over, i.e., that liability for failure to train is separate from vicarious liability and that the entity that failed to train can be directly liable.

The majority and now Pan-Oceanic attempted to distinguish *Longnecker* by concluding that institutional negligence like that found against the hospital there is subject to different rules than the negligence at issue here. *McQueen, supra* at ¶ 45, quoting *Longnecker* at 894. However, when *Longnecker* referred to institutional negligence, it was referring to this scenario. The court simply meant the hospital's institutional negligence (failure to train) was separate from *respondeat superior* liability related to employee fault. Pan-Oceanic says the absence of *respondeat superior* there was determinative of the outcome. Def. br. at 24. That is not correct. If the doctor who did not precheck the harvested heart had been an employee of the hospital and the jury found the hospital failed to train him, the case would have been presented in the same way with the same outcome.

In addition, given the discussion and holding of *Longnecker*, this case does not fall under the cloak of new law requiring prospective application. Def. br. at 25.

F. Plaintiff's hypothetical addressing entrustment was accurate.

As an example of a situation where even negligent entrustment might constitute a tort independent of employee conduct, Plaintiff hypothesized a situation where a doctor discovers and reports to the employer a health issue that would make the driver employee unfit but does not alert the patient. Pl. main br. at 27. Pan-Oceanic says the premise is outlandish. Def. br. at 28. To the contrary, it is common knowledge that missed medical reports are hardly a rare event.

The hypothetical actually tracks the example the *Ferrer* court used when it said the *respondeat superior* bar to direct actions against employers did not apply if the employee acted without knowledge of the danger. Pan-Oceanic's driver did not suffer from a dangerous health condition unknown to him, but he did suffer from a dangerous lack of knowledge about how to react to an unusual driving situation unique to carrying heavy machinery on trailers. Pan-Oceanic says the linchpin of Plaintiff's hypothetical is that the employer had notice of something the employee did not. Def. br. at 28. Plaintiff agrees – counsel could not have said it better. That is what occurred here. Defendant's next line contending such a situation did not exist here is incorrect. That is exactly the charge sent to the jury.

II. Regardless of whether Pan-Oceanic forfeited its challenge to IPI 50.01, that instruction's propriety hinges on the whether the employer could be directly liable and need not be independently addressed. Pan-Oceanic's challenge to the absence of IPI B21.02.02 and IPI 20.01.01 was forfeited because it did not object to their absence. In any event, their absence would not have caused prejudice because Pan-Oceanic's counsel told the jury that Plaintiff had the burden of proof and because the issues were easily understood.

[Reply to Def. br. at 33-48.]

Pan-Oceanic contends the judge on her own motion should have drafted and given IPI B21.02.02 and a modified version of IPI 20.01.01 for Defendant. IPI B21.02.02 says the plaintiff has the burden of proof and IPI 20.01.01 provides a framework for the negligence and willful and wanton issues. App. to main br. at A75, A78. Plaintiff in his main brief argued that Pan-Oceanic forfeited any error by failing to tender instructions or objecting to their absence and also that Pan-Oceanic had not shown prejudice.

Pan-Oceanic's brief does not address IPI 20.01.01, so regardless of whether that issue was forfeited at trial, it is forfeited here.[2]

As to IPI B21.02.02, Plaintiff points out that Pan-Oceanic begins its argument with a section caption saying the appellate court correctly ruled that the trial court erred in refusing Pan-Oceanic's tendered IPI 21.02.[3] Def. br. at 36. That is incorrect. The appellate court did not find that the judge should

[2] Defendant's brief at page 40 refers to three flawed instructions as if it had addressed all three, but that did not occur. It addressed only two.

[3] Defendant presumably meant B21.02 because that is what it tendered. C1868-69.

have accepted Pan-Oceanic's IPI B21.02 instruction. It would never had said that because B21.02 was clearly improper. B21.02 addresses negligence claims involving one plaintiff and one defendant with comparative negligence alleged. That was not this case. The only proper instruction would have been B21.02.02 because that is the only instruction addressing *both* negligence and willful and wanton counts, and that was what was at issue.[4] Pan-Oceanic later says B21.02.02 would have been a "better" instruction but it was in fact the *only* applicable instruction. Def. br. at 40. It was not "imperfect" (Def. br. at 50) and it is not a matter of labels (Def. br. at 45). It was simply the wrong instruction.

Pan-Oceanic also says the trial court refused its B21.02 instruction. Def. br. at 37. That is also not correct. The court simply reserved ruling (R2203), as it wrote on the instruction (C1869).[5] That is relevant because reserving a ruling warned counsel to raise the instruction later and obtain a ruling. Pan-Oceanic was not the victim of an adverse ruling but rather of simply failing to obtain a ruling. It admits that. Def. br. at 38 (did not retender).

Pan-Oceanic argues that failure to give the B21.02 instruction was reversible error, citing *Johnson v. Chicago City Ry. Co.*, 166 Ill. App. 79, 82

[4] Pan-Oceanic's tendered instruction also referred to comparative negligence, but it dropped that defense. R502. Its argument at page 37 that the burden of proof instruction was required due to a comparative negligence issue overlooks that there was no such issue. It was not included in the jury charge. C1797.

[5] Defendant is technically correct when it notes at 37 that it did not withdraw its erroneous instruction. Plaintiff's main brief at 35 used the term withdrew but should have described it as not having re-presented the instruction.

(1911). That case is not precedent because it is pre-1934. In any event, it is inapposite. The trial court there refused a proper instruction, and in fact refused more than one proper instruction and also gave an instruction that was contrary to the law. There was no forfeiture issue and no suggestion the lawyers had not supplied the omitted instruction. The case is inapposite. That is entirely different from this case where Defendant did not tender an instruction.

Pan-Oceanic argues strenuously at page 37 that it did tender an instruction but, as explained above, that was not helpful because it tendered the wrong instruction. It did not tender a version of B21.0202 that simply required some tweaking to match the evidence here, but rather tendered an entirely different and completely inapposite instruction. It was not a situation where B21.02.02 would have "been a more appropriate instruction." Def. br. at 37. Rather, it was the only appropriate instruction. It would have been error to give the tendered instruction and Pan-Oceanic has not tried to explain how its tendered instruction could have been proper.

Pan-Oceanic cites *Grover v. Commonwealth Plaza Condo. Ass'n,* 76 Ill. App. 3d 500, 509, 394 N.E.2d 1273, 1280 (1979) for its contention that the trial judge should have corrected Pan-Oceanic's instructional error. Def. br. at 38. But as noted, Pan-Oceanic never retendered its instruction. Thus, even if the court had some duty to assist counsel, it had no occasion to do that. *Grover* reiterated that a party cannot complain unless the challenged matter was the

subject of objection. It held that where a party does not offer an instruction, it cannot complain about the court's failure to give that instruction. *Id.* 509-10. That is Plaintiff's point.

The *Grover* court then noted that the trial court had given no instructions on the subject at issue (contracts), a topic not then covered by pattern instructions, because none had been tendered. However, the court also recognized that, unlike this case, the appellant had tendered a modified version of the burden of proof based on the negligence pattern instructions. The trial judge rejected it, not because it did not state the law or was unnecessary, but because it was factually misleading. The judge had apparently agreed to give such an instruction, and the reviewing court noted that the court's reversal on that position may have influenced the defendant not to tender a reworded version of that instruction.

Pan-Oceanic did nothing to trigger (Defendant's term, at 38) the court's supposed duty to draft its instructions. Further, unlike this case, the trial court there had not reserved ruling but rather flatly rejected the instruction. Finally, the reviewing court there was clearly influenced by the fact that the case went to the jury with no instructions as to the substantive law in an apparently somewhat complex case. That was not the situation here.

Pan-Oceanic cites *In re Nancy M.*, 317 Ill. App. 3d 167, 173, 739 N.E.2d 607, 612 (2d Dist. 2000) (Def. br. at 39) as an example where a court found the trial court should have intervened. However, that case involved due process

claims raising out of the involuntary administration of psychotropic medications. That court began by noting the case was moot, and Pan-Oceanic's brief acknowledged it was overruled. The issue there was far removed from this garden variety vehicle accident because personal liberty of an incompetent was at the heart of the case.

Plaintiff' in his main brief at 46 additionally pointed out that if Pan-Oceanic had tendered B21.02.02, Plaintiff's counsel would not have objected. Pan-Oceanic calls that argument "specious" because Plaintiff's counsel did object. Def. br. at 43. But counsel was properly objecting to an inapplicable and thus erroneous instruction. Counsel would have had no reason to object to a proper instruction if Pan-Oceanic's counsel had tendered one, and the court would have had no reason to refuse it.

Pan-Oceanic contends reversal is required because the instructions "inaccurately stated the law". Def. br. at 46. However, as is surely clear, the issue here does not involve an instruction that inaccurately stated the law. Rather the issue concerns Defendant's failure to tender an instruction (B21.02.02), a different matter. The jury was not misled by improper instructions.

Pan-Oceanic contends its counsel's description to the jury in argument about the burden of proof was "cursory" and thus did not effectively convey to the jury who had the burden of proof in the absence of such an instruction. Def. br. at 47. Plaintiff's main brief at 41 described what occurred. Pan-Oceanic's

counsel told the jury Plaintiff had not carried *his* burden of proof. R2363-64. Its counsel argued it could lose only if McQueen had not met *his* burden of proof. R2391. Finally, its counsel said if Plaintiff did not carry *his* burden of proof, the jury had to find for Defendants. R2364. What could be clearer?

Pan-Oceanic contends Plaintiff's brief incorrectly said counsel in one of Plaintiff's authorities did not tell the jury the law (which was a reason for reversing where a critical instruction was not given). Def. br. at 47; *People v. Cook*, 262 Ill. App. 3d 1005, 1019, 640 N.E.2d 274, 283 (1994). However, that court held that ". . . neither side apprised the jury that the State had the burden of proving that defendant was not justified in the force he used." Plaintiff's brief was correct.

Pan-Oceanic generally blames the trial judge. However, its counsel should have been alerted to the need for a burden of proof instruction because burden of proof was mentioned generally. R2136, R2141, 2197-98, R2414. Further, the court accepted defense counsel's tender of IPI 21.01 defining burden of proof.[6] R2202, R2323. That should have reminded counsel of the need for B21.02.02. The court specifically mentioned burden of proof. R2324. The record additionally shows the trial judge reviewed the instructions (R1272) and that counsel told the court the instructions were ready to go (R1632). The court specifically warned counsel to review the instructions to ensure that

[6] Counsel called it 21.02 in the instruction conference, but he also described it as the definition of the burden of proof and that is 21.01. They were clearly addressing IPI 21.01.

nothing was missing and to alert the court if they wanted something added. R2410. The court cannot be blamed for Pan-Oceanic's failures.

III. The circuit court did not abuse its discretion when it barred rebuttal evidence about master keys because Pan-Oceanic did not timely disclose that information.

[Answer to Def. br. at 48-49.]

Standard of Review

The standard of review where a party challenges an evidentiary ruling is abuse of discretion. *Leonardi v. Loyola University of Chicago*, 168 Ill.2d 83, 92, 658 N.E.2d 450, 454-55 (1995).

Argument

Pan-Oceanic contends the court erred in barring rebuttal testimony by Gulzar Singh about the availability of master keys. The issue arose when Plaintiff challenged the Pan-Oceanic driver's claim that he had lost the key. But the driver is no longer involved – he was found not guilty. The trial court correctly concluded that any error in impeaching or rehabilitating him was therefore immaterial. The point is also immaterial because that evidence went to loading and the allegation at issue is the failure to train.

In any event, the court properly barred rebuttal because Defendant had not disclosed Singh's testimony that there were no longer master keys. Defendant's Rule 213 disclosures did not mention keys and the court relied on that. R424, R426-27. The court's decision was most influenced by learning during an offer of proof that Singh had told his counsel about the master keys

before trial, but Defendant had not disclosed that information even though it was obvious it would come up. R2265.

IV. The circuit court did not abuse its discretion in denying a remittitur on punitive damages.

[Answer to Def. br. at 50-51.]

Standard of Review

Where a party seeks remittitur of damages, the standard of review is abuse of discretion. *In re Drakeford v. Univ. of Chicago Hosps.*, 2013 IL App (1st) 111366, ¶ 68, 994 N.E. 2d 119, 136.

Argument

In arguing alternatively that the evidence does not support punitive damages, Pan-Oceanic sets out only testimony favorable to it. Critically, the jury also heard Pan-Oceanic's president admit it would be utter disregard for safety if Green did not have a chance to have safety meetings. R1600, R1747. He also admitted that if a driver was not informed how to handle an unstable load, that would be a reckless disregard of safety rules. R1748. And he admitted if Pan-Oceanic did not train Green to handle an unstable load, that would be an egregious violation of its safety practices. R1678-79. Green denied attending any safety meetings and said no one taught him what could happen if a load was unstable or that an unstable load could cause a crash. R955-R956, R993-94.

The jury thus heard that Pan-Oceanic failed to train its driver about a driving technique critical to retaining control, its president admitted lack of

such training is reckless, and its driver denied receiving such training. The jury also heard that Pan-Oceanic's failure to train created a potentially dangerous driving scenario based on its admission that its rig blocked the interstate, posing a serious risk to motor traffic. C651. Finally, the jury learned that Pan-Oceanic likely concealed inculpatory evidence, further evidence of "bad" conduct that bolsters punitive damages. Defendant admitted that. R2493.

Pam-Oceanic claims such damages must involve an element of outrage similar to that of a crime, citing *Shirk v. Kelsey*, 246 Ill. App. 3d 1054, 1066, 617 N.E.2d 152, 160 (1993). But *Shirk* continued further, saying willful conduct, the predicate for punitive damages, could also be found where a party acted with reckless indifference. That echoes this Court's analysis of the parameters of willful conduct in *Ziarko v. Soo Line R. Co.*, 161 Ill. 2d 267, 275–76, 641 N.E.2d 402, 406 (1994). It noted there is a thin line between simple negligence and willful and wanton acts and that under the facts of one case, willful and wanton misconduct may be only degrees more than ordinary negligence. The trial court did not abuse its discretion in finding that Plaintiff met his burden here.

V. If the court affirms, the appellate court properly ordered a retrial. Defendant had requested a new trial and cannot complain about receiving the relief it requested.

[Answer to Def. br. at 32-33.]

Pan-Oceanic argues for different relief than that granted by the appellate court. It asks the Court to modify the appellate court decision by changing the relief to judgment notwithstanding the verdict rather than the new trial awarded by that court. As Defendant notes, the Court needs to consider this point only if it affirms. Defendant essentially argues its own multiple errors entitle it to reversal of the judgment against it, allowing it to benefit from its errors by receiving judgment as a matter of law rather than a new trial solely because the jury found the driver not guilty.

First, Pan-Oceanic received one of the forms of relief it requested. It asked alternatively for judgment notwithstanding the verdict or a new trial. Def. app. ct. br. at 34, 47. The court awarded the latter. Having gotten what it asked for, it has no basis for complaint.

Pan-Oceanic cites one case for its proposition that inconsistent verdicts are a basis for judgment notwithstanding the verdict, *Schmid v. Fairmont Hotel Co.-Chicago*, 345 Ill. App. 3d 475, 494, 803 N.E.2d 166, 181 (2003). However, the *Schmid* opinion does not contain the word "inconsistent." Rather, the court entered judgment notwithstanding the verdict after finding that the defendant did not owe any duty to the plaintiff. It has no application here.

This Court held in *Redmond v. Socha*, 216 Ill. 2d 622, 642, 837 N.E.2d 883, 895 (2005) that legally inconsistent verdicts require a new trial. The

Court did not provide that relief there because it held that a jury may find against both the plaintiff and the counter-plaintiff, even when the evidence suggests the sole cause was negligence, so the verdicts were not inconsistent. *Id.* at 646. In this situation, it supports the award of a new trial if this Court affirms.

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

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding the words containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance and the certificate of service is 5,446 words.

/s/ Michael W. Rathsack
Michael W. Rathsack

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

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 April 21, 2021, there was electronically filed and served upon the Clerk of the above court the Reply Brief of Appellant. On April 21, 2021, service of the Reply 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 Reply 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