No. 126666

IN THE
SUPREME COURT OF ILLINOIS

FLETCHER McQUEEN,

Plaintiff-Appellant,

vs.

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

Defendant-Appellee.

On Petition for 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 THE DEFENDANT-APPELLEE PAN-OCEANIC ENGINEERING CO., INC.

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NATURE OF THE CASE

On August 17, 2012, Lavonta Green was driving a truck on behalf of his employer, Pan-Oceanic Engineering Co., Inc. ("Pan-Oceanic"). The truck had been loaded with a bobcat tractor by nonparty, Patten Industries ("Patten"). Green struck the motor vehicle of plaintiff, Fletcher McQueen, who sustained injuries therefrom. Following the accident, McQueen brought this action against both Green and Pan-Oceanic. Count II of the complaint at issue alleged negligence by Pan-Oceanic for failure to hire, supervise, and train Green. (C792, ¶19(a)(b) and (d).) It is undisputed that Green was acting within the scope of his employment (C791, ¶9.), and Pan-Oceanic admitted *respondeat superior*. (C2337, ¶4.)

The jury found in favor of Green, but against Pan-Oceanic. (C1911.) Pan-Oceanic appealed, arguing that the verdicts were inconsistent as a matter of law because negligent training is part and parcel of negligent hiring, supervision, entrustment, and retention, which are derivative actions, and cannot lie directly against an employer where *respondeat superior* has been admitted.

The appellate court, relying on *Gant v. L.U. Transport, Inc*., 331 Ill. App. 3d 924 (1st Dist. 2002) and other authority, agreed with Pan-Oceanic that direct actions for negligent training are not permitted where *respondeat superior* has been triggered, and reversed and remanded this cause based upon a finding of inconsistent verdicts. *McQueen v. Green*, 2020 IL App (1st) 190202, ¶56. The appellate court also found that the jury instructions were flawed and denied Pan-Oceanic a fair trial. The dissent argued that *Gant* should either not be followed, or, that its application should be restricted. *Id*. at ¶71.

ISSUES PRESENTED FOR REVIEW

1) Was the appellate court correct in holding that the rule that an admission of *respondeat superior* by an employer bars direct actions for negligent hiring, retention, supervision, and entrustment also includes negligent training?

2) Was the appellate court correct in finding a verdict of no negligence by an employee legally inconsistent with a verdict finding negligent training against the employer, where the employer admitted *respondeat superior*, which bars direct actions against the employer?

3) Did the appellate court properly rule that the trial court's errors in refusing Pan-Oceanic's tendered long-form instruction based on IPI 50.01, and in refusing Pan-Oceanic's tendered burden of proof instruction based on IPI 21.02, denied Pan-Oceanic a fair trial, resulting in prejudice, and warranting reversal?

STATEMENT OF THE FACTS

Testimony About Loading the Bobcat

At all times relevant, Green was a truck driver for Pan-Oceanic and was acting within the scope of his employment. (C791, ¶9, C2337, ¶4.) On April 17, 2012, Green drove to Patten to pick up a bobcat tractor. Green testified that he could not load the bobcat onto his truck himself, as it he did not have the master key. (R827:16-19, R828:16-24.) It is undisputed that Patten loaded the bobcat onto the vehicle being operated by Green. Green thought that "it didn't look right." (R484:5-6.) After the bobcat was loaded, Green called Savinder "Savi" Singh at Pan-Oceanic, but he did not say that the load looked "unsafe." (R484:11-14, R833:18-21.) Singh spoke with Patten about the vehicle, and Patten assured

Green and Singh that the bobcat was "safe." (Green, R831:8-11, R834:18-R835:4; G. Singh, R1699:2-6.) Before leaving, Green personally checked to make sure that the load was secure. (Green, R1068:18-1069:16.) There was trial testimony that the bobcat tractor was well-secured, and that a well-secured load would not cause a problem. (Green, R486:7-16, R957:21-R958:5, R999:22-R1000:9, R1043:22-R1044:7; R1062:1-21, R1068:18-R1069:16; G. Singh, R1588:4-22.) This opinion was confirmed by plaintiff's expert witness. (Diaz, R1125:14-22, R1151:1-4.) Trial witnesses testified that Patten knew how to correctly load the bobcat onto the truck. (Green, R1048:1-13, R1048:24-R1049:20; G. Singh, R1640:7-19, R.1644:14-R1645:21, R1646:3-R1648:2, R1697:16-21, R1699:2-6.) Gulzar Singh testified "it was reasonable for Lavonta [Green] and Savi [Singh] to rely on Patten's statement that the load was safe." (R1699:2-6.) After being advised by Patten that the load was safe, Savi Singh told Green to drive safely. (Green, R831:8-11, R834:18-R835:4, R960:17-R961:5; S. Singh, R1877:1-4.)

The Accident

While driving on the Eisenhower Expressway, Green struck a vehicle operated by McQueen, and McQueen suffered injuries as a result. McQueen subsequently filed suit. Among other things, McQueen alleged in his complaint that the accident was proximately caused by Green's negligence. (C791, ¶¶10, 12-17.) No other Pan-Oceanic employee was named in McQueen's complaint. (C790-C803.) McQueen also named Green's employer, Pan-Oceanic, as a defendant.

At trial, Pan-Oceanic denied that Green or it proximately caused the accident. Trial testimony revealed that nothing like this accident this had ever happened before to Green or Pan-Oceanic. (Green, R1062:17-21; G. Singh, R1702:16-19.) The lack of skid marks at

the scene demonstrated that Green did not slam on the brakes. (Green, R977:3-5; Horton, R1162:17-21, R1185:2-4.) Illinois State Trooper Horton testified that the crash happened for "reasons unknown." (R1172:13-16.)

Allegations of Negligent Training, Entrustment and Supervision

Among the negligence allegations against Pan-Oceanic in Count II of the complaint were the following: "a. failure to properly hire; b. failure to properly train; c. failure to have proper policies and procedures; d. failure to properly supervisor [sic]…." (C792, ¶19.) The issues instruction submitted to the jury stated that Pan-Oceanic was negligent for, among other things, "permitt[ing] Lavonta Green to take the load on the highway…." (C1835(d), R2477:2-3.) The same instruction also claimed Pan-Oceanic was liable for failing to "implement and/or follow proper policies and procedures." (C1835(c), R2476:24-R2477:1.) In closing arguments, plaintiff told the jury that Pan-Oceanic "simply didn't care about what happens to these drivers or the public when they're on the road." (R2340:1-3.) Plaintiff's closing arguments also contended that Pan-Oceanic, "ordered and permitted Lavonta Green to take the load on the highway after Pan-Oceanic knew or should have known that it was unsafe." (R2345:4-8.).

Trial Testimony About Training By Pan-Oceanic

At trial, Pan-Oceanic denied that it negligently trained Green, and presented testimony that it had extensive training in place. Testimony adduced at trial demonstrated that Green was a well-trained, experienced, and competent driver. (Green, R482:5-R483:10, R921:14-18, R1062:1-16; S. Singh, R1767:2-4; G. Singh, R1702:16-19.) Pan-Oceanic had frequent safety meetings and trained employees, including Green, in safety. (G. Singh: R1584:10-R1586:4, R1672:9-R1673:9, R:1678:11-16, R1684:23-R1686:4,

R1693:13-18, R1704:23-R1707:2). Pan-Oceanic hired an outside safety consultant (G. Singh: R1655:15-R1656:20). Pan-Oceanic took the safety of its own employees and others on the road seriously. (Green: R966:17-967:3, R1787:5-8; G. Singh, R1599:15-24, R1694:16-1695:11, R1704:23-R1707:2.)

Jury Instruction IPI 50.01

Pan-Oceanic tendered the long-form IPI 50.01 as Defendant's Instruction 12, as follows:

> "The defendants are sued as principal and agent. The defendant Pan-Oceanic Engineering Co., Inc. is the principal and the defendant Lavonta M. Green is its agent. If you find that the defendant Lavonta M. Green is liable, then you must find that the defendant Pan-Oceanic Engineering Co., Inc. is also liable. **However, if you find that Lavonta M. Green is not liable, then you must find that Pan-Oceanic Engineering Co., Inc. is not liable**." (C1876) (emphasis added).

Plaintiff asked to tender a modified short-form IPI 50.01. Pan-Oceanic immediately objected, and the court made no ruling at that time. (R2204:5-2207:15.) The court ultimately refused Pan-Oceanic's long-form IPI 50.01, and instead permitted plaintiff's short-form version which was read to the jury. (R2474:16-21.) Pan-Oceanic reiterated its objections to short-form IPI 50.01 in its Post-Trial Motion. (C2308.)

Burden of Proof Jury Instruction

Pan-Oceanic tendered a burden of proof instruction based upon IPI 21.02 and plaintiff objected to it, and the court elected to reserve its ruling. (R2202:18-2203:10, C1868-1869.) However, when the instructions were read to the jury, the trial court offered no burden of proof instruction at all. Instead, the court merely read the definition of burden of proof from IPI 21.01. (R2474:4-9.)

ARGUMENT

I. THE FIRST DISTRICT APPELLATE COURT CORRECTLY RULED THAT THE VERDICTS WERE LEGALLY INCONSISTENT.

A. Standard of Review

The appellate court reversed the judgment entered by the trial court, finding that the jury verdict ascribing liability to Pan-Oceanic, who had admitted *respondeat superior*, was legally inconsistent with a finding that its employee, Green, was not negligent. The question of whether a jury's verdicts are inconsistent is a question of law and is reviewed *de novo*. *Redmond v. Socha*, 216 Ill. 2d 622, 642 (2005). In this case, the appellate court correctly determined that the verdicts were legally inconsistent, and therefore properly reversed the judgment entered by the trial court.

B. Direct actions against employers for negligent training are barred where *respondeat superior* is conceded.

Both parties agree that, at the time of the accident, Pan-Oceanic's employee, Green, was acting within the scope of his employment. In its answer to the complaint at issue, Pan-Oceanic admitted liability for its employee's conduct pursuant to the doctrine of *respondeat superior*. (C2337, ¶4.) "Under the theory of *respondeat superior,* an employer can be liable for the torts of an employee, but only for those torts that are committed within the scope of the employment." *Bagent v. Blessing Care Corp*., 224 Ill. 2d 154, 163 (2007).

Illinois courts have long held that where an employer admits liability for an employee's conduct under *respondeat superior*, the plaintiff cannot maintain a separate independent claim against the employer arising out of the same occurrence. Specifically, direct claims of negligent hiring, entrustment, supervision, and retention cannot lie against

an employer where *respondeat superior* has been conceded. *Doe v. Coe*, 2019 IL 123521, ¶33; *Gant v. L.U. Transport, Inc*., 331 Ill. App. 3d 924, 928 (1st Dist. 2002).

Plaintiff argues that negligent training is somehow distinct from negligent hiring, entrustment, supervision, and retention, and therefore should not be barred in cases where *respondeat superior* has been admitted. However, plaintiff has not unearthed a single Illinois case where a direct action for negligent training was permitted over *respondeat superior*. That is because it is a long-established legal precept in Illinois that negligent training is part and parcel of negligent hiring, retention, supervision, and entrustment, direct actions for which are barred by *respondeat superior*. *Doe v. Coe*, 2019 IL 123521, ¶¶15, 66-75; *Rogina v. Midwest Flying Serv*., 325 Ill. App. 588 (2nd Dist. 1945), *Johnson v. First Student, Inc.*, No. 18 C 50061, 2018 WL 5013918, *2 (N.D. Ill. Oct. 16, 2018); *Meyer v. A&A Logistics, Inc.*, No. 13 CV 0225, 2014 WL 3687313, *3-4 (N.D. Ill. July 24, 2014); *Gilliam-Nault v. Midwest Transp. Corp.*, No. 18 CV 4991, 2019 WL 2208287, May 22, 2019, *2. In this way, the appellate court merely confirmed the longstanding rule, and its narrow ruling here is consistent with established Illinois jurisprudence.

Here, the verdicts are inconsistent because the jury found that Green's conduct did not proximately cause the accident. Thus, there was no causal nexus between any alleged negligent training and the accident. Contrary to the contentions of ITLA's amicus brief, barring direct claims of negligent training where *respondeat superior* is triggered does not result in employers asserting *respondeat superior* to avoid liability. Rather, it ensures that employers will be held liable for their conduct, but only in those cases where employer negligence actually caused the accident.

C. Pan-Oceanic's liability for negligent training was derivative of and dependent upon Green's negligence, if any.

1. Direct actions against employers for negligent hiring, supervision, retention, and entrustment are all barred by *respondeat superior*.

In its brief, plaintiff seeks a departure from well-settled Illinois law in order to permit direct claims for negligent training even where *respondeat superior* is triggered. (Appellant's Br., pp. 16-20.) Plaintiff contends that because some claims of vicarious liability under *respondeat superior* may also include claims relating to the conduct of the employer, direct actions should be permitted even in the face *of respondeat superior*. That is not the law. In Illinois, negligence imputed to the employer under *respondeat superior* – even where the allegations include additional claims against the employer for negligent training, supervision, retention, entrustment and hiring – is *still* predicated upon the conduct of the employee.

This exact issue was addressed in *Gant v. L.U. Transport, Inc*., 331 Ill. App. 3d 924, 928 (1st Dist. 2002), where the court specifically ruled 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 the employee under a *respondeat superior* theory." Contrary to plaintiff's assertions, *respondeat superior* bars these claims, even though they contain additional allegations against employers only. *Gant* explains the rationale for this as follows:

> "Although negligent entrustment may establish **independent fault** on the part of the employer, it should not impose additional liability on the employer. The employer's liability under negligent entrustment, because it is predicated initially on, and therefore is entirely derivative of, the

> negligence of the employee, cannot exceed the liability of the employee." *Id.* at 928 (emphasis added).

In *Oakley Transport, Inc. v. Zurich Ins. Co*., 271 Ill. App. 3d 716, 727 (1st Dist. 1995), the court held that "[b]ecause the claim for negligent supervision is not independent of, but inextricably intertwined with, the employee's use of the truck, any breach by the employer to supervise such use is necessarily deemed to have arisen therefrom." Thus, Illinois courts have clearly ruled that direct claims for negligent entrustment and supervision are barred by *respondeat superior*, even when they contain additional allegations against the employer only.

2. Direct negligent training claims are likewise barred by *respondeat superior*.

This holds true for claims of negligent training as well. For example, in *Rogina v. Midwest Flying Serv*., 325 Ill. App. 588, 591 (2nd Dist. 1945), a case with strikingly similar facts to those presented here, plaintiff sued a flight school/employer for negligent entrustment in failing to adequately train the pilot, arguing that even where the pilot/employee himself was not negligent, liability for the crash should still fall upon the employer. The plaintiff in *Rogina*, as here, argued that the count for negligent training should not be barred by *respondeat superior* because it was "not predicated solely on the negligence of the servant," who was found not guilty. *Id*. at 593. The *Rogina* court flatly rejected this argument, finding that where the school admitted *respondeat superior* over the pilot, it could not be liable without a jury finding that the pilot himself was at fault for the crash. *Id*. at 594. Thus, where the employee himself is not negligent, the alleged negligence of the employer, *even if it exists*, cannot be said to have proximately caused the accident and is therefore of no moment, and *respondeat superior* bars the claim. Similarly,

in *National Railroad Passenger Corp. v. Terracon Consultants, Inc*., 2014 IL App (5th) 130257, ¶16, (hereinafter "*Terracon*"), the court clearly indicated that, under *Gant v. L.U. Transport, Inc*., 331 Ill. App. 3d 924, 928 (1st Dist. 2002), direct actions for negligent training, would be barred where an employer had conceded *respondeat superior*.

3. Additionally, claims of negligent hiring, supervision, retention, and entrustment necessarily include negligent training, all of which are barred as direct actions where *respondeat superior* is admitted.

Illinois courts have long deemed negligent training to be an element of negligent hiring, supervision, retention, and/or entrustment. For example, in *Doe v. Coe*, 2019 IL 123521, ¶¶11, 15, 33, 74, this court found that allegations of negligent hiring, supervision, and retention included claims of negligent training, and that such claims are derivative and not independent torts where *respondeat superior* is triggered. In *Doe*, the issue was whether the defendant church knew or should have known of its employee's potentially predatory behavior. The court stated that the count of the complaint alleging negligent hiring, supervision, and retention, included allegations that the employee was or should have been "trained" to spot improper situations, and that "all of the same allegations regarding training" were made against the church as well. *Id*. at ¶¶11, 15. This clearly demonstrates that this court has recently recognized negligent training to be part and parcel of negligent hiring, supervision, and retention. *Id*. at ¶74. Likewise, *Baumrucker v. Express Cab Dispatch, Inc*., 2017 IL App (1st) 161278, ¶50, specifically noted that "lack of training" was an element of negligent entrustment.

Similarly, *Oakley Transport, Inc. v. Zurich Ins. Co*., 271 Ill. App. 3d 716, 727 (1st Dist. 1995) signals the inclusion of negligent training as a part of negligent supervision. *Oakley* analyzed liability for negligent supervision in the context of insurance coverage

and found that, even when negligent supervision charges are lodged against the employer, they are still dependent on the conduct of the employee: "[t]he gravamen of negligent supervision is that one party (the supervisor) acted unreasonably in allowing another party (the supervisee) over whom he or she had a duty to control commit some wrong against a third party." *Id*. at 724-725. This is exactly what plaintiff alleges here: that Pan-Oceanic, as supervisor, acted unreasonably in allowing Green (the supervisee) to operate the loaded truck without adequate training. According to *Oakley*: "[s]uch supervision 'arises' out of the employee's 'use' of the vehicle because the negligent supervision is derivative of, and dependent upon, the underlying use of the vehicle. [The employer's] negligent supervision simply cannot be divorced from its employee's negligent driving." *Id*. at 726-727. While the word "training" is not used in *Oakley*, the conduct of an employer supervising an employee can clearly be read to inlcude necessary training as an element of reasonable supervision. Thus, *Doe v. Coe*, 2019 IL 123521, *Gant v. L.U. Transport, Inc*., 331 Ill. App. 3d 924, 928 (1st Dist. 2002), *Rogina v. Midwest Flying Serv*., 325 Ill. App. 588, 591 (2nd Dist. 1945), *National Railroad Passenger Corp. v. Terracon Consultants, Inc*., 2014 IL App (5th) 130257, ¶16 , *Oakley*, and *Baumrucker* all undermine plaintiff's contention that Illinois law permits plaintiffs to maintain direct actions against employers for negligent training, even in the face of *respondeat superior*.

4. Plaintiff's cases do not support his argument that a direct action for negligent training should be permitted where *respondeat superior* has been admitted.

In support of his contention that negligent training claims can survive *respondeat superior*, plaintiff completely ignores *Doe v. Coe*, 2019 IL 123521, ¶33, and *Rogina v. Midwest Flying Serv*., 325 Ill. App. 588 (2nd Dist. 1945), despite defendant relying on them

below, and instead cites a host of inapposite cases. (Appellant's Br., pp. 17-19.) For example, plaintiff relies on *Sperl v. Henry*, 2018 IL 123132, which examined contribution claims among joint tortfeasors for vicarious liability in a principal-agent context, where, unlike here, the jury found that the agent truck-driver was negligent. Significantly, *Sperl* even made a point of noting that direct actions for negligence were not at issue there. *Id.* at ¶37-38. Another distinguishable case, *Moy v. County of Cook*, 159 Ill. 2d 519, 531 (1994), found that the county could not be vicariously liable for the conduct of the sheriff because there was no employment relationship, and therefore no *respondeat superior*. *Behrens v. California Cartage Co., Inc*., 373 Ill. App. 3d 860, 863-864 (2007) examined whether the liability for a loaned servant under *respondeat superior* was the temporary agency who placed the employee, or the company where she was placed. In *Behrens*, unlike here, direct claims against the employer were not at issue, and the employee was indisputably negligent. Another irrelevant case cited by plaintiff, *Madden v. Paschen*, 395 Ill. App. 3d 363, 381-382 (1st Dist. 2009), considered the "retained control rule" for liability owed by independent contractors under the Restatement (Second) of Torts §414. While *Madden* did discuss vicarious liability, it did not consider *respondeat superior*. Nor did *Madden* treat a situation where an employer was found negligent and the employee was not.

Plaintiff's reliance on *Proctor v. Davis*, 291 Ill. App. 3d 265 (1st Dist. 1997) is also misplaced. (Appellant's br., p. 24.) In *Proctor*, the defendant doctor was not an employee of the defendant pharmaceutical company, and therefore vicarious liability/*respondeat superior* was not even at issue. Similarly, *Lockett v. Bi-State Transit Auth.,* 94 Ill. 2d 66 (1983) has no application here. Plaintiff cites *Lockett* for the proposition that "an employer in some circumstances can be separately liable for its own conduct despite admitting legal

responsibility for its employee's fault." (Appellant's br., p. 27.) Defendant does not dispute the conclusion of *Lockett*, only its application here. *Lockett* found that "defendants-principals may be found guilty of willful and wanton misconduct even though the tortfeasor-agents…may have been only negligent." *Id.* at 73. At issue was the degree of liability: merely negligent versus willful and wanton. However, in our case, the jury found no negligence whatsoever by employee Green, (C1911), thus *Lockett* has no application here.

5. Policy considerations support the continuation of the longstanding rule barring direct actions where *respondeat superior* is admitted.

The question is not whether the plaintiff can ever allege an independent tort against an employer. Clearly, he can. The question here is whether negligent training can exist as a direct action against an employer where the employer has admitted responsibility under *respondeat superior.* In this specific situation Illinois case law prohibits direct actions, and the policy underlying this rule explains why. The entire concept of *respondeat superior* is that where employees are acting within the scope of their employment, their liability is inextricably bound with their employer. *Gant v. L.U. Transport, Inc*., 331 Ill. App. 3d 924, 928 (1st Dist. 2002). If the employee acting within the scope of employment is negligent, then his employer is strictly liable for his negligence. *Id.* However, if the employee, acting within the scope of his employment, is not negligent, then the employer is likewise not negligent. Independent claims for negligence against an employer can only arise when the employee is acting *outside* the scope of employment *Doe v. Coe*, 2019 IL 123521, ¶33, or where the employee is acting within the scope of employment but *respondeat superior* has

not been admitted. *National R.R. Passenger Corp v. Terracon Consultants, Inc.*, 2014 IL App (5th) 130257, ¶16.

The policy underpinning the idea that *respondeat superior* should bar these direct actions arising out of the same occurrence and necessarily dependent on employee conduct is to prevent the fault of one party from being "assessed twice." *Gant*, 331 Ill. App. 3d at 929-930. Significantly, neither the plaintiff nor ITLA even address the policy goal of preventing double-dipping. Rather, plaintiff seems to be arguing that there will be no double recovery here because Green was found not liable. Aside from the torturous logical leaps required to find that poor training could have proximately caused an accident even where the poorly trained driver did not, the plaintiff's rationale is entirely dependent on hindsight. Ironically, plaintiff himself argues against wait-and-see gamesmanship (Appellant's Br., p. 37), and yet advocates for it here. Would plaintiff permit potentially duplicative recoveries only in cases where the employee is found not liable and the employer is found liable? In those cases where both employer and employee were found liable, would the direct actions then be retroactively barred? How would the jury instructions and verdict forms be created to anticipate the potential outcomes? Practically speaking, the already rushed, confusing, and difficult process of crafting jury instructions at the close of trial would be further ensnarled.

Furthermore, by permitting negligent training as a direct action even where *respondeat superior* is admitted, this court would engender a flood of litigation against employers and eviscerate the purpose of *respondeat superior*. In this way the exception would swallow the rule. Such considerations are valid. In *Savino v. Robertson*, 273 Ill. App. 3d 811, 818 (1st Dist. 1995), as here, the court was urged to "abandon well-established

precedent" in Illinois, and "that of a majority of jurisdictions" and eliminate existing limitations on negligence actions. In rejecting the change, the court predicted that the "practical effect" of the change would be to "open a legal Pandora's box." *Id*. The same is true here.

D. Plaintiff's presumptions regarding the jury's reasoning are improper, erroneous and irrelevant, as there was no proximate cause.

Plaintiff next avers that the jury "presumably" believed that the accident was proximately caused by Pan-Oceanic failing to properly train Green. (Appellant's Br., pp. 20-21.) Plaintiff's attempt to "presume" an evidentiary basis for the jury's finding of no negligence by Green is improper. *Nowak v. Coghill*, 296 Ill. App. 3d 886, 896 (2nd Dist. 1998) (rejecting speculation on proximate cause). Moreover, no presumptions are required here as the jury here *did* consider proximate cause and found that Green did not proximately cause the accident. (C1911.)

Plaintiff argues that evidence at trial supported a finding that Pan-Oceanic's failure to properly train Green proximately caused the accident. But such a finding cannot stand without also finding that Green in fact proximately caused the accident, either by failing to secure the load properly, or failing to refrain from braking, or some other theory relating to his training. The failure to train (even if it occurred) cannot by itself cause an accident. Without negligence by Green there is no causal nexus between Pan-Oceanic's alleged misconduct and the injury to plaintiff. The fact that the jury totally exonerated Green is fatal to plaintiff's claims that Pan-Oceanic's training was negligent. *Rogina v. Midwest Flying Serv.*, 325 Ill. App. 588, 594 (2nd Dist. 1945); *see also Bausback v. K Mart Corp*., 194 Ill. App. 3d 325, 331 (2nd Dist. 1990).

Furthermore, presumptions cut both ways. Even if, *arguendo*, presumptions were to be entertained, it is just as likely that the jury agreed with defendant that the lack of skid marks demonstrated that Green did not slam on the brakes (Green, R977:3-5; Horton, R1162:17-21, R1185:2-4), and agreed that Green properly checked that the load was secure (Green, R1068:18-1069:16). The jury could have also agreed with Illinois State Trooper Horton who testified that the crash happened for "reasons unknown." (R1172:13-16.) *See Mort v. Walker*, 98 Ill. 2d 391, 396 (1983) (holding that "the use of circumstantial evidence is not limited to those instances in which the circumstances support only one logical conclusion. Instead, circumstantial evidence will suffice whenever an inference may reasonably be drawn therefrom.") In other words, the jury could have believed that Pan-Oceanic was liable for negligently training Green, but also found that this inadequate training had no bearing on the accident.

Unfortunately for plaintiff, a finding of negligent training is irrelevant where the driver himself is not negligent. According to *Terracon*, "when an employer has conceded responsibility, under the theory of *respondeat superior*, for an employee's negligence, the employer cannot also be held responsible under a separate theory of negligent entrustment…." *National R.R. Passenger Corp. v. Terracon Consultants, Inc.*, 2014 IL App (5th) 130257, ¶16. This rule, as discussed at I. B. and C. *supra*, bars direct actions for negligent training as well, regardless of what the jury may or may not have "presumably" concluded. Irrespective of why the jury found in favor of Green and against Pan-Oceanic, the clear rule against direct actions where *respondeat superior* has been conceded renders the verdicts irreconcilable as a matter of law. Thus, even if the jury did believe that Green was not responsible because he was negligently trained by Pan-Oceanic, this verdict is still

impermissible because it is contrary to Illinois law. No verdict which runs afoul of the law can stand. Where verdicts are irreconcilable as a matter of law they must be rejected. *Redmond v. Socha*, 216 Ill. 2d 622, 642 (2005).

Significantly, the only case plaintiff cites in the section advocating reversal based upon presumptions of the jury's rationale is *Calloway v. Bovis*, 2013 IL App (1st) 112746, ¶77. (Appellant's Br., p. 21.) Here, plaintiff cites *Calloway* for the idea that where an injury is foreseeable, the conduct leading to the injury can be deemed the "legal cause in fact." This is all well and good, but totally irrelevant here because under Illinois law the negligent training cannot be the legal cause in fact where the driver was found not negligent. *Rogina*, 325 Ill. App. at 594.

II. CASES RELIED UPON BY THE MAJORITY OPINION SUPPORT THE LONGSTANDING ILLINOIS RULE BARRING DIRECT ACTIONS AGAINST EMPLOYERS FOR NEGLIGENT HIRING, SUPERVISION, ENTRUSTMENT, RETENTION, AND TRAINING, WHERE *RESPONDEAT SUPERIOR* IS ADMITTED.

As discussed in section I. of this Argument, *supra*, the longstanding rule in Illinois is that direct actions against employers for negligent hiring, supervision, entrustment, retention, and training are barred by *respondeat superior*, even where these allegations are in addition to the allegations regarding the conduct of the employee only. *Gant v. L.U. Transport, Inc*., 331 Ill. App. 3d 924, 928 (1st Dist. 2002); *Doe v. Coe*, 2019 IL 123521, ¶33. In its opinion at ¶44, the First District Appellate Court stated that "No Illinois cases directly addressed whether negligent training should be treated differently than negligent entrustment." *McQueen v. Green*, 2020 IL App (1st) 190202, ¶44. While it is true that this exact question has not previously been considered, it not quite correct to say that this issue has never been previously decided in Illinois. In fact, the court in *Rogina v. Midwest Flying*

Serv., 325 Ill. App. 588, 594 (2nd Dist. 1945), specifically found that allegations of negligent training were encompassed by negligent entrustment, and therefore the claims for negligent training were barred by *respondeat superior*. (For more complete discussion of negligent training as a part of negligent hiring, supervision, retention, and entrustment, see I. C., *supra*.)

However, in order to further demonstrate the wide acceptance and sound jurisprudence of expressly including negligent training with negligent hiring, supervision, retention, and entrustment as direct actions barred by *respondeat superior*, the appellate court also considered cases from other states. Specifically, the court stated that, "[l]ooking 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." *McQueen*, at ¶44.

In this context, the appellate court first cites *Greene v. Grams*, 384 F. Supp. 3d 100 (D.D.C. 2019). In his brief, plaintiff attempts to distinguish *Greene*, contending that the negligent hiring allegations therein did not involve allegations of negligent training. This is false. The facts of *Greene* show that negligent training *was* inherent in the negligent hiring claims there. Just as in the present case, the conduct at issue in *Greene* was the failure of the tractor-trailer driver to brake appropriately. While the driver in *Greene* ran a red light, (*Greene*, 384 F. Supp. 3d at 102), and our driver's accident involved merging traffic (C791, ¶¶6-10), the proper braking a tractor-trailer was the conduct at issue in both cases. Nevertheless, plaintiff makes the argument negligent training was not before the court in *Greene* because "no one really needs training to stop for a red light." (Appellant's br., p.

29.) However, the same essential allegation is present in our case: that Pan-Oceanic "failed to train Lavonta Green regarding proper braking." (R2477:7-8, C1835(g).) Plaintiff cannot have it both ways. Thus, while plaintiff may disagree with the holding in *Greene*, its attempt to distinguish it on the facts fails on its face.

The appellate court here next cites *Ferrer v. Okbamicael*, 390 P. 3d 836 (Colo. 2017). As with *Greene*, plaintiff attempts to distinguish *Ferrer* on the facts. In so doing, plaintiff erroneously states that neither *Ferrer* nor *McHaffie v. Bunch*, 891 S.W.2d 822 (Mo. 1995), on which *Ferrer* relied, involved claims of negligent training. (Appellant's br., pp. 29-30.) Based on this false claim, plaintiff then argues that, even if Illinois chooses to agree with *Ferrer* and *McHaffie*, direct actions of negligent training should still not be barred by *respondeat superior*, because negligent training was not present in those cases.

However, a review of both *Ferrer* and *McHaffie* reveal that negligent training claims *were* at issue in both cases. The *Ferrer* court plainly states on multiple occasions that the direct negligence claims against the employer there included negligent "training." *Ferrer*, 390 P. 3d at 839-840. Likewise, the discussion of *McHaffie* in *Ferrer* clearly states that the plaintiff charged the tractor-trailer driver in *McHaffie* with inadequate "training." *Ferrer*, 390 P. 3d at 843. *See also*, *McHaffie*, 891 S.W.2d at 824 (reciting the allegations against the defendant employer as including negligent "training"). In sum, plaintiff's summaries of the facts in *Ferrer* and *McHaffie* are wrong, and allegations of negligent training were included in the direct actions barred in both cases by *respondeat superior*.

In his brief, plaintiff attempts to argue that Green could have proximately caused the accident through no fault of his own merely because he was improperly trained. That is not the law. Moreover, it makes no sense. In order to show that the training was negligent,

plaintiff must show that it proximately caused the accident. However, if Green's driving did not proximately cause the accident, then his training, however inadequate, cannot be deemed to have been a proximate cause of the accident. *See*, *e.g.*, *Rogina v. Midwest Flying Serv*, 325 Ill. App. 588, 594 (2nd Dist. 1945). The simple truth is that the jury found that Green's conduct did not proximately cause the accident. (C1911.)

In *Ferrer*, the court did discuss an "unknowing employee" exception to the *McHaffie* rule against direct actions where *respondeat superior* is present. But the exception applies only in cases where an employer knowingly directs an employee to use defective equipment. *Ferrer*, 390 P. 3d at 845-846. There was no such claim here. Moreover, the exception clearly has no application to negligent training claims, as the allegations of negligent training in both *Ferrer* and *McHaffie* were part and parcel of the negligence claims barred by *respondeat superior*. *Ferrer*, 390 P. 3d at 839-840, 842.

III. THE DISSENT'S ANALYSIS DOES NOT SUPPORT A DEPARTURE FROM THE GENERAL RULE THAT DIRECT ACTIONS FOR NEGLIGENT TRAINING ARE BARRED BY *RESPONDEAT SUPERIOR*.

As described herein, at I and II., *supra*, the general rule in Illinois is that direct actions against employers for negligent hiring, supervision, retention, entrustment, and training are all barred when *respondeat superior* has been triggered. In his quest to abandon this long-established rule, plaintiff next urges this court to adopt the rationale set forth in the dissent. The dissent first acknowledges that *Gant v. L.U. Transport, Inc*., 331 Ill. App. 3d 924, 928 (1st Dist. 2002) bars direct actions for negligent hiring, retention and entrustment. *McQueen v. Green*, 2020 IL App (1st) 190202, ¶70. The dissent then seeks to either overturn *Gant* altogether, or to prevent this court from "extend[ing]" *Gant* to claims

for negligent training. *Id.*, at ¶71. However, the analysis in the dissent must be rejected for the following five reasons.

A. Appellate opinion did not "extend" *Gant.*

The dissent here incorrectly suggests that the majority opinion is "extend[ing]" *Gant v. L.U. Transport, Inc*., 331 Ill. App. 3d 924, 928 (1st Dist. 2002) to include negligent training. In fact, as discussed at length at I. C., *supra*, negligent training has long been held by Illinois courts to be barred by *respondeat superior* along with negligent hiring, retention, supervision, and entrustment. *See, e.g., Rogina v. Midwest Flying Serv*., 325 Ill App. 588, 594 (2nd Dist. 1945).

B. Logic dictates that negligent training is part and parcel of negligent hiring, retention, supervision, and entrustment.

Any logical analysis of negligent training reveals that it includes negligent training as an essential element, a fact which has long been recognized by Illinois courts. It is axiomatic that the deficiently trained employee must be found to have proximately caused the accident in order for the employer responsible for the negligent training to also be a proximate cause. *See, e.g*., *Gant v. L.U. Transport, Inc*., 331 Ill. App. 3d 924, 928 (1st Dist. 2002), *Oakley Transport, Inc. v. Zurich Ins. Co*., 271 Ill. App. 3d 716, 727 (1st Dist. 1995). That negligent training claims are logically derivative is discussed more fully at I. C., *supra*.

C. The plaintiff here inextricably bound his allegations of negligent training with allegations of negligent entrustment and negligent supervision.

The unavoidable truth, which plaintiff cannot evade, is that the negligent training alleged here overlaps with negligent retention, entrustment, and supervision so completely that no claim of negligent training can exist independently, even if such a direct claim were

permissible where *respondeat superior* is conceded. Indeed, the complaint at issue charges Pan-Oceanic with negligent hiring, supervision and retention. (C792, ¶19(a)(b)&(d).) This pleading in itself reveals the vicarious nature of the negligent training claims alleged here. Moreover, the instruction submitted to the jury charged that Pan-Oceanic was negligent for, among other things, "permitt[ing] Lavonta Green to take the load on the highway…." (C1835(d), R2477:2-3.) This is negligent entrustment. *Rogina v. Midwest Flying Serv*., 325 Ill. App. 588, 594 (2nd Dist. 1945). The same instruction also claimed Pan-Oceanic was liable for failing to "implement and/or follow proper policies and procedures." (C1835(c), R2476:24-R2477:1.) This is negligent supervision. *Oakley Transport, Inc. v. Zurich Ins. Co*., 271 Ill. App. 3d 716, 727 (1st Dist. 1995) (holding that negligent supervision is "inextricably intertwined with" an employee's use of the employer's truck). Thus, even if the jury found Green only drove the truck because Savi Singh directed him to do so, that conduct is clearly negligent entrustment or supervision, and therefore barred by *respondeat superior*.

Plaintiff's closing arguments also reveal that the claims of negligent training here are not exclusive but were bound up with claims for negligent retention, entrustment, and supervision. (R2345:4-8.). Plaintiff made this clear, arguing in closing that, by permitting Green to drive the vehicle, Pan-Oceanic "simply didn't care about what happens to these drivers or the public when they're on the road." (R2340:1-3.) This argument goes to Pan-Oceanic's alleged negligence in entrusting Green to drive with an allegedly dangerous load, and its negligent failure to properly supervise Green. Thus, the complaint, the jury instructions, and plaintiff's closing argument all demonstrate that the supposedly independent negligent training claims against Pan-Oceanic are, in fact, inextricably bound

with negligent retention, supervision, and entrustment, all of which are indisputably barred by *respondeat superior*. *Gant v. L.U. Transport, Inc.*, 331 Ill. App. 3d 924, 928 (1st Dist. 2002); *see* I. C., *supra*.

D. Cases relied upon by the dissent are not germane.

The dissent relies primarily on *Longnecker v. Loyola Univ. Med. Ctr*., 383 Ill. App. 3d 874 (1st Dist. 2008), which stands for the limited proposition that in medical negligence cases, a hospital may face vicarious liability for the negligence of its agents as well as direct liability for its own institutional negligence. *Id.* at 885. *Longnecker* did not address *respondeat superior*. However, *respondeat superior* is the crux of our case, and is the legal basis for barring plaintiff's claim. Any analysis which fails to take this crucial fact into account lacks merit. Nevertheless, the dissent focuses on the general proposition reflected in *Longnecker* that, in certain limited circumstances, an employer can be liable when an employee is not. Defendant agrees that this is true, but it is immaterial because it is not permissible here. This issue before us is whether the negligent training claim can lie against Pan-Oceanic where *respondeat superior* has been admitted and where the employee, acting within the scope of employment, has not been found negligent. The law in Illinois is very clear: the claim is barred. *Doe v. Coe*, 2019 IL 123521, ¶33; *Gant v. L.U. Transport, Inc*., 331 Ill. App. 3d 924, 930; *Johnson v. First Student, Inc.*, No. 18 C 50061, 2018 WL 5013918, *2 (N.D. Ill. Oct. 16, 2018).

In his brief, plaintiff expands on the dissent's analysis of *Longnecker,* and argues for the first time that its claims against Pan-Oceanic are for institutional negligence and that such claims should be not be barred by *respondeat superior*. (Appellant's br., pp. 23-24.) However, plaintiff cites no authority for this newly asserted proposal to change Illinois

law. Additionally, his reliance on *Longnecker* here is misplaced, as *respondeat superior* was never raised in that case. Plaintiff also cites to the definition of institutional negligence at IPI 105.03.01. (Appellant's br., pp. 23-24.) What plaintiff fails to mention is that this jury instruction is for "Health Care Institutions" and that this instruction was not given at trial in this case, nor should it have been. Plaintiff provides no legal authority for maintaining a claim of institutional negligence outside the setting of a hospital or health care provider. Moreover, plaintiff never previously raised institutional negligence as a basis for a direct action in this cause, thereby waiving it. *Sasser v. Alfred Benesch & Co*., 216 Ill. App. 3d 445, 452 (1st Dist. 1991). Thus, this meritless argument must be rejected as irrelevant, waived, and as unsupported by legal authority, thus violating of Ill. Sup. Ct. R. 341(h)(7). *Trilisky v. City of Chicago*, 2019 IL App (1st) 182189, ¶54.

Plaintiff also argues that the appellate court distinguished *Longnecker* purely on the institutional negligence argument. (Appellant's br., p 23.) This is incorrect. A plain reading of the appellate court opinion reveals that the absence of *respondeat superior* in *Longnecker* was determinative in finding *Longnecker* inapposite. The opinion here clearly states that the rules for institutional liability cannot apply "when an employer admits liability under *respondeat superio*r." *McQueen v. Green*, 2020 IL App (1st) 190202, ¶45. Thus, all of plaintiff's arguments about the applicability of a hospital's institutional negligence as applied to a trucking company evaporate because it is *respondeat superior* which bars the claims here, and it was not even discussed in passing in *Longnecker*.

The dissent also cites *Neuhengen v. Global Exp. Specialists*, Inc., 2018 IL App (1st) 160322. However, the key factor in *Neuhengen*, and not present in the instant case, was that the employee there was actually found negligent. *Id*. at ¶70. The *Neuhengen* court did

not create a rule that employers can be independently liable for punitive damages where the employee has not been negligent. Rather, *Neuhengen* held that an employer could be found liable for willful and wanton conduct where the employee was liable for mere negligence. In short, *Neuhengen* looked at relative degrees of liability (merely negligent versus willful and wanton). *Id*. at ¶127. The relative degree of misconduct was not at issue in our case. Thus, *Neuhengen* has no application here, where employee Green was found not negligent at all. (C1911.)

Neuhengen is further distinguishable as Pan-Oceanic had no prior knowledge of any incompetence of its employee, Green. *Neuhengen* explains that willful and wanton claims survive *respondeat superior* where employers entrust vehicles to a "reckless or incompetent driver" or hire "an incompetent servant." *Neuhengen*, ¶96, (*quotation omitted*). Likewise, in *Neuhengen*, the employee was concededly negligent (at ¶70) and had been the subject of prior complaints by co-workers for being "unsafe" (at ¶ 139). These allegations of notice by the employer of an unfit employee were not present in our case. In fact trial testimony revealed that Green was an experienced, competent, and well-qualified driver. (R482:5-R483:10, R921:14-18, R1062:1-16, R1673:23-24-R1674:1-5, R1702:16-19, R1767:2-4).

E. Alternatively, any change in the common law should be prospective not retrospective.

Even if this court agrees with the dissent that *Gant v. L.U. Transport, Inc*., 331 Ill. App. 3d 924 (1st Dist. 2002), is wrong or that negligent training henceforth should be removed from the class of direct actions barred by *respondeat superior*, such a finding should be prospective not retrospective. The appellate court opinion should be affirmed, as

the law in place at the time of the trial clearly rendered the verdicts inconsistent. According to *Tzakis v. Maine Township*, 2020 IL 125017, ¶28:

> "the following three factors are relevant in determining whether a prospective application is proper: '(1) whether the decision to be applied nonretroactively established a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) whether, given the purpose and history of the new rule, its operation will be retarded or promoted by prospective application; and (3) whether substantial inequitable results would be produced if the former decision is applied retroactively.[Citations omitted.]"

Here, all three requirements for prospective application are satisfied. First, as discussed at I. and II., *supra*, past precedent suggested that negligent training was part and parcel of negligent hiring, supervision, retention, and entrustment and therefore direct actions were barred by *respondeat superior* and Pan-Oceanic reasonably relied on this. *See, e.g.*, *Rogina v. Midwest Flying Serv*., 325 Ill. App. 588 (2nd Dist. 1945), *Johnson v. First Student, Inc.*, No. 18 C 50061, 2018 WL 5013918, *2 (N.D. Ill. Oct. 16, 2018); *Meyer v. A&A Logistics, Inc.*, No. 13 CV 0225, 2014 WL 3687313, *3-4 (N.D. Ill. July 24, 2014); *Gilliam-Nault v. Midwest Transp. Corp.*, No. 18 CV 4991, 2019 WL 2208287, May 22, 2019, *2. To the extent that this was an issue of first impression, its resolution was not clearly foreshadowed as all previous rulings suggested that direct actions for negligent training claims would be barred by *respondeat superior*.

The second requirement also favors prospective only application, as it will give employers notice of potential liability for a new independent tort and will also allow plaintiffs to utilize this newly recognized avenue of recovery. Thus, both sides will benefit from prospective application. The third element of the test, which looks at equity, also favors prospective application. If applied retroactively, all litigants will be harmed as they

did not have adequate notice to bring or defend these claims because they reasonably relied on precedent grouping negligent training in with other derivative torts barred by *respondeat superior*. The Illinois Supreme Court has previously applied rules prospectively and not to the litigants in the subject suit, where, as here, these three requirements have been met. *Tzakis*, 2002 IL 125017 at ¶37. *See also*, *Bogseth v. Emanuel*, 166 Ill. 2d 507, 515 (1995).

IV. NEGLIGENT ENTRUSTMENT INCLUDES NEGLIGENT TRAINING AND PLAINTIFF'S SEIZURE DISORDER HYPOTHETICAL IS NOT ANALOGOUS

Plaintiff also makes the baseless claim that negligent entrustment is a "more restrictive" tort than negligent training. This is at odds with the law in Illinois, where negligent training has been frequently deemed to be situated within the parameters of negligent entrustment. As far back as 1945, *Rogina v. Midwest Flying Serv*., 325 Ill. App. 588, 590-591 (2nd Dist. 1945), found that negligent training was an element of negligent entrustment. Thus, plaintiff's corollary assertion that direct action for negligent entrustment in the face of *respondeat superior* should be permitted is entirely without merit, as *Rogina* clearly barred direct actions for negligent training under a theory of negligent entrustment where *respondeat superior* had been admitted. *Id*. at 594. (Appellant's br., p. 27.)

Following this flawed logic, plaintiff then goes on to envision a hypothetical where an employer might be liable for an employee who experienced a seizure while driving. In plaintiff's scenario the employer would be liable because it had notice of the medical condition but still entrusted a vehicle to the driver. According to plaintiff, "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."

(Appellant's br., pp. 28.) Plaintiff then contends that, in such a scenario, the employer should be directly liable in spite of *respondeat superior*.

The problems with this hypothetical situation are myriad. First, plaintiff does not explain why a doctor would discover a seizure disorder and advise an employer but not advise a patient. This premise is outlandish. Second, nothing in this hypothetical has anything to do with the facts at hand. No secret health condition suffered by Green is alleged to have been the cause of the accident. Third, the negligent training which was actually alleged in this cause was not a secret, known only by the employer. There was ample testimony that Pan-Oceanic provided training to its employees, including Green (R1584:10-R1586:4; R1672:9-R1673:9, R1678:11-16, R1684:23-R1686:4, R1693:13-18, R1704:23-R1705:22), that it reasonably relied on Patten (R831:8-11, R834:18-R835:4, R1699:2-6), that it hired an outside consultant regarding safety and training (R1655:15-R1656:20, R1705:23-R1707:2), and, that it reasonably believed that Green was a trained and experienced driver (R482:5-R483:10, R921:14-18, R1062:1-16, R1673:23-R1674: 5, R1678:11-16, R1702:16-19, R1767:2-4). Thus, the linchpin of plaintiff's hypothetical scenario – a situation where the employer had notice of something about which its employee did not have notice – is not present in this case.

In this context, plaintiff cites *Hollywood Trucking Inc. v. Watters*, 385 Ill. App. 3d 237 (5th Dist. 2008), for the idea that truck drivers must submit to a medical exam. This requirement is not at issue in our case. Further, *Hollywood* does not address *respondeat superior* or direct actions against employers for their drivers' negligence. Plaintiff also cites *Levy v. Comm'n on Human Rights & Opportunities*, 671 A.2d 349, 353 (Conn. 1996) as authority for a driver's medical certificate being sent to the employer. Like *Hollywood*,

Levy has nothing to do with direct actions or *respondeat superior*. Moreover, neither *Hollywood* nor *Levy* has anything to do with the hypothetical driver with a seizure disorder conjured by plaintiff. Neither our case, nor *Hollywood* nor *Levy*, treats a situation where an employee has a dangerous medical condition of which the employer is aware, but not the employee. Should such a situation ever occur in real life, the question of whether a direct action for negligent entrustment might be reviewed by a court. But it has no relevance here whatsoever.

V. FEDERAL CIVIL RIGHTS CASES ARE NOT APPLICABLE

Following through with his everything-but-the-kitchen-sink approach here, plaintiff also cites two federal civil rights cases which do not involve *respondeat superior* and do not even interpret Illinois law. (Appellant's br., p. 25.) Therefore, they have no application here. For example, in *Hopkins v. Andaya*, 958 F.2d 881, 888 (9th Cir. 1992), *overruled on other grounds*, *Federman v. County of Kern*, 61 F. App'x. 438, 440 (9th Cir. 2003), the Ninth Circuit reversed summary judgment in favor of the police officer and city in a federal civil rights claim, finding that, because the claim against the police officer was resurrected, then his employer's liability was also resurrected. *Id*. at 888. The court mentioned, in *dicta*, that, hypothetically, if the officer was ultimately exonerated, the city might still be liable for improper training, but the court there did not even consider the issue of *respondeat superior*. *Id*. This omission renders *Hopkins* wholly inapplicable here, even if its failure to treat Illinois law does not.

In *Int'l Ground Transp. v. Mayor and City Council of Ocean City, Md*., 475 F. 3d 214 (4th Cir. 2007) (hereinafter "*IGT*"), the Fourth Circuit, also considering a federal civil rights claim, found that, in certain cases of qualified immunity where constitutional rights

have been violated, employees can avoid liability while the municipalities can still be held liable. *Id*. at 219-220. However, as with *Hopkins*, *IGT* deals with the very narrow area of civil rights law and has no application here.

Plaintiff relies on these irrelevant cases merely to assert the general proposition that employers can sometimes be liable when employees are not. This is not in dispute. But the limited circumstances which permit employer liability without employee liability simply do not exist in this case. Where, as here, the employee, acting within the scope of employment, is not negligent, and where the employer has asserted *respondeat superior*, the employer cannot be liable under Illinois law. *Doe v. Coe*, 2019 IL 123521, ¶33; *Gant v. L.U. Transport, Inc*., 331 Ill. App. 3d 924, 930 (1st Dist. 2002); *Johnson v. First Student, Inc.*, No. 18 C 50061, 2018 WL 5013918, *2 (N.D. Ill. Oct. 16, 2018).

VI. NEGLIGENT TRAINING CLAIMS ARE VICARIOUS BY LAW AND BY LOGIC, NOT BY LABELS

Despite all legal authority and policy to the contrary, plaintiff persists in contending that the negligent training alleged here relates exclusively to employer conduct and therefore should not be deemed vicarious. (Appellant's Br., pp. 31-32.) On page 31 of his brief, he asserts that "the appellate court's confusion may have been the result of court's labeling certain kinds of conduct as conduct that necessarily invokes vicarious liability without considering the nature of that conduct." Here, plaintiff tries to reframe the rationale of the appellate court into a problem of semantics. Contrary to plaintiff's assertions, however, this is not a problem of labels. The negligent training alleged against Pan-Oceanic is vicarious not only because the law says it is, but because the facts support that interpretation. The court in *Rogina v. Midwest Flying Serv.*, 325 Ill. App. 588, 593 (2nd Dist. 1945), faced this same question where the jury exonerated an allegedly untrained pilot

whose plane crashed. The court then found that *respondeat superior* barred the claims against the flying school/employer for the following reasons:

> "Although [the employee] may have been inexperienced as a night flyer, unless he did something that was the proximate cause of the injury which caused the death of [plaintiff], the [employer] cannot be held liable, or responsible for damages for [plaintiff's] death. Since the jury, by its verdict, found that [the employee] was not guilty, of any negligence which caused [the plaintiff's] death, it seems clear that no negligent acts on the part of [the employer] was the proximate cause of the plaintiff's intestate injuries." *Id*. at 594.

As with the employee pilot in *Rogina*, all the negligent training in the world by Pan-Oceanic amounts to nothing because the jury found that Green did not proximately cause the accident. (C1911.)

The cases relied upon by plaintiff in this context all involve procedural technicalities, which are not at issue in our case. *Walstad v. Klink*, 2018 IL App (1st) 170070, ¶16, ruled that 735 ILCS 5/2-616(d), permitting relation back of amended pleadings, should be "liberally construed 'so that cases are decided on their merits rather than on procedural technicalities.'" Nothing in *Wolstad* suggests that grouping negligent training together with negligent hiring, supervision, retention, and entrustment as direct claims barred by *respondeat superior* is a mere "procedural technicality." Rather Illinois courts have taken great pains to explain the substantive rationale for this bar on double-dipping. *See, e.g.*, *Gant v. L.U. Transport, Inc*., 331 Ill. App. 3d 924, 929-930 (1st Dist. 2002).

In re Marriage of Kuyk, 2015 IL App (2d) 140733, ¶9, is similarly irrelevant here. In *Kuyk*, the court reviewed two pleadings filed by a party as a single petition, irrespective of the titles of those pleadings. In our case, the titles of the parties' respective pleadings are not at issue. *Nationstar Mortgage LLC v. Benavides*, 2020 IL App (2d) 190681, is also

inapplicable. *Nationstar* rejected a request to quash a summons in a foreclosure case for not including the word "defendant" in the caption. *Nationstar* held that "courts should not elevate form over substance but should *construe a summons liberally*." *Id*. at ¶18 (emphasis added.) Our case does not involve an imperfectly worded summons or pleading. The case before us considers whether a plaintiff should be allowed to sue an employer directly for negligent training, a tort which Illinois courts have heretofore consistently deemed vicarious when *respondeat superior* has been admitted. (*See*, I. and II., *supra*.)

VII. J*NOV* RATHER THAN RETRIAL IS THE PROPER OUTCOME HERE

Should this court affirm the appellate court's reversal of the trial court judgment, Pan-Oceanic respectfully seeks entry of judgment *non obstante verdicto* ("j*nov*") against plaintiff, rather than a retrial in this matter. "A judgment *n.o.v.* should be granted only when 'all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors [a] movant that no contrary verdict based on that evidence could ever stand.' [Citation omitted.] In other words, a motion for judgment *n.o.v.* presents 'a question of law as to whether, when all of the evidence is considered, together with all reasonable inferences from it in its aspect most favorable to the plaintiffs, there is a total failure or lack of evidence to prove any necessary element of the [plaintiff's] case.' [Citation omitted.]" *York v. Rush-Presbyterian-St. Luke's Med. Ctr*., 222 Ill. 2d 147, 178 (2006). Here, the facts indisputably show that Green was acting within the scope of his employment at all times relevant and that Pan-Oceanic had admitted liability under *respondeat superior*. (C791, ¶9; C2337, ¶4.)

If this court affirms the finding of the appellate court that *respondeat superior* barred a direct action for negligent training against Pan-Oceanic, then it is also indisputable

that the verdict in favor of Green is legally inconsistent with the verdict against Pan-Oceanic. In Illinois, inconsistent verdicts are a basis for j*nov*. *Schmid v. Fairmont Hotel Company-Chicago*, 345 Ill. App. 3d 475, 482, 494 (1st Dist. 2003). J*nov* rather than retrial is clearly warranted here. Indeed, the retrial would be a merely superfluous exercise as a jury already found Pan-Oceanic's employee, Green, not negligent, and the verdict in favor of Green has not been appealed. (C1911.) Without negligence by Green, no vicarious liability can attach to Pan-Oceanic for negligent training because of the operation of *respondeat superior*. *Gant v. L.U. Transport, Inc*., 331 Ill. App. 3d 924, 928 (1st Dist. 2002).

VIII. INCONSISTENT VERDICTS ENOUGH TO WARRANT REVERSAL.

The appellate court wrote in its opinion, "[w]hile the legally inconsistent verdicts alone are cause for a new trial, the state of the jury instructions compels additional comment." *McQueen*, 2020 IL App (1st) 190202, ¶65. Therefore, if this court affirms the appellate court on the issue of inconsistent verdicts, then it need not even address the issue of the refused jury instructions.

Nevertheless, in the remaining sections of its brief, Pan-Oceanic will address the issues raised by plaintiff regarding the faulty jury instructions.

IX. THE APPELLATE COURT CORRECTLY RULED THAT THE TRIAL COURT ERRED IN REFUSING PAN-OCEANIC'S LONG-FORM IPI 50.01.

A. Standard of Review

The standard of review for permitting or refusing jury instructions is abuse of discretion. *York v. Rush-Presbyterian-St. Luke's Med. Ctr*., 222 Ill. 2d 147, 203 (2006). A trial court is deemed to have abused its discretion when the jury is not "fairly, fully and comprehensively" apprised of the relevant legal principles. *Schultz v. Northeastern*

Regional Commuter R.R. Corp., 201 Ill. 2d 260, 273 (2002). As to the threshold question of determining whether the instruction accurately stated the law, the standard of review is *de novo*. *Studt v. Sherman Health Sys*., 2011 IL 108182, ¶13.

B. It was error to give short-form IPI 50.01 to the jury here as it incorrectly stated the law.

Here, the trial court erred in refusing Pan-Oceanic's long-form IPI 50.01, (C1876), and in giving short-form IPI 50.01 in its place. (R2474:16-21.) The short-form IPI 50.01 given: "allowed the jury to find against Pan-Oceanic even if Green was not liable, which was an incorrect statement of the law." *McQueen v. Green*, 2020 IL App (1st) 190202, ¶46. Therefore, if this court affirms the appellate court's ruling that claims for negligent training are barred by *respondeat superior*, then it is axiomatic that short-form IPI 50.01 was given in error.

Because it is undisputed that Green was acting within the scope of his employment at all times relevant. (C790-C803; C2337, ¶4), plaintiff's claims against Pan-Oceanic here were necessarily vicarious and derivative and barred by *respondeat superior*. *Doe v. Coe*, 2019 IL 123521, ¶33. Thus, the long-form IPI 50.01 tendered by Pan-Oceanic, (C1876), should have been given. *Baikie v. Luther High School South*, 51 Ill. App. 3d 405, 409-410 (1st Dist. 1977).

The impact of this error cannot be overstated. If the jury had known that a finding in favor of Green also meant the exoneration of Pan-Oceanic it would not have rendered inconsistent verdicts. The jury instruction as given was not a correct statement of the applicable statement of law in the case and thus a new trial is warranted. *Doe v. Univ. of Chicago Med. Ctr.*, 2014 IL App (1st) 121593, ¶¶79, 80, 83, 89 (finding reversible error for

improperly giving IPI 50.01 to a jury). *See also, Green by Fritz v. Jackson*, 289 Ill. App. 3d 1001, 1012 (1st Dist. 1997).

C. Pan-Oceanic tendered long-form IPI 50.01 and properly preserved its objections to short-form IPI 50.01.

Plaintiff argues that Pan-Oceanic waived its objections to the instruction as given, and even falsely asserts that "Pan-Oceanic's counsel did not tender an alternative instruction containing the last sentence." (Appellant's Br., pp. 34.) However, a review of the record reveals this to be incorrect. In fact, Pan-Oceanic *did* properly tender the long form IPI 50.01 as Defendant's Instruction 12 (C1876). Later, plaintiff asked to tender a modified IPI 50.01, to which defendant objected, and the court made no ruling at that time. (R2204:5-2207:15.) Based upon its erroneous ruling that direct claims for negligent training were not barred by *respondeat superior*, (discussed more fully herein at I and II, *supra*), the trial court ultimately refused Pan-Oceanic's long-form IPI 50.01, and instead chose plaintiff's short-form IPI 50.01, which omitted the crucial final sentence. (R2474:16-21.) While Pan-Oceanic concedes it did not re-object to short-form IPI 50.01 when it was read aloud to the jury, it did properly preserve the issue at the jury instruction conference (R2086:1-2089:12), and again in its Post-Trial Motion. (C2308.) *Grover v. Commonwealth Plaza Condo. Ass'n*, 76 Ill. App. 3d 500, 510 (1st Dist. 1979). Thus, plaintiff's reliance on *Deal v. Byford*, 127 Ill. 2d 192, 203 (1989), *Ladao v. Faits*, 2019 IL App (1st) 180610, ¶¶22, 24, and *Grundsen v. Malone*, 125 Ill. App. 3d 1068, 1075-1076 (1984), is misplaced, as the aggrieved litigants in those cases, unlike Pan-Oceanic here, failed to ever make any objections or tender their own instructions.

Under Illinois law, a litigant is not required to keep objecting to the same ruling in order to preserve the matter for appeal. *Cetera v DiFillipo*, 404 Ill. App. 3d 20, 33 (1st Dist.

2010). Once the court has ruled, a party can assume the judge will keep ruling the same way. *Id*. At trial, Pan-Oceanic objected to Verdict Form B, (C1911), which also reflected the trial court's erroneous ruling that plaintiff's negligent training claim could survive *respondeat superior.* (R2304:13-2305:19.) These objections were identical to those which formed the basis for its previously stated objection to short-form IPI 50.01. (R2204:5-2207:15.) In making its erroneous ruling that Pan-Oceanic could be liable without Green also being found liable, the trial court stated, "We're going to give [Verdict Form B] over defendants' objection with all of the instructions as part of the record." (R2305:17-19.) Thus, in light of Pan-Oceanic's consistently argued objections to the trial court's erroneous ruling permitting a direct action for negligent training, Pan-Oceanic's failure to subsequently re-tender long-form IPI 50.01, or to reiterate its objection to short-form IPI 50.01did not constitute waiver.

X. THE APPELLATE COURT CORRECTLY RULED TRIAL COURT ERRED IN REFUSING PAN-OCEANIC'S TENDERED IPI 21.02

A. Standard of Review

The standard for determining whether the trial court's failure to give certain jury instructions was an abuse of discretion is whether, taken as a whole, the instructions fully, fairly, and comprehensively informed the jury of the relevant legal principles. *Demos v. Ferris-Shell Oil Co*., 317 Ill. App. 3d 41, 56 (1st Dist. 2000). Faulty jury instructions require a new trial where the error has resulted in serious prejudice to a party's right to a fair trial. *Doe v. University of Chicago Med. Ctr*., 2014 IL App (1st) 121593, ¶87. In determining whether a party has been prejudiced, consideration should be given to whether the instructions taken as a whole were sufficiently clear so as not to mislead the jury. *Id*.

B. The trial court abused its discretion by failing to give the jury a burden of proof instruction.

The trial court refused defendant's burden of proof instruction based upon IPI 21.02, tendered as Defendant's Instruction 9, and did not give any burden of proof instruction in its place. (R2202:18-R2203:10, C1868-C1869.) This was improper. A trial court's failure to give a burden of proof instruction to the jury has long been deemed reversible error. *Johnson v. Chicago City Railway Co.*, 166 Ill. App. 79, 83 (1st Dist. 1911). In fact, "the trial court's nondescription of the applicable burden of proof cannot be harmless because the jury's deliberations, findings, and ultimate decision were rendered through an improper scope of analysis [citation omitted]," and this, therefore, constitutes reversible error requiring a new trial. *Powell v. Dean Foods Co*., 2013 IL App (1st) 082513-B, ¶135. To give no burden of proof instruction here was reversible error, especially where contributory negligence was alleged (R408:23-R409:8), and Pan-Oceanic actually tendered the burden of proof instruction (R2202:3-R2203:10). *Babcock v. Chesapeake & Ohio Railway Co.*, 83 Ill. App. 3d 919, 928 (1st Dist. 1979).

C. Trial court had a duty to fully, fairly and accurately instruct the jury.

On appeal, Pan-Oceanic argued that the trial court abused its discretion in failing to give any burden of proof instruction to the jury and argued that IPI 21.02.02 might have been a more appropriate instruction in this case. However, plaintiff's brief inaccurately implies that defendant never offered any burden of proof instruction. (Appellant's Br., pp. 35-36.) This is incorrect. Pan-Oceanic tendered a burden of proof instruction based upon IPI 21.02, as Defendant's No. 9, and plaintiff objected to it. (R2202:18-2203:10, C1868-1869.) Plaintiff also inaccurately claims, without citation to the record, that Pan-Oceanic withdrew its tendered IPI 21.02. This is false. The court initially reserved ruling on Pan-

Oceanic's burden of proof instruction (R2202:18-2203:10), but ultimately read no burden instruction to the jury at all.

It is the duty of the trial court to define issues on each count for the jury. *Goertz v. Chicago & N.W. Ry. Co*., 19 Ill. App. 2d 261, 270 (1st Dist. 1958). In this case, Pan-Oceanic tendered IPI 21.02, and it was refused. While Pan-Oceanic fully admits that it did not re-tender a burden of proof instruction, this does not alleviate the trial court from its duty to instruct the jury. In *Grover v. Commonwealth Plaza Condo. Ass'n*, 76 Ill. App. 3d 500, 509 (1st Dist. 1979), the appellate court, facing a very similar situation, ruled as follows:

> "We agree the trial court should not give instructions that may mislead the jury, but we believe the court committed reversible error in 'simply reject(ing) the tendered instruction without any attempt at modification or alteration.' [Citation omitted.]"

In our case, plaintiff objected to Pan-Oceanic's tendered burden of proof instruction and the court had not ruled. (C1868-C1869, R2202:18-R2203:10.) Thus, this was not a situation where the trial court was unaware of need for an instruction. By tendering a burden of proof instruction, Pan-Oceanic triggered the trial court's duty to act, and its refusal to so was an abuse of discretion. Noting this duty, *Coukoulis v. Schwartz*, 297 Ill. App. 377, 383 (4th Dist. 1938), held that "[i]t is to the credit of the trial judge who must pass upon instructions at the most difficult hour of the trial, to correct its errors, if errors intervene, at the earliest possible moment," even where the prejudiced party offered no instructions at all.

Plaintiff also attempts to distinguish *Powell v. Dean Foods Co*., 2013 IL App (1st) 082513-B, ¶135, a case upon which the appellate court relied in our case. *McQueen v. Green*, 2020 IL App (1st) 190202, ¶60. Plaintiff claims that our case is "different from *Powell* with its agency issues where the burden of proof was more nuanced." (Appellant's

br., p. 40.) This is incorrect. Indeed, the agency via *respondeat superior* is at the crux of this case, and a burden of proof instruction (whether IPI 21.02 as originally tendered by defendant, or IPI 21.02.02 as discussed on appeal) was essential information for the jury. The fundamental necessity of instructing the jury on the burden of proof is the rule set forth in *Powell*, 2013 IL App (1st) 082513-B, at ¶135, and it applies here.

Plaintiff asserts that affirming the appellate court decision is tantamount to requiring the trial court to tender jury instructions *sua sponte*. (Appellant's Br., pp. 3, 36.) The problem with this argument is twofold. First, Pan-Oceanic did tender a burden of proof instruction, so no *sua sponte* instructions were sought here. Second, contrary to plaintiff's assertions, when justice demands it, trial courts are required to provide *sua sponte* instructions. In *In re Nancy M*, 317 Ill. App. 3d 167, 174 (2nd Dist. 2000), *overruled on other grounds* by *In re Mary Ann P.*, 202 Ill. 2d 393, 400-401 (2002), the court, considering the involuntary administration of medication, found that where neither party has tendered a necessary instruction, the "trial court is required to offer an instruction *sua sponte* if it relates to…the question of the burden of proof." *In re Timothy H.*, 301 Ill. App. 3d 1008, 1016 (2nd Dist. 1998), held that the trial court actually has an affirmative duty to prepare burden of proof instructions in the context of administering psychotropic drugs. While the situation before us does not involve the deprivation of any party's liberty, these cases show that the significance of the burden of proof instruction to ensuring a fair trial cannot be overstated.

Additionally, plaintiff cites *Williams v. Conner*, 228 Ill. App. 3d 350, 363 (5th Dist. 1992), in this context. (Appellant's br., p. 36.) However, *Williams* actually supports Pan-Oceanic's claim here that giving a burden of proof instruction is fundamental to a fair trial.

In *Williams*, the court found no prejudice in failing to give an issues instruction partly because a burden of proof instruction was given in that case. *Id*. at 364. Additionally, *Williams'* finding of no prejudice is inapposite here because *Williams* considered a single flawed instruction. In our case, the appellate court went out of its way to hold that it was the cumulative impact of three flawed instructions *together* which prejudiced Pan-Oceanic and denied it a fair trial. *McQueen*, 2020 IL App (1st) 190202, ¶65.

Plaintiff also cites *Burkhamer v. Krumske*, 2015 IL App (1st) 131863, ¶20, and seems to suggest that by pointing out the flaws in the instructions on appeal, Pan-Oceanic was somehow gaming the system and purposely withholding instructions at trial in order to raise their omission as error should the verdict go against it. (Appellant's Br., p. 37.) This contention has no basis in fact as Pan-Oceanic *did* tender a burden of proof instruction (as well as long form IPI 50.01). Moreover, in *Burkhamer*, the court was not reviewing jury instructions, but rather examined what the requirements are for filing post-trial motions following a mistrial, and thus has no application here.

D. Pan-Oceanic did not waive its objections to the omission of a burden of proof instruction.

By tendering its own burden of proof instruction, IPI 21.02, over the objections of plaintiff, Pan-Oceanic preserved the issue for appeal. (R2202:18-R2203:10, C1868-C1869.) On appeal, Pan-Oceanic argued that, should the court remand, IPI 21.02.02 would be an even better burden of proof instruction than the originally tendered IPI 21.02. However, the fact that a better instruction might exist than that originally proposed does *not* constitute waiver. The court in *Mikolajczyk v. Ford Motor Co*., 231 Ill. 2d 516, 557 (2008), a case relied on by plaintiff, examined this exact issue and found no waiver. In *Mikolajczyk*, defendant's proposed nonpattern instruction was refused by the trial court.

On appeal, plaintiff argued that because defendant's tendered nonpattern instruction was flawed, it was as if no instruction had been tendered at all, and, therefore, the issue was waived on appeal. *Id*. at 559. The Illinois Supreme Court disagreed, finding that, by tendering an instruction, the defendant had preserved the issue on appeal, even where the originally tendered instruction was imperfect. *Id*. at 560-561. Ultimately, *Mikolajczyk*, like the appellate court here, found reversible error because the flawed instructions prejudiced defendant and denied him a fair trial in failing to instruct the jury on the "legal principles applicable to the case." *Id*. at 562-563.

XI. PAN-OCEANIC DID NOT FORFEIT ITS RIGHT TO APPEAL FLAWED JURY INSTRUCTIONS.

Plaintiff also argues that Pan-Oceanic forfeited its right to appeal the flawed instructions, claiming that, "this case does not involve any of the factors identified as prerequisites for declining forfeiture." (Appellant's Br., pp. 43.) Plaintiff never explains whether he means to distinguish any difference between forfeiture and waiver. According to *People v. Phipps*, 238 Ill. 2d 54, 62 (2010), there is a difference between waiver and forfeiture in the criminal context:

> "Waiver is distinct from forfeiture, however. While forfeiture applies to issues that could have been raised but were not, waiver is the voluntary relinquishment of a known right. *Blair*, 215 Ill. 2d at 443-44 & n. 2, 294 Ill.Dec. 654, 831 N.E.2d 604. In *Blair*, this court noted, "'[w]hereas forfeiture is the failure to make the timely assertion of the right, waiver is the "intentional relinquishment or abandonment of a known right.'" *Blair*, 215 Ill.2d at 444, n. 2, 294 Ill. Dec. 654, 831 N.E.2d 604, *quoting United States v. Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770, 1777, 123 L.Ed. 508, 519 (1993). In determining whether a legal claim has been waived, courts examine the particular facts and circumstances of the case. [Citation omitted.] Waiver principles are construed liberally in favor of the defendant. [Citation omitted.]"

If waiver is the relinquishment of a known right, as *Phipps* holds, then the question at hand is waiver, not forfeiture, because Pan-Oceanic was aware of its rights to long-form IPI 50.01 and a burden of proof instruction, as evidenced by the fact that it tendered both. Moreover, the appellate court's critique of Pan-Oceanic on this score was not its failure to tender the instructions, but its failure to re-tender them. *McQueen v. Green*, 2020 IL App (1st) 190202, ¶¶47, 59. Perhaps plaintiff is just using the term forfeiture as a synonym for waiver. If so, the case law in Illinois is clear that there was no waiver by Pan-Oceanic here. *See* IX & X, *supra*.

In arguing that forfeiture should have barred Pan-Oceanic's right to appeal the flawed jury instructions, plaintiff claims that in *Deal v. Byford*, 127 Ill. 2d 192, 200-201 (1989), the court "enforced forfeiture" on instruction issues. This is false. *Deal* never uses the term "forfeiture." Instead, *Deal* addressed waiver and instead found waiver where a party did not tender an instruction. *Id*. at 203. As discussed herein previously, Pan-Oceanic *did* tender both a burden of proof instruction and long-form IPI 50.01, both of which were refused. Thus, *Deal* does not apply here. It should also be noted that plaintiff relies on *People v. Ward*, 113 Ill. 2d 516, 522-523 (1986); *People v. Anderson*, 112 Ill. 2d 39 (1986), two cases cited in *Deal*, as authority for finding forfeiture or waiver in our case. However, *Ward* and *Anderson* have nothing to do with the waiver of jury instructions in civil cases, but consider whether issues not raised petitions for leave to appeal are waived in criminal cases.

Plaintiff also cites *Zaabel v. Konetski*, 209 Ill. 2d 127, 136 (2004), where a court found objections to a petition modification in a child-support dispute waived, where the party only raised it for the first time in its reply brief before the appellate court, and, even

then, failed to provide any supporting argument. This does not "mirror" the situation here, as plaintiff would have it. (Appellant's Br., p. 46.) Here, Pan-Oceanic tendered instructions at trial, and reasserted its arguments in post-trial motions, and again on appeal.

Plaintiff also tries to distinguish several cases which *permitted* appeal despite forfeiture or waiver: *In re Amanda H.*, 2017 IL App (3d) 150164, ¶33; *Poullette v. Silverstein*, 328 Ill. App. 3d 791, 797 (2002); *In re P.J.*, 2018 IL App (3d) 170539, ¶11; *Golden Rule Ins. Co. v. Schwartz*, 203 Ill. 2d 456, 463 (2004); *In re Robert S.*, 213 Ill. 2d 30, 57 (2004) (this case did not address forfeiture or waiver, but rather permitted appellate review in spite of mootness,); *Village of Lake Villa v. Stockovich*, 211 Ill. 2d 106, 118-119 (2004). Thus, these cases actually support the opinion of the appellate court permitting review here. Furthermore, Illinois courts, including this court, have specifically permitted review of flawed jury instructions in spite of waiver due to the importance of the interests at stake here: to "fairly and correctly state the law," to provide a "fair trial," and to ensure a "just result." *See, e.g.*, *Dillon v. Evanston Hosp.*, 199 Ill. 2d 483, 504-505 (2002); *Mikolajczyk v. Ford Motor Co.*, 231 Ill. 2d 516, 562-563 (2008).

Plaintiff's final basis for applying forfeiture here is the specious argument that, "this was not a situation where plaintiff would have opposed the instructions if Pan-Oceanic had tendered them." (Appellant's br., 46.) This is demonstrably false. Plaintiff's objected to Pan-Oceanic's instruction No. 12, long-form IPI 50.01. (R2204:5-R2207:15, C1876.) Additionally, when Pan-Oceanic tendered its burden of proof instruction, IPI 21.02, plaintiff *did* object:

The Court:	Okay. So it will be reserved, but I'm going to put plaintiff objects, correct?
Plaintiff's Counsel:	Yes. (R2203:7-9.)

Based on the foregoing, plaintiff's entire argument on forfeiture amounts to nothing, and the appellate court opinion should be affirmed.

XII. THE APPELLATE COURT CORRECTLY FOUND THAT A FAIR TRIAL DID NOT OCCUR WHERE PAN-OCEANIC'S TENDERED INTRUCTIONS WERE REFUSED, EVEN IF, *ARGUENDO*, PAN-OCEANIC WAIVED ITS OBJECTIONS THERETO.

A. Where flawed jury instructions denied a party a fair trial, the issue can be reviewed on appeal in spite of waiver.

The appellate court cited *Dillon v. Evanston Hosp*., 199 Ill. 2d 483, 504-505 (2002), for the idea that a "just result" and considerations of a "uniform body of precedent" should override considerations of waiver. *McQueen v. Green*, 2020 IL App (1st) 190202, ¶65. In *Dillon*, as here, the court was reviewing the sufficiency of jury instructions. *Dillon* ultimately found that the trial court erred in giving the instruction even though the defendants in that case, unlike here, "failed to object with specificity to the form of the instruction and failed to offer their own versions thereof." *Id.* at 504. Applying the test found in *Dillon*, the appellate court here found that the verdict could not stand. *McQueen*, 2020 IL App (1st) 190202, ¶65; *Dillon*, 199 Ill. 2d at 505. If *Dillon* found error where the defense made no objection and did not even tender its own instructions, how much greater was the error here, where Pan-Oceanic did both? According to the appellate court here, "[t]he instructions, as a whole, did not fairly and correctly state the applicable law, which prevented a fair trial." *McQueen*, 2020 IL App (1st) 190202, ¶65.

In his brief, plaintiff delves into the plain error doctrine, arguing inconsistently that the appellate court did not rely on the plain error doctrine, and that the plain error doctrine should not apply, *citing Gillespie v. Chrysler Motors Corp*., 135 Ill. 2d 363, 375 (1990) and *York v. El-Ganzouri*, 353 Ill. App. 3d 1 (1st Dist. 2004). (Appellant's Br., pp. 37-38.)

While the appellate court did note that Pan-Oceanic raised plain error as a basis for reversal due to the refusal of long-form IPI 50.01, it did not expressly reference plain error in the part of the opinion where it held that the faulty instructions were improper. *McQueen*, 2020 IL App (1st) 190202, ¶¶47,65. Rather, in paragraph 65, where it found error for improper instructions, the appellate court expressly relied on *Dillon*, recognizing the paramount importance of instructions which fairly and correctly state the applicable law. Thus, it is unclear whether the holding here regarding the jury instructions in reliance on *Dillon* can also be characterized as an implementation of the plain error doctrine.

Pan-Oceanic submits that this is a distinction without a difference. What matters are not the labels, but whether the policy goals of justice, fairness, and accurate instruction on the law are met. *Grover v. Commonwealth Plaza Condo. Ass'n*, 76 Ill. App. 3d 500, 509 (1st Dist. 1979), and *Johnson v. Chicago City Railway Co.*, 166 Ill. App. 79, 83 (1st Dist. 1911). In our case, the appellate court found that the instructions were flawed, and that these insurmountable flaws required reversal in spite of waiver. This was also the situation in *Dillon v. Evanston Hosp*., 199 Ill. 2d 483, 504-505 (2002) and *Mikolajczyk v. Ford Motor Co*., 231 Ill. 2d 516, 562-563 (2008). Whether the appellate court's ruling on this issue is characterized as plain error or ensuring a fair trial is immaterial, so long as justice is served.

B. The flawed jury instructions were prejudicial to Pan-Oceanic.

Plaintiff also argues that the trial court's rulings on jury instructions should not be overturned, citing *Sikora v. Parikh*, 2018 IL App (1st) 172473, ¶71, which did not consider flawed IPI jury instructions, and *United States v. McKnight*, 665 F.3d 786, 792 (7th Cir. 2011), which held that each case must be considered according to its own facts.

(Appellant's br., p. 44-45.) Thus, neither case actually supports a finding of waiver here. Further, by urging deference here plaintiff seems to have abandoned his earlier acknowledgement that the standard of review for IPI 50.01 here is *de novo*, since it presents a question of law. *Studt v. Sherman Health Sys*., 2011 IL 108182, ¶13. (Appellant's Br., p. 33.)

In any event, the law in Illinois is clear that where, as here, the jury instructions inaccurately stated the law and denied a party a fair trial, reversal is required. *Dillon v. Evanston Hosp*., 199 Ill. 2d 483, 504-505 (2002). The appellate court correctly found that Pan-Oceanic suffered prejudice as a result of the faulty jury instructions. *McQueen v. Green*, 2020 IL App (1st) 190202, ¶65. In arguing that there was no prejudice to Pan-Oceanic, plaintiff cites a host of cases which do not support its argument. *Carey v. J.R. Lazzara, Inc*., 277 Ill App. 3d 902, 910 (1st Dist. 1996), *Trimble v. Olympic Tavern, Inc*., 239 Ill. App. 3d 393, 400-401 (2nd Dist. 1993), and *People v. Huckstead*, 91 Ill. 2d 536, 545 (1982), all found no prejudice because the instructions given accurately stated the law. Here, short-form IPI 50.01 did not accurately state the law, as it omitted the rule that a finding in favor of Green would also mean finding in favor of Pan-Oceanic under the doctrine of *respondeat superior*. (*See* I., *supra*.) Moreover, a failure to include any burden of proof instruction left a fundamental gap in the jury's ability to deliberate. *Johnson v. Chicago City Railway Co.*, 166 Ill. App. 79, 83 (1st Dist. 1911). *Ittersagen v. Advocate Health & Hosp. Corp*., 2020 IL App (1st) 190778, ¶87, finding no prejudice where objection to counsel's remarks was sustained, is likewise inapposite here as it did not address the test for prejudice from flawed instructions.

Plaintiff cites *Interest of D.M.*, 2020 IL App (1st) 200103, ¶30, as setting forth the standard for prejudice as "a reasonable probability, not a mere possibility, of a different outcome." However, this is the test for determining ineffective assistance of counsel, not whether a a party was prejudiced by flawed jury instructions. Nevertheless, Pan-Oceanic meets this standard, because long-form IPI 50.01, had it been given, would have made a different outcome a certitude, as the jury would not have been permitted to find for Green and against Pan-Oceanic.

Plaintiff next cites *People v. Cook*, 262 Ill. App. 3d 1005, 1018-1019 (1st Dist. 1994), arguing that because defense counsel discussed the burden of proof in closing arguments, any error in not giving the actual burden of proof instruction was cured. As with *Interest of D.M.*, this case does not apply the test for prejudice resulting from faulty instructions, but rather looks at the test for ineffective assistance of counsel as evidenced by flawed instructions. Thus, *Cook* has no application here. Nevertheless, even taking plaintiff's argument at face value, *Cook* still does not support a finding of no prejudice here. In his brief, plaintiff erroneously claims that prejudice was found in *Cook* because the defense counsel "did *not* apprise the jury of the state's burden of proof." (Appellant's br., p. 42.) In fact, defense counsel in *Cook did* apprise the jury of the burden of proof in closing arguments. *Id*. at 1019. However, *Cook* found that this mention was not enough to overcome the omission of an actual burden of proof instruction. *Id*. Similarly, here, defense counsel's closing argument made only cursory references to the burden of proof, (R2364:1-13, R2391:8-10), along with an unfulfilled promise to the jury that "the court will instruct you" on burden of proof (R2364:3-4). Further, in *Cook*, the court found prejudice not just because of the missing burden of proof instruction, but also because another instruction

(IPI 3.13) was flawed as well. *Id*. This rationale mirrors our case, where the appellate court found reversible error not because of a single flawed instruction, but because of three flawed instructions. *McQueen*, ¶65. Similarly, the *de minimis* burden of proof references in closing here could not overcome prejudice resulting from the "cumulative" flaws with the instructions. *Cook*, 262 Ill. App. 3d at 1020.

Plaintiff also claims that *Powell v. Dean Foods Co.*, 2013 IL App (1st) 082513-B, ¶¶129-135, should not apply here because, in *Powell*, the jury was not told who had the burden of proof, whereas here the jury was told about the burden of proof by defense counsel in closing arguments. (Appellant's Br., p. 41.) This is incorrect. In *Powell*, the jury *was* given several instructions about the burden of proof and agency (IPI 21.01, IPI 20.01, IPI 50.03 and IPI 50.10), but all of these were deemed insufficient without IPI 21.02 as well. Here, as in *Powell*, the mere mention of burden of proof without an actual instruction was likewise insufficient.

XIII. ALTERNATIVELY, THE APPELLATE COURT OPINION MUST BE AFFIRMED FOR OTHER ERRORS PREVIOUSLY STATED

In the event this court decides to break with decades of Illinois common law, as well as the majority of American jurisdictions which follow the *McHaffie* rule, and instead find that negligent training claims can survive *respondeat superior*, Pan-Oceanic respectfully requests that the appellate court decision nevertheless be affirmed because of the improper exclusion of crucial lay witness testimony, which denied Pan-Oceanic a fair trial.

At trial, Green testified that he could not load the bobcat himself because he did not have a key. (R827:16-19, R828:16-24.). Plaintiff's expert then testified that there were a hundred available master keys, suggesting that Green was lying. (R1129:2-5.) To rebut

this, Pan-Oceanic sought to have its witness, Gulzar Singh, testify that, as a theft-prevention method, he had modified all the bobcat ignitions so that only a master key could operate them. (R422:10-23.) Plaintiff objected, saying it exceeded Pan-Oceanic's Ill. Sup. Ct. R. 213(f)(1) disclosures (C2418-C2422), and the trial court agreed, striking the testimony. (R431:2-4.) Pan-Oceanic subsequently made an offer of proof (R2255:13-R2266:10), but the trial court did not alter its original ruling (R2267:10-11).

Illinois courts have held that each and every piece of anticipated testimony need not be detailed with exact specificity in a 213(f)(1) disclosure. Such a requirement would be impracticable and unwieldy. Rather, it is enough that the party "identify the subjects on which the witness will testify." Ill. Sup. Ct. Rule 213(f)(1). *ESP Global, LLC v. Northwest Community Hosp*., 2020 IL App (1st) 182023, ¶¶34-36. The trial court abused its discretion in limiting Gulzar Singh's testimony. In its 213(f)(1) disclosures, Pan-Oceanic advised that Gulzar Singh would testify about, among other things: "the actions of various representatives at Patten Industries and their loading of the skid steer [bobcat] onto Pan Oceanic's trailer, statements made by representatives of Patten Industries, the condition of the vehicles, the trailer, and the skid steer [bobcat] involved in the accident (before and after the accident)." (C2420.) This disclosure clearly covers the question of why Patten loaded the bobcat rather than Green, and therefore necessarily includes testimony about the missing master key. The trial court's abuse of discretion in barring Gulzar Singh's testimony was prejudicial and led to a finding of liability against Pan-Oceanic. *See, e.g., Grandi v. Shah*, 261 Ill. App. 3d 551, 557 (1st Dist. 1994); *Babcock v. Chesapeake & Ohio Railway Co.*, 83 Ill. App. 3d 919, 924 (1st Dist. 1979).

XIV. ALTERNATIVELY, PUNITIVE DAMAGES WERE NOT WARRANTED.

Assuming, *arguendo*, that the trial court judgment is reinstated, the punitive damages award must be stricken in its entirety, or alternatively, reduced. "[W]hile generally the measure of damages is a jury question, the issue of whether the circumstances in a particular case warrant the imposition of punitive damages is a question of law for the court." *Dethloff v. Ziegler Coal Co*., 82 Ill. 2d 393, 408 (1980) (*quotation omitted*). In *Queen v. Behm*, 58 Ill. App. 3d 253 (2nd Dist. 1978), the reviewing court found that the trial court correctly refused punitive damages absent aggravating circumstances. The same is true here, where no aggravating circumstances are present or even alleged.

The trial evidence showed that, on the day of the accident, Patten specifically told both Green and Savi Singh of Pan-Oceanic that the bobcat was loaded safely (Green, R831:8-11, R834:18-835:4; G. Singh, R1699:2-6), and that Savi Singh specifically told Green to drive safely (Green, R960:17-961:5; S. Singh, R1877:1-4). Pan-Oceanic had frequent safety meetings and trained employees, including Green, in safety (G. Singh: R1584:10-R1586:4, R1599:15-24, R1672:9-1673:9, R:1678:11-16, R1684:23-1686:4, R1693:13-18), hired an outside safety consultant (G. Singh: R1655:15-1656:20), and took safety of employees and others on the road seriously (Green: R966:17-967:3, R1787:5-8; G. Singh, R1599:15-24, R1694:16-1695:16, R1704:23-R1707:2,). That these measures failed to prevent the accident on August 17, 2012, does not rise to the level necessary for punitive damages under Illinois law, even where the jury found it to be "reckless." In *Shirk v. Kel*sey, 246 Ill. App. 3d 1054, 1066 (1st Dist. 1993), the court overturned a jury finding of willful and wanton, holding that, for conduct to support punitive damages, "the conduct must involve some element of outrage similar to that usually found in crime…." *See also*,

Slovinski v. Elliot, 237 Ill. 2d 51, 64-65 (2010); *Richards v. Checker Taxi Cab Co., Inc.,* 168 Ill. App. 3d 154, 157 (1st Dist. 1988). The trial evidence here did not rise to the level necessary for the imposition of punitive damages. Thus, they should be stricken or remitted.

CONCLUSION

For the reasons stated herein Defendant-Appellee Pan-Oceanic requests that the appellate court opinion be affirmed. Alternatively, Defendant-Appellee Pan-Oceanic requests such other relief as may be deemed appropriate.

Respectfully submitted,

/s/ Daniel G. Suber
One of the attorneys for Defendant-Appellee, Pan-Oceanic

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CERTIFICATE OF COMPLIANCE

I, the undersigned attorney for the defendant-appellee, Pan-Oceanic Engineering Co., Inc., hereby certifies that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in 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 342(a), is 14,999 words.

/s/ Daniel G. Suber
One of the attorneys for the Defendant-Appellee,
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APPENDIX

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Carolyn Taft Grosboll
SUPREME COURT CLERK

APPENDIX TABLE OF CONTENTS

The plaintiff has the burden of proving each of the following propositions as to each defendant:

First, that the defendants 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;

Second, that the plaintiff was injured;

Third, that the negligence of the defendants was a proximate cause of the injury to the plaintiff.

You are to consider these propositions as to each defendant separately.

If you find from your consideration of all the evidence that any of these propositions has not been proved as to the defendants, then your verdict shall be for the defendants. On the other hand, if you find from your consideration of all the evidence that all of these propositions have been proved as to the defendants, then you must consider defendants' claims that the plaintiff was contributorily negligent.

As to those claims, the defendants have the burden of proving each of the following propositions:

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

B: That plaintiff's negligence was a proximate cause of his injury.

If you find from your consideration of all the evidence that plaintiff has proved all the propositions required of the plaintiff and that the defendants have not proved both of the propositions required of the defendants, then your verdict shall be for the plaintiff as to the defendants and you shall not reduce plaintiff's damages.

If you find from your consideration of all the evidence that the defendants have proved both of the propositions required of the defendants, and if you find that the plaintiff's contributory 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 defendants.

If you find from your consideration of all the evidence that the plaintiff has proved all the propositions required of the plaintiff and that the defendants have proved both of the propositions required of the defendants, and if you find that the plaintiff's contributory 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 as to the defendants and you will reduce the plaintiff's damages in the manner stated to you in these instructions.

C 1868

Defendants' Instruction No.: 9
I.P.I. Instruction No. B21.02

Granted: ____
Denied: ____
Reserved: X

π Objects

C 1869

The defendants are sued as principal and agent. The defendant Pan-Oceanic Engineering Co., Inc. is the principal and the defendant Lavonta M. Green is its agent. If you find that the defendant Lavonta M. Green is liable, then you must find that the defendant Pan-Oceanic Engineering Co., Inc. is also liable. However, if you find that Lavonta M. Green is not liable, then you must find that Pan-Oceanic Engineering Co., Inc. is not liable.

Defendant's Instruction No.: 12
I.P.I. Instruction No. 50.01

Granted: ____
Denied: ____
Reserved: ✓

C 1876

No. 126666

IN THE
SUPREME COURT OF ILLINOIS

FLETCHER McQUEEN,

Plaintiff-Appellant,

vs.

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

Defendant-Appellee.

The undersigned, being first duly sworn, deposes and states that on April 7, 2021, there was electronically filed and served upon the Clerk of the above court the Brief of the Appellee. Service of the Brief will be accomplished by e-mail as well as electronically through the filing manager, Odyssey eFileIL, to the following counsel of record:

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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/ Daniel G. Suber
Daniel G. Suber

Under penalties as provided by the 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.

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4/7/2021 10:57 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK

/s/ Daniel G. Suber
Daniel G. Suber