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JURISDICTIONAL STATEMENT

This is an appeal from a judgment for plaintiff Fernando Maldonado on his claim of vicarious liability against appellant Gateway Hotel Holdings, L.L.C., arising out of plaintiff's participation in a boxing match. The case was tried to a jury in the Circuit Court of the City of St. Louis. On December 11, 2001, the jury awarded plaintiff total damages of $41,100,000, including compensatory damages of $13.7 million and punitive damages of $27.4 million. The jury awarded punitive damages even though the court had determined that plaintiff failed to make a submissible case for such damages, and did not submit that issue to the jury.

On January 11, 2002, Gateway filed its Motion for Judgment Notwithstanding the Verdict or, in the Alternative, Motion for New Trial. On March 8, 2002, the trial court entered its judgment on the jury's verdict in plaintiff's favor in the amount of the compensatory damages and struck the punitive damages award.[1] Gateway timely appealed the judgment to the Missouri Court of Appeals for the Eastern District of Missouri on April 3, 2002.

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[1] After the jury reached its verdict but before the trial court entered judgment, the court requested the parties to submit memoranda on the issue of the proper remedy for the jury's improper award of punitive damages. After Gateway filed the requested memoranda, it filed its post-trial motions before the trial court considered the arguments on the punitive damages question and entered judgment on the jury's verdict.

On October 7, 2003, the court of appeals filed its opinion affirming the trial court's judgment, with Judge Ahrens dissenting. On October 22, 2003, Gateway timely filed its motion for rehearing and alternative application for transfer in the court of appeals. The court of appeals denied Gateway's motion and alternative application on December 17, 2003.

On December 31, 2003, Gateway timely filed its application for transfer in this Court. This Court granted Gateway's application for transfer on January 27, 2004.

STATEMENT OF FACTS

Plaintiff Fernando Ibarra Maldonado is a professional boxer who sued defendant/appellant Gateway Hotel Holdings, L.L.C. ("Gateway") and other defendants for injuries he sustained in a boxing match held at the Regal Riverfront Hotel ("the Hotel"). Gateway owns the Hotel. Plaintiff claimed at trial – but did not allege in his petition – that Gateway was vicariously liable for the failure of Hartmann Productions, L.L.C., the promoter of the boxing event, to have an ambulance onsite at the boxing match or additional medical personnel to monitor plaintiff's condition after his boxing match.[2] The jury returned a multi-million dollar verdict for plaintiff, from which Gateway appeals.

The Event Contract

In the fall of 1998, Doug Hartmann of Doug Hartmann Productions, L.L.C. ("Hartmann") approached Chrissy Pashia ("Pashia"), the convention services manager for the Hotel, about scheduling an evening of boxing at the Hotel. Tr. 551. Hartmann told

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[2] Albert Sandler, D.O., John Williams, M.D., and Devon N. Golding, M.D., were ringside physicians during the match. L.F. 106. Plaintiff sued Drs. Sandler, Williams and Goldman, alleging that, during their respective periods of treatment, they negligently failed to detect and diagnose his condition; negligently failed to immediately summon an ambulance; and negligently failed to monitor his condition. L.F. 111-12. Plaintiff dismissed his claims against these doctors on the first day of trial. L.F. 11.

Pashia that he wanted to stage a boxing match and thought the Hotel would be a good location for the match. Tr. 551.

The Hotel rents space for various events each year, including conventions, conferences, dinners, and lunches. Tr. 607. As convention services manager, Pashia – who plaintiff called to testify in his case in chief – helps event hosts like Hartmann choose a space for the event, plan the food and beverage functions at the Hotel, and set up the room for the event. Tr. 547. Pashia has each event host sign a contract containing boilerplate language that outlines the area the event will use, and the Hotel's catering and beverage responsibilities. Tr. 607-609.

The Hotel handled Hartmann's event in the same manner it handles other events, and Pashia prepared the event contract for the boxing match Hartmann planned to hold at the Hotel. Tr. 552, 623. The contract was similar to other contracts the Hotel has with other entities that rent meeting space and put on events at the Hotel. Tr. 623. A copy of the contract is included in the Appendix ("App") at A15. Pashia signed the contract for the Hotel and Doug Hartmann signed for Hartmann Productions. Tr. 560; App. at A20.

Pashia considered the contract a catering contract. Tr. 559. The contract described the "program" that the Hotel would provide: the reservation of a block of guest rooms; space for the boxing match and spectators; check-in and check-out times; parking; credit arrangements; billing; room rental and food and beverage sales. App. at A15-A18; Tr. 555, 566-67, 616. The contract set out the amounts Hartmann would pay for these services, which were based on the amount of food and beverages sold. App. at A17. The

contract provided that "a Convention Services Manager will coordinate all aspects of your program and will serve as your principle [sic] contact." App. at A18.

The Hotel did not have a role in deciding what would happen at Hartmann's event. Tr. 609. Although the Hotel did contact the Missouri state agency regulating boxing matches to inquire about certain requirements for the match, it did not plan the match, promote the match, run the match, inspect the ring, or check the credentials of any doctor, referee, judge or other persons involved in actually staging the bouts. Tr. 615, 633-34. Gateway did not share in the losses or profits that Hartmann made from the match, played no role in selling the tickets to the event, and received no money from the ticket sales. Tr. 633-34. Hartmann made all arrangements for the boxing match. Under the contract, Hartmann agreed to make arrangements to have an ambulance onsite during the matches. Tr. 649-51; Exs. 1-3, 12, 34; App. at A20. The contract was silent with regard to the presence of additional medical personnel available to monitor a boxer's condition after a bout.

Regulation Of Boxing In Missouri

The Missouri Office of Athletics regulates boxing matches in Missouri. T. 696. As required by that agency, the match at issue complied with all federal and state laws, and complied with all of the safety rules of the Missouri Department of Athletics. Tr. 699, 702, 711. With its regulatory authority, the Missouri Office of Athletics licenses promoters of boxing matches, and issued a license to Hartmann for his match at the Hotel. Tr. 696, 697. Hartmann chose the boxers and determined who and how they would fight. Tr. 707-708, 712. At Hartmann's request, Tim Lueckenhoff of the Missouri

Department of Athletics chose the fight judges, the timekeeper, and the inspectors. Tr. 704, 705, 707. A physician approved and arranged for by the Missouri Department of Athletics was present at the ringside during the entire match. Tr. 703, 705.

Under federal law, either an EMT with resuscitative equipment or an ambulance must be present at a boxing match. Tr. 710. Notwithstanding his agreement to do so, Hartmann did not make arrangements to have an ambulance at the event. Tr. 709-10. Instead, Hartmann provided an EMT with resuscitative gear during the match. Tr. 704.

The Boxing Match

The boxing match was held on January 29, 1999. Plaintiff, a veteran of twenty-four professional fights and thirty-four amateur fights, was a professional boxer who participated in and was compensated for one of the bouts. Ex. 80 at 22-23, 27. Plaintiff had no correspondence, communication, or other contact with the Hotel at any time prior to the boxing match. Ex. 80 at 56-57.

Before he came to Missouri, plaintiff knew that boxing was a dangerous sport. Ex. 80 at 51. He understood that boxers can get hurt while fighting and he understood that they can get knocked out. Ex. 80 at 51-52. He understood that boxers might die while boxing. Ex. 80 at 53.

Plaintiff sustained several blows to the head during the match, and his fight ended when he was knocked out. Tr. 258-59. Under the attention of the ringside physician, plaintiff was revived, left the ring and walked to his dressing room. Tr. 259. While in the dressing room, plaintiff again lost consciousness. Tr. 319. The ringside doctor and EMT were summoned, and an ambulance was called. Tr. 368-69. Plaintiff was taken by

ambulance to St. Louis University Hospital. Tr. 324. As a result of his injury, plaintiff suffered brain damage.

The Lawsuit

Plaintiff filed this suit to recover for his injuries. L.F. 103. In his Second Amended Petition, plaintiff asserted claims against the ringside doctors, Dr. Sandler, Dr. Williams and Dr. Golding; the promoter, Hartmann Productions; Doug Hartmann, individually; the matchmaker, Peyton Sher Enterprises, Inc.; and three Hotel defendants.[3] L.F. 103. He claimed that the defendants owed him a duty to provide an ambulance on the Hotel's premises during the boxing match, and to monitor plaintiff's medical condition after his bout. L.F. 103. Plaintiff alleged that defendants' negligent failure to have an ambulance onsite or to have medical personnel in his dressing room to monitor his condition delayed his treatment, resulting in his brain damage injury. L.F. 103. He alleged that Gateway, as the owner of the Hotel, was a joint venturer with Hartmann and was directly liable for its own negligence in failing to provide an ambulance and medical monitoring. L.F. 106-07. Plaintiff did not allege that Gateway was vicariously liable for Hartmann's conduct.

Plaintiff subsequently dismissed all of the defendants except Gateway, Regal and Richfield prior to trial, and the case proceeded to trial solely against the Hotel defendants (collectively, "Gateway"). At trial, plaintiff abandoned his joint venture claim. Instead,

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[3] In addition to Gateway, plaintiff sued Regal Hotel International and Richfield Hospitality Services, Inc.

he theorized that boxing is an inherently dangerous activity, that Hartmann was Gateway's independent contractor, and that Hartmann negligently failed to provide an ambulance onsite and active medical monitoring of plaintiff after his bout. L.F. 693. He submitted his claim solely against Gateway, claiming that Gateway was vicariously liable as a landowner for Hartmann's negligence because, under the "inherently dangerous activity" doctrine, a landowner may be held liable for an independent contractor's negligent acts. Tr. 984-85. Plaintiff argued that he was "an invitee" or "at worst a licensee" at the boxing match. Tr. 983, 985-87.

Although plaintiff now sought damages against Gateway under the inherently dangerous activity doctrine, he acknowledged that he "clearly" assumed the risk of injury from the alleged inherently dangerous activity of boxing. L.F. 291. He asserted that his claims were for "the injuries he sustained *after* his bout ended because of the delay in transporting him to the hospital…[and that] he did not assume any risk for injuries sustained or exacerbated by the defendants' negligence." L.F. 291.

At the close of plaintiff's case and the close of all the evidence, Gateway moved for a directed verdict, arguing *inter alia* that plaintiff failed to prove Hartmann was Gateway's independent contractor because there was no evidence that Gateway hired Hartmann to do anything on Gateway's behalf; instead, Hartmann rented space and catering services at the Hotel. Tr. 694, 963, 986. Gateway also argued that plaintiff failed to make a submissible case under the inherently dangerous activity doctrine because, under plaintiff's theory of liability, he failed to prove that the injuries for which

he sought to hold Gateway liable resulted from any dangers inherent in boxing, and that Maldonado had assumed any risks inherent in boxing. Tr. 982-87, 990-91.

In response, plaintiff contended that Gateway could be held vicariously liable for what happened after he got knocked out. Tr. 999-1000. Plaintiff acknowledged that "the object of the sport [of boxing] . . . is to strike someone in the head and cause brain damage. That's inherent in the sport. That's what the sport is about. That's what you're supposed to do." Tr. 996-97. Plaintiff acknowledged that "the object of the sport is to injure." T. 997. He claimed that Gateway was liable because "part of the boxing experience, part of the boxing activity is not just getting hit in the head, it's being knocked out, and it's what happens after you get knocked out." Tr. 999.

The trial court denied Gateway's motion for directed verdict, and submitted plaintiff's theory of liability to the jury.

The Instructions and the Punitive Damages Claim

Over Gateway's objection, the trial court instructed the jury that "The term 'inherently dangerous activity' as used in these instructions means an activity that necessarily presents a substantial risk of harm unless adequate precautions are taken." L.F. 692. The trial court refused Gateway's request that, if an instruction defining "inherently dangerous activity" were given, the definition be expanded in accordance with M.A.I. 16.08 to inform the jury that the term "inherently dangerous activity" "does not include a risk of harm that is not inherent in or a normal part of the work to be performed, and that is negligently created solely as a result of the improper means in

which the work under the contract is performed." Tr. 1008, 1013. The court also refused Gateway's assumption of risk instruction. Tr. 1045.

In addition, over Gateway's objection, the trial court submitted the plaintiff's verdict director to the jury. Tr. 1013-32; L.F. 693. That verdict director instructed the jury to find for plaintiff and against Gateway if it believed that "first, boxing is an inherently dangerous activity"; "second, during such activity" Hartmann failed to provide an ambulance or medical personnel in plaintiff's locker room; third, Hartmann was thereby negligent; and "fourth, such negligence and the danger inherent in such activity combined to directly cause or directly contribute to cause damage to plaintiff." L.F. 693.

The trial court determined that plaintiff failed to make a submissible case for punitive damages, and granted Gateway's motion for directed verdict on that claim. Tr. 1004. Gateway requested that the court give a withdrawal instruction on punitive damages. Tr. 1038-39; 1045-46. Gateway made this request because, in opening statement, plaintiff's attorney had informed the jury that he intended to ask for punitive damages at the close of the case, and plaintiff's attorney had also mentioned punitive damages during voir dire, referred to a prior lawsuit against Gateway, and alluded to plaintiff's punitive damage claim during trial. Tr. 125-26, 203-04, 637-41. The court, however, refused to give Gateway's proffered withdrawal instruction on the punitive damages issue. Tr. 1007, 1038-39, 1045-46.

Plaintiff's Closing Argument

Despite the court's refusal to submit the issue of punitive damages to the jury, in closing argument plaintiff's counsel again referred to a prior lawsuit against Gateway,

and repeatedly urged the jury to "make [Gateway] listen" with its verdict. Tr. 1090-92. Plaintiff's counsel argued that Gateway had engaged in "the worst kind of wrong because their conduct in this case was based on their pocketbook, not somebody else's safety." Tr. 1054-55. Gateway objected to plaintiff's arguments on the ground that plaintiff's counsel was making an argument for punitive damages, which was no longer an issue in the case. Tr. 1055, 1090, 1091. The trial court overruled Gateway's objections. Tr. 1055, 1090, 1091.

During its deliberations, the jurors sent a note asking whether they were prohibited from awarding punitive damages. Tr. 1092. The court responded by informing the jury, "you must be guided by the evidence as you remember it and the instructions given to you by the court." Tr. 1093. Gateway renewed its request for a withdrawal instruction and renewed its objection to plaintiff's closing argument. Tr. 1093. The trial court again denied Gateway's request, and declined to give the jury any further instruction. Tr. 1093.

The Jury's Verdict

The jury returned a verdict awarding plaintiff compensatory damages of $13.7 million, and wrote onto the verdict form an award of punitive damages of $27.4 million. L.F. 698. After reviewing post-trial memoranda on the issue, the trial court struck the punitive damages and entered a judgment in the amount of the compensatory damages awarded. L.F. 797. In resolving the parties' post-trial motions, the trial court specifically found that plaintiff had assumed the risks inherent in boxing, but that plaintiff had not been injured as the result of a risk inherent in boxing. L.F. 819; App. at A7.

The Court of Appeals' Opinion

The court of appeals affirmed the judgment in a two-to-one decision. A copy of the court's majority opinion is included in the appendix to this brief at A30. The court found that the Hotel benefited from the contract because it "received profits from room rentals, food and beverage sales;" it would "receive compensation regardless of whether the event actually took place;" and the event, which was advertised as "Ringside at the Regal," provided "significant exposure for the hotel on national television." Slip Op. at 5; App. at A34. Contrary to the explicit contract language in which Gateway agreed to coordinate all aspects of Hartmann's "program" for rooms, food and beverage service at the Hotel, the court stated in its opinion that Gateway agreed to "'coordinate all aspects' of the event." Slip Op. at 5; App. at A34. The court of appeals held that an independent contractor relationship existed between Gateway and Hartmann, reasoning as follows: "[a]lthough Gateway did not solicit Hartmann Productions' business, ultimately the activity performed by Hartmann Productions benefited the hotel, which is the primary consideration in determining whether sufficient evidence existed of an independent contractor relationship." Slip Op. at 5; App. at A34.

The court of appeals also reasoned that Gateway was vicariously liable for Hartmann's negligence. The court acknowledged Missouri law holding that "a landowner will not be considered liable if the negligence of the independent contractor is 'collateral.'" Slip Op. at 7; App. at A36. The court held, as a matter of law, that Hartmann's negligence was not collateral negligence. Slip Op. at 7; App. at A36. The court then held that the trial court properly instructed the jury on the definition of

"inherently dangerous activity," and did not err in refusing to include the full instruction requested by Gateway, because Gateway's requested instruction was "a definition of collateral negligence," and "the issue was not collateral negligence, but whether there was any direct negligence." Slip Op. at 9; App. at A38. Judge Ahrens dissented, based on his conclusion that the trial court had erred in failing to include the collateral negligence language in the instruction defining "inherently dangerous activity." Dissenting Op. at 6; App. at A47. Judge Ahrens stated that "the failure of the trial court to submit this instruction with the requested phrase misstated the law, limited the jury in its determination, and Gateway in its arguments, and therefore materially affected the merits of the action." Dissent at 6; App. at A47.

This Court subsequently granted transfer of this appeal.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN DENYING GATEWAY'S MOTION FOR DIRECTED VERDICT AND DENYING GATEWAY'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, BECAUSE PLAINTIFF FAILED TO PLEAD AND PROVE THAT GATEWAY WAS LIABLE UNDER THE "INHERENTLY DANGEROUS ACTIVITY" DOCTRINE AS A LANDOWNER WHO HIRED HARTMANN TO BE AN INDEPENDENT CONTRACTOR, IN THAT (1) THERE WAS NO EVIDENCE THAT GATEWAY HIRED HARTMANN TO PERFORM AN INHERENTLY DANGEROUS ACTIVITY ON GATEWAY'S BEHALF; AND (2) UNDER PLAINTIFF'S THEORY OF LIABILITY, PLAINTIFF HAD ASSUMED ANY RISK INHERENT IN THE ALLEGED INHERENTLY DANGEROUS ACTIVITY OF BOXING AND WAS NOT ENTITLED TO RECOVER FROM GATEWAY, UNDER THE INHERENTLY DANGEROUS ACTIVITY DOCTRINE, FOR INJURIES RESULTING FROM RISKS THAT WERE NOT INHERENT IN THAT ACTIVITY.

Giddens v. Kansas City Southern Ry., 29 S.W.3d 813 (Mo. banc 2000)

Hougland v. Pulitzer Pub. Co., Inc., 939 S.W.2d 31 (Mo. App. 1997)

Sheppard v. Midway R-1 School Dist., 904 S.W.2d 257 (Mo. App. 1995)

Bowles v. Weld Tire & Wheel, Inc., 41 S.W.3d 18 (Mo. App. 2001)

II. THE TRIAL COURT ERRED IN SUBMITTING INSTRUCTION 6, BECAUSE THE INSTRUCTION DID NOT PROPERLY INSTRUCT THE JURY ON THE MEANING OF "INHERENTLY DANGEROUS ACTIVITY" UNDER THE FACTS OF THIS CASE, IN THAT (A) THE INSTRUCTION PERMITTED THE JURY TO IMPOSE LIABILITY BASED ON RISKS ASSUMED BY PLAINTIFF AND (B) PLAINTIFF CLAIMED THAT THE RISK ON WHICH HE BASED HIS CLAIM WAS NOT A RISK INHERENT IN BOXING BUT A RISK CREATED BY HARTMANN'S CONDUCT, AND THEREFORE THE INSTRUCTION SHOULD HAVE SUBMITTED THE ISSUE OF COLLATERAL NEGLIGENCE TO THE JURY BY ADVISING THE JURY THAT THE TERM "INHERENTLY DANGEROUS ACTIVITY" DID NOT INCLUDE A RISK NEGLIGENTLY CREATED BY HARTMANN'S CONDUCT.

Harvey v. Washington, 95 S.W.3d 93 (Mo. banc 2003)

Seitz v. Lemay Bank and Trust Co., 959 S.W.2d 458 (Mo. banc 1998)

Sheppard v. Midway R-1 School Dist., 904 S.W.2d 257 (Mo. App. 1995)

Martin v. Buzan, 857 S.W.2d 366 (Mo. App. 1993)

III. THE TRIAL COURT ERRED IN SUBMITTING PLAINTIFF'S INSTRUCTIONS 6 (DEFINING "INHERENTLY DANGEROUS ACTIVITY") AND 7 (PLAINTIFF'S VERDICT DIRECTOR), BECAUSE THE INSTRUCTIONS PERMITTED PLAINTIFF TO RECOVER ON A THEORY NOT PLEADED OR PROVED AT TRIAL AND ALLOWED THE PLAINTIFF TO RECOVER FOR DAMAGES RESULTING FROM RISKS THAT HE HAD ASSUMED OR RISKS THAT WERE NOT INHERENT IN BOXING, IN THAT PLAINTIFF HAD ASSUMED ANY RISK INHERENT IN BOXING AND, UNDER PLAINTIFF'S THEORY OF RECOVERY, ANY ALLEGED RISKS FROM NOT HAVING AN AMBULANCE OR MONITORING PERSONNEL AFTER THE BOUT WERE NOT RISKS INHERENT IN BOXING.

Martin v. Buzan, 857 S.W.2d 366 (Mo. App. 1993)

Ballinger v. Gascosage Elec. Co-Op., 788 S.W.2d 506 (Mo. banc 1990)

Nance v. Leritz, 785 S.W.2d 790 (Mo. App. 1990)

Sheppard v. Midway R-1 School Dist., 904 S.W.2d 257 (Mo. App. 1995)

IV. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING REFERENCE TO OR EVIDENCE OF A PRIOR CLAIM AND RESULTING LAWSUIT, *NOVAK V. ARCH PRODUCTIONS, INC.*, ARISING OUT OF A KICKBOXING MATCH, EXCLUDING EVIDENCE OF THE COURT'S RULINGS IN THAT CASE, AND REJECTING GATEWAY'S PROPOSED WITHDRAWAL INSTRUCTION, BECAUSE DEFENDANT'S PARTICIPATION IN THAT LITIGATION WAS IRRELEVANT, IN THAT *NOVAK* WAS NOT PROOF OF GATEWAY'S NEGLIGENCE, WAS NOT EVIDENCE OF GATEWAY'S LIABILITY FOR PUNITIVE DAMAGES, AND WAS NOT RELEVANT TO ANY ALLEGED NOTICE TO OR DUTY OF GATEWAY OR HARTMANN, AND EVIDENCE OF THE PRIOR LAWSUIT WAS MISLEADING BECAUSE THE TRIAL COURT IN THAT CASE HAD HELD THAT GATEWAY DID NOT HAVE A DUTY TO ENSURE THAT AN AMBULANCE WAS ONSITE.

Oldaker v. Peters, 817 S.W.2d 245 (Mo. banc 1991)

Ford v. Gordon, 990 S.W.2d 83 (Mo. App. 1999)

Overfield v. Sharp, 668 S.W.2d 220 (Mo. App. 1984)

V. THE TRIAL COURT ERRED IN DENYING GATEWAY'S REQUESTS FOR A WITHDRAWAL INSTRUCTION ON PUNITIVE DAMAGES AND IN OVERRULING GATEWAY'S OBJECTIONS TO PLAINTIFF'S ARGUMENTS THAT GATEWAY'S CONDUCT WAS "BASED UPON THEIR POCKETBOOK" AND URGING THE JURY NOT TO "LET THIS HAPPEN AGAIN" AND TO "MAKE THEM LISTEN WITH YOUR VERDICT IN THIS CASE" BECAUSE THE ARGUMENT IMPROPERLY INJECTED PUNITIVE DAMAGES INTO THE CASE WHEN THOSE DAMAGES WERE NOT SUBMITTED TO THE JURY, IN THAT IT URGED THE JURY TO PUNISH GATEWAY AND DETER IT FROM SIMILAR CONDUCT IN THE FUTURE. FURTHERMORE, THE LACK OF A WITHDRAWAL INSTRUCTION LEFT THE JURY WITH THE MISCONCEPTION THAT PUNITIVE DAMAGES WERE APPROPRIATE AND GATEWAY WAS PREJUDICED BOTH BY PLAINTIFF'S ARGUMENT AND THE LACK OF THE WITHDRAWAL INSTRUCTION, IN THAT THE JURY RETURNED A VERDICT THAT NOT ONLY ATTEMPTED TO AWARD PUNITIVE DAMAGES BUT ALSO CATEGORIZED AS COMPENSATORY DAMAGES AN AMOUNT ALMOST THREE TIMES THE HIGHEST FIGURE MENTIONED BY PLAINTIFF'S COUNSEL.

Yoos v. Jewish Hosp. of St. Louis, 645 S.W.2d 177 (Mo. App. 1982)

Smith v. Courter, 531 S.W.2d 743 (Mo. banc 1976)

Temple v. Atchison, T & S.F. Ry., 417 S.W.2d 97 (Mo. 1967)

Fisher v. McIlroy, 739 S.W.2d 577 (Mo. App. 1987)

VI. THE TRIAL COURT ERRED IN DENYING GATEWAY'S MOTION FOR NEW TRIAL, BECAUSE THE VERDICT WAS EXCESSIVE AND NOT BASED ON THE EVIDENCE, IN THAT THE EXCESSIVENESS OF THE VERDICT AND THE TRIAL COURT'S ERRORS IN ALLOWING IMPROPER ARGUMENT AND ERRONEOUSLY ADMITTING EVIDENCE AS DISCUSSED IN POINTS II AND V RESULTED IN A VERDICT THAT WAS THE RESULT OF THE JURY'S PASSION, PREJUDICE AND BIAS.

Blevins v. Cushman Motors, 551 S.W.2d 602 (Mo. banc 1977)

Fust v. Francois, 913 S.W.2d 38 (Mo. App. 1995)

Barnett v. La Societe Anonyme Turbomeca France, 963 S.W.2d 639 (Mo. App. 1997)

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING GATEWAY'S MOTION FOR DIRECTED VERDICT AND DENYING GATEWAY'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, BECAUSE PLAINTIFF FAILED TO PLEAD AND PROVE THAT GATEWAY WAS LIABLE UNDER THE "INHERENTLY DANGEROUS ACTIVITY" DOCTRINE AS A LANDOWNER WHO HIRED HARTMANN TO BE AN INDEPENDENT CONTRACTOR, IN THAT (1) THERE WAS NO EVIDENCE THAT GATEWAY HIRED HARTMANN TO PERFORM AN INHERENTLY DANGEROUS ACTIVITY ON GATEWAY'S BEHALF; AND (2) UNDER PLAINTIFF'S THEORY OF LIABILITY, PLAINTIFF HAD ASSUMED ANY RISK INHERENT IN THE ALLEGED INHERENTLY DANGEROUS ACTIVITY OF BOXING AND WAS NOT ENTITLED TO RECOVER FROM GATEWAY, UNDER THE INHERENTLY DANGEROUS ACTIVITY DOCTRINE, FOR INJURIES RESULTING FROM RISKS THAT WERE NOT INHERENT IN THAT ACTIVITY.

Eschewing his pleaded theory of joint venture, plaintiff submitted his case to the jury on a single, unprecedented theory: that under the inherently dangerous activity doctrine, Gateway was vicariously liable for Hartmann's alleged negligence in failing to have an ambulance onsite or a physician available in the dressing room to monitor plaintiff's condition after plaintiff was injured in his boxing match. As a matter of law, the inherently dangerous activity doctrine does not apply to a situation in which a hotel

has rented space and provided catering services to a promoter seeking to stage boxing matches on the hotel's property, and a boxer participating in one of those matches seeks damages because the promoter did not have an ambulance or additional medical personnel onsite. No Missouri court has applied the inherently dangerous activity doctrine to circumstances remotely similar to the circumstances of this case, and this Court should reject plaintiff's attempt to expand the scope of landowner liability.

Under the inherently dangerous activity doctrine, a landowner may be liable when the landowner engages an independent contractor to perform an inherently dangerous activity on the landowner's behalf. The doctrine is inapplicable in this case because Gateway did not engage or commission Hartmann, the promoter, to perform an inherently dangerous activity, or any other activity, on Gateway's behalf. At Hartmann's request, Gateway rented space for Hartmann to conduct his boxing matches and provided catering services for Hartmann's event. Hartmann did everything else. No Missouri case supports an argument that Hartmann was an independent contractor of Gateway for the purposes of the boxing matches Hartman promoted and staged. Because there was no landowner/independent contractor relationship between Gateway and Hartmann, Gateway cannot be vicariously liable for any alleged negligence of Hartmann in not having an ambulance onsite or additional medical personnel in the dressing room.

In addition, Gateway was entitled to a directed verdict because plaintiff assumed the risk of injury from any dangers inherent in boxing, and Gateway is not liable for any risks created by Hartmann's collateral negligence. In order to avoid an assumption of risk defense, plaintiff claimed that he had been injured not as a result of the primary risks

inherent in boxing, but rather as a result of the secondary risk of injury from delayed medical treatment caused by Hartmann's failure to have an ambulance or additional medical personnel on site. Under the inherently dangerous activity doctrine, a landowner is not liable for injuries caused by risks assumed by a plaintiff or secondary risks created by the negligence of the alleged contractor. Because plaintiff claimed that he was not injured as a result of a risk inherent in the alleged inherently dangerous activity of boxing, Gateway cannot be held liable under the inherently dangerous activity doctrine.

Plaintiff's novel claim against Gateway is not permitted under Missouri law. The Court should reverse the judgment of the trial court and remand with directions that judgment be entered in favor of Gateway.

A. Standard of Review

The same standard governs review of the trial court's denial of a motion for directed verdict and judgment notwithstanding the verdict: this Court determines whether the plaintiff made a submissible case. *Giddens v. Kansas City Southern Ry.*, 29 S.W.3d 813, 818 (Mo. banc 2000). A case may not be submitted to the jury unless "each and every fact essential to liability is predicated upon legal and substantial evidence." *Id.* "Substantial evidence is that which, if true, has probative force upon the issues, and from which the trier of fact can reasonably decide the case." *Kenney v. Wal-Mart Stores, Inc.*, 100 S.W.3d 809, 814 (Mo. banc 2003). This Court reviews *de novo* whether the evidence in a given case is substantial. *Id.*

In determining whether plaintiff made a submissible case, the Court views the evidence and all reasonable inferences in the light most favorable to plaintiff, and, except

for evidence submitted by plaintiff, disregards the evidence favorable to defendant. *Giddens*, 29 S.W.3d at 818. The Court will not overturn the verdict unless there is a complete absence of probative facts to support it. *Id.* However, "the rule entitling a plaintiff to the most favorable view of the evidence does not authorize courts to supply missing evidence or to disregard the dictates of common reason and to accept as correct or true that which obviously, under all the circumstances in evidence, cannot be correct or true," nor does it require the Court to give plaintiff "the benefit of any other than reasonable inferences." *Begley v. Connor*, 361 S.W.2d 836, 839 (Mo. 1962).

B. The Inherently Dangerous Activity Theory Is Inapplicable Because Hartmann Was Not Gateway's Independent Contractor.

The inherently dangerous activity doctrine, which is an exception to the general rule relieving landowners of liability for the negligence of independent contractors, is not applicable here because, as a matter of law, Hartmann was not Gateway's independent contractor. The undisputed facts proved that Gateway did not hire, engage, or commission Hartmann to stage a boxing event or do anything else on Gateway's behalf, and therefore Gateway was not vicariously liable for Hartmann's negligence.

In Missouri, a landowner generally is not liable for injuries to innocent third parties caused by the negligence of an independent contractor or its employees. *Matteuzzi v. Columbus Partnership, L.P.*, 866 S.W.2d 128, 130 (Mo. banc 1993); *Zueck v. Oppenheimer Gateway Properties, Inc.*, 809 S.W.2d 384, 386 (Mo. banc 1991). Under the "inherently dangerous activity" exception to this rule, a landowner who hires an independent contractor to perform an inherently dangerous activity on the landowner's

behalf has a non-delegable duty to take adequate precautions to prevent injury from the dangers inherent in that activity. *Matteuzzi*, 866 S.W.2d at 130. The inherently dangerous activity doctrine provides that "a landowner remains liable to innocent third parties if the plaintiff can show that *the landowner has directed the contractor to perform an act which is dangerous to others*." *Gillespie v. St. Joseph Light & Power Co.*, 937 S.W.2d 373, 376 (Mo. App. 1996) (emphasis added), quoting *Salmon v. Kansas City*, 241 Mo. 14, 145 S.W. 16, 24 (1912). If the landowner hires an independent contractor to perform such an activity on the landowner's behalf, the landowner "remains liable for the torts of the contractor" simply for "commissioning the activity," and liability attaches without any proof that the landowner was negligent. *Ballinger v. Gascosage Elec. Co-Op.*, 788 S.W.2d 506, 511 (Mo. banc 1990).

An independent contractor is "one who *contracts with another to do something for him,* but is neither controlled by the other nor subject to the other's control with respect to his physical conduct in the performance of the undertaking." *Hougland v. Pulitzer Pub. Co., Inc.*, 939 S.W.2d 31, 33 (Mo. App. 1997) (emphasis added). That definition necessarily contemplates that the independent contractor is an individual or entity that is hired, retained or commissioned to do work on another's behalf. When the facts are undisputed, the issue of whether one is an independent contractor is an issue of law. *Id.* Missouri cases considering the inherently dangerous activity doctrine consistently involve an independent contractor engaged by a landowner to perform dangerous work or a dangerous activity on the landowner's behalf. *See Zueck*, 809 S.W.2d at 385; *Gillespie*, 937 S.W.2d at 374-76; *Matteuzzi*, 866 S.W.2d at 129-130; *Lammert v. Lesco Auto Sales*,

936 S.W.2d 846, 848-50 (Mo. App. 1996); *Reed v. Ocello*, 859 S.W.2d 242, 243-45 (Mo. App. 1993).

Even assuming that boxing is an inherently dangerous activity as that term is defined under Missouri law,[4] to recover against Gateway under the inherently dangerous activity doctrine plaintiff had to prove that Gateway hired, retained or commissioned Hartmann to organize and promote a boxing match and that in performing those activities Hartmann acted as Gateway's independent contractor. Plaintiff failed to meet this burden. The relevant, undisputed facts in this case established that, as a matter of law, Hartmann was not Gateway's independent contractor.

Gateway did not hire, retain, or commission Hartmann to do anything, and Hartmann did not stage the boxing matches or do anything on behalf of Gateway. The boxing event was Hartmann's idea and project, not Gateway's. Tr. 551. Hartmann approached Gateway to rent space at the Hotel to stage a boxing event for Hartmann's benefit. Tr. 551. In the contract between Gateway and Hartmann, Gateway agreed to rent space to Hartmann and to provide food and beverages for the event. Ex. 34; App. at A17; Tr. 633. The contract placed no obligation on Hartmann to stage the event. Ex. 34; App. at A15. Gateway played no role in organizing the bouts. Gateway did not sell tickets to the event or receive money from ticket sales. Tr. 633-34. Hartmann, not Gateway, promoted and staged the boxing event, and Gateway did not pay Hartmann to

[4] No Missouri court has held that boxing is an inherently dangerous activity as that term is used to determine a landowner's liability for the acts of an independent contractor.

do so. Tr. 615, 617, 633-34. Although Hartmann was obligated to pay Gateway even if Hartmann cancelled the event, that payment would have been nothing more than a standard cancellation fee exacted because the Hotel had reserved space for Hartmann and had given up the opportunity to rent the space to someone else.

The relationship between Gateway and Hartmann did not have any of the characteristics of an employer/independent contractor relationship. Hartmann was not an independent contractor who staged the boxing matches, or did anything, at the request or on behalf of Gateway. There is no authority or rationale for expanding the definition of an independent contractor to include someone who rents space from a hotel or other landowner for the renter's own business purposes.

At trial, plaintiff argued that *Hatch v. V.P. Fair Foundation, Inc.*, 990 S.W.2d 126 Mo. App. 1999), supported his claim that Hartmann was Gateway's independent contractor and that Gateway was vicariously liable for Hartmann's negligence. However, *Hatch* is easily distinguished from this case, and offers no support for plaintiff's theory of liability against Gateway.

The plaintiff in *Hatch* sued the V.P. Fair Foundation ("Fair Foundation") for injuries he sustained at a bungee jumping attraction at the V.P. Fair. *Hatch*, 990 S.W.2d at 132-33. The Fair Foundation had contracted with Northstar Entertainment, Inc., to provide that attraction as part of the event the Fair Foundation was staging. *Hatch*, 990 S.W.2d at 131. The Fair Foundation's contract with Northstar "expressly included an addendum that Northstar is an independent contractor." *Id.* at 138. Hatch was injured after a Northstar employee failed to attach the bungee cord to the crane when Hatch

jumped. *Id.* at 131. In his lawsuit, Hatch claimed that the Fair Foundation was vicariously liable for Northstar's negligence under the inherently dangerous activity doctrine. *Id.* at 132-33.

Gateway's activities were fundamentally different from those of the Fair Foundation, and Gateway's relationship with Hartmann was fundamentally different from the Fair Foundation's relationship with Northstar. There was no question in *Hatch* that the Fair Foundation staged and promoted a Fourth of July event and contracted with various parties, including Northstar, to provide activities and services at the event and on behalf of the Fair Foundation. There also was no issue as to Northstar's status as the Fair Foundation's independent contractor. The issue before the court of appeals in *Hatch* was whether bungee jumping was inherently dangerous, not whether Northstar was an independent contractor. The court of appeals determined that the activity was, in fact, inherently dangerous and found the Fair Foundation vicariously liable for Northstar's negligence. *Id.* at 136.

In contrast to this case, the landowner in *Hatch* who provided space for the Fair Foundation's event – the U.S. Forest Service – was not a party to the lawsuit. In contrast to the Fair Foundation's contract with Northstar in *Hatch*, there was no evidence that Hartmann was ever referred to, or intended to be, Gateway's independent contractor. See App. at A15. Unlike the Fair Foundation in *Hatch*, Gateway did not coordinate or promote either the boxing event or some larger event that included the boxing event. Gateway was, instead, in a position similar to that of the U.S. Forest Service in *Hatch.* The Forest Service permitted the V.P. Fair event to be held on its property, but did not

organize or stage that event and was not vicariously liable for the conduct of the Fair Foundation or Northstar. Likewise, Gateway permitted the boxing event to be held on its property, but did not organize, promote or stage that event.

Hatch might have some application to this case only if the court of appeals had held that the U.S. Forest Service was vicariously liable for Northstar's negligence because an independent contractor relationship was created – between the Forest Service and either the Fair Foundation or Northstar – through the Forest Service's receipt of a fee for use of the Arch grounds, and receipt of increased attendance fees resulting from the national, televised exposure of that national monument. The Court in *Hatch* did not so hold, and *Hatch* does not support the illogical conclusion of the court of appeals in this case.

The court of appeals concluded that an independent contractor relationship was created because Gateway would "receive profits from room rentals, food and beverage sales" and would receive possible future business from the event. Slip Op. at 5; App. at A34. Put another way, the court held that Gateway's contract with Hartmann created an independent contractor relationship because the Hotel received money for renting space and providing catering. Under the court of appeals' reasoning, *every* contract to rent a hotel room, or group of rooms, will create an independent contractor relationship between the hotel patron and the hotel as long as the hotel receives revenue from the rental contract. Every wedding party, every school that rents space for a prom, and every company that holds a conference at a Missouri hotel will become the hotel's independent

contractor if the hotel leases space and sells food and drink.[5] This conclusion is unprecedented, and finds no support in Missouri law.

Before the court of appeals' opinion in this case, no Missouri appellate court had held that a rental or catering contract will create an independent contractor relationship if the landowner receives a pecuniary benefit. No Missouri court had held that the "primary consideration" in determining whether an independent contractor relationship exists is whether "ultimately" the activity contemplated in the contract "benefited" the alleged principal. Plaintiff's argument, and the Eastern District's opinion adopting it, would significantly and pointlessly expand the scope of the independent contractor relationship in Missouri.

The justification for the inherently dangerous activity exception is simple. It arises from a situation in which the landowner wants or needs to conduct an inherently dangerous activity, but chooses to hire or retain someone else – an independent contractor

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[5] The effect of this analysis does not stop with hotels or landowners. Under the plaintiff's analysis, a person renting a car from Avis would be the independent contractor of Avis, because the rental car company will benefit financially from the rental contract and may obtain additional business because others will see the renter driving the Avis car. A singer or band (or promoter acting on their behalf) renting a concert hall for a performance would become an independent contractor of the concert hall's owner, simply because that owner was to receive compensation from the rental contract and might receive favorable exposure from those attending the concert.

– to perform that activity on the landowner's behalf, rather than the landowner performing the activity itself. The inherently dangerous activity exception to non-liability merely recognizes that a landowner cannot avoid liability for performing a dangerous activity simply by hiring someone else to do the dirty work. Neither the relationship between Gateway and Hartmann nor the rationale for imposing vicarious liability under the doctrine is present here.

There was no evidence at trial that Gateway, as a landowner, hired, engaged or commissioned Hartmann to perform work for Gateway. Absent such evidence, Hartmann did not meet the definition of an independent contractor as "one who contracts with another to do something for him." *See Hougland*, 939 S.W.2d at 33. Because Hartmann was not Gateway's contractor, Gateway could not be held vicariously liable for Hartmann's negligence under the inherently dangerous activity doctrine for any aspect of the boxing activity that Hartmann conducted on Gateway's premises. The trial court erred in submitting plaintiff's claim to the jury because plaintiff failed to make a submissible case against Gateway.

C. Plaintiff's Claim Is Not Based On Risks Inherent In Boxing, But Rather on Hartmann's Collateral Negligence.

Even if Hartmann had been Gateway's independent contractor, the inherently dangerous activity doctrine still did not apply to this case because, under that doctrine, plaintiff could only recover for injuries resulting from a risk of harm that made the activity inherently dangerous. But, in this case, plaintiff could not seek recovery for injuries caused by a risk of harm inherent in boxing because he had assumed those risks.

In an attempt to avoid the defense of assumption of risks, plaintiff improperly sought recovery under the inherently dangerous activity doctrine for injuries that resulted from a risk that was *not* inherent in boxing. As a matter of law, plaintiff cannot recover for injuries that were not inherent in boxing, but instead resulted from a risk created by Hartmann's alleged negligence. *Ballinger v. Gascosage Elec. Co-op*, 788 S.W.2d 506, 511 (Mo. banc 1990); *Martin v. Buzan*, 857 S.W.2d 366, 369 (Mo. App. 1993); *see also* M.A.I. 16.08.

1. Plaintiff Assumed The Risk Of Injury From Dangers Inherent In Boxing.

Plaintiff acknowledged that his claim could not be based on any injury he suffered during his boxing bout because he assumed the risk of that injury. L.F. 291. As the court of appeals acknowledged in its slip opinion, a willing participant in a sporting event assumes the risk of injury inherent in that sport. Slip Op. at 6; *Sheppard v. Midway R-1 School District*, 904 S.W.2d 257, 262-63 (Mo. App. 1995).

"Assumption of risk as applied to athletic competition generally involves 'primary' assumption of risk." *Martin v. Buzan*, 857 S.W.2d 366, 369 (Mo. App. 1993). "Primary assumption of risk is utilized in situations where a plaintiff has assumed known risks inherent to a particular situation or activity." *Id.*; *see also Sheppard*, 904 S.W.2d at 262 ("Generally, assumption of risk in the sports context involves primary assumption of risk because the plaintiff has assumed certain risks inherent in the sport or activity"). "Persons participating in sports may be held to have consented, by their participation, to

those injuries which are reasonably foreseeable consequences of participating in the competition." *Martin*, 857 S.W.2d at 369.

The nature of the activity of boxing creates the risk of being punched in the head. In fact, a boxer wins the boxing match by causing sufficient injury to render his opponent unconscious. Plaintiff's own counsel explicitly stated to the court that "the inherent nature, the object of the sport [of boxing] . . . is to strike someone in the head and cause brain damage. That's inherent in the sport. That's what the sport is about. That's what you're supposed to do." Tr. 996-97. Consequently, by plaintiff's own admission, the risk of suffering brain damage from being hit in the head and knocked out by a punch is a risk inherent in the sport of boxing, and everyone who participates in a boxing match assumes that risk.

Plaintiff admitted that he was an experienced boxer who was well aware of the risks of boxing. Ex. 80, pp. 22-23, 51-52; Tr. 996-97. Because he was aware of the risks inherent in boxing, plaintiff assumed and consented to those injuries that resulted from his participation in the sport, including the risk of injury that occurred – brain damage from a knock-out punch to his head. *See Martin*, 857 S.W.2d at 369-70; *see also Sheppard*, 904 S.W.2d at 263-64; *McKichan v. St. Louis Hockey Club, L.P.*, 967 S.W.2d 209 (Mo. App. 1998); *Classen v. Izquierdo*, 520 N.Y.S. 2d 999, 1001 (N.Y. Sup. Ct. 1987) (professional boxer assumed the risk of injury from participation in a boxing match, including any risks posed by improperly maintained or faulty emergency medical equipment).

A defendant is liable for a plaintiff's injury sustained during an athletic competition only if the defendant acted recklessly. *Martin*, 857 S.W.2d at 369. There was no evidence of reckless conduct by Gateway in this case. In fact, by striking plaintiff's claim for punitive damage, the trial court necessarily concluded that Gateway's conduct had not been reckless. The court's judgment is final; plaintiff did not appeal from the court's ruling on that issue.

Plaintiff was not entitled to recover damages from Gateway for injuries resulting from risks inherent in boxing. Under settled Missouri law, therefore, he could not recover damages for injuries he sustained as a result of his participation in the boxing match, and Gateway was entitled to judgment as a matter of law.

2. Plaintiff Seeks Recovery For Risks Created Solely By The Alleged Negligence Of Hartmann.

In an attempt to avoid the assumption of risk defense, plaintiff claimed that he was not seeking damages for any injuries resulting from any risks inherent in boxing. Instead, he claimed that he only sought recovery for the injuries he sustained *after* the boxing match, and allegedly caused by delayed medical treatment resulting from Hartmann's failure to have an ambulance onsite or medical personnel in his dressing room (in addition to the ringside doctors and the EMT onsite). Plaintiff asserted that he assumed only the *primary* risk associated with participation in the boxing match, the risk of being punched in the head and knocked out. L.F. 781. Relying in part on *Sheppard* and *Martin*, *supra*, plaintiff argued that he did not assume the *secondary* risk of injury created by the failure to have an ambulance onsite, and that Gateway was vicariously liable for

Hartmann's negligence in creating that secondary risk. L.F. 781, 785. Even if plaintiff's claim is not completely barred because he assumed the risk, plaintiff and the trial court misapplied the principles of primary and secondary assumption of risk. Whatever Hartmann's liability to plaintiff might be, Gateway is not vicariously liable to plaintiff for the secondary risks created by Hartmann's alleged negligence.

As *Martin* and *Sheppard* demonstrate, the difference between primary and secondary assumption of risk in the context of sporting events is that primary risks are risks inherent in the sport, and secondary risks are risks that are not inherent in the sport, but instead created by a party's negligence. Primary assumption of risk acts as a complete bar to recovery because "a defendant does not have a duty to protect a sports participant from dangers which are an inherent and normal part of a sport." *Sheppard*, 904 S.W.2d at 263, quoting *Scott v. Pacific West Mountain Resort*, 834 P.2d 6, 13-14 (Wash. 1992); *Martin*, 857 S.W.2d at 369.

In contrast, a participant in a sporting event does not assume the "secondary" risks created by a defendant's negligence. For example, in *Sheppard*, *supra*, the plaintiff, a participant in a junior high school track meet, sued the school district that hosted the meet for injuries she sustained while participating the long-jump. *Sheppard*, 904 S.W.2d at 259. In response to the defendant's claim of assumption of risk, the plaintiff argued that she had alleged and introduced evidence showing that the school district created the risk of injury by inadequately preparing the long jump pit, "a risk not inherent in the long jump event." *Id.* The court of appeals sided with the plaintiff, holding that "assumption

of risk is not a complete bar to recovery where the risk is not an inherent part of the sport, but rather the defendant created the risk of injury through its negligence." *Id.* at 260, 263.

In resolving the parties' post-trial motions in this case, the trial court accepted plaintiff's argument that he did not assume the "secondary" risk of injury from Hartmann's negligence. L.F. 819. Citing *Sheppard*, the trial court also recognized that this secondary risk was not a risk inherent in boxing.

> Primary assumption of risk, which is a total bar to recovery, arises from risks inherent in the sport itself. Secondary assumption of risk involves voluntary exposure to risks created by the defendant's conduct as opposed to those inherent in the sport itself. Sheppard v. Midway R-1 School District, 904 S.W.2d 257 (Mo. App. W.D. 1995). The Court finds that defendant's contention [that plaintiff assumed the risk of being injured in the boxing match] is without merit *because plaintiff's claim is based not on a risk inherent to boxing*, but rather on defendant's negligence in failing to provide medical personnel after the injury to monitor his condition or to have an ambulance available so that in the event of injury he could receive prompt medical care.

L.F. 819 (emphasis added); App. at A7.

Under plaintiff's theories of liability, the distinction between primary and secondary assumption of risk simply does not support imposing vicarious liability on Gateway for Hartmann's negligence. The cases on which plaintiff and the trial court relied, *e.g.*, *Martin* and *Sheppard*, only involve the issue of whether plaintiff might have

a claim against Hartmann; they do not support plaintiff's claim that a landowner may be held vicariously liable under the inherently dangerous activity doctrine for injuries not caused by risks inherent in the allegedly dangerous activity. To the contrary, application of the distinction between primary and secondary risk precludes plaintiff's claim of vicarious liability against Gateway, because Gateway is not liable under the inherently dangerous activity doctrine for the secondary risks created by Hartmann's negligence. Once the court held that the plaintiff did not assume the risk that there would be no ambulance onsite or additional medical personnel in the dressing room – because these were secondary risks not inherent in boxing – the court should have entered judgment in favor of Gateway.

3. Under The Inherently Dangerous Activity Doctrine, Plaintiff Could Only Recover For Injuries Resulting From Risks Inherent In Boxing.

Under the inherently dangerous activity doctrine, the plaintiff must prove not only that the activity that caused his injury was inherently dangerous, but also that his injuries resulted from the risks that make the activity inherently dangerous. *Lawrence v. Bainbridge Apartments*, 957 S.W.2d 400, 403 (Mo. App. 1997); *Bowles v. Weld Tire & Wheel, Inc.*, 41 S.W.3d 18, 24 (Mo. App. 2001). A landowner is not liable under the "inherently dangerous activity" doctrine for an independent contractor's collateral negligence. *Bowles*, 41 S.W.2d at 24. The collateral negligence creates a risk that is not intrinsic in the work itself, and which could have been prevented by routine precautions of a kind which any careful contractor would be expected to take. *Id.* "Under the theory of collateral negligence, a landowner is not required to contemplate or anticipate

abnormal or unusual kinds of negligence on the part of the contractor, or negligence in the performance of operative details of the work which ordinarily may be expected to be carried out with proper care, unless the circumstances under which the work is done give him warning of some special reason to take precautions, or some special risk of harm to others inherent in the work." *Id.*

Plaintiff did not claim that he was injured as a result of the risks inherent in boxing. In fact, as discussed above, plaintiff insisted that he sought recovery for only the secondary risks created by Hartmann's negligence, and not the primary risks inherent in the sport. L.F. 291; 306-07; 780-81. Thus, under plaintiff's own characterization of his claim, any risk created by Hartmann's failure to have an ambulance or additional medical personnel is not a risk inherent in boxing, but instead a risk created by Hartmann's negligence for which Gateway, as a matter of law, is not liable.

Struggling with the issue of assumption of risk, plaintiff has tried to devise a new cause of action by attempting to blend two different, and incompatible, theories of recovery: (1) the theory of recovery in *Sheppard*, which holds that an athlete may recover for secondary risks because those risks *are not inherent* in the sport, and (2) the inherently dangerous activity doctrine, which holds that a plaintiff must be injured *as the result of a danger inherent in the activity*. However, by embracing a theory of secondary risk – and arguing that he was not seeking recovery for injuries from risks inherent in boxing – plaintiff created an issue of collateral negligence, which precludes recovery against Gateway under the inherently dangerous activity doctrine.

It is well-settled in Missouri that to impose liability under the inherently dangerous activity doctrine, "the court must find that plaintiff incurred injury as a direct result of the nature of the inherently dangerous activity." *Nance v. Leritz*, 785 S.W.2d 790, 793 (Mo. App. 1990). Plaintiff admittedly did not seek recovery for injuries that resulted from a risk inherent in boxing. As a matter of law, under plaintiff's theory, he was injured only as a result of Hartmann's collateral negligence, and, as discussed below, he could not recover from Gateway for those injuries under the inherently dangerous activity doctrine.

4. The Court Of Appeals' Opinion Incorrectly Adopts Plaintiff's Misplaced Reliance On The Restatement.

In concluding that the inherently dangerous activity doctrine applied to make Gateway vicariously liable for the plaintiff's injuries, the court of appeals adopted the plaintiff's reliance on the following comment to section 426 of the Restatement (Second) of Torts.

> Thus an employer may hire a contractor to make an excavation, reasonably expecting that the contractor will proceed in the normal and usual manner with bulldozer or with pick and shovel. When the contractor, for his own reasons, decides to use blasting instead, and the blasting is done in a negligent manner, so that it injures the plaintiff, such negligence is "collateral" to the contemplated risk, and the employer is not liable. If, on the other hand, the blasting <u>is provided for or contemplated by the contract, the negligence in the course of the operation is within the risk contemplated, and the employer is responsible for it</u>.

Slip Op. at 8; App. at A37 (emphasis in original). The court of appeals held that, because the contract between Gateway and Hartmann called for Hartmann to provide an ambulance onsite, Hartmann's *failure* to do so "was within the risk contemplated and therefore was not collateral negligence." Slip Op. at 8; App. at A37.[6] Remarkably, therefore, plaintiff and the court of appeals seek to transform Hartmann's contractual commitment to have an ambulance present into a conclusion that Gateway had a non-delegable duty to have an ambulance onsite, and that Gateway contemplated that Hartmann might not arrange for an ambulance.

The court of appeals misapplied the Restatement to plaintiff's theory of recovery. The Restatement merely provides that the landowner may be liable if the contract provides for the independent contractor to perform an inherently dangerous activity, and if the plaintiff's injury results from a risk inherent in that activity. Section 426 of the Restatement does not support plaintiff's claim against Gateway.

Under plaintiff's own characterization of his own claim, the risks inherent in boxing were irrelevant to plaintiff's claim against Gateway, because plaintiff assumed those risks. *See Sheppard*, *supra*, and *Martin*, *supra*. Therefore, the only activity to which the Restatement example could be applied was Hartmann's conduct in arranging for medical treatment at the boxing match through an EMT rather than an ambulance,

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[6] The court of appeals also held that the presence of additional medical personnel was within the contemplation of the parties, even though it was not required by any applicable regulation and was not mentioned in the event contract. Slip Op. at 8.

despite the contractual provision calling for an ambulance. Hartmann substituted an EMT for an ambulance and, according to plaintiff, that substitution created a dangerous situation. Because the risk was created by Hartmann's conduct, Gateway is not liable. Plugging the undisputed facts and plaintiff's theory of liability into the Restatement yields the following.

> Thus an employer may hire a contractor to arrange for immediate medical treatment, reasonably expecting that the contractor will provide an ambulance [in accordance with the contract]. When the contractor, for his own reasons, decides to provide an EMT instead [an inherently dangerous activity], and thereby causes injuries, such negligence is "collateral" to the contemplated risk, and the employer is not liable. If, on the other hand, [the inherently dangerous activity of] arranging for medical treatment through an EMT is provided for or contemplated by the contract, the negligence in the course of operation is within the risk contemplated, and the employer is responsible for it.

Thus, to the extent section 426 of the Restatement has any application to plaintiff's claim against Gateway, plaintiff's theory of liability is viable only if the Court creates the extraordinary precedent that arranging for medical treatment through an EMT is an inherently dangerous activity contemplated by the contract.

Rather than supporting the imposition of vicarious liability, Hartmann's agreement to provide an ambulance at the boxing match further supports the conclusion that Gateway was not liable for Hartmann's conduct. The contract contemplated that

Hartmann *would* provide an ambulance. Plaintiff introduced no evidence suggesting that Gateway had reason to anticipate that Hartmann would not have an ambulance onsite as provided in the contract.[7] *See Bowles*, 41 S.W.3d at 24 (landowner not liable when it had no reason to believe the independent contractor would choose a negligent course of action).

Before the court of appeals' opinion in this case, no Missouri court had extended the inherently dangerous activity doctrine to include the consequential failure to provide adequate medical attention at a work site subsequent to an injury, as plaintiff sought to do here. Expanding the scope of landowner liability to accommodate plaintiff's claim is both impractical, unwarranted, and unsupported by Missouri law.

Plaintiff failed to make a submissible case against Gateway under the inherently dangerous activity doctrine. He not only failed to prove that Hartmann was Gateway's independent contractor, but also affirmatively asserted that his injuries did not result from any risks inherent in the alleged "inherently dangerous activity" of boxing. There is no authority for plaintiff's attempt to impose vicariously liability on Gateway for risks that were not inherent in boxing but were created by Hartmann's conduct. The trial court

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[7] Plaintiff presented testimony that some employees of Gateway believed that the use of an EMT rather than an ambulance would suffice because applicable regulations called for *either* an ambulance or an EMT with resuscitative equipment. Tr. 649-51, 654-55. There is no evidence, however, that anyone at Gateway or the Hotel anticipated or was aware that Hartmann was not going to arrange for an ambulance.

erred in denying Gateway's motions for directed verdict and judgment notwithstanding the verdict, and in entering judgment for plaintiff. The judgment should be reversed, and judgment entered in Gateway's favor.

II. THE TRIAL COURT ERRED IN SUBMITTING INSTRUCTION 6, BECAUSE THE INSTRUCTION DID NOT PROPERLY INSTRUCT THE JURY ON THE MEANING OF "INHERENTLY DANGEROUS ACTIVITY" UNDER THE FACTS OF THIS CASE, IN THAT (A) THE INSTRUCTION PERMITTED THE JURY TO IMPOSE LIABILITY BASED ON RISKS ASSUMED BY PLAINTIFF AND (B) PLAINTIFF CLAIMED THAT THE RISK ON WHICH HE BASED HIS CLAIM WAS NOT A RISK INHERENT IN BOXING BUT A RISK CREATED BY HARTMANN'S CONDUCT, AND THEREFORE THE INSTRUCTION SHOULD HAVE SUBMITTED THE ISSUE OF COLLATERAL NEGLIGENCE TO THE JURY BY ADVISING THE JURY THAT THE TERM "INHERENTLY DANGEROUS ACTIVITY" DID NOT INCLUDE A RISK NEGLIGENTLY CREATED BY HARTMANN'S CONDUCT.

Even if plaintiff had made a submissible case against Gateway under the inherently dangerous activity doctrine, the trial court erred in submitting Instruction 6 to the jury because the instruction did not define "inherently dangerous activity" in accordance with the Missouri Approved Instructions. Instead, Instruction 6 permitted the jury to find Gateway liable for risks expressly assumed by plaintiff and prohibited the jury from considering the issue of collateral negligence, for which Gateway is not liable. Even assuming Hartmann's conduct was not collateral negligence as a matter of law, plaintiff's claim and the evidence created an issue of fact on the issue of collateral negligence, and the trial court should have given an instruction submitting that issue to the jury. For these reasons, Gateway is entitled to a new trial.

A. Standard Of Review.

"This Court reviews de novo, as a question of law, whether a jury was properly instructed." *Harvey v. Washington*, 95 S.W.3d 93, 97 (Mo. banc 2003). The jury's verdict will be reversed if the offending instruction misdirected, misled or confused the jury. *Id.; Seitz v. Lemay Bank and Trust Co.*, 959 S.W.2d 458, 463 (Mo. banc 1998).

B. Instruction Number 6 Misdirected The Jury.

After devising his theory that Gateway was vicariously liable for Hartmann's conduct in failing to have an ambulance onsite or a doctor in the dressing room, plaintiff tendered the following jury instruction:

> The term "inherently dangerous activity" as used in these instructions means an activity that necessarily presents a substantial risk of harm unless adequate precautions are taken.

L.F. 692. A copy of Instruction 6 is included in the appendix to this brief at A11. The instruction was purportedly based on M.A.I. 16.08. L.F. 692.

Gateway objected to plaintiff's instruction on several grounds, including that the instruction was not supported by the law, the evidence, or plaintiff's theory of liability against Gateway. Tr. 1007-1010. In connection with its objection, Gateway requested that, if the court determined that an instruction defining inherently dangerous activity were warranted, the instruction that plaintiff submitted be modified because it did not properly define "inherently dangerous activity" under M.A.I. 16.08, the facts of this case, and the nature of plaintiff's claim. M.A.I. 16.08 requires an additional bracketed phrase that "should be added [to the definition] at the request of defendant" if the law and the

evidence "support the addition of this bracketed phrase." Tr. 1007; M.A.I. 16.08, Notes on Use, 2. With the bracketed phrase, the instruction provides as follows:

> The term "inherently dangerous activity" as used in these instructions means an activity that necessarily presents a substantial risk of harm unless adequate precautions are taken, but does not include a risk of harm that is not inherent in or a normal part of the work to be performed and that is negligently created solely as a result of the improper manner in which the work under the contract is performed.

M.A.I. 16.08.

In objecting to the plaintiff's proffered Instruction 6, Gateway's counsel specifically stated the following.

> [T]he inherently dangerous activity referenced in this case is boxing, and . . . in their response to the motion for summary judgment, as well as in their petition, the plaintiff limits their request for damages to activity which is outside of the inherently dangerous activity. . . . Here the plaintiffs seek to have it both ways. They seek to have the inherently dangerous activity doctrine imposed because of boxing, yet they seek to avoid any assumption of risk defense by limiting their claims in their petition to only those claims that arose as a result of injuries sustained after the inherently dangerous activity was over, and I do not believe such a submission is supported by the evidence.

Tr. 1008-09. In response, plaintiff's counsel stated that "the instruction reads fine without that additional language. I frankly don't see the need to have it." Tr. 1011. The trial court overruled Gateway's objection, refused Gateway's request for the full instruction, and submitted plaintiff's definition of "inherently dangerous activity" to the jury as Instruction 6.

The trial court's submission of plaintiff's Instruction 6 was error, and misled the jury. The instruction was at odds with plaintiff's theory of liability and the trial court's own understanding of that theory. As discussed in Point I, and as acknowledged by the trial court, the "risk of harm" at issue did not include the "primary" risk from dangers inherent in boxing because plaintiff assumed those risks, by his own admission and as a matter of settled law. L.F. 780-81; *Martin v. Buzan*, 857 S.W.2d 366, 369-70 (Mo. App. 1993); *Sheppard v. Midway R-1 School Dist.*, 904 S.W.2d 257, 263-64 (Mo. App. 1995). To avoid this bar to recovery, plaintiff asserted that he only sought recovery for injuries resulting from the secondary risk of additional injury created by Hartmann's negligence in failing to provide an onsite ambulance or additional medical monitoring. Yet, Instruction 6 improperly permitted the jury to base Gateway's liability on the very risks of boxing that plaintiff assumed as a willing participant in the sport and for which he was not entitled to recover.

At the very least, the evidence raised an issue of fact as to whether plaintiff was injured as a result of Hartmann's collateral negligence, for which Gateway could not be liable. In light of that evidence, M.A.I.'s notes on use required the trial court to include

the bracketed phrase in the definition of "inherently dangerous activity" so that the jury could consider the issue of collateral negligence. M.A.I. 16.08, Notes on Use, ¶ 2.

In its majority opinion, the court of appeals erroneously concluded that the trial court "correctly refused to submit the issue of collateral negligence to the jury" because "the issue was not collateral negligence, but whether there was any direct negligence." Slip Op. at 9. This conclusion misconstrued the plaintiff's claim, and finds no support in the record. The issue was not, as the court claimed, "direct negligence," but vicarious liability. Plaintiff never contended at trial that Gateway committed any "direct negligence"; he claimed that Hartmann committed the only negligent acts at issue. And, under plaintiff's theory of liability, Hartmann's negligence was necessarily collateral because it created secondary risks that were not inherent in boxing.

The trial court's erroneous failure to properly instruct the jury prejudiced Gateway. Without the full definition of "inherently dangerous activity," the instruction permitted the jury to award plaintiff damages for risks inherent in boxing, damages that he purportedly did not seek and to which he was not entitled under Missouri law. The instruction also did not permit the jury to consider and resolve the issue of whether plaintiff was injured as a result of Hartmann's collateral negligence. As Judge Ahrens recognized in his dissenting opinion, by giving Instruction 6 the trial court denied Gateway "the opportunity to argue that, under the instructions of the court, no duty was owed because the risk of delayed medical treatment was not inherent in boxing." Dissenting Op. at 6. The trial court's failure to submit Instruction 6 with the bracketed

phrase "misstated the law, limited the jury in its determination, and Gateway in its arguments, and therefore materially affected the merits of the action." *Id.*

For the reasons discussed in Point I, Gateway was entitled to a directed verdict or judgment notwithstanding the verdict on plaintiff's claim because he failed to make a submissible case under the inherently dangerous activity doctrine. Even if plaintiff made a submissible case, however, Instruction 6 should have conformed to plaintiff's theory – that his injuries resulted from a risk of harm created by Hartmann's negligence, and not from a risk inherent in boxing – and should have presented to the jury the issue of collateral negligence.

The trial court erred in submitting Instruction 6 to the jury, and its error prejudiced Gateway. If the Court does not conclude that Gateway is entitled to judgment as a matter of law, Gateway requests this Court to reverse and remand for a new trial.

III. THE TRIAL COURT ERRED IN SUBMITTING PLAINTIFF'S INSTRUCTIONS 6 (DEFINING "INHERENTLY DANGEROUS ACTIVITY") AND 7 (PLAINTIFF'S VERDICT DIRECTOR), BECAUSE THE INSTRUCTIONS PERMITTED PLAINTIFF TO RECOVER ON A THEORY NOT PLEADED OR PROVED AT TRIAL AND ALLOWED THE PLAINTIFF TO RECOVER FOR DAMAGES RESULTING FROM RISKS THAT HE HAD ASSUMED OR RISKS THAT WERE NOT INHERENT IN BOXING, IN THAT PLAINTIFF HAD ASSUMED ANY RISK INHERENT IN BOXING AND, UNDER PLAINTIFF'S THEORY OF RECOVERY, ANY ALLEGED RISKS FROM NOT HAVING AN AMBULANCE OR MONITORING PERSONNEL AFTER THE BOUT WERE NOT RISKS INHERENT IN BOXING.

A. Standard Of Review

The standard of review is the same as that for Point II.

B. Instructions 6 and 7 Were Not Supported By The Record Or Missouri Law.

As discussed in Point I, plaintiff argued that he was not seeking damages for injuries resulting from punches to the head during the bout, but rather for injuries allegedly caused by Hartmann's failure to have an ambulance or additional medical monitoring onsite. Tr. 984-86, 997; L.F. 291. Plaintiff claimed that he assumed the primary risks inherent in the sport, but not the secondary risks created by Hartmann's negligence that, as a matter of law, were not inherent in the sport. *Martin v. Buzan*, 857 S.W.2d 366, 369-70 (Mo. App. 1993); *Sheppard v. Midway R-1 School District*, 904

S.W.2d 257, 263-64 (Mo. App. 1995); *McKichan v. St. Louis Hockey Club, L.P.*, 967 S.W.2d 209 (Mo. App. 1998).

Notwithstanding the record, and over defendant's objection, the court submitted Instruction 6, discussed in Point II, and plaintiff's verdict director, Instruction 7. Instruction 7 read as follows.

Instruction No. 7

Your Verdict must be for plaintiff Fernando Ibarra Maldonado and against defendant Gateway Hotel Holdings, Inc. if you believe:

First, boxing is an inherently dangerous activity, and

Second, during such activity, Doug Hartmann Productions, L.L.C. either:

Failed to provide an ambulance on standby during the plaintiff's boxing match, or

Failed to provide medical personnel in plaintiff's locker room to monitor his condition, and

Third, Doug Hartmann Productions, L.L.C. in one or more respects submitted in Paragraph Second, was thereby negligent, and

Fourth, such negligence and the danger inherent in such activity combined to directly cause or contribute to cause damage to plaintiff.

L.F. 693. A copy of Instruction 7 is included in the appendix to this brief at A12.

Instruction 7 explicitly directed the jury to award plaintiff damages if it found that he was injured from "the danger inherent in" boxing as well as Hartmann's negligence.

The danger inherent in boxing includes the risk of injury from getting punched in the head, a risk plaintiff admits he assumed. Consequently, Instructions 6 and 7, considered together, improperly allowed the jury to find Gateway liable for, and award damages based on, risks inherent in boxing for which plaintiff admitted he was not entitled to recover. *See Martin, supra; Sheppard, supra.* In light of the incomplete definition given to the jury in Instruction 6, Instruction 7 also improperly permitted the jury to award plaintiff damages for risks resulting solely from Hartmann's collateral negligence, without presenting the issue of collateral negligence to the jury. *See Ballinger v. Gascosage Elec. Co-Op*, 788 S.W.2d 506, 511 (Mo. banc 1990); *Nance v. Leritz*, 785 S.W.2d 790, 794 (Mo. App. 1990).

Plaintiff's submission under Instructions 6 and 7 was hopelessly muddled. He used the risks inherent in boxing to argue that boxing is inherently dangerous, then claimed he was not seeking recovery based on those risks (to avoid an assumption of risk defense), and then submitted his claim under instructions that allowed the jury to find that boxing was inherently dangerous based on a risk that plaintiff assumed and for which he was not seeking recovery. Instructions 6 and 7 were not supported by the record or consistent with Missouri law. If the Court does not conclude that Gateway is entitled to judgment as a matter of law, it should reverse and remand for new trial.

IV. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING REFERENCE TO OR EVIDENCE OF A PRIOR CLAIM AND RESULTING LAWSUIT, *NOVAK V. ARCH PRODUCTIONS, INC.*, ARISING OUT OF A KICKBOXING MATCH, EXCLUDING EVIDENCE OF THE COURT'S RULINGS IN THAT CASE, AND REJECTING GATEWAY'S PROPOSED WITHDRAWAL INSTRUCTION, BECAUSE DEFENDANT'S PARTICIPATION IN THAT LITIGATION WAS IRRELEVANT, IN THAT *NOVAK* WAS NOT PROOF OF GATEWAY'S NEGLIGENCE, WAS NOT EVIDENCE OF GATEWAY'S LIABILITY FOR PUNITIVE DAMAGES, AND WAS NOT RELEVANT TO ANY ALLEGED NOTICE TO OR DUTY OF GATEWAY OR HARTMANN, AND EVIDENCE OF THE PRIOR LAWSUIT WAS MISLEADING BECAUSE THE TRIAL COURT IN THAT CASE HAD HELD THAT GATEWAY DID NOT HAVE A DUTY TO ENSURE THAT AN AMBULANCE WAS ONSITE.

In addition to the instructional error, the trial court erroneously permitted plaintiff to introduce evidence of a prior claim against defendant arising out of a kickboxing match at the hotel, and to argue that Gateway had failed to learn its lesson from the prior claim. The court improperly admitted evidence of the prior claim as relevant to the issue of notice and duty, even though the trial court in the prior lawsuit had held that Gateway did not have a duty to have an ambulance present. As a result, the jury was misled by the false impression that, based on this prior incident, Gateway knew it had a duty to have an ambulance but ignored that duty. The admission of this evidence requires a new trial.

A. Standard Of Review

"Substantial deference is shown a decision of the trial court as to the admissibility of evidence, which will not be disturbed absent a showing of abuse of discretion." *Oldaker v. Peters*, 817 S.W.2d 245, 250 (Mo. banc 1991). The trial court abuses its discretion when its decision is clearly against the logic of the circumstances and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful deliberation. *Id.* An appellate court should grant relief when an erroneous admission prejudices the complaining party or adversely affects the jury in reaching its verdict. *Ford v. Gordon*, 990 S.W.2d 83, 87 (Mo. App. 1999). Evidence is considered prejudicial if it "tends to lead the jury to decide the case on some basis other than the established propositions in the case." *Id*.

B. The Evidence Regarding Gateway's Involvement In Another Lawsuit Was Not Relevant To Any Issues In This Case.

Gateway was a defendant in a prior case styled *Novak v. Arch Productions, Inc., et al*., Cause No. 942-10449. The *Novak* case involved injury to James Colombo, a professional kickboxer who participated in a kickboxing match at the Hotel in 1993. Mr. Colombo sustained serious injuries during the match, which necessitated immediate medical attention at emergency facilities. In his lawsuit against the Hotel and others (including the promoter), the plaintiff in *Novak* claimed that the Hotel negligently failed to provide an ambulance onsite at the kickboxing match and that the plaintiff had been injured as a result of delay in treatment. L.F. 46. In *Novak*, Judge Dierker had ruled, contrary to plaintiff's claim, that the inherently dangerous activity doctrine did not apply

to Colombo's claim and that the Hotel did not owe the plaintiff a duty to have an ambulance present onsite. L.F. 281; App. at A26-27. Ultimately, *Novak* concluded with a settlement between the parties. Tr. 19-20.

During the pre-trial proceedings in this case, Gateway filed a motion in limine to exclude any reference to Colombo's claim or the *Novak* case. Tr. 15, 20; L.F. 676. The trial court denied Gateway's motion. Tr. 20. The trial court also ruled that it would not permit Gateway to introduce evidence of the trial court's ruling in *Novak* that Gateway did not have a duty to ensure that an ambulance was present. Tr. 18-20. Beginning with opening statement and during the trial, plaintiff repeatedly referred to the *Novak* case, and Gateway objected to those references. Tr. 264-65, 637-641. Gateway's objections were overruled, as was Gateway's subsequent motion to withdraw references to the *Novak* case and request for a withdrawal instruction. L.F. 697; Tr. 1006.

Because all of Gateway's objections were overruled, the jury was permitted to hear that the Hotel had been sued in the past for the failure to have an ambulance present at a kickboxing match involving alleged brain injuries to one of the participants. Plaintiff questioned witnesses about the facts of the *Novak* case, and read the allegations in that case to the jury from a large blow-up of the petition. Tr. 637-38, 595. He argued that *Novak* constituted notice to Gateway that it should have taken some action to provide an ambulance at the match, and claimed that the case gave notice to Gateway that the risk of harm to plaintiff was foreseeable. Tr. 639-640. He then argued in closing argument that Gateway should be punished because it "didn't listen in the last case," and specifically referred to Angelo Dundee's alleged testimony in *Novak* that "you should have had an

ambulance." Tr. 1091. Plaintiff relied on the allegations in the *Novak* case as evidence of notice and duty, despite the outcome of the *Novak* case, an outcome that informed Gateway that *it did not owe* plaintiff the very duty Mr. Maldonado was seeking to impose on Gateway. The jury was not permitted to hear about the Judge Dierker's ruling in *Novak*.

Under the circumstances, the trial court's admission of evidence regarding the *Novak* case was an extreme abuse of discretion that misled the jury and unfairly prejudiced Gateway. The settled law in Missouri is that "it is improper to admit evidence of a party's participation in prior lawsuits absent evidence that the specific facts of the prior litigation are relevant or that a pattern of fraudulent suits is present." *Overfield v. Sharp*, 668 S.W.2d 220, 223 (Mo. App. 1984). *Novak* was irrelevant to the purported issue of Gateway's notice because notice to Gateway was not an issue; plaintiff claimed that Gateway was vicariously liable for Hartmann's actions, not that Gateway itself acted negligently in failing to provide an ambulance onsite. Even more troubling, given Judge Dierker's ruling in *Novak* that the Hotel *had no duty to provide an ambulance* at the kickboxing match, it was patently unreasonable for the trial court to allow plaintiff to use *Novak* as evidence that the Hotel had such a duty, or had notice of this duty.

Plaintiff's references to *Novak* in closing argument also were improper and prejudicial, playing on the jurors misunderstanding about the circumstances of *Novak*. As discussed more fully in Point V, plaintiff argued to the jury that Gateway "didn't listen" in the *Novak* case, and that the jury should "make Gateway listen" with a large verdict in this case. Tr. 125-26, 203-04, 1054-55, 1089-99. By arguing that Gateway

"didn't listen" in *Novak*, plaintiff suggested to the jury that the mere allegations in *Novak* constituted proof of the Hotel's duty, breach, and liability, despite plaintiff's knowledge that, in *Novak*, the Hotel was not found to have had, much less breached, the duty plaintiff sought to impose here. The jury was given the false impression that a prior court and/or jury may have already found Gateway responsible for breaching its duty, when in fact Judge Dierker had absolved Gateway of such a duty. Plaintiff relied on this false impression to argue improperly that the jury should "make Gateway listen" by punishing it with a large verdict, despite the trial court's determination that plaintiff failed to make a submissible case for punitive damages.

Plaintiff's references to *Novak* were highly prejudicial. His arguments led to a verdict against Gateway for $13.7 million in compensatory damages and $27.4 million in punitive damages, a verdict that was unsupported by the evidence and resulted from the jury's disobedience of the trial court's instructions.

The trial court abused its discretion in admitting evidence of the *Novak* case, and then compounded its error by excluding the evidence that the court in *Novak* had held that Gateway had no duty to have an ambulance onsite. If the Court determines that plaintiff made a submissible case under the inherently dangerous activity doctrine, the Court should nevertheless reverse the trial court's judgment and remand this case for a new trial.

V. THE TRIAL COURT ERRED IN DENYING GATEWAY'S REQUESTS FOR A WITHDRAWAL INSTRUCTION ON PUNITIVE DAMAGES AND IN OVERRULING GATEWAY'S OBJECTIONS TO PLAINTIFF'S ARGUMENTS THAT GATEWAY'S CONDUCT WAS "BASED UPON THEIR POCKETBOOK" AND URGING THE JURY NOT TO "LET THIS HAPPEN AGAIN" AND TO "MAKE THEM LISTEN WITH YOUR VERDICT IN THIS CASE" BECAUSE THE ARGUMENT IMPROPERLY INJECTED PUNITIVE DAMAGES INTO THE CASE WHEN THOSE DAMAGES WERE NOT SUBMITTED TO THE JURY, IN THAT IT URGED THE JURY TO PUNISH GATEWAY AND DETER IT FROM SIMILAR CONDUCT IN THE FUTURE. FURTHERMORE, THE LACK OF A WITHDRAWAL INSTRUCTION LEFT THE JURY WITH THE MISCONCEPTION THAT PUNITIVE DAMAGES WERE APPROPRIATE AND GATEWAY WAS PREJUDICED BOTH BY PLAINTIFF'S ARGUMENT AND THE LACK OF THE WITHDRAWAL INSTRUCTION, IN THAT THE JURY RETURNED A VERDICT THAT NOT ONLY ATTEMPTED TO AWARD PUNITIVE DAMAGES BUT ALSO CATEGORIZED AS COMPENSATORY DAMAGES AN AMOUNT ALMOST THREE TIMES THE HIGHEST FIGURE MENTIONED BY PLAINTIFF'S COUNSEL.

Despite the trial court's refusal to submit plaintiff's punitive damage claim to the jury, in closing argument, plaintiff's attorney repeatedly made improper "send a message" punitive damage arguments during his closing argument. The trial court erroneously refused Gateway's objections to that closing argument and Gateway's

request for a withdrawal instruction on the issue of punitive damages both before and after plaintiff's closing argument. By sanctioning this improper argument, the court erroneously lead the jurors to believe that they should consider wholly improper factors in reaching a verdict. The court's error permitted the plaintiff to inject punitive damages into the case after failing to make a submissible case for such damages, resulted in a verdict for excessive compensatory damages, and so inflamed the jury that it attempted to award punitive damages. If the Court finds that Gateway is not entitled to relief under Point I, it should nevertheless reverse and remand this case for a new trial.

A. Standard Of Review

The trial court's ruling in closing argument is reviewed for abuse of discretion. *Nelson v. Waxman*, 9 S.W.3d 601, 606 (Mo. banc 2000). An abuse of discretion exists "if the trial court's decision was clearly against reason and results in prejudice to the opposing party." *Grose v. Nissan North America, Inc*., 50 S.W.3d 825, 830 (Mo. App. 2001); *Criswell v. Short*, 70 S.W.3d 592, 594 (Mo. App. 2002). "[T]he party responsible for error relating to argument on the issue of damages is charged with a rebuttable presumption that the error was prejudicial." *Tune v. Synergy Gas Corp.*, 883 S.W.2d 10, 22 (Mo. banc 1994); *see also Lester v. Sayles*, 850 S.W.2d 858, 864 (Mo. banc 1993). While the field of permissible argument is broad, "the law does not contemplate that counsel may go beyond the issues or record and urge prejudicial matters." *Yoos v. Jewish Hosp. of St. Louis*, 645 S.W.2d 177, 193 (Mo. App. 1982).

B. Respondent's Argument Improperly Injected Punitive Damages.

In opening statement, plaintiff's counsel told the jury that Gateway's conduct justified an award of punitive damages. Tr. 203. After the trial court declined to submit plaintiff's punitive damages claim, Gateway requested an instruction expressly withdrawing the issue of punitive damages from the jury's deliberation. L.F. at 1003-04; 1038-42. The trial court rejected Gateway's tendered withdrawal instruction. Tr. 1039, 1042, 1045-47; L.F. 696.

Although the court correctly ruled that the evidence did not support submission of punitive damages, plaintiff's closing argument repeatedly raised the issue of punitive damages by suggesting that Gateway put monetary considerations above safety and by urging the jury to return a verdict that would "make [Gateway] listen" to prevent injuries to others in the future. Plaintiff's counsel began by arguing that Gateway's conduct was "the worst kind of wrong because their conduct in this case was based upon their pocketbook, not somebody else's safety." Tr. 1054-55. Defense counsel objected on the grounds that plaintiff's attorney was arguing for punitive damages, which had not been submitted. Tr. 1055. The court stated, "It's closing argument. I'll allow you to proceed." Plaintiff's counsel proceeded by stating, "Ladies and gentlemen, it should never have happened and it shouldn't happen again." Tr. 1055.

Plaintiff's counsel argued that the case was about money and "about promoters and hotels making a lot of money off of these boxers." Tr. 1089. He argued, "Fernando didn't need to be here, ladies and gentlemen. This shouldn't have happened and we don't want it to happen again." Tr. 1090. Gateway again objected that this was a punitive

damage argument when punitive damages had been withdrawn from the jury. The court again overruled the argument and told plaintiff's counsel, "You may continue."

Plaintiff's improper argument continued: "Ladies and gentlemen, it shouldn't happen again, and that's why we're here. It shouldn't happen again to another fighter, and that's what we're going to ask you to do to make sure a month from now, or twelve months from now, or two years from now if you read in the newspaper or see on TV something else happened, you can say to yourself, 'I did the best I could.' Ladies and gentlemen, they haven't listened. They didn't listen in the last [the *Novak*] case. You know, Angelo Dundee testified in the last case and told them, 'You should have an ambulance.'" Tr. 1090-91.

Gateway again objected that this punitive damages argument was improper because punitive damages had not been submitted. Tr. 1091. The court again overruled the objection and allowed plaintiff's counsel to continue. Emboldened by the trial court's rulings, plaintiff's counsel concluded with a pure punitive damages argument: "Ladies and gentlemen, they haven't listened. Two fighters brain damaged, no ambulance, and they still won't listen. They won't listen. Everybody has told them, ladies and gentlemen. Mr. Colombo told them, Angelo Dundee told them, Fernando told them, and

they're still not listening. Ladies and gentlemen, make them listen. Make them listen with your verdict in this case. Thank you." Tr. 1091.[8]

Defense counsel objected yet again: "Judge, real briefly, the last words of Mr. Simon's closing was 'Make them listen.' Again I renew my punitive damage objection I made previously. That's a punitive damage argument and that's inappropriate." Tr. 1091-92. Again, the court overruled the objection. Tr. 1092.

During deliberations, the jury submitted a question, "Are we prohibited from awarding compensatory and underlying punitive damages?" Tr. 1092-93. The court responded, "You must be guided by the evidence as you remember it and the instructions given to you by the Court." Tr. 1093. Gateway renewed its request for a withdrawal instruction on punitive damages and also renewed "the objection to the closing argument of plaintiff's counsel in interjecting punitive damages in this case, which was not proper." T. 1093. The court declined to give any additional instructions. Tr. 1093.

The jury returned with a verdict in plaintiff's favor for $13.7 million and $27.4 million in punitive damages. Tr. 1094. Gateway asked for a mistrial, noting both the court's failure to give a withdrawal instruction on punitive damages and the plaintiff's closing argument "that they needed to tell them, the hotel, not to do this in the future" and to send a message to the hotel. Tr. 1095. The court acknowledged that "unfortunately

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[8] The unfairness of plaintiff's closing argument is further compounded by the fact that, unbeknownst to the jury, Judge Dierker had told Gateway in *Novak* that it did not have a duty to have an ambulance.

they [the jurors] didn't follow the instructions of the Court with regard to the question, last question they sent up, so I—that much I do know." Tr. 1096. After the parties submitted memoranda addressing the invalid verdict form, the court then struck only the punitive damages portion of the verdict.

The court's action in ultimately striking the punitive damages did not cure the prejudicial effect of plaintiff's closing argument. Plaintiff's counsel repeatedly told the jury that plaintiff was injured because Gateway based its conduct on money rather than someone's safety, that the jury should keep this from happening to another fighter in the future, that two fighters had been brain damaged, that the Hotel did not listen in the last case and still would not listen, and that the jury should "make them listen" with its verdict. Tr. 1054-55, 1089-91. Plaintiff's closing argument was the very type of argument that Missouri courts have consistently condemned as injecting punitive damages. *See Smith v. Courter*, 531 S.W.2d 743, 745-47 (Mo. banc 1976) (trial court properly granted new trial where it found that punitive damages were improperly injected by plaintiff's argument to "say, through the adequacy of your verdict, Lockwood—and anyone else that reads about it or hears about it—improve the quality of what you sell"); *Pierce v. Platte-Clay Elec. Co-op, Inc.*, 769 S.W.2d 769, 779 (Mo. banc 1989); *Fisher v. McIlroy*, 739 S.W.2d 577, 582 (Mo. App. 1987) (argument to "send a message to the young people in this city" injected a plea for punitive damages and entitled the opposing party to a new trial). "Juries cannot be told directly or in effect that they may consider punishment or deterrence as an element of damages and include a sum of money in their verdict so as to punish the defendant or deter others from like conduct unless the

pleadings, evidence and instructions warrant the separate submission of punitive damages under the law." *Smith*, 531 S.W.2d at 748; *see also Fisher*, 739 S.W.2d at 582 ("a closing argument to a jury that the jury could, by its verdict, speak out about its feelings as to a certain matter in issue at trial and that the jury could send a message to a particular group in the community through its verdict is viewed as injecting the issue of punitive damages into a case through the argument, even though such damages had not been pled").

Had the trial court sustained Gateway's initial objection and instructed the jury to disregard the improper argument, the argument might not have been prejudicial. *See Pierce*, 769 S.W.2d at 779 (plaintiff's counsel "danced dangerously close to reversible error" but "the trial court's firm instruction to the jury prevented prejudice"). The trial court, however, repeatedly overruled Gateway's objections, which encouraged further argument along the same lines, and conveyed to the jury the erroneous message that plaintiff's argument was appropriate and that a verdict consistent with that argument was acceptable. The court abused its discretion in overruling Gateway's objections. *See Mock v. J.W. Githens Co.*, 719 S.W.2d 79, 84-85 (Mo. App. 1986) (judgment reversed where trial court repeatedly overruled objections to improper argument).

After the verdict, plaintiff suggested to the trial court that the proper response to Gateway's claim of error was simply to strike the punitive damage portion of the verdict. Tr. 1094, 1098. Plaintiff was wrong, and the court should not have accepted his argument. While courts have sometimes held that the erroneous submission of punitive damages does not affect an actual damages award, they have done so on the grounds that

the punitive damages were submitted under separate instructions and were clearly segregated from compensatory damages. *See School Dist. of Independence v. U.S. Gypsum Co.*, 750 S.W.2d 442, 451 (Mo. App. 1988); *Henry v. City of Ellington*, 789 S.W.2d 205, 206 (Mo. App. 1990). Those grounds did not exist here. The jurors were given no instructions on punitive damages, because the issue was not submitted. The jurors may well have assumed that they could "make Gateway listen," as plaintiff's counsel had urged, by enlarging the compensatory award, as well as attempting an award of punitive damages.

Not only was plaintiff's closing argument presumptively prejudicial, but the size of the verdict indicates that the portion of the award not clearly labeled as punitive damages contained a punitive damage component. The sole reference to an amount of damages was plaintiff's argument that "I don't think $5,000,000 is sufficient, not in this case, not on these facts." Tr. 1066. No higher number was ever mentioned; yet the jury almost tripled that figure. Under these circumstances, plaintiff cannot meet his burden of rebutting the presumption of prejudice, and Gateway is entitled to a new trial.

C. The Trial Court Also Erred In Refusing Appellant's Withdrawal Instruction On Punitive Damages.

The trial court also erred in refusing to give the jury Gateway's withdrawal instruction for punitive damages. The court should have instructed the jury on the withdrawal of punitive damages before submitting the case to the jury. At the very least, the court should have tendered the withdrawal instruction when the jury requested guidance on the damages.

Although the trial court agreed that plaintiff failed to make a submissible case on his punitive damages claim, the court refused defendant's withdrawal instruction on punitive damages, stating that "[t]here is nothing on punitives that has come in as far as evidence is concerned." Tr. 1038-1039. The Court did acknowledge that punitive damages were "mentioned in the voir dire." Tr. 1039. Contrary to the court's suggestion, however, plaintiff's references to punitive damages were not limited to voir dire. Plaintiff's counsel had referred to punitive damages throughout the trial. After questioning the potential jurors during voir dire regarding punitive damages, plaintiff's counsel referred again to punitive damages during his opening statements. Tr. 125-26, 203-204. He then introduced evidence of a prior claim against Gateway arising out of a kickboxing match, the *Novak* case, and highlighted that evidence in closing argument when he claimed that Gateway had ignored the message of the *Novak* case and he asked the jury to send a message to Gateway with a large verdict. Tr. 1054-55, 1089-91.

A trial court commits reversible error if it fails to give a withdrawal instruction when evidence raises a false issue. *Mays v. Penzel Const. Co.*, 801 S.W.2d 350, 355 (Mo. App. 1990); *Temple v. Atchiston, T & S.F. Ry.*, 417 S.W.2d 97, 99 (Mo. 1967) (withdrawal instructions should be given when appropriate because "it is not only the office of instructions to inform the jury as to the law of the issues raised, but, where the evidence is of a character as might easily lead to the raising of a false issue, the court ought to guard against such an issue by appropriate instructions"). The court's refusal to give Gateway's withdrawal instruction on punitive damages exacerbated the already substantial prejudice caused by plaintiff's improper "send a message" closing argument.

The court's error in overruling Gateway's objections and in refusing to instruct the jury that it could not consider punitive damages was manifested in the verdict. L.F. 698.

The trial court abused its discretion in permitting plaintiff to make plainly improper closing arguments and in refusing to give the jury a withdrawal instruction on punitive damages. If the Court does not order the entry of judgment in favor of Gateway, it should reverse and remand for a new trial.

VI. THE TRIAL COURT ERRED IN DENYING GATEWAY'S MOTION FOR NEW TRIAL, BECAUSE THE VERDICT WAS EXCESSIVE AND NOT BASED ON THE EVIDENCE, IN THAT THE EXCESSIVENESS OF THE VERDICT AND THE TRIAL COURT'S ERRORS IN ALLOWING IMPROPER ARGUMENT AND ERRONEOUSLY ADMITTING EVIDENCE AS DISCUSSED IN POINTS II AND V RESULTED IN A VERDICT THAT WAS THE RESULT OF THE JURY'S PASSION, PREJUDICE AND BIAS.

If the damages awarded to a plaintiff are so excessive as to indicate that the jury was motivated by passion and prejudice, "then the judgment is severely prejudiced and can only be addressed through a new trial." *Fust v. Francois*, 913 S.W.2d 38, 49 (Mo. App. 1995); *Blevins v. Cushman Motors*, 551 S.W.2d 602, 614-15 (Mo. banc 1977). To establish such a claim, there must be both an excessive verdict and "some trial error or misconduct of the prevailing party which prejudiced the jury." *Fust*, 913 S.W.2d at 49; *see also Blevins*, 551 S.W.2d at 615.

In determining whether a compensatory damage award is excessive, the court should consider the evidence in the case and the verdict in light of the following factors: (1) loss of income, present and future, (2) medical expenses, (3) plaintiff's age, (4) the nature and extent of his injuries, (5) economic factors, (6) awards given and approved in comparable cases, and (7) the superior opportunity for the jury and trial court to appraise the plaintiff's injuries and other damages. *Barnett v. La Societe Anonyme Turbomeca France*, 963 S.W.2d 639, 657 (Mo. App. 1997). Consideration of those factors here shows that passion and prejudice, resulting from trial court error, motivated the jury to

award plaintiff excessive compensatory damages of $13.7 million – almost triple the only figure that plaintiff cited, $5 million. The record does not support such a substantial award.

As discussed in Points IV and V, the trial court's abuse of discretion in permitting plaintiff's counsel to ask the jury to punish Gateway incited and prejudiced the jury against Gateway. Notwithstanding the trial court's determination that punishment was not warranted in this case, plaintiff's counsel repeatedly argued to the jury that Gateway had engaged in wrongful conduct, that Gateway had acted reprehensibly in elevating money over a man's life, and that the jury needed to "make [Gateway] listen" with a multi-million dollar verdict. Plaintiff's counsel made these arguments with the trial court's blessing; the court encouraged plaintiff to continue with his argument each time it overruled Gateway's objection that the argument improperly injected punitive damages into the case. The jury, obviously convinced by plaintiff's court-sanctioned inflammatory argument, did precisely what plaintiff asked: the jury punished Gateway by rendering an excessive compensatory verdict and by attempting to award punitive damages that it had not been instructed to consider.

In addition, the trial court improperly admitted evidence that Gateway had previously been sued by a kickboxer for injuries sustained at the Hotel during a kickboxing match. Plaintiff repeatedly referred to this prior claim as evidence that Gateway had not learned its lesson. For reasons discussed in Point IV, the court erred in admitting this evidence. Again, plaintiff used this improper evidence to incite and inflame the jury.

The amount of the verdict in this case was excessive, and the excessiveness of the verdict resulted from the jury's bias and prejudice, which in turn resulted from the trial court's error in permitting improper, inflammatory argument about an issue that should have been expressly removed from the jury's consideration, and in admitting irrelevant, inflammatory evidence regarding a prior lawsuit. Under these circumstances, the verdict itself is "severely prejudiced and can only be addressed through a new trial." *Fust*, 913 S.W.2d at 49. The judgment for plaintiff should be reversed, and this case should be remanded for a new trial.

CONCLUSION

For the reasons discussed in Point I, the judgment for plaintiff should be reversed and the case remanded with directions to enter judgment in favor of defendant Gateway. If the Court does not conclude that Gateway is entitled to judgment as a matter of law, the Court should remand for a new trial for the reasons asserted in Points II through VI.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the Substitute Brief of Appellant and the separately bound appendix to the brief, and a disk containing the Substitute Brief of Appellant, were mailed on February 27, 2004, via U.S. First Class Mail to: Mr. John G. Simon, Simon & Passanante, Attorney for Respondent, 701 Market Street, Suite 390, St. Louis, MO 63101.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Substitute Brief of Appellant includes the information required by Rule 55.03, and complies with the requirements contained in Rule 84.06 and Local Rule 360. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 17,194, exclusive of the cover, signature block, and certificates of service and compliance.

The undersigned further certifies that the disk filed with the Substitute Brief of Appellant was scanned for viruses and was found virus-free through the Norton anti-virus program.

APPENDIX TO APPELLANT'S SUBSTITUTE BRIEF