IN THE SUPREME COURT OF MISSOURI

JULIETA MALDONADO PEREZ, as Next Friend of FERNANDO IBARRA MALDONADO,	)	
Plaintiff/Respondent,	)	No. SC85747
vs.	)	
REGAL HOTEL INTERNATIONAL, INC., et al.,	)	
Defendant/Appellant.	)	

Appeal from the Circuit Court of the City of St. Louis
The Honorable Michael Calvin, Judge

SUBSTITUTE REPLY BRIEF OF APPELLANT GATEWAY HOTEL HOLDINGS, L.L.C.

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STATEMENT OF FACTS

Plaintiff makes several inaccurate statements of "fact" that are not supported by the record, and fail to cure the deficiencies in plaintiff's claim. The record demonstrates that Hartmann rented space and contracted for catering services from the Hotel, Hartmann was not an independent contractor, plaintiff assumed all risks inherent in boxing, and, under his own theory of liability, plaintiff was not injured as a result of risks inherent in boxing.

Plaintiff states that Gateway and Hartmann "entered into a contract to put on a nationally televised professional boxing event billed as 'Ringside at the Regal,'" Hartmann "agreed to stage and defendant agreed to host" the event, and "the purpose of having Hartmann Productions put on a boxing match at defendant's Regal Hotel was for the hotel to make a profit, attract guests, and allow people to become acquainted with defendant's Regal Hotel." Resp.Br. at 7-8. Through this misleading characterization of the evidence, plaintiff suggests Hartmann's purpose, in whole or in part, was to benefit the Hotel. It was not. Hartmann was not acting on the Hotel's behalf or for its benefit. The evidence was undisputed that the Hotel played no role in planning, promoting, running, or selling tickets to the event, and the Hotel did not share in the ticket revenues. Tr. 609, 615, 633-34. There was no evidence that Gateway "had" Hartmann put on a "nationally televised" boxing event or anything else at the Hotel, or that Gateway was involved in billing the event as "Ringside at the Regal." Gateway agreed to "host" Hartmann and his boxing event to the same extent that it agrees to "host" any other guest or organization that wants to take advantage of the Hotel's banquet rooms or services.

Plaintiff makes the anomalous statements that "neither Christopher Pixton nor Christine Pashia checked to see whether there was an ambulance onsite" the night of the boxing match, but that defendant "knew prior to the match that an ambulance would not be provided." Resp.Br. at 10. Both statements are irrelevant to plaintiff's theory of liability, and the latter is false. There is no evidence that Gateway knew before the match that an ambulance would not be present. Christopher Pixton testified that, the day before Hartmann signed the contract, the Hotel learned from Timothy Lueckenhoff, an administrator at the Missouri Office of Athletics, that Missouri's regulations required either an ambulance or an EMT onsite. Tr. 560. Notwithstanding this information, the contract between the Hotel and Hartmann was not changed to delete the reference to an ambulance. Mr. Pixton also testified that someone on the Hotel's executive committee determined that providing either an EMT or an ambulance complied with the spirit of the contract, because providing an EMT met the applicable regulations. Tr. 654-55. Mr. Pixton did not, however, state that this determination was made before the boxing match; he testified that he did not know when he was told this. Tr. 656. Neither Mr. Pixton nor any other witness testified that they did not expect Hartmann to have an ambulance at the boxing match.

Finally, plaintiff's second amended petition did not, as plaintiff suggests, allege a claim under the inherently dangerous activity doctrine. Plaintiff alleged only that Gateway was jointly and severally liable with Hartmann under a joint venture theory. L.F. 108, 110. Plaintiff did not allege that Hartmann was Gateway's independent

contractor, that Gateway was vicariously liable for Hartmann's negligence, or that boxing was an "inherently dangerous activity."

Having abandoned his joint venture claim, plaintiff first mentioned the inherently dangerous activity doctrine as a theory of liability against Gateway in his memorandum in opposition to Gateway's motion for summary judgment, filed a week before trial. L.F. 295-96, 311.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING GATEWAY'S MOTION FOR DIRECTED VERDICT AND DENYING GATEWAY'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

A. Hartmann was not Gateway's independent contractor.

The facts of this case – which involves a boxing promoter who contracts for rooms and catering from a hotel so he can stage boxing matches – do not support application of the inherently dangerous activity doctrine or implicate the purpose of that doctrine. "The obvious purpose of the [inherently dangerous] exception is to prevent the landowner, for whose benefit the work is being done, from avoiding liability and defeating the recovery of an injured, innocent third party, by hiring a contractor who is not fiscally responsible to do the dangerous work." *Zueck v. Oppenheimer Gateway Properties, Inc.*, 809 S.W.2d 384, 386 (Mo. banc 1991). Gateway did not hire Hartmann as a contractor to do inherently dangerous work for Gateway's benefit or on its behalf.

Plaintiff does not deny that his judgment against Gateway depends entirely on the argument that Hartmann was Gateway's independent contractor. Instead, plaintiff summarily concludes that Hartmann was an independent contractor, without ever analyzing the requirements of that relationship, explaining how those requirements are satisfied in this case, or explaining why this Court should expand the definition of "independent contractor" to include someone who rents space and catering from a hotel for an event. Lacking any case finding an independent contractor relationship on similar facts, plaintiff now makes the extraordinary argument that an independent contractor

relationship exists whenever an activity is inherently dangerous. Resp.Br. at 29 ("Defendant's hysterical claim that every wedding, prom, etc. that rents space from a hotel will become the hotel's independent contractor misses the mark because those activities are . . . not inherently dangerous"). Under plaintiff's novel theory, only a party who rents space from a landowner for use in what is claimed to be an inherently dangerous activity becomes the landowner's independent contractor, and the landowner becomes vicariously liable for the renter's negligence. Missouri law does not support this most recent twist in plaintiff's liability analysis.

In addition to alternately ignoring or distorting the nature of the independent contractor relationship, plaintiff also distorts the record in his effort to argue that Hartmann was Gateway's independent contractor. For example, plaintiff claims that "Hartmann Productions entered into a contract with defendant to put on the boxing attraction referred to as 'Ringside at the Regal,'" falsely implying that Gateway played a role in promoting the match, Resp.Br. at 25. Hartmann advertised the event as "Ringside at the Regal" because the boxing event was going to be held at the Hotel, not as part of any plan to promote the Hotel. "Ringside at the Regal" does not appear anywhere in the event contract (App. at A15-A20), and Christopher Pixton's gave undisputed testimony that Gateway played no role in calling the event "Ringside at the Regal" or in promoting the event.

> Q. Was there any cross-promoting as it related to Doug Hartmann's event?
>
> A. Absolutely not.

Q. It was called Ringside at the Regal.

A. True.

Q. Did the Regal help promote that?

A. No. . . . But in order to say where the event is going to be, you have to use the name of where it is, so it's at the Regal or at the Adam's Mark or at the Marriott, depending on where the event is actually held.

***

Q. Let me ask you about this situation where Doug Hartmann Productions came in and had a contract with you guys. Did you promote that?

A. No, we didn't.

Q. Did you advertise it?

A. No, ma'am, we did not.

Q. Did you organize it?

A. No, ma'am, we did not.

Q. Did you do anything other than what Crissy [Pashia] told us about, which was serve food and beverage and set up the room?

A. No.

Q. Okay. Did you participate in advertising?

A. To my knowledge, no.

Q. And you didn't have a problem with him calling it Ringside at the Regal?

A. No.

Tr. 662-65. No witness testified that Gateway promoted the event or was involved in calling it "Ringside at the Regal."

Plaintiff states that "Hartmann Productions organized and put on the boxing attraction so that the Regal Hotel would make a profit from the customers the boxing match would attract," as though Hartmann's motive was to benefit the Hotel. Resp.Br. at 26. Plaintiff's sole "support" for his claim is Ms. Pashia's testimony that she believed that the Hotel would profit from the room rentals and food and beverage sales. Tr. 554. No witness testified that Hartmann staged the boxing event to make a profit for the Hotel. Hartmann organized and staged the event to make a profit for Hartmann, and surely would have preferred not being charged for the Hotel's rooms and catering services.

Plaintiff also fails to cite any evidence, much less "overwhelming evidence," that Gateway "engaged" Hartmann to stage the boxing event. Resp.Br. at 28. Unsuccessfully attempting to support this assertion, plaintiff claims only that the jury purportedly "heard evidence that hotel-venues often seek opportunities to host boxing matches, and in fact do routinely host them." *Id.* No portion of the transcript that plaintiff cites, however, contains testimony that hotels routinely seek out and host boxing events. Instead, plaintiff cites only to testimony that neither hotels nor venues such as the Savvis Center generally provide an ambulance at any event for which they have leased space. Tr. 933, 935, 946, 955. This is not evidence that Gateway engaged Hartmann to stage the

matches. Further, there was no evidence that the Hotel in this case sought out Hartmann. Finally, plaintiff cites no case holding that banquet centers, sports venues and hotels create independent contractor relationships with their lessees simply by marketing the availability of their space and services, or by seeking to host and hosting events.

Plaintiff claims that *Hatch v. V.P. Fair Foundation, Inc.* supports the conclusion that Hartmann was Gateway's independent contractor because in *Hatch*, the V.P. Fair Foundation's fee for Northstar's participation in the Fair "was to come from Northstar's gross ticket revenue, regardless of whether Northstar made a profit." Resp.Br. at 27. Plaintiff, however, fails to explain how the fee arrangement in *Hatch* made Hartmann Gateway's independent contractor in this case. Gateway did not even have the same fee arrangement as the V.P. Fair Foundation had with Northstar. App. at A16-17. More importantly, no Missouri case holds that a fee arrangement alone proves independent contractor status. The court in *Hatch* never cited the fee arrangement or the Foundation's profits from the bungee jumping event as proof that Northstar was the Foundation's independent contractor.[1] In fact, Northstar's status as the Foundation's independent contractor was not an issue in *Hatch*; the parties agreed that Northstar was the Foundation's independent contractor. 990 S.W.2d 126, 138 (Mo. App. 1999). Instead, the court in *Hatch* was confronted with the issue of whether bungee jumping was an

[1] The court in *Hatch* mentioned the fee arrangement in affirming summary judgment for the defendants on Hatch's joint venture claim.

inherently dangerous activity for which the Foundation, which organized and promoted the Fair, was liable.

Plaintiff argues that Gateway's status was not analogous to the U.S. Forest Service in *Hatch* because "the V.P. Fair Foundation, not the Forest Service, engaged Northstar." Resp.Br. at 27. Plaintiff misses the point. The very reason that Gateway's status is *not* analogous to the Foundation's status in *Hatch* is precisely *because* the Foundation engaged Northstar to put on the bungee jumping event as part of the Fair, while Gateway did not engage Hartmann to do anything. Gateway merely agreed to rent rooms to Hartmann to stage the boxing matches, just as the Forest Service agreed to permit the V.P. Fair Foundation to hold the Fair on its property.

Adoption of the court of appeals' and plaintiff's analysis would create an independent contractor relationship every time a hotel leases space to any party. This is not "slippery slope" reasoning that "misses the mark," as plaintiff claims, but the natural result of plaintiff's argument. Resp.Br. at 28-29. In fact, it is plaintiff who "misses the mark" when he argues that the court's opinion will not create independent contractor relationships in all hotel lease or rental contracts because activities such as weddings and proms "are clearly not inherently dangerous." Resp.Br. at 29. As noted, plaintiff now apparently contends that an independent contractor relationship arises whenever the activity is dangerous. Therefore, under plaintiff's misguided analysis, if a hotel enters into a contract with the Democratic Party to provide a ballroom, rooms, and catering services for the nationally-televised Democratic National Convention, the Democratic Party is not the hotel's independent contractor or agent, even though the hotel would

benefit financially from the activities, guests and national exposure. But if the hotel uses the exact same event contract to provide the same services to a boxing promoter, the promoter becomes the hotel's independent contractor. Not surprisingly, plaintiff offers no authority for this extraordinary proposition. Determination of independent contractor status is distinct from the determination of whether an activity is inherently dangerous.

The material facts concerning the nature of the relationship between Hartmann and Gateway were undisputed. Hartmann approached the Hotel with a request to rent space for his event. The Hotel agreed to rent space, to reserve rooms for guests, and to provide food and beverages. Hartmann, not the Hotel, planned, promoted and organized the event. Hartmann was not Gateway's independent contractor, the inherently dangerous activity doctrine does not apply, and this Court should reverse the judgment against Gateway.

B. Plaintiff could not recover for injuries from risks that were not inherent in boxing.

Plaintiff argues that he assumed the primary risks inherent in boxing, but not the secondary risk of injury from lack of an ambulance or additional medical monitoring onsite. Resp.Br. at 31. As a matter of law, however, secondary risks are risks that are *not inherent* in the sport. *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). Under the inherently dangerous activity doctrine, plaintiff could only recover for risks that were inherent in the dangerous activity, and could not recover for secondary risks. *Nance v. Leritz*, 785 S.W.2d 790, 793 (Mo. App. 1990). Yet, by his own characterization of his claim,

plaintiff is seeking damages only for injuries resulting from risks that were *not* inherent in the alleged dangerous activity (and therefore for which he could not recover). Plaintiff's argument collapses under the weight of its own inconsistencies.

Plaintiff argues that, although Hartmann's failure to provide an ambulance created a "secondary risk," Hartmann's conduct was not "collateral" negligence because the contract contemplated that Hartmann would provide an ambulance. Plaintiff thus apparently argues that this contract provision established Gateway's nondelegable duty to provide the ambulance. However, there is no authority for plaintiff's argument that the inherently dangerous activity doctrine imposes on landowners a nondelegable duty to take precautions against secondary risks.

Section 426 of the Restatement, on which plaintiff and the court of appeals relied, imposes liability on a landowner only if the landowner engages an independent contractor to perform an inherently dangerous activity, and the plaintiff is injured by a risk that makes the activity inherently dangerous. The Restatement does not impose liability in the situation presented here, where the plaintiff admits he *assumed* all risks inherent in the dangerous activity, and then claims that he was injured by the failure to take precautions against risks that were not inherent in that activity.

Plaintiff's reliance on *Smith v. Inter-County Telephone Co.*, 559 S.W.2d 518 (Mo. banc 1977) is misplaced. Resp.Br. at 41. *Smith* actually supports Gateway's position. In *Smith*, this Court stated that a submissible case under the inherently dangerous activity doctrine requires proof that "*the activity which caused the damage* was reasonably necessary to the performance of the contract and was inherently dangerous." *Smith*, 559

S.W.2d at 524. Plaintiff claimed that Hartmann's failure to provide an ambulance caused his damages, and that the inherently dangerous activity, boxing, did not cause his damages. The failure to provide an ambulance is not an inherently dangerous activity. Under *Smith*, therefore, plaintiff failed to make a submissible case.

Plaintiff argues that Hartmann's alleged negligence was not collateral because it did not create a "common" risk. Resp.Br. at 45. The inherently dangerous activity doctrine differentiates between "peculiar" risks and "common" risks. "An activity is inherently dangerous if the work being done, by its very nature, involves some 'peculiar risk' of physical harm." *Bowles v. Weld Tire & Wheel, Inc.*, 41 S.W.3d 18, 24 (Mo. App. 2001). "A peculiar risk is differentiated from a 'common risk' in that common risks are those to which persons in general are subjected by the ordinary forms of negligence that are typical in the community." *Id.* By asserting that Hartmann did not create a common risk, plaintiff apparently contends that the risk of delayed medical treatment was "peculiar" to, and therefore inherent in, boxing. The problem with this argument is that plaintiff assumed all risks "peculiar" to boxing. If the risk of delayed medical treatment was a "peculiar" risk, plaintiff could not use that risk as a basis for recovery against Gateway. Furthermore, the risk posed by delayed medical treatment after sustaining an injury is "common" in the sense that it is no more peculiar to boxing than to any other activity involving any potential risk of injury. "Common risks" are not risks that make an activity inherently dangerous. *Bowles*, 41 S.W.3d at 24. Consequently, whether the risk created by Hartmann was peculiar or common, plaintiff could not seek recovery from Gateway for the injuries from that risk.

Finally, plaintiff again distorts the record in his effort to argue that Gateway is vicariously liable. He claims that "the jury heard and believed the testimony of Marvin Elam, a professional boxing and kickboxing referee in Missouri since the 1970s, that he is aware of only two fights where there was no onsite ambulance – Mr. Maldonado's and the match involving James Colombo, both at the same Hotel." Resp.Br. at 44. Plaintiff thus implies that Mr. Elam testified that an ambulance was present at every other fight he refereed in Missouri. Mr. Elam gave no such testimony. He testified only that he was aware of the lack of an ambulance in plaintiff's and Mr. Colombo's boxing events because an ambulance was called after those fights, and he testified in those two cases. Tr. 276-78. Mr. Elam acknowledged that his job does not include checking to see if an ambulance is present. Tr. 276-77. He never testified that ambulances were present at all other bouts. Furthermore, even assuming Mr. Elam had testified that ambulances are commonly present at other boxing matches, the presence of ambulances at other boxing matches would not make Hartmann Gateway's independent contractor, or make the risk of delayed post-injury treatment a risk inherent in boxing.

The inherently dangerous activity doctrine does not apply to make Gateway vicariously liable for Hartmann's conduct. Plaintiff failed to prove that Hartmann was Gateway's independent contractor. To avoid an assumption of risk defense, he claimed that he was not injured from a risk inherent in boxing, thereby precluding recovery under the inherently dangerous activity doctrine. Plaintiff failed to make a submissible case against Gateway under the theory of liability presented to the jury. The judgment for plaintiff should be reversed, and judgment should be entered in Gateway's favor.

II. THE TRIAL COURT ERRED IN SUBMITTING INSTRUCTION 6.

Plaintiff contends that Gateway did not preserve its argument in Point II for review, claiming that Gateway failed to state the grounds for its objection as required by Rule 70.03. Resp.Br. at 48. The court of appeals rejected plaintiff's claim of waiver, and considered this issue on the merits. App. at A38, n.5. This Court likewise should reject plaintiff's argument.

Gateway objected to Instruction 6 on the ground that it failed to include the bracketed phrase in M.A.I. 16.08. Tr. 1008. As noted in Gateway's opening brief, Gateway argued that the phrase was necessary because the plaintiff did not seek damages for injuries from an inherently dangerous activity; Gateway's counsel explicitly stated that "the plaintiff limits their request for damages to activity which is outside of the inherently dangerous activity." App.Br. at 49; Tr. 1008-09. Gateway stated that plaintiff's submission was not supported the evidence because he had attempted to avoid the 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." App.Br. at 49; Tr. 1008-09. Gateway argued that "the evidence before the Court does not support the submission of this instruction, and so we would object for – to this instruction, even if modified as set forth in 16.08, which I think is an appropriate modification." Tr. 1009-11. Contrary to plaintiff's claim in his brief, Gateway did distinctly state the grounds for its objection to Instruction 6.

Furthermore, plaintiff's argument that Gateway "**never**" argued that there was a disputed fact issue as to whether plaintiff was injured by an inherently dangerous activity

is nonsense. Resp.Br. at 49. The very purpose of instructions "is to secure the jury's determination of disputed questions of fact." *Nooney Krombach Co. v. Blue Cross & Blue Shield of Missouri*, 929 S.W.2d 888, 895 (Mo. App. 1996). In objecting to Instruction 6 and requesting inclusion of the bracketed phrase, Gateway informed the trial court that the instruction did not properly guide the jury in determining the disputed issue of whether plaintiff was injured by an inherently dangerous activity, or instead by Hartmann's collateral negligence.

This Court should reject plaintiff's claim that Gateway failed to preserve its challenge to Instruction 6.

A. The trial court erred in submitting Instruction 6.

Plaintiff argues that examples of collateral negligence in Restatement sections 427 and 416 demonstrate that Hartmann's negligence was not collateral. In fact, those Restatement examples demonstrate the opposite.

Restatement section 427 illustrates that a landowner will be liable if the independent contractor negligently performs dangerous work contemplated in the contract. Resp.Br. at 52-53. In the example, a plaintiff trips over building materials that the independent contractor piled onto a public sidewalk. *Id.* The landowner is liable for the contractor's negligence because the contract contemplated that the work would be performed in that manner; "the danger is inherent in the work." In contrast, the landowner is not liable if he did not contemplate that the contractor would pile the materials on the sidewalk, and has no reason to expect it. In that situation, "the negligence is collateral." Resp.Br. at 53.

In this case, the Hotel contemplated that Hartmann would provide an ambulance. Hartmann chose to provide an EMT. Under the Restatement example, any risk created by having an EMT rather than an ambulance was not contemplated by the contract, and resulted from Hartmann's collateral negligence.

The example that plaintiff cites from Restatement section 416 and the facts in *Ballinger v. Gascosage Elec. Co-op*, 788 S.W.2d 506 (Mo. banc 1990) present the same situation: the plaintiffs in *Ballinger* and the Restatement example were injured by a risk inherent in the dangerous activity. In the Restatement example, the contractor's work requires excavations, creating a the risk that someone will fall into the excavation and be injured. In this case, plaintiff admits that the danger inherent in the activity was the risk of a "knockout," a risk that plaintiff assumed. Resp.Br. at 55. While the fence in the Restatement example would prevent or diminish the likelihood that the plaintiff would encounter the risk presented by the excavation, falling into the open ditch, an onsite ambulance would not have prevented or diminished the likelihood of the risk presented by boxing, the knockout punch. As presented by plaintiff, Hartmann's alleged negligence was collateral because it created a risk extrinsic to the risk of getting punched.

Like the plaintiff in the Restatement example, the plaintiff *Ballinger* was injured by a risk inherent in the dangerous work: electrocution resulting from the activity of stringing electrical conductors close to an energized line. *Ballinger*, 788 S.W.2d at 511-12. The verdict director in *Ballinger* suggested that supplying the plaintiff with rubber gloves or proper maintenance of the electrical lines would have prevented electrocution. Plaintiff attempts to analogize *Ballinger* to this case by claiming that "likewise, here, the

danger or risk arose from 'the very nature of the activity' – the knockout, boxing." Resp.Br. at 55. Plaintiff's analogy fails. Under plaintiff's theory, he assumed the danger or risk from "the knockout" inherent in the activity. Also, while gloves or proper line maintenance would have prevented or diminished the likelihood that the plaintiff in *Ballinger* would encounter the risk inherent in working with electricity – electrocution – an ambulance onsite would not have prevented or diminished the likelihood that plaintiff would encounter the risk inherent in boxing – a punch to the head.

Like his reliance on *Ballinger* and the Restatement examples, plaintiff's reliance on *Hatch v. V.P. Fair Foundation* is also misplaced. Plaintiff claims that the issue of collateral negligence was present in *Hatch* because the failure to attach the bungee cord to the jumper was "not the failure to take a special precaution, but instead a failure to perform a fundamental and essential element of the activity." Resp.Br. at 56. Plaintiff's argument is absurd. If evidence of a failure to perform a "fundamental" and "essential" element of bungee jumping raises a jury issue of collateral negligence, then the failure to perform an activity that is neither fundamental nor essential to boxing, nor capable of preventing the plaintiff from encountering the dangers of that sport, raises a similar jury issue. The court's determination in *Hatch* that the jury should determine whether the contractor's negligence was collateral is compelling support for Gateway's argument that, if plaintiff made a submissible case, the trial court should have included the bracketed portion of M.A.I. 16.08 in Instruction 6.

Finally, Gateway has not misconstrued the court of appeals' opinion. *See* Resp.Br. at 57. In discussing the trial court's refusal to include the bracketed phrase in Instruction

6, the majority stated that "the issue was not collateral negligence, but whether there was any direct negligence." App. at A38. The majority was wrong. The issue was whether plaintiff was injured as the result of collateral negligence, or from a risk inherent in boxing. Contrary to the court's statement, collateral negligence plainly was "the issue."

The description of collateral negligence in M.A.I. 16.08 applies to plaintiff's claim. The trial court erred in submitting Instruction 6 to the jury. If the Court does not conclude that Gateway is entitled to judgment as a matter of law, Gateway requests that this Court reverse and remand this case 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).

As he claimed in the court of appeals, plaintiff summarily claims that Gateway waived its objection to Instruction 7, plaintiff's verdict director. He states that "defense counsel did not object to or indicate any error in giving this Missouri Approved Instruction." Resp.Br. at 58. The record establishes that Gateway preserved this issue for review.

Gateway's objections to Instruction 7 and the parties' and court's discussion of that instruction span twenty pages of the transcript. Tr. 1013-1033. Gateway's objection included arguments that Instruction 7 was improper for the same reasons stated in its objection to Instruction 6 (Tr. 1013); that the alleged negligence did not relate to the inherently dangerous activity and that plaintiff's alleged damages did not result from the alleged dangerous activity (Tr. 1013-14); that there was no independent contractor relationship between Gateway and Hartmann (Tr. 1014, 1016); and that Gateway had no duty to provide an ambulance or additional medical personnel (Tr. 1015, 1021-22). Gateway reiterated its objections to Instruction 7 in its motion for new trial. L.F. 731, 734-35. Gateway preserved its challenge to the instruction.

Instruction 7 misdirected the jury. When considered with Instruction 6, Instruction 7 permitted the jury to find Gateway liable for risks of injury that plaintiff assumed, and thus award plaintiff damages that he admitted he was not entitled to. Instruction 7 also permitted the jury to award plaintiff damages, under the inherently

dangerous activity doctrine, for risks resulting solely from Hartmann's collateral negligence. Plaintiff was not entitled to recover these damages. *See Ballinger v. Gascosage Elec. Co-Op.*, 788 S.W.2d 506, 511 (Mo. banc 1990).

The court erred in giving Instruction 7. If the Court does not conclude that Gateway is entitled to judgment as a matter of law, the Court should reverse the judgment and remand this case for a new trial.

IV. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING REFERENCE TO OR EVIDENCE OF *NOVAK V. ARCH PRODUCTION ET AL.*, EXCLUDING EVIDENCE OF THE COURT'S RULINGS IN THAT CASE, AND REJECTING GATEWAY'S PROPOSED WITHDRAWAL INSTRUCTION.

Plaintiff argues that Gateway waived its objection to evidence of the *Novak* claim and lawsuit by introducing evidence that the Hotel had been sued in that case. Resp.Br. at 61. Plaintiff is wrong. Gateway did not open the door to plaintiff's argument that *Novak* was evidence of Gateway's alleged liability. The evidence Gateway introduced during plaintiff's case was elicited only to explain why the Hotel checked with its corporate entity before renting space to Hartmann for the boxing match. Gateway made its limited references to *Novak* to show that the Hotel did not act with indifference, and to thereby avoid plaintiff's punitive damage claim, which was still in the case. Gateway did not discuss the details regarding the claim in *Novak*, the lawsuit, or the result. Furthermore, by the time this evidence was elicited from Gateway employees, the trial court had denied Gateway's motion in limine to exclude the evidence, and plaintiff had repeatedly referred to the *Novak* case, over Gateway's objections. T. 15-16, 20, 202-03, 637-41. Gateway did not waive its objection to the evidence of the *Novak* case by responding to the issue that plaintiff had previously injected into the case. *M.A.B. v. Nicely*, 909 S.W.2d 669, 672 (Mo. banc 1995) ("after having been ruled against, a party should be permitted to make the best contest he can by offering countervailing evidence, without being put to the hazard of losing the point of his objection").

A. *Novak* was not relevant to the issues in this case.

Plaintiff argues that *Novak* was relevant because it constituted proof that "the precautions of which plaintiff complained were within the direct contemplation of the Hotel at the time it contracted with Hartmann Productions." Resp.Br. at 65. The contract itself, however, demonstrated that the Hotel intended for Hartmann to provide an ambulance. The selective information about *Novak* that the trial court admitted was highly prejudicial evidence that was unnecessary to establish what the Hotel contemplated.

Plaintiff repeatedly argues, without explanation, that *Novak* was proof of what precautions are reasonable, and that "having an ambulance onsite was an adequate precaution." Resp.Br. at 66. Plaintiff never clarifies how a lawsuit in which no ambulance was present at a kick-boxing match proves that having an ambulance onsite is an adequate precaution. Moreover, the issue of what precautions are "reasonable" or "adequate" was never determined in *Novak*. Unlike Missouri and Federal boxing regulations, which demonstrate the precautions that state and federal authorities have deemed are reasonable, *Novak* merely demonstrated what the plaintiff in that case theorized was reasonable. *Novak* was settled, and no judgment was entered for the plaintiff. Moreover, the partial summary judgment entered for the hotel defendants in that case recited that (1) "the risk of subsequent injury from delay in the administration of adequate emergency medical treatment is not a risk inherent in the sport of kick-boxing," and (2) "this Court finds no basis for imposing a duty on the landowner or operator to

provide an ambulance with emergency medical facilities on the premises when another entity organizes and operates a sporting event on those premises." App. at A27.

Plaintiff misses the point on the nature of the trial court's ruling in *Novak*, and mischaracterizes the impact of *Hatch* on the issues decided in *Novak*. *Novak* was not proof that Gateway had notice of a duty to have an ambulance available or medical personnel in the locker room, because in *Novak* the trial court ruled that Gateway had no such duty. And contrary to the plaintiff's argument, the Eastern District's opinion in *Hatch v. V.P. Fair Foundation, Inc.*, 990 S.W.2d 126 (Mo. App. 1999) did not diminish the impact of the trial court's ruling in *Novak*. Plaintiff claims that the court's decision in *Novak* is "not good law" because, in *Hatch*, the court of appeals overruled its precedent holding that an activity could not be deemed inherently dangerous if it could be performed safely. Resp.Br. at 71. The trial court in *Novak*, however, never suggested that kick-boxing is not inherently dangerous because it can be performed safely. After finding that the evidence presented a submissible claim of negligence against Arch Productions, the organizer of the kick-boxing match, and that the plaintiff had assumed the primary, but not the secondary, risks of kick-boxing, the trial court in *Novak* ruled that plaintiff could not make a submissible case against the hotel defendants because the sport of kick-boxing did not warrant the application of the inherently dangerous activity doctrine. Again, the trial court found that the risk of delayed medical treatment was not inherent in the sport and that the hotel had no duty to provide an ambulance. No reasoning in *Hatch* transformed the court's judgment into "bad law."

Apart from plaintiff's misinterpretation of both *Novak* and *Hatch*, the point ultimately is not whether *Novak* was "good" or "bad" law. The point is that plaintiff improperly used *Novak* to mislead the jury into thinking that Gateway had previously ignored, and continued to ignore, its duty to have an ambulance onsite, when the trial court in *Novak* had specifically held that Gateway had no such duty.

Novak was not proof of any aspect of plaintiff's claim. If *Novak* was proof of anything, it was proof of Gateway's defense that the inherently dangerous activity doctrine does not apply to this case.

B. The trial court should have permitted Gateway to introduce evidence of the decision in *Novak*.

The trial court permitted plaintiff to argue that *Novak* was proof of Gateway's alleged liability, to question witnesses on the facts of *Novak*, and to read to the jury from a large blow-up of the *Novak* petition. T. 637-41, 643. However, the court precluded Gateway from informing the jury that Gateway was not found liable in *Novak* because the court determined that Gateway owed no duty to plaintiff to have an ambulance onsite. Tr. 18-20.

The trial court either should not have allowed plaintiff to discuss or introduce evidence of *Novak* or, once plaintiff raised that issue, should have allowed Gateway to explain to the jury that the court in *Novak* had held that the inherently dangerous activity doctrine did not apply to kick-boxing, that the risk of inadequate medical care was not a risk inherent in boxing, and that the Hotel had no duty to have an ambulance or additional medical personnel onsite. The court's erroneous decision prejudiced Gateway; it allowed

the jury to infer, incorrectly, that a court had previously held Gateway liable for violation of an alleged duty to provide an ambulance.

Assuming *Novak* was relevant, then it was relevant in its entirety. In response to plaintiff's argument to the jury that *Novak* was proof of notice and duty, Gateway should have been allowed to inform the jury that the court in *Novak* determined that Gateway did not have a duty to provide an ambulance. The trial court abused its discretion in allowing only selective references to *Novak* that gave rise to an incorrect inference unfairly favorable to plaintiff. If the Court finds that plaintiff made a submissible case, the judgment should be reversed and remanded for a new trial.

V. THE TRIAL COURT ERRED IN DENYING GATEWAY'S REQUEST FOR A WITHDRAWAL INSTRUCTION ON PUNITIVE DAMAGES AND IN OVERRULING GATEWAY'S OBJECTIONS TO PLAINTIFF'S CLOSING ARGUMENTS.

Plaintiff argues that Gateway waived the error alleged in Point V, because Gateway did not request that the jury be sent back to the jury room "to put the verdict in proper form." Resp.Br. at 74. However, Missouri law did not require Gateway to request that the jury be sent back with directions to reduce the size of an excessive verdict influenced by improper argument.

Gateway's argument on appeal is not that a new trial is necessary because the *form* of the verdict was improper, but that the jury's verdict reflected the prejudicial effect of plaintiff's improper closing argument. This argument was made to the trial court. When the jury returned its verdict, the parties and the trial court agreed that the verdict revealed a problem with the jury's deliberations. T. 1094-95. Gateway moved for a mistrial, arguing that plaintiff's improper closing argument influenced the verdict and that the court should have given a withdrawal instruction. T. 1094-95. Gateway reasserted its arguments in its motion for new trial. L.F. 731, 733, 736, 740, 748-50. Gateway preserved the error charged in Point V.

A. The jury did not follow the court's instructions.

A verdict may be presumed valid where there is no indication to the contrary within that verdict. *Stalcup v. Orthotic & Prosthetic Lab, Inc*., 989 S.W.2d 654, 659 (Mo. App. 1999) ("in the absence of exceptional circumstances, appellate courts assume

that a jury obeys a trial court's directions and follows its instructions"). The jury has no right to disregard, rewrite, or ignore the court's instructions in the case. *Kansas City v. Martin*, 369 S.W.2d 602, 609 (Mo. App. 1963). When the jury fails to follow one of the court's instructions, it is reasonable to infer that it might have disregarded others, and the verdict cannot stand. *See id.*

The jury failed to follow the trial court's instructions; it returned a verdict containing "punitive damages." The jury purported to determine punitive damages without knowing the standard for punitive damages and without any directive from the court to even consider that issue. The jury ignored the court's verdict form and instructions on how to determine damages, and wrote its own verdict form. The jury's decision to disregard the court's instructions and to award damages it was not permitted to consider was influenced by plaintiff's improper "send a message" closing argument.

The court even admitted that "unfortunately [the jury] 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." T. 1096. Because the verdict showed that the jury did not follow the trial court's instructions, no portion of the jury verdict in this case was reliable. The trial court should have granted a new trial in light of a verdict influenced by plaintiff's inadmissible argument.

B. Plaintiff improperly injected punitive damages into the case in closing argument.

Plaintiff argues that the improper comments made during closing argument were "isolated" and did not pervade or become the theme of his closing argument. Resp.Br. at

82. He suggests that any error in permitting the improper closing argument was harmless, because the "send a message" comments were made at the end of his closing argument. Resp.Br. at 83. Plaintiff's argument is contrary to this Court's decisions on the prejudicial effect of "send a message" arguments.

"Send a message arguments" are improper because they inject punitive damages into a case where such damages are not submitted. *Smith v. Courter*, 532 S.W.2d 743, 748 (Mo. banc 1976). "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." *Id*. Plaintiff's closing argument in this case did precisely what this Court admonished against in *Smith*. By arguing that Gateway had "failed to listen" and repeatedly exhorting the jury to "make [Gateway] listen" with its verdict, plaintiff convinced the jurors to disregard the instructions and impose whatever damages they believed were proper, including damages to punish Gateway. The jury accepted plaintiff's invitation by both inflating the compensatory damages *and* writing in punitive damages on the verdict form.

As the "party responsible for error relating to argument on the issue of damages," plaintiff bears the burden of overcoming the presumption that the error was prejudicial. *Lester v. Sayles*, 850 S.W.2d 858, 864 (Mo. banc 1993); *Tune v. Synergy Gas Corp.*, 883 S.W.2d 10, 22 (Mo. banc 1994). Plaintiff fails to show how an argument that clearly

incited the jury to disobey the court's instructions and return the improper verdict in this case was not prejudicial.

Plaintiff's contention that "send a message" was not a theme of his argument and did not call for punitive damages is false. The principal theme of plaintiff's rebuttal argument was that Gateway should be punished for bad conduct. The verdict is tainted by this improper argument and therefore invalid. Gateway is entitled to a new trial.

C. The trial court erred in refusing to submit Gateway's withdrawal instruction on punitive damages.

Plaintiff mentioned punitive damages throughout this matter beginning in voir dire, continuing throughout opening statement, and ending with improper closing argument. The jury clearly was confused on the punitive damages issue. The jurors were told at the beginning of the case that the plaintiff would ask for punitive damages, but never told that punitive damages were withdrawn.

Without a withdrawal instruction, the jury returned a verdict that included not only $13.7 million that the jury called compensatory damages, but also $27.4 million handwritten on the verdict form as "punitive damages." The court's failure to instruct the jury that punitive damages had been withdrawn caused so much confusion that the jury was unable to follow the court's instructions. The jurors' description of some of the damages as "punitive" certainly does not establish that the remaining $13.7 million, more than two and a half times the highest number mentioned by plaintiff's counsel, did not include some amount to punish and deter.

A trial court commits reversible error if it fails to give a withdrawal instruction when the record raises a false issue. *Mays v. Penzel Const. Co*., 801 S.W.2d 350, 355 (Mo. App. 1990). Plaintiff's closing argument raised the false issue of punitive damages, and the court should have instructed the jurors that the issue was withdrawn from their consideration. The court's error prejudiced Gateway. The judgment for plaintiff should be reversed and the case remanded for a new trial.

CONCLUSION

For the reasons discussed in Gateway's opening brief and in this Substitute Reply Brief, the judgment for plaintiff should be reversed and the case remanded with directions to enter judgment in favor of Gateway. If the Court does not conclude that Gateway is entitled to judgment as a matter of law, the Court should remand this case for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the Substitute Reply Brief of Appellant and a disk containing the brief were mailed on April 8, 2004, via U.S. First Class Mail to: Mr. John G. Simon, Mr. Paul J. Passanante, Simon & Passanante, Attorney for Respondent, 701 Market Street, Suite 390, St. Louis, MO 63101.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Substitute Reply Brief of Appellant includes the information required by Rule 55.03, and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 7,379, exclusive of the cover, signature block, and certificates of service and compliance.

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

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