IN THE SUPREME COURT OF MISSOURI

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

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

SUPPLEMENTAL BRIEF OF APPELLANT GATEWAY HOTEL HOLDINGS, L.L.C.

Thomas B. Weaver #29176
Cynthia A. Sciuto #43247
ARMSTRONG TEASDALE LLP
One Metropolitan Square, Suite 2600
St. Louis, MO 63102-2740
(314) 621-5070
(314) 621-5065 Facsimile

Debbie S. Champion #38637
RYNEARSON, SUESS, SCHNURBUSCH & CHAMPION, L.L.C.
#1 South Memorial Drive
19th Floor, Suite 2600
St. Louis, MO 63102

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

POINT RELIED ON

I. REMAND FOR A NEW TRIAL ON PLAINTIFF'S SUBMITTED THEORY OF LIABILITY OR ON A DIFFERENT THEORY IS INAPPROPRIATE IN THIS CASE, BECAUSE (1) THE ESSENTIAL EVIDENCE HAS BEEN FULLY PRESENTED AND, ON REMAND, PLAINTIFF COULD NOT MAKE A SUBMISSIBLE CASE UNDER THE INHERENTLY DANGEROUS ACTIVITY DOCTRINE, (2) THE RECORD SHOWS THAT PLAINTIFF MADE A STRATEGIC DECISION TO SUBMIT HIS CASE SOLELY ON THE INHERENTLY DANGEROUS ACTIVITY DOCTRINE, AND (3) THE FACTS DO NOT SUPPORT ANY OTHER THEORY OF LIABILITY AGAINST GATEWAY.

Moss v. National Super Markets, Inc., 781 S.W.2d 784 (Mo. banc 1990)

Bunch v. Mo. Pac. R.R., 386 S.W.2d 40 (Mo. 1965)

Blaine v. J.E. Jones Constr. Co., 841 S.W.2d 703 (Mo. App. 1992)

Kaufmann v. Nagle, 807 S.W.2d 91 (Mo. banc 1991)

ARGUMENT

I. REMAND FOR A NEW TRIAL ON PLAINTIFF'S SUBMITTED THEORY OF LIABILITY OR ON A DIFFERENT THEORY IS INAPPROPRIATE IN THIS CASE, BECAUSE (1) THE ESSENTIAL EVIDENCE HAS BEEN FULLY PRESENTED AND, ON REMAND, PLAINTIFF COULD NOT MAKE A SUBMISSIBLE CASE UNDER THE INHERENTLY DANGEROUS ACTIVITY DOCTRINE, (2) THE RECORD SHOWS THAT PLAINTIFF MADE A STRATEGIC DECISION TO SUBMIT HIS CASE SOLELY ON THE INHERENTLY DANGEROUS ACTIVITY DOCTRINE, AND (3) THE FACTS DO NOT SUPPORT ANY OTHER THEORY OF LIABILITY AGAINST GATEWAY.

The Court has ordered the parties to file supplemental briefs addressing two questions: (1) whether remand of a case is proper if a party submits instructions and receives a verdict and judgment on a theory that is not supported by the evidence and no other theory is offered to the jury by that party; and (2) whether, on remand, the party that received the judgment can submit the case on a theory not raised in the first trial.

The answer to these questions depends on the circumstances of each case. Missouri appellate courts have allowed remand for retrial on the theory raised in the first trial when the plaintiff did not introduce all available evidence, and the record indicates there may be additional evidence that might enable plaintiff to make a submissible case on retrial. In certain circumstances, courts also have allowed a remand after concluding that the evidence did not support the theory of liability plaintiff submitted to the jury, and on remand have allowed plaintiff to submit the case on a theory not raised in the first

trial. However, none of the circumstances permitting remand are present here. In this case, remand is not proper because the record shows that plaintiff admittedly presented all evidence he wanted to present, and could not make a submissible case on remand under the inherently dangerous activity doctrine. With regard to other theories of liability, plaintiff abandoned his pleaded claims and deliberately chose to submit his case solely on the inherently dangerous activity doctrine, and, in any event, could not make a submissible case on any other theory of recovery.

A. The facts show that plaintiff introduced all available evidence and made a strategic choice to submit his claim solely on the "inherently dangerous activity" theory of recovery.

Plaintiff filed an original and two amended petitions. L.F. 14, 86, 103. In each version of his petition, he alleged that defendants Gateway Hotel Holdings[1] and Hartmann Productions engaged in a joint venture to organize and sponsor a boxing event, that both defendants were negligent, and that the defendants were jointly and severally liable for their alleged negligence in producing that event. L.F. 18-19, 89-90, 107-09. Although plaintiff generally alleged that defendant Gateway was aware of the dangers inherent in boxing, plaintiff never alleged that Hartmann was Gateway's independent

[1] Although plaintiff also sued Regal Hotel International and Richfield Hospitality Services, Inc., judgment was entered only against Gateway.

contractor, or that Gateway was vicariously liable for Hartmann's conduct under the inherently dangerous activity doctrine.[2]

After the case had been pending for over two years, Gateway filed its motion for summary judgment. L.F. 126. Gateway argued that it was entitled to judgment because the undisputed facts established that the Hotel (which Gateway owned) played no role in organizing or promoting the boxing match; plaintiff was a professional boxer who was well aware of the dangers of boxing; and Gateway did not owe plaintiff a duty to ensure that there was an ambulance or additional medical personnel onsite. L.F. 126-39. Plaintiff responded to Gateway's motion by asserting, for the first time, that Gateway was vicariously liable for Hartmann's negligence under the inherently dangerous activity doctrine. L.F. 296. He claimed that, alternatively, Gateway was liable because it was a joint venturer with Hartmann, and because Gateway had undertaken to ensure that an ambulance would be at the event and had negligently performed that undertaking. L.F. 300-03.

In its order denying Gateway's motion for summary judgment, the trial court found that there were questions of material fact as to whether the boxing match was an inherently dangerous activity and whether plaintiff assumed the risk of not having an ambulance available at the boxing event. L.F. 640. The court did not mention either plaintiff's claim of joint venture or his claim that the Hotel undertook to provide an ambulance. The court's order was entered November 29, 2001, less than a week before trial began. L.F. 638; Tr. 10.

---

[2] Plaintiff settled with Hartmann and the other defendants prior to trial.

Before trial, Gateway filed a motion in limine seeking to exclude any reference to a joint venture between Hartmann and Gateway, based on the lack of any evidence of a joint venture. L.F. 661. The trial court denied the motion, leaving it to the plaintiff's counsel to decide whether to describe the relationship between Gateway and Hartmann as a joint venture. Tr. 12-13.

At the close of all the evi dence, Gateway filed motions to strike plaintiff's claim for punitive damages and for a directed verdict. Tr. 963-64. During the arguments on those motions and on plaintiff's proposed instructions, plaintiff's counsel explicitly abandoned his pleaded theory of liability. When Gateway's counsel started to address plaintiff's failure to make a submissible case on the pleaded theory of joint venture, plaintiff's counsel stated, "Judge, we're not going forward with joint venture." Tr. 980. Plaintiff's counsel expressed his intent to instead submit his case only on the inherently dangerous activity doctrine. Tr. 984, 987. Plaintiff's counsel stated that "we're entitled to submit it on the evidence we want to submit it on." Tr. 987. He stated, "We believe we can submit on the inherently dangerous activity with Mr. Hartmann as the independent contractor." Tr. 987. When Gateway's counsel pointed out that plaintiff had never alleged a vicarious liability claim in any of his petitions and that plaintiff had alleged only liability based on joint venture, plaintiff's counsel again stated that he was entitled to "present the evidence in our case in the manner we choose to present it." Tr. 1020, 1022. Plaintiff submitted his case against Gateway solely on the inherently dangerous activity doctrine. L.F. 693.

B. Remand for a new trial on the same theory is not appropriate where the plaintiff introduced all available evidence on that theory, and the court finds that the plaintiff could not make a submissible case on retrial.

In response to the Court's first question, when the plaintiff fails to make a submissible case on his chosen theory of liability, the preference is for reversal and remand, and the Court should not reverse the judgment outright unless it is convinced that the plaintiff could not make a submissible case on retrial. *Moss v. National Super Markets, Inc.*, 781 S.W.2d 784, 786 (Mo. banc 1990). However, remand is not appropriate "if the record indicates that the available essential evidence has been fully presented" and on remand plaintiff would not be entitled to recover. *Kaufmann v. Nagle*, 807 S.W.2d 91, 95 (Mo. banc 1991). To support remand, the record must indicate "that other and additional evidence might be adduced in support of plaintiff's action and enable him to make a submissible case." *Id*.. As discussed below, these cases do not support remand here.

C. Remand for a new trial on a different theory is not appropriate when the plaintiff fails to make a submissible case on a theory of recovery chosen for strategic reasons, or the facts do not support submission on a different theory.

On the Court's second question, remand for a new trial on a *different* theory is permissible only in limited circumstances where the plaintiff's attorney mistakenly submits the case on the wrong theory of liability. The Court may reverse the judgment and remand to allow the plaintiff to submit another theory "where a plaintiff has, from the outset, misconceived the law and has chosen a mistaken legal theory to submit to the jury

for redress." *Blaine v. J.E. Jones Constr. Co.*, 841 S.W.2d 703, 710 (Mo. App. 1992). The Court also may order remand where the plaintiff has pleaded several theories of recovery, but mistakenly chosen to submit the wrong theory to the jury. *Id.* However, the Court should not reverse the judgment and remand the case merely to permit a party to experiment with different theories of liability. *Bunch v. Mo. Pac. R.R.*, 386 S.W.2d 40, 44 (Mo. 1965). Remand under either of these circumstances is appropriate only "where the evidence shows the plaintiff may recover upon another theory." *Blaine*, 841 S.W.2d at 710. For the Court to permit remand, the plaintiff's counsel must have "missed completely the appropriate theory," or counsel's decision to submit on the incorrect pleaded theory must have been based on mistake or "misadventure" and not made to seek a tactical or strategic advantage. *Id.*

Remand is not permissible where the plaintiff deliberately chooses to submit one of several pleaded theories of recovery because he believes this choice works to his advantage; such a decision is a matter of legal strategy, not a "misadventure." *Bunch*, 386 S.W.2d at 44; *Blaine*, 841 S.W.2d at 710. When, as in the present case, a party has received the benefit of presenting his evidence on all pleaded claims to the jury and then deliberately chooses to restrict the submission to one issue, "such a course is more a matter of legal strategy than of misadventure," and the case should not be remanded for a new trial. *Quinn v. St. Louis Pub. Serv. Co.*, 318 S.W.2d 316, 323 (Mo. 1958). The holdings in these cases prohibit remand here.

Bunch and *Blaine* are instructive on the issue of when the failure to make a submissible case results from misadventure, warranting remand, or a strategic choice,

requiring reversal. In *Bunch*, the plaintiff, who was injured in a train collision, submitted his case to the jury on the humanitarian negligence theory, claiming that the defendant negligently failed to slacken the train speed after the plaintiff was in a position of peril. *Bunch*, 386 S.W.2d at 41. This Court affirmed the trial court's directed verdict in defendant's favor, because there was no substantial evidence that the defendant's engineer could have slackened the train's speed after the plaintiff placed himself in imminent peril. *Id.* at 44. The Court then rejected plaintiff's claim that he was entitled to retry his case on a failure to warn theory. *Id.* The Court noted that the plaintiff had pleaded a failure to warn theory and had introduced evidence on that theory at trial. *Id.* The Court could not find "anything that might be termed a misadventure in that a ground of recovery, appearing to be reasonably valid, was not pleaded or anticipated in the evidence." *Id.*

Similarly, in *Blaine*, plaintiffs pleaded – through five amended petitions – a claim of fraud based on defendants' alleged affirmative misrepresentations about their intent to construct an apartment complex in the vicinity of plaintiffs' homes. *Blaine*, 841 S.W.2d at 705-06. In their sixth and seventh amended petitions, the plaintiffs abandoned their fraud theory and alleged instead that the defendants had a duty to disclose their intent to construct the apartment complex. *Id.* The plaintiffs submitted their case solely on their finally pleaded theory. *Id.* at 706. The court of appeals found that the defendants did not owe plaintiffs the alleged duty to disclose, and reversed the judgment outright. *Id.* at 710. The court found that plaintiffs had chosen their theory for tactical or strategic reasons, and refused to remand the case to permit the plaintiffs to retry their case on another

theory. *Id.* at 710. *See also Quinn*, 318 S.W.2d at 323 (when the plaintiff elected to submit his case solely on one theory, "he abandoned all other allegations of negligence contained in his petition"; the manner of pleading, the plaintiff's decision to dismiss certain defendants at the close of his case, and the decision to submit on a single issue "indicates strategy rather than misadventure").

In contrast to the cases discussed above, in *Centerre Bank of Kansas City v. Angle*, the court of appeals found that remand for a trial on a derivative liability theory was warranted because the plaintiffs had had reasonable grounds to believe that their direct action was appropriate, and the plaintiffs pleaded facts and introduced evidence at trial that supported a derivative claim. 976 S.W.2d 608, 616 (Mo. App. 1998). And in *Balke v. Cent. Mo. Elec. Coop*., the court of appeals held that remand for a new trial on a different theory was appropriate where the plaintiffs had originally brought their lawsuit in the mistaken belief that a suit for strict liability under Restatement Section 402A could be maintained against a supplier of electricity. 966 S.W.2d 15, 27 (Mo. App. 1998). The court of appeals found that the plaintiffs' mistaken belief in the viability of their claim "was not unreasonable given the fact this issue was a case of first impression in this state and the split in other jurisdictions addressing this issue." *Id.*

D. Remand is inappropriate in this case.

Based on the cases discussed above, and in view of the record, the Court should not remand this case either to allow the plaintiff to retry his inherently dangerous activity claim or to plead and submit his case on a different theory than the one he chose to submit to the jury.

1. The Court should not order remand to allow plaintiff to retry his failed inherently dangerous activity claim.

The record does not support remanding the case to allow plaintiff to attempt again to prove his claim based on the inherently dangerous activity doctrine. All available essential evidence was presented, and, for the reasons discussed in Gateway's other briefs, that evidence establishes that the inherently dangerous activity doctrine does not apply.

Moss, *supra*, demonstrates when remand for retrial on the same theory is proper. In *Moss*, a slip and fall case, this Court found that the plaintiff failed to make a submissible case, but also noted that the record showed that plaintiff had failed to introduce available evidence that might have permitted the jury to find that the store had constructive notice of the slick spot. *Moss*, 781 S.W.2d at 786. Noting that an appellate court should reverse a plaintiff's verdict outright only when persuaded that the plaintiff could not make a submissible case on retrial, this Court remanded the case to permit the plaintiff to offer the omitted evidence. *Id.*

Unlike *Moss*, the record here does not show that plaintiff could offer any additional evidence in an attempt to salvage his fundamentally deficient claim based on the inherently dangerous activity doctrine. Remand for retrial on that theory of recovery is unwarranted. *See also Kaufmann*, 807 S.W.2d at 95 (remand is appropriate when the "record indicates that other and additional evidence might be adduced . . . and enable . . . [plaintiff] to make a submissible case"); *Smoot v. Vanderford*, 895 S.W.2d 233 (Mo. App. 1995) (where plaintiff had presented all available evidence on the issue of liability

and could not muster additional evidence sufficient to make a submissible case, remand for a new trial was unwarranted).

2. The Court should not order remand to permit plaintiff to retry his action under a different theory of liability.

Remand for a retrial on a different theory of liability also is inappropriate here. This is not a case in which the plaintiff misconceived the law from the outset of the litigation. This also is not a case where the plaintiff pleaded several theories of liability, but mistakenly submitted on the wrong one. In this case, plaintiff alleged, in each of three petitions, that defendant Gateway was negligent and was liable as a joint venturer. On the eve of trial, when confronted with Gateway's motion for summary judgment on plaintiff's pleaded theory of liability, plaintiff asserted a new theory: vicarious liability based on the inherently dangerous activity doctrine. In denying Gateway's subsequent motion in limine on joint venture, the Court left it to plaintiff whether he wished to pursue his joint venture theory. At the close of evidence, plaintiff explicitly informed the trial court that he was abandoning his joint venture claim. He decided to submit his case solely on the theory that Gateway was liable as a landowner under the inherently dangerous activity doctrine. Tr. 980. In response to repeated statements by Gateway's counsel that plaintiff had never pleaded the theory he planned to submit to the jury, plaintiff's counsel asserted that he was "entitled to submit it on the evidence we want to submit it on." Tr. 987. In oral arguments in this Court, plaintiff's counsel acknowledged that he chose not to submit his case on a joint venture theory, and that he saw no problem with submitting his case on a vicarious liability theory. Plaintiff plainly chose to submit

his claim on the inherently dangerous activity doctrine, foregoing his pleaded theory of recovery, a course of action that reflects a calculated legal strategy rather than any sort of "misadventure." *Quinn*, 318 S.W.2d at 323; *Blaine*, 841 S.W.2d at 710.

Furthermore, nothing in the record suggests that there was additional evidence that would have enabled plaintiff to make a submissible case on any other theory of liability. First, plaintiff could not make a submissible case on his abandoned joint venture theory. The elements of a joint venture are (1) an express or implied agreement among the members, (2) a common purpose to be carried out by the members, (3) a community of pecuniary interests in that common purpose, and (4) an equal voice, giving an equal right of control in the direction of the enterprise. *Hatch v. V.P. Fair Found.*, 990 S.W.2d 126, 138 (Mo. App. 1999). None of those elements is present here.

There was no agreement between Gateway and Hartmann to act as joint venturers. Instead, the parties entered into a contract in which the Hotel agreed to rent meeting space, reserve a block of rooms, and provide food and beverages for an event that Hartmann would promote and stage. L.F. 154. This fact alone warranted a finding that no joint venture existed. "A court may not imply a joint venture where it is evident a different business form was involved." *Hatch*, 990 S.W.2d at 138.

There was no common purpose to be carried out by Hartmann and the Hotel. The Hotel's only purpose was to rent its facility and provide food and beverages. Hartmann's purpose was to stage the boxing event.

There was no community of pecuniary interests. "The community of pecuniary interests requires that the parties have a right to share in the profits and a duty to share in

the losses." *Hatch*, 990 S.W.2d at 138. The Hotel did not share in Hartmann's profits or losses from the ticket sales to the boxing events, and Hartmann did not share in the Hotel's profits or losses from room rentals and food and beverage services. The parties' pecuniary interests were unquestionably separate.

Finally, there was no "equal voice" or "equal right of control in the direction of the enterprise." The undisputed evidence was that the Hotel did not plan or promote the boxing event; inspect the ring; arrange for or check the credentials of any doctor, referee, judge, or other person involved in staging the bouts; or sell tickets to the event. Tr. 615, 633-34. The Hotel had no voice in the direction of Hartmann's enterprise, including whether the boxing matches occurred at all.

Plaintiff presented all available evidence on the joint venture theory of recovery, and the evidence failed to support it. Remand for a trial on the issue of Gateway's liability as a joint venturer is not warranted. *See Smoot*, 895 S.W.2d at 241; *Allstates Transworld Vanlines, Inc. v. Southwestern Bell Tel. Co.*, 937 S.W.2d 314, 319 (Mo. App. 1997).

In his opposition to defendant's motion for summary judgment, plaintiff also argued that Gateway might be liable under the theory of liability discussed in Section 324A of the Restatement (Second) of Torts. L.F. 303-05. Plaintiff did not plead this theory of liability and did not pursue it at trial, and the trial court did not mention it in denying Gateway's motion for summary judgment. L.F. 638-641. Plaintiff's apparent abandonment of this unpleaded theory of liability is not surprising, because section 324A does not apply to the facts of this case.

Section 324A "applies to any undertaking to render services to another, where the actor's negligent conduct in the manner of performance of his undertaking, or his failure to complete it, or to protect the third person when he discontinues it, results in physical harm to the third person." Comment b, Section 324A. In other words, liability under Section 324A is based on a defendant's negligent performance of services undertaken for one party that results in injury to a third party. Nothing required by Section 324A is present here. The only services the Hotel undertook to perform for Hartmann were the renting of space and the provision of catering services to serve those who came to see the boxing matches. There is no claim or evidence that the Hotel was negligent in providing rooms or catering services for Hartmann, much less that the performance of those services resulted in injury to plaintiff. The Hotel did not undertake to provide Hartmann (or anyone else) with an ambulance or medical personnel. Plaintiff abandoned this theory of liability (to the extent he ever seriously considered it) for the same reason he abandoned his joint venture claim: the facts do not support it.

Remand for a new trial on a theory of direct negligence also is not warranted because nothing suggests that plaintiff can make a submissible case on any theory that the Hotel had and breached a duty to have an ambulance and additional medical personnel at the event. Plaintiff's counsel acknowledged in oral argument before this Court that he was not aware of any case holding that a hotel has such a duty. In fact, in *Novak v. Arch Productions*, a prior case against Gateway involving a kickboxing match, the circuit court found "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." L.F. 287. In addition, the Hotel and Hartmann contractually agreed that *Hartmann* – not the Hotel – would arrange to have an ambulance onsite. Neither the contract between the parties nor any statute or common law imposed a duty on Gateway to ensure the presence of an ambulance or additional medical personnel onsite to treat the boxers.

Plaintiff was severely injured as a result of his voluntary participation in the boxing matches organized, promoted, and staged by Hartmann. In their struggle to find a theory of liability against Gateway, plaintiff's attorneys attempted to manipulate the inherently dangerous activity doctrine to fit the facts of this case. As established in Gateway's other briefs, that doctrine does not apply. The unfortunate fact of plaintiff's injuries does not justify allowing plaintiff multiple opportunities to test claims against the Hotel. The simple reality is that there is no basis for holding the Hotel liable for any injuries plaintiff allegedly suffered as a result of Hartmann's failure to have an ambulance or additional medical personnel onsite.

CONCLUSION

For the reasons discussed in Gateway's brief, Gateway cannot be held liable under the inherently dangerous activity doctrine, and the fully developed record does not support any other possible theory of liability. The judgment should be reversed, with instructions to enter judgment for defendants.

Respectfully submitted,

ARMSTRONG TEASDALE, LLP

Thomas B. Weaver #29176
Cynthia A. Sciuto #43247
One Metropolitan Sq., Ste. 2600
211 N. Broadway
St. Louis MO 63102-2740
(314) 621-5070
(314) 621-5065 (Facsimile)

Debbie S. Champion #38637
RYNEARSON, SUESS,
SCHNURBUSCH & CHAMPION, L.L.C.
Attorney for Appellant
One So. Memorial Drive, Suite 1900
St. Louis, MO 63102
(314) 421-4430
(314) 421-4431 (Facsimile)

ATTORNEYS FOR APPELLANT
GATEWAY

CERTIFICATE OF SERVICE

A copy of the Supplemental Brief of Appellant and a disk containing the brief were mailed on October 20, 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.

_____

CERTIFICATE OF COMPLIANCE AS TO DISK

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

_____