IN THE SUPREME COURT OF MISSOURI

No. SC85747

Fernando Ibarra Maldonado, et al.
Plaintiff/Respondent

v.

Gateway Hotel Holdings, Inc.,
Defendant/Appellant.

Appeal from the Circuit Court of the City of Saint Louis,
The Honorable Michael Calvin, Judge, Division 13

SUBSTITUTE BRIEF OF RESPONDENT

Submitted by:

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STATEMENT OF FACTS

A. Procedural background

Plaintiff, a professional boxer from Mexico, sued defendant Gateway Hotel Holdings, Inc. ("Gateway Hotel" or "defendant") to recover for injuries suffered after he participated in a nationally televised boxing event at the Regal Riverfront Hotel. Plaintiff alleged that defendant was liable for failing to have an ambulance on standby and for failing to have a doctor monitor him in the locker room after the boxing match. The case was submitted to the jury under the "inherently dangerous activity" doctrine.[1]

B. The Parties

Defendant Gateway Hotel owned and operated the Regal Riverfront Hotel ("defendant's Regal Hotel" or "Hotel") located in St. Louis, Missouri. (L.F. 106, Second Amended Petition at ¶10). Doug Hartmann and Doug Hartmann Productions, L.L.C., ("Hartmann Productions" or "Hartmann") are in the business of sponsoring, promoting and holding professional boxing entertainment events. (L.F. 107 at ¶11). Plaintiff was a professional boxer from Mexico, and at the time of the boxing match from which this action arose, he was 23-years-old, married, and had a three-year-old daughter. (Tr. 184; Tr. 675-78). Plaintiff came to defendant's Regal Hotel to participate in a nationally televised boxing match,

[1] Plaintiff believes that defendant's statement of facts is incomplete and partially inaccurate, and here presents a separate statement of facts.

advertised as "Ringside at the Regal." (Tr. 185; Tr. 663 ln 3-4). Plaintiff sued defendant for injuries he sustained as a result of the failure to have an ambulance at the boxing match held at defendant's Regal Hotel and the failure to have a doctor monitor his condition following the match. (L.F. 107-09).

C. Defendant and Hartmann Productions entered into a contract to put on a nationally televised professional boxing event billed as "Ringside at the Regal."

In December 1998, defendant's Regal Hotel entered into a contract with Hartmann Productions, whereby Hartmann Productions agreed to stage and defendant agreed to host a nationally televised professional boxing event, called "Ringside at the Regal" on January 29, 1999. (Tr. 649; L.F. 314; Tr. 663 ln 3-4). The contract required Hartmann Productions to provide a doctor at ringside, an ambulance on standby at the Regal Hotel on the night of the event, and to comply with the laws of Missouri regarding boxing matches. (Tr. 649, ln 21- 650, ln 3). Hartmann Productions would organize, promote, and stage the boxing match, while defendant's Regal Hotel would provide, among other things, the facilities, staff, catering services, and security. (Tr. 566-74; L.F. 314-19). By hosting the boxing event, defendant's Regal Hotel benefitted by, among other things, food and beverage sales, room rentals, parking, and national television exposure. (Tr. 554-555, 564, 568, 572, 579, 584; 922, ln 2-7; L.F. 319). 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. (Tr. 554, ln 4-25). In addition, defendant received a nonrefundable deposit of $5,000 from Hartmann Productions (Tr. 575, ln 8-10), and it would receive liquidated damages if the boxing event got canceled. (Tr. 578, ln 2-5).

Finally, by putting on a nationally televised professional boxing event at defendant's Regal Hotel, Hartmann Productions promoted the Regal Hotel and enhanced its goodwill all to the benefit of defendant. Indeed, the nationally-televised professional boxing event opened with the graphic: "Fox Sports Net Presentation, Ringside at the Regal." (Tr. 922, ln 2-7). Defendant acknowledged that the boxing match made money for the Regal Hotel. (See e.g. Tr. 570, ln 12-13).

D. The prior kickboxing match and defendant's knowledge.

Defendant's Regal Hotel had prior experience with, and therefore actual knowledge of, the consequences of the failure to provide an ambulance on-site or medical personnel to monitor a boxer. The defendant had previously been sued by James Colombo, a kickboxer who was injured during a kickboxing match held at the Regal Hotel in 1993. (L.F. 50, *Novak* petition). Mr. Colombo fell into a persistent neurologic vegetative state following his match held at the Regal Hotel. (L.F. 50, *Novak* petition). The Hotel failed to provide an ambulance during that event, six years before plaintiff's match. (*Id.*) Mr. Colombo's ensuing lawsuit alleged that he sustained severe brain damage from the delay caused by not having an ambulance onsite. (L.F. 50, *Novak* petition). That case settled for $4 million

after 2½ days of trial. (L.F. 395). The Hotel contributed $3 million to that settlement. (L.F. 396). Christopher Pixton, the human resources director of the Hotel and an executive committee member of the hotel at the time, had been personally involved in the Columbo kick boxing incident. (Tr. 637, ln 8-14; Tr. 643, ln 9-11; Tr. 580 ln 18-24). Christopher Pixton testified that because of the hotel's experience with the James Colombo kickboxing incident and the subsequent lawsuit, the contract with Hartmann Productions was sent to the corporate headquarters for input and approval. (Tr. 207 ln 13- Tr 208 ln 5). Corporate headquarters made a decision to require a contractual provision requiring the promoter to have an ambulance on standby. *Id.* Christine Pashia, the convention services manager, who negotiated and signed the contract, testified that she did not recall having any conversation with Doug Hartmann about the contract requiring an ambulance, even though this contractual provision was stuck in the contract at the last minute. (Tr. 598, ln 23- 599, ln 2; Tr. 591, ln 11-13).

E. Prior to entering into a contract with Hartmann Productions, defendant's Regal Hotel contacted the Missouri Office of Athletics regarding the requirements of putting on a boxing event at the Regal Hotel.

Prior to entering into a contract with Hartmann Productions to put on a boxing event, defendant inquired of the Missouri Office of Athletics about the requirements for putting on a boxing event at the Regal Hotel. (Tr. 580-81). The purpose of this inquiry was to determine requirements under Missouri law for

holding a boxing match at defendant's Regal Hotel. (Tr. 581, ln 21 - 582, ln 3). Defendant's Regal Hotel received a fax from the administrator at the Missouri Office of Athletics, detailing the minimum safety requirements for putting on a boxing event. (Tr. 585).

Defendant subsequently inserted this language into the contract with Hartmann Productions:

> INSURANCE:
>
> A five million dollar Indemnity Insurance Policy must be provided by January 1, 1999. Promoter to provide a doctor at ringside **and an ambulance on standby at the Hotel on the night of the event**. All other safety provisions is [sic] delineated by the Missouri Office of Athletics must be strictly adhered to by the engager.

(L.F. 319) (emphasis added). The night of the boxing match, neither Christopher Pixton nor Christine Pashia checked to see whether there was an ambulance onsite. (Tr. 657 ln 16-19; Tr. 553 ln 1-6).

F. Defendant Gateway Hotel knew prior to the match that an ambulance would not be provided.

Christopher Pixton testified that he believed Hartmann Productions had complied with the contract with the Regal Hotel because the Hotel made the decision that it was all right to go ahead with the boxing match without an

ambulance. In particular, at trial, attorney for plaintiff, Mr. Dodson, read Mr. Pixton's sworn testimony, which stated:

A [Mr. Pixton]: '...[W]e weren't getting Mr. Hartmann out of the contract, but this is what was required by both the state and the feds, and this was what was approved by the state and therefore **as far as we are [sic] concerned this was good enough.**'

Q.[Mr. Dodson]: 'Okay. And who would have decided that this was good enough; that is, what's contained in that letter?'

A [Mr. Pixton]: 'I'm not sure who on the hotel executive committee made the ultimate decision.'

(Tr. 654, ln 21- 655, ln 14).

On direct examination, when presented with this sworn testimony at trial, Christopher Pixton admitted that he had gotten the word that it was "good enough; that is, not having an ambulance but an EMT." (Tr. 656, ln 4-8). Furthermore, Christopher Pixton determined that the letter of the contract was complied with because they had an EMT and two ringside doctors onsite. (Tr. 651, ln 14-21).

G. Plaintiff's bout and the aftermath.

The "Ringside at the Regal" event took place on January 29, 1999 at defendant's hotel. Plaintiff was knocked out in the sixth round. (Tr. 258, ln 6-12). Plaintiff was revived in the ring and was able to walk to the locker room. (Tr. 259, ln 13-22). No medical personnel accompanied plaintiff to the locker room. (Tr. 259, ln 19-25; Tr. 479, ln 1-4), and there were no medical personnel in the locker

room to monitor plaintiff. (Tr. 479 ln 5- ln 9; Tr 359 ln 1-6; Tr. 364, ln 1-4). In the locker room, plaintiff's condition declined rapidly. (Tr. 359, ln 15-19).

When plaintiff got back to the locker room at about 8:35 p.m., he sat down on the ground with a towel over his head. (Tr. 361, ln 22-25). At around 8:37, he collapsed, and when he tried to stand up with the assistance of his manager, his knees buckled. (Tr. 394, ln 4-10). He was eventually laid on a table and became unconscious. (Tr. 319, ln 17-19). A ringside physician, Albert Sandler, D.O., was summoned and arrived at the locker room. (Tr. 367 ln 1-3). Dr. Sandler immediately ordered the people in the locker room to "get an ambulance;" however, there was no ambulance on standby at the Hotel. (Tr. 369, ln 12-22). The on-site EMT, when he arrived, did not have intubation equipment. (Tr. 305 ln 5-25). At around 8:50, plaintiff stopped breathing. (Tr. 529 ln 19; Tr. 530 ln 1-15; Tr. 531 ln 8-25). The ambulance received the dispatch call at 8:55 p.m. (Tr. 308, ln 12-16). The ambulance and its crew arrived at defendant's Regal Hotel at 9:05 p.m. (Tr. 310, ln 17-21). It took 18 minutes to call an ambulance after the plaintiff collapsed in the locker room. It took 30 minutes for the ambulance to arrive after plaintiff entered the locker room. The ambulance crew transported plaintiff to the closest "Level One Trauma Center," St. Louis University Emergency Room, arriving at 9:18. (Tr. 324 ln 6-17). There, plaintiff was administered drugs to reduce the pressure in the cavity between the brain and skull. (Tr. 470).

Dr. David Schreiber, plaintiff's expert neurologist, testified that a person who has suffered a knockout should be medically monitored for a **minimum** of a half-an-hour. (Tr. 477, ln 16-18). Dr. Schreiber testified that Mr. Maldonado's brain had been deprived of oxygen because of the pressure that had built up on the brain, causing severe, permanent and disabling brain damage. (Tr. 457-458; Tr. 460-61; Tr. 462 ln 20-463 ln 3; Tr. 485 ln 14-19; Tr. 488-489). Dr. Schreiber testified that had Mr. Maldonado's injury been timely detected, and had he been immediately transported to the closest "level one trauma center", and had there not been the 28 minute delay (Tr. 481-82), he would not have suffered the injuries and brain damage that he did. (Tr. 485 ln 14-19; Tr. 484 ln 14-23; 483).

H. The denial of the Hotel's motion for summary judgment based upon the inherently dangerous doctrine.

Before trial the Hotel filed a motion for summary judgment that sought judgment on plaintiff's "negligence claims" in the second amended petition, which was denied on November 29, 2001. (L.F. 639). The trial court held that plaintiff made a submissible case under the inherently dangerous activity doctrine. (L.F. 640). It also specifically found that material questions of fact existed for the jury as to whether boxing was an inherently dangerous activity. (*Id.*).

I. The jury's award of compensatory damages.

This action was then tried to a jury beginning December 3, 2001. Plaintiff submitted his case on the very theory which was the basis for the court's denial of defendant Gateway Hotel's summary judgment motion, i.e., the hotel was liable

under the inherently dangerous activity doctrine based on the facts pleaded in plaintiff's second amended petition that boxing is inherently dangerous. (L.F. 107, ¶ 14). Before the case was ultimately submitted to the jury, the trial court dismissed plaintiff's claim for punitive damages against the Hotel. (Tr. 1004, ln 1-4). While the jury was deliberating, a note from the jury was delivered to the trial court. (Tr. 1092, ln 1-4). The jury asked, "[A]re we prohibited from awarding compensatory and punitive damages?" The trial court responded that the jury was to be guided by the evidence and the instructions given by the trial court. (Tr. 1093). Later, the jury found in favor of plaintiff and awarded him $13,700,000.00 in compensatory damages. (L.F. 698). The jury then wrote in an additional award of $27,400,000.00 in punitive damages. (*Id.*)

Following the receipt of the verdict, the trial court did not immediately enter a judgment but requested the parties to favor the court with their opinions on how to deal with the verdict. (Tr. 1096 ln 17-19). Defense counsel did not request that the jury be returned to correct the verdict. (Tr. 1096-97). Defendant filed a post-trial motion on December 18, 2001, while plaintiff filed his own motion on January 10, 2002. (L.F. 699). The pending motions were called and argued on March 8, 2002, at which time the trial court entered a judgment in the amount of $13.7 million and struck the $27.4 million punitive damage award. (L.F. 817). The court subsequently denied defendant's post-trial motions. (L.F. 822).

POINTS RELIED ON

I. THE TRIAL COURT DID NOT ERR IN DENYING GATEWAY'S MOTION FOR DIRECTED VERDICT OR IN DENYING GATEWAY'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, BECAUSE (1) HARTMANN PRODUCTIONS WAS THE INDEPENDENT CONTRACTOR OF DEFENDANT, AND (2) HARTMANN PRODUCTIONS' FAILURE TO TAKE THE SPECIAL PRECAUTIONS FOR THE INHERENTLY DANGEROUS ACTIVITY OF BOXING WAS DEFENDANT'S NON-DELEGABLE DUTY.

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

Hatch v. V.P. Fair Foundation, Inc., 990 S.W.2d 126 (Mo. App. E.D. 1999)

Sheppard By Next Friend Wilson v. Midway R-1 School Dist., 904 S.W.2d 257, 262-63 (Mo. App. W.D. 1995)

M.A.I. 31.15 (1992)

II. THE TRIAL COURT DID NOT ERR IN SUBMITTING INSTRUCTION 6, BECAUSE THE INSTRUCTION PROPERLY INSTRUCTED THE JURY ON THE MEANING OF "INHERENTLY DANGEROUS ACTIVITY."

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

Restatement (Second) of Torts §§ 416, 426 and 427 (1965)

Prosser and Keeton, "Law of Torts," §71 (5th ed. 1984)

III. THE TRIAL COURT DID NOT ERR IN SUBMITTING PLAINTIFF'S INSTRUCTION NUMBERS 6 OR 7 BECAUSE PLAINTIFF MADE A SUBMISSIBLE CASE UNDER THE INHERENTLY DANGEROUS ACTIVITY DOCTRINE.

See Point I

Missouri Rule of Civil Procedure 70.03

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING EVIDENCE OF AND REFERENCE TO *NOVAK V. ARCH PRODUCTIONS, INC.*, OR BY REJECTING GATEWAY'S PROPOSED WITHDRAWAL INSTRUCTION, BECAUSE DEFENDANT'S PARTICIPATION IN THAT LITIGATION WAS RELEVANT TO VARIOUS ISSUES IN THIS CASE AND DEFENDANT WAIVED ITS RIGHT TO OBJECT BY MENTIONING THE *NOVAK* LAWSUIT IN DEFENDANT'S OPENING STATEMENT.

Boehmer v. Boggiano, 412 S.W.2d 103 (Mo. 1967)

Hatch v. V.P. Fair Foundation, Inc., 990 S.W.2d 126 (Mo. App. E.D. 1999)

Martin v. Durham, 933 S.W.2d 921 (Mo. App. W.D. 1996).

V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION (1) BY DETERMINING THAT THE JURY DID NOT INCLUDE A PUNITIVE DAMAGES COMPONENT IN THE COMPENSATORY DAMAGES AWARD BECAUSE THE JURY'S IMPROPER AWARD OF PUNITIVE DAMAGES WAS SEPARATE AND DISTINCT FROM ITS AWARD OF ACTUAL DAMAGES; (2) BY OVERRULING GATEWAY'S OBJECTIONS TO PLAINTIFF'S CLOSING ARGUMENT BECAUSE THE ARGUMENT DID NOT IMPROPERLY INJECT PUNITIVE DAMAGES INTO THE CASE; OR (3) BY DENYING GATEWAY'S REQUESTS FOR A WITHDRAWAL INSTRUCTION ON PUNITIVE DAMAGES.

Derossett v. Alton and Southern Ry. Co.Railroad, 850 S.W.2d 109 (Mo. App. E.D.

1993)

Dickerson v. St. Louis Southwestern Ry. Co., 674 S.W.2d 165 (Mo. App. E.D.

1984)

School Dist. of City of Independence, Mo., No. 30 v. U.S. Gypsum Co., 750 S.W.2d 442 (Mo. App. W.D. 1988)

VI. THE TRIAL COURT DID NOT ERR IN DENYING GATEWAY'S MOTION FOR NEW TRIAL BECAUSE THE VERDICT WAS SUPPORTED BY THE EVIDENCE AND WAS NOT EXCESSIVE.

Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852 (Mo. banc 1993)

Hatch v. V.P. Fair Foundation, Inc., 990 S.W.2d 126 (Mo. App. E.D. 1999)

Tune v. Synergy Gas Corp., 883 S.W.2d 10 (Mo. banc 1994)

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN DENYING GATEWAY'S MOTION FOR DIRECTED VERDICT OR IN DENYING GATEWAY'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, BECAUSE (1) HARTMANN PRODUCTIONS WAS THE INDEPENDENT CONTRACTOR OF DEFENDANT, AND (2) HARTMANN PRODUCTIONS' FAILURE TO TAKE THE SPECIAL PRECAUTIONS FOR THE INHERENTLY DANGEROUS ACTIVITY OF BOXING WAS DEFENDANT'S NON-DELEGABLE DUTY.

A. Defendant waived part of its claim of error in Point I of its Points Relied On by not addressing the issue in the text of its brief.

An issue that is referenced in the Points Relied On, but which is not discussed, or is barely mentioned but not developed in the Argument, should be considered abandoned. *See, Hayes v. Hatfield*, 758 S.W.2d 470, 474 (Mo. App. W.D. 1988); *Boswell v. Steel Haulers, Inc.*, 670 S.W.2d 906, 912 (Mo. App. W.D. 1984). Here, in its Points Relied On, defendant briefly mentions that plaintiff did not plead the "inherently dangerous activity doctrine" in plaintiff's second amended petition. In the Argument section of its brief, however, defendant does not discuss or develop this argument as it did in its Motion for Judgment

Notwithstanding the Verdict. (L.F. 718-719). Accordingly, defendant has abandoned this issue in Point I of its appeal.

Moreover, this argument lacks merit in light of paragraph 14 of the second amended petition, in which plaintiff alleged that defendant was aware **of the dangers inherent in boxing** and did not provide an ambulance onsite. (L.F. 107). Also, the trial court denied defendant's motion for summary judgment based on the inherently dangerous activity doctrine because there was a fact question of whether boxing was inherently dangerous. (L.F. 640). Consequently, it is clear that plaintiff pled and defendant had timely notice of the theory of liability submitted to the jury.

B. 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. *Skinner v. Thomas*, 982 S.W.2d 698, 699 (Mo. App. E.D. 1998). Under Missouri law, a jury verdict should not be overturned unless there is a "complete absence of probative facts" to support the verdict. *King v. Unidynamics Corp.*, 943 S.W.2d 262, 264 (Mo. App. E.D. 1997); *accord*, *Seitz v. Lemay Bank & Trust Co.*, 959 S.W.2d 458, 461 (Mo. banc 1998). Appellate courts review the evidence and reasonable inferences therefrom in the light most favorable to the jury's verdict, disregarding evidence to the contrary. *Seitz*, 959 S.W.2d at 461. "The jury is the sole judge of the credibility of the witnesses and the weight and value of their testimony and may believe or

disbelieve any portion of that testimony." *Georgescu v. K-Mart Corp*., 813 S.W.2d 298, 299 (Mo. banc 1991).

C. Hartmann Productions was the independent contractor of Gateway.

The three-judge panel of the court of appeals rejected defendant's argument that Hartmann Productions was not its independent contractor, stating that "there was sufficient evidence that Hartmann Productions was the independent contractor of Gateway under the inherently dangerous activity doctrine." In so holding, the court of appeals focused on the unique relationship between the contractor and the landowner in the inherently dangerous activity's context, and the benefit that the landowner receives from that inherently dangerous activity. In particular, the court of appeals stated:

> Missouri courts have yet to define the term independent contractor under the inherently dangerous activity doctrine. Gateway cites *Hougland v. Pulitzer Pub. Co., Inc*., 939 S.W.2d 31, 33 (Mo.App. E.D.1997), for the general definition of independent contractor. However, we do not believe such a broad definition of the term is appropriate here. Additionally, we note that the test of control in the independent contractor relationship has been "overemphasized in judicial reasoning." 5 Harper and James, The Law of Torts, sec. 26.11 (2nd ed.1986). The control

> justification is often insufficient, and the motive behind vicarious liability is based upon the principle that "an enterprise (and its beneficiaries) should pay for the losses caused by the risks that it creates (even without its fault)." *Id.*

(Court of Appeals' Slip Opinion "Slip Op."at 3, filed October 7, 2003). The court of appeals further stated:

> In the present case, we are faced with a unique relationship, and it must be evaluated on its particular circumstances. *Trinity Lutheran Church v. Lipps*, 68 S.W.3d 552, 558 (Mo.App. E.D. 2001). In evaluating the relationship between a hotel, which is providing a venue for an inherently dangerous activity and the promoter who is coordinating such an event, as in the present case, we consider several factors. **The primary consideration is the benefit to the hotel from the relationship.** Hartmann Productions contracted with the hotel to stage a boxing match at the hotel. Although there was evidence that Hartmann Productions initially approached the hotel about the event, there was also evidence that Hartmann Productions contracted with the hotel to promote the event to the benefit of the hotel. Carrie Pashia, the convention services manager for the hotel, believed the match would be a profitable endeavor for the hotel. The hotel received profits

> from room rentals, food and beverage sales. Additionally, the hotel was to receive compensation regardless of whether the event actually took place. The event was advertised as "Ringside at the Regal," which provided significant exposure for the hotel on national television. Pashia stated that the event would help people become acquainted with the hotel and bring them into the hotel. Thus, **the hotel had a dual interest. Not only was the hotel to benefit from the rental income and food and beverage sales, but also, the hotel would benefit from future business generated by the exposure and promotion it would receive from hosting the event.**

(*Id*.)(emphasis added).

Accordingly, the court of appeals held "there was sufficient evidence that Hartmann Productions was the independent contractor of Gateway under the inherently dangerous activity doctrine." (*Id.*).

1. The court of appeals correctly determined that Hartmann Productions was the independent contractor of defendant.

Hartmann Productions entered into a contract with defendant to put on the boxing attraction referred to as "Ringside at the Regal" and, therefore, was defendant's Regal Hotel's independent contractor. (Tr. 649, ln 21- 25). Christopher Pixton, defendant's agent, admitted that the Regal Hotel had "entered

into a contract with Mr. Hartmann." (*Id.*). The contract required, *inter alia*, that Mr. Hartmann provide a doctor at ringside, an ambulance on standby at the Hotel on the night of the event, and that Hartmann be in compliance with the safety provisions of the Missouri Office of Athletics. (Tr. 649, ln 21- 650, ln 3; L.F. 159). In addition, Hartmann Productions was contractually obligated to obtain: "A five million dollar Indemnity Insurance Policy . . . by January 1, 1999." (L.F. 159). There was also a liquidated damages clause if "the function" i.e, the boxing match, was canceled. *Id.*

Indeed, Hartmann Productions organized and put on the boxing attraction so that the Regal Hotel would make a profit (Tr. 554, ln 6-15) from the customers the boxing match would attract. In particular, it intended to benefit and did benefit from these customers through its sales of food and beverage services, wait staff, rooms and accommodations for the event, and rooms for participants in the event. (*See*, Statement of Facts). Moreover, it also benefitted from receiving national exposure for the Regal Hotel on Fox television as well as promotion for the hotel from people who came to the event. This exposure and promotion, as the court of appeals correctly noted, would translate into future business. (*Id.*). In addition to the other profits the Regal Hotel made from Hartmann Productions putting on the boxing match, Hartmann paid the defendant various fees pursuant to the contract such as the master charge, the boxing room rental, parking, and concessions from the gross income from patrons attending "Ringside at the Regal." (*Id.*). Contrary to defendant's contention that it just rented rooms to Hartmann Productions,

Hartmann Productions was engaged to organize, promote and stage an event that would attract business and customers to the defendant's Regal Hotel.

2. Defendant's status in this case is not analogous to that of the U.S. Forest Service in the *Hatch* case.

In *Hatch v. V.P. Fair Foundation, Inc.*, the V.P. Fair Foundation ("V.P. Fair"), not the Forest Service, engaged Northstar. 990 S.W.2d 126, 138-139 (Mo. App. E.D. 1999). Furthermore, as the case is here with Gateway, there was evidence that the V.P. Fair had a dual interest in its involvement with Northstar. In *Hatch*, the V.P. Fair received a dual benefit from the Northstar attraction. Just as defendant did not pay Hartmann to stage a boxing match, the V.P. Fair did not pay Northstar to set up and operate the bungee jumping attraction. *Id.* at 138-139. Instead, the V.P. Fair's fee was to come from Northstar's gross ticket revenue, regardless of whether Northstar made a profit. *Id.* Even though Northstar was not paid by V.P. Fair to operate a bungee jumping attraction on the V.P. Fair premises, the V.P. Fair was nevertheless liable for Northstar's negligence under the inherently dangerous activity doctrine.[2] *Id.* Indeed, the bungee cord attraction produced an additional benefit for the V.P. Fair in that it attracted people to the

[2] Though the contract addendum referred to Northstar as the "independent contractor," under Missouri law this is not dispositive as a court looks to the nature of the relationship. *See, e.g., Talley v. Bowen Const. Co.*, 340 S.W.2d 701, 704 (Mo. banc 1960).

V.P. Fair, much like the boxing match in this case attracted business to the Regal Hotel. In both cases, there was press coverage of the events, providing television exposure. *Id.* at 131. This press coverage was not promoting the U.S. Forest Service.

3. Defendant's argument that Hartmann Productions is not Gateway's independent contractor is without merit.

First of all, the overwhelming evidence establishes that defendant engaged Hartmann Productions. The jury heard evidence that hotel-venues often seek opportunities to host boxing matches, and in fact do routinely host them. (Tr. 933, ln 9-12; Tr. 935, ln 15-19; Tr. 946, ln 15-22; Tr. 955, ln 12-18). Defendant's argument -- that there is a distinction between a landowner-venue which "hires, engages, or commissions" an independent contractor to put on an inherently dangerous activity (in which case the doctrine should apply), and a landowner which simply leases or provides premises to an independent contractor to conduct an inherently dangerous activity– is logically untenable. Indeed, the basis for vicarious liability is whether the landowner is getting a benefit from the conduct of an inherently dangerous activity on its premises. In this case, the evidence established that the Hotel benefited from the boxing matches, more than from the rental fee. Therefore, Hartmann was an independent contractor for the purpose of the "inherently dangerous activity" doctrine.

Defendant speculates, in "slippery slope" fashion, about what might happen if Hartmann Productions is deemed an independent contractor. (Defendant's brief

at 32-33). If defendant's argument is accepted, landowners could insulate themselves from liability by using straw promoters, while still reaping the commercial benefits from the activity. *See, Zueck v. Oppenheimer Gateway Properties, Inc.*, 809 S.W.2d 384, 388 (Mo. banc 1991) (quoting W. Keeton, Prosser and Keeton on The Law of Torts 6 (5th ed.1984)) (holding that these rules of tort law ought to function to promote care and punish neglect by placing the burden of their breach on the person who can best avoid the harm). Furthermore, defendant's hysterical claim that every wedding party, prom, etc. that rents space from a hotel will become the hotel's independent contractor misses the mark because those activities are clearly not inherently dangerous.

Accordingly, the court of appeals correctly determined "there was sufficient evidence that Hartmann Productions was the independent contractor of Gateway under the inherently dangerous activity doctrine."

D. Defendant had a non-delegable duty to take special precautions.

Defendant had a non-delegable duty to ensure that the special precautions of providing an ambulance and medical monitoring were taken; its failure to ensure that these special precautions were taken renders it liable to plaintiff under the inherently dangerous activity doctrine. Under the inherently dangerous activity doctrine, a landowner has a non-delegable duty to take special precautions

to prevent injury from the inherently dangerous activity.[3] MAI 16.08; *Hatch*, 990 S.W.2d at 134. Liability is imposed upon the landowner without any requirement that the landowner be proven negligent. *Id.* However, liability is imposed upon the landowner "only where 'the harm results from the negligence of the contractor in failing to take precautions against the danger involved in the work itself, which the employer should contemplate at the time of the contract.'" *Id.* at 135 (quoting Restatement (Second) of Torts § 427 cmt. d (1965)). Thus, if the negligence of the independent contractor is "collateral," the general rule exempting a landowner from liability for injuries to third parties caused by the negligence of an independent contractor applies. *Id.* (*See also*, Slip Op. at 4).

Here, defendant argues that it cannot be held liable because: (1) plaintiff assumed the risk of Hartmann's negligence in failing to take the special

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[3] An "inherently dangerous activity" is one that necessarily presents a substantial risk of harm unless adequate precautions are taken. In particular, an activity is inherently dangerous because it contains "by its very nature" some peculiar risk of physical harm, which imposes on the landowner a non-delegable duty of taking special precautions. *Hatch*, 990 S.W.2d at 136. 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. *Hofstetter v. Union Electric Co.*, 724 S.W.2d 527, 531 (Mo. App. 1986).

precautions, (2) Hartmann's negligence in failing to take the special precautions was collateral, and (3) the special precautions were related to the secondary, rather than inherent, risks of the inherently dangerous activity of boxing. However, as discussed *infra*, defendant's arguments are clearly without merit; accordingly, it is liable to plaintiff for the failure to take the special precautions of providing an ambulance and medical monitoring.

1. **Plaintiff did not assume the risk of Hartmann's negligence in failing to take the special precautions of providing an ambulance and medical monitoring.**

Defendant argues that "[p]laintiff assumed the risk of injury from dangers inherent in boxing." (Defendant's brief at 35). Defendant further states that "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." (*Id.* at 36).

While plaintiff assumed the *primary risk* of being injured by a punch during the boxing match, s*ee, Martin v. Buzan*, 857 S.W.2d 366, 369 (Mo. App. E.D. 1993), plaintiff did not assume the secondary risk of injury from the defendant's negligent failure to provide medical monitoring or an onsite ambulance. *Id.; See also, Sheppard By Next Friend Wilson v. Midway R-1 School Dist.*, 904 S.W.2d 257, 262-63 (Mo. App. W.D. 1995) (holding that participant assumed primary risk of long jump competition, but not secondary risk of negligence in preparing pit).

Citing *Sheppard By Next Friend Wilson*, 904 S.W.2d at 262-63, the court of appeals noted that "assumed risks in sporting events do not include those created by a defendant's negligence"; accordingly, it correctly held that plaintiff did not assume the risk of Hartmann's negligence. (Slip Op. at 4). More importantly, it held that the duty to take the special precautions for an inherently dangerous activity of boxing is **nondelegable**, though the landowner will not be considered liable if the negligence of the independent contractor is collateral (discussed *infra*). *(Id.).*

In this case, defendant failed to present evidence to meet the elements of "implied secondary assumption of risk." Implied secondary assumption of risk arises when the **plaintiff knowingly proceeds to encounter a known risk** imposed by the defendant's breach of a duty (Hartmann's negligence). *Sheppard*, 904 S.W.2d at 262. The trial court specifically rejected this argument, holding that "defendant did not present evidence that would support a finding of secondary assumption of risk." (L.F. 819). More importantly, defendant argued to the jury that the risks inherent in the sport of boxing caused the damage, and not the delay from the lack of an ambulance onsite or medical monitoring. (Tr. 1074). The jury flatly rejected this argument. (L.F. 693, 698; discussed *infra*).

Finally, the rationale for defendant's argument was previously rejected in *Novak*, where defendant argued that a kickboxer assumed the risk of the injuries inherent in the sport of kick-boxing. The Circuit Court for the City of St. Louis held that "Colombo assumed the primary risk of being injured by the activity of

kick-boxing itself. *See, Martin v. Buzan*, 857 S.W.2d 366, 369 (Mo. App. 1993). However, Colombo did not assume the risk of being injured by defendants' alleged negligence in failing to provide adequate emergency medical care at the Hotel during the matches. See *id*." (L.F. 285).

2. There was no issue of collateral negligence in this case because the special precautions Hartmann agreed to take to reduce the risks inherent in boxing were contemplated by defendant and Hartmann in their contract.

Collateral negligence has been defined as "negligence which is unusual or abnormal, or foreign to the normal or contemplated risks of doing the work, as distinguished from negligence which creates only the **normal or contemplated risk**." Restatement (Second) of Torts § 426 cmt. a (1965); *Hatch*, 990 S.W.2d at 135. Indeed, the court of appeals stated:

> Pursuant to the Restatement (Second) of Torts, it is not necessary for a landowner to contemplate these unusual or abnormal types of negligence by the contractor, or negligence which may occur in the ordinary operative details of the work being carried out which may be expected to be assumed with proper care. However, it is necessary for the landowner to contemplate this negligence when '**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.**'

(Slip Op. at 4) (emphasis added) (citing Restatement (Second) of Torts § 426 cmt. b (1965); S*ee also, Hatch*, 990 S.W.2d at 135.[4]

Applying this law as well as §427 of the Restatement (Second) of Torts, the court of appeals in this case made the following determination:

> Here, we find that the failure of Hartmann Productions to have medical monitoring and an ambulance present at the hotel for the boxing match was not collateral negligence. Rather, this was "negligence of the contractor in failing to take precautions against the danger involved in the work itself, which the employer should contemplate at the time of the contract." *Hatch*, 990 S.W.2d at 135 (quoting Restatement (Second) of Torts §427 cmt. d (1965)). Boxing is an activity

[4] Furthermore, the Reporter's Notes of §426 indicates:

> This Section has been changed from the first Restatement, which limited the rule to negligence consisting "solely in the improper manner in which the contractor does the detail of the work." **The new Section places the emphasis instead upon negligence which is abnormal, or foreign to the usual or contemplated risks of doing the work.**

Reporter's notes, §426 (emphasis added).

> that is by its very nature, violent and potential injury is an obvious risk. Because injury is clearly a potential risk of the sport, and the sport is of a violent nature itself, this would provide sufficient warning to a landowner of the potential risk of harm or special reason to take certain medical precautions to prevent further injury from a delay in treatment. **The negligent failure to have medical monitoring or an ambulance on stand-by is not the type of negligence which would be foreign to the contemplated risk of being injured or knocked unconscious during a boxing match. Moreover, having medical monitoring and an ambulance on stand-by was provided for or contemplated by the contract between Hartmann Productions and the hotel.**

(Slip Op. at 4) (emphasis added).

The court of appeals further noted that Comment a of §426 of the Restatement (Second) of Torts sets forth the following example of what constitutes collateral negligence:

> 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 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.**

(*Id*.) (*cited with approval* in *Hatch*, 990 S.W.2d at 136).

In determining what negligence and risks were in the contemplation of the parties in this case, the court of appeals stated that:

> A specific provision in the contract between the hotel and Hartmann Productions required the promoter to provide a physician at ringside and to have an ambulance on stand-by at the hotel the night of the boxing match. Furthermore, although adequate medical monitoring was not specifically set out in the contract, **the contract language regarding the ambulance and a doctor at ringside demonstrates medical monitoring was contemplated**. Hartmann Productions' failure to provide an ambulance on stand-by or provide medical monitoring was within the risk contemplated and therefore was not collateral negligence.

(*Id.* at 4-5.) (emphasis added).

For defendant to establish that Hartmann's negligence was collateral, it had to prove that Hartmann's "negligence ... [wa]s unusual or abnormal, or foreign to the normal or contemplated risks of doing the work" as distinguished from negligence which created only the **normal or contemplated risk**. Defendant and Hartmann Productions clearly contemplated that boxing posed a substantial risk of harm to plaintiff. Moreover, both contemplated that special precautions - an ambulance on standby and medical monitoring - were needed because of this substantial risk of harm to plaintiff. Indeed, as a result of its experience with the *Novak* case, defendant specifically added a contractual requirement that Hartmann Productions provide an onsite ambulance and a ringside doctor onsite. (Tr. 594, ln 23- Tr. 595, ln 3; Tr. 221; Tr. 651, ln 4-9). Because defendant included these precautions into its contract with Hartmann Productions, these precautions were undeniably within the contemplation of the parties. Defendant cannot plausibly argue that these contemplated precautions were for any reason other than to reduce the normal inherent risks of boxing. Thus, Hartmann's negligence in failing to take these precautions cannot be collateral.

Defendant is trying to redefine collateral negligence by arguing that it was beyond the parties' contemplation that special precautions would not be taken. This is not the law in Missouri. The defendant had a non-delegable duty to take the special precautions. The contractor's failure to take them cannot be collateral negligence. Accordingly, the court of appeals correctly determined that Hartmann's negligence was not collateral in this case.

a. Defendant knew that there would not be an ambulance at the boxing match.

Defendant claims that "Plaintiff introduced no evidence suggesting that Gateway had reason to anticipate that Hartmann would not have an ambulance onsite as provided in the contract." (Defendant's brief at 45). In particular, defendant contends that plaintiff presented testimony that some employees of Gateway believed that the use of an EMT, rather than an ambulance, would suffice because of the relevant regulation. (*Id.).*

Hartmann breached the contract by failing to obtain an ambulance. Christopher Pixton, the human resources director and an executive committee member of the Hotel, who had been personally involved in the Columbo kick boxing incident, admitted that the Hotel knew Hartmann did have an ambulance on standby, but believed it was "good enough; that is, not having an ambulance but an EMT." (Tr. 656, ln 4-8). He further indicated that someone on the Hotel's executive committee made the ultimate decision that it was good enough to have an EMT (therefore, acceptable not to have an ambulance). (Tr. 654). No such decision would have been made if Hartmann was planning to have an ambulance. In fact, Christopher Pixton claimed that the contract was complied with because Hartmann had an EMT and two ringside doctors onsite. (Tr. 651, ln 4-9).

Accordingly, defendant knew that Hartmann did not supply an ambulance, or at a minimum was anticipating that he would not have an ambulance, and in fact argued that their contract with Doug Hartmann was complied with. Having

claimed at trial that Hartmann's conduct complied with the contract, defendant cannot now complain that the same conduct is collateral negligence of Hartmann.

3. The precautions at issue in this case were directly related to the inherent risks of the sport of boxing.

Defendant contends that "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" and that "[t]o the contrary, application of the distinction between primary and secondary risk[5] 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." (Defendant's brief at 40).

Defendant has not disputed on appeal that boxing is an inherently dangerous activity. As a practical matter, it has taken the position that the inherently dangerous activity of boxing ends at the knockout or bell and, therefore,

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[5] Defendant is attempting to confuse the analysis and the terminology of two separate doctrines: the assumption of the risk doctrine and the inherently dangerous activity doctrine. Though the term 'risk' is used in 'secondary risk', it is intended to refer to Hartmann Productions' negligence, which is based on the failure to take special precautions for the inherently dangerous activity of boxing. At all times the terms "risk" and "inherent" should be kept in the context of their respective doctrines.

the special precautions for the knockout are as a matter of law outside the scope of the inherently dangerous activity. The court of appeals held the contemplated precautions in this case were within the scope of the inherently dangerous activity. In particular, it held that:

> There was extensive evidence adduced by Gateway that it had, in fact, taken "adequate precautions" as that term is used in defining an inherently dangerous activity. The issue of adequate precautions, however, was well within the contemplated risk. See e.g. *Ballinger v. Gascosage Elec. Co-op*., 788 S.W.2d 506 (Mo. banc 1990). The risks inherent in boxing are inextricably connected with the question of adequate precautions. The danger arises from "the very nature of the activity." Id. at 511-12. Thus the negligence issue submitted to the jury was not collateral negligence but rather direct negligence relating to the activity.[6]

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[6] In support of its contention that Hartmann's negligence is outside of the scope of the activity of boxing, defendant claims that "[i]t 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', (citing *Nance v. Leritz*, 785 S.W.2d 790, 793 (Mo. App. 1990)) (Defendant's brief at 46). The *Nance* holding should be read in context. In

(Slip Op. at 5.).

The court of appeals correctly determined that the contemplated precautions in this case were within the scope of the inherently dangerous activity. In fact, this Court has adopted the following test to determine whether a risk is within the inherently dangerous activity: "The one [inherently dangerous] starts with danger and requires preventive care to make safety, while the other starts with safety and requires negligence to make danger [common risks]...." *Smith v. Inter-County Telephone Co.*, 559 S.W.2d 518, 522 (Mo. banc 1977) (overruled on other grounds) (adopting this test). M.A.I. 16.08 defines "inherently dangerous activity": [t]he term 'inherently dangerous activity' as used in this [these] instructions means an activity that necessarily presents a substantial risk of harm unless adequate precautions are taken." In either case, special precautions are necessary to protect the individual from the dangers of the activity. Defendant cannot plausibly argue that Fernando Maldonado, having been knocked unconscious, was in a safe situation or that under Missouri law, the jury was not

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Nance, the issue before the court was whether an activity was made dangerous because of its inherent nature or whether a safe activity was made dangerous by the improper choice of method made by a contractor. *Id.* at 793. This issue is not before this Court because defendant is not contending that boxing is not inherently dangerous or that boxing is a safe activity that was made dangerous by the improper method chosen by Hartman Productions.

free[7] to conclude that if the contemplated special precautions had been taken, a substantial risk of harm to plaintiff would have been removed. In addition, under Missouri law, a boxing match can not even be staged unless the minimum regulations of the Missouri Office of Athletics are complied with; that is, an ambulance on standby or an EMT with resuscitative equipment and a doctor at

[7] Defendant claims that "[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 the independent contractor." (Defendant's brief at 29 n.4). If the trial court concludes the activity involves some peculiar risk of harm by ascertaining the nature of the activity and the manner in which the activity is ordinarily performed, the determination of whether an activity is inherently dangerous is "ultimately a question of fact" for jury determination. *Hatch*, 990 S.W.2d at 136-137. In this case, the jury determined that unless adequate precautions were taken, boxing necessarily presents a substantial risk of harm, and therefore boxing was an inherently dangerous activity. (L.F. 693, 698; M.A.I. 31.15; M.A.I. 16.08 (plaintiff has the burden of demonstrating that an activity is inherently dangerous). In other words, ultimately the jury makes the factual determination of what adequate precautions prevent substantial risks of harm. At all times, the jury was free to accept defendant's argument that no precaution prevented a substantial risk of harm, but they rejected this argument.

ringside (discussed *supra*). Accordingly, Missouri law regards it within the scope of the activity of boxing.

Furthermore, Missouri's approved jury instruction recognizes that an independent contractor's negligence in not taking the precautions is not a separate risk. *See,* M.A.I. 31.15 (1992) (under the inherently dangerous doctrine, plaintiff has to carry the burden of proof that: (1) the independent contractor's negligence in not taking the precautions; and (2) the contractor's negligence, combined with the inherently dangerous activity caused damage to the plaintiff). Indeed, this Court has not regarded the failure to take special precautions for an inherently dangerous activity as a new risk not inherent in that activity. *See e.g.*, *Ballinger*, 788 S.W.2d at 511-512 (stating the risks resulting from failing to take the special precautions of wearing rubber gloves or maintain proper clearance between the new conductors and the energized conductor was not a separate and distinct risk from those risks and danger which arose from the "very nature of the activity," i.e., stringing new electrical conductors in close proximity to an energized, or 'hot,' conductor). Accordingly, the Hotel's negligence in not taking the contemplated special precautions for an inherently dangerous activity was not a new risk.

a. The jury determined that plaintiff's injuries resulted from a danger inherent in boxing– the knockout – combined with the absence of the adequate precautions.

In this case, the lack of special precautions (the on-site ambulance and the lack of medical monitoring in the locker room) for the risks of boxing (the knock out), caused substantial harm to plaintiff. The jury heard and believed the expert testimony of Angelo Dundee that the precaution of having an on-site ambulance and medical monitoring of knocked-out boxers were precautions taken at most professional boxing matches around the country. (Supplemental Legal File "Supp. L.F.", 13 ln19-14 ln 3; 14 ln 17-15 ln 1-4; L.F. 671). The jury heard and believed the testimony of Marvin Elam, a professional boxing and kickboxing referee in Missouri since the 1970's (Tr. 246-48), that he is aware of only two fights where there was no on-site ambulance – Mr. Maldonado's and the match involving James Colombo, both at the same Hotel. (Tr. 270 ln7-13). The jury heard and believed defendant's own agent, Christopher Pixton, admit that boxing was a dangerous sport requiring special precautions. (Tr. 645). The jury heard and believed plaintiff's expert neurologist, Dr. Schreiber, who testified that if Mr. Maldonado's injury was timely detected and he was then immediately transported to the closest "level one trauma center," he would not have suffered the injuries and brain damage that he did. (Tr. 485 ln 14-19). The jury heard and believed plaintiff's evidence that the delay directly and proximately caused Mr. Maldonado's brain damage. (Tr. 484 ln 14-18; Tr. 485 ln 10-19; Tr. 457-458; Tr. 460-461; Tr. 462 ln 20-463 ln 3).

As a result, the jury determined that plaintiff's injuries resulted from an inherent risk of boxing combined with the negligence of Hartmann in failing to make adequate precautions of medical monitoring and an on-site ambulance.

b. The negligence of Hartmann Productions did not create a new risk, unrelated to the special precautions, sufficient to relieve defendant of its non-delegable duty.

To constitute the creation of new risks, not inherent in the work, the independent contractor must create risks which are **common** risks, not related to the special precautions for the inherently dangerous activity. *See, e.g., Brandt v. Missouri Pacific R. Co.*, 787 S.W.2d 781, 784 (Mo. App. E.D. 1990) (contractor was injured while testing a hoist, not from the peculiar risk from lowering employees in hoist down shaft during inherently dangerous activity); *Hofstetter v. Union Electric Co.*, 724 S.W.2d at 531 (holding that plaintiff's injury resulted from the **common** risk of the independent contractor not providing steps from the five-foot high platform of the ring and from not setting planks over the railroad ties, not from the peculiar risk of falling while erecting the crane, the inherently dangerous activity).

Defendant cites *Bowles v. Weld Tire & Wheel, Inc.* for the proposition that a landowner is not liable when it has no reason to believe the independent contractor would choose a negligent course of action. (Defendant's brief at 40). The *Bowles* case is distinguishable. In *Bowles*, the contractor was negligent in using a gasoline-powered washer, which emitted carbon monoxide, to remove old,

loose paint and dirt from the stairwell walls in a three-story enclosed stairwell, causing carbon monoxide poisoning to plaintiff. 41 S.W.3d 18, 21-22 (Mo. App. W.D. 2001). The court held that the contractor's negligence created a new risk because exposure to carbon monoxide is not a special hazard intrinsic to the work of painting an enclosed stairwell that should have been anticipated by a landowner; the contract between the landowner and contractor was for preparing and painting exterior and interior portions of Weld's facility including a three-story enclosed stairwell, and no mention was made of using a gasoline-powered power washer in that contract. *Id.*

Because of its experience with *Novak*, because of the risks inherent in boxing, and as evidenced by the contract with Hartmann Productions, defendant clearly contemplated the type of negligence that occurred in this case; Hartmann's negligence was not collateral negligence and did not constitute a new risk not inherent to the activity of boxing.

For the foregoing reasons, Point I of defendant's appeal should be denied.

II. THE TRIAL COURT DID NOT ERR IN SUBMITTING INSTRUCTION 6, BECAUSE THE INSTRUCTION PROPERLY INSTRUCTED THE JURY ON THE MEANING OF "INHERENTLY DANGEROUS ACTIVITY."

A. Standard of review.

In reviewing challenges to jury instructions, this Court checks for error that materially affected the merits of the case. *EPIC, Inc. v. City of Kansas City*, 37 S.W.3d 360, 366 (Mo. App. W.D. 2000). The jury's verdict will be reversed only if the offending instruction misdirected, misled or confused the jury. *Id.*

B. Defendant did not properly preserve for appeal its objection to MAI 16.08.

Missouri Rule of Civil Procedure 70.03 provides: "[c]ounsel shall make specific objections to instructions considered erroneous. No party may assign as error the giving or failure to give instructions unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." *Id.* If a party's complaint on appeal was never made a trial, the propriety for giving the instruction has not been preserved for review. *Doe v. Alpha Therapeutic Corp*., 3 S.W.3d 404, 419 (Mo. App. E.D. 1999). Where an alleged error relating to an instruction differs from the objections made to the trial court, the error may not be reviewed on appeal. *Seidel v. Gordon A. Gundaker Real Estate Co*., 904 S.W.2d 357, 364 (Mo. App. E.D. 1995).

During the instruction conference, defense counsel stated: "I further would object to this 16.08 in that it fails to include a necessary portion of the instruction. That should include the second portion that goes on to say, "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,' that second section." (Tr. 1008 ln 9-16). Defense counsel then argued the inherently dangerous activity doctrine did not apply to this case, and that M.A.I. 16.08 - modified or not - should not be used. Defense counsel offered no reasons why this additional language should be added to M.A.I. 16.08 or why not adding it, would be error. (Tr. 1008-13).

In approving plaintiff's proffered instruction 16.08, the trial court stated: "I'm going to allow the instruction over objection. I'm not going to include in the bracketed part in the instruction. Be quite frank with you, I'm not entirely sure what instance I would do that in, but it's there." (Tr. 1013 ln 4-8). Defense counsel did not give the trial court any reason why the bracketed addition should be used, but merely said, "Judge, I'll submit to you, if I may, tomorrow morning just an instruction for you to deny with that in there." (Tr. 1013 ln 10-12). Defense counsel, however, never submitted the instruction with the language to be denied.

Defendant failed to distinctly state the grounds for the objection regarding the requested additional language for instruction No. 6 as required by Rule 70.03. Furthermore, the error defendant claims in its brief related to instruction No. 6

differed from the error claimed in the objections made to the trial court. Defendant now argues that the addition in 16.08 should be allowed because there is a **fact question** regarding collateral negligence, and whether that collateral negligence was created solely by Hartmann. (Defendant's brief at 48). This argument was **never** made to the trial court. Accordingly, this alleged error has not been preserved for appeal, and Point II should, therefore, be denied.

C. The trial court did not err by giving Instruction No. 6, M.A.I. 16.08, without modification.

Defendant contends that "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." It further contends, citing the dissent, that "Gateway was denied 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." (Defendant's brief at 51) (*citing* Dissenting Op. at 6). The dissenting judge felt that Hartmann Productions' failure to secure an ambulance for the event was a departure from the contemplated method of performing the work under the contract, and as a result of the improper manner in which the contract was performed, an additional risk was created, which required the addition of the bracketed instruction. (Dissenting Op. at 6).

For the reasons set forth in Point I, plaintiff made a submissible case on the issue of the inherently dangerous activity doctrine, and therefore the trial court properly gave the M.A.I. 16.08 instruction for the definition of 'inherently

dangerous.' As set out in Point I, the law and the evidence did not support the addition of the bracketed phrase: "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" because there was not an issue of collateral negligence.

Furthermore, on this point, the majority of the court of appeals stated:

> [t]his bracketed phrase may have some application in some situations. If the law and the evidence support the addition of this bracketed phrase, it should be added to the definition at the request of the defendant. See *Ballinger v. Gascosage Elec. Co-op.*, 788 S.W.2d 506, 511 (Mo. banc 1990); and Restatement (Second) of Torts, § 426." *Id.* **The bracketed portion of MAI 16.08 should only be given when requested by defendant and when collateral negligence is an issue in the case. It is a definition of collateral negligence.** *See Hatch*, 990 S.W.2d at 135. As stated *supra*, the issue was not collateral negligence, but whether there was any direct negligence. The trial court correctly refused to submit the issue of collateral negligence to the jury.

(Slip Op. at 5) (emphasis added).

Indeed, this instruction is based on Restatement (Second) of Torts §426: Negligence Collateral To Risk Of Doing The Work. §426 provides:

> Except as stated in §§428 and 429, an employer of an independent contractor, unless he is himself negligent, is not liable for physical harm caused by any negligence of the contractor if (a) the contractor's negligence **consists solely in the improper manner in which he does the work**, and (b) it creates a risk of such harm which is not **inherent in or normal to the work**, and (c) the employer had **no reason to contemplate the contractor's negligence when the contract was made**.

(*Id.*)(emphasis added).

In order to establish collateral negligence, defendant must demonstrate all three subparts of § 426. For the reasons stated in Point I, defendant cannot meet this burden. In particular, regarding subparts (a) and (b), Hartmann Productions' negligence did not consist solely in the improper manner in which it did the work that created a risk of harm which is not inherent in or normal to the inherently dangerous activity of boxing. If subparts (a) and (b) applied, Hartmann's negligence, in the absence of plaintiff's involvement in the inherently dangerous boxing activity, would have injured plaintiff. *Compare, Hofstetter v. Union Electric Co.*, 724 S.W.2d at 531 (holding that plaintiff was injured because of failure to provide a wood walk way between railroad ties and steps, not injured in

dangers inherent in erecting the crane); *Brandt v. Missouri Pacific R. Co.*, 787 S.W.2d at 784 (holding that plaintiff was injured while testing a hoist because they did not secure a tripod leg, not from risk from lowering employees in hoist down shaft during inherently dangerous activity). It is undisputed that Hartmann's negligence, in the absence of plaintiff's involvement in the inherently dangerous boxing activity, did not injure plaintiff. Regarding subpart (c), the type of negligence - not having an ambulance or medical monitoring for a knocked out boxer - was clearly contemplated as evidenced by the contract and because of defendant's experience with *Novak*.

Furthermore, Hartmann's failure to take special precautions for the inherently dangerous activity of boxing is not collateral negligence as evidenced by the Restatement (Second) of Torts, Prosser and Keeton §71, and this Court's decision in *Ballinger*.

Critically, Restatement (Second) of Torts §427 provides illustrations of what constitutes and does not constitute collateral negligence in an inherently dangerous activity:

> 5. A employs B, an independent contractor, to construct a building on A's land abutting on the highway. The contract contemplates that B will pile building materials on the public sidewalk. B does so, and negligently fails to guard the materials or to set out warning lights. C, a pedestrian, trips

over a board in the dark, and is injured. The danger is inherent in the work, and A is subject to liability to C.

6. The same facts as in Illustration 5, except that A does not contemplate that B will pile the materials on the sidewalk, and has no reason to expect it. The negligence is "collateral," and A is not liable to C.

Id. See also, Nance v. Leritz, 785 S.W.2d 790, 793 (Mo. App. 1990) (*Smith*, 559 S.W.2d at 524) (holding that liability may be imposed on the employer/landowner even though the contractor disregards a contract provision and fails to take precautions to avoid injury from performing the inherently dangerous activity).

Furthermore, Restatement (Second) of Torts §416 (1965) [8], "Work Dangerous In Absence Of Special Precautions," provides the following illustration:

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[8] Sections 416 and 427 have been applied more or less interchangeably in the same cases. §416 cmt. a. The rule stated in this Section is more commonly stated and applied where the employer should anticipate the need for some specific precaution, such as a railing around an excavation in the sidewalk. The rule stated in § 427 is more commonly applied where the danger involved in the work calls for a number of precautions, or involves a number of possible hazards, as in the case of blasting, or painting carried on upon a scaffold above the highway. *Id.*

> A employs B, an independent contractor, to erect a building upon land abutting upon a public highway. The contract entrusts the whole work of erection to B, and contains a clause requiring the contractor to erect a sufficient fence around the excavations necessary for the erection of the building. It contains also a clause by which the contractor assumes all liability for any harm caused by his work. B digs the excavation but fails to erect a fence. In consequence C, while walking along the highway at night, falls into the cellar and is hurt. A is subject to liability to C.

Id.

Again, this is not considered collateral negligence.

In addition, in Prosser and Keeton, "The Law of Torts," it states: "it has been held that there is collateral negligence where a painter drops a paint bucket out of the window while the workman is painting an inside storeroom, but not to drop a paint bucket while he is painting a sign over a sidewalk." § 71 at 516 (5th ed. 1984). It further states that:

> [w]here the peculiar risk inheres in the work to be done itself, ..., **the fact that the risk which was to be expected materializes through the incidental negligence of the service in dropping the bucket will not relieve the employer of liability**. But where the employer reasonably

> expect that windows will be painted in place on the building, and the contractor decides to remove them and in the process drops one five floors, the negligence is collateral to the risk.

Id.

Finally, the bracketed portion of the instruction in question was not given in *Ballinger* where the landowner contended that installation of electrical lines, which injured the plaintiff, were routinely done without incident. 788 S.W.2d at 509-510, 511-512. In *Ballinger*, this Court did not consider the addition necessary because the danger arose from the "very nature of the activity," i.e., stringing new electrical conductors in close proximity to an energized, or 'hot,' conductor, and not from the failure of the independent contractor to wear rubber gloves or maintain proper clearance between the new conductors and the energized conductor, though apparently these were routine precautions normally taken by independent contractors. *Id*. at 509-510.

Likewise, here, the danger or risk arose from the "very nature of the activity" -- the knockout, boxing. If the worker in *Ballinger* had worn gloves (the special precaution), it would have removed or prevented a substantial risk of harm from the "hot wires." Similarly, if there had been an ambulance onsite and medical monitoring of plaintiff (the special precaution), it would have removed or prevented a substantial risk of harm to plaintiff from the inherently dangerous activity of boxing.

D. There was an issue of collateral negligence in *Hatch*, which is not present in this case.

In *Hatch*, the V.P. Fair claimed that Northstar's failure to attach the bungee cord was an act of collateral negligence, unusual or foreign to the normal contemplated risks. 990 S.W.2d at 137. The court in *Hatch* noted that "[t]his additional provision, which defendants requested be given, properly submitted the question of whether or not Northstar's negligence was collateral and, if it was, whether or not it was the sole cause of the risk of harm." *Id.* at 137 n.6. Unlike this case, in *Hatch*, there appears to be no evidence that the V.P. Fair contemplated or had reason to anticipate that the independent contractor would fail to attach the bungee cord to the crane. This was not the failure to take a special precaution, but instead, a failure to perform a fundamental and essential element of the activity. Nevertheless, if Northstar had returned five years later, and the V.P. Fair had put contract terms to make sure that special precautions were taken to make sure that the bungee cord was properly attached, plaintiff contends that there would no longer be a fact issue of collateral negligence, but rather a non-delegable duty on the part of the V.P. Fair to make sure that the precautions were taken by Northstar, or if they were not, the VP Fair would be responsible for ensuring that they were taken.

Finally, defendant faults the majority opinion for stating "the issue was not collateral negligence, but whether there was any direct negligence." (Defendant's brief at 51). Defendant further contends: "the issue was not, as the court claimed,

'direct negligence,' but vicarious liability, and plaintiff never contended at trial that Gateway committed any 'direct negligence.'" *Id.* Defendant misconstrues the majority's opinion. In Point I, the court held that the negligence issue submitted to the jury was not collateral negligence, but rather **direct negligence relating to the activity**. The majority opinion clearly states that Hartmann's negligence was not collateral negligence but instead, direct negligence in failing to take the special precautions (in a way contemplated by the contract) relating to the activity of boxing.

Accordingly, the law and the evidence did not support the use of the bracketed phrase of the instruction in this case. Point II of defendant's brief should therefore be denied.

III. THE TRIAL COURT DID NOT ERR IN SUBMITTING PLAINTIFF'S INSTRUCTION NUMBERS 6 OR 7 BECAUSE PLAINTIFF MADE A SUBMISSIBLE CASE UNDER THE INHERENTLY DANGEROUS ACTIVITY DOCTRINE.

A. Standard of review.

See, Point I for standard of review and law on preserving issue for appeal.

B. The trial court did not err in submitting plaintiff's Instruction Number 6.

See, Point I.

C. Defendant did not preserve this point for appeal as it relates to plaintiff's Instruction Number 7.

Defendant did not preserve this point for appeal because it objected only to submissibility and not the language of the instruction. Defense counsel did not object to or indicate any error in giving this Missouri Approved Instruction; rather defendant's arguments challenged the underlying submissibility of plaintiff's claim on the inherently dangerous activity doctrine. Accordingly, defendant did not preserve this issue for appeal.

D. Alternatively, the trial court did not err in submitting plaintiff's Instruction Number 7.

For the reasons set out in Point I, plaintiff made a submissible case on the issue of the inherently dangerous activity doctrine, and therefore the trial court properly gave M.A.I. 31.15 for submission of a claim under the inherently

dangerous activity doctrine. Contrary to defendant's implications that plaintiff recovered for the primary risks of boxing (Defendant's brief at 53), plaintiff's instruction M.A.I. 31.15 was based on damage caused by Hartmann Productions' negligence. (L.F. 693).

For the foregoing reasons, Point III of defendant's appeal should be denied.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING EVIDENCE OF AND REFERENCE TO *NOVAK V. ARCH PRODUCTIONS, INC.*, OR BY REJECTING GATEWAY'S PROPOSED WITHDRAWAL INSTRUCTION, BECAUSE DEFENDANT'S PARTICIPATION IN THAT LITIGATION WAS RELEVANT TO VARIOUS ISSUES IN THIS CASE AND DEFENDANT WAIVED ITS RIGHT TO OBJECT BY MENTIONING THE *NOVAK* LAWSUIT IN DEFENDANT'S OPENING STATEMENT.

A. The court of appeals found no error.

The three-judge panel of the court of appeals reviewed defendant's Point on Appeal which alleged that the trial court erred in denying its request for a withdrawal instruction and in its evidentiary rulings, allowing reference to and evidence of the *Novak* case: a case involving Gateway and a kickboxer's claim of negligence for failing to have an ambulance on-site during a match. The court of appeals held that no error of law appeared, so it denied Gateway's Point on Appeal. It declined to address this issue in the opinion, stating that a written opinion would have no precedential value, citing Rule 84.16(b).

B. Admissibility of evidence is reviewed under an abuse of discretion standard.

"Appellate courts give substantial deference to the decisions of trial courts as to the admissibility or exclusion of evidence, which will not be disturbed absent

a showing of an abuse of discretion." *Murray v. Lamont*, 931 S.W.2d 899, 901 (Mo. App. S.D. 1996). The trial court, however, only commits an abuse of discretion when its decision "is clearly against the logic of the circumstances . . . and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberation." *Id.*

C. Defendant waived this issue for appeal because defense counsel "opened the door" by affirmatively using the *Novak* case as evidence in its own case and by not properly objecting to references to the case at trial.

To preserve a question of admissibility after objectionable testimony is given, the objecting party must move to strike or withdraw the evidence from the jury's consideration. *State ex rel. Missouri Highway and Transp. Comm'n v. Matula*, 910 S.W.2d 355, 361 (Mo. App. E.D. 1995); *see also Bewley*, 617 S.W.2d at 552 (Mo. App. W.D. 1981) (not having objected to respondents' allusion to the payment of the car damage in opening argument, then broaching the subject itself in its own opening argument, appellant will not be heard to complain of any inadmissibility of the evidence on the matter); *Turnbo by Capra v. City of St. Charles*, 932 S.W.2d 851, 857 (Mo. App. E.D. 1996).

Defendant claims that "[b]eginning with opening statement and throughout the trial, plaintiff repeatedly referred to the *Novak* case, and Gateway objected to those references." (Defendant's brief at 58). It further states that "Gateway's

objections were overruled, as was Gateway's subsequent motion to withdraw references to the case and request for a withdrawal instruction." *Id.*

1. Defendant waived its right to object to evidence about the Novak case when it made a strategic decision to try to use that evidence to defendant's advantage.

Defense counsel did not object to plaintiff's counsel mentioning the Colombo incident ("*Novak* case") and lawsuit during opening statement. (Tr. 202). Furthermore, Defendant "opened the door" to this evidence by affirmatively using this evidence in its own opening statement:

> But with respect to safety provisions [Tim Leuckenhoff] said, "We require that the promoter have a doctor ringside and that the promoter either have an EMT, which is an emergency medical technician, ringside with resuscitative equipment with oxygen and a way to get that oxygen into somebody, or alternatively you can have an ambulance onsite." So [the Hotel] heard that and they decided to go ahead, **since they had previously been sued over the ambulance issue**, and tell Mr. Hartmann in the contract, "You've got to have an ambulance," so they did that.

(Tr. 209).

This followed an earlier reference to the *Novak* case when counsel, describing the testimony of Christopher Pixton, indicated:

> And he'll tell you, "You know, I thought at the point I should contact my corporate, **because we had a boxing match before and somebody got hurt and we ended up having to defend a lawsuit in that boxing match**, so I'd better give this to my corporate." And the evidence will show that he did. He called his corporate and they sent the contract up there . . .

(Tr. 207 ln 13- Tr 208 ln 5) (emphasis added).

Defense counsel acquiesced to the admission of the evidence by attributing its actions in requiring the ambulance in the contract to the prior lawsuit. In addition, defense counsel made no objections to the following references to the Colombo case: Christopher Pixton's involvement in the lawsuit (Tr. 637) and (Tr. 656); Defense counsel eliciting testimony from their expert witness about this matter (Tr. 832-33); Plaintiff's counsel's cross-examination of Mr. DiSalvo, director of sales and marketing for defendant (Tr. 953-954); in the deposition testimony of Mr. Boll, corporate attorney with Richfield Hospitality (Tr. 672; L.F. 481-82) and in the deposition testimony of Angelo Dundee (Tr. 431; Supp. L.F. 17).

The defendant cannot now complain that evidence it failed to object to and affirmatively used should not have been allowed, or that any error resulted because of its introduction. Defendant did not rely on this evidence solely to rebut plaintiff's use of the *Novak* case, but instead affirmatively used this evidence to establish what actions defendant took to safeguard the safety of plaintiff and preclude liability. In addition, defendant used this evidence to demonstrate that its conduct was reasonable, arguing that because of its experience in *Novak*, defendant went beyond the required regulations and added a contractual provision for the promoter to have an ambulance for the fight. (Tr. 970; Tr. 209; Tr. 221; Tr. 234, ln 18-25). Accordingly, defendant has waived this issue for appeal and Point V of defendant's brief should be denied.

2. In addition, the *Novak* case was relevant to many issues in the case.

Defendant contends that the Novak case was not relevant to any issues in this case. (Defendant's brief at 57). *Boehmer v. Boggiano*, 412 S.W.2d 103, 110 (Mo. 1967) (if evidence is admissible for one valid purpose, it cannot properly be excluded).

a. The *Novak* case was relevant to the issue of notice and what precautions the landowners should have contemplated.

The *Novak* case put defendant on notice of the need for precautions and was relevant to demonstrate what precautions defendant should have contemplated in

entering into this contract with Hartmann Productions. Plaintiff carried the burden to prove that "(2) during such activity, the independent contractor on the defendant's premises must have failed to take precautions which were **contemplated or should have been contemplated**. M.A.I. 31.15 (1992); *Hatch*, 990 S.W.2d at 133.

Plaintiff's evidence of the prior injury to and lawsuit of kickboxer James Colombo, who was injured in 1993 at the Hotel when there was no on-site ambulance, demonstrated that the precautions of which plaintiff complained were within the direct contemplation of the Hotel at the time it contracted with Hartmann Productions. Defendant presented testimony of Christopher Pixton that because of the hotel's experience with the James Colombo kickboxing incident and the subsequent lawsuit, the contract was sent to corporate headquarters for its input and approval. (Tr. 207 ln 13- Tr 208 ln 5). Accordingly, the *Novak* case is highly probative to show that the precaution of an on-site ambulance was within the direct contemplation of defendant when it entered into its contract with Hartmann Productions to put on a boxing match.

b. The *Novak* case is also relevant evidence of adequate precaution and rebuttal evidence.

Throughout defendant's case in chief, defendant produced evidence through state officials including Mr. Lueckenhoff, promoters, and individuals from the Adam's Mark, Marriott, Nassau Coliseum, the Days Inn, the Drury Inn, Long Beach Convention And Arena, Savvis Center, Kiel Center, St. Louis Arena, or the

old St. Louis Arena, the Forum in LA, the Hilton, the Hyatt, the Wyndham Hotel that having an ambulance onsite at a boxing match was not an ordinary precaution for a boxing match. (Tr. 933, ln 9-12; Tr. 935, ln 15-19; Tr. 946, ln 15-22; Tr. 955, ln 12-18). Indeed, Mr. Lueckenhoff testified that he had witnessed 12,000 fights, and an ambulance was only necessary in four. (Tr. 725, ln 20; Tr. 727, ln 5-7). Defendant claimed and presented evidence that boxing was not inherently dangerous because having an ambulance onsite was not a precaution that could have prevented harm; therefore defendant should not be liable. (Tr. 1074). Mr. Lueckenhoff testified that defendant was in compliance with the federal rules and the regulations of the Missouri Office of Athletics, which have adopted the federal standard and that this standard is safe. (Tr. 714, ln 1-5; Tr. 771, ln 13-18).

Plaintiff had the burden of proving that boxing was an inherently dangerous activity occurring on the defendant's premises. M.A.I. 31.15 (1992); *Hatch*, 990 S.W.2d at 133. The *Novak* case was relevant to the issue of whether boxing was an inherently dangerous activity because it showed that having an ambulance onsite was an adequate precaution, that could, if utilized, prevent a substantial risk of harm occurring to the participant in a boxing match.

Furthermore, the *Novak* case was relevant to the issue of whether an ambulance on-site is an adequate or reasonable precaution that should have been taken in this case. Defendant took the position that an ambulance was not necessary during the boxing match, was not a precaution taken at most boxing matches throughout the United States, and that its absence was not the "but for"

cause of plaintiff's injuries (Tr. 235 ln 13-17). Clearly, the *Novak* case was relevant to rebut these contentions.

c. The *Novak* case was clear evidence of defendant's notice of its non-delegable duty to provide an ambulance.

Defendant states that "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." (Defendant's brief at 59).

As explained *supra*, the issue in this case is whether defendant breached a non-delegable duty; as stated in Hatch, a "nondelegable duty to see that the inherently dangerous activity is performed with **that degree of care which is appropriate to the circumstances**, or in other words, to see that all **reasonable precautions shall be taken during its performance**, to the end that third persons may be effectually protected against injury. 990 S.W.2d at 134-35.

Throughout the trial, defendant argued that Hartmann Productions and defendant's Regal Hotel took all reasonable precautions and were not negligent. Clearly, defendant's actual knowledge of the *Novak* case was relevant its knowledge of what adequate or reasonable precautions were required in connection with a boxing match.

Though the inherently dangerous activity doctrine is based on vicarious liability, the duty at all times is on the landowner. *Hatch*, 990 S.W.2d at 133-34 ("a person who **engages** a contractor to do work of an inherently dangerous character remains subject to an absolute, nondelegable duty," which cannot be shifted to an independent contractor). Because notice is relevant in establishing a duty to invitees, it should also be relevant to the very same duty to the very same invitees - indeed, a duty which the landowner cannot shift to the independent contractor because of the inherently dangerous activity. *See also, Stacy v. Truman Medical Center*, 836 S.W.2d 911, 926 (Mo. banc 1992)(holding that when the theory of recovery is negligence, any knowledge or warning, including knowledge of prior accidents, that a defendant had of the type of accident in which a plaintiff was injured clearly aids the jury in determining whether a reasonably careful defendant would have taken further precautions under all the facts and circumstances).

Consequently, the *Novak* case was relevant to prove notice as well as what reasonable precautions should have been taken.

D. Defendant failed to request a limiting instruction and, therefore, cannot complain on appeal that one was not given.

Defendant claims the trial court abused its discretion in admitting the evidence of the *Novak* case as it was not evidence of Gateway's liability for punitive damages, notice, or any alleged duty of Gateway or Hartmann. (Defendant's brief at 53, 55).

As demonstrated, the evidence was relevant to the central issues in the case – what precautions should have been taken and whether the Hotel was negligent not to have an ambulance on standby. Defendant fails to recognize that "proffered evidence which is admissible for one purpose may not be excluded because it may also be inadmissible for another purpose." *Martin v. Durham*, 933 S.W.2d 921, 924 (Mo. App. W.D. 1996). If the defendant was concerned about the jury considering the evidence for an improper purpose, it should have requested a limiting instruction. But it did not and, "if the defendant fails to seek an instruction limiting the purpose for which evidence may be considered, he cannot later be heard to complain that the jury considered such evidence for the wrong purpose." *Id.* Because the evidence of the other claim and incident were admissible for the above purposes, defendant should have requested a limiting instruction.

E. The trial court did not abuse its discretion by rejecting the proposed withdrawal instruction.

Defendant claims the trial court abused its discretion by rejecting Gateway's proposed withdrawal instruction. (Defendant's brief at 56). Defendant offered the rejected instruction which stated: "The evidence of the prior kickboxing case or incident is withdrawn from the case and you are not to consider such evidence in arriving at your verdict." (L.F. 697). Such an instruction was improper for a number of reasons. Foremost, as discussed *supra*, the evidence was relevant to the issue of notice. Additionally, as mentioned *supra*, defendant

introduced the issue itself and affirmatively used the evidence. It thereby waived its objections to it. The defendant cannot ask that evidence it itself used be withdrawn from the jury. Furthermore, as stated above, the *Novak* case demonstrated what precautions defendant should have contemplated in entering into its contract with Hartmann Productions as well as rebutting defendant's position that compliance with Missouri's boxing regulation was sufficient. Accordingly, there was no error in allowing the evidence of the prior suit and incident and there was no error in refusing the withdrawal instruction.

F. The trial court did not err in excluding the court's ruling in the *Novak* case.

Defendant claims "the jury was not permitted to hear any references to the outcome of the *Novak* case, an outcome that informed Gateway that ***it did not owe*** plaintiff the duty he alleged. In *Novak*, the trial judge, Hon. Robert Dierker, had ruled that, contrary to plaintiff's claim, ***the Hotel did not owe the plaintiff a duty to have an ambulance present onsite.*** L.F. 281." (Defendant's brief at 55).

In *Novak*, plaintiff argued that kickboxing was "an inherently dangerous activity and therefore a premises liability claim can be maintained against the Hotel Defendants." (L.F. 287). The trial judge in the Circuit Court of the City of St. Louis held:

> [t]his Court finds kick-boxing is not an activity which would warrant the application of the inherently dangerous activity doctrine. Additionally, 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. *See Lammert v. Lesco Auto Sales*, 936 S.W.2d 846, 850-51 (Mo. App. E.D. 1996). Therefore, summary judgment is appropriate as to the premises liability claim against Hotel Defendants."

Id.

In determining that the activity that injured the kickboxer was not inherently dangerous, Judge Dierker relied on *Lammert*, 936 S.W.2d at 850-51, which held that an activity is not inherently dangerous if it could be performed safely. The Eastern District, however, overruled *Lammert* in *Hatch v. V.P. Fair Foundation, Inc.*, 990 S.W.2d at 135-36, to the extent that it held that an activity is not inherently dangerous if it can be performed safely. In *Hatch*, the court stated that such holding is in contradiction to this Court's opinion in *Ballinger*, 788 S.W.2d 506, 509 (Mo. banc 1990).

Accordingly, the *Novak* trial court's determination that the inherently dangerous doctrine did not apply to the Hotel because kick boxing is not an inherently dangerous sport is not good law after *Hatch*. Indeed, the *Novak* court's statement that it "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" (L.F. 287) is, as well, no longer good law, because post-*Hatch* the Hotel has a non-delegable duty to provide special precautions for the inherently dangerous activity.

For the foregoing reasons, Point IV of defendant's appeal must be denied.

V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION (1) BY DETERMINING THAT THE JURY DID NOT INCLUDE A PUNITIVE DAMAGE COMPONENT IN THE COMPENSATORY DAMAGE AWARD BECAUSE THE JURY'S IMPROPER AWARD OF PUNITIVE DAMAGES WAS SEPARATE AND DISTINCT FROM ITS AWARD OF ACTUAL DAMAGES; (2) BY OVERRULING GATEWAY'S OBJECTIONS TO PLAINTIFF'S CLOSING ARGUMENT BECAUSE THE ARGUMENT DID NOT IMPROPERLY INJECT PUNITIVE DAMAGES INTO THE CASE; OR (3) BY DENYING GATEWAY'S REQUESTS FOR A WITHDRAWAL INSTRUCTION ON PUNITIVE DAMAGES.

A. The court of appeals found no error.

The three-judge panel of the court of appeals reviewed defendant's contention that the trial court erred in denying its request for a withdrawal instruction on punitive damages and in overruling certain objections by it during closing argument. The court of appeals held that no error of law appeared, and declined to write an opinion on this issue, stating that a written opinion would have no precedential value, citing Rule 84.16(b).

B. The trial court did not abuse its discretion by holding that the award of compensatory damages was supported by the evidence and did not include a punitive component.

Defendant contends that "[t]he court's action in ultimately striking the punitive damages did not cure the prejudicial effect of plaintiff's closing argument" because "[n]ot 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.'" (Defendant's brief at 30).

1. Defendant waived its right to allege error based on the jury's verdict because it did not request that the jury be sent back to correct the verdict.

Defendant waived this claim by failing to request that the judge return the jury for further deliberation to correct the verdict form. The remedy for a verdict which raises questions is to send the jury back to put the verdict in the proper form. *Johnson v. Hyster Co.*, 777 S.W.2d 281, 285 n.8 (Mo. App. W.D. 1989) (citing *Rodgers v. City of St. Louis*, 688 S.W.2d 42, 44 (Mo. App. E.D. 1985)). Defendant cannot now complain that the punitive damages award is evidence that punitive damages were included in the award of compensatory damages. Defendant was required to make that objection at trial and request that the jury correct the verdict. Because defendant failed to do so, it waived its objection and Point V of its appeal should be denied.

2. This Court must presume that the jury correctly followed the instruction regarding compensatory damages.

Appellate courts "**must presume** that the jury follows the instructions given to them by the court." *Cole ex rel. Cole v. Warren County R-III School Dist.*, 23 S.W.3d 756, 758 (Mo. App. E.D. 2000) (internal citations omitted) (emphasis added).

Plaintiff's counsel specifically instructed the jury to base their award of compensatory damages on the evidence:

> Ladies and gentlemen, let me talk to you now about damages in this case, . . . this is Instruction No. 8, If you find in favor of plaintiff, then you must award plaintiff such sum as you believe **will fairly and justly compensate plaintiff for any damages you believe he sustained and is reasonably certain to sustain in the future as a direct result of the conduct submitted in Instruction No. 7.** That's the damage instruction and let me read it to you.

(Tr. 1064 ln 12-24) (emphasis added).

Plaintiff's counsel argued that an award of compensatory damages must be based on the evidence. Plaintiff's counsel listed all of the evidence, found by defendant's own expert, of plaintiff's permanent physical and mental injuries plaintiff suffered including brain damage, loss of vision, difficulty standing, etc. . .

(Tr. 1064 ln - 1065 ln 23). Plaintiff's counsel asked the jury to compensate plaintiff for these compensatory damages only, and very clearly directed the jury to consider the facts and evidence of this case in making its award. (Tr. 1066 ln 2-3). In particular, he stated: "Ladies and gentlemen, let me tell you this. **I don't think $5,000,000 is sufficient, not in this case, not on these facts.** But ladies and gentlemen, that's for you to decide. You go back, you talk about it. You discuss it. You think about it." (Tr. 1066 ln 11-19) (emphasis added).

Consequently, plaintiff's counsel asked the jury to award plaintiff an amount of compensatory damages in excess of $5 million as a result of the severe physical and mental injuries he suffered, and which caused severe brain damage and made him unemployable due to defendant's conduct. Plaintiff's counsel asked for a verdict based on plaintiff's injuries, not to punish defendant. Accordingly, this Court must presume that the jury followed the instruction for compensatory damages, especially when plaintiff's counsel specifically instructed the jury to base the award of compensatory damages on the evidence.

3. The trial court correctly held the judgment entered did not include a punitive component because the jury separately itemized the punitive damages, and the court struck it before entering judgment.

In ruling on the post-trial motions, the trial court ruled that though the jury had failed to follow the instructions provided by the court, "it is also apparent that the improper action taken by the jury was with regard to the award of punitive

damages, which **was remedied when such amount was not included in the judgment entered by the Court.**" (L.F. 821) (emphasis added). Critically, the trial court found "plaintiff's argument regarding the lack of prejudice regarding the actual damages to be persuasive" and the trial court denied the motion for new trial on this basis. *Id.* Finally, the trial court denied defendant's motion for remittitur because the trial court found that "in light of **the nature of plaintiff's injuries**, the jury's verdict is not against the weight of the evidence." (L.F. 822) (emphasis added).

The trial court determined that the jury made an error solely with regard to the unauthorized award of punitive damages, and not compensatory damages. Accordingly, the trial court correctly determined that any improper action of the jury was cured by not including the punitive damages award in the final judgment. Critically, it found that the award of compensatory damages was based on the evidence and did not include a punitive component, and in light of the nature of plaintiff's injuries, was not excessive. (L.F. 821-822).

4. Defendant has not demonstrated that the compensatory damages verdict was excessive and not supported by the evidence.

Defendant's argument is similar to the argument made in cases where a case is submitted on actual and punitive damages, the jury awards both, but the trial court later grants j.n.o.v. regarding punitive damages, and enters a judgment as to actual damages. In those cases, defendants have argued that the punitive

damages argument and evidence tainted the award of actual damages, and, therefore a new trial should be granted. *See, e.g., School Dist. of City of Independence, Mo., No. 30 v. U.S. Gypsum Co.*, 750 S.W.2d 442, 450 (Mo. App. W.D. 1988) (exhorting the jury in closing argument in support of punitive damages to teach USG a lesson and send it a message and that "one million dollars in punitive damages would be a mere slap on the wrist in light of USG's net worth of a billion dollars"); *Henry v. City of Ellington*, 789 S.W.2d 205, 207 (Mo. App. S.D. 1990).

To establish that any argument and evidence tainted the actual damages award, the defendant must show: (1) the evidence, when viewed in the light most favorable to the verdict, does not warrant such a verdict; and, (2) that there was error sufficient to cause prejudice. *U.S. Gypsum Co.*, 750 S.W.2d at 451. This standard should, likewise, apply to this case because the jury separately itemized compensatory and punitive damages. Thus defendant here is essentially making an identical argument - that the allegedly improper comments tainted the actual damage verdict.

As set out in detail in Point VI, there was ample evidence, when viewed in the light most favorable to the verdict, to warrant such damages. The court of appeals held the verdict was not excessive, deferring to the superior opportunity for the jury and trial court to appraise Maldonado's injuries and other damages**.** (Slip Op. at 6). In fact, the court of appeals noted that the jury heard evidence that Maldonado, a young athlete, age 23 at the time of match, who was sound

physically and mentally, was severely and permanently injured. (*Id.*). The court of appeals noted that Gateway's own expert found many significant mental and physical disabilities during his examination of plaintiff. (*Id.*). The court emphasized that in denying Gateway's request for remittitur, the experienced trial judge found "that in light of the nature of plaintiff's injuries, the jury's verdict is not against the weight of the evidence." (*Id.*).

There was sufficient evidence to support the jury's separate award of compensatory damages and this point must be denied.

C. The trial court did not abuse its discretion by overruling Gateway's objections to plaintiff's closing argument.

1. The trial court's rulings on the propriety of closing argument is reviewed only for abuse of discretion.

"[T]he trial court is accorded broad discretion in ruling on the propriety of a closing argument to the jury and will suffer reversal only for an abuse of discretion." *Moore v. Missouri Pac. R.R. Co.*, 825 S.W.2d 839, 844 (Mo. banc 1992). This is because the trial court is in the best position to evaluate the consequences of any impermissible comments. *Hammer v. Waterhouse*, 895 S.W.2d 95, 105 (Mo. App.1995). "In ruling on the propriety of final argument, the challenged comment must be interpreted in light of the entire record rather than in isolation.'" *Gerow v. Mitch Crawford Holiday Motors*, 987 S.W.2d 359,

363 (Mo. App. E.D. 1999).[9] "[C]ounsel is traditionally given wide latitude to suggest inferences from the evidence on closing argument." *Moore*, 825 S.W.2d at 844.

2. Many of the remarks and arguments of which defendant complains were never objected to, and therefore not properly preserved for appeal.

A party must object to remarks in closing to preserve them for appeal. *Moore v. Smith*, 657 S.W.2d 664, 667 (Mo. App. E.D. 1983). Defendant did not object to the following closing remark about which it now complains: "Ladies and gentlemen, it should never have happened and it shouldn't happen again." (citing Tr. 1055). Defendant did not object to: "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." The only objection came to the plaintiff's suggested cost of the ambulance: "Judge, I'm going to object. There's no evidence to support

[9] Even if this Court deems that the trial court abused its discretion in overruling the defendant's objection, a new trial should be limited to the issues of damages, and not liability. *See Tune v. Synergy Gas Corp.*, 883 S.W.2d 10, 22 (Mo. banc 1994) (citing Rule 84.14 (stating where error goes only to damages and does not affect liability, the case was reversed and remanded for a new trial on damages only because "[n]o new trial shall be ordered as to issues in which no error appears.")

how much the cost of an ambulance would be." (Tr. 1090, ln 5-7). This objection was sustained. (Tr. 1090, ln 8-9).

Furthermore, plaintiff's counsel's references to "pocketbook" and "money" regarding the regulations for boxing were based on evidence (explained *infra*) admitted during trial without objection and, therefore, were proper subjects of closing argument. (Tr. 773-74; L.F. 250 at 21, 15-25); *see Bewley v. Allright Carpark, Inc.*, 617 S.W.2d 547, 552 (Mo. App. 1981). Accordingly, since no timely objections were made to the above-cited remarks and arguments, defendant did not preserve them for appeal and they should not be considered.

3. Plaintiff's counsel did not improperly inject punitive damages into the case by making an improper "send a message" argument.

a. Appellate courts defer to the trial court's determinations of whether a defendant was prejudiced by an improper argument.

In *Pierce v. Platte-Clay Elec. Coop., Inc.*, this Court considered the prejudicial effect of a "send a message" argument and held: "Wisdom gathered from long experience tells us that trial courts are better positioned to assess the amount of prejudice injected by admittedly improper arguments. ... Given the cold record on appeal, appellate courts of this state uniformly uphold trial courts' determinations of the prejudice injected by 'send a message' arguments." 769 S.W.2d 769, 778 (Mo. banc 1989) (citations omitted); *see also, Amador v. Lea's*

Auto Sales & Leasing, Inc., 916 S.W.2d 845, 852 (Mo. App. S.D. 1996) (deferring to the trial court's determination that there was no prejudicial effect resulting from the argument that "... car sales companies will listen to your verdict in this case. And by your verdict, you'll be helping other persons in similar situations...."); *Dickerson v. St. Louis Southwestern Ry. Co.*, 674 S.W. 2d 165, 173 (Mo. App. E.D. 1984)(holding that it was not prejudicial error to tell the jury to bring back a verdict that will be heard by the railroad all of the way out to San Francisco)(overruled on other grounds).

b. The trial court determined that plaintiff's counsel did not make an improper closing argument.

The trial court determined that plaintiff's arguments were not an improper "send a message" argument. (Tr. 1091). The trial court confirmed this determination when it denied defendant's motion for new trial, based on the contention that counsel for plaintiff improperly injected punitive damages into his closing argument which tainted the entire verdict. (L.F. 819-820). Pursuant to *Pierce* and *Dickerson*, this Court should defer to the trial court's determination that the remarks were not improper.

c. The comments made by plaintiff's counsel in closing were isolated and did not pervade or become the theme of the closing argument.

Missouri courts have held that a purportedly improper "send a message" argument in closing should only result in reversal when it is the subject or theme

of the entire closing, and that when the improper argument does not pervade the entire argument it is not reversible error. *See, Pierce*, 769 S.W.2d at 779. *See also, Derossett v. Alton and Southern Ry. Co. Railroad*, 850 S.W.2d 109 (Mo. App. E.D. 1993)(even though an improper send a message argument was made, it was not reversible error because it was not the subject of the entire closing argument); *Beis v. Dias*, 859 S.W.2d 835, 840 (Mo. App. S.D. 1993) (no reversible error because "send a message" argument was not theme of closing argument).

Here, the portions of plaintiff's counsel's argument of which defendant complains were isolated and clearly did not pervade the closing argument. Indeed, nearly all of these remarks were made near the end of plaintiff's rebuttal argument. Plaintiff's counsel's closing argument began on page 1052 of the trial transcript. Defendant's counsel made one objection at page 1055 to the argument "that this was the worst type of wrong because it was based on the pocketbook, instead of safety." That objection was properly overruled because it was not an argument to punish or deter defendant, but merely evidence that the boxing regulation which defendant was relying on in establishing that it met its duty was based on saving money, and not safety. For the remainder of plaintiff's case-in-chief closing argument there were no objections by defendant's counsel for purportedly improper injections of punitive damages. (*See,* Tr. 1052-67). Plaintiff's rebuttal argument began on page 1087 of the trial transcript and the first statement which

defendant alleges injected punitive damages was on page 1090 and the only other one was on page 1091 where the argument concluded.

In fact, plaintiff's counsel's closing argument discussed the following evidence just to highlight some of the main themes: (1) disputing defendant's claim that they just rent rooms (Tr. 1053); (2) disputing defendant's claim that the minimum requirements are safe (Tr. 1054); (3) explaining the jury instructions (Tr. 1056-63); (4) discussing evidence that boxing is dangerous (Tr. 1058); (5) discussing the absence of the ambulance and medical monitoring (Tr. 1059); (6) discussing the 28 or 30 minute delay before the ambulance came, and the damage that caused plaintiff (Tr. 1060); (7) discussing of the time line - sequence of events (Tr. 1061); (8) disputing defense experts' opinions (Tr. 1064); (9) instructing the jury to look to the evidence in assessing compensatory damages (Tr. 1064-66); (10) itemizing defendant's experts findings of injuries to plaintiff; (*Id.*); and (11) discussing causation (Tr. 1067). Furthermore on rebuttal, plaintiff's counsel: (12) stated that plaintiff had not assumed the risk that there would not be an ambulance there (Tr. 1087); (13) discussed that defendant's counsel admitted that boxing was dangerous (Tr. 1088); (14) rebutted defendant's claim that the delay did not cause plaintiff's injuries (*Id.*); and (15) discussed the timeline (Tr. 1089).

When taking into account the entire closing argument, the isolated statements of which defendant complains cannot be said to pervade or constitute the theme of the closing argument. Moreover, the trial court was in the best position to evaluate the statements, and properly held, in ruling on the post-trial

motions, that no reversible error was committed. The verdict, therefore, should be upheld.

d. Plaintiff's closing argument was based on the evidence and was proper rebuttal argument.

i. The evidence upon which the argument that the regulations were because of money and not safety was based on evidence that was admitted without objection.

Plaintiff's references to "pocketbook", "money", and "this should not have happened and it should never happen again" in closing argument were based on the evidence that the safety regulations were promulgated for the benefit of the promoter's pocketbook, and not for the boxer's safety. In closing, plaintiff's counsel argued: "What else do we hear from Mr. Lueckenhoff? It's about money. ... The only reason you heard in this cause as to why there wasn't is a matter of money. ... It's the worst kind of wrong because their conduct in this case was based upon their pocketbook, not somebody else's safety." (Tr. 1054 ln. 10-15).

Defense counsel argued and introduced evidence at trial that defendant should not be liable because it met the requirements of federal law and Missouri regulations pertaining to boxing and that these requirements were safe. (Tr. 1068-69). Mr. Lueckenhoff, in his direct testimony on behalf of defendant, testified that there was not a requirement to have an ambulance onsite. (Tr. 711). Mr. Lueckenhoff testified at trial that the reason the state regulation does not require

an ambulance onsite during boxing matches is because of the cost to promoters, and not out of considerations for safety for the boxer (Tr. 773-74; L.F. 250 at 21, 15-25) and that he was concerned the cost of requiring an ambulance at a boxing match would have driven the promoters out of business. (*Id.*). Because of these costs to the promoter of having to keep an ambulance onsite during a boxing match, he admitted that the regulations have not been updated. (*Id.*).

Plaintiff's counsel's reference to pocketbook and money were not made to seek punitive damages or to "send a message" but were proper rebuttal to defendant's evidence.

4. Plaintiff's closing argument in rebuttal was entirely proper in light of defendant's closing argument.

The theme pervading defendant's closing argument was that it was not necessary, nor a precaution ordinarily taken, to have an ambulance onsite during a boxing match, and therefore the absence of the ambulance onsite was not negligence. In particular, defense counsel claimed that "[i]n this case an ambulance was not required under state law. The promoter was not negligent. In this case there didn't need to be an ambulance there." (Tr. 1069 ln 20-24). She further stated that "federal law had spoken," and an ambulance was not required. (Tr. 1068 ln 25-1069). She referenced the following individuals for the proposition that an ambulance is not ordinarily at a boxing match:
Mr. Lueckenhoff, (Tr. 1071) officials from the state (Tr. 1071), individuals from the Adam's Mark, Marriott, Nassau Coliseum, the Days Inn, the Drury Inn, Long

Beach Convention And Arena, Savvis Center, Kiel Center, St. Louis Arena, or the old St. Louis Arena, the Forum in LA, the Hilton, the Hyatt, the Wyndham Hotel. (Tr. 1076 ln 1-11; Supp. L.F. 18-19). Finally, she argued, knowing that he was the expert in the *Novak* case, that Angelo Dundee agreed that an ambulance was not needed. (Tr. 1070). Furthermore, defense counsel claimed that Hartmann Productions was not allowed to go over the state's authority and have an ambulance, citing various witnesses. (Tr. 1069). She argued that boxing was not inherently dangerous because having an ambulance onsite was not a precaution that could have prevented harm, and therefore, defendant should not be liable. (Tr. 1074).

To counter defendant's claim that an ambulance is not a necessary precaution for boxing, it was proper rebuttal argument for plaintiff's counsel to direct the jury to the evidence that Mr. Columbo (the boxer injured in the *Novak* case), Angelo Dundee, and plaintiff had told defendant that it needs to have an ambulance onsite during a boxing match, and that a plaintiff's verdict regarding this matter would cause this defendant to listen and understand that it should have made sure that Hartmann Productions had an ambulance on-site during this boxing match. Indeed, even the argument that "[t]hey didn't listen in the last case. You know, Angelo Dundee testified in the last case and told them, 'You should have an ambulance' (Tr. 1091 ln 1-4) is proper rebuttal after defense counsel claimed that Angelo Dundee agreed that an ambulance is not necessary at a boxing match. If defense counsel can introduce evidence (as explained in Point IV) and argue in

closing that other hotels and promoters do not require nor ordinarily have ambulances onsite at boxing matches, and that this is not a necessary precaution that would prevent the substantial risk of harm inherent in boxing, it more than invites the fair rebuttal argument that defendant's Hotel has been sued before for not taking the adequate precaution of having an ambulance onsite for the peculiar risk of harm from a knockout. This is particularly proper considering the broad scope of argument that counsel is permitted to make in closing argument based on the evidence introduced at trial.

5. Plaintiff's counsel did not make an improper "send a message" argument.

Plaintiff's counsel did not make an improper punitive damages or "send a message" argument because: (1) the challenged remarks did not expressly request the jury to punish defendant Gateway Hotel or send a message to the boxing industry; (2) the challenged remarks were based on the evidence; and (3) the jury was instructed to base their award of compensatory damages on the evidence.

The challenged remarks in closing argument did "not expressly request the jury to punish" the defendant. *See, Dickerson,* 674 S.W.2d at 173 (argument not improper because no express request to punish). Rather, as demonstrated *supra*, the plaintiff "expressly limited his request for damages to an amount proven by the evidence." *Id.* (argument not improper because requested damages limited to evidence). If the argument referred to any potential deterrent effect, as the defendant charges, plaintiff limited his argument to the defendant's conduct and

not "others" generally. *Id.* (distinguishing *Smith v. Courter*, 531 S.W.2d 743, 745 (Mo. banc 1976). Furthermore, the remarks were either based on the evidence or entirely proper rebuttal argument.

Finally, in *Smith v. Courter,* the court held that a "send a message" argument was prejudicial because it was impossible to tell what part of the actual damages award included a punitive component. 531 S.W.2d at 747. This is not the case here because, as explained *supra,* the trial court determined that the jury had segregated the punitive damages award from the compensatory damages.

Accordingly, the trial court did not abuse its discretion by overruling Gateway's objections to plaintiff's closing arguments, and, therefore, Point V should be denied.

C. The trial court did not abuse its discretion by not allowing defendant's withdrawal instruction.

The decision of whether to give a withdrawal instruction under M.A.I. 34.02 is within the discretion of the trial court. M.A.I. 34.02, (1969), Committee Comments; *Stevens v. Craft*, 956 S.W.2d 351, 355 (Mo. App. E.D. 1997). An abuse of discretion occurs only when a trial court's ruling is clearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock one's sense of justice and indicate a lack of careful consideration. *Id.* "Ordinarily, it is not error to refuse a withdrawal instruction." *Soper v. Bopp*, 990 S.W.2d 147, 157 (Mo. App. S.D. 1999).

The trial court properly refused the withdrawal instruction as there was no punitive damages evidence to be withdrawn from the jury. The rejected instruction reads:

> The issue of punitive damages is withdrawn from the case and you are not to consider such issue in arriving at your verdict.

(L.F. 696).

Withdrawal instructions may be appropriate when "*evidence on an issue has been received*, but there is inadequate proof for submission of the issue to the jury; when *there is evidence presented* which might mislead the jury in its consideration of the case as pleaded and submitted; *when there is evidence presented* directed to an issue that is abandoned; or *when there is evidence* of such character that might easily raise a false issue." *Stevens*, 956 S.W.2d at 355 (internal citations omitted) (emphasis added).

In denying a withdrawal instruction, the trial court found that there was no evidence in the case which was relevant only to the issue of punitive damages. (Tr. 1038-39). In other words, the evidence which the jury heard all was relevant to issues in the case other than the punitive damages issue. Thus, there was no need for a withdrawal instruction.

Furthermore, after the jury submitted the question, "Are we prohibited from awarding compensatory and underlying punitive damages?" (T. 1092), the court re-emphasized the instructions that it had given the jury: "You must be guided by

the evidence as you remember it and the instructions given to you by the Court." (T. 1093). Gateway renewed its request for a withdrawal instruction on punitive damages. (*Id.*) After hearing further argument, the trial court again declined to give the withdrawal instructions, but did send the response that they were to be guided by the instructions. (*Id.*).

A withdrawal instruction may also be used to clarify what the jury may consider in awarding damages. *Stevens*, 956 S.W.2d at 355; M.A.I. 34.02, Committee Comment. However, any confusion this jury may have had about damages did not contaminate the compensatory damages award. Rather, the jury made a clear distinction between the punitive damages and compensatory damages. There is, therefore, no threat that the jury improperly considered the "punitive damage issue" in awarding the compensatory component. Accordingly, the trial court did not abuse its discretion in declining to give the withdrawal instruction, and the defendant suffered no prejudice as a result.

For the foregoing reasons, Point V of defendant's appeal should be denied.

VI. THE TRIAL COURT DID NOT ERR IN DENYING GATEWAY'S MOTION FOR NEW TRIAL BECAUSE THE VERDICT WAS SUPPORTED BY THE EVIDENCE AND WAS NOT EXCESSIVE.

A. A verdict is excessive and warrants reversal only when the defendant shows that trial error prejudiced the jury.

Once a jury has determined the award of damages, "the trial judge may find passion and prejudice from an excessive verdict." *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 872 (Mo. banc 1993). If the verdict is excessive due to passion and prejudice on the part of the jury, "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). "Such relief is only available upon a showing that trial error incited prejudice in the jury." *Id.*

1. Missouri law regarding whether a verdict for compensatory damages is excessive.

In determining whether a compensatory damages 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. *Hatch*, 990 S.W.2d at 141.

In applying these factors, the court in *Hatch* did not find a $5 million verdict for personal injuries excessive because the trial court was in the best position to evaluate the evidence regarding Hatch's injuries (injuries to his back, legs, and shoulders; couldn't play sports or interact with his four kids) and damages, and therefore, it determined that the verdict was not so grossly excessive as to shock the conscience. *Hatch*, 990 S.W.2d at 142. *See also*, *Giddens v. Kansas City Southern Ry. Co.*, 29 S.W.3d 813, 822 (Mo. banc 2000) (though the court stated that $1,520,000 for injured left hand was generous, particularly if the jury found Giddens to be contributorily at fault to a substantial degree, it was not so grossly excessive so as to shock the conscience of the court or cause the court to believe that the jury award was based on passion and prejudice rather than on the evidence). Likewise, in *Lopez v. Three Rivers Elec. Co-op., Inc.*, 92 S.W.3d 165, 171 (Mo. App. 2002), this Court held that the $11 million and $10 million verdicts were not so grossly excessive as to shock the conscience, noting in part the superior opportunity for the jury and the trial court to evaluate plaintiffs' damages.

2. A $13.7 million verdict is not so excessive for the injuries plaintiff sustained as to "shock the conscience."

The jury and trial court had the opportunity and the superior position to appraise the evidence of the plaintiff's injuries and damages. The compensatory

award was fully supported by the evidence. The jury heard the defendant's own expert's findings of Fernando Ibarra Maldonado's injuries and conditions:

> significant brain injury which will not get better; difficulty with concepts; headaches, defective vision in both eyes to the left; no feeling on his left side; numbness on the left side of body; poor leg control; poor memory; double vision; did not know the colors of Mexico's flag or the bird on it; falls asleep and fatigues easily; things told to him need to be repeated; slow thinking; poorly pronounced speech; in ability to remember 3 separate words; cannot understand 3 part commands; reduced motor function in hands and fingers; slow speech; often uses the wrong words; poor judgment; displays poor social judgment; weakness in his right lower face; difficulty moving tongue; left knee buckles when he stands up and buckles easily when standing; involuntary movements in his left side; left leg spastic and unstable; neurologic deficits entire left side; unable to manipulate objects in his left hand; difficulty performing and inability to perform thought tasks involving higher cerebral functions; poor motor control sensory discrimination; difficulty with abstract

> thinking; difficulty with perception; difficulty regulating his own behavior; poor attention, concentration, understanding, visualization and abstraction; instructions to him need to be continually repeated and reinforced; fatigues and falls asleep easily.

(Tr. 835; 799 ln 19-22).

At the time of the boxing match, plaintiff was 23-years-old with a wife and a daughter. (Tr. 675-676.). He was a professional boxer, who trained and ran every day. (Tr. 677-78). He fought in a professional boxing match that was nationally televised. Now both he and his young daughter are in the constant care of his parents. (Tr. 676). Plaintiff's expert testified that Fernando's mother explained that before it was like talking to a man, now he talks like "a little kid," "crazy", and "confused." (Tr. 441 ln 25-; 799 ln 19-22). Defendant's own expert explained that he could do "certain kinds" of farm work, but only with supervision. (Tr. 832 ln 8-13). Simply put, $13.7 million to compensate the loss of someone's ability to work, enjoy life and think rationally at the age of 23 is not excessive.

The jury assessed compensatory damages at $13.7 million based on plaintiff's evidence and the profound and permanent injuries suffered by plaintiff. (L.F. 698). As mentioned, the court of appeals held the verdict was not excessive. In fact, the court of appeals noted that the jury heard evidence that Maldonado, a

young athlete, age 23 at the time of match, who was sound physically and mentally, was severely and permanently injured, citing as evidence Gateway's own expert listing of various mental and physical disabilities found during his examination of plaintiff. (Slip Op. at 6). It further noted that "[t]he jury viewed Maldonado's video deposition and heard testimony from Maldonado's mother regarding his condition." (*Id.).* Notably, it emphasized that in denying Gateway's request for remittitur, the experienced trial judge found "that in light of the nature of plaintiff's injuries, the jury's verdict is not against the weight of the evidence." (*Id.).* Accordingly, the court of appeals, based upon its review of the record, properly deferred to the superior opportunity for the jury and trial court to appraise Maldonado's injuries and other damages. (*Id.)* (citing *Hatch*, 990 S.W.2d at 141).

B. The trial court found the verdict was not due to passion or prejudice, nor was it excessive.

In denying defendant's motion for remittitur, the trial court made the determination that "in light of **the nature of plaintiff's injuries**, the jury's verdict is not against the weight of the evidence." (L.F. 822) (emphasis added).

"A trial court has great discretion in approving the verdict or setting it aside as excessive" and appellate courts will not disturb that decision unless there has been an abuse of discretion either by the trial judge or the jury. *Callahan*, 863 S.W.2d at 872. The complaining party cannot direct the appellate court to the size of the verdict alone to show passion and prejudice by the jury. *Id.* Instead, he or she must show some other error was committed during the trial. *Id.* "Specifically,

appellant must show, first, that the verdict, when viewed in the light most favorable to the prevailing party, was 'glaringly unwarranted.'" *Id.*; *Tune v. Synergy Gas Corp.*, 883 S.W.2d 10, 21 (Mo. banc 1994) ("[t]o obtain relief on the basis of excessive verdict, the defendants must demonstrate that the verdict is glaringly unwarranted so as to shock the conscience of the court."). "Second, appellant must show trial error or misconduct by the prevailing party that was responsible for producing the passion or prejudice." *Id.*

The assessment of damages is primarily the function of the jury and each case must stand on its own facts. *Fust v. Francois*, 913 S.W.2d 38, 49 (Mo. App. 1995). The test applied by appellate courts is not fine-tuned and should not be; the appellate courts generally defer to the jury's decision as to the amount of damages. *Id.* This is as it should be because the determination of the amount of damages is a task that lay juries are particularly able to perform. *Id.*

As set forth in Point II, *supra*, the $13.7 million verdict was not excessive based on the injuries plaintiff suffered. Point VI of defendant's appeal should therefore be denied.

CONCLUSION

For the foregoing reasons, the trial court's judgment should be affirmed.

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned certifies that the foregoing Brief of Respondent 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 20,187, exclusive of the cover, signature block, and certificates of service and compliance.

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

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