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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DANIEL FLECK,)	
)	
Plaintiff-Appellee,)	
)	
v.)	Appeal from the Circuit Court of
)	Cook County.
W.E. O'NEIL CONSTRUCTION CO.,)	
)	
Defendant-Appellant,)	
)	
<hr/>		No. 10 L 12641
W.E. O'NEIL CONSTRUCTION CO.,)	
)	
Third-Party Plaintiff-Appellant,)	
)	
v.)	The Honorable
)	Clare Elizabeth McWilliams,
GLOBAL FIRE PROTECTION,)	Judge Presiding.
)	
Third-Party Defendant-Appellee and)	
Cross-Appellant.)	

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Lavin and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held:* jury verdict in construction negligence case against defendant general contractor affirmed where: defendant was not entitled to a judgment notwithstanding the verdict; the verdict was not against the manifest weight of the evidence; and the jury received appropriate instructions. Circuit court's decision to limit third-party defendant employer's liability in a third-party contribution action to the amount of workers' compensation benefits it paid to plaintiff affirmed where the indemnification provision included in the employer's subcontract did not amount to a waiver of the *Kotecki* damage cap.

¶ 2 Plaintiff Daniel Fleck filed a negligence action against defendant W.E. O'Neil Construction Company (O'Neil) seeking to recover damages for injuries that he sustained while working on a construction project. O'Neil, in turn, filed a third-party complaint for contribution against plaintiff's employer, Global Fire Protection (Global Fire). Following a jury trial, judgment was entered in favor of plaintiff and against defendant O'Neil and third-party defendant Global Fire. O'Neil and Global Fire both filed posttrial motions. The circuit court denied O'Neil's challenge to the verdict and granted Global Fire's motion to limit its liability to the amount of workers' compensation benefits it had paid to plaintiff. This appeal followed. For the reasons explained herein, we affirm the judgment of the circuit court.

¶ 3 **BACKGROUND**

¶ 4 **The Injury and Pleadings**

¶ 5 In 2009, a construction project (Project) was underway at the Metra Market located in the Ogilvie Transportation Center. Defendant O'Neil was the general contractor of the Project and had retained Global Fire to provide fire protection subcontracting services. Plaintiff, a union journeyman sprinkler fitter employed by Global Fire, was assigned to work on the Project. On April 27, 2009, during the course of his work on the Project, plaintiff suffered a significant back injury while he was attempting to manually install a large cast-iron dry pipe valve.

¶ 6 Following his injury, plaintiff filed a negligence action against O'Neil. In his complaint, plaintiff alleged that O'Neil retained control over the "means and methods by which" he

performed his work on the Project and "owed [him] a duty to provide a safe place to work and a duty to exercise ordinary care and caution for [his] safety." Plaintiff further alleged that O'Neil breached its duty of care "by committing one or more of the following negligent acts or omissions:

- a. Negligently and carelessly failed to provide Plaintiff with a safe place to work;
- b. Negligently and carelessly coordinated the work so as to create an unsafe work environment;
- c. Negligently and carelessly failed to provide Plaintiff with a hoist, winch, mechanical lift or other support which was proper and suitable for the tasks he was required to perform.
- d. Negligently and carelessly failed to properly supervise the work on the project;
- e. Negligently and carelessly failed to make a reasonable inspection of the jobsite and equipment being utilized thereon; and,
- f. Otherwise was negligent and careless in the operation of its business."

¶ 7 Plaintiff further alleged that "as a direct and proximate result of one or more of [O'Neil's] foregoing negligent acts or omissions, [he] was required to manually lift heavy construction equipment while working at the project referenced herein, causing severe and permanent injuries to his lumbar spine."

¶ 8 In its answer, O'Neil denied all material allegations of negligence and advanced a contributory negligence affirmative defense against plaintiff.

¶ 9 O'Neil also filed a third-party complaint for contribution against Global Fire. In its amended filing, O'Neil alleged that Global Fire owed a duty of care to plaintiff "to properly train,

properly supervise and to ensure a safe work environment for him." O'Neil further alleged that Global Fire breached its applicable duty of care when it:

- "a. Negligently and carelessly failed to provide Plaintiff with a safe place to work;
- b. Negligently and carelessly coordinated Plaintiff's work so as to create an unsafe work environment;
- c. Negligently and carelessly failed to provide Plaintiff with a hoist, winch, mechanical lift or other support which was proper and suitable for the task he was required to perform;
- d. Negligently and carelessly failed to properly supervise Plaintiff's installation work;
- e. Negligently and carelessly failed to make a reasonable inspection of Plaintiff's installation work for safety; and
- f. Otherwise was negligent and careless in the operation of its business."

¶ 10 Citing the Illinois Contribution Among Joint Tortfeasors Act (740 ILCS 100/1-5 (West 2008)), O'Neil alleged that in the event that a judgment was entered in favor of plaintiff, it was "entitled to recover from [Global Fire], by way of contribution such amounts as are commensurate with the degree of fault or misconduct attributable to [Global Fire] as a proximate cause of the Plaintiff's injuries and/or damages."

¶ 11 Global Fire, in turn, denied O'Neil's allegations of negligence. In addition, Global Fire invoked the *Kotecki* rule as an affirmative defense and argued that in the event that it was found negligent, its liability was limited to \$572,833.77, the amount of workers' compensation benefits that it had paid to plaintiff. Global Fire's affirmative defense was premised on the Illinois supreme court's seminal ruling in *Kotecki v. Cyclops Welding Corp.*, 146 Ill. 2d 155 (1991), in

which the court held that a third-party defendant employer's liability is limited to its statutory liability under the Illinois Workers' Compensation Act (820 ILCS 305/1 *et seq.* (West 2008)).

¶ 12 In response, O'Neil filed a motion to strike Global Fire's affirmative defense. In support of its motion to strike, O'Neil pointed to the indemnification provision included in Global Fire's subcontract, which called for Global Fire to assume responsibility for "any and all damage or injury" incurred by its employees on the jobsite and to indemnify O'Neil against "any and all loss, cost, expense, liability, damage or injury, including legal fees and disbursements" resulting from the injury. O'Neil argued that Global Fire waived its *Kotecki* damage cap defense by agreeing to the indemnification provision included in its subcontract.

¶ 13 After reviewing the parties' filings, the circuit court denied O'Neil's motion to strike Global Fire's *Kotecki* affirmative defense. In doing so, the court concluded that the language contained in the parties' indemnification agreement was insufficient to constitute a valid *Kotecki* waiver. As such, the court determined that "Global Fire's liability is limited [to] the amount of the workers' compensation."

¶ 14 The cause then proceeded to trial.

¶ 15 Trial

¶ 16 At trial, plaintiff testified that in 2005, he joined the sprinkler fitters union and commenced a five-year apprenticeship with Global Fire. During his apprenticeship, plaintiff received fieldwork training on wet and dry fire protection systems and safety training in accordance with the Occupational Safety and Health Act (OSHA). He testified that the job shared a lot of similarities with his previous job as a union painter, including "lifting, working on the lifts, working [o]n ceilings, [and] working on construction sites in general." He explained that hoists and winches were common types of equipment that he utilized as a painter and as a

sprinkler fitter to lift "heavy things." In the sprinkler fitting industry, those particular lifting mechanisms were commonly used to lift sprinkler pipes and valves.

¶ 17 Plaintiff testified he was assigned to work on the Project in 2008. Global Fire's role on the Project was to turn the existing dry fire protection system into a wet system. He testified that he worked alongside "a lot of other trades" on the site and that he and all of the other tradesmen were overseen by Paul Laketa, O'Neil's superintendent. Plaintiff testified that Laketa was on site "all the time" and coordinated and scheduled all of the different construction work involved in the Project. Laketa also oversaw construction safety at the Project. Plaintiff explained that O'Neil mandated that all tradesmen take part in a safety orientation and attend weekly "toolbox talk[s]" with their foremen as well as monthly safety meetings. O'Neil would also host regular luncheons to reward safe work habits. In addition, Laketa would regularly walk the job site and admonish the tradesmen to wear their hardhats and safety glasses and to change their positions on the lifts in an effort to promote a safe work environment.

¶ 18 Plaintiff testified that Laketa had the greatest amount of authority at the Project site. He explained that Laketa would dictate where he and other Global Fire employees worked and would direct them to move their materials and equipment to certain areas on the job site. Plaintiff testified that he never personally refused Laketa's orders and never saw any other tradesmen refuse to follow Laketa's orders. Although Laketa would control where and when plaintiff worked, Laketa did not dictate which materials that he would use; rather, the materials were left to the discretion of Global Fire. Laketa similarly did not dictate which tools plaintiff used or provide any instructions regarding the manner in which those tools were to be used.

¶ 19 Plaintiff testified that he sustained his back injury on the Project during the installation of a metal dry pipe valve on April 27, 2009, in a small engineer's room. He explained that although

Global Fire was converting the preexisting fire protection system from a dry system to a wet system, the engineer's room on the property was going to have a dry system because it was situated close to the loading dock. Given the temperature fluctuations in loading docks, wet systems cannot be utilized in such areas. Plaintiff testified that during the course of his employ as a union sprinkler fitter, it was common practice to drill into the ceiling in order to secure a hoist, winch or other lifting mechanism which could be used to raise pipe valves and other pieces of heavy materials and equipment. Plaintiff testified, however, that ceiling drilling was prohibited on the Project. Laketa would regularly walk the job site and would "remind[] everybody all the time that there was absolutely to be no drilling into the ceiling." Due to the prohibition on ceiling drilling, Global Fire was using scissor lifts on the Project to raise heavy materials and equipment. Initially, plaintiff and Maria Rosales, Global Fire's forewoman, tried to "get a scissor lift into the area" where the engineer's room was located; however, they determined that there was "no way" to get the lift over to the room. Plaintiff explained that another subcontractor, at O'Neil's direction, had just poured a concrete floor and that the lift could not be moved over to the engineer's room while the concrete was drying. He further explained that they could not wait for the concrete to dry because they were instructed to install the dry valve in the engineer's room that morning. As a result, the only option that they had was to manually lift the valve, which measured approximately 18 inches by 18 inches and weighed 110 pounds. Plaintiff admitted that he was a little concerned about manually lifting the valve but testified that he knew he had to "get [his] job done and keep everyone happy and keep the job moving." As a result, he and Maria worked together to manually lift the valve. When they did so, "something popped in [his] back" and "hurt real bad." They put the valve down and plaintiff

took some time to "work out the kink." Later that day, he and Rosales attempted to manually lift the valve again and they were successful.

¶ 20 Plaintiff testified that he was taught proper lifting technique during his safety training and that he was following the proper technique and "bending at the knees" when he hurt his back. Although plaintiff was able to successfully lift and install the dry valve on his second attempt, he continued to experience back pain and he realized later on that he "was really hurt." As a result, he reported his injury to his supervisors and Global Fire filed an accident report. Plaintiff was initially treated with muscle relaxants and physical therapy. He underwent physical therapy for approximately one year and received epidural spinal injections; however, he still experienced pain in his back. As a result, he underwent microdiscectomy surgery. When the surgery did not alleviate his back pain, plaintiff underwent a second surgical procedure: a spinal fusion. Although he obtained some relief, plaintiff testified that he has been unable to return to his job as a sprinkler fitter because his is not physically able to do so.

¶ 21 Plaintiff acknowledged that no one from O'Neil provided any instructions as to how he and Rosales were to lift the dry valve in the engineer's room. He also acknowledged that he did not seek out Laketa's advice regarding the lifting of the valve, but explained that it was because "there was no other way" to raise the valve other than by doing so manually. As a result, he did not raise any concerns that he had about manually lifting the valve with Laketa or anyone else from O'Neil.

¶ 22 Eric Thompson, another sprinkler fitter employed by Global Fire, testified that he was also assigned to work on the Project. He confirmed that O'Neil was the general contractor on the Project and had the most authority on the construction site. O'Neil coordinated and scheduled all of the various trades. Laketa, O'Neil's superintendent, was at the job site "on a daily basis" and

would provide Global Fire's foremen with daily instructions regarding "what was to be done, what areas were hot and needed to get done first and accomplished." Laketa would also change the schedule when something needed to "get done right away" and order Global Fire employees to redo work to his satisfaction. Thompson confirmed that Laketa also enforced safety regulations at the Project site.

¶ 23 Thompson testified that Global Fire employees followed Laketa's orders at the job site because the construction industry operates pursuant to a "hierarchy" and subcontractors must "do what [they're] told." Global Fire employees generally had the autonomy to determine "how" something should be installed; however, Laketa could make changes. Thompson clarified, however, that Laketa directed Global Fire employees not to use lifts on several occasions and prohibited Global Fire employees from conducting any drilling into the ceiling. Neither Laketa nor O'Neil, however, provided Global Fire employees with equipment.

¶ 24 Thompson testified that he installed a number of heavy valves during his tenure as a sprinkler fitter and that he never lifted them manually unless he had to because they are heavy and cumbersome to maneuver. Instead, he regularly utilized mechanical lifting devices to lift heavy pieces of material and equipment. Thompson testified that the Metra Project was unique because the sprinkler fitters were precluded from drilling into the ceiling to secure hoisting devices because the trains "went over" the concrete in the ceiling. Laketa regularly enforced the no ceiling drilling policy and told Global Fire employees on multiple occasions that they were not to drill into the ceiling.

¶ 25 Although he was not present at the time of plaintiff's injury, Thompson testified that he was familiar with the engineer's room in which the accident occurred. Given the restriction on drilling into the ceiling, he testified that plaintiff and Maria would not have been able to use a

hoisting device to lift the dry pipe valve. Moreover, given the small size of the room, a scissor lift would not have been a viable option to lift the valve either. Thompson acknowledged that journeymen are informed that they can refuse to perform unsafe work; however, he explained that they rarely do so. Instead, they "do what [their] foreman tells" them to do in order to "keep their job and keep on going." Thompson testified that he worked with plaintiff for several years and found him to be a skilled and safety conscious sprinkler fitter.

¶ 26 Ronald Berek testified that he was a superintendant for Global Fire during the course of the Project. As such, he coordinated the tools, equipment and manpower needed at the job site. He testified that he spoke to Laketa frequently about construction deadlines and the work Global Fire had contracted to provide; however, Berek was only at the job site "once a week" or "once every other week." Berek confirmed that Laketa had the most authority on the Project. He would tell Global Fire employees where to work and what to do. Berek also confirmed that the Project was unique in that Global Fire employees were prohibited from drilling in to the ceiling to secure chain falls and other lifting mechanisms. Given the prohibition against drilling into the ceiling, plaintiff was not able to use a hoisting device to install the dry valve in the engineer's room. In addition, Berek testified that plaintiff and Rosales would not have been able to utilize a mechanical scissor lift to install the dry pipe valve given the small size constraints of the room in which the valve installation was to occur.

¶ 27 Maria Rosales, Global Fire's foreman on the Project, testified that she was responsible for reading the blueprints and ensuring that the pipes were installed accurately. She estimated that she saw Laketa on the job site "occasionally every other day." She also attended "coordination meetings" that he led. Although Laketa coordinated the work, Rosales did not feel rushed to complete the work. She testified that Laketa never told her "how" to do her job, explaining that

Laketa's job was "to coordinate and make sure everybody was doing their job safely." Accordingly, Laketa never told Global Fire employees how to hang pipes because Global Fire's employees were "professionals" and "knew what to do." He simply told them where to hang the pipes. She clarified that Laketa did prevent them from doing any drilling into the ceiling; however, she claimed that the restriction was not unusual and did not make the job any more difficult. Rosales confirmed that the materials and equipment that Global Fire employees used on the Project were provided by Global Fire, not O'Neil.

¶ 28 Rosales testified that she prepared for the valve installation in the engineer's room the day before the installation was to occur. She borrowed a dolly from one of the other trades and used it to bring the valve into the room along with other tools needed to complete the job. Rosales testified that Global Fire did not have any chain falls for employees to use on the Project and that she never asked Global Fire to provide chain falls or other lifting devices. Rosales testified that she also never asked Laketa for any kind of lifting device because she "didn't work for Paul Laketa. [She] worked for Global Fire Protection." Global Fire did have "two gigantic lifts" at the job site; however, the lifts would not have fit into the small engineer's room in which she and plaintiff were to install the dry valve. Even if they could have gotten the lift into the room, it "would be in [their] way." Rosales testified, however, that it was not uncommon for sprinkler fitters to lift pipe valves manually. That morning, she told plaintiff that they needed to install the valve and that they needed to do it "[that] day because [they] needed to finish up." She suggested that they lift the valve "and put it on [a] bucket and roll it over" to the pipe stand. Plaintiff, however, suggested that they just pick it up and walk it over to the pipe stand. He did not mention obtaining a chain fall. When they both reached down to pick up the valve, plaintiff "took the brunt of the weight" and hurt his back.

¶ 29 Paul Laketa, O'Neil's superintendent on the Project, estimated that there were approximately 20 to 30 subcontractors in addition to various other personnel involved in the Project. He confirmed that he was responsible for scheduling and coordinating the work of the various subcontractors. In addition, he was responsible for enforcing the construction schedule and ensuring that the work performed by the tradesmen satisfied the Project's plans and specifications. Laketa testified, however, that the "means and methods" were left up the individual subcontractors because they were "trained in their specific discipline[s]" and were considered to be "experts" in their given field. Given his job responsibilities, he was on site every day and conversed with Global Fire employees "on a daily basis" regarding "what was transpiring on the job site." Because ceiling drilling was prohibited on the Project, Laketa made sure that "everybody was aware of it."

¶ 30 Laketa testified that O'Neil required Global Fire and all of the other subcontractors working on the Project to complete a safety orientation program and to submit their own safety policies to O'Neil for review. In addition, O'Neil had a safety officer who maintained a presence at the job site. Laketa acknowledged that he would also discuss safety matters with subcontractors and their employees and issue instructions if he saw someone engaging in an unsafe construction practice. He recalled instances in which he told workers to put on their hardhats and safety glasses and to attach safety chains while using mechanical lifts. On another occasion, he told a worker not to climb on pipes. He could not recall an instance where a worker refused his instructions. Laketa testified, however, that the individual subcontractors were responsible for ensuring that the means and methods that they utilized on the job site were safe.

¶ 31 David Soderman, a professional safety consultant, testified as Global Fire's retained safety expert. Based on his review of relevant contractual provisions, he opined that O'Neil was

"hired by the owner because of [O'Neil's] expertise in running a construction job, [and] they were given the control of the job site, as far as coordination of the work. They also were delegated the responsibility of safety on the site by the contract." Soderman further testified that there was a "hierarchy of control on the job site." He explained: "Global [Fire] was a contractor to O'Neil to perform their work. And O'Neil was in charge of the entire job site as far as scheduling, coordination of work, and safety." In accordance with its contractual requirements, Soderman opined that O'Neil exerted control at the jobsite through its superintendent Paul Laketa. Laketa not only scheduled and coordinated Global Fire's work, but he also "directed them in certain cases to reroute their piping, do it a different way." In addition, Laketa "discipline[d]" workers for safety violations.

¶ 32 Soderman testified that "every construction site has unique facets to it," and that one of the unique facets of the Project was the prohibition against conducting any drilling into the ceiling. This restriction, in effect, prevented plaintiff and other Global Fire employees from using "the material handling equipment that was custom and practice in [their] trade" to raise equipment and materials. As a result, "they couldn't raise their equipment up the proper way and avoid injuries." Rather, they were forced to lift heavy valves manually, which is not a safe construction custom or practice. Soderman opined that O'Neil violated its duty to provide Global Fire employees with a safe workplace free of recognized hazards. He testified that O'Neil "either should have known or did know the hazards that were involved in lifting this valve off of the floor from their experience on multiple jobs." Given that O'Neil coordinated and directed Global Fire's work, Soderman opined that O'Neil should have performed a job safety analysis to ensure that the valve in the engineer's room could be raised safely and that plaintiff did not have raise it manually.

¶ 33 John Lauhoff, a safety engineer and certified safety professional, testified as O'Neil's retained safety expert. With respect to the relevant contracts at issue, Lauhoff confirmed that O'Neil had the greatest authority on the jobsite and was contractually "responsible for overall site safety." As such, O'Neil expected that "the subcontractor employees would follow all of the rules that were given to them, as well as any instructions given to them by their supervisor in order to maintain a safe workplace." Although O'Neil was not contractually required to provide any subcontractors with equipment, Lauhoff testified that O'Neil would provide tradesmen with equipment if needed.

¶ 34 Lauhoff further testified that Global Fire, in its capacity as a subcontractor, was "responsible for all the means and methods" as to how the job was to be performed." Global Fire was also "responsible for the safety of all of [its] employees." Although Global Fire was responsible for the means and methods of sprinkler fitting, Lauhoff acknowledged that Laketa would instruct the subcontractors to change work on occasion. In addition, Laketa would order Global Fire to move equipment if he thought it interfered with the work of other tradesmen. There is no evidence that subcontractors failed to abide by Laketa's instructions.

¶ 35 With respect to the circumstances surrounding plaintiff's injury, Lauhoff opined that plaintiff "failed to follow the means and methods of the industry for the particular project he was doing" and "failed to request assistance for getting the proper equipment in order to position t[he] valve." Although plaintiff was precluded from drilling into the ceiling to secure a chain fall to lift the valve, Lauhoff testified that plaintiff could have secured a chain fall to one of the I-beams in the room with a beam clamp and used it to raise the valve. Because neither of the two I-beams in the room was located exactly where the valve would be installed, Lauhoff testified

that plaintiff and Rosales could have "swung" the valve into its proper location. The use of a clamped chain fall would have met safety standards and requirements.

¶ 36 Lauhoff further testified that O'Neil did not violate any safety or industry standards in connection with plaintiff's injury, explaining: "In order for O'Neil to have violated some standards, they would have had to been aware that the task was being performed and how it was being performed. [O'Neil] had no knowledge of that, so they were not in violation." Moreover, O'Neil did provide plaintiff with a safe job site. Lauhoff emphasized that O'Neil had all of the subcontractors undergo a safety orientation and employed a "safety person" that came by the site every few weeks. In addition, Laketa performed daily walkthroughs in which he would correct safety violations. Lauhoff testified that it was not O'Neil's responsibility to ensure that plaintiff had a safe hoisting device available to him when he was installing the dry pipe valve in the engineer's room.

¶ 37 After presenting the aforementioned testimony, the parties commenced closing arguments. The jury then received a series of relevant instructions. After engaging in deliberations, the jury returned with a verdict in favor of plaintiff. The jury found that plaintiff incurred a total of \$2,375,394 in damages and attributed the fault of the parties as follows: "[Plaintiff], 15 percent; W.E. O'Neil, 35 percent; Global Fire, 50 percent." Given plaintiff's degree of fault, the jury reduced his recoverable damages to \$2,019,084.

¶ 38 O'Neil and Global Fire both filed posttrial motions. O'Neil's motion challenging the jury's verdict and its allocation of fault was denied. Global Fire's motion to limit its liability to \$572,833.77, the sum of the workers' compensation benefits that it had paid to plaintiff, however, was granted. This appeal followed.

¶ 39

ANALYSIS

¶ 40 Section 414 Liability

¶ 41 On appeal, O'Neil first challenges the circuit court's denial of its motion for a judgment notwithstanding the verdict. O'Neil argues that a judgment notwithstanding the verdict is warranted because "the evidence failed to establish it was directly or vicariously liable for [Global Fire's] negligence under principles of construction negligence."

¶ 42 Plaintiff responds that the circuit court properly denied O'Neil's motion for a judgment notwithstanding the verdict because the evidence established that O'Neil exercised sufficient control over job site safety as well as Global Fire's subcontracting work to subject it to liability under section 414 of the Restatement (Second) of Torts.

¶ 43 A motion for a judgment notwithstanding the verdict should only be granted in limited circumstances, such as when "all the evidence, when viewed in the light most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based upon that evidence could ever stand." *Pedrick v. Peoria Eastern Railroad Co.*, 37 Ill. 2d 494, 504 (1967). When reviewing a ruling on a motion for a judgment notwithstanding the verdict, a reviewing court will not reweigh the evidence or evaluate the credibility of the witnesses, as these functions are within the unique province of the jury. *Board of Trustees of Community College District No. 508 v. Coopers & Lybrand*, 208 Ill. 2d 259, 274 (2003); *Drakeford v. University of Chicago Hospitals*, 2013 IL App (1st) 111366, ¶ 7. Ultimately, the standard for entry of a judgment notwithstanding the verdict is " 'high,' " (*York v. Rush-Presbyterian- St. Luke's Medical Center*, 222 Ill. 2d 147, 178 (2006) (quoting *Pasquale v. Speed Products Engineering*, 166 Ill. 2d 337, 351 (1995)) and is "limited to 'extreme situations only' " (*Knauerhaze v. Nelson*, 361 Ill. App. 3d 538, 548 (2005) (quoting *Jones v. Chicago Osteopathic Hospital*, 316 Ill. App. 3d 1121, 1125 (2000)). Indeed, a motion for a judgment notwithstanding the verdict may not be granted simply

because a verdict is against the manifest weight of the evidence. *Maple v. Gustafson*, 151 Ill. 2d 445, 454 (1992)). A judgment notwithstanding the verdict is also not appropriate "if there is any evidence, together with reasonable inferences to be drawn therefrom, demonstrating a significant factual dispute, or where the assessment of credibility of the witnesses or the determination regarding conflicting evidence is decisive to the outcome." *Id.* In addition, a judgment notwithstanding the verdict is "not appropriate if 'reasonable minds might differ as to the inferences or conclusions to be drawn from the facts presented.'" *Ramirez v. FCL Builders, Inc.*, 2013 IL App (1st) 123663, ¶ 116 (quoting *Pasquale*, 166 Ill. 2d at 351). When reviewing a circuit court's ruling on a motion for judgment notwithstanding the verdict, the evidence must be considered in the light most favorable to the party opposing the motion. *Thacker v. UNR Industries*, 151 Ill. 2d 343, 353-54 (1992); *Ramirez*, 2013 IL App (1st) 123663, ¶ 116. A motion for a judgment notwithstanding the verdict presents a question of law as to whether there was a complete failure to substantiate a key element of the plaintiff's case, and as such, the circuit court's ruling on such a motion is subject to *de novo* review. *York*, 222 Ill. 2d at 178; *McDonald v. Northeast Regional Commuter R.R. Corp.*, 2013 IL App (1st) 102766, ¶ 20.

¶ 44 To prevail on a negligence action, the plaintiff must establish that the defendant owed him a duty of care, breached that duty, and that the defendant's breach of that duty proximately caused his injury. *Lee v. Six Flags Theme Parks*, 2014 IL App (1st) 130771, ¶ 65; *Ramirez*, 2014 IL App (1st) 123663, ¶ 118. As a general rule, one who entrusts work to an independent contractor will not be held liable for the acts and omissions of that independent contractor. *Madden v. Paschen*, 395 Ill. App. 3d 362, 380 (2009); *Calderon v. Residential Homes of America, Inc.*, 381 Ill. App. 3d 333, 340 (2008). The rationale behind this rule is that the "principal generally does not supervise the details of the independent contractor's work and, as a

result, is not in a good position to prevent negligent performance." *Pestka v. Town of Fort Sheridan Co.*, 371 Ill. App. 3d 286, 200 (2007); see also *Martens v. MCL Construction Corp.*, 347 Ill. App. 3d 303, 313 (2004). Section 414 of the Restatement, however, sets forth the "retained control" exception to this general rule. Restatement (Second) of Torts § 414, at 387 (1965). This provision, which has been adopted in Illinois (*Fonseca v. Clark Construction Group, LLC.*, 2014 IL App (1st) 130308, ¶ 26; *Cochran v. George Sollitt Construction Co.*, 358 Ill. App. 3d 865, 871 (2005); *Rangel v. Brookhaven Constructors, Inc.*, 307 Ill. App. 3d 835, 838 (1999)), provides as follows:

"One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care. Restatement (Second) of Torts § 414, at 387 (1965).

¶ 45 The comments that accompany this Restatement provision provide some illumination as to the necessary degree of control a defendant general contractor must exercise to be subject to liability. *Lee*, 2014 IL App (1st) 130771, ¶ 66; *Calderon*, 381 Ill. App. 3d at 341. Comment *a*, provides, in pertinent part as follows:

"If the employer of an independent contractor retains control over the operative detail of doing any part of the work, he is subject to liability for the negligence of the employees of the contractor engaged herein, under the rules of that part of the law of Agency which deals with the relation of master and servant. The employer, may however, retain a control less than that which is necessary to subject him to liability as master. He may retain only the power to direct the order in which the work shall be done,

or to forbid its being done in a manner likely to be dangerous to himself for others. Such a supervisory control may not subject him to liability under the principles of Agency, but he may be liable under the rule stated in this Section unless he exercises his supervisory control with reasonable care so as to prevent the work which he has ordered to be done from causing injury to others." Restatement (Second) of Torts § 414, Comment *a*, at 387 (1965).

¶ 46 Comment *a* thus distinguishes between vicarious and direct liability and clarifies that a "general contractor, by retaining control over the over the operative details of its subcontractor's work, may become vicariously liable for the subcontractor's negligence; alternatively, even in the absence of such control the general contractor may be directly liable for not exercising his supervisory control with reasonable care." *Cochran*, 358 Ill. App. 3d at 874. Comment *b*, in turn, provides further detail regarding the theory of direct liability described in Comment *a*. *Lee*, 2014 IL App (1st) 130771, ¶ 68; *Calderon*, 381 Ill. App. 3d at 341. Comment *b* provides as follows:

"The rule in this Section is usually, though not exclusively, applicable when a principal contractor entrusts a part of the work to subcontractors, but himself or through a foreman superintends the entire job. In such a situation, the principal contractor is subject to liability if he fails to prevent the subcontractors from doing even the details of the work in a way unreasonably dangerous to others, if he knows or by the exercise of reasonable care should know that the subcontractor's work is being so done, and has the opportunity to prevent it by exercising the power of control which he has retained in himself. So too, he is subject to liability if he knows or should know that the subcontractors have carelessly done their work in such a way as to create a dangerous

condition, and fails to exercise reasonable care either to remedy it himself or by the exercise of his control cause the subcontractor to do so." Restatement (Second) of Torts § 414, Comment *b*, at 387 (1965).

¶ 47 Comment *c*, on the other hand, describes the necessary degree of retained control a general contractor must exercise in order to be subject to vicarious liability. *Lee*, 2014 IL App (1st) 130771, ¶ 69; *Calderon*, 381 Ill. App. 3d at 342. Comment *c* provides:

"In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to the methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way." Restatement (Second) of Torts § 414, Comment *c*, at 387 (1965).

¶ 48 Thus, whether a duty of care exists under section 414 of the Restatement ultimately "turns on" whether the defendant general contractor controlled the work of the subcontractor in such a manner that it should be subject to liability. *Ramirez*, 2014 IL App (1st) 123663, ¶ 122; see also *Gregory v. Beazer East*, 384 Ill App 3d 178, 186 (2008) (recognizing that section 414 "renders the retention of control key in imposing liability"); *Martens*, 347 Ill. App. 3d at 318 ("The central issue is retained control, whether contractual, supervisory, operational[], or some mix thereof"). In this case, O'Neil maintains that the evidence failed to establish that it retained

the necessary degree of control to be subject to vicarious or direct liability under section 414 of the Restatement. We will address each of O'Neil's arguments in turn.

¶ 49

1. Vicarious Liability

¶ 50

O'Neil argues that it did not exercise contractual or actual control over the operative details of plaintiff's work and as a result, there is no evidence upon which to support a finding of vicarious liability. In support, O'Neil points to several provisions contained in Global Fire's subcontract. Article I of the subcontract contained the following language: "Contractor and the Subcontractor have an independent contractor status in relation to each other. As an expert in its field of work, the Subcontractor has sole control over the mean and methods by which the work is to be done, including all requirements for doing the work safely, and the Contractor is not in charge of the construction means and methods, or the safety of the work." That Article also provided that the "Subcontractor shall furnish all labor and all materials *** and all other things necessary to perform the Work set forth in the plans and specifications." Regarding workplace safety, O'Neil's contract with the owner provided that it was responsible for overall workplace safety; however, Article II of Global Fire's subcontract mandated that "[T]he Subcontractor shall perform the Work and his obligations under this Agreement in accordance with and subject to each of the provisions of the Principal Contract to the full extent that such provision is applicable to the Work." As a result, Global Fire was contractually obligated to fulfill its subcontracting duties in a safe manner.

¶ 51

O'Neil is correct that "the best indication of whether a contractor has retained control over the subcontractor's work is the parties' contract, if one exists," (*Joyce v. Mastri*, 371 Ill. App. 3d 64, 73 (2007)); however, contractual provisions are not dispositive where they conflict with actual practice. See, e.g., *Wilkerson v. Paul H. Schwendener, Inc.*, 379 Ill. App. 3d 491,

497 (2008); *Bokodi v. Foster Wheeler Robbins, Inc.*, 312 Ill. App. 3d 1051, 1063 (2000).

Although the aforementioned contractual provisions purport to make Global Fire solely responsible for the means and methods employed to complete its work as well as over the safety of its work, the testimony presented at trial established that O'Neil went to great lengths to control the safety standards at the worksite as well as the means and methods that Global Fire utilized to complete its work on the Project.

¶ 52 Plaintiff, Thompson and Berek each testified that O'Neil had the most authority on the Project and that its superintendent, Paul Laketa, maintained a daily presence at the job site. With respect to Project safety, O'Neil required all of the tradesmen employed by the various subcontractors to attend a safety orientation program. Although O'Neil required each of the subcontractors to establish their own safety policies, Laketa testified that each of the policies had to be submitted to O'Neil for approval. Laketa also testified that O'Neil also employed a safety officer who maintained a presence at the Project site. In addition, Laketa, himself would actively inspect the site for safety issues. During those inspections, he would discuss safety matters with the tradesmen and would stop work and issue instructions if he saw anyone engaging in an unsafe construction practice. Laketa specifically recalled instances in which he directed workers to put on hardhats and safety goggles and to attach safety chains while utilizing mechanical lifts. He also admonished a worker not to climb on pipes and ordered another to remove an unsafe ladder from the jobsite. Contrary to O'Neil's claim that subcontractors were entirely responsible for ensuring the safety of their own workers, it is thus apparent from the record that O'Neil went to great lengths to control safety standards at the work site. See, *e.g.*, *Bokodi*, 312 Ill. App. 3d at 1063 (recognizing that section 414 liability may be imposed on a general contractor that employed a full-time safety manager to ensure compliance with safety measures, exercised

discretionary authority to stop work if being done in an unsafe manner, and "went to great lengths to control the safety standards at the work site").

¶ 53 O'Neil, however, insists that it merely retained a general right of supervision and that it left the means and methods of the work to the individual subcontractors. Although Laketa testified that he was primarily responsible for scheduling and coordinating the work of the various subcontractors and that he left the means and methods of the work to the individual subcontractors, there is no dispute that O'Neil prohibited Global Fire and all of the other subcontractors from drilling into the ceiling to secure lifting mechanisms. There is similarly no dispute that this prohibition was regularly enforced by Laketa. Global Fire's safety expert, David Soderman, testified that this restriction was a "unique facet" of the Project, which had the effect of preventing plaintiff and other Global Fire employees from using chain falls and other lifting mechanisms that were commonly utilized in the sprinkler fitting field to raise heavy equipment and materials. Given this prohibition, the jury could have reasonably concluded that Global Fire's employees were not free to perform work in their own way on the Project site and that O'Neil retained the requisite degree of control over the operative details of Global Fire's work to give rise to a finding of section 414 vicarious liability. See, e.g., *Ramirez*, 2014 IL App (1st) 123663, ¶ 143 (concluding that the circuit court correctly denied the defendant general contractor's motion for a judgment notwithstanding the verdict where the general contractor prohibited subcontractors from using all-terrain vehicles on the job site to move materials because this was evidence that the general contractor exerted the requisite control over the means and methods employed by the subcontractor to support a vicarious liability finding).

¶ 54

Direct Liability

¶ 55 O'Neil, however, also argues that there is no evidence to support a finding that it was directly liable for plaintiff's injuries under section 414. Specifically, O'Neil argues that there is no evidence that it knew or should have known that defendant would have attempted to manually install the dry pipe valve in the engineer's room. As set forth above, a "general contractor may be directly liable for not exercising his supervisory control with reasonable care." *Cochran*, 358 Ill. App. 3d at 874. "The general contractor's knowledge, actual or constructive, of the unsafe work methods or a dangerous condition is a precondition to direct liability." *Id.* at 879-80. In this case, there is no dispute that Laketa coordinated and scheduled the work of the various subcontractors. Given Laketa's thorough daily monitoring of the job site and his enforcement of the prohibition against any ceiling drilling, the jury could have determined that he knew or should have known the problems posed by the installation of the dry valve in the engineer's room. See, *e.g.*, *Bokodi*, 312 Ill. App. 3d at 1063 (concluding that general contractor and its subsidiaries should have known about the "dangerous hoisting method" employed by the plaintiff given "the fact that defendants were constantly monitoring the work site"). Moreover, given Laketa's enforcement of Project specifications, the jury could have also concluded that he was aware or should have been aware of the size constraints of the engineer's room and that the use of a mechanical scissor lift would not have been feasible to raise the dry pipe valve into place. Although O'Neil suggests that plaintiff could have used a beam clamp to secure a chain fall to an I-beam in the engineer's room and "swung" the 110-pound valve into place, there is no evidence that plaintiff or any other Global Fire employee ever employed such a tactic; rather, evidence established that standard practice used by sprinkler fitters to raise heavy equipment and materials was to secure a hoisting device by drilling into the ceiling or using a mechanical lift. Based on the record, the jury could have reasonably concluded that O'Neil would have been aware that the

restrictions that it enforced on the Project would have necessitated the manual installation of the dry pipe valve. See, e.g., *Ramirez*, 2014 IL App (1st) 123663, ¶ 154 (concluding that the circuit court properly denied the defendant general contractor's motion for a judgment notwithstanding the verdict on the issue of direct liability where the jury could have inferred that the general contractor would have been aware that its prohibition against the use of mechanical means to move materials on the job site would have led tradesmen to utilize unsafe manual methods to move the materials they needed to complete their job).

¶ 56 Applying the standard of review applicable to the denial of a judgment notwithstanding the verdict, we are unable to conclude that the jury's verdict is unfounded or that the evidence so overwhelmingly favors O'Neil that its verdict cannot stand. As such, we conclude that the circuit court properly denied O'Neil's motion for a judgment notwithstanding the verdict.

¶ 57 We similarly reject O'Neil's alternative argument that the jury's verdict is against the manifest weight of the evidence. As the trier of fact, it is the jury's role to weigh the evidence, make credibility determinations, and to resolve conflicts in expert testimony. *York*, 222 Ill. 2d at 179; *McHale v. W.D. Trucking, Inc.*, 2015 IL App (1st) 132625, ¶ 60. In a negligence action, it is also the role of the trier of fact to determine the relative allocation of fault between the parties. *Merca v. Rhodes*, 2011 IL App (1st) 102234, ¶ 45. When reviewing a jury verdict, a reviewing court may not substitute its judgment for that of the trier of fact and will not that disturb the verdict unless it is against the manifest weight of the evidence. *Snelson v. Kamm*, 204 Ill. 2d 1, 34 (2003). A verdict is against the manifest weight of the evidence only where the opposite conclusion is clearly apparent or where the jury's findings appear to be unreasonable, arbitrary and not based on the evidence. *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 38; *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 106 (1995).

¶ 58 As set forth above, there was sufficient evidence to support the jury's verdict in favor of plaintiff in this construction negligence action. The jury heard a plethora of evidence about the roles of the parties and their course of performance leading up to plaintiff's accident. The jury heard details about O'Neil's and Global Fire's contractual responsibilities and their conduct on the Project site. The record established that O'Neil, through Laketa, enforced the strict no ceiling drilling policy and carefully coordinated and supervised the work of the various subcontractors. Laketa also carefully monitored jobsite safety and corrected any safety violations that he observed during his daily monitoring of the Project site. After hearing the aforementioned evidence, the jury assessed Global Fire's fault to be 50%, O'Neil's fault to be 35% and plaintiff's fault to be 15%. Given the record, the jury's verdict and its allocation of fault cannot be deemed unreasonable, arbitrary, or not based on the evidence. Therefore, we reject O'Neil's claim that the verdict is against the manifest weight of the evidence.

¶ 59 **Jury Instruction**

¶ 60 O'Neil next argues that the circuit court erred when it declined to provide the jury with the instruction that it tendered regarding general contractor liability. O'Neil argues that the instruction that the circuit court provided in its place contained an "incomplete statement of law." Given that the jury received an incomplete instruction regarding the central issue in the case, O'Neil argues that a new trial is warranted.

¶ 61 Plaintiff responds that the circuit court properly rejected O'Neil's proposed jury instruction and provided the jury with an instruction that correctly conveyed the law regarding a general contractor's duty of care pursuant to common law negligence and section 414 of the Restatement.

¶ 62 The purpose of jury instructions is to convey to the jury the correct principles of law applicable to the submitted evidence. *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 507 (2002). In accordance with the directives of Illinois Supreme Court rule 239(a), the circuit court "shall" instruct the jury with an Illinois Pattern Instruction (IPI) when it is "applicable in a civil case, giving due consideration to the facts and the prevailing law, *** unless the court determines that it does not accurately state the law." Ill. S. Ct. R. 239(a) (eff. Jan. 1, 1999). In the event that the circuit court determines that an IPI instruction does not accurately state the law, a non-IPI instruction may be used in its stead. *Schultz v. Northeast Regional Commuter R.R. Corp.*, 201 Ill. 2d 260, 273 (2002); *Ramirez*, 2014 IL App (1st) 123663, ¶ 163. Generally, a circuit court's decision concerning whether or not to provide a particular instruction is reviewed for an abuse of discretion; however, the issue of whether a particular jury instruction accurately conveys the applicable law is subject to *de novo* review. *Studt v. Sherman Health Systems*, 2011 IL 108182, ¶ 13. Ultimately, even if the circuit court errs and provides the jury with an improper instruction, the error does not require reversal unless a reviewing court can conclude that the error seriously prejudiced the appellant and resulted in an unfair trial. *Studt*, 2011 IL 108182, ¶ 13; *Ramirez*, 2014 IL App (1st) 123663, ¶ 164.

¶ 63 IPI Civil No. 55.01 pertains to general contractor liability, and provides as follows: "A contractor who entrusts work to a subcontractor can be liable for injuries resulting from the work if the contractor retains some control over the safety of the work and if the injuries were proximately caused by the contractor's failure to exercise that control with ordinary care." Illinois Pattern Jury Instruction, Civil No. 55.01 (2011). In *Ramirez v. FCL Builders, Inc.*, 2014 IL App (1st) 123663, this court found that IPI Civil No. 55.01 did not contain an accurate statement of law. *Id.* at ¶¶ 165-172. We reasoned:

"[T]he pattern instruction requires the contractor to have retained control over safety in order to be liable. Section 414, however, applies to '[o]ne who entrusts work to an independent contractor, but who retains *the* control of any part of the work.' (Emphasis added.) Restatement (Second) of Torts § 414 (1965). *** [S]ince the jury is not instructed as to the amount of control required, a jury could easily find that minimal control over safety is sufficient to hold a contractor liable. Thus, it is evident that IPI Civil (2011) No. 55.01 encompasses conduct that would not give rise to liability under Section 414." *Id.* at ¶ 168.

¶ 64 Recognizing that IPI Civil 55.01 did not contain an accurate statement of law, plaintiff and O'Neil both provided the circuit court with modified versions of the instruction to provide to the jury. The circuit court, however, rejected the versions proffered by the parties and elected to instruct the jury with its own modified version of IPI Civil 55.01. Accordingly, the jury was instructed, in pertinent part, as follows:

"A general contractor who entrusts work to a subcontractor can be liable for injuries resulting from the work if that general contractor retained sufficient control over the operative details and the means and methods of the work such that the subcontractor's employee was not free to do his work in his own way and the injuries were proximately caused by the general contractor's failure to exercise that control with ordinary care."

¶ 65 O'Neil, however, argues that the instruction that the circuit court elected to provide to the jury was incomplete as it did not specify the threshold of control that a general contractor must exercise in order to be subject to liability under section 414 of the Restatement. O'Neil maintains that the court should have included additional language from Comment *c* of the Restatement in

its instruction, which provides the requisite clarification. O'Neil's proposed modified instruction contained the following additional language:

"It is not enough that the general contractor has merely a general right of control such as the rights to order the work stopped or resumed, to inspect the progress of the work, to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alteration or deviations to the plans. Such a general right is usually reserved to employers, but it does not mean the subcontractor's employee is controlled as to the methods of work or the operative details of work."

¶ 66 On review, we cannot agree that the circuit court abused its discretion in denying O'Neil's request to provide the aforementioned "clarification." The instruction that the circuit court tendered to the jury accurately conveyed the applicable law regarding a general contractor's liability pursuant to section 414 of the Restatement. The crux of the retained control exception discussed in Comment *c* is that the subcontractor's employee was not free to perform the work in his own way. The court's instruction properly informed the jury that O'Neil could not be found liable unless it exerted sufficient control over "operative details and the means and methods of the work such that [plaintiff] was not free to do his work in his own way." Although the additional language that O'Neil proposed is accurate, we do not find that its inclusion was essential for the jury to properly understand or apply the retained control exception.

¶ 67 Assuming *arguendo* that the circuit court erred in denying O'Neil's request to include additional explanatory language in its instruction, we find the purported error harmless. See *Ramirez*, 2014 IL App (1st) 123663, ¶ 173 (recognizing that the inclusion of an erroneous general contractor liability instruction in a construction negligence case does not mandate reversal unless it can be determined that the error seriously prejudiced the appellant). As this

court has previously held, there was sufficient evidence for the jury to conclude that O'Neil was both vicariously and directly liable under section 414 of the Restatement. Based upon the testimony presented at trial, there was more than enough evidence to support a finding that O'Neil exerted the requisite degree of control over the operative details of Global Fire's work as well as Project safety to subject O'Neil to section 414 liability. Thus, even if a jury instruction error was made, we are unpersuaded that it had any impact on the trial result. See, e.g., *Ramirez*, 2014 IL App (1st) 123663, ¶ 174 (concluding that the trial court's error concerning IPI Civil No. 50.01 was harmless where "there was sufficient evidence for the jury to conclude that defendant [general contractor] was liable under section 414, both vicariously and directly").

¶ 68 Third-Party Contribution Action

¶ 69 O'Neil next challenges the circuit court's rulings in its third-party claim for contribution. Specifically, O'Neil argues that the circuit court erred in denying its motion to strike Global Fire's *Kotecki* defense. O'Neil contends that Global Fire waived its *Kotecki* defense when it agreed to the inclusion of an indemnification provision in its subcontract.

¶ 70 Global Fire initially responds that this court lacks jurisdiction to resolve this matter because the circuit court initially failed to enter a final order resolving O'Neil's third-party action after the jury returned with its verdict. On the merits, Global Fire contends that the circuit court properly found that the language contained in the parties' indemnification provision lacked the requisite specificity to constitute a *Kotecki* cap waiver.

¶ 71 1. Jurisdiction

¶ 72 As a threshold matter, we first address Global Fire's jurisdictional challenge. In order to do so, we will provide a brief recounting of the underlying circuit court proceedings. In this

case, on September 23, 2014, after the jury returned with its verdict in favor of plaintiff and against both O'Neil and Global Fire, the circuit court entered the following written judgment:

"This cause coming to be heard on verdict at the conclusion of trial. It is hereby ordered: That judgment is awarded the Plaintiff, Daniel Fleck in the amount of \$2,019,084 (two million nineteen thousand eighty four & 0/100) plus recoverable costs."

¶ 73 Thereafter, plaintiff filed a motion to amend the judgment order, which the circuit court granted. The amended order contained the following language:

"That in accordance with the Jury's verdict, the judgment order dated September 23, 2014 is amended *nunc pro tunc* to reflect that judgment is entered in favor of Plaintiff, DANIEL FLECK, and against the Defendant, W.E. O'NEIL CONSTRUCTION COMPANY, INC., in the amount of \$2,019,084 (two million nineteen thousand eighty four & 0/100), plus recoverable costs. It is further ordered that Verdict Form A is attached thereto and incorporated herein without further notice."

¶ 74 Neither the original nor amended written judgment referenced Global Fire or resolved O'Neil's third-party action against Global Fire. Various posttrial motions were litigated and decided. Notwithstanding the lack of final order resolving the third-party action, O'Neil filed a notice of appeal on April 16, 2015, seeking to challenge the jury's verdict in favor of plaintiff as well as Global Fire's third-party contribution liability. Global Fire, in turn, filed a motion to dismiss O'Neil's appeal for lack of jurisdiction. In support of its motion, Global Fire observed that the circuit court had not entered a final judgment with respect to the third-party action. In response, this court entered the following order:

"The Motion to Dismiss is entered and continued. This matter is remanded to the circuit court for the limited purpose of the entry of a final judgment order with regard to

the Third-Party Defendant by September 9, 2015. Leave is granted to file said order directly with the clerk of the Appellate Court."

¶ 75 On August 25, 2015, in accordance with this court's order, the circuit court entered the following judgment order resolving O'Neil's third-party contribution action against Global Fire:

"Judgment is entered in favor of O'Neil and against Global [Fire], and such judgment is entered in the amount, over O'Neil's objection, of workers compensation benefits paid to plaintiff in the amount of \$572,833.77, pursuant to Global [Fire's] *Kotecki* affirmative defense."

¶ 76 O'Neil filed a notice of appeal the next day. Upon the entry of the circuit court's final order, this court then denied Global Fire's motion to dismiss O'Neil's third-party contribution action appeal. Global Fire, however, argues that the circuit court was divested of jurisdiction when O'Neil filed its initial notice of appeal and that this court's order instructing the circuit court to enter a final order was of no consequence. We disagree. The entry of a final judgment *and* the filing of a timely notice of appeal are necessary prerequisites to divest the circuit court of jurisdiction and confer jurisdiction on the appellate court. See Ill. S. Ct. R. 303(a)(1) (eff. June 4, 2008) (mandating that a notice of appeal must be filed "within 30 days after the entry of the *final judgment* appealed from") (Emphasis added.); see also *In re Estate of Carlen*, 2015 IL App (5th) 130599, ¶ 16 (quoting *Baldassone v. Gorzelanczyk*, 282 Ill. App. 3d 330, 333 (1996) ("Appellate court jurisdiction is limited to reviewing a final judgment, which terminates the litigation and disposes of the parties' rights on either the entire controversy or some definite and separate part of it' "). In this case, the circuit court did not initially enter a final judgment resolving O'Neil's third-party action. Accordingly, when O'Neil filed its first notice of appeal on April 16, 2015, there was no final judgment in that action in which to appeal. The filing of the

notice of appeal was thus premature and did not operate to divest the circuit court of jurisdiction or bestow jurisdiction on this court. See *In re Marriage of Guadio*, 368 Ill. App. 3d 153, 158 (2006) ("A premature notice of appeal does not confer jurisdiction on the appellate court.") Rather, the circuit court retained jurisdiction over the third-party action when it entered its final judgment on August 25, 2015, at this court's direction. O'Neil filed a new notice of appeal with respect to the third-party action the following day, thereby providing this court with jurisdiction to review its claim. Global Fire fails to provide this court with any controlling legal authority to the contrary. Having found that there is no jurisdictional bar, we will review O'Neil's challenge to Global Fire's affirmative defense.

¶ 77

2. *Kotecki* Waiver

¶ 78

In *Kotecki*, our supreme court was called upon to strike a balance between the competing interests reflected in the Illinois Workers' Compensation Act (820 ILCS 305/1 *et seq.* (West 2008)) and the Illinois Joint Tortfeasor Contribution Act (Contribution Act) (740 ILCS 100 *et seq.* (West 2008)). Under the Workers' Compensation Act, an employer was given the opportunity to waive any common law defenses in a negligence action brought by an injured employee, including the employee's own contributory negligence, in exchange for limited liability. 820 ILCS 305/5, 11 (West 2008); *Virginia Surety Co. v. Northern Insurance Company of New York*, 224 Ill. 2d 550, 557 (2007). The limited liability that employers enjoyed under the Workers' Compensation Act, however, was threatened by the Contribution Act, the purpose of which was to require that each party whose fault contributes to an injury pay its *pro rata* share of the common shared liability. 740 ILCS 100/2, 3 (West 2008); *Virginia Surety*, 224 Ill. 2d at 557. Under the Contribution Act, an employer "could be 'third-partied' into its employee's suit against

a nonemployer tortfeasor and be ordered to pay a sum according to its *pro rata* share of fault in causing the employee's injury." *Virginia Surety*, 224 Ill. 2d at 558.

¶ 79 The *Kotecki* court described the inherent tension between the two statutory enactments as follows:

" ' If contribution or indemnity is allowed, the employer may be forced to pay his employee—through the conduit of the third-party tortfeasor—an amount in excess of his statutory workers' compensation liability. This arguably thwarts the central concept behind workers' compensation, i.e., that the employer and employee receive the benefits of a guaranteed, fixed-schedule, nonfault recovery system, which then constitutes the exclusive liability of the employer to his employee. [Citation.] If contribution or indemnity is not allowed, a third-party stranger to the workers' compensation system is made to bear the burden of a full common-law judgment despite possibly greater fault on the part of the employer.' " *Kotecki*, 146 Ill. 2d at 162-63 (quoting *Lambertson v. Cincinnati Corp.*, 312 Minn. 114, 119-20 (1977)).

¶ 80 The supreme court resolved this conflict by holding that an employer's maximum liability in a third-party suit for contribution would be limited to its liability under the Workers' Compensation Act. *Id.* at 164-65. The court reasoned that this approach "strikes a balance between the competing interests of the employer, as a participant in the workers' compensation system, and the equitable interests of the third-party defendant in not being forced to pay more than its established fault." *Id.* at 164.

¶ 81 The damage cap established by the supreme court in *Kotecki* however, is not absolute. Courts have held that the *Kotecki* cap can be waived if an employer enters into an indemnification agreement prior to the commencement of litigation in which the employer agrees

to assume full liability for damages. *Braye v. Archer-Daniels-Midland Co.*, 175 Ill. 2d 201, 208 (1977); see also *Virginia Surety Co.*, 224 Ill. 2d at 559 ("Nothing in *Kotecki* prohibits an employer from volunteering to remain liable for its *pro rata* share of damages proximately caused by its negligence; *Kotecki* simply allows the employer to avail itself of the *Kotecki* cap on its liability."). In determining when, and whether, to waive the *Kotecki* damage cap, "an employer engages in a strategic analysis involving the structure of the Workers' Compensation Commission award, the time value of money, the expected life span of the employee or his beneficiaries, the respective shares of liability of the various parties, and the likelihood of a large tort judgment against a third-party tortfeasor." *Cozzone v. Garda GL Great Lakes, Inc.*, 2016 IL App (1st) 151479, ¶ 14. In order for there to be a contractual waiver of the *Kotecki* damage cap, however, the contract must have a specific valid provision by which the waiver is made. *Liccardi v. Stolt Terminals, Inc.*, 178 Ill. 2d 540, 545 (1997); *Estate of Willis v. Kiferbaum Construction Corp.*, 357 Ill. App. 3d 1002, 1006 (2005). Whether there has been a valid *Kotecki* waiver is necessarily a matter of contract interpretation, which is subject to *de novo* review. *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 129 (2005).

¶ 82 In this case, the subcontract that Global Fire entered into with O'Neil contained the following indemnification provision:

"INDEMNIFICATION – ARTICLE XX. To the fullest extent permitted by law, the Subcontractor hereby assumes the entire responsibility and liability for any and all damage or injury of any kind or nature whatever (including death resulting therefrom) to all persons, whether employees of the Subcontractor or otherwise, and to all property caused by, resulting from, arising out of, or occurring in connection with the Subcontractor's (or sub-subcontractor's) execution of the Work. If any claims for such

damage or injury (including death resulting therefrom) shall be made or asserted, the Subcontractor agrees to indemnify and save harmless the General Contractor, W.E. O'Neil Construction Company, O'Neil Industries, Inc., the Owner and Others required in the contract documents, their officers, agents, servants and employees (hereafter referred to in this Article collectively as 'Indemnitees') from and against any and all loss, cost, expense, liability, damage or injury, including legal fees and disbursements, that the Indemnitees may directly or indirectly sustain, suffer of incur as a result thereof. ***"

¶ 83 In finding that the above indemnification provision did not constitute a waiver of the *Kotecki* damage cap, the circuit court relied on this court's previous decision in *Estate of Willis v. Kiferbaum Construction Corp.*, 357 Ill. App. 3d 1002 (2005). In *Willis*, this court was called upon to construe the indemnity provisions contained in two contracts and determine whether they amounted to waivers of the *Kotecki* damage cap. The provision contained in the first contract provided that the subcontractor would indemnify the general contractor, owner and architect against "all claims, damages, losses and expenses*** [for an injury] caused in whole or in part by any negligent act or omission of the Subcontractor." *Id.* at 1007. The indemnification provision further provided that "the indemnification obligation under this Paragraph *** shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the Subcontractor under *** workmen's compensation acts." (Emphasis added.) *Id.* We concluded that the inclusion of this language in the contract amounted to a clear *Kotecki* cap waiver. *Id.* The indemnification provision contained in the second contract, on the other hand merely provided that the subcontractor would "indemnify and assume responsibility for all damages or injury to employees resulting from the execution of its work 'to the fullest extent permitted by law.'" *Id.* The indemnification provision in the second

contract did not contain any explicit reference to workers' compensation payouts or the obligation of the subcontractor in relation to such payouts. *Id.* As a result, we concluded that the language contained in the second indemnification provision did not amount to a waiver of the *Kotecki* cap.

¶ 84 The circuit court in this case found that the indemnification provision in Global Fire's subcontract mirrored the second indemnification provision discussed in *Willis*. That is, neither indemnification provision contained a specific reference to workers' compensation liabilities and did not explicitly provide that the indemnification responsibilities delineated therein were not to be limited by the benefits that the subcontractor would be responsible for under the Workers' Compensation Act. On review, we find no error. In order for a subcontractor employer to waive its *Kotecki* defense, there must be a specific valid provision contained in its subcontract that does so. *Willis*, 357 Ill. App. 3d at 1006. In this case, no such waiver language is contained in Global Fire's indemnification agreement. Therefore, the circuit court did not err in denying O'Neil's motion to strike Global Fire's affirmative defense or in limiting Global Fire's liability to \$572,833.77, the amount of workers' compensation benefits that it paid to plaintiff. In light of this finding, we need not address Global Fire's alternative argument that that the indemnification provision is void because it fails to accord with Illinois public policy.

¶ 85 CONCLUSION

¶ 86 The judgment of the circuit court is affirmed.

¶ 87 Affirmed.