2017 IL App (5th) 160100-U

NO. 5-16-0100

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

CHUCK A. WEHMEYER,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 13-L-511
	)	
CATERPILLAR, INC.,	)	Honorable
	)	Vincent J. Lopinot,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE MOORE delivered the judgment of the court.
Justices Welch and Barberis concurred in the judgment.

ORDER

¶ 1 *Held*: Circuit court's order that granted new trial to the plaintiff in this personal injury and products liability case is reversed because no reasonable person would agree with the positions cited by the trial judge as his reasons for giving the plaintiff a new trial.

¶ 2 The defendant, Caterpillar, Inc., appeals the order of the circuit court of St. Clair County that granted a new trial to the plaintiff, Chuck A. Wehmeyer, in this personal injury and products liability case. For the reasons that follow, we reverse.

¶ 3 FACTS

¶ 4 The facts necessary to our disposition of this appeal follow. On October 3, 2013, the plaintiff filed, in the circuit court of St. Clair County, a multi-count complaint, against

multiple defendants, in which the plaintiff contended, as to all counts, that he was seriously injured on October 6, 2011, in a construction accident that he alleged occurred when a mechanical lift known as a "Telehandler," manufactured by the defendant, "tipped," throwing him from his position on an access platform on the lift approximately 20 feet to the ground. He alleged the lift "was being operated in a foreseeable manner by Robert Duff" at the time the accident occurred. Of relevance to this appeal are counts I and II of the complaint, which were directed at the defendant and alleged strict products liability (count I) and negligence (count II), as well as the defendant's November 7, 2014, "counterclaim for contribution" against named codefendant Ervin Yoder, who owned the contracting business that employed both Duff and the plaintiff at the time of the accident.

¶ 5 The trial in this case began on the morning of October 26, 2015, before the Honorable Vincent J. Lopinot. Prior to *voir dire*, the plaintiff and the defendant Robert Duff (who, as noted above, was operating the lift at the time the plaintiff was injured) moved, jointly, to have the court approve a good faith settlement. Counsel for the defendant objected. Judge Lopinot entertained arguments on the motion from both parties, during which counsel for the defendant contended, *inter alia*, that Duff "was never served" and accordingly was "not officially a defendant." Counsel for the plaintiff responded that Duff was served "back in November of 2013," then stated that Yoder was not served. Ultimately, Judge Lopinot granted the motion for approval of a good faith settlement.

¶ 6 After the jury was seated, and opening statements made, the presentation of evidence began. Because on appeal the plaintiff does not contend, and because after the

trial Judge Lopinot did not find, that the jury's ultimate determination that the plaintiff did not successfully prove his case against the defendant was against the manifest weight of the evidence, we need not discuss, in great detail, much of the evidence adduced during the six-day trial. Suffice it to say, voluminous conflicting evidence was presented, by lay witnesses and by expert witnesses, with regard to what responsibility the defendant, as the manufacturer of the lift, bore for the accident that seriously injured the plaintiff, as opposed to what responsibility for the accident might have belonged to the company that rented the lift to Yoder, Yoder himself, and Duff as an employee of Yoder.

¶ 7 Of significance to the issues raised on appeal, Dr. Lauren R. Schwarz testified by video deposition that she was a clinical neuropsychologist and that, following a referral to her by one of the plaintiff's physicians, she assessed the plaintiff for "neurocognitive deficits" following the accident. In addition to describing in general the deficits she found in the plaintiff which she attributed in "substantial" part to the accident, Dr. Schwarz testified, *inter alia*, that in the course of her assessment of the plaintiff she learned that following the injury, the plaintiff experienced tension in his relationship with his father and stepmother; in particular the plaintiff told her that they wanted to pursue "guardianship or conservatorship of him," which distressed the plaintiff because he believed "they were trying to get his money."

¶ 8 Betty Bockhorst testified by video deposition that she was a licensed professional counselor with a master's degree in rehabilitation counseling. She testified that the plaintiff was referred to her in 2012 by the physical therapy department of the hospital that employed her, and that she very quickly diagnosed him with major depression. She

testified that she had seen the plaintiff 122 times between July 2012 and August 2015, just prior to the date of the deposition, seeing him once a week for an hour. When asked about who was available to provide support to the plaintiff, Bockhorst testified, "Basically, it's just Peggy, his wife. His family he doesn't have much support with." She testified that she was aware that Peggy had terminal cancer, that she believed Peggy's death would "devastate" the plaintiff, and that she did not know of anyone who would be able to step in to "fill the void that she's going to leave in terms of support, guidance, and assistance." She testified that she had no reason to believe the plaintiff had struggled with depression prior to his accident, or had the kind of "focus" issues he now has.

¶ 9 When examined by the defendant, Bockhorst conceded that she did not know the plaintiff prior to his accident, and therefore did not have firsthand knowledge of what his life was like prior to the accident. She agreed that after she had been seeing the plaintiff for approximately a month, he told her that he "didn't want to be like his old self before the accident" and "didn't want to be now the person he was before the accident" because "his old self wouldn't be a good person to be." She testified that in her first session with the plaintiff, she learned from him that he was raised in what she characterized as a "dysfunctional" family, and that the plaintiff's father physically abused him. She learned that the plaintiff's relationship with his stepmother "really got bad" after his accident, and that the plaintiff's father and stepmother rejected his wife, Peggy, and excluded her from family gatherings. She also agreed that the plaintiff "had issues with his siblings and half-siblings," although no detail was elicited about what kinds of issues, or who was

responsible for the issues, other than that the plaintiff "did get along with one" while "there was one that he definitely did not get along with."

¶ 10 With regard to the plaintiff's children, Bockhorst testified that the plaintiff told her that he was not in their lives much when they were growing up but that "he would like to see them." She testified that "he didn't go into any problems that he had, just that he was not in their life." Bockhorst was asked to read aloud handwritten comments the plaintiff made when asked to list his children; she read, "Supposedly have another daughter here in Hermann, Missouri. Never knew about her or met her. Supposedly called my brother, Mike, after she was 18. *** Said I may be her dad. Don't know; don't care." She subsequently read a second note, "When [I] talk to them all they want is money. Their mom got custody of them and took them where I didn't know where they were." Bockhorst agreed the family problems "could be a cause" of depression. Bockhorst testified that although the plaintiff did not presently need help managing his finances "with what he has," if he had more money to manage, he would. She specifically opined that with regard to "stocks and bonds," she did not think the plaintiff could "handle anything like that." Bockhorst also testified in detail about other areas of her treatment of the plaintiff, and his functioning, that are not relevant to this appeal.

¶ 11 The plaintiff's wife, Peggy, testified, *inter alia*, that she was "banned" by the plaintiff's parents for a short time after the accident from visiting him at the hospital. When queried on cross-examination by the defendant, she also testified about other aspects of the plaintiff's life prior to his accident, particularly his relationship with his family. Peggy testified that the plaintiff "and his dad did not get along even since

childhood." When asked if it was "even worse with his stepmother," Peggy testified, "I guess." She testified that the plaintiff was "especially close" to one of his sisters, but "[j]ust the opposite" with another sister. However, aside from the latter sister, "[t]he other ones, they're–pretty much they have stayed by his side, and they try to encourage him more now." She testified that she thought they would continue to "provide some guidance and support" in the future. She testified that the plaintiff had a total of eight siblings and half-siblings. She testified that the way she is treated by some of his family members is very upsetting to the plaintiff, and that after she was not invited to family functions, he stopped attending them too. She testified that he was very upset when his family tried to "put him into a conservatorship," and that he still thinks they will try again to do so.

¶ 12 On the afternoon of Friday, October 30, 2015, as the trial neared its conclusion, a jury instructions conference was held. At the outset of the conference, the defendant noted that there was "something that's a big issue" that needed to be resolved. The defendant noted that some of the plaintiff's proposed jury instructions referred to Ervin Yoder as a defendant, even though the plaintiff had represented in court that Yoder had not been served, and the defendant therefore asked "how a non-party can be a defendant." One of the plaintiff's attorneys responded that he had been "under the impression Erv Yoder had never been served" when he so stated in open court, but that subsequently, he had been "shown in fact a summons had been issued and served on Mr. Yoder. So he was named in the complaint, he was served with a summons which included the complaint, so he's name[d] and served. He's a party." Counsel for the plaintiff

subsequently stated, during the conference, that Yoder was served with the defendant's counterclaim for contribution, but then noted that the language of the service document indicated that although it "was served in conjunction with their counterclaim *** the complaint was served along with it." Judge Lopinot reviewed the documents in question and stated that "it looks like Erv was served on November 22, 2014, in Warrenton, Missouri." He asked the defendant if that service had been accomplished by the defendant. The defendant responded that it had, "with our third-party complaint[1] attached to it." When Judge Lopinot asked the defendant how this was known, the defendant replied, "we are the ones that employed that special process server, so–and we didn't give him a copy of the complaint. We gave him our third contribution complaint." Counsel for the plaintiff again argued that because the document used the word "complaint," it must mean "the complaint in this case." Judge Lopinot pointed out that "probably all the summons that are ever issued in any courthouse say that," and stated that he did not believe there were "special summonses for cross-complaints or third-party complaints or whatever." He asked counsel for the plaintiff if the plaintiff had ever served Yoder. Counsel replied, "No. I can volunteer, our firm never served him."

¶ 13 Judge Lopinot then asked counsel what the plaintiff's position was, "assuming that the only thing that he was–and that he was served with was the third-party complaint?" Counsel for the plaintiff stated that "if he was not served with the complaint, then I would

[1]We note that the parties used the terms "counterclaim," "third-party complaint," and "third contribution complaint" interchangeably. As noted above, the document was officially styled, when filed with the court on November 7, 2014, as a "counterclaim for contribution."

agree he's not a proper defendant and he is only a counter-defendant," but added, "I don't think we have evidence of that one way or the other. The only evidence we have is what's in front of us which says the complaint." After consulting on the record with the court clerk, and further with the parties, Judge Lopinot stated, "if you didn't do it, you didn't–the process server that served it, I can only assume that this was the counterclaim. All right? So I'm not going to include Yoder on the jury instruction[s] with–with regard to the complaint, okay, because there's no indication." He told counsel for the plaintiff, "if you can come up with some indication by Monday or something that he was, in fact, served with the complaint *** we could deal with it on Monday, but otherwise they're not going to be included, or he's not going to be included."

¶ 14 The conference continued. Subsequently, the defendant objected to the plaintiff's proposed instruction 16, which was the short-form version of Illinois Pattern Jury Instruction (IPI) 12.04 (Illinois Pattern Jury Instructions, Civil, No. 12.04 (2015)), and which discussed apportionment of fault, but did not discuss the concept of sole proximate cause. In conjunction with objecting to the plaintiff's proposed instruction 16, the defendant tendered the long-form versions of both IPI 12.04 (Illinois Pattern Jury Instructions, Civil, No. 12.04 (2015)) and IPI 12.05 (Illinois Pattern Jury Instructions, Civil, No. 12.05 (2015)), both of which did discuss sole proximate cause. Counsel for the plaintiff renewed his objection to the exclusion of Yoder, stating, "So, the 12.04 adding the sole proximate cause, understanding that we object to not including Yoder, but subject to that objection, if Yoder is not a party to the case then I would agree there is evidence of sole proximate cause." He added, "I would still object to 12.05," stating that

he believed that 12.05 was appropriate for situations "like an act of God such as wind or something along those lines," and that there was no evidence to support the instruction in this case. After further discussion, Judge Lopinot clarified, "So the–so the plaintiff, obviously you're objecting to Yoder not being there, but you're saying that 12.04 would be more appropriate than 12.05?" Counsel for the plaintiff responded, "Yes." Ultimately, Judge Lopinot ruled that only 12.04 would be given.

¶ 15 On Monday, November 2, 2015, subsequent to the conclusion of the conference, but prior to the instruction of the jury, the plaintiff filed a motion to reconsider the ruling that Yoder was not a defendant. In support thereof, counsel for the plaintiff argued that during the on-record discussion the previous Friday afternoon, there had been several mistakes of law. He stated that, "at the least there's no dispute [Yoder] was served with a summons, and under the rules that would be enough to claim jurisdiction on him." He argued that Yoder was sufficiently on notice of the claim against him as a defendant, because even if it were assumed that he was served only with the counterclaim, "the counterclaim told him there is a complaint, he is a defendant, he is being alleged to have been negligent and Caterpillar is seeking relief against him." Counsel also argued that the process server's return constituted "prima facie evidence" that could be disregarded only in the face of "clear and satisfactory evidence" that was not present in this case.

¶ 16 In response, the defendant pointed out that Judge Lopinot had given the plaintiff until that day (Monday, November 2, 2015) to show that the complaint had been served on Yoder, and that "[n]othing has changed since Friday." The defendant acknowledged that the court had jurisdiction over Yoder "as a third-party defendant," but "if you want to

sue somebody and you want to have the ability to get a judgment against them you have to serve them with your complaint and that hasn't been done." The defendant also argued that the defendant would be prejudiced if the court now allowed Yoder in as a "direct defendant," because the defendant would have asked different questions of both lay and expert witnesses had it known Yoder would be treated as a direct defendant. He reiterated that because "there's nothing different than there was Friday," Judge Lopinot "should deny their motion to reconsider."

¶ 17 Judge Lopinot denied the motion to reconsider. When he mentioned that the defendant had filed a motion to dismiss, the defendant stated that it believed the motion was now moot, and Judge Lopinot agreed. The defendant noted that it had that morning filed a voluntary dismissal of its counterclaim for contribution against Yoder. Thereafter, the final witness in the case testified and closing arguments were given. During its argument, the defendant contended, *inter alia*, that the accident was solely caused by someone other than the defendant. Specifically, the defendant stated three times during closing argument that Yoder was "the sole proximate cause" of the accident, due to the fact that he did not adequately train Duff with regard to how to safely operate the lift. Following deliberations that lasted a little under two hours, the jury returned with a verdict which stated, "We, the jury, find for Caterpillar, Inc. on Count I and Count II and against Chuck Wehmeyer." On November 12, 2015, Judge Lopinot entered judgment on the jury's verdict.

¶ 18 On December 2, 2015, the plaintiff filed a timely motion for a new trial, wherein the plaintiff sought a new trial on the basis of the following four allegations of error: (1)

Yoder should not have been omitted from the verdict form and jury instructions; (2) the "sole proximate cause" instruction (also referred to at trial and in this decision as the "long-form 12.04" instruction) should not have been given because it "was not supported by the law or the evidence"; (3) family discord evidence was erroneously admitted by Judge Lopinot; and (4) the jury's verdict was against the manifest weight of the evidence. On February 9, 2016, after briefing by both parties and argument, Judge Lopinot took the plaintiff's motion under advisement. On February 17, 2016, Judge Lopinot issued an order wherein he granted the plaintiff's motion for a new trial because: (1) he concluded that he had given "the jury the long-form version of IPI 12.04 in error"; and (2) he concluded that he had erred when he "allowed evidence of discord within the family of the [p]laintiff without any evidence that it caused the [p]laintiff to suffer from any diagnosable condition prior to the 2011 incident." This timely appeal followed.

¶ 19 ANALYSIS

¶ 20 We begin with our standard of review and other relevant legal principles. A judge who has presided over a trial has been afforded the opportunity to observe and consider the conduct of that trial as a whole, which includes the manner of speaking of the attorneys at trial and the impact their comments had on the jury. *Boren v. The BOC Group, Inc.*, 385 Ill. App. 3d 248, 254 (2008). As a result, this court has held that such a judge is in a position superior to that of this court to consider the effect of any errors that occurred, the fairness of the trial to all parties involved, and whether substantial justice was accomplished in the trial. *Id*. Accordingly, we have ruled that the decision to grant or not grant a new trial is an exercise of the trial judge's discretion, one that we will not

disturb unless a clear abuse of that discretion is shown. *Id.* We allow the trial judge greater latitude in granting a new trial than in denying one, and the mere fact that this court would have reached a different result does not justify reversing an order granting a new trial. *Id.* Instead, we will find a clear abuse of discretion only if the appellant has convinced us that no reasonable person would take the view adopted by the trial judge. *Id.*

¶ 21 In this case, the defendant contends on appeal that Judge Lopinot erred when he granted the plaintiff's request for a new trial, because Judge Lopinot did not in fact err at trial when he: (1) gave the "sole proximate cause" instruction; and (2) allowed a limited amount of "so-called 'family discord' evidence" to be presented. The defendant also contends that if we uphold Judge Lopinot's order granting a new trial, we should rule that additional evidence about the plaintiff's preinjury life (including evidence of pre-injury contributing causes to his current cognitive defects) that Judge Lopinot excluded at the previous trial must be admitted at the new trial. In response, the plaintiff argues that Judge Lopinot correctly decided, posttrial, that he had erred at trial, and that, in addition, Judge Lopinot should have granted a new trial based upon the exclusion of Yoder from the verdict forms and instructions.

¶ 22 As noted above, on appeal the plaintiff does not contend–and after the trial Judge Lopinot did not find–that the jury's ultimate determination that the plaintiff did not successfully prove his case against the defendant was against the manifest weight of the evidence. In fact, in his brief on appeal the plaintiff "acknowledges the trial court was uniquely positioned to weigh the evidence," and states that "[a]s such, he will not claim

the trial court erred in not finding the verdict was against the manifest weight of the evidence." Accordingly, the plaintiff has waived further consideration of that argument by this court or the trial court. See, *e.g.*, *Gallagher v. Lenart*, 226 Ill. 2d 208, 229 (2007) (waiver arises from affirmative act, is consensual, and consists of intentional relinquishment of a known right); see also Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (argument must contain the contentions of the appellant, the reasons therefor, and the citation of authorities; points not argued in an opening brief are forfeited and shall not be raised in the reply brief, in oral argument, or in a petition for a rehearing).

¶ 23 With regard to the "sole proximate cause" or "long-form 12.04" instruction, the defendant contends on appeal that because the plaintiff has provided no proof that Yoder was ever served with the complaint in this case, as opposed to the defendant's counterclaim for contribution, Yoder was not a proper defendant and accordingly it was appropriate for Judge Lopinot to give the instruction. The defendant points out that the plaintiff had many opportunities, over a two-year span from the date of the filing of the lawsuit to the date of trial, to serve Yoder, but chose not to do so. The defendant also contends the plaintiff agreed to the instruction, pointing out that during the instructions conference, counsel for the plaintiff stated, "So, the 12.04 adding the sole proximate cause, understanding that we object to not including Yoder, but subject to that objection, if Yoder is not a party to the case then I would agree there is evidence of sole proximate cause." Counsel then added, "I would still object to 12.05," and explained his reasons therefor. After further discussion, Judge Lopinot clarified, "So the–so the plaintiff, obviously you're objecting to Yoder not being there, but you're saying that 12.04 would

be more appropriate than 12.05?" Counsel for the plaintiff responded, "Yes." The defendant further contends that some of the plaintiff's current arguments about why the long-form 12.04 instruction was improper are waived, because the plaintiff failed to raise them during the instructions conference, instead raising them for the first time in the motion for a new trial. Finally, the defendant contends the instruction, as given, "properly advised the jury of the law."

¶ 24 In response to the defendant's arguments on appeal about the instruction, the plaintiff contends: (1) he did not invite, cause, or agree to the instruction, but instead objected to it; (2) the instruction was improper because Yoder "was never dismissed"; (3) the trial court could order a new trial even on a basis not raised by the parties; (4) the instruction was improper as a matter of law because the defendant "identified multiple other causes"; and (5) the instruction was improper because the defendant "was liable for any foreseeable misuse" of the lift. The plaintiff also contends that the family-discord evidence was prejudicial because it may have been used improperly by the jury to make a finding as to liability, the issue of damages notwithstanding. As noted above, the plaintiff claims as well that Judge Lopinot should have granted a new trial based upon the exclusion of Yoder from the verdict forms and instructions.

¶ 25 We begin with the long-form 12.04 jury instruction. Illinois Pattern Jury Instructions, Civil, No. 12.04 (2015) states:

> "More than one person may be to blame for causing an injury. If you decide that a [the] defendant[s] was [were] negligent and that his [their]

negligence was a proximate cause of injury to the plaintiff, it is not a defense that some third person who is not a party to the suit may also have been to blame.

[However, if you decide that the sole proximate cause of injury to the plaintiff was the conduct of some person other than the defendant, then your verdict should be for the defendant.]"

When only the first paragraph is given, that is considered the short-form version of the instruction. As described above, at trial the plaintiff proposed, as his instruction 16, that the short-form version be given. When both paragraphs are given together, it is the long-form version of the instruction–the one that was given and is at issue in this appeal. The Notes on Use for the instruction state that the second paragraph (and therefore the long-form version) "should be used only where there is evidence tending to show that the sole proximate cause of the occurrence was the conduct of a third person." IPI Civil No. 12.04, Notes on Use.

¶ 26 As noted above, although Judge Lopinot ruled that he had given "the jury the long-form version of IPI 12.04 in error," he chose not to explain how he believed he had erred. Nevertheless, we will, in the interests of justice, consider the various suggestions of error of the plaintiff. First, the plaintiff argues that Yoder was not a "third person" or "some person other than the defendant" but was instead a codefendant, which would render the long-form instruction inapplicable to the present case. Accordingly, the first question this court must answer is whether Yoder was a defendant in this case at the time the jury was instructed. It is clear from the record that although Yoder was named by the plaintiff as a defendant in this case, Yoder was never served by the plaintiff with the plaintiff's

complaint, and was served by the defendant with only the defendant's counterclaim for contribution. We know this is true because after some back and forth, described in detail above, counsel for the plaintiff ultimately stated, "No. I can volunteer, our firm never served him." Moreover, in response to questioning from Judge Lopinot, the defendant stated that it was the defendant who employed the special process server who was the only person to serve Yoder in this case, and that the server "didn't give him a copy of the complaint. We gave him our third contribution complaint."

¶ 27 Judge Lopinot then asked counsel what the plaintiff's position was, "assuming that the only thing that he was–and that he was served with was the third-party complaint?" Counsel for the plaintiff stated that "if he was not served with the complaint, then I would agree he's not a proper defendant and he is only a counter-defendant," but added, "I don't think we have evidence of that one way or the other. The only evidence we have is what's in front of us which says the complaint." After consulting on the record with the court clerk, and further with the parties, Judge Lopinot stated, "if you didn't do it, you didn't–the process server that served it, I can only assume that this was the counterclaim. All right? So I'm not going to include Yoder on the jury instruction[s] with–with regard to the complaint, okay, because there's no indication." He told counsel for the plaintiff, "if you can come up with some indication by Monday or something that he was, in fact, served with the complaint *** we could deal with it on Monday, but otherwise they're not going to be included, or he's not going to be included."

¶ 28 The conference continued. The defendant objected to the plaintiff's proposed instruction 16, offering instead the long-form versions of both 12.04 and 12.05. Counsel

for the plaintiff renewed his objection to the exclusion of Yoder, stating, "So, the 12.04 adding the sole proximate cause, understanding that we object to not including Yoder, but subject to that objection, if Yoder is not a party to the case then I would agree there is evidence of sole proximate cause." He added, "I would still object to 12.05," and explained his reasons therefor. After further discussion, Judge Lopinot clarified, "So the– so the plaintiff, obviously you're objecting to Yoder not being there, but you're saying that 12.04 would be more appropriate than 12.05?" Counsel for the plaintiff responded, "Yes." Ultimately, Judge Lopinot ruled that only 12.04 would be given.

¶ 29 On Monday, November 2, 2015, subsequent to the conclusion of the conference, but prior to the instruction of the jury, the plaintiff filed a motion to reconsider the ruling that Yoder was not a defendant. In support thereof, counsel for the plaintiff argued that during the on-record discussion the previous Friday afternoon, there had been several mistakes of law. He stated that, "at the least there's no dispute [Yoder] was served with a summons, and under the rules that would be enough to claim jurisdiction on him." He argued that Yoder was sufficiently on notice of the claim against him as a defendant, because even if it were assumed that he was served only with the counterclaim, "the counterclaim told him there is a complaint, he is a defendant, he is being alleged to have been negligent and Caterpillar is seeking relief against him." Counsel also argued that the process server's return constituted "*prima facie* evidence" that could be disregarded only in the face of "clear and satisfactory evidence" that was not present in this case.

¶ 30 In response, the defendant pointed out that Judge Lopinot had given the plaintiff until that day (Monday, November 2, 2015) to show that the complaint had been served

on Yoder, and that "[n]othing has changed since Friday." The defendant acknowledged that the court had jurisdiction over Yoder "as a third-party defendant," but "if you want to sue somebody and you want to have the ability to get a judgment against them you have to serve them with your complaint and that hasn't been done." The defendant also argued that the defendant would be prejudiced if the court now allowed Yoder in as a "direct defendant," because the defendant would have asked different questions of both lay and expert witnesses had it known Yoder would be treated as a direct defendant. He reiterated that because "there's nothing different than there was Friday," Judge Lopinot "should deny their motion to reconsider." Judge Lopinot denied the motion to reconsider. When he mentioned that the defendant had filed a motion to dismiss, the defendant stated that it believed the motion was now moot, and Judge Lopinot agreed. The defendant noted that it had that morning filed a voluntary dismissal of its counterclaim for contribution against Yoder.

¶ 31 Accordingly, the record clearly supports the defendant's position that Judge Lopinot properly concluded at trial that because Yoder was never served with the plaintiff's complaint, and because the defendant's counterclaim for contribution against Yoder had been dismissed, Yoder was not a party defendant for purposes of the "sole proximate cause" instruction and the verdict forms. We agree with the defendant that under these circumstances–where there had been no change in the facts before the trial court, other than the fact that the plaintiff had not succeeded at trial–no reasonable person would agree with a decision by Judge Lopinot to suddenly reverse his position, find that Yoder was a party defendant for purposes of the instruction and verdict forms, and order

a new trial. We reiterate that Judge Lopinot chose not to explain how he believed he had erred, but to the extent it was on this basis, he erred in granting a new trial and must be reversed.

¶ 32 The record also clearly supports the defendant's assertion that counsel for the plaintiff conceded at trial that, "there is some evidence of proximate cause if Yoder is not a party to the case then I would agree there is evidence of sole proximate cause," and thereafter objected only to 12.05. Counsel for the plaintiff clearly and unequivocally answered, "Yes," when Judge Lopinot stated, "so the plaintiff, obviously you're objecting to Yoder not being there, but you're saying that 12.04 would be more appropriate than 12.05?" We agree with the defendant that, in light of the fact that counsel for the plaintiff conceded that in the absence of Yoder as a party, there was evidence of sole proximate cause, and asked for 12.04 to be given instead of 12.05, no reasonable person would agree with a decision by Judge Lopinot to reverse positions and order a new trial. To the extent Judge Lopinot ordered a new trial on this basis, he erred, and must be reversed. See, *e.g.*, *Ervin v. Sears, Roebuck & Co.*, 65 Ill. 2d 140, 144 (1976) (party may not assert error on the basis of instructions which the party has caused to be given to the jury; manifestly unfair for trial judge to grant new trial to party that injected error into trial).

¶ 33 In addition, the record clearly supports the defendant's argument that although the plaintiff contends Yoder "was never dismissed" from this case, Judge Lopinot's ruling makes it clear that he granted the defendant's motion to dismiss its counterclaim for contribution against Yoder, which was the only claim involving Yoder that was properly before Judge Lopinot. To the extent Judge Lopinot might have ordered a new trial on the

basis that he "never dismissed" Yoder, no reasonable person would agree with such an order and it must be reversed.

¶ 34 We next consider the plaintiff's contention that the instruction was improper as a matter of law because the defendant "identified multiple other causes" rather than a single other cause of the injury, and was improper because the defendant "was liable for any foreseeable misuse" of the lift. In *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 101 (1995), the Supreme Court of Illinois reiterated the longstanding rule that a defendant has the right to rebut evidence that tends to show that the defendant's alleged acts were both negligent and the proximate cause of the purported injuries, and "also has the right to endeavor to establish by competent evidence that the conduct of a third person, or some other causative factor, is the sole proximate cause of [the] plaintiff's injuries." The long-form 12.04 instruction must be given if there is sufficient evidence to support it. *Id.* " 'Whether the jury would have been persuaded is not the question. All that is required to justify the giving of an instruction is that there be some evidence in the record to justify the theory of the instruction.' " *Id.* (quoting *Lowe v. Norfolk & Western Ry. Co.*, 124 Ill. App. 3d 80, 118 (1984)).

¶ 35 The plaintiff seizes upon the supreme court's use of the phrase "a third person," as well as the use of that phrase in the Notes on Use for the instruction (see IPI Civil No. 12.04, Notes on Use), to contend that if multiple other causes–or multiple third persons–are alleged to be involved, the instruction is "improper as a matter of law." We do not agree. We first note that we agree with the defendant that, as a factual matter, the defendant's sole proximate cause argument to the jury in this case did not identify

multiple other proximate causes–to the contrary, the defendant consistently argued that the sole proximate cause in this case was a single third person, Yoder. Indeed, as noted above, the defendant specifically stated three times during closing argument that Yoder was "the sole proximate cause" of the accident, due to the fact that he did not adequately train Duff with regard to how to safely operate the lift. Thus, the plaintiff's argument is unavailing in light of the facts of this case.

¶ 36 Moreover, the plaintiff is incorrect as a matter of law. In *Nolan v. Weil-McLain*, 233 Ill. 2d 416, 444-45 (2009), the Supreme Court of Illinois made it clear that a defendant asserting a sole proximate cause defense may allege that multiple other proximate causes, alone or combined, were the sole proximate cause of the alleged injuries, and that the defendant was not in any way the cause of the alleged injuries. The *Nolan* court also held that its "ruling in *Leonardi* is universally applicable to all tort actions." *Id*. at 444. This, of course, reflects both common sense and the plain meaning of the legal term "sole proximate cause," for as long as a defendant is not in any way the cause of the alleged injuries–in other words, as long as the sole proximate cause lies elsewhere–it should be of no consequence whether it was one third party other than that defendant, or more than one third party other than that defendant, that constituted the sole proximate cause of the injuries. Any rule to the contrary would result in a grave miscarriage of justice, for it would lead to the arbitrary and unreasoned result that in a case wherein the defendant was not in any way responsible for the injuries and one third party other than the defendant was, the defendant could present a sole proximate cause defense, but in a case wherein the defendant was not in any way responsible for the

injuries and more than one third party other than the defendant was, the defendant could not present a sole proximate cause defense, despite the fact that in both cases the defendant was not in any way responsible for the injuries, and the sole proximate cause of the injuries clearly was elsewhere.

¶ 37 The plaintiff cites two cases in support of his contention that "there are decisions post-*Nolan* reiterating that a defendant is not entitled to such an instruction once it has presented evidence of multiple other causes." We begin by noting that the two cases cited by the plaintiff are both cases from this court and thus cannot be construed to in any way "overrule" *Nolan*. See, *e.g.*, *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 28 ("overruling a decision by the Illinois Supreme Court is an action the appellate court has no authority to take"). Moreover, one of the cases–*Yoder v. Ferguson*, 381 Ill. App. 3d 353 (2008)–is not a post-*Nolan* case at all; it was decided in 2008, whereas *Nolan* was decided in 2009. In the other case, *Abruzzo v. City of Park Ridge*, 2013 IL App (1st) 122360, ¶¶ 60-63, the question on appeal was whether a defendant was entitled to a special interrogatory about sole proximate cause *after* the sole proximate cause instruction was given. To the extent the *Abruzzo* court held that the sole proximate cause instruction never should have been given in the first place because there were multiple other causes, we find the reasoning of the *Abruzzo* court unpersuasive in light of *Nolan* and decline to follow it.

¶ 38 The plaintiff also claims that *Nolan* is distinguishable because it dealt with a case wherein the trial court excluded sole proximate cause evidence, and therefore the question of the proper jury instruction was not addressed on appeal. The plaintiff posits

that whether the defendant "can introduce evidence, and whether it is entitled to the long-form version of IPI 12.04, are distinct issues." The plaintiff's position is again unavailing. In its recitation of the facts of the case, the *Nolan* court noted that at trial the sole proximate cause instruction was given, over the objection of the plaintiff. *Nolan*, 233 Ill. 2d at 426. Had this been error, the *Nolan* court surely would have noted that on remand the judge was not to give the instruction; moreover, it is not clear, given the supreme court's ruling in *Leonardi* that the instruction must be given if there is sufficient evidence to support it (168 Ill. 2d at 101), how the *Nolan* court would have come to the conclusion that the defendant could present evidence of multiple other proximate causes that constituted the sole proximate cause of the alleged injuries, but would not be entitled to the sole proximate cause instruction merely because there were multiple other proximate causes. It would simply make no sense for the *Nolan* court to hold, as it did, that a defendant pursuing a sole proximate cause defense could present evidence of multiple other proximate causes that constituted the sole proximate cause of the alleged injuries, but that the same defendant would not be entitled to an instruction on sole proximate cause related directly thereto. What, one might ask, would be the point of presenting the evidence, if not to lay the foundation for the proper instruction of the jury with regard to the relevance and significance of that evidence with regard to sole proximate cause?

¶ 39 We turn next to the plaintiff's contention that the instruction was improper as a matter of law because the defendant "was liable for any foreseeable misuse" of the lift. The plaintiff posits on appeal that because "[t]here was no evidence Duff's alleged

misuses could not have been foreseen," it follows that the defendant "could not rely on a sole proximate cause defense." In support of this proposition, the plaintiff contends that in Illinois, "foreseeable misuses are still within the scope of the manufacturer's fault," and points to this court's decision in *Brdar v. Cottrell, Inc.*, 372 Ill. App. 3d 690 (2007), as proof that the sole proximate cause instruction may not be given in a case where the misuse was foreseeable. We begin by noting that although in *Brdar*, we did in fact hold that the trial judge did not err in refusing to give the sole proximate cause instruction, our reason for doing so had nothing to do with foreseeability: it was because the evidence adduced at trial was too weak, in light of the *Leonardi* standard discussed above, to support giving the instruction. 372 Ill. App. 3d at 704-05. With regard to the question of foreseeability, we held only that the trial judge did not err in refusing to give a different instruction, one that would have told the jury that the plaintiff was required to prove that the product in question (a trailer designed to transport automobiles) was in the same condition at the time of the accident that it was at the time it left the control of the manufacturer. *Id.* Thus, *Brdar* is not apposite to the case on appeal in the manner the plaintiff suggests it is.

¶ 40 That difference between *Brdar* and the present case notwithstanding, we agree with the defendant that in this case, as in all such cases, the burden to prove causation and liability always rested firmly with the plaintiff. See, *e.g.*, *Leonardi*, 168 Ill. 2d at 93-94 (in any negligence action, plaintiff bears burden of proving proximate cause; proximate cause "is an element of the *plaintiff's* case" and invocation of sole proximate cause defense by defendant "in no way shifts to the defendant the burden of proof" (emphasis in

original)). Accordingly, the operative question is not, as the plaintiff contends, whether there was "evidence Duff's alleged misuses could not have been foreseen," but whether there was evidence that Duff's alleged misuses could have been foreseen. We agree with the defendant that a review of the record substantiates the defendant's position that although witnesses Kevin Sevart and Joseph Groves testified about the foreseeability of people moving the lift with the boom raised and extended, using the boom after the lift has been leveled, and using unapproved platforms with the lift, as well as the foreseeability of injuries resulting therefrom, no witness was asked if, and no witness testified that, Duff's alleged misuse of the lift, by failing to level it at all, was foreseeable. Thus, even if the plaintiff had contended at trial–and we note that he did not raise this point until after the trial–that the instruction was improper as a matter of law because Duff's alleged misuse of the defendant's product was foreseeable, there would have been no evidence to support the position of the plaintiff and no basis to refuse to give the instruction.

¶ 41 To the contrary, as noted elsewhere in this decision, the instruction was, *inter alia*, legally proper and required by the evidence presented at trial, and Judge Lopinot did not err in any way by giving it. Moreover, the plaintiff admits that the jury was instructed on the plaintiff's theory that the defendant failed to design a product that would "protect users from foreseeable misuse by an operator." Clearly, the jury was not persuaded by the plaintiff's theory.

¶ 42 Accordingly, we conclude that no reasonable person would agree with a decision by Judge Lopinot to order a new trial on either the basis that the instruction was improper

as a matter of law because the defendant "identified multiple other causes" rather than a single other cause of the injury, or that it was improper because the defendant "was liable for any foreseeable misuse" of the lift. Accordingly, to the extent Judge Lopinot ordered a new trial on either basis, he erred, and must be reversed.

¶ 43 With regard to the "so-called 'family discord' evidence," the defendant contends on appeal that it was an abuse of Judge Lopinot's discretion for him to grant a new trial on the basis of his posttrial statement that he had erred at trial when he "allowed evidence of discord within the family of the [p]laintiff without any evidence that it caused the [p]laintiff to suffer from any diagnosable condition prior to the 2011 incident." The defendant notes that a large amount of evidence that the defendant wished to introduce about the plaintiff, his lifestyle, and his relationship with his family was excluded, and contends that the small amount that was admitted by Judge Lopinot was proper. In support of this contention, the defendant claims that the evidence admitted was relevant with regard to the plaintiff's $2.5 million claim for damages, because the jury could not properly assess damages for "loss of a normal life" without knowing what the plaintiff's pre-accident "normal life" was like. The defendant further contends the evidence was relevant only as to damages, and because the jury never reached the question of damages, there is no way the plaintiff was prejudiced by the admission of the evidence. The plaintiff, on the other hand, argues that the evidence was not limited to damages, and that the danger exists that the jury might have been "unduly influenced by evidence that would cause it not to like or trust [the plaintiff] or anyone who could help [the plaintiff] with any money he was awarded." In the alternative, the plaintiff contends that even if

the evidence was limited to damages, Judge Lopinot still had the right to reverse his trial position and grant a new trial on the basis of his admission of the evidence.

¶ 44 In 1973, in the wrongful death case of *Mulvey v. Illinois Bell Telephone Co.*, 53 Ill. 2d 591, 599 (1973), the Supreme Court of Illinois held that, as a general proposition, "[i]t is unnecessary" for a court to consider allegations of error "pertaining to the extent of damages" if "it is evident that the jury, having found the defendant not liable, never reached the question of damages." However, the *Mulvey* court added that an exception exists where "errors which go to the question of damages may be so pervasive and prejudicial as to create the likelihood that they may have affected a jury's decision on the issue of liability." *Id.* at 599-600. In *McDonnell v. McPartlin*, 192 Ill. 2d 505, 531 (2000), the Supreme Court of Illinois reiterated the *Mulvey* rule and its exception. The *McDonnell* court concluded that because the evidence and argument complained of in the case before it "went only to the question of damages," and because the jury "found in favor of the defendants as to liability, and thus never reached the question of damages," the court "need not, therefore, consider whether the trial court erred in permitting such evidence and argument." *Id.* at 532. The *McDonnell* court then assumed, *arguendo*, that the trial court erred in admitting the evidence and argument, and laid out the manner by which a court is to determine if the *Mulvey* rule exception is present: by reviewing the record on appeal to weigh the likelihood that the error alleged was "so pervasive as to affect the jury's decision as to liability." *Id.* at 532-33. The *McDonnell* court reviewed the argument and testimony adduced over the course of the four-week trial, and concluded that "[g]iven the length of this trial and the sheer volume of evidence placed

before the jury, the relatively small amount of evidence and argument [that was assumed to be error] was not pervasive at all, much less so pervasive as to affect the jury's decision on liability." *Id*.

¶ 45 Applying the *Mulvey* rule, its exception, and the *McDonnell* analysis to the case at bar, we conclude that no reasonable person would agree with Judge Lopinot's decision that a new trial was warranted here. As explained above, although the defendant claims the evidence presented here went only to the question of damages, the plaintiff contends it potentially might have impacted the jury's decision on liability. To address the concerns of the plaintiff, we will follow the guidance of the *McDonnell* court and assume, *arguendo*, that the plaintiff is correct and that the evidence was admitted in error; we therefore review the record on appeal to weigh the likelihood that the error alleged was "so pervasive as to affect the jury's decision as to liability." See *id*.

¶ 46 In this case, as described in detail above, the evidence complained of consists of the following: (1) Dr. Schwarz's testimony that in the course of her assessment of the plaintiff she learned that following the injury, the plaintiff experienced tension in his relationship with his father and stepmother, with the plaintiff telling Dr. Schwarz that they wanted to pursue "guardianship or conservatorship of him," which distressed the plaintiff because he believed "they were trying to get his money"; (2) counselor Betty Bockhorst's testimony that the plaintiff: (a) did not have much family support (including people who might care for him once Peggy was no longer there to care for him); (b) told her that he "didn't want to be like his old self before the accident" and "didn't want to be now the person he was before the accident" because "his old self wouldn't be a good

person to be"; (c) was raised in what she characterized as a "dysfunctional" family, and that the plaintiff's father physically abused him; (d) told her his relationship with his stepmother "really got bad" after his accident, and that the plaintiff's father and stepmother rejected his wife, Peggy, and excluded her from family gatherings; (e) "had issues with his siblings and half-siblings" (we note that no detail was elicited about what kinds of issues, or who was responsible for the issues, other than that the plaintiff "did get along with one" while "there was one that he definitely did not get along with"); (f) told her that he was not in his children's lives much when they were growing up but that "he would like to see them"; (g) had written, when asked to list his children, "Supposedly have another daughter here in Hermann, Missouri. Never knew about her or met her. Supposedly called my brother, Mike, after she was 18. *** Said I may be her dad. Don't know; don't care"; and (h) had also written about his children, "When [I] talk to them all they want is money. Their mom got custody of them and took them where I didn't know where they were"; and (3) Peggy's testimony that she was "banned" by the plaintiff's parents for a short time after the accident from visiting him at the hospital, that the plaintiff "and his dad did not get along even since childhood," and that the plaintiff was very upset when his family tried to "put him into a conservatorship," and that he still thinks they will try again to do so.

¶ 47 We begin by noting that Peggy provided additional testimony that undercut some of Bockhorst's testimony about the extent of the family discord and the ramifications of the plaintiff receiving money from the defendant. When asked if the plaintiff's relationship was "even worse with his stepmother," Peggy testified, rather equivocally, "I

guess." She also testified that the plaintiff was "especially close" to one of his sisters, but "[j]ust the opposite" with another sister, and notably testified that aside from the latter sister, "[t]he other ones, they're–pretty much they have stayed by his side, and they try to encourage him more now." She testified that she thought they would continue to "provide some guidance and support" in the future. She testified that the plaintiff had a total of eight siblings and half-siblings.

¶ 48 We also note that, as the defendant suggests, none of this testimony necessarily paints the plaintiff in a negative light, as none of it suggests that the plaintiff caused any of the alleged discord, rather than being the victim of bullying by various family members throughout his life. More importantly, this evidence was adduced over the course of a six-day trial. In terms of both quantity and quality of evidence, it was a mere smattering of the total evidence considered by the jury, which, as also described above, for purposes of liability consisted of the voluminous conflicting testimony of lay witnesses and expert witnesses with regard to what responsibility the defendant, as the manufacturer of the lift, bore for the accident that seriously injured the plaintiff, as opposed to what responsibility for the accident belonged to the company that rented the lift to Yoder, Yoder himself, and Duff as an employee of Yoder. Having reviewed the record on appeal, we conclude, as did the *McDonnell* court, that "[g]iven the length of this trial and the sheer volume of evidence placed before the jury, the relatively small amount of evidence and argument [that was assumed to be error] was not pervasive at all, much less so pervasive as to affect the jury's decision on liability." See 192 Ill. 2d at 532-33. Therefore, no reasonable person would adopt the position of Judge Lopinot and grant

a new trial on the basis of the "family discord" evidence admitted in this case, and it was a clear abuse of discretion for Judge Lopinot to grant a new trial on this basis. See, *e.g.*, *Boren v. The BOC Group, Inc.*, 385 Ill. App. 3d 248, 254 (2008).

¶ 49 We have already considered and rejected the plaintiff's additional proposed reason to affirm Judge Lopinot's order: that Judge Lopinot should have granted a new trial based upon the exclusion of Yoder from the verdict forms and instructions. Because we reverse Judge Lopinot's order granting the plaintiff a new trial, and because therefore there will be no new trial, we need not consider the defendant's arguments with regard to what kind of evidence should be permitted at such a trial.

¶ 50 CONCLUSION

¶ 51 For these reasons, we reverse the order of the circuit court of St. Clair County that granted the plaintiff's motion for a new trial. The judgment for the defendant is reinstated.

¶ 52 Reversed.