2019 IL App (1st) 182078-U

SIXTH DIVISION
September 27, 2019

No. 1-18-2078

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ALEXANDER J. RICCIARDI, Plaintiff-Appellant, v. THE ALLSTATE CORPORATION, ALLSTATE INSURANCE COMPANY, ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY, ALLSTATE INDEMNITY COMPANY, KELLY SERVICES, INC., and MONIQUE D. BRYANT-ROGERS, Defendants (The Allstate Corporation, Allstate Insurance Company, Allstate Property and Casualty Insurance Company, Allstate Indemnity Company, and Kelly Services, Inc., Defendants-Appellees).	)	Appeal from the Circuit Court of Cook County. No. 2014 L 6194 Honorable Rena Van Tine, Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justice Cunningham concurred in the judgment.
Justice Harris specially concurred.

ORDER

¶ 1 *Held:* Trial court did not abuse its discretion when it granted motion *in limine* that excluded requests to admit that called for a legal conclusion; trial court did not improperly deprive plaintiff of opportunity to elicit testimony; trial court did not abuse its discretion when it denied plaintiff's motion for a new trial; affirmed.

¶ 2 Plaintiff, Alexander Ricciardi, was severely injured after he was struck by a car that was driven by Monique Bryant-Rogers. At the subsequent jury trial, Bryant-Rogers admitted liability and plaintiff sought to recover from defendants, Allstate Insurance Company and its related entities (Allstate) and Kelly Services, Inc. (Kelly Services) via *respondeat superior*. The jury ultimately assessed total damages of approximately $35 million. However, pursuant to a special interrogatory, the jury found that Bryant-Rogers was not acting within the scope of her employment at the time of the accident. Thus, Allstate and Kelly Services were not responsible for the damages. On appeal, plaintiff contends that: 1) the trial court abused its discretion when it granted a motion *in limine* that excluded certain answers to plaintiff's requests to admit; 2) the trial court abused its discretion when it prohibited plaintiff from eliciting those answers during Bryant-Rogers's testimony; and 3) the trial court abused its discretion when it denied plaintiff's motion for a new trial. We affirm.

¶ 3 The record reveals that on June 6, 2014, Bryant-Rogers was a customer service representative in Allstate's roadside assistance center in Northbrook. While driving back from lunch with two co-workers, Bryant-Roger's car struck plaintiff's motorcycle. On June 11, 2014, plaintiff filed a lawsuit against Bryant-Rogers, alleging that Bryant Rogers's negligence caused plaintiff to suffer severe and permanent personal and pecuniary injuries. On March 29, 2016, plaintiff issued requests to admit to Bryant-Rogers under Illinois Supreme Court Rule 216 (eff. July 1, 2014). Three of those requests are relevant to this appeal:

"4. Monique D. Bryant-[Rogers] was working for Allstate Insurance Company at

the time of the accident.

* * *

26. Monique D. Bryant-[Rogers] was in the scope of her employment with Allstate Insurance Company at the time of the accident.

***

27. Monique D. Bryant-Rogers was in the scope of her employment with Kelly Services at the time of the accident."

Bryant-Rogers, who was represented by counsel, answered "[a]dmits" to the three requests.

¶ 4 On April 20, 2016, plaintiff filed an amended complaint that named Allstate and Kelly Services as additional defendants. In part, plaintiff alleged that on the date of the collision, Bryant-Rogers was an employee and/or agent for Allstate and Kelly Services and operated a vehicle as an employee and/or agent for Allstate and Kelly Services.

¶ 5 Before trial, plaintiff filed a motion *in limine* to bar the opinions and testimony of a defense expert, Deborah DeMott, because her opinions were "strictly based on common law interpretation and legal conclusions." DeMott had opined in part that Bryant-Rogers' conduct was not within the scope of her employment at the time of the accident. Plaintiff's counsel maintained at a hearing that "[a]ll [DeMott's] doing is offering legal conclusions based upon the jury instruction." The court granted plaintiff's motion *in limine* to bar DeMott's testimony.

¶ 6 Defendants filed a motion *in limine* to exclude Bryant-Rogers's answers to requests to admit numbers 26 and 27, in which Bryant-Rogers admitted that she was in the scope of her employment with Allstate and Kelly Services at the time of the accident. Defendants asserted that whether Bryant-Rogers was within the scope of her employment at the time of the accident was an inadmissible legal conclusion. Defendants also stated that it would be improper and

highly prejudicial to admit Bryant-Rogers' answers in a trial that targeted defendants. Further, at a June 2017 discovery deposition, Bryant-Rogers stated that she did not understand the term "scope of employment." At a hearing on the motion *in limine*, Bryant-Rogers's counsel recalled that Bryant-Rogers answered the requests to admit to the best of her ability and was never read the law. Plaintiff's counsel maintained that he was not trying to claim that the requests to admit were binding on Allstate or Kelly Services, but were binding on Bryant-Rogers "as to what her state of mind was at the time that this accident happened."

¶ 7 The court granted defendants' motion *in limine*. In an oral ruling, the court stated that the requests to admit were issued before Allstate and Kelly Services were in the case and it would be unfair to hold the requests to admit against them. The court further found that Bryant-Rogers's response would "just confuse the jury in terms of focusing on the scope of authority and the scope of employment as defined by statute." Also, the requests to admit called for a legal conclusion and Bryant-Rogers's "flip-flop response" would not help the jury. The court added that Bryant-Rogers's opinion or state of mind on the scope of employment was not relevant "to what the scope of employment actually is as defined by statute when she clearly from the face of it didn't understand what scope of employment meant in the legal sense." After the court's ruling, plaintiff's counsel confirmed that no one would be allowed to ask Bryant-Rogers if she was in the scope of employment. Plaintiff's counsel asked, "They can't say to her you weren't in the scope of employment?" The court responded, "Correct, the flip side of that is also accurate."

¶ 8 We summarize below the trial testimony that pertained to Bryant-Rogers's relationship to Allstate and Kelly Services. Via a videotaped evidence deposition, Guljeet "Rosie" Singh testified that she had been a Kelly Services senior talent solutions manager and served as the main point of contact for Allstate hiring managers. Singh recalled that Bryant-Rogers initially

worked at Allstate in Northbrook from November 2013 to April 2014. When Bryant-Rogers left, she was on a "final" for attendance, which meant she would be fired if she was late or absent again. In May 2014, Bryant-Rogers returned to Allstate and started with a status of verbal warning. Bryant-Rogers could be fired if she was late again. Singh further stated that nothing in Bryant-Rogers's job description required the use of a motor vehicle.

¶ 9 Plaintiff's counsel called Bryant-Rogers to testify. She stated that as a call center representative, she helped Allstate insureds when they had a problem. Plaintiff's counsel asked, "[T]he entire time that you worked there, whenever you answered the phone, you always said you were an Allstate employee, correct?" Bryant-Rogers answered, "Yes." Before she returned in May 2014, Bryant-Rogers was told that she would lose her job if she was tardy one more time. On June 6 at 11:32 a.m., Bryant-Rogers left the Allstate building for lunch with two co-workers. She had to return to her desk within 30 minutes or she would be considered late. After 15 minutes had passed, Bryant-Rogers had not found the restaurant she was looking for and turned in to a gas station. Bryant-Rogers was getting nervous because she did not want to be late. She affirmed that all that was on her mind was returning to Allstate so that she would not be late. Bryant-Rogers entered the road again, and when she crossed the third lane of traffic, she struck plaintiff's motorcycle. Bryant-Rogers stated that she was rushing at the time of the accident.

¶ 10 On cross-examination by defense counsel, Bryant-Rogers stated that she had to be in the call center to do her job. She was not expected to perform any services for Allstate and Kelly Services on her lunch break and she understood that she was off the clock. Defense counsel and Bryant-Rogers also had the following exchange:

> "Q. Wouldn't you agree that at the exact moment of the accident, you weren't working at all?

A. No, I was not working."

¶ 11 On redirect, plaintiff's counsel asked, "You in fact were working for Allstate at the time of the accident; is that right?" Defense counsel objected that there was a motion *in limine* and requested a sidebar. There, plaintiff's counsel stated, "There's no motion *in limine* on this," and maintained that his question pertained to Bryant-Rogers's response to request to admit number 4, where Bryant-Rogers had admitted she "was working for Allstate Insurance Company at the time of the accident." Plaintiff's counsel added that defense counsel "opened the door on it," and plaintiff's counsel was allowed to show "that in fact she filed documents saying she was." Further, defendants' motion *in limine* only pertained to requests to admit numbers 26 and 27. Plaintiff's counsel "was not getting into the whole request [to admit], just the one request to admit."

¶ 12 At first, the court indicated that it would not allow the use of request to admit number 4. The court was concerned that allowing plaintiff's question would "open the door to *** everything else." Plaintiff's counsel responded that "they're totally different topics. One is scope of employment, and you ruled that that's a legal conclusion." He maintained that "[i]t's just this one request to admit. I'm not getting into anything about scope of employment." Plaintiff's counsel assured the court that he was "not asking to get into any other purpose. *** I just am talking about this one request to admit. And their motion *in limine* was very specific to [numbers] 26 and 27." Plaintiff's counsel also clarified that he only intended to use the answer to the request to admit for impeachment purposes. The court stated that plaintiff's counsel could ask Bryant-Rogers "were you working for Allstate Insurance Company at the time of the accident." If Bryant-Rogers replied "no," then plaintiff's counsel could impeach her with the

answer to the request to admit number 4, though plaintiff's counsel would refer to the request to admit as "a document you filed with the court and swore under oath to."

¶ 13 More discussion continued after the court's proposed solution. The court suggested that plaintiff's desired question was related to the scope of employment issue that was addressed in defendants' motion *in limine*. Plaintiff's counsel again denied that the two matters were related, stating, "[i]t isn't. It isn't. I'm directly addressing [defense counsel's] question on cross that said *** you weren't working for Allstate. And that's what this addresses. That's all." The court stated, "But that can be taken as a scope of employment issue," to which plaintiff's counsel replied, "So we opened the door on it. So I guess we should get into the entirety of the requests to admit. I mean, he's the one who asked the question." The court eventually stated, "Okay. Let's see what she says."

¶ 14 The sidebar ended and the court instructed the jury that "whether Monique Bryant-Rogers was within the scope of her employment is going to be an issue for you to decide. So no one witness on the case can give the ultimate answer to that." When testimony resumed, the following exchange ensued between plaintiff's counsel and Bryant-Rogers:

> "Q. Ms. Bryant-Rogers, you were working for Allstate at the time of this accident, right?
>
> A. Through Kelly Services, yes."

Bryant-Rogers also affirmed that she had been in Northbrook because she was working for Allstate through Kelly Services.

¶ 15 After testimony ended, the parties presented closing arguments. In his closing, plaintiff's counsel stated in part that "[y]ou can be doing something at lunch that puts you in the scope of your employment." Plaintiff's counsel noted that Bryant-Rogers was told that she would be fired

if she was late and she was trying to serve her employer so she would not be fired. Plaintiff's counsel asserted that everything Bryant-Rogers did "that day in the car as they got closer and closer to being late was motivated to be able to serve Allstate and *** Kelly [Services]."

¶ 16 In his closing, defense counsel stated in part that Bryant-Rogers "told you at the exact moment of the accident, I wasn't working." Further, Bryant-Rogers had testified that lunch was "her time" and neither Allstate nor Kelly Services tried to contact her during lunch. According to defense counsel, Bryant-Rogers was motivated by hunger and not by a purpose to serve her employer.

¶ 17 After deliberations, the jury returned a verdict that found for plaintiff and against Bryant-Rogers. The jury awarded plaintiff approximately $35 million in damages. However, the jury did not find against Allstate and Kelly Services. Pursuant to special interrogatories, the jury found that Bryant-Rogers was not acting within the scope of her employment for Allstate or Kelly Services at the time of the accident.

¶ 18 Subsequently, plaintiff filed a motion for a new trial. In part, plaintiff asserted that the trial court should not have granted the motion *in limine* that excluded Bryant-Rogers's answers to requests to admit numbers 26 and 27—the scope of employment requests to admit. Plaintiff maintained that the admissions were relevant and highly probative evidence of Bryant-Rogers's state of mind and should be considered conclusive on that issue. Plaintiff also stated that the trial court improperly allowed defendants to cross-examine Bryant-Rogers on the issue of her employment after excluding evidence of her prior inconsistent statements from the scope of employment requests to admit. According to plaintiff, defendants' cross-examination opened the door to plaintiff's use of the admissions.

¶ 19 In response, defendants asserted in part that plaintiff had sought to use a different request to admit during Bryant-Rogers's testimony. Defendants also maintained that plaintiff was able to fully examine Bryant-Rogers about her state of mind and the facts pertaining to her employment.

¶ 20 After a hearing, the court denied the motion for a new trial. In an oral ruling, the court recalled that plaintiff was not allowed to use Bryant-Rogers's answers to the scope of employment requests to admit because that would have been "patently unfair" to Allstate and Kelly Services, as those entities were not in the case when Bryant-Rogers's answered the requests. The court added that even if a response to a request to admit is relevant, "it does have to go through a 403 analysis, which I did at the time." The court stated that it weighed the risk of prejudice against the probative value, and "did find and continue to find the risk of prejudice substantially outweighs the probative value of the response." The court stated that the answers would have confused and prejudiced the jury, which would not know who to hold the answers against. The court further found that the answers were "patently a legal conclusion" and not judicial admissions. Also, plaintiff had a more than adequate opportunity to question Bryant-Rogers about her state of mind and her scope of employment. The court recounted that it "thoroughly allowed her state of mind to be explored." The court concluded that plaintiff was not prejudiced or denied a fair trial.

¶ 21 On appeal, plaintiff first contends that the trial court abused its discretion when it granted defendants' motion *in limine* to exclude Bryant-Rogers's answers to the scope of employment requests to admit. Plaintiff asserts that Bryant-Rogers's subjective state of mind was a material factor in determining the scope of her employment with Allstate and Kelly Services. Further, Bryant-Rogers's answers were judicial admissions as to her state of mind.

¶ 22 A trial court's ruling on a motion *in limine* is reviewed for an abuse of discretion. *Gossard v. Kalra*, 291 Ill. App. 3d 180, 182 (1997). "The trial court abuses its discretion when the ruling is arbitrary or unreasonable or no reasonable person would agree with the position taken by the court." *Citibank, N.A. v. McGladrey & Pullen, LLP*, 2011 IL App (1st) 102427, ¶ 13. This standard of review is the most deferential, "with the exception of no review at all." (Internal quotation marks omitted.) *Jones v. Yellow Cab Affiliation, Inc.*, 2017 IL App (1st) 151107, ¶ 35.

¶ 23 Under the doctrine of *respondeat superior*, an employer can be vicariously liable for the tortious acts of its employees if the torts were committed within the scope of employment. *Pyne v. Witmer*, 129 Ill. 2d 351, 359 (1989). To determine whether an employee acted within the scope of employment, Illinois courts apply the Restatement (Second) of Agency, § 228 (1958), which provides that an employee's conduct is within the scope of employment if three criteria are met: 1) it is of the kind the employee is employed to perform, 2) it occurs substantially within the authorized time and space limits, and 3) it is actuated, at least in part, by a purpose to serve the employer.[1] *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 164 (2007); *Hoy v. Great Lakes Retail Services, Inc.*, 2016 IL App (1st) 150877, ¶ 24.

¶ 24 Under Rule 216, a party to an action may serve another party to that action with a written request for the admission "of any specified relevant fact set forth in the request." Ill. S. Ct. R. 216(a) (eff. July 1, 2014); *Robertson v. Sky Chefs, Inc.*, 344 Ill. App. 3d 196, 199 (2003). The party receiving the request has 28 days to deny or object to the request. Ill. S. Ct. R. 216(c) (eff. July 1, 2014). Otherwise, the factual matters in the request are deemed judicial admissions that cannot later be controverted by any contradictory evidence. *Robertson*, 344 Ill. App. 3d at 199.

[1] "The Third Restatement of Agency states the test in more general terms, but with essentially the same meaning." *Nulle v. Krewer*, 374 Ill. App. 3d 802, 805 n.1 (2007) (citing Restatement (Third) of Agency, § 7.07, Comment *b*, at 199 (2006)).

"Judicial admissions are not evidence at all, but rather have the effect of withdrawing a fact from contention." (Internal quotation marks omitted.) *Rath v. Carbondale Nursing & Rehabilitation Center*, 374 Ill. App. 3d 536, 538 (2007). While a party may request admissions of any fact that is relevant, including ultimate facts, requests for legal conclusions are improper. *P.R.S. International, Inc. v. Shred Pax Corp.*, 184 Ill. 2d 224, 236 (1998).

¶ 25 To review, the two scope of employment requests to admit were:

> "26. Monique D. Bryant-[Rogers] was in the scope of her employment with Allstate Insurance Company at the time of the accident.
>
> ***
>
> 27. Monique D. Bryant-[Rogers] was in the scope of her employment with Kelly Services at the time of the accident."

Bryant-Rogers answered "[a]dmits" to both requests.

¶ 26 Plaintiff's theory is that the responses to the requests are judicial admissions as to whether she was motivated by a purpose to serve her employer. Defendants assert that the responses to the requests are not judicial admissions because the requests called for a legal conclusion. If the requests to admit indeed called for a legal conclusion, then the answers would not be deemed judicial admissions even though Bryant-Rogers did not object. *Id*. at 242. Again, requests under Rule 216 must be limited to questions of fact. *Id*. at 237.

¶ 27 A request to admit is proper "if a finder of fact must take some analytical step, no matter how small, from the contents of the admissions to the final conclusion that the party seeks to establish." *Hubeny v. Chairse*, 305 Ill. App. 3d 1038, 1043-44 (1999). Meanwhile a legal conclusion is a "statement that expresses a legal duty or result but omits the facts creating or supporting the duty or result." Black's Law Dictionary (11th ed. 2019). The two requests to

admit here, which asked Bryant-Rogers to admit she was in the scope of her employment, are classic requests for a legal conclusion. Plaintiff requested the legal result he was seeking—that Bryant-Rogers acted within the scope of her employment, but without any facts that would be needed to lead to that result. Notably, plaintiff strenuously argued that defendants' proposed expert would offer legal conclusions if she were allowed to testify that Bryant-Rogers' conduct was not within the scope of her employment at the time of the accident, which is the converse of plaintiff's requests to admit.

¶ 28 Plaintiff relies on *Lawlor v. North American Corp. of Illinois*, 409 Ill. App. 3d 149 (2011), which does not support plaintiff's position. In *Lawlor*, the court found that a party was bound by a judicial admission in an affidavit that two entities were agents. 409 Ill. App. 3d at 163. Plaintiff claims that just as *Lawlor* found that the ultimate issue of agency could be determined by binding admission, so too can the ultimate issue of the scope of employment. Yet, despite the alleged judicial admission, the court in *Lawlor* still considered whether the evidence adduced at trial was sufficient to establish an agency relationship. *Id.* The case's subsequent history is also instructive. On appeal, the supreme court declined to address the claim that a party was bound by "the so-called 'judicial admission' " in the affidavit. *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 52. But, the supreme court noted that the affidavit did not "dispense with the need *** to prove the existence of an agency relationship, which was a fact question presented to the jury." *Id.* ¶ 52 n.7. *Lawlor* does not suggest that a legal conclusion can be a judicial admission.

¶ 29 Plaintiff further asserts that any alleged defect in a request to admit—including that the request calls for a legal conclusion— must be raised by written objection, which Bryant-Rogers did not do. In support, plaintiff cites a special concurrence from *P.R.S. International, Inc.*, 184

Ill. 2d at 245 (Harrison, J., specially concurring), which stated that the claim that a requested admission asks for a legal conclusion must be raised by written objection, just like any other objection. However, as even plaintiff recognizes, that special concurrence did not carry the day. The majority found that a failure to object on the grounds that a request asked for a legal conclusion did not constitute an admission. *Id*. at 242. See also *Hubeny*, 305 Ill. App. 3d at 1043 (citing the majority opinion in *P.R.S. International, Inc.* and stating "[o]nly if the request seeks the admission of a conclusion of law will a trial on the issue be required despite the opposing party's failure to respond"). Consistent with governing precedent, Bryant-Rogers's failure to object to the requests for a legal conclusion did not constitute a judicial admission.

¶ 30 Additionally, using Bryant-Rogers's answers against Allstate and Kelly Services would violate the rule that an admission may only be used "against the party who made it and not against other parties in the suit." *Rowe v. State Bank of Lombard*, 247 Ill. App. 3d 686, 696 (1993). See also *Banco Popular v. Beneficial Systems, Inc.*, 335 Ill. App. 3d 196, 208 (2002) (under Rule 216, one party's admissions cannot be used against another party in the litigation, but only against himself). Though plaintiff states that the alleged admissions would be evidence of Bryant-Rogers's state of mind, the admissions would have actually been used against defendants, who stood to be held liable if Bryant-Rogers was found to be acting in the scope of her employment. The trial court correctly excluded Bryant-Rogers's answers.

¶ 31 Plaintiff further asserts that even if the answers were not judicial admissions, the trial court still abused its discretion by excluding relevant evidence of Bryant-Rogers's state of mind. Plaintiff claims that the court improperly weighed the probative value of the answers against any potential prejudice.

¶ 32 Illinois Rule of Evidence 403 (eff. Jan. 1, 2011) provides that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury," among other factors. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." (Internal quotation marks omitted.) *Bergman v. Kelsey*, 375 Ill. App. 3d 612, 636 (2007). "Prejudice is an undue tendency to suggest a decision on an improper basis." *LaSalle Bank, N.A. v. C/HCA Development Corp.*, 384 Ill. App. 3d 806, 822 (2008). Evidence that is arguably relevant may be excluded if it would confuse the issues or tend to mislead the jury. *Demos v. Ferris-Shell Oil Co.*, 317 Ill. App. 3d 41, 53 (2000).

¶ 33 The trial court did not abuse its discretion when it determined that Bryant-Rogers's answers should be excluded. The record indicates that the trial court considered the proposed evidence and whether it was relevant. The court found that the answers would confuse the jury where the scope of employment had a specific definition and Bryant-Rogers apparently did not understand the term when she answered the requests to admit. In her discovery deposition, Bryant-Rogers stated that she did not understand what the term "scope of employment" meant. The trial court noted that her "flip-flop response"—between the request to admit and her deposition—would not help the jury. The record confirms that the court performed a Rule 403 analysis and its decision to exclude the answers was not unreasonable or arbitrary.

¶ 34 Next, plaintiff contends that the court abused its discretion during Bryant-Rogers's testimony. According to plaintiff, the court improperly allowed defendants to cross-examine Bryant-Rogers on the issue of her employment after plaintiff was deprived of the ability to offer her prior inconsistent statement from the requests to admit that she was in the scope of her

employment. Plaintiff asserts that defendants' cross-examination opened the door to plaintiff's use of the admissions.

¶ 35 Plaintiff correctly notes that a party can open the door to using otherwise excluded evidence. See *Rush v. Hamdy*, 255 Ill. App. 3d 352, 366 (1993) (the defendants opened the door to excluded testimony of one phone call where they introduced testimony of other phone calls); *Hamrock v. Henry*, 222 Ill. App. 3d 487, 495 (1991) (the plaintiff opened the door to questions about her pension when she testified that the pension board referred her to a doctor). Plaintiff asserts that here, defendants opened the door to the scope of employment requests to admit by cross-examining Bryant-Rogers extensively about her understanding of her employment at the time of the accident. Plaintiff points to defendants' specific question, "Wouldn't you agree that at the exact moment of the accident, you weren't working at all?", to which Bryant-Rogers replied, "No, I was not working."

¶ 36 We will not answer whether defendants actually opened the door to using the scope of employment requests to admit because plaintiff forfeited his argument. After defendants asked the above question, plaintiff's counsel asked Bryant-Rogers, "You in fact were working for Allstate at the time of the accident, is that right?" At the sidebar that followed, plaintiff's counsel asserted that his question pertained to request to admit number 4, in which Bryant-Rogers admitted that she was working for Allstate at the time of the accident. Throughout the sidebar, plaintiff's counsel insisted that the scope of employment requests were not at issue and even stated that the two sets of requests to admit were "totally different topics." The closest reference to opening the door to the scope of employment requests came at the end of the sidebar, when the court suggested that plaintiff's proposed question could be related to the scope of employment. Plaintiff's counsel replied, "So we opened the door on it," but plaintiff's counsel

did not seek to use the scope of employment requests to admit. Instead, plaintiff's counsel received the outcome he asked for—he was permitted to use Bryant-Rogers's answer to request to admit number 4 for impeachment purposes. Only after trial did plaintiff assert that he should have been allowed to use the scope of employment requests. Having emphatically denied that the scope of employment requests were at issue during trial, plaintiff forfeited the argument that the trial court improperly excluded them during Bryant-Rogers's testimony. See *Guski v. Raja*, 409 Ill. App. 3d 686, 697 (2011) (plaintiff forfeited issue of whether excluded evidence could be introduced where plaintiff did not assert that a motion *in limine* was violated, move to strike the offending testimony, or try to introduce the desired evidence on redirect in response to an alleged expansion of testimony on cross-examination); *LaSalle Bank, N.A.*, 384 Ill. App. 3d at 826 (plaintiffs forfeited argument that excluded evidence should have been admitted where plaintiffs were told by the trial court to "check with the gatekeeper" if the defendant had opened the door to the evidence, but plaintiffs' attorney did not do so).

¶ 37 Lastly, plaintiff contends that the trial court abused its discretion when it denied his motion for a new trial. Plaintiff asserts that an improper exclusion of evidence by granting a motion *in limine* is grounds for a new trial.

¶ 38 A trial court will set aside the jury verdict and order a new trial only if 1) the verdict was against the manifest weight of the evidence or 2) serious and prejudicial errors were made at trial in the exclusion or admission of evidence. *McHale v. W.D. Trucking, Inc.*, 2015 IL App (1st) 132625, ¶ 56. We will not reverse the trial court's ruling on a motion for a new trial unless the trial court abused its discretion. *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 179 (2006).

¶ 39 Plaintiff's motion for a new trial included the same issues that plaintiff raises on appeal. Plaintiff asserted that the court should not have granted the motion *in limine* excluding the scope of employment requests and that the court should not have allowed defendants to cross-examine Bryant-Rogers about her employment after depriving plaintiff of the ability to offer the scope of employment requests. After a hearing on the motion for a new trial, the court explained why it had excluded the scope of employment requests and recalled that it had allowed Bryant-Rogers's state of mind to be explored during trial. As discussed above, the trial court properly granted defendants' motion *in limine* that excluded the scope of employment requests. We also agree with the trial court that plaintiff had ample opportunity to elicit testimony from Bryant-Rogers about her state of mind. Bryant-Rogers stated that she represented herself as an Allstate employee on the phone, affirmed that she was thinking about being on time to Allstate just before the accident, and stated she was nervous because she did not want to be late. On redirect examination, plaintiff's counsel was allowed to ask if Bryant-Rogers was working for Allstate at the time of the accident, to which Bryant-Rogers replied, "Through Kelly services, yes." Bryant-Rogers also affirmed that she had been in Northbrook because she was working for Allstate through Kelly Services. Throughout direct and redirect examination, Plaintiff was able to fully explore Bryant-Rogers's state of mind about her employment and was not prejudiced by the exclusion of the scope of employment requests. The trial court did not abuse its discretion when it denied plaintiff's motion for a new trial.

¶ 40 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 41 Affirmed.

¶ 42 JUSTICE HARRIS, specially concurring:

¶ 43 I concur with my colleagues that the trial court did not abuse its discretion. Plaintiff contends on appeal that the trial court erred in precluding evidence that the driver of the car, Ms. Bryant-Rogers, admitted in discovery that she "was in the scope of her employment" with Allstate and Kelly Services at the time of her accident. Plaintiff argues that Ms. Bryant-Rogers should be bound by her admission as indication of her state of mind at the time of the accident.

¶ 44 The trial court did not err in excluding that evidence. Generally, the issue of whether someone was acting in the scope of their employment is a question for the jury to resolve, depending on the facts presented, unless the conduct is so extreme so as to make the conduct "a complete departure from the business of the master." *Davila v. Yellow Cab Co.*, 333 Ill. App. 3d 592, 601 (2002). The mere opinion of Ms. Bryant-Rogers on an issue the jury must decide may prove confusing to the jury. She even acknowledged that she did not understand the phrase and there was no testimony from her clarifying what she understood the phrase to mean.

¶ 45 Furthermore, although our supreme court has not dictated a precise definition of "scope of employment," it has set forth "broad criteria" to consider in making the determination. *Pyne v. Witmer*, 129 Ill. 2d 351, 359-60 (1989). "Conduct of a servant is within the scope of employment if, but only if: (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; and (c) it is actuated, at least in part, by a purpose to serve the master. *** Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master." *Id.* at 360. Thus, Ms. Bryant-Rogers' state of mind that she was "in the scope of employment" is only relevant as it pertains to (c), whether she had a purpose to serve her employer. Ms. Bryant-Rogers testified, however, that at the time of the accident she was not performing services for her employer, and she was "off the clock" and free to do what

she wanted. Her conclusion that she was acting "in the scope of her employment" at the time of the accident, given her other statements, would have also confused the jury. We cannot say the trial court abused its discretion in excluding this evidence.

¶ 46 Plaintiff also complains that without Ms. Bryant-Rogers' admission, he was unable to counter evidence brought out by defendants when they cross-examined her. Plaintiff points to an exchange where Ms. Bryant-Rogers was asked, "Wouldn't you agree that at the exact moment of the accident, you weren't working at all?" and she answered, "No, I was not working." Plaintiff's counsel, however, was allowed to ask Ms. Bryant-Rogers, "you were working for Allstate at the time of this accident, right?" to which she responded, "Through Kelly services, yes." Additionally, plaintiff's counsel examined Ms. Bryant-Rogers extensively on her state of mind at the time of the accident, emphasizing the fact that she was anxious to return to work because she did not want to be late. Plaintiff was able to present relevant evidence of her state of mind as it relates to the scope of employment issue. The trial court did not abuse its discretion in excluding the evidence where no prejudice resulted. *People v. Diamond*, 54 Ill. App. 3d 439, 442 (1977).