2016 IL App (1st) 142535-U

SIXTH DIVISION
March 31, 2016

Nos. 1-14-2535 & 1-14-3050 (consolidated)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MARCIA DEMPE, as Guardian of the Person of Christopher Lindroth, Disabled; MARCIA DEMPE and FIRST MIDWEST BANK/ WEALTH MANAGEMENT COMPANY, as Coguardians of the Estate of Christopher Lindroth, Disabled; Plaintiffs-Appellees and Cross-Appellants, v. THE METROPOLITAN PIER AND EXPOSITION AUTHORITY, d/b/a McCORMICK PLACE EXPOSITION CENTER, Defendant and Third-Party Plaintiff and Cross-Appellee (Global Experience Specialists, f/k/a GES Exposition Services, Incorporated, Defendant-Appellant and Third Party Plaintiffs-Appellees; Coastal International, Incorporated, Third-Party Defendant-Appellant).	)	Appeal from the Circuit Court of Cook County. No. 08 L 7378 Honorable Drella Savage and Thomas Lyons, Judges Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Rochford and Justice Hoffman concurred in the judgment.

ORDER

¶ 1 ***Held:*** In this personal injury case, we affirm the denial of judgment notwithstanding the verdict and new trial on the jury's findings that: (1) defendant service contractor was liable for the injuries of the disabled individual; (2) the disabled person was 35% at fault; and (3) defendant's conduct was not willful and wanton. Additionally, we affirm the grant of summary judgment based on tort immunity as

> to the defendant metropolitan pier and exposition authority because its employee was engaged in supervision of an activity. We dismiss for lack of appellate jurisdiction the appeals from the order setting the *Kotecki* cap and the order denying a good-faith finding and enforcement of a conditional agreement between plaintiff and the employer.

¶ 2 Christopher Lindroth, an employee of Coastal International, Incorporated (Coastal), suffered serious injuries while working at a trade show held at McCormick Place. His mother, plaintiff Marcia Dempe, as guardian of his person and coguardian of his estate (along with First Midwest Bank/Wealth Management Company (First Midwest)),[1] brought suit alleging negligence and willful and wanton conduct against the Metropolitan Pier and Exposition Authority (MPEA) (a public body and the owner and operator of McCormick Place); and negligence against ASI Show, Incorporated (ASI) (the trade show exhibitor); and Global Experience Specialists, Incorporated (GES) (the official services contractor for ASI). Pursuant to the Local Governmental and Governmental Employees Tort Immunity Act (Act) (745 ILCS 10/1-101 *et seq*. (West 2012)), the trial court granted summary judgment in favor of MPEA on plaintiff's negligence claims. ASI was granted summary judgment and is not a party to this appeal. MPEA and GES filed separate complaints for contribution against Coastal.

¶ 3 After trial, the jury returned a verdict of $34.15 million in favor of plaintiffs and against GES, but found Lindroth 35% at fault for his injuries, reducing the verdict to approximately $22.2 million. On GES's contribution claim, the jury allocated 75% of GES's responsibility to Coastal. The jury also found in favor of MPEA and against plaintiff on the remaining willful and wanton count.

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[1] The circuit court of Lake County, Indiana, granted Dempe's petition to appoint First Midwest as coguardian of Lindroth's estate in December 2013, and First Midwest was added as a party beginning with the fifth (and final) amended complaint ("complaint"). For ease of expression, we refer to both plaintiffs as "plaintiff."

¶ 4 On appeal, GES argues the trial court erred in denying its posttrial motion for judgment notwithstanding the verdict (judgment *n.o.v.*) and a new trial, and determining the limit of Coastal's contribution liability due to its workers' compensation obligations. Plaintiff cross-appeals, arguing that the trial court erred in: (1) granting MPEA's motion for summary judgment pursuant to the Act on the negligence claim; and (2) denying its motion for judgment *n.o.v.* and a new trial with respect to the jury's finding in favor of MPEA on the willful and wanton claim. Coastal appeals the trial court's denial of its motions for a good faith finding and to enforce a conditional agreement (agreement) between it and plaintiff. We dismiss GES's appeal of the order fixing Coastal's contribution liability and Coastal's appeal of the order denying a good-faith finding and enforcement of the agreement for lack of appellate jurisdiction. We affirm the orders denying the motions for a new trial and judgment *n.o.v.* of plaintiff and GES and granting MPEA's motion for summary judgment and the judgment on the verdicts.

¶ 5 BACKGROUND

¶ 6 ASI contracted with MPEA to hold an exhibition in the north building at McCormick Place on July 11 and 12, 2007, with the move-in scheduled to begin on July 6, 2007. ASI, in turn, contracted with GES to be the official service contractor to supervise the logistics of setting up and dismantling the show. The participants in the show were permitted to hire exhibitor-approved contractors for the construction of their booths. Coastal was an exhibitor-approved contractor.

¶ 7 Lindroth was injured on July 10, 2007, while working on the set-up of the ASI exhibition. Lindroth's injuries occurred when he was a passenger on a motorized cart (cart) and the driver of the cart swerved to avoid hitting an oncoming vehicle on the north ramp of McCormick Place.

Charles Caruso, an MPEA employee, had directed the vehicle into the same lane. The cart, which was used by Coastal employees, was in an unsafe condition.

¶ 8 Plaintiff sued MPEA and GES. In the complaint, plaintiff alleged that MPEA, by its employee (Caruso), was negligent (count II) and wilful and wanton (count IV) for having directed northbound traffic into the southbound lane of the north ramp without first having determined whether it was safe to do so, and provided inadequate traffic control. In addition, plaintiff alleged that MPEA was both negligent (count I), and willful and wanton (count III) for allowing the use of the defective cart at McCormick Place.

¶ 9 In the claim against GES (count VI), plaintiff alleged that GES, as the official service contractor for ASI, had a duty to keep the workplace safe and assure compliance with all applicable rules. GES was alleged to have been negligent in, among other things, allowing Coastal to use unsafe equipment (the cart) when it knew or should have known that the equipment was hazardous.

¶ 10 GES filed a third-party complaint against Coastal seeking contribution for any amount for which GES would be found liable. MPEA filed a multi-count counterclaim which included allegations that it was entitled to contractual indemnification from Coastal.

¶ 11 MPEA's Motion for Summary Judgment

¶ 12 MPEA moved for summary judgment on counts II and IV, arguing that section 3-108 of the Act (745 ILCS 10/3-108 (West 2012)), which immunizes public bodies and employees for their supervision of activities, barred plaintiff's claim that it was liable for Caruso's actions in directing traffic on the north ramp. The trial court found that Caruso's duties "to ensure that incoming vehicles had access to go up the north ramp" may have been "ministerial," but were supervisory in nature and, therefore, MPEA was protected from the negligence claim under

section 3-108(a). The court granted MPEA summary judgment on count II, but denied the motion as to count IV, which alleged willful and wanton conduct. MPEA was granted summary judgment on counts I and III on other immunity grounds.

¶ 13 Trial Proceedings

¶ 14 The cause then proceeded to a five-week trial on plaintiff's willful and wanton claim against MPEA based on Caruso's conduct in directing vehicles into oncoming traffic, her negligence claim against GES based on its undertaking as official service contractor to keep the site safe, and GES's contribution claim against Coastal.

¶ 15 Eric Bjorkland testified that on July 10, 2007, he and Lindroth were carpenters employed by Coastal to assist in the building and dismantling of the exhibits for the ASI show in the north building of McCormick Place.

¶ 16 That afternoon, at about 2 p.m., Lindroth called Bjorkland seeking a ride to the employees' parking lot. Bjorkland drove the cart to pick up Lindroth.

¶ 17 The cart was rusty and had a plainly visible out of date registration sticker. Because the cart's brakes did not work, Bjorkland would turn off the cart and use his feet to bring it to a halt. A few months prior, a "McCormick guy" told Bjorkland to remove the cart from service and have it inspected because of its expired registration sticker. Bjorkland took the cart to the inspection area, but no inspector ever attended to the cart. Prior to the occurrence, Coastal employees had used the cart a "bunch of different ways" on the show floor, such as to retrieve materials or equipment, or to drive workers to their vehicles. It was common practice for Coastal employees to stand on the back of the cart because it had no passenger seat. A picture of the cart was admitted into evidence which showed its poor condition and a visible outdated registration sticker.

¶ 18 With Lindroth standing on the back of the cart, Bjorkland took the north ramp. The north ramp had two lanes divided by double yellow lines and a guard house with two swing gates at its entry. The gate over the northbound lane—which vehicles used to enter the loading area—had a stop sign, whereas the gate over the southbound lane—for exiting vehicles—had a "Do Not Enter" sign. Caruso, an MPEA security guard, was posted at the guard house that day.

¶ 19 When the cart was about halfway down the north ramp, Caruso waved a northbound truck into the southbound lane. Bjorkland told Lindroth that he was pulling over so that the truck could pass. To do so, Bjorkland turned off the cart and pulled over to the right curb. After the truck passed, Bjorkland started the cart.

¶ 20 When Bjorkland had driven the cart about 15 or 20 feet further down the ramp, Caruso directed another northbound vehicle around the gate and into his southbound lane. Bjorkland tried to turn off the cart, but the key fell to the floor. Bjorkland turned the cart quickly to the right curb and used his feet to slow the cart. Bjorkland did not have time to warn Lindroth. Bjorkland heard a loud "thump," "like something hitting concrete." Bjorkland saw Lindroth on the ground, between the two lanes, moaning and bleeding from the back of his head. At that point, Caruso approached and asked what had happened. Bjorkland told Caruso that he had pulled the cart over because Caruso had waved a vehicle into his lane.

¶ 21 Charles Caruso testified that he began working as a security officer with MPEA in 2004. On July 10, 2007, Caruso was assigned to the guardhouse at the north ramp leading to the north building at McCormick Place. The purpose of the guardhouse assignment was to "secure the dock areas" and to "control who can get up there and make sure that they have authorization." His job responsibilities on that day were to "stop the cars or trucks and make sure they had a

pass" and log the entering vehicle's information. Caruso had the authority to issue "penalties or violations when somebody doesn't abide by the McCormick Place security and safety policies."

¶ 22 Caruso stated that, at the time of the occurrence, as was his practice, the security gate was "half open, half closed," with the southbound gate open. Caruso left the northbound gate closed to prevent incoming drivers from speeding up the ramp without stopping at the guard house. Caruso claimed that, before waving northbound vehicles into the southbound lane, he looked "each time" to ensure there was no oncoming traffic. Caruso said that he had consistently followed this procedure for the two years prior to the accident without incident.

¶ 23 At about 2:30 p.m., a GMC vehicle stopped at the northbound gate. After verifying that the GMC had the authority to enter, Caruso "waved" the vehicle around the closed northbound gate and into the southbound lane. Caruso did not watch the GMC after having waved it through. A Chrysler was immediately behind the GMC at the gate. After verifying the Chrysler's credentials, Caruso waved it around the northbound gate. Caruso watched the Chrysler proceed up the ramp and saw the cart up against the curb. Caruso walked to the cart and saw Lindroth lying on the roadway.

¶ 24 David Causton, the General Manager of McCormick Place, testified that ASI's contract with MPEA required ASI to maintain a safe work environment and comply with MPEA's safety rules, including rules relating to motorized vehicles on the premises. MPEA rules require motorized vehicles to be inspected yearly. The inspection includes a brake test. After passing the inspection, a vehicle is given a registration number and safety stickers to be applied to the front, side, and rear of the vehicle. MPEA rules prohibited passengers from standing on the back of moving carts, requiring instead that passengers be seated. Finally, the failure to inspect or register a motorized vehicle—or any violation of MPEA's rules—would result in its removal.

Causton expected GES, as the official service contractor of ASI's tradeshow, to bring a defective cart to his attention.

¶ 25 Mary Upton, ASI's vice president of trade show operations, testified that ASI retained GES as the "official service contractor" of ASI's trade show at McCormick Place. Upton explained that the general service contractor is usually aware of, and sensitive to, safety issues. Any safety violations were to be reported to GES because "a GES supervisor would know what to do" and "take the most efficient action." Upton agreed that GES's "safety superintendent" had a duty to "make things safe." When shown a photograph, Upton described the cart as a "wreck." If she had seen the cart on the exhibit floor, Upton would have brought it to GES's attention and she would have expected GES to report the cart to MPEA or remove it.

¶ 26 Stanley Jackson, GES's safety manager, testified that GES had exclusive control over the ASI show areas and was responsible for overall safety at the site. GES provided a written sheet entitled "Official Contractors Information for the ASI Show Chicago," to all exhibitor-approved contractors, which stated that they were required to comply with "all reasonable rules and regulations of the venue [McCormick Place]." Jackson explained that ASI informed the exhibitors and the exhibitors' approved contractors to bring safety issues to the attention of GES.

¶ 27 Jackson agreed that he was responsible for, not only the "enforcement and maintenance of the GES safety program but also to see that the rules and regulations of [MPEA] were complied with." Jackson agreed he "had the ability and authority to take corrective action on violations of [MPEA] rules" and he and "[GES] operations managers" had the responsibility to ensure motorized carts complied with MPEA rules as to inspections and registrations. He answered "yes" when asked whether his safety responsibilities and those of his staff "extended to everybody in the hall, GES employees, exhibitors and their contractors."

¶ 28 Jackson would "typically put in eight to ten hours a day at McCormick Place overseeing show site safety" and would "travel around the show site, *** looking for and correcting for safety violations." He expected "all [GES] operation managers" "to be observant for unsafe things such as a [cart] out of compliance." When he was shown a photograph, Jackson said the cart looked like "scrap."

¶ 29 Plaintiff's retained expert, Richard Feenstra, testified that the cart's outward appearance—namely, the "plainly visible" outdated registration sticker and the amount of rust on the cart—would "immediately grab someone's attention." Feenstra said that, due to GES's omnipresence at the exhibit and the amount of time the cart would have been traveling around the show floor, it was unreasonable to believe that no one from GES saw the defective condition of the cart.

¶ 30 Fadi Alzeidan, a board-certified family physician who treated Lindroth testified that Lindroth would require 24-hour nursing care, as well as physical, speech, and occupational therapy for the rest of his life.

¶ 31 Upon this evidence, the jury awarded damages in favor of plaintiff and against GES in the amount of $34.15 million and found Lindroth 35% at fault for his injuries. The jury allocated 75% of GES's responsibility to Coastal on GES's contribution claim. Finally, the jury found in favor of MPEA on plaintiff's claim of willful and wanton conduct and answered a special interrogatory consistent with that finding. The trial court entered judgment on the verdicts.

¶ 32 Posttrial Proceedings

¶ 33 The Agreement Between Coastal and Plaintiff

¶ 34 On March 28, 2014, Coastal and plaintiff signed an agreement in which Coastal would pay $1 million (the limit of its insurance coverage) to plaintiff and waive its workers' compensation lien rights on only that $1 million, both conditioned upon a finding of good faith

and the trial court dismissing the claims against Coastal. On March 31, 2014, Coastal filed a motion for a good faith finding, noting that the agreement was "contingent upon" a finding of good faith and the dismissal with prejudice of all claims against Coastal. GES objected, contending that its right to contribution from Coastal (which GES alleged was approximately $16.65 million) would be extinguished for $1 million. MPEA joined GES's objection. On June 10, 2014, plaintiff, after withdrawing her consent to the agreement, filed an objection to a good faith finding, stating that she had acquiesced because of Lindroth's financial needs. Coastal then moved to enforce the agreement.

¶ 35 On June 16, 2014, following a hearing, the trial court denied Coastal's motions.

¶ 36 Plaintiff's Posttrial Motion

¶ 37 On April 7, 2014, plaintiff filed a posttrial motion seeking either judgment *n.o.v.* or a new trial because the willful and wanton verdict was against the manifest weight of the evidence and the trial court had erred in granting MPEA's motion for summary judgment on count II. On June 24, 2014, the trial court denied plaintiff's motion for judgment *n.o.v.* and a new trial.

¶ 38 MPEA's Motion for Indemnification

¶ 39 On April 7, 2014, MPEA filed a motion seeking to be indemnified for attorney fees and costs against Coastal as raised in its sixth amended counterclaim. On September 4, 2014, the trial court entered an order which granted MPEA's motion as to its contractual right to indemnity, but left unresolved the amount which was owed and allowed discovery on the matter.

¶ 40 GES's Combined Posttrial Motion and *Kotecki* Cap Motion

¶ 41 On April 7, 2014, GES filed a combined posttrial motion for a new trial / judgment *n.o.v.* and motion to set the cap on Coastal's liability pursuant to *Kotecki v. Cyclops Welding Corp.*,

146 Ill. 2d 155 (1991) (the *Kotecki* cap). Following a hearing on July 16, 2014, the trial court denied GES's motion for judgment *n.o.v.* and a new trial.

¶ 42 A separate hearing on GES's motion to set the *Kotecki* cap was held on September 10, 2014. Following that hearing, the trial court, having rejected Coastal's argument that it lacked jurisdiction to set the *Kotecki* cap, determined that "the limit or the [*Kotecki*] cap *** will be the amount paid of the workers' comp[ensation] lien as of the time of the judgment *** and the additional payments *** that would be made and will continue to be made by the time this case is resolved and GES pays their judgment against *** plaintiff."

¶ 43 On that date, the trial court also entered an order which included the following finding: "The court hereby finds pursuant to [Illinois Supreme Court Rule] 304(a) that there is no just reason to delay enforcement or appeal as to plaintiff and GES's posttrial motions."

¶ 44 Parties' Appeals

¶ 45 On August 18, 2014, Coastal filed a notice of appeal (appeal number 1-14-2535) challenging the trial court's denial of its motions for a good-faith finding and to enforce the agreement. On October 2, 2014, GES filed its notice of appeal (appeal number 1-14-3050) challenging the jury's verdict, the entry of judgment on the verdict, the denial of its posttrial motion, and the order determining the *Kotecki* cap. On October 7, 2014, plaintiff filed a notice of cross-appeal (appeal number 1-14-3050), challenging the trial court's granting of summary judgment in favor of MPEA on count II, the jury's verdict in favor of MPEA on the willful-and-wanton claim, and the denial of their posttrial motion. At the time of the appeals, MPEA's indemnification claim against Coastal remained pending. This court consolidated the appeals.

¶ 46 ANALYSIS

¶ 47 Jurisdiction

¶ 48 This court has the independent duty to consider whether it has jurisdiction over the appeals and cross-appeal, and dismiss an appeal if we determine that our jurisdiction is wanting. *Archer Daniels Midland Co. v. Barth*, 103 Ill. 2d 536, 539 (1984). Rule 301 allows appeals from final judgments as a matter of right. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); see also Ill. Const. 1970, art. VI, § 6.

¶ 49 "Subject to certain exceptions, an appeal can be taken in a case only after the circuit court has resolved all claims against all parties." *State Farm Fire & Casualty Co. v. John J. Rickoff Sheet Metal Co.*, 394 Ill. App. 3d 548, 556 (2009). Supreme Court Rule 304(a), however, provides that, "If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both." Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). The written finding may be made either at the time of, or after the entry of, a final judgment. See *Board of Trustees of Community College District No. 508 v. Rosewell*, 262 Ill. App. 3d 938, 949 (1992).

¶ 50 Here, at the time the appeals were filed, not all claims of all parties were resolved because MPEA's indemnification motion was still open. The written order entered on September 10, 2014, states: "The court hereby finds pursuant to Supreme Court Rule 304(a) there is not just reason to delay enforcement or appeal as to plaintiff and GES's posttrial motions." Pursuant to this express finding, we have jurisdiction over the orders denying GES's and plaintiff's posttrial motions. We also have jurisdiction over the order granting MPEA

summary judgment as that order was a step in the procedural progression leading to those orders. See *In re Marriage of O'Brien*, 2011 IL 109039, ¶ 23 (citing *Burtell v. First Charter Service Corp.*, 76 Ill. 2d 427, 435 (1979)).

¶ 51 However, the September 10, 2014 Rule 304(a) finding, by its express language, did not apply to the order denying Coastal's motions for a good faith finding and to enforce the agreement, and was made almost a month after Coastal had already appealed the order. In the absence of Rule 304(a) language authorizing an immediate appeal by Coastal of the order denying its motions for a good faith finding and to enforce the agreement, the appeal filed here by Coastal on August 18, 2014, was premature. We recognize that the Second District of this court has held that "pursuant to Rule 303(a)(2) 'if a litigant files a notice of appeal from a final judgment as to fewer than all of the parties or claims, and the trial court subsequently enters a Rule 304(a) finding as to that judgment, then the notice of appeal becomes effective when the finding is entered.' " *Harreld v. Butler*, 2014 IL App (2d) 131065, ¶ 18. However, in the present case, the Rule 304(a) finding was not entered as to the judgment appealed from by Coastal and, thus, Coastal's premature notice of appeal did not confer jurisdiction on the appellate court. Therefore, we must dismiss the appeal of the order denying the motions for a good faith finding and to enforce the agreement for lack of appellate jurisdiction.

¶ 52 Finally, we consider our jurisdiction as to GES's appeal from the order setting the *Kotecki* cap. In *Kotecki*, our supreme court held that an employer's maximum liability in a third-party suit for contribution is limited to its liability to its employee under the Workers' Compensation Act. *Kotecki*, 146 Ill. 2d at 165.

¶ 53 The September 10, 2014, order included Rule 304(a) language with respect to the orders relating to GES's and plaintiff's "post-trial motions." We need not resolve any ambiguity as to

whether GES's motion seeking to set the *Kotecki* cap constitutes a "posttrial motion" covered by this language. See *McCarthy v. Denkowski*, 301 Ill. App. 3d 69, 72 (1998) (generally, a posttrial motion "attacks the original judgment"). "By the rule's own terms, a Rule 304(a) finding can confer appealability *only* on a judgment that is already *final*." (Emphases added.) *In re Marriage of Duggan*, 376 Ill. App. 3d 725, 735 (2007). A judgment or order is "final" if it disposes of the rights of the parties, either on the entire case or on some definite and separate part of the controversy. *Dubina v. Mesirow Realty Development, Inc.*, 178 Ill. 2d 496, 502 (1997). In other words, a final order terminates "the litigation between the parties on the merits of the cause, so that, if affirmed, the trial court has only to proceed with execution of the judgment." *Kellerman v. Crowe*, 119 Ill. 2d 111, 115 (1987) (quoting *Village of Niles v. Szczesny*, 13 Ill. 2d 45, 48 (1958)). Although the order from which GES appeals determined the *Kotecki* cap, until GES pays more than its *pro rata* share of the judgment, the trial court cannot enforce its determination as to the *Kotecki* cap. See 740 ILCS 100/2(b) (West 2014) ("The right of contribution exists only in favor of a tortfeasor who has paid more than his *pro rata* share of the common liability."). A Rule 304(a) finding "does not make an otherwise nonfinal order either final or appealable." *Valdovinos v. Luna-Manalac Medical Center, Ltd.*, 307 Ill. App. 3d 528, 539 (1999). We must, therefore, also dismiss the appeal of the trial court's order setting the *Kotecki* cap for lack of appellate jurisdiction.

¶ 54 GES's Motion for New Trial / Judgment *N.O.V.*

¶ 55 GES contends that the trial court erred in denying its motion for judgment *n.o.v.* or new trial on five grounds: (1) GES did not voluntarily undertake a duty to find and remove dangerous carts from the show floor and, therefore, plaintiff's case failed for lack of duty; (2) any duty undertaken by GES was not owed to Lindroth; (3) GES had neither actual nor constructive notice

of the condition of the cart and, therefore, there was no jury question as to GES's negligence; (4) plaintiff failed to create a jury question as to whether GES's acts were a proximate cause of the injuries; and (5) Lindroth was more than 50% at fault, as a matter of law and, thus, recovery is barred.

¶ 56 On a motion for a new trial, the trial court may set aside the verdict " 'if the verdict is contrary to the manifest weight of the evidence.' " *Maple*, 151 Ill. 2d at 454 (quoting *Mizowek v. De Franco*, 64 Ill. 2d 303, 310 (1976)). A verdict is against the manifest weight of the evidence " 'where the opposite conclusion is clearly evident or where the findings of the jury are unreasonable, arbitrary and not based upon any of the evidence.' " *Id.* (quoting *Villa v. Crown Cork & Seal Co.*, 202 Ill. App. 3d 1082, 1089 (1990)). We review a ruling on a motion for a new trial for an abuse of discretion. *Lawlor*, 2012 IL 112530, ¶ 38. A court abuses its discretion only where its ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would adopt the court's view. *Blum v. Koster*, 235 Ill. 2d 21, 36 (2009).

¶ 57 A judgment *n.o.v.* is warranted "in those limited cases" where all of the evidence adduced at trial, " 'when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand.' " *Maple v. Gustafson*, 151 Ill. 2d 445, 453 (1992) (quoting *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967)). In making this determination, a trial court weighs neither the evidence nor the credibility of the witnesses. *Id.* "Most importantly, a judgment *n.o.v.* may not be granted merely because a verdict is against the manifest weight of the evidence." *Id.* Our standard of review is *de novo*. *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 37.

¶ 58 As GES's arguments on appeal support a motion for judgment *n.o.v.* and not a new trial, we will consider each argument in turn under those standards.

¶ 59 To prove negligence, a plaintiff must establish the existence of a duty of care owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by that breach. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 430 (2006). It is well established that liability can arise from the negligent performance of a voluntary undertaking. See *Pippin v. Chicago Housing Authority*, 78 Ill. 2d 204, 209 (1979) (citing *Nelson v. Union Wire Rope Corp.*, 31 Ill. 2d 69, 74 (1964)). Under this theory, the duty of care imposed on a defendant is limited to the extent of the undertaking. *Bell v. Hutsell*, 2011 IL 110724, ¶ 12. To show a defendant undertook a duty, there must be some substantial steps or affirmative acts taken in pursuit of the undertaking. *Id*. ¶ 26.

¶ 60 First, GES argues that, under the evidence, it did not undertake a duty as to the defective cart. The evidence showed that GES, as the official service contractor retained by ASI, voluntarily undertook a duty to ensure a safe working environment on the show floor. GES took substantial steps in pursuit of this undertaking. GES provided information sheets to the exhibitor approved contractors, which required them to comply with MPEA's rules and regulations. GES had a safety manager, Jackson, and he and his staff were on site. Jackson admitted that he and the members of his staff, as part of their safety responsibilities, had the responsibility for the "enforcement and maintenance of the GES safety program" and "to see that the rules and regulations of the venue [MPEA] were complied with." Those rules required annual inspection of motorized vehicles and up-to-date registrations. Jackson testified that if he or a member of his staff observed a cart with an expired registration sticker, it was their responsibility to ensure that the cart was inspected and registered under MPEA rules. Finally, Causton, the general manager of McCormick Place, testified that GES, as the official service contractor, was expected to bring the presence of a defective cart to his attention, and that the outdated registration sticker should

have led to the cart's removal under MPEA rules. Viewing this evidence in the light most favorable to plaintiff and drawing all reasonable inferences in plaintiff's favor, the trial court did not err in denying judgment *n.o.v.* on the issue of whether GES voluntarily under took a duty to ensure a safe work place which included a duty to assure compliance with MPEA rules, including those rules applicable to the cart.

¶ 61 GES next argues that ASI did not owe a duty to keep Lindroth, as an employee of Coastal, safe and, therefore, GES owed no duty to Lindroth. However, Jackson, when asked, admitted that his responsibilities and those of his staff for safety extended to all present at the site, including exhibitor approved contractors. Even without this evidence, GES's argument fails.

¶ 62 In reviewing this issue, we look to section 324A of the Restatement (Second) of Torts, "Liability to Third Person for Negligent Performance of Undertaking." That section provides:

> "One who undertakes *** to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> ***
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking." Restatement (Second) of Torts § 324A (1965).

¶ 63 The comment to section 324A(c) explains that a party who voluntarily undertakes a duty "is also subject to liability to a third person where the harm is suffered because of the reliance of the other for whom he undertakes to render the services, or of the third person himself, upon his

undertaking. This is true whether or not the negligence of the actor has created any new risk or increased an existing one. Where the reliance of the other, or of the third person, has induced him to forgo other remedies or precautions against such a risk, the harm results from the negligence as fully as if the actor had created the risk." Restatement (Second) of Torts § 324A (1965), cmt. e. Our supreme court has adopted section 324A. *Pippin*, 78 Ill. 2d at 210-11.

¶ 64 We find *Pippin* informative. There, the plaintiff's son was attacked and killed while visiting a building owned and operated by the Chicago Housing Authority (CHA). *Id.* at 205. CHA had contracted with a private security company, Interstate, to provide security for persons lawfully on CHA properties. *Id.* at 210. The plaintiff sued CHA and Interstate for her son's death. The court initially observed that CHA, as a landlord, ordinarily owes no duty to protect guests from a criminal attack, and that the case before it did not involve a "special relationship" that would result in an exception to the general rule. *Id.* at 208. The *Pippin* court, then examined whether Interstate, nonetheless, owed a duty to the plaintiff's son. The court, relying on section 324A(c) of the Restatement (Second) of Torts, held that Interstate had assumed a duty, owed to persons lawfully on CHA property, of exercising reasonable care in the performance of its contracted obligation to protect such persons. *Id.* Further, CHA had relied upon this undertaking. *Id.* at 211. Therefore, Interstate owed a duty to the plaintiff's son who was lawfully on the property.

¶ 65 Under its contract with ASI, GES had the responsibility for both the installation and dismantling of the exhibits and maintained control over the exhibition space. As discussed, GES's role included ensuring a safe workplace, compliance with all safety rules, including the enforcement of MPEA's rules, which required the cart to be annually inspected, have up-to-date registrations, and a passenger seat. As GES's safety manager, Jackson was on the exhibit site to

correct safety violations and admitted he was to report noncompliant and defective carts. The evidence showed that ASI was aware of GES's role in keeping the exhibit floor safe and relied on GES to assure safety. Thus, even if ASI had no duty to Lindroth as an employee of Coastal, under Rule 324(c), the evidence showed that GES assumed a duty owed to those working on the exhibit floor to provide a safe work environment and compliance with the applicable rules, and ASI relied on this undertaking. Viewing the evidence in the light most favorable to plaintiff, we cannot hold that it so overwhelmingly favors GES that no contrary verdict based upon that evidence could ever stand. *Maple*, 151 Ill. 2d at 453. Therefore, the trial court did not err in denying GES's motion for judgment *n.o.v.* on this point.

¶ 66 Next, GES argues that, under the evidence, there was no jury question whether it had notice of the defective condition of the cart. Plaintiff argues that GES had constructive notice.

¶ 67 "Constructive notice can only be shown where the dangerous condition is shown to exist for a sufficient length of time to impute knowledge of its existence to the defendants." *Ishoo v. General Growth Properties, Inc.*, 2012 IL App (1st) 110919, ¶ 28. In a case involving constructive notice, the time element to establish constructive notice is a material factor. *Hayes v. Bailey*, 80 Ill. App. 3d 1027, 1030 (1980).

¶ 68 The evidence established that the cart was in great disrepair and had a clearly noticeable expired registration in violation of MPEA's rules requiring "up to date" registration after an annual inspection. An inspection would have shown that the cart's brakes were not operable. Prior to the incident, the cart was in regular use at McCormick Place, and Coastal's employees regularly stood on the back of the cart in violation of MPEA rules. Jackson, who had the responsibility of ensuring compliance with MPEA's rules, generally spent eight to ten hours each day traveling around the show site to ensure there were no safety violations. Feenstra said that

the cart's "visual appearance" would "immediately grab someone's attention." Feenstra opined that, due to the ubiquitous presence of GES on the show floor and the amount of time the cart would have been traveling around the show floor, it was unreasonable to believe that no one from GES ever saw the defective condition of the cart. On this evidence, when viewed in favor of plaintiff, the trial court properly denied judgment *n.o.v.* regarding the issue of GES's constructive notice.

¶ 69 GES's next argument is that plaintiff had failed to establish the existence of a jury question with respect to whether its conduct was a proximate cause of Lindroth's injuries. Proximate cause has two elements: cause in fact and legal cause. *Lee v. Chicago Transit Authority,* 152 Ill. 2d 432, 455 (1992). An act or omission is said to be a cause in fact of the event if it was a material element and a substantial factor in bringing the event about. *Id.* Legal cause concerns foreseeability, *i.e.*, whether the injury is one that a reasonable person would see as a likely result of the allegedly tortious conduct. *Id.* at 456. In essence, proximate cause exists when the plaintiff's injury is the natural and probable result of the defendant's negligent act or omission. *N.W. v. Amalgamated Trust & Savings Bank,* 196 Ill. App. 3d 1066, 1076-77 (1990). Notably, there can be more than one proximate cause contributing to any one injury. *D.C. v. S.A.*, 178 Ill. 2d 551, 564 (1997). Where reasonable minds could differ, the issue of proximate cause is a question of fact for the jury to decide. *Lee*, 152 Ill. 2d at 455.

¶ 70 As discussed, GES undertook a duty to protect the safety of the workplace, including a duty to enforce MPEA's safety rules, which ran to Lindroth. " ' "By undertaking to act" ' a defendant becomes ' "subject to a duty with respect to the manner of performance." ' " *Bell,* 2011 IL 110724, ¶ 23 (quoting *Wakulich v. Mraz,* 203 Ill. 2d 223, 242 (2003) (quoting *Nelson v. Union Wire Rope Corp.*, 31 Ill. 2d 69, 85 (1964))). Lindroth was injured while standing on the

back of the cart which was in a hazardous condition. In violation of MPEA rules, the cart had an outdated registration sticker, had not passed an annual inspection, including a brake test and had no back seat which caused passengers, including Lindroth, to stand on the back. GES had the authority to either direct that the cart be properly registered and, thus, inspected, or notify MPEA if the cart owner refused to do so. These violations, if reported, would have subjected the cart to removal from the venue. Feenstra testified that it was unlikely that GES would not have seen the defective cart. Thus, there was evidence that GES negligently performed its duty to keep the exhibit floor safe and enforce compliance with MPEA rules, and that its negligence was a cause of Lindroth's injuries. Since the evidence viewed in the light most favorable to plaintiff does not so overwhelmingly favor GES that no contrary verdict could ever stand, the trial court correctly rejected GES's motion for judgment *n.o.v.* on the issue of proximate cause.

¶ 71 Finally, GES asserts that Lindroth's standing on the back of the cart made him more than 50% contributorily negligent as a matter of law and, therefore, recovery is barred. Setting aside whether this conclusory argument is forfeited for failure to provide case citations in support of it (see Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013)), GES's claim is meritless. GES's negligent performance of its duty to keep the site safe and assure compliance with MPEA's rules led to the uninterrupted use of the cart, which had no backseat for Lindroth to sit on, and inoperable brakes. Had GES performed its duty in a non-negligent manner, the cart would have been either inspected by MPEA (which likely would have revealed the nonfunctioning brakes) or removed from the premises. Under the facts of this case, we cannot hold that the evidence so overwhelmingly favored GES that any contrary finding as to the apportionment of fault cannot stand. The trial court thus correctly denied GES's motion for judgment *n.o.v.* on this issue.

¶ 72 In sum, the trial court did not err when it denied GES's motion for judgment *n.o.v.* Moreover, even if GES had presented arguments on appeal in support of its motion for a new trial, we would find, based on the evidence as outlined, the jury's verdict was not against the manifest weight of the evidence and the trial court did not abuse its discretion in denying GES's motion for a new trial.

¶ 73 Plaintiff's Cross-Appeal

¶ 74 On cross-appeal, plaintiff argues that the trial court erred in granting summary judgment for MPEA on the negligence claim of count II after finding Caruso was supervising an activity, and that the jury's verdict finding in favor of MPEA on the claim that Caruso acted willfully and wantonly, was against the manifest weight of the evidence. Both arguments turn on the conduct and role of Caruso.

¶ 75 MPEA's Motion for Summary Judgment–Tort Immunity

¶ 76 The trial court granted MPEA's motion for summary judgment with respect to count II, pursuant to section 3-108(a) of the Act, because plaintiff was seeking to impose liability on MPEA for Caruso's negligent supervision of an activity on public property. Plaintiff argues that section 3-108 did not bar plaintiff's claim because Caruso was performing ministerial tasks.

¶ 77 Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012). In making a determination of whether a genuine issue as to any material fact exists, the court construes the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the opponent. *Williams v. Manchester*, 228 Ill. 2d 404, 417

(2008). We review a court's decision on a motion for summary judgment *de novo*. *Virginia Surety Co. v. Northern Insurance Co. of New York*, 224 Ill. 2d 550, 556 (2007).

¶ 78 The interpretation of the Act poses a question of law which is appropriate for summary judgment. *Dixon v. Chicago Board of Education*, 304 Ill. App. 3d 744, 747 (1999) (citing *Barnett v. Zion Park District*, 171 Ill. 2d 378, 385 (1996)). The primary rule of statutory interpretation, to which all other rules are subordinate, is to ascertain and give effect to the legislature's intent. *Kraft, Inc. v. Edgar*, 138 Ill. 2d 178, 189 (1990). To do so, we first look to the statutory language itself. *Id.* If the language is clear and unambiguous, we may not depart from the plain language and meaning of the statute by reading into it exceptions, limitations or conditions that the legislature did not express, nor by rendering any word or phrase superfluous or meaningless. *Id.* The construction of a statute is subject to *de novo* review. *Hall v. Henn*, 208 Ill. 2d 325, 330 (2003).

¶ 79 Section 3-108(a) of the Act provides as follows:

> "Except as otherwise provided in this Act, neither a local public entity nor a public employee who undertakes to supervise an activity on or the use of any public property is liable for an injury unless the local public entity or public employee is guilty of willful and wanton conduct in its supervision proximately causing such injury." 745 ILCS 10/3-108(a) (West 2012).

Thus, under section 3-108(a), a public employee and entity are immune from suit for the negligent supervision of any activity on public property.

¶ 80 The Act defines neither the term "supervise," nor "supervision." This court, when construing section 3-108, has defined supervision to include "coordination, direction, oversight, implementation, management, superintendence, and regulation." *Dixon v. Chicago Board of*

Education, 304 Ill. App. 3d 744, 748 (1999) (citing *Longfellow v. Corey*, 286 Ill. App. 3d 366, 369-70 (1997)). We have also construed "supervise" to mean to " 'oversee with the powers of direction and decision the implementation of one's own or another's intention.' " *Gusich v. Metropolitan Pier and Exhibition Authority*, 326 Ill. App. 3d 1030, 1033 (quoting Webster's Third New International Dictionary 2296 (1986)). Further, in construing the meaning of "activity" in section 3-108, our supreme court has held that the statute "does not limit, in any manner, the types of activities which are included." (Emphasis added.) *Epstein v. Chicago Board of Education*, 178 Ill. 2d 370, 376 (1997). The *Epstein* court also rejected the argument that supervision of a ministerial task did not fall within the purview of section 3-108. *Id.* at 380-81.

¶ 81 In substance, plaintiff alleged in count II that MPEA was liable because Caruso was negligent in his control and direction of the traffic on the north ramp. Thus, plaintiff sought to impose liability on MPEA for Caruso's negligent supervision, as that term has been defined, of vehicle movement on the ramp. Further, in his deposition, Caruso testified that the purpose of his assignment was to "*control* who can get up there and make sure that they have authorization." (Emphasis added.) Caruso also explained that, on the day of the accident, as part of his duties, he verified an entering vehicle's credentials, and directed the vehicle around the closed northbound gate and into the southbound lane. Under these allegations and testimony, the trial court properly granted summary judgment in favor of MPEA based upon section 3-108 as there was no question of material fact that Caruso was supervising the entry and direction of vehicles travelling on the north ramp. See 745 ILCS 10/2-109 (West 2012) ("A local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable.").

¶ 82 Plaintiff, however, argues that section 3-108 does not apply because Caruso's duties were ministerial tasks, and included the recording of the entering vehicle's information into a logbook. In *Epstein,* the supreme court rejected a similar argument that section 3-108 of the Act protects only supervision of non-ministerial tasks. See *Epstein*, 178 Ill. 2d at 376, 380-81. Moreover, it was Caruso's negligent direction and control of traffic that was at issue here rather than his other ministerial tasks. We affirm the grant of summary judgment on count II.

¶ 83 The Jury Verdict Regarding Willful and Wanton Claim

¶ 84 Plaintiff's argument, that the verdict on the willful and wanton count was against the manifest weight of the evidence, is one for a new trial and not for judgment *n.o.v.,* and we will consider it under the applicable standard for motions for a new trial which we previously recited.

¶ 85 The Act defines "willful and wanton conduct" as follows:

> "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property. This definition shall apply in any case where a 'willful and wanton' exception is incorporated into any immunity under this Act." 745 ILCS 10/1-210 (West 2012).

Whether the alleged tortious conduct rises to the level of willful and wanton conduct depends upon the facts of each case, the determination of which is normally question of fact for the jury to decide. *Drakeford v. University of Chicago Hospitals*, 2013 IL App. (1st) 111366, ¶ 11.

¶ 86 The question here is whether Caruso's conduct rose to the level of willful and wanton. Caruso testified that he left the gate partially open to prevent incoming drivers from speeding past the guard booth and that, before waving northbound vehicles into the southbound lane, he looked up "every time" to ensure there was no oncoming traffic. Caruso had consistently

followed this procedure for two years prior to the accident without incident. Caruso testified that, on the day of the accident, he looked before directing vehicles into the southbound lane. On these facts, we cannot hold that the jury's finding, that Caruso did not act with utter indifference or conscious disregard for the safety of others, was against the manifest weight of the evidence. *Lawlor*, 2012 IL 112530, ¶ 38. Consequently, the trial court did not abuse its discretion in denying plaintiff's motion for new trial on the wilful and wanton claim against Caruso.

¶ 87 CONCLUSION

¶ 88 We dismiss the appeal brought by Coastal (appeal number 1-14-2535) from the order denying the motions for good faith finding and to enforce the agreement. Under the appeal brought by GES (appeal number 1-14-3050), we dismiss for lack of appellate jurisdiction the trial court's order regarding the *Kotecki* cap and affirm the denial of GES's motion for judgment *n.o.v.* and new trial. With respect to plaintiff's claims on cross-appeal (appeal number 1-14-3050) we affirm the order granting MPEA summary judgment on count II and the denial of plaintiff's motion for new trial and judgment *n.o.v.* on the willful and wanton claim against MPEA. We affirm the judgment of the trial court on the jury verdicts.

¶ 89 Appeal number 1-14-2535 dismissed.

¶ 90 Appeal number 1-14-3050 affirmed in part; dismissed in part.