2015 IL App (2d) 140574
No. 2-14-0574
Order filed June 25, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CARLA A. WHITEBREAD, as Independent Administrator of the Estate of Wyatt R. Whitebread, Deceased, ANNETTE L. PACAS, as Independent Administrator of the Estate of Alejandro G. Pacas, Deceased, And WILLIAM PIPER,	)	Appeal from the Circuit Court of Carroll County.
Plaintiffs-Appellees,	)	
v.	)	Nos. 10-L-12 11-L-10 11-L-9
CONSOLIDATED GRAIN AND BARGE COMPANY,	)	
Defendant-Appellant	)	
(Haasbach, LLC, Mark A. Cruse, Eric A. Kresin, Dirk Harbach, Williard L. Harbach, Barbara Harbach, Heath Harbach, Barbara Jean Harbach, Harbach Family Partnership, HAAS & Haas, LLC, Robert J. Haas, R.J. Haas, and Ryan Stoner, Defendants).	)	Honorable Val Gunnarsson. Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly: (1) denied defendant's motion for judgment *n.o.v.* and a new trial; (2) barred evidence of a nonparty's negligence; and (3) instructed the jury. Therefore, we affirmed.

¶ 2 On July 28, 2010, two individuals (Wyatt R. Whitebread, age 14, and Alejandro G. Pacas, age 19) were killed in a grain elevator facility (the Facility) by "walking down" grain. The two got caught in the corn flow in the bin and died by suffocation. A third individual, William Piper, age 20, survived but was injured. Plaintiffs, Carla A. Whitebread and Annette L. Pacas, as independent administrators of the estates of the deceased, and Piper, filed wrongful death and survival complaints against defendant, Consolidated Grain and Barge Company (CGB). Piper also filed a personal injury complaint against CGB. Plaintiffs alleged that CGB negligently operated the Facility, and a jury found CGB guilty on three counts of negligence.[1]

¶ 3 CGB appeals, arguing that the trial court erred by: (1) denying its motion for judgment *n.o.v.* and a new trial because it owed no duty to the individuals working in the bin and because plaintiffs failed to prove that CGB was a proximate cause of the injury; (2) barring it from offering evidence that Haasbach was negligent; and (3) instructing the jury that each plaintiff could recover damages for both emotional distress and emotional suffering. We affirm.

¶ 4 I. BACKGROUND

¶ 5 Plaintiffs filed individual complaints alleging CGB's negligence. The complaints alleged three theories of negligence: common law negligence, negligence based on retained control under section 414 of the Restatement, and negligence based on premises liability under section

[1] In addition to CGB, plaintiffs filed suit against the owner of the Facility, Haasbach, LLC (Haasbach), and its members. Plaintiffs ultimately settled with all defendants except CGB.

343 of the Restatement (Restatement (Second) of Torts §§ 343, 414 (1965)). The cases were consolidated for trial.

¶ 6 A grain elevator facility is a place where farmers store grain until it is shipped to different locations. The grain arrives by truck and is weighed and unloaded, graded, dried, and placed in aerated storage bins until sold. CGB owned the Facility, located in Mount Carroll, until it sold the Facility to one of its customers, Haasbach, in 2005. CGB and Haasbach entered into a "Facility Lease and Handling Storage Agreement" (Agreement), which stated that "CGB desires to lease the [Facility] owned by Haasbach" and "Haasbach desires to operate the Facility for CGB."

¶ 7 During opening statement, plaintiffs argued that the Facility was under the operational control of CGB, a big corporation with safety rules and a safety department. Haasbach, on the other hand, was a group of farmers with one full-time employee at the Facility, Matt Schaffner. Plaintiffs argued that grain was not moved in or out of the Facility without CGB's approval, and that pursuant to the warehouse license that CGB held, it maintained operational control of the Facility at all times. Plaintiffs admitted that Haasbach was at fault for the accident[2] but argued that CGB, which had operational control of the Facility, was also at fault.

¶ 8 CGB responded as follows in its opening statement. Haasbach, not GCB, caused the accident. CGB argued that its role at the Facility was "encountering the grain when it first

[2] In a motion *in limine*, plaintiffs moved to bar evidence of Haasbach's negligence. The court determined that CGB could present evidence of Haasbach's conduct, *i.e.*, how individuals ended up in the bin, because Haasbach could not be excised from the accident. However, the court barred CGB from offering opinion testimony or argument that Haasbach was negligent.

arrived, [and] encountering the grain when it last left" the Facility. "[A]ll the other work that was done with the grain to dry it, elevate it, to store it and to transfer it was all done by Haasbach" pursuant to the Agreement. CGB argued that it did not own or operate the Facility, and it did not hire, instruct, or direct the individuals to go into bin no. 9, the site of the accident, on July 28, 2010**,** the date of the accident. CGB further argued that it did not control whom Haasbach hired or how it did its work, and it did not know that the individuals were working in the bins. According to CGB, it was Haasbach's employee, Schaffner, who made all of these decisions and thus violated CGB's policy and the Occupational Safety and Health Act (OSHA) policy of not allowing anyone to walk down grain. Although OSHA and CGB had provisions preventing workers from walking down grain, CGB's provision applied to facilities that it operated, and it did not operate the Facility.

¶ 9 A. The Agreement and Warehouse License

¶ 10 The following evidence was adduced regarding the Agreement, which was slightly modified in 2009 and in effect at the time of the accident. The Agreement divided the storage of the grain at the Facility: 1.5 million bushels of storage space for grain was allocated to Haasbach and 500,000 bushels was allocated to CGB. The Agreement stated that CGB desired to have its grain handled by Haasbach. It further stated that the Facility was CGB's principal place of business; CGB would pay Haasbach rent; Haasbach was responsible for 100% of all fixed and variable expenses associated with the daily operation of the Facility unless otherwise allocated to CGB; CGB would pay Haasbach compensation for drying wet bushels and would provide Haasbach with threshold drying levels on a weekly basis; Haasbach would keep the Facility in good order and repair as defined by OSHA; each party would immediately notify the other party of any quality deterioration discovered at the Facility; CGB could inspect the storage at any time

for its own determination of the quality; and CGB would provide labor, testing materials, and equipment necessary to sample, weigh, grade and test all inbound and outbound shipments. In addition, the Agreement gave CGB the right of first refusal to purchase grain from Haasbach and the right of first refusal on the sale of the Facility.

¶ 11 The Agreement also contained the following provisions:

> "Grain Handling. Grains received hereunder shall be delivered to the [Facility] by truck and shall be shipped out by truck. Haasbach shall provide all necessary labor and equipment to promptly, efficiently, and safely handle the elevation, storage, transfer (excluding trucking) and monitor the quality of Grains into and out of the Facility. The mixing and blending of the Grain shall be directed by CGB's management. Haasbach shall maintain normal working hours between 7 a.m. and 5 p.m. Monday through Friday; between 7 a.m. and 9 p.m. Monday through Sunday during the months of drying; or as otherwise reasonably requested by CGB during seasonal busy times.
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> ***
>
> Access. CGB *** shall have the right, but not the obligation, to inspect the Grains and shall have full access to the [Facility] to fully witness and monitor the transfer and all handling aspects of Grains by Haasbach hereunder, including the inspection of in-store Grains quality and aeration practices. ***
>
> Quality. Haasbach's responsibility for the Grains shall be limited exclusively to the supplying of clean, dry storage space, the careful handling of Grains and drying Grains to moisture levels as directed by CGB management."

Finally, the Agreement stated that CGB would provide the warehouse license.

¶ 12 CGB's assistant accounting manager and manager of licensing and storage, Allen Smith, testified regarding the warehouse license. The warehouse license applied to multiple CGB facilities, including the Facility, and stated that CGB, "at Mt. Carroll, Illinois, is hereby licensed in accordance with the United State [*sic*] Warehouse Act, the regulators and the licensing agreement for grain warehouses to conduct the [CGB] terminal located in various locations in the State of Illinois." CGB held the warehouse license for all the bins at the Facility and had "ultimate responsibility for the operation and integrity of the warehouse storage facility." To Smith, ultimate responsibility under the warehouse license meant that if there was a problem, the United States Department of Agriculture (USDA) would "come after" CGB; CGB would be the one to lose financially if the grain was out-of-condition or short.

¶ 13 Smith testified that without the warehouse license, no one would have been able to operate the Facility. As warehouse operator of the Facility, CGB was required to conduct the Facility in accordance with federal warehouse regulations and to "[h]ave a safe and clean work environment and ensure adequate security and protection of stored or handled grain from tampering or adulteration." CGB had to "[m]aintain at all time legal and operational control of all licensed storage space," and its warehouse obligations could not be transferred to Haasbach. CGB kept a daily position record, which was a record of all grains stored, handled, or under the control of the warehouse operator. The warehouse license meant that any time a truck was going to load or unload at the scale, CGB had to be involved.

¶ 14 B. Witness Testimony

¶ 15 Mark Cruse, CGB's director of grain operations, testified that CGB was responsible for the quality of the grain in the bins at the Facility. Cruse never checked to see if proper grain handling procedures were being used in the bins.

¶ 16 Greg Beck, the vice president of the grain division at CGB, testified that CGB wanted the right to monitor the transfer and handling of all aspects of the grain by Haasbach because if CGB thought the handling was incorrect, it wanted the ability to do something about it.

¶ 17 Eric Kresin, CGB's general manager for the southwest region, testified that he was responsible for the day-to-day activities of moving grain. He was present at the Facility almost daily. All of the grain at the Facility was commingled, meaning CGB owned part of the grain in bin no. 9. CGB weighed all of the inbound and outbound loads of grains, and it set the drying levels for the grain. Kresin himself set the drying levels and directed Schaffner (of Haasbach) as to the grain that needed to be shipped out of the Facility, including the quality and quantity.

¶ 18 Kresin was questioned regarding the Agreement, which stated that Haasbach would "keep the Facility in good order and repair as defined by OSHA," and that it would provide "all necessary labor and equipment to promptly, efficiently, and safely handle the elevation, storage, transfer (excluding trucking) and monitor the quality of Grains into and out of the Facility." On direct examination, Kresin gave conflicting testimony regarding whether it was his responsibility to make sure that Haasbach complied with the terms of the Agreement. On cross-examination, Kresin testified that he never provided any CGB safety rules or training to Haasbach; he did not know whether OSHA applied to Haasbach; and he never discussed Haasbach's safety rules with Schaffner. Kresin explained that under the Agreement, Haasbach was responsible for the day-to-day operation of the Facility. Haasbach was responsible for its own people and equipment, whereas CGB had its own responsibilities under the Agreement. Kresin was not required to advise Haasbach of safety issues or to make sure that it followed OSHA. The Agreement did not require Kresin to determine what steps Schaffner was taking to maintain the quality of the grain.

The Agreement gave CGB full access to the Facility; if Schaffner was not present at the Facility for whatever reason, CGB could step in to handle things.

¶ 19 Kresin was in charge of operations for CGB's other facilities in Savanna, Warren, and Freeport. CGB had safety rules for contractors working in bins at those facilities. One CGB provision stated that walking down grain and any practice which could expose an employee to engulfment in product and mechanical hazards was prohibited. In addition, there was a provision for communication between an entrant to a bin and the attendant at all times. When possible, the attendant was supposed to keep visual contact with the individual entering the bin. However, Haasbach was not a contractor of CGB at the Facility. CGB did not bring any contractors to the Facility because Haasbach owned and operated it and was responsible for the equipment.

¶ 20 Kresin was not aware of Whitebread, Pacas, and Piper working for Haasbach. He was also not aware of the warehouse license and its language that CGB was to maintain legal and operational control of the Facility at all times.

¶ 21 Haasbach employee Schaffner testified as follows. Reporting the condition of the grain to Kresin was part of Schaffner's routine, and the corn from the 2009 harvest year was wet. Schaffner would check the moisture level of the grain in the fall and winter and then discuss a course of action with Kresin, who set the moisture level for the grain. The two would decide whether they should run fans in the bins to eliminate some of the moisture. In addition, Kresin would decide whether the grain needed to be blended to change the moisture level. Schaffner and Kresin talked daily about how much grain was to be hauled out. Occasionally, Kresin told Schaffner that the grain taken from the Facility and delivered to another CGB facility was too wet and that Schaffner needed to pull drier grain. Schaffner complied with Kresin's directives, and Kresin had access to the entire Facility.

¶ 22 In July 2010, Schaffner told Kresin about the condition of the grain in bin no. 9. Some of the grain in the bin had begun to mold, which was caused by moisture, and it was going to be "out-of-condition before too long"; it was on the verge of being out-of-condition. That same month, Schaffner hired two of his 15-year old daughter's[3] friends, Christopher Lawton and Whitebread, both age 14, as well as Pacas and Piper, ages 19 and 20. On July 28, 2010, Schaffner sent the four young men to work inside bin no. 9. It was Schaffner's custom and habit to tell Kresin what he was doing at the Facility and when people were working in the bins and moving out grain. However, Schaffner did not recall specifically telling Kresin that these four young men were working in bin no. 9 on July 28, 2010, and his practice was not to communicate such information daily. Schaffner provided safety training, instructing them to be cautious of the moving grain and to stay away from the sump pumps, where the grain was flowing. He gave them dust masks.

¶ 23 The bin was approximately 48 feet high, had a diameter of 118 feet, and held around 500,000 bushels. A conveyor ran beneath the bin, and it contained three sump pumps (a primary, intermediate, and outer one). Schaffner told the four young men that they would be moving corn down in the bin, which was filled half-way to the top. Because the grain was not flowing freely into the center sump pump, they had to shovel corn into it. The four climbed up a ladder to the top of the bin, entered from the roof, and then climbed down the ladder into the bin.

¶ 24 Lawton and Piper offered similar testimony as to what transpired next. The bin was hot and dark. The four of them walked around the bin, using their shovels to break up chunks of corn that were stuck together so that the corn would start flowing again. After about two hours, Schaffner opened up the intermediate sump pump in the floor of the bin. Suddenly, Whitebread

[3] Schaffner had hired his daughter, M.J., the month before (June 2010).

was face down and sliding, feet first, into the intermediate sump pump. Lawton tried to dig him out but the grain was flowing quickly. Piper and Pacas grabbed Whitebread and told Lawton to get help. Lawton got out of the bin and told M.J. to call 911 and turn off the pump.

¶ 25 Piper testified that when Whitebread started to sink, he and Pacas tried to get him out but the corn was rising too fast. Schaffner jumped into the bin and tried to shovel Whitebread out but then left the bin to let the rescuers know where they were. After Schaffner left the bin, the corn started to flow again because Schaffner turned the conveyor back on. Piper and Pacas began to sink again and were face to face; Pacas was Piper's best friend. The corn covered Pacas's mouth and the two squeezed each other's hands until Piper felt Pacas's hand go limp. The corn was filling up to Piper's chin, and he panicked. Next, a responder put a plastic bucket over Piper's head. The pressure of the corn was so strong he could take only short gasps of breath. Piper's right leg was twisting and felt like it was going to pop at the knee, and there was "an insane amount of pressure" on his lower back.

¶ 26 Around 1 p.m., Brent Asay, an emergency medical technician, responded to the 911 call and saw two individuals, Pacas and Piper, trapped in the corn, chest high. Asay realized that holes needed to be cut inside the bin to get the corn out. While he yelled down to the boys to say he was getting help, the conveyor was turned on. Asay yelled to turn the conveyor off, and it was turned off 60 to 90 seconds later. After that, Asay saw only one head. Asay vacuumed corn out of the bin for three hours, and Piper was extracted from the bin alive.

¶ 27 Piper testified that Pacas's body was exposed in front of him as the rescuers extracted Piper from the bin. It was a six-hour process, and Piper felt like his body was being ripped in half. Piper was placed on a stretcher and then removed from the scene by helicopter. When he arrived at the hospital, he was in a panic and crying. He was also in a lot of pain and had to be

medicated for anxiety. He could not use his legs until the third day in the hospital, when he was able to slowly walk. The condition note from the nurse at the hospital that treated Piper was read into evidence, as was the deposition of treating surgeon Dr. Jacino Obregon. Dr. Patricia Egan diagnosed Piper as suffering from post-traumatic stress disorder (PTSD). Piper suffered from grief and survivor's guilt.

¶ 28 At the Facility, Pacas was recovered around 10 p.m., and Whitebread was recovered about 45 minutes later. The coroner, Matthew Jones, was present when the two bodies were recovered. Whitebread and Pacas died of asphyxiation as a result of being engulfed in corn. Whitebread's body had corn compressions, similar to the compressions on a golf ball, all over his body. He also had blistering on his face, head, and chest from the heat and livor mortis, which is pooling of the blood in the legs. Whitebread's nose was injured from the pressure, and corn was found in his mouth and in all of his clothing. Pacas suffered corn compressions on 50% of his body, blistering on his skin, livor mortis, and corn was found in all of his clothing.

¶ 29 Dr. Scott Denton, a forensic pathologist, testified that Whitebread suffered from trauma to his nose and blistering on his skin while he was still alive. Though Pacas experienced less heat injury than Whitebread, he too suffered from suffocation. Dr. Denton opined that Whitebread and Pacas were conscious for approximately 1½ to 2 minutes while submerged in the grain before passing out from lack of oxygen. During this time, they would have felt fear and panic. After passing out, they would have suffered irreversible brain damage and died.

¶ 30 William Field was retained by plaintiffs as an expert witness. Field testified that grain entrapment, which occurred when someone could not remove himself from the grain, and grain engulfment, which occurred when someone was fully submerged in the grain, were well-known hazards in the grain industry. Partial entrapment occurred when someone was partially buried in

the grain, and many people died of partial entrapment. One-third of all entrapment victims were individuals who rushed in to assist other entrapped workers.

¶ 31 Out-of-condition grain was grain that had become moldy, crusted, heated, or infested by insects. There was a direct correlation between out-of-condition grain and entrapment based on workers entering the bins to break up the encrusted grain that did not flow well or that clung to the walls. Field testified that at least some of the grain in bin no. 9 was out-of-condition, thus making it difficult to remove from the bin wall. Field's opinion was based on the fact that the individuals involved in this incident were handed tools, including a pickaxe, and naturally flowing grain did not require the use of a pickaxe. Also, photographs of the bin revealed that crusted grain or grain chunks had blocked the flow of grain.

¶ 32 Field further testified that moisture levels had a direct relationship to crusting and grain spoilage. Workers became engulfed when grain was encrusted on bin walls; they worked underneath the encrusted grain area and then the grain would come down on top of them. Based on standards published by the American Society of Agriculture and Biological Engineering, the moisture level for grain that was stored one or two years should be "below 14.5% or something in the 14% range." Moisture levels of 15-17% would result in some spoilage, especially on the surfaces of the bin walls. The moisture level was directed by CGB in 2009 and 2010 at 16%. Although it was possible to store grain for short periods of time at that moisture level, especially in the winter months, storing grain at that moisture level from fall to the following July would cause spoilage and crusting of grain that would make it difficult to move it out of storage.

¶ 33 According to the Agreement, CGB had the responsibility of ensuring that the grain and moisture content was monitored and maintained. Field testified that CGB was concerned with the quality of the grain in order to sell it. The significance of the warehouse license was that it

allowed CGB to buy grain, commingle it, store it in a bin, and then resell it. The warehouse license protected farmers who stored grain at a facility. The warehouse license required that the grain be maintained at a certain standard and the Facility be operated in a certain way to ensure the quality of the grain. Because CGB held the warehouse license, it was CGB's responsibility to make sure that the quality of the grain was preserved.

¶ 34 OSHA required bin workers to wear a harness, a lifeline, and a retrieval system. OSHA prohibited workers from walking down grain when the grain was being unloaded. In addition, the grain industry itself had adopted "normal daily practices." Field testified that in order to enter a bin in other facilities that were owned by CGB, CGB would issue a permit and then use a lifeline and harness, along with backup observers and communication capabilities. Some of the industry no longer had workers enter bins and would instead contract with a skilled team if bin entry was required. Field noted that Schaffner admitted having very little training and experience in maintaining the quality of grain.

¶ 35 Field rendered the following opinions: (1) OSHA standards were not being followed in the handling of the grain at the Facility; (2) the warehouse license determined who controlled the grain stored at the Facility; (3) the warehouse license did not allow CGB to delegate its duties to Haasbach, which had no license; (4) CGB was the warehouse operator of the Facility and had ultimate responsibility for the operation and integrity of the Facility; (5) as warehouse operator, CGB had duties such as having proper ventilation and making sure that the Facility was maintained properly; (6) CGB did not maintain adequate operational control of bin no. 9 in June and July 2010; (7) based on CGB's inappropriate management practices, the grain in bin no. 9 was allowed to go partially out-of-condition, causing it to be less fluid due to moldy conditions, crusting, and the formation of free standing grain that exceeded the grain's natural angle of

repose; (8) the accident would not have happened if the grain had been maintained in an appropriate condition because it would not have been out-of-condition and thus in need of removal from the bin walls; and (9) CGB knew the condition of the grain in bin no. 9 because that was its business.

¶ 36 Field admitted that the warehouse license was not a worker safety statute. He also clarified that although CGB could delegate day-to-day responsibilities or activities, it was ultimately responsible for the Facility.

¶ 37 CGB expert Stephan Andrew, a mechanical engineer with OSHA training, testified that he visited the Facility and bin no. 9. Andrew opined that Pacas would have survived and been rescued, like Piper, had Schaffner not re-started the conveyor. The grain was stable until the conveyor was turned on, which caused Pacas's total engulfment.

¶ 38 CGB expert James Edward Maness testified that OSHA prevented workers from walking down grain without certain protections. In an offer of proof (outside the presence of the jury), Maness stated that Haasbach violated OSHA regulations because workers entering the bins received no training on how to enter and hazards to avoid. Maness further stated that CGB's conduct was not inconsistent with OSHA. The court denied the offer of proof, reiterating that Haasbach's negligence was not an issue in the case; rather, the issue was whether Haasbach was the proximate cause of the individuals' deaths and injury.

¶ 39 During closing argument, CGB argued that the question for the jury was whether it had the responsibility for putting Whitebread, Pacas, and Piper in the bin on the day of the incident. It argued that "no one disputes that Haasbach was at fault in this. No one disputes the fact that the [three individuals] should not have been in the grain bin."

¶ 40 The jury found CGB guilty on all three theories of negligence. Pacas's and Whitebread's estates were each awarded $8 million in damages, which included $1 million for pain and suffering and $1 million for emotional distress. Piper was awarded $830,109.50, which included $200,000 for pain and suffering and $500,000 for emotional distress experienced and reasonably certain to be experienced in the future.

¶ 41 CGB filed a posttrial motion, which was denied, and it timely appealed.

¶ 42 II. ANALYSIS

¶ 43 A. Motion for New Trial and Judgment

¶ 44 CGB's first argument on appeal is that the trial court erred by denying its motion for judgment *n.o.v.* and for a new trial. We set forth the relevant standards of review.

¶ 45 A motion for judgment *n.o.v.* presents a question of law as to whether, when all of the evidence is considered, together with all reasonable inferences drawn from it, in the light most favorable to the plaintiffs, there is a total failure or lack of evidence to prove any necessary element of the plaintiff's case. *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 37. It is proper for a court to enter a judgment *n.o.v.* only where the evidence, when viewed in a light most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on the evidence could ever stand. *Ramos v. Kewanee Hospital*, 2013 IL App (3d) 12001, ¶ 28. *Id.* When ruling on a motion for judgment *n.o.v.*, the trial court does not weigh the evidence, nor is it concerned with the credibility of witnesses. *Id.* The standard for entry of judgment *n.o.v.* is a high one; it is not appropriate if reasonable minds might differ as to inferences or conclusions to be drawn from the facts presented. *Lawlor*, 2012 IL 112530, ¶ 37. A trial court's decision to deny a motion for judgment *n.o.v.* is reviewed *de novo*. *Ramos*, 2013 IL App (3d) 12001, ¶ 28.

¶ 46 In contrast, when a trial court considers a motion for a new trial, it weighs the evidence and may set aside the verdict and order a new trial if the verdict is contrary to the manifest weight of the evidence. *Hamilton v. Hastings*, 2014 IL App (4th) 131021, ¶ 26. A verdict is against the manifest weight of the evidence only where the opposite conclusion is clearly evident or where the jury findings are unreasonable, arbitrary, and not based upon any of the evidence. *Id*. The decision on a motion for a new trial will not be reversed unless the trial court abused its discretion. *Id*. We apply the abuse-of-discretion standard because the trial court had the benefit of observing the witnesses and credibility issues may have been relevant to the jury's verdict. *Id*. "In determining whether the trial court abused its discretion, we consider whether the jury's verdict was supported by the evidence and whether the losing party was denied a fair trial." *Id*.

¶ 47 At the outset, we note that CGB challenges the jury's verdict as to all three counts of negligence. Because, as we discuss, the evidence supports the jury's finding of common law negligence, we need not address CGB's arguments regarding the other negligence counts. See *Moore v. Jewel Tea Co.*, 116 Ill. App. 2d 109, 124 (1969) (if the evidence was sufficient to support any count, the judgment must be affirmed).

¶ 48 B. Common Law Negligence

¶ 49 1. Duty

¶ 50 A plaintiff alleging negligence must show that the defendant owed a duty of care to the plaintiff, breached that duty of care, and that the defendant's breach proximately caused injuries to the plaintiff. *St. Paul Mercury Ins. v. Aargus Security Systems, Inc*., 2013 IL App (1st) 120784, ¶ 58. A duty may be described as an obligation to conform to a certain standard of conduct for the protection of another against an unreasonable risk of harm. *Id*. The determination of whether a defendant owes a plaintiff a duty of care is a question of law decided

by the court. *Id*. Our review on a question of law is *de novo*. *Jane Doe-3 v. McLean County Unit District No. 5 Board of Directors*, 2012 IL 112479, ¶ 20.

¶ 51 Every person owes a duty of ordinary care to others to guard against injuries which naturally flow as a reasonably probable and foreseeable consequence of an act. *Simpkins v. CSX Transportation, Inc.*, 2012 IL 110662, ¶ 19. "Thus, if a course of action creates a foreseeable risk of injury, the individual engaged in that course of action has a duty to protect others from such injury." *Id*.

¶ 52 Our supreme court has stated that the duty analysis must begin with the threshold question of whether the defendant, by his act or omission, contributed to a risk of harm to this particular plaintiff. *Id*. ¶ 21. If so, then this court weighs the following four factors to determine whether a duty ran from the defendant to the plaintiff: (1) the reasonable foreseeability of the injury; (2) the likelihood of the injury; (3) the magnitude of the burden of guarding against the injury; and (4) the consequences of placing the burden on the defendant. *Id*. "Any analysis of the duty element turns on the policy considerations inherent in the above factors, and the weight accorded each of the factors depends on the circumstances of the particular case." *Jane Doe-3*, 2012 IL 112479, ¶ 22.

¶ 53 In support of its argument that it owed no duty to plaintiffs, CGB argues that it did not own, operate, or control the Facility; instead, Haasbach owned the Facility. CGB did not hire Haasbach to operate the Facility, and Haasbach assumed the responsibility of safely operating the Facility. CGB argues that Haasbach was in control of the bins and was responsible for what happened in them. CGB did not agree to empty bins, make hiring decisions for Haasbach, train or supervise Haasbach's employees, or control the safety methods of Haasbach's work.

¶ 54 CGB acknowledges that Kresin testified that it was his responsibility to obtain Haasbach's compliance with the Agreement. CGB argues that, even so, plaintiffs erroneously assume, pursuant to the Agreement, that CGB had a duty to train Haasbach in safe grain bin operations, to give Haasbach the CGB safety rules, and to supervise Haasbach's employees. However, nothing in the Agreement imposed such a duty on CGB. Rather, the Agreement made Haasbach responsible for safe bin operations in that Haasbach agreed to "keep the [Facility] in good order and repair as defined by OSHA"; provide "all necessary labor and equipment" to "safely handle the elevation, storage [and] transfer" of the grain; and to keep the stored grain "well maintained and properly monitored for quality." CGB points out that Kresin testified that it was not his job to ensure that Haasbach worked safely, and he had no authority to tell Haasbach workers how to do their jobs.

¶ 55 As stated, the threshold question is whether CGB, by its act or omission, contributed to a risk of harm to the individuals who were killed and injured in this case. For the following reasons, CGB's actions created a foreseeable risk of injury.

¶ 56 Essentially, CGB argues that the Agreement relieved it of any duty in this case, and that any duty to the individual workers was owed by Haasbach alone. However, CGB downplays its control over the Facility, the grain**,** and Haasbach, as both the warehouse license and the Agreement illustrate. The Agreement stated that CGB would provide the warehouse license, which gave it "ultimate responsibility for the operation and integrity of the [Facility]." Under the warehouse license, CGB had to at all times maintain legal and operational control of the Facility, and these obligations could not be transferred to Haasbach. Plaintiffs' expert, Field, testified that the warehouse license determined who controlled the Facility and the grain. Therefore, the fact that Haasbach owned the Facility and hired the workers does not change the fact that CGB at all

times possessed ultimate responsibility over the Facility's operation, a responsibility that could not be delegated to Haasbach, and it does not mean that CGB did not owe the workers a duty. See *Jane Doe-3*, 2012 IL 112479, ¶ 22 (the relationship between the plaintiff and the defendant need not be a direct relationship between the parties); see also *Simpkins*, 2012 IL 110662, ¶ 19 (duty does not depend upon contract, privity of interest or the proximity of relationship, but extends to remote and unknown persons).

¶ 57 While the warehouse license alone arguably establishes CGB's duty to the workers, we note that the Agreement also gave CGB ultimate responsibility for the grain's quality. As CGB's director of grain operations (Kruse) testified, CGB was responsible for the quality of the grain. CGB Vice President Beck testified that CGB wanted the right to monitor all aspects of Haasbach's handling of the grain because if CGB thought the handling was incorrect, it wanted the ability to do something about it. Field similarly testified that under the Agreement, CGB had the responsibility of ensuring that the grain and moisture content was monitored and maintained. As a result, the Agreement gave CGB the authority to set the moisture levels of the grain. Pursuant to the Agreement, CGB paid Haasbach for drying wet bushels of grain to its designated moisture levels; CGB had the right to inspect Haasbach's drying practices; CGB directed the mixing and blending of the grain to achieve its designated moisture levels; CGB had full access to the Facility; and CGB had the right to witness and monitor Haasbach's handling of the grain.

¶ 58 According to Field, because CGB set the moisture level of the grain too high, the grain in bin no. 9 went partially out-of-condition, meaning that the grain was clumping and sticking to the walls. Indeed, Field testified that it was CGB's inappropriate management of the grain that led to the partially out-of-condition grain in bin no. 9. Based on CGB's inappropriate management of the moisture and quality of the grain, CGB contributed to a risk of harm to the

workers who were sent inside the bin to break up the encrusted grain that clung to the walls. Having answered this threshold question in the affirmative, we now weigh the four factors to determine whether CGB owed a duty to the workers who were injured and killed in this case.

¶ 59 The first factor is whether the risk of harm was reasonably foreseeable. Our focus is on whether the injury was reasonably foreseeable at the time CGB engaged in the allegedly negligent action, which was, as stated, setting the moisture at an unreasonable level which resulted in the foreseeable deterioration of the grain. See *Simpkins*, 2012 IL 110662, ¶ 25 (the question is whether the injury was reasonably foreseeable at the time the defendant engaged in the allegedly negligent action).

¶ 60 In this case, once the grain was out-of-condition, the risk of harm was reasonably foreseeable. In general, the practice of walking down grain or working inside bins containing grain is dangerous. Field testified regarding the direct correlation between out-of-condition grain and entrapment based on workers entering the bins to break up the encrusted grain that did not flow well or that clung to the walls. CGB was aware that bin no. 9 was partially out-of condition, and Schaffner testified that it was his custom and habit to tell Kresin what he was doing at the Facility and when people were working in the bins and moving out grain. Therefore, at the time the moisture levels were set at an unreasonably high level, it was foreseeable that Schaffner would have to send workers into bin no. 9 to walk down the grain so that it would flow freely.

¶ 61 The second factor is the likelihood of injury. As stated, walking down grain is a known injury hazard, and Field testified that OSHA required bin workers to wear a harness, a lifeline, and a retrieval system. In addition, the grain industry itself had adopted normal daily practices for bin entry and often contracted with skilled teams when entering bins. In this case, the

workers entered the bin without any harness, training, or safeguards. They also entered the bin in violation of OSHA, which prohibits the act of walking down grain when the grain is already flowing. Thus, the likelihood of injury was high.

¶ 62 The third and fourth factors also weigh in favor of finding a duty in this case. Based on CGB's operational control of the entire Facility under the warehouse license and its authority over the grain's quality under the Agreement, the magnitude of placing the burden on CGB to guard against the injury was not too great (factor three). Likewise, the consequences of placing the burden on CGB was not too great (factor four), in that CGB could not delegate its operational control over the Facility to Haasbach, even if it so desired. Therefore, all of the factors weigh in favor of finding that CGB owed a duty to the individuals killed and injured in this case. In sum, given CGB's control over the quality of the grain under the Agreement and its control over the Facility under the warehouse license, it owed a duty to the workers to protect them from unsafe conditions caused by its mismanagement of the grain. *Simpkins*, 2012 IL 110662, ¶ 19 (if a course of action creates a foreseeable risk of injury, the individual engaged in that course of action has a duty to protect others from such injury).

¶ 63 CGB's final argument with respect to duty also lacks merit, in that its reliance on *Jentz v. ConAgra Foods, Inc.*, 767 F.3d 688 (7th Cir. 2014), is misplaced. While federal cases are persuasive but not binding (*State Bank of Cherry v. CGB Enterprises, Inc.*, 2013 IL 113836), *Jentz* concerned a wholly different issue; namely, whether someone who engaged an independent contractor to redress an unsafe condition was liable when the feared event occurred. *Jentz*, 767 F.3d at 691. Accordingly, it offers no guidance.

¶ 64 2. Proximate Cause

¶ 65 Having found that CGB owed a duty to plaintiffs, we next consider CGB's argument that plaintiffs failed to prove that it was a proximate cause of the accident. Proximate cause includes both cause in fact and legal cause. *Rice v. White*, 374 Ill. App. 3d 870, 888 (2007). Cause in fact exists where there is a reasonable certainty that a defendant's acts caused the injury or damage. *Id*. "A defendant's conduct is a 'cause in fact' of the plaintiff's injury only if that conduct is a material element and a substantial factor in bringing about the injury." *Abrams v. City of Chicago*, 211 Ill. 2d 251, 258 (2004). A defendant's conduct is a material element and a substantial factor in bringing about the injury if, absent that conduct, the injury would not have occurred. *Id*. On the other hand, legal cause is primarily a question of foreseeability: whether the injury is of a type that a reasonable person would see as a likely result of his or her conduct. *Id*. Typically, proximate cause is a question of fact; however, a court may determine lack of proximate cause as a matter of law where the facts alleged do not sufficiently establish both cause in fact and legal cause. *Rice*, 374 Ill. App. 3d at 888.

¶ 66 CGB argues that plaintiffs' theory of causation is "a red herring." According to CGB, plaintiffs' theory is that the grain inside bin no. 9 was partially out-of-condition, causing it to clump, which is why Schaffner sent the individuals into the bin. However, if the grain's stickiness was a problem, CGB argues that, under the Agreement, it was Haasbach, not CGB, that was responsible for monitoring and maintaining the grain's quality.

¶ 67 A review of the evidence shows that CGB's conduct was a material element and a substantial factor in bringing about the accident. As previously stated, CGB maintained operational control of the Facility, and it had ultimate control over the grain's quality. Schaffner testified that he advised Kresin of the condition of the grain in bin no. 9, which had begun to mold and was on the verge of being out-of-condition. CGB set the moisture level of the grain,

and according to Field, it was CGB's inappropriate management practices of setting the moisture level too high that allowed the grain in bin no. 9 to go partially out-of-condition. The moldy conditions made the grain less fluid and caused crusting on the bin walls. Schaffner testified that because the grain was not flowing freely in the center sump pump, he sent Whitebread, Pacas, and Piper inside the bin to break up chunks of grain that were stuck together so that it would start flowing again. As Field opined, the accident would not have happened if the grain had been maintained in an appropriate condition because it would not have been out-of-condition and thus in need of removal from the bin walls. Accordingly, the evidence supports the finding that CGB was a cause in fact of the individuals' injuries and deaths.

¶ 68 CGB next argues that Schaffner's conduct in sending plaintiffs into the bin broke the causal chain between CGB's conduct and the injuries. CGB argues that at worst, the moisture level set by CGB furnished a condition but was not the cause of the accident. Also, with respect to Pacas, CGB argues that Schaffner's decision to re-start the conveyor was the proximate cause of his death.

¶ 69 Our supreme court has stated that the test in analyzing cases with an intervening cause is whether the defendant reasonably might have anticipated the intervening cause as a natural and probable result of its own negligence. *Abrams*, 211 Ill. 2d at 259. "If the negligence charged does nothing more than furnish a condition by which the injury is made possible, and that condition causes an injury by the subsequent, independent act of a third person, the creation of the condition is not the proximate cause of the injury." *Id*. However, if the defendant could reasonably foresee the intervening act, that act will not relieve the defendant of liability. *Mack v. Ford Motor Co.*, 283 Ill. App. 3d 52, 57 (1996). To avoid liability, the defendant must demonstrate that the intervening event was unforeseeable as a matter of law. *Id*. A foreseeable

intervening force does not break the chain of legal causation, and the precise nature of the intervening cause need not be foreseen. Where varying inferences are possible, foreseeability is a question for the jury. *Id*.

¶ 70 CGB relies on two cases to support its position. First, in *Abrams*, the defendant City failed to send an ambulance to the plaintiff, who was pregnant and suffering labor pains. *Abrams*, 211 Ill. 2d at 253. The plaintiff then called her friend to transport her to the hospital, but her driver friend drove recklessly by driving through a stoplight and colliding with another car. *Id*. at 255. Though the defendant City conceded that the refusal to provide ambulance service was a cause in fact of the collision, it argued that its conduct could not be a legal cause of the plaintiff's injuries when the intervening causes were the reckless driving of the plaintiff's driver and the individual she hit. *Id*. at 259-60. The individual hit was also reckless in that he was substance-impaired and speeding through the intersection on a suspended license. *Id*. at 262. The supreme court agreed, reasoning that the defendant City could not have reasonably anticipated that a refusal to send an ambulance would likely result in the plaintiff's driver running a red light at the same time a substance-impaired driver was speeding through the intersection on a suspended license. *Id*. at 262. In other words, the injury was not of a type a reasonable person would see as the likely or probable result of the failure to send an ambulance. *Id.*

¶ 71 Second, in *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252 (1999), the issue was whether an illegally parked truck was the proximate cause of the plaintiff's injuries, who illegally jaywalked next to the parked truck when she was struck by a car. *Id*. at 254-55. The supreme court determined that although the illegally parked truck was a cause in fact of the plaintiff's injuries, it was not a legal cause of her injuries. *Id*. at 259-60. The question was

whether it was reasonably foreseeable that a truck driver's violation of a no parking sign at mid-block would likely result in a pedestrian's ignoring a marked crosswalk at the corner, walking to mid-block, and attempting to cross in violation of the law. *Id.* at 261. The court stated that the truck driver neither caused the plaintiff to make that decision, nor reasonably could have anticipated that decision as a likely consequence of their conduct; one did not follow from the other. *Id.*

¶ 72 *Abrams* and *Galman* are distinguishable from the case at bar. As plaintiffs point out, the parties in *Abrams* and *Galman* were strangers, and the intervening causes were independent acts of third parties that were not foreseeable as a matter of law. To this end, our supreme court has distinguished between situations involving the unforeseeable, independent acts of third parties and situations where the third party was under the control of the first wrongdoer:

> "If the act of a third party is the immediate cause of the injury and is such as in the exercise of reasonable diligence would not be anticipated and the third person is not under the control of the one guilty of the original wrong, the connection is broken and the first act or omission is not the proximate cause of the injury. There may be more than one proximate cause of an injury. But if two wholly independent acts, by independent parties, neither bearing to the other any relation or control, cause an injury by one creating the occasion or condition upon which the other operates, the act or omission which places the dangerous agency in operation is the efficient intervening cause that breaks the causal connection and makes the other act or omission the remote and not the proximate cause of the injury." *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 407 (2004) (quoting *Merlo v. Public Service Corp.*, 381 Ill. 300, 317 (1942)).

In other words, legal cause is established only if the defendant's conduct is so closely tied to the plaintiff's injury that he should be held legally responsible for it. *Young v. Bryco Arms*, 213 Ill. 2d 433, 446 (2004). "The question is one of public policy – how far should a defendant's legal responsibility extend for conduct that did, in fact, cause the harm?" *Id.*

¶ 73 In this case, Haasbach, the third party, was under the control of CGB, the one guilty of the original wrong. The Agreement gave CGB the authority to set the moisture levels of the grain and to direct Haasbach's mixing and blending of the grain to achieve its designated moisture levels. Under the Agreement, CGB paid Haasbach for drying wet bushels of grain; CGB had the right to inspect Haasbach's drying practices; and CGB had the right to witness and monitor Haasbach's handling of the grain. Given the relationship between the parties and CGB's control over Haasbach, it is impossible to say that CGB's setting of the moisture level was a wholly independent act bearing no relation to Schaffner's decision to send the individuals into the bin.

¶ 74 As Field testified, it was CGB's inappropriate management of the grain in bin no. 9 that led to the need to send workers into the bin. By setting the moisture level too high, CGB caused the grain in bin no. 9 to go partially out-of-condition and clump along the bin wall. Field testified that moisture levels had a direct relationship to crusting and grain spoilage. He also testified that there was a direct correlation between out-of-condition grain and entrapment based on workers entering the bins to break up the encrusted grain that did not flow well or that clung to the walls. As a result, it was reasonably foreseeable that CGB's inappropriate management of bin no. 9, in allowing the grain to go partially out-of-condition, would result in Schaffner sending workers into the bin to break up the chunks of grain so that it flowed freely. See *Watson v. Enterprise Leasing Co.*, 325 Ill. App. 3d 914, 922 (2001) (the test that should be applied in all

proximate cause cases is whether the first wrongdoer reasonably might have anticipated the intervening efficient cause as a natural and probable result of the first party's own negligence). The need to remediate the out-of-condition grain followed from CGB's poor management of the grain's moisture level in that bin.

¶ 75 This is also true of Schaffner's decision to re-start the conveyor in a misguided effort to save the engulfed individuals. Field testified regarding the issues that confront first responders trying to save engulfed or entrapped bin workers. Field testified that even in situations where workers were only partially entrapped, such as Pacas, many still died due to unsuccessful rescue efforts. Though Schaffner should not have re-started the conveyor, it was foreseeable that rescue efforts would not succeed once Pacas was engulfed in the grain. In sum, CGB's inappropriate management of bin no. 9 was the cause in fact and legal cause of the individuals' injuries and deaths.

¶ 76 CGB's final challenge to the jury's finding of common law negligence is that the common law negligence claim was duplicative of plaintiffs' claim under section 414 of the Restatement (retained control). CGB's argument affords no relief because, as previously mentioned, if the evidence was sufficient to support any count, the judgment must be affirmed. See *Moore*, 116 Ill. App. 2d at 124. The jury in this case entered a general verdict in favor of plaintiffs on all three counts of negligence. Accordingly, CGB's claim that the common law negligence count was duplicative of the negligence count under section 414 of the Restatement matters little because the evidence was sufficient to support the common law negligence count.

¶ 77 Therefore, for all of these reasons, the trial court properly denied CGB's motion for judgment *n.o.v.* and its motion for a new trial.

¶ 78 C. Evidence of Haasbach's Negligence

¶ 79 CGB next argues that the trial court erred by barring evidence of Haasbach's negligence. Prior to trial, plaintiffs moved *in limine* to bar evidence that Haasbach was negligent. The court ruled that while CGB could not offer opinion evidence that Haasbach was negligent, it could introduce evidence that Haasbach's conduct caused Whitebread and Pacas's deaths and Piper's injuries. The trial court further ruled that CGB could argue that Haasbach was the sole proximate cause of the individuals' injuries and deaths.

¶ 80 Questions regarding the admission of evidence at trial are left to the sound discretion of the trial court, and we will not reverse a trial court's decision absent an abuse of that discretion. *Roach v. Union Pacific R.R.*, 2014 IL App (1st) 132015, ¶ 19. This same deferential standard applies to a trial court's decision on a motion *in limine*. *Id.*

¶ 81 At the outset, we disagree with plaintiffs that CGB has forfeited this issue. Plaintiffs argue that CGB agreed with the court's ruling when counsel for CGB said that it made "sense" to allow it to argue that Haasbach's conduct caused the individuals' injuries and deaths. Understanding the trial court's ruling is not the same as agreeing with it, and plaintiffs take CGB's statement out of context. Significantly, CGB opposed plaintiffs' motion *in limine* to bar evidence of Haasbach's negligence, and it made an offer of proof at trial that Haasbach's conduct violated OSHA. Although the trial court refused the offer of proof based on its ruling that evidence of Haasbach's negligence was barred, the record is clear that CGB did not forfeit the issue. Accordingly, we consider CGB's argument on the merits.

¶ 82 The dispositive case on this issue, according to CGB, is *McDonnell v. McPartlin*, 192 Ill. 2d 505 (2000). According to CGB, *McDonnell* holds that a jury is entitled to hear evidence of an "empty-chair's" (*i.e.*, Haasbach's) negligence. CGB misstates the holding of *McDonnell*, however. The issue in *McDonnell* was whether "a defendant in a medical negligence case who

asserts that a nonparty physician's conduct was the sole proximate cause of the plaintiff's injury (the so-called 'empty chair' defense) must demonstrate that the nonparty physician's conduct was professionally negligent, as well as the sole proximate cause of the plaintiff's injury, in order for the jury to be instructed on sole proximate cause." *Id.* at 511. The *McDonnell* court held that "a defendant is not required to demonstrate that the nonparty physician's conduct was professionally negligent in order for the jury to be instructed on sole proximate cause." *Id.* In reaching this conclusion, the court reasoned that negligent conduct and proximate cause were distinct, albeit related, concepts. *Id.* at 522. While there was a pronounced tendency when considering one to include the other, it was also true that not every injury resulted from a negligent cause. *Id.* Consequently, the court did not hold, as CGB asserts, that a jury was entitled to hear evidence of an empty-chair or nonparty's negligence.

¶ 83 CGB further cites *Ramirez v. FCL Builders, Inc.*, 2014 IL App (1st), ¶ 193, which states that the settling party's "culpability" was relevant to a sole proximate cause defense. However, in this case, CGB was allowed to introduce evidence of Haasbach's fault or culpability. In fact, plaintiffs admitted as much during opening argument, stating that Haasbach was at fault for the accident, but arguing that CGB was at fault as well. CGB's defense, as illustrated in both opening and closing arguments, was that Haasbach alone, not CGB, was at fault and caused the accident. The trial court then gave a jury instruction on sole proximate cause. Therefore, aside from characterizing Haasbach's conduct as "negligent," CGB was allowed to argue and elicit evidence that Haasbach alone was at fault and responsible for the individuals' injuries and deaths. Therefore, CGB cannot show how it was prejudiced. See *Chapman v. Hubbard Woods Motors, Inc.*, 351 Ill. App. 3d 99, 108 (2004) (a party is not entitled to reversal based upon

rulings on evidence unless the error was substantially prejudicial and affected the outcome of the trial).

¶ 84 D. Jury Instruction

¶ 85 CGB's third and final argument is that the trial court erred by instructing the jury that plaintiffs could recover damages for both pain and suffering and emotional distress. Pointing out that plaintiffs did not bring a claim for emotional distress, CGB argues that the law does not allow an itemization for both pain and suffering and emotional distress. In addition, CGB argues that allowing plaintiffs to recover damages for both pain and suffering and emotional distress allowed for a double recovery.

¶ 86 Typically, we review a trial court's decision to grant or deny an instruction for an abuse of discretion. *Studt v. Sherman Health Systems*, 2011 IL 108182, ¶ 13. " 'The standard for determining an abuse of discretion is whether, taken as a whole, the instructions are sufficiently clear so as not to mislead and whether they fairly and correctly state the law.' " *Id.* (quoting *Dillon v. Evanston Hospital*, 483 Ill. 2d 483, 505 (2002)). However, when the question is whether the applicable law was conveyed accurately, the issue is a question of law, and our standard of review is *de novo*. *Id.*

¶ 87 CGB argues that our standard of review is *de novo*, whereas Piper, in his individual brief, argues that our standard of review is whether the trial court abused its discretion. While we agree with Piper[4] that the standard of review is whether the trial court abused its discretion,

[4] We reject Piper's argument that this issue is forfeited because the "Argument" portion of CGB's brief "is not correlated" with the "Points and Authorities" section of its brief. The case cited in support of Piper's argument, *Colville v. City of Rochelle*, 130 Ill. App. 2d 541, 545-46 (1970), does not stand for this proposition and does not concern forfeiture.

because the issue is whether the jury instructions correctly stated the law, our result would be the same under either standard of review.

¶ 88 In this case, over CGB's objection, the trial court gave a jury instruction for Whitebread and Pacas modeled on Illinois Pattern Jury Instructions, Civil, No. 30.10 (2006). The jury was instructed that it could award damages for pain and suffering and also for emotional distress if it determined that such damages were proved to have resulted from CGB's negligence. Also over CGB's objection, the trial court gave a jury instruction for Piper modeled on Illinois Pattern Jury Instructions, Civil, Nos. 30.01, 30.04.01, 30.05, 30.05.01, 30.06 (2006). The jury was instructed that it could award damages for pain and suffering and also for emotional distress experienced and reasonably certain to be experienced in the future if it determined that such damages were proved to have resulted from CGB's negligence. Based on these instructions, the jury awarded Whitebread's and Pacas's estates $1 million for pain and suffering and $1 million for emotional distress and Piper $200,000 for pain and suffering and $500,000 for past and future emotional distress.

¶ 89 Both of the arguments raised by CGB were rejected in *Babikian v. Mruz*, 2011 IL App (1st) 102579. In *Babikian*, the plaintiff filed a medical malpractice action against the defendant doctor for negligent medical treatment. *Id.* ¶ 1. On appeal, the defendant argued that the trial court erred by instructing the jury that damages could be awarded for pain and suffering and for emotional distress. *Id.* ¶ 16. The trial court gave an instruction informing the jury that it could award damages for pain and suffering and also for emotional distress, so long as the jury determined that such damages were proved to have resulted from the defendant's negligence. *Id.* ¶¶ 17-18.

¶ 90 As CGB argues here, the defendant doctor in *Babikian* argued that the instruction was improper because damages for emotional distress were allowed only where a cause of action for intentional or negligent infliction of emotional distress had been asserted, which the plaintiff had not alleged. *Id.* ¶ 19. Applying an abuse-of-discretion standard, the reviewing court noted that the rule in Illinois was just the opposite, in that damages for emotional distress were available to prevailing plaintiffs in cases involving personal torts. *Id*. ¶¶ 17, 19.

¶ 91 In addition, the defendant doctor in *Babikian* argued that the verdict form, which included a separate line for emotional-distress damages, caused the jury to grant the plaintiff a double recovery. *Id.* ¶ 20. The reviewing court rejected that claim, noting that it was presumed that the jury understood and followed the court's instructions. *Id*. The *Babikian* court further noted that there was no indication in the record that the jury was confused in its determination of the appropriate amount of damages, and the defendant doctor failed to submit any special interrogatories, which would have demonstrated whether a double recovery had been awarded. *Id*.

¶ 92 CGB acknowledges *Babikian* but argues that it should not be followed. We disagree. Not only did the court properly instruct the jury that plaintiffs could recover damages for both pain and suffering and emotional distress, the jury's verdict was supported by the evidence. It was undisputed that both Whitebread and Pacas suffered from blistering and livor mortis as they became submerged in the grain. The evidence showed that after they were submerged, they were both conscious for 1½ to 2 minutes, during which time they would have felt panic and fear until passing out and experiencing brain death. In Piper's case, it took rescuers six hours to free him from entrapment in the grain, and he felt as though his body were being ripped in half. After he was rescued, he could not support his own weight and was admitted to the hospital where it took

three days for him to be able to walk. Moreover, Piper gripped the hand of his best friend, Pacas, as Pacas suffocated to death, and Piper's psychologist testified that Piper continued to suffer from PTSD. As the court in *Babikian* reasoned, without a special interrogatory, CGB's claim that plaintiffs received a double recovery is mere conjecture. *Babikian*, 2011 IL App (1st) 102579, ¶ 20. Accordingly, we reject CGB's arguments regarding the jury instructions, as well its corresponding requests for a remittitur or new trial on damages.

¶ 93 III. CONCLUSION

¶ 94 For the foregoing reasons, the judgment of the Carroll County circuit court is affirmed.

¶ 95 Affirmed.