2014 IL App (3d) 120122-U

Order filed July 1, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

DUSTIN STONE,	)	Appeal from the Circuit Court
	)	of the Tenth Judicial Circuit,
Plaintiff-Appellee,	)	Tazewell County, Illinois
	)	
v.	)	
	)	
	)	
MITEK INDUSTRIES, INC.	)	Appeal No. 3-12-0122
	)	Circuit No. 08-L-155
Defendant-Appellant,	)	
	)	
v.	)	
	)	
CENTRAL ILLINOIS TRUSS, INC.,	)	Honorable
	)	Paul P. Gilfillan,
Third Party Defendant-Appellee.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Justice Schmidt dissented.

ORDER

¶ 1 Held: (1) Defendant product manufacturer was not entitled to JNOV or a new trial on issue of proximate cause where the evidence suggested that appellant's product was in an unreasonably dangerous condition due to a design defect when it left the defendant's control, that the plaintiff's injury was a natural and probable result of the design defect, and that the acts and omissions of the plaintiff and other parties which contributed to the accident were not improbable or unforeseeable; (2) defendant was not entitled to a new

trial on the issue of the plaintiff's assumption of the risk where the evidence suggested that the plaintiff was unaware of the specific product defect that rendered the defendant's product unreasonably dangerous; (3) the jury's liability verdict was not against the manifest weight of the evidence; (4) defendant could not challenge the jury's apportionment of fault and damages based upon juror affidavits because such affidavits are inadmissible to impeach the process by which a jury reached its verdict; (5) the trial court did not abuse its discretion by refusing to answer a jury question regarding a jury instruction where the instruction given to the jury was clear and answered the question posed by the jury; (6) the trial court did not err in dismissing the defendant's third-party contribution claim against the plaintiff's employer in exchange for the employer's waiver of its lien on past and future worker compensation benefits, and the setoff procedure adopted by the trial court was consistent with Illinois law; (7) the trial court properly granted summary judgment in favor of the employer on the defendant's claim for negligent spoliation of evidence where most of the employer's post-accident alterations to the product were made before the employer had a duty to preserve the product and the other alterations it made could not have prejudiced the defendant; and (8) the remaining issues and arguments raised by the defendant lack merit.

¶ 2 Dustin Stone suffered a serious leg injury while working for Central Illinois Truss, Inc. (CIT), resulting in the amputation of his leg above the knee. Stone filed a product liability action against Mitek Industries, Inc. (Mitek), the manufacturer or the "RoofGlider" machine that injured his leg. Stone alleged that the machine's safety bar system (which was supposed to prevent the type of accident that caused Stone's injury) was defectively designed. Mitek filed a third-party complaint for contribution against CIT alleging that CIT negligently allowed the machine to fall into a "profound state of disrepair," rendering the machine's safety bar system nonfunctional.

¶ 3 The jury found that the RoofGlider was in an unreasonably dangerous condition when it left Mitek's control (*i.e.*, that the machine was defectively designed), and returned a verdict against Mitek. However, the jury found that Mitek was entitled to contribution from CIT for 29% of the damages awarded.

¶ 4 After the jury reached its verdict, CIT waived its workers' compensation lien, acknowledged its responsibility to pay all future workers' compensation benefits to which Stone

is entitled, and moved to dismiss Mitek's third-party contribution claim against it. The trial court granted CIT's motion to dismiss Mitek's contribution claim and entered judgment against Mitek. The court granted Mitek an immediate setoff against the verdict in the amount of the workers' compensation benefits that CIT had already paid to Stone. The court found that Mitek was also entitled to a setoff for all future workers' compensation benefits that CIT paid to Stone. However, the parties were unable to agree to a stipulation as to the amount of such future benefits, and the trial court ruled that the relevant case law precluded it from awarding a setoff for future workers' compensation benefits before the Illinois Workers' Compensation Commission (the Commission) actually determined the amount of such benefits in a workers' compensation proceeding. Accordingly, the trial court denied Mitek's motion to determine the present cash value of such future benefits. Moreover, the trial court ordered Stone to "apply for eligible future [workers' compensation] benefits ** in his pending case before the [Commission]," and ordered CIT to pay Mitek all future amounts of such benefits awarded to Stone in that Commission proceeding.

¶ 5 In this appeal, Mitek seeks reversal of the jury's verdict or, in the alternative, a new trial on liability, arguing that: (1) Stone failed to prove that his injury was proximately caused by any design defect in the RoofGlider; (2) Stone assumed the risk of injury by working in a restricted safety zone while the RoofGlider was being operated even though he knew the RoofGlider was in a state of disrepair; (3) the trial court erred by instructing the jury that Mitek's expert witness had violated a court order by reviewing the trial testimony of some of Stone's lay and expert witnesses; (4) the trial court abused its discretion in refusing to answer a question from the jury requesting clarification on Mitek's contribution claims against CIT; (5) the jury's verdict was

against the manifest weight of the evidence; and (6) the jury apportioned fault between Mitek and CIT via an improper quotient verdict.

¶ 6 Mitek also challenges the damages awarded against it. Specifically, Mitek argues that (1) the trial court erred in allowing speculative testimony regarding Stone's alleged need for a powered knee prosthesis that does not yet exist; (2) the trial court's judgment dismissing Mitek's contribution claim against CIT in exchange for CIT's waiver of its workers' compensation lien is "unworkable," and Mitek is entitled to either a contribution or a setoff that fairly reflects CIT's liability.

¶ 7 Finally, Mitek argues that the trial court erred in granting summary judgment in favor of CIT on Mitek's third-party claim against CIT for negligent spoliation of evidence. Mitek argues that CIT had a duty to preserve evidence of the condition of the RoofGlider on the day of the accident, and CIT's negligent failure to preserve such evidence severely prejudiced Mitek's defense.

¶ 8 **FACTS**

¶ 9 CIT is a truss manufacturing plant located in Deer Creek, Illinois. In 2005, Mitek visited CIT and installed a "RoofGlider," which is a machine designed to manufacture wooden trusses. The RoofGlider system consists of a number of tables positioned approximately 20 inches apart spanning approximately 100 feet. To construct a truss, workers at the plant lay out pieces of wood on these tables and hammer metal plates into the wood. After the plates have been hammered into place, a worker uses the RoofGlider to roll over the truss, putting weight on (and thereby firming up) the truss. From there, the truss is moved to a finish roller, which further compresses the plates to complete the truss.

¶ 10 The main component of the RoofGlider is the "gantry," which slowly rolls over the trusses. To operate the gantry, a worker stands on the RoofGlider's operating platform, which is located on one side of the machine which is referred to as the "bottom cord side." To activate the RoofGlider, the operator depresses a button on a joystick and moves the joystick to the left or right. Once the joystick is moved, the gantry will move down the tables, pressing the roof truss. The joystick is a "deadman" control, meaning that once the operator lets go of the joystick, power to the motor is cut, a brake is applied, and the gantry comes to a stop within approximately 20 inches. The gantry's top speed is approximately 1.5 miles per hour if there are trusses on the tables, and 2.2 miles per hour is no trusses are on the table. Once the joystick is activated, a light located at the "top cord" side of the gantry (the side opposite the operating platform) begins to flash and a loud warning buzzer goes off before the gantry begins to move. The gantry also has a red emergency stop button which cuts power to the motor, applies the brake, and de-activates the joystick.

¶ 11 Moreover, attached to the gantry is push bar safety system made up of two pivot arms connected to a horizontal aluminum bar. One of the pivot arms is located on the top cord side of the machine and the other is located on the bottom cord side. The pivot arms are joined together by a horizontal aluminum tube that extends about 32 inches in front of the gantry. This horizontal bar acts as an emergency stop bar. The bar can be pressed by a worker if he is in the path of the gantry as it is traveling toward him. When the push bar is pressed, it is designed to activate a limit switch on the bottom cord (operator's) side of the gantry, stopping the machine. There is no limit switch on the top cord side of the machine.

¶ 12 In the version of the RoofGlider at issue in this case, the safety bar was connected to the pivot arms via a "C-collar," which is a clasp with a top and bottom portion held together by the

screws.[1] When the screws holding the C-collars together are relatively tight, the push bar system operates as a single, rigid unit; no matter which side of the bar is pressed, the pivot arms move together, activating the limit switch and stopping the gantry. However, if the screws holding the C-collars together are loosened, the push bar no longer responds as a single rigid unit. In that event, pushing the safety bar on the top cord side will not activate the limit switch on the bottom cord side, and the gantry will keep moving.

¶ 13 Stone was employed by CIT as a truss assembler. He had been trained to work on and around the RoofGlider, and had been told how to work the safety bar mechanism. Stone testified that, as far as he knew, when the safety bar was pressed, the RoofGlider would stop moving forward. Prior to the accident, Stone had tested the stop bar, causing the machine to come to a stop. In addition, Stone had witnessed Shane Boyle (the CIT employee who trained Stone) operate the stop bar on nearly a daily basis. On each occasion, the stop bar had functioned properly.

¶ 14 On November 11, 2008, Stone was working at CIT with Boyle and Skylar Priest. Priest was operating the gantry, and Stone was working approximately 20 feet north of the gantry on the top cord side of the gantry, hammering plates into a truss on the tables. At some point, Stone heard the RoofGlider's buzzer, indicating that the machine was moving in his direction. Stone could see that Priest was not paying attention. Stone turned, yelled, and waved his arms in an attempt to get Priest's attention as he tried to exit the tables. Stone reached out and pushed the safety bar, but the RoofGlider kept coming. It trapped and crushed his left leg. Stone remained trapped in the machine for over an hour until firefighters were able to use the jaws of life to free

[1] Glenn McNeelege, the former engineering manager of Mitek's engineering division, testified that earlier versions of the RoofGlider contained a safety bar that was welded to the pivot arms.

him. He lost between one and two liters of blood and ultimately had to have his leg amputated above the knee. After his knee was amputated, Stone had a second surgery to revise the amputation so he could be fitted with a prosthetic.

¶ 15 Stone sued Mitek alleging that the RoofGlider's safety bar system was defectively designed. Mitek filed a third-party complaint against CIT for contribution and indemnity based on CIT's alleged negligent failure to inspect and maintain the stop bar mechanism, CIT's alleged negligent failure to inform its employees of the rules for the safe operation of the RoofGlider (including rules prohibiting the movement of the gantry in the direction of workers who are within the restricted safety zone) and its failure to enforce those rules, and (3) Skylar Priest's negligent operation of the gantry. Mitek also filed a claim against CIT for negligent spoliation of evidence, alleging that CIT had made repairs to the RoofGlider's push bar system after the accident which prevented Mitek from knowing the condition of the machine at the time of the accident. The trial court granted CIT's motion for summary judgment on Mitek's claim for spoliation of evidence, and the matter proceeded to trial on Stone's complaint and Mitek's third-party claim for contribution against CIT.

¶ 16 Todd Erwin, CIT's general manager, testified during the trial. Erwin testified that, after the accident, he and three other CIT employees looked at the RoofGlider to determine what went wrong. They discovered that the safety bar was not functioning properly. Specifically, they discovered that, when the safety bar was pressed on the top cord side (the location from which Stone had pressed it before the accident), it did not activate the limit switch on the bottom cord side. Erwin testified that he was able to press the bar 2.5 feet before the limit switch would activate. Erwin also found that the screws in the C-collar clasp on the top cord side were loose. After running a series of tests, Erwin determined that the safety bar would not work properly

when the screws in the C-collar were loose. Erwin also found that the C-collar on the bottom cord side was missing and that someone had put duct tape on it to hold it together. Erwin testified that he had never seen this duct tape prior to the accident and that, if he had, he would have removed it to find out why it was there. Erwin also testified that, prior to the accident, he did not know that the screws in the C-collar clasp were loose, and no one at CIT knew that loose screws might cause the safety bar to fail. He also testified that Mitek had never warned CIT of this possibility and never advised CIT to check the tightness of the screws.

¶ 17 CIT's expert, Dr. John Meyer, inspected and tested the RoofGlider. Meyer determined that, when the screws in the safety bar are loosened, the push bar must be pressed considerably further to get the stop mechanism to activate. Meyer opined that the "primary" and "driving" force causing the screws to loosen was the vibration of the gantry as it moves down the tables. He also opined that: (1) Mitek's design of the safety bar system was defective in that it used C-collars with screws that were prone to loosen, rendering the safety bar ineffective; (2) a competent design engineer should have appreciated the dangers associated with the loosened screws, but Mitek's design engineers failed to do so; (3) Mitek's manufacturer's manual for the RoofGlider system was deficient because it merely advised the user in general terms to periodically test the safety bar but did not specify whether the bar should be tested from the top cord side or the bottom cord side and did not warn of the dangers of screws loosening in the C-collars; (4) the addition of a second limit switch on the top cord side of the push bar would have rendered the RoofGlider safer and prevented Stone's accident.

¶ 18 John Mroszczyk, Stone's liability expert, opined that the RoofGlider's safety bar experienced vibration and shock in its ordinary use at CIT which caused the screws and bolts holding the safety bar together to loosen, rendering the stop bar system ineffective at the time of

the accident. Mroszczyk also opined that: (1) the RoofGlider was in an unreasonably dangerous condition the day Mitek sold it and the day of the accident because of the faulty safety bar system; (2) the lack of a second limit switch for the safety bar made the machine unreasonably dangerous; (3) the lack of a light bar and bumper system (which would have caused the machine to stop automatically before it hit Stone even if the safety bar had not been pressed, just as an automatic garage door stops before it hits an object) made the machine unreasonably dangerous; (4) the risks of the C-collar and screw design outweighed any proposed benefits of that design; (5) the machine could have been made reasonably safe if had included a second limit switch on the pivot arm on the top cord side of the machine or if it had used either a welded safety push bar or a light bar system instead of a push bar secured by a C-collar and screws.

¶ 19 Mitek's expert, Dr. Dennis Brickman, also tested and inspected the RoofGlider. Brickman testified that, when the screws in the safety bar were tight, the safety bar only needed to be pushed approximately four inches to work. However, Brickman testified that, when the screws were loosened, he could not get the safety bar system to operate when he pressed the bar at the top cord side.

¶ 20 Stone testified that he understood that truss assemblers had to leave the tables if the gantry was moving toward them. (Following Mitek's practice, we will refer to this rule as the "restricted safety zone" rule.) Boyle, Stone's supervisor, testified that the restricted safety zone rule was discussed by Erwin and others, but that "no one really obeyed" the rule at CIT. Kirk Williams, another CIT employee, testified that all of the employees broke the rule on occasion. On cross-examination, Stone admitted that he was working in the restricted safety zone when the accident occurred and that he was not supposed to be there when the gantry was moving toward him. He also admitted that, if he had left the table area when he heard the RoofGlider's buzzer

(as he knew he was supposed to), he "probably" would have been able to make it out of the restricted safety zone before the accident happened.

¶ 21 Eric Goldsmith, another truss assembler at CIT, testified that the push bar was in "poor" condition at the time of the accident. He testified that the screws holding the C-collar on the top cord side were sometimes loose and slightly stripped, and that he personally tightened these screws about once a week. He told Bob Fogal, (whom Goldsmith identified as CIT's "maintenance man"), about the screws coming loose. [2] According to Goldsmith, Fogal told him that "[w]e'll get to it or we'll look into it." Goldsmith believed that he also told Erwin about the problem on more than one occasion and received a similar reply. Goldsmith also testified that the screws on the bottom cord side of the C-collar had fallen out altogether and that the bottom half of the C-collar was missing on that side. The only thing holding the pivot arm and the push bar together on that side was duct tape, and it had been that way for months. Goldsmith testified that he and "everyone in the shop" would replace or repair the duct tape when it would wear out or tear while the gantry was moving. Goldsmith stated that it was his understanding that everyone on the shift, including Stone, was aware that the C-collar screws were loose.

¶ 22 Priest testified that the condition of the safety bar was a "visible safety issue," and that he once saw the safety bar bouncing on the tables while the gantry was moving. Priest testified that he told Boyle that this was something that "needed to be taken care of." Boyle testified that the safety bar had been duct-taped for months and that he had alerted Fogal to the problem prior to

[2] Four CIT truss assemblers (including Priest and Goldsmith) testified that Fogal was in charge of maintenance of the RoofGlider. However, Fogal denied this. Erwin testified that no one was officially in charge of maintaining the RoofGlider, but that Fogal (who was hired as a truck driver) had "kind of drifted into" that position because he was mechanically inclined.

the accident. During his deposition testimony, Erwin testified that he (Erwin) had not inspected the push bar in years.

¶ 23 The jury rendered a verdict in favor of Stone in the amount of $13,544,172.71. The jury apportioned liability among the parties as follows: Stone (0%), Mitek (71%), CIT (29%). The jury answered "yes" to the following special interrogatory: "When the RoofGlider left the control of Mitek Industries, Inc., was it in an unreasonably dangerous condition?"

¶ 24 After the verdict, CIT moved to dismiss Mitek's claim for contribution in exchange for a waiver of CIT's statutory right to reimbursement from Stone for past and future workers' compensation benefits under section 5(b) of the Illinois Workers' Compensation Act, 820 ILCS 305/5(b) (West 2008). Mitek filed a written objection to CIT's motion to dismiss. CIT filed a reply and, in the alternative, moved to stipulate to the amount of future workers' compensation benefits. CIT and Stone agreed to stipulate to a pre-determined amount of such benefits, but Mitek did not agree to join the stipulation or to propose its own stipulated amount. Instead, Mitek argued that, if the trial court granted CIT's motion to dismiss Mitek's contribution claim (which Mitek opposed), the court should hold an evidentiary hearing to take evidence from all parties on the amount of future workers' compensation benefits. The trial court entered an order providing that: (1) CIT and its insurer remain liable to Stone for workers' compensation benefits for the remainder of his life; (2) Stone shall periodically seek such benefits as they become due; and (3) CIT will pay any future benefits that the Commission awards Stone directly to Mitek; and (4) Mitek may apply annually for an accounting or for enforcement of the court's order. This appeal followed.

¶ 25 **ANALYSIS**

¶ 26 1. Proximate Cause

¶ 27 Mitek argues that Stone failed to establish that any alleged design defect in the RoofGlider was a proximate cause of his injury. We disagree.

¶ 28 To prevail on a product liability claim alleging defective design, the plaintiff must establish that the allegedly defective condition of the product is a proximate cause of his injury. *Barr v. Rivinius, Inc.*, 58 Ill. App. 3d 121, 127 (1978). The standards for proving proximate causation are the same whether the case involves negligence or strict liability in tort. *Id.* Proximate cause exists "if the injury is the natural and probable result of the negligent act or omission and is of such a character that an ordinarily prudent person would have foreseen it as a result of such negligence." *Niffenegger v. Lakeland Construction Co.*, 95 Ill. App. 3d 420, 425 (1981). "The intervention of independent, concurrent or intervening forces will not break the causal connection if such intervention was foreseeable." *Id.* at 426.

¶ 29 Although its request for relief is not entirely clear, Mitek appears to request either a judgment notwithstanding the verdict (JNOV) or a new trial on this issue. The standard for obtaining a JNOV is very difficult to meet and is limited to extreme situations. *Bergman v. Kelsey*, 375 Ill. App. 3d 612, 621-22 (2007). A JNOV should be granted "only when all the evidence, viewed in a light most favorable to the nonmovant so overwhelmingly favors the movement that no contrary verdict could stand based on the evidence." *Id.* at 621. A trial court may not reweigh the evidence and set aside a verdict merely because the jury could have drawn different inferences or reached different conclusions, or because the court feels that other results are more reasonable. *Maple v. Gustafson*, 151 Ill. 2d 445, 452-53 (1992). An appellate court should not usurp the jury's function and substitute its judgment on questions of fact fairly

submitted, tried, and determined from the evidence which did not greatly preponderate either way. *Bergman*, 375 Ill. App. 3d at 621-22.

¶ 30 A new trial should be granted only when the verdict is contrary to the manifest weight of the evidence. *Id.* at 629. A verdict is contrary to the manifest weight of the evidence when the opposite conclusion is clearly evident or when the jury's findings prove to be unreasonable, arbitrary and not based upon any of the evidence. *Id.* Credibility determinations and the resolution of inconsistencies and conflicts in testimony are for the jury. *Id.* Proximate cause is ordinarily an issue of fact for the jury to decide unless the facts are undisputed and reasonable minds could not differ as to the inferences to be drawn from those facts. Robinson, 402 Ill. App. 3d at 403.

¶ 31 Mitek cannot meet either of these demanding standards. Mitek asserts that the evidence presented at trial "established without question" that Stone's accident was caused by: (1) CIT's failure to maintain its equipment that it knew had fallen into disrepair; (2) CIT's failure to enforce rules prohibiting employees from remaining in the restricted safety zone while the RoofGlider was in motion; (3) Priest's failure to operate the machine properly; and (4) Stone's failure to leave the restricted area immediately after becoming aware that the gantry was bearing down on him. Citing *Barr v. Rivinius*, 58 Ill. App. 3d 121, 127 (1978), Mitek argues that the allegedly defective condition of the RoofGlider was not a proximate cause of Stone's injury because it "did nothing more than furnish a condition by which the injury was made possible."

¶ 32 We disagree. Although there is evidence suggesting that negligent acts by CIT employees may have contributed to the accident, there is sufficient evidence to support the jury's verdict that the defective condition of the RoofGlider was a proximate cause of Stone's injury. Mroszczyk, Stone's liability expert, testified that the RoofGlider's safety bar experienced

vibration and shock in its ordinary use at CIT which caused the screws and bolts holding the safety bar together to loosen, rendering the stop bar system ineffective at the time of the accident. Mroszczyk opined that the RoofGlider was in an unreasonably dangerous condition the day Mitek sold it and the day of the accident because of the faulty safety bar system. Meyer, CIT's expert, also opined that Mitek's design of the safety bar system was defective in that it used C-collars with screws that were prone to loosen when the gantry rolled over the tables, rendering the safety bar ineffective. Meyer also opined that: (1) a competent design engineer should have appreciated the dangers associated with the loosened screws, but Mitek's design engineers failed to do so; and (2) Mitek did not warn CIT of the dangers of loosening screws in the C-collars. In addition, Mitek's own expert testified that, when the screws in the C-collar were loosened, he could not get the safety bar system to operate when he pressed the bar at the top cord side. Mitek was required by OSHA regulations and engineering standards to design a reliable "point of operation" guard system for the RoofGlider. The expert testimony summarized above suggests that Mitek failed to fulfill this obligation because the safety bar system on the RoofGlider at issue in this case was prone to fail during its regular use (i.e., the regular use of the gantry caused the screws to loosen, thereby causing the safety bar system to fail). Moreover, Meyer's testimony suggested that it was foreseeable that this failure would occur during regular use of the gantry, and Meyer and Mroszczyk both identified alternative designs that would have made the RoofGlider reasonably safe and prevented Stone's accident. This testimony strongly suggests that Stone's injury was a "natural and probable result" of the design defect. *Niffenegger*, 95 Ill. App. 3d at 426. The jury was entitled to rely on this expert testimony and to conclude that Mitek's defective design of the safety bar system was a proximate cause of Stone's injury.

¶ 33 As noted above, when other causes combine with a design defect to produce an injury, the causal connection between the defective product and the injury will be broken "only if the acts or omissions of others were improbable or unforeseeable." *Perez v. Sunbelt Rentals, Inc.*, 2012 IL App. (2d) 110382, ¶ 8 (2012). Mitek has not shown this to be the case. Several CIT employees testified that they were not aware that loosening of the screws through regular use would cause the safety bar system to fail, and Mitek did not warn CIT of this risk or tell CIT to frequently inspect and tighten the screws. Thus, there was evidence suggesting that it was foreseeable to Mitek both that the safety bar would fail from regular use and that CIT employees would not be aware of the risks posed by loosened screws or the need to regularly inspect and tighten the screws to prevent these types of accidents from occurring. Moreover, the industry requirement of a reliable "point of operation" safety system implies that it was foreseeable that an employee would be within the restricted safety zone and would need to rely on the safety bar system to avoid an injury.[3]

[3] This fact distinguishes the instant case from *Barr*, in which the injured party was a bystander who was hit by a slow-moving road construction machine but was not using the machine or deliberately interacting with it at the time of his injury. The Barr court held that a reasonably diligent manufacturer could not be expected to anticipate the plaintiff's injury under the facts presented in that case. Here, by contrast, Mitek could clearly foresee that a CIT employee would be in front of the gantry as it moved toward the tables and would need to push the stop bar to stop the gantry. Moreover, as noted, there was expert testimony and other evidence suggesting that vibrations from regular use of the gantry caused the screws to loosen, thereby causing the safety bar system to fail. It was for the jury to determine whether this evidence established that Stone's injury was foreseeable to Mitek. See *Niffenegger*, 95 Ill App. 3d at 426 ('"[q]uestions of

¶ 34 In short, there was ample evidence supporting the jury's verdict on proximate causation, and any conflicts in the evidence were for the jury to decide. See *Bergman*, 375 Ill. App. 3d at 629. Mitek is not entitled to a new trial or a JNOV on this issue.

¶ 35 2. Assumption of the risk

¶ 36 Mitek also argues that it is entitled to a new trial because Stone assumed the risk of danger by remaining in the restricted safety zone when he knew the gantry was approaching, even though he knew that the safety bar system was in a state of disrepair. To establish the affirmative defense of assumption of the risk in a product liability design defect case, the defendant must prove that the plaintiff was "aware of the product defect and voluntarily proceed[ed] in disregard of the known danger." *Court v. Grzelinski*, 72 Ill. 2d 141, 149 (1978). The plaintiff's knowledge of the defect which made the product unreasonably dangerous is an "essential element" of proof of the defense of assumed risk). *Kinka v. Harley Davidson Motor Co.*, 36 Ill. App. 3d 752, 758 (1976). Even if the plaintiff's occupation involves certain general risks of injury, for assumption of the risk to preclude recovery the plaintiff "must be aware of the defect in the product and of the specific risk posed by that product." *Calderon v. Echo, Inc.*, 244 Ill. App. 3d 1085, 1091 (1993). In other words, it is not enough for the plaintiff to be aware of a general risk of injury posed by the product; rather, he must be aware of the *specific* risk posed by a *specific product defect* and nevertheless choose to confront that risk. A jury's verdict on the issue of assumption of the risk is reviewed under the manifest weight of the evidence standard. *Calderon*, 244 Ill. App. 3d at 1090.

¶ 37 Here, although there was some evidence suggesting that Stone might have been aware that the screws on the C-collar were loose and that the C-collar was held together with duct tape,

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foreseeability are ordinarily for the jury to resolve").

there was little or no evidence suggesting that Stone was aware of the specific product defect at issue. Stone was not aware that the safety bar became inoperative on the top cord side when the screws on the C-collar became loose. Several CIT employees testified that no one at CIT was aware of that fact. Moreover, there is no evidence that Stone was aware that the stop bar system would fail on the date of his injury. To the contrary, Stone testified that, as far as he knew, the safety bar would stop the machine whenever it was pushed.

¶ 38 Thus, the weight of the evidence suggests that Stone was unaware of the specific product defect that rendered the RoofGlider unreasonably dangerous. The jury's rejection of Mitek's assumption of the risk defense was therefore appropriate.

¶ 39 Although Mitek does not raise the issue as a separate point of error, Mitek also suggests that the trial court erred in sustaining Stone's counsel's objections to certain statements that Mitek's counsel made during closing argument regarding Stone's actions immediately before the accident. During his closing argument, Stone's counsel attempted to remind the jury of Stone's admission that he "probably" would have been able to make it out of the restricted safety zone if he had left the tables when he heard the buzzer, as he knew he was supposed to do. Stone's counsel objected. The trial court sustained the objection and ordered the reference to Stone's conduct stricken. A few minutes later, when Mitek's counsel again mentioned Stone's failure to leave the tables, the trial court again sustained an objection and ordered the jury to disregard Mitek's counsel's remark. Mitek argues that these rulings by the trial court prevented the jury from considering testimony that was "of vital importance to" the issue of proximate cause, Mitek's defense of assumption of the risk, and Mitek's contribution claim against CIT.

¶ 40 We disagree. The trial court's ruling was not improper because Stone's failure to leave the restricted safety area was not relevant to any legal issue in the case. It was not relevant to

Mitek's defense of assumption of the risk, because Stone's decision to remain in the safety area did not in any way imply that Stone was aware of the specific defect in the stop bar system or the risks posed by that defect. Nor was it relevant to the issue of proximate causation, because (as noted above) the very existence of the stop bar system demonstrated that it was foreseeable that an employee would need to use the stop bar to stop the gantry as it moved toward him. Nor was it relevant to Mitek's contribution claim or to the issue of Stone's comparative fault. Although comparative fault is applied in strict liability cases, a plaintiff's damages award may not be reduced if he merely fails to discover or guard against a defective product. *Coney v. J.L.G. Industries, Inc.*, 97 Ill. 2d 104, 118-19 (1983). "The consumer or user is entitled to believe that the product will do the job for which it is built." *Id.* at 119. Accordingly, "a consumer's unobservant, inattentive, ignorant, or awkward failure to discover or guard against a defect should not be compared as a damage-reducing factor." *Id.* Because Stone was unaware of the failure of the stop bar system and believed it to be in working order at the time of the accident, his failure to leave the restricted zone when he heard the buzzer may not be considered as a basis of comparative fault in this case. Even assuming *arguendo* that Stone acted negligently, his negligence would have consisted merely in the failure to guard against a possible defect in the stop bar system. That type of negligence is not relevant to any legal issue presented in this case. Therefore, the exclusion of this evidence could not possibly have prejudiced Mitek.

¶ 41 3. Mitek's Challenge to the Jury's Liability Verdict

¶ 42 Mitek argues that the jury's verdict against it was against the manifest weight of the evidence. 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." *Maple*, 151 Ill. 2d at 454.

¶ 43 Contrary to Mitek's argument, the jury's verdict was supported by the evidence. Mitek maintains that, because of CIT's failure to maintain the RoofGlider and its utter disregard of safety procedures, "no machine left in the hands of CIT can be made safe." However, because this case involves a claim for design defect, the question is whether the injury claimed resulted from a condition of the product that rendered the product unreasonably dangerous and that existed at the time the product left the manufacturer's control. *Mikolajczyk v. Ford Motor Co.*, 231 Ill. 2d 516, 525 (2008). At least three of the experts who testified at trial provided evidence in support of these elements. Meyer testified that, when the screws in the safety bar are loosened, the push bar must be pressed considerably further to get the stop mechanism to activate. Mitek's expert, Brickman, reached the same conclusion. Meyer opined that screws were loosened primarily by vibration of the gantry as it moves down the tables. John Mroszczyk, Stone's liability expert, agreed. Meyer opined that Mitek's design of the safety bar system was defective in that it used C-collars with screws that were prone to loosen, rendering the safety bar ineffective. He also opined that the addition of a second limit switch on the top cord side of the push bar would have rendered the RoofGlider safer and prevented Stone's accident. Similarly, Mroszczyk opined that: (1) the RoofGlider was in an unreasonably dangerous condition the day Mitek sold it and the day of the accident because of the faulty safety bar system; (2) the lack of a second limit switch for the safety bar made the machine unreasonably dangerous; (3) the lack of a light bar and bumper system (which would have caused the machine to stop automatically before it hit Stone even if the safety bar had not been pressed, just as an automatic garage door stops before it hits an object) made the machine unreasonably dangerous; (4) the risks of the C-collar and screw design outweighed any proposed benefits of that design; (5) the machine could have been made reasonably safe if had included a

second limit switch on the pivot arm on the top cord side of the machine or if it had used either a welded safety push bar or a light bar system instead of a push bar secured by a C-collar and screws.

¶ 44 Accordingly, notwithstanding the evidence of CIT's failure to properly maintain the RoofGlider and to observe safety rules, there is ample evidence supporting the jury's conclusion that the RoofGlider's safety bar system was defectively designed and in an unreasonably dangerous condition at the time it left Mitek's control. Mitek does not even challenge this evidence. Thus, the jury's verdict is entitled to deference. *Maple*, 151 Ill. 2d at 452.

¶ 45 4. Mitek's Challenge to the Jury's Apportionment of Fault/Damages.

¶ 46 Mitek also argues that the jury's apportionment of damages between Mitek and CIT was against the manifest weight of the evidence. "A jury's apportionment of damages between joint tortfeasors will not be set aside as contrary to the manifest weight of the evidence unless all reasonable, intelligent minds would reach a different conclusion or unless it is clearly evident that jurors have reached a wrong conclusion or an incorrect result." *Suich v. H & B Printing Machinery, Inc.*, 185 Ill. App. 3d 863, 882 (1989). Once again, Mitek cannot satisfy this demanding standard.

¶ 47 Mitek argues that it presented "uncontroverted juror affidavits" which proved that the jury's apportionment of damages was the result of an improper "quotient" verdict. In these affidavits, a number of jurors stated that the jury was deadlocked on the apportionment of fault attributable to Mitek and CIT. To resolve the impasse, the jurors agreed that each juror would write two numbers on a piece of paper representing his or her view of the percentage of fault attributable to each party. The numbers were then added together and divided by twelve to obtain an average, and this average became the jury's verdict.

¶ 48 Mitek's argument on this issue is unavailing. "[J]uror testimony or affidavits [may] not be admitted to show the motive, method, or *process by which the jury reached its verdict*." (Emphasis added.) *Redmond v. Socha*, 216 Ill. 2d 622, 636 (2005); see also *Carroll v. Preston Trucking Co.*, 349 Ill. App. 3d 562 (2004) (rejecting juror affidavits offered to support assertion that the jury used an impermissible quotient process to reach its verdict).[4] This prohibition was incorporated into Illinois Rule of Evidence 606(b) (adopted January 1, 2011). The rule serves to protect the finality of judgments and the privacy of the jury room, and it protects jurors from being harassed by the defeated party. *Redmond*, 216 Ill. 2d at 636.

¶ 49 Accordingly, Mitek presented no admissible evidence supporting its claim of an improper quotient verdict. Mitek's challenge to the jury's verdict based on allegations of a quotient verdict must therefore be rejected.

¶ 50 5. The Trial Court's Refusal to Answer a Jury Question

¶ 51 Mitek argues that the trial court abused its discretion by refusing to answer a question posed by the jury during its deliberations on Mitek's third-party contribution claim against CIT. During its deliberations, the jury submitted a question to the trial judge regarding Mitek's Jury Instruction No. 20 (IPI 600.04), an Illinois pattern contribution instruction which listed each of Mitek's claims of negligence against CIT. The jury asked whether all seven of Mitek's allegations must be proved in order to justify a finding of fault on CIT's part. After conferring

[4] Juror affidavits may be admitted to prove the existence of improper extraneous influences on the jury or to show that there was a mistake in filling out the verdict form. However, Mitek did not offer the juror affidavits for either of these purposes. Rather, it offered them to show that the method or process that the jury used to reach its verdict as to the apportionment of fault between Mitek and CIT. That is prohibited.

with counsel, the trial court concluded that the question was adequately answered by the instruction given, and he instructed the jury that the applicable law was contained in the instruction given to them. Mitek argues that this was an abuse of discretion which caused the jury to become deadlocked on the apportionment of fault between Mitek and CIT, resulting in the improper quotient verdict.

¶ 52 The trial court's response to a jury question is reviewed for an abuse of discretion. *People v. Reid*, 136 Ill. 2d 27, 39 (1990); *People v. Sanders*, 368 Ill. App. 3d 533 (2006). "The general rule is that the trial court has a duty to provide instruction to the jury where it has posed an explicit question or requested clarification on a point of law arising from facts about which there is doubt or confusion." *People v. Childs*, 159 Ill. 2d 217, 229 (1994); see also *People v. Millsap*, 189 Ill. 2d 155, 160 (2000); *Reid*, 136 Ill. 2d at 39. This is true even though the jury was properly instructed originally. *Childs*, 159 Ill. 2d at 229. However, a trial court may exercise its discretion and properly decline to answer a jury's inquiries, *inter alia*, where "the instructions are readily understandable and sufficiently explain the relevant law," and "where further instructions would serve no useful purpose or would potentially mislead the jury." *Childs*, 159 Ill. 2d at 228; see also *Reid*, 136 Ill. 2d at 39 (holding that the trial court did not abuse its discretion by declining to answer a question of law posed by the jury and by telling the jury to "continue its deliberations on the basis of the instructions it had previously received" where, *inter alia*, the jury had "received a complete set of written instructions" (including pattern instructions) and the trial court "apparently decided that the written instructions settled any confusion the jury displayed").

¶ 53 In this case, the trial court concluded that the Illinois pattern contribution instruction given to the jury adequately answered the jury's question. We agree. That instruction provides

that "[i]f you find [Mitek] liable to [Stone], then you must consider the claim for contribution by [Mitek]." It then states that "[Mitek] claims that [CIT] was negligent in *one or more of the following respects*," and proceeds to list all of Mitek's claims of negligent conduct by CIT. (Emphasis added.) After listing all of Mitek's negligence claims, the instruction states that Mitek further claims that "*one or more of the foregoing*" was a proximate cause of [Stone's] injuries." (Emphasis added.) This instruction clearly conveys that the jury may apportion fault to CIT if it finds that CIT was negligent in "one or more" of the ways listed in the instruction; it does not state or imply that the jury may find CIT at fault only if Mitek proves *all* of its claims for negligence. Thus, the trial court could have reasonably concluded that the instructions the jury received were "readily understandable and sufficiently explain the relevant law," and that further instructions would serve no useful purpose. The trial court's decision to refer the jury to the instructions they had already received and to decline further comment was not an abuse of discretion.

¶ 54 Mitek relies on *Childs*, but that case is distinguishable. In *Childs*, the jury posed a question regarding what the State conceded was an "intricate" and "difficult" point of law, and which case law suggested was a common source of juror confusion. *Childs*, 159 Ill. 2d at 234. Moreover, although the trial court did not fully understand the jury's question, it made no effort to seek clarification from the jury. *Id.* Further, the court communicated with the jury "*ex parte*," thereby depriving the defendant of his rights to be informed of the question and to allow his counsel to participate in the process of determining an appropriate response. *Id.* Under these circumstances, our supreme court was unable to conclude that the "manner in which the court dealt with the jury's inquiry was not a factor in the rendering of [the guilty] verdict." *Id.* Thus, our supreme court held that the State had "failed to sustain its burden of proving that the trial

court's improper *ex parte* communication to the jury was harmless beyond a reasonable doubt." *Id.* at 234-35. Here, by contrast, the pattern instruction at issue was clear, simple, and straightforward, and the trial judge understood the jury's question. Moreover, the trial court involved counsel for all the parties in crafting his response, so there is no issue of *ex parte* communications (which was central to the supreme court's holding in *Childs*). Unlike the trial court in *Childs*, the trial court in this case acted properly under the law and did not abuse its discretion.

¶ 55 Moreover, even if there were an abuse of discretion in this case, Mitek cannot show that it was prejudiced in any way by the court's response to the jury's question. Mitek received a verdict against CIT. The jury found CIT 29% responsible and apportioned damages accordingly. Thus, if the jury misunderstood the jury instruction (which seems unlikely), Mitek cannot show that it was harmed in any way by the jury's confusion. Mitek speculates that the court's failure to answer the jury's question caused the jury to become deadlocked on the apportionment of fault between Mitek and CIT which led to an improper quotient verdict. However, this claim is based entirely on the juror affidavits, which may not be considered as evidence of the jury's deliberation process or methods. *Redmond*, 216 Ill. 2d at 636. Accordingly, Mitek's claim of prejudice is based entirely on speculation and incompetent evidence, and must therefore be disregarded.

¶ 56 6. The Dismissal of Mitek's Contribution Claim

¶ 57 Mitek argues that the trial court erred in dismissing Mitek's third-party claim for contribution against CIT in exchange for CIT's waiver of its workers' compensation lien. Because this issue involves the interpretation of the Workers' Compensation Act and the Contribution Act, we review the issue *de novo*.

¶ 58 Illinois has a workers' compensation system in which employers compensate their employees for job related injuries or illnesses, regardless of fault. See 820 ILCS 305/5(a) *et seq.* (West 2008). In return for not having to prove fault, employees receive only workers' compensation benefits from their employers and cannot sue their employers to receive additional damages. See 820 ILCS 305/5(a) (West 2008). Sometimes, however, parties other than an employer might cause an employee to be injured at work. An employee in this situation can sue these third parties for damages. See 820 ILCS 305/5(b) (West 2008) ("Where the injury or death for which compensation is payable under this Act was caused under circumstances creating a legal liability for damages on the part of some person other than his employer to pay damages, then legal proceedings may be taken against such other person to recover damages notwithstanding such employer's payment of or liability to pay compensation under this Act."). These third parties can in turn seek contribution from the employer under the Contribution Act, thereby pulling the employer into the suit. *Id.*

¶ 59 In *Kotecki v. Cyclops Welding Corp.*, 146 Ill. 2d 155, 164-65 (1991), the Illinois Supreme Court attempted to balance the competing interests of the employer, as a participant in the workers' compensation system, and the equitable interest of the third party defendant in not being forced to pay more than its established fault. See *Virginia Surety Co., Inc. v. Northern Insurance Co. of New York*, 224 Ill. 2d 550, 558 (2007). 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. This balance allows nonemployer defendants to recover limited contribution from the employer, and also extends the limited liability protection of the Workers' Compensation Act to contribution claims. *Kotecki*, 146 Ill. 2d at 165; *Virginia Surety Co.*, 224 Ill. 2d at 558.

¶ 60 When an employee recovers damages for workplace injuries from a third-party tortfeasor, the Workers' Compensation Act provides that the settlement or judgment received by the worker is dedicated to repaying workers' compensation paid by his employer. 820 ILCS 305/5(b) (West 2008); *LeFever*, 185 Ill. 2d at 398. The employer may claim a lien on the worker's recovery, in an amount equal to the amount of workers' compensation due the worker. 820 ILCS 305/5(b) (West 2008); *LeFever*, 185 Ill. 2d at 398. Alternatively, in order to avoid or satisfy its liability for contribution to a third party, the employer may waive its workers' compensation lien and agree to forego any reimbursement for workers' compensation payments made to the employee. *Id.* The employer may waive its lien even after the jury has returned a verdict on the employee's personal injury claim and the third party's contribution claim. *Id.* at 399-400. By waiving its lien, the employer satisfies any judgment that has been entered against it for contribution. See *Kim v. Alvey, Inc.*, 322 Ill. App. 3d 657 (2001).

¶ 61 If the employer waives its workers' compensation lien, the amount of the employer's workers' compensation liability is set off against the verdict, reducing the amount the third party owes to the employee. See, e.g., *LaFever*, 185 Ill. 2d at 398 (where the employer waived its lien after being found liable for contribution, court granted setoff to reduce amount of judgment owed by third party by the amount of the lien). This prevents a double recovery for the employee.

¶ 62 When the employer has already paid all of the workers' compensation benefits it owes to the employee, determining the amount of this setoff is straightforward. However, a difficulty arises when the workers' compensation proceeding remains open, and the employer remains liable to pay future benefits, the value of which have not yet been determined by the Commission. In that event, the question becomes whether a trial court may ascertain the present value of such future benefits and award that amount as a setoff against the third-party's liability.

¶ 63 In *Branum v. Slezak Construction Co., Inc.*, 289 Ill. App. 3d 948, 968-69 (1997), the only published Illinois case directly on point, the First District of our appellate court answered this question in the negative. The *Branum* court held that, "absent an agreement between all parties, a setoff of workers' compensation benefits cannot be made until the amount of workers' compensation benefits to which the [employee] is entitled is fully determined," and that the employer's future workers' compensation liability "should be left to the Industrial Commission, which has the statutory power to make such a determination." *Id.* Federal courts applying Illinois law have followed *Branum* on this issue. See, *e.g.*, *Baltzell v. R & R. Trucking Co.*, 554 F.3d 1124 (7th Cir. 2009); *Ocampo v. Paper Converting Machine Co.*, 2005 WL 2007144 (N.D. Ill. 2005).

¶ 64 In this case, the jury rendered a verdict in the amount of $13,544,172.71. The jury then decided Mitek's contribution claim against CIT, ruling that CIT was 29% at fault and therefore owed $3,927,810 in contribution to Mitek. After the jury verdict, CIT moved to dismiss Mitek's contribution claim in exchange for CIT's waiver of its past and future workers' compensation lien. In its final judgment order, the trial court granted CIT's motion and set up the following procedure to ensure that Mitek received an appropriate setoff: (1) the court deducted from the jury's damages award the amount of workers' compensation benefits that CIT had already paid to Stone, (which totalled $228,637.56); (2) it ordered Stone to pay his future medical expenses out of pocket and to apply for eligible future benefits in his pending case before the Commission; (3) it ordered CIT to pay any benefits that the Commission subsequently awarded to Stone directly to Mitek; and (4) it authorized any party to apply annually for an accounting or enforcement of these provisions. The court acknowledged that this procedure would result in "cumbersome after effects," and it noted that it would have preferred to allow the parties to present evidence as to

the present value of future workers' compensation benefits reasonably likely to be awarded to Stone so that the court could decide that issue now. However, the court concluded that the governing case law precluded that option and suggested that the procedure it crafted was "the only viable solution" authorized by the case law.

¶ 65 Mitek objects to the trial court's ruling on several grounds. First, Mitek argues that CIT waived its right to "escape" contribution liability in this manner by allowing the jury to decide Mitek's contribution claim and determine the amount of CIT's liability for contribution. In other words, Mitek suggests that, if CIT wanted to waive its workers' compensation lien, it had to do so before the jury reached a verdict. Mitek also argues that CIT could not waive its lien to future workers' compensation benefits until the amount of its liability for such benefits have been determined, either by order of the court or by the agreement of the parties. Because that amount was not determined in this case, Mitek argues that the trial court erred by allowing CIT to waive a lien as to future benefits "that had not yet been ascertained."

¶ 66 We disagree. CIT was entitled to waive its workers' compensation lien and thereby obtain dismissal of Mitek's contribution claim after the jury reached a verdict on the underlying claim and on Mitek's third-party contribution claim. *LeFever*, 185 Ill. 2d at 398; *Kim v. Alvey, Inc.*, 322 Ill. App. 3d 657, 668 (2001) (noting that "*LaFever* clearly allows an employer to raise its lien in a posttrial motion," and ruling that "[the] argument that the *Kotecki* setoff limit is as an affirmative defense that must be raised prior to trial is not supported by existing case law"). Moreover, an employer may waive its lien after trial even though it still owes future workers' compensation payments to the plaintiff, and even if the amount of such payments is undetermined at the time of the waiver. See, *e.g.*, *Branum,* 289 Ill. App. 3d 948 (not questioning a trial court's decision to permit an employer to waive its lien even though the employer still

owed workers' compensation); *Kim*, 322 Ill. App. 3d 657 (holding that the trial court properly allowed an employer to waive its lien in a posttrial motion, even though the amount of its workers' compensation obligation (and hence, the value of the lien) had not yet been determined); *Baltzell*, 554 F.3d at 1131 (applying Illinois law) (holding that the trial court should have allowed the employer to waive its lien after trial even though the amount of the employer's future workers' compensation liability was not yet determined).

¶ 67 Mitek also argues that the scheme established by the trial court is unjust and unworkable because Stone has no incentive to pursue future workers' compensation benefits on Mitek's behalf, and CIT has every reason to oppose such benefits. Thus, Mitek maintains that it will be unable to recover amounts that the jury determined were owed by CIT, thereby frustrating the purpose of the Contribution Act (740 ILCS 100/1 *et seq.*) (West 2008) (Contribution Act). Mitek also contends that the trial court's scheme "raises serious concerns regarding the finality of the trial court's judgment," and observes that no court has ever adopted the approach taken by the trial court in this case.

¶ 68 Contrary to Mitek's argument, the scheme devised by the trial court is consistent with Illinois law. As noted, CIT was entitled to waive its workers' compensation lien and thereby obtain dismissal of Mitek's contribution claim after the jury reached a verdict on the underlying claim and on Mitek's third-party contribution claim. *LeFever*, 185 Ill. 2d at 398. That left only the amount of Mitek's setoff to be determined. The trial court granted Mitek a setoff in the amount of workers' compensation benefits already paid by CIT, but declined to determine the present value of future benefits for purposes of the setoff. The court left the determination of that amount to the Commission, as required by our appellate court in *Branum*. The court ordered

Stone to file claims for future benefits in the Commission as they come due, and ordered CIT to pay any future benefits ordered by the Commission directly to Mitek.

¶ 69 Admittedly, this procedure arguably carries some risk that Mitek might not receive the full amount of the setoff to which it is entitled. However, Mitek is not entirely without recourse because the court's order requires Stone to file claims for future benefits and allows Mitek to move for an accounting and to enforce the court's order on an annual basis. Moreover, contrary to Mitek's argument, the procedure ordered by the trial court does not violate the Contribution Act because: (1) CIT's contribution liability was fully discharged when CIT waived its workers' compensation lien; and (2) the procedure set up by the court is designed to provide Mitek with an appropriate setoff.

¶ 70 In any event, even assuming *arguendo* that the trial court's procedure partially frustrates the purposes of the Contribution Act, we would still affirm the procedure because, unlike the procedure proposed by Mitek, it is satisfies the mandates of the Workers' Compensation Act. In *LaFever*, our supreme court acknowledged that the Contribution Act and Workers' Compensation Act are "distinct statutory schemes" and "the operation of one may not always complement the operation of the other." *Id.*, 185 Ill. 2d at 404 (citing *Kotecki*, 146 Ill. 2d at 164). Moreover, our supreme court made clear that it will [s]ometimes *** tolerate a result that partially frustrates the legislative purpose underlying the Contribution Act if, by doing so, we allow the workers' compensation statute to operate as intended." *Id.* Indeed, on at least one occasion, our supreme court decided to "knowingly curtail" the operation of the Contribution Act to allow implementation of section 5(b) of the Workers' Compensation Act. *Id.* In short, where the requirements of the Workers' Compensation Act come into conflict with the purposes of the Contribution Act, the latter must yield. The alternative procedures proposed by Mitek in this

case could require CIT to pay more in contribution than it ends up paying in workers' compensation benefits. That would contravene the Worker's Compensation Act and our supreme court's holding in *Kotecki*. Although the procedure adopted by the trial court is not perfect, it avoids this impermissible result.

¶ 71 In sum, the trial court did not err in granting CIT's motion to dismiss Mitek's contribution claim or in allowing CIT to waive its lien as to past and future workers' compensation benefits. Moreover, the setoff procedure that the trial court adopted was consistent with Illinois law.

¶ 72 7. Mitek's claim against CIT for negligent spoliation of evidence.

¶ 73 Prior to trial, Mitek filed a third-party complaint against CIT which included a claim for negligent spoliation of evidence. In that claim, Mitek alleged that CIT made alterations to the RoofGlider after the accident, thereby preventing Mitek from inspecting it in the condition it was in at the time of the accident. Mitek claims that this severely and unfairly prejudiced Mitek's defense by making it impossible to determine the cause of the accident. CIT filed a motion for summary judgment on Mitek's spoliation claim. The trial court granted CIT's motion, finding that: (1) CIT had no duty to preserve the RoofGlider after the accident; (2) even if CIT had such a duty, Mitek cannot establish that the repairs CIT made to the RoofGlider were the proximate cause of Mitek's inability to prove its defense; (3) Stone's claim was for design defect, not for a manufacturing defect; (4) Mitek had a reasonable opportunity to inspect the stop bar mechanism at issue (or its main components); (5) there was never a complete or near complete destruction of the RoofGlider; and (6) CIT "did not voluntarily undertake steps to preserve the [RoofGlider] and took reasonable steps in relation to the [RoofGlider] post accident." Mitek appeals the court's grant of summary judgment to CIT on Mitek's negligent spoliation claim. This court

reviews the trial court's grant of summary judgment *de novo*. *Clark Investments, Inc. v. Airstream, Inc.*, 399 Ill. App. 3d 209, 213 (2010).

¶ 74 Under Illinois law, spoliation of evidence is a form of negligence. *Martin v. Keeley & Sons, Inc.*, 2012 IL 113270, ¶ 26. Accordingly, a plaintiff claiming spoliation of evidence must prove that: (1) the defendant owed the plaintiff a duty to preserve the evidence; (2) the defendant breached that duty by losing or destroying the evidence; (3) the loss or destruction of the evidence was the proximate cause of the plaintiff's inability to prove an underlying lawsuit; and (4) as a result, the plaintiff suffered actual damages. *Id.*; see also *Dardeen v. Kuehling*, 213 Ill. 2d 329, 336 (2004); *Boyd v. Travelers Insurance Co.*, 166 Ill. 2d 188, 194, 196 (1995).

¶ 75 The threshold question that we must decide is whether CIT owed Mitek a duty to preserve the RoofGlider. "The general rule in Illinois is that there is no duty to preserve evidence." *Martin*, 2012 IL 113270, ¶ 27. Our supreme court has established a two-prong test which a party must meet in order to establish an exception to the no-duty rule. *Id.*; see also *Boyd*, 166 Ill. 2d at 195. Under the first, or "relationship," prong of the test, the party bringing a claim for spoliation must show that an agreement, contract, statute, special circumstance, or voluntary undertaking has given rise to a duty to preserve evidence on the part of the party charged with spoliation. *Martin*, 2012 IL 113270, ¶ 27; *Dardeen*, 213 Ill. 2d at 336; *Boyd*, 166 Ill. 2d at 195. Under the second, or "foreseeability," prong of the test, the party claiming spoliation must show that the duty extends to the specific evidence at issue by demonstrating that "a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action." *Martin*, 2012 IL 113270, ¶ 27 (quoting *Boyd*, 166 Ill. 2d at 195). If the plaintiff fails to satisfy either prong of this test, the defendant has no duty to preserve the evidence at issue. *Martin*, 2012 IL 113270, ¶ 27.

¶ 76 In this case, Fogal testified that he made several repairs to the RoofGlider on November 11, 2008, the day after Stone's accident.[5] The trial court ruled that CIT did not have a duty to preserve the RoofGlider at that time. We agree. There was no contract in place at that time requiring CIT to preserve evidence. Nor was there an applicable statute imposing any such requirement. As of November 11, 2008, neither Mitek nor any other party had asked CIT to preserve the RoofGlider or expressed an intention to inspect the RoofGlider or document its condition. (Stone did not file his complaint against Mitek until November 25, 2008.) Moreover, CIT took no action at that time suggesting that it had voluntarily assumed a duty to preserve the RoofGlider. To the contrary, CIT's actions immediately after Stone's accident (including its interactions with OSHA) show that CIT's intent was to repair the RoofGlider and return it to operation as quickly as possible. On November 24, 2008, the trial court entered a protective order prohibiting CIT from making any "changes, modification, or alteration of any kind" to the RoofGlider without the agreement of all parties or the further order of the court. However, this order was not in place until approximately two weeks after Fogal made the repairs at issue. There is no evidence that CIT assumed a duty to preserve the RoofGlider prior to the entry of the protective order.

¶ 77 Mitek's arguments to the contrary are unavailing. Mitek notes that CIT preserved the RoofGlider until it had time to consult with OSHA about its legal obligations. Citing our

[5] Specifically, Fogal testified that, on November 11, 2008, he: affixed new screws to the C-collar connecting the pivot arm to the stop bar; removed duct tape from the C-collar on the operator's side; replaced the subject C-collar from the left operator side; and reconnected the red cables to the stop bar. Fogal testified that he replaced the gas spring on the stop bar a few days later, *i.e.*, on or about November 14, 2008.

appellate court's decision in *Martin v. Keeley & Sons, Inc.*, 2011 IL App (5th) 100117, ¶ 22, Mitek argues that this imposed a duty on CIT to preserve the RoofGlider for other litigants. However, Mitek fails to note that our supreme court reversed our appellate court's judgment in *Martin* and expressly rejected our appellate court's conclusion that the defendant's preservation of evidence "until IDOT and OSHA had completed their work-site inspections" was "sufficient to establish a voluntary undertaking [to preserve the evidence]" *Martin*, 2012 IL 113270, ¶¶ 30, 36. Our supreme court made clear that "[a]voluntary undertaking requires a showing of affirmative conduct by the defendant evincing [the] defendant's intent to voluntarily assume a duty to preserve evidence." *Id.* ¶ 31. There must be "some affirmative acknowledgement or recognition of the duty by the party who undertakes the duty." *Id.* ¶ 36. It is not enough if the party preserves the evidence for its own investigative purposes or to fulfill its legal obligations under OSHA. *Id.* ¶¶ 30, 31. Rather, there must be evidence that the party affirmatively undertook a duty *to another party* (*e.g.*, a duty to preserve the evidence for the purpose of potential future litigation). *Id.* ¶ 31; see also *id.* ¶ 36. In this case, there is no evidence suggesting that CIT affirmatively undertook any duty to Mitek to preserve the RoofGlider prior to the entry of the protective order.

¶ 78 Mitek also argues that certain "special circumstances" in this case created a duty on CIT's part to preserve the RoofGlider. Specifically, Mitek argues that CIT had such a duty because: (1) CIT had "a statutory right to a lien under the Workers' Compensation Act"; (2) CIT notified its insurer of Stone's workers' compensation claim the day after the accident; (3) CIT's privilege logs indicate that its insurer "requested access to the RoofGlider"; and (4) Erwin testified that, "shortly after the accident," and prior to the trial court's entry of the protective order, "a lawyer representing one of the parties to this litigation inspected the RoofGlider."

¶ 79 We disagree. CIT's statutory right to a lien under the Workers' Compensation Act did not create a duty to preserve the RoofGlider. The case that Mitek cites in support of its argument on this point (*Jones v. O'Brien Tire and Battery Service Center, Inc.*, 322 Ill. App. 3d 418, 424 (2001)) is inapposite. Contrary to Mitek's suggestion, the *Jones* court neither decided nor even considered whether statutory lien rights, standing alone, created a duty to preserve evidence. At most, *Jones* suggests in *dicta* that a workers' compensation insurer's right to a lien against the proceeds of a worker's third-party claim against a product manufacturer would make the insurer "aware of the possibility of third-party litigation." *Jones*, 322 Ill. App. 3d at 422. However, in *Martin*, our supreme court ruled that a party's status as a "potential litigant," standing alone, does not constitute a "special circumstance" sufficient to create a duty to preserve evidence. *Martin*, 2012 IL 113270, ¶¶ 49-51. Further, the statutory lien right to which Mitek refers arises out of the employer-employee relationship of Stone and CIT. 820 ILCS 305/5(b) (West 2008). In *Martin*, our supreme court ruled that an employer-employee relationship did not constitute a "special circumstance" sufficient to impose a duty upon an employer to preserve evidence. *Id.* ¶ 48. For all these reasons, CIT's right to a lien under the Workers Compensation Act is of no moment.

¶ 80 Moreover, Mitek cites no authority for the proposition that an employer assumes a duty to preserve evidence merely by contacting its workers' compensation insurer after a workplace accident. Nor have we found any. That is not surprising, because such an expansive rule would be in tension with *Martin* and other decisions of our supreme court which have required a more explicit indication of a duty to preserve evidence for the plaintiff's benefit (such as "a request by the plaintiff to preserve the evidence and/or the defendant's segregation of the evidence for the plaintiff's benefit"). See, *e.g.*, *Martin*, 2012 IL 113270, ¶ 45.

¶ 81 Moreover, contrary to Mitek's assertion, CIT's privilege logs do not suggest that CIT's insurer "requested access to the RoofGlider" after CIT reported the accident. Further, Mitek provides no record citation in support of its claim that that Erwin testified that "a lawyer representing one of the parties to this litigation inspected the RoofGlider" prior to the entry of the protective order. That argument is therefore waived. *Scoggin v. Rochelle Community Hospital*, 176 Ill. App. 3d 648, 650 (1988) ("It is well settled that the failure to cite authority in support of an argument waives the issue.").

¶ 82 This does not resolve the matter, however. As Mitek notes, Fogal testified that he performed additional repairs on the RoofGlider after a screw or bolt in the C-Collar broke while one of the parties' experts was examining the RoofGlider. As Mitek correctly notes, both Stone's expert and Mitek's expert examined the RoofGlider after the protective order was entered. Thus, Mitek argues that there is a genuine issue of material fact as to whether Fogal made these additional repairs while the protective order was in effect. If so, Mitek maintains, that would preclude summary judgment for CIT because the protective order created a duty to preserve the RoofGlider in the condition it was in at the time the order was entered. See, *e.g.*, *Kilburg v. Mohiuddin*, 2013 IL App (1st) 113408, ¶¶ 36-38 (plaintiff's complaint sufficiently alleged facts to support a showing that defendants had a duty to preserve a taxi where, *inter alia*, the trial court had entered a protective order requiring the preservation of the taxi).

¶ 83 We disagree. Even assuming that Fogal breached an enforceable duty to preserve the RoofGlider at the time he conducted these additional repairs, CIT would still be entitled to summary judgment. Although Fogal initially testified that he was unsure who was examining the RoofGlider when the bolt on the C-collar broke, after being reminded of the dates of each expert's inspection he recalled that the bolt broke during an inspection by "*Mitek's* people."

Fogal testified that he made the additional repairs *after* that inspection took place. Thus, Mitek had an opportunity to inspect the RoofGlider in the condition it was in prior to Fogal's additional repairs. Any repairs made after Mitek's examination of the RoofGlider could not possibly have prejudiced Mitek. Accordingly, Mitek cannot show that these subsequent repairs were the proximate cause of its inability to defend against Stone's claims, and any spoliation claim based on these repairs fails as a matter of law. See, *e.g.*, *Martin,* 2012 IL 113270, ¶ 26.

¶ 84 **CONCLUSION**

¶ 85 We have considered all of the other issues and arguments raised by Mitek and we find them meritless. For the foregoing reasons, we affirm the judgment of the circuit court of Tazewell County.

¶ 86 Affirmed.

¶ 87 JUSTICE SCHMIDT, dissenting.

¶ 88 Plaintiff's injury was severe, life-altering, and, based on the evidence presented at trial, completely preventable. Plaintiff was struck by a machine traveling 1.5 miles per hour that he knew was coming. The injury was the product of the "perfect storm" created by the negligence of CIT and its employees: a broken safety bar where bolts were replaced with duct tape. An operator of the machine who was not paying attention, and the plaintiff working in an area in which he knew he should not be working. This verdict and the majority's order effectively transform the manufacturer into the insurer of the safety of anyone who comes into contact with its machine. This is not the law. The verdict against Mitek is against the manifest weight of the evidence. I would reverse that verdict. I, therefore, respectfully dissent.

¶ 89 According to plaintiff's and CIT's expert witnesses, the machine was unreasonably dangerous before it left the factory because the "safety bar experienced vibration and shock in its

ordinary use at CIT which caused the screws and bolts holding the safety bar together to loosen" (*supra* ¶ 18) and "a competent design engineer should have appreciated the dangers associated with the loosened screws." *Supra* ¶ 17.

¶ 90 The RoofGlider designed by Mitek is not, as a matter of law, unreasonably dangerous simply because bolts in the C-collar could loosen. If we were to follow that logic, every car that leaves the assembly line in Detroit, or elsewhere, is similarly unreasonably dangerous. Lug nuts can loosen and wheels fall off, brake lines leak causing brakes to fail, *et cetera*. As our supreme court has noted, "[v]irtually any product is capable of producing injury when put to certain uses or misuses." *Hunt v. Blasius,* 74 Ill. 2d 203, 211 (1978). Every product with moving parts experiences vibrations during its ordinary use, even one that goes less than two miles an hour during operation. That bolts were used in the construction of the C-collar, or even that an injury occurred, does not equate to an unreasonably dangerous product. See *West v. Deere & Co.*, 145 Ill. 2d 177, 180 (1991). In fact, Bob Fogal (CIT's *de facto* maintenance man) testified that the day after the accident, he removed a pivot arm and C-collar from the opposite side of the machine and moved it to the side where plaintiff was injured. The next day, OSHA inspected the machine and it was put back into service. How can the machine be unreasonably dangerous upon leaving the factory, if it is inspected by OSHA and put back into service after the machine is repaired to the condition it was in when it left the factory? The answer is: it is not. The expert's opinion to the contrary is entitled to no weight. The jury's verdict was against the manifest weight of the evidence.

¶ 91 Even assuming, *arguendo*, that the RoofGlider was defective, both plaintiff and CIT were aware of the defect. The majority's opinion ignores the testimony of Todd Erwin (CIT's general manager), Shane Boyle (plaintiff's supervisor), Eric Goldsmith and Skylar Priest (both CIT

employees/truss assemblers), and places the burden of insuring plaintiff's safety squarely on the manufacturer's shoulders. Erwin testified at trial that prior to the accident, he did not know the screws in the C-collar clasp were loose. How could he have known, if, as according to his deposition testimony, he had not inspected the push bar in years?

¶ 92 Goldsmith testified that the push bar was in "poor" condition at the time of the accident. Yes it was. Everyone involved, except Mitek, knew that. The bolts holding the C-collar on the top cord side were loose and slightly stripped, and Goldsmith personally tightened those bolts about once a week. Goldsmith also mentioned the problem to Bob Fogal, as well as Erwin, clearly contradicting Erwin's testimony that he did not know the bolts holding the C-collar were loose. CIT obviously gave up on tightening the bolts before the accident as Goldsmith further testified the duct tape was the only thing holding the pivot arm together, and it had been that way for months. Goldsmith stated it was his understanding that everyone on the shift, including plaintiff, knew the bolts were loose because everyone in the shop would replace or repair the duct tape. Duct tape created a flexible connection between the bar and the arm so that when the bar was pushed, the duct tape flexed and the arm did not move to activate the safety switch.

¶ 93 Priest testified that the push bar was a "visible safety issue," and that he once saw the safety bar bouncing on the tables while the gantry was moving. Priest reported the problem to Boyle. Boyle testified that the safety bar had been duct-taped for months, and that he had alerted Fogal to the problem prior to the accident.

¶ 94 All of this evidence is in addition to (1) plaintiff's testimony that he knew he should not have been in the restricted safety zone, that he "probably" could have cleared the tables before the RoofGlider reached him; and (2) testimony that Priest was not paying attention when he began operating the gantry. "It is the rule that where other causes combine to produce injury, the

causal connection between the defective product and the injury will be broken only if the acts or omissions of others were improbable or unforeseeable." (Internal quotation marks omitted.) *Perez v. Sunbelt Rentals, Inc.*, 2012 IL App (2d) 110382, ¶ 8 (quoting *Doran v. Pullman Standard Car Manufacturing Co.*, 45 Ill. App. 3d 981, 987 (1977)). Moreover, "[i]f the allegedly defective condition of the product does no more than furnish a condition by which the injury is made possible and that condition causes any injury by the subsequent act of a third person, the two are not concurrent and the existence of the defective condition is not the proximate cause of the injury." *Barr v. Rivinius, Inc.*, 58 Ill. App. 3d 121, 127 (1978) (finding that plaintiff's injury was not proximately caused by any unreasonably dangerous condition of defendant's product where operator could have looked forward to see plaintiff, the road grader was moving slowly, and plaintiff was standing 15 to 20 feet in front of the shoulder spreader).

¶ 95 Going back to my earlier comment regarding lug nuts, an analogous situation would be where someone continues to drive his or her vehicle knowing the lug nuts are loose. Instead of tightening the lug nuts, he or she uses duct tape as a stop-gap measure to hold the wheels in place. Inevitably, a wheel comes off and the person is injured when the car veers off the road. The idea that the car manufacturer could be held liable is ludicrous, but that is essentially what happened here. The majority opinion, in essence, establishes an unattainable standard for any manufacturer—creating a product that will never injure anyone, even when in a known state of disrepair.

¶ 96 Plaintiff's experts also testified about some additional safety measures that would have made the machine safer. Again, failure on the part of a manufacturer to make its products "stupid-proof" is not a tort. A proper repair of the bolts in the C-clamp could not have taken five minutes to do correctly: replace with new bolts and perhaps a lock nut or lock washer. Yet, for

months CIT used only duct tape to hold one end of the safety bar in place, all the while allowing employees to work in the restricted zone in the path of the machine. Add to the mix a machine operator not paying attention and we have the recipe for disaster. Factually, logically and legally, Mitek did not proximately cause plaintiff's injuries.