2017 IL App (1st) 16-1319-U

THIRD DIVISION
August 30, 2017

No. 1-16-1319

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

MARIE LARGEN,	)	
	)	Appeal from the Circuit Court
Plaintiff-Appellee,	)	of Cook County, Illinois,
	)	County Department, Law Division.
v.	)	
	)	
TINLEY PARK ROLLER RINK, INC., an Illinois Corporation,	)	No. 12 L 11088
	)	
	)	The Honorable
Defendant-Appellant	)	Thomas Flanagan,
	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Lavin and Cobbs concurred in the judgment.

ORDER

Held: The trial court abused its discretion in granting the plaintiff's motion for a new trial where the evidence was sufficient to support the jury verdict, and the jury instruction complained of was supported by the evidence, and neither misled the jury, or prejudiced the plaintiff.

¶ 1 This cause arises from a negligence action brought by the plaintiff, Marie Largen (Largen) against the defendant, Tinley Park Roller Rink, Inc. (the roller rink) alleging that she sustained injuries when she fell while skating backward at the roller rink's premises. After the jury returned a verdict in favor of the roller rink, the plaintiff filed a motion for a new trial. The trial

court initially denied the plaintiff's motion but then subsequently *sua sponte* entered an order granting a new trial. After the roller rink requested clarification of the two inconsistent rulings, or in the alternative a reconsideration of the grant of a new trial, the trial court explained that because Illinois Pattern Jury Instruction, Civil, 60.01 could "possibly" have been confusing to the jury, a new trial was necessary. The trial court therefore denied the roller rink's motion for reconsideration and ordered a new trial. The roller rink now appeals contending that the trial court erred in granting the plaintiff a new trial. For the reasons that follow, we reverse.

¶ 2 I. BACKGROUND

¶ 3 The record before us reveals the following relevant facts and procedural history. On January 21, 2012, the plaintiff was injured at the roller rink when, while skating backward, she fell and broke her wrist. On October 1, 2012, the plaintiff filed a two count action against the roller rink, alleging negligence and premises liability. That complaint was amended on December 27, 2012, to include an additional count alleging violations of the Illinois Roller Skating Rink Safety Act (the Roller Skating Act) (745 ILCS 72/1 *et seq*. (West 2012)).

¶ 4 On February 13, 2013, the roller rink filed its answer denying liability and contending that it properly maintained the rink and trained its employees. The roller rink further pleaded two affirmative defenses: (1) contributory negligence; and (2) assumption of risk under the Roller Skating Act (745 ILCS 72/30 (West 2012)).

¶ 5 After the close of discovery, the roller rink filed a motion for summary judgment seeking dismissal of the third count of the plaintiff's complaint alleging violations of the Roller Skating Act, and the trial court granted that motion on the basis that the Act does not allow for private causes of action alleging violations of the Act. The parties then proceeded with only the negligence and premises liability counts. On the eve of trial, the roller rink filed a motion to

dismiss pursuant to the assumption or risk provision in section 30 of the Roller Skating Act (745 ILCS 72/30 (West 2012)). The trial court denied that motion and the parties proceeded with a three-day jury trial at which the following evidence was adduced.

¶ 6 A. Jury Trial

¶ 7 The plaintiff first testified that she is 53 years old and a registered nurse responsible for home care of critical patients, which requires the use of her hands. The plaintiff averred that she has skated since she was 6 years old, and that she has been a part of both competitive skating and adult mixed league roller derby teams. Over the years she has won numerous trophies for individual and group speed competitions.

¶ 8 The plaintiff testified that she owns four pairs of speed roller skates and that they are all professionally made and preordered. She has used the same style of roller skates since she was a child. The plaintiff averred that, unlike her skates, the rental skates at the roller rink have a much taller boot, are less efficient and have worn out wheels. She testified that based on her experience the newer the wheel the better the grip on the rink floor.

¶ 9 The plaintiff stated that on January 21, 2012, she brought a brand new pair of skates to the roller rink, which she had received as a Christmas gift from her husband, and which cost $1,000. She stated that she had not used the skates before, so the wheels were brand new. The plaintiff's skates were introduced into evidence at trial and she testified that there were plastic bags on the wheels because she covered the wheels immediately after the accident to preserve the black-gray substance that had embedded itself in the wheel and was not part of the skates before she skated that night. The plaintiff averred that based on her experience, the wheels alone could not have contributed to her to fall because they were brand new and had a good grip.

¶ 10 The plaintiff testified that on Saturday, January 21, 2012, she went to the roller rink with her

husband, Tim Largen (Largen), and two friends, Kathy Rybicki (Rybicki), and Matt Bryce (Bryce), whom she had known from a speed skating team since he was a child. She stated that she went to the roller rink with her friends every Saturday evening for years. The plaintiff and her friends arrived at the roller rink at about 8:15 p.m. The plaintiff stated that at that time she did not see any of the three roller rink employees, Andrew Plucinski (Andrew), William Plucinski (William) or James Millsaps (Millsaps) looking after the rink floor. In fact, she saw Andrew and William inside the DJ booth, neither wearing skates, or referee or staff shirts. She stated Millsaps was on the rink floor "running around chasing" and "a** grabbing his girlfriend," who was skating.

¶ 11 The plaintiff also stated that on that night, she saw something she had not noticed at the rink the week before, some L-shaped brackets about eight feet above the skating surface on the back wall, which looked to her like they were for mounting or holding speakers.

¶ 12 The plaintiff stated that she skated for a bit, but then noticed three boys from the concession stand, skating on the rink and throwing little popsicle necklaces on the floor. The plaintiff approached the roller rink's security officer, Jeff Dybeck (Dybeck), and told him what she had seen. After that, she decided not to skate and instead went to the cafeteria behind the DJ booth to socialize with her friends. At that point, the plaintiff was only waiting for the backward skate, which was her favorite part of the evening, after which she intended to go home. She informed Rybicki and Bryce of her intention and told them there were "some kids on the floor skating a little recklessly."

¶ 13 At around 10 p.m., the plaintiff went to the DJ booth and asked Andrew and William (who were both there) when the backward skate would start. They told her that it would begin as soon as "this song ended." The plaintiff left the DJ booth and came around the corner and

entered the skating rink. The lights came on, the song ended, and the backward skate was announced. The plaintiff began skating backward and had "just completed her guide" when her wheels came to an abrupt stop and she fell backward. She landed on her right wrist and heard it snap.

¶ 14 The plaintiff testified that she was an advanced skater and claimed that she had never had difficulty with or had fallen skating backward before.

¶ 15 The plaintiff testified that her husband lifted her off the floor, and together with Rybicki tried to maneuver her off the rink. Bryce looked at the floor to see what the plaintiff could have tripped over. The plaintiff testified that no one from the roller rink came over to help her or check if she was alright, and the music was never stopped, so people continued to skate around her. The plaintiff was certain that she did not see any roller rink employees on the floor.

¶ 16 The plaintiff's friends helped her walk over to the cafeteria where she was approached by the roller rink security guard, Dybeck, who looked at her wrist and brought her an ice pack. The plaintiff testified that Bryce then appeared and gave Dybeck a piece of black plastic and told him that the plaintiff had tripped on it in the rink. The plaintiff then watched as Dybeck took the black object and snapped it in half. She therefore testified that the defense exhibit, offered by the roller rink into evidence, as the object that Bryce gave to the security guard, was not in fact the real object that Bryce saw her trip on.

¶ 17 After speaking to Dybeck, the plaintiff did not wait for the general manager, but gave the Dybeck her name and telephone number and left for the hospital. She explained that she did so because she was in pain, her wrist was rapidly swelling, and as a nurse she knew of all the complications that could arise if her hand was not stabilized immediately. She admitted, however, that she did not call an ambulance.

¶ 18 At the hospital, the plaintiff's arm was initially placed in a cast, and a few days later she underwent surgery. Plates, pins and screws were placed into her wrist. The plaintiff stated that the surgery has left a permanent scar that goes from the palm of her hand to the mid forearm. The plaintiff testified that as a result of the surgery, she was unable to work in her full capacity for about eight weeks (the first four of which she was at home, and the remaining on restricted duty). The plaintiff missed a total of 125 hours of work at a pay rate of $36.08, and her medical bills amounted to $28,598.94. The plaintiff also testified that she has continued to be in pain and has suffered anxiety since her injury. As a result she has stopped doing activities that she enjoyed doing before, such as roughhousing with her grandchildren, biking and roller skating, including Saturday date night with her husband and friends at the roller rink. As a result of the injury she has also gained about 20 pounds.

¶ 19 Kathy Rybicki (Rybicki) next testified consistently with the plaintiff as to what transpired on January 21, 2012. Like the plaintiff, Rybicki claimed that on the night of the incident, she noticed new brackets near the DJ booth above the skating rink floor, near where the plaintiff fell. Rybicki further testified consistently with the plaintiff that when they all sat in the cafeteria to help the plaintiff after her fall, Bryce brought a dime sized oval object and gave it to the security guard, who snapped it in half and put it in a white envelope. She, like the plaintiff, claimed that the defense exhibit purporting to be the object Bryce retrieved was not in fact the object the plaintiff had tripped on.

¶ 20 On cross-examination, Rybicki admitted that in her deposition given prior to trial she had stated that she never saw the black object, allegedly retrieved by Bryce, on the rink floor.

¶ 21 The plaintiff's husband, Tim Largen, next testified consistently with the plaintiff and Rybicki.

Largen further testified that when the plaintiff fell, he and Bryce looked at the floor, and right behind the plaintiff's skates, underneath her wheels Bryce found "an inch-long plastic molly, deformed and flattened." Largen explained that a molly is a piece of receptacle plastic that you put in a wall or stone to receive a screw, usually to hang things. Consistently with the plaintiff and Rybicki, Largen also testified that on the night in question, the roller rink had a brand new L-shaped bracket hanging over the rink near to where the plaintiff fell. Largen further stated that Bryce picked up the molly and later gave it to Dybeck, who took the molly and snapped it in half.

¶ 22 Carey Westberg Quitter (Quitter), the general manager of the roller rink, next testified that he has worked at the rink for 35 years, and that his duties include maintaining the safety and cleanliness of the rink, managing employees and overseeing the day to day operations of the rink. Quitter explained that his parents have owned and operated the rink for over 50 years. They bought the rink in the mid 1950s, and converted it from a square dance hall to a roller rink, but kept the original floor. Quitter explained that they are very proud of the original floor and dust-mop it multiple times during the course of a day, including before every private party and before every public skate session (two on Saturdays). According to Quitter, the rink employs one full time maintenance person (who has been with the roller rink for 50 years) to clean the floor daily. In addition, Quitter's father plastic coats the floor with polyurethane and sands it, twice a year.

¶ 23 Quitter testified that there was no construction inside the roller rink anytime near or on the date of the plaintiff's fall. As to the brackets testified to by the plaintiff's witnesses, Quitter stated that the rink floor is surrounded by brick and that therefore placing anything into the brick would require steel, not plastic, anchors. He affirmatively testified that this was never done.

¶ 24 Quitter described the roller rink floor as being about 75 by 185 feet long, with an adjacent DJ booth and skate rental room. Quitter explained that the DJ booth faces the rink floor, but that to reach it you have to exit the roller rink. Similarly, the skate rental room has a window that looks onto the rink floor.

¶ 25 Quitter stated that there are three roller rink employees who are tasked with roller rink floor safety. The first is the skate guard who is responsible for being on the floor at all times and making sure that the floor is clean and that skaters are skating appropriately. Quitter himself trains the skate guard and reviews all roller skating rink rules and regulations with him. In addition, according to Quitter, skate guard duty is sometimes shared by the roller rink's skate rental attendant and DJ. The skate rental attendant is primarily responsible for giving out skates to patrons, but when there are no customers at the window, the attendant is asked to go onto the floor and act as an additional skate guard. The same applies to the DJ, who is mainly responsible for playing music, organizing program events, and monitoring the rink floor from the DJ booth, but who may go onto the floor and then acts as an additional skate guard.

¶ 26 Quitter next testified about the roller rink's policy regarding injuries. He stated that the roller rink has signs posted at the front door, next to the ticket booth, which inform patrons that they are skating at their own risk. He identified a photograph of one such sign that states: "Not responsible for accidents or injury. Skate at your own risk." In addition, Quitter testified that the roller rink has signs, also posted at the front door, informing patrons about the duties owed to them by the roller rink, as well as the duties the patrons themselves have while skating on the premises. He explained that those signs list all important safety issues that could be encountered by the skaters in the rink. Exhibits of these signs were entered into evidence.

¶ 27 Quitter acknowledged that these safety guidelines are used by the Roller Skating

Association, of which the roller rink has been a member for decades. Quitter acknowledged that the Roller Skating Association's safety standards come from the Roller Skating Act which explicitly requires the following from all roller rink operators, *inter alia*: (1) that a skate guard be on duty whenever the rink is open; (2) that one skate guard be on duty for approximately every 200 skaters; (3) that the skate guard watch for foreign objects of all kinds that may have fallen on the floor; (4) that the skating surface be inspected before each session and be kept clean; and (5) that rental skates be checked on a regular basis for good mechanical condition. Sections of the Roller Skating Act (745 ICLS 72 (West 2012)) referring to the aforementioned safety standards were entered as an exhibit during Quitter's testimony.

¶ 28 Quitter testified that the roller rink makes its best effort to maintain these safety standards and policies. He explained that apart from always having a skate guard on the floor, and cleaning the floor before every session, the DJ always also makes an announcement asking all skaters not to wear hats, purses, or even handkerchiefs onto the floor, so that they are not dropped and crate a risk. He explained, however, that the roller rink cannot have its employees be "at every place every second" of the three-hour skating session, and that things do fall on the ground. Quitter averred, however, that all of his skate guards, concession people, and everyone working in the rink make an effort to pick up any objects from the rink floor.

¶ 29 Quitter next testified regarding the events that transpired on January 21, 2012. He stated that prior to the evening 8 p.m. skating session, the floor had been cleaned. Quitter himself had walked the floor prior to the session to inspect it and did not observe any foreign objects on it. Quitter testified that at 8 p.m. he took his place in the ticket booth at the front of the roller rink. He testified that based on the ticket sales that evening there were a total of 114 skaters in the rink.

¶ 30 Quitter testified that for that evening skate session, he had assigned skate guard duty to Andrew, DJ duty to William and skate room attendant duty to Millsaps. Quitter acknowledged that William was "a bit late coming to work" (because of his second job) so that Andrew replaced him in the DJ booth at 8 p.m. Quitter explained, however, that Andrew only went into the DJ booth to program the computer to play songs one after another by itself, after which he returned to the floor to resume his skate guard duties.

¶ 31 Quitter stated that the plaintiff arrived at the rink at about 8 p.m. with her husband and friends. Quitter was familiar with the plaintiff because she had been skating at the rink for a long time. He admitted that he never had to discipline the plaintiff or her friends for poor skating, or throwing anything on the rink floor.

¶ 32 Quitter averred that he first became aware of the incident involving the plaintiff at about 9:55 p.m., when he was approached by Bryce and shown a little "black object," which Bryce claimed had caused the plaintiff to fall. Quitter testified that he saved the object Bryce gave him and placed it in an envelope with the date and time of the accident. Quitter stated that in making an effort to preserve the evidence, he had both Bryce and Dybeck sign the envelope when the object was placed inside. The envelope and the black object were both admitted into evidence, and Quitter testified that the envelope was in the same condition as on the night in question and that the object was the one shown to him by Bryce and given to him by Dybeck. The envelope contained the signatures of Quitter, Dybeck and Bryce and the following handwritten notation: "Never saw this before [the plaintiff] fell. ([Dybeck] witness skate cop.) Found on the floor. No notice was given."

¶ 33 Quitter acknowledged that as per the Roller Skating Association's rules, he filled out a

skating safety survey (safety survey), which is used to document an investigation into the cause of a rink floor injury. He stated that he filled out the survey together with his rink security officer, Dybeck, whose responsibility it was to investigate the injury. The survey contained a drawing of the rink with an X marking the spot where the plaintiff fell, as well as the name of the two witnesses to the injury-- Bryce and Rybicki.

¶ 34 On cross-examination, Quitter acknowledged that he left a blank space under the question asking him how the injury had occurred. He explained, however, that he did so because this question required him to take down the plaintiff's own statement regarding what had transpired on the rink, and by the time he was filling out the survey the plaintiff had already left and he could not locate her anywhere inside the building.

¶ 35 Quitter also admitted that he did not answer the survey question which asked if he had examined the floor, but explained that he did so because he himself had not examined the floor after the injury. Quitter explained that based on his discussion with his staff, someone had been on the floor already, and after talking to Bryce, and receiving the black object, he did not believe he needed to instruct anyone else to go out onto the floor and inspect it again. He also testified that no one had complained about any object on the floor before the incident, and had they, he would have instructed his skate guards to pick it up.

¶ 36 Andrew Plucinski next testified that he has worked at the roller rink for ten years, sometimes as a DJ sometimes as a skate guard. He was trained by shadowing other skate guards and DJs. He explained that his duties as a DJ involved playing music, keeping his skate guards on the floor and being "another set of eyes on the floor." As a skate guard, Andrew's duties were to keep everyone safe, by, among other things, making sure no one was skating too fast and the floor was clean. As a skate guard, he wore a referee jersey, and inside the DJ box he wore a staff

shirt, which was black and had white lettering with "Staff" printed on the front and the roller rink skate logo on the back.

¶ 37 Andrew testified that on January 21, 2012, he began his shift by working as the DJ, because his brother arrived late at work, but around 8:30 p.m., transitioned to skate guard and remained on the rink floor. Andrew stated that he knew the plaintiff because she had been coming to the rink for years and admitted that she was an accomplished skater. Andrew averred that on that evening he saw the plaintiff skating with her husband and two friends. He testified that he did not see the plaintiff fall but stated that he did come to her assistance when he saw her on the ground surrounded by a group of people, and asked if "everyone was alright." Andrew testified that on that evening, no one complained to him about any black object on the floor.

¶ 38 On cross-examination, Andrew admitted that there had been construction work in the roller rink with brackets put up on the wall to hang speakers, about eight feet off the skating surface. He acknowledged that the speakers were never put in, but that the brackets remained. On redirect examination, however, he testified that he could not recall when this construction took place, and whether it was in 2011 or 2012.

¶ 39 Andrew's brother, William, next testified that he has worked for the roller rink for 19 years. He stated that as DJ his responsibilities included playing music, running the program, and monitoring the rink floor from the DJ booth. He stated that he was trained by one of the roller rink owners, who showed him how to watch over the floor from the DJ booth, and instructed him on how to handle certain situation, *i.e.*, ensuring skaters were not cutting through the middle of the floor, or skating too fast, and keeping people off the floor, if someone fell.

¶ 40 William stated that on January 21, 2012, before 10 p.m., the plaintiff came into the DJ

booth asking if there would be a backward skate. William told her the next song would be the backward skate because he always did one at 10 p.m. The plaintiff returned to the floor and when she came back to the DJ booth about 10 or 15 minutes later, she was grabbing her writs and saying that she fell and had broken it. Her husband came to her and they left. William stated that Quitter subsequently showed him a "piece of black dirt or something" and said this was what the plaintiff fell over. Aside from that, prior to or after the incident no one mentioned anything to him about any object on the floor, and William himself never saw any such object in the rink. He stated that if he had seen a black object on the floor, or if someone had complained about it, he certainly would have told a skate guard to remove it.

¶ 41 James Millsaps next testified that on January 21, 2012, he was a sophomore in high school and had worked at the roller skating rink for about three months. His duties included being a skate guard, and passing out skates in the skate rental room. As a skate guard, Millsaps was responsible for, *inter alia*: (1) looking around the rink floor and picking up any trash or other items that were not supposed to be there; and (2) skating around the rink and instructing skaters who were skating too fast to slow down. When he acted as a skate guard, Millsaps wore a referee shirt. He testified that he did not recall seeing anyone fall in the rink on January 21, 2012, but explained that he would not have seen anyone fall that day because he was working as a skate guard attendant, handing out skates, and was not inside the rink. He testified affirmatively, however, that there must have been someone on the rink floor that night because "there is always someone out there."

¶ 42 After the close of evidence, the plaintiff voluntarily dismissed the premises liability count of its complaint and chose to proceed only on negligence.

¶ 43 During the jury instruction conference, the plaintiff requested that the jury be instructed with

Illinois Pattern Jury Instruction, Civil, 60.01 (I.P.I. 60.01), which involves negligence claims based on a violation of a statute. The plaintiff requested that three subsections of section 15 the Roller Skating Act (745 ILCS 72/15 (West 2012)), which had been discussed by several witnesses at trial as imposing certain duties on roller skating operators, be included in this instruction. These included the roller skating operators duty to: (1) "comply with all roller skating rink safety standards published by the Roller Skating Rink Operators Association, including but not limited to the proper maintenance of roller skating equipment and roller skating surfaces" (745 ILCS 72/15(2) (West 2012)); (2) "when the rink is open for sessions, have at least one floor supervisor on duty for every 200 skaters" (745 ILCS 72/15(4) (West 2012)); and (3) "maintain the skating surface in a reasonably safe condition and clean and inspect the skating surface before each session" 745 ILCS 72/15(5) (West 2012)). The plaintiff also wanted I.P.I. 60.01 to include language reflecting the roller skating rink's duty to "watch out for foreign objects of all kinds on the floor," but because this language was not part of section 15 of the Act (745 ILCS 72/15 (West 2012)), it was stricken. The plaintiff's I.P.I. 60.01 was then granted over the roller rink's objection.

¶ 44 The roller rink then requested that the jury be instructed with its version of I.P.I. 60.01, which would modify the plaintiff's version by adding two sections from the Roller Skating Act articulating: (1) a skater's responsibilities while skating in the rink (745 ILCS 72/20 (West 2012)): and (2) a skater's possible assumption of the risks associated with skating (735 ILCS 72/25, 30 (West 2014)).

¶ 45 The plaintiff objected to this instruction. Specifically, with respect to the assumption of

risk language (745 ILCS 72/30 (West 2012)) the plaintiff argued that a jury should not get to determine what constitutes a bar to a lawsuit, particularly in this instance, where that legal question had already survived a motion for dismissal.

¶ 46 After a lengthy discussion between the parties and the trial court as to whether the assumption of risk language from the Roller Skating Act should be included in the instruction, the plaintiff finally suggested that I.P.I. 60.01 be "tossed out" altogether. The plaintiff's counsel argued that "[i]f lawyers and [a] judge have this much difficulty, it's going to do nothing but confuse the jury. They don't get their 60.01. I don't get mine. *** So frankly, if we're just going to confuse the jury *** let's get rid of 60.01 altogether and just try the case."

¶ 47 The trial court ultimately ruled that the jury should be instructed on the entire Roller Skating Act. As the court stated:

> "Let me ask you a question. This attempted duties and responsibilities of roller skaters is part and parcel of the Public Act; right? Give them a copy of the Public Act. They can figure that out. Get a photostat of it and put it in the instructions. This is the law. It is the law.
>
> ***
>
> Number it and call it anything you want. It tells them the law under Public Act such and such and such under 60.01, 60.01 is as follows, in *haec verba*."

¶ 48 On the following morning, the plaintiff submitted the following I.P.I. 60.01, including the full language of sections 15, 20, 25, and 30 of the Act:

> "There was in force in the State of Illinois at the time of the occurrence in question a certain statute which provided that a roller skating rink shall:

- [Section] 15: Operator responsibilities. It is the responsibility of the operator to the extent practicable to:

  (1) Post the duties of roller skaters and spectators and the duties and obligations of the operator as prescribed in this Act in conspicuous places in at least 3 locations in the roller skating rink.

  (2) Comply with all roller skating rink safety standards published by the Roller Skating Rink Operators Association, including but not limited to the proper maintenance of roller skating equipment and roller skating surfaces.

  (3) Maintain the stability and legibility of all signs, symbols, and posted notices required by this Act.

  (4) When the rink is open for sessions, have at least one floor supervisor on duty for every 200 skaters.

  (5) Maintain the skating surface in a reasonably safe condition and clean and inspect the skating surface before each session.

  (6) Maintain in good condition the railings, kickboards, and walls surrounding the skating surface.

  (7) In rinks with step-up or step-down skating surfaces, ensure that the covering on the riser is securely fastened.

  (8) Install fire extinguishers and inspect fire extinguishers at recommended intervals.

  (9) Inspect emergency lighting units periodically to insure the lights are in proper order.

  (10) Keep exit lights and lights in service areas on when skating surface lights are

turned off during special numbers.

(11) Check rental skates on a regular basis to insure the skates are in good mechanical condition.

(12) Comply with all applicable State and local safety codes.

- [Section] 20: Skater responsibilities. It is the responsibility of each roller skater to:

(1) Maintain reasonable control of the skater's speed and course at all times.

(2) Heed all posted signs and warnings.

(3) Maintain a proper outlook to avoid other roller skaters and objects.

(4) Accept the responsibility for knowing the range of the skater's own ability to negotiate the intended direction of travel while on roller skates and to skate within the limits of that ability.

(5) Refrain from acting in a manner that may cause or contribute to the injury of the skater or any other person.

- [Section] 25: Assumption of risk; collisions; injuries. Roller skaters and spectators are deemed to have knowledge of and to assume the inherent risks of roller skating. Those risks not otherwise attributable to an operator's breach of his or her duties as set forth in Section 15 include, but are not limited to, injuries that result from collisions or incidental contact with other roller skaters or spectators, injuries that result from falls caused by loss of balance, and injuries that involve structures such as support columns, walls, doors, lockers, benches, railings, and other properly placed structures within the building.

- [Section] 30: Bar of suit; complete defense. The assumption of risk set forth in Section 25 is a complete bar of suit and is a complete defense to a suit against an operator by a roller skater or spectator for injuries resulting from the assumed risks of skating unless the operator has violated his or her duties or responsibilities under this Act.

If you decide that a party violated that statute on the occasion in question, then you may consider that fact together with all other facts to what extent, if any, a party was negligent before and at the time of the occurrence."

¶ 49 In offering this instruction, the plaintiff's counsel once again made his objection, stating:

"I want to make absolutely clear for the record that though I'm submitting this at your instruction and that I certainly do not believe that a jury should be taxed with the question of law such as barring a lawsuit, nor do I believe that the assumption of the risk provision of this Act applies under the facts that have been heard in this courtroom.

***

So to let the jury go where no judge has done in this case I frankly think is plain error, but I am nonetheless at your instruction or your direction submitting this instruction which does have the entirety of the Act and I do have all four sections of the Act here which I'll pass up as well."

¶ 50 This instruction was tendered to the jury along with a copy of the full statute. The jury was also separately instructed on comparative negligence, to which neither party objected. After deliberations, the jury returned a verdict in favor of the roller rink.

¶ 51 On December 16, 2015, the plaintiff filed a posttrial motion requesting a new trial, and

arguing that the trial court had erred in allowing the use of IPI 60.01, which included the assumption of risk provision. After the defendant responded, and the plaintiff filed her reply brief, on February 25, 2016, the trial court entered an order denying the plaintiff's motion. That order stated in full: "Motion of plaintiff for new trial is denied. Longer order will follow."

¶ 52 On March 8, 2016, the court entered the following order:

> "The court has reconsidered the lengthy briefs. Motion of plaintiff for a new trial is granted. In retrospect, the instructions were very possibly confusing to the jury. It seems the attorneys agreed to give the full Skating Safety Act as 60.01 along with comparative negligence instructions."

¶ 53 On April 7, 2016, the roller rink filed a motion to clarify the two inconsistent orders or in the alternative reconsider the grant of a new trial. At a hearing held on April 20, 2016,[1] the trial court denied the motion to reconsider its February 25, 2016, and clarified that its March 8, 2016, order granting the plaintiff a new trial remained the order of the court. In doing so, the court explained that after having entered the order on February 25, 2016, it went back to the briefs and reconsidered the matter, and changed its mind. The court explained that it was allowing a new trial because I.P.I. 60.01 could have been confusing to the jury, since from it the jury could have inferred that the court had already made a finding of fact that there was an assumption of risk.

¶ 54 On June 13, 2016, the trial court entered another order stating:

[1] Although the transcript of this hearing is not part of the record on appeal, the parties stipulated to filing an uncertified record by way of an appendix to the roller rink's brief. The transcript of this hearing is part of the appendix.

"The order attached here was filed on 4/20/16. The Court believes we (I) discuss [*sic*] the view by the Court of the agreed instructions. See also the order of 3-8-16."

¶ 55 The roller rink now appeals.

¶ 56 II. ANALYSIS

¶ 57 On appeal the roller rink contends that the trial court abused its discretion in granting the plaintiff a new trial. For the reasons that follow, we agree.

¶ 58 In doing so, however, we initially reject the roller rink's contention that the trial court was not permitted to reconsider and alter its original February 25, 2016, order, *sua sponte*. Contrary to the roller rink's position, the March 8, 2016, order reconsidering the February 25, 2016, order was not a *nunc pro tunc* order. A *nunc pro tunc* order is an "entry now for something previously done, made to make the record speak now for what was actually done then," (*Kooyega v. Hertrz Equipment Rentals, Inc.*, 79 Ill. App. 3d 1051, 1056 (1979). The purpose of a *nunc pro tunc* order is to "correct the record for a clerical or inadvertent scrivener's error, not to alter the actual judgment of the court or correct judicial errors." *U.S. Bank National Association v. Luckett*, 2013 IL App (1st) 113678, ¶ 27. Both the language of the March 8, 2016, order and the transcript from the April 20, 2016, hearing reveal that the March 8, 2016 order was not intended to correct any clerical errors, but rather to reverse the trial court's original order after the court had had an opportunity to reread the briefs and reconsider the matter fully. As such, the March 8, 2016, order is by no means a *nunc pro tunc* order.

¶ 59 Moreover, contrary to the roller rink's position, a trial court is at liberty to *sua sponte* reconsider a prior ruling, so long as it has jurisdiction, regardless of whether there is new evidence or a motion to reconsider pending before it. See *National Union Fire Ins. Co. of Pittsburgh v. DiMucci*, 2015 IL App (1st) 122725, ¶ 57 ("a court is within its discretion to ***

sua sponte reconsider a prior ruling"); see also *People v. Marker*, 233 Ill. 2d 158, 172 (2009) (recognizing that prior Illinois Supreme Court decisions "expressed the clear judicial policy which favors allowing a trial court to reconsider its rulings"); see also *People v. Smith*, 232 Ill. App. 3d 121, 127 (1992) (recognizing that a trial court may *sua sponte* reconsider a prior final appealable order, within 30 days of its entry, since that is the period of time for which it retains jurisdiction over the matter). In the present case, there can be no doubt that on March 8, 2016, the trial court continued to have jurisdiction over the matter. The February 25, 2016, order was not final and appealable, as it contained language indicating that a "longer order was to follow." Even if we could consider the February 25, 2016, order a final order, since the March 8, 2016, order reconsidering that order was entered within 30 days, the court retained jurisdiction over the matter. *People v. Bailey*, 2014 IL 115459, ¶ 8 (a court retains jurisdiction only for 30 days after entry of a final order). Accordingly, we find nothing procedurally flawed in the trial court's decision to *sua sponte* reconsider its prior ruling.

¶ 60 We similarly reject the roller rink's assertion that the plaintiff has somehow waived this issue for purposes of appeal by not offering an alternative remedial jury instruction. Contrary to the roller rink's assertion, the record below reflects that the plaintiff continually objected to the trial court's version of I.P.I. 60.01, and offered both an alternative remedial instruction, excluding all assumption of risk language, or, in the alternative the abandonment of any such instruction, so as to avoid any jury confusion. As such, we may consider the issue on appeal.

¶ 61 Accordingly, with these two preliminary matters out of the way, we turn to the merits of this appeal, and address whether I.P.I. 60.01 as instructed "possibly confused the jury" warranting a new trial. For the reasons that follow, we find that it did not.

¶ 62 The threshold for giving a jury instruction in a civil case is not high, so long as the jury

instruction is supported by the evidence in the record to justify the theory of instruction. *Mobley v. Tramco Transmission, Inc.*, 2014 IL App (1st) 122123, ¶ 22 (citing *Heastie v. Roberts*, 226 Ill. 2d 515, 543 (2007)). In civil cases, the trial court must instruct the jury using an Illinois Pattern Jury Instruction (I.P.I.) unless it determines that the instruction does not accurately state the law. *Studt v. Sherman Health Systems*, 2011 IL 108182, ¶ 14 (citing Ill. S. Ct. R. 239(a) (eff. Jan. 1, 1999)). It is within the trial court's discretion to grant or deny a particular instruction. *Studt*, 2011 IL 108182, ¶ 14. The standard for deciding whether a trial court abused its discretion in tendering an instruction is "whether, taken as a whole, the instructions are sufficiently clear so as not to mislead and whether they fairly and correctly stated the law." *Studt*, 2011 IL 108182, ¶ 14; see also *Auten v. Franklin*, 404 Ill. App. 3d 1130, 1127 (2010). However, if the issue is whether a jury instruction accurately conveyed the applicable law, the issue is a question of law, subject to *de novo* review. *Studt*, 2011 IL 108182, ¶ 14. A reviewing court ordinarily will not reverse a trial court for giving faulty instruction unless they "clearly misled the jury" and resulted in serious "prejudice to the appellant." *Schultz v. Northeast Illinois Regional Commuter Rail Road Corp*., 201 Ill. 2d 260, 274 (2002); see also *Ramirez v. FCL Builders, Inc*., 2014 IL App (1st) 123663, ¶ 164 ("even if the reviewing court determines that the trial court gave faulty instruction to the jury, reversal is not warranted unless the error results in *serious prejudice* to the appellant's right to a fair trial." (Internal quotation marks omitted; Emphasis added)); see also *Brooks v. City of Chicago*, 106 Ill. App. 3d 459, 466 (1982) ("A liberal application of the harmless error doctrine to jury instruction issues is favored when it appears that the rights of the complaining party have in no way been prejudiced.")

¶ 63 In the present case, the use of I.P.I 60.01 was neither unsupported by the evidence at trial, nor

clearly mislead the jury or resulted in any serious prejudice to the plaintiff, so as to warrant a new trial. The plaintiff's cause of action was premised on the roller rink's negligence in failing to abide by certain duties applicable to all roller rink operators under the Roller Skating Act (745 ILCS 72/1 *et seq*. (West 2012)). The roller rink, on the other hand, raised two affirmative defenses under that same statute, namely assumption of risk and contributory negligence. Both parties used the Roller Skating Act throughout trial and entered it as an exhibit, and plaintiff was the first to offer the Act as part of I.P.I. 60.01. After both parties offered different portions of the Act to be used as I.P.I. 60.01, the trial court ruled that the entire statute would be used.

¶ 64 Nothing in the instruction given was either insufficiently clear or misstated the law. The language of the instruction mirrored I.P.I. 60.01, word for word, and the statutory language added used the exact words from the Act, without any changes or modifications. The instruction informed the jury of the existence of the Roller Skating Act (745 ICLS 72/1 *et seq*. (West 2012)) and the duties of both the roller rink and the plaintiff under that Act. The instruction further informed the jury under what circumstances, if any, the plaintiff could assume the risk of injury while skating in the roller rink, and under what circumstances she could not, and what the consequences of her assumption of risk would entail. The instruction further gave the jury an option to consider the Act in the context of contributory negligence, by informing it that if it determined that either party violated the Act, it could also consider "that fact together with all other facts to the extent if any" in determining the party's negligence. We find nothing remotely confusing in this instruction.

¶ 65 The plaintiff posits that I.P.I. 60.01 was confusing because it permitted the jury to consider a

purely legal question, *i.e*, whether the assumption of risk was a complete bar to the plaintiff's recovery. In doing so, the plaintiff points to the inclusion of section 30 of the Roller Skating Act (745 ILCS 72/35 (West 2012)) in the pattern jury instruction, which provides in full:

> "[Section] 30: Bar of suit; complete defense. The assumption of risk set forth in Section 25 is a complete bar of suit and is a complete defense to a suit against an operator by a roller skater or spectator for injuries resulting from the assumed risks of skating unless the operator has violated his or her duties or responsibilities under this Act."

¶ 66 We disagree with the plaintiff's reading of this portion of the instruction. Contrary to the plaintiff's position, the instruction does not vest the jury with resolving a purely legal question. The plaintiff's position would have merit if the aforementioned paragraph ended by concluding that assumption of risk is always a complete bar to any injuries resulting form the assumed risk of skating. However, this is not what the paragraph provides. The instruction provides that assumption of risk is a complete bar "unless the operator has violated his or her duties or responsibilities under the Act," referring the jury back to the list of duties owed by the roller rink as outlined at the beginning of the instruction. As such, the instruction properly tasks the jury with determining whether under the evidence presented to it at trial, the roller rink breached any of its duties, so as to impose liability, regardless of whether the plaintiff had assumed the risk of skating. This is a question of fact, and not one of law, and is consistent with the purpose of I.P.I. 60.01, which is to permit a plaintiff to use the violation of a statute as evidence of the standard of care, and the defendant to rebut that evidence of negligence by proof that it acted reasonably under the circumstances. See I.P.I. 60.01, *Comment, Introduction, Legislation as Evidence of Standard of Care*.

¶ 67 Accordingly, since we find that I.P.I. 60.01 as originally instructed properly stated the law

and did not mislead the jury or seriously prejudice the plaintiff in any way, we find that the trial court's order granting the plaintiff's motion for a new trial constituted a clear abuse of discretion. In making this determination, we must consider whether the jury's verdict was supported by the evidence and whether the losing party was denied a fair trial. *Ramirez*, 2014 IL App (1st) 123663, ¶ 158. A grant of a new trial is permissible only if the trial court finds that the jury's verdict was against the manifest weight of the evidence; however "where there is sufficient evidence to support the verdict of the jury, it constitutes an abuse of discretion for the trial court to grant a motion for a new trial." *Ramirez*, 2014 IL App (1st) 123663, ¶ 158.

¶ 68 In the present case, there is sufficient evidence to support the jury verdict. Although the plaintiff's witnesses all claimed that she fell as a result of a black object that was caught in her roller skate, and which the roller rink was responsible for removing, the roller rink's general manager testified that the rink floor had been cleaned before the skating session, and he himself had inspected it and found no foreign objects on the floor. The general manager further testified that at the time of the incident at least one skate guard was on duty on the rink floor. He also explained that the roller rink makes its best effort to abide by the rules articulated by the Roller Skating Association in keeping the rink floor clean, so that prior to each skate session patrons are asked not to bring anything onto the floor, and all individuals employed by the roller rink, (including, *inter alia*, concession workers, skate guards, rental attendants and DJs) make an effort to pick things up from the rink floor. In addition, both the general manager and the two roller rink employees responsible for watching the rink floor on the night in question testified that no one had complained about any black object on the floor, and that had they seen any foreign object on the floor or if someone had complained about it, they would have immediately removed it. In addition, although the plaintiff's witnesses implied that there had been some

collusion by the roller rink in an attempt to thwart the investigation into her injury, the general manager testified that he filled out the Roller Skating Association's safety survey and preserved the object she claimed she tripped on in an envelope, and that envelope containing the object was introduced into evidence. Significantly, the envelope contained the signature of the plaintiff's friend, Bryce, who had claimed to have found the object, but who was not called as a witness at trial. Under this record, there was sufficient evidence for the jury to conclude that the roller rink had complied with all Roller Skating Association roller rink safety standards, exercised reasonable care in cleaning and inspecting the skating surface before the skating session, and maintained the skating surface "in a reasonably safe condition," which were the only duties required of it under the Roller Skating Act (745 ILCS 72/15(5) (West 2012)). The jury, as the arbiter of credibility and facts, clearly found that the failure to notice and remove the dime-sized plastic black object, or "piece of dirt" as it was referred to by William, was not unreasonable, and did not require imposing liability on the roller rink.

¶ 69 III. CONCLUSION

¶ 70 For the aforementioned reasons, we reverse the trial court's order granting the plaintiff a new trial and conclude that the original jury verdict must stand.

¶ 71 Reversed.