2014 IL App (1st) 121229-U

SECOND DIVISION
December 23, 2014

Nos. 1-12-1229, 1-12-1234 & 1-12-2249 (Consolidated)

CLARENCE HATCHETT,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant and	)	Cook County
Cross-Appellee,	)	
	)	
v.	)	No. 09 L 5185
	)	
NORTHEAST ILLINOIS REGIONAL COMMUTER RAILROAD d/b/a METRA,	)	
	)	Honorable
Defendant-Appellee and	)	Barbara A. McDonald,
Cross-Appellant.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justice Neville and Justice Liu concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in refusing to tender an assumption of risk instruction to prevent jury confusion and because defendant did not raise this defense at trial. The jury's general verdict was not absolutely irreconcilable with its special findings.

¶ 2 Plaintiff, Clarence Hatchett, filed this negligence action under the Federal Employer's Liability Act (FELA) (45 U.S.C. §51 through 60) (West 2000)) and the Locomotive Inspection Act (Locomotive Act) (49 U.S.C. §20701-20702 (2000)) after he sustained a shoulder injury

while working for defendant, Northeast Illinois Regional Commuter Railroad (Metra). Following a jury trial, the jury returned a verdict for plaintiff awarding him $231,576. The jury also made a finding that plaintiff was 70% contributorily negligent for his injury and reduced the judgment to $69,472.80. The trial court entered judgment on the jury's verdict. Plaintiff appeals from the trial court's order denying his motion for a judgment notwithstanding the verdict, or in the alternative, a new trial. Defendant cross-appeals from the trial court's order denying the posttrial motion to set aside the judgment.

¶ 3 BACKGROUND

¶ 4 Metra is a publicly run commuter train service operating in northeast Illinois. On January 7, 2009, Clarence Hatchett, a 26 year employee of Metra and locomotive engineer, tore his rotator cuff while applying the train's automatic break. Hatchett filed the instant action alleging Metra violated the Locomotive Act and FELA. Plaintiff alleged that his injury was proximately caused by defendant's negligence; in providing plaintiff a safe place to work; maintaining, keeping in good condition and inspecting the engineer's seat; failing to warn plaintiff of the dangerous and unsafe condition of the seat; keeping the locomotive systems and engineer's seat free of dangerous conditions; and permitting the seat to remain in an unsafe condition when it knew or in the exercise of ordinary care should have known of the unsafe condition of the engineer's seat.

¶ 5 At trial, plaintiff testified that he began working for Metra as a carman in 1993 and in 1994 was promoted to locomotive engineer. On January 7, 2009, he was assigned to operate locomotive 109 scheduled to depart at 5:31 p.m. from Union Station in Chicago and travel to Antioch. He boarded the train shortly after 5:20 p.m. When he entered the engineer's cabin he

noticed that the engineer's seat was positioned all the way forward causing one of his knees to hit the front of the control panel. The seat is connected to a wall channel which allows it to slide back and forth. Hatchett unsuccessfully attempted to use the front release lever located under the seat to move it backwards on its track. Hatchett then attempted to lift the seat and slide it back but again the seat would not move. The seat's forward position placed the train's automatic brake handle about six inches behind his left shoulder. This required Hatchett to reach back to pull the brake. Typically, the engineer's seat is positioned behind the break, allowing the engineer to push the break forward rather than pull the break from behind. Hatchett preferred to have the seat positioned back further so he could push the brake, like a bench press. He was unable to make further attempts to move the seat before the scheduled departure time. He did not report the seat's problem or request the seat be fixed prior to departure. When the train left Union Station, Hatchett did not believe that the seat was unsafe and thought that he could correct the seat's position at the first scheduled stop.

¶ 6 While en route, Hatchett applied the brake six times without any trouble. Before reaching the first stop in Franklin Park, plaintiff applied the brake a seventh time and immediately felt severe pain and a "pop" in his left shoulder. He immediately released the break valve and switched to his right hand to break the train. Hatchett then used his right hand to pull the brake for the rest of the route. After the train's final stop in Antioch, Hatchett was taken to Condell Memorial Hospital for medical treatment. Hatchett was later diagnosed with a torn rotator cuff.

¶ 7 The jury also heard testimony from Metra engineers and employees about the working condition of the engineer's seat. Jonathan Stinson testified that he is employed as a locomotive engineer for Metra and had worked on locomotive 109 a week before Hatchett's injury. He

explained that the engineer's seat was located too far forward and he encountered problems adjusting the seat. The front release lever did not work properly and he was unable to maneuver the seat backward using the wall channel. Stinson encountered these problems on two occasions between January 1 and January 6, 2009 and reported the problems to his ramp supervisor.

¶ 8 Brenda Simmons testified that she was a Metra carman assigned to the Antioch yard. She inspected the seat immediately after Hatchett pulled into the yard and reported his injury. The seat would not swivel but she could not recall whether it went forward and backward. She did not attempt to move the seat manually. Thomas Opala testified that he was a mechanical foreman at the Antioch yard on January 7, 2009 and was Simmons's supervisor. Opala was asked by Metra's safety department to inspect the engineer's seat. Opala found the engineer's seat was more forward than normal and the front release lever would not work. In order to move the seat, he had to lift the seat up half an inch to take it out of place and put it down at a different position in the wall channel and then slide it backwards. Once the seat was adjusted he found that "[i]t was probably the easiest seat I've ever adjusted in my career."

¶ 9 Patrick Danz, a train master for Metra responsible for supervising transportation and operations at Union Station, testified that plaintiff had several options available other than using the chair in its awkward position. Hatchett could have requested the mechanical team on site, located on the same track as Hatchett's train, fix the problem. Additionally, Hatchett could have requested an alternate "protector" train be tied to the engineer's car. On January 7, 2009, Danz was working from the yard master's office at Union Station and confirmed that a protector train was available and could have been attached to Hatchett's train within 15 to 30 minutes. He admitted that these solutions would have caused a slight delay to the train schedule, but Metra

does not value the timeliness of departing trains over safety and Hatchett would not have been penalized for any delay caused by any response due to the problem with his seat.

¶ 10 The trial judge's instructions to the jury tracked Hatchett's specific claims of negligence: that the defendant violated the Locomotive Act for using or permitting the use of the locomotive which was not in proper and safe condition and a danger to life and limb; and that the defendant violated FELA in one or more of the following ways: by failing to maintain and keep the engineer's seat in good condition; inspect the engineer's seat; or warn plaintiff of the dangerous and unsafe condition of the seat when "[d]efendant knew or in the exercise of ordinary care should have known of the unsafe condition." In addition, the jury was instructed that under FELA "[i]t was the duty of the railroad to use ordinary care to provide the plaintiff with a reasonably safe place in which to do his work."

¶ 11 The trial court gave a contributory negligence instruction (Illinois Pattern Jury Instructions, Civil, No. 160.08 (2005)) at Metra's request. The court refused to give plaintiff's tendered assumption of risk instruction (Illinois Pattern Jury Instruction, Civil, No. 160.09 (2006)) on the grounds that the court wanted to prevent jury confusion and because defendant had not raised an assumption of risk defense at trial. Metra also tendered the following special interrogatories:

> "1. At the time of the occurrence, was the engineer's cab seat in Defendant Metra's Locomotive No. 109 in proper and safe condition for operation on the railroad without unnecessary danger to life or limb?
>
> 2. At the time of the occurrence, did Defendant Metra use ordinary care to provide the Plaintiff Clarence Hatchett with a reasonably safe place in which to do his work?

3. At the time of the occurrence, did the condition of the engineer's cab seat in Defendant Metra's Locomotive No. 109 cause or contribute to cause Plaintiff Clarence Hatchett's rotator cuff injury?

4. Did plaintiff Clarence Hatchett's conduct in operating Locomotive No.109 without first reporting that he could not move the engineer's seat or requesting help with moving the seat constitute contributory negligence?"

¶ 12 The jury returned a verdict for Hatchett in the amount of $231,576. However, the jury reduced the award by 70% to $69,473 based on its finding of plaintiff's contributory negligence. In addition to the verdict, the jury answered "yes" to each special interrogatory. Hatchett filed a motion for judgment notwithstanding the verdict (judgment *n.o.v.*) or, alternatively, for a new trial. Metra also filed a posttrial motion requesting the trial court enter judgment for Metra, arguing that the jury's answers to the special interrogatories were irreconcilable with the general verdict. The trial court denied the parties' motions. Thereafter, plaintiff filed a petition requesting a new trial pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)) alleging that defendant purposefully withheld relevant discovery dispositive to the issues at trial. The trial court denied plaintiff's petition. Hatchett and Metra filed timely notices of appeal from the trial court's denial of their posttrial motions.

¶ 13 ANALYSIS

¶ 14 Hatchett first contends the trial court abused its discretion by denying his motion for a judgment *n.o.v.*, or in the alternative for a new trial on the basis that the trial court erred by refusing to give the jury an assumption of risk instruction (Illinois Pattern Jury Instruction, Civil No. 160.09 (2006)) on plaintiff's FELA claim.

¶ 15 Under FELA, an employee is entitled to recover damages for his injuries "if the employer's negligence played any part in producing the injury, no matter how slight." *Taylor v. Burlington Northern R.R. Co.*, 787 F. 2d 1309, 1313 (9th Cir. 1986). FELA expressly eliminated the defense of assumption of risk in FELA actions. *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill. 2d 260, 282 (2002); *Uhrhan v. Union Pacific R.R. Co.*, 155 Ill. 2d 537, 548 (1993). However, FELA contains a "mandatory rule" of contributory negligence, to reduce, but not extinguish entirely, the employee's damages in proportion to his fault. *Taylor*, 787 F. 2d at 1314, citing 45 U.S.C. § 53 (2008).

¶ 16 During the jury instruction conference, the trial court addressed defendant's proposed contributory negligence instruction on plaintiff's FELA claim. Plaintiff argued that the evidence did not establish he was contributorily negligent, but rather established that he assumed the risk of a dangerous condition and therefore, the assumption of risk instruction was necessary to avoid jury confusion between assumption of risk and contributory negligence. Plaintiff asserted that he discovered the engineer's seat was in an awkward position 10 minutes before the train was scheduled to depart Union Station. Plaintiff contended that he would be admonished by Metra for any delay in the train's departure and that there was not a sufficient amount of time to call for a mechanic to fix the chair or to obtain a protector train. Conversely, Metra argued that the record established that plaintiff had a sufficient amount of time to either get the chair fixed or employ an alternative to using the seat in its awkward position and that Metra would not have admonished plaintiff for a delay for employing these alternatives.

¶ 17 The trial court instructed the jury on contributory negligence and read the jury the following instruction:

> "if [p]laintiff could not reasonably expect the railroad to correct the defect within a reasonable time, then the plaintiff had no real alternative but to perform the task, defect or not, and his actions in performing the task would not constitute contributory negligence.
>
> But if reasonably safe alternatives were available, such as if notification could have resulted in immediate correction of the problem, then it was not necessary for [p]laintiff to accept the dangerous condition. Thus, when alternatives besides quitting or refusing to perform the task are available to [p]laintiff, his actions are reviewed for reasonableness, and unreasonable actions or omissions constitute contributory negligence." Illinois Pattern Jury Instruction, Civil, No. 160.08 (2005).

¶ 18 The trial court refused to give the assumption of risk instruction to prevent jury confusion and because defendant had not raised such a defense at trial. Ultimately, the jury found Metra liable for plaintiff's injuries but also found plaintiff contributorily negligent. The rejected assumption of risk instruction provided:

> "in any action brought against a railroad to recover damages for injury to an employee, the employee shall not be held to have assumed the risks of his employment in any case where the injury resulted in whole or in part by reason of any defect, due to the railroad's negligence, in its engines." Illinois Pattern Jury Instruction, Civil No. 160.09 (2006).

¶ 19 In essence, instruction 160.09 informs the jury that assumption of risk is not a defense available to a defendant in a FELA case. *Hamrock v. Consolidated Rail Corp.*, 151 Ill. App. 3d 55, 62 (1986). The giving of an assumption of risk instruction in a case where the defense had

not been pled or argued is "a confusing, negative statement which refers to issues not involved in an FELA case." *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill. 2d 260, 283 (2002). An assumption of risk instruction should not be given routinely in every FELA case, but rather should be given "when the issue of assumption of risk is expressly or implicitly before the jury." *Id.* at 63. Thus, in reviewing the denial of Hatchett's motion for a judgment *n.o.v.*, or in the alternative for a new trial, the issue presented is whether defendant pled, argued or implicitly put the assumption of risk defense before the jury.

¶ 20 Plaintiff contends that Metra placed the assumption of risk defense before the jury, just under a different name. At trial, Metra claimed that Hatchett had reasonable alternatives other than operating the train with the seat in an awkward position and therefore, Hatchett was contributorily negligent. Metra asserts that Hatchett did not, but could have: attempted to move the seat back or swiveled the seat to better reach the handbrake, requested aid from a mechanic at Union Station, or used a replacement car. Hatchett argues that his use of the seat in the awkward position, which defendant asserts was contributory negligence, was actually an assumption of risk because it was not reasonable for Hatchett to remedy the defective seat's position prior to the locomotive's scheduled departure.

¶ 21 "Every party has the right to have the jury instructed fairly and correctly." *Bielicke v. Terminal R.R. Ass'n of St. Louis*, 291 Ill. App. 3d 690, 693 (1997). A trial court has the discretion "to determine, whether based on the evidence, an instruction is applicable and should be given" (*Schultz*, 201 Ill. 2d at 283) and "that determination will not be disturbed absent an abuse of that discretion." *Id.* at 273-74. A trial court abuses its discretion when its decision is arbitrary or "exceeds the bounds of reason and ignores established principles of law." *Id.* at 110. Jury

instructions are proper when they fairly, fully, and comprehensively inform the jury of the relevant legal principles. *Eskew v. Burlington Northern & Santa Fe Ry. Co.*, 2011 IL App (1st) 093450, ¶ 31. As a reviewing court, we "will not reverse a trial court for giving faulty instructions unless they clearly misled the jury and resulted in prejudice to the appellant." *Schultz*, 201 Ill. 2d at 274.

¶ 22 Contributory negligence and assumption of the risk are closely related and several courts have distinguished them. See *Hamrock*, 151 Ill. App. 3d at 62; *Birchem v. Burlington Northern R.R. Co.*, 812 F. 2d 1047 (8th Cir. 1987); *Fashauer v. New Jersey Transit Rail Operations*, 57 F.3d 1269 (3rd Cir. 1995). "There is some overlap between the doctrines of assumption of risk and contributory negligence" in a FELA case; "however, the defenses are not interchangeable." *Schultz*, 201 Ill. 2d at 282. "Assumption of risk is 'an employee's voluntary, knowledgeable acceptance of a dangerous condition that is necessary for him to perform his duties. ' " *Id*. (citing *Taylor v. Burlington Northern R.R. Co.*, 787 F. 2d 1309, 1316 (9th Cir. 1986). Assumption of risk in an employment context under FELA refers to "implied consent." *Fashauer*, 57 F. 3d at 1279. A plaintiff's recovery under FELA cannot be reduced on the basis that the employee consented to the risk by "performing a task in the manner which the employer directed." *Id*. at 1280. Practically speaking, if a plaintiff has no real choice but to perform his duties in an unsafe manner, this constitutes assumption of risk and in a FELA case "his recovery should not be reduced because he performed the task, regardless of whether the plaintiff acted reasonably or unreasonably." *Id*. at 1279.

¶ 23 Contributory negligence is a " 'careless act or omission on the plaintiff's part tending to add new dangers to conditions that the employer negligently created or permitted to exist.' "

Schultz, 201 Ill. 2d at 282 (citing *Taylor v. Burlington Northern R.R. Co.*, 787 F. 2d at 1316. "[W]hen the plaintiff has reasonable alternatives available to him, he must act reasonably in performing his job. And if he acts unreasonably, he is answerable for contributory negligence." *Id*. Where reasonable alternatives "besides quitting or refusing to perform the task in an unsafe way are available, a plaintiff is charged with acting with due care and will be held responsible for acting unreasonably." *Id*. at 1280.

¶ 24 An assumption of risk instruction is proper where there is evidence that the employee was without a reasonably safe alternative to performing his work in the manner at issue. *Schultz*, 201 Ill. 2d at 282. If there is any evidence presented at trial to support the plaintiff's lack of due care, the defendant is entitled to have the jury instructed on contributory negligence. *Uhrhan*, 155 Ill. 2d at. at 547. However, "[w]here an act of alleged contributory negligence is but the practical counterpart of assumption of risk, it does not constitute a defense" and a contributory negligence instruction should not be tendered to the jury. *Birchem*, 812 F. 2d 1047 (a defense designated as contributory negligence but alleged that the injured employee used a mudjack, knowing it was defective and knowing that there were no parts available to fix the defect, was in actuality the practical counterpart to assumption of risk and therefore could not be considered by the jury).

¶ 25 Here, nothing in the record indicates that assumption of risk was ever raised or implied by Metra. Rather, Metra supplied evidentiary support for its contributory negligence defense, that Hatchett had reasonable alternatives he could employ in the 10 minutes before departure to remedy the awkward position of the seat, and if a train delay had occurred, Hatchett would not have been penalized. Patrick Danz, a train master for Metra responsible for supervising transportation and operations at Union Station, testified that Hatchett could have requested

assistance from mechanical personnel at Union Station or used an alternative "protector" engine tied to the engineer's car. On January 7, 2009, there were two car men and a foreman available to assist with mechanical issues and their operations were based on the same track as Hatchett's train. In addition, a "protector" engine located only two tracks away was available for use. Once notified that a protector engine is needed, it can be tied to a train and ready for departure within 15 to 30 minutes. Danz also explained that Metra includes a cushion in the train schedule for delays. Metra does not place timeliness over the safety of its employees and Hatchett would not have been reprimanded for any delay in the train's schedule because of an attempt to fix the seat or use an alternative train engine.

¶ 26 Contrary to Hatchett's argument and unlike the plaintiff in *Birchem*, there is no evidence that Hatchett used the seat, knowing it was defective and with the knowledge that it couldn't be fixed. Hatchett testified that he believed the chair was not defective and it could be fixed at the first scheduled train stop. The record establishes that there was no evidence before the jury that inferred plaintiff performed a dangerous job, knowing of the danger and without any safe alternative, therefore assumption of risk was not implicitly before the jury. The record also establishes that Metra presented evidence that Hatchett had reasonably safe alternatives available to him, other than quitting or refusing to perform his duties. Thus, we find Metra's contributory negligence defense is not the practical counterpart of assumption of the risk and the trial court did not err in refusing to give an assumption of risk instruction. *Bielicke*, 291 Ill. App. 3d at 693 (it is error to give a jury instruction when no evidence exists to support the theory of the instruction); *Fashauer*, 57 F.3d 1280 (where no evidence of assumption of risk reached the jury, an instruction on contributory negligence alone is sufficient). Therefore, we find the trial court

did not abuse its discretion when it denied plaintiff's motion for a judgment notwithstanding the verdict, or in the alternative for a new trial.

¶ 27 Next, Hatchett argues in a conclusory fashion that the trial court erred in giving the jury special interrogatories 1, 2, and 4 and in denying plaintiff's section 2-1401 petition for a new trial because Metra failed to disclose the substance of three work orders involving the engineer's seat during discovery. Plaintiff cites no authority in support of these arguments and therefore, regarding these issues, Hatchett's appellate brief fails to comply with Supreme Court Rule 341(h)(7) (eff. July 1, 2008). Supreme Court Rule 341(h)(7) specifies that an appellant's argument "shall contain the contentions of the appellant and the reasons therefor with citation of authorities and the pages of the record relied on." Ill. S. Ct. R. 341 (h)(7) (eff. July 1, 2008). Supreme court rules are not suggestions, but rather, they are mandatory guidelines and must be followed. *Voris v. Voris*, 2011 IL App (1st) 103814, ¶ 8; *Niewold v. Fry*, 306 Ill. App. 3d 735, 737 (1999). "Arguments that violate Rule 341 do not merit consideration and can be rejected solely for that reason." *Kic v. Bianucci*, 2011 IL App (1st) 110622, ¶ 23. "A reviewing court is entitled to have the issues on appeal clearly defined, to be cited pertinent authorities and are not a depository in which an appellant is to dump *** argument and research as it were, upon the court." *In re state of Kunz*, 7 Ill. App. 3d. 760, 763 (1972). The failure to cite to authority may result in forfeiture of the issue on appeal. *Soter v. Christoforacos*, 53 Ill. App. 2d 133, 137 (1964); *People v. Ward*, 215 Ill. 2d 317, 332, (2005). Accordingly, because Hatchett fails to cite any authority in support of his contentions that the trial court erred in giving the jury special interrogatories 1, 2 and 4 and in denying his section 2-1401 petition, these arguments have been forfeited.

¶ 28 *Metra's Cross-Appeal*

¶ 29 Metra argues that the jury's answers to special interrogatories 1 and 2 irreconcilably conflict with the general verdict and therefore, the trial court erred in denying its posttrial motion and refusing to enter judgment for Metra.

¶ 30 A special interrogatory "tests the general verdict against the jury's determination as to one or more specific issues of ultimate fact." *Simmons v. Garces*, 198 Ill. 2d 541, 555 (2002). Section 2-1108 of the Code of Civil Procedure (735 ILCS 5/2-1108 (West 2010)) governs the use of special interrogatories. "Unless the nature of the case requires otherwise, the jury shall render a general verdict." *Id*. However, "[t]he jury may be required by the court, and must be required on request of any party, to find specially upon any material question or questions of fact submitted to the jury in writing." *Id*. When a special "finding of fact is inconsistent with the general verdict, the former controls the latter and the court may enter judgment accordingly." *Id*.

¶ 31 A special interrogatory only prevails where it is clearly and absolutely irreconcilable with the jury's verdict. *Simmons*, 198 Ill. 2d at 556. In determining whether there is an inconsistency between a general verdict and the jury's special findings, "all reasonable presumptions must be exercised in favor of the general verdict." *Balough v. Northeast Illinois Regional Commuter R.R. Corp.*, 49 Ill. App. 3d 750, 769 (2011). "If a special interrogatory does not cover all the issues submitted to the jury and a 'reasonable hypothesis' exists that allows the special finding to be construed consistently with the general verdict, they are not 'absolutely irreconcilable' and the special finding will not control." *Simmons*, 198 Ill. 2d at 555-56. We review a trial court's finding of whether a jury's general verdict is inconsistent with the jury's answers to special interrogatories *de novo*. *Ahmed v. Pickwick Place Owners' Ass'n*, 385 Ill. App. 3d 874, 885

(2008).

¶ 32 Metra contends that plaintiff's FELA claims rest entirely on whether plaintiff was given a reasonably safe place to work, and the jury's answers to special interrogatories 1 and 2 in favor of Metra equate to a finding that Metra provided plaintiff with a reasonably safe place to work and therefore, absolutely contradict the general verdict. As such, we compare the special findings to the general verdict. At issue were plaintiff's claims that Metra was liable for plaintiff's injuries pursuant to the Locomotive Act and FELA. The jury returned a general verdict finding Metra liable and plaintiff 70% contributorily negligent.

¶ 33 Upon Metra's motion, the trial court tendered the jury special interrogatory 1 which asked: whether the engineer's seat was in "proper and safe condition for operation on the railroad without unnecessary danger to life or limb." This special interrogatory tracked the precise language of the trial court's jury instruction on plaintiff's Locomotive Act claim. Therefore, because the jury answered "yes" to special interrogatory 1, this special finding indicated the jury found that Metra did not violate the Locomotive Act and the jury's general verdict was premised on plaintiff's remaining claims of negligence under FELA.

¶ 34 Pursuant to FELA, a common carrier, like Metra, is liable for damages to an employee who suffered an injury while employed by Metra which resulted "in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines *** or other equipment." 45 U.S.C. § 51. The jury was instructed that under FELA, Metra had a general duty "to use ordinary care to provide plaintiff with a reasonably safe place in which to do his work." The jury was also instructed that plaintiff claimed Metra violated FELA by being negligent in one or more of three

ways in failing to: (1) maintain and keep the engineer's seat in good condition; (2) inspect the engineer's seat; or (3) warn plaintiff of the dangerous and unsafe condition of the seat when "[d]efendant knew or in the exercise of ordinary care should have known of the unsafe condition of its engineer's seat."

¶ 35 Metra argues that because the jury answered "yes" to special interrogatory 1, finding that the seat was in a proper and safe condition without unnecessary danger to life and limb, this is equivalent to a finding that Metra fulfilled its duty to provide plaintiff with a reasonably safe place to work, and therefore contradicts the general verdict of Metra's liability under FELA. However, Metra failed to raise this argument in its posttrial motion before the trial court. It is well settled that issues "not raised in the trial court are considered waived on appeal" and will not be considered. (Internal quotation marks omitted.) *Cholipski v. Bovis Lend Lease, Inc.*, 2014 IL App (1st) 132842, ¶ 58. In its posttrial motion, Metra failed to make any argument that the jury's answer to special interrogatory 1 was absolutely irreconcilable to the general verdict. Accordingly, we find this argument has been waived and cannot be raised for the first time on appeal. *Id*.

¶ 36 In Metra's posttrial motion, and here in support of its cross appeal, Metra argues that the jury's affirmative answer to special interrogatory 2 is absolutely irreconcilable with the general verdict. Metra asserts that because the jury was instructed that Metra had a duty to provide plaintiff with a reasonably safe workplace and that the jury made such a special finding in answering special interrogatory 2, Metra cannot be liable under FELA and this special finding is irreconcilable with the general verdict.

¶ 37 Special interrogatory 2 asked: "at the time of the occurrence did Defendant Metra use

ordinary care to provide Plaintiff Clarence Hatchett with a reasonably safe place in which to do his work?" The trial court found special interrogatory 2 problematic because it only disposed of whether Metra provided Hatchett a "reasonably safe workplace" at the time of the occurrence, *i.e.* at the time the shoulder was injured and therefore, interrogatory 2 did not account for all possible hypothesis of liability under FELA. We agree.

¶ 38 In *Goranowski v. Northeast Illinois Regional Commuter R.R. Corp.*, 2013 IL App (1st) 121050, this court rejected Metra's argument that special interrogatory 2 is dispositive over multiple claims of breach under FELA, because it does not explain how this general duty to provide an employee a reasonably safe place to work encompasses the multiple claims of negligence. In *Goranowski*, Metra's proposed special interrogatory asked: "On May 10, 2005, did Metra railroad use ordinary care to provide plaintiff with a reasonably safe place in which to do his work?" *Id.* ¶ 3. The *Goranowski* court found this special interrogatory presented only a single duty under FELA for Metra to provide its employee with "a reasonably safe place in which to do his work" and because the jury instructions "do not explain that the general duty encompasses Metra's three claims of breach," it is possible that the jury could answer "yes" to the interrogatory and still find Metra liable. *Id.* ¶ 8. Therefore, any "answer to the special interrogatory in favor of Metra would not test the veracity of a general verdict in favor of the plaintiff" (*Id.* ¶ 8) and "[a]n affirmative answer from the jury would only spur more debate about the jury's interpretation of the special interrogatory and the meaning of the jury's answer." *Id.* ¶ 9.

¶ 39 In the instant case, special interrogatory 2 asked the jury "[a]t the time of the occurrence, did Defendant Metra use ordinary care to provide the Plaintiff Clarence Hatchett with a reasonably safe place in which to do his work?" Similar to *Goranowski*, we also find that there is

a reasonable hypothesis from which the jury could have found in the affirmative on special interrogatory 2, yet still find Metra liable under FELA. Special interrogatory 2 only addressed Metra's duty to provide a reasonably safe place to work *at the time of the occurrence*. Hatchett alleged several claims of negligence under FELA and the jury instruction on those claims did not require a finding of breach only at the exact time of the shoulder injury. The jury was instructed that Metra is liable under FELA if an employee in the course of his employment was injured due to a defect in Metra's equipment or Metra's negligence. Plaintiff alleged three claims of negligence against Metra, which included negligence in failing to inspect and warn plaintiff that the engineer's seat was not working properly. Metra engineer Stinson testified that he had similar troubles with the engineer's seat and its lever and had reported this problem to Metra, two times in the week prior to Hatchett's injury. Hatchett testified that he could not get the seat to move backward using the lever. Mechanical foreman Opala testified that the seat's lever would not work and, in order to move the seat, he had to use other means including lifting the seat and manually placing it in a different section of the wall channel. The jury heard evidence that there was a problem with the lever before and after Hatchett's injury and the jury could have reasonably found that Metra failed to inspect, maintain, or warn Hatchett of the problem with the seat's lever in the days *prior* to his use of the locomotive on January 7, 2009 and his injury. This reasonable hypothesis does not conflict with the special finding that Metra provided plaintiff with a reasonably safe place to work "at the time of the occurrence."

¶ 40 Accordingly, because a reasonable hypothesis exists under which the jury made the special finding and still found Metra liable under FELA, the jury's special findings are not clearly and absolutely irreconcilable with the general verdict. *Simmons*, 198 Ill. 2d at 555-56.

¶ 41 CONCLUSION

¶ 42 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 43 Affirmed.