

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

Appeal No. ED 87350

James T. Daoukas,

Respondent,

vs.

William Lacey,

Appellant.

**RESPONDENT'S
OPENING BRIEF**

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POINT RELIED ON

The trial court erred in granting summary judgment for the City of St. Louis because the City was vicariously liable for Lacey's negligence in that Lacey was employed by the City and engaged in his negligent conduct within the course and scope of his employment by the City.

Helm v. Wismar, 820 S.W.2d 495 (Mo. banc 1991)

In re Carey, 89 S.W.3d 477 (Mo. banc 2002)

James v. Paul, 49 S.W.3d 678 (Mo. banc 2001)

State ex rel. McHaffie v. Bunch, 891 S.W.2d 822 (Mo. banc 1995)

SUPPLEMENTAL STATEMENT OF FACTS

Appellant William Lacey asserts facts and procedural history contrary to the record. Lacey also fails to state facts respondent James Daoukas believes are material to the issues on appeal. Therefore, pursuant to Rule 84.04(f), Daoukas submits his supplemental statement of facts.

A. This was not filed as a “premises liability” case.

Lacey asserts that Daoukas’ “original petition against the City contained a single count entitled ‘premises liability.’” *Lacey Brief* at 10, citing LF 26-29. The original petition did not assert a premises liability claim and did not contain a count entitled “premises liability.” [LF 26-29].

The original petition was framed solely in terms of ordinary negligence, not premises liability:

9. The electrical explosion caused Daoukas to suffer serious and permanent injuries, all due as a direct and proximate result of the carelessness and negligence of the City as follows:

a. William Lacey negligently and carelessly bypassed a safety locking mechanism allowing Daoukas access to Feeder 3C while the feeder immediately adjacent to Feeder 3C, identified as Feeder 3D, was active with high voltage current;...

[LF 27-28].

The importance of this procedural fact is straightforward. While the City of St. Louis and, subsequently, Lacey have attempted throughout to characterize this as a “premises liability” case, it is not. As discussed in the argument, Daoukas never claimed the City was liable because of the dangerous condition of its premises. Rather, Daoukas claimed the City was liable because Lacey, its employee, acting within the course and scope of his employment, engaged in conduct — the dismantling of a safety interlock system — that unreasonably placed Daoukas at risk of harm. Daoukas also claimed that Lacey was individually liable for his negligent conduct.¹

B. Daoukas did not accept Lacey’s dismantling of the safety interlock system without complaining because Daoukas was not aware Lacey had bypassed the system.

Lacey states that he disabled the safety interlock system in the presence of Daoukas and Pat O’Brien, Daoukas’ coworker, and that neither man objected to Lacey defeating the interlock. *See, e.g., Lacy Brief* at 7-8; *see also id.* at 24-25. This statement of the evidence is materially misleading, because it suggests that

¹ Notwithstanding that Daoukas did not plead a premises liability claim in either the original or first amended petitions, the trial court was convinced by the City that Daoukas was attempting unsuccessfully to plead premises liability. [LF 87-88]. Daoukas dealt with the trial court’s erroneous acceptance of the City’s contentions by filing a second amended petition that alleged separate “premises liability” and “negligence” counts in the hope the trial court would then understand that Daoukas was pleading a negligence claim that did not rely on premises liability. [See LF 89-100]. The case was ultimately submitted to the jury on common-law negligence. [LF 476; *see also* Tr. 517-18, 522].

Daoukas and O'Brien knew Lacey was bypassing the safety interlock and did not object. In fact, the evidence at trial established that while both Daoukas and O'Brien were in the same room as Lacey when he disabled the safety interlock system, neither man was aware he was disabling the safety interlock:

Q: After having re-energized feeder 3D, the lights come on. Then what did Mr. Lacey do?

A: He went over to 3C. Like I said, never did touch 3C the whole time until right now. Tried to get into 3C. Could not get into 3C. You need a key. The key is over in 3D. He goes back over. He turns 3D back off. Completely shuts everything down.

Q: When he did that, what happened to the lights?

A: The lights, everything went out. Everything is dead again. He pulled the key out of 3D. Went over to 3C. Put the key in. Opened the door. He didn't have to do anything but open the door, because nobody had ever touched the handle. He didn't touch the handle. He just opened the door. It was already in the off position. He really — I didn't know what he was doing. He was having trouble getting the key out of 3C. He's having trouble getting that key back out. He's reaching around the back, doing this. I didn't know what he was doing. He knows what to do when he gets the key out. He goes over to 3D. Puts the key in. He's got 3C open now. It's open about 10 inches. He goes over to 3D. Puts the key in and turns 3D back on again.

Q: At that point what happened to the lights?

A: The lights come back on. When he turned it back on, the lights are back on.

Q: How many minutes past do you think Mr. Lacey was fiddling with the door on 3C when the lights were off?

A: It wasn't that long. It wasn't really that long. A minute I guess. It was pretty quick.

Q: What were you and Pat [O'Brien] doing?

A: We were standing right behind him. We were standing right behind him watching him, just watching him. We didn't know what he was doing. We didn't have any idea what he was doing. We were just standing there.

[Tr. 234-36 (testimony of Daoukas); *see also* Tr. 286 (same)]. Similarly, O'Brien testified he did not know what Lacey was doing with the cabinet lock. O'Brien did not pay particular attention to Lacey's activities because O'Brien was preparing tools for the job while Lacey opened the cabinet. [Tr. 151].

Since Daoukas did not know what Lacey was doing, he had no reason to object to Lacey's conduct. Moreover, there were no objective signs that Lacey was doing something wrong. Lacey did not use any tools to get the key out of the interlock; he was only using his hands. [Tr. 286-87]. Furthermore, the doors to feeder 3C and 3D were never both open at the same time. The safety interlock's function is to prevent both doors from being open at the same time. [Tr. 85-86, 145, 222-23].

One can reasonably infer that if both doors had been open at the same time, Daoukas might have had reason to suspect that Lacey was tampering with

the interlock. Because the only thing Daoukas saw was Lacey using his hands to “jiggle” the key out of the only open feeder cabinet, he had no objective reason to believe Lacey had bypassed the safety interlock.

In any case, the jury assigned Daoukas a substantial portion of the fault — 49% — for his injuries. Thus, to the extent Lacey is contending on appeal that Daoukas was at fault for failing to object to Lacey’s bypassing of the safety interlock and continuing to work on the equipment, the jury has already determined the degree of Daoukas’ fault relative to that of Lacey. [LF 477-78].

C. Lacey’s bypass of the safety interlock was negligent and proximately caused Daoukas’ injuries.

Lacey in his brief fails to mention the evidence at trial establishing that his bypassing of the safety interlock was both negligent and the direct and proximate cause of Daoukas’ very extensive injuries.²

² These injuries were not only extensive — they were horrific. Daoukas and O’Brien staggered out of the room and onto the tarmac screaming and on fire. [Tr. 196]. The paramedic who first arrived on the scene described Daoukas as having second and third degree burns from his waist up to his face, with the heat blisters basically burned away and the skin charred. [Tr. 187-89; Exhibit 25].

Daoukas was treated at the burn unit of St. John’s Mercy Hospital. Dr. Peter Rumbolo, a plastic surgeon who devotes 100 percent of his time to burn care, treated him. [*Rumbolo Depo.* at 6-7]. Dr. Rumbolo testified that Daoukas was burned with second and third-degree burns on close to 30 percent of his total body surfaces, including his face, neck, anterior trunk and abdomen, both upper extremities, and upper back. “The third-degree burn is where the entire outer layer, the epidermis, the second layer of the dermis, is completely destroyed,

The City's long-time electrical supervisor at the airport, Michael Tebeau, was critical of Lacey's conduct:

Q: I want you to assume some things for me now. I'm going to just represent to you that Mr. Lacey testified under oath that he did override and defeat the interlock. Assuming that is the case, would you have some criticism of Mr. Lacey's actions?

A: I would not condone such an action.

Q: And why is that?

A: It's just not a safe practice.

Q: Why is it unsafe? What hazard does it create?

A: It would give somebody a false sense of — that power is not in that cubicle.

* * *

exposing the, the lower levels of the skin and fat — not skin but just the fat and muscles sometimes.... [The Skin is] burned completely." Daoukas had third-degree burns on the upper trunk, abdomen, and left upper extremity. [*Id.* at 12-14]. Some of the second-degree burns progressed and became third-degree. Ultimately Daoukas' third-degree burns covered about 25 percent of his body. [*Id.* at 25-26]. Dr. Rumbolo removed the burned skin and used skin from other parts of Daoukas' body for skin grafts. [*Id.* at 17]. Daoukas spent 25 days in the burn unit before being released to the rehabilitation unit. [*Id.* at 28-29].

Once Daoukas was released from the hospital, he began to suffer depression as he realized his physical limitations. [Tr. 313]. He was diagnosed with post-traumatic stress disorder. [Tr. 387, 396]. His body continues to be scared and damaged. [Exhibits 27, 28, 29, 30; Tr. 272-73]. He cannot lift anything over 20 pounds. [Tr. 275]. He cannot stand to be in a hot environment and needs to be especially careful in the sun. [*Dr. Rumbolo Depo.* at 32-34].

Q: ... Based on your investigation, is it your opinion had that interlock not been overridden, that this incident would not have occurred?

A: Basically, yes. As long as the transformer was energized without overriding the interlock, these people could not have been working in that cubicle.

Q: So this would not have occurred?

A: Correct.

[Tr. 182-83; *see also Tebeau Deposition Excerpts* at 1].

Daoukas' expert witness, Michael Wald, explained the dangers inherent in bypassing the interlock:

Q: William Lacey actually went in disabled that or unscrewed that interlock system?

A: He took it apart so that you could move the handle even though you're not supposed to be able to.

Q: Based on your experience, Mr. Wald, would a reasonable electrician in Mr. Lacey's position have done such a thing?

A: No. You should never —

Q: Why?

A: That's why you have safety interlocks to prevent people from getting hurt. It's to prevent accidents from happening. The only time you would ever take a safety device like that apart is when you know all the power is off, and you're doing some kind of mass maintenance on all the cabinets. You want to open them all up to vacuum them or clean them or something like that. You

would never defeat a safety interlock when there's power around. It's a dangerous practice. That's why it's called a safety device.

[Tr. 86-87].

The expert witness concluded:

The cause of this accident is the bypassing of that safety mechanism. If that safety mechanism hadn't been bypassed, this cabinet could not have been energized. This dangerous situation could not have occurred. Nobody would have gotten hurt.

[Tr. 91].

Lacey's testimony establishes the following facts demonstrating his negligence:

Lacey made the decision to bypass the safety interlock on his own. He was not asked to disable the interlock by Daoukas or O'Brien. [Tr. 491; *Lacey Deposition Excerpts* at 4].

Lacey acknowledges that his bypassing of the safety interlock was a cause of Daoukas's injuries:

Q: In your mind, is the defeating of the interlock somehow — did that somehow contribute to the accident in your mind?

A: In my mind, yes.

Q: How is that?

A: Well, it never would have gotten — this power, this switch could never — would have been left on. It would have been turned off.

[*Lacey Deposition Excerpts* at 2].

Lacey would not have bypassed the safety interlock if he knew that Daoukas and O'Brien did not understand what he was doing. "If I had known that they didn't know what I was doing, I wouldn't have did it." [Tr. 491].

Finally, one can infer that Lacey knew that his bypassing of the safety interlock was bad conduct and the cause of the electrical explosion because he hid the fact that he had done so. Lacey was required to give a statement about what had happened. Lacey prepared a two-page, handwritten statement on the day of the incident, about seven hours after it happened. [Tr. 495-96; Exhibit 5]. Lacey testified that he tried to put down in the statement as much detail as he could remember. [Tr. 497]. Lacey did not disclose in his statement, however, that he had disabled the safety interlock — possibly the most important "detail" he could have given about the incident:

Q: Mr. Lacey, do you mention in the statement that you defeated the interlock?

A: No.

[Tr. 497].

ARGUMENT

I. The trial court did not err in denying Lacey's motion for judgment notwithstanding the verdict because Lacey was negligent in disabling the safety interlock on the electrical cabinet worked on by Daoukas. (*Response to Point Relied On I.*)

The standard of review for denial of a JNOV is essentially the same as for review of denial of a motion for directed verdict:

In determining whether the evidence was sufficient to support the jury's verdict, the evidence is viewed in the light most favorable to the result reached by the jury, giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences that conflict with that verdict. This Court will reverse the jury's verdict for insufficient evidence only where there is a complete absence of probative fact to support the jury's conclusion.

Dhyne v. State Farm Fire & Cas. Co., Appeal No. SC87032, 2006 Mo. Lexis 52 (April 11, 2006), citing *Giddens v. Kansas City Southern Railway Co.*, 29 S.W.3d 813, 818 (Mo. banc 2000).

Lacey's first point relied on is based entirely on his claim to a defense under the independent contractor exception to premises liability. The point is without merit because Daoukas' claim against Lacey was not based on premises liability. Liability was based on general negligence. Lacey confuses conduct on the premises with the condition of the premises. Neither premises liability nor

the independent contractor exception to premises liability are applicable to Daoukas' claim.

The first point relied on should therefore be denied.

Under Missouri law, premises liability is imposed upon a possessor of land under certain circumstances:

When the plaintiff is an invitee, a possessor of land is subject to liability for injuries caused by a condition on the land **only** if the possessor:

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

Harris v. Niehaus, 857 S.W.2d 222, 225-26 (Mo. banc 1993), quoting and adopting *Restatement (Second) of Torts* § 343 (1965); *Gillespie v. St. Joseph Light & Power Co.*, 937 S.W.2d 373, 375 (Mo. App. 1996). This cause of action is commonly referred to as an action for premises liability. See, e.g., *Burns v. Frontier II Props. Ltd. Partnership*, 106 S.W.3d 1, 3 (Mo. App. 2003) (stating elements of cause of action for premises liability).

The key thing to note for purposes of this appeal is that this doctrine only applies to cases where “a possessor of land is subject to liability for injuries caused *by a condition on the land...*” *Harris*, 857 S.W.2d at 225 (emphasis added). It is not a general rule governing liability of a possessor of land for all injuries resulting from his conduct whether or not caused by a condition on the land. One must not confuse, as Lacey does, *conduct on* the premises with the *condition of* the premises. See discussion *infra* at 19–22.

The “independent contractors exception” is a doctrine providing an owner of land a defense against premises liability if the owner has engaged an independent contractor to perform work on the land and has surrendered possession and control of the land to the independent contractor.

Missouri long ago adopted an exception to the general rule of landowner liability, holding that landowners are not liable for injuries caused by an independent contractor in possession and control of the premises. The rationale for this exception is that because the landowner has no right of control over the manner in which the work is done by an independent contractor, its duty of care shifts to the independent contractor, and the latter becomes the party required to bear the responsibility for any injuries.

Gillespie, 937 S.W.2d at 376.

The independent contractor exception has its own exception. The owner of land does not avoid premises liability under the independent contractor

exception if the owner retains possession of the land by exercising control over both the job site and the activities of the independent contractor. *Matteuzzi v. Columbus Partnership, L.P.*, 866 S.W.2d 128, 130 (Mo. banc 1993). The owner's degree of control over the independent contractor's activities must reach beyond merely securing compliance with the contract, and must include control over the physical activities of the contractor's employees or the details of the manner in which the work is done. *Halmick v. SBC Corporate Services, Inc.*, 832 S.W.2d 925, 927, 929 (Mo. App. 1992).

Lacey in his brief discusses the independent contractor defense to premises liability and the exception to the defense reimposing liability upon an owner who controls the details of the manner in which the independent contractor's employees do their work. *See Lacey Brief* at 20-21.

All of Lacey's legal discussions, however, are entirely irrelevant to the appeal because this is not a premises liability case. It was not tried as a premises liability case. It was not submitted to the jury as a premises liability case. This was a general negligence case. It was tried as a general negligence case. It was submitted to the jury as a general negligence case, as shown by the verdict directing jury instruction, Instruction No. 5:

In your verdict you must assess a percentage of fault to Defendant, whether or not Plaintiff was partly at fault, if you believe:

First, Defendant disabled the safety locking mechanism between electrical cabinet 3D and electrical cabinet 3C in Transformer Room #5, and

Second, Defendant was thereby negligent, and

Third, such negligence directly caused or contributed to cause damage to Plaintiff.

The term “negligent” or “negligence” as used in this instruction means the failure to use that degree of care that an ordinarily carefully electrician would use under the same or similar circumstances.

[LF 476].

Not every injury that takes place on an owner’s property potentially gives rise to a premises liability case. To even have the potential of giving rise to a premises liability claim, the injury must have resulted from a condition on the land. Again, the distinction is between conduct on the premises and the condition of the premises. Where the injury results from some negligence of the owner *other than* a failure to discover and protect against a dangerous condition on the land, the claim potentially available to the injured party is for negligence, not premises liability. *Williams v. Barnes & Noble, Inc.*, 174 S.W.3d 556 (Mo. App. 2005); *Cook v. Smith*, 33 S.W.3d 548 (Mo. App. 2000).

In *Williams*, plaintiff was entering a book store when she was pushed down by a person fleeing the store, injuring her head. She filed what she styled a premises liability claim in which the “dangerous condition” was the store’s

employee chasing an alleged shoplifter through a crowd of people. *Williams*, 174 S.W.3d at 559. The appellate court rejected this contention:

In her response to the motion for summary judgment, plaintiff claimed that the “conduct of the employee in chasing the shoplifter” created the dangerous condition. She provides no authority for the notion that the employee’s negligent actions in pursuing the shoplifter may be categorized as a “dangerous condition” for purposes of a premises liability claim. Generally, the dangerous condition is some sort of *artificial condition* on the property itself, not a negligent or dangerous act of one of the inhabitants of such property. Plaintiff provides no authority to the contrary. We find plaintiff’s argument unpersuasive.

Id. at 560 (citation omitted).

Although the *Williams* court noted that the petition alleged facts which could be “regarded as an attempt to plead a regular active negligence case rather than a claim in premises liability,” because *Williams* “insist[ed] her cause of action is only for premises liability for a dangerous condition,” the court affirmed the grant of summary judgment for defendant. *Id.* at 560-61.

In *Cook*, plaintiff was one of a group of teenagers, members of a high school volleyball team, attending a party and bonfire at the home of one of the team members. Defendant’s son Justin left an ATV running while he put wood on the bonfire. One guest began driving the ATV. Plaintiff Cook rode as a passenger. Although Justin waved his hands and yelled to the girls to return the

ATV, they ignored him. *Cook*, 33 S.W.3d at 550-51. Justin knew the ATV had a defective brake. Because of the defective brake and the driver's lack of experience, the girls went over an embankment and Cook was badly injured. *Id.* at 551.

The plaintiff in *Cook* sued on two theories: premises liability and negligent supervision. The trial court granted a directed verdict at trial in defendant's favor on both counts. *Id.* at 551. The appellate court affirmed the directed verdict on the premises liability claim and reversed on the negligent supervision claim. *Id.* at 555. With regard to the premises liability claim, the court held:

The pivotal issue in this point is whether an ATV is an artificial condition of land. Cook argues that the only requirement for a condition to be artificial is that it be on ("thereon") the land. She relies heavily on *Wieggers by Evans v. Fitzpatrick*, 766 S.W.2d 126, 129 (Mo. App. 1989), which held that a metal ladder brought onto land was an artificial condition of land for purposes of the attractive nuisance doctrine. Because the attractive nuisance doctrine was not pleaded and because there is little similarity between a ladder and a motorized vehicle, this court finds *Weiggers [sic]* inapplicable.

Conditions of land generally are in the nature of "hidden dangers, traps, snares, pitfalls, and the like." A review of premises liability cases in Missouri indicates nothing akin to a motorized vehicle as an artificial condition. As such, the court declines to extend the meaning of artificial condition of land to include an ATV, even a defective one.

Id. at 552-53 (citations omitted).

This case is similar to *Williams* and *Cook*. Here, the danger was not an artificial condition of the land, like a pitfall or a snare. The danger was Lacey's conduct in negligently disabling the safety interlock while Daoukas was performing his work. Lacey's conduct was similar to, albeit more obviously dangerous than, the bookstore employee's conduct chasing an alleged shoplifter through a crowded store. It was Lacey's conduct, not the condition of the premises, that caused harm to Daoukas. Thus this case was properly submitted not under premises liability but common-law negligence. *Accord Like v. Glaze*, 126 S.W.3d 783, 785 (Mo. App. 2004) (when dog breaks its chain and leaves yard to bite passerby, basis of liability of owner of property where dog was chained is not premises liability but common-law negligence).

A simple analogy may further clarify the issue.

The night Daoukas was injured, Lacey drove him and O'Brien to the airport electrical substation in his truck. Daoukas rode in Lacey's truck on the airport grounds between the terminal and the substation on two separate occasions that night. [Tr. 223, 231]. If Lacey had negligently driven his truck into an electrical pole on the airport grounds on one of those trips, seriously injuring Daoukas, there would be no doubt Lacey would have been liable for Daoukas' injuries notwithstanding that the collision would have taken place on property owned by the City at a time when an independent contractor was performing

electrical work on the property. That is because the injury would have resulted from Lacey's negligent conduct rather than from a dangerous artificial condition of the property. The same is true here.

If the Court accepted Lacey's implicit contention that the only possible basis for liability against a possessor of land is premises liability — a contention that is directly contradicted by the results in *Williams* and *Cook*, among other cases — this would give possessors of land a “free pass” on a wide variety of torts so long as they have an independent contractor somewhere on their property doing some kind of work. This is clearly not a reasonable result, yet it follows unavoidably from the position taken by Lacey in this litigation.

Because Daoukas made a submissible case for general or common-law negligence, the judgment in his favor should be affirmed. Lacey has never addressed or disputed Daoukas' common-law negligence claim. Lacey's opening brief never addresses submissibility of Daoukas' negligence claim. The submissibility of Daoukas' claim under negligence is not the subject of any point relied on. Because Lacey never raised nor preserved any objection at trial — or on appeal — to the common-law negligence claim Daoukas submitted to the jury through Instruction No. 5, the judgment should be affirmed. *Accord Messina v. Prather*, 42 S.W.3d 753, 762-763 (Mo. App. 2001) (requirement that errors be preserved at trial or otherwise be waived on appeal).

Logan v. Show-Me Power Electric Coop., 122 S.W.3d 670 (Mo. App. 2003), the principal authority upon which Lacey rests his appeal, is therefore wholly inapposite. *Logan* was a premises liability case. While *Logan*, like the present case, involved an electrician harmed when working with high-voltage electricity (the electrician in *Logan* died), the cases have nothing else in common. The present case involves an active act of negligence, the disabling of the interlock safety system. *Logan* involved only a dangerous condition of property, energized high-voltage lines. No one tampered with the high-voltage lines in *Logan* to disable whatever safety systems might have been incorporated in those lines. No one engaged in conduct that directly and proximately led to the decedent's death.

The remaining arguments made by Lacey in his first point relied are equally inapposite, as each assumes that the case was submitted on premises liability, not general negligence.³

For all these reasons, Lacey's first point relied on should be denied and the judgment in favor of Daoukas should be affirmed.

II. The trial court did not err in denying Lacey's motion for judgment notwithstanding the verdict because Lacey was negligent in disabling the safety interlock on the electrical cabinet worked on by Daoukas regardless of the "something extra" exception, a doctrine

³ Lacey argues that it is inconsistent for Lacey to be liable and for the City to not be vicariously liable as his employer. *See Lacey Brief* at 26. Daoukas agrees, and has cross-appealed from the trial court's grant of summary judgment for the City. *See infra* at 31–36.

not relevant to the claim submitted by Daoukas. (*Response to Point Relied On II.*)

Daoukas' claim against Lacey was not a claim against a co-employee. Daoukas was employed by Sachs Electric. Lacey was employed by the City of St. Louis. Because Lacey was not employed by Sachs Electric, Lacey was not within the scope of immunity from liability provided to co-employees by the Workers' Compensation Act. *Accord Sexton v. Jenkins & Assoc., Inc.*, 41 S.W.3d 1, 5 (Mo. App. 2000). Co-employee immunity is simply inapplicable. Because this was not a case involving co-employee immunity under the Workers' Compensation Act, the question of whether the "something extra" doctrine exception to co-worker immunity applies is a meaningless question. It makes no sense to ask whether one can apply an exception to a doctrine that is not involved in the case.

Daoukas agrees that the trial court erred in attempting to analyze this case under the "something extra" doctrine. This error, however, played no part in the judgment entered for Daoukas and thus provides no basis for setting aside the judgment. Lacey's liability in this case is governed by common-law negligence, not the Workers' Compensation Act. The verdict directing instruction did not submit any facts relevant to the "something extra" exception. Daoukas made a submissible case under common-law negligence and Lacey has never asserted nor argued to the contrary.

For this reason, Lacey's second point relied on should be denied and the judgment for Daoukas affirmed.

III. The trial court did not err in overruling Lacey's objection to Instruction No. 5 because Lacey owed a duty to Daoukas not to disable the safety locking mechanism in the electrical cabinet while Daoukas was working on the cabinet. (*Response to Point Relied On III.*)

In his brief, Lacey states:

During the jury instruction conference, *counsel for Lacey objected to Instruction No. 5 on the grounds that Lacey did not owe a duty to Daoukas*. Because the trial court overruled Lacey's objection without explanation, it is unclear whether the trial court ignored the issue of duty or ruled that Lacey owed a duty to Daoukas. Regardless, by submitting Instruction No. 5 over Lacey's objection, the trial court determined Lacey owed a duty to Daoukas.

Lacey Brief at 37 (emphasis added).

Lacey misstates the record. Lacey did not object to the instruction on the ground that Lacey did not owe a duty to Daoukas. Lacey objected on the ground that the instruction did not correctly state the plaintiff's burden under a premises liability theory — a theory that was not the theory submitted by the instruction. The discussion at the instruction conference was as follows:

Court: The Court understands that the plaintiff is submitting as a verdict director a version of 1701 which I've labeled Instruction No. A. Does the defendant object to the Court giving that instruction?

Garside: Yes, Your Honor.

Court: What is the ground of that objection?

Garside: We object that the instruction doesn't — for one thing, *it doesn't correctly state the plaintiff's burden under a premises liability theory that we believe should apply to this case*, because the plaintiff was an employee of an independent contractor. We also believe that, even if this case can be submitted under some analogue to co-employee liability, it doesn't correctly state the elements, or, rather, there's been no evidence to support all the elements that are necessary to make that kind of a case. In particular —

Court: This instruction is submitting — is presuming the fault of the plaintiff will not be submitted.

Garside: I apologize.

Court: You object to it on that basis?

Garside: Yes, absolutely, Your Honor. We believe we've made a submissible case for comparative fault.

Court: The objection will be sustained. Instruction No. A will be refused. The Court understands as an alternative the Court has labeled as Instruction No. 5, which assumes that the fault of the plaintiff will be submitted. Do you object to this instruction?

Garside: Not on the ground it presumes the fault of the plaintiff will be submitted. *On the grounds I earlier stated.*

Court: The objection will be overruled....

[Tr. 518-19 (emphasis added)].

Thus, Lacey never objected to Instruction No. 5 on the ground that it erroneously presumed he owed a duty to Daoukas. He objected because the instruction did not state the elements of a premises liability theory that Lacey believed should control the case. It is the plaintiff, however, not the defendant, who gets to decide under what theory he wants to submit his case. “A party is entitled to choose the theory of recovery on which to submit his case to the jury. And a party is entitled to a verdict-directing instruction predicated on his theory of the case, if that theory is supported by the evidence.” *Adams v. Badgett*, 114 S.W.3d 432, 436 (Mo. App. 2003) (citations omitted).

Lacey is not entitled to now argue a different objection to Instruction No. 5 than the objection he presented to the trial court. Failure to make a specific objection to an instruction waives any claim of error as to the unmade objection. *Pace Properties, Inc. v. American Manufacturers Mut. Ins. Co.*, 918 S.W.2d 883, 887 (Mo. App. 1996), applying Rule 70.03 of the Missouri Rules of Civil Procedure. Lacey did not specifically object to absence of duty at trial, and therefore cannot assert that objection to the instruction on appeal. *Id.*

In any case, there was sufficient evidence at trial to establish that Lacey had a duty to Daoukas. The key consideration in deciding whether a common law duty of care exists is whether it is foreseeable that harm may result from the

conduct absent such care. *Hoover's Dairy, Inc. v. Mid-American Dairymen, Inc.*, 700 S.W.2d 426 (Mo. banc 1985); *Lopez v. Three Rivers Elec. Corp.*, 26 S.W.3d 151 (Mo. banc 2000).

The duty to exercise care may be a duty imposed by common law under the circumstances of a given case.... It is generally stated that foreseeability that some injury might result from the act complained of normally serves as the paramount factor in determining the existence of a duty. When deciding if some injury was reasonably foreseeable, whether expressly or implicitly, courts examine what the actor knew or should have known. The duty of a person to use care and his liability for negligence depend upon the tendency of his acts under the circumstances as they are known or should be known to him. The foundation of liability for negligence is knowledge — or what is deemed in law to be the same thing: opportunity by the exercise of reasonable diligence to acquire knowledge — of the peril which subsequently results in injury.

Hoover's Dairy, 700 S.W.2d at 431-32 (citations and internal quotations omitted).

[W]hether a duty exists in a given situation depends upon whether a risk was foreseeable. In the absence of a particular relationship recognized by law to create a duty, the concept of foreseeability is paramount in determining whether a duty exists.... Foreseeability for purposes of establishing whether a defendant's conduct created a duty to a plaintiff depends on whether the defendant should have foreseen a risk in a given set of circumstances....

* * *

For purposes of determining whether a duty exists, this Court has defined foreseeability as the presence of some

probability of likelihood of harm sufficiently serious that ordinary persons would take precautions to avoid it. The existence of a mere possibility is insufficient. The test is not the balance of probabilities, but of the existence of some probability of sufficient moment to induce the reasonable mind to take the precautions which would avoid it.

Lopez, 26 S.W.3d at 156 (citations and quotations omitted); *see also Madden v. C&K Barbeque Carryout, Inc.*, 758 S.W.2d 59, 62 (Mo. banc 1988) (establishing a duty, not previously recognized in Missouri law, on the part of business owners to protect business invitees against the reasonably foreseeable criminal acts of unknown third persons even absent a “special relationship” between the plaintiff and the defendant).

Here, sufficient evidence established that it was foreseeable that Lacey’s conduct in disabling the safety interlock presented a probability of likelihood of serious harm to Daoukas. Lacey admitted that he would not have disabled the safety interlock if he had known that Daoukas did not know what Lacey was doing. [Tr. 491]. Lacey also admitted that his disabling of the interlock was the proximate cause of Daoukas’ injuries. [*Lacey Deposition Excerpts* at 2].

The City’s airport electrical supervisor, Lacey’s boss’s boss, admitted he could not condone Lacey’s conduct in bypassing the safety interlock because it was an unsafe practice that would give someone working on the cabinet a false sense that it was not energized. Obviously, giving someone a false sense of safety

can place that person in danger. Tebeau testified that if Lacey had not bypassed the safety interlock, Daoukas would have not been injured. [Tr. 182-83; *see also Tebeau Deposition Excerpts* at 1].

The expert witness, Michael Wald, also testified that Lacey had engaged in a dangerous practice and that nobody would have been hurt but for Lacey's negligence in bypassing the safety interlock. [Tr. 86-87, 91].

Finally, it is simply common sense that disabling a safety device on high-voltage equipment presents such a risk of serious harm to others that no ordinarily careful person would do such a thing. Here, what was readily foreseeable in fact occurred. Lacey had a duty, he breached it, and that breach directly and proximately caused Daoukas' serious injuries.

Thus, because Lacey failed to preserve at trial the purported error in Instruction No. 5 that he now asserts on appeal, and because the record sufficiently established that Lacey owed a duty to Daoukas that he breached, Lacey's third point relied on should be denied and the judgment for Daoukas affirmed.

CROSS-APPEAL

IV. The trial court erred in granting summary judgment for the City of St. Louis because the City was vicariously liable for Lacey's negligence in that Lacey was employed by the City and engaged in his negligent conduct within the course and scope of his employment by the City.

The trial court granted the City of St. Louis summary judgment on all claims alleged against it by Daoukas. [LF 416-23]. The decision focused solely on whether the City was liable under a theory of premises liability, even though the second amended petition included both premises liability and negligence claims. [*Id.*; compare with LF 89-100]. The decision, entered by Judge Julian Bush, accepted the prior ruling in the case by Judge John Riley “that in order for Mr. Daoukas to recover against the City, he must show that the City controlled his physical activities or the details of the manner in which his work was done.” [LF 417].

The trial court erred in entering summary judgment for the City on all counts because its decision ignored Daoukas' claim brought under common-law negligence and focused solely on the claim for premises liability — a claim that was added for the first time in the second amended petition in response to Judge Riley's insistence, in response to the City's arguments, that the only claim available against a property owner was a claim for premises liability. The error of this

position is discussed at length in Daoukas’s response to Lacey’s first point relied on *supra*.

Count II of the second amended petition, a count captioned “negligence,” states in relevant part:

19. The Count does not arise out of any claim that the City exercised control over the premises, but instead arises out of the negligent acts and omissions of the City’s employee, William Lacey.

20. That the aforesaid electric related explosion and Plaintiff’s consequent injuries were caused or contributed to be caused by the negligence and carelessness of William Lacey acting within the scope and course of his employment with defendant the City of St. Louis in the following respects to-wit: ...

f. William Lacey negligently bypassed a safety locking mechanism which allowed a source of high voltage current to pass from an electrical feeder to the adjacent electrical feeder where Plaintiff was working ...

[LF 97-98].

The jury found Lacey liable for his negligence as described above, the trial court entered judgment for Daoukas against Lacey on this claim, and, for the reasons stated previously in this brief, that judgment should be affirmed on appeal. The only question in this cross-appeal, then, is whether the City should be held vicariously liable for the negligence of its employee. It should.

There is no dispute that Lacey was employed by the City and that he bypassed the safety interlock system within the course and scope of his employment by the City. In its answer to the second amended petition, the City made the following admissions:

3. The City admits it owns and operates Lambert St. Louis International Airport....

4. The City admits defendant William Lacey is an individual, and resides in St. Louis County, Missouri. The City further admits he was employed by the City as an electrician at all times mentioned in plaintiff's Second Amended Petition....

12. The City admits its employee William Lacey controlled the fuses removed from breakers in the East Terminal Substation, which fuses were removed for the safety of plaintiff and his coworker. The City further admits its employee William Lacey bypassed an interlock mechanism for the switches inside Transformer Room #5....

[LF 146, 147].

Once vicarious liability for negligence is admitted under *respondeat superior*, the person to whom negligence is imputed becomes strictly liable to the third party for damages attributable to the conduct of the person from whom negligence is imputed. The liability of the employer is fixed by the amount of liability of the employee.

State ex rel. McHaffie v. Bunch, 891 S.W.2d 822, 826 (Mo. banc 1995).

Thus, the Court should reverse the summary judgment entered in favor of the City based on (1) the City's admission that Lacey was employed by the City and performing his work for the City when he defeated the safety lock, and (2) Lacey's negligence, as established at trial and as should be affirmed on appeal.

The final question, then, is whether the Court should enter judgment for Daoukas against the City for \$2,040,000 pursuant to Rule 84.14 or, alternatively, remand the case for further proceedings. In *Helm v. Wismar*, 820 S.W.2d 495 (Mo. banc 1991), a case where vicarious liability was disputed, the Supreme Court reversed the judgment for employer and remanded for trial on the issue of whether employer was liable. The Court added that, on remand, the jury would need to assess damages against employer, using the damages awarded against employee as a cap, because employer did not have an opportunity to defend in the first case and thus was not collaterally estopped by the amount of damages determined in that trial. *Helm*, 820 S.W.2d at 498-99.

Daoukas suggests it is appropriate to enter judgment for him and against the City, notwithstanding the decision in *Helm*, so as to bring this action to a final conclusion. That is because the City was in privity with Lacey in this case and thus can be held collaterally estopped even though not a party to the verdict. One of the elements in applying collateral estoppel is "whether the party against

whom collateral estoppel is asserted was a party *or in privity with* a party to the prior adjudication...” *In re Carey*, 89 S.W.3d 477, 498 (Mo. banc 2002) (emphasis added). “Our courts have stated that privity exists where the party sought to be precluded has interests that are so closely aligned to the party in the earlier litigation that the non-party can be fairly said to have had its day in court.” *James v. Paul*, 49 S.W.3d 678, 683 (Mo. banc 2001).

Here, the interests of Lacey and the City were identical. Indeed, as a practical matter, the City completely ran and controlled Lacey’s conduct of the trial. Lacey was brought into the case late — “the City’s counsel voluntarily entered an appearance on behalf of Lacey,” *Lacey’s Brief* at 11 n.2 — and was represented by the same insurance defense lawyers who represented the City. These lawyers continued to represent Lacey, and continued to refer to themselves as the lawyers for the “defendants,” even after the City obtained summary judgment and Lacey was the sole defendant. [See LF 431, 442, 446, 474]. Even on Lacey’s notice of appeal, the City’s lawyers signed as “Attorneys for Defendants.” [LF 494].

Consequently, because of the privity between the City and Lacey, and because of the expansion of the doctrine of collateral estoppel in our Supreme Court’s decisions in the years since *Helm* was decided, the Court should enter judgment for Daoukas and against the City of St. Louis for \$2,040,000.

CONCLUSION

The judgment for Daoukas against Lacey for \$2,040,000 should be affirmed. The summary judgment for the City of St. Louis should be reversed, and judgment should be entered for Daoukas against the City for \$2,040,000.

Respectfully submitted,

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