FOURTH DIVISION
May 6, 2004

No. 1-03-0501

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MONIKA SCHNUR, as Special Adm'r of the Estate of ADOLF SCHNUR, Plaintiff-Appellee, v. BUCKINGHAM FOUNTAIN HOTEL, LP, an Illinois Limited Partnership, d/b/a FAIRMONT HOTEL COMPANY-CHICAGO, Defendant-Appellant.	Appeal from the Circuit Court of Cook County. No. 99 L 09825
BUCKINGHAM FOUNTAIN HOTEL, LP, an Illinois Limited Partnership, d/b/a FAIRMONT HOTEL COMPANY-CHICAGO, Third-Party Plaintiff-Appellant, v. MAREN ELECTRIC COMPANY, INC., Third-Party Defendant-Appellee.	Honorable Edward R. Burr, Judge Presiding.

ORDER

The plaintiff, Monika Schnur, as special administrator of the estate of her husband Adolf Schnur, brought this wrongful death action seeking to recover damages incurred when her husband was fatally injured while working at the defendant Fairmont Hotel (Fairmont). Prior to

trial, the Fairmont filed an affirmative defense asserting that the decedent was a "borrowed" employee from Maron Electric Company[1] and, accordingly, that the plaintiff's cause of action was barred by the Worker's Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 1998)). Specifically, the Fairmont alleged that under section 5(a) of the Act (820 ILCS 305/5(a) (West 1998)), the plaintiff's only remedy was under the Act itself. The Fairmont also filed a third-party action against Maron. The plaintiff moved to strike the affirmative defense and the hotel sought summary judgment. Both motions were denied.

Thereafter, the parties agreed and stipulated that the trial court should "find and determine, without participation by the jury, the employment status of the decedent at the time of his demise," based upon the depositions and exhibits attached to the respective motions. The court concluded that the decedent was not a "borrowed employee" and granted the plaintiff's motion to strike the affirmative defense. The case then proceeded to a jury trial, after which the jury returned a verdict in favor of the plaintiff against the Fairmont and favor of the third-party defendant Maron. Accordingly, the trial court awarded damages of $4,428,672, reduced 20% for the decedent's comparative negligence, resulting in a net award of $3,542,937.60. The court then entered judgment on the verdict and denied the Fairmont's posttrial motion. Although the Fairmont has appealed the trial court's decision in favor of the plaintiff and Maron, only the plaintiff has filed a response. For the following reasons, we affirm.

The plaintiff's one-count complaint, alleged that the decedent, an electrician employed by

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[1] Defendant's notice of appeal and the record on appeal indicate the spelling of this defendant as "Maren," while both parties' briefs on appeal refer to "Maron." For consistency purposes, we will refer to this defendant as "Maron Electric Company" or "Maron."

Maron, died on July 8, 1999 after he fell though a false ceiling above the hotel's ballroom to the ballroom floor below. Plaintiff alleged that the Fairmont had negligently maintained its property and improperly directed the decedent to perform construction operations in an unsafe area without providing protective equipment for him. The Fairmont's answer denied all allegations of negligence and raised two affirmative defenses: first, that the decedent was comparatively negligent, and second, that the decedent, while an employee of Maron, was a "borrowed" employee pursuant to section 5(a) of the Act.

The Fairmont then filed a third-party complaint against Maron, claiming that the decedent was a Maron employee and that Maron was negligent in failing to properly supervise and train its employee and in failing to provide him with the proper equipment. In its third-party answer, Maron admitted that the decedent was its employee, but asserted in an affirmative defense that because the decedent was performing his job at the time of his death, Maron could not be held liable in contribution for an amount greater than its workers' compensation liability.

The plaintiff then filed requests to admit, directed to both the Fairmont and Maron. As plaintiff notes, one of the facts admitted by the Fairmont was that, at the time of the accident, it and Maron were operating under the terms of a service agreement into which they had both previously entered in March of 1988. In pertinent part, that service agreement stated that Maron, the contractor, was "an independent contractor and all persons employed to furnish services hereunder [including the decedent] are employees of contractor and not Fairmont." The Fairmont asserted that the decedent was "formally" a Maron employee but was simultaneously a "borrowed or joint" employee. In response to plaintiff's request to admit, Maron admitted that the decedent

was its employee at the time of the incident and that its insurer had already paid out benefits to the plaintiff in connection with the death of the decedent.

The Fairmont moved for summary judgment, relying on the deposition testimony of several witnesses to bolster its argument that the decedent was a "loaned" employee as a matter of law and, consequently, that plaintiff's action was barred by the "exclusive remedy" provision of the Act. Section 5(a) of the Act states:

> "No common law or statutory right to recover damages from the employer * * * or the agents or employees of * * * [the employer] for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act * * *." 820 ILCS 305/5(a) (West 1998).

At the same time, the plaintiff moved to dismiss the Fairmont's second affirmative defense pursuant to sections 2-615 and 2-619 of the Illinois Code of Civil Procedure (735 ILCS 5/2-515, 2-619 (West 1998)), asserting that the Fairmont had failed to provide any evidence supporting its contention that the decedent was a "borrowed employee" of the Fairmont. Attached to plaintiff's motion were the depositions of Charles Biagi, Michael Lynch, Michael Ruhl, Donald Schwartz, and James Richert.

Charles Biagi, who was employed as the Fairmont's director of engineering at the time of the occurrence, testified that the hotel had "hired" the decedent, but later stated that the decedent worked for Maron. In fact, he noted that the Fairmont's contract was actually with Maron and that the decedent's wages and benefits were dictated by an electrical union contract to which Maron, and not the Fairmont, was a signatory. In other words, Maron paid the decedent and then billed the hotel for his wages along with other charges.

Biagi further stated that the decedent reported directly to Michael Ruhl, a Fairmont employee, who gave out daily assignments to hotel employees and to tradespeople who were employed by outside contractors. The decedent, along with all other tradespeople and employees, had to wear a hotel uniform and follow the Fairmont's employee handbook. Biagi noted that if the decedent had to make a purchase order, he would give that order to Ruhl and, after it was approved, the decedent would buy the materials from suppliers that were independent of Maron.

Biagi stated that, in general, if the decedent did not agree with something that he or Ruhl asked the decedent to do, they would try to reach an agreement among themselves. If they could not reach an agreement, however, Biagi would call "Mr. Richards"[2] at Maron and tell him that they were having a problem. In other words, if Biagi had an issue with the equipment or materials being supplied or if he needed more men in his daily operations, he or Ruhl would contact Richert. Lastly, Biagi stated that although the decedent worked at the hotel every day, he attended Maron safety meetings and completed reports for Maron. Since the Fairmont did not have the ability to train electricians, the proper training required by the service agreement was left to Maron.

Michael Ruhl testified that he was promoted to director of operations following Biagi's retirement in May of 2000. He stated that he considered the decedent to be a Fairmont employee, as he never saw anyone from Maron come to the hotel to supervise the decedent or assign him work. Ruhl stated that he had the authority to discipline the decedent if the need ever arose.

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[2] The record reveals that the individual referred to as "Mr. Richards" was actually James Richert.

Michael Lynch was the hotel's director of security/loss prevention at the time of the occurrence. Lynch stated that he was aware that outside contractors, such as Maron, provided some of the maintenance personnel to the hotel, and that the personnel supplied by Maron were not hotel employees, but Maron employees. To Lynch's knowledge, the decedent specifically was a Maron employee at the time of his death and prior to it.

Donald J. Schwartz, Maron's treasurer and corporate secretary, testified that Maron is an electrical construction company that employs 130-150 electricians, approximately 10 of whom perform outside maintenance work pursuant to service contracts. All of Maron's maintenance electricians were not expected to report to Maron, but to the daily work locations they were assigned. He also noted that because the Fairmont operated as a union hotel, it had to obtain its electricians through a union contractor. Schwartz claimed that the decedent was chosen by the hotel because he had been the superintendent for the electrical contractor that had performed the original hotel construction, and thus was familiar with the building. It was Schwartz's understanding that the service agreement the Fairmont had with Maron (as to the decedent's employment) remained in effect throughout the time that the decedent worked at the hotel.

Schwartz's testimony also indicates that he regarded the decedent to be a Maron employee, but not a Fairmont employee:

"Q. Adolf Schnur was an employee of Maron, correct?

A. Right.

Q. As such, Maron's workers' comp policy covered Adolph Schnur, correct?

A. Yes.

Q. In fact, there's a specific reference on page 6 [of the service agreement] to the idea that – under No, 11, Article 11, do you see that?

Q. – (continuing) that all persons employed to furnish services hereunder are employees of contractor and not of Fairmont. Do you see that?

A. Yes.

Q. Okay. And that is a reference to Adolf Schnur, correct?

A. It would include him, right?

Q. So while Mr. Schnur was working at the Fairmont, he would have been working there as an employee of Maron Electric Company, not as an employee of the Fairmont, correct?

A. Yeah. . .

* * *

Q. But there's no question but that when Adolf Schnur was working at the Fairmont, he was an employee of Maron, correct?

A. Yes."

Specifically, paragraph 11 of the service agreement to which Schwartz referred stated that Maron, the "contractor," was "an independent contractor and all persons employed to furnish services hereunder are employees of contractor and not Fairmont." To Schwartz's recollection, Maron derived no work at the hotel other than that provided by the decedent during the entire time the agreement was in effect, and the decedent himself never worked for Maron other than as an electrician at the hotel.

Schwartz added that Maron did not provide the decedent with materials or equipment, as each electrician maintained his own stock or inventory of personal tools. Like Biagi, he also noted that Maron electricians who worked at such facilities, including the decedent, were subject to Maron's safety manual. To that end, Maron would be obligated by the service agreement to handle safety issues in connection with the decedent's work at the hotel.

In addition, Schwartz claimed that the decedent's work as a union electrician was covered by a "principal agreement" between the Electrical Contractor's Association of the City of Chicago and Local Union No. 134, I.B.E.W. Under section 5.01 of the principal agreement, Maron could not lend an electrician to another electrical contractor, and apparently was prohibited from lending union electricians to nonunion contractors or organizations that were not contractors in any respect. Accordingly, Schwartz stated that it was his understanding that the assignment or transfer of the decedent's work to the hotel would have violated the principal agreement.

Lastly, with regard to the actual work done at the hotel, Schwartz claimed that Richert could dictate how the decedent was to perform certain work, as he was subject to direction from Richert. Richert, who visited the Fairmont on a monthly basis, was also the person the decedent would contact if he needed advice as to how to carry out his tasks. It was Schwartz's understanding that, if the Fairmont wished to terminate the decedent's services, it would have to go through Maron. However, if the Fairmont was dissatisfied with the decedent's work, it would communicate directly with him, not with Richert. Moreover, while Maron paid all of the decedent's wages and earnings and withheld the decedent's fringe benefits and payroll taxes, the Fairmont scheduled his hours and provided all of his assignments.

James Richert, Maron's project manager, testified that the decedent had been an employee of another electrical contractor during the Fairmont's construction and was familiar with the project. He stated that Biagi called him and told him that he wanted to hire the decedent as the hotel's maintenance electrician. The hotel, however, had to go through a licensed electrical contractor to hire the decedent because the hotel was not an electrical contractor and the decedent could not employ himself. In that regard, Richert stated that he participated in the service agreement between Maron and the hotel, and that because such agreements are normally self-renewing from year to year, the agreement with the decedent remained in place and unchanged for the 10 to 11 years the decedent worked at the hotel.

Richert stated that while Maron had no way of knowing what the decedent's assignments were on a day-by-day basis, it was part of Richert's job to see that employees such as the decedent were complying with Maron's safety policy, rules, and regulations. Further, he stated that he normally visits outside facilities where Maron electricians are employed two to three times per month. Although those "outside electricians" report to someone else at their respective facilities, Richert stated that, ultimately, he is their boss and has the right to dictate the manner in which those maintenance electricians are to perform their jobs.

Richert also explained that if the Fairmont wanted to terminate the decedent's services, it would have had to be done through Maron, as the terms of the service agreement prevented the hotel from firing him. Similarly, if the hotel had any issues with the decedent's work or had needed additional electricians, it would have contacted Richert. Lastly, Richert testified that the City of Chicago requires a maintenance permit to perform electrical work at the hotel and that

Maron obtained these permits because the hotel was not licensed to do so. Under the service agreement, Maron was solely responsible for the costs accompanying such permits.

The trial court repeatedly stated that the employment status of the defendant was a question of fact for the jury. However, because all of the parties wanted the matter to be resolved by the trial court, it agreed to decide the issue. In the court's words, "I believe there that there are fact issues to be tried and determined by a trier of fact. In this case, it would have been the jury except for the agreement reached and my acquiescence to undertake that responsibility." After discussing the facts presented, the court concluded that "Schnur was not a borrowed employee of the defendant at the time of his unfortunate demise." Accordingly, on September 5, 2002, the trial court granted the plaintiff's motion to strike the Fairmont's second affirmative defense, and denied the defendant's motion for summary judgment.

Prior to the case going to trial, the trial court also ruled on various motions *in limine*. The Fairmont sought to exclude any evidence of either an OSHA citation or the payment of a $4500 penalty attendant to an informal settlement agreement as a result of the decedent's accident at the hotel. The OSHA citation issued to the Fairmont, dated June 28, 1999, was for the failure to use protective equipment which could have prevented a fall while its "employees" were walking along beams suspended above a ceiling. On August 17, 1999, the Fairmont and OSHA entered into an informal settlement agreement under which it agreed to correct the conditions for which it had been cited and pay a $4500 penalty. The agreement provided that "by entering into the agreement, the [Fairmont] does not admit that it violated the cited standards for any litigation or purpose other than a subsequent proceeding under the Occupational Safety and Health Act."

After hearing argument, the trial court also denied this motion, finding that the plaintiff was entitled to introduce into evidence both "the OSHA citation and the informal settlement agreement with the Occupational Safety and Health Administration." Later at trial, the plaintiff introduced evidence of the OSHA citation and agreement through OSHA expert witness Timothy Galarnyk , who stated that the Fairmont had withdrawn its contest of the citation, and that such an action is an admission that the violation existed.

In another motion *in limine*, the trial court granted the plaintiff's motion to bar the hotel from introducing any evidence or testimony covered by the Dead Man's Act. 735 ILCS 5/8-201 (West 1998). The Dead-Man's Act provides in pertinent part:

> "In the trial of any action in which any party sues or defends as the representative of a deceased person or person under a legal disability, no adverse party or person directly interested in the action shall be allowed to testify on his or her own behalf to any conversation with the deceased or person under legal disability or to any event which took place in the presence of the deceased ***." 735 ILCS 5/8-201 (West 1998).

Thereafter, during Ruhl's testimony in plaintiff's case-in-chief, he testified that on the day of the incident, he and the decedent went up into the ballroom ceiling to check the hotel plumbing and drain lines for trouble. He stated that the two of them used one ladder for access, with the decedent in the lead, then used planking to access a second ladder and reach the channel grid inside the ceiling. As Ruhl jotted down some notes, he heard drywall break as the decedent fell through the ceiling.

On cross-examination, the court cautioned defense counsel not "to talk about what [the decedent] was doing," then sustained the plaintiff's objection and barred any examination of Ruhl as to where the decedent was situated or what he was doing during the time that he and the

decedent were in the ballroom ceiling. However, during the jury instruction conference, the trial court refused the Fairmont's jury instruction tendered in accordance with Illinois Pattern Jury Instruction, Civil, No. 5.02 (3d ed.1995) (IPI 5.02), stating that it would be giving the jury "another issue for review."

Thereafter, the jury returned a verdict in favor of plaintiff and Maron against the Fairmont, and awarded damages of $4,428,672 reduced 20% for the decedent's comparative negligence, resulting in a net award of $3,542,937.60. The trial court denied the Fairmont's post trial motion, and the Fairmont has appealed, arguing that the trial court erred in finding that the decedent was not a borrowed employee, that it erred in admitting evidence of the Fairmont's OSHA citation and settlement, and that it erred in denying the Fairmont's tender of its Dead Man's Act jury instruction.

Initially, the parties disagree as to the proper standard of review. The Fairmont notes that on the issue of whether the decedent was a borrowed employee, there were no conflicts in the evidence presented, there was no evidentiary hearing, and the parties' respective motions to strike the affirmative defenses and for summary judgment presented only questions of law. Accordingly, the Fairmont asserts that review of this issue is *de novo* because the trial court heard no testimony in basing its determination on documentary evidence (see Gaidar v. Tippecanoe Distribution Service, Inc., 299 Ill. App. 3d 1034, 1039-40 (1998)) and because interpretation of the contracts relating to the decedent's employment is a matter of law (see Illinois Fraternal Order of Police Labor Council v. Town of Cicero, 301 Ill. App. 3d 323, 335 (1998)).

Furthermore, the Fairmont notes that in denying its motion *in limine* to bar evidence of the

OSHA citation, the trial court relied upon erroneous conclusions of law regarding the admissibility of the OSHA citation and settlement agreement. Thus, while review of a ruling on a motion *in limine* is for an abuse of discretion, review is *de novo* where the court's exercise of that discretion was based on inaccurate legal conclusions. See Beehn v. Eppard, 321 Ill. App. 3d 677, 680-81 (2001).

As plaintiff notes, however, when the parties submitted their respective motions to the trial court regarding the decedent's employment status, the court expressly stated that the motions had been properly denied because "such a determination is a question of fact for the jury to decide with appropriate instruction on the applicable law." Nevertheless, at the urging of the parties, the court agreed to "undertak[e] the fact-finding determination of employment status." Moreover, in the trial court's view, the fact that it was deciding the employment status issue would not transform it from a factual issue into a legal one. Consequently, plaintiff asserts that our review of the trial court's determination of the employment status issue should be undertaken pursuant to the "manifest weight of the evidence" standard.

In A.J. Johnson Paving Co. v. Industrial Comm'n, 82 Ill. 2d 341 (1980), the Illinois Supreme Court noted that the issue of whether an employee is a "loaned employee" under the Workers' Compensation Act generally has been considered a question of fact, to be determined by the jury or trier of fact; in that case, by the Industrial Commission. The plaintiff, Johnson Paving, contended (like the Fairmont here) that because the facts were not in dispute, the question became one of law. A.J. Johnson Paving, 82 Ill. 2d at 343. The court responded that although the facts may be undisputed, if more than one inference can reasonably be drawn from these facts, the

question must remain characterized as one of fact and not one of law. A.J. Johnson Paving, 82 Ill. 2d at 348-49. See also, Barraza v. Tootsie Roll Industries, Inc., 294 Ill. App. 3d 539, 548 (1998).

Ordinarily, in reviewing the findings of fact of the trial court in which the evidence is conflicting, we will not substitute our opinion unless the trial court's conclusions are manifestly against the weight of the evidence. Tedrowe v. Burlington Northern, Inc., 158 Ill. App. 3d 438, 444 (1987). Nevertheless, as the Fairmont notes, if the trial court only considers depositions, transcripts, or other evidence that documentary in nature, we are not bound by the trial court's findings and may make an independent decision on the facts. Delasky v. Village of Hinsdale, 109 Ill. App. 3d 976, 980 (1982). Thus while we cannot say that it is impossible to arrive at more than one reasonable inference from the facts in the record which bear upon the issue of whether an employer-employee relationship between the Fairmont and the decedent, the standard of review set forth by the Johnson Paving court may only apply if the trial court here heard courtroom testimony on the issue of the decedent's employment status. Therefore, because the trial court in the case was not in a better position than us to assess credibility or weigh the evidence, we will make an independent examination of the stipulated evidence.

With regard to our review of the trial court's ruling on the Fairmont's motion *in limine* to bar evidence of the OSHA citation, it is well established that it is within the trial court's discretion to determine the admissibility of evidence, and its determination may not be reversed absent an abuse of that discretion. Gill v. Foster, 157 Ill. 2d 304, 312 (1993). Likewise, we review a trial court's ruling on a motion *in limine* for abuse of discretion, except where the court 's decision is

"based solely on its interpretation of caselaw" (Petre v. Kucich, 331 Ill. App. 3d 935, 941 (2002)) or where the court's exercise of that discretion was based on inaccurate legal conclusions. Beehn, 321 Ill. App. 3d at 680. In such an instance, review is plenary. Beehn, 321 Ill. App. 3d at 680. Because we find no evidence in the case at bar that the trial court's decision to allow evidence of the OSHA citation was based only on caselaw, or that it relied on an erroneous conclusion of law in denying the Fairmont's motion to bar evidence of the OSHA citation, we review that issue under the abuse of discretion standard.

Finally, with regard to the trial court's refusal to issue IPI 5.02 to the jury, it is uncontested that the trial court's refusal to issue a tendered jury instruction is reviewed under an abuse of discretion standard. Kucich, 331 Ill. App. 3d at 943.

After a review of the record, we affirm the trial court's finding that the decedent was not a borrowed employee of the Fairmont. The factors we are to consider in making such a determination are well known and focus primarily upon (1) whether the alleged second employer had the right to direct and control the manner in which the employee performed his work, and (2) whether an employment contract existed between the alleged second employer and the employee. Johnson Paving, 82 Ill. 2d at 347; Barraza, 294 Ill. App. 3d at 545; Crespo v. Weber Stephen Products Co., 275 Ill. App. 3d at 641.

We recognize the decedent's twelve-year record of employment at the Fairmont, and that he was required to wear a hotel uniform and comply with a hotel employee handbook. We also acknowledge that the decedent received his daily assignments from the Fairmont's employees, that such tasks were overseen by the hotel, and that the Fairmont provided and purchased any

equipment and materials needed by the decedent to perform his work without the knowledge of Maron. Finally, the record also makes clear that the Fairmont had the authority to coordinate and prioritize work assignments and that it could stop work for safety reasons. However, none of these facts suggest that the decedent consented –either implicitly or explicitly– to becoming a borrowed employee of the hotel.

With regard to the issue of control of the manner in which the decedent carried out his work, an employee is considered a borrowed employee only if he has become "wholly subject to the control and direction of the second employer and free from the control of the original employer." Mosley v. Northwestern Steel & Wire Co., 76 Ill. App. 3d 710, 719 (1979). Key to that determination are considerations of the manner of hiring, the mode of payment, the nature of the work, the manner and supervision of the work, and the right to discharge. Crespo, 275 Ill. App. 3d at 638.

Here, while it is true that the decedent took his work assignments from the hotel and that Maron had no knowledge of what those assignments might be each day, he effectively acted on an independent basis in choosing the manner in which to conduct his work. As evidence of this, if the hotel was dissatisfied with the decedent's work, it was to bring its complaints to Maron, the signatory of the decedent's paychecks. And even though Maron never had a reason to supervise the decedent's work, it alone retained the *ability* to dictate the manner in which the decedent's work was performed. This is evidenced by the fact that Maron's project manager for maintenance made on-site visits to the hotel to see if its workers were complying with Maron's safety program, rules and regulations. As such, we simply cannot find the hotel's direction of the decedent to

provide the amount of control necessary to make him a borrowed or *de facto* hotel employee.

With regard to whether there was a contract between the decedent and the Fairmont, we find that paragraph 11 of the service agreement between the Fairmont and Maron decisively states that the decedent and anyone else provided by Maron to the Fairmont is an employee of Maron, the contractor, and is not an employee of the Fairmont. The Fairmont asserts that paragraph 11 of that agreement related only "to the payment of benefits, payroll taxes and status under Internal Revenue Regulations." For this, it points to the deposition testimony of Schwartz, who stated that "the relationship that we *** employed him from a union and a payroll standpoint, but never provided him with any form of supervision or work direction *** as to any particular type of work because that all was taken care of by the hotel." However, Schwartz was not testifying as to anything relating to the service agreement, and his statements are relevant only to the issue of control rather than the issue of contractual obligation. Moreover, even if paragraph 11 of the service agreement only referenced which company was to be accountable for the decedent's "benefits, payroll taxes, and status under Internal Revenue Regulations," we would find that all such responsibilities are highly indicative of a company that had a contractual relationship with the decedent. Accordingly, based on the existence of paragraph 11 of the service agreement, we hold that the Fairmont freely contracted out of its ability to claim the decedent as its employee, borrowed or otherwise.

We also affirm the trial court's decision to deny the Fairmont's motion *in limine* to bar the admittance of the Fairmont's OSHA citation and agreement. Previously, this court has found that violations of OSHA standards may constitute evidence of negligence but do not create a statutory

duty. Miller v. Archer-Daniels-Midland Co., 261 Ill. App. 3d 872, 879 (1994), *appeal denied*, 157 Ill. 2d 505 (1994). Moreover, as the Fairmont states, an OSHA citation form typically states that:

> "[I]ssuance of this Citation does not constitute a finding that a violation of the [Occupational Safety and Health] Act has occurred unless there is a failure to contest as provided for in the Act [*i.e.*, within 15 business days of the Citation] or, if contested, unless the Citation is affirmed by the Review Commission." Herson v. New Boston Garden Corp., 40 Mass. App. Ct. 779, 793, 667 N.E.2d 907, 917 (Mass. App. Ct. 1996).

In the present case, the Fairmont argues that the trial court emphasized the fact that the hotel withdrew its notice of contest as an admission that it violated the cited standard. However, the Fairmont claims, such a finding fails to recognize that the Fairmont's decision not to contest the citation may represent nothing more than a financial decision that it is cheaper to pay the fine with no contest. In fact, the Fairmont argues that to uphold the introduction of the OSHA citation and payment of the penalty would be to undermine the public policy of encouraging compromise and settlement.

The Fairmont also argues that paragraph 8 of the settlement agreement expressly stated that the Fairmont did not admit that it violated the cited standards for any litigation or purpose other than a subsequent OSHA proceeding. Accordingly, it concludes that it cannot be admissible in the plaintiff's trial against it. Furthermore, it notes that section 3 of the settlement agreement included the hotel's concession to correct the problem, and that such post-occurrence remedial measures were inadmissible to prove negligence. See Herzog v. Lexington Township, 167 Ill. 2d 288, 300 (1995).

Plaintiff concedes that a person entering into a settlement "should not be required to explain his conduct before a jury where apart from the mere act of payment there is no other act or statement on his part which could be construed as an admission of liability." Hill v. Hiles, 309 Ill. App. 321 (1941). However, she argues that where a party has done something in addition to the act of payment that could be construed as an admission of liability, that type of evidence has been allowed to go to a jury. See, *e.g.*, Gaslite Illinois, Inc. v. Northern Illinois Gas Co., 46 Ill. App. 3d 917, 921, 925-26 (1977) (held that a notation on a check meant check was not for settlement purposes, but for curtailment of a program).

Initially, the trial court found that paragraph 8 of the settlement agreement did not affect the plaintiff because the language was not binding to any outside parties. Moreover, the trial court found that the defendant entered into a settlement agreement in which it admitted, for OSHA purposes, that it had violated the cited standard. The court noted that the defendant also agreed, as a condition of settlement, that it would correct the violation and post a copy of the settlement agreement near the location of the violation for three days or until it had corrected the violation. In finding defendant's actions to constitute an admission of a violation, the court stated, "you can't correct something that doesn't exist." Later, as the court explained in upholding its ruling, OSHA expert witness Timothy Galarnyk had testified for the plaintiff that the Fairmont had initially contested the citation but, thereafter, withdrew its notice of contest. The court stated that it was heavily influenced by Galarnyk's testimony that the act of withdrawing a notice of contest is an admission that the violation existed.

Under an abuse of discretion standard, we will reverse the judgment of the lower court

only when no reasonable person could take the view it adopts. In re Marriage of Getautas, 189 Ill. App. 3d 148, 153 (1989). Based on the language of the settlement agreement, its seems clear that the agreement was not intended to confer upon the Fairmont a blanket exemption from any further litigation from any other possible parties, and that it constituted an admission, for OSHA purposes, that the Fairmont had violated OSHA regulations. This is bolstered by the fact that the Fairmont agreed to remedy the violation, and by the credible testimony of Galarnyk, who opined that the Fairmont's withdrawal of its notice of contest to the OSHA citation is an admission that an OSHA violation existed. Thus, because it appears that the OSHA citation effectively became a violation, it seems reasonable for the trial court to allow the plaintiff to bring it into evidence as indicative of negligence. See Archer-Daniels-Midland Co., 261 Ill. App. 3d at 879.

In so finding, we also disagree with the Fairmont's assertion that the trial court erred in allowing inadmissible evidence of subsequent remedial measures. This case simply does not involve, in any regard, the post-occurrence remedial measures enacted by the hotel. Instead, it involves an acknowledgment by the hotel that it violated OSHA and that it promised to correct that violation. And once the OSHA citation became admissible, any mention of remedial measures became irrelevant, as the evidence of the Fairmont's negligence was already before the jury. Ultimately, because we cannot say that no reasonable person could have concluded that the Fairmont's actions constituted an admission of an OSHA violation which, in turn, was admissible, we affirm the trial court's decision to deny the Fairmont's motion *in limine*.

The Fairmont's last argument on appeal is that the trial court erred in refusing to tender IPI 5.02 to the jury. IPI 5.02 states:

> "The plaintiff in the case is suing as an administrator for a deceased person. Since the deceased cannot be here to testify the law does not permit the defendant or any other person directly interested in this action to testify on his own behalf to any conversation to the deceased person to any event which took place in the presence of the deceased. The fact that the defendant did not testify in this matter should not be considered by you for or against him." IPI Civil 3d. 5.02.

The Fairmont asserts that without this instruction, the jury would be left to wonder why Ruhl, the one witness who was with the decedent at the time of his demise, did not testify as to what the decedent said and did immediately before and during the incident.

Further, the Fairmont notes that not only had the plaintiff previously raised the bar of the Dead Man's Act, but the trial court granted the plaintiff's motion *in limine* to bar any testimony from the defendant as to conversations or transactions that took place in the decedent's presence. Accordingly, the Fairmont claims, without the tendered instruction, the jury could not have known why Ruhl, as the sole witness to what transpired in the ballroom ceiling, had not testified to the decedent's actions precipitating his death. And because this instruction was a correct statement of the law that would have removed any prejudice to the defendant, the Fairmont asserts that the failure to give the instruction warrants a new trial. See Aldridge v. Morris, 337 Ill. App. 369, 374 (1949) (noting that the instruction that the defendant did not testify could not be considered as a circumstance for or against him was a correct statement of law).

Plaintiff responds that we should not consider the Fairmont's claim of error since the plaintiff exercised her right to waive the protection of the Dead Man's Act. For this, she notes that on September 6, 2002, when Ruhl testified in the plaintiff's case-in-chief, plaintiff's counsel objected to the defendant's cross-examination of Ruhl on the basis that counsel's questions were

likely to elicit testimony that was barred by the Dead Man's Act. At that time, the trial court indicated that the Dead Man's Act was in force, and that defense counsel should refrain from certain lines of questioning. However, on September 9, 2002, plaintiff's expert witness Galarnyk testified, and plaintiff's counsel did not object when defense counsel elicited testimony from Galarnyk about the path the decedent had taken in the ceiling; what movements he had made; the specific parts of the ceiling on which he had stepped; the size, shape, and configuration of those parts; and what happened when the decedent fell. In allowing such testimony to go in without objection, plaintiff asserts that it was waiving the protections of the Dead Man's Act *sub silentio.*

In fact, plaintiff asserts that when Ruhl was called again in the defendant's case-in-chief after Galarnyk testified, "it could and should have asked [the court] to reconsider and/or clarify [its] rulings on the Dead Man's Act before Ruhl took the stand." Plaintiff argues that because she had not objected to the defendant's examination of Galarnyk as to matters within the scope of the Dead Man's Act, the court would likely have allowed Ruhl to testify as to those events as well. In other words, because the plaintiff waived the Dead Man's Act's protection, and the fact that the defendant failed to revisit this issue with the trial court did not entitle it to have the jury hear IPI 5.02. We disagree.

If plaintiff is suggesting that she intentionally waived the Dead Man's Act's protection with respect to Galarnyk after she invoked it with respect to Ruhl (and even filed a motion *in limine* to that end), we think that such a tactic would fall under unfair and impermissible gamesmanship. The purpose of the Dead Man's Act is to protect decedents' estates from fraudulent claims and to equalize the position of the parties in regard to the giving of testimony.

Smith v. Haran, 273 Ill. App. 3d 866, 875 (1995). It is not intended to be used as an evidentiary sword to disable opponents from entering unfavorable evidence, only then to silently claim a waiver of that protection in order to enter evidence favorable to one's own agenda. If plaintiff had intended waiver of this protection, she should have made her desire clear to the court and opposing counsel. As we think that no court should reward such a crafty usage of the Dead Man's Act as an offensive weapon and in contradiction to its stated purpose, if that is what plaintiff has done here, we cannot find that the Fairmont has waived this issue.

That stated, our focus turns to the content of what the defendant argues prejudiced it in the minds of the jury. Specifically, defendant claims that had Ruhl been able say what he would have liked to have said, he would have stated something to the effect that the decedent "took off like he was in his own backyard." However, because of the Dead Man's Act, defendant argues that the jury had no idea as to what kind of interaction the decedent had with Ruhl in the moments leading up to his death, and would naturally question why Ruhl had not come forward with that testimony.

As the trial court noted, based upon the defendant's direct examination of Ruhl, the defense had "plenty to talk about with respect to the comparative fault of Adolf Schnur because he's up there leading the way, and he knows as well as Ruhl that that's a dangerous thing to be doing. No fall protection, knowing you could go through the ceiling, know the height to which you would fall, but [the statement that he took off like he was in his own backyard] doesn't change anything with respect to the Fairmont's liability in this case, if any." The court later stated:

> "[O]ne of the things that the instruction says – you can't talk about, in light of the Dead Man's Act, about conversations or actions. The testimony never was that [the decedent] said it was safe. That never was in the discovery. Keep in mind I read every single one of those transcripts. There never was any discussion that [decedent] ever said [to Ruhl], 'come with me kid. I know the way because it's safe.' He never misled him. It was an inference on the part of Ruhl. *** So the conversation never took place, according to the discovery deposition testimony, and from which you would like to infer something that nobody ever said, was never barred by the Dead Man's Act because it never happened. The actions were testified to substantially. [The decedent and Ruhl] left the morning meeting, and they proceeded to an access area on the north side. But there was no omission of statements made by [decedent] upon which Mike Ruhl relied for his actions."

Moreover, after Galarnyk testified that he had actually been in the ceiling to inspect it, he offered a reconstructive analysis of what occurred in the ceiling on the morning of the accident. As plaintiff notes, Galarnyk opined on the path the decedent must have taken in the ceiling, what movements he made, which parts of the ceiling he stepped on, the size of those parts, and what happened when the decedent fell.

In looking at the testimony from both Ruhl and Galarnyk, we find that it was reasonable for the trial court to deduce that all of the evidence which the defendant wanted Ruhl to put before the jury in defendant's cross examination of Ruhl in the plaintiff's case-in-chief, was eventually put before the jury through other means. Thus, we, like the trial court, find it highly unlikely that Ruhl's specific testimony about the manner in which the decedent proceeded into the ceiling –assuming such testimony existed– would have had any effect on the jury's deliberations or findings. Clearly, the jury's 20% reduction of the trial court's damage award evidences the jury's assiduity in concentrating upon the decedent's comparative negligence. Accordingly, because we find the trial court's conclusion to be perfectly reasonable that no Dead Man's Act

issues existed, we hold that the trial court acted well within its discretion in denying defendant's tendered IPI 5.02.

In sum, because we find better indicia of an employment relationship solely between the decedent and Maron, we affirm the trial court's striking of defendant's second affirmative defense. Moreover, because there is ample evidence in the record to make reasonable the trial court's decisions to allow evidence of the OSHA citation and to deny defendant's tendered IPI 5.02, we find the trial court acted well within its discretion on those matters. For the foregoing reasons, the decision of the trial court is affirmed.

Affirmed.

GREIMAN, J., with HARTMAN and THEIS, JJ., concurring.