

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-1286

SCOTT CANAVAN

vs.

CRIFE MOBILE HOME TRANSPORT, LLC, & others.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff brought this negligence action to recover for personal injuries sustained after a six-vehicle convoy caused an overhanging cable wire to fall and drag him across the ground. He brought suit against, among others, the entities and individuals involved in the convoy, including Cripe Mobile Home Transport, LLC (Cripe), the company engaged to take two oversized modular classroom units to their destination, as well as two of its truck drivers, Robert Blocher and Mark Gale (collectively, the defendants).² After all other alleged tortfeasors settled with the plaintiff or were otherwise

¹ Robert Blocher and Mark A. Gale.

² The six vehicles in the convoy consisted of an escort high pole car, an oversized vehicle operated by Gale, two additional escort vehicles, another oversized vehicle operated by Blocher, and a flag car in the rear.

dismissed from the case,³ the claims against the defendants proceeded to a jury trial. Following a defense verdict and an order dated September 9, 2020, allowing a joint motion for the entry of a separate and final judgment in favor of the defendants, the plaintiff appealed.⁴ We affirm.

Discussion. 1. Final instructions to jury. The plaintiff first argues that the judge's instructions to the jury were "incomplete, incorrect, and failed to instruct as to the principles of law governing the issues presented." A party is not, however, entitled to argue error on appeal as to jury instructions, "unless he objects thereto before the jury retires to consider its verdict." Mass. R. Civ. P. 51 (b), 365 Mass. 816 (1974). See Boston Edison Co. v. Massachusetts Water Resources Auth., 459 Mass. 724, 740 (2011) (plaintiff's failure to object to jury instructions waived its right to claim error on appeal). At the conclusion of the judge's final instructions to the jury, the judge held a sidebar conference in which the

³ One of the involved entities defaulted prior to trial, but nevertheless settled with the plaintiff after trial. The plaintiff's claims against the Canal Insurance Company were severed and stayed pending disposition of the tort claims against the defendants.

⁴ No separate and final judgment under Mass. R. Civ. P. 54 (b), 365 Mass. 820 (1974), entered on the docket. The parties have treated the order allowing the motion for the entry of a separate and final judgment as a judgment. We shall address the parties' arguments. See GTE Prods. Corp. v. Stewart, 421 Mass. 22, 24 n.3 (1995).

plaintiff requested that the judge clarify that the defendants consisted of the Cripe company as well as its two drivers, and that the negligence of one would apply to all of them; the judge did so. At that time, the plaintiff made no objection to the effect that the instructions were incomplete, incorrect or failed to cover the relevant principles of law. See Muzzy v. Cahillane Motors, Inc., 434 Mass. 409, 416-417 (2001) (after having agreed to instructions that were ultimately given, plaintiff could not claim prejudicial error on appeal where only objection lodged at trial was that jurors appeared to be confused).

Although the plaintiff acknowledges that he failed to object to the instructions as given, he contends that his claim is preserved because he requested a "joint tortfeasor" instruction subsequent to the charge conference but prior to closing arguments. At that time, the judge indicated that he would consider the issue, but the record is devoid of any further discussion on the topic prior to the jury instructions. If the plaintiff believed that the instruction was not given,⁵ he

⁵ Arguably, the judge did cover the substance of the instruction. See Doull v. Foster, 487 Mass. 1, 6 (2021) (judge is not bound to instruct in exact manner of parties' requests, as long as applicable law is adequately explained). The plaintiff requested language instructing that "[w]hen two or more causes combine to produce injuries, the [d]efendant is not relieved of liability because it is responsible for only one such cause." The judge instructed that the plaintiff may recover if he proves

was required to object at the conclusion of the charge to put the judge on notice so that any error could be corrected at the time. See Flood v. Southland Corp., 416 Mass. 62, 67 (1993) (point of prompt objection is to put judge on notice so that any error can be remedied in timely fashion). His mere request for an instruction could not suffice to preserve an objection to its absence. See Dalrymple v. Winthrop, 50 Mass. App. Ct. 611, 617-618 (2000). Any claim with respect to the final charge to the jury is waived.

2. Response to jury question. The defendant did object to the instructions that the judge gave to the jury in response to a jury question during deliberations. The jury submitted a question, asking the judge to "clarify the defendants," and to clarify whether they were "judging the negligence of Blocher and Gale, or of all employees hired by Cripe in the convoy (i.e., pole cars and chase car drivers as well)." After consulting with the parties, the judge instructed the jury that they were "judging the negligence of Blocher and Gale and the defendant, Cripe" and that they were "not judging in terms of a verdict all the employees hired by Cripe in that convoy, that is, the pole

that the defendants' negligence was a substantial contributing factor in causing his injuries and that such negligence "can be a substantial contributing factor in producing the plaintiff's injuries even if it comes together with or unites with some other cause to produce the injury or injuries."

cars and the chase car drivers as well." The judge further indicated that the actions of the other entities may be relevant to their deliberations on proximate cause, but that the verdict slip was to address the negligence of "Blocher, Gale and Cripe itself, the company."

On appeal, the plaintiff argues that the judge erred in not instructing the jury on "principles of agency, vicarious liability of a corporation through the acts of its employees, agents and servants versus independent contractor, and joint and several liability of joint tortfeasors." Even assuming that the objection was adequately preserved for appeal,⁶ there was no error in the judge instructing the jury as he did. See DaPrato v. Massachusetts Water Resources Auth., 482 Mass. 375, 384-385 (2019) (objected-to instruction reviewed for error, and if found, whether error was prejudicial). The answer was a correct statement and responsive to the question, which sought only clarification regarding which defendants were being judged by them. See Urban Inv. & Dev. Co. v. Turner Constr. Co., 35 Mass. App. Ct. 100, 104-105 (1993) ("necessity, extent, and character

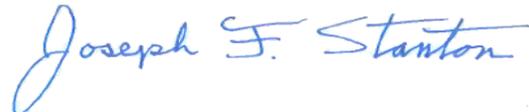
⁶ When asked for input on the appropriate response to the jury question, the plaintiff made no request for any of the instructions referenced on appeal, suggesting only that the jurors be advised that "Cripe is responsible [for] all employees and everyone they hired because both the buck stops there and that's the law in Massachusetts."

of any supplemental instructions are matters within the discretion of the judge"). The judge did not make any "finding of fact" on agency or invade the role of the jury, as the plaintiff claims. There was no abuse of discretion.⁷

3. Conclusion. The order dated September 9, 2020, is affirmed, and a separate and final judgment in favor of defendants Cripe Mobile Home Transport, LLC, Robert Blocher, and Mark A. Gale shall enter.

So ordered.

By the Court (Green, C.J.,
Singh & Hand, JJ.⁸),



Clerk

Entered: January 14, 2022.

⁷ Indeed, the instructions pressed for on appeal would have changed the theory on which the case was tried; the plaintiff specifically approved of the judge's proposed instruction concerning the allegations in the case:

The judge: "Okay, so you want me to just put 'there's only one type of claim asserted in this case, plaintiff's claim that the Cripe defendants were negligent in the operation of motor vehicles on the alleged accident -- on the date of the alleged accident, July 9th?'"

Plaintiff's counsel: "Right."

⁸ The panelists are listed in order of seniority.