

construction site and Waldenfels was an ironworker employed by a subcontractor. Waldenfels was allegedly injured when he was leaving the construction site through a gate and he slipped and fell on a sign that was covered by snow.

¶ 3 Waldenfel and his wife (plaintiffs) subsequently filed a two-count complaint against defendant.¹ Count 1 was brought by Fred Waldenfels and asserted a claim of negligence.

Waldenfels alleged that defendant had a duty to exercise ordinary care toward him and to provide him with a reasonably safe workplace. Defendant allegedly breached that duty by "failing to perform proper housekeeping," allowing a construction sign to fall and remain in a place of ingress and egress and failing to remove snow from the site in a timely manner. Waldenfels alleged that he sustained injuries as a proximate result of one or more of these negligent acts or omissions. Count II was brought by Waldenfel's wife and asserted a claim of loss of consortium against defendant based upon the injuries sustained by her husband.

¶ 4 The case proceeded to a jury trial, where Waldenfels testified to the following events. The incident occurred on December 17, 1999, when Waldenfels was leaving the construction site for lunch. The site was surrounded by a fence, and there was a gate at one of the entrances to the site. It was snowing when Waldenfels went to work that day. When he left the building in which he was working for lunch, it had stopped snowing and two to four inches of snow had accumulated on the ground. Waldenfels left the building and walked to the gate at one of the

¹The record contains a motion filed by plaintiffs at the conclusion of trial seeking to file a second amended complaint to conform to the proofs. There is no amended complaint in the record, only plaintiffs' original complaint.

entrances to the site. A cement truck and a van were parked in the area and were blocking his exit. As Waldenfels was walking around the van, he slipped on a sign that said, "Construction Keep Out" and fell backwards, hitting his head on the ground and his knee on a fence post. Waldenfels testified that he could not see the sign or board at the time of his fall because it was covered by snow. However, he left to pick up lunch after he fell and saw the sign when he returned to the construction site. He explained that he could see part of the sign at this time because his fall had brushed some of the snow off of the sign. Waldenfels had also seen the sign, a four-by-eight laminated board, at the gate on prior occasions when he entered and exited the construction site. He explained that when the gate was open the sign was put on an easel so that the public would not enter the site. Waldenfels did not know how the sign fell to the ground or how long it had been there. The incident occurred on a Friday and Waldenfels went to the doctor on the following Monday after becoming "real sore."

¶ 5 Plaintiffs' presented the testimony of Eugene Holland, a consulting architect engineer. Holland testified to custom and practice in construction safety and safety standards. He offered the opinions that defendant was required to provide oversight of the construction site in compliance with standards set by the Occupational Safety and Health Act (OSHA). Defendant failed to provide this oversight in that it did not provide safe ingress and egress to the construction site as it did not remove the sign that was covered by snow. Defendants also failed to comply with OSHA requirements that it inspect the construction site, including areas of ingress and egress, regularly for safety and that it train people to conduct these inspections. This included inspecting the construction area for debris. According to Holland, these failures were a

proximate cause of plaintiffs' injuries. Defendant also failed to comply with various provisions in its contract with Hyatt (the contract). These included provisions requiring defendant to take precautions to ensure the safety of the public and workers at the construction site, to conduct housekeeping and cleanup of the site which included keeping areas of ingress and egress free of obstructions and removal of snow and ice. Holland testified that these failures were a proximate cause of plaintiffs' injuries. Holland also testified that defendant failed to comply with paragraph 7.5 of the contract. That paragraphs provides:

"7.5 Security. The Contractor assumes all responsibility for security at the Site during the progress of the Work. All gates shall be locked at all times unless Contractor maintains adequate security personnel to monitor all persons entering and leaving the Site. The Contractor shall provide sufficient watchmen as necessary for proper protection of the Site and the Work and shall provide temporary protection at all openings in the outside walls to prevent unauthorized persons from obtaining access during the night and at other nonworking hours. In the event that the Work of any Subcontractor or the Contractor involves a special risk or hazard, then the party performing same shall furnish such additional protection as necessary or desirable to protect against such special risk or hazard."

¶ 6 Following closing arguments, the trial court instructed the jury on the following four allegations of negligence: 1) defendant "failed to perform proper housekeeping to keep an area of ingress and egress free from the accumulation of waste materials and rubbish at a construction site;" 2) defendant "allowed a construction sign to fall and remain in a place of ingress and

egress;" 3) defendant "failed to remove snow in a timely fashion;" and 4) defendant failed to perform inspections in a timely manner. Plaintiff also requested that the jury be given the following instruction as an additional basis of negligence:

"[Defendant] failed to maintain adequate security personnel for proper protection of areas of ingress and egress of a construction site."

The trial court refused to give the jury this instruction.² The jury returned a verdict in favor of defendant and against plaintiffs. Plaintiffs filed a motion for a new trial based upon the court's refusal to submit the proposed instruction to the jury. The court denied the motion in a written order.³ This appeal followed.

¶ 7 Plaintiff contends that the trial court abused its discretion when it refused to submit to the jury the proposed instruction regarding security personnel. Plaintiffs claim that the instruction was supported by the evidence presented at trial and therefore should have been given to the jury.

¶ 8 We begin by observing that plaintiffs have failed to provide a complete transcript of the proceedings in the trial court. Plaintiffs have not included the transcript of the jury instruction conference during which the trial court refused plaintiffs' proposed instruction. The report of proceedings provided by plaintiffs also does not include the testimony of all of the witnesses who

²The record does not contain a transcript of the jury instruction conference and we therefore do not know the basis for the trial court's refusal to submit this instruction to the jury.

³The written order does not indicate a basis for the court's ruling.

appeared at trial.⁴ As the appellant, it is plaintiffs' burden to provide a sufficiently complete record to support a claim of error and, absent such a record, we will resolve any doubts arising from the incompleteness of the record against the appellant. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984); *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156 (2005). With these principles in mind, we now consider whether the jury should have been given plaintiffs' proposed instruction.

¶ 9 A litigant generally has the right to have the jury instructed on each theory supported by the evidence. *Heastie v. Roberts*, 226 Ill. 2d 515, 543 (2007). The question is not whether the jury would have been persuaded by the evidence. *Id.* Instead, all that is required to justify the giving of an instruction is that there be some evidence in the record to justify the theory of the instruction. *Id.* The evidence may be insubstantial. *Id.*

¶ 10 "While the threshold for permitting an instruction in a civil case is modest, the standard for reversing a judgment based on failure to permit an instruction is high. The decision as to which jury instructions to use falls within the discretion of the trial court. A reviewing court will not disturb the trial court's determination unless the trial court has abused its discretion, and a new trial will be granted only when the refusal to give a tendered instruction results in serious prejudice to a party's right to a fair trial." *Heastie*, 226 Ill. 2d at 543; see also *Leonardi v. Loyola University*, 168 Ill. 2d 83, 100 (1995) ("The question of what issues have been raised by the

⁴The proceedings included in the record make reference to the trial testimony of Waldenfels' wife as well as Joe Kafka and Roger Metcalk, who were identified in pretrial disclosures as Waldenfels' coworkers. None of these witnesses' testimony is included in the record.

evidence is within the discretion of the trial court").

¶ 11 The plaintiffs in this case sought relief under a theory of negligence. To prevail on such a claim, a plaintiff must show a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by the breach. *Schultz v. Hennessy Industries, Inc.*, 222 Ill. App. 3d 532, 540 (1991). A proximate cause is one that produces an injury through a natural and continuous sequence of events unbroken by any effective intervening cause. *Kleen v. Homak Manufacturing Co., Inc.*, 321 Ill. App. 3d 639, 641 (2001). Proximate cause is composed of two distinct requirements: legal cause and cause in fact. *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 257-58 (1999). “A defendant’s conduct is a cause in fact of the plaintiff’s injury only if that conduct is a material element and a substantial factor in bringing about the injury.” *First Springfield Bank & Trust*, 188 Ill. 2d at 258. The question is whether the injury would not have occurred absent defendant’s conduct. *First Springfield Bank & Trust*, 188 Ill. 2d at 258. Legal cause is a question of foreseeability, and the inquiry is whether the injury is of a type that a reasonable person would see as a likely result of his or her conduct. *First Springfield Bank & Trust*, 188 Ill. 2d at 258.

¶ 12 Under a negligence theory, liability cannot be predicated upon speculation, surmise, or conjecture as to the cause of injury. *Kleen*, 321 Ill. App. 3d at 641; *Schultz*, 222 Ill. App. 3d at 540; *Lindenmier v. City of Rockford*, 156 Ill. App. 3d 76, 85 (1987). Moreover, the mere possibility of a causal connection is insufficient to raise the requisite inference of fact. *N.W. v. Amalgamated Trust & Savings Bank*, 196 Ill. App. 3d 1066, 1077 (1990). Proximate cause can only be established when there is a reasonable certainty that the defendant’s acts caused the

injury. *Schultz*, 222 Ill. App. 3d at 540.

¶ 13 In this case, we find that the trial court did not abuse its discretion by denying plaintiffs' proposed jury instruction because there was no evidence that justified the theory of the instruction. Plaintiffs' proposed instruction was based on section 7.5 of the contract and the theory underlying it was that the gate to the construction site should not have been opened because security personnel were not posted the gate and that, had the gate not been opened, the incident would not have occurred. Plaintiffs also suggest that had there been security posted at the entrance to the site, the sign would have likely been discovered and Waldenfels would not have slipped on it and fell.

¶ 14 Plaintiffs' theory is pure speculation. There was no evidence presented at trial that any alleged breach of section 7.5 of the contract was a proximate cause of plaintiffs' injuries. Section 7.5 of the contract has no relevance to the issues raised in this case. The language of section 7.5 is unambiguous and clearly is directed at the contractor's duty to lock the gate or provide security personnel in order to prevent unauthorized access to the construction site. Section 7.5 specifically required that "all gates [to the construction site] shall be locked unless" defendant provided "adequate security personnel to monitor all persons entering and leaving the Site" and to provide "temporary protection at all openings in the outside walls to prevent unauthorized persons from obtaining access during the night and at other nonworking hours." However, unauthorized access to the construction site was not an issue raised by the evidence at trial. In fact, Waldenfels was an employee of defendant who was authorized to enter and exit the site. Section 7.5 does not impose any duty on the security personnel to monitor the site for fallen

signs or other debris or to keep the areas of ingress and egress free from snow and ice and obstructions that might cause an accident such as the one that occurred in this case.

¶ 15 More importantly, there was no evidence presented at trial that plaintiffs' injuries were caused by or were a foreseeable result of defendant's alleged failure to comply with section 7.5 of the contract. It is true that plaintiff's expert, Holland, testified that defendant failed to comply with section 7.5. However, contrary to plaintiffs' assertion, Holland did not testify that this failure was the proximate cause of plaintiff's injury. Instead, after stating that defendant failed to comply with section 7.5, Holland proceeded to testify about uneven surfaces at a construction site and whether plywood was an effective way to guard against that situation. There is no other testimony in the record, nor do plaintiffs direct this court to any, that a reasonable person would have seen plaintiff's injuries as a likely result of the alleged failure to comply with the security provision in the contract. As such, any finding of liability resulting from the failure to comply with this section would be improperly based upon speculation and conjecture. Under these circumstances, we cannot say that no reasonable person would agree with the trial court's ruling or that the court's refusal to submit plaintiffs' proposed instruction resulted in "serious prejudice" to plaintiffs' right to a fair trial. Accordingly, we find that the trial court did not abuse its discretion when it refused to tender plaintiffs' proposed jury instruction.

¶ 16 In a related argument, plaintiffs argue that they were prejudiced by the court's ruling on the proposed instruction in the context of defendant's notice defense. Plaintiffs claim that defendant was allowed to argue a lack of notice of the fallen sign as a defense to liability and that, had the jury been given the security instruction, notice would not have been an issue

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because the gate would not have been open. However, this is a circular argument that ignores the facts of the case. The record shows that the gate was open when the incident occurred. The question then becomes whether, since the gate was open, the lack of security personnel proximately caused plaintiffs' injuries. This of course brings us back to the issue resolved above against the plaintiffs. It is simply a reiteration of plaintiffs' argument that the court abused its discretion by refusing to submit the proposed instruction to the jury.

¶ 17 For the reasons stated, the judgment of the circuit court of Cook County is affirmed.

¶ 18 Affirmed.