2015 IL App (2d) 140889-U
No. 2-14-0889
Order filed September 15, 2015



IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| CHRISTINE NICHOLS, as Special Administrator of the Estate of Ryan Nichols,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>JAMES BERLES,<br><br>Defendant<br><br>(Curran Contracting Company, Maintenance Coatings Company, and Baxter & Woodman, Inc., Defendants-Appellees; Rural Mutual Insurance Company, Intervenor-Appellant). | ) | Appeal from the Circuit Court of McHenry County.<br><br>No. 12-LA-99<br><br>Honorable Thomas A. Meyer, Judge, Presiding. |

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

**ORDER**

¶ 1 *Held*: Plaintiff failed to plead sufficient acts to allege that Baxter and Woodman, Inc., owed a duty of care to Ryan Nichols. Plaintiff further failed to plead sufficient facts alleging that Curran Contracting Company or Maintenance Coatings Company were the proximate cause of Nichols's injury. Therefore, we affirmed the circuit court's grants of defendants' motions to dismiss.

¶ 2 Ryan Nichols (Nichols or decedent) was a construction worker for the Illinois Department of Transportation (IDOT). On August 22, 2011, James Berles struck and killed

Nichols with his vehicle while making a left turn. Nichols had been performing road work in the intersection at the time of the accident. Plaintiff, Christine Nichols, as special administrator of her husband's estate, brought suit against Berles for negligence. She later amended her negligence complaint to add Baxter & Woodman, Inc. (BWI), Curran Contracting Company (Curran), and Maintenance Coatings Company (MCC). IDOT had contracted with BWI and Curran to provide road construction services at the intersection where Nichols was injured. MCC was a subcontractor of Curran.

¶ 3 BWI filed a motion to dismiss pursuant to section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2012)), because plaintiff had not alleged that it owed Nichols a duty of care. The trial court granted BWI's motion. Subsequently, Curran filed a 2-619 motion to dismiss on the basis that plaintiff failed to allege that it was the proximate cause of Nichols's death. MCC joined Curran's motion. The trial court granted Curran's motion and entered Rule 304(a) language under Illinois Supreme Court Rule (Rule) 304(a) (eff. Feb. 26, 2010) with respect to BWI, Curran, and MCC. This appeal followed, and for the reasons herein, we affirm.

¶ 4 I. BACKGROUND

¶ 5 Berles testified to the following related to the August 22, 2011, accident in a February 7, 2014 deposition. He would drive through the site of the accident—the intersection of U.S. Highway 14 (U.S. 14) and Illinois Route 47 (Route 47), near Woodstock, Illinois—almost daily as part of his normal routine. He had not observed road construction in that area for the week prior to the accident, but construction had been ongoing on his route for two years, including near the site of the accident. Road repavement at the intersection of U.S. 14 and Route 47 had been completed about a week prior to the accident. The road had not yet been striped but there

were markings akin to chalk lines that he understood meant they were going to be used to guide the traffic striping. He did not observe any flaggers that morning, but he did see at least one "Road Construction Ahead" sign on Route 47 before turning onto U.S. 14. He had previously seen flaggers on his route when road construction was active.

¶ 6 The accident occurred when Berles made a left turn from northbound Route 47 onto westbound U.S. 14, after waiting at a red light at the intersection. He received a left-turn arrow, and he first looked to the southbound traffic on Route 47 to see if any vehicles were making a right turn onto westbound U.S. 14. One vehicle did. Berles then turned his attention to a white utility truck parked by the median on U.S. 14. The truck had a yellow emergency light on top "like a gumball," and it had its headlights and emergency light on. The truck was the vehicle that Nichols had driven that morning.

¶ 7 Berles never saw Nichols before he hit him with his vehicle. While turning, Berles recounted as follows, referring first to his observation of the white truck:

> "I slowed down. I didn't know if somebody was in the vehicle. The sun wasn't bright that morning, but it was out, and it was glaring off his windshield; so I couldn't see inside the vehicle. I didn't know if anybody was looking to throw a U-turn there. That's what I thought was happening.
>
> So I focused on the vehicle until I could see that, you know, okay, there's nobody in there, and I had slowed down and then thud as soon as I went; and that's when I felt it, and that was the first time that I saw Nichols."

¶ 8 Police responded to the scene, and Officer Fink spoke with Berles. He issued Berles a citation for failure to exercise due care for a pedestrian. While Officer Fink was going over his report with him, Berles stated that he "should have known better, I drive down this way often

and I know they were doing road work out here." Fink also met with two witnesses. One witness, Irene Congdon, stated she was traveling directly behind Berles's vehicle in the left turn lane before the accident. She observed Nichols in the road, but she did not know if Berles saw Nichols or not. She then observed Berles hit Nichols.

¶ 9 Sergeant Leard later issued a "Supplemental Crash Investigation Report," which documented that there were two signs on Route 47, one indicating "ROAD WORK AHEAD EXPECT DELAYS" and another that read "ROAD CONSTRUCTION AHEAD." The "ROAD CONSTRUCTION AHEAD" sign was orange and had arrows pointing left and right to indicate where the construction was taking place. On October 4, 2013, Berles was found guilty, after factual stipulation, of the offense of failure to exercise due care to a pedestrian.

¶ 10 Turning to the complaint, plaintiff was Nichols's spouse and became special administrator of his estate. On March 9, 2012, plaintiff filed a four-count complaint against Berles, alleging Berles was liable for wrongful death (count I), negligence (count II), last expenses (count III), and loss of consortium (count IV). The complaint alleged, in pertinent part, that on August 22, 2011, at approximately 8:30 a.m., the decedent was an IDOT employee performing road construction on U.S. 14 near its intersection with Route 47 in Woodstock, Illinois, whereupon Berles struck him with his car while making a left turn onto U.S. 14 from Route 47, resulting in Nichols's death. Plaintiff alleged that Berles was liable for one or more of the following careless and negligent acts or omissions in violation of the Illinois Vehicle Code (Vehicle Code) (625 ILCS 5/11-601, 903, 908 (West 2010)): failing to maintain an adequate and sufficient lookout; operating a vehicle at a greater speed than reasonable given the conditions; failing to decrease speed to avoid a collision; failing to yield the right-of-way to avoid a collision; and failing to yield the right-of-way, proceed with due caution, and maintain a safe

speed in the midst of road construction workers.

¶ 11 On August 21, 2013, plaintiff filed her first amended complaint, in which she added defendants Curran, MCC, and BWI. IDOT retained BWI to provide civil engineering services in connection with its construction project to resurface U.S. 14. The two entities entered a "start-up agreement for consultant services" on March 5, 2010, and then entered into a "prime agreement for consultant engineering services" (the Contract) on June 17, 2010, which superseded the March 5 agreement. IDOT also hired Curran to resurface U.S. 14, and it resurfaced the road prior to August 22, 2011. Curran subcontracted with MCC to paint the highway lanes that it resurfaced.

¶ 12 Plaintiff's first amended complaint realleged counts I through IV of the original complaint against Berles. Plaintiff then added the same four counts—wrongful death, negligence, last expenses, and loss of consortium—against Curran, MCC, and BWI. In support of the four counts against Curran, plaintiff alleged that Curran acted negligently in failing to provide a safe construction zone, failing to provide adequate lane closures, failing to provide adequate warning signs, failing to provide a flagger, and failing to supervise the work being done in the roadway. She alleged that these negligent acts were the proximate cause of decedent's death. Plaintiff made the same allegations of negligence in her four counts against MCC.

¶ 13 In support of her final four counts against BWI, plaintiff alleged, in pertinent part, that BWI acted negligently by failing to make a reasonable inspection of the work area in order to prevent injury, configuring the highway lanes in a confusing and disorienting manner, failing to provide a safe place to work, failing to warn workers of known dangerous conditions, failing to provide adequate safeguards to prevent injury in the work area, failing to supervise the work area, and failing to establish proper traffic controls around the work area. Plaintiff maintained

that these alleged acts of negligence were the proximate cause of Nichols's death.

¶ 14 On December 27, 2013, BWI filed a section 2-619(a)(9) motion (735 ILCS 5/2-619(a)(9) (West 2012)) to dismiss counts XIII through XVI of plaintiff's first amended complaint. In its motion, BWI argued as follows. Plaintiff mistakenly asserted that BWI was liable for Berles's negligent operation of his motor vehicle. Plaintiff needed to establish that BWI owed decedent a duty and that the breach of its duties proximately caused decedent's injury. However, plaintiff could not establish either. Any tort duty would have to derive from BWI's limited Contract with IDOT, in which it agreed to provide certain professional engineering services. The Contract with IDOT required that BWI prepare preliminary plans and perform an initial evaluation of pavement conditions by June 31, 2010. IDOT, not BWI, mandated the use of IDOT traffic control details that complied with Illinois requirements, including signage and lane closures/configurations as contained in the Manual on Uniform Traffic Control Devices (MUTCD). Because of these requirements, BWI did not have discretion in the compulsory details of the devised plans. Moreover, the Contract did not require BWI to provide any services during the time of active road construction, to be present at the location during construction or observe the work being performed by IDOT employees, or to be responsible for worker safety or site inspections. BWI lacked control of the site, and the Contract omitted any requirements for it to be involved in the methods of road construction. Accordingly, it had no duty to provide for decedent's safety during road construction.

¶ 15 BWI continued that not only did it lack a duty to protect decedent but also that it was not the proximate cause of decedent's injury. It argued that the creation of the road construction condition was not the proximate cause of decedent's injury where Berles's independent, intervening act was the legal cause of the injury. Illinois law supported that mere creation of the

condition of road construction does not create liability where the driver independently acts negligently. Moreover, it argued that but for Berles's action, decedent never would have been struck, as Berles admitted in a handwritten statement to police that:

> "As I turned onto Route 14 to go west, I was in the left turn [lane] which is the far south lane. I observed a white pick-up truck with flashing lights in the center shoulder on Route 14 eastbound traffic, just before the Route 14 left lane to turn on Route 47 northbound. I thought the truck was going to do something, like make a u-turn. I focused on the truck, thinking it was going to move. As I looked at the truck I felt a thud on my vehicle. I realized I hit something and then I see something to the right. I began to pull over because I know [*sic*] I hit something and then I observed I hit a person."

Moreover, Berles admitted that he was aware that the area was a construction zone and that traffic controls were in place at the time of decedent's injury. Therefore, BWI argues, it was solely Berles's inattentive driving that was the actual cause of decedent's injury, not anything that could be attributed to BWI. Likewise, BWI was not the legal cause of decedent's injuries because BWI's services to IDOT—completed months before decedent's injury—did not promote or encourage Berles to hit decedent with his car. Rather, Berles's conduct was a superseding, independent cause of injury.

¶ 16 BWI attached the affidavit of John Ambrose as an exhibit in support of its motion to dismiss. Ambrose averred as follows. He was the vice president and regional manager at BWI at all times relevant to this action, and he was a licensed professional engineer in Illinois. The Contract required that BWI perform a "limited review project" at the construction site. BWI's limited review included the preparation of preliminary plans, an initial evaluation of the existing pavement conditions, and an initial cost estimate, all of which were to be completed by July 31,

2010. BWI was also responsible for the development of final plans, a final evaluation of existing pavement conditions, and a final cost estimate, due by October 31, 2010. He averred that all of these plans and estimates were completed per IDOT's requirements. BWI did not engage in any actual traffic engineering design work because the State mandated the use of IDOT-generated details for the plans. State-mandated requirements included traffic signage, lane closures, lane configurations, and "other State requirements called for in the [MUTCD]." IDOT did not allow BWI discretion in the provision of the "compulsory details." BWI did not provide nor was required to provide any services during active construction. The Contract did not require that BWI go to the site and observe the work being done there, and the Contract did not require that BWI be responsible for site or worker safety.

¶ 17 Plaintiff and Rural Mutual Insurance Company (RMI), as intervenor, filed a response in opposition to BWI's motion to dismiss on March 6, 2014. They argued that BWI owed decedent a duty of care deriving from the Contract, which required that BWI exercise engineering judgment and contemplate worker safety in preparation of its submitted plans to IDOT. Additionally, they argued that the question of whether BWI's services were a proximate cause of decedent's injury was not a question that could be decided as a matter of law, nor did Berles's actions preclude BWI as a proximate cause of decedent's death.

¶ 18 Their response included the affidavit of James Valenta, as a rebuttal to Ambrose's affidavit. Valenta averred as follows. He was a licensed professional engineer in Michigan and Ohio and had been a professional engineer for 36 years. He personally inspected the intersection of U.S. 14 and Route 47. BWI was responsible for the design of the intersection's repavement project per its Contract, and it negligently performed its duty to prepare adequate project plans. IDOT had adopted the MUTCD, and section 1A.09 of the MUTCD required that the use of

traffic control devices should be made using engineering judgment. The MUTCD stated that, although it provided standards, guidance, and options for traffic control devices, it was not a substitute for proper judgment. Therefore, BWI was not limited by the Contract and had discretion, indeed a duty, to exercise engineering judgment in the plans for adequate traffic control devices at the construction site. Section 1A.13 of the MUTCD again required the use of engineering judgment in the deployment of traffic control devices. The MUTCD further emphasized that worker safety was equally important to the safety of road users, reinforcing that BWI owed a duty to Nichols.

¶ 19 On April 15, 2014, the trial court held a hearing on BWI's section 2-619 motion to dismiss. Plaintiff and intervenor's attorneys argued that BWI's contractual duty required it to exercise engineering discretion, which meant that it was ultimately responsible for what it claimed were deficient markings and warning signs for an "evolving situation" at the construction site. The court, however, stated that "every driver is expected to know that they should keep an eye on where they are going," and that ultimately, it was "Berles's inattention to what was in front of him that was the ultimate problem here, not the failure to put a sign up that said don't look at this truck." Thus, Berles's inattention to the road in front of him was a "sufficient intervening cause" with respect to the issue of proximate cause. Moreover, the court stated that under the applicable case law, with respect to the issue of duty, the plaintiff had to establish that the defendant failed to abide by the plans called for by the Contract or that the plans were so egregious or dangerous that no competent contractor would follow them. The court did not believe that a duty had been established or that there was any evidence that BWI's actions or inactions could possibly be the cause of the accident. It orally granted BWI's motion to dismiss, with prejudice. The court subsequently entered a written order granting BWI's

section 2-619 motion to dismiss counts XIII through XVI with prejudice.[1] It also granted plaintiff leave to file a second amended complaint.

¶ 20 On May 6, 2014, plaintiff filed a motion to reconsider the court's April 15 ruling as well as to file her second amended complaint. The second amended complaint was substantially the same as the first amended complaint, but in it plaintiff removed the counts for loss of consortium against each defendant.

¶ 21 On June 5, 2014, Curran filed a section 2-619 motion to dismiss plaintiff's second amended complaint. It argued first that plaintiff could not show proximate cause because Berles's driving was the actual cause of decedent's death; decedent's injury was not linked to its work on U.S. 14, which it had completed prior to the accident; and the reasoning of the trial court's April 15, 2014, order in favor of BWI on the issue of proximate cause applied to Curran as well.

¶ 22 On August 13, 2014, the trial court held a hearing in which it first denied plaintiff's motion to reconsider the section 2-619 dismissal related to the first amended complaint. After denying the motion to reconsider, the court turned to Curran's 2-619 motion to dismiss, which MCC joined. In delivering its ruling, the court first said that it was referencing its ruling on BWI's motion to dismiss "by incorporation." The court continued that the "proximate cause of this accident from the evidence [the court has] seen seems to lie solely and completely with Mr. Berles' inattention to the roadway and failure to observe what was readily visible on the roadway

[1] The court also addressed and granted Curran's motion to dismiss count VIII with prejudice because plaintiff's count for loss of consortium damages was repetitive with the count for wrongful death damages. Plaintiff agreed the counts were repetitive and told the court that she sought to "clean up" the pleadings via a second amended complaint.

at some stage along the way." It found that arguments regarding the merits of signs or flaggers in preventing the accident amounted to no more than speculation. In particular, the court did not see "anything that indicate[d] *** that Curran violated a safety provision of the contract such that they had to provide for workers' safety." Rather, "Curran's work provided no more than a condition, and it cannot be the proximate cause of this occurrence." Counsel for RMI objected that the court was reaching the issue of duty, an issue that Curran's motion, which was based entirely on proximate cause, did not raise. The court, however, maintained that it was granting the motion to dismiss. Thereafter, the court granted Rule 304(a) language (Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010)), with respect to MCC, Curran, and BWI, allowing the dismissal of the counts against them to be immediately appealable. It also said that it would consider evidence on the issue of duty—in particular, whether the contract between Curran and IDOT gave rise to an additional duty owed to decedent on the part of Curran or MCC—before it lost jurisdiction over Curran and MCC pursuant to Rule 304(a). However, neither plaintiff nor RMI subsequently filed a motion to introduce evidence of an additional duty arising from the contract.

¶ 23 Plaintiff and RMI[2] timely appealed.

¶ 24 II. ANALYSIS

¶ 25 A section 2-619 motion to dismiss admits the legal sufficiency of the plaintiff's claim but asserts certain defects or defenses outside the pleadings which defeat the claim. *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55. In ruling on such a motion, we must construe the pleadings and supporting documents in the light most favorable to the nonmoving party and accept as true all well-pleaded facts in the complaint and all inferences that may reasonably be drawn in the

[2] Hereafter, when we refer to plaintiff's arguments, we mean the arguments made by both plaintiff and RMI in their joint briefs on appeal.

complainant's favor. *Id.* Our review is *de novo*. *Glasgow v. Associated Banc-Corp*, 2012 IL App (2d) 111303, ¶ 11. Here, plaintiff argues that the trial court erred in dismissing its complaint because: (1) the complaint properly alleged that BWI owed decedent a duty of care, and (2) whether BWI, MCC, or Curran were proximate causes of decedent's injury should not have been decided as a matter of law upon the motion to dismiss, and the record demonstrates that there was an issue of fact regarding proximate cause. We address each argument in turn.

¶ 26 1. BWI's Motion to Dismiss

¶ 27 Plaintiff argues as follows that BWI owed a legal duty of care to the decedent. In Illinois, the scope of an engineer's tort duty depends on the contract terms giving rise to the duty. Accordingly, BWI's duty that it owed the decedent arose from the Contract with IDOT. The Contract required that BWI use engineering judgment when designing, preparing, reviewing, and approving plans for the construction site where decedent was injured. Such use of engineering judgment included planning the use of adequate signage and traffic controls during construction.

¶ 28 In particular, the Contract incorporated the MUTCD, which expressly required engineering judgment to be exercised when making a decision concerning the use of traffic control devices. Here, that meant that BWI had a duty to use judgment in preparing the plans for the construction work done on U.S. 14 at the time of decedent's injury, which included decisions related to pavement markings, complying with signage requirements, configuring lane closures, and the use of traffic control devices. Moreover, section 6 of the MUTCD required that BWI account for pedestrian and worker safety. Thus, the Contract required that BWI exercise engineering judgment in developing the construction plans and to factor in worker safety in its plan development.

¶ 29 BWI responds as follows. The trial court's ruling on the motion to dismiss was consistent with *Thompson v. Gordon*, 241 Ill. 2d 428 (2011), and *Ferentchak v. Village of Frankfort*, 105 Ill. 2d 474 (1985), where the supreme court ruled that duty was a question of law that the trial court must determine *ab initio*. In *Ferentchak*, the supreme court looked to the engineer's contract to determine whether the engineer owed a legal duty to the plaintiffs to set foundation grade levels for their homes and found that the engineers did not; the court refused to expand the engineer's duties beyond those established by their contract, and the contract did not require them to set foundation grade levels for the plaintiffs' homes. In *Thompson*, the supreme court again examined the design professional's contract with the plaintiff and found the professional did not owe the plaintiff a duty. In particular, the supreme court held that a design professional's duty is established by the scope of the relevant contract and may not be expanded.

¶ 30 BWI continues that its duty, like the alleged duties in *Thompson* and *Ferentchak*, was limited by its Contract. Per Ambrose's affidavit, BWI's contracted services included implementing IDOT-mandated traffic control details, from which BWI did not have discretion to deviate. Furthermore, per Ambrose, the scope of the Contract did not include that BWI provide any services during active road construction, nor did the Contract provide for any site or worker safety provisions, site inspections, or site supervision. Plaintiff failed to refute Ambrose's affidavit with Valenta's conuter-affidavit, which never addressed that the Contract did not require that any of BWI's alleged services be performed during active construction. Additionally, Valenta's affidavit failed to refute that IDOT retained control in mandating traffic control details, BWI did not have worker safety responsibilities, and BWI was not required to inspect or supervise the construction zone. Accordingly, the trial court deemed these facts admitted, and these facts established that BWI did not owe plaintiff a legal duty of care.

¶ 31 Plaintiff replies as follows. BWI's Contract required that it provide a site plan that incorporated state mandated signage, lane closures, and more. Furthermore, the MUTCD, which the Contract incorporated, required that BWI exercise "engineering judgment" and stressed the importance of pedestrian and worker safety at road construction sites. Moreover, BWI's attack on Valenta's affidavit that it was not based on admissible evidence was a legal conclusion and factually baseless. Rather, Valenta's affidavit was based on admissible evidence—in particular, his review of the Contract, BWI's prepared plans per the Contract, and the MUTCD. With regard to Ambrose's affidavit, Ambrose conceded that the Contract incorporated the MUTCD, and Valenta's affidavit refuted Ambrose's assertion that BWI's plans were replicas of standard plans for traffic construction by asserting that BWI's plan included non-standard elements, such as "estimated quantifiers for pavement markings and designs for the placement of permanent pavement marking."

¶ 32 Plaintiff continues that, despite BWI's assertion that the MUTCD did not impose a duty on BWI because the "manual describes the application of traffic control devices, but shall not be a legal requirement for their installation," BWI failed to take into context the entirety of the relevant MUTCD section. Rather, the MUTCD imposed a duty to exercise engineering judgment in design of BWI's construction plan. Finally, unlike in *Thompson* or *Ferentchak*, BWI's duty to exercise engineering judgment here arose under the terms of its Contract with IDOT.

¶ 33 We first address whether BWI owed decedent a duty, and for the following reasons, we hold that it did not. Plaintiff and BWI rightly agree that the scope of BWI's legal duties here is limited by the terms of the Contract (see *Block v. Lohan Associates, Inc.*, 269 Ill. App. 3d 745, 756 (1993) ("When negligence is based upon a contractual obligation, the scope of duty is

determined by the terms of the contract.")), and we thus turn to the terms of the Contract to examine what duty, if any, BWI owed decedent (*id.*; *Putman v. Village of Bensenville*, 337 Ill. App. 3d 197, 208 (2003)).

¶ 34 In examining the Contract, we apply the basic rules of contract interpretation. *Thompson*, 241 Ill. 2d at 440-41. That is, we will look to the language of the contract to determine the parties' intent, construing it as a whole, and if the words are clear and unambiguous, we will give them their plain, ordinary, and popular meaning. *Id.* at 441. Only if the language is susceptible to more than one meaning will we consider extrinsic evidence. *Id.*

¶ 35 Section 2 of the Contract, which pertains to "Scope of Work," states that BWI's work included:

> "[T]he preparation of contract plans and special provisions for resurfacing projects, widening and resurfacing projects, drainage improvements, preparation of bridge repair plans, bridge deck inspection and deck repair surveying, signal plans, miscellaneous structure details, geotechnical investigations, review of contract plans prepared by consultants and local agency consultants for roadway and bridge reconstruction projects and supplemental field surveying of various projects."

The Contract itself does not specifically reference the MUTCD, nor is there any provision addressing, delineating, or limiting BWI's duty owed toward construction workers. The Contract does incorporate by reference IDOT's "Standard Agreement Provisions for Consultant Services," but plaintiff has not provided this court with a copy of said agreement, and we are unable to say whether the MUTCD was incorporated thereby. Plaintiff does not even attempt to argue that it was. Rather, plaintiff relies on Ambrose's reference to the MUTCD in his affidavit

to argue that the Contract incorporated certain provisions of the MUTCD and imposed a duty on BWI. We therefore turn to Ambrose's affidavit to examine this contention.

¶ 36 Ambrose's affidavit addressed the contractual scope of BWI's work. Ambrose, a licensed engineer and vice president and regional manager for BWI, averred that BWI's first work order under the Contract was a limited review project of U.S. 14, which included preparation of preliminary plans, an initial evaluation of existing pavement conditions, and an initial cost estimate, to be completed by July 31, 2010. BWI was also required to develop final plans, a final evaluation of existing pavement conditions, and a final cost estimate by October 31, 2010. BWI completed these requirements. Ambrose continued that the plans included several sheets of IDOT-mandated traffic control details, and that BWI did not engage in any actual traffic engineering design work because IDOT mandated the use of specific details in the plans. The State-mandated traffic requirements included traffic signage, lane closures and configurations, and other requirements called for in the MUTCD, and IDOT and the MUTCD did not allow BWI any discretion in the provision of the compulsory details of the plans. The scope of BWI's services did not include the provision of any services during active construction. BWI had no contact or involvement with IDOT during active construction, and IDOT did not request that BWI furnish any services during the active construction phase. Finally, Ambrose averred that the Contract did not require that BWI provide for site or worker safety; that it supervise or inspect active construction; or that it place, monitor or maintain any traffic control devices at the project site.

¶ 37 After reviewing Ambrose's affidavit, it is clear that there is a dispositive failing in plaintiff's argument that the MUTCD imposed a duty on BWI. Ambrose's affidavit does not support that any such duty arose from the Contract's terms. Plaintiff makes a speculative

extrapolation from Ambrose's affidavit that the Contract incorporated the MUTCD, when Ambrose only averred that IDOT mandated certain traffic control details, such as markings and lane closures, which IDOT had derived from the MUTCD. BWI was not free to deviate from these compulsory details. The Contract itself makes no reference to the MUTCD, nor did Ambrose aver that the Contract incorporated the MUTCD. The record shows only that IDOT referenced the MUTCD in deciding what to mandate BWI to do in preparing its plans, and it does not show that the Contract required BWI to reference or follow the MUTCD. Plaintiff also does not argue that BWI had discretion in deciding traffic control details under the terms of the Contract, instead relying entirely on sections of the MUTCD to assert that BWI was required to exercise engineering judgment. Because the Contract did not incorporate the MUTCD, the MUTCD could not be the source of BWI's duty, and plaintiff's sole argument on this issue fails.[3]

¶ 38 Accordingly, we need not reach whether the MUTCD imposed any duty on BWI because any such duty would not have arisen from the terms of the Contract. The only argument before us is that the Contract incorporated the MUTCD, and the MUTCD required BWI to exercise engineering judgment consistent with it, which amounted to a legal duty of care owed to construction workers.

¶ 39 2. Curran and MCC's Motion to Dismiss

¶ 40 Although Curran and MCC's motion to dismiss only argued that they were not the proximate cause of decedent's injury, MCC first argues that it did not owe a duty of care to

[3] We do not address whether BWI was the proximate cause of decedent's injury because we have already held that BWI did not owe decedent a duty. See *Dunn v. Baltimore & Ohio R. Co.*, 127 Ill. 2d 350, 365 (1989) ("[U]nless a duty is owed, there is no negligence.").

decedent.[4] MCC argues that although the trial court did not grant MCC's motion to dismiss based on the issue of duty, but rather based on proximate cause, the record supports a dismissal for a lack of duty, and the appellate court may affirm on any basis supported by the record. Plaintiff responds that the question of whether MCC owed a duty to decedent is not an issue before this court because MCC did not raise the issue below and the trial court did not rule on it.

¶ 41 With respect to the issue of duty in Curran and MCC's motion to dismiss, the relevant trial court proceedings are as follows.[5] At the August 13, 2014, hearing, the court asked, "Where did Curran's duty arise? If you can explain what their duty was." Counsel for plaintiff responded that he thought it was a common law duty, but then said "let me preface this all by saying we are not here to discuss duty *** we haven't had an opportunity to brief that." The court then tried to clarify plaintiff's argument, asking whether plaintiff's argument was that MCC and Curran should have put up traffic signs, and plaintiff responded that they should have, but in the alternative they should not have proceeded with work in the absence of adequate traffic signage. When pressed by the court whether he was arguing "that Curran had a responsibility to provide for the safety of other workers on the job site," counsel responded that "without taking complete discovery of the contract between Curran and IDOT and between Curran and everyone else and also[MCC], I can't answer that question."

¶ 42 The court granted MCC and Curran's motion to dismiss, reasoning that the proximate cause of the accident lay solely with Berles's inattention and failure to observe what was readily visible on the road. As for the lack of traffic signs or flaggers, the court found these arguments

[4] Curran, however, did not make any argument with respect to duty in its response brief.

[5] The proceedings below addressed Curran, but the court later clarified that its ruling on the motion to dismiss applied to both Curran and MCC.

amounted to no more than speculation. It also did not find any indication that Curran or MCC violated a safety provision in their contracts. However, it left an "out," saying that if plaintiff could provide some evidence of a contractual duty that was violated, it would consider it. Plaintiff again objected that the court was addressing duty in its analysis, which it had not had a chance to brief or argue yet. Thus, any role duty played in the court's decision was "something of a disadvantage." The court responded that "if it turns out there is evidence that supports a duty outside of common law duty, meaning the contracts, I would think that's relevant. But I don't have that right now."

¶ 43 The court granted Rule 304(a) language and noted that it would retain jurisdiction for 30 days, in which time plaintiff could file a motion to reconsider. The court said that plaintiff could bring forth a motion on "anything," to present evidence that there were additional duties in MCC and Curran's contracts. However, plaintiff never filed a motion to introduce evidence of a contractual duty before appealing to this court. Plaintiff only argues that duty is not at issue on appeal.

¶ 44 Despite the trial court's receptiveness to evidence of a contractual duty before it lost jurisdiction, we do not find that duty is properly before us. A section 2-619 motion admits the legal sufficiency of the plaintiff's complaint but raises defects, defenses, or other affirmative matters that either arise on the face of the complaint or are established by external submissions. *Zahl v. Krupa*, 365 Ill. App. 3d 653, 657-58 (2006). When a claim is dismissed pursuant to section 2-619, the question is whether there is a genuine issue of material fact and whether the defendant is entitled to judgment as a matter of law. *Id.* at 658. Importantly, MCC and Curran's motion to dismiss argued only a lack of proximate causation, not duty. By its nature, the section 2-619 motion admitted all well-pleaded facts and the legal sufficiency of plaintiff's complaint

(*Piser v. State Farm Mutual Automobile Insurance Co.*, 405 Ill. App. 3d 341, 344 (2010)), which included allegations of their duty. Given that the motion did not raise affirmative matters related to the issue of duty and that discovery was ongoing at the time the court granted the motion to dismiss, we will not review whether dismissal was proper based on a lack of duty. *Cf. Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 430-31 (2006) (finding that defendants forfeited their argument regarding proximate cause when they raised the issue for the first time on appeal and argued only that they did not owe plaintiff a duty in the trial court); *Charleston v. Larson*, 297 Ill. App. 3d 540, 552-53 (1998) (resolving the appeal of a motion to dismiss on the issue of duty, which was fully briefed in the trial court, and declining to address whether the same motion should be affirmed on proximate causation, which was not raised in the trial court).

¶ 45 Turning to the issue of proximate cause, plaintiff argues that we cannot decide proximate cause as a matter of law. Plaintiff argues that proximate cause is ordinarily a question of fact reserved for the trier of fact. See *Harrison v. Hardin County Community Unit School Dist. No. 1*, 197 Ill. 2d 466, 476 (2001). While it is true that proximate cause is generally a question of fact, "the lack of proximate cause may be determined by the court as a matter of law where the facts alleged do not sufficiently demonstrate both cause in fact and legal cause." *Young v. Bryco Arms*, 213 Ill. 2d 433, 447 (2004). Thus, we may affirm on this basis.

¶ 46 Nonetheless, plaintiff argues that an issue of material fact existed as to proximate cause. Plaintiff argues as follows. It was reasonably foreseeable to Curran and MCC that performing their work in the absence of adequate traffic controls would result in the injury of an IDOT worker. Moreover, the fact that Berles or the decedent may also have acted negligently did not relieve MCC and Curran of liability.

¶ 47 Plaintiff cites several cases to support that MCC and Curran were the proximate causes of decedent's injury. First, plaintiff cites *Biel v. Bridgeview*, 335 Ill. App. 3d 526, 533 (2002), where the court held that a genuine issue of material fact existed as to whether the defendant's failure to replace a streetlight was a material element in the death of a pedestrian. The plaintiff, as administrator of the pedestrian's estate, argued that it was foreseeable that the lack of illumination contributed to the pedestrian's injury. *Id.* at 533. Plaintiff analogizes the facts of *Biel* to our case, arguing that it was foreseeable to Curran and MCC that performing work in a construction zone without proper traffic control would have likely resulted in a worker being struck by a vehicle.

¶ 48 Plaintiff next cites *Martinelli v. City of Chicago*, 2013 IL App (1st) 113040, arguing that its facts closely resemble the facts here. In *Martinelli*, the plaintiff, a telecommunications worker who was assisting Chicago city workers with a "mundane water department job," was struck by an admittedly distracted motorist. *Id.* ¶ 2. The City of Chicago had established safety provisions that included barricades in the form of large vehicles and flagmen to protect the workers, but those protections were removed during the city workers' extended lunch break. *Id.* During the lunch, the telecommunications workers, including plaintiff, remained working in the workzone. *Id.* It was during that time that the distracted motorist struck and injured the plaintiff. The plaintiff lost his left leg to the accident, and he and his wife sued the city for negligence. *Id.* The jury found in favor of the plaintiff and rejected, through a special interrogatory accompanying the verdict, that the driver was the sole proximate cause of his injury. *Id.*

¶ 49 In affirming, the *Martinelli* court reasoned that distracted drivers were legally foreseeable, elaborating that it "is well known that people do various things that lead to distracted driving," including "spilling a drink; dropping a cigarette; reaching for an item of food

or drink; applying makeup; [or] looking at a map *** this era's drivers are distracted on a regular basis by their apparent need to remain in constant communication on their cell phones." *Id.* ¶ 30. Moreover, a city foreman testified that it was his duty to provide for the safety of all workers, pedestrians, and motorists via flaggers and barricades. Although he provided these protections before and after an extended lunch break, he did not provide them during the break despite that the plaintiff, other workers, and at least one city worker continued working. *Id.* ¶ 29.

¶ 50 Plaintiff argues that the reasoning of the *Martinelli* court applies with equal force here. Like *Martinelli*, temporary traffic controls were not in place at the time of Nichols's injury, which was caused by a distracted driver. The city in *Martinelli* was not relieved of liability merely because the driver was distracted, and likewise, MCC and Curran should not be relieved of liability here. Distracted drivers, such as Berles, were foreseeable.

¶ 51 Plaintiff cites three more cases in support of its position. In *Leone v. City of Chicago*, 235 Ill. App. 3d 595, 603-04 (1992), the court affirmed the trial court's holding that a police officer was negligent in ordering the plaintiff, who he had pulled over to issue a traffic citation, to stand between their cars to observe his expired license plate, whereupon the plaintiff was struck by a recklessly driven vehicle. In *Gilmore v. Stanmar, Inc.*, 261 Ill. App. 3d 651, 657-58 (1994), the appellate court reversed the circuit court, holding that the plaintiff-motorist had sufficiently alleged that the defendant's large canopy, which extended into the street, obscured the plaintiff's vision and caused his motor vehicle accident, in which he was severely injured. Finally, plaintiff cites *Lemings v. Collinsville School District*, 118 Ill. App. 3d 363, 367 (1983), where the supreme court affirmed the circuit court's denial of a motion to dismiss. In *Lemings*, the plaintiff had alleged that a dumpster placed by the defendant hindered the view of both

pedestrians and drivers at its location, and as a result of the obscured views, the plaintiff-pedestrian was injured by an automobile when she tried to cross the street. *Id.* at 364-67.

¶ 52 Both MCC and Curran respond to plaintiff's proximate cause argument. MCC responds as follows. The Illinois supreme court has held that the failure to look in front of one's vehicle and observe what is readily observable in the direction of travel is an intervening cause that renders other causes remote. *Briske v. Burnham*, 379 Ill. 193, 200 (1942). In *Briske*, the plaintiff brought suit against two railroad companies and the village of Burnham for personal damages she incurred while a passenger in a vehicle that struck a barricade placed across an avenue in Burnham. *Id.* at 194. The avenue on which plaintiff sustained her injury had been vacated by village ordinance two years prior to her injury. *Id.* at 195-96. The barricade placed on the avenue contained a solid rail, was about three and a half feet tall, and extended completely across the vacated street, about 50 feet from the railroad tracks. *Id.* at 195. The barricade rail was painted with alternating black and white stripes and had a red reflector placed on top of it. *Id.* 195-96. The accident occurred on a clear, dry night, and the driver testified that his headlights were on and that at least one streetlight was also on. *Id.* at 196. He observed a railroad crossing sign on his left-hand side, and he slowed down to 15 to 20 miles per hour. He looked to see if a train was coming, and at that moment he struck the barricade. *Id.* Other testimony indicated that the car was traveling 35 to 40 miles per hour and never slowed down. *Id.* at 198. Plaintiff secured a judgment in her favor in the trial court, but the appellate court reversed without remand, entering judgment in favor of defendants. *Id.* at 194.

¶ 53 On appeal, the supreme court's inquiry was limited to a determination of the proximate cause of the accident. *Id.* at 199. It found that the vacated street and barricade did no more than

"furnish a condition," and the "intervening efficient cause of plaintiff's injuries" was the driver's negligence. *Id.* The supreme court reasoned that:

> "The night was clear, and the pavement dry and in good condition. The lights on the care [*sic*] were the same height as the barricade and [the driver] admitted that they reflected 200 feet ahead of him. *** The barricade and the reflector on it were plainly visible. *** [H]is lights were functioning properly and it follows, necessarily, that it was his inattention which constituted the negligence occasioning injuries to his guest. The conclusion is inescapable, under these circumstances, that [the driver] could and would have stopped his car had he used his powers of observations. The law does not permit him to say that he did not see the obstruction when, if he had properly exercised his faculty of sight, he would have seen the barrier." *Id.* at 199-200.

Accordingly, the supreme court held that the driver's negligence, not the presence of the barricade, was the proximate cause of the accident. *Id.* at 200.

¶ 54 MCC argues as follows that under *Briske*, Berles's inattention constituted an intervening cause that broke any causal chain that would include MCC. Another motorist, Irene Congdon, who was traveling directly behind Berles in the left turn lane, was able to observe Nichols working in the road. There were no obstructions in the road and visibility was clear. It was merely Berles's inattention to what was directly in front of him that caused the accident. In fact, Berles admitted he was not looking in front of his vehicle while turning but instead was looking at a parked truck. This established his inattentiveness, and he could have stopped his car before hitting Nichols had he been paying attention to what was in front of him. No warning sign was necessary to tell him to look straight ahead when driving his car, but rather, that is common sense.

¶ 55 MCC also cites *Shank v. H.C. Fields*, 378 Ill. App. 3d 290 (2007), where a motorist was injured when a semi-truck caused a multiple-vehicle accident in a construction site. Plaintiff brought suit against the IDOT-contractor who performed construction at the site for negligence for failure to open both lanes of traffic on the day of the accident. *Id.* at 291. The contractor was required by IDOT specifications to reopen all lanes of traffic for the holiday weekend, but due to a delay, only one of the two highway lanes was open that afternoon. *Id.* 290-91. Traffic was backed up for over a mile as the two lanes merged into one, and a semi-truck driver, driving a 40,000-pound load, struck the line of backed-up vehicles at over 50 miles per hour. *Id.* at 291. The road was level and weather was clear, and the truck driver knew there would be traffic stoppage due to construction because he had driven over the same stretch of road multiple times in the past two months. *Id.*

¶ 56 The appellate court addressed whether the contractor's failure to reopen the second traffic lane was the proximate cause of plaintiff's injury. *Id.* at 294. It explained that case law has distinguished between conduct that is the cause of an accident and conduct that does nothing more than furnish a passive condition by which the injury is made possible. *Id.* It held that the failure to have both lanes open was not so closely tied to plaintiff's injury that the contractor should have had responsibility for it; it only furnished the condition that allowed the accident to happen. *Id.* at 295. The truck driver was completely inattentive, and the contractor's failure did not promote or encourage the driver's inattentiveness. *Id.* Taking plaintiff's logic to an extreme, the court stated that "[t]he accident would not have happened if the authorities had not built the road in the first place, but that also is no basis for liability." *Id.*

¶ 57 MCC argues that Berles, like the driver in *Shank*, was aware that construction had been taking place in the area and did not need a sign to tell him to pay attention to what was in front of

him. Any failure to place signs or flaggers did not promote or encourage Berles's inattention to what was in front of his vehicle as he drove.

¶ 58 Finally, MCC argues that the difference flaggers or additional traffic signs would have made is speculative. "[T]he existence of a fact cannot be inferred when a contrary fact could be inferred with equal certainty from the same evidence." *Billman v. Frenzel Construction Co.*, 262 Ill. App. 3d 681, 687 (1993). MCC argues that Berles admitted he knew there was construction in the area but fixated on the IDOT truck. It is speculation to say that flaggers or additional signs would have prevented Berles from fixating on the truck instead of what was in front of him while making the left turn and striking Nichols.

¶ 59 Curran also responds that it was not the proximate cause of Nichols's injury. Curran cites many of the same cases in support of its position, including *Briske* and *Shank*, and we do not recount those arguments again. Like MCC, Curran argues that any actions it took merely furnished a condition under which the injury occurred but was not the cause of the injury, and Berles was an intervening cause that severed any chain of causation. Simply, nothing that Curran did promoted or encouraged Berles to fixate on the IDOT truck and operate his vehicle without observing where his vehicle was traveling.

¶ 60 Plaintiff replies by reiterating her initial arguments and by arguing that had there been proper traffic controls to warn Berles of the presence of workers, such as flaggers or traffic signs, he would have understood why the truck was on the road and thus would not have needed to focus on it while making a left turn. Plaintiff argues that, thus, MCC and Curran were causes in fact of Nichol's injury. In support, plaintiff cites *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 260 (1999), where the supreme court held that an illegally parked truck was a cause

in fact of a pedestrian's injury, when that pedestrian was struck by an automobile.[6] With regards to legal cause, plaintiff argues that it was foreseeable that Berles would concentrate on the parked truck in the absence of proper traffic controls. Plaintiff distinguishes *Shank* because the driver there was reckless and there were traffic control devices present to warn the truck driver. *Shank*, 373 Ill. App. 3d at 292-93.

¶ 61 We agree with MCC and Curran that they were not the proximate cause of Nichols's injury as a matter of law. To demonstrate proximate cause, a plaintiff must show both cause in fact and legal cause. *Young*, 213 Ill. 2d at 446. For cause in fact, a court must first ask whether the injury would have occurred but for the defendant's conduct. *Coole v. Central Area Recycling*, 384 Ill. App. 3d 390, 397 (2008). If multiple factors may have combined to cause the injury, we ask whether the "defendant's conduct was a material element and a substantial factor in bringing about the injury." *Id.* Legal cause is established "if the defendant's conduct is 'so closely tied to the plaintiff's injury that he should be legally responsible for it.' " *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 395 (2004). Legal cause is a question of policy, that is, "[h]ow far should a defendant's legal responsibility extend for conduct that did, in fact, cause the harm?" *Id.* Thus, the proper inquiry for legal causation is an assessment of foreseeability, examining whether the injury is of a type that a reasonable person would see as a likely result of his or her conduct. *Id.* Proximate cause may be determined as a matter of law if

[6] The *Galman* court continued, however, to find that the illegally parked truck was not the legal cause of the pedestrian's injury. *Id.* Moreover, plaintiff never argues that the IDOT truck was responsible for causing Nichols's injury, nor that MCC or Curran was responsible for the truck's presence.

the facts alleged do not sufficiently demonstrate both cause in fact and legal cause. *Vertin v. Mau*, 2014 IL App (3d) 130246, ¶ 10.

¶ 62 In addition, Illinois courts draw a distinction between a condition and a cause of a plaintiff's personal injury:

> "If the negligence does nothing more than furnish a condition by which the injury is made possible, and that condition causes an injury by the subsequent act of a third person, the creation of the condition is not the proximate cause of the injury. [Citations omitted.] The test that should be applied in all proximate cause cases is whether the first wrongdoer reasonably might have anticipated the intervening efficient cause as a natural and probable result of the first party's own negligence." *Galman*, 188 Ill. 2d at 257.

The distinction between a condition and a cause is not at odds with the bifurcated proximate cause analysis. The *Galman* court clarified that cases such as *Briske*, although employing a different vocabulary than more recent cases, are all focused on the same questions: whether the defendant's negligence was a material and substantial element in bringing about the injury, and if so, whether that type of injury was reasonably foreseeable. *Id.* at 258-59. Moreover, " 'it is not the distinction between "cause" and "condition" which is important, but the nature of the risk and the character of the intervening cause.' " *Shank*, 373 Ill. App. 3d at 294-95 (quoting W. Keeton, Prosser & Keeton on Torts §42, at 278 (5th ed. 1984)).

¶ 63 Several of plaintiff's cases are distinguishable from our situation. In *Biel*, the alleged cause of the injury was a lack of illumination on the roadway (*Biel*, 335 Ill. App. 3d at 533), but there is no allegation here that Berles was unable to see where he was driving. In *Leone*, the court relied on the special duty the police officer owed the plaintiff when he pulled the plaintiff over for a traffic stop and placed the plaintiff in a vulnerable position. *Leone*, 235 Ill. App. 3d at

603-04. Here, we are only focused on causation, not duty, and the allegations do not depend on any party being placed in a more vulnerable position by another. In *Gilmore*, the issue was whether the defendant caused the injury by deploying a large canopy that obscured the driver's vision (*Gilmore*, 261 Ill. App. 3d at 657-58), whereas here the issue is not whether MCC and Curran did something to cause the accident but whether they failed to do something that may have prevented it. Likewise, *Lemings* does not aid us. There, the alleged cause of the injury was the placement by defendant of a dumpster that hindered the view of motorists and pedestrians, not the failure of the defendant to provide adequate warnings. *Lemings*, 118 Ill. App. 3d at 364-67.

¶ 64 *Martinelli*, however, requires closer examination. At first glance, *Martinelli* stands at odds with *Briske* and holds that distracted drivers, like Berles, are foreseeable and do not relieve a party of its negligence in failing to provide adequate traffic controls at a construction site. *Martinelli*, 2013 IL App (1st) 113040, ¶¶ 29-30. First, we note that *Briske* is a supreme court decision, whereas *Martinelli* is from our first district. We are not bound by other appellate court decisions (*People v. Cummings*, 375 Ill. App. 3d 513, 519 (2007)), but we are bound by supreme court decisions (*Gatreaux v. DKW Enterprises, LLC*, 2011 IL App (1st) 103482, ¶ 23). Nevertheless, this is not a situation where we merely apply the case law we are bound to follow in disregard of a sister district. Rather, there are important factual and analytical distinctions between *Martinelli* and our case.

¶ 65 In *Martinelli*, the appellate court first addressed whether the defendant, the city of Chicago, was the cause in fact of the plaintiff's injury. *Martinelli*, 2013 IL App (1st) 113040, ¶ 25. It found that but for the city's conduct the accident that injured the plaintiff would not have occurred. *Id.* The jury heard testimony that the city was required by permit to provide various

safety measures, including flagmen and barricades. *Id.* ¶¶ 8, 25. Flagmen and barricades (in the form of large vehicles) were used before and after the accident but were not present when plaintiff was injured because the roadways were partially closed. *Id.* ¶¶ 2, 25. An expert for the plaintiff testified that had the city provided proper safety measures, which would have included properly placed vehicles as barricades, the accident would not have occurred. *Id.* ¶ 12. The driver also testified he was "confused" by what was happening near the site of the accident. *Id.* ¶ 25. He assumed it was okay to follow the vehicle in front of him but was surprised that when he followed the vehicle around a pillar, he was faced with oncoming traffic. *Id.* This caused him to veer back toward his lane, which placed him on course to hit plaintiff. *Id.* The driver also testified that he would have slowed down had there been a vehicle barricading the area where plaintiff was working. *Id*.

¶ 66 Turning to legal cause, the *Martinelli* court found that the driver's inattention, although careless, was foreseeable by the city. *Id.* ¶¶ 28, 30-31. The court found that today's drivers are easily distracted and "run-of-the-mill distracted driving," such as spilling a drink or looking at a map, was clearly foreseeable. *Id.* ¶ 30. Moreover, in "the context of this specific occurrence," the driver traveling through the construction zone followed another vehicle around a viaduct pillar and then had only three and a half seconds before the accident occurred, meaning a momentary distraction could, and did, prove fatal. *Id.* ¶ 36.

¶ 67 In contrast, our case did not involve a construction site with lane closures and a pillar that would tend to block a driver's visibility. Rather, plaintiff began at a stop in the left turn lane. The road at the site of the accident had already been repaved and only needed to be painted. The driver behind Berles was clearly able to observe Nichols working in the road, and Nichols was directly in Berles's correct driving lane. This indicates that Nichols was plainly observable to

Berles had he looked in Nichols's direction. Plaintiff asserts that but for the absence of flaggers and additional traffic signs, the accident would not have occurred. This is speculation, and proximate cause may not be based on conjecture. *Nichols v. City of Chicago Heights*, 2015 IL App (1st) 122994, ¶ 44. Similarly, in *Shank*, the court could not say that the accident would have happened but for the defendant's alleged negligence in failing to open both lanes of traffic. *Shank,* 373 Ill. App. 3d at 295. "A completely inattentive driver is a threat at any time," and thus had the traffic been only slow-moving but not stopped, the accident very well may still have occurred. *Id.*

¶ 68 Here, plaintiff provides no evidence other than her legal conclusion to establish cause in fact. In the absence of such evidence, we cannot say plaintiff created an issue of fact that MCC or Curran were the proximate causes of Nichols's injury. Berles admitted that he had driven that stretch of road for two years, and he told the officer at the scene that he "should have known better" because he knew they were performing road construction in that area. It was therefore just as likely that Berles would have fixated on the truck or been otherwise inattentive had additional warnings been present. Like in *Briske*, had Berles "properly exercised his faculty of sight" (*Briske,* 379 Ill. at 200) to observe what was in front of his vehicle, he would have seen Nichols and been able to stop.

¶ 69 Because plaintiff cannot show cause in fact, she cannot show proximate cause. *Vertin*, 2014 IL App (3d) 130246, ¶ 10 (plaintiff must show cause in fact and legal cause to demonstrate proximate cause). Accordingly, we do not address legal cause and do not need to consider the foreseeabilty of distracted drivers, a point emphasized in *Martinelli*.

¶ 70 III. CONCLUSION

¶ 71 The trial court correctly dismissed the complaint against BWI, MCC, and Curran. Plaintiff failed to sufficiently allege that BWI owed Nichols a duty of care that arose from its Contract. Plaintiff also failed to sufficiently allege that Curran and MCC were the proximate cause of Nichols's injury. Accordingly, we affirm the judgment of the McHenry County circuit court.

¶ 72 Affirmed.