2018 IL App (2d) 170960-U
No. 2-17-0960
Order filed June 19, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ARNOLD J. KLEHM GROWER, INC.,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 12-L-585
	)	
LUDWIG SVENSSON, INC.,	)	Honorable
	)	Robert K. Villa,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: In this appeal from a jury verdict in a product liability action, (1) the trial court did not err in granting summary judgment for plaintiff on defendant's affirmative defenses of *res ipsa loquitur* and "open and obvious"; (2) defendant forfeited its challenges to the trial court's rulings on evidentiary issues and jury instructions; and (3) the jury's verdicts were not legally inconsistent.

¶ 2 Defendant, Ludwig Svensson, Inc., appeals from the jury verdict in favor of plaintiff, Arnold J. Klehm, in plaintiff's product liability action for damages from a fire in plaintiff's greenhouse complex. Plaintiff's theory at trial was that the spread of the fire was exacerbated by a flammable shade cloth manufactured by defendant and purchased by plaintiff from a third party, Cravo Equipment Limited (Cravo). Defendant challenges (1) various pretrial rulings of

the trial court; (2) the court's rulings on jury instructions; and (3) the court's rejection of defendant's claim that the jury verdicts were inconsistent. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The background we provide in this section will be supplemented as we discuss each issue on appeal.

¶ 5 The following undisputed facts are taken from the record in the summary judgment proceedings. Plaintiff owned and operated a greenhouse complex in Hampshire. In the early morning hours of September 27, 2011, an employee arrived at plaintiff's facility to discover that a fire had broken out in one of the greenhouses. The fire did not originate in the greenhouse itself but in an addition that plaintiff had built contiguous to the greenhouse. Part of the addition was used as a garage and part as a winery. The fire in the garage/winery spread into the greenhouses themselves, extensively damaging the structure and the inventory of plants inside. At the time of the fire, the greenhouses were equipped with a shade system produced by Cravo and sold to plaintiff. One component of the shade system was a shade cloth, or shade screen, with the model number "ULS15." The shade cloth was a type of plastic mesh sheeting. Cravo did not manufacture the cloth but purchased it from defendant, which produced the product for use in shade systems. Plaintiff did not deal directly with defendant in the purchase of the shade system. Plaintiff installed the shade system above the plants in its greenhouses both to provide shade and contain warmth.

¶ 6 In April 2013, plaintiff filed its two-count amended complaint against defendant. Plaintiff alleged that the "highly combustible/flammable nature" of the shade cloth, and its "tendency *** to 'burn and drop,' " caused the rapid spread of the fire throughout the greenhouses. Count 1, labeled "negligent design," alleged that defendant was negligent because

its design of the shade cloth deviated from the standard of care followed by other industry manufacturers of shade cloths. Count 2, labeled "negligent failure to warn," alleged that the shade cloth's flammability and tendency to " 'burn and drop' " were dangerous propensities not obvious to users of the cloth, and therefore defendant was negligent for failing to warn plaintiff of them.

¶ 7 Defendant filed an answer and asserted an affirmative defense of "contribution," claiming that plaintiff was itself negligent by causing or allowing a fire to start on its premises.

¶ 8 Plaintiff subsequently filed two motions for summary judgment. The first motion sought summary judgment on count 2 (negligent failure to warn). The second motion sought summary judgment on defendant's contribution defense. To this latter motion, plaintiff attached: (1) reports by state and local fire officials who investigated the September 2011 fire; (2) the deposition of Joseph Mazzone, the fire investigator retained by plaintiff's insurance company, Hortica; and (3) the report of Delmar Morrison, defendant's own expert witness. According to plaintiff, none of these sources were able to determine a cause of the fire. Claiming a lack of evidence that its acts or omissions caused the fire, plaintiff asked for summary judgment on defendant's contribution defense.

¶ 9 Defendant replied to plaintiff's motions and also cross-moved for summary judgment on both counts 1 and 2. Defendant sought judgment on count 1 based on the deposition of Cravo's president, Richard Vollebregt, and the reports of Morrison and Craig Beyler, plaintiff's own expert. Defendant claimed from these sources that the ULS15 shade cloth, albeit flammable, was consistent with industry norms at the time Cravo purchased it from defendant.

¶ 10 As for count 2, defendant claimed that it had no duty to warn plaintiff because it was unaware that plaintiff was an end user of its shade cloth. Here defendant relied on the deposition

of its president, Manuel Manotas, who testified that 99% of defendant's sales were to distributors like Cravo and not to end users. According to Manotas, defendant often does not know the identity of end users when selling to a distributor.

¶ 11 Defendant alternatively claimed that, under the "open and obvious" rule, it had no duty to warn plaintiff that the shade cloth could catch fire, because "any ordinary person knows that cloth is flammable and burns." Defendant further asserted that plaintiff was twice warned about the shade cloth's flammability. First, relying on the depositions of Vollebregt and Arnold Klehm, defendant claimed that the quote Cravo prepared for plaintiff for the shade system advised plaintiff that the shade cloth was flammable and that a flame resistant option was available at extra cost (which option plaintiff declined). Second, citing Manotas' deposition, defendant asserted that, during the period in which plaintiff purchased the shade system, defendant would place an insert in each roll of shade cloth it sold. The insert advised that the only flame resistant shade cloth manufactured by defendant was a product named "Revolux."

¶ 12 Also, regarding the origin of the fire, defendant relied on the reports of fire investigators and the depositions of Mazzone, Klehm, and two representatives of Hortica, Tim Richey and Kurt Penn. Defendant noted from these sources that, in the months before the fire, plaintiff was cited for improper use of extension cords in the garage/winery. Defendant asserted that "all investigators agreed that the only possible source for the fire was the improperly used electrical cords."

¶ 13 While the foregoing summary judgment motions were pending, defendant moved for leave to file the additional affirmative defenses of *res ipsa loquitur* and "open and obvious." Defendant asserted that, by operation of *res ipsa*, plaintiff's negligence could be inferred based on the following facts: (1) fire investigators determined that the fire started in the garage/winery;

(2) at the time of the fire, the only source of electricity in the garage/winery was electrical extension cords; (3) use of the cords was in violation of the state fire code; (4) fire investigators "determined that the only possible source of ignition for the fire [was] the electrical extension cords and electric appliances located in the winery"; and (5) there was no evidence of a natural source of ignition (such as lighting) or of arson.

¶ 14 Defendant claimed that the "open and obvious" defense applied because, not only was plaintiff specifically advised that the shade cloth utilized in its shade system was flammable, but "[t]he flammability of any cloth in general is an open, known and obvious condition."

¶ 15 Subsequently, plaintiff moved for summary judgment on the new affirmative defenses. Regarding the *res ipsa* defense, plaintiff asserted that, contrary to defendant's representations, fire investigators were unable to determine a cause of the fire. Plaintiff noted that defendant did not produce evidence that the fire was caused by electrical cords rather than such other means as "a lightning strike, a trespasser, [or] a faulty wire." Plaintiff also disputed defendant's claim that the flammability of any cloth is open and obvious.

¶ 16 The trial court held a hearing on all pending motions for summary judgment. The court denied summary judgment for either party on count 1, count 2, or the affirmative defense of contribution. However, the court granted summary judgment for plaintiff on the *res ipsa* defense because defendant was not able to tie the extension-cord citations to the later fire. The court initially denied summary judgment on the affirmative defense of "open and obvious," but several days later the trial court *sua sponte* reversed itself and granted summary judgment for plaintiff on that defense. Also prior to trial, the court disposed of several motions *in limine*.

¶ 17 The case was tried before a jury, which found in favor of defendant on count 1 but in favor of plaintiff on count 2.

¶ 18 Defendant filed a posttrial motion claiming, *inter alia*, that the jury's verdicts were inconsistent. The trial court denied the motion.

¶ 19 Defendant filed this timely appeal.

¶ 20 II. ANALYSIS

¶ 21 A. Summary Judgment

¶ 22 1. General Principles

¶ 23 Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005 (West 2016). "A triable issue of fact exists where there is a dispute as to a material fact or where, although the facts are not in dispute, reasonable minds might differ in drawing inferences from those facts." *Petrovich v. Share Health Plan of Illinois, Inc.*, 188 Ill. 2d 17, 31 (1999). "Because summary judgment is a drastic means of disposing of litigation, the pleadings and supporting documentation are construed strictly against the movant and liberally in favor of the opponent, and summary judgment should be granted only when the movant's right is clear and free from doubt." *Peters v. R. Carlson & Sons, Inc.*, 2016 IL App (1st) 153539, ¶ 13. While a party need not prove its case in order to survive summary judgment, it must present a factual basis that would arguably entitle that party to judgment. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12. Mere speculation, conjecture, or guess is insufficient to withstand summary judgment. *Barrett v. FA Group., LLC*, 2017 IL App (1st) 170168, ¶ 26. We review summary judgment rulings *de novo*. *Id.* ¶ 25.

¶ 24 2. Denial of Summary Judgment for Defendant on Count 2

¶ 25 Defendant contends that the trial court erred in denying its cross-motion for summary judgment on count 2 (negligent failure to warn). Defendant recognizes a potential procedural obstacle: the merger rule. "Generally, when a case proceeds to trial after a motion for summary judgment is denied, the order denying the motion for summary judgment merges with the judgment entered and is not appealable." *Young v. Alden Gardens of Waterford, LLC*, 2015 IL App (1st) 131887, ¶ 42. "The rationale for this rule is that review of the denial order would be unjust to the prevailing party, who obtained a judgment after a more complete presentation of the evidence." *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 355-56 (2002). "But where the issue raised in the summary judgment motion is one of law and would not be before the jury at trial, the order denying the motion does not merge and may be reviewed by the appellate court." *Labate v. Data Forms, Inc.*, 288 Ill. App. 3d 738, 740 (1997).

¶ 26 Defendant claims that its challenge on appeal to the denial of summary judgment on count 2 presents a question of law, namely whether defendant owed plaintiff a duty of care. Defendant cites this familiar principle: "Whether a duty is owed presents a question of law for the court to decide, while breach of duty and proximate cause present questions of fact for the jury to decide." *Thompson v. Gordon*, 241 Ill. 2d 428, 438-39 (2011). "The touchstone of [a] court's duty analysis is to ask whether a plaintiff and a defendant stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff." *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 436 (2006). "[T]he existence of a duty turns in large part on considerations of public policy." *Id.* at 441.

¶ 27 Defendant argues that it was entitled to summary judgment on count 2 because (1) defendant did not know the identity of end users of the shade cloth such as plaintiff, and, therefore, owed them no duty of care; (2) the shade cloth was not unreasonably dangerous under

prevailing industry norms; (3) the flammability of the shade cloth was open and obvious;[1] and (4) Cravo warned plaintiff of the flammability of the shade cloth.

¶ 28 Of the foregoing, only point (1) pertains to whether plaintiff and defendant "stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff" (*Marshall*, 222 Ill. 2d at 436). The remaining points relate to whether defendant breached its duty of care, which is a question of fact. Consequently, only point (1) was not merged into the later judgment.

¶ 29 While point (1) was not merged, it is forfeited for review. Defendant's factual representations in support of point (1) are supported only by citations to pleadings filed below. See Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017) (argument "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on").

¶ 30 Accordingly, we find no error in the denial of defendant's cross-motion for summary judgment on count 2.

¶ 31 3. Summary Judgment for Plaintiff on *Res Ipsa Loquitur*

¶ 32 Defendant also challenges the summary judgment ruling precluding it from presenting *res ipsa* as an affirmative defense. Defendant's *res ipsa* theory was that the fire in the garage/winery was started due to plaintiff's negligence, specifically, its use of extension cords, which, several days before the fire, was found in violation of the state fire code. As plaintiff notes, defendant cites no authority on appeal supporting use of *res ipsa* as an affirmative defense. For its own part, however, plaintiff cites no authority *against* using the doctrine in that manner.

[1] The defense of "open and obvious" was stricken by the trial court during summary judgment proceedings.

Our research reveals no Illinois authority on the issue. We need not decide whether *res ipsa* can, as a general matter, be used as an affirmative defense, for even if it can, defendant has failed to show, on this particular record, that the trial court erred in granting summary judgment on defendant's *res ipsa* theory.

¶ 33 The following undisputed facts are pertinent to the *res ipsa* issue. At the time of the fire, the winery and garage portions of the addition were separated from each other by a wall with an overhead door. As there was no power source in the winery, plaintiff ran extension cords from the garage portion into the winery portion in order to power the winemaking equipment. In July 2011, the Hampshire Fire Department cited plaintiff for improper use of extension cords. The citation directed plaintiff to keep the extension cords unplugged while not in use or replace them with surge protectors. On September 14, 2011, several days before the fire, the fire department cited plaintiff for continuing improper use of extension cords. In the aftermath of the fire, investigators noted extension cords on the floor of the garage/winery. The investigators who opined on the issue agreed that the fire originated in the garage/winery.

¶ 34 *Res ipsa* permits "an inference of negligence from otherwise inexplicable facts and circumstances by allowing proof of general negligence through circumstantial evidence." (Emphasis omitted.) *Imig v. Beck*, 115 Ill. 2d 18, 26 (1986). Presented as an affirmative defense, *res ipsa loquitur* would require a defendant to plead and prove that the plaintiff "was injured (1) in an occurrence that ordinarily does not happen in the absence of negligence, (2) by an agency or instrumentality within the defendant's [here, the plaintiff's] exclusive control." *Heastie v. Roberts*, 226 Ill. 2d 515, 531-32 (2007). "[W]hile reliance on the *res ipsa* doctrine may normally require that the injury can be traced to a specific cause for which the defendant [here, the plaintiff] is responsible, Illinois law also authorizes use of the doctrine where it can be

shown that the defendant [here, the plaintiff] was responsible for all reasonable causes to which the accident could be attributed." *Id.* at 538. A party raising *res ipsa* can resist summary judgment if the record "raises a question of material fact as to whether [the] injury more probably than not is the result of negligence." *Jones v. Minster*, 261 Ill. App. 3d 1056, 1060 (1994). *Res ipsa* does not apply if the injury can be as readily attributable to another cause as to the opposing party's negligence. *Cosgrove v. Commonwealth Edison Co.*, 315 Ill. App. 3d 651, 655 (2000). In determining whether *res ipsa* applies, a court may consider opinion evidence as to causation (*Dyback v. Weber*, 114 Ill. 2d 232, 236-238, 243-44 (1986)), though such evidence is, strictly speaking, "specific evidence" of negligence and not circumstantial evidence (*Kolakowski v. Voris*, 83 Ill. 2d 388, 397 (1980) ("The inference of negligence raised by the doctrine of *res ipsa loquitur* does not disappear when such specific evidence is admitted. Rather, both the opinion of the expert witness as well as the inference of general negligence arising from the doctrine of *res ipsa loquitur* remain to be considered by the jury with all other evidence in the case.")). The applicability of *res ipsa* is a question of law for the trial court to decide, and our review is *de novo*. *Heastie*, 226 Ill. 2d at 531.

¶ 35 Defendant begins its *res ipsa* analysis as follows:

> "In the instant case, it was undisputable that Plaintiff had the sole control over the winery where the fire originated and the extension cords and all of the contents and items contained therein that could have started the fire. Moreover, the accident occurred under circumstances that would not have occurred in the ordinary course of events if Plaintiff had used proper care while any instrumentality that could have caused the fire was under its control. The fire started in Plaintiff's winery, immediately adjacent to its greenhouse. Plaintiff had sole control over every item in the winery which could have caused the file

> [*sic*] and where it is undisputed was the location and the origin of the fire. But for some negligent act of Plaintiff, no fire would have occurred on its property. Therefore, it is clear that the cause of Plaintiff's fire could only be traced to a specific instrumentality or cause for which Plaintiff was solely responsible or that Plaintiff was responsible for all reasonable causes to which the incident could be attributed. [*Raleigh v. Alcon Laboratories, Inc.*, 403 Ill. App. 3d 863, 869 (2010)]."

¶ 36 These remarks are unpersuasive. "[F]ires frequently have causes other than negligence," such as lightning strikes or arson. *Dyback*, 114 Ill. 2d at 243. Consequently, "the mere occurrence of a fire is generally insufficient to invoke the doctrine[.]" *McGuckin v. Chicago Union Station*, 191 Ill. App. 3d 982, 997-98 (1989). "[H]owever, a fire in conjunction with certain surrounding circumstances may give rise to an inference of negligence." *Id.* at 998. In the quoted paragraph, defendant provides only conclusory assertions, devoid of record citations, as to whether (1) the fire could have occurred in the absence of negligence, and (2) plaintiff was responsible for all causes to which the fire could reasonably be attributed. Accordingly, we disregard these statements as not constituting argument under Supreme Court Rule 341(h)(7) (eff. Nov. 1, 2017) (argument "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on").

¶ 37 In the next paragraph, defendant notes that, on September 14, 2011 (13 days before the fire), the Hampshire fire department cited plaintiff for continuing improper use of extension cords. Defendant then makes the following representations about certain deposition testimony in the record, including that of Mitchell Kushner, who investigated the fire for the Illinois State Fire Marshall:

> "Kushner *** testified that he found the remains of electrical cords 'all over the place,' mostly on the floor of the garage/winery. [Citation.] Kushner also testified that the only reason this particular fire was labeled 'undetermined' was because the Fire Marshall's Office does not have an electrical expert on staff, and such an electrical expert's investigation would have been required to formally classify the cause of the fire as electrical. [Citation.] More pertinently, Kushner testified that the only possible cause of the fire were the extension cords and the electrical appliances those cords were powering in the garage/winery. [Citation.] In fact, everyone deposed agreed that the only possible source of ignition for the fire were the electrical extension cords and electrical appliances in the garage/winery. [Citation.] There was no contradictory evidence at all; no evidence of a different accelerant, or arson or lightning or anything else. [Citation.]"

Defendant supports the latter two assertions in this paragraph with string citations to multiple pages of the record. Defendant does not identify which deponents are testifying. We admonish defendant that it is not our task to consult the record in order to make sense of a party's citations. Turning to the record, we note that not "everyone deposed" in the case is represented in the citations, but only three deponents: Mazzone, Richey, and Kushner, whose testimony defendant cited earlier in the paragraph. We begin with Kushner's testimony.

¶ 38 Defendant is correct that Kushner testified to finding extension cords on the floor of the garage, but defendant does not fairly state some of Kushner's conclusions. Kushner referenced, and testified consistently with, his official incident report dated September 27, 2015, which was attached to his deposition. In the report, Kushner stated in relevant part:

> "This R/AI [Reporting Arson Investigator] and Investigators determined that the fire originated within the south section of the addition [the garage/winery] and

communicated to the east and north. This R/AI and Investigators found the remains of electrical cords and an electrical appliance within the area of origin.

This R/AI and Investigators did not touch or remove the remains of the electrical cords and appliance in order for them to be examined by an electrical expert in the manner in which they were found.

At the time of this report, this fire is being classified as Undetermined in nature with the ignition of unknown materials ignited with an unknown heat source due to the extensive damage to the structure and contents in the area of origin." (Emphasis added.)

¶ 39 Contrary to defendant's representation, Kushner did not testify that an electrical expert was needed only "to formally classify the fire as electrical." Besides ruling out arson, Kushner could offer nothing definitive as to the cause of the fire. He testified, consistent with his report, that an electrical expert was needed before it could be determined whether the fire's cause was electrical. Specifically, the expert would need to ascertain whether any of the appliances were electrified at the time of the fire and, if they were, whether they failed.

¶ 40 Kushner further testified:

"Q. Now, you testified that the purpose for noting [in the September 27, 2015, report] the presence of electrical cords and electrical appliances is because they could have been a potential cause of the fire, correct?

A. Yes, sir.

Q. And did you note anything else other than electrical cords and electrical appliances as a potential cause of the fire?

A. No, because that's what I wanted to make sure was either included or excluded. I couldn't prove if there was [an] electrical fire, but I wanted to make sure that we preserved it and documented [it].

Q. Is it fair to say that electrical cords and electrical appliances were the only possible cause that you identified?

A. In my report, yes."

Kushner opined to a reasonable degree of investigative certainty that the fire originated in the garage/winery. Kushner was not asked whether he could opine with similar certainty as to the cause of the fire.

¶ 41 Mazzone testified that, when plaintiff's insurer retained him to investigate the fire, he contacted Kushner, who had previously conducted his investigation. Kushner informed Mazzone that the cause of the fire was as yet undetermined. When Mazzone inspected the site, he observed extension cords that were plugged into outlets in the garage and run into the winery. Mazzone agreed with Kushner that the fire originated in the winery. Mazzone saw evidence of "arcing" in the remains of the extension cords. Mazzone explained that "arcing" is the "heat or spark produced when for whatever reason the conductors either deteriorate or are allowed to touch one another." According to Mazzone arcing "could be either the cause *or the result* of the fire" (emphasis added). Mazzone was unable to determine a cause of the fire to a reasonable degree of investigative certainty. Mazzone testified that he did not know whether the violation for which plaintiff was cited on September 14, 2011, was corrected before the time of the fire. Mazzone's findings nonetheless took into account "the fact that there were extension cords present [at the time of the fire] and that their use could be considered hazardous."

¶ 42 In his investigative report attached to his deposition, Mazzone noted that both Kushner and Mike Lucas, Hampshire's fire investigator, classified the cause of the fire as "UNDETERMINED, but believe[d] that an electrical cause would be likely." Mazzone also noted in his report that he found no evidence of arson.

¶ 43 Defendant's citation to Richey's deposition is perplexing, as Richey offers no opinion of his own as to the cause of the fire but simply refers to Mazzone's findings.

¶ 44 Defendant's *res ipsa* defense urges an inference that the fire was caused by plaintiff's negligence, namely its improper use of extension cords, for which it was cited in June 2011 and again on September 14, 2011. Thus, the *res ipsa* defense links the fire not simply to the cords, but to the improper use of the cords that undisputedly existed at least as of 13 days before the fire. Defendant fails to demonstrate that he presented enough of a factual basis for that link in order to survive summary judgment. First, the specific evidence of negligence that defendant relies on fails to connect the fire to any negligent use of the extension cords. While Kushner believed that the cords and appliances were possibly (or even likely, according to Mazzone's characterization) causes of the fire, he was unable to positively classify a cause because further investigation was necessary. Kushner was not specifically asked whether he could opine to a reasonable degree of certainty as to how the fire occurred. Moreover, despite whether Kushner believed the fire originated with the cords, we can read nothing from his deposition as to whether plaintiff's negligence caused the fire. Kushner did not mention the citations related to the cords or suggest whether the cords were being utilized in a hazardous or noncompliant manner at the time of the fire.

¶ 45 By contrast, Mazzone acknowledged the citations and appeared to presume that the cords might have been "hazardous" at the time of the fire. However, Mazzone testified that the

evidence he saw of "arcing" in the cords was inconclusive as to the cause of the fire, and he ultimately could not testify to a reasonable degree of certainty as to how the fire started.

¶ 46 Importantly, "[o]pinions that are inadmissible at trial cannot be used in opposition to a motion for summary judgment" (*Essig v. Advocate BroMenn Medical Center*, 2015 IL App (4th) 140546, ¶ 49), and the opinion of an expert that is not to a reasonable degree of certainty within his field of expertise is not admissible at trial (*Torres v. Midwest Development Co.*, 383 Ill. App. 3d 20, 27 (2008)).

¶ 47 Defendant does not compensate for this lack of competent expert opinion as to the cause of the fire. As noted, he offers only bald assertions, supported by no record citations, that the fire could not have occurred absent plaintiff's negligence.

¶ 48 For these reasons, we affirm the summary judgment in favor of plaintiff on defendant's *res ipsa* defense.

¶ 49 4. Summary Judgment for Plaintiff on "Open and Obvious"

¶ 50 Defendant also challenges the summary judgment in plaintiff's favor on defendant's "open and obvious" defense.

¶ 51 Plaintiff asserts that defendant forfeited review of this issue by failing to make an offer of proof, tender a proposed jury instruction, or move for a directed verdict. Plaintiff cites no authority to suggest that a party whose affirmative defense was stricken on summary judgment must preserve the issue in any of the ways plaintiff identifies. Accordingly, we reject the claim of forfeiture.

¶ 52 Moving to the merits, we hold that the trial court did not err. Count 2 of plaintiff's amended complaint alleged negligent failure to warn. In Illinois, a claim of negligent failure to warn is subsumed within the broader cause of action for negligently defective design. *Blue v.*

Environmental Engineering, Inc., 215 Ill. 2d 79, 95-6 (2005). In *Blue*, the supreme court described that broader cause of action as follows:

> "In a negligence defective design case, the focus is on the conduct of the defendant, but in a strict liability defective design case, the focus is on the product. [Citations.] [C]ourts have held that a plaintiff raising a negligence claim must do more than simply allege a better design for the product; he must plead and prove evidence of a standard of care by which to measure a defendant's design and establish a deviation from that standard. [Citations.] Thus, to establish a negligence claim for a defective design of a product, a plaintiff must prove that either (1) the defendant deviated from the standard of care that other manufacturers in the industry followed at the time the product was designed, or (2) *that the defendant knew or should have known, in the exercise of ordinary care, that the product was unreasonably dangerous and defendant failed to warn of its dangerous propensity*." (Emphasis added.) *Id.* at 95-96.

¶ 53 "It is settled law that a manufacturer has no duty to warn of " 'those inherent propensities of a product which are obvious to all who come in contact with the product.' " *Sollami v. Eaton*, 201 Ill. 2d 1, 10 (2002) (quoting *McColgan v. Environmental Control Systems, Inc.*, 212 Ill. App. 3d 696, 700 (1991)). "The purpose of a warning is to apprise a person of a danger of which he is not aware, and thus enable the person to protect himself against it." *Collins v. Sunnyside Corp.*, 146 Ill. App. 3d 78, 81 (1986). "When a danger is fully obvious and generally appreciated, nothing of value is added by a warning." *Id.*

¶ 54 "The duty to warn is determined by an objective analysis, *i.e.*, the awareness of an ordinary person," who is assumed to be reasonable. *Sollami*, 201 Ill. 2d at 7, 14. "The plaintiff's

subjective knowledge is immaterial" to the inquiry. *Klen v. Asahi Pool, Inc.*, 268 Ill. App. 3d 1031, 1035 (1994).

¶ 55 Plaintiff's count 2 alleged that the shade cloth manufactured by defendant was unreasonably dangerous because it was "highly combustible/flammable" and had a tendency to " 'burn and drop,' ***, which facilitated rapid fire spread and caused damage to property that would otherwise escape harm in the event of a fire."

¶ 56 Several deponents testified to the nature of the shade cloth and its role in the spread of the fire. Lucas testified that, when he arrived at the scene while the fire was ongoing, he observed the fire spread throughout the greenhouse complex at a low to mid level, and at a faster than normal pace. Several days later, Lucas returned to the scene with fellow fire investigators. Lucas concluded from his investigation that an accelerant was present somewhere within the greenhouse that caused the fire to spread more rapidly than normal. Given that the fire spread at a low to mid level, the accelerant was located somewhere off the ground. Lucas noted that, during his site investigation, one of his fellow investigators brought out a four- to five-foot square piece of mesh material that he had found inside the greenhouse complex. The investigator ignited the material. Lucas observed that the material ignited very easily and burned "very quickly and *** at a very hot rate as well." Lucas and the others discussed whether this material might have accelerated the spread of the fire. Lucas testified that he observed piles of the mesh at points inside the greenhouses. He concluded that the mesh had burned and fallen in sections onto the floor. Lucas was unable to opine to a reasonable degree of investigative certainty what caused the fire to spread rapidly throughout the greenhouses.

¶ 57 Mazzone testified that, during his site investigation, he and his fellow investigators took a section of the shade cloth and ignited it with a cigarette lighter. The cloth "burned pretty well";

Mazzone characterized the cloth as "combustible." He testified that he was not aware of the cloth's combustibility until he ignited it. Mazzone opined, to a reasonable degree of investigative certainty, that the shade cloth caused the fire to spread more rapidly than it otherwise would have done.

¶ 58 Beyler, plaintiff's expert witness, was deposed and also submitted a report. Beyler stated that ULS15, the particular model of shade cloth utilized by plaintiff, was tested by several industry organizations. The testing revealed that, once ignited, the shade cloth will "indefinitely spread flame" until consumed. Specifically, ULS15 had "the propensity *** to spread flame over the entire shade cloth surface even beyond the initiating fire source (*i.e.*, the material supports self-propagating flame spread)." Some testing measured the flame spread at 24 to 96 inches per minute. The testing also revealed that, if the cloth is elevated while burning, flaming pieces will drop from it. According to Beyler, the spread of the fire inside the greenhouses would not have been nearly as extensive absent the shade cloth.

¶ 59 The foregoing descriptions of the shade cloth were not contradicted during the summary judgment proceedings.

¶ 60 Defendant asserts that the hazards of the shade cloth were an open and obvious condition. First, defendant claims that "cloth catching fire is an open and obvious danger to any reasonable person," and that such a person will also anticipate that a cloth installed overhead will, once ignited, eventually fall to the ground. Second, the quote prepared by Cravo for the shade system informed plaintiff that ULS15 was flammable and that a fire resistant cloth was an option, which plaintiff rejected.

¶ 61 Defendant's first point alludes to the proper standard: we are concerned with what an ordinary reasonable person would perceive about the shade cloth. However, defendant's second

point, which relies on the advisory from Cravo, introduces elements of a separate defense: assumption of risk. "The test for assumption of risk is a subjective one that allows the jury to consider the individual plaintiff's knowledge, experience, and background in determining whether he has assumed the risk of using a product known by him to be dangerous." *Boland v. Kawasaki Motors Manufacturing Corp., USA*, 309 Ill. App. 3d 645, 653 (2000). Notably, as formally pled, defendant's affirmative defense of "open and obvious" likewise relied on the advisory from Cravo. On appeal, however, defendant cites no authority on assumption of risk but only on "open and obvious." Accordingly, we apply the latter standards alone. See Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017) (failure to cite authority results in forfeiture of the contention). Under those standards, there is no dispute of material fact that the above-described hazards of the shade cloth were not open and obvious. As far as the record shows, there was nothing in the appearance of the shade cloth to suggest such hazards. In an age in which flame resistant materials are available, an ordinary reasonable person would not expect a shade cloth to catch fire, much less to act as an accelerant, spreading fire quickly along its entire surface and, correspondingly, along the length of the structure in which it was installed.

¶ 62 Therefore, the trial court did not err in granting summary judgment for plaintiff on defendant's "open and obvious" defense.

¶ 63 B. *In Limine* Evidentiary Rulings

¶ 64 Defendant challenges several of the trial court's *in limine* evidentiary rulings. As defendant fails to cite any authority in support of its contentions, they are forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017) (contentions not supported by citation to legal authority are forfeited).

¶ 65 C. Jury Instructions

¶ 66 Defendant asserts that the trial court erred in submitting several jury instructions proposed by plaintiff that were not taken from the Illinois Pattern Jury Instructions (IPI). Defendant, however, specifically identifies only one such instruction, which addressed the non-delegability of the duty to warn. Defendant remarks that, at the jury instruction conference, plaintiff claimed support for this instruction in *Mahr v. G. D. Searle & Co.*, 72 Ill. App. 3d 540 (1979). Defendant claims that *Mahr* did not support the instruction, and, if it did, the trial court thereby erred in excluding certain evidence offered by defendant. However, defendant does not even tell us what *Mahr* was about. Consequently, his contention is forfeited for lack of development. See Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017).

¶ 67 Defendant also devotes a paragraph to several proposed instructions of its own that the trial court rejected. Strangely, defendant does not actually assert that the rejection was error. Thus, defendant has forfeited the point. *Id.*

¶ 68 D. Verdicts on Counts 1 and 2

¶ 69 Defendant asserts that the verdict in plaintiff's favor on count 2 (negligent failure to warn) is inconsistent with the verdict in defendant's favor on count 1 (negligent design). We disagree.

¶ 70 In confronting a challenge to the consistency of verdicts, a court will exercise all reasonable presumptions in favor of the verdicts, and will not find them legally inconsistent unless absolutely irreconcilable. *Redmond v. Socha*, 216 Ill. 2d 622, 643 (2005). Verdicts will not be considered absolutely irreconcilable if supported by any reasonable hypothesis. *Id.* at 644. Whether verdicts are inconsistent is a question of law that we review *de novo*. *Id.* at 642.

¶ 71 Defendant claims that the verdicts represent contradictory finding by the jury on whether the shade cloth was defectively designed. We reiterate what the supreme court said in *Blue* about claims for negligently defective design:

> "[T]o establish a negligence claim for a defective design of a product, a plaintiff must prove that either (1) the defendant deviated from the standard of care that other manufacturers in the industry followed at the time the product was designed, or (2) that the defendant knew or should have known, in the exercise of ordinary care, that the product was unreasonably dangerous and defendant failed to warn of its dangerous propensity." *Blue*, 212 Ill. 2d at 95.

Thus, there are two ways in which a defendant may incur liability in negligence for defective design of a product: (1) failure to meet the industry standard of care; or (2) failure to warn of a dangerous propensity of which the defendant knew or should have known. In the abstract, a fact finder could logically find liability under one but not the other.

¶ 72 In this case, the parties resorted to non-IPI instructions for both counts. The instructions did not, however, conform to *Blue*'s standards. Most significantly, the instructions for count 1 (negligent design) did not require plaintiff to prove that defendant deviated from the standard of care established by industry practice. There was in other respects considerable overlap between the counts as to what plaintiff had to prove for each claim. Nonetheless, there exists a clear basis on which to reconcile the verdicts. Defendant argued at trial that plaintiff was contributorily negligent for failing to install fire breaks, smoke detectors, or a sprinkler system in the greenhouse complex. However, only with respect to count 1 was the jury instructed on contributory negligence. At the jury instruction conference, the trial court and the parties made

clear their intent that contributory negligence would apply to count 1 alone. The elements instruction for count 1 contained these final two paragraphs:

> "If you find from your consideration of all the evidence that the Defendant has proved both of the propositions required of the Defendant, and if you find that the Plaintiff's contributory negligence was more than 50% of the total proximate cause of the injury or damage for which recovery is sought, then your verdict shall be for the Defendant as to Count I.
>
> If you find from your consideration of all the evidence that the Plaintiff has proved all the propositions required of the Plaintiff and that the Defendant has proved both of the propositions required of the Defendant, and if you find that the Plaintiffs contributory negligence was 50% or less of the total proximate cause of the injury or damage for which recovery is sought, then your verdict shall be for the Plaintiff as to Count I and you shall reduce the Plaintiff's damages in the manner stated to you in these instructions."

The jury was given no instruction allowing for a finding of contributory negligent on count 2.

¶ 73 Likewise, only the verdict forms for count 1 allowed for a finding of contributory negligence. (The verdict forms for both counts did allow for the jury to consider plaintiff's failure to mitigate damages.) Verdict forms A, B, and C pertained to count 1. Form C read: "As to Count I: Negligent Design, we, the jury, find for [defendant] and against [plaintiff]." The jury was instructed that they should return Form C if they "[found] for [defendant] and against [plaintiff], *or* if [they] [found] that Plaintiff's contributory negligence was more than 50% of the total proximate cause of the injury or damage for which recovery is sought[.]" (Emphasis added.) The jury returned Form C. There jury was given no special interrogatory to clarify its

basis for the verdict on count 1. Based on the possibility that the jury found defendant's contributory negligence to exceed 50%--a consideration not available to the jury on count 2—we find no inconsistency between the verdict in defendant's favor on count 1 and the verdict in plaintiff's favor on count 2.

¶ 74 Defendant claims that, "if the jury did, in fact, find for the Defendant on Count 1 due to Plaintiff's own contributory negligence, then certainly the same contributory negligence would apply to Count II." On the contrary, contributory negligence would not apply to count 2 because the instructions made no provision for it to apply.

¶ 75 Consequently, we reject defendant's claim that the verdicts were inconsistent.

¶ 76 III. CONCLUSION

¶ 77 For the foregoing reasons, we affirm the judgment of the circuit court of Kane County.

¶ 78 Affirmed.