

THIRD DIVISION
DECEMBER 31, 2013

No. 1-11-0163

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THOMAS BROWN,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee/Cross-Appellant,	)	Cook County.
	)	
v.	)	
	)	
AT&T BROADBAND and LB	)	
COMMUNICATIONS,	)	
	)	06L12038
Defendants-Appellants/Cross-Appellees,	)	
	)	
ILLINOIS BELL TELEPHONE COMPANY	)	
d/b/a AMERITECH ILLINOIS; AT&T	)	
CORPORATION d/b/a AT&T LOCAL SERVICES;	)	
PIRTANO CONSTRUCTION COMPANY, INC.;	)	The Honorable
COMMONWEALTH EDISON COMPANY,	)	Henry R. Simmons, Jr.,
	)	Judge Presiding.
Defendants.	)	

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Hyman and Justice Mason concurred in the judgment.

ORDER

¶ 1 *HELD*: Circuit court's denial of defendants' motion for a judgment notwithstanding the

verdict upheld where the plaintiff established a *prima facie* case of negligence; circuit court's order denying the plaintiff's motion for a judgment notwithstanding the verdict with respect to the jury's comparative negligence finding affirmed where the finding was supported by the evidence.

¶ 2 Plaintiff Thomas Brown was injured as he was riding his bicycle through an area in which there was an ongoing utility pole relocation project underway. He filed a negligence action against the corporate entities involved in the project, including AT&T Broadband and LB Communications (collectively defendants). Following a jury trial, the jury found that defendants were negligent and liable for Brown's injuries. The jury also found that Brown was comparatively negligent and reduced his damages by half. Each party filed post-trial motions, seeking a judgment notwithstanding the verdict, but the motions were denied. The parties then filed appeals seeking review of the circuit court's denials of their post-trial motions. On appeal, AT&T Broadband and LB Communications argue that the circuit court erred in denying their motion for a judgment notwithstanding the verdict because Brown failed to establish a *prima facie* case of negligence. Defendants raise no issue on appeal regarding the nature and extent of Brown's injuries or the amount of damages awarded by the jury. On cross-appeal, Brown argues that he is entitled to judgment notwithstanding the verdict on the jury's finding that he was comparatively negligent because there is no evidence to support such a conclusion. For the reasons set forth herein, we affirm the judgment of the circuit court.

¶ 3

I. BACKGROUND

¶ 4 In 2002, the Village of Arlington Heights (Village or Village of Arlington Heights) commenced an extensive aerial rebuild and utility pole relocation project (Central Road Project or Project), the purpose of which was to position utility poles further back from the main street.

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To do so, new utility poles were constructed and utility companies were required to rebuild the old systems onto the new poles. Various corporate entities were involved in the replacement of utility poles and wires called for by Project, including AT&T Broadband, LB Communications, Illinois Bell Telephone Company (Illinois Bell) d/b/a Ameritech Illinois (Ameritech), AT&T Corporation b/d/a AT&T Local Services (AT&T Local), PirTano Construction Company (PirTano), and Commonwealth Edison Company (Com Ed).

¶ 5 Com Ed was responsible for the placement of the new utility poles. Once the poles were constructed, the other companies involved in the Project would string up the new wire. Service would then be transferred or spliced from the old utility poles and wiring systems to the new utility poles and systems. After all service was transferred, the old systems and old poles would be "wrecked" and removed. The position of the various utilities on the utility poles were determined in accordance with industry practice as follows: Com Ed's electrical power lines were at the top of the poles; AT&T Local's telephone lines and fiber optic cables were placed below the electrical power lines; AT&T Broadband's cable television wires were affixed below AT&T Local's telephone lines; and telephone lines belonging to Illinois Bell d/b/a Ameritech were the last utility wires on the poles.

¶ 6 On the evening of May 17, 2002, plaintiff Thomas Brown was riding his bicycle on the sidewalk that ran alongside Central Road in Arlington Heights, where the Central Road Relocation Project was ongoing, and had an accident in which he sustained a serious injury to his right knee, which resulted in six surgeries and extensive rehabilitation efforts. Immediately following his accident, Brown observed a piece of strand wire wrapped around his leg and the

sprocket of his bicycle. The wire was attached to a utility pole at one end by a bolt, but was left unsecured on the other end. Strand wire was wire that was used by the companies involved in the Central Road Project to bind with, and support, heavier wires, such as coaxial cables and fiber optic cables, before they were strung to a utility pole.

¶ 7 Following his accident, Brown filed a negligence action in the circuit court against the corporate entities involved in the Central Road Project. Some of the original defendants settled or were dismissed from Brown's negligence action and the case went to trial against AT&T Broadband,¹ a cable television company, and its subcontractor LB Communications, and PirTano, a subcontractor for AT&T Local Services, a fiber optics telephone company.

¶ 8 Trial

¶ 9 Thomas Brown testified that prior to May 17, 2002, he worked 40 hours per week as a letter carrier for the United States Postal Service (USPS), earning approximately \$46,000 annually. Before his accident, he had no physical limitations and was a "pretty active person." He confirmed that he had been riding his bicycle on the evening of May 17, 2002. He was on his way home from a meeting at his church and was riding his bike on the sidewalk. As he was heading westbound toward Arlington Heights Road, he maneuvered over a slight depression in the sidewalk and then he felt something hit him in the chest and he fell to the ground. Initially, Brown "d[id] [not] know why [he] fell," but then he noticed that "there was a wire that was wrapped around [his] leg, [and] the sprocket, you know, the bicycle." He denied that the dip in

¹ For purposes of clarity, we note that AT&T Broadband was at all times a separate and distinct legal entity from AT&T Local.

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the sidewalk had caused him to lose control of his bike and fall to the ground. Brown testified that he did not immediately feel any pain at that time but felt "fear" and "panic" and was "dumfounded" as to what had happened. After unwrapping the wire from his leg, Brown knew that "something was serious[ly]" wrong and called the paramedics. When the paramedics arrived, he was given pain medication and transported to the hospital. He testified that he underwent a number of surgical procedures and rehabilitation efforts to treat his injury and was unable to return to work until January 2003.

¶ 10 At that time, he was physically unable to resume his normal duties as a letter carrier. Instead, he worked approximately four hours per day doing desk work because there was not an available full time light-duty position at the USPS. Brown eventually left his employ with the USPS in December 2003, because there were no such permanent positions available. Prior to the accident, Brown had intended to continue his work with USPS until he retired at the age of 65. Since his accident, Brown has worked a number of different jobs to support himself. Over the years, he looked for jobs that did not involve a lot of heavy lifting or standing. Although Brown's doctor no longer had him on any specific restrictions, he testified that he is currently physically unable to take his dogs for long walks, golf or bowl, all of which were activities that he enjoyed before the accident.

¶ 11 On cross-examination, Brown acknowledged that he did not have a light on his bicycle at the time of the accident, but stated that there was adequate lighting in the area and that he was wearing an illuminating headlamp on his head. He agreed that a bicyclist has a responsibility to look where he is riding to remain safe and avoid accidents. Although he had looked down at the

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ground after riding over the depression in the sidewalk, Brown denied that his eyes were still lowered at the time of his accident. He did not know if the front wheel of his bicycle went over the wire that ultimately wrapped around his leg, but confirmed that he felt the wire hit him first in his left shoulder. Brown admitted that he did not know how the wire got on the ground or how it had hooked around his leg. He also did not know who owned the wire. Brown confirmed that he was not fired from the USPS, rather he took a "voluntary disability retirement." He agreed that he was currently able to work a full-time job and testified that he was earning approximately \$1100 a month, which was "good for [him]." Brown no longer requires prescription pain medication, but takes approximately five Advils per day.

¶ 12 Jim Klein, a firefighter and paramedic employed by the Village of Arlington Heights, testified that he received a radio dispatch at 9:29 p.m. on May 17, 2002, and was directed towards the intersection of Central Road and Dryden Avenue, where a "subject was laying on the ground." When Klein arrived at the scene, he observed Brown on the ground. His lower leg appeared to be out of place. Brown reported a lot of pain and anxiety and had to be medicated in order for Klein to immobilize him effectively. When asked about the cause of his injury, Brown indicated that he had been riding his bicycle on the sidewalk and became entangled by a coiled steel cable wire that was attached to a utility pole at one end and hanging loose from the other end. He reported that he had not seen the wire as he was riding his bicycle. Based on the extent of Brown's injuries, Klein transported him to the hospital to receive medical treatment. He never notified anybody at the Village of Arlington Heights about the loose wire that purportedly caused Brown's fall.

¶ 13 Doctor Michael Bryan Neal, an orthopaedic surgeon, testified that he treated Brown on a regular basis following his accident. The total value of the medical services he provided to Brown totaled \$39,000. Doctor Neal first saw Brown late at night on May 17, 2002, in the emergency room at Northwest Community Hospital. Brown was in the trauma bay and had presented with a "terrible right knee injury." Brown reported that he had injured his knee while riding his bicycle on the sidewalk adjacent to Central Road and his leg had gotten ensnared by a coiled wire. Doctor Neal described the severity of Brown's injury as "catastrophic" and explained that he had shattered the top part of his knee joint of the tibia and that the shaft of his knee joint had "almost completely dislocated with the tibia or leg bone riding anterior to the end of the thigh bone." Brown was taken into the operating room where Doctor Neal manipulated his leg to reduce the dislocation and inserted a splint into the leg. Brown's condition deteriorated over the next two days because his sciatic nerve, which is a nerve that travels down to knee level, had been injured when his knee was dislocated. As a result, Brown was unable to feel his legs or his feet and suffered severe swelling.

¶ 14 After observing Brown's condition, Doctor Neal became concerned that Brown could potentially lose his leg and took him into emergency surgery. At that time, he made incisions on each side of Brown's right leg to reduce the swelling and pressure. He also used three screws and several carbon rods to secure Brown's knee joint. Skin grafts were then used to close the incision sites. Brown was subsequently sent to a rehabilitation facility, as he could not walk and needed care. Doctor Neal explained that rehabilitation assistance is necessary when a patient suffers such a significant trauma.

¶ 15 He subsequently saw Brown again on June 11, 2002. At that point, Brown's skin grafts had "taken" and the screws had not become infected. He also had partial nerve recovery, but still had some deficits given that the accident caused him to permanently lose the normal alignment of his knee. The following month, in July 2002, Brown called Doctor Neal and reported that he was experiencing fever and redness around his knee. Doctor Neal was concerned that Brown's pins had become infected and had Brown report immediately to the emergency room where cultures were taken, the results of which revealed that he had "a particularly bad [skin] infection called MRSA or methicillin-resistant Staphylococcus aureus." He was given a round of antibiotics, but when he did not respond, Doctor Neal had a culture taken of the bone and discovered that Brown had a "deep bone infection." On July 12, 2002, Doctor Neal subsequently operated on Brown and removed all of the pins and metal that had previously been inserted into Brown's knee. Brown remained in a cast for about a month, and after it was removed, Doctor Neal allowed him to start putting light weight on his right leg. Brown subsequently had additional procedures as he continued his rehabilitation efforts including operations to repair torn cartilage. Ultimately, Doctor Neal performed a total of six surgeries on Brown following his accident.

¶ 16 Doctor Neal further testified that he allowed Brown to resume modified work in January 2003, however, he opined that Brown could never work again as a USPS letter carrier or perform any job that required heavy manual labor or a lot of standing due to his physical limitations. He opined, however, that Brown would be able to work a desk job or perform a "light-demand" job for approximately 40 hours per week. Although Brown has undergone a number of surgical procedures and engaged in rehabilitation efforts, Doctor Neal testified that due to the catastrophic

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nature of the injury, Brown's leg would be "somewhat functionally affected for the rest of his life." In addition, Brown will "inevitab[ly]" require a total knee replacement during his lifetime and additional physical therapy. Doctor Neal further opined that Brown will likely experience difficulty and pain going up and down stairs as well as after walking for any prolonged period of time and will likely continue to experience various degrees of discomfort on a daily basis.

¶ 17 Daniel Burns, a long-time friend and former co-worker of Brown's, testified that he received a phone call from Brown shortly after his fall. Following the call, he and his wife drove to the location of the purported accident and took several photographs of the scene, including pictures of a wire wrapped, in part, with black duct tape dangling close to the sidewalk. Burns estimated that the wire, if uncoiled, would be long enough to span across four lanes of traffic.

¶ 18 Burns returned to the scene the next morning to take additional pictures in the daylight. He also took pictures of the newer utility poles and wires that were being constructed as part of the Village's aerial rebuild and utility pole relocation Project. The new poles had two different strands, one secured with gray duct tape and another secured with black duct tape. Burns testified that the wire that was involved in Brown's accident was "very similar" to the wires attached to the new poles.

¶ 19 On cross-examination, Burns indicated that he was currently employed by an electrical contracting company and that he delivered strand wire as part of his job, but acknowledged that he was not familiar with the customs and practices regarding the installation or attachment of those wires. He was, however, aware that his company used black electrical tape with strand wires and knew that black electrical tape was not unique to any particular industry. Burns also

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acknowledged that he had not observed any workers in the area on the night of Brown's accident or the following day when he returned to the scene to take pictures. He specifically confirmed that he never saw any workers from AT&T Broadband or LB Communications. He also never reported the condition of the wire to the Village or to the police.

¶ 20 Donald White, vice president of communications at PirTano, confirmed that PirTano crews were working on the Central Road Project in Arlington Heights in 2002. White described the Project as a "forced relocat[ion]" Project and explained that the purpose of the Project was to move the utility pole line further back from the main road. As such, the old system had to be rebuilt onto the new pole lines, which "entailed running strand on the new pole lines, putting fiber up to the new strand, and then cutting the system over, splicing it, to the existing system at either end ***."

¶ 21 White testified that PirTano was working exclusively with fiber optic cables in connection with the Project, which are cables that have glass inside them that are "used for transmission of data at very high speeds." He explained that this type of cable is "very different" than other cables, including coaxial cables used for cable television services, which were the cables that AT&T Broadband and LB Communications were working with on the Project. White explained that PirTano had been subcontracted by AT&T Local to work specifically with the fiber optic cables on the relocation Project. As the contractor, AT&T Local dictated that PirTano use 10-millimeter strands to support the fiber optic cables; however, it did not dictate the type of duct tape PirTano was to use to bind the strands. Accordingly, White explained that PirTano used gray or silver duct tape to bind the 10-millimeter strands used on the Project because "[i]t's

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what [PirTano] always used to secure strand[s]." He acknowledged that neither gray, silver, nor black duct tape is unique to a particular industry or a particular company. Although multiple companies were involved in the Project, including Com Ed, SBC Ameritech, and AT&T Broadband, White explained that PirTano only had a subcontract with, and worked for, AT&T Local. As such, PirTano employees never touched any other entities' lines, cables or strands when fulfilling the terms of the its subcontract. White emphasized that the only support cables that PirTano employees worked with were the 10-millimeter strands required by AT&T Local. Any work with a strand that measured at any other size, such as the 5/16- inch strand alleged to be the cause of Brown's accident, would not have occurred as it would have fallen outside the scope of PirTano's subcontract.

¶ 22 To fulfill its subcontract, White detailed the sequence of the work that PirTano planned to complete on the Project as follows:

"First we would put the strand on the new poles. Once that is complete, we did some hand digging on either end of the project in order to tie the new system into the existing system. Both of the ties at the ends were in an underground manhole.

Once that was done, then we would come back and lash up the fiber. And once the fiber was in place, we would cut over the system from the old system to the new system. And after that was done, then we would go back and wreck out the old cables."

¶ 23 Based on this sequence, White confirmed that PirTano would not have done any work on the old pole with the hanging wire that was involved in Brown's accident until after the old system had been cut over and spliced to the new system. After reviewing PirTano's time sheets

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and records, White explained that the last day that PirTano performed any work on the Project in April 2002, was on the 29th of that month. That day, PirTano employees "did a hand dig at the far end [of the Project] to tie the old system into the new system." They did not install any type of strand or cables on any of the poles. White further testified that PirTano employees did not return to do additional work on the Project until May 21, 2002, several days after Brown's accident. At that time, PirTano returned to the Project to run strands along some of the new poles that Com Ed had installed. White explained that PirTano employees were absent from the Project for the first few weeks of May 2002, because they were waiting for Com Ed to install new utility poles. He indicated that such delays are common when multiple companies are performing work on the same utility project. PirTano work records further showed that June 13, 2002, was the first date that its employees began "wrecking out" the old wires that were fashioned to the old utility poles.

¶ 24 White confirmed that PirTano provided detailed safety training to all of its employees that work in the field and conducted "toolbox talks" in the field periodically to discuss safety issues pertaining to specific projects. During training, employees are "shown exactly how to—how to—do the installation, what the safe—a safe way to do the aerial reconstruction, to climb poles, to attach the cables, to attach the strand and detension it, how to secure a job after they leave it, and how to go through inspections at the end of every day to make sure that the site is secured." PirTano's safety manual includes a specific section on "good housekeeping," which provides instructions to employees to inspect the jobs sites before they leave to make sure that the site is secure and that there are no safety hazards present. White confirmed that PirTano employees are

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trained never to leave a strand of wire hanging loose from a pole before leaving a job site and agreed that doing so would be both unreasonable and "very unsafe." White confirmed that he had never been to the scene of Brown's accident and had not personally observed any wire left unsecured in the area. Accordingly, he never personally measured the wire that was purportedly involved in Brown's accident; rather, he only viewed pictures of the wire. Based on the pictures, White opined that the wire did not appear to be a 10-millimeter strand. Instead it was "something smaller," such as a 5/16-inch strand.

¶ 25 Mark Bernhardt, regional safety and compliance manager for Comcast Cable, which purchased AT&T Broadband in 2002, testified that his primary job responsibility was to prevent injuries and accidents. He confirmed that he was familiar with safety standards within the cable industry, including the use of aerial cables. Bernhardt specifically testified that cable strands should never be left dangling from a utility pole as it would not conform to industry safety standards. Bernhardt confirmed that in 2002, AT&T Broadband was involved in the Central Road Project and employed LB Communications as a subcontractor. AT&T Broadband also supplied the company with the cables and strands they were to use on the Project. Although Bernhardt did not know the size of the wire that AT&T Broadband supplied to LB Communications, it typically supplied 5/16-inch strands to subcontractors involved in similar projects. At the time of the Project, AT&T Broadband had a safety manual that applied to its employees as well as to the employees of its subcontractors. One of AT&T Broadband's policies was to ensure that work areas were left in a safe condition. Bernhardt confirmed that based on the terms of AT&T Broadband's subcontract with LB Communications, it had the authority to

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stop its subcontractor's work if it observed any employees engaging in any unsafe work practices. Bernhardt further confirmed that AT&T Broadband was a completely separate entity from AT&T Local and that AT&T Broadband did not hire PirTano to do any work on the Project.

¶ 26 Bernhardt was not involved in the day-to-day work operation on the Central Road Project and acknowledged that he did not know the status of AT&T Broadband or LB Communications' work on the Project as of May 17, 2002, the date of Brown's accident. Based on his knowledge, the strand that was purportedly involved in Brown's accident was not owned, controlled or placed by AT&T Broadband or LB Communications. After reviewing the pictures that had been taken of the strand, he acknowledged that it is similar to the type of support strand that AT&T Broadband used. Bernhardt, however, explained that the type of strand that AT&T Broadband used was not unique to that company; rather it was a strand "generally used by all the communication industry." Similarly, the bolt that the strand at issue was allegedly attached to, was not a bolt unique to AT&T Broadband.

¶ 27 Larry Brastad, the owner of LB Communications, confirmed that his company had a subcontract with AT&T Broadband to perform work on the Central Road Project. Specifically, LB Communications worked with cable television wires. Multiple companies were involved in the Project at various times, and on some occasions, employees from his company were working on the same poles that employees from PirTano were working on. Generally though, PirTano worked on the new poles first because their lines were higher than the lines that LB Communications were working on. Based on his recollection, PirTano used gray duct tape on the fiber optic strands it was working with, while LB Communications used black, grey, blue and

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red duct tape. Brastad explained that his company used whatever duct tape was available at the time.

¶ 28 Brastad confirmed that LB Communications worked with 5/16-inch strands and 5/8th-inch bolts to secure those strands on the Central Road Project. Those materials were supplied by AT&T Broadband. Although Brastad was the foreman of his crew and kept detailed work records, he was unsure where the records pertaining to the Project were located or whether they had been misplaced or accidentally thrown out. He did testify, however, that based on his recollection, the last day that LB Communications worked on the Project prior to Brown's accident was May 8, 2002, but acknowledged that he did not have documentation to substantiate his claim. Brastad did not recall seeing a loose strand hanging from an old pole around the time of Brown's accident, but acknowledged that he would have recognized it to be a safety hazard had he seen it and would have done something to remedy that situation.

¶ 29 Brastad acknowledged that safety was important to his company and that LB Communications would not likely be awarded any subcontracts with AT&T Broadband or any other company if it had a history of engaging in unsafe work practices. He also confirmed that it would be an unsafe work practice to leave an unsecured strand lying around a job site. Prior to Brown's accident, Brastad had not observed any employee of any entity working near the pole that purportedly contained the loose wire that was involved in the accident. He confirmed that LB Communications did not have any reason to work on the old pole at issue at the time of Brown's accident. Based on his recollection, LB Communications was working on completing the new television wires around that time, and accordingly, his employees "couldn't work on the

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old system yet because it [was] still live." Brastad explained that "you have to finish the new system first, get that lived up before you take down the old."

¶ 30 At some point before LB Communications temporarily stopped its work on the Project in the middle of June 2002, Brastad testified that he remembered observing a grey truck stopped at or near the utility pole at issue. He testified that he was certain that the truck did not belong to PirTano because that company used distinctive silver trucks emblazoned with blue writing, but could not recall with any certainty the company to whom the truck belonged. He also confirmed that while LB Communications and PirTano worked on the same Project, they worked separately and did not report to, or supervise, each other. After reviewing images of the accident scene, Brastad was certain that the strand at issue did not belong to PirTano. Because he was not present at the time of Brown's accident, Brastad could not state for certain whether an employee from PirTano left the strand at issue unsecured from the utility pole, but he believed that PirTano had temporarily stopped work on the Project prior to Brown's accident because Com Ed had not finished putting up the new utility poles.

¶ 31 James Downum, a former employee of Commonwealth Edison, was called to testify as an expert witness for Brown. He had worked on the Project and was familiar with the general area where Brown's accident occurred. He agreed that a condition involving an unsecured strand hanging from a utility pole close to the sidewalk would be hazardous to the public. After reviewing pictures taken of the pole and strand allegedly involved in Brown's accident, Downum testified that based on his familiarity with the area and the industry, he was "very confident" that the strand was a basic "cable TV messenger strand." His opinion was based on the apparent size

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of the strand, its location on the utility pole and the type of bolt to which it was affixed on the pole. Downum explained that a standard cable TV strand is comparatively smaller than a fiber optic strand, and the strand at issue was a smaller strand.

¶ 32 On cross-examination, Downum acknowledged that he never actually measured the strand depicted in the pictures. He also had no knowledge as to the size of the strands that any of the corporate entities involved on the Project used and, accordingly, he had no opinion as to whether the strand belonged to a specific corporate entity. He also acknowledged that neither the strand nor the bolt was unique to any telecommunications, cable or phone industry. Although he worked as a troubleshooter on the Project, Downum never observed AT&T Broadband or LB Communications employees working on the utility pole in question and had no knowledge as to whether those companies were aware that a strand was unsecured prior to Brown's accident.

¶ 33 John Runtz, a former employee of Illinois Bell, was a design engineer on the Central Road Project. He handled "joint work agreements," and arranged for job assignments to remove utility poles that were jointly owned by Com Ed and the phone company. After viewing pictures of the alleged accident scene, Runtz identified the unsecured wire as a "galvanized steel strand" and explained that such strands are "normally placed between poles and any numbers of things can be lashed to it with lashing wire: fiber, coaxial cable, lead cable, plastic cable, whatever need[s] to be placed." Although Illinois Bell worked with the same type of strand allegedly involved in Brown's accident, Runtz testified that Illinois Bell did not do any work on that particular area of the Project until June 2002, after Brown's accident, and stated that the strand did not belong to the phone company. After viewing pictures of the strand, Runtz testified that

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the strand on the utility pole at issue was likely either used by a cable television or fiber optics company, but acknowledged that that type of strand was not unique to one particular industry and could be used by many companies for different purposes. Similarly, the bolt to which one end of the strand was attached was not unique to any particular utility company. Nothing in the photographs allowed him to specifically identify which company owned or controlled the strand or bolt. Runtz clarified that he could not identify the company to whom the strand belonged because during "that particular time frame cable TV companies were being bought and sold all the time. It was hard to keep track." He was certain, however, that the strand at issue was a cable television strand.

¶ 34 Arthur Lyons, a lineman for Illinois Bell, now SBC Ameritech, testified that his job responsibilities included placing cable on telephone poles. He confirmed that he was involved in the Central Road Project and was responsible for "sw[i]ng[ing] [the company's] facilities from the old pole over to the new ones, and then remov[ing] the old poles." Lyons first commenced work on the Project in June 2002. After observing pictures of the accident scene, Lyons identified the strand at issue as a cable television strand. He confirmed that a strand should never be left dangling from a utility pole because it posed a safety hazard and would have violated Illinois Bell's safety practices as well as industry safety standards. Lyons acknowledged that he has never worked for a cable television company and that various utility entities used strands similar to the type depicted in photographs that he was shown. Although Lyons could not definitively name the corporate entity that owned the strand at issue, he opined that it necessarily belonged to either of the non-SBC entities on that particular utility pole and that it was

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"[a]bsolutely" a cable television strand.

¶ 35 William Atella, a design engineer at Illinois Bell, testified that his job responsibilities included designing "outside plans for telephone infrastructure [and] poles underground." In June 2002, Atella was a construction manager on the Central Road Project, and "oversaw a line crew and splicing crew that replaced and spliced telephone cables." He testified that Illinois Bell did not start working on the Project near the area of Brown's accident until June 10, 2002. He confirmed that Illinois Bell had not performed any work on the old utility pole alleged to be the site of Brown's accident. After reviewing pictures of the scene, Atella testified that he believed that the strand at issue was a "cable TV," strand. He conceded, however, that he had never worked in the cable television industry. Atella confirmed that leaving an unsecured strand at a job site would be a definite violation of industry safety standards. He also confirmed that he did not know which cable entity owned the strand or what the intended purpose of the strand had been.

¶ 36 James Zacharshi, a lineman employed by SBC Ameritech, worked on the Central Road Project in 2002, and was assigned to move the company's "aerial innerduct from the old poles back to the new ones." He agreed that the failure to firmly secure a wire support strand would pose an unsafe condition to the public. After viewing pictures of the utility pole and strand at issue, Zacharshi testified that he would "have to assume it's cable, cable TV company." He identified the wire as coaxial cable and explained that the phone company did not use that type of cable. He acknowledged, however, that as an employee of SBC Ameritech, he used electrical tape similar to the type of tape depicted in the pictures of the strand allegedly involved in

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Brown's accident.

¶ 37 After presenting the aforementioned testimony, Brown rested his case. Prior to the conclusion of the case, PirTano reached a settlement agreement with Brown and all claims against PirTano were dismissed with prejudice. Jurors were not informed of the settlement, but were advised that they did not need to reach a decision as to PirTano's liability, or lack thereof, with respect to this case. AT&T Broadband and LB Communications subsequently moved for a directed verdict, but their motion was denied.

¶ 38 Defendants called Arnold Ehlert, a lineman splicer employed by LB Communications, who also worked on the Central Road Project in 2002, and detailed the procedure that he employed on the Project. After the new poles were constructed, Ehlert would run a strand wire and lash it to a coaxial wire. He would then splice it to the old cables to activate the new cable system. Splicing generally occurred at night to avoid disruption to customers' cable service. Once the new poles were activated, Ehlert explained that he would then go and remove the old system from the old poles. He indicated that LB Communications would not have had any reason to perform any work on the old poles until the new poles were activated. At the time of Brown's accident, Ehlert testified that construction of the new poles had not been completed and thus, the strand that purportedly caused Brown's accident would not have been LB Communications' strand as "there would be no reason for it to be us" given the progress on the Project. He explained that LB Communications would not have had any reason to work on the pole depicted in the pictures before July 2002, which is when they returned to the old poles to "wreck out" the old system. Ehlert confirmed that the strand wire and the bolt depicted in the

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pictures of the accident site were commonly used equipment in the industry. The strand appeared to be a 5/16-inch strand. Finally, Ehlert acknowledged that an improperly secured strand would constitute "a hazard."

¶ 39 Cornelio DeLaCerde, a construction specialist with Comcast, previously known as AT&T Broadband, confirmed that AT&T Broadband was involved in the Central Road Project and employed LB Communications as its subcontractor. Although he was present at the Project on a regular basis, DeLaCerde did not recall whether he was working on the Project on May 17, 2002. However, he testified that neither AT&T Broadband nor its subcontractor would have had any reason to work on the old utility pole at issue in Brown's accident. Based on his review of time sheets and work records, AT&T Broadband and LB Communications would not have worked on that pole until July 2002, when they returned to the area to "wreck out" the old system. DeLaCerde further testified that LB Communications was only using "quarter-inch strand[s]" on the Project, and specifically denied that AT&T Broadband's subcontractors used 5/16-inch strands. After observing pictures of the strand wire at issue, DeLaCerde testified that it was "[p]robably [a] 5/16[- inch strand]."

¶ 40 Neal Woods, a telecommunications expert, testified that "strand [wire] is strand" and is not unique to any utility industry. He further testified that there is a general industry standard with respect to the order of utility companies on a utility pole. Generally, the power company is at the top of the pole and the telephone company is at the bottom of the pole; however, there is no set order with respect to the utilities in between those entities. After reviewing pictures taken of the utility pole at issue in the instant case, Woods opined that the strand was possibly an

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"abandoned strand." He based his opinion on that fact that there was no cable attached to that strand and all of the utilities on the pole "appear[ed] to be" fully supported and none of the companies involved in the Project, including AT&T Broadband and LB Communications, would have had any reason to attach a second strand wire to the old pole. Woods indicated that he had no opinion as to the diameter or the age of the strand depicted in the photographs of the accident site.

¶ 41 After hearing closing arguments, the jury returned with a verdict, finding in favor of Brown and against AT&T Broadband and LB Communications. The jury specifically found that LB Communications was aware of the condition of errant strand prior to Brown's injury. The jury further found that amount of damages that Brown suffered as a direct proximate result of defendants' negligence totaled \$1,962,752; however, the jury also concluded that Brown was "50 percent" comparatively negligent and reduced his damages by half to \$981,376.

¶ 42 Post-Trial Motions

¶ 43 Following the jury's verdict, both parties filed post-trial motions. AT&T Broadband and LB Communications filed a motion for a judgment notwithstanding the verdict, arguing that the jury's finding of negligence was based on speculation and could not stand. Brown, in turn, filed a motion for a judgment notwithstanding the verdict on the jury's comparative negligence finding, arguing that there was no evidence that he acted negligently or that any negligence on his part contributed to the accident. The circuit court denied both post-trial motions and the parties filed timely notices of appeal. We will first address the arguments raised by AT&T Broadband and LB Communications before we turn to Brown's cross-appeal.

¶ 44

II. ANALYSIS

¶ 45 On appeal, AT&T Broadband and LB Communications argue that the trial court erred in denying their motion for a judgment notwithstanding the verdict. They assert that Brown failed to establish a *prima facie* case of negligence because he did not know how the accident occurred and did not see the wire at issue until after the accident. Given the deficiencies in Brown's case and his failure to establish the element of proximate cause, AT&T Broadband and LB Communications maintain that the jury's verdict "was necessarily the result of guesswork and speculation" and that its judgment cannot stand.

¶ 46 Brown responds that the evidence established that he was struck by defendants' negligently secured strand wire as he was riding his bike, which caused him to fall off of his bicycle and suffer significant injuries. Given that the issue of proximate cause is one that falls within the province of the jury and that the evidence supports the jury's finding of negligence, Brown asserts that the circuit court properly denied defendants' motion for a judgment notwithstanding the verdict.

¶ 47 A motion for a judgment notwithstanding the verdict should only be granted in limited circumstances, such as when "all the evidence, when viewed in the light most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based upon that evidence could ever stand." *Pedrick v. Peoria Eastern Railroad Co.*, 37 Ill. 2d 494, 504 (1967). When reviewing a ruling on a motion for a judgment notwithstanding the verdict, a reviewing court will not reweigh the evidence or evaluate the credibility of the witnesses, as these functions are within the unique province of the jury. *Board of Trustees of Community College District No.*

508 v. Coopers & Lybrand, 208 Ill. 2d 259, 274 (2003); *Drakeford v. University of Chicago Hospitals*, 2013 IL App (1st) 111366, ¶ 7. Ultimately, the standard for entry of a judgment notwithstanding the verdict is "high," (*York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 178 (2006), quoting *Pasquale v. Speed Products Engineering*, 166 Ill. 2d 337, 351 (1995)) and is "limited to 'extreme situations only' " (*Knauerhaze v. Nelson*, 361 Ill. App. 3d 538, 548 (2005), quoting *Jones v. Chicago Osteopathic Hospital*, 316 Ill. App. 3d 1121, 1125 (2000)). Indeed, a motion for a judgment notwithstanding the verdict may not be granted "if there is any evidence, together with reasonable inferences to be drawn therefrom, demonstrating a significant factual dispute, or where the assessment of credibility of the witnesses or the determination regarding conflicting evidence is decisive to the outcome." *Maple v. Gustafson*, 151 Ill. 2d 445, 454 (1992). In addition, a judgment notwithstanding the verdict is "not appropriate if 'reasonable minds might differ as to the inferences or conclusions to be drawn from the facts presented.' " *Ramirez v. FCL Builders, Inc.*, 2013 IL App (1st) 123663, ¶ 116, quoting *Pasquale v. Speed Products Engineering*, 166 Ill. 2d 337, 351 (1995). When reviewing a circuit court's ruling on a motion for judgment notwithstanding the verdict, the evidence must be considered in the light most favorable to the party opposing the motion. *Thacker v. UNR Industries*, 151 Ill. 2d 343, 353-54 (1992); *Ramirez*, 2013 IL App (1st) 123663, ¶ 116. A motion for a judgment notwithstanding the verdict presents a question of law as to whether there was a complete failure to substantiate a key element of the plaintiff's case, and as such, the circuit court's ruling on such a motion is subject to *de novo* review. *York*, 222 Ill. 2d at 178; *McDonald v. Northeast Regional Commuter R.R. Corp.*, 2013 IL App (1st) 102766, ¶ 20.

¶ 48 To prevail on a negligence claim, a plaintiff must establish that the defendant owed the plaintiff a duty of care, that the defendant breached that duty, and that the breach of that duty proximately caused the plaintiff's injury. *Reed v. Galaxy Holdings, Inc.*, 394 Ill. App. 3d 39, 42 (2009); *Pavlik v. Wal-Mart Stores, Inc.*, 323 Ill. App. 3d 1060, 1063 (2001). A defendant's negligence may be shown through both direct and circumstantial evidence. *Barker v. Eagle Food Centers, Inc.*, 261 Ill. App. 3d 1068, 1072 (1994). Whether a defendant's acts or omissions constituted a breach of duty and whether those acts or omissions proximately caused a plaintiff's injury are generally issues of fact to be decided by a jury. *Thompson v. Gordon*, 241 Ill. 2d 428, 439 (2011).

¶ 49 To establish the element of proximate cause, the plaintiff must " 'affirmatively and positively show' that the defendant's alleged negligence caused the injuries for which the plaintiff seeks to recover." *Bermudez v. Martinez Trucking*, 343 Ill. App. 3d 25, 29 (2003), quoting *McInturff v. Chicago Title & Trust Co.*, 102 Ill. App. 2d 39, 48 (1968). The element of proximate cause need not be established by direct evidence; rather, it may be established by circumstantial evidence. *Westlake v. C. House Corp.*, 2011 IL App (1st) 100653, ¶ 18. Specifically, "causation may be established by facts and circumstances which, in the light of ordinary experience, reasonably suggest that the defendant's negligence operated to produce the injury." *Keating v. 68th and Paxton, LLC.*, 401 Ill. App. 3d 456, 473 (2010). When circumstantial evidence is relied upon to establish proximate cause, " ' the evidence must support an inference which is reasonable and probable, not just possible.' " *Westlake*, 2011 IL App (1st) 100653, ¶ 18, quoting *Stojkovich v. Monadnock Building*, 281 Ill. App. 3d 733, 740 (1996).

While it is not necessary that the circumstantial evidence support only one logical conclusion (*Mort v. Walter*, 98 Ill. 2d 391, 196-97 (1983)), the existence of a fact cannot be inferred when a contrary fact can be inferred with equal certainty (*Richardson v. Bond Drug Co.*, 387 Ill. App. 3d 881, 886 (2009)).

¶ 50 In this case, because the accident happened in the evening when Brown was alone, he was the only witness to provide testimony about the circumstances of his accident. Brown testified that he was riding on the sidewalk that ran alongside Central Road at approximately 9:30 p.m. on May 17, 2002. Although it was dark, Brown was wearing a headlamp and was looking straight ahead. Brown further testified that when he maneuvered his bicycle over a slight depression in the sidewalk, he looked downward briefly. He then felt "something" hit him on the chest and fell to the ground. Brown conceded that he did not immediately know why he had fallen, but subsequently noticed that a wire was wrapped around his leg and around the sprocket of his bicycle. He had not seen the wire prior to the accident.

¶ 51 Based on Brown's testimony about his initial uncertainty about the cause of the accident and that he looked down as he rode his bicycle over a slight depression in the sidewalk and did not observe the wire prior to falling off of the bicycle, defendants argue that the evidence "suggests that Brown hit a bump, bobbed his head, and more probably veered off the sidewalk and knocked the [properly attached] wire off the old utility pole." Indeed, AT&T Broadband and LB Communications assert that this cause for the accident is just as probable as Brown's explanation that a strand wire had not been properly secured and that the errant wire was left hanging and caused his accident. We disagree. Although Brown acknowledged looking down

briefly after his bicycle hit a slight depression, he testified that he did not lose control of the bike and that he had raised his eyes immediately before the accident. There is no evidence that his bicycle left the sidewalk and traveled onto the grass, where the old utility pole was located, prior to the accident. Although there was duct tape on the wire, which defendants argue demonstrates that efforts had been made to properly secure the wire, the fact that Brown felt a wire hit him in the chest prior to falling in the ground suggests that it is more probable that the wire had not actually been properly affixed to the utility pole and had been hanging down and caused his accident. Although there might theoretically be various possibilities as to the cause of Brown's accident, this is not a case where all potential possibilities were equally likely. *Cf., Keating v. 68th & Paxton, LLC*, 401 Ill. App. 3d 456, 474-75 (2010) (affirming summary judgment in favor of the defendant where the plaintiff's explanation for the cause of his fall was only possible, not probable, because the defendant's explanation for plaintiff's injury was equally likely).

Ultimately, we find that Brown presented sufficient circumstantial evidence upon which a reasonable inference could be drawn that the wire was not properly secured and that it caused his accident.

¶ 52 In addition to presenting sufficient evidence of proximate cause, Brown also presented a plethora of evidence that a wire left hanging not only violated industry standards but also created an unsafe and dangerous condition to the public. Donald White, vice president of communications of PirTano, Mark Bernhardt, regional safety and compliance manager for ComCast, Larry Brastad, owner of LB Communications, Arthur Lyons, a lineman for Illinois Bell, James Zacharshi, a lineman for SBC Ameritech, William Atella, a design engineer from

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Illinois Bell, and James Downum, plaintiff's retained expert, each attested to the fact that an inadequately secured strand wire was improper and dangerous. No witness called by either party provided an opinion to the contrary.

¶ 53 AT&T Broadband and LB Communications, however, further assert they are entitled to a judgment notwithstanding the verdict because Brown also failed to "demonstrate to a reasonable certainty that it was these defendants *** who owned, controlled or placed the wire, if it was negligently placed, i.e., unattached to the utility pole."

¶ 54 At trial, James Downum, a former first-responder and troubleshooter for Com Ed, and Brown's retained expert, testified that after viewing pictures, he was "very confident" in his ability to identify the wire at issue as a "cable TV messenger strand." His opinion was based on the size of the strand depicted in pictures, its location on the utility pole, and the type of bolt to which it was affixed at one end. Downum explained that cable television wires generally require smaller support strands than other wires, including fiber optic wires. Fiber optic companies generally use larger strand wire so that they can easily add additional capacity in the future. Although defendants suggest that Downum was not qualified to provide expert testimony, they never raised any objections as to his competency as an expert at trial. In addition, while Downum did not name AT&T Broadband and LB Communications specifically, based on his testimony about the type of wire, and that fact that it was undisputed that defendants performed cable television installation on the Project, the jury could reasonably conclude that the strand belonged to defendants.

¶ 55 Moreover, Downum's testimony was not the sole source of evidence that plaintiff

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proffered as to the issue of ownership and control of the wire. John Runtz, a design engineer on the Central Road Project, Arthur Lyons, a lineman for Illinois Bell, William Atella, a design engineer and construction manager on the Project, and James Zacharshi, a lineman employed by SBC Ameritech, each testified that the wire at issue was a cable television strand. Their opinions, like Downum's, were based on the appearance of the strand and its position on the utility pole. Moreover, Larry Brastad, president of LB Communications, acknowledged that AT&T Broadband provided his company with 5/16-inch strands to use on the Project. These strands were smaller than the 10-millimeter strands that Pirtano was using on the Project, and appeared to be identical to the strand depicted in pictures of the accident site. Although Neal Woods, defendant's expert suggested the strand was an abandoned strand, and Cornelio DeLaCerde denied that AT&T Broadband had provided LB Communications with 5/16-inch strands, we note that issues pertaining to credibility determinations and inconsistencies in the evidence are questions for the jury. *Board of Trustees of Community College District No. 508*, 208 Ill. 2d at 274; *Drakeford*, 2013 IL App (1st) 111366, ¶ 7.

¶ 56 The most persuasive evidence that defendants were not responsible for the dangling wire would have been work records— which LB Communications admitted it both maintained and provided to AT&T Broadband— reflecting work done on the Project. For reasons they were unable to explain, neither LB Communications nor AT&T Broadband were able to produce those records. Given the other evidence connecting the dangling wire to these defendants, the jury could properly draw a negative inference from the absence of this relevant evidence.

¶ 57 Ultimately, after considering the evidence in the light most favorable to Brown, we are

unable to agree that the evidence so overwhelmingly favored AT&T Broadband and LB Communications such that no contrary verdict could ever stand. Accordingly, we find that the circuit court properly denied defendants' motion for a judgment notwithstanding the verdict. See generally, *Ramirez*, 2013 IL App (1st) 123663, ¶ 125.

¶ 58 On cross-appeal, Brown argues that the jury erred in finding that he was comparatively negligent and in reducing his damages by 50%.

¶ 59 AT&T Broadband and LB Communications respond that Brown's decision to ride his bicycle in the area in which an extensive aerial relocation project was taking place at night, with limited visibility, demonstrated his comparative fault.

¶ 60 "Contributory negligence is the [plaintiff's] failure to exercise that care, which under the circumstances presented by the evidence, a reasonably prudent person would take to avoid injury." *Calloway v. Bovis Lend Lease, Inc.*, 2013 IL App (1st) 112746, ¶ 94. The issue of a plaintiff's negligence is "always a question for the jury unless 'it is established from the undisputed facts that all reasonable minds, in the exercise of fair and earnest judgment, would reach the same conclusion that the plaintiff was [comparatively] negligent.'" *Bier v. Leanna Lakeside Property Ass'n*, 305 Ill. App. 3d 45 (1999), quoting *Doris v. Bradley*, 76 Ill. App. 3d 890, 892-93 (1979); see also *Powell v. Dean Foods Co.*, 2013 IL App (1st) 082513-B, ¶ 126.

¶ 61 Here, after reviewing the evidence, we do not agree that evidence of Brown's negligence was too speculative to support the jury's finding. Brown testified that he was aware of the extensive aerial relocation Project when he elected to ride his bicycle home on an unfamiliar path. In addition, Brown conceded that he had a responsibility to maintain a proper lookout. Although

he was wearing a headlamp, there is no dispute that Brown did not see the wire before the accident. See generally *Burroughs v. McGinness*, 63 Ill. App. 3d 664, 667 (1978) (recognizing that a party's failure to maintain a proper lookout supports a negligence finding). Ultimately, based on a review of the record, we cannot agree that evidence so overwhelmingly favors Brown such that the jury's comparative negligence finding cannot stand. We thus uphold the circuit court's denial of Brown's post-trial motion.

¶ 62

III. CONCLUSION

¶ 63 Accordingly, the judgment of the circuit court is affirmed.

¶ 64 Affirmed.