FOURTH DIVISION
December 7, 2017

No. 1-16-2919

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

ROBERT KINSTNER,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	No. 10 L 12876
HARBOUR CONTRACTORS, INC.,	)	
	)	Honorable
Defendant-Appellee.	)	Patrick Foran Lustig,
	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Burke and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court did not err in excluding evidence of subsequent remedial measures; (2) defense counsel's reference to OSHA was not reversible error; (3) the trial court did not err in giving a sole proximate cause instruction; and (4) plaintiff was not deprived of a fair trial due to the cumulative errors.

¶ 2 Plaintiff Robert Kinstner filed a negligence action against defendant Harbour Contractors, Inc., after he was injured as a result of a fall due to uneven ground while at a construction site for a police station, located at 3600 North Halsted Street in Chicago. Defendant was the general contractor for the construction site. Plaintiff was employed by Garth/Larmco

(Larmco), a masonry subcontractor at the site. Following trial, the jury found in favor of defendant.

¶ 3 Plaintiff appeals, arguing that (1) the trial court erred in excluding evidence that defendant undertook subsequent remedial measures at the site where defendant has disputed its control over the site; (2) defendant violated a stipulation and order *in limine* to bar testimony as to whether the construction site was compliant with Occupational Safety and Health Administration (OSHA) standards; (3) the trial court erred in accepting defendant's sole proximate cause jury instruction; and (4) the cumulative errors deprived plaintiff of a fair trial.

¶ 4 Initially, we note that neither party's statement of facts is in compliance with Supreme Court Rule 341(h)(6), which requires that the statement of facts in an appellate brief "shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment." Ill. S. Ct. R. 341(h)(6) (eff. Jan. 1, 2016). The statement of facts in each party's brief lacks a complete recitation of the facts necessary for the issues on appeal, and the facts provided improperly include argument and comment.

¶ 5 In November 2010, plaintiff filed his initial complaint alleging negligence against defendant. In August 2011, his first amended complaint was filed which again raised a single count of negligence against defendant.

¶ 6 Prior to trial, the parties filed several motions *in limine*. One of defendant's motions asked the court to bar any testimony relating to subsequent remedial measures, including stoning, shoveling, or salting the areas where plaintiff's injury occurred at the construction site. Defendant stated that it did not dispute ownership or control of the construction site, including the area where plaintiff was injured. The trial court granted the motion. Prior to trial, the parties discussed a stipulation regarding control. After a discussion between the parties and the court, an

agreed stipulation was reached which plaintiff's counsel stated to the jury during the opening statement and at the close of plaintiff's case. Counsel stated:

> "There's been a stipulation reached between the parties in this case. A stipulation is an agreement that no one contests, no one argues one way or the other. It's an agreement, and both parties have agreed, general contractor and the Plaintiff, that all parties agree that the general contractor, here Harbour, had overall control of the entire construction site including the area where Plaintiff was working. That's not contested."

¶ 7 Also prior to trial, the parties agreed and the trial court ordered that neither party could introduce evidence through their experts as to whether defendant was in violation of or in compliance with OSHA standards.

¶ 8 The following evidence was presented at trial. We note that since plaintiff's claims on appeal do not relate to his injuries and his subsequent medical treatment, we set forth only the testimony necessary to decide the issues before us.

¶ 9 Plaintiff testified that in February 2010, he was working as an operating engineer at the construction site for masonry subcontractor Larmco. His position involved running a lull, which is a type of forklift that hoists material and is used to keep the bricklayers and laborers supplied with materials, including mortar and blocks, as well as carry planks and scaffold around the site. Plaintiff testified that the area where he worked on the site was a work area in which people would walk and other machines, such as a truck for deliveries, would operate as well. The area was near the south wall of the building with entrance doors he used to place supplies. Plaintiff had written, "use side doors," on the entrance to direct other workers to another entrance.

Larmco had a “silo” immediately to the side of the doors where employees would mix the mortar.

¶ 10 On the day of the accident, February 9, 2010, at approximately 10 a.m., plaintiff was talking to his boss, superintendent Ed Allen. After Allen walked away, plaintiff heard a thud and observed Allen on his back. Plaintiff left his machine and went toward Allen. He testified that he wanted to see if Allen was hurt. Plaintiff did not observe Allen fall and did not know what happened to Allen. As plaintiff was walking, his “right foot hit the top of the rut,” and he slipped and fell. Plaintiff testified there was snow and ice in the rut.

¶ 11 Plaintiff was subsequently transported by ambulance to the Illinois Masonic Hospital. Plaintiff had fractured his right ankle and surgery was required. Plaintiff later developed complex regional pain syndrome, which resulted in chronic pain and the loss of his construction career.

¶ 12 On cross-examination, plaintiff admitted that his foreman at the site would conduct “toolbox talks,” where they discussed safety. Plaintiff testified that he understood the need to be careful when working on a construction site with snow. Plaintiff further admitted that Allen as the superintendent and the site foreman for Larmco had the authority to stop the work for Larmco employees if they thought the employees were working in unsafe conditions. Plaintiff was aware that he could report to his foreman anything that made his job difficult or impossible to perform safely. He testified that “every contractor had a duty to keep their area clean.”

¶ 13 Plaintiff estimated that the lull he operated weighed between 20,000 and 40,000 pounds. He testified that when the lull drives over an area with snow, it might leave track marks. Plaintiff testified that if the ground was frozen, then the lull would not leave tire tracks. If the ground was not frozen, then it could leave tire tracks and ruts. Plaintiff testified that in the three to four weeks prior to his accident, there was no snow on the site, the ground was dirt. When asked if

there were "ruts or depressions," plaintiff responded, "Not that I know of, no." Plaintiff testified that he did not notice any ruts in the area of his accident before he fell. Plaintiff testified that he did not know how deep the snow was on the day of the accident. At the time of the accident around 10 a.m., plaintiff had been working at the site on the lull for approximately four to four and a half hours and had no problems outside before he fell. He had not made any complaints about his working conditions, and the weather was not interfering with his ability to do his job safely. Plaintiff testified that a Larmco laborer would make the mortar that plaintiff would deliver in the building in his lull. He was not aware of any of the Larmco laborers making the conditions at the site dangerous for him to do his job. Plaintiff could not recall if the snow at the site was packed down. Plaintiff testified that he did not know how deep the rut in the ground was. He did not recall telling anyone he fell on black ice or packed-down snow.

¶ 14 Plaintiff admitted that since the accident, he has not worked in any capacity and has not tried working in any capacity. He has not applied for work in a sedentary job. Plaintiff is unable to work as an operator of heavy machinery. On redirect, plaintiff testified that he slipped on snow covered ice and that a rut was present.

¶ 15 Ed Allen's testimony was presented to the jury via a videotaped evidence deposition. The deposition was taken approximately two weeks prior to trial. At the time of the deposition, the parties had not reached a stipulation regarding defendant's overall control of the construction site.

¶ 16 In 2010, Allen was employed by Larmco as a superintendent. He was present at the police station construction site on a daily basis to check that the Larmco employees had the manpower and equipment needed to do the job. He testified that Larmco's scope of work had nothing to do with preparing or maintaining the ground conditions. Larmco's role was limited to

masonry, which was to build the building with brick and block stone. Allen knew plaintiff, as plaintiff was an operator of a lull on the site. Plaintiff would bring in material as the bricklayers or laborers needed it. Allen testified that the lull could create ruts in the ground if it was operating on soft or wet ground, and it did create ruts at this jobsite from time to time. The mortar was mixed on site in a location called a "silo."

¶ 17 Allen testified that defendant was the general contractor and it exercised its control over scheduling with Larmco at times. Defendant had control over the sequencing of the work at the site to make sure the job is finished on schedule and done in a safe manner. Allen testified that the general contractor has the authority to exercise control over safety on the job. He also agreed that a general contractor has the authority to stop work if it observed work being done unsafely. Allen testified that Larmco had authority to exercise some control over the means and methods of its work, which included setting up the scaffolding, the brick, block and stone, and what was feasible for them to do their work. Larmco's scope of work did not require them to maintain any of the commons areas or make them safe. Allen testified that defendant directed Larmco as to where they could place their silo on the site. Allen testified that defendant had the authority to remove ice from pathways where men would be walking or working.

¶ 18 Allen testified that filling in the ruts with stone was one way to eliminate them. He said it was common when the ruts "get bad." Filling in ruts with stone was considered a safety measure and he testified that defendant as the general contractor had the authority and responsibility to fill in ruts.

¶ 19 On February 9, 2010, Allen arrived on the jobsite around 9 a.m. He testified that the ground was snow covered at the site and the temperature was below freezing. Because the ground was frozen, he testified that ruts would not have been made that day. Allen estimated that

the ruts at issue at the site had been there "probably [] for a month or better." He said defendant had the authority to control the means and methods to prevent working in ruts. Allen testified that based on his experience, stone allows water to seep through to prevent ice forming on the top because it allows for drainage.

¶ 20 When Allen was at the site, he spoke with plaintiff. He observed the snow, but ice was not visible. After speaking with plaintiff, Allen turned to walk away and slipped on uneven ground and "landed in the rut." He described his fall as his "feet went right out from under" him and he "hit the ground hard." His hardhat remained on. Seconds later, he heard plaintiff yell out and observed him "laying in the rut." Plaintiff was "perpendicular" to the way Allen had fallen. Allen did not observe plaintiff's fall. Allen then got up and went to see plaintiff. He testified that plaintiff was screaming that his leg was broken. Allen testified that the rut was "four to six inches" deep. Allen helped plaintiff get up, but plaintiff was unable to put pressure on his leg. They moved plaintiff to the lull, where plaintiff was able lean against a tire. Plaintiff was subsequently taken to the hospital.

¶ 21 Allen testified about a photograph showing stone at the construction site and asked if placing stone in that manner was a feasible alternative to remedy the site. Allen responded in the affirmative. He testified that putting down stone was customarily done to make pathways safe for travel and equipment. Allen testified that he observed a wheel track, but no rut in the photograph. Based on custom and practices in the industry, Allen testified that defendant would have had the authority to lay down the stone and it had the authority to lay the stone down whenever it chose. Allen said that defendant had the authority to lay the stone prior to February 9, 2010. Defendant, as the general contractor, would have been expected to know if work was going to be conducted in the area the day of the accident.

¶ 22 On cross-examination, Allen testified that at the time of the accident, Larmco was working three to five jobs, which he visited each day. He would be at each site ranging from one to four hours. Allen was asked if he was aware that Larmco agreed in its contract with defendant to take reasonable safety precautions with respect to their job performance, and he answered, "Yes." Allen testified that Larmco employees are capable of working in changing weather conditions, including cold and snow. Allen agreed that it was his job as well as the Larmco foreman to make sure Larmco workers were working safely. Allen testified that Larmco controlled the means of methods of the brickwork being performed. Larmco determined the manpower and equipment needed for the masonry work. Allen testified that defendant did not determine how many Larmco employees were necessary to do the brickwork and what equipment the employees should use. It was defendant's duty to schedule or sequence the work at the site.

¶ 23 Allen agreed that the Larmco foreman had the authority to stop the work if he felt that conditions, including snow and ice, made it unsafe for Larmco employees. Allen was not aware of an instance in which the foreman requested the work to be stopped because of unsafe conditions. Allen testified that he also had the authority to stop work, but he did not stop or suspend work due to an unsafe condition. Allen was not aware of any complaints from Larmco employees that unsafe conditions prevented them from doing their job.

¶ 24 On the day of accident, Allen was not aware of any other trades or other Larmco employees working near plaintiff. Allen testified that there was "half inch or so. Maybe a little bit more," of snow covering the ground at the site. He talked to plaintiff at his machine. He did not know how many loads plaintiff would have moved that day. Allen testified that work at the site began at 7 a.m. Allen talked to plaintiff for five to ten minutes, and during that time, plaintiff

did not voice any complaints about the working conditions. Allen testified that as he walked away from plaintiff, plaintiff said to him, "careful, it's slippery." Allen then took one step and fell on the ice. He did not see plaintiff fall.

¶ 25 Allen testified that he had not observed an area like the site of the accident stoned before because it was "not a standard entry for main deliveries. Normally, it's a wider space." Allen agreed that construction sites are not perfectly smooth, flat surfaces and the sites are changing because of the work being performed. He also agreed that the walking surface at construction sites is changing because of the work being performed. He testified that it is important to take responsibility for your own safety and look where you are going, and that he felt he was looking where he was going on the day of the accident. Allen testified that the Larmco foreman would conduct weekly toolbox talks at the jobsite, which included information about safety. Allen agreed that everyone at a jobsite has a responsibility for their own safety and to be aware of their work site conditions. Allen testified that the general contractor is responsible for safety throughout the whole job. Allen agreed that there was a hierarchy at the site with the general contractor superintendent at the top, then to the subcontractors, and last individual workers from particular subcontractors. When asked if he had observed any condition on the jobsite that suggested that plaintiff should not be working outside in the conditions as they existed that day, Allen agreed that he had not. Allen testified that he had the authority to stop the work if he chose and he would not put the safety of one Larmco worker at risk to keep the other Larmco employees working.

¶ 26 Daniel Skiera testified in plaintiff's case that he was employed as a superintendent for defendant. He testified that as the general contractor, defendant was at the top of hierarchy on the jobsite "contractor wise." He noted that the Public Building Commission is also involved at the

site. According to Skiera, defendant coordinated the scheduling of the subcontractors with their respective input. Defendant had "some control" over the sequencing and scheduling of the work at the site.

¶ 27 Skiera was asked several questions about the contract with the City of Chicago to build the police station. Under the contract, "the work [was] under the charge and care" of defendant until final completion. It also testified that, defendant was "solely responsible for selecting the means, the methods, the techniques, the sequences, and procedures used in performing the work." The contract further provided that defendant was "responsible for project health and safety" as of the date the project began, and defendant had "sole and complete responsibility for implementation of a safety program." Skiera agreed that the contract included all of these provisions. The contract also required defendant to "furnish and install all necessary facilities to provide safe means of access to all points where work is being performed and make all necessary provision to insure the safety of all workers *** during the performance of the work."

¶ 28 Skiera testified that defendant created a site-specific safety plan, as required under the contract. Skiera agreed that part of the safety plan required the project superintendent, Jim Ledvina, to "regularly observe jobsite work areas, tools, and equipment daily and take all appropriate actions necessary to eliminate or control any hazards that are identified." The safety plan provided that all workers must be kept away from an identified hazard until corrected and "[a]ll hazards identified during daily observations or periodic inspections should be corrected or controlled immediately."

¶ 29 Skiera testified that defendant, as the general contractor, had the authority to exercise control over safety. Defendant also had the authority to direct the subcontractors where to store

and stage their materials. Skiera testified that, "Generally on my jobs it's a coordinated effort with the subcontractor."

¶ 30 Skiera was not present at the jobsite the day of the accident. He agreed that the accident report stated that plaintiff "fell in snowy conditions and injured his leg." Skiera agreed that defendant had the authority to exercise control over the entire jobsite. He testified that lulls can cause ruts when the ground is not firm enough. He said that "any uneven ground can be a potential hazard." Skiera agreed that water or ice and snow in a rut area can cause a slipping hazard. He testified that you try to minimize ruts to whatever extent you can. He testified that compacting the ground, then filling ruts with gravel, and then compacting the ground again was a way to fix ruts. Plaintiff's counsel showed Skiera a photograph showing gravel and Skiera testified that no ruts were visible. Skiera testified that defendant had the authority to place gravel in the area of ruts to flatten the ground whenever it chose. Skiera agreed that from time to time, defendant directed the work of various Larmco employees. When shown a photograph of the accident site and asked if he could see the ruts, Skiera responded that it looked "like a normal jobsite" to him.

¶ 31 On cross-examination by defendant's attorney, Skiera testified that he had been a superintendent with defendant for 12 years. Skiera denied that defendant controlled "the means or methods" of how Larmco did their work, specifically the actual process of the brickwork. Defendant did not decide what equipment Larmco was going to use on the jobsite.

¶ 32 Defense counsel asked Skiera about the contract between defendant and Larmco, as the masonry subcontractor. Skiera agreed that the contract stated that Larmco "shall take reasonable safety precautions with respect to performance of the job order and shall comply with the safety

program initiated by contractor." Skiera testified that the site-specific safety plan was available at the jobsite in a binder located in the trailer.

¶ 33 Skiera testified that the ground at construction sites is not "perfectly smooth and safe." Skiera agreed that the safety plan provided that safety was "everybody's business at a construction site." The safety plan required the subcontractor superintendent's to "plan and execute all work operations so as to comply with the stated objections of the safety action plan." Skiera testified that the plan indicated for the superintendent to implement immediate corrective action to eliminate unsafe practices and conditions when observed. All observed unsafe conditions and practices not within the subcontractor's jurisdiction should be reported to defendant. Skiera testified that subcontractors played a significant role in jobsite safety because "[e]veryone has to keep their work area clean. Everyone has to contribute to the safety of the job." Skiera testified that this responsibility is also passed onto the individual employees, including plaintiff. He said that construction activities are on uneven ground and the conditions were ever changing, "it has to be fluid in order to build that to a point where it's a finished product." He agreed that the plan stated that "each employee worker will refrain from any unsafe acts that might endanger themselves or others." Employees were to report any unsafe conditions or acts to their supervisor. Skiera was not aware of anyone reporting a problem with the area where the accident happened.

¶ 34 Skiera testified that defendant worked to coordinate the job where everyone worked together to create a plan as a joint decision. He testified that it was a joint decision as to where Larmco's materials were placed, although defendant retained the ultimate call.

¶ 35 James Ledvina testified during defendant's case. He testified that he was retired, but previously worked for defendant as a field superintendent for 12 years. As a field superintendent,

he made the schedules with input from the subcontractors to coordinate and keep everything on schedule. He was on site every day at the police station construction site. He also walked the site regularly. He testified that per the architect's plans, designated roadways were stoned. Another road was made for the crane. Ledvina testified that stone was used for safety reasons, and with the crane, it needed to be in a level position to prevent tipping. He said they did not stone every day or week, nor did they follow vehicles that made tracks to put down stone.

¶ 36 In February 2010, the police station outer building was complete and all the trades were inside completing work, including brickwork, plumbing, electric, and HVAC. He said there were two entrances for the workers to use and one entrance for the mason and his equipment. He indicated that the doors with "use side doors" written on it were to be used by the masons. He had directed the lull driver, plaintiff, to write "use side doors" on that entrance. To his knowledge, the workers generally followed this direction.

¶ 37 Ledvina testified that Larmco's silo for mixing mortar was placed in that location after a meeting with Larmco's foreman and laborers. He agreed that defendant had the ultimate authority to decide where Larmco could put their material. Ledvina testified that at job sites he generally liked to get input from the different subcontractors.

¶ 38 Ledvina said that Larmco used the silo to mix the mortar, which was placed in tubs, and then the lull driver would put the tubs into the building. He denied that defendant performed any of the actual duties of building, putting, and setting the brick. He also denied that defendant controlled the means or the methods of how Larmco performed their work. He testified that Larmco would determine how they placed bricks on any particular day based on the architect's plans. He testified that before February 2010, there were occasions when the silos were filled with water. Larmco's laborers did the mixing, and water was added to the mortar mix. On

occasion, the water overflowed and the water flowed south toward Addison. Ledvina testified that when this issue arose, he had a meeting with the laborers and told them they could not do that. He said the meeting alleviated the problem, which was not an issue after that.

¶ 39 On February 9, 2010, Ledvina was at the site in the morning. He walked the site every day, including that day. He testified that it had snowed "maybe half an inch" that morning and there was a forecast for "heavy snow in the afternoon." He walked by the area of the accident that morning and did not see any condition he felt was dangerous and needed to be rectified immediately. He admitted there was uneven ground, but said that on "all construction sites, the ground is fairly uneven." He also said that "anything can pose a potential trip hazard." Ledvina testified that the lull could leave tracks, but it did not leave tracks if the ground was frozen. He admitted that tire tracks were present in the area, but he did not believe it was condition that was dangerous and needed to be rectified. Ledvina agreed that he had an obligation to rectify a hazardous condition if he observed one under the safety plane.

¶ 40 Ledvina testified that the safety plan put obligations on workers and the subcontractors' superintendent because it was "everyone's responsibility to try and keep a safe working site." One of those obligations was if you see something unsafe, report it to defendant. Ledvina testified that at no time prior to February 9, 2010, did Larmco's foreman or plaintiff report to him that the area where plaintiff was working was a dangerous condition. He admitted that defendant had the authority to stop work, but he did not stop work the day of the accident because he did not think there was anything unsafe.

¶ 41 Ledvina did not witness plaintiff's accident. He heard about the accident while on rounds and arrived at the location within 5 to 10 minutes. Ledvina was shown a photograph of the site after the accident. He noted what appeared to be a tire track from the lull. When asked if the tire

track appeared to be four to six inches deep, he responded, “No. I wouldn’t even say it’s an inch.” Ledvina disagreed with the use of the term “rut,” he said it was “tire track.”

¶ 42 On cross-examination, plaintiff’s counsel questioned Ledvina about a prior statement in which Ledvina was asked, “then the day before the accident and sometime before the accident, it had snowed fairly heavily,” and Ledvina answered, “Yeah. You can see by the pictures the snow on the ground.” Ledvina agreed that was what he said, but there was light snow in the morning and a heavy snow in the afternoon. Counsel asked Ledvina about the water flowing out of the silo and if the water had flowed into the ruts and turned into ice. Ledvina answered that he did not know if the water flowed over that day. Ledvina testified that the ice could have been created by the lull driving over the snow. Ledvina testified that the ruts were present for a “couple of days.”

¶ 43 Ledvina admitted that any ice that may have formed in the area of the accident was supposed to be corrected immediately. When asked if it was custom and practice for the general contractor to exercise control over safety, he answered, “Yes. It’s everyone’s job to control safety.” Ledvina testified that defendant could have stoned the area “if it needed it.”

¶ 44 On redirect, Ledvina testified that he did not give any indication that water had flown out of the silo on the day of the accident, and he was not aware of that occurring. On recross, Ledvina testified, “Any depression in the ground can cause an unsafe condition no matter how deep it is.” He agreed that was one of the reasons to keep level using gravel or other means.

¶ 45 Joseph Broz testified as an expert safety engineer for plaintiff. He testified that he received various documents to review, including deposition transcripts from plaintiff and Allen as well as a statement from Ledvina.

¶ 46 Broz testified that walking and working surfaces are a common discussion topic in safety meetings because a flat place to walk and work is needed. He said ruts create a risk of "tripping, falling, breaking a leg." Ice forming in a rut is also a safety concern because ice is slippery and an unsafe condition can be created. Further, snow covering ice in a rut is even more of a safety risk. Broz testified that under the site-specific safety plan, it was Ledvina's responsibility to regularly observe the job site and take appropriate action to eliminate or control any hazards identified. Additionally, the plan stated that subcontractor's personnel should be kept away from an identified hazard until corrected.

¶ 47 Broz testified that Larmco was not responsible to fix the ground conditions where plaintiff was working, rather it was defendant's responsibility as general contractor. The general contractor is in charge and designated to perform the safety functions. He testified that the general contractor is responsible for coordinating the people working on the site, including traffic through the common areas. Broz testified that a proper walkway should have been prepared and managed to keep people away from truck traffic. He said that workers should be kept separate from heavy machinery, that they should not share a common space. If workers are going to share the pathway with heavy machinery, then defendant could have directed traffic away from the walkways, "could have prepared a better, more solid roadway that wouldn't rut up," and "could have spent a little time every morning inspecting and cleaning up and compacting whatever rutted area was left." Broz agreed that stone was one way to correct a rutted area.

¶ 48 Plaintiff's attorney showed Broz a photograph of an area with gravel. Broz testified that "it's not what you typically see in a gravel walkway on a construction site." Gravel is then compacted by "a roller or a wacker." Broz testified that this correction is not expensive or time consuming because it was "the type of thing that saves the contractor money in the long run as

far as access to the work. It eliminates safety hazards which are a problem with the general contractor."

¶ 49 Broz testified that an area with ruts is "if it's totally unsafe, then no one should be working there." The work should be stopped until it is fixed. He testified that gravel should be laid down daily, every morning. Broz testified that he reviewed a report describing the accident as well as photographs of the area. He believed that the rut was four to six inches deep, "it may even be a little bit deeper than four to six inches." He testified that the daily construction field report indicated a winter storm and that four to six inches of snow fell on the day of the accident. Based on his reading of the materials, Broz estimated that the ruts had been there "two to three weeks, months." He further testified that based on Ledvina's deposition, water flowed from where the mortar was mixed into the ruts. He said that it was the general contractor who controls everything on site and determined that was the spot to mix the mortar. His opinion was that the rut was "definitely" unsafe or a hazard, and was made "more so" with ice. He did not believe that defendant followed its safety plan because they did not "make their periodic inspections" and did not "do immediate correction on the hazards." He also said that defendant did not prepare for winter conditions.

¶ 50 On cross-examination, Broz testified that a lull is used in masonry work to help stock masons up on a scaffold. He admitted that the lull was in Larmco's control and that the lull can create depressions. He agreed that the lull is needed to traverse through mud, snow, and ice, and when it travels over snow, it crushes the snow. He also agreed that plaintiff had been working on the site three to four months operating the lull and had made many depressions or ruts. Broz further admitted that defendant did not control the means and methods of plaintiff's work, that defendant "had nothing to do with exactly how a lull was operated." He agreed that defendant

had nothing to do with how Larmco employees mixed the mortar. He also agreed that plaintiff had been operating the lull for three to four hours before the accident and it was appropriate for him to operate the lull on that date. He said that plaintiff knew there was snow and that "everyone on the job site knew there was snow and ice all over."

¶ 51 Broz testified that if plaintiff "was creating unsafe conditions with his ruts, which he was, it was reasonable to expect [defendant], the general contractor, to be aware of this and be prepared to control it." Defendant was "required to supervise the work of all the subcontractors to whatever extent they had to." He admitted that Larmco had a responsibility to make sure the area was safe for its workers, but added that they were not the only entity with responsibility.

¶ 52 Defense counsel asked Broz about the safety plan as it related to the subcontractor's responsibilities. Broz admitted that the safety plan provided for the subcontractor's superintendent to plan and execute work operations as to comply with the objections of defendant's safety plan. He also agreed that the safety plan stated that the subcontractor's superintendent was to "implement immediate corrective action to eliminate unsafe practices and conditions when they are observed or reported." He admitted that the plan required Allen, as Larmco's superintendent, to report all observed unsafe conditions to defendant. Further, he admitted that the safety plan required each employee to "accept responsibility for their own safety" and to report all unsafe conditions to their supervisor as well as to refrain from an unsafe act that may endanger themselves. Broz testified that the rut at issue was "more than likely" made by the lull. Broz admitted that he was not able to independently verify the rut, rather his opinion was based on a photograph.

¶ 53 On redirect, Broz testified that defendant was "specifically responsible for everything" under the contract for the work. He testified that none of the rules relating to Larmco negated the responsibilities of defendant and Ledvina as the field superintendent.

¶ 54 Philip Colleran testified as an expert occupational safety consultant for defendant. He testified that his opinions are based upon a reasonable degree of certainty within his field of expertise. Defense counsel asked Colleran to describe what was going around the construction site near or around the time of the accident. Colleran testified that at this stage, the building was "fairly much enclosed" and plaintiff's employer was doing a lot of interior work. He said that construction sites "change minute by minute." He noted that mortar was mixed outside, but in an enclosure to prevent freezing and then brought inside to do masonry work on the interior.

¶ 55 Colleran testified that defendant "definitely [were] the ones who are going to be *** driving the safety." He noted that the subcontractors had no authority over each other. He testified that "everybody has a basic responsibility for their own safety." Colleran testified that based on his training and experience, defendant's safety plan was "the kind of thing that you see on most jobs nowadays." He did not find the safety plan deficient in any way. He found the conditions of the construction site to be "what you'd expect to see." In looking at photographs of the area of the accident, Colleran was asked if he would describe the area as "rutted," he responded, "No. That's not rutted. That's uneven ground because that's the way it is. You don't have a smooth surface, you know. It's not a paved surface. That's the ground of a construction site."

¶ 56 Defense counsel then asked the following question,

> "Based on the photograph that you saw of the construction site, the one I was just holding up, as an OSHA inspector, if you had seen

> that ground, would that have been something that you would have written up or found a contractor in violation of?"

Colleran responded, "No, I wouldn't say so." Plaintiff's counsel then made an objection that the reference to OSHA violated a court order and moved to strike. The trial court sustained the objection and instructed the jury to "disregard the last question and answer."

¶ 57 When asked if the activities of building a building could create uneven ground, Colleran responded in the affirmative. Defense counsel then asked based on his training and "experience with OSHA," and experience as a safety consultant, if he found the area in a reasonably safe condition for plaintiff. Plaintiff's counsel objected based on the reference to OSHA. The trial court asked defense counsel to rephrase the question. Counsel then asked, "Based on your training and your experience, including your work experience, and based on your review of all the materials, did you find that area where [plaintiff's] accident happened was in a reasonably safe condition at the time of his accident?" Colleran answered that whether the slippery condition was reasonably safe was a question for the jury. He continued to state that this condition was "typical" for construction and "those ground conditions are not what I would say are something that is a departure from what you typically see."

¶ 58 On cross-examination, Colleran admitted that falling at job sites is the number one source of injuries and it is important to provide firm, level, dry surfaces for workers. He testified that "a rut could be a tripping hazard." He testified that in his report that it is desirable to work on firm, dry and level surfaces instead of rough ground.

¶ 59 Colleran agreed that the safety plan provided that the superintendent was to be present whenever work was being performed at the site. He further agreed that the contract stated that the general contractor was to "furnish and install all necessary facilities to provide safe means of

access," "make all necessary provisions to ensure the safety of workers *** during the performance of the work," and to take "any precautions that may be necessary to render all portions of the work secure in every respect to decrease the possibility of accidents from any cause." Colleran also agreed that defendant had "a duty to do ongoing maintenance of the general site conditions and that includes the ground. And when it does get bad, then you do take action." He testified that it was Ledvina's responsibility overall, including with respect to eliminating hazards identified during daily observations, but also noted that the individual subcontractors have their own superintendent. He admitted that ruts by themselves can cause unsafe conditions, and with ice and snow, it is even more dangerous.

¶ 60 On redirect, Colleran agreed that he wrote in his report that, "as a practical matter, the activities associated with most types of building construction create irregular ground and conditions on even the best of projects. Elimination of variations and unfinished exterior grades is neither reasonable nor practicable."

¶ 61 At the close of the plaintiff's case, counsel read the following stipulations to the jury.

> "All parties agreed that the general contractor has overall control of the entire construction site including the area where plaintiff was working.
>
> The second stipulation, all parties agree that it is feasible to place gravel on the ground in any construction site including the site involved in this case.
>
> And the third and final stipulation, all parties agree that the area where plaintiff was working was open to construction workers and machinery on this job site."

¶ 62 During the jury instruction conference, defendant submitted a jury instruction on sole proximate cause, which the trial court accepted over plaintiff's objection. This instruction was included in the instructions given to the jury before deliberations.

¶ 63 Following deliberations, the jury returned a verdict in favor of defendant. In May 2016, plaintiff filed his posttrial motion requesting a new trial. In his motion, he argued that he was denied his right to a fair trial as a result of erroneous evidentiary rulings by the trial court and misconduct by defendant. Specifically, he contended that the trial court's exclusion of defendant's subsequent remedial measure to show control, defendant's intentional violation of a motion *in limine* not to introduce OSHA references, and the trial court's acceptance of defendant's sole proximate cause jury instruction tainted the trial and denied plaintiff a fair hearing of his case. The trial court subsequently denied plaintiff's posttrial motion on October 6, 2016.

¶ 64 This appeal followed in compliance with Illinois Supreme Court Rule 303 (eff. Jan. 1, 2015) with a timely notice of appeal filed on November 3, 2016. Accordingly, this court has jurisdiction of this appeal under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994).

¶ 65 On appeal, plaintiff frames this appeal as a review of the trial court's evidentiary rulings. However, the appeal arises from the trial court's denial of plaintiff's posttrial motion seeking a new trial based on three claims: (1) the exclusion of defendant's subsequent remedial measures of placing gravel at the site of the accident; (2) defendant's violation of the motion *in limine* not to reference OSHA at trial; and (3) the trial court's acceptance of a sole proximate cause jury instruction. We review the trial court's denial of plaintiff's motion for a new trial for an abuse of discretion. *Pecaro v. Baer*, 406 Ill. App. 3d 915, 918 (2010).

¶ 66 Further,

> " '[a] trial court has the responsibility to determine the admissibility of evidence and this determination will not be overturned in the absence of a clear abuse of discretion. *Patch v. Glover*, 248 Ill. App. 3d 562, 567 (1993). Even if the trial court did abuse its discretion, a new trial should be ordered "only when evidence improperly admitted appears to have affected the outcome of the trial." *Tzystuck v. Chicago Transit Authority*, 124 Ill. 2d 226, 243 (1988).' " *Schmidt v. Ameritech Illinois*, 329 Ill. App. 3d 1020, 1040-41 (2002) (quoting *Vickers v. Abbott Laboratories*, 308 Ill. App. 3d 393, 412 (1999)).

"In other words, a new trial is necessary where the exclusion of evidence was the result of 'serious and prejudicial errors made at trial.' " *Id.* (quoting *Lagestee v. Days Inn Management Co.*, 303 Ill. App. 3d 935, 942 (1999)).

¶ 67 Plaintiff first contends that the trial court erred in excluding evidence of defendant's subsequent remedial measure at trial. Specifically, plaintiff asserts that defendant failed to honor its stipulation regarding overall control at the site and, therefore, plaintiff should have been allowed to present evidence of defendant's subsequent remedial measure of laying gravel at the site to show defendant's control over safety at the site. Defendant responds that the trial court's rulings were proper as plaintiff was able to elicit testimony from defendant's employees, Skiera and Ledvina, admitting the feasibility of placing gravel and their authority to take such action. Defendant maintains that there was no testimony disputing that defendant had the control to

perform the subsequent remedial measure of placing gravel in the rut or tire tracks, and accordingly, there was no error by the trial court.

¶ 68 "Evidence of post-accident remedial measures is not admissible to prove prior negligence." *Herzog v. Lexington Township*, 167 Ill. 2d 288, 300 (1995). This rule is based on several reasons: (1) "a strong public policy favors encouraging improvements to enhance public safety," (2) "subsequent remedial measures are not considered sufficiently probative of prior negligence, because later carefulness may simply be an attempt to exercise the highest standard of care," and (3) "a general concern that a jury may view such conduct as an admission of negligence." *Id.* (citing *Schaffner v. Chicago & North Western Transportation Co.*, 129 Ill. 2d 1, 14 (1989) and *Hodges v. Percival*, 132 Ill. 53, 56-57 (1890)).

¶ 69 Nevertheless, evidence of subsequent remedial measures may be admitted for the purpose of establishing ownership or control when disputed by the defendant, or to show the feasibility of precautionary measure disputed by the defendant. *Id.* at 300-01. We point out that the parties stipulated that it was feasible to place gravel on the ground at the construction site at any time. Further, defendant never disputed its own authority to place gravel at the construction site.

¶ 70 On multiple occasions, plaintiff refers to defendant's stipulation as to "overall control" as a "colorless stipulation" or "colorless admission" under the belief that defendant disputed control when counsel asked witnesses about whether Larmco had control over its employees means and methods of work, including the brickwork and equipment used as well as the authority to stop work if it felt the conditions were unsafe for its employees, and that all individuals on the site share an obligation regarding safety. We disagree that these questions "opened the door" to place control as a contested issue for the jury.

¶ 71 Our review of the evidence presented at trial does not support plaintiff's argument that defendant contested overall control as set forth in the stipulation. Defendant questioned the witnesses to show that while defendant had overall control of the site, Larmco possessed a degree of control over its employees' work and their safety. This evidence did not negate defendant's control over the ground. Defendant's field superintendent Ledvina walked the site every day and admitted that defendant had the authority to stop work if the site was unsafe and that defendant could have placed gravel if the area needed it. Testimony that all entities at the construction site shared a degree of responsibility toward safety did not alter defendant's overall control. The testimony set forth that while everyone had a responsibility regarding safety, defendant was at the top of the hierarchy and retained ultimate control over safety and the site. Defendant had control over the sequencing of work, the placement of Larmco's equipment and silo, and direction of subcontractors around the site. While defendant did consult with Larmco to determine these points, the evidence set forth that defendant had the ultimate decision on the matters. The evidence at trial was uncontested that it was defendant's responsibility to place gravel at the site as a way to remedy any dangerous ground conditions. No one testified that Larmco bore any control over placing gravel on uneven ground at the site, which was the subsequent remedial measure plaintiff contends he should have been allowed to present at trial on the question of control.

¶ 72 In *Herzog*, the plaintiff was injured in car accident on a curving roadway and filed a negligence action against the defendant township. Prior to the accident, the roadway had a single sign indicating curves ahead, but subsequently, five additional signs were added to the roadway, including "advisory speed plates and additional winding road markings." *Herzog*, 167 Ill. 2d at 299. Prior to trial, the defendant sought to exclude evidence of the additional signs in a motion *in*

limine, which the trial court allowed. On appeal, the plaintiff argued for the first time that he should have been allowed to impeach the defendant's witnesses with the subsequent remedial measures. After observing that the plaintiff waived the claim, the supreme court considered the plaintiff's contention. *Id.* at 300-01.

¶ 73 The supreme court observed that Illinois has recognized that subsequent remedial measures can be admissible for impeachment purposes. In that case, the defense witnesses had testified that one sign was adequate. The court reasoned:

> "In order for the evidence of the subsequent signs to be considered impeaching, we must accept the premise that the conduct of placing additional signs contradicts the witnesses' testimony and supports the view that the original condition was unsafe. However, this premise directly contradicts the assumptions that support the general rule regarding subsequent remedial measures. Just as evidence of subsequent remedial measures is not considered sufficiently probative to be admissible to prove prior negligence, that evidence is not admissible for impeachment where the sole value of the impeachment rests on that same impermissible inference of prior negligence.
>
> Allowing such evidence in these circumstances would swallow the general rule prohibiting the introduction of subsequent remedial measures and frustrate the policy considerations that support it. In every case, a defendant will dispute that his prior conduct was negligent. Once a defendant disputes his or her

> negligence at trial, a plaintiff could always seek to introduce evidence of subsequent remedial measures under the guise of impeachment. Thus, the general rule of excluding evidence of subsequent remedial measures would be swallowed by the impeachment exception. Furthermore, contrary to the policies supporting the general rule, parties to lawsuits would be discouraged from making improvements for fear that such actions would be used against them at trial." *Id.* at 301-02.

¶ 74 The supreme court found that where the impeachment value rested on inferences other than prior negligence, then such evidence may be admitted where its probative value outweighs the prejudice to defendant. The court also held that impeachment evidence of remedial measures may be admissible when the defense exaggerated claims that its actions had been the " 'safest possible.' " *Id.* at 302-03. "In such a situation, the defendant has gone beyond simply stating that he was not negligent prior to the accident and claimed that no greater care was possible. Any subsequent remedial measure taken by the defendant is directly impeaching of this claim without an inference of prior negligence." *Id*. at 303. In that case, the defense witnesses made no exaggerated claim, but testified that the single sign was adequate, and therefore, the plaintiff was not entitled to impeach with subsequent remedial measure of additional signs on the road. *Id*.

¶ 75 While this case did not involve the use of subsequent remedial measures for impeachment purposes, the decision in *Herzog* supports our reasoning here. Plaintiff's claim that he should have been allowed to present the subsequent remedial measure of placing gravel is based on his assertion that defendant contested control despite its stipulation. However, similar to the exaggerated claim discussion in *Herzog*, if defendant had claimed that it was not its

responsibility to place gravel or that it had no control over the working conditions and safety of subcontractors, such as Larmco, then the issue of control would have been presented to the jury and the subsequent remedial measure would have been admissible.

¶ 76 However, the evidence does not show that defendant attempted to negate its overall control over the site and the ground. The evidence established that defendant was at the top of hierarchy of everyone working at the site. Further, the stipulation also stated that it was feasible to place gravel at the site and defendant's witnesses never testified that placing gravel was the responsibility of Larmco or another entity. We point out that the witnesses discussed photographs which showed the placement of gravel at a construction site to show the feasibility of the action. The only information withheld from the jury was that the gravel placement was in the same location of plaintiff's accident. We find no error in excluding the subsequent remedial measure of placing gravel at the accident site from the trial.

¶ 77 Plaintiff also asserts that defense counsel's closing argument included contentions that defendant did not have control of the area of plaintiff's accident. Rather, plaintiff's employer Larmco had control of the area. Plaintiff cites pages in the report of proceedings from defense counsel's closing argument, but does not specifically detail or quote the comments on which his claim of error is based. In his statement of facts, plaintiff describes the comments as follows.

> "Defendant argued the employer had control of the area where the accident happened. Defendant argued pursuant to terms of the contract, **defendant did <u>not</u> have control**, but rather the employer controlled the area and specifically assumed control of that area. Finally, defendant argued that the contract discharged the general contractor (defendant Harbour) and that there was no proof of

> defendant's control and therefore plaintiff did not meet its basic burden of proof." (Emphasis in original.) (Citations to record omitted.)

¶ 78 Our review of defendant's closing argument discloses that no objection was made to any comment during closing argument regarding control. "Failure to object to improper closing argument results in forfeiture of the objection on appeal." *Jacobs v. Yellow Cab Affiliation, Inc.*, 2017 IL App (1st) 151107, ¶ 121.

¶ 79 Further, plaintiff fails to set forth any reasoned argument with citation to authority on this claim. Plaintiff's argument on this claim amounts to a few sentences throughout his main argument about control, such as, "And then, during closing argument, they denied control and blamed the employer for being the sole company in control and the sole proximate cause," and "defendant told the jury during closing argument that defendant was not in control, defendant was not a proximate cause of the injury, and that plaintiff did not meet its burden of proof regarding the first element – control over safety. *** Defendant argued the employer controlled the work area." Plaintiff again did not quote the specific language complained of, nor did he cite any authority. Supreme Court Rule 341(h)(7) requires an appellant to include in its brief an "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). Moreover, it is well-settled that a contention that is supported by some argument but does not cite any authority does not satisfy the requirements of Rule 341(h)(7), and bare contentions that fail to cite any authority do not merit consideration on appeal. *Wasleff v. Dever*, 194 Ill. App. 3d 147, 155-56 (1990). Plaintiff has not set forth a specific claim of error relating to closing arguments.

¶ 80 Even if we were to set aside our forfeiture finding, which we do not, the trial court cured any error by properly instructing the jury both before and after closing arguments that the arguments of counsel were not evidence. Before the closing arguments began, the trial court properly admonished the jury as follows:

> "The only caution that I give you regarding the closings is the same one that I gave you regarding the opening. And that is, that what the attorneys say in their closing argument is not evidence. It's just their argument about what they believe the evidence has shown, what they think they have proven.
>
> But if there's anything that is different from what you recall hearing from the witnesses or what you saw in the exhibits compared to what the attorneys say, you go with your recollection of the evidence because that's what you are to be considering."

¶ 81 Later, when giving the jury their instructions, the court instructed that: "If any statement or argument of an attorney is not supported by the law or the evidence, you should disregard that statement or argument."

¶ 82 "An improper comment that also violates a *motion in limine* does not necessarily constitute reversible error." *Willaby v. Bendersky*, 383 Ill. App. 3d 853, 862 (2008). "To constitute reversible error, such a comment must cause substantial prejudice, not cured by the trial court's actions." *Id.* " 'Improper comments generally do not constitute reversible error unless the party has been substantially prejudiced.' " *Id.* (quoting *Magna Trust Co. v. Illinois Central R.R. Co.*, 313 Ill. App. 3d 375, 395 (2000)). "Where, as here, the trial court tells the jury that closing arguments are not evidence, the scope and character of the arguments are left to the trial

court and will not be reversed absent an abuse of discretion." *Wilbourn v. Cavalenes*, 398 Ill. App. 3d 837, 855 (2010).

¶ 83 Plaintiff has forfeited any claim relating to closing arguments by failing to make a timely objection at trial and failing to sufficiently present the claim on appeal. Further, plaintiff has not made any argument that he was substantially prejudiced by the comments and the trial court cured any possible error.

¶ 84 Plaintiff raises as a final basis that the subsequent remedial measure was admissible by arguing that there was no showing that defendant was the party that took remedial action. "[S]ubsequent remedial actions taken by a person other than the person against whom the evidence is being offered are not precluded under the subsequent remedial measures doctrine." *LoCoco v. XL Disposal Corp.*, 307 Ill. App. 3d 684, 693 (1999). According to plaintiff, defendant never admitted that it was the party responsible for placing gravel on the site as a remedial measure, and therefore, the evidence was admissible. We reject this argument. The evidence at trial suggested that defendant was the party responsible for placing gravel at the site. The testimony of Allen, Skiera, and Ledvina indicate that defendant as the general contractor had the ability to place gravel at any time. No witness suggested that an unnamed third party had such authority. The trial court reached the same conclusion prior to trial and denied plaintiff's request. As defendant points out, plaintiff never made an offer of proof that a third party completed the remedial measure of placing gravel at the site. "[T]o preserve an error in the exclusion of evidence, the proponent of the evidence must make an adequate offer of proof in the trial court." *Sullivan-Coughlin v. Palos Country Club, Inc.*, 349 Ill. App. 3d 553, 561 (2004). "Failure to make such offer of proof results in waiver of the issue on appeal." *Id.* Absent an offer

of proof showing that a third party completed the remedial measure, plaintiff has forfeited this issue on appeal.

¶ 85 Next, plaintiff argues that defendant violated the motion *in limine* by asking Colleran for his opinion and referenced his training as an OSHA inspector and this question substantially prejudiced plaintiff and warrants a new trial. Defendant responds that an impropriety was cured by the trial court's actions of sustaining plaintiff's objection and instructing the jury to disregard the testimony.

¶ 86 Prior to trial, the parties had agreed to exclude any references to OSHA standards regarding the safety of the accident site.

¶ 87 Defense expert Colleran testified at trial about his background and training, which included employment at OSHA for 17 years in positions ranging from a management assistant to a senior compliance officer, where he performed inspections of factories and construction sites. After leaving that employment, he later taught compliance to OSHA employees. Later during Colleran's testimony, defense counsel asked Colleran the following question, "Based on the photograph that you saw of the construction site, the one I was just holding up, as an OSHA inspector, if you had seen that ground, would that have been something that you would have written up or found a contractor in violation of?" Colleran answered in the negative.

¶ 88 Plaintiff's counsel objected to the question as a violation of the bar on reference to OSHA. The trial court promptly sustained the objection and instructed the jury to disregard the question and answer. A short time later, defense counsel posed a question referring to Colleran's "experience with OSHA," but plaintiff's counsel again objected and the court instructed defense counsel to rephrase the question, which counsel did. No other references to OSHA occurred during the trial.

¶ 89 "An improper comment that also violates a motion *in limine* does not necessarily constitute reversible error." *Willaby v. Bendersky*, 383 Ill. App. 3d 853, 862 (2008). "To constitute reversible error, such a comment must cause substantial prejudice, not cured by the trial court's actions." *Id.* " 'Improper comments generally do not constitute reversible error unless the party has been substantially prejudiced.' " *Id.* (quoting Magna Trust Co. v. Illinois Central R.R. Co., 313 Ill.App.3d 375, 395 (2000)). "Where the trial court sustains a timely objection and instructs the jury to disregard the improper comment, the court sufficiently cures any prejudice." *Id.*

¶ 90 Here, while defense counsel's reference to OSHA in the question to Colleran was improper, plaintiff's counsel objected and the trial court immediately sustained the objection and instructed the jury to disregard the offending question and answer. We reject plaintiff's argument that this single reference amounted to substantial prejudice, such that the trial court could not "unring the bell." Given the extensive testimony over several days of trial, we cannot conclude that a single reference had any effect on the jury's verdict. Accordingly, we reject plaintiff's claim of reversible error.

¶ 91 Plaintiff next contends that the trial court erred in accepting defendant's sole proximate cause jury instruction. Plaintiff asserts that the instruction should not have been given because defendant admitted to overall control and, thus, another party could not have been the sole proximate cause of the accident. Defendant maintains that the trial court properly gave the instruction based on defendant's contention that "if the 'ruts' constituted a dangerous condition plaintiff's employer had an obligation to report said condition" to defendant.

¶ 92 "A particular jury instruction given by the trial court is proper if it is sufficiently clear, fairly and correctly states the law, and is supported by some evidence in the record." *Yoder v.*

Ferguson, 381 Ill. App. 3d 353, 381 (2008) (quoting *Rios v. City of Chicago*, 331 Ill. App. 3d 763, 776 (2002)). "[T]he trial court's determination as to what issues are raised by the evidence will be disturbed only if the court abused its discretion." *Id.*

¶ 93 The sole proximate cause instruction given in this case stated:

> "More than one person may be to blame for causing an injury. If you decide that the defendant was negligent and that negligence was a proximate cause of injury to the plaintiff, it is not a defense that some third person who is not a party to the suit may also have been to blame.
>
> However, if you decide that the sole proximate cause of injury to the plaintiff was the conduct of some person other than the defendant, then your verdict should be for the defendant." See Illinois Pattern Jury Instructions, Civil, No. 12.04 (2014) (hereinafter IPI Civil (2014) No. 12.04).

¶ 94 "A defendant raising the sole proximate cause defense seeks to defeat a plaintiff's claim of negligence by establishing proximate cause solely in the act of another not a party to the suit. Accordingly, this defense is aptly referred to as the 'empty chair' defense." *McDonnell v. McPartlin*, 192 Ill. 2d 505, 516 (2000). The supreme court in *McDonnell* observed:

> "The instruction clearly refers only to the '*conduct* of some person other than the defendant,' not the *negligent conduct* of some person other than the defendant. The 'Notes on Use' accompanying the instruction similarly explain that '[t]he second paragraph should be used only where there is evidence tending to

> show that the sole proximate cause of the occurrence was the *conduct* of a third person,' not the *negligent conduct* of a third person. Thus, the sole proximate cause instruction contains no express requirement that the jury consider whether the third person's conduct was negligent. The sole proximate cause instruction likewise contains no implicit requirement that the jury consider whether the third person's conduct was negligent. We note that the first paragraph of IPI Civil 3d No. 12.04 implicitly refers to the third person's negligence by referring to the third person's 'blame.' The second paragraph of the instruction, however, contains no similar reference." (Emphasis in original.) *Id.* at 517-18.

¶ 95 "A defendant's denial is sufficient to raise the sole proximate cause issue." *Yoder*, 381 Ill. App. 3d at 383 (citing *McDonnell*, 192 Ill. 2d at 520-21). "The defendant may endeavor to prove a third party or some other cause is the sole proximate cause and tender jury instructions on that theory if supported by some competent evidence." *Id.* (citing *McDonnell*, 192 Ill. 2d at 521).

¶ 96 In this case, defendant presented evidence that safety at the construction site was everyone's responsibility and that Larmco was aware of the conditions where plaintiff was working, but had not notified defendant that it felt it was unsafe. Contrary to plaintiff's argument, this theory did not negate defendant's stipulation that it had overall control. As previously discussed, defendant did not dispute that as the general contractor, it was at the top of the hierarchy over the individual subcontractors. A defendant may offer different theories of defense and have the jury instructed on them if evidence and argument are provided to support

the theory. However, it is within the trial court's discretion to determine if sufficient evidence was presented to give an instruction. Based on the vast amount of evidence presented, we cannot say the trial court erred in giving the sole proximate cause instruction (IPI Civil (2012) No. 12.04) where the evidence suggested that a third party's conduct may have been the sole proximate cause. Accordingly, plaintiff has not demonstrated that he suffered serious prejudice to his right to a fair trial and reversal is not warranted.

¶ 97 Moreover, even if the trial court erred in instructing the jury on sole proximate cause, any error was harmless. "A reviewing court ordinarily will not reverse a trial court for giving faulty instructions unless they clearly misled the jury and resulted in prejudice to the appellant." *Schultz v. Northeast Illinois Regional Commuter Railroad Corp.*, 201 Ill. 2d 260, 274 (2002). Plaintiff has not shown such prejudice as to warrant reversal in this case.

¶ 98 Finally, plaintiff argues that the cumulative effect of his claimed errors deprived him of a fair trial. "A new trial is necessary when the cumulative effect of trial errors so deprives a party of a fair trial that the verdict might have been affected." *In re Estate of Mankowski*, 2014 IL App (2d) 140154, ¶ 63. As we have already concluded that no prejudicial error occurred or was forfeited, we need not consider plaintiff's claim. See *id.*

¶ 99 Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 100 Affirmed.