2011 IL App (2d) 100323-U
No. 2—10—0323
Order Filed August 3, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

KELLY S. THOMAS, Indiv. and as Special Adm'r of the Estate of Jaceson A. Thomas, Deceased,	)	Appeal from the Circuit Court of Kendall County.
Plaintiff-Appellant,	)	
v.	)	No. 07—L—86
WHEATON TRENCHING, INC.,	)	Honorable Timothy J. McCann,
Defendant-Appellee.	)	Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justice Hutchinson concurred in the judgment.
Justice Bowman specially concurred.

ORDER

Held: Where evidence did not so overwhelmingly favor plaintiff such that no contrary verdict could stand, and where jury's verdict was not contrary to the manifest weight of the evidence, trial court properly denied plaintiff's motions for a directed verdict and judgment notwithstanding the verdict. Trial court did not abuse its discretion in denying plaintiff's motion *in limine* to exclude argument and evidence related to contributory or comparative negligence. Even if defense counsel made an improper damages argument in closing argument, a new trial is not warranted.

¶ 1 On June 22, 2006, Jaceson A. Thomas, a truck driver, tragically died after a 13,000-pound concrete pipe being handled by defendant's, Wheaton Trenching, Inc.'s, equipment operator rolled into him. Thomas's wife, plaintiff Kelly S. Thomas, sued defendant for negligence. Prior to trial, plaintiff moved *in limine* to exclude any argument or evidence that Thomas's actions prior to the accident constituted contributory or comparative negligence. The trial court denied plaintiff's motion. On March 2, 2010, after a trial, a jury rejected plaintiff's negligence claim and found in defendant's favor.

¶ 2 On appeal, plaintiff argues that: (1) the court erred in denying plaintiff's motions (during trial and at the close of the evidence) for a directed verdict; (2) the court erred in denying plaintiff's motion *in limine* to bar all evidence and argument related to Thomas's contributory or comparative negligence; (3) the court erred in denying plaintiff's posttrial motion for a judgment notwithstanding the verdict (judgment *n.o.v.*) or, alternatively, for a new trial; and (4) defendant's closing argument constituted reversible error warranting a new trial. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Jaceson Thomas was employed as a truck driver by Stark & Sons, Inc. On June 22, 2006, at around 7:15 a.m., Thomas loaded his flatbed truck with large concrete pipes and drove to a construction site in Yorkville. Defendant was a contractor charged with performing sewer work on the site. Loren Johnson, a truck driver employed by another company, also arrived at the site with four concrete pipes in his flatbed truck trailer. When both drivers arrived, John Weith, an equipment operator employed by defendant, drove over to them in a CAT (Caterpiller) 963 loader.[1] Weith, as

[1] The CAT 963 track loader uses track wheels, contains a cab for the operator, and has, on the end of a front extension piece, a bucket approximately eight feet wide and five feet tall with

part of his responsibilities, had determined that ground conditions would allow the drivers to drive their trucks onto the site and safely make their deliveries. Weith showed Thomas and Johnson where on the site they should unload their trucks. Weith, Thomas, and Johnson walked the area where the trucks would drive, and the ground surface appeared dry, firm, and without mud.

¶ 5 According to custom and practice, once the truck drivers completed unloading the pipes, their jobs would be complete and they could leave the site. Weith would then be responsible for moving and placing the pipes exactly where they were needed. Here, however, as the trucks began to drive off of the asphalt driveway and onto the site as directed, the front end of Johnson's truck sank into the ground where an old ditch contained soft dirt. The truck was stuck. Thomas left his truck and walked over to Johnson's truck to offer his assistance. It was determined that the only way to dislodge the truck would be to pull it out from behind. Therefore, the decision was made to unload the concrete pipes and place them on the side of Johnson's truck trailer; Weith could then pull out the truck from the rear.

¶ 6 Weith first attempted to remove the pipes by "spearing" them from the side of the truck. The spearing attempt did not work because the CAT did not have sufficient leverage. Next, Weith, Johnson, and Thomas used the truck's hydraulic lifts to roll the pipes off of the truck's trailer. After the first three pipes were unloaded and placed on the ground, however, there remained insufficient room to unload the fourth pipe. Therefore, using the CAT's fork attachment to scoop up each pipe, Weith moved each of the three pipes from behind the truck to the side of the truck. Weith safely and properly scooped and moved each of the first three pipes. While standing to the right side of the truck, 8 to 10 feet from the back, right corner, Thomas and Johnson observed Weith moving the first

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forks.

three pipes. Weith testified that he did not move the pipes without first knowing where the two drivers were located. Weith agreed that, in certain positions, the bucket attachment on the CAT machine would have obstructed his vision.

¶ 7 After the three pipes were moved to the side, the truck's hydraulic lifts were again used to unload the fourth pipe from the truck trailer. Once on the ground, the fourth pipe rested 8 to 10 feet from the back of the truck. Weith testified that, before approaching the fourth pipe, he throttled the CAT 963 and observed Thomas and Johnson talking, off to the right of the truck. More specifically, before moving his machine, Weith observed Thomas and Johnson "a good eight to ten feet off the back corner of the trailer on the right side[,] probably straight across in back of the trailer[,] both just standing there talking." Weith considered the drivers to be standing a safe distance away. Weith then concentrated on the forks of his machine and started to engage the fourth pipe using the same method that he had used with the previous three pipes, as well as "thousands of times" before. However, as he engaged the fourth pipe, it began to roll. Weith immediately threw the machine into neutral so as to not further push the pipe. Weith explained that he stopped, "looked up, and that was it. [Thomas] was between the truck and the pipe, and the pipe was in motion. There was nothing I could do." Weith observed Thomas walking in a casual manner between the truck and the pipe. "It seems like he wasn't aware of the surroundings. He was just casually walking. Just----I don't know where he was going or what he was doing. I don't have a clue, but it just seemed like in a causal manner." Weith explained that he had no time to sound a horn to warn Thomas of the moving pipe. The pipe hit Thomas with such force that it bounced back several feet. Thomas fell to the ground, called out for someone to call his wife [plaintiff], and asked emergency personnel to please not let

him die. Emergency vehicles transported Thomas to the hospital where he later died, leaving behind plaintiff and two children.

¶ 8 Weith agreed with the following propositions: (1) as an operator, he had a responsibility to perform the lift safely, to control the lift, and to secure the load, and, here, he did not safely complete the fourth lift and control that pipe; (2) he had a responsibility to take into account the drivers' safety; (3) if the forks were placed under the pipe as intended, the pipe would have lifted up instead of rolled and, therefore, he must have bumped the bottom of the pipe with the forks, causing the pipe to start rolling before the forks got underneath it; (4) the fourth pipe was not moving until he contacted it; (5) the pipe moved only as a result of his hitting the pipe; (6) the pipe rolled in the direction where it ultimately struck Thomas only because he hit the pipe and caused it to roll in that direction; and (7) if he had not hit the pipe, Thomas would not have been struck by it. When asked, "if you didn't know that [Thomas] was between the back end of the truck and the front end of pipe at the time that it began to roll, as an operator with the responsibility to take into account Jaceson Thomas' safety[,] wasn't it your obligation to not do that lift until you knew where he was?" Weith replied, "I knew where he was." Weith agreed that, when he looked up, Thomas was not stepping into the area between the truck and the pipe but, rather, he was already there and the pipe was rolling. Weith was asked, "And there's a zone that you're supposed to keep in mind that wherever that pipe can go if you lose control, you shouldn't do that lift, isn't that right?" Weith responded, "Sure." Weith testified that he thinks every day about the events that occurred.

¶ 9 Frank Savegnago, defendant's owner, agreed that Weith was responsible for maintaining control of the pipe while he handled it and that Weith's hitting the pipe was the reason the pipe rolled at Thomas. Savegnago agreed that, without Weith's mishandling the load and causing it to

roll, Thomas would not have died as a result of this occurrence. He agreed that "[w]here Thomas is at the time that Mr. Weith is going to attempt to move this pipe is a condition that Mr. Weith has to make himself aware of when considering whether he can do the lift safely."

¶ 10 At the conclusion of Weith's and Savegnago's testimonies (and an emergency responder who treated Thomas at the scene), plaintiff moved the court for a directed verdict, arguing that those witnesses had established duty, breach of duty, and proximate causation of Thomas's injuries. Defendant responded that the witnesses had established only the mechanical sequence of events that led to the pipe crushing Thomas, but not the question of who was at fault. Defendant noted that the evidence also established that, for some unknown reason, Thomas walked between the pipe and the back of the truck while the machine was approaching the pipe. The court denied plaintiff's motion.

¶ 11 Johnson (the other truck driver) testified that, before his truck got stuck in the soft dirt, ground conditions on the site looked "okay." Johnson testified that, before Weith approached the fourth pipe, he and Thomas were talking and standing together on the passenger side of the truck. Johnson testified that he stood on the side of the truck, as opposed to behind it, because he knew the fourth pipe was about to be moved. Johnson was looking out toward the field and not at Weith and the pipe, so he did not actually see Weith's machine approach the pipe. However, he testified that he could hear the machine approaching the pipe. At some point, he turned around and saw that the pipe was quickly rolling toward the back end of the trailer and that Thomas was walking between them. Johnson tried to yell "get out of there" to Thomas and tried to stop the pipe with his hands, but there was not enough time. Thomas had almost cleared the back end of the trailer when he was struck. Johnson testified that he did *not* know exactly where the pipe was when Thomas began to walk between the pipe and the back of the truck. He only knew that when he turned around and saw

Thomas, the pipe was already rolling. Johnson testified that, before the accident, Thomas's work gloves were sitting on the back, passenger-side of the truck; after the accident, the gloves were on the ground.

¶ 12 Weith had available alternative methods for removing the concrete pipe from the truck, including: using another piece of equipment (a Komatsu excavator) to lift the pipe out of the truck (the "tea cup" method); rolling the pipe on the ground by pushing the top of it with the CAT shovel; or, if Weith could not see what he was doing, using a spotter's assistance. With respect to the method that Weith did choose for moving the pipes, *i.e.*, scooping them onto the bucket with the forks and then lifting them, Weith has personally moved thousands of pipes using that same method. Johnson testified that he has seen pipe picked up with forks and moved in the fashion Weith chose "literally thousands of times," although he thought it could be unsafe if the bucket created a vision obstruction.

¶ 13 Michael Stark, Thomas's employer, testified that he knew and loved Thomas and his family. Stark testified that he believed that, instead of using the CAT 963, Weith should have used the excavator to move the pipes. He testified that Weith made a bad decision to use the CAT forklift, and that Weith's attempt to pick up the fourth pipe was "careless." Stark was asked, "Do you believe that it would have been safe for Jaceson Thomas to move between that pipe and the back of the truck if that pipe was in the process of being moved?" He replied, "if it was in the process of being moved, no, it would not be safe. If the pipe was stationary and setting [*sic*] there, then I think it would be safe." He agreed that it would be common sense not to go through that zone if the pipe was in the process of being moved.

¶ 14 Plaintiff called an expert, Dennis Puchalski, who opined that, because Weith's ultimate responsibility as an operator is to properly assess the surroundings and ensure that the work area is clear, Weith's actions deviated from normal custom and practice. Plaintiff asked Puchalski to assume that Thomas was 8 to 10 feet to the right of the truck, walked in a nonchalant manner across the back of the truck, and had almost cleared the back of the truck when he was struck by the quickly moving pipe. If that was the case, Puchalski testified, then he was of the opinion that Thomas was between the pipe and truck *before* Weith *struck* the pipe. He testified that Weith should not have engaged the pipe with the forks if Thomas was behind the truck. However, on cross-examination, Puchalski agreed that, "I would have to almost be an eyewitness to know" the timing of the exact moment when the pipe began to move versus when Thomas began to cross between the pipe and truck.

¶ 15 Another safety consultant, Dave Soderman, opined that defendant caused the pipe to roll into Thomas. Further, Soderman opined that the Komatsu excavator, which customarily is used to place pipes in a trench, could have been used to move the pipes. He testified that the forks on the CAT 963 were not long enough to get under the pipe and could cause the pipe to move. Soderman agreed that, in his deposition two years after the event, but prior to his being retained as an expert, he stated that he could not come to any conclusions (presumably as to fault) because he did not know the timing of the events.

¶ 16 At the close of plaintiff's case, defendant moved for a directed verdict, noting the distinction between conduct that is a cause-in-fact of an injury versus the injury's legal cause. Plaintiff renewed her motion for a directed verdict. The court denied both motions.

¶ 17 Eugene Holland, an expert retained by defendant, agreed that: (1) Weith mishandled and lost control the pipe; and (2) Thomas died because the pipe hit him. However, Holland testified that Thomas was also responsible for his own safety. Holland testified that Weith exercised reasonable care and good practice by verifying the drivers' location out of harm's way prior to moving the fourth pipe. Specifically, Holland testified that Weith did all that was reasonably responsible by first ascertaining where the drivers were before he started the activity. Thereafter, Weith focused on trying to lift the pipe. Holland was asked whether he would agree that Weith was obligated to consider that the drivers were in the same area as the pipes when he decided how he would lift them. Holland replied, "Yes, sir. He did that." Holland did not agree that it was necessary for Weith to see Thomas at all times *during* the lift because, if Weith had chosen to look away from the lift to look for Weith, he would not be focused on the work. Holland disagreed that Weith would be able to perform the lift and know where the drivers were at all times. "As a practical matter, could John Weith have kept his eye on Jaceson Thomas over to the side and approached and picked up that pipe at the same time?" Holland answered, "He could not."

¶ 18 Holland further testified that the procedure Weith chose, *i.e.*, moving the pipe with the forklift (and, specifically, with forks the length of those on the CAT 963), was standard in the industry, that choosing the suggested alternative methods (tea cup method, rolling the pipes, spotter, etc.) would simply *not* be normal practice. He testified that spotters "are not used under those circumstances, period," because Weith was not performing a blind lift where one cannot see where one is putting the object during or after the lift (such as lowering the pipe into a deep hole). Holland opined that Thomas's movement between the truck and the pipe caused his death. Holland agreed that the exact timing of when Thomas walked in front of the pipe is unknown and, thus, it is

unknown whether the pipe was already moving when he walked in front of it. Holland concluded that it would "absolutely not" be safe for Thomas to be near the pipe if it was about to be moved, and that Weith did nothing wrong where he approached the pipe only *after* seeing that Thomas and Johnson were not standing in harm's way.

¶ 19 Savegnago (re-called in defendant's case) testified that the CAT 963 was fully capable of lifting the pipes and that the length of the forks, 52 inches, was adequate to pick up the pipes (which were approximately 60 inches in diameter) because the forks extended past the center line of the pipe by approximately 18 inches. Savegnago explained that lifting and moving pipes with a forklift is the CAT 963's primary use. In contrast, the excavator is primarily used for excavating and setting pipe into a trench. While the excavator could be used to pick up a pipe and carry it 100 to 200 yards to another location, that would not be the desirable or preferable use.

¶ 20 At the close of the evidence, plaintiff moved for a directed verdict. Defendant renewed its motion for a directed verdict. The trial court denied both motions.

¶ 21 The court instructed the jury and provided it with three verdict forms that essentially provided the following verdict options: (1) defendant was not negligent *or* Thomas's contributory negligence was more than 50% of the proximate cause of his injury; (2) defendant was 100% negligent; or (3) defendant was negligent and Thomas committed contributory or comparative negligence that was 50% or less of the proximate cause of his injury. On March 2, 2010, in accordance with option number one above, the jury returned a verdict that "we, the jury, find for the defendant Wheaton Trenching, Inc., and against the Plaintiff." Plaintiff orally moved for a judgment *n.o.v.* and a directed verdict in her favor. The court denied plaintiff's motions. On March 22, 2010, plaintiff filed a

second, written posttrial motion for a judgment *n.o.v.* or, alternatively, for a new trial. On June 23, 2010, the court denied plaintiff's second posttrial motion. Plaintiff timely appeals.

¶ 22 II. ANALYSIS

¶ 23 A. Directed Verdict and Judgment *N.O.V.*

¶ 24 Plaintiff argues first that the trial court erred where it denied her motions for a directed verdict. Plaintiff asserts that the evidence clearly established that defendant owed a duty, breached that duty, and proximately caused Thomas's death. She argues that defendant's multiple admissions reflect that Weith had a responsibility to safely handle the load, that he carelessly mishandled the load, that he caused the pipe to roll, and that, if Weith had properly handled the load, it would not have hit and killed Thomas. Plaintiff further argues that defendant was negligent because the evidence reflects that Weith did not consider using alternative methods that, if used, would not have crushed Thomas. Moreover, plaintiff asserts that Weith should have discussed with the truck drivers the method he chose for moving the pipe, so as to alert them of what they might expect. Plaintiff argues that Thomas's location was a condition of which Weith should have been aware and that the evidence was "uncontroverted that Jaceson Thomas did not step into any zone, he was in a position and John Weith sent the pipe at him." Plaintiff asserts that the trial court's denial of her motions for a directed verdict erroneously conveyed to the jury that: (1) plaintiff did not present sufficient evidence as to the *prima facie* elements of the case; and (2) the court believed that contradictory evidence was presented that required the jury to make findings as to duty, breach of duty, proximate cause, and injury. Finally, plaintiff asserts that defendant made no showing that Weith's conduct was reasonable, and that, based on the foregoing evidence, the jury should have received only two verdict forms (both finding defendant negligent). Plaintiff requests that we remand for a new trial

as to damages only or, alternatively, that we direct a judgment for plaintiff, reverse the trial court's judgment finding defendant not negligent, and remand for a new trial limited to issues of contributory negligence and damages.

¶ 25 The *third* issue plaintiff raises on appeal is that the court erred in denying her posttrial motion for a judgment *n.o.v.* or, alternatively, a new trial. Recognizing that the standards of review for directed verdicts and judgments *n.o.v.* are the same, plaintiff adopts her foregoing directed-verdict arguments as her argument that the court erred in denying her motion for a judgment *n.o.v.* Addressing the court's denial of her alternative request for a new trial, plaintiff asserts that the jury's verdict was against the manifest weight of the evidence. She concludes that a new trial should have been granted because "no evidence was presented to contradict or rebut defendant's admissions that John Weith's mishandling of the pipe and resultant rolling of the pipe at Jaceson Thomas was the only reason for his death. These facts were without dispute." Plaintiff's arguments on these issues overlap; therefore, we address them together.

¶ 26 1. Directed Verdict and Judgment *N.O.V.*

¶ 27 Motions for directed verdicts and judgments *n.o.v.*, although made at different times, raise the same questions, and are governed by the same rules of law. *Maple v. Gustafson*, 151 Ill. 2d 445, 453 (1992). Courts should enter directed verdicts or judgments *n.o.v.* only in "limited cases" (*Maple*, 151 Ill. 2d at 453) where the evidence, when viewed in the non-movant's favor, "so overwhelmingly favors" the movant that "no contrary verdict based on that evidence could ever stand." *Id.* at 428. Where reasonable minds might differ regarding inferences or conclusions to be drawn from the evidence, a judgment *n.o.v.* is improper. *Pasquale v. Speed Products Engineering*, 166 Ill. 2d 337, 351 (1995). More specifically, "[t]he court has no right to enter a judgment *n.o.v.* if there is any

evidence, together with reasonable inferences to be drawn therefrom, demonstrating a substantial factual dispute, or where the assessment of credibility of the witnesses or the determination regarding conflicting evidence is decisive to the outcome." *Maple*, 151 Ill. 2d at 454. A judgment *n.o.v.* may *not* be granted simply because the verdict is against the manifest weight of the evidence. *Id*. at 453. "A denial of a motion for judgment notwithstanding the verdict, like an adverse ruling on a motion for directed verdict, is reviewed under the *de novo* standard." *Evans v. Shannon*, 201 Ill. 2d 424, 427 (2002).

¶ 28 To recover damages in a negligence action, the plaintiff must prove that the defendant owed a duty to the plaintiff, breached that duty, and that the breach proximately caused the plaintiff's injury. *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 225 (2010). Questions regarding breach of duty and proximate cause of the injury are reserved for the trier of fact. *Id*. at 226. Here, we conclude that the trial court correctly denied plaintiff's motions for a directed verdict and judgment *n.o.v.* where the evidence as to breach of duty and proximate cause was not so overwhelmingly in plaintiff's favor that no contrary verdict could ever stand.

¶ 29 First, the jury was instructed that defendant owed a duty, before and at the time of the occurrence, to use ordinary care for Thomas's safety. The concept of duty encompasses whether the plaintiff and the defendant stood in such a relationship to one another that the law imposes on the defendant an obligation of reasonable conduct for the plaintiff's benefit. *Krywin*, 238 Ill. 2d at 226. In determining whether a duty should be imposed, the inquiry involves four factors: (1) the reasonable foreseeability of the injury; (2) the likelihood of the injury; (3) the magnitude of the burden of guarding against the injury; and (4) the consequences of placing the burden on defendant. *Id.*

¶ 30 It does not necessarily follow that where a duty exists and an injury occurs, the duty was breached. Here, plaintiff ignores that the aforementioned standards reflect that the duty Weith owed to Thomas was one to use reasonable and ordinary care to protect Thomas from a reasonably foreseeable injury. While plaintiff is correct that Weith admitted to improperly handling the load in that, if he had lifted it properly, it would not have rolled and that, if the pipe had not rolled, it would not have hit Thomas, those "admissions" establish that Weith's actions caused Thomas's injuries. This was never disputed. There was no question that Weith's attempt to lift the fourth pipe failed and that Thomas's injuries resulted from that failure. Therefore, as this is not, for example, a strict-liability action, the question that remained was whether the conduct that led to the failed lift reflected a lack of ordinary and reasonable care to protect Thomas from a reasonably foreseeable injury. Here, when viewed in defendant's favor, the evidence did not so overwhelmingly answer the aforementioned question in the affirmative that no verdict in defendant's favor could ever stand.

¶ 31 The jury could have found that, although Weith failed in his task of lifting the fourth pipe, he used ordinary care and, therefore, did not breach his duty. The evidence established that, before attempting to move the fourth pipe, Weith safely and properly moved three others, one at a time, with the CAT 963. Weith scooped those three pipes with the fork and cradled them in the bucket, and then moved them from the rear of the truck to the side of the truck. Each time he moved one of those pipes, he checked to see where Thomas and Johnson were located. Standing to the right side of the truck, 8 to 10 feet from the back, right corner, Thomas and Johnson observed Weith's procedure for moving the first three pipes. Weith approached the fourth pipe knowing that he had just successfully moved three other pipes using the same method, knowing that Thomas and Johnson had observed his procedure for moving those three pipes, and knowing, *prior* to approaching the

fourth pipe, that Thomas and Johnson were standing and talking in the same position as before (8 to 10 feet from the back, right corner of the truck). Weith's testimony regarding Thomas's location before the fourth pipe was moved was supported by Johnson, the only other eyewitness. Johnson agreed that he and Thomas were, in fact, standing on the side of the truck before the fourth pipe was moved and that he *knew* the fourth pipe was going to be moved.

¶ 32 Thus, when the circumstances of the fourth lift are viewed in defendant's favor, the evidence presented did not so overwhelmingly suggest a breach of duty that no contrary verdict could stand. While plaintiff asserts that Weith failed to discuss his method for moving the pipes with Thomas, the evidence established that, immediately prior to the accident, Thomas was not unaware of the procedure—he had witnessed Weith use the same method to successfully move three other pipes. In addition, we note that although plaintiff correctly asserts that the evidence reflected that Thomas's location was a condition of which Weith needed to be aware, the testimony also established that Weith *was* aware of Thomas's location *prior* to approaching the fourth pipe. The question for the jury, therefore, was whether being aware of Thomas's location prior to, but not necessarily during, the lift satisfied the standard of reasonable care. The opinions in this regard differed, and Holland testified that expecting Weith to continuously keep an eye on Thomas while engaging the load would be impractical and, therefore, that Weith did all that could be reasonably required by verifying, prior to approaching the pipe, that Thomas was in a safe location. The determination of the credibility of these opinions and the conclusions to be drawn from the conflicting testimony could be outcome determinative. Accordingly, the court correctly declined to render a directed verdict or judgment *n.o.v.*

¶ 33 Plaintiff next argues that defendant was negligent and breached its duty because Weith did not consider using alternative methods (an excavator, a spotter, etc.) that might not have led to injury. Besides the fact that such a conclusion is speculative, the evidence regarding these methods was conflicting. For example, while there was no dispute that an excavator was *capable* of moving the pipes, there was testimony that it would not have been customary to use an excavator in that fashion. Similarly, while a spotter theoretically might assist in those moments where the bucket might have impeded Weith's vision, there was testimony that it would not have been customary to use a spotter in that situation. Most critically, however, the evidence also suggested that, irrespective of any alternative or arguably "better" methods that might have been used, the evidence reflected that there was nothing inherently unusual or improper about the method that Weith chose. Weith testified that he had used the same method to move thousands of other pipes. Johnson testified that he had seen pipes moved using the same method "literally thousands of times." Holland testified that moving the pipe with a forklift was standard practice. Savegnago testified that using the forklift to move the pipes was the CAT 963's primary use and was preferable to using an excavator. Again, where the evidence, when viewed in defendant's favor, permitted the jury to conclude that Weith's chosen method for moving the pipes reflected customary procedure and ordinary care and, therefore, that defendant did not breach its duty to Thomas, the trial court properly denied plaintiff's motions for a directed verdict and a judgment *n.o.v.*

¶ 34 We also conclude that the court's rulings were proper because the evidence presented regarding proximate cause was not so overwhelmingly in plaintiff's favor that no contrary verdict could stand. Proximate cause encompasses two elements: cause in fact and legal cause. *Krywin*, 238 Ill. 2d at 225-26. Those elements consider the following two questions: was the defendant's

negligence a material and substantial element in bringing about the injury (cause in fact), and, if so, was the injury of a type that a reasonable person would see as a likely result of his or her conduct (legal cause). *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 258-59 (1999).

¶ 35 Weith testified that he saw Thomas standing to the side of the truck before he approached the fourth pipe, but that he did not know when Thomas moved between the pipe and truck. Johnson testified that he and Thomas were standing on the side of the truck before Weith moved the fourth pipe, but he did not know when Thomas moved between the pipe and the truck. Stark testified that, if the pipe was about to be moved, it would not have been safe for Thomas to move between the pipe and truck. Puchalski testified, based on plaintiff's counsel's hypothetical, that he was of the opinion that Thomas was between the pipe and truck before Weith *struck* the pipe. However, not only is this testimony not necessarily in conflict with Weith's testimony that Thomas was standing to the side of the truck before Weith *approached* the pipe, Puchalski agreed that he could not know the exact timing of when Thomas began walking. Thus, where the evidence suggested that Thomas was standing in a safe location prior to Weith's approach of the pipe (but *subsequently* moved to a position between the pipe and truck), the jury could have found that, at the time Weith approached the pipe, he could not reasonably expect that, if the lift failed, Thomas would be injured. Plaintiff notes that Weith *admitted* that he was supposed to keep in mind the zone between the pipe and the truck and analyze where the pipe could go if he lost control of it and, if someone could be harmed, he should not do the lift. Again, plaintiff ignores that Weith testified that he *did that*, but that the evidence suggested that, although Thomas was in a safe location when the pipe was approached and the lift began, he subsequently *moved*. It again bears mentioning that this is not a question of strict liability but, rather, whether reasonable care was exercised and whether it was reasonably foreseeable

that Thomas would be injured as a result of Weith's actions. Because the evidence did not so overwhelmingly suggest that Thomas's injury was of a type that Weith should reasonably have seen as a likely result of his conduct, the court properly denied plaintiff's motions.

¶ 36 In sum, the conclusions to be drawn from the conflicting evidence would have been outcome determinative. Namely, while plaintiff established that defendant owed Thomas a duty of ordinary care and that a tragic injury occurred because Weith hit the pipe, the evidence that Weith failed to use ordinary care and, thus breached his duty, or that he proximately caused the injury, was not so overwhelmingly favorable to plaintiff that no contrary verdict could stand. As such, the court did not err in denying plaintiff's motions for a directed verdict or judgment *n.o.v.* In light of our conclusion, we reject plaintiff's undeveloped argument that only two verdict forms, both finding defendant negligent, should have been submitted to the jury. Similarly, we reject plaintiff's argument that the court's denial of the directed-verdict motions conveyed to the jury that plaintiff failed in her burden of proof. We note, for the sake of argument, that even if such a message were conveyed, defendant, too, presumably suffered from the same message when the court denied defendant's motion for a directed verdict.

¶ 37 2. New Trial

¶ 38 We turn next to the trial court's denial of plaintiff's motion for a new trial. In contrast to a judgment *n.o.v.*, a new trial may be awarded on the basis that the verdict is contrary to the manifest weight of the evidence. *Maple*, 151 Ill. 2d at 454. Accordingly, when considering a motion for a new trial, the court must weigh the evidence and set aside the verdict and order a new trial only if the verdict is contrary to the manifest weight of the evidence, *i.e.*, if the opposite conclusion is clearly evident or the jury's finding is unreasonable and not based upon any of the evidence. *Id.* We

reverse a trial court's ruling on a motion for a new trial only where it is affirmatively shown that the court abused its discretion. *Id.* at 455. In considering whether the court's ruling constitutes an abuse of discretion, we consider whether the jury's verdict was supported by the evidence, whether the losing party was denied a fair trial, and remain mindful that the trial judge, in considering the motion for new trial, had the benefit of observing the witnesses, their manner in testifying, and the circumstances aiding the jury's credibility determinations. *Id.* at 456. Where there is sufficient evidence to support the jury's verdict, granting a motion for a new trial constitutes an abuse of the trial court's discretion. *Id.*

¶ 39 Here, the trial court did not abuse its discretion in determining that the jury's verdict was not contrary to the manifest weight of the evidence and, therefore, that plaintiff's motion for a new trial must be denied. As stated above, there was sufficient evidence in the record for the jury to find that defendant was not negligent, either because there was no breach of the duty of ordinary care or because Weith's actions did not proximately cause a foreseeable injury. Accordingly, because the jury's verdict is based upon the evidence and the opposite conclusion is not clearly evident, the trial court did not err in denying plaintiff's motion for a new trial.

¶ 40 B. Motion *in Limine*—Contributory or Comparative Negligence

¶ 41 Plaintiff next argues that the trial court erred in denying her motion *in limine* to exclude evidence or argument that Thomas's actions constituted contributory or comparative negligence. Plaintiff reasons that defendant admits that the *only* reason Thomas was killed was because Weith mishandled the pipe and caused it to roll. She asserts that the fact that Thomas was in a position to be hit does not rise to the level of contributory negligence because "there was no evidence of foreseeability of harm attributable to Jaceson Thomas before the incident." Under Illinois law,

plaintiff argues, a condition is not a legal cause of an incident. Here, plaintiff asserts, Thomas's presence in a position to be hit does not equate with contributory negligence because there is no evidence that Thomas should have foreseen that Weith would lose control of the pipe. Plaintiff argues that the court's error in denying her motion led to the jury being improperly instructed that, in addition to deciding whether plaintiff satisfied her burden of proof, it needed to decide defendant's claim that Thomas was guilty of contributory negligence. Plaintiff argues that the court abused its discretion in allowing defendant's contributory-negligence argument and requests that we reverse the trial court's judgment, find that Thomas's conduct did not constitute contributory negligence, and remand the cause for a new trial on damages only.

¶ 42 We will not disturb a trial court's ruling on a motion *in limine* addressing the admission of evidence absent a clear abuse of discretion. *Sbarboro v. Vollala*, 392 Ill. App. 3d 1040, 1055 (2009). An abuse of discretion occurs when no reasonable person would take the same view. *Id.*

¶ 43 The concepts of contributory fault and comparative negligence are codified in section 2—1116 of the Code of Civil Procedure (735 ILCS 5/2—1116 (West 2006)). Our supreme court has stated that section 2—1116, which limits a plaintiff's recovery when contributory negligence is established, makes clear that "people generally have a duty to exercise ordinary care for their own safety." *Hobart v. Shin*, 185 Ill. 2d 283, 290 (1998). A party is guilty of contributory negligence when he or she acts without the degree of care that a reasonably prudent person would have used for his or her own safety under like circumstances and that action is the proximate cause of his or her injuries. *Coole v. Central Area Recycling*, 384 Ill. App. 3d 390, 396 (2008). The issue of contributory negligence is ordinarily a question of fact for the jury. *Id.*; *Old Second National Bank of Aurora v. Baumann*, 86 Ill. App. 3d 547, 549 (1980).

¶ 44 We conclude that the trial court's denial of the motion *in limine* was not an abuse of discretion. Plaintiff notes that Weith admitted that, when the pipe rolled and he looked up, Thomas was already in the zone of danger, *not* stepping into the zone of danger. However, given that Weith also testified that Thomas was in a safe spot before he approached the pipe, a question remained whether Thomas stepped between the pipe and the truck *after* Weith approached the pipe and, possibly, while the pipe was being moved. That evidence, if found credible, supported a finding that Thomas violated his duty to exercise ordinary care for his own safety and, therefore, that his actions contributed to his death. We disagree with plaintiff's argument that Thomas's act of walking between the pipe and the truck when the pipe was being moved could not constitute contributory negligence because Thomas could not have reasonably foreseen that Weith would roll the pipe and cause him harm. Instead, the jury could have concluded that it would be reasonable for Thomas to foresee the possibility that, when the forklift tried to lift the pipe, it could roll and, if he was near the pipe, he could be injured. Although Thomas had witnessed Weith safely move three other pipes, the safe movement of some pipes did not extinguish Thomas's obligation to continue to exercise ordinary care for his own safety during the inherently dangerous process of moving 13,000-pound concrete pipes.

¶ 45 Plaintiff argues that Thomas's location during the accident, *i.e.*, the fact that he was in a position to be injured, was a condition that allowed the accident to happen, but it was not a *cause* of the accident. First, we note that the analysis of condition-versus-cause appears to apply when the intervening act of a *third* party proximately causes the injury. See *e.g.*, *Young v. Bryco Arms*, 213 Ill. 2d 433, 449 (2004) ("the condition-versus-cause analysis applies to cases in which injury is caused by the intervening acts of third parties"); see also *Abrams v. City of Chicago*, 211 Ill. 2d 251,

259 (2004); *Galman*, 188 Ill. 2d at 257-58 and n.1. Here, there was no intervening third party that caused or contributed to Thomas's injury, nor did Thomas furnish a condition by which a subsequent, intervening act by another allowed a third-party to be injured.[2]

¶ 46 Further, plaintiff's reliance on *Old Second* for the proposition that Thomas's location was merely a condition and, therefore, could not constitute contributory negligence, is misplaced. In *Old Second*, the decedent was riding in the back of a pickup truck. The driver, in the course of illegally speeding and running off the highway, caused the decedent to be thrown from the truck. The court rejected the argument that the decedent's position in the vehicle, *i.e.*, sitting in the back of the pickup truck, amounted to contributory negligence. *Old Second*, 86 Ill. App. 3d at 551. The court specifically noted, however, that the decedent did not distract the driver (*Id.* at 549), that the driver looked back for no apparent reason before losing control of the vehicle (*Id.*), and that the plaintiff had waived the potential argument that the decedent contributed to the accident by failing to ask the driver to reduce his speed (*Id.* at 551).

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[2] For example, in *Abrams*, the plaintiff was in labor and called the City's 911 line. The operator determined that an ambulance was unnecessary and recommended the plaintiff use private transport to the hospital. The plaintiff's friend ultimately picked her up and decided to drive through a red light, where the vehicle was stuck by another driver who was intoxicated and speeding. The plaintiff was severely injured, and her baby died. The plaintiff's negligence action against the City failed. Our supreme court held that the City did not proximately *cause* the accident but, rather, merely furnished a condition by which the accident was made possible through the illegal acts of others. *Abrams*, 211 Ill. 2d at 262.

¶ 47 Quite simply, the circumstances here differ from *Old Second.* Here, unlike in *Old Second*, the decedent took action. In other words, the condition—where Thomas was located—*changed* because he moved between the truck and the pipe. As plaintiff notes, a party's actions may be a material element and substantial factor in bringing about an injury (again, a cause in fact) if, absent the conduct, the injury would not have occurred. See *Galman*, 188 Ill. 2d at 258. Here, there was a question of fact regarding whether, absent Thomas's conduct, the injury would have occurred. For the same reasons, we find distinguishable plaintiff's hypothetical in her reply brief, where she posits whether, if a person working in a building below a level where other work is performed is hit and killed by a heavy object a worker mishandles, would be considered comparatively at fault for being in a position to be hit. Again, that is not the situation here. The evidence here raised the question whether Thomas knew the fourth pipe was about to be moved and nevertheless walked between the pipe and the truck. The distinction is that, here, there was evidence to suggest that Thomas was not merely in the wrong place at the wrong time, but, rather, that he took a deliberate action that reflected a lack of ordinary care for his own safety and, without which, the injury might not have occurred. Accordingly, we conclude that the court did not abuse its discretion in denying plaintiff's motion *in limine*.

¶ 48 We note a final point. It is theoretically possible that, even if the court erred in denying the motion and admitting the evidence, the error was harmless. An erroneous evidentiary ruling may be harmless where it relates to an issue the jury never reached. *Bachman v. General Motors Corp.*, 332 Ill. App. 3d 760, 785 (2002). Here, the jury found for defendant and against plaintiff. It was not specified whether that verdict was based on a finding that Thomas's actions constituted contributory negligence that amounted to more than 50% of the proximate cause of his death *or*

whether the jury simply found that defendant did not act in a negligent manner. As we noted in the prior section, the evidence would have supported the jury finding defendant not guilty of negligence. Accordingly, if the jury never reached the question of contributory negligence because it determined simply that defendant was not negligent, any alleged error in the motion *in limine* ruling was harmless.

¶ 49 C. Defendant's Closing Argument

¶ 50 Plaintiff's final argument on appeal is that defendant's closing argument was error. She notes that defense counsel argued to the jury that the compensation plaintiff sought equated to a purchase of 60 houses at a cost of $250,000 or $300,000, and to "do the math." The trial court overruled plaintiff's objection. Plaintiff argues that it was improper for defense counsel to suggest a mathematical formula to calculate damages. She contends that the argument "improperly calls upon the jury to, in a personal way, evaluate the social benefit of compensatory damages with the benefit of home ownership or other uses." Plaintiff argues that the error was prejudicial and warrants reversal of the judgment and a new trial.

¶ 51 We reject plaintiff's argument. "An attorney is permitted wide latitude in closing argument, and a judgment will not be reversed unless the challenged remarks were of such a character that they prevented the plaintiff from receiving a fair trial." *Sutton v. Overcash*, 251 Ill. App. 3d 737, 763 (1993). Here, while plaintiff argues that defense counsel's argument was improper and prejudicial, she does not suggest that it deprived her of a fair trial. Further, "[i]n determining whether a party has been denied a fair trial because of improper closing argument, a reviewing court gives considerable deference to the trial court because it is in a superior position to assess the accuracy and effect of counsel's statements." *Guzeldere v. Wallin*, 229 Ill. App. 3d 1, 15 (1992). Here, the trial

court was in a position to assess the effect of counsel's statements in closing arguments and it rejected plaintiff's objections at trial and in her posttrial motion. Finally, even if there was error, the error was harmless because the jury found against plaintiff and in defendant's favor, and consequently, did not reach the issue of damages. In sum, we reject plaintiff's argument that a new trial is warranted based on defense counsel's closing argument.

¶ 52 III. CONCLUSION

¶ 53 For the foregoing reasons, the judgment of the circuit court of Kendall County is affirmed.

¶ 54 Affirmed.

¶ 55 JUSTICE BOWMAN, specially concurring:

¶ 56 I respectfully disagree with the majority's conclusion that the jury could have found that although Weith failed in his task of lifting the fourth pipe, he used ordinary care, and therefore, did not breach his duty. Slip order at ¶31. In reaching this conclusion, the majority looks to Weith's observations of Thomas's location in relation to the pipe, but I disagree that Thomas's location is a factor. In my opinion, we must look at Weith's admissions, taking his testimony in the light most favorable to defendant. Accepting that Thomas was not walking in front of the pipe at the time Weith began the process of moving the fourth pipe, I conclude that Weith still breached his duty to lift the pipe safely and securely. By the fact that Weith failed to properly lift the pipe, the pipe rolled and ultimately killed Thomas. Regardless of where Thomas was standing when Weith started the process, the pipe would not have rolled but for Weith's conduct. Had Thomas walked in the exact same manner as he did that day, he would not have been killed if Weith properly performed his job because the pipe would not have been rolling. It is undisputed that the rolling pipe killed Thomas. The only remaining question for the jury to decide was whether Thomas's actions contributed to his

death and if so, by what percentage. Accordingly, I believe the trial court erred in denying plaintiff's motion for a directed verdict on the issue of defendant's negligence and ultimately in instructing the jury on whether defendant was negligent. A directed verdict is properly entered in those limited cases where " 'all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand.' " *Maple,* 151 Ill. 2d at 453, quoting *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967). Here, I do not see how the jury could conclude, based on the testimony of Weith, that defendant was *not* negligent.

¶ 57 Unfortunately, I cannot find that reversal is warranted in this case because I agree that the jury ultimately could have concluded that Thomas's own actions barred recovery. Because the verdict forms provide insufficient guidance as to what the jury concluded, we cannot reverse. See *Krklus v. Stanley*, 359 Ill. App. 3d 471, 479 (2005) (when a jury returns a general verdict, the verdict will be upheld if there was sufficient evidence to sustain either theory, and the objecting party, having failed to request a special interrogatory as to the grounds for the verdict, cannot complain). In *Krklus*, a similar situation arose where the jury found in favor of the defendant physicians by returning a general verdict form that did not specify whether it found the defendants were not negligent or whether it found that the plaintiff's contributory negligence was more than 50%. *Id.* The plaintiff appealed, arguing that the trial court erred in providing the jury instructions on comparative negligence; the defendant argued that the plaintiff could not argue error where the jury returned a general verdict form and the plaintiff never requested a special interrogatory. *Id.* The appellate court agreed that because the plaintiff failed to request a special interrogatory as to the basis of the jury's finding and because sufficient evidence was presented at trial to support a finding that

the defendant was not negligent even if there was no evidence of contributory negligence to warrant that instruction. *Id.* Here, I acknowledge that there was sufficient evidence presented regarding Thomas walking into the path of the pipe, and the jury could have believed that his actions contributed more than 50% to the total proximate cause of his death. Therefore, I reluctantly concur in the majority's outcome.