

No. 1-15-3025

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

HIGGINS BROTHERS, INC. and ILLINOIS EMCASCO)	Appeal from the
INSURANCE COMPANY, INC., as Subrogee of Higgins)	Circuit Court
Brothers, Inc.,)	of Cook County.
)	
Plaintiffs-Appellants,)	
)	
v.)	No. 12 L 12341
)	
ASSOCIATED SERVICES, INC.,)	Honorable
)	Thomas V. Lyons, II,
Defendant-Appellee.)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 **Held:** In this property damage subrogation case, we affirm the judgment entered on the jury’s verdict in favor of the defendant. We also affirm the order denying the plaintiffs’ posttrial motion. The plaintiffs-appellants failed to submit a sufficient record on appeal for this court to review the issues presented.

¶ 2 Plaintiffs Higgins Brothers, Inc. and its subrogee, Illinois Emcasco Insurance Company (Emcasco), filed a complaint against defendant Associated Services, Inc. (Associated), alleging that Associated negligently performed welding work to repair a paint spray booth in the Higgins Brothers warehouse. The complaint alleged that Associated caused a fire which resulted in substantial damage to the warehouse and its contents. Following a trial, a jury returned a verdict

in favor of Associated. The circuit court denied plaintiffs' posttrial motion and entered judgment on the verdict. We affirm.

¶ 3

BACKGROUND

¶ 4 Higgins Brothers operates a manufacturing business in Chicago that buys, sells, and reconditions steel drums, barrels, and other industrial containers. Associated's employee, David Suarez, worked as a handyman for Higgins Brothers on numerous occasions, including the date of the alleged incident.

¶ 5 On December 30, 2011, Suarez spot-welded and repaired a filter frame on a spray paint booth in the Higgins Brothers warehouse. In the early morning hours of December 31, 2011, a fire occurred at the warehouse. The fire caused substantial damage to the building and its contents. Higgins Brothers' damages totaled \$663,572.11 to the building, \$321,464.73 for the contents in the building, and \$121,233.13 in extra expenses. The record shows Higgins Brothers' insurer, Emcasco, paid for the loss to the building.

¶ 6 Plaintiffs then filed this lawsuit against Associated. Count I was a standard negligence claim; count II sought relief under a *res ipsa loquitur* theory. Associated moved to strike the *res ipsa loquitur* count under section 2-615 of the Illinois Code of Civil Procedure (735 ILCS 5/2-615 (West 2012)). The circuit court granted that motion.

¶ 7 The case proceeded through discovery, during which defendant disclosed David de Vries as its controlled expert witness pursuant to Illinois Supreme Court Rule 213(f)(3) (eff. Jan. 1, 2007). He prepared a report in connection with his review of photographs of the fire damage and other records related to the investigation of the cause of the fire. In his discovery deposition, de Vries concluded that the fire commenced in the spray paint booth. His conclusion conflicted with a Chicago Fire Department report prepared by Lieutenant Hugh Dennehy. He opined that

the fire originated in the first floor paint room and was caused by an ember or arc from a weld that ignited wood structural members.

¶ 8 Emcasco retained its own origin-and-cause investigator, Joe Mazzone, who determined that the fire was caused by an ember or molten welding slag from Associated's welding activities. Mazzone agreed with Lieutenant Dennehy's conclusion that the point of origin occurred outside of the spray paint booth. Emcasco also hired Nino Berardi, an independent adjuster to conduct a loss investigation.

¶ 9 Before trial, plaintiffs presented motions *in limine* to bar de Vries from testifying as to the cause of the fire, arguing that his report and deposition testimony lacked foundation. The circuit court barred de Vries from offering an opinion regarding the cause of the fire, but allowed him to testify that had the spray paint booth been free of combustible materials, there would not have been a fire.

¶ 10 After the parties presented their evidence to the jury, plaintiffs sought leave to amend their complaint to reinstate the *res ipsa loquitur* count. The record contains no order indicating whether the circuit court granted plaintiffs' motion for leave to amend; however, the record includes a file-stamped copy of plaintiffs' amended complaint containing the additional count. Plaintiffs also moved for a directed verdict, which the court denied.

¶ 11 During the jury instructions conference, plaintiffs attempted to tender a *res ipsa loquitur* instruction to the jury. The circuit court denied the instruction, finding that the plaintiffs failed to establish the elements of *res ipsa loquitur*. The parties also tendered three verdict forms to the jury. The court instructed the jury that: (1) if it found in favor of Higgins Brothers and Emcasco, and against Associated Services, to use Verdict Form A; (2) if it found Higgins Brothers committed contributory negligence, to use Verdict Form B; and (3) if it found in favor of

Associated Services and against Higgins Brothers and Emcasco, to use Verdict Form C. The jury returned a verdict in favor of Associated and against plaintiffs. The circuit court entered judgment on the verdict.

¶ 12 Plaintiffs filed a posttrial motion for judgment notwithstanding the verdict or, in the alternative, a motion for a new trial. Plaintiffs attached exhibits to their motion including: (1) a transcript of de Vries's discovery deposition testimony; (2) the motions *in limine* to bar de Vries's trial testimony; (3) an affidavit in support of posttrial motion executed by plaintiffs' counsel regarding the court's denial of the use of separate verdict forms for each plaintiff and the service of a subpoena on the court reporter to recover audio tapes of a portion of the jury instructions conference concerning this issue; (4) copies of plaintiffs' proposed verdict forms and the verdict forms tendered to the jury; (5) an uncertified trial transcript excerpt of the parties' arguments on their motions *in limine*; (6) an uncertified transcript of de Vries's trial testimony; (7) an uncertified trial transcript excerpt of the argument on plaintiffs' motion for directed verdict; and (8) an uncertified trial transcript of the jury instructions conference. Associated's response to plaintiffs' posttrial motion included uncertified transcripts of the trial testimony of Mazzone, de Vries, Jill Higgins (office manager and secretary for Higgins Brothers), Berardi, and Suarez.

¶ 13 On October 2, 2015, the circuit court denied plaintiffs' posttrial motion. This appeal followed.

¶ 14 ANALYSIS

¶ 15 Plaintiffs argue that the circuit court erred by: (1) allowing de Vries to provide opinions as to the cause and origin of the warehouse fire; (2) denying plaintiffs' motion for a directed verdict; (3) refusing to tender separate verdict forms for Higgins Brothers and Emcasco to the

jury; and (4) denying plaintiffs' request to tender a *res ipsa loquitur* instruction to the jury.¹ The record before us consists of 11 volumes of common law record. Other than a single supplemental volume only containing a certified transcript of Lieutenant Dennehy's testimony, the record contains no volumes consisting of reports of proceedings filed with, and bound and certified by, the clerk of the circuit court. The common law record does, however, contain copies of the posttrial motion. As noted above, uncertified trial transcripts of the testimony of certain witnesses and of other proceedings are attached to that motion and the response thereto.

¶ 16 Supreme Court Rules 321 and 324 require an appellant to provide a complete record on appeal. See Ill. S. Ct. R. 321 (eff. Feb. 1, 1994); Ill. S. Ct. R. 324 (eff. May 30, 2008). Our supreme court "has long held that in order to support a claim of error on appeal the appellant has the burden to present a sufficiently complete record." *Webster v. Hartman*, 195 Ill.2d 426, 432 (2001) (citing *Foutch v. O'Bryant*, 99 Ill.2d 389, 391–92 (1984)). "In fact, '[f]rom the very nature of an appeal it is evident that the court of review must have before it the record to review in order to determine whether there was the error claimed by the appellant.'" *Id.* (quoting *Foutch*, 99 Ill.2d at 391). "Where the issue on appeal relates to the conduct of a hearing or proceeding, this issue is not subject to review absent a report or record of the proceeding." *Id.* Instead, we must presume that the orders entered by the court were in conformity with the law and had a sufficient factual basis. *Id.*

¶ 17 Under Supreme Court Rule 323(a), the report of proceedings consists of "evidence, oral rulings of the trial judge, a brief statement of the trial judge of the reasons for his decision, and any other proceedings that the party submitting it desires to have incorporated in the record on

¹ In their opening brief, plaintiffs also argued that the circuit court committed error when it tendered to the jury two instructions based on IPI Civil (2011) No. 60.01, but they later withdrew this argument in their reply brief.

appeal.” Ill. S. Ct. R. 323(a) (eff. Dec. 13, 2005). Further, the report of proceedings “shall include all the evidence pertinent to the issues on appeal.” *Id.* If a verbatim transcript is unavailable, the appellant may file an acceptable substitute, such as a bystander’s report or an agreed statement of facts. Ill. S. Ct. R. 323(c) (eff. Dec. 13, 2005). “A post-trial motion is not a substitute for a report of proceedings.” *Altek, Inc. v. Vulcan Tube and Metals Co.*, 79 Ill. App. 3d 226, 229 (1979).

¶ 18 The Illinois Supreme Court Rules establish strict protocols regarding transcripts included in an appellate record. Before a transcript is made part of the court record, the court reporting personnel must give due notice to opposing parties, who may object to their accuracy by filing an objection within 14 days of transmission of the transcript. Ill. S. Ct. R. 323(b) (eff. Dec. 13, 2005). If an objection is filed, the dispute is presented to the court for resolution. *Id.* If no objection is filed, then the transcript may be filed with the court “without further certification.” *Id.* The parties may also stipulate to the accuracy of a transcript and file it without certification. *Id.* Nothing in Rule 323(b) allows a party to rely on uncertified transcripts which are simply contained in the record because they were exhibits to motions.

¶ 19 “Certification is designed to assure the accuracy of the record.” *Ray v. Winter*, 67 Ill. 2d 296, 302-03 (1977). A reviewing court may not consider uncertified transcripts as part of the record on appeal. *Johnson v. Saenz*, 311 Ill. App. 3d 693, 696 (2000); *Robinson v. Moore*, 30 Ill. App. 3d 915, 917 (1975). The parties did not stipulate to the accuracy of the transcripts in this record, and Associated has duly objected to the lack of a proper record in the brief it filed with this court. After receiving this objection, the plaintiffs did not move to supplement the record or correct this error. Instead, in their reply brief, they gloss over Associated’s objection, stating that

the uncertified transcripts were adequate, and that if Associated wanted to correct the omission, it should have done so itself.

¶ 20 Every issue presented on appeal relates directly to the testimony presented at trial. From our review of the parties' submissions and the record, it is evident we cannot review the issues relating to whether the evidence supported the jury's verdict and the bases for the circuit court's rulings on evidentiary issues without a sufficient record of those proceedings. *Corral v. Mervis Industries*, 217 Ill. 2d 144, 156 (2005). We cannot assume the circumstances of the court's rulings and the intent of the court in entering its orders on the basis of the parties' speculation and opposing versions of the events. *Webster*, 195 Ill. 2d at 435. Other than the transcript of the testimony of Lieutenant Dennehy, the trial transcripts included in the common law record are not stipulated to, not filed pursuant to Rule 323(a), and not certified. As such, they are insufficient for review of the evidentiary issues raised on appeal. *W.E. Mundy Landscaping and Garden Center, Inc. v. Hish*, 187 Ill. App. 3d 164, 166 (1989). We must therefore reject plaintiffs' claims of error.

¶ 21 Accordingly, we affirm the judgment of the circuit court.

¶ 22 Affirmed.