2012 IL App (1st) 110500-U

FOURTH DIVISION
March 22, 2012

No. 1-11-0500

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

ROBERT PETROUSKI, Plaintiff-Appellee, v. BRANDENBURG INDUSTRIAL SERVICE COMPANY, Defendant-Appellant, and F.H. PASCHEN/SN NIELSEN, INC., of ILLINOIS, a CORPORATION, Defendant.	)	Appeal from the Circuit Court of Cook County No. 06 L 10628 Honorable James P. Flannery, Jr., Judge Presiding.

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

ORDER

¶ *1* *Held*: Defendant is not entitled to judgment notwithstanding the verdict where there was sufficient evidence of proximate cause beyond mere speculation that defendant

> was the source of the concrete rock on which plaintiff tripped, and where the evidence supported a finding that defendant did more than create a condition allowing plaintiff's injury to occur, but was the proximate cause of plaintiff's injury.

¶ 2 Plaintiff-appellee Robert Petrouski filed a complaint against defendant-appellant Brandenburg Industrial Service Company (Brandenburg), among others, for injuries he sustained in a construction accident on October 11, 2004. Following trial, the jury found for Petrouski and against Brandenburg. After reducing the award by 33% to account for Petrouski's negligence, the jury awarded Petrouski $436,095. On appeal, Brandenburg contends the trial court erred in denying its motion for judgment notwithstanding the verdict (judgment *n.o.v.*) because the evidence was insufficient to establish it was the proximate cause of plaintiff's injuries. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 Petrouski sustained injuries while employed as an ironworker on the Chicago Skyway demolition and reconstruction project (Skyway project). The general contractor on the Skyway project was defendant F.H. Paschen/S.N. Nielsen (Paschen), who subcontracted with Brandenburg and S&J Construction (S&J), Petrouski's employer, among others. Brandenburg was responsible for the demolition work while S&J performed the ironwork. On October 11, 2004, Petrouski was moving a tank with the assistance of two other ironworkers when he tripped on concrete debris and injured his back.

¶ 5 At trial, Petrouski testified to the circumstances leading up to his accident. Petrouski had been on the project for several weeks prior to his injury, and worked as part of a gang with Richard Goldsworthy, Todd Villa and George Alivojvodic, all ironworkers who were employed

by S&J. Their daily activities involved removing rivets on the Skyway with a compressed air gun. On the day of the accident, Petrouski and his co-workers were working in the area of 95th Street and Baltimore Avenue. In order to perform their duties, they needed to secure a tank weighing at least 235 pounds which delivered air to their tools.[1] The maximum lifting weight for ironworkers was 100 pounds. While the men sometimes utilized a crane to move the tank from its storage shed, on the day of the accident the crane was unavailable, so the tank had to be moved manually. Alivojvodic and Goldsworthy pushed the tank forward while Petrouski, who suffered from back problems, walked backwards bracing the tank. As Petrouski was walking, he stepped on a rock which caused him to twist his ankle and briefly lose control of the load. Though he was in pain and felt something go out in his back, he was able to move the tank the remaining 8 to 10 feet to its final location and continue working.

¶ 6 Petrouski testified extensively as to the conditions on the Skyway project. Specifically, he noted that there was ongoing noise and falling debris indicative of demolition occurring above the ironworkers' area of work. He believed Brandenburg was performing the demolition, as he saw Brandenburg's trucks in the area daily and also noticed a Brandenburg employee on the ground throughout the day to warn of falling debris. Petrouski complained to this employee of falling debris on two separate occasions prior to his accident. Petrouski referred to the debris alternately as concrete pieces or rocks ranging in size from "small" to six to eight inches in width. The debris accumulated on the ground to the point where there was at least two pickup truckfuls.

[1] Petrouski and his co-workers testified the tank weighed anywhere from 300 to 500 pounds, while one of the owners of S&J testified it weighed only 235 pounds.

On the day of the accident, though Petrouski saw concrete debris on the ground, he and his co-workers did not clear a path prior to moving the tank but instead kicked the debris away as they were walking. Petrouski admitted this was an unsafe practice, but noted that clearing a path would only result in the debris blocking a different work area.

¶ 7 The other ironworkers with whom Petrouski worked testified to similar conditions. Richard Goldsworthy, Todd Villa, and George Alivojvodic all agreed that chunks of concrete littered the ground around the area of 95th Street and Baltimore Avenue and clean-up occurred very sporadically. They testified that when arriving each morning there would be concrete pieces in the manlifts which they used to reach the Skyway. The men would empty the concrete from the lifts before beginning work and place it away from their work area in order to facilitate easier ground movement. The workers explained the debris may have reached the ground and their lifts directly from the demolition work above, or from vibrations off the Safespan, which was placed below the bridge as fall protection for the demolition crew and also served to catch demolition debris. Goldsworthy and Villa testified concrete would fall on a daily basis, while Alivojvodic stated that concrete pieces fell infrequently. All the ironworkers stated they regularly saw Brandenburg trucks and employees in their work area, and both Goldsworthy and Villa explicitly testified Brandenburg was the demolition contractor and the cause of the ground debris.

¶ 8 The ironworkers testified that it was generally unsafe to work in a field where debris was on the ground and falling around them. They recognized they could bring safety concerns to their union steward or their foreman and then refuse to work if the conditions were not adequately addressed. However, Goldsworthy testified that he was aware of instances where ironworkers

who refused to work were laid off, but declined to provide specific examples. Alivojvodic also testified that while walking on debris was less safe then walking on paved ground, "you wouldn't forego your job for walking on that for a few minutes."

¶ 9 With regard to moving the tank, the ironworkers testified it was safer to move with a crane, but they had moved it manually on several occasions when a crane was unavailable. The workers further admitted that on the day of the accident nothing prevented them from clearing the concrete debris prior to moving the tank, but testified that it was not the general practice to clean up debris resulting from the work of another trade.

¶ 10 Petrouski's foreman, Michael Standley, echoed the testimony of the ironworkers. He testified that he regularly saw rocks fall from the bridge where Brandenburg was demolishing the pavement onto the area where his men were working and noticed debris in the lifts every morning. He also testified the debris that accumulated on the ground would be picked up periodically, but he was unable to identify who performed the clean-up. Standley stated that he saw Brandenburg employees in the area of 95th Street and Baltimore Avenue everyday, and that he had informed Brandenburg of falling debris three to four times. He believed he had spoken to someone named Chuck. Standley also testified as to the use of the tank, stating that it had been moved manually on several prior occasions, but that it was unsafe to move the tank when debris covered the ground. At his deposition, however, he had stated this was a safe practice.

¶ 11 Plaintiff's expert, safety consultant Dennis Puchalski, testified that he reviewed depositions, photographs, contracts, job documents and safety standards prior to giving his opinions. He concluded that (1) the debris on the ground in the area of 95th Street and Baltimore

Avenue came from Brandenburg's demolition work; and (2) Brandenburg failed to comply with safety standards requiring the continuous clearing of demolition debris from work areas. Ultimately he determined that if the debris had not been present the accident would not have occurred.

¶ 12 On cross-examination, he stated the ground debris could also have originated from vibrations off the Safespan, from the emptying of the manlifts by the ironworkers, or by somebody from Paschen. When he was later recalled as a defense witness, he testified the proper practice would have been for Petrouski to use a hoist to move the tank and that it constituted an unsafe practice to attempt to maneuver the tank manually when concrete debris was present. He then concluded that if Petrouski had refused to move the tank he would not have been injured.

¶ 13 Robert Kapovich, the foreman at S&J, who was on the site daily and routinely drove by the work being performed at 95th Street and Baltimore Avenue, testified that there were no chunks of concrete on the ground and that ironworkers would never have been allowed to work in an area where demolition was being performed above. Kapovich went on to testify that he never sent a worker home for voicing safety concerns.

¶ 14 Scott Bowden, the senior project manager with Paschen at the time of the accident, testified there was neither falling concrete nor concrete debris in the area where Petrouski was working. Moreover, he stated he never received complaints regarding falling debris.

¶ 15 Several Brandenburg employees also testified to the conditions on the Skyway project. Andrew Youpel, Brandenburg's safety manager, and Richard Voigt, Brandenburg's project manager, testified that demolition work necessarily resulted in concrete debris, but falling debris

was limited to areas known as "drop zones" which were cordoned off to prevent access by other trades. Brandenburg would also use a safety spotter during demolition work, who would stand below the Skyway and coordinate with the workers above to determine when it was safe to drop debris. Youpel testified that the presence of ground debris was a safety issue and Brandenburg was responsible for cleaning the debris resulting from its demolition work. However, both Youpel and Voigt testified they never received complaints of falling debris, and Youpel never saw debris on the ground as he was performing his weekly inspections. Voigt further stated that in October 2004 Brandenburg was demolishing the median slab on the Skyway, which did not require establishing drop zones, as the concrete debris was removed by truck.

¶ 16 Brandenburg superintendent Ronald Freeman testified that the demolition of the median strip in the area above 95th Street and Baltimore Avenue in October 2004 resulted in only small pieces falling below. He explained that this debris was routinely cleaned and did not accumulate beyond several shovelfuls. While he admitted it was Brandenburg's responsibility to clean demolition debris, both on the ground and on the Safespan, he pointed to other possible sources of concrete debris in the area of 95th Street and Baltimore Avenue. Specifically, he testified there was a practice of "fly dumping" in that location, where people would throw garbage, concrete and old furniture into the open field below. He also testified that Kenny Construction was undertaking a sidewalk replacement project both prior to and during the time of Petrouski's accident. According to Freeman, Kenny Construction piled the concrete they removed from the sidewalk under the Skyway.

¶ 17 Speaking about the Skyway project generally, Freeman testified that ironworkers never

worked in areas where demolition was occurring above and that he never received complaints about falling debris or debris on the ground during the course of the Skyway project.

¶ 18 Following trial, the jury found in favor of Petrouski and assessed damages against Brandenburg in the amount of $650,888. These damages were reduced by 33%, which the jury found to represent Petrouski's contribution to his own injuries. The trial court entered judgment on the jury's verdict and denied Brandenburg's motion for posttrial relief and for judgment *n.o.v.* Brandenburg timely appeals.

¶ 19 ANALYSIS

¶ 20 Brandenburg contends it is entitled to judgment notwithstanding the verdict because it was not the proximate cause of plaintiff's injuries.

¶ 21 It is fundamental that a judgment *n.o.v.* can only be entered in those cases where all evidence, when viewed in the light most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict could stand. *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 178 (2006) (quoting *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967)). Needless to say, the standard for obtaining a judgment *n.o.v.* is very difficult to meet and limited only to extreme situations. *Knauerhaze v. Nelson*, 361 Ill. App. 3d 538, 548 (2005) (quoting *Jones v. Chicago Osteopathic Hospital*, 316 Ill. App. 3d 1121, 1125 (2000)). This court may not substitute its judgment for that of the jury as to credibility of witnesses and weight of evidence. *Grillo v. Yeager Construction*, 387 Ill. App. 3d 577, 589 (2008). Nor may we 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 v. Gustafson*, 151 Ill. 2d 445, 454 (1992). A trial court's decision on a motion for judgment *n.o.v.* is subject to *de novo* review. See *Snelson v. Kamm*, 204 Ill. 2d 1, 42 (2003).

¶ 22 In a negligence action, the plaintiff must establish that the defendant owed the plaintiff a duty, breached that duty, and an injury proximately caused by the breach resulted. *Lewis v. Chica Trucking, Inc.*, 409 Ill. App. 3d 240, 271 (2011). Initially, Brandenburg argues any evidence that its demolition activity was the source of the rock on which Petrouski tripped was too speculative to support the jury's finding that it was the proximate cause of Petrouski's injury. We disagree.

¶ 23 When considering circumstantial evidence as to causation, it is not necessary for the circumstances to support only one logical conclusion. *Mort v. Walter*, 98 Ill. 2d 391-396-97 (1983). Rather, it is sufficient if the circumstances lead to an inference of probability rather than possibility. *Richardson v. Bond Drug Co.*, 387 Ill. App. 3d 881, 886 (2009). Stated differently, speculation, guess or conjecture cannot establish liability. *Bermudez v. Martinez Trucking,* 343 Ill. App. 3d 25, 30 (2003). Moreover, the existence of a fact cannot be inferred when a contrary fact can be inferred with equal certainty. *Richardson*, 387 Ill. App. 3d at 886.

¶ 24 In the case *sub judice*, the ironworkers' testimony clearly justifies an inference that the rock probably came from Brandenburg's demolition work. Specifically, the ironworkers, including Petrouski, testified they regularly saw Brandenburg trucks and employees in the area of 95th Street and Baltimore Avenue; they heard the noise of jackhammers and drilling above their area of work, which was indicative of demolition activity; and they saw concrete debris fall to the

ground. While Petrouski could not say with certainty the specific rock he stepped on was thrown by Brandenburg, several ironworkers testified generally that Brandenburg's demolition was the cause of the debris in their work area.

¶ 25 Brandenburg nevertheless posits the rock may have been the product of fly dumping, sidewalk demolition work by Kenny Construction, the ironworkers' practice of removing concrete pieces from their manlifts every morning, or the natural landscape. While there is some support for these contentions, the jury had an evidentiary basis to reject these possibilities.

¶ 26 For example, Freeman, the only person to testify regarding fly dumping near 95th Street and Baltimore Avenue, testified the debris that resulted ranged from garbage to old beds to tires. However, none of the ironworkers, who were present in that area on a daily basis, corroborated Freeman's testimony, instead describing the debris they encountered as "chunks of concrete." Freeman was also the only witness to testify regarding Kenny Construction's sidewalk demolition activity, and his testimony was contradicted by Standley, who explicitly stated he never saw Kenny Construction working nearby. Petrouski also stated he never saw sidewalk demolition work occurring. Likewise, the ironworkers contradicted Puchalski's testimony that the debris could have accumulated when they discarded concrete pieces from their manlifts each morning. The ironworkers explained that when they removed concrete from the lifts, they would pile the pieces "out of the way" or "on the side of the road" in order to keep their work area clear and to ease their movement on the ground.

¶ 27 Finally, Brandenburg points to no specific testimony that the debris on the ground was the product of the natural landscape, instead relying on Petrouski's description of the material on

which he tripped as a "rock." However, a review of the testimony of the ironworkers, including Goldsworthy and Petrouski, reveals that the terms "concrete" and "rock" were used interchangeably to describe demolition debris. For instance, when Goldsworthy was asked about the ground conditions on the morning of the accident, he replied, "[t]here was rocks all over, big chunks of concrete and smaller ones." Similarly, though Petrouski testified he tripped on a rock, he had previously described that there were "a lot of roadwork pieces of concrete" on the ground the morning of his accident. The jury could reason that this was not a contradiction, but instead an alternate way of referring to the same material.

¶ 28 Thus, while there may be various possibilities as to the source of the debris, the evidence did not show all possibilities were equally likely. The jury had a reasonable, evidentiary basis to support their finding that the rock on which plaintiff tripped was probably from Brandenburg's demolition work as opposed to any other source.

¶ 29 As such, the cases on which Brandenburg relies are inapposite, in that they address situations where the plaintiff could not testify to the physical mechanism causing her fall (*Vance v. Lucky Stores, Inc.*, 134 Ill. App. 3d 166 (1985); *Kimbrough v. Jewel Companies, Inc.*, 92 Ill. App. 3d 813 (1981)), or where there was no evidence apart from sheer speculation as to the cause of the plaintiff's accident. *Friedman v. Safe Security Services, Inc.*, 328 Ill. App. 3d 37 (2002); *Leavitt v. Farwell Tower Ltd.*, 252 Ill. App. 3d 260 (1993). In *Leavitt*, the only evidence establishing causation was that the decedent was found dead at the bottom of an elevator shaft, his mail was found on the ground near the elevator several floors above, and the defendant had failed to install an automatic door closure device during its elevator repair, which was an unsafe

practice. 252 Ill. App. 3d at 268. From these circumstances, this court concluded it was equally as likely that the decedent had forced the doors open himself or jumped or slipped into the shaft as it was that the decedent had entered the shaft assuming an elevator was present, as the plaintiff argued. *Id.*

¶ 30 Here, in contrast, there was witness testimony as to the source of the rock, allowing the jury to rely on evidence rather than speculation in inferring that Brandenburg was the proximate cause of the accident. See *e.g.*, *Wojtowicz v. Cervantes*, 284 Ill. App. 3d 524, 533-35 (1996) (distinguishing *Leavitt* on the basis that testimony of preoccurrance witnesses justified probability that the defendant's driving, rather than the plaintiff's illness or his unfamiliarity with the road, caused the accident.) Merely because there were other possibilities as to the rock's origins does not entitle Brandenburg to a verdict in its favor; it is quintessentially the province of the jury to resolve conflicting testimony and come to a conclusion. See *Gustafson*, 151 Ill. 2d at 454. Therefore, the trial court did not err in denying Brandenburg's motion for judgment *n.o.v.* on this basis.

¶ 31 In the alternative, Brandenburg maintains that even assuming the rock on the ground was the result of its demolition work, the rock only furnished a condition making Petrouski's injury possible, but was not the proximate cause of the injury, thereby relieving Brandenburg of liability.

¶ 32 Generally, proximate cause encompasses both cause in fact and legal cause. *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 225-26 (2010). Cause in fact exists where there is a reasonable certainty that the defendant's acts caused the plaintiff's injury. *Lee v. Chicago Transit*

Authority, 152 Ill. 2d 432, 456 (1992). Legal cause concerns foreseeability, namely, whether the injury is of a type which a reasonable man would see as a likely result of his conduct. *Id.* at 456, (quoting *Masotti v. Console*, 195 Ill. App. 3d 838, 845 (1990)). Under the related cause versus condition analysis, it is necessary to determine whether a defendant's negligence only furnished a condition making the plaintiff's injury possible, and the condition then caused an injury by the subsequent, independent act of a third party, thereby breaking the causal connection. *Merlo v. Public Service Co.*, 381 Ill. 300, 316 (1942).

¶ 33 We first address Petrouski's contention that the cause versus condition analysis is no longer viable in Illinois. The only case Petrouski cites for this proposition is *Reed v. Danville-Concrete Products Co.*, 102 Ill. App. 3d 205, 207 (1982), where this court noted the distinction between causes and conditions has been criticized. However, our supreme court in *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 257-58 (1999) explicitly declined to abandon the "condition versus cause" dichotomy, and considered it compatible with the traditional proximate cause analysis articulated in *Lee*. The court noted that under either analysis, we must ask whether the defendant's negligence was a material and substantial element in bringing about the injury and if so, whether the injury is the kind a reasonable person would see as likely based on his conduct. *Id.* at 258-59. More recently, our supreme court clarified that where an injury results from the subsequent, independent act of a third party, defendant's conduct may nevertheless remain a material and substantial element of the injury if the intervening cause was of a type that a reasonable person would see as likely or foreseeable based on his conduct. *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 407 (2004).

¶ 34 The independent act at issue here is Petrouski's decision to move the tank manually through the ground debris with the assistance of two other ironworkers. Viewed in the light most favorable to Petrouski, the evidence supports a finding that this act was foreseeable. There was testimony by all of the ironworkers that Brandenburg trucks and employees were present in the area of 95th Street and Baltimore Avenue at the same time as the ironworkers. Indeed, Petrouski explicitly testified he saw a Brandenburg employee on the ground daily and had made complaints to him on two occasions prior to his accident regarding falling debris. Standley, the ironworkers' foreman, testified that he had also complained to Brandenburg of falling debris prior to the accident. He believed that alerting Brandenburg to falling debris was sufficient to alert them to debris on the ground as well. Significantly, Brandenburg superintendent Freeman admitted that clearing the demolition debris was Brandenburg's responsibility, and Brandenburg safety supervisor Youpel admitted that ground debris presented safety concerns.

¶ 35 While Brandenburg may not have foreseen the exact circumstances under which Petrouski would stumble over the debris, this is not required. See *Scerba v. City of Chicago*, 284 Ill. App. 3d 435, 440 (1996). Instead, it is sufficient if the hazard created is closely related in time and space to the injury. *Id.* (where bus driver blocked crosswalk in front of school, the hazard that a student would sustain injury walking around the bus to cross the street was not unforeseeable.) Here, based on the evidence that Brandenburg was present in the area and had received complaints regarding the debris, it could certainly foresee the hazard that a fellow sub-contractor's employee would be injured encountering the concrete it had failed to clear, which is sufficient to support a finding of proximate cause.

¶ 36 This is not a case where the unlawful actions of an independent third party operated to produce an injury that was wholly attenuated from Brandenburg's original negligence, as in *Cole v. The Housing Authority of LaSalle County*, 68 Ill. App. 3d 66 (1979), or *Quirke v. City of Harvey*, 266 Ill. App. 3d 664 (1994). In *Cole*, we held that a contractor's action of leaving metal stakes on a construction site was not the proximate cause of the plaintiff's injuries where a third party picked up a stake and threw it at the plaintiff. 68 Ill. App. 3d at 71-72. Similarly, in *Quirke*, we held that the defendant's decision to turn off the city's power line in order to prevent a suicide by electrocution was not the proximate cause of an accident where motorists failed to treat an inoperative traffic light as a four-way stop sign, as required by law. 266 Ill. App. 3d at 665, 670.

¶ *37* Petrouski's decision to work in the presence of the ground debris was not comparable to the actions of the third parties in *Cole* and *Quirke*. It was not a blatantly criminal action or violative of any statutory duty; rather, the evidence revealed it was a reasonably foreseeable response to the condition Brandenburg created. The ironworkers all testified it was not customary to clear an area of debris resulting from the work of another trade. Indeed, Petrouski testified that clearing a path to one location would merely result in blocking another area where work needed to be performed. Therefore, they proceeded in the face of the debris in order to do their jobs. We cannot say this was an unforeseeable decision on par with the independent intervening actions in *Cole* and *Quirke*.

¶ 38 Brandenburg's reliance on *Cannon v. Commonwealth Edison*, 250 Ill. App. 3d 379 (1993), is likewise misplaced. There, the court determined that "no amount of foresight" would

have enabled Commonwealth Edison to prevent Cannon from descending the stairs to his basement during a blackout. *Id.* at 385. Here, in contrast, it requires little foresight to imagine that debris left on the ground of a construction site poses a tripping hazard to employees of sub-contractors. Indeed, the Brandenburg safety supervisor admitted the presence of ground debris was a safety issue. As a result, we find the foreseeability of Petrouski's actions was properly before the jury for resolution as a question of fact.

¶ 39 Merely because Petrouski may have had the option to wait for a crane, clear the debris, lodge a complaint, or refuse to work where he felt the conditions were unsafe does not compel a finding in favor of Brandenburg. We find the case of *Durbin v. St. Louis Slag Products Co.*, 206 Ill. App. 3d 340 (1990) instructive. There, the defendant appealed from a jury verdict finding the defendant 45% liable for the plaintiff's injuries, the plaintiff 35% liable, and the co-defendant 15% liable. *Id.* at 353. The plaintiff had alleged that the defendant quarry owner unevenly loaded his truck with crushed rock, causing the truck to tip over when he later unloaded the rock while in a jackknife position. *Id.* The defendant argued the plaintiff was the sole proximate cause of his injuries given that unloading in a jackknife position was not preferred and the plaintiff could have refused to dump the load when, where and how he did. *Id.* at 356. We disagreed and held that the jury reasonably found that the plaintiff's injuries were caused by the actions of both parties. *Id.* at 357. We noted specifically that the plaintiff had previously dumped in a jackknife position and that on this occasion, he had checked to make sure the ground was level before unloading. *Id.*

¶ 40 Similarly, here, the fact that Petrouski could have waited for a crane or refused to move

the tank under the less than ideal conditions does not absolve Brandenburg of liability as a matter of law. Just as in *Durbin*, it was appropriate for the jury to determine that Petrouski's failure to take various steps to perform his job more safely and Brandenburg's failure to clear the job site of its debris were both the proximate causes of Petrouski's injuries. This is particularly true where there was testimony that it was common practice to move the tank manually, and workers on the Skyway project had done so on several prior occasions. Further, just as Durbin took steps to ensure his safety prior to dumping in a more vulnerable position, on the day of Petrouski's accident the workers attempted to avoid the debris by kicking it out of their way as they walked.

¶ 41 Finally, to the extent Brandenburg contends the debris presented an open and obvious danger, as in *Kleiber v. Freeport Farm & Fleet, Inc.*, 406 Ill. App. 3d 249 (2010), we find this argument has been waived due to Brandenburg's failure to raise it in its posttrial motion. Ill. S. Ct. R. 366(b)(2)(iii) (eff. Feb. 1, 1994); see also *Lopez v. Northwestern Memorial Hospital*, 375 Ill. App. 3d 637, 647 (2007). More significantly, there were no instructions provided to the jury regarding the open and obvious exception to liability, nor was the jury directed to make a finding regarding the nature of the condition. Instead, this appeal is the first time Brandenburg has argued it can escape liability based on the open and obvious exception to a duty of care. As a result, we find the issue has not been properly preserved for review. See *Van Gelderen v. Hokin*, 2011 IL App (1st) 093152, ¶¶ 24-25 (where jury was not instructed on open and obvious exception, no findings were made as to the nature of the condition, and the defendant had failed to specifically address the application of the open and obvious doctrine as a basis for reversal in its posttrial motion, argument on this issue was waived.)

¶ 42 Even assuming *arguendo*, Brandenburg did properly preserve the issue, the open and obvious danger rule has been adopted in Illinois as an exception to the duty of care owed by possessors of land to invitees. *Buerkett v. Illinois Power Co.*, 384 Ill. App. 3d 418, 422 (2008). As such, it is appropriate in an analysis of premises liability claims such as those at issue in *Kleiber*. *Kleiber*, 406 Ill. App. 3d at 256; see also *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 147 (1990); *Chu v. Bowers*, 275 Ill. App. 3d 861, 866 (1995) (open and obvious rule applies only in premises liability cases.) Because Petrouski's case before the jury sounded in negligence rather than premises liability, the open and obvious doctrine is inapplicable and does not support a finding that Brandenburg was not the proximate cause of Petrouski's injury as a matter of law.

¶ 43 CONCLUSION

¶ 44 For the reasons stated, we affirm the trial court's denial of Brandenburg's motion for judgment *n.o.v.*

¶ 45 Affirmed.