

No. 1-15-3507

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

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

STEVIE SMITH,)
) Appeal from the
) Circuit Court of
 Plaintiff-Appellant,) Cook County
)
 v.) No. 12 L 7833
)
 MASTERLINK CONCRETE PUMPING, LLC,)
) Honorable
) Moira S. Johnson,
 Defendant-Appellee.) Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Gordon and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* Affirming the judgment of the circuit court of Cook County granting summary judgment to the defendant concrete pumping company in connection with injuries allegedly sustained by the plaintiff while working on a construction project.

¶ 2 After Stevie Smith (Smith) was injured while working on a construction project, he filed an action against Masterlink Concrete Pumping, LLC (Masterlink). The circuit court granted Masterlink’s motion for summary judgment, and Smith appealed. Smith contends that the circuit court erred by not permitting him to amend his complaint, and striking his motion for reconsideration. Masterlink asserts that the appeal is untimely and this court lacks jurisdiction, and it otherwise challenges Smith’s contentions. As discussed herein, we find that this court has

jurisdiction, and we affirm the judgment of the circuit court.

¶ 3

BACKGROUND

¶ 4 On July 12, 2012, Smith filed a single-count negligence complaint against Masterlink in the circuit court of Cook County. The complaint provided that on July 12, 2010, as part of the construction of a water treatment facility, Smith was employed by F.H. Paschen¹ (FHP) as a laborer pouring concrete to create a stairwell and concrete walls. Smith allegedly was instructed and supervised by Masterlink while he worked on the project. The complaint provided that Masterlink committed one or more negligent acts or omissions, *e.g.*, linking an excessive number of hoses from the pump to the concrete pour area, failing to provide adequate safety measures while instructing Smith where to place the hoses, failing to warn him of the danger due to the excessive number of hoses, and failing to use a “safe and alternative” means to pump the concrete. According to the complaint, Masterlink’s conduct caused Smith to slip and fall while carrying the hoses from Masterlink’s concrete pump to the pour area in question. Masterlink filed an answer and raised affirmative defenses, including contributory negligence and failure to mitigate. Masterlink subsequently filed a third-party complaint against various parties involved in the construction project, including FHP.

¶ 5 In April 2015, Masterlink filed a motion for summary judgment, alleging as follows. Masterlink had been engaged by FHP, the contractor, to provide a concrete pumping apparatus to the jobsite and a “driver/operator” for the apparatus. Masterlink also provided the conduit to allow the concrete to travel from the ready-mix trucks to the ultimate points of placement. The other companies on the project provided the concrete, and FHP employees handled the mechanics of the concrete pours.

¹ FHP is referred to elsewhere in the record as “F.H. Paschen, S.N. Nielsen & Associates, LLC.”

¶ 6 According to Masterlink, Smith worked in the position of “hoseman,” *i.e.*, he was in charge of directing the Masterlink operator as to where the concrete was to be placed, whether the concrete pump apparatus should or should not pump, and the rate of flow at which the concrete was to be pumped. It was the responsibility of the hoseman to relay instructions for pump placement, flow rate, and pump on/off to the Masterlink pump operator who, in turn, input the commands into a remote-control device. Masterlink asserted that the pump operator’s job was to follow the direction of the FHP hoseman. Masterlink further asserted that the FHP foreman determined whether additional hose segments were needed to reach the area where the concrete was to be placed.

¶ 7 On July 12, 2010, Smith was working as a hoseman and “pusher.”² At the time of Smith’s injury, the concrete was being placed in a building stairwell. Because the Masterlink operator could not observe the end point of the pump-hose, he was “working in the blind.” When working in the blind, the Masterlink operator must rely on instructions from the hoseman as to whether to raise or lower the hose, whether to start or stop the flow of concrete, and whether to adjust the rate of flow of the concrete. According to Masterlink, the FHP hoseman would determine which method of communication worked best for them in a particular situation. Although FHP had radios available on the date of the incident, Smith chose to communicate with the Masterlink operator by direct verbal communication.

¶ 8 Approximately one hour after the incident, Smith was asked to complete a statement describing what had occurred. In the statement, which was appended to the motion for summary judgment, Smith stated that he “was working with the concrete hose pouring a wall.” Despite his efforts, he was unable to fully fasten a clamp to connect two hoses. When he finally succeeded,

² When the foreman is not present, the pusher is the highest-ranking person with regard to concrete placement operations.

he felt a pain between his legs and on his right side. In his complaint filed two years later, Smith stated that the incident occurred when he slipped and fell while working in the concrete pour area while carrying the hoses from Masterlink's concrete pump to the pour area. Masterlink asserted that Smith offered yet another version of the events during his deposition: that he felt a "tweak" between instructing the pump operator to begin the flow of concrete and directing him to stop.

¶ 9 Masterlink advanced four arguments in its motion for summary judgment. First, it contended that there could be no breach of duty where there was no evidence that the pump operator was doing anything other than following Smith's direction as hoseman. Second, Masterlink argued that Smith could not establish proximate cause. Specifically, it asserted that "cause in fact" was not present where Smith could not establish that Masterlink's conduct was a material element and substantial factor of his claimed "tweak" where the "tweak" occurred during an action that Smith had directed. Masterlink also argued that "legal cause" was not present where it was not foreseeable that Smith would be injured during an activity that he directed. Third, Masterlink contended that the doctrine of primary implied assumption of risk negated Smith's claims where he voluntarily chose to support the concrete pumping hose on his shoulder and then asked that the hose be lowered prior to his alleged injury. Finally, Masterlink asserted there was no evidence of a slip and fall, and thus there was no proximate cause between Masterlink's purported conduct and Smith's injury as alleged in the complaint.

¶ 10 Smith's deposition from June 13, 2013, was appended to the motion for summary judgment. Smith testified regarding his work experience that he had previously worked as concrete laborer on a single construction project at FHP for approximately fifteen months prior to the incident, and also worked for ten years in concrete pump operations at another construction company. Approximately 90% of the time on the FHP project, Smith was working

with a concrete pump apparatus, which is used because a regular ready-mix truck does not have a sufficiently long chute to reach certain areas.

¶ 11 Smith testified that if a hose did not reach the pour site, a laborer other than the hoseman typically would connect hose extensions. Because the hoses were flexible, the hoseman needed to direct the end of the hose exactly where the concrete was to be placed by using a rope or by using his arm and shoulder to physically manipulate the hose. Smith testified that there were no rules that dictated how the hoseman should hold the hose. He further testified that the hoseman would communicate with the pump operator through hand signals or by radio.

¶ 12 At approximately 2:00 p.m. on the date of the incident, Smith was working as a pusher, and Timmy Grislack (Grislack) was the foreman on the project. Smith testified that walls are typically poured as the building is being built. According to Smith, “[w]e don’t usually wait till we get three floors up and say, Oh, let’s pour this wall three floors down,” but “that’s what happened that day.” Although Smith expressed reservations, Grislack stated, “I don’t care.” Grislack made the decision to pour the wall, but the two connected hoses were forty feet short of the necessary length. Grislack directed a laborer to attach a third hose, and laborers carried in a fourth and fifth hose to the pour area. Each hose weighed between 80 and 100 pounds. According to Smith, no more than two hoses should have been used on the pump when the boom – the remote-controlled robotic arm – was fully extended. Smith opined that the pump operator “should have just told the [foreman] no” regarding the use of the additional hoses. The pump operator was the sole Masterlink employee on the site.

¶ 13 Smith testified that the pump operator was on the roof, but opined that he should have been with Smith. According to Smith, a pump operator often situates himself near the hoseman so the operator is not “in the blind.” In this instance, Smith and the pump operator

communicated by yelling to each other. Although Smith initially testified that he had not asked Grislack for a radio, he later testified that he had asked for one earlier in the day in a different area of the construction site. According to Smith, any radio would be provided by FHP, not Masterlink. During his ten years in the business, he never witnessed a concrete pump operator providing a set of radios.

¶ 14 Grislack was not present as the hoses were being lowered through a hole in the roof. Smith and two laborers climbed onto the 8-foot scaffolding and connected a fourth hose. Smith had clamped hoses together at least one hundred times prior to that date. When the third and fourth hoses were attached, Smith began to do a pour. He screamed up to the pump operator to send the concrete as the hose rested over his shoulder and he held the end of the fourth hose. While he poured the concrete, Smith directed the pump operator to lower the hose. Smith felt a tweak as the hose was descending, and he directed the pump operator to stop lowering the hose. Smith opined that the hose was lowered too quickly because the pump operator could not see him. Although Smith described the hose movement and the tweak as simultaneous, he also testified that he felt the tweak a “split second” after directing the operator to stop.

¶ 15 As he continued to feel the “tweak,” Smith poured concrete for another five minutes. When he decided to connect a fifth hose to reach a stairway, he asked that the concrete flow stop. At that point, Smith and another laborer had moved from the scaffolding to a “rebar,” *i.e.*, a steel reinforcing rod. As he clamped the fourth and fifth hoses together and started the pour, his pain worsened. Smith testified that he experienced “a little trouble with that clamp.” The first time he informed anyone that he was injured was after clamping together the fourth and fifth hoses.

¶ 16 Smith testified that the reference to a slip and fall in the complaint was inaccurate. He was also questioned regarding descriptions of the incident in his paperwork which was

completed after the incident. Witness statement forms completed by his coworkers indicated that Smith was “trying to beat the clamp on to add another pipe” and “began hitting it with [a] hammer.” Smith did not disagree with these descriptions, but indicated that they described the later events and not the initial “tweak.” At the conclusion of his deposition, Smith detailed his medical treatment and physical limitations following his injury.

¶ 17 The deposition testimony of the Masterlink pump operator, Kirk Bult (Bult), was appended to Smith’s response to the motion for summary judgment. As of the date of his November 2014 deposition, Bult had been employed by Masterlink for 9-1/2 years. Bult remembered Smith from the construction project, but he was unaware that he had been injured until after the incident. Bult could not recall certain details from the date of the incident.

¶ 18 Bult characterized himself as “strictly operator” and testified that laborers from the contractor connect the hose to the boom and connect hoses to each other. Bult also testified that his first priority is setting up and stabilizing his truck and positioning the boom. According to Bult, the sole matter within his control is the set-up of his truck. Bult also testified that an FHP employee – typically Grislack – would determine the route for the hose to enter into the building. Furthermore, FHP employees would have been the individuals maneuvering the hoses into or within the building, carrying and attaching any additional hoses. Although Bult would sometimes observe the hoses being connected, he did not direct the laborers as to how exactly to hook them up.

¶ 19 Bult testified that he controlled the boom functions, the pump on-and-off, and the speed of the cement flow using a remote control. If Bult pressed the “stop” button for the pump, any concrete already in a vertical section of a suspended hose would pour out due to gravity. When operating the pump, he always positioned himself where he could view his truck to ensure no

equipment damage. Although not always possible, he would also try to position himself to view the end of the pourer, for safety and communication purposes. If “working in the blind” – where he could not view the end point of the concrete placement – Bult would rely on the verbal, radio, or hand signals of the FHP laborers. According to Bult, FHP would have provided radios.

¶ 20 Bult testified that there is no limit to the amount of hose that may be placed on the end of an extended boom. He indicated that if one hose is suspended, it will not have an effect on the remaining hoses that are resting on the ground. Bult had never witnessed a boom collapse or his pump truck tip over due to excessive weight. When asked about Smith’s deposition testimony – that he had been informed by a pump operator that no more than two hoses should be hooked up to the end of a boom – Bult indicated that such a limitation applies only where the hoses are suspended. Similar to Smith’s testimony, Bult testified that if hoses are on the ground or resting on a structure, the pressure is relieved and additional hoses may be attached.

¶ 21 A hearing was held on Masterlink’s motion for summary judgment. On July 22, 2015, the circuit court granted the motion and entered summary judgment in favor of Masterlink. On August 14, 2015, Smith filed a motion for reconsideration and for leave to file a first amended complaint. In the motion, Smith represented that the circuit court had granted summary judgment for Masterlink based on Smith’s deposition testimony that he did not slip and fall, as was alleged in the complaint.³ He argued that the complaint alleged “other mechanisms of injury” and thus an amended complaint would merely strike language from the original complaint, not add any new theories or allegations of liability. The sole modification in the proposed amended complaint appended to Smith’s motion was the deletion of the reference to a slip and fall, *i.e.*, the complaint instead alleged that Smith was injured while working in the

³ The record on appeal does not include a transcript of the July 22, 2015, proceedings.

concrete pour area while carrying hoses from Masterlink's concrete pump. Smith scheduled the motion for presentment on August 21, 2015.

¶ 22 Although the record on appeal does not include a transcript, Smith's counsel has represented that two issues regarding his motion arose during the August 21, 2015, proceedings: the motion was not served on FHP and the order granting summary judgment was not appended to the motion. The circuit court struck Smith's motion without prejudice on August 21, 2015.

¶ 23 On August 27, 2015, Smith filed an emergency motion to vacate the order striking the motion. Smith stated that he brought the motion in accordance with *Yazzin v. Meadox Surgimed, Inc.*, 224 Ill. App. 3d 288 (1991), wherein the court dismissed an appeal on jurisdictional grounds where the plaintiff improperly re-noticed her stricken posttrial motion and the order striking the motion had not been vacated. In separate filings, Masterlink challenged the motion to vacate on timeliness grounds and responded to the substantive arguments in Smith's motion to reconsider.

¶ 24 During the hearing on December 3, 2015, Smith's counsel argued that although his initial inclination was to refile the motion, he had instead filed a motion to vacate, in light of *Yazzin*. Masterlink's counsel responded, in part, that Smith had "refiled it" outside of the 30-day period following the entry of the order granting summary judgment. Masterlink's counsel also argued that the motion for leave to amend the complaint should fail on the merits. After hearing arguments, the circuit court treated the motion as a motion to reconsider. The circuit court denied the motion, finding that it did not err and that Smith did not raise any new issues. The court also ruled that it "would not allow an amendment to the complaint at this time because it is untimely." A written order entered on December 3, 2015, provided that the motion to vacate, the motion for leave to file an amended complaint, and the motion for reconsideration were denied

for the reasons stated on the record. Smith filed a notice of appeal on December 7, 2015.

¶ 25

ANALYSIS

¶ 26

Appellate Jurisdiction

¶ 27 This court has a duty to consider our jurisdiction before proceeding to the merits of the case. *Won v. Grant Park 2, L.L.C.*, 2013 IL App (1st) 122523, ¶ 5. Prior to submitting briefs in this matter, Masterlink filed a motion to dismiss this appeal for lack of appellate jurisdiction. In an order entered on January 20, 2016, the motion was denied without prejudice. We turn to the jurisdictional arguments raised in the appellate briefs.

¶ 28 Masterlink contends that the appeal must be dismissed for lack of jurisdiction on a number of grounds. First, it asserts that the December 7, 2015, notice of appeal was filed after the 30-day period following the entry of the order granting summary judgment on July 22, 2015. Second, Masterlink argues that the notice of appeal was untimely where there was no timely postjudgment motion pending upon the expiration of the 30-day period following the entry of the summary judgment order. The postjudgment motion had been stricken, and the order striking the motion was never vacated. Furthermore, no postjudgment motion was ever refiled. Third, Masterlink contends that even if the 30-day period commenced on the date the circuit court struck the postjudgment motion, the notice of appeal would have been due on September 21, 2015.

¶ 29 Rule 303(a)(1) of the Illinois Supreme Court Rules provides, in pertinent part:

“The notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from, or, if a timely posttrial motion directed against the judgment is filed, whether in a jury or a nonjury case, within 30 days after the entry of the order disposing of the last

pending postjudgment motion directed against that judgment or order, irrespective of whether the circuit court had entered a series of final orders that were modified pursuant to postjudgment motions.” Ill. S. Ct. R. 303(a)(1) (eff. Jan. 1, 2015).

The timely filing of a notice of appeal is mandatory and jurisdictional. *Won*, 2013 IL App (1st) 122523, ¶ 20. In this instance, the notice of appeal was filed on December 7, 2015 – months after the July 22, 2015, summary judgment order was entered.

¶ 30 Smith filed a motion to reconsider and for leave to file an amended complaint on August 14, 2015, within 30 days of the summary judgment order. Such motion was timely in accordance with section 2-1203(a) of the Code of Civil Procedure (Code). Section 2-1203(a) provides that in non-jury cases, “any party may, within 30 days after the entry of the judgment or within any further time the court may allow within the 30 days or any extensions thereof, file a motion for a rehearing, or a retrial, or modification of the judgment or to vacate the judgment or for other relief.” 735 ILCS 5/2-1203(a) (West 2014).

¶ 31 Smith scheduled his motion for presentment on August 21, 2015, the 30th day after entry of the summary judgment order. The circuit court struck the motion without prejudice on that date. Smith contends that, by striking the motion without prejudice, the order “clearly contemplated” that he would “file another motion vis-à-vis” the motion to reconsider and for leave to file an amended complaint. Masterlink responds, in part, that Smith could have refiled the motion before the end of the day on August 21, 2015, but failed to do so.

¶ 32 The record on appeal does not include a transcript, report of proceedings, or agreed statement of facts (see Ill. S. Ct. R. 323 (eff. Dec. 13, 2005)) pertaining to the August 21, 2015, hearing, therefore, we will not speculate regarding the circuit court’s statements therein. We observe, however, that the “without prejudice” language of the order supports the position that

the circuit court contemplated an additional or refiled motion. See, e.g., *DeLuna v. Treister*, 185 Ill. 2d 565, 576 (1999) (noting that the inclusion of “without prejudice” in an order “signals the circuit court’s intent to allow a plaintiff to refile an action”).

¶ 33 Although Masterlink may be correct that Smith could have refiled the motion in the remaining hours of August 21, 2015, such stance creates a harsh result. If, for example, Smith’s motion to reconsider and for leave to file an amended complaint had been *filed* prior to the expiration of the 30-day period following the summary judgment order but not *heard* until after such period (see Ill. S. Ct. R. 184 (eff. July 1, 1982)), the “stricken without prejudice” language would presumably be read to permit Smith to refile his motion or file an additional motion. The fact that the motion was presented on the last day of the 30-day period should not dictate a different result. Nothing in the Code requires that a hearing be set within 30 days of the entry of the final judgment or order. *Holtz v. Crown*, 357 Ill. App. 3d 994, 999 (2005).

¶ 34 We recognize that a second postjudgment motion, filed after the denial of the first, advancing arguments that were raised or could have been raised in the first motion, does not toll the time for filing a notice of appeal. See, e.g., *Yazzin*, 224 Ill. App. 3d at 290. Accord *Yang v. Chen*, 283 Ill. App. 3d 80, 83 (1996). In this case, however, there was no “denial” or other substantive ruling on the “first” motion – the motion to reconsider and for leave to amend the complaint – until December 3, 2015. Although we acknowledge the important policy concerns, such as efficiency and finality, that underlie the limitations on multiple postjudgment motions (e.g., *Sears v. Sears*, 85 Ill. 2d 253, 259 (1981)), this case does not involve successive motions and does not implicate such concerns.

¶ 35 In sum, the order denying all of the postjudgment motions – the motion to vacate and the motion to reconsider and for leave to amend the complaint – was entered on December 3, 2015,

after briefing and argument. As such order was the final order for purposes of this appeal, the notice of appeal filed on December 7, 2015, was timely.

¶ 36 Summary Judgment Order

¶ 37 Smith contends that the trial court erred in granting summary judgment in favor of Masterlink. Specifically, Smith argues that Masterlink breached the duty of care it owed to Smith. According to Smith, this breach of Masterlink's duty caused his injuries. Masterlink responds that it did not breach any duty to Smith and that Smith cannot establish proximate cause. It also contends that the doctrine of primary implied assumption of risk negates Smith's claims where he voluntarily chose to support the concrete pump hose on his shoulder and then requested that the hose be lowered before his alleged injury occurred. Finally, Masterlink asserts that the grant of summary judgment was proper where the complaint "describes an event that simply did not happen," *i.e.*, the slip and fall, which was denied by Smith during his deposition testimony.

¶ 38 Section 2-1005(b) of the Code provides that a defendant may, at any time, move with or without supporting affidavits for summary judgment in its favor. 735 ILCS 5/2-1005(b) (West 2014). Summary judgment is proper only where the pleadings, admissions, depositions, and affidavits demonstrate that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Melchers v. Total Electric Construction*, 311 Ill. App. 3d 224, 227 (1999). In considering whether summary judgment is proper, we must construe the pleadings, admissions, depositions, and affidavits "most strictly" against the moving party and liberally in favor of the nonmovant. *Id.* Summary judgment is a drastic remedy that should be granted only where the movant's right to it is clear and free from doubt. *Id.* We review an order granting summary judgment *de novo*. *Id.* at 228.

¶ 39 To state a cause of action for negligence, Smith must allege the existence of a duty of care owed by Masterlink to Smith, a breach of that duty, and an injury proximately caused by the breach. See *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 430 (2006). Proximate cause is an essential element of a negligence claim that, if not proven, prevents a plaintiff from establishing a *prima facie* case. *Vertin v. Mau*, 2014 IL App (3d) 130246, ¶ 10. Although proximate cause is generally a question of fact, the lack of proximate cause may be determined by a court as a matter of law where the facts alleged do not sufficiently demonstrate both cause in fact and legal cause. *Young v. Bryco Arms*, 213 Ill. 2d 433, 447 (2004). Accord *Vertin*, 2014 IL App (3d) 130246, ¶ 10. Thus, if a plaintiff fails to establish the element of proximate cause, summary judgment is proper. *Keating v. 68th & Paxton, L.L.C.*, 401 Ill. App. 3d 456, 472 (2010).

¶ 40 The term “proximate cause” encompasses two distinct requirements: cause in fact and legal cause. *Young*, 213 Ill. 2d at 446. The first requirement, cause in fact, is present where there is a reasonable certainty that a defendant’s acts caused the injury or damage. *Id.* Accord *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 455 (1992). In deciding this question, we “first ask whether the injury would have occurred absent the defendant’s conduct.” *Young*, 213 Ill. 2d at 446. In addition, when there are multiple factors that may have combined to cause the injury, “we ask whether defendant’s conduct was a material element and a substantial factor in bringing about the injury.” *Id.* See also *Lee*, 152 Ill. 2d at 455 (providing that “[u]nder the substantial factor test, the defendant’s conduct is a factual cause of the plaintiff’s injury if the conduct was a material element and a substantial factor in bringing about the injury”).

¶ 41 Smith has not demonstrated that any conduct by Masterlink was a material element and a substantial factor in bringing about his injury. Grislack, the FHP foreman, made the decision to pour the wall, even though the hoses were allegedly short of the required length. FHP laborers,

including Smith, attached the additional hoses. Smith chose to hold the hose over his shoulder as he pumped the concrete. Smith directed Bult to lower the hose, and Bult complied. When Smith yelled to Bult to stop the descent of the hoses, Bult again complied. Smith testified that if the pump operator was operating “in the blind” where he could not view the hoseman, then radios should be used for communication. Smith also testified, however, that FHP, and not Masterlink, would provide the radios. FHP thus had the ability to remedy the purportedly “poor” communication with Bult.

¶ 42 “The existence of proximate cause cannot be established by speculation, surmise, or conjecture.” *Majetich v. P.T. Ferro Construction Co.*, 389 Ill. App. 3d 220, 224 (2009). Smith has not described any particular act of Masterlink that actually caused the “tweak” to occur where such “tweak” occurred during an action directed by Smith. Absent evidence that Masterlink proximately caused his injuries, Smith has failed to establish the existence of a genuine issue of material fact. See *id.*

¶ 43 The second requirement of proximate cause, legal cause, is established only if the defendant’s conduct is so closely tied to the plaintiff’s injury that he should be held legally responsible for it. *Young*, 213 Ill. 2d at 446. “The proper inquiry regarding legal cause involves an assessment of foreseeability, in which we ask whether the injury is of a type that a reasonable person would see as a likely result of his conduct.” *Id.* Accord *Lee*, 152 Ill. 2d at 455. In the instant case, Smith’s injury is not of a type that is foreseeable to a reasonable person. Smith had years of experience in concrete pump operations. At the time of his injury, he was not only the hoseman, but also the pusher. He knew how many hoses were dangling. As the hose rested on his shoulder, he was aware that Bult was operating in the blind. Smith was injured when the hose was lowered at his direction. No reasonable person would foresee that an experienced

professional like Smith would position himself in a risky manner or that he would be injured during an action he initiated, directed, and controlled.

¶ 44 Simply put, we find nothing in the record from which it can be inferred that any act or omission of Masterlink could or might have been a proximate cause of Smith's injuries. We may affirm the grant of summary judgment on any basis apparent in the record, regardless of whether the circuit court relied on that basis or whether the circuit court's reasoning was correct. *Harlin v. Sears Roebuck & Co.*, 369 Ill. App. 3d 27, 31-32 (2006). In the instant case, Smith failed to present sufficient evidence to establish proximate cause, and thus summary judgment was appropriate. See *Keating*, 401 Ill. App. 3d at 470-71. We need not consider the remainder of Smith's arguments regarding the grant of summary judgment in Masterlink's favor.

¶ 45 Motion to Reconsider and For Leave to Amend the Complaint

¶ 46 Smith contends that, in granting summary judgment, the circuit court stated that the "slip and fall" allegation in the complaint was not supported by the evidence. According to Smith, the record contains proof of every element of a negligence claim and thus summary judgment was improper. We observe that the record does not include any transcript of the hearing on the motion for summary judgment, and Smith does not cite to any page in the record for his contention. See, e.g., Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) (providing that the argument in an appellant's brief shall include citation of the pages of the record relied on). Even assuming *arguendo* that Smith's representations of the court's statements are accurate, his arguments otherwise fail. No amendment to the complaint was provided to the trial court which cured the lack of any necessary elements to allege proximate cause. As discussed below, the circuit court properly denied Smith's motion for leave to amend the complaint.

¶ 47 Section 2-1005(g) of the Code provides that "[b]efore or after the entry of a summary

judgment, the court shall permit pleadings to be amended upon just and reasonable terms.” 735 ILCS 5/2-1005(g) (West 2014). See also 735 ILCS 5/2-616 (West 2014). In considering whether the circuit court abused its discretion in ruling on a motion to file an amended complaint, we rely on four factors set forth in *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992): (1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified. A plaintiff must meet all four *Loyola* factors. *Hayes Mechanical, Inc. v. First Industrial, L.P.*, 351 Ill. App. 3d 1, 7 (2004).

¶ 48 As to the first *Loyola* factor, the proposed amendment does not cure the defects in the complaint. For example, the revised paragraph in the amended complaint deletes the reference to a slip and fall and instead provides that Smith “was injured while working in the concrete pour area while carrying the aforementioned hoses from [Masterlink’s] concrete pump to the pour area.” This allegation, however, does not comport with Smith’s deposition testimony, *i.e.*, Smith did not testify that he carried hoses from the pump to the pour area. Furthermore, the amended complaint does not remedy the deficiencies regarding proximate cause, as discussed above. Finally, both the original and proposed amended complaints contain other allegations that are inconsistent with Smith’s deposition testimony. For example, there is no indication that Masterlink “linked an excessive number of hoses.” Smith testified that he and/or his FHP colleagues linked the hoses.

¶ 49 The remaining three *Loyola* factors also support the circuit court’s decision to deny the motion to amend. Smith did not attempt to amend the complaint after his deposition in June 2013 – wherein he denied a slip and fall – or in the twenty-six months that followed until the

July 2015 order granting summary judgment to Masterlink. During such period, Smith appears to have ignored Masterlink's repeated argument that the slip-and-fall allegation was unsupported, forfeiting opportunities to correct the defective complaint. His failure to amend the complaint prejudiced Masterlink by, among other things, causing it to incur additional attorney fees.

¶ 50 “Where it is apparent even after amendment that no cause of action can be stated, leave to amend should be denied.” *Hayes Mechanical*, 351 Ill. App. 3d at 7. Such is the case herein. As we conclude that the circuit court properly denied Smith's request for leave to amend his complaint, we need not consider Masterlink's arguments based on statute of limitation grounds.

¶ 51 Smith next contends that the circuit court erred by striking his motion to reconsider. Although Smith contends that the circuit court struck the motion on the basis that he had failed to provide proper notice of the motion, the sole support he cites for this proposition is the August 21, 2015, order. The order, in its entirety, provides: “This matter coming to be heard on Plaintiff's Motion to Reconsider, the Court being fully advised, IT IS ORDERED: The Motion is stricken without prejudice.” As noted above, the record does not include a transcript, report of proceedings, or agreed statement of facts with respect to the hearing. We are unable to assess the merits of Smith's arguments where he has failed to provide an adequate record for our review. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984) (stating that the appellant “has the burden to present a sufficiently complete record” and “doubts which may arise from the incompleteness of the record will be resolved against the appellant”).

¶ 52 Smith's final contention is that the circuit court erred by failing to vacate its order striking his motion to reconsider. Given that the parties briefed and argued the motion to reconsider and the court ruled on the motion, the significance of the denial of the motion to vacate is questionable at best. Furthermore, the circuit court properly denied Smith's motion to

reconsider. The purpose of such motion is to bring to the court's attention newly discovered evidence that was unavailable at the time of the original hearing, changes in existing law, or errors in the court's application of the law. *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 36. As discussed herein, none of the foregoing circumstances was present.

¶ 53

CONCLUSION

¶ 54 For the reasons stated above, the judgment of the circuit court of Cook County is affirmed in its entirety.

¶ 55 Affirmed.