RECENT DEVELOPMENTS IN CONSTRUCTION NEGLIGENCE

An Update Of Complexities in Construction Negligence Litigation (Third Quarter 2003)

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Since our earlier article on construction negligence there have been some developments on the control/duty issue which merit discussion. In that article we pointed out that the current trend of the appellate decisions is in favor of an "operative details" analysis, as opposed to consideration of whether or not the defendant has retained *broad* and *general* authority over the project. The former focuses upon supervision of *how* the work is performed, i.e. manner, means, and methods in the dual contexts of retained authority and the exercise of that authority. The latter turns on the powers which are vested in the owner or contractor with emphasis upon the contract documents. Also implicit in the "mix" is actual knowledge or reason to know of the hazardous condition or unsafe act. The "operative detail" cases are less likely to find the requisite knowledge, which generally attends the details of the work, than those which center on contract language. Where the contract controls the courts are more likely to find "knowledge" from the implication that the retention of a broadly based right to supervise presupposes the obligation to inspect and therefore to know.

The comments to Section 414 of the Restatement (Second) of Torts clearly favor the "operative details" approach. In doing so they condemn the contractual "general control" analysis, stating:

> c. In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

The reason for the Restatement position is self-evident. In the construction industry it is unusual to find an agreement between equals. Construction contracts are prepared "top down" and

contemplate a dominant/servient relationship. The servient party always agrees to accept full control of the project, including the safety of workers on the job. If that language alone controlled the existence of a duty would cease to be multi-factorial. Instead, a duty to supervise the work of downstream contractors for the protection of workers on the site would descend from the owner through the general contractor and thence to every subcontractor on the job.

Three recent cases, two from the First District and one from the Fourth, reflect conceptual differences on this significant issue. In *Shaughnessy v. Skender Construction Co.*, 342 Ill.App.3d 730 (1st Dist., 2003) the court affirmed a summary judgment in favor of the defendant, utilizing the "operative details" approach, and despite the existence of broad contractual empowerments. The opposite result was reached by the Fourth District in *Moss v. Rowe Construction Co.*, 344 Ill.App.3d 772 (2003) where the court literally wedded the questions of control and legal duty to the language of the prime contract. In doing so the court referred to *Shaughnessy,* but felt that the First District had failed to consider the retained powers which were found in the agreement. That set the stage for *Martens v. MCL Construction Corp.*, *et al.*, 2004 WL 369143 (2004). There another division of the First District reaffirmed the rationale of *Shaughnessy* and, in doing so, took the *Moss* court to task. The following juxtaposition of the contractual language in each of these cases, together with a discussion of the divergent reasoning between the Districts demonstrates the theoretical battlefield upon which future litigation in the area will be fought.

<u>JUXTAPOSITION OF CONTRACTUAL PROVISIONS</u>

SHAUGHNESSY	*MOSS*	*MARTENS*
The contract between the racquet club and Skender was a standard form agreement approved by the Associated General Contractors of America. The contract provided that Skender would supervise and direct the work and be responsible for and control the construction means, methods, techniques, sequences and procedures for coordinating all portions of the work, unless the contract provided otherwise. Skender also agreed to be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the contract and to employ a superintendent whose duties included the	Under the general contract between IDOT and Rowe, Rowe was required to maintain control of safety on the project: "Article VIII. Safety: Accident Prevention: 1. In the performance of this contract the contractor shall comply with all applicable [f]ederal, [s]state, and local laws governing safety, health, and sanitation (23 CFR [§] 635). The contractor shall provide all safeguards, safety devices[,] and protective equipment and take any other needed actions as it determines, or as the SHA [State Highway Agency] contracting officer may determine to be reasonably necessary to protect the life and health of employees	Only a few provisions of the general conditions document between the owner and MCL are relevant to the matters raised on appeal. Specifically, MCL was responsible for and had control "over construction means, methods, techniques, sequences and procedure and for coordinating all portions of the Work under the Contract, unless Contract Documents give other specific instructions concerning these matters." MCL required subcontractors to be bound by the terms of the contract documents and to assume toward MCL all the obligations an responsibilities MCL assumed toward the owner and architect. MCL was "responsible for

prevention of accidents.

Guinea acknowledged that, contractually, superintendent Williams had the authority to stop the work if he detected unsafe practices or conditions, but Skender did not employ a safety person for the project.

on the job and the safety of the public and to protect property in connection with the performance of the work covered by the contract.
2. It is a condition of this contract, and shall be made a condition of each subcontract, which the contractor enters into pursuant to this contract, that the contractor and any subcontractor shall not permit any employee, in performance of the contract, to work in surroundings or under conditions which are unsanitary, hazardous[,] or dangerous to his/her health or safety, as determined under construction safety and health standards (29 CFR [§] 1926) promulgated by the Secretary of Labor, in accordance with [s]ection 107 of the Contract Work Hours and Safety .Standards Act (40 U.S.C. [§] 333).
Further, the general contract required:
"The contractor shall furnish (a) a competent superintendent or supervisor who is employed by the firm, has full authority to direct performance of the work in accordance with the contract requirements, and is in charge of all construction operations (regardless of who performs the work) * * *."

initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract." Regarding safety, MCL would give notices and comply with applicable laws, ordinances, rules and regulations bearing on the safety of persons or property or their protection fro damage, injury or loss; erect and maintain, as required by existing conditions and performance of the contract, reasonable safeguards for safety and protection; and designate a member of MCL at the site whose duty was to prevent accidents.

SHAUGHNESSY

In *Shaughnessy* the plaintiff, an employee of a sub-subcontractor, was injured when a wooden board which he had placed to "bridge" an opening broke. Using a construction negligence theory under Section 414 of the Restatement, he sued the general contractor and the steel deck subcontractor, neither of which was present when the accident took place. Nor did either know of the plaintiff's use of the board. Moreover, the plaintiff acknowledged that he received all of his orders from his employer and had no contact with either of the defendants. Nor did either defendant control the "manner by which the plaintiff did his work."

The circuit court granted summary judgment on the control/duty issue. The plaintiff appealed, based largely on the terms of the contract regarding the defendants' retention of control. The appellate court affirmed, holding that there was no evidence that the general contractor, or the subcontractor, either had or exercised control over how the plaintiff or his employer did their work. To the contrary, and in accordance with Section 414, it found that they were free to do that work "in their own way." Addressing the contract, the court found that both the prime and subcontracts merely reflected the reservation of "a general right to stop, start and inspect the progress of the work."

Of equal, if not paramount significance, was the fact that the unsafe practice, i.e. placing and walking on the board, was transient and created by the plaintiff. Consequently, neither defendant knew or had reason to know of its existence. That basis for the holding emphasizes recognition that a *negligence theory is involved*. Liability is *not* strict. Rather, even assuming the existence of a duty borne of control, a plaintiff must still prove that the defendant knew or had reason to know of the dangerous condition or practice. This is in contradistinction to the Structural Work Act in which the question was whether the defendant, "having charge of the work," *could* have discovered the violation; not whether it *should* have been aware of it. Thus, the *Shaughnessy* court emphasizes:

> . . . Moreover, no one from Skender or Garbe saw plaintiff engage in the unsafe practice that led to his injury or even had notice that the plaintiff intended to engage in such conduct. Plaintiff, who was injured on his first day at the job site, admitted that he was only on the board for a "fraction of a second" before the board broke and that only his co-worker was in the area. . .
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> . . . Moreover, there was no evidence that Skender or Garbe knew or had notice of the hazardous method the plaintiff employed to descend into the basement. (*Shaughnessy*, 342 Ill.App.3d at 739-41).

See also *Kotecki v. Walsh Construction Co.*, 333 Ill.App.3d 583, 588-89 (2002) and *Rangel v. Brookhaven Constructors, Inc.*, 307 Ill.App.3d 835, 839 (1999).[1]

<u>MOSS</u>

The Fourth District in *Moss* eschewed the multi-factorial approach in favor of a doctrinal analysis which started and ended with the language of the contracts. There the decedent was employed by the electrical subcontractor on the job, Laesch Electric, Inc. Laesch had a subcontract with the defendant, Rowe Construction. Rowe was working under an agreement with

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[1] It should be noted that *Shaughnessy* recognizes a linkage between continuous and pervasive control which would be sufficient to give rise to a duty and a likelihood that the defendant would know of the unsafe practice. *See* 342 Ill.App.3d 730 at 739-40.

the Illinois Department of Transportation. That prime contract obligated Rowe to comply with all safety laws and regulations. In addition, Rowe was to have a safety representative on the project who was to be "in charge of all operations." The decedent was killed when a derrick which his employer was using to load concrete foundations overturned crushing him.

There was no evidence that Rowe had anything to do with that operation. Nor was there any indication that Laesch was not free to lift the foundations as it saw fit. Consequently, the trial court entered summary judgment in favor of the defendant.

Not only did the Fourth District reverse, its reliance on the contract to create a duty overwhelmed the traditional factors that usually control the analysis. In addressing those "traditional factors" Justice Myerscough specifically disavowed the "operative details" approach in favor of using "contractual terms as the foundation of section 414 liability stating:

> In granting summary judgment in the present case, the trial court reasoned as follows:
> "'[R]etain control' means the contractual language and/or practices of the contractor/sub[ ]contractor must demonstrate control by the general contractor over the means and methods of performance by the sub-contractor of the job which leads to the injury. Here the contractual language does not specifically address supervision of the means or methods of the sub[ ]contractors removing concrete structures; the work that led to the death of plaintiff decedent."
> However, this is not the appropriate question. The issue is not control of the "means and methods" of performing the task, but rather who contractually and/or physically has the duty to control safety of the project. First, the contractual language must be reviewed to determine what terms address the duty to control for safety. The facts must then be reviewed to determine whether the duty was physically fulfilled under the contract.
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> and
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> In the face of this contractual duty to control safety, the trial court erred in considering whether the general contractor retained control over the means and methods over the performance of the job of removing the concrete structures and not the contract language. The law requires the trial court to review the contractual language regarding the general contractor's duty to maintain safety of workers.

As is evident from the preceding language, the Fourth District believes that the issues of duty and breach can both be resolved from the terms of the prime and subcontracts. Control/duty derives from what the contractor or subcontractor is contractually bound to do in the area of

accident prevention. Breach is measured by the quality of the defendants' performance of those undertakings. Implicit in the analysis is the recognition that an affirmative, albeit platitudinous, covenant to provide a safe work place or program, carries with it the obligation to do so and *ergo* the duty to inspect and discover. Lost in the rationale is the legal fact that the cause of action is based upon negligence and therefore turns upon what the defendant knew or reasonably should have known.

The *Moss* court paid lip service to the First District's reasoning in *Shaughnessy*. It chose not to *directly* criticize the multi-factorial basis for that decision. Instead, it elected to distinguish its opinion from that in *Shaughnessy* by finding that the First District had failed to properly consider the underlying contracts. As it is significant to the discussion of *Martens v. MCL Construction Corp.*, 2004 WL 369143 (2004) which follows, the *Moss* court's treatment of S*haughnessy* is set forth below:

> . . . In *Shaughnessy v. Skender Construction Co.*, 342 Ill.App.3d 730, 276 Ill.Dec. 687, 794 N.E.2d 937 (2003), the court *disregarded contract language* requiring the general contractor to be "responsible for initiating, maintaining[,] and supervising all safety precautions and programs. In connection with the performance of the contract and to employ a superintendent whose duties included the prevention of accidents." *Shaughnessy*, 342 Ill.App.3d at 732-33, 276 Ill.Dec. 687, 794 N.E.2d at 938. We cannot ignore the contract. To do so, here, would make the contractual obligations for safety a meaningless nullity, especially in light of the deposition testimony here. (Italics supplied).

MARTENS

Predictably, the preceding critique brought a response from the First District. In *Martens v. MCL Construction Corp.*, 2004 WL 369143 (February 27, 2004) another division of that court considered the control/duty question in the context of the conflicting viewpoints of *Shaughnessy* and *Moss*. There, the defendants were the construction manager, MCL, and the steel fabrication subcontractor, Shelco. Shelco subcontracted the steel erection work to the plaintiff's employer. The plaintiff was injured when he fell from a steel beam while engaged in the process of landing, positioning, and connecting steel bar joists to the beams. The plaintiff was not "tied off" and the cause of action under Section 414 was based upon the defendants' failure to provide adequate fall protection.

Despite contractual provisions which made the construction manager responsible for: (1) construction means, methods, techniques, sequences, and procedures, and (2) initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the Contract, MCL was not directly involved in the operative details of the steel erection contractor's work. Moreover, the testimony of that subcontractor's supervisors, and other parties, consistently disclaimed interference with the means and methods of plaintiff's work.

Consequently, the battle lines were clearly drawn between the *Shaughnessy* and *Moss* approaches.

The *Martens* court elected the former. In so doing it responded to the Fourth District's criticism of *Shaughnessy* in kind. First, it pointed out that the former did not disregard the pertinent contract language. To the contrary, it found that the *Shaughnessy* court specifically considered the agreement and noted an absence of facts which indicated that ". . . defendants failed to comply with those contractual responsibilities." Elaborating on that point, the *Martens* opinion further recognizes that the *Shaughnessy* defendants' general rights to monitor and supervise did not entail "extensive supervision and monitoring" to the point where they "*knew the worker created the unsafe condition that led to his injury."* Of greater significance, the *Martens* specifically condemned the contractual analysis which underpins the *Moss* decision. In doing so it recognized that the caveats which are found in the comments to Section 414 would be vitiated by a simplistic approach in which control/duty is defined by contract, and breach is measured in the context of performance. In that regard it concurred with the multi-factorial analysis of *Shaughnessy* stating:

> In *Shaughnessy v. Skender Construction Co.*, 342 Ill.App.3d 730, 738 (2003), the court reviewed similar contract language and determined such a general statement of control between the owner and the general contractor did not mean that the independent contractor was controlled as to his methods of work or as to operative detail. We agree with the *Shaughnessy* court; *if such general contract language alone was sufficient to subject a general contractor to liability under section 414, then the distinction in comment c to section 414 between retained control versus a general right of control would be rendered meaningless.* (Italics supplied).

CONCLUSION

The opinions in *Shaughnessy*, *Moss* and *Martens* can neither be synthesized nor reconciled. Clearly, the Fourth District believes that the stock adhesion language which appears in virtually all downstream construction contracts, albeit general, is sufficient to impose a duty under Section 414. Moreover, the breach of that duty can then be measured by the defendants' compliance with its covenants under the agreement. Conversely, the First District in *Shaughnessy* and *Martens* defines control by the authority which a contractor *has and exercises* over the operative details of the work which the plaintiff was performing, particularly as they bear upon the safety of that work. In that context the negligence underpinnings of Section 414 are preserved, as the defendant's conduct is evaluated based upon what it knew or should have known, as opposed to what it could or was obligated to learn in the performance of its contract.

Ultimately the supreme court will have to chose between these divergent approaches. However, the author submits that adoption of the *Moss* analysis would come close to creating a comparative fault version of the Structural Work Act.