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**CONTINUING DEVELOPMENTS
IN CONSTRUCTION NEGLIGENCE**

A Further Update of Complexities in Construction Negligence Litigation

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This series started with COMPLEXITIES IN CONSTRUCTION NEGLIGENCE LITIGATION (*IDC Quarterly*, vol. 13, no. 3, p. 8). That survey was followed by RECENT DEVELOPMENTS IN CONSTRUCTION NEGLIGENCE (*IDC Quarterly*, vol. 14, no. 2) and PREMISES LIABILITY EXPOSURE IN CONSTRUCTION INJURY CASES (*IDC Quarterly*, vol. 15, no. 1). These articles discussed how the intermediate appellate courts have treated construction negligence and emphasized that the Illinois Supreme Court has yet to tackle the issue. That is still the case. The following discussion continues the analysis to the present time by focusing upon significant intervening decisions of the Illinois Appellate Courts, First, Second and Third Districts, as well as the Seventh Circuit Court of Appeals. Unfortunately, as before, it is practically impossible to synthesize opinions and reasoning which are both diverse and divergent.

As discussed in the preceding articles, construction negligence, while it coexisted with the Structural Work Act (*Larson v. Commonwealth Edison Co.*, 33 Ill. 2d 316, 325, 211 N.E.2d 247 (1965)), has come into its own following repeal of that statute in 1995 (PA 89-2). The Structural Work Act created a duty, and therefore directed potential liability, to “persons having charge of the [work].” 740 ILCS 150/9 (West 1994) (repealed by Pub. Act 89-2, § 5, eff. Feb. 14, 1995). The common law doctrine of construction negligence arises under Section 414 of the Restatement (Second) of Torts. The concept of duty under that section focuses upon a party who has “control” of a relevant “part of the work.” Comment c to section 414 provides in that respect:

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.

Since 1995, the appellate courts of each district have attempted to identify the elements of “control” under Section 414 which are sufficient to obligate one party in a contractual chain for injuries suffered by an employee of an independent contractor. In COMPLEXITIES IN CONSTRUCTION NEGLIGENCE LITIGATION we saw *inter alia* a conceptual difference of

opinion between the cases which define “control” under Section 414 in the context of the manner, means and methods used by the independent contractor in the performance of its work (*Fris v. Personal Products Co.*, 255 Ill. App. 3d 916, 923-25, 627 N.E.2d 1265 (3rd Dist. 1994), and *Bieruta v. Klein Creek Corp.*, 331 Ill. App. 3d 269, 274-79, 770 N.E.2d 1175 (2nd Dist. 2002), and those which target liability upon the retention of general supervisory powers. *Bokodi v. Foster Wheeler Robbins, Inc.*, 312 Ill. App. 3d 1051, 1061-63, 728 N.E.2d 726 (1st Dist. 2000). RECENT DEVELOPMENTS IN CONSTRUCTION NEGLIGENCE emphasized the trend away from overall control and toward an “operative details” analysis, particularly in the Illinois Appellate Court First District. *Shaughnessy v. Skender Constr. Co.*, 342 Ill. App. 3d 730, 794 N.E.2d 937 (1st Dist. 2003), and *Martens v. MCL Constr. Corp.*, 347 Ill. App. 3d 303, 807 N.E.2d 480 (1st Dist. 2004).

That article also focused upon the different treatment accorded by the First District in *Shaughnessy* and *Martens*, *supra*, and the Fourth District in *Moss v. Rowe Constr.*, 344 Ill. App. 3d 772, 801 N.E.2d 612 (4th Dist. 2003), on the issue of defining “control” by the terms of the general contract between the owner and the defendant. In *Moss*, the Fourth District favored an analysis which started and ended with the contractual obligations which were imposed upon the defendant/general contractor. There, the court preferred to define “control” in terms of the safety obligations which were assumed by the general contractor in contradistinction to the actual exercise of authority over the “means and methods” by which the subcontractor performed its work. In *Moss*, the Fourth District criticized the multi-factoral approach which was used by the First District in *Shaughnessy*. Thereafter the First District reciprocated in *Martens*, stating at 347 Ill. App. 3d 316:

In *Shaughnessy v. Skender Constr. Co.*, 342 Ill. App. 3d 730, 738, 276 Ill.Dec. 687, 794 N.E.2d 937 (4th Dist. 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.

Shaughnessy, *supra* and *Martens*, *supra*, also recognized that Section 414 measures the exposure of a defendant in the setting of what the contractor knew or “by the exercise of reasonable care should have known” about the hazardous condition which actually caused the plaintiff’s injury. In *Shaughnessy* the court held that even assuming there was sufficient control to impose a duty, the defendant neither knew nor had reason to know of the transient condition which caused the injury. The same was true in *Martens* where the court found that neither the construction manager nor the steel fabrication contractor had reason to anticipate that the plaintiff would fall from a steel beam while engaged in the process of landing, positioning and connecting steel bar joists to the beams without “tying off.”

The following update considers pertinent construction negligence authorities which have been decided after *Shaughnessy*, *Moss* and *Martens*. These cases show a solidifying evolution toward defining “control” in the context of a defendant’s actual exertion of authority over the manner, means and methods by which an independent contractor performs its work. However,

they are by no means uniform in that respect. Nor should the influence of the prime contract between the owner and the defendant/general contractor or the impact of the subcontract between the general contractor and the independent subcontractor be overlooked.

Conceptual Considerations

Vicarious Liability vs. Negligence

Two recent cases discuss Section 414 in the context of direct liability, as opposed to vicarious liability. Both consider the term “operative detail” as it is used in comments a and c of that section. As discussed above, and in the preceding three articles, “control” has generally been defined in the context of the authority of the defendant over the independent contractor’s “methods of work” or the “operative detail” of that work. In the context of construction negligence those terms are customarily used interchangeably and refer to the general contractor’s: (1) contractual right to tell a subcontractor how to do its work or (2) the exercise of that authority on the job. *Shaughnessy v. Skender Constr. Co.*, *supra* and *Martens v. MCL Constr. Corp.*, *supra*.

Cochran v. Sollitt Constr. Co., 358 Ill. App. 3d 865, 832 N.E.2d 355 (1st Dist. 2005) and *Aguirre v. Turner Constr. Co.*, 501 F.3d 825 (7th Cir. 2007) both hold that Section 414 has alternative implications, both of which are triggered by the term “operative detail.” In *Cochrane*, the plaintiff, an employee of the HVAC subcontractor, was working on overhead ductwork when he fell from a ladder which was positioned on a plywood board that was resting on two milk crates. He sued the general contractor on premises liability and construction negligence theories. Regarding the latter, he claimed that the general contractor had “control” over the work by virtue of the prime contract with the owner which made Sollitt solely responsible for safety on the job, including compliance with all applicable state and federal laws and regulations. Using that language, the plaintiff relied upon *Moss v. Rowe Constr. Co.*, 344 Ill. App. 3d 772, 801 N.E.2d 612 (4th Dist. 2003), to contend that Sollitt had “control,” even though it was never exercised and even though the subcontract delegated that responsibility to the plaintiff’s employer.

As it did in *Martens*, *supra*, the court held that the concept of “retained control” involved numerous factors; only one of which was the contract between the owner and the general contractor. In discussing the proper analysis, it held that Section 414 poses two possible theories for liability. The first is mentioned in comment *a* when the “operative detail” which is retained by the defendant is so extensive that the law of agency applies and the independent contractor is therefore viewed as the agent of the general contractor. Alternatively, Section 414 deals with “direct liability” in which the level of control is not so comprehensive as to establish vicarious liability but is sufficiently extensive to give rise to the duty on the part of the general contractor to exercise reasonable care for the safety of the independent contractor’s employees.

The *Cochran* court then recognizes that the following factors are significant in determining whether the degree of retaining control is sufficient to require reasonable care in its exercise:

- (1) the language of the prime contract, particularly as it relates to safety on the job;
- (2) the general contractor’s active implementation and enforcement of safety procedures on the job, including:
 - (a) the presence of a full-time safety manager;

- (b) conducting safety meetings;
- (c) inspection for safety violations, and
- (d) enforcement of safety measures.

All of these indicia of control go to the requirement in comment c that “. . . the contractor is not entirely free to do the work in his own way.”

The decision in *Cochran* is also significant for its recognition that the existence of a duty only obligates the general contractor to act where he has actual or implied knowledge of the hazard. Thus, the court holds:

According to comment *b* to section 414, the general contractor’s knowledge, actual or constructive, of the unsafe work methods or a dangerous condition is a pre-condition to direct liability.

Cochran, 358 Ill. App. 3d at 879-80, 832 N.E.2d at 366. As in *Shaughnessy* and *Martens*, summary judgment was affirmed in *Cochran* because the general contractor neither knew nor had reason to know of the transient risk which was created by the plaintiff. In other words, while control may load the gun, the application of standard negligence principles is required to pull the trigger.

The Court of Appeals, Seventh Circuit in *Aguirre v. Turner Constr. Co.*, 501 F.3d 825, 829-30 (7th Cir. 2007), likewise recognized the dichotomy in Section 414 between vicarious and direct liability. In doing so it held that comment a specifically indicates that the duty which that section contemplates starts where the law of agency ends. Thus, Section 414 applies to instances where retained control exists but is less than that which makes the general contractor derivatively liable for the subcontractor’s negligence. In reversing summary judgment in favor of the general contractor, the court focused upon the extensive on-site safety program which the general contractor imposed upon the plaintiff’s employer. The court further held that the enforcement by the general contractor of its safety standards at the worksite overrode the subcontractor’s contractual acceptance of responsibility. In that regard it found:

. . . The contractual assignment of oversight of employee safety to [the subcontractor/employer] does not control here for the same reason it did not in *Bokodi*, *i.e.*, because [the general contractor/employer’s] extensive safety oversight and requirements affected the means and methods by which [the subcontractor/employer] sought to ensure the safety of its own employees.

Aguirre v. Turner Constr. Co., 501 F.3d 825, 831 (7th Cir. 2007). *Aguirre*, *supra*, is also significant for its recognition that the plaintiff could skirt the “reasonable care” requirement by relying upon *res ipsa loquitur*. This is a unique approach in construction negligence cases where the dominant issue is “control” of the work. Despite remanding for consideration of that issue, the *Aguirre* court held that the retention of “. . . some control over both the design and construction of A.L.L.’s scaffolding. . .” permitted the presumption that the general contractor failed to exercise reasonable care, even though substantial control was also vested in and exercised by the independent contractor/employer.

Use of Construction Contracts

Consideration of Both Prime and Subcontracts

In *Moss v. Rowe Constr. Co.*, 344 Ill. App. 3d 772, 801 N.E.2d 612 (4th Dist. 2003) the issue of control turned on the general contractor's acceptance of responsibility under its prime contract with the Illinois Department of Transportation. The Illinois Appellate Court, First District in *Martens v. MCL Constr. Corp.*, 347 Ill. App. 3d 303, 807 N.E.2d 480 (1st Dist. 2004) repudiated that approach. Thereafter, in *Cochran v. Sollitt Constr. Co.*, 358 Ill. App. 3d 865, 832 N.E.2d 355 (1st Dist. 2005) the appellate court attempted to reconcile the two. In so doing it held that the language of the prime contract is one of the factors to consider in a multi-factorial analysis of the retention of control for the purposes of applying Section 414. In *Moorehead v. Mustang Constr. Co.*, 354 Ill. App. 3d 456, 821 N.E.2d 458 (3rd Dist. 2004) the court considered both the prime contract by which the general contractor agreed to ". . . be fully and solely responsible for the job site safety" and the subcontract pursuant to which the plaintiff's employer expressly assumed those obligations. In reversing summary judgment in favor of the general contractor, the *Moorehead* court also found that the defendant's project manager and safety director were present on the site every day and had observed the hazardous condition of the extension ladder upon which the plaintiff was working at the time that he fell.

In *Moiseyev v. Rot's Bldg. & Dev., Inc.*, 369 Ill. App. 3d 338, 860 N.E.2d 1128 (3rd Dist. 2006) the plaintiff, an employee of a subcontractor, OSI Construction, fell from a scaffold on a residential construction site. He sued the general contractor, Rot's Building & Development (RBD), and Rot, individually, on a construction negligence theory under Section 414. There was no formal written contract between RBD and OSI. Nor, contrary to the circumstances in *Moorehead*, did the defendant exert any supervision or authority over the incidental aspects of the work by the subcontractor. In its analysis, the *Moiseyev* court clearly adopted the "operative detail" approach of *Fris v. Personal Products Co.*, 255 Ill. App. 3d 916, 923-25, 627 N.E.2d 1265 (3rd Dist. 1994) in preference to the general ability to stop the work rationale of its subsequent decision in *Brooks v. Midwest Grain Products Co.*, 311 Ill. App. 3d 871, 874-85, 726 N.E.2d 153 (3rd Dist. 2000). The court also emphasized the corollary proposition that for liability to attach, even assuming sufficient control to give rise to a duty, the defendant must have actual or constructive knowledge of the hazardous condition.

In *Downs v. Steel and Craft Builders, Inc.*, 358 Ill. App. 3d 201, 831 N.E.2d 92 (2nd Dist. 2005) the Illinois Appellate Court, Second District prioritized the subcontract between the general contractor and the subcontractor in its multi-factorial analysis stating:

The best indicator of whether a contractor has retained control over the subcontractor's work is the party's contract, if one exists. The interpretation of a contract is a question of law and therefore may be decided on a motion for summary judgment.

Downs, 358 Ill. App. 3d at 205, 831 N.E.2d at 98. There the plaintiff, an employee of P&M Water & Sewer, Inc. (P&M) was injured when a trench in which he was working collapsed. He sued Steel and Craft Builders, the general contractor, on a negligence theory under Section 414 of the Restatement. The contract between Steel and Craft and P&M specifically obligated the subcontractor to comply with OSHA and the Construction Safety Act of 1960, and held the general contractor harmless against any injuries arising out of the work of P&M. The plaintiff

contended that in accordance with an interpretation of the New Jersey Court of Appeals .” . . . OSHA regulations impose a nondelegable duty on general contractors to maintain safe job sites.” *Kane v. Hartz Mountain Indus., Inc.*, 278 N.J.Super. 129, 142-43, 650 A.2d 808, 814 (N.J. Super. Ct. App. Div. 1994). The *Downs* court declined to follow that reasoning. Instead, it affirmed summary judgment in favor of Steel and Craft Builders based upon: (1) the provisions of the subcontract; (2) the absence of any control by the general contractor over the “means, methods and techniques of the excavation,” and (3) the absence of any evidence that the defendant knew or had notice of the hazardous condition. *Downs v. Steel and Craft Builders, Inc., supra*.

The Second District subsequently took its reasoning in *Downs v. Steel and Craft Builders, Inc., supra*, one step further. In *Joyce v. Mastri*, 371 Ill. App. 3d 64, 861 N.E.2d 1102 (2nd Dist. 2007) the plaintiff fell from a ladder on a construction site at the United States Army Reserve Base in Arlington Heights, Illinois. Addison Services was the general contractor and the plaintiff was employed by Elk Grove Mechanical, Inc. (EGM), a demolition subcontractor. The prime contract between Madison Services and the United States Government obligated the general contractor to comply with applicable safety standards, including OSHA and its accompanying regulations. The subcontract between Madison and EGM obligated the subcontractor to: (1) be mutually bound to the provisions of the prime contractor and (2) comply with all applicable laws, ordinances, rules and regulations. In addition the subcontract obligated EGM to indemnify and hold Madison harmless against any loss or expense which was attributable to “bodily injury” as a consequence of EGM’s negligence.

The plaintiff, *inter alia*, argued that the general contract between Madison and the United States Government imposed a nondelegable duty upon the general contractor to comply with OSHA and its regulations. As a consequence, Joyce contended that Madison owed a direct duty of care under Section 414. As in *Downs*, the Second District rejected that contention. It did so on two grounds. First, it adopted its reasoning in *Downs*, stating:

In that case, the court determined that the defendant general contractor could not be held liable under plaintiff’s section 414 claim, as governed by Illinois law. Therefore, liability would have resulted only from affecting the defendant’s right to contract away private liability for injuries, or from enlarging defendant’s liabilities to plaintiff under section 414 by declaring that, via OSHA, defendant retained control of the independent contractor’s work. This court explained that “[d]oing so would create an exception that would swallow the rule, because no matter what steps defendant would take to shield itself from liability, the OSHA inevitably would pierce defendant’s armor, striking a fatal blow that otherwise would be blocked under the theories advanced by plaintiff.” *Downs*, 358 Ill. App. 3d at 209, 294 Ill.Dec. 569, 831 N.E.2d 92. We find no reason to depart from our previous determination that a nondelegable duty does not arise under OSHA, because OSHA creates only a governmental program to enforce compliance and does not deal with the assignment of liability among contractors.

Joyce, 371 Ill. App. 3d at 76-77, 861 N.E.2d at 1112. Second, the court found no reason why the safety provision could not be delegated to the subcontractor. In that regard it held:

Contrary to plaintiff’s assertion, nothing in these provisions prohibited Madison Services from delegating its duty to maintain safety at the work site to its

subcontractor, EGM. Plaintiff cites no authority for its argument that Madison Services was prohibited from delegating its safety responsibilities because the project was federally funded and on federal property. As previously discussed, Madison Services, through its contract with EGM, contractually and actually removed itself from the incidental aspects of the construction and safety work performed by EGM. Accordingly, we conclude that summary judgment was appropriate on plaintiff's section 414 claim.

Joyce, 371 Ill. App. 3d at 78-79, 861 N.E.2d at 1113. As in *Downs* and the other authorities *supra*, the court also found that summary judgment for a general contractor is appropriate where the defendant neither maintains nor exercises control over the incidental aspects of the subcontractor's work.

CONCLUSION

The thicket of decisions following *Shaughnessy v. Skender Constr. Co.*, 342 Ill. App. 3d 730, 794 N.E.2d 937 (1st Dist. 2003) and *Martens v. MCL Constr. Corp.*, 347 Ill. App. 3d 303, 807 N.E.2d 480 (1st Dist. 2004), indicates that the intermediate appellate courts are consistently applying a multi-factorial approach which focuses upon the general contractor's control over "the operative details" of the subcontractor's work. The safety of that performance is increasingly emphasized. However, the general contractor's adoption and enforcement of its own safety program is generally subordinated to the subcontractor's contractual agreement to be responsible for the safety of its employees. Even in cases where the "factors" otherwise favor control on the part of the general contractor, courts will not impose liability absent actual or constructive knowledge of the hazardous condition.