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ILLINOIS LAW MANUAL

CHAPTER V - PREMISES LIABILITY

H. CONSTRUCTION NEGLIGENCE

1. Introduction

With the repeal of the Structural Work Act in 1995, a general contractor's liability for injury to an independent subcontractor's employee at a work site is now based on common law negligence theories. Rangel v. Brookhaven Constructors, Inc., 307 Ill. App. 3d 835 (1999); Schaugnessy v. Skender Construction Co., 342 Ill. App. 3d 730 (2003). Under common law negligence principles, the essential elements of a cause of action are "the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by that breach." Ward v. Kmart Corp., 136 Ill. 2d 132 (1990); Radtke v. Schal-Bovis, Inc., 328 Ill. App. 3d 51 (2002). As discussed below, the courts' main focus in construction negligence cases has been on the issue of "control" under Restatement Second Section 414 with theories of "vicarious liability" and "direct liability." Additionally, the Courts have allowed "premises" theories to proceed in construction cases under Restatement Second Sections 343 and 343A.

2. Duty

In any negligence action, the plaintiff must present sufficient evidence to show that the defendant owed a duty to the plaintiff. Radtke v. Schal-Bovis, Inc., 328 Ill. App. 3d 51 (2002). Whether a duty exists is a question of law that must be decided by

the court. Schoenbeck v. DuPage Water Comm'n., 240 Ill. App. 3d 1045 (1993).

Restatement Second Section 414 **"Vicarious Liability" Analysis**

Generally, a general contractor is not liable for the acts or omissions of an independent contractor hired by the general. Schaugnessy, 342 Ill. App. 3d at 736. However, Section 414 of the Restatement (Second) of Torts, adopted by Illinois courts, provides an exception to the general rule. Schaugnessy, 342 Ill. App. 3d at 370; see also Larson v. Commonwealth Edison Co., 33 Ill.2d 316 (1965).

Section 414 of the Restatement (Second) of Torts states:

One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

The "retained control" concept is explored in comment (c) of Section 414. Comment (c) states:

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 retention of a right of supervision that the contractor is not entirely free to do the work in his own way.** (Emphasis added)

Restatement (Second) of Torts Section 414, comment (c), at 388 (1965).

A reading of the cases which have applied Section 414 establishes that the authority to stop the work for safety reasons is the most important factor courts consider when determining whether a defendant has retained the requisite degree of control necessary to impose liability. In addition to the Schaugnessy case cited above, the following cases also appear to hold that retaining authority to stop the work for safety reasons is a sufficient retention of control to impose liability:

- Tsourmas v. Dineff, 161 Ill. App. 3d 897 (1987)
- Haberer v. Village of Sauget, 158 Ill. App. 3d 313 (1987)
- Ryan v. Mobil Oil Corporation, 157 Ill. App. 3d 1069 (1987)
- Schoenbeck v. DuPage Water Commission, 240 Ill. App. 3d 1045 (1993).

In Bokodi v. Foster Wheeler Robbins, Inc., 312 Ill. App. 3d 1051 (2000), despite the defendants' statement in the agreement that the subcontractors were to be in control

of their work, the court found that the general contractor controlled the work and that the defendants went to great lengths to control the safety standards.

Several cases which have analyzed construction contracts in light of Section 414 have found that the owner or employer did not retain sufficient control for purposes of imposing liability. For example, in Schoenbeck v. DuPage Water Commission, 240 Ill. App. 3d 1045 (1993), the court found that there was no employer-independent contractor relationship. Without that relationship, Section 414 did not apply. In Fris v. Personal Products Company, 255 Ill. App. 3d 916 (1994), the court found that, even though the owner was acting as its own general contractor, it did not retain sufficient control over the "operative" details of the plaintiff's employer's work to impose liability. The court in Conroy v. Sherwin Williams Company, 168 Ill. App. 3d 333 (1988), found that an owner (Sherwin Williams) retained control over the work and the authority to direct the overall work. The general contractor (Phillips), who had hired the independent contractor (Conroy), had not retained sufficient control over the work for Phillips to be found liable. Furthermore, the court found that, at the time of Conroy's injury, he was performing work for Sherwin Williams as opposed to the general contractor, Phillips.

In a ground-breaking First District case, the subcontract agreement stated:

The General Contractor shall have the right to exercise complete supervision and control over the work to be done by the Subcontractor, but such supervision and control shall not in any way limit the obligations of the Subcontractor.

Rangel v. Brookhaven Constructors, Inc., 307 Ill. App. 3d 835 (1999).

The court held that the general's reservation of the right of supervision was a general right and did not refer, directly or

indirectly, to a right to manage the job. Id. The evidence showed that the general had not directed the “operative details” of the work performed. The subcontractor supplied the scaffold on which the plaintiff had been injured, and instructed the plaintiff to utilize the braces of the scaffold in an unsafe manner. Further, the unsafe method of performing the work was proposed just hours before the injury, and there was no evidence to suggest that the general knew or should have known of the unsafe method. Therefore, the court found that the general did not owe a duty to the plaintiff, an employee of the subcontractor, and summary judgment was granted. Id.

Defendants should focus on comment (c) of Section 414 of the Restatement in defending construction site accident cases. Evidence should be elicited from witnesses that the owner, general contractor, or architect could not direct the plaintiff's employer in the means and methods of his work. It can be argued that the lack of authority to control the means and methods of doing the work is evidence of insufficient control to impose liability, especially in light of the case law developed in past years, including Bieruta v. Klein Creek Corp., 331 Ill. App. 3d 269 (2002), Kotecki v. Walsh Construction, 333 Ill. App. 3d. 583 (2002), Ross v. Dae Julie, Inc., 341 Ill. App. 3d (2003), Shaugnessy v. Skender Construction Co., 342 Ill. App. 3d 370 (2003), Martens v. MCL Constr. Corp., 347 Ill. App. 3d 303 (2004), Cochran v. George Sollitt Constr. Co., 358 Ill. App. 3d 865 (2005), Aquirre v. Turner Constr. Co., 2006 U.S. Dist. LEXIS 9816 (2006), and Pestka v. Town of Fort Sheridan Co., LLC, 2007 Ill. App. LEXIS 33 (January 22, 2007, decided).

The Martens’ decision clearly points to the fact that the trend is tending toward less liability for architects, owners, general contractors and co-subcontractors who do not control the “operative details” of the injured employee's work. As the Martens’ Court states, “the party who retains control is the logical party upon whom to impose a duty to ensure worker’s safety. Penalizing a

general contractor's efforts to promote safety and coordinate a general safety program among various independent contractors at a large jobsite hardly serves to advance the goal of worksite safety.” Martens, Id. at 312. See also, Downs v. Steel and Craft Builders, Inc., 385 Ill. App. 3d 201, 831 N.E.2d 92 (2nd Dist. 2005) (summary judgment in favor of general contractor appropriate where independent contractor contractually responsible for jobsite safety and general contractor takes no active role in ensuring safety, or where the general contractor reserves the general right of supervision over the independent contractor but does not retain control over incidental aspects of the independent contractor's work).

Restatement 414(b) **“Direct Negligence” Analysis**

In Moorehead v. Mustang Constr. Co., 345 Ill. App. 3d 456, 821 N.E.2d 358 (3rd Dist. 2004), the Third District reversed a grant of summary judgment for a general contractor who agreed in its contract to be “fully and solely responsible for the jobsite safety” of the means, methods and techniques of construction, agreed to provide a safety director and could stop the work for safety reasons. The evidence showed that plaintiff had been using an extension ladder without proper feet and not blocked on its base for several weeks before the accident, and that the safety director had noticed same prior to the occurrence. The court referenced the language of Restatement Second of Torts, Section 414 comment (b), previously not addressed specifically by other appellate decisions. Restatement 414(b) states:

The rule stated in this Section is usually, though not exclusively, applicable when a principal contractor entrusts a part of the work to subcontractors, but himself or through a foreman superintends the entire job. In such a situation, the principal contractor is subject to liability if he fails to prevent the subcontractors from doing even the

details of the work in a way unreasonably dangerous to others, if *he knows or by the exercise of reasonable care should know that the subcontractors' work is being so done, and has the opportunity to prevent it by exercising the power of control which he has retained in himself.* So too, he is subject to liability if he knows or should know that the subcontractors have carelessly done their work in such a way as to create a dangerous condition, and fails to exercise reasonable care either to remedy it himself or by the exercise of his control cause the subcontractor to do so.

Restatement (Second) of Torts 414, comment (b) (Emphasis added).

Here, because the general contractor knew of the dangerous condition/unsafe work practice involving the ladder before the accident, the court found the existence of a duty under 414 such to defeat a motion for summary judgment.

Thus, just when it seemed that the Appellate Court had clarified the competing interpretations of Restatement 414 in the decision of Martens v. MCL Construction Corp., 347 Ill. App. 3d 303 (1st Dist. 2004), the confusion began again with the Third District's decision in Moorhead, *infra*, and the First District decision of Cochran v. George Sollitt Construction Co., 358 Ill. App. 3d 865, 832 N.E.2d 355 (1st Dist. 2005). In Cochran, while the First District affirmed summary judgment in favor of a general contractor, it seemed to carve out a niche for "direct negligence" actions under Restatement 414 that could become the exception that theoretically swallows the rule.

In Cochran, a sheet metal worker was injured when a ladder that had been placed on a sheet of plywood atop two milk crates shifted, causing injuries. The record revealed this was the plaintiff's first day on

the job and he had only been working for less than an hour in a sub-basement mechanical room at a hospital. His employer's foreman set up and directed him to work on the unsafe ladder setup. No one from the general contractor had any contact with the sheet metal worker prior to the accident, nor instructed the worker as to how, when or where to do his work, nor provided any equipment.

The general contract, however, contained strong safety language that the general "shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract. The Contractor shall take reasonable precautions [over] the safety of, and shall provide reasonable protection to prevent damage, injury, loss to...employees on the Work and other persons who may be affected thereby." The general contractor admitted they had "general control" over its subcontractors' work, but denied it had "specific control" over the subcontractors, including the sheet metal contractor. While the general had a field superintendent, he was not required to perform a daily "walk-through," but would observe progress of the work and had the authority to stop the work for safety reasons. The primary responsibility for safety of the subcontractors' employees were the subs themselves, who were required to have their own safety protocol and tool box safety meetings. While the superintendent had seen the sub-basement room where the accident occurred the day before, he did not observe any unsafe conditions. He was unaware of the unsafe ladder usage the day of the accident.

The injured worker brought suit against the general contractor, claiming it was in control of the work site under Restatement (Second) of Torts, Section 414, which states:

One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose

safety the employer owes a duty of reasonable care, which is caused by his failure to exercise his control with reasonable care.

In a motion for summary judgment, the general argued no duty was created under Section 414 of the Restatement (Second). After the trial court agreed, the injured worker appealed.

The First District Appellate Court affirmed. Similar to the analysis seen in most Section 414 cases, the court first focused on the language of comment (c) of Section 414, which discussed the term “retained control.” Comment (c) provides:

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.*

Restatement (Second) of Torts, Section 414, comment (c) (Emphasis added). Under the above comment, sufficient “retained control” was not shown over the operative details of the plaintiff’s work so as to impose a duty under Section 414.

Instead of ending its analysis there, the First District went on to address the concept of “direct liability” under comment (b) of Section 414. Comment (b) provides:

The rule stated in this Section is usually, though not exclusively, applicable when a principal contractor entrusts a part of the work to subcontractors, but himself or through a foreman superintends the entire job. In such a situation, the principal contractor is subject to liability if he fails to prevent the subcontractors from doing even the details of the work in a way unreasonably dangerous to others, if *he knows or by the exercise of reasonable care should know that the subcontractors’ work is being so done, and has the opportunity to prevent it by exercising the power of control which he has retained in himself.* So too, he is subject to liability if he knows or should know that the subcontractors have carelessly done their work in such a way as to create a dangerous condition, and fails to exercise reasonable care either to remedy it himself or by the exercise of his control cause the subcontractor to do so.

Restatement (Second) of Torts, Section 414, comment (b) (Emphasis added). The court thus reasoned that a general contractor’s actual or constructive knowledge of a subcontractor’s unsafe work methods or a dangerous condition is a precondition to “direct” liability under Section 414. In Cochran, there was no evidence in the record that any of the “competent persons” from the general had observed the unsafe setup during the short time period before the accident. As such, there could be no “direct” liability and summary judgment was proper as to the general.

This “direct liability” prong of Section 414, as laid out by the Cochran court, has dangerous ramifications for general contractors. First, the court seemingly does an “end run” around the “retained control” analysis seen in other Section 414 cases. Typically, a court would first look to see a duty existed, i.e., analyze whether there

were sufficient facts in the record to show that the general contractor had retained control over operative details of the work. If no such control existed, there was no duty and summary judgment was proper. Here, in what appears to be an expansion of 414, in situations where there was no "control," (and thus no duty), the court could also now look toward whether there was notice to the general contractor of any unsafe work practice by the subcontractor or dangerous condition created by the sub. In those situations, the court could impose "direct" liability by the contractor's failure to exercise its general retained right to stop the work for safety reasons. After Cochran, general contractors may be in a difficult situation. Clever plaintiff's lawyers, by either friendly co-worker's or their own client's testimony, can presumably create questions of fact to defeat a summary judgment motion merely by offering testimony that the general contractor was present and witnessed unsafe work practices on occasions prior to the accident. In a case where there is no evidence of control by the general contractor, what previously would have been a relatively straightforward summary judgment motion, after Cochran, is now complicated by the fact that the very lack of exercise of control could now be the basis for imposing liability. See also, Joyce v. Mastri, et al., (2007 Ill. App. LEXIS 7 (January 11, 2007, decided), Pestka v. Town of Fort Sheridan Co., LLC, 2007 Ill. App. LEXIS 33 (January 22, 2007, decided) (finding no "direct negligence" by general contractor under Section 414 given "dangerous condition" existed for very short time period and there was no evidence of actual or constructive knowledge of the dangerous condition).

There is a definitive split in Section 414 analysis by the appellate districts. Hopefully, the Illinois Supreme Court will add clarification to the analysis of whether a general contractor owes a duty under Section 414 and not allow the "direct negligence" exception to swallow the "retained control" rule for general

contractors, owners and other jobsite entities.

Thus, the focus for defendants should be to persuade the court that whatever right or supervision of authority is retained is a general one only, which does not give rise to a duty. Also, it is important that there be no evidence of anything other than an exercise of a general right of supervision. If, for example, the project manager for an owner or general contractor was to instruct an independent contractor's employee in the means or methods of doing his work, the general right of supervision could become a specific one and a duty would be imposed. Even if this is the case, the fact question of whether the owner, general contractor, or architect had control may still be argued to a jury.

Although there is no Supreme Court decision harmonizing the positions put forth by the various appellate court districts, a recent case which does not even involve a construction accident injury, may shed some light on how the Supreme Court might approach and resolve the Restatement Section 414 dilemma. In a case entitled Jane Doe v. Big Brothers, Big Sisters of America, 359 Ill. App. 3d 684 (1st Dist. 2005), Presiding Justice Burke, who has recently been elevated to the Illinois Supreme Court, wrote an opinion analyzing Restatement Section 414 as to the level of retention of control necessary to impose a duty on one who employs an independent contractor. Thus, the Supreme Court could conceivably adopt the reasoning of the Martens, supra.

3. Potential Arguments by Plaintiffs

Several cases have found the concept of "control" discussed in Section 414 to be sufficiently similar to the concept of "in charge of" the work under the Structural Work Act, and applied the same analysis traditionally applied in Structural Work Act cases. Under this analysis, whether or not a defendant had "control" becomes a question of fact to be decided by a jury.

In Lulich v. Sherwin Williams Company, 992 F.2d 719 (1993), the court implicitly recognized that the same factors which it had reviewed relative to who was "in charge of" the work under the Structural Work Act also applied to the issue of "control" under Section 414. In Damnjanovic v. United States, 9 F.3d 1270 (7th Cir. 1993), the court noted that evidence which supported the allegation that the government was "in charge of" the work also supported the plaintiff's contention that the government retained supervision and control of the work. In Berger v. Prairie Development, Ltd., 218 Ill. App. 3d 814 (1991), the court held that "while there may be some difference between a party's being 'in control' instead of 'in charge,' we believe that the concepts are similar enough that the analysis under the Structural Work Act applies equally to the control issue." Id. at 1121.

Under the Structural Work Act, ten (10) factors were considered in determining whether a defendant had charge of the work. Chance v. City of Collinsville, 112 Ill. App. 3d 6 (1983); Hernandez v. Paschen Contractors, Inc., 335 Ill. App. 3d. 936 (2002). (See Chapter IV, Section C(3)(ii)). Based upon the rulings in Berger, Damnjanovic, and Lulich, plaintiffs will likely urge courts to analyze the same factors in determining whether or not an owner or contractor or architect is "in control" of the work under Section 414. If that analysis is adopted, it should be noted that the courts have held that a party need not meet all ten points to prove sufficient involvement for having "charge of" the work. McKanna v. Duo Fast Corp., 161 Ill. App. 3d 518 (1987).

The opinion in Rangel v. Brookhaven, supra, provides defendants with a counter-argument. In defending construction site accident cases in the future, defendants should be wary of plaintiffs' arguments that the existence of a duty is a question of fact relating to whether the employer retained "control." See Brooks v. Midwest Grain Products of Illinois, Inc., 311 Ill. App. 3d 871 (2000); Bokodi v. Foster Wheeler Robbins, Inc., 213 Ill. App. 3d 1051 (2000). However,

because construction accidents are now governed by common law negligence principles, defendants should contend that duty is a question of law. In most cases, the construction contract will contain language that indicates that the independent contractor is in control of the work, and has the duty to comply with OSHA and other safety regulations. Frequently, construction contracts also provide that the independent contractor will be in charge of the safety of its employees. Defendants should argue strenuously that those contract provisions do not create a duty on the part of the owner, contractor, or architect to provide a safe place to work for the independent contractors' employees. Several Illinois cases have held, however, that the question of "control" is within the province of a jury. See also Moss v. Rowe Construction, 344 Ill. App. 3d 772 (2004). In addition to the above, the obvious additional hurdles of analyzing a case under Comment (b) of Section 414, as discussed above, must be considered.

Restatement Second Sections 343 and 343A "Premises" Analysis

In addition to the above Section 414 considerations, plaintiffs will attempt to also pursue construction negligence claims under a "premises" theory under Restatement (Second) Sections 343 and 343A.

Section 343. Dangerous Conditions Known to or Discoverable by Possessor.

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he:

- a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
- b) should expect that they will not discover or realize the danger, or

will fail to protect themselves against it, and

- c) fails to exercise reasonable care to protect them against the danger.

Restatement (Second) of Torts, Section 343, at 215 (1965).

The Illinois Supreme Court in Genaust v. Illinois Power Company, 62 Ill. 2d 456 (1976), adopted Section 343 of the Restatement (Second) of Torts. However, in doing so, the court specifically found that a defendant did not owe the plaintiff a duty if the condition on the land was an obvious and open hazard that the plaintiff could appreciate.

Fourteen years after the court's ruling in Genaust, the court adopted the more liberal Section 343(a) of the Restatement (Second) of Torts, which introduces the concept of the plaintiff's comparative negligence in a situation where there are open and obvious dangers.

343A. Known or Obvious Dangers.

- (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them unless the possessor should anticipate the harm despite such knowledge or obviousness.

Restatement (Second) of Torts, Section 343A at 218 (1965). [emphasis provided]

In Clifford v. The Wharton Business Group LLC., 353 Ill. App. 3d 34, 817 N.E.2d 1207 (1st Dist. 2004), the First District specifically addressed Restatement 343A as a viable theory on construction negligence cases. In Clifford, a worker fell through a floor opening when he tried to hold up a collapsing wall. The contractor, who also

owned the site in question, moved for summary judgment, arguing that it was not liable for the acts or omissions of its independent contractor under the retained control doctrine. The trial court granted summary judgment, and the worker appealed.

The First District reversed, holding the trial court erred by deciding the case purely under the retained control (Restatement 414) analysis. Instead, the appellate court held that a premises theory under Restatement 343 and 343A, was proper under these facts. As such, summary judgment was not proper.

Cases applying Section 343A take into account the knowledge and behavior of the plaintiff. If the plaintiff could be distracted despite the openness and obviousness of the condition on the land, it would not bar the plaintiff's right to recovery. Instead, the plaintiff's recovery would be reduced by the amount of his or her comparative negligence rather than being barred altogether. Examples of cases applying 343A are American National Bank v. National Advertising, 143 Ill.2d 14 (1992); Deibert v. Bauer Brothers Construction Company, Inc., 141 Ill.2d 430 (1990); and Ward v. Kmart Corp., 136 Ill.2d 132 (1990). In American National Bank, the plaintiff was electrocuted when he came in contact with an electric line 24 to 30 inches from the top of a billboard that the plaintiff was painting. In Deibert, the plaintiff was a construction worker who was injured when he stumbled in a tire rut while exiting a portable bathroom because he had looked up to see whether construction materials were being thrown off of a balcony near the portable bathroom. In Ward, the plaintiff was injured as he walked into a concrete post outside a customer entrance to a department store. In each of these cases, there were obvious conditions which resulted in the plaintiff's injuries. However, in each of those cases, the court found that the owner or possessor of the land should have anticipated harm to the plaintiff despite the openness or obviousness of the condition due to the fact that the plaintiffs could be

distracted by other things going on around them. As a result, none of the plaintiffs were barred from recovery by the openness and obviousness of the conditions. Instead, the comparative negligence of the plaintiff could be taken into account in determining an award.

Of note, the case of Lafever v. Kemlite Co., 185 Ill. 2d 380 (1998), carved out another exception to the “open and obvious” defense in Illinois. In LaFever, a truck driver injured his back when he slipped and fell on waste material near a trash compactor on a manufacturer’s premises. As part of his duties, the driver had to walk in the area around the compactor which was often slippery and filled with debris. The manufacturer was responsible for cleaning the area near the compactor. Prior to the injury, the driver and his fellow employees had complained to the manufacturer and requested that the compactor area be cleaned. At trial, the manufacturer argued no duty existed as the area constituted an open and obvious condition.

On appeal, the Illinois Supreme Court held that if a landowner has reason to expect that an invitee will proceed to encounter a known or obvious danger because to a reasonable person the advantage of doing so outweighs the apparent risk, then a duty exists. The Lafever Court concluded that in order for the driver to complete his job duties he had to walk through the hazardous area surrounding the compactor area. Although he knew of the risk, he could not avoid it. Further, there was only a slight burden to the defendant to clean the area. As such, the defendant could have foreseen the risk and thus owed a duty to the driver.

In construction negligence cases, an injured worker may argue the “deliberate encounter” exception to any open and obvious conditions on the job site. Since job sites are by their very nature untidy, a worker could easily argue they would be forced to work around such conditions in the course of their job duties, thus creating

liability for an open and obvious condition. As such, Sections 343 and 343A, may very well be used by plaintiffs’ attorneys in seeking to recover for construction site accidents as well as Section 414. It should also be noted that the available defenses under Sections 343 and 343A do not apply to Section 414. See Haberer v. Village of Sauget, 158 Ill. App. 3d 313, 511 N.E.2d 805 (5th Dist. 1987). Thus, the “open and obvious” defense is not a valid defense to an action brought under Section 414.

4. Defenses

Defendants should attempt to steer the focus to the analysis within comment (c) of Section 414 of the Restatement in defending construction site accident cases. Evidence should be elicited to make the good faith argument that the lack of authority to control the means and methods of doing the work is evidence of a lack of control so as to make summary judgment warranted. In addition, evidence should be developed so as to avoid a finding of any “direct liability” under comment (b) of Section 414.

With the repeal of the Structural Work Act, several defenses come back into play, first and foremost, comparative negligence. Under comparative negligence, a plaintiff’s amount of fault will reduce his award. Also, the defense of assumption of risk can again be used where applicable. As discussed above, the “open and obvious” defense has both positives and negatives. Defendants can argue that they have no liability because the condition of the land which caused the injury was open and obvious.

In construction negligence cases under a premises theory, an injured worker would likely assert the “deliberate encounter” exception to any open and obvious conditions. Since job sites are by their very nature untidy, a worker could easily argue that he would be forced to work around such conditions in the course of their job duties, thus creating liability for an open and obvious condition.