

TORT NOTES
By: James J. Morici, Jr.

**APPELLATE COURT APPLIES TRADITIONAL “CONTROL” FACTORS IN
REVERSING SUMMARY JUDGMENT; DISTINGUISHES ITS EARLIER
DECISION IN FRIS ON SECTION 414 DUTY**

The Appellate Court of Illinois, Third District, severely distinguished its 1994 decision in Fris v. Personal Products Company, 225, Ill.App.3d 916, 627N.E.2d 1265 in its December 23, 2004 Moorehead v. Mustang Construction Company, 2004 WL 2984866 decision. In Moorehead, the Plaintiff, an ironworker was injured when the top half of an extension ladder which did not have proper safety feet and was not locked at the base slipped out from under him causing a 15 foot fall. Id.

The trial court in Moorehead granted Defendant general contractor’s motion for summary judgment on the basis that Mustang did not retain sufficient control over the subcontractor’s work. The Appellate Court reversed and remanded that decision.

In distinguishing Fris, the Court noted that there Plaintiff was performing a routine and incidental activity over which the Defendant had no control (the Court did not go into any detail concerning its factual analysis of that earlier finding). Instead, the Court distinguished Fris stating that its procedural status differed from the case at bar. The Court found this distinction to exist in light of the fact that Fris was decided by the Appellate Court after a jury trial and that in the present case Moorehead sufficiently alleged the existence of the duty, and material issues of fact remained so as to avoid summary judgment. **Again the Court did not go into any factual analysis of Fris but rather stated that “whether Moorehead can sustain his negligence claim at trial remains to be proven and alluded to Brooks v. Midwest, 311 Ill.App.3d 871, 726N.E.2d 153.**

In support of its opinion finding that summary judgment was improper in the Moorhead case, the Court took note of the contract between the owner and the defendant general contractor. The Court made reference to numerous provisions which outlined the parties’ responsibilities. These included that the Defendant agreed to: be fully and solely responsible for job site safety and the means, methods, and techniques of construction; to take reasonable precautions for the safety of the employees and equipment under the control or custody of the subcontractors; to designate a safety director for the prevention of accidents; and have the authority to stop unsafe work. While the Court also noted that the

Defendant general contractor had an onsite project manager who inspected the work for compliance with the plans and safety and that its safety director conducted weekly safety inspections, these acts of conduct were clearly not major factors in its decision. The Court clearly relied upon what can only be termed the traditional control/charge factors often referred to as the “chance factors” which have been used by courts in determining questions of duty in both Section 414 construction negligence cases and cases under the repealed Illinois Structural Work Act over the past 40 years.

In doing so, the Court relied upon recent decisions that have supported that approach including Brooks, Id. And distinguished cases including Rangel v. Brookhaven, 307 Ill.App.3d 835 719 N.E.2d 174 (1999). Shaughnessy v. Skender Construction Company, 342 Ill.App.3d 730 794 N.E.2d 937 (2003) and Martens v. MCL Construction Corp., 347 Ill.App.3d 303, 807N.E.2d 480 (2004) which had, at least according to the current opinion, too stringently interpreted its Fris decision for purposes of summary judgment.

In addition to making it clear that the traditional factors referenced above would be sufficient to avoid summary judgment, the Court also addressed the Defendant’s claim that it could somehow avoid responsibility through its subcontract with the Plaintiff’s employer. While the Court noted that the subcontract between Mustang and the Plaintiff’s employer required that the terms and provisions of the general contract, including safety specifications, were incorporated into the subcontract, that nothing in the general contract allowed the Defendant to delegate its duty. In relying upon Weber v. Northern Illinois Gas Company, 10 Ill.App.3d 625 295N.E.2d Page 41 (1973), the Court noted that the general contract provided Mustang “shall be fully and solely responsible for the job site safety” and that what was at issue was Mustang’s control of the project under its contract with the owner.

This case is of extreme importance to Plaintiffs in defending against summary judgment motions in that it severely distinguishes Fris while limiting it to its own facts. Fris, and its progeny Rangel, Shaughnessy, Martens, etc. have been severely undercut and whether or not the duty owed by general contractors has been met is quite properly reserved as a jury question.

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