

## **TORT NOTES**

**By: James J. Morici, Jr.**

### **Bieruta v. Klein Creek Corporation: Another Pit Fall For Construction Negligence Law**

On May 20, 2002, the Illinois Appellate Court for the First District issued its opinion in the case of Bieruta v. Klein Creek Corporation, 331 Ill. App. 3d 269, 770 N.E.2d 1175. This construction negligence case affirmed the trial court's order which granted summary judgment based on the Defendant's claim that it did not retain sufficient control over the work to give rise to a duty.

In Bieruta, the Plaintiff was injured when he fell into a trench which he had excavated himself with a backhoe. The incident occurred just four days after the trench was dug, with no work being performed during two of the interim days. Plaintiff injured his back when he fell into the trench after turning around to respond to a co-worker calling his name. Plaintiff's superintendent had instructed the Plaintiff just minutes before his accident to return to his backhoe, before he "slipped or had an accident."

Plaintiff brought suit against the owner/developer of this residential subdivision, Klein Creek, which had hired Plaintiff's employer and the other subcontractors. Plaintiff advanced two theories of liability: a premises liability theory under Restatement (Second) of Torts Section 343, and a construction negligence theory under Restatement (Second) of Torts Section 414.

The Appellate Court found that the trench was a known and obvious condition under Section 343A(1). As such, it then became the Plaintiff's burden to demonstrate that this risk of harm

was foreseeable. Not surprisingly, the Appellate Court did not think it reasonable that a co-worker calling Plaintiff's name was foreseeable, especially when Plaintiff had been instructed to remain in his backhoe.

The First District then turned to the construction negligence theory and rejected it, finding no indication that the Defendant exerted any control over the excavation work. The Appellate Court noted that there was no evidence to suggest that Plaintiff's employer was not entirely free to perform the work in its own way. Furthermore, the evidence showed the Defendant never directed the "operative details" of Plaintiff's work.

The Plaintiff did cite the well-known litany of favorable construction negligence cases, including Bokodi v. Foster Wheeler Robbins, Inc., 312 Ill.App.3d 1051, 728 N.E.2d 726, and Brooks v. Midwest Grain Products of Illinois, Inc., 311 Ill.App.3d 871, 726 N.E.2d 153. However, the Appellate Court found the cases to be factually distinguishable from the present case, and more similar to Rangel v. Brookhaven Constructors, Inc., 307 Ill.App.3d 835, 719 N.E.2d 174.

This case is another frustrating example of how bad facts make bad law. In addressing this case, the practitioner must point out the factually specific nature of this case, which makes it as much of an aberration as Rangel. Despite Defendant's assertions, Rangel and Bieruta are not "the law" in construction negligence cases. The law remains to be Section 414; bad facts, such as in this case, will defeat a construction negligence case.

There are, however, certain things to be taken from Bieruta. In affirming the summary

judgment, the Appellate Court's notation of what is missing provides a practitioner's wish list for a Section 414 case. For example, the First District noted that there was no contract between the Defendant and Plaintiff's employer. In a construction negligence case, the contract is the key document to establishing the rights and responsibilities of the Defendant, essential to establishing control. Further, there was no evidence that the Defendant supervised the manner in which the work was done. A practitioner must focus on establishing this supervision through deposition testimony and documentary evidence and distinguish it from the harmless "checking of daily progress" which will not impose liability under Section 414.

Lastly, and most importantly, the deposition of the Plaintiff is the ideal time to defeat any anticipated motions for summary judgment. In Bieruta, Plaintiff's admission at his deposition that the Defendant did not control the manner of his work sealed his fate. A properly prepared Plaintiff's testimony regarding a Defendant's retention of control over the manner of his or her work would at the very least create a question of material fact to defeat a motion for summary judgment.

*For a discussion of the historical perspectives of Section 414 and its increased significance in light of the repeal of the Illinois Structural Work Act, see "Construction Negligence: Out from the shadow of the Structural Work Act" 87 Illinois Bar Journal, Page 34, January, 1999.*

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