TORT NOTES
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GENERAL CONTRACTOR OWED DUTY OF CARE TO CARPENTER UNDER PREMISES LIABILITY DOCTRINE PRECLUDING SUMMARY JUDGMENT

On September 30, 2004, the Illinois Appellate Court for the First District reversed the lower court's granting of summary judgment in the case of Clifford v. Wharton Business Group, LLC, 2004 WL 2192558 (Ill.App. 1 Dist.).

In Clifford, Plaintiff was working as a carpenter on a 10-unit town home building under construction. Plaintiff suddenly heard a creaking noise, looked up, and saw a framed wall collapsing. The Plaintiff apparently fell or was thrown into a nearby 4 foot by 10 foot stairway opening in the floor, causing injury.

Plaintiff brought suit against the general contractor, Wharton Business Group, which had hired Plaintiff's employer. Plaintiff alleged that Wharton, through its agents and employees, was, among other counts, negligent in creating or permitting a dangerous work environment and permitting dangerous conditions to exist at the construction site.

Relying on Section 414 of the Restatement (Second) of Torts, Wharton filed its motion for summary judgment before the court. Wharton argued that as a general contractor it was not liable for the acts or omissions of Plaintiff's employer, O'Toole Construction, because it did not retain control over the operative details of the carpenters work.

Plaintiff answered the Motion for Summary Judgment, arguing that the case was not governed by the theory of retained control articulated in Section 414, but rather was governed by the premises liability doctrine as expressed in Section 343 and 343(a) of the Restatement, which provides that 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. Section 343(a) provides a "known or obvious" exception to the liability of a possessor of land under Section 343 dictating "a possessor of land is not liable to his invitees for physical harm caused by them by and activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge of obviousness."

Plaintiff argued that Wharton owed him a duty of care, despite the obvious nature of the uncovered stairwell opening in the floor, because Wharton should have reasonably anticipated that Clifford would have become distracted while working and momentarily forget about the dangerous opening in the floor. The defense replied that it did not create the opening of the floor and neither knew or had control over the distraction of the falling wall.

The Circuit Court granted the defense's Motion for Summary Judgment, finding that Wharton did not control the operative details of the carpentry subcontractors work, did not retain control over the safety aspects of the work, did not know or create the improperly braced wall or the opening into which Clifford fell, and therefore, did not owe Clifford a duty of care as a matter of law.

The Appellate Court ruled that Section 343 and 414 are not mutually exclusive; rather, each one offers an independent basis for recovery. The court went further in saying that the duty of reasonable care imposed on a general contractor as the owner or possessor of the premises is independent of its duty to exercise reasonable care where it retains control of the work entrusted to an independent contractor.

Upon recognizing the differences between Sections 414 and 343, the First District then turned its attention to the premises liability theory, stating that although it is true that persons who own, occupy, or control and maintain land are not ordinarily required to foresee and protect against injuries from potentially dangerous conditions that are open and obvious, one of the exceptions to this general rule is the "distraction exception."

The Court relied heavily on the well-cited case of Ward v. K-Mart Corp., 136 Ill.2d 132, 554 N.E.2d 223, 143 Ill.Dec. 288 (1990), and Rexroad v. City of Springfield, 207 Ill.2d 33, 796 N.E.2d 1040, 277 Ill.Dec. 674 (2003). The Appellate Court found that in light of the decisions in Ward and Rexroad, Section 343(a) did not require proof that the possessor of the land created or had control over the distraction. The First District further ruled that Illinois Law did not require proof that the hazardous condition was created by the possessor of the land. In the immediate case, the Court found that the central concern was whether or not Wharton had reason to anticipate that an individual similarly situated as the Plaintiff would have his attention distracted, so that he would fail to protect himself against the open and obvious dangerous condition. The Court found that it was beyond dispute that Wharton knew that the floors were being laid with openings for stairwells. The court disagreed with the Defendant's claim that they must have created the hazard in order for the duty to attach. Citing to Section 343, the Court held that a Defendant is subject to liability if it "knows or by the exercise of reasonable care would discover" the hazard.

The First District held that the Defendant knew that O'Toole's carpenters were erecting walls and bracing them in proximity to an uncovered hole in the floor, according to Wharton's specifications. This type of work would require the carpenters to look upward, thus Defendants could reasonably anticipate that a carpenter's attention would likely be distracted and that he would fall into an open hole. Based upon these findings, the Appellate Court reversed the trial court's granting of summary judgment and remanded the case for further proceedings concerning the Defendant's liability as the owner or possessor of the premises.

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