

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

**CONTROL AND THE DUTY OF A GENERAL CONTRACTOR UNDER  
RESTATEMENT OF TORTS SECOND SECTION 414, CONSTRUCTION  
NEGLIGENCE**

In the recent opinion of Downs v. Steel & Craft Builders, Inc., 2005 WL 1492077 (Ill.App.2 Dist), the Appellate Court, has seemly rewarded a general contractor for in effect “burying its head in the sand” concerning construction site safety. The Plaintiff, Richard Downs, suffered serious injuries in April, 1999 when a trench collapsed burying him up to the neck. The appeal arose following the granting of summary judgment in favor of the defendant general contractor. Absent from the opinion is any mention of the contractual relationship between the general contractor and the owner of the site. Upon this paucity of information, and perhaps because of it, the lower court found that the Defendant did not have a duty under Section 414 of the Restatement of Torts Second and, in fact, had transferred all responsibility for safety to the Plaintiff’s employer/subcontractor.

The West Chicago construction site was owned by an interfamily partnership. The defendant general contractor was a corporation entirely owned by one of the partners and acted as the general contractor for the job. The opinion makes no mention of how this owner/general contractor relationship arose, nor does it articulate any contractual provisions between the two entities. It appears that the closely related entities may have acted upon an oral agreement.

The above is an important distinction, in that it is clearly not the custom and practice within the custom industry for general contractors to act absent a written contract. The court went to great lengths to indicate that the general contractor had not accepted any responsibilities for safety on the construction site. (This obviously disregards the fact that OSHA, as well as the custom and practice for safety in the construction industry, and the law as articulated in the Illinois Supreme Courts IPI instructions on construction site negligence clearly impose safety responsibilities upon the general contractor.)

The court, in its decision and relying heavily on the fact that there was evidently no contractual obligation assumed by the defendant general contractor relative to safety found that the defendant did not exercise control over safety and accordingly, owed no duty to the plaintiff. The court noted that generally in a construction negligence case involving a contract between a defendant general contractor and an independent contractor that employed the plaintiff, summary judgment would be improper where the general contractor had agreed to retain control over safety.

The above statement, in the court’s opinion, clearly distinguishes this case from the vast majority of construction projects in that standard provisions between owners and the general contractors they hire requiring the defendant to exercise responsibility over safety and often to take all reasonable precautions for the protection of persons on the work. The court sites

to Moorehead v. Mustang Construction Company, 354 Ill.App.3d 456, 461 (2004) where the general contractor agreed to “be fully and solely responsible for the job site safety.” In fact, the various factors usually looked to to determine whether or not control is present are akin to those expressed under the former Illinois Structural Work Act relative to an entity’s “having charge” over the work. The court made reference to one of the leading First District cases on this point. Bokodi v. Foster Wheeler Robbins, Inc., 312 Ill.App.3d 1051 (1<sup>st</sup> Dist. 2000) and Brooks v. Midwest Grain Products of Illinois, Inc., 311 Ill.App.3d 871 (1<sup>st</sup> Dist 2000).

This case should have little precedential value and is easily distinguishable, in part because of what is really the absence of sufficient facts upon which a determination of control ought to be determined. Further, it is the opinion of this author that this case is inapplicable to any case in which a defendant general contractor has entered into an agreement with an owner to superintend a construction site and exercise authority over construction site safety. In addition, the underlying summary judgment and the appeal seem to have been decided in the absence of any expert opinion relative to the custom and practice in the construction industry of the safety responsibilities applicable to general contractors. Accordingly, the Downs case should find its rightful place within that category of unique and somewhat aberrational opinions relative to the area of construction negligence.

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