

TORT NOTES
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**NEGLIGENCE CLAIM AGAINST SUBCONTRACTOR MAY STAND WHEN
ITS EMPLOYEES CAUSE INJURY TO EMPLOYEES OF ANOTHER
SUBCONTRACTOR DESPITE ABSENCE OF CONTRACTUAL DUTY
BETWEEN THE COMPANIES**

Multi-employer worksites are very common on large construction projects. The chain of command often found is one of a general contractor hiring subcontractors to do various components of the work with those subcontractors sometimes hiring their own subs to perform specific tasks. This author has written extensively about the duties imposed by Section 414 of the Restatement of Torts 2d upon owners, contractors and others exerting control over the safety aspects of construction sites such that they have a duty to provide a safe workplace for all of the subcontractors and their employees present on the site.

The subject matter in Melchers v. Total Electric Construction, et al., 311 Ill.App.3d 224 732 N.E.2d 815 (1st Dist., 1999) addresses a situation in which the activities of one subcontractor lead to an injury to an employee of another subcontractor in the absence of any contractual obligations and/or right to control and/or supervise the safety of each others work. The Court held that an excavation contractor had a duty to exercise reasonable care to protect an employee of an electrical subcontractor from injury caused by its equipment or apparatus even though it was not contractually bound to supervise them.

In Melchers, the owner of the project hired the Plaintiff's employer Commercial/Total to install conduit and wire for a new switch interlocking system at its railroad terminal. Id. at 723 N.E.2d 815. Commercial/Total entered into an oral sub-subcontract with an excavation company Riverside to dig where necessary to provide access to electrical connections.

In the days leading up to the Plaintiff's injury, Riverside removed existing railroad track and tie and thereafter dug a trench using a backhoe removing the dirt and rock with a bobcat. Id. Thereafter, the Plaintiff and other electricians employed by Commercial/Total, performed further excavation in the trench to gain access to high voltage connections. The materials excavated were placed into wheel barrows at grade level upon planks that had been supplied by Riverside. When a wheelbarrow was full, one of Plaintiff's co-employers would remove it to a dumping area. During this process, Plaintiff's foreman allowed a wheelbarrow to fall into the trench injuring the Plaintiff due to the wheelbarrow having been unevenly loaded and having wet clay stuck to one side.

In determining whether or not a third party complaint brought by the owner could stand against Riverside, the Court noted that that complaint was grounded in negligence. Id. at 817. The Court noted that "In order to prevail on a negligence claim a Plaintiff must show a duty owed by the Defendant to the Plaintiff, a breach of that duty, and an injury

proximately caused by the breach.” When deciding whether to impose a duty, Illinois Courts consider the foreseeability of the Plaintiff’s injury, the likelihood of the occurrence, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the Defendant.” Id. Page 818.

The Court agreed with Riverside that when an action in negligence is based upon a contractual obligation that the scope of the duty imposed is determined by the terms of the contract. The Court agreed that that fact might allow Riverside to escape liability for failure to supervise the activities of Commercial/Total. Id.

The Court, however, found that Riverside had a duty to exercise reasonable care to protect the Plaintiff from injury caused by its equipment or apparatus and that it could not avoid its common law duty by claiming that it was not contractually bound to supervise Commercial/Total’s employees. The Court found that summary judgment in favor of Riverside was inappropriate in that a jury might conclude that the use of the wheelbarrow in the manner described constituted a breach of Riverside’s general negligence duty and that if so, Riverside would be held liable for its conduct.

Melchers remains current law and remains useful to the practitioner notwithstanding its having been distinguished on its facts in two cases. See Binz v. Brandt Construction Company, Inc., 301f 3d 529 and Preze v. Boarden Chemical, Inc., 336 Ill.App.3d 52, 782 N.E.2d 710 (1st, 2002)

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