

TORT NOTES
By: James J. Morici, Jr.

SEVENTH CIRCUIT HOLDS THAT SECTION 414 OF THE RESTATEMENT OF THE TORTS 2D STATES A THEORY OF DIRECT LIABILITY FOR A GENERAL CONTRACTOR'S NEGLIGENCE

In its September, 2007 opinion the Seventh Circuit Court of Appeals became the highest court of review to speak on the duties of general contractors under Restatement of Torts 2d Section 414 since the Illinois Supreme Court adopted it as a statement of Illinois law in Larsen v. Commonwealth Edison, 33 Ill.2d 316 (1965). Noting that some confusion has arisen recently among Illinois intermediate appellate courts regarding whether Section 414 states a theory of vicarious liability or direct liability (e.g. Cochran v. George Sollitt Construction Company, 358 Ill.App.3d 865 (2005)). The Court wrote “Although the Illinois Supreme Court has yet to lend its guidance on this issue, we are confident it would interpret Section 414 in accordance with its plain language and accompanying commentary which clearly state a theory of direct liability for a general contractor’s own negligence, not a basis for imposing vicarious liability on a general contractor for the negligence of a subcontractor. Aguirre v. Turner Construction Company, et al., 501 Fed.3d 825 (7th Cir., 2007), 2006WL 644009.

Aguirre was injured when he fell from a scaffold while working as a bricklayer on the renovation of Soldier Field in Chicago. He was employed by a subcontractor on the project which was being overseen by the defendant. He maintained that his fall was a result of the design and/or construction defects in the scaffold. Id. at 501(f) 3d 8 at 2006 WL 644009, p.3.

In reversing the grant of summary judgment, the Court noted that the language of Comment a to § 414 did not stipulate the circumstances under which that section would apply as mistakenly concluded by some courts including the district court below, but that it merely referred to the principals of vicarious liability within the *Restatement of Agency*. Id.p.5. The Court noted that Section 414 went on to take over where agency law ends by providing a theory of direct liability based on the existence of a duty of a reasonable care. A duty is triggered when the general contractor has retained supervised control over the independent contractor without retaining control over all operative details of a project. Id.

The Court went on to note that in Comment b to § 414 that the rule “is usually though not exclusively applicable when a principal contractor entrusts a part of the work to subcontractors, but himself or through a foreman, superintends the entire job.” Id. Liability arises where the general contractor knows or by the exercise of reasonable care should know that the subcontractor’s work is being done dangerously and has the opportunity to prevent it by exercising the power of control which he has retained. Id. Liability also arises, according to the Court, if the general contractor knows or should know that the subcontractors have carelessly done their work in such a way as to create a dangerous condition and fails to exercise reasonable care either to remedy it himself or by the exercise of his control to cause the subcontractor to do so. Id.

The Court went on to note that Illinois courts have held that an employer need only retain the control of *any part of the work* in order to be subject to liability. Brooks v. Midwest Grain Products of Illinois, 311 Ill.App.3d 871 (2000). The Court went on to cite Bokodi v. Foster Wheeler Robbins, 312 Ill.App.3d 1051 (1st Dist. 2000) as being the most prominent and closely comparable case in which a retained control duty of care was found to exist. The Court distinguished cases which have recently found no duty under Section 414 including Martens v. MCL Construction Corp., Kotecki v. Walsh Construction Company, and Rangel v. Brookhaven Constructors, Inc., 307 Ill.App.3d (1999) where the contractors either had no authority to stop deficient work of subcontractors, engaged in no oversight whatsoever of the work performed, or promulgated no specific safety rules for the work in question. Id. p.6.

It is hoped that the illumination shed on this area of the law by the Seventh Circuit Court of Appeals will be used to support the claims of injured working men and women where those retaining control over safety on construction projects failed to exercise their duty of ordinary care leading to serious injury.

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