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WELCOME!

To our Clients:

Wiedner & McAuliffe is pleased to provide our inaugural issue of the firm's Civil Litigation Quarterly newsletter. This newsletter is our most recent effort to provide comprehensive representation to our clients by supplying the latest developments and significant case law relating to all areas of civil liability. There will also be supplements between quarterly issues advising you of recent developments in the law which may immediately impact upon claims evaluation and handling, risk management, insurance coverage, trial practice and other areas of importance. Our civil litigation attorneys invite your questions, comments and suggestions relating to, not only matters addressed in each newsletter, but also, legal issues, concerns and problems which may arise at anytime. We are honored by the trust you place with us everyday and are committed to providing you with the highest level of representation.

Regards,



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**IS THE DECK STACKED? THE ILLINOIS  
PATTERN JURY INSTRUCTIONS IN  
CONSTRUCTION INJURY CASES AND  
THE ISSUE OF CONTROL**

By: J. JASON COGGINS

Prior to 1995, nearly any defendant in an Illinois construction injury case that was remotely involved in a construction project, could face liability. The Structural Work Act governed liability in nearly every case, and a plaintiff needed only prove that a defendant was "in charge of" the work to impose liability.

In 1995, the Structural Work Act was repealed, and plaintiffs were relegated to rely on common law negligence principles to establish liability in construction cases. This development has favored defendants by making it more difficult for plaintiffs to meet the stricter standards of "duty" and "proximate cause" which are required to impose liability in an ordinary negligence action. However, recent disagreement over the legal standards governing construction cases, now threaten the level playing field that defendants currently enjoy.

**A. The Restatement (Second) of Torts Section 414 and Construction Cases**

In construction cases since 1995, the general rule of law is that one who employs an independent contractor is not liable for the acts or omissions of the latter. Beiruta v. Kline Creek Corporation, 331 Ill. App. 3d 269, 770 N.E.2d 1175, 1180 (1<sup>st</sup> Dist. 2002). Illinois courts, however, adopted an exception to this rule based upon Restatement (Second) of Torts Section 414. Section 414 provides that one who retains "the control of any part of the work is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." This current legal standard governs whether liability is imposed on defendants in construction cases.

Not surprisingly, Section 414 does not define the type and amount of "control" needed to establish liability. Comment (c) of Section 414, however, provides a detailed explanation of the type of control needed to impose liability:

In order for the rules in this section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative details. There must be such retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

Restatement (Second) of Torts Section 414 Comment (c).

The majority of Illinois courts applying Section 414 in construction cases have followed Comment (c) and focused their analysis on whether a defendant retained control over the "means and methods" of the plaintiff's work. The majority view is significant for defendants because general contractors or subcontractors, who had no involvement with the injury producing work, can now avoid liability. Even a general contractor, whose contract obligates it to essentially be "in charge of" safety on the job, may avoid liability if it did not control the "means and methods" of the plaintiff's work.

The most recent case, Martens v. MCL Construction Corp., 347 Ill. App. 3d 303, 807 N.E.2d 480 (1<sup>st</sup> Dist. 2004), interprets Section 414 and demonstrates this point. In Martens, the First District Appellate Court affirmed summary judgment in favor of a defendant general contractor who did not have sufficient control over the work of the subcontractor. The court held that although the defendant's contract made it responsible for initiating and supervising a safety program, (which included policing contractors for rule and regulation violations, maintaining reasonable safeguards, and designating a safety director whose duty was to prevent accidents) these safety responsibilities did not equate to control over the means and methods of the subcontractor's steel erection work. Most significantly, the court rejected the plaintiff's argument regarding the defendant's

ability to affect worker safety. The Court held that “[t]he central issue is retained control of the independent contractor’s work, whether contractual, supervisory, operational, or some mix thereof.” The court looked past the contract and determined that the facts demonstrated that the defendant general contractor did not control the way in which the subcontractor performed its work and that only the subcontractor exercised control over plaintiff’s work.

## **B. Disagreement Over Control and the Illinois Pattern Jury Instructions**

Unfortunately, some courts, along with the Illinois Pattern Jury Instructions, have disregarded Comment (c) of Section 414, thereby undermining a level playing field for defendants. In 2003, the IPI Committee approved the new IPI 55.02 (Construction Negligence-Duty):

**A party who retained *some control* over the safety of the work has a duty to exercise that control with ordinary care.**

Although the Committee conceded that it “struggled” over how to define “control,” this jury instruction clearly does not follow the analysis set forth in Comment (c) of Section 414, or the majority view of courts. The instruction essentially imposes liability on a defendant if it retains “some control over the safety of the work.” By employing the same standard as the repealed Structural Work Act, the IPI jury instructions has effectively reinstated a system that unfairly favors plaintiffs and imposes broader liability potential upon construction defendants.

In Moss v. Rowe Construction Company, 344 Ill.App. 3d 772, 801 N.E.2d 612 (4<sup>th</sup> Dist. 2003), the court deviated from Comment (c) of Section 414 and held that the issue is not the “means and methods” but rather the duty arising from the contract to control safety. The court shifted its focus to the contract language as the determinative factor to determine whether a duty should be imposed on the defendant. The court found that the facts in that case demonstrated that the defendant contractually

agreed to assume the duty to control the safety of the workers on the project and that the assumption was sufficient to preclude summary judgment.

Justice Cook, specially concurring in the Moss case, noted that IPI 55.02 may not accurately reflect the law. As he explained, according to the instruction, the mere “ability to stop unsafe work and not permit it to be resumed until done to the satisfaction of the controlling entity” is sufficient for the imposition of a duty. As Justice Cook emphasized, if this were true, every owner, general contractor, and employer would appear to have that ability and a duty would be imposed in every case. In contrast, Comment (c) to Section 414 states that “[s]uch a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail.” Restatement (Second) of Torts § 414, Comment (c), at 388. Thus, the problem with the analysis used by the Moss court, and the Illinois Pattern Jury Instructions, is that if the boilerplate language found in nearly all construction contracts, is sufficient to potentially impose liability, then nearly any defendant can be held liable. Due to the disagreement over the current state of the law governing construction cases, it is important that defendants aggressively challenge these types of claims.

Wiedner & McAuliffe, Ltd. represents numerous defendants in construction cases and has successfully persuaded many judges that the proper approach is to rely upon Comment (c) of Section 414. We actively argue against application of the Illinois IPI jury instruction and see that our clients are afforded the advantages of the majority view. This approach has resulted in either favorable settlements or findings of no liability for our clients.

## **THE CRITICAL HOUR OF THE NEW CLAIM: PRESERVING AND EVALUATING EVIDENCE**

**By: JAMES M. ROZAK**

Paramedics know that the first hour after a serious accident is critical to the survival of a patient. Without proper medical intervention in the critical hour the risk of complications

escalates and the statistical probability of survival plummets. Failure to take timely action or taking improper action during the critical hour makes survival uncertain.

The same is true for your new claim file. Whether your insured is alleged to have caused property damage or you are pursuing subrogation to recover first party property payments, the early days of your claim are critical to the success of your case. The decisions that are made in that first "critical hour" of receiving notice of a new claim, will set in motion a chain of events that will affect the ultimate outcome, and inevitably, your bottom line.

Experts will agree that having an action plan or strategy in place, prior to an emergency will increase the chances of a favorable outcome. The following tips could make or save your case:

- 1) Preserve Evidence – What is the evidence? Where is it? Who has custody? Is the evidence being preserved? Evidence includes the incident scene as well as all instrumentalities (i.e. products or conditions) that might have bearing on liability. Does the evidence suggest that other parties should be involved? If so, preserve, preserve, preserve. Then notify...
- 2) Notify All Potential and Identifiable Parties – Avoid the temptation to lock sights on one defense theory or one target. Use the shotgun approach by notifying all potential parties. Document your efforts to identify and notify these parties. Proper notification should, at the very least, include information regarding: the incident, the existence of the evidence and the opportunity to view evidence prior to alteration or destruction. Following this advice will reduce allegations of spoliation and increase the possibility that all potentially relevant evidence will be retained for evaluation by an expert.
- 3) Early Retention of Qualified Consultants/Experts – There are really

two components to this advice: 1) Find your expert early (before they are retained by others) so they can provide advice as to potential causation while the evidence or scene is unaltered; and 2) Make sure your expert is qualified. Does the expert have the background to be considered an "expert"? Does the expert have expertise in the discipline relevant to your case? Simply stated, find the right expert for your set of facts. Keep in mind, it may be necessary to hire more than one expert (i.e. a fire cause & origin expert and an electrical engineer). Finally, consultants/experts should have the opportunity to inspect the scene. Much can be learned when experts are allowed to prove to one another, at the scene or inspection, how the theory of causation is (or is not) objectively possible.

- 4) Make an Early Determination of the Value of the Case – Ask yourself at the outset, "What are my goals?" Cost containment (i.e. reduce exposure and attorneys costs)? Precedent setting (i.e. taking a stand against exaggerated injuries and inflated damages or dangerous manufacturers)? One goal may be adverse to another. Before setting sail, know your jurisdiction and the legal hurdles along the way, as well as the costs of reaching your goal. Today's legal environment is rife with pitfalls for the unwary. Take control at the earliest possible time by setting a value and/or budget based on the reality of the individual case and your own goals.

By protecting the rights of others and implementing a strategy that ensures early preservation of the best available evidence, you have taken control of the new claim. You can then make informed decisions as to the value or "quality of life" of your case based on your own goals.

At Wiedner & McAuliffe, Ltd., our litigation team provides its clients with the legal advice needed to make informed decisions. Our attorneys frequently accompany clients and

consultants to loss scene investigations to ensure that evidence preservation is conducted in accordance with evolving standards, such as National Fire Protection Association, NFPA 921, *Guide for Fire and Explosions Investigations* (edition 2004). Wiedner & McAuliffe, Ltd. has proven time and time again that its attorneys have the legal expertise necessary to take control of a claim during the critical hour and assist you in making informed decisions to meet your goals.

### CASES OF THE QUARTER

#### **AGGRAVATION OF A PRE-EXISTING CONDITION IS NOT A SEPARATE ITEM OF DAMAGE**

Connie Hess v. Michelle Esty, 351 Ill.App.3d 490, 813 N.E.2d 270 (2nd Dist. 2004).

In this case, the court held that while it is proper for a jury to be instructed to consider the aggravation of a pre-existing condition when determining damages of a liable plaintiff, it is not proper to treat aggravation of a pre-existing condition as a separate element of damages. While acknowledging that the Illinois Pattern Jury Instructions (IPI) list pre-existing condition damages separately, the court also notes that the Supreme Court of our state has pointed out that Illinois Pattern Jury Instructions do not receive advance approval from the court. Thus, their propriety is not decided until the issue is before the court in a live case.

#### **PREMISES LIABILITY: PLAINTIFF MAY NOT GUESS ABOUT ICE FORMATION**

Elfrieda Strahs v. Tovar's Snow Plowing, Inc., Walgreen Company, and Bond Drug Co. of Illinois, 349 Ill.App.3d 634, 812 N.E.2d 441 (1<sup>st</sup> Dist. 2004).

Here, the First District affirmed the trial court's granting of a directed verdict on behalf of all three defendants, agreeing that, as a matter of law, there were not any evidentiary facts from which the jury might construe the facts necessary for recovery for injuries from fallen ice.

In reaching its decision, the court held that the plaintiff had failed to provide any factual basis for her contention that the patch of ice which

she fell on was an artificial or unnatural accumulation which was caused by Tovar's Snow Plowing. Although plaintiff did testify that it was ice she slipped on, she also said that it had been raining recently, that the streets were wet, that she did not see any water forming from the snow plows through the parking lot, and that she only *assumed* that the ice formation upon which she fell came from the melting snow piles.

Plaintiff also argued that the trial court erred in instructing the jury to disregard her testimony that the snow along the perimeters appeared to be plowed- as opposed to fallen- snow. Since she was allowed to testify as to other aspects of the snow such as amount, color and such, plaintiff's contention that she was barred from testifying about the nature of the snow accumulation was inaccurate and unfounded.

#### **WHERE THERE IS NO DUTY TO DEFEND, THE INSURANCE COMPANY MAY RECOVER DEFENSE COSTS FROM ITS INSURED**

Gen. Agents Ins. Co. of America, Inc. v. Midwest Sporting Goods Co., The City of Chicago and The County of Cook, 349 Ill.App.3d 529, 812 N.E.2d 620, 285 Ill.Dec. 800 (1<sup>st</sup> Dist. 2004).

A divided court held that "where [an] insured knew when it accepted the payments that the insurer intended to seek recovery of defense costs if the court agreed that the claims were not covered, the insurer may recover any payments made for the claim not covered by the policy."

In the underlying action, plaintiff, an insurance company, denied coverage in a public nuisance suit brought by the City of Chicago against its insured for "selling guns to inappropriate purchasers." While maintaining that it owed no duty to defend its insured in the action, it nonetheless agreed to provide defense in the suit until the court ruled by way of a declaratory judgment as to whether or not it had a duty. In doing so, it explicitly reserved its "right to recoup any defense costs paid in the event that it was determined that the [insurance company] [did] not owe the Insured a defense in the matter." Subsequently, the insurance company obtained a judgment from the trial court declaring that it had no duty to defend and then further obtained

a judgment ordering that they be reimbursed for costs.

The Court affirmed the trial court's decision to order reimbursement on the grounds that the payments were not made pursuant to a contract, but were instead an accommodation, the conditions of which the insured accepted by accepting the payments.

### TRANSFER OF VENUE FROM COOK COUNTY GRANTED

Jamie Botello v. Illinois Central Railroad Company, Richard Stickler and David Hendricks, 348 Ill.App.3d 445, 809 N.E.2d 197 (1<sup>st</sup> Dist. 2004).

In this case, the First District reversed the trial court's denial of defendants' motion to transfer venue from Cook to DuPage County based on *forum non-conveniens*.

In its *forum non-conveniens* analysis, the court weighed both public and private interests, eventually holding that the totality of the circumstances demanded that defendants' motion to transfer from Cook to DuPage County be granted. While acknowledging that plaintiff has a right to choose its forum, that choice is given less deference where the defendant is not a resident of the forum which he chooses. In fact, in such a situation it is reasonable to conclude that the plaintiff is engaged in forum shopping, which is contrary to the purposes behind the venue rule. With respect to private factors, the court pointed out that plaintiff did not identify any potential witnesses residing in Cook County, whereas the majority of occurrence witnesses resided or worked in DuPage County. Furthermore, plaintiff's injury occurred on train tracks in DuPage County, which militated in favor of defendant's view.

In terms of public interest requirements, the court pointed out that the effect of the trial would be of great importance to DuPage residents, and of little importance to Cook County residents. They reached this decision by stating that if plaintiff's allegations were true, then the occurrence and the unsafe area are both within DuPage County lines. It would not be fair to burden the Cook County courts or community with an unrelated suit. Congestion of

courts also factored into the Appellate Court's ruling, pointing out that in actions in excess of \$50,000.00, the average time between filing and verdict in Cook County was nearly one full year longer than it was in DuPage County.

### COUNTERCLAIMS FOR CONTRIBUTION MUST BE FILED WITHIN TWO YEARS OF SUIT

Veronica & Jesus Barragan v. Osman Construction Corp, 815 N.E.2d 842, 287 Ill.Dec. 198 (1<sup>st</sup> Dist. 2004).

In this case, the court affirmed the trial court's determination that the two-year Statute of Limitations provided in 735 ILCS 5/13-204 applied to the issue, as opposed to 735 ILCS 5/13-207, which allows counterclaims otherwise barred by time limits to proceed. In reaching this decision, the court applied several basic principles of statutory construction.

Since Section 13-204 specifically applied to all actions for contribution or indemnity, it preempted more general application than Section 13-207 might arguably have. The court stated that "[t]hird party counterclaims for contribution and indemnity are a subset of the general category of counterclaims." Section 13-204 was also the more recent enactment, inasmuch as it had been amended as recently as 1995 (Section 13-207 was enacted in, and has not been substantively amended since, 1982).

Further, the purpose of Section 13-207 (preventing the intentional filing of claims as late as possible, thus depriving the other party of a reasonable opportunity to file a counterclaim within the original limitations period) was not at issue here. Even though the claim in the present case was filed one week before the statutory deadline, "the timing [did] not foreclose a response." The fact that Appellant did not file its counterclaim until four months after the deadline supported the court's conclusion. Since the circumstances underlying Section 13-207 were not present, both statutes could be given their full effect.

## EXCULPATORY AGREEMENT UPHELD TO BAR PLAINTIFF FROM RECOVERY

Waddill Platt v. Gateway International Motor Sports Corporation, et. al., 351 Ill.App.3d 326, 813 N.E.2d 279 (5<sup>th</sup> Dist. 2004).

The court in Platt affirmed the trial court's granting of defendant's motion for summary judgment with respect to a plaintiff's negligence allegations. In this case, plaintiff was a public relations employee whose job involved attending various stock car races. At the race on the date in question, plaintiff's base of operation was a Marlboro media trailer which was located on the infield, requiring the plaintiff to cross the racetrack to enter or exit. Before the beginning of the race on the date of injury a group of tow trucks was going about 50 to 70 miles an hour around the track in order to dry the track for the upcoming race (this practice is apparently common).

The court rejected plaintiff's arguments that the exculpatory agreement which he signed, which barred suits for negligence against the racetrack, did not apply because the term "event" in the agreement was ambiguous and because the parties did not contemplate the risk that was involved here. The court, while acknowledging that the exculpatory agreements are not favored and are strictly construed against the benefiting party, nonetheless, held the present agreement to be valid. In reaching this decision, the court stated that since the tow trucks were preparing for an event by driving around the racetrack, plaintiff's resulting negligence claim arose out of, or was related to, an event regardless of the fact that no race was actually in progress.

The court further rejected plaintiff's contention that the exculpatory agreement failed in the case at hand because the parties did not contemplate the risk involved. Looking to Schlessman v. Henson, 83 Ill.2d 82, 86 (1980), the court held that regardless of whether or not the parties actually contemplated the precise accident, which was the cause of the present suit the risk was at least within the contemplation of both parties where the plaintiff had been involved in auto racing for years, had signed similar agreements prior to this agreement, and was aware of the common practice of driving tow

trucks around the course at high speed to dry the track.

## PREMISES LIABILITY: NO DUTY TO HAVE DEFIBRILLATOR ON PREMISES

Terry Alan Salte and Charlene Salte v. YMCA of Metropolitan Chicago Foundation, 351 Ill.App.3d 524, 814 N.E.2d 610 (2<sup>nd</sup> Dist. 2004).

A divided court affirmed the trial court's dismissal of plaintiffs' complaint pursuant to 735 ILCS 5/2-615. Plaintiffs argued on appeal that: 1) defendant had a duty to equip its paramedic with a defibrillator; 2) defendant voluntarily undertook the duty to equip its paramedic with a defibrillator; and 3) defendant's reference to a defibrillator as a "sophisticated medical device" in its motion to dismiss was improper. The case arose out of an incident in which plaintiff was a member of defendant's health club and suffered a cardiac arrest while using a treadmill. Plaintiff remained in cardiac arrest until the county paramedics arrived eight minutes later; he alleged that this delay led to physical and emotional damages.

With respect to plaintiffs' first argument, the court held that although a business owner/business invitee relationship existed between the parties, defendant's duty to aid the plaintiff did not include the duty to have a defibrillator on the premises and to use such a defibrillator on him. In reaching this conclusion, the court pointed out that there is no Illinois case law regarding a landowner's duty to have a defibrillator for business invitees, but the courts in other jurisdictions that have considered the question have held that health clubs do not have a duty to have a defibrillator on the premises. Relying on Restatement (Second) of Torts Section 314(a), comment (f), the court stated that defendant's duty was to render whatever first aid they were reasonably capable of providing under the circumstances and *not* all medical care that could reasonably be foreseen to be needed by a patron.

With regards to plaintiffs' assertion, that defendant's characterization of a defibrillator as a "sophisticated medical device" was in effect a denial of plaintiffs' allegation that a defibrillator was inexpensive and easy to use, the court

disagreed that this constituted a dispute over an issue of fact which would preclude summary judgment under Section 5/2-615. The court pointed out that:

the characterization of something as 'sophisticated' does not necessarily contradict the characterization of something as 'inexpensive and easy to use'-we are not affirming on the ground that defendant had no duty to have a defibrillator on its premises because it was not an inexpensive and easy to use device. Rather, we are affirming on the grounds that defendant had no duty to have a defibrillator on its premises, without regard to a defibrillator's cost or complexity.

Judge Callum dissented, opining that whether use of a defibrillator was within the definition of reasonable assistance was a question of fact, which should have precluded dismissal and instead should have been left to a jury to decide.

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