

Feature Article

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Defining the Retained Control Exception: An Update on §414

The general rule in a construction negligence setting is that no duty is owed by a contractor for an independent contractor's negligence. Section 414 of the Restatement (Second) of Torts contains a well-known exception to this rule that often surfaces when a general contractor "retains control" over the work of a subcontractor-employer. There has been much debate among the appellate courts in their attempts to define when the exception applies. The factors to be analyzed and the weight assigned to each have varied from one case to the next. This trend continues with five recent First District decisions and displays that the "retained control exception" definition remains a work in progress.

Section 414 Background

Prior to its repeal in 1994, the Structural Work Act governed most construction accident claims. 740 ILCS 150/1 *et seq.*; *Calderon v. Residential Homes of America, Inc.*, 381 Ill. App. 3d 333, 885 N.E.2d 1138, n. 2 (1st Dist. 2008). Since then, those claims have been evaluated in accordance with the principles set forth in the Restatement. *Id.* The general rule is that one who entrusts work to an independent contractor will not be liable for the independent contractor's acts or omissions. *Calderon*, 381 Ill. App. 3d at 340. This is because the principal generally does not supervise the details of the independent contractor's work and, as a result, is not in a good position to prevent negligence, whereas the independent contractor's employees have submitted to the independent contractor's right to monitor and direct such details as their employer. *Gregory v. Beazer East*, 384 Ill. App. 3d 178, 186, 892 N.E.2d 563 (1st Dist. 2008); *Calderon*, 381 Ill. App. 3d at 340.

For most workplace injuries, the injured employee is precluded from bringing common law negligence claims against the employer under the exclusive remedy provisions of the Illinois Worker's Compensation Act. 820 ILCS 305/5(a). This makes the general and other non-employer contractors more likely targets in a civil action arising out of a construction site injury.

Section 414 of the Restatement provides the "retained control exception" to the general rule against liability, and states as follows:

One who entrusts work to an independent contractor, but 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.

Restatement (Second) of Torts, §414, at 387 (1965).

Under this section, the retention of control is the key to imposing liability. *Gregory*, 384 Ill. App. 3d at 186-87; *Calderon*, 381 Ill. App. 3d at 341, 342. The comments to §414 discuss a "continuum of control" as to the necessary degree of control a party must exercise to be subject to liability under this section. *Gregory*, 384

Ill. App. 3d at 186-87; *Calderon*, 381 Ill. App. 3d at 341, 342. Most notably, Comment c offers the following explanation of when the exception applies:

In order for the rule stated 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 detail. 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, § 414, Comment c, at 388 (1965).

Despite the detail provided in these comments, the interpreting case law has not established a consistent standard of when a defendant is subject to liability. The IPI Committee struggled with this issue, conceding that “[d]ue to the lack of consensus among the appellate courts and Supreme Court cases on this subject since [*Larson v. Commonwealth Edison Co.*, 33 Ill.2d 316, 211 N.E.2d 247 (1965)] the concept of ‘control’ caused the committee great difficulty.” IPI Civil No. 55.00, Committee Comment b (2005). The recent decisions discussed below do not make the committee’s task any easier.

Recent Developments

Wilkerson v. Schwendener, Inc.

The plaintiff in *Wilkerson* was installing second-floor joists while balancing on top of wall frames that were less than six inches wide and about nine feet above ground. *Wilkerson v. Schwendener*, 379 Ill. App. 3d 491, 492, 884 N.E.2d 208 (1st Dist. 2008). He was working without fall protection at this time and brought suit against the general contractor for injuries he sustained when he fell.

The contract between the general contractor and the plaintiff’s employer required the employer to comply with a list of safety regulations, hold weekly safety meetings, prepare a site-specific safety plan, and attend the general contractor’s weekly safety-related meetings. *Id.* at 494. Under the contract, the employer was responsible for providing all materials and labor for the work, and supervising its own employees. *Id.*

About five weeks prior to the accident, the general contractor issued a letter stating that the employer’s work practices were “totally unacceptable” and that a “lack of focus on safety” will not be tolerated. *Id.* at 494-95. This letter was considered a “wake up call” for the employer and made specific reference to prior conversations regarding utilizing fall protection. *Id.* at 495. The letter concluded that the general contractor will stop work unless the employer complies with certain safety guidelines. *Id.*

Although the appellate court acknowledged that the contract between the employer and the general contractor “seemingly” left the control of the operative details of work and safety to the employer, it found that the general contractor’s actions on the jobsite demonstrated that it retained more than a general right of supervision. The “best evidence” of this fact is the above letter in which the general contractor asserted its “discretionary authority” to stop work, although it did not actually exercise that authority. *Id.* at 497. This letter, coupled with the other safety requirements outlined in the contract, resulted in a finding that the trial court’s summary judgment was improper. The court distinguished *Martens v. MCL Construction Corp.*, 347 Ill. App. 3d 303, 807 N.E.2d 480 (1st Dist. 2004), where the general contractor also issued safety citations, because the general in *Martens* did not have authority to stop work.

Presumably the safety plan employed by the general and the repeated safety warnings controlled “the manner in which the work was done” or prevented the plaintiff from performing the work in “his own way.”

But it is unclear how the general's participation in safety controlled the plaintiff's work in this instance because he continued to work without fall protection after the warnings. Although it seems counterintuitive, it is important to understand that a safety-conscious general may be subjecting itself to greater liability exposure.

Calderon v. Residential Homes of America, Inc.

The general contractor had entered into a comprehensive subcontract with the plaintiff's employer to provide roofing services at a residential development. *Calderon v. Residential Homes of America, Inc.*, 381 Ill. App. 3d 333, 855 N.E.2d 1138 (1st Dist. 2008). The contract required the subcontractor to "inspect its own work for quality and completion," but specified that "all final decisions as to quality and completion" would be left to the general contractor. All of the subcontractor's work was to be performed in accordance with OSHA safety standards and the general contractor reserved the right to terminate the contract if the work failed to conform to those standards. *Calderon*, 381 Ill. App. 3d at 335. The subcontract also made reference to a safety manual that had been prepared by the general contractor. Subsequently the plaintiff, a roofer, lost his balance and fell from a ladder. *Id.* at 336.

The appellate court noted that as a general rule the parties' contract is the "best indicator of whether a contractor had retained control over the subcontractor's work." *Id.* at 343. However, the court found that the contractual provisions regarding safety and OSHA compliance by themselves did not create a duty of care. *Id.* at 343. That is because "[p]enalizing a general contractor's efforts to promote safety and coordinate a general safety program among various independent contractors at a large jobsite hardly serves to advance the goal of work site safety." *Id.*, quoting from *Martens*, 347 Ill. App. 3d at 318.

The general contractor's involvement in safety was insufficient to create a duty under the appellate court's analysis. There was no evidence that a safety manual existed, much less that it affected the plaintiff's means and manner of performing his work. *Id.* at 344. The general contractor's safety meetings fell short as well because they were designed to "ensure that the subcontractors were implementing and enforcing their own safety policies, not to mandate compliance with any safety measures imposed" by the general contractor. *Id.* at 345. Although it had the right to stop work, there was never an instance where the general contractor in fact sent home one of the subcontractor's employees for engaging in unsafe work. *Id.* at 344. As a result, the general contractor did not contractually or actually retain control.

The court also rejected the argument that there was control over the means and methods because the plaintiff testified that he did not receive any instruction as to how to perform his job from the general contractor. *Id.* at 346. The general contractor's daily presence at a jobsite cannot be "equated with constant monitoring" or "pervasive supervision and monitoring." *Id.* at 346-348. Summary judgment was affirmed.

Gregory v. Beazer East

Mobil had hired a general contractor and welding contractor for a construction project occurring between 1970 and 1971. *Gregory v. Beazer East*, 384 Ill. App. 3d 178, 892 N.E.2d 563 (1st Dist. 2008). The welding contractor in turn hired the plaintiff's decedent, a pipefitter. To protect himself against the heat from the pipes, the decedent had used asbestos-containing blankets and gloves provided by the welding contractor. *Id.* at 181. No one had informed him that there was asbestos in those items. The decedent received all instructions and tools from his employer, and he did not look to Mobil for direction, supervision or anything else regarding the project. *Id.* at 181. Mobil had contracted with the general contractor to "supervise, inspect, expedite and control all phases of the work." *Id.*

On appeal, the plaintiff contended that the trial court erred in finding that Mobil owed no duty to warn of the presence of asbestos under section 414. The appellate court affirmed. By the decedent's admission, Mobil did not provide any direction or supervision of the welding tasks and, indeed, he did not look to Mobil for this. *Id.* at 187. Mobil did not provide the decedent with the asbestos blankets or gloves, and did not direct or order

him to use them. *Id.* at 187. Mobil's general right to stop work, monitor completion and control access to the site were "simply general rights it had as the ultimate employer on the construction project." *Id.* at 188.

The supervision of a safety program, providing a safety manual to be followed, or hiring a safety director "does not constitute retained control *per se*; the court must still conduct an analysis pursuant to the section 414 retained control exception." *Id.* at 190, citing *Martens*, 347 Ill. App. 3d at 318. It is "[o]nly when the safety program sufficiently affected the subcontractor's employees' means and methods of doing their work would the program possibly bring the owner within the ambit of the retained control exception." *Id.* at 190-91. Thus, no duty was owed by Mobil.

Garcia v. Wooton Construction, Ltd.

The plaintiff was an ironworker in the process of unloading a crane basket containing kegs of bolts when he felt something pop in his back. *Garcia v. Wooton Construction, Ltd.*, 387 Ill. App. 3d 497, 499, 900 N.E.2d 726 (1st Dist. 2008). The general contractor had leased the only crane for the worksite and was responsible for making the crane available to the subcontractors on the project. *Id.* at 501-502. It was made clear throughout the case that the general contractor was not involved in how the ironworkers lifted their bolts or performed their work. *Id.* at 502, 503. On the day of the accident, the general contractor informed the plaintiff's employer that the crane would be moved and returned after lunch. *Id.* at 502-503. As a result, "the plaintiff could not use the preferred, but more time-consuming method of using a choker and the crane to unload the kegs from the basket. Instead, the plaintiff unloaded the kegs manually," as instructed by his foreman. *Id.* at 502. In the plaintiff's view, he would not have been injured if he had not been in a rush to finish emptying the basket by lunch.

The court found that the general contractor retained some degree of control over the manner in which the ironwork was done by assuming control over the only crane at the worksite. *Id.* at 506. The unsafe method used by the plaintiff was "foreseeable" to the general contractor because it was aware that the plaintiff's employer would direct the unloading to be done "in a manner that would provide the crane to the general contractor in as short of a time as possible, that is, by manually unloading the basket, rather than taking the safer but more time-consuming method of using the choker and crane." *Id.* at 507.

The lesson from *Garcia* is that a duty may be owed if there is some foreseeable effect on the plaintiff's work as a result of the general's conduct, even if there is no direct control over the manner of the work. It also appears that the general voluntarily assumed a duty to provide the plaintiff with the safest method to perform the work by supplying the crane in the first place. The permissible scope of conduct for a general to avoid liability is unclear, but under *Wilkerson* and *Garcia* general contractors would have been better served taking a hands-off approach when it came to their subcontractors' work.

Grillo v. Yeager Construction

The plaintiff was performing masonry work from a scaffold for the construction of a new home and testified that the worksite surface was not properly backfilled by the general contractor. *Grillo v. Yeager Construction*, 387 Ill. App. 3d 577, 580-81, 900 N.E.2d 1249 (1st Dist. 2008). This resulted in open holes and trenches around the home where masonry work was to be performed. For this reason, the back two legs of the scaffold were placed on cinder blocks. The plaintiff acknowledged that he observed the scaffold setup in this manner before the accident and that it violated OSHA regulations and industry practice. *Id.* at 582. Nevertheless, he climbed 12 feet up the scaffold before it suddenly tipped upside down, and he fell into an open hole. *Id.* at 582.

The court found sufficient evidence of retained control for the jury to decide whether the general contractor was liable under §414. The first such evidence examined by the court was the AIA standard contract between the general contractor and the homeowner (not with the plaintiff's employer). The contract specified that the general contractor was "solely responsible" for the means and methods of the construction work as

well as “all safety precautions and programs.” *Id.* at 594. Without any further discussion the court proceeded to find that “[t]here was also evidence that defendant’s actions on the jobsite indicated that defendant retained more than a general right of supervision.” *Id.* at 594.

Many of the “actions” identified in the opinion are merely “general rights” listed in Comment c of section 414. Nevertheless, the significance of this ruling is in the impact of the contractual language in the retained control analysis, particularly where there is no direct involvement by the general in the plaintiff’s work. The *Calderon* court noted that when the contract reveals that a general has retained control over safety at a construction site, then summary judgment in favor of the contractor is not appropriate. *Calderon*, 381 Ill. App. 3d at 343. The *Grillo* decision is a perfect example.

Conclusion

Unfortunately, it is difficult to read these recent decisions together and formulate any clear standard for determining when a duty is owed to an independent contractor’s injured employee. Certain contractual language on safety may trigger a duty by itself where seemingly similar language in another contract may not. What may be considered pervasive day-to-day monitoring at one worksite may not be the case at another. Yet there is a noticeable trend for courts to focus their section 414 analyses on factors not found in the Restatement. Courts are increasingly looking for some mix of contract language and participation in safety to determine whether there is sufficient control. Section 414 also may be invoked if a defendant’s conduct has a foreseeable effect on the plaintiff’s work. A plaintiff’s admission that he did not receive direction from the general is only one component to consider on the continuum of control, and does not end the analysis under Illinois law.

While the meaning of retaining control continues to evolve with every decision, it is clear that section 414 is no longer a narrow exception limited to the text found in the Restatement.

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