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Construction Law

Lindsay Drecoll Brown and Matthew S. Sims
Cassiday Schade LLP, Chicago

Retaining Control: Recent 2014 Interpretations of Restatement Section 414

Defending against construction negligence claims requires an understanding of the most recent court rulings pertaining to Section 414 of the Restatement (Second) of Torts. Restatement (Second) of Torts § 414 (1965). Adopted in Illinois in 1965 in *Larson v. Commonwealth Edison Co.*, 33 Ill. 2d 316, 323 (1965), that section provides an exception to the general rule that one who employs an independent contractor may not be held vicariously liable for the acts or omissions of that entity. *Madden v. P.M. Paschen/S.N. Nielsen, Inc.*, 395 Ill. App. 3d 362, 381 (1st 2009). Specifically, Section 414 states:

> 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.

The concept of "retained control" is explained by comment (c) to Section 414, as follows:

> 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 a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

Even with the clarifying language contained within comment (c), the amount of control required to trigger a duty under Section 414 remains a constantly moving target, requiring intensive factual analysis and intuition. The level of control that may be exerted without risking a finding of duty is often up for debate, particularly in light of conflicting appellate court decisions addressing the issue. Compare *Bokodi v. Foster Wheeler Robbins*, 312 Ill. App. 3d 1051 (1st Dist. 2000) with *Martens v. MCL Const. Co.*, 347 Ill. App. 3d 303 (1st Dist. 2004). This dispute is further complicated by conflicting interpretations of Section 414's application that have been rendered by the Seventh Circuit Court of Appeals. Decisions by the Seventh Circuit in this arena aim to predict how the Illinois Supreme Court would decide the same issue. *Taco Bell Corp. v. Cont'l Cas. Co.*, 388 F.3d 1069, 1077 (7th Cir. 2004). Contrary to the Illinois Appellate Court, the Seventh Circuit has found that there

cannot be a finding of vicarious liability under Section 414. *Lee v. Six Flags Theme Parks, Inc.*, 2014 IL App. (1st) 130771, ¶ 84, fn. 7; *Aguirre v. Turner Const. Co.*, 501 F.3d 825, 828 (7th Cir. 2007) (rejecting the theory of vicarious liability under Section 414 from *Cochran v. George Sollitt Const. Co.*, 358 Ill. App. 3d 865 (1st Dist. 2005)).

A number of decisions rendered by Illinois Appellate Court in 2014 clarify this murky issue, specifically addressing how much control may result in a finding of retained control under Section 414. Those decisions are briefly highlighted below as each may assist practitioners in assessing a client's risk level and providing advice regarding the potential impact of specific contractual language.

Cain v. Contarino

According to the Illinois Appellate Court, Second District, in *Cain v. Contarino*, a court can find retained control despite clear contract language to the contrary if the conduct of the parties demonstrates *actual* control. 2014 IL App (2d) 130482, ¶ 86. However, a general contractor does not necessarily retain control over the manner in which work is done by refusing the subcontractor's request to use specific construction equipment to complete a particular task. *Id.* ¶ 116-117.

In *Cain*, the plaintiff was injured while performing carpentry work for his employer at the construction site of a single-family home. The plaintiff's employer, Hawkins Construction, was directing his work at the site pursuant to an agreement with the project's general contractor. *Id.* ¶ 40. The agreement unambiguously gave the subcontractor complete control over the means and methods of its work. *Id.* ¶ 77. It also made the subcontractor responsible for jobsite safety. *Id.* Nonetheless, the plaintiff alleged that the general contractor should be held liable for the subcontractor's negligence pursuant to Section 414. *Id.* ¶ 48. The general contractor moved for summary judgment on the grounds that it did not retain or exercise an amount of control over the subcontractor's work sufficient for a duty to arise under Section 414. *Id.* ¶ 10. The circuit court granted the motion, entering summary judgment in favor of the general contractor and against the plaintiff. *Id.* ¶ 42.

On appeal, the plaintiff argued the general contractor retained control in the areas of work safety, work means, and methods. *Id.* ¶ 86. As to work safety, the plaintiff failed to identify any specific safety measure imposed on the subcontractor. *Id* ¶ 88. The court specifically rejected the plaintiff's references to the general contractor's apparent right to halt unsafe work practices, as well as the general contractor's requirement that the subcontractor utilize all necessary safety equipment, reasoning that "a general right to enforce safety does not amount to retained control." *Id.* ¶ 106.

Turning to the control over the means and methods of the work, the court addressed the plaintiff's contention that the general contractor exhibited control over the equipment utilized by his company. *Id.* ¶ 86. The plaintiff testified that he was injured while setting roof trusses on a garage by hand. *Id.* ¶ 33. He claimed that certain risks associated with truss work are alleviated when the work is performed with the assistance of a crane. *Id.* The plaintiff's employer purportedly requested a crane for use during the truss work, but the general contractor denied that request. *Id.* ¶ 33, 113. The plaintiff alleged that he was not free to perform his work in the manner he wanted due to that denial. *Id.* ¶ 49. The court rejected this argument, finding the general contractor owed no duty of care under the retained control exception of Section 414. *Id.* ¶ 118. Notably, the court rejected this argument as it was unsupported by any expert testimony, or even testimony based on industry custom and practice. *Id.* ¶¶ 116-117.

A few practice points may be drawn from *Cain.* First, the opinion contains extensive quotations to what could be considered "typical" Section 414 deposition questioning, much of it contextualized with the factual record. Contemporaneously, the court provides a roadmap for a few arguments that could be used to neutralize those standard lines of questioning. Next, the decision includes a brief discussion of how a contractual

requirement to comply with OSHA may not indicate sufficient retained control to impose a duty. *Id.* ¶ 85 ("[E]ven if the contract imposed new regulatory liability upon [the subcontractor], any control would stem from OSHA, not from [the general contractor]."); *see also Calderon v. Residential Homes of Am., Inc.*, 381 Ill. App. 3d 333, 343 (1st Dist. 2008) (finding OSHA regulations do not create a duty of care). Finally, practitioners may take note of the court's finding that the general contractor's single instance of control over window leveling was insufficient to impose a duty of care with regard to the setting of building trusses. *Id.* ¶¶ 107-108. The practice point to be drawn is that evidence of a single instance of control *unrelated to the activity in which the plaintiff was injured* is insufficient to impose a duty of care.

Fonseca v. Clark

A prime contractor, otherwise known as a general contractor, will not be found liable for the acts of a subcontractor where the subcontractor contractually agrees to be responsible for jobsite safety and the prime contractor neither engages in an active role of ensuring safety, nor retains control over the incidental aspects of the independent contractor's work. *Fonseca v. Clark Const. Group. LLC*, 2014 IL App (1st) 130308.

In *Fonseca*, the plaintiff was employed as a drywall contractor working at a building in downtown Chicago. *Id.* ¶ 3. The building owner hired a general contractor to oversee the construction of the new building, and in turn, the general contractor hired the plaintiff's employer to work as a drywall contractor. *Id.* The general contractor had also hired an electrical contractor to perform the electrical work for the building. *Id.* ¶ 7. While in the process of moving a heavy piece of drywall, the plaintiff tripped on electrical debris that was on the floor of the hallway, which caused the heavy piece of drywall to fall on him, causing multiple injuries. *Id.* ¶¶ 11-12.

The plaintiff filed a negligence suit against the general contractor and the electrical contractor, alleging the electrical contractor failed to remove debris from the area where he was working, and the general contractor failed to properly supervise the work on the construction site. *Id.* ¶ 13. The general contractor moved for summary judgment, arguing that it had not retained sufficient control to trigger a duty under Section 414. *Id.* ¶18. The trial court granted summary judgment in favor of the general contractor and the plaintiff appealed. *Id.*

In affirming summary judgment in favor of the general contractor, the *Fonseca* court recognized the issue of whether the general contractor owed a duty under Section 414 turned on whether it had sufficient control over the work of the electrical subcontractor. Specifically, the *Fonseca* Court relied heavily on the general contractor's subcontract with the electrical subcontractor, which included statements that the electrical contractor assumed the entire responsibility for the work, *including the responsibilities which the general contractor had assumed to the owner*, and the electrical contractor was responsible for cleaning and removing debris from its work area. *Id.* ¶ 29.

The *Fonseca* court discounted the portions of the general contract with the owner that obligated the general contractor to control the work of subcontractors, finding that these responsibilities were passed down to the electrical contractor. *Id.* Moreover, the general contractor had not actually exercised any contractually retained right to control. As such, the *Fonseca* court found that the general contractor "did not *retain* control over [the subcontractor]." *Id.* (emphasis in original). The *Fonseca* court further found that even though the general contractor had a safety manager, held weekly safety meetings, and imposed a safety manual on the subcontractor, those factors were insufficient to trigger a duty under Section 414. *Id.* ¶¶ 30-31. In short, pursuant to the *Fonseca* decision, a prime contractor may rely on a subcontract to "pass-down" responsibility for safety—and ultimately, any legal duties under Restatement (Second) of Torts, Section 414—to subcontractors.

To adequately assess whether a duty arises under Section 414, practitioners must consider contractual control, supervisory control, and operational control. *Lee v. Six Flags Theme Parks, Inc.*, 2014 IL App (1st) 130771. In *Lee*, a heavy equipment mechanic fell to his death while working to dismantle the "Splash Water Falls" ride by disconnecting and removing structural steel. *Id.* ¶¶ 3-4. His estate filed a number of claims against the property owner, Six Flags, including a claim for construction negligence. *Id.* ¶ 5. In that claim, the plaintiff alleged Six Flags retained sufficient control over the work of its general contractor, the mechanic's employer, to be held liable for that contractor's negligence pursuant to Section 414. *Id.* The circuit court granted summary judgment against the plaintiff on that claim and the plaintiff appealed. *Id.* ¶¶ 63, 73.

Upon review, the appellate court noted, "[t]he best indicator of whether an employer has retained control over the independent contractor's work is the parties' contract, if one exists." *Id.* ¶ 74. Pursuant to the agreement executed by Six Flags and the contractor, Six Flags did not retain contractual control over the general contractor's work. *Id.* ¶ 76. The contractor was explicitly identified as the sole entity responsible for and with control over "construction means, methods, techniques, sequences and procedures," as well as for coordinating the work performed. *Id.* ¶ 8. The agreement also incorporated safety guidelines promulgated by Six Flags, which stated the contractor was responsible for safety and safety training, as well as for ensuring compliance with all applicable laws and OSHA requirements, including those in effect for proper barricading and warning of holes. *Id.* ¶¶ 8-9. The guidelines further required contractors working above six feet to provide fall protection equipment to their employees and enforce the use of that fall protection equipment. *Id.* ¶ 10.

The court held the Six Flags safety guidelines insufficient to be indicia of retained control. *Id.* ¶ 78. The court reasoned that requiring compliance with OSHA regulations does not create any duty of care, nor is the existence of a safety manual, plan or director analogous to retaining control absent evidence that those things affected the contractor's means and methods of completing its work. *Id.* ¶ 77. In contrast to such a finding, the Six Flags safety guidelines did not contain anything different from the contractor's own safety guidelines. *Id.* ¶¶ 81-82.

The court's inquiry did not end with the contract, as retained control may also be exhibited through supervisory and/or operational control. *Id.* ¶ 74. Supervisory control is exhibited through pervasive monitoring of the manner in which the work is being done. *Id.* ¶ 89. In this case, Six Flags personnel visited the work site two to three times per week, but limited its interactions during visits to assessing the amount of work completed. *Id.* ¶¶ 92-94. Frequent jobsite visits are not enough to rise to the level of retained control where the purpose of the drop-in is merely to check on the progress of a given project. *Id.* ¶ 89. As such, the court found the plaintiff failed to establish retained supervisory control. *Id.*

Similarly, the plaintiff failed to demonstrate the contractor was unable to perform the work in its own way, such that a finding of operational control could be supported. *Id.* ¶ 97. A finding of operational control may be appropriate where supplies and directions were given to the contractor. *Id.* ¶ 96. The court found no such evidence in the record, noting the decedent only received instructions from his employer and the contractor supplied safety harnesses to its employees. *Id.* ¶¶ 96-97. Of interest, the court was not swayed by testimony from the safety manager for Six Flags indicating that fall protection equipment, including harnesses, lanyards and retractable equipment, was provided to maintenance personnel by Six Flags Great America. *Id.* ¶ 19.

Noteworthy from *Lee* is its outright rejection of the Seventh Circuit's interpretation of Section 414. *Id.* ¶ 84, n. 7. The *Lee* Court made it a point to state that the Seventh Circuit decision in *Aguirre v. Turner Const. Co.*, 501 F.3d 825, 828 (7th Cir. 2007) and the district court decision of *O'Neill v. Ford Motor Co.*, 2009 U.S. Dist. LEXIS 115107 (N.D. Ill. Dec. 9, 2009) were at odds with the Illinois Appellate Court's recognition of vicarious versus direct liability under Section 414. *Id.* ¶ 84, n. 7. Practitioners may also note that the *Lee* court

recast *Bokodi v. Foster Wheeler Robbins, Inc.*, 312 Ill. App. 3d 1051 (1st Dist. 2000) and *Wilkerson v. Paul H. Schwendener, Inc.*, 379 Ill. App. 3d 491 (1st Dist. 2008) as "Direct Liability" cases, although neither of those cases explicitly recognized a specific distinction between direct and vicarious liability. Further, the *Lee* court echoed the sentiments of *Cochran* in rejecting the older Section 414 cases of *Pasko v. Commonwealth Edison Co.*, 14 Ill. App. 3d 481 (1st Dist. 1973) and *Weber v. Northern Illinois Gas Co.*, 10 Ill. App. 3d 625 (1st Dist. 1973). The supercesion of *Bokodi, Wilkerson, Pasko,* and *Weber* may be tempered by the well-established principle that "[a] panel, division, or district of the appellate court has no authority to overrule another panel, division, or district." *In re Marriage of Gutman,* 232 Ill. 2d 145, 149 (2008).

Ramirez v. FCL Builders, Inc.

Ramirez v. FCL Builders, Inc., 2014 IL App (1st) 123663 is particularly important to practitioners not only because it adds to the numerous interpretations of the level of control analysis, but also because of its impact on related jury instructions. In *Ramirez*, the plaintiff was injured while employed as a roofer for a subcontractor, Sullivan Roofing. *Id.* at ¶ 1. He subsequently asserted a claim against the general contractor, FCL Builders, for negligence pursuant to Section 414 of the Restatement (Second) of Torts. *Id.* at ¶ 4. In support of that claim, the plaintiff argued FCL Builders retained control over the work by Sullivan Roofing. *Id.* at ¶ 5. At trial, Illinois Pattern Jury Instruction No. 55.01 was submitted to the jury at the plaintiff's request and over FCL Builders' objection. *Id.* at ¶ 165. The instruction, entitled "Construction Negligence—Work Entrusted To Another" states:

> A[n] [owner] [contractor] [other] who entrusts work to a [subcontractor] [contractor] [other] can be liable for injuries resulting from the work if the [owner] [contractor] [other] retained some control over the safety of the work and the injuries were proximately caused by the [owner's] [contractor's] [other's] failure to exercise that control with ordinary care.

IPI Civil (2011) No. 55.01.

The *Ramirez* Court held that Illinois Pattern Jury Instruction No. 55.01 does not accurately state the law of construction negligence because it fails to explain that a mere general right to control safety is not sufficient for a finding of "retained control" according to comment (c) to Section 414 and recent interpreting case law. *Id.* ¶ 165. Instead, to impose liability under Section 414 the defendant must have more than "some control" over the subcontractor's work. *Id.* ¶ 168. Ultimately, the Court found FCL Builders was not entitled to a new trial despite the submission of the improper jury instruction, reasoning the instruction did not severely prejudice FCL Builders' right to a fair trial. *Id.* ¶ 196. Nonetheless, the decision may be used by practitioners in the future to guard against this faulty jury instruction.

Additional Unpublished Decisions

In addition to the foregoing published opinions, three unpublished decisions interpreting Section 414 were rendered by the First District Appellate Court this year: *Escareno v. Terra Cotta Commons Condos. Ass'n*, 2014 IL App (1st) 120682-U, *Torres v. Gutmann Leather LLC*, 2014 IL App. (1st) 122460-U, and *Lynne v. Duke Realty Ltd. P'ship*, 2014 IL App (1st) 123659-U. Although practitioners may benefit from a review of the holdings set forth within each of these decisions, they are not binding authority.

Conclusion

Cain, *Ramirez*, *Fonseca*, and *Lee* are useful decisions for contractors defending construction negligence cases. These recent decisions demonstrate the evolving state of Section 414 liability in Illinois that recognizes direct versus vicarious liability, which continues to move further away from the Seventh Circuit's interpretation of Section 414. Nevertheless, a duty analysis under Section 414 still requires intensive factual analysis, and any bright-line rule as to the amount of control required to trigger a duty appears to remain elusive.

About the Authors

Lindsay Drecoll Brown is a senior associate in the Chicago office of *Cassiday Schade LLP*. She concentrates her practice in civil litigation defense, with an emphasis on construction law, professional liability and product liability. Ms. Brown received her J.D., *cum laude*, from Loyola University Chicago School of Law, and her undergraduate degree from Michigan State University, with high honors. She is a member of the Illinois Association of Defense Trial Counsel's Construction Law Committee.

Matthew S. Sims is a senior associate attorney in *Cassiday Schade*'s Chicago Office. He has a broad practice in civil litigation, including areas such as the defense of construction contractors in injury cases, medical liability defense, product liability defense, and commercial litigation. He has extensive experience in risk transfer and indemnification.

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