

Premises Liability Exposure in Construction Injury Cases

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Since the demise of the Structural Work Act, considerable energy has been expended in cobbling together a substitute under Section 414 of the Restatement of Torts. See, Restatement (Second) of Torts § 414 (1965); see also, *Bokodi v. Foster Wheeler Robbins, Inc.*, 312 Ill. App. 3d 1051, 728 N.E.2d 726 (2000); *Rangel v. Brookhaven Contractors*, 307 Ill. App. 3d 835, 719 N.E.2d (1999). That provision imposes a common law duty of ordinary care upon owners, contractors and others who possess the requisite degree of control over the work of subcontractors on the job site, in lieu of a supreme court decision on the subject. *Brooks v. Midwest Grain Products Co.*, 311 Ill. App. 3d 871, 726 N.E.2d 153 (2000). While the substantive and evidentiary elements required to establish control remain the subject of intense dispute, the current trend of appellate decisions favors the “operative details” approach. See, *Martens v. MCL Construction Corp.*, 347 Ill. App. 3d 303, 807 N.E.2d 480 (2004); *Shaughnessy v. Skender Construction Co.*, 342 Ill. App. 3d 730, 794 N.E.2d 937 (2003). That approach defines a contractor’s duty in terms of control over the means and methods of a subcontractor’s work, as opposed to the retention of broad general powers over the construction project.¹

Whether influenced by the difficulties in establishing a duty under Section 414, the desire for an alternative basis for liability, or both, plaintiffs have turned to premises liability theories in cases against *general contractors* where the injury is a result of a hazardous *condition* at the construction site. *Kotecki v. Walsh Construction Co.*, 333 Ill. App. 3d 583, 776 N.E.2d 774 (2002); *Bieruta v. Klein Creek Corp.*, 331 Ill. App. 3d 269, 770 N.E.2d 1175 (2002). In doing so, the plaintiffs employ the traditional analysis that is afforded by Section 343 of the Restatement (Second) of Torts, which provides:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

- (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
- (c) fails to exercise reasonable care to protect them against the danger.

Restatement (Second) of Torts § 343 (1965). It has long been recognized that Section 343 applies to general contractors on a construction site. In *Deibert v. Bauer Brothers Construction Co., Inc.*, 141 Ill. 2d 430, 566 N.E.2d 239 (1990), the supreme court found that a general contractor qualifies as a “possessor” within the Restatement’s definition of the term. As such, it owes a duty to keep the construction site reasonably safe for the benefit of construction workers on the job. *Deibert*, 141 Ill. 2d at 434-35. While use of a premises liability theory in construction negligence cases following *Deibert* has been limited, a few courts have considered it as an adjunct to or an alternative for construction negligence claims under Section 414. *Kotecki v. Walsh Construction Co.*, 333 Ill. App. 3d 583; *Bieruta v. Klein Creek Corp.*, 331 Ill. App. 3d 269. However, because the possessor’s duty is qualified by the patency of the hazardous condition under Section 343A of the Restatement, that option has met with limited success. In both *Kotecki* and *Bieruta*, the court affirmed summary judgments in favor of the defendant on construction negligence and premises liability theories. *Kotecki v. Walsh Construction Co.*, 333 Ill. App. 3d 583; *Bieruta v. Klein Creek Corp.*, 331 Ill. App. 3d 269. In considering the latter, the First District in both cases rejected the plaintiff’s claims that because he was distracted the open and obvious rule should not apply.

Technically, the patency of a risk is not a defense. Rather, it qualifies the hazard and thereby limits the possessor’s duty. *Dunn v. Baltimore & Ohio Ry. Co.*, 127 Ill. 2d 350, 365, 537 N.E.2d 738, 744 (1989). Simply stated, except under extraordinary circumstances, the defendant has no reason to anticipate harm from a hazard which is self-evident. *Bucheleres v. Chicago Park District*, 171 Ill. 2d 435, 448, 665 N.E.2d 826, 832 (1996). The focus on the risk is through the eyes of the possessor. *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 143-45, 554 N.E.2d 223, 228, 229 (1990). The same is true of the two exceptions which make an otherwise patent hazard actionable under Section 343(b) and (c). Restatement (Second) of Torts § 343(b), (c)(1965). If the defendant had reason to anticipate that persons upon the premises might be distracted and therefore not appreciate the risk, there is potential exposure. *Ward v. K Mart Corp.*, 136 Ill. 2d 132; *Deibert v. Bauer Brothers Construction Co., Inc.*, 141 Ill. 2d 430. Also, if the defendant has reason to believe that persons on the property might deliberately encounter the condition, a duty exists to protect them against it. *Lafever v. Kemlite*, 185 Ill. 2d 380, 396-97, 706 N.E.2d 441, 450 (1998).

The open and obvious rule and its exceptions apply with full vigor in construction injury cases which are brought under a premises liability theory. For example, in *Deibert v. Bauer Brothers Construction Co.*, 141 Ill. 2d 430, the plaintiff was injured when he stepped in a tire rut as he was exiting a portable bathroom at the construction site. At the time he was looking “skyward” to discover whether construction materials were falling from overhead and he did not see the ruts. Despite the fact that the “ruts” were obvious, the court found a duty on the part of the general contractor because it knew that construction materials were dropped from above in the area and therefore had reason to know that construction workers might be “distracted” from looking at the road ahead. *Deibert v. Bauer Brothers Construction Co.*, 141 Ill. 2d 430.

As discussed above, the use of premises liability theories in construction injury cases met with scant success following *Deibert*, because of the “open and obvious” limitation upon a possessor’s duty. In *Bieruta v. Klein Creek Corp.*, 331 Ill. App. 3d 269, 770 N.E.2d 1175 (2002), the plaintiff turned and fell into a ditch when a co-worker called his name from behind him. The suit was brought under construction negligence and premises liability theories. Summary judgment for the defendant was granted by the trial court and affirmed on appeal. The First District Appellate Court held that the owner and general contractor, Klein Creek, could not be expected to anticipate that workers at the site might be distracted when their names were called. Specifically, the court stated:

Here, we find that it was not reasonable that Klein Creek would anticipate that a co-worker calling out Bieruta's name would distract Bieruta's thereby causing him to fall into the trench. In *Deibert* and the other cases mentioned by the plaintiff, the distractions were known to the possessor of the land or caused by the possessor.

Bieruta v. Klein Creek Corp., 331 Ill. App. 3d at 273.

Similarly, in *Kotecki v. Walsh Construction Co.*, 333 Ill. App. 3d 583, 776 N.E.2d 774 (2002), the court affirmed a summary judgment on the plaintiff's Section 414 and premises liability claims. There, the plaintiff, a painter, fell as he was descending a ladder with his paint supplies and equipment. In addition to a number of other infirmities, which defeated the plaintiff's claim that the construction site was hazardous, the appellate court rejected the contention that the presence of "multiple workers" at the site was a distraction. In doing so it recognized: "A distraction-free environment on a construction project would be an impossible burden to meet . . ." *Kotecki v. Walsh Construction Co.*, 333 Ill. App. 3d 583, 540, 776 N.E.2d 774, 780 (1st Dist. 2002).

Contrary to past precedent is the recent First District decision in *Clifford v. The Wharton Business Group, LLC*, 353 Ill. App. 3d 34, 817 N.E.2d 1207, 288 Ill. Dec. 557, 2004 WL 2192558 (2004). *Clifford* is significant for its expansion of the "distraction exception" in construction site injury cases which involve "open and obvious" conditions. There the plaintiff was employed as a carpenter by one of the subcontractors which Wharton, the general contractor, had employed on a 10-unit townhome project. Construction had progressed to the point where on each of the upper floors a four-foot by ten-foot stairway opening had been made. Earlier in the day Clifford and his fellow employees had put up and braced an interior wall. As the plaintiff worked in its vicinity the wall collapsed. Clifford put his hands up in an attempt to stop it and apparently fell or was thrown into the stairwell opening.

The original complaint was brought under Section 414 of the Restatement. After a dispositive motion was filed, a second count for premises liability was brought. It alleged that the unguarded stairwell was an actionable condition of the property. Summary judgment for the defendant was entered on both claims.

On appeal the First District Appellate Court specifically held that construction negligence and premises liability theories are viable alternative grounds for recovery. In so doing, the court stated, "We clarify that sections 343 and 414 are not mutually exclusive; rather, each one offers an independent basis for recovery." *Clifford v. The Wharton Business Group, LLC*, 353 Ill. App. 3d at 47.

It then went on to affirm summary judgment on the construction negligence theory, and followed the operative details analysis.

[T]here is no indication that Wharton exercised the level of control necessary to subject it to liability under section 414. Wharton clearly did not control the operative detail of O'Toole's methods of work, such that O'Toole was not entirely free to do the work in its own way. Wharton did not supply any equipment to O'Toole's employees, did not direct the carpenters how to perform their tasks, and did not hold safety meetings or maintain safety rules for its subcontractors.

Clifford v. The Wharton Business Group, LLC, 353 Ill. App. 3d at 48.

The court, however, reversed the summary judgment which had been entered in favor of the general contractor on the plaintiff's premises liability theory. In doing so it agreed that the stairwell opening was not only obvious but known to the plaintiff. Nonetheless, it held that Wharton had reason to expect that construction workers might be distracted and thereby overlook and forget the hazard.

This aspect of the opinion flies in the face of *Bieruta* and *Kotecki* and broadens the distraction exception to the point where it subsumes the open and obvious rule in construction site cases.

As discussed above, the *Bieruta* court held that a general contractor had no reason to anticipate the type of distraction which took place there, namely the plaintiff's response to having his name called. The *Kotecki* court denied the presence of other workers as a distraction, and in doing so refused the argument that general commotion on the job was sufficient to justify inattention. *Clifford* rejects the rationale of both *Bieruta* and *Kotecki*. First, it holds that the defendant need not anticipate the type of distraction which took place stating, "Contrary to Wharton's position it is not necessary for a defendant to foresee the precise nature of the distraction." Second, the *Clifford* court adopts a distraction exception the breadth of which devours the open and obvious rule which it is intended to qualify. In doing so, it stands the more restrictive reasoning in *Kotecki* on its head by holding that virtually every activity on a construction site can constitute a qualifying distraction. Specifically, the *Clifford* court held that "[a]ll that is required is the defendant's awareness that those in proximity to the open and obvious hazard are likely to become distracted in some way and forget about the presence of the hazard." (Emphasis supplied). *Clifford v. The Wharton Business Group, LLC*, 353 Ill. App. 3d at 46.

Contrary to the holding in *Kotecki* that a distraction-free environment on a construction project would be an impossible burden to meet, *Clifford* holds that the defendant must carry that "burden" if it is to overcome the plaintiff's assertion that he was distracted in "some way" and therefore failed to heed the warning of peril which his senses would otherwise have imparted. In expanding the exception, the *Clifford* court relies upon the supreme court decision in *Rexroad v. City of Springfield*, 207 Ill. 2d 33, 796 N.E.2d 1040 (2003) for the proposition that the distraction standard has a low threshold. In *Rexroad*, the student manager of a high school football team was injured when he stepped into a hole in an adjacent city parking lot, which was about 64 square feet in size, four inches deep, and was filled with sand. At the time he was on his way from the locker room to the practice field with a helmet which he had retrieved and was focusing his attention on the player who needed the helmet. The hole was unquestionably open and obvious. The trial court agreed and entered summary judgment for the defendant. The Fourth District affirmed *Rexroad*, 331 Ill. App. 3d 545, 772 N.E.2d 821 (2002). The plaintiff relied upon the distraction exception and the supreme court reversed.

We find the present case to be similar to *Ward*. It was reasonably foreseeable that students may fail to avoid the risk posed by the hole by becoming distracted or momentarily forgetful. The record contains some evidence that this was the case. Matthew testified he was distracted from the hole because of his focus on carrying a football helmet to the player who needed it . . .

Rexroad, 207 Ill. 2d 33, 45, 796 N.E.2d 1040, 1047 (2003).

The *Clifford* decision also relies upon *Shaffer v. Mays*, 140 Ill. App. 3d 779, 489 N.E.2d 35 (1986) in which the plaintiff fell into a stairwell opening while helping to remodel a house which was owned by the defendant, his father-in-law. At the time the plaintiff was helping to move a heavy and awkward object into place when he stepped into the uncovered hole and fell to the basement, sustaining severe injuries. A verdict for the plaintiff was affirmed despite the plaintiff's testimony that he was aware of the stairwell. The court found a distraction in that plaintiff was looking upward and toward the person helping him. *Shaffer v. Mays*, 140 Ill. App. 3d 779, 489 N.E.2d 35 (1986).

Given the breadth of the distraction exception that is enunciated by the court in *Clifford* 353 Ill. App. 3d 34 (2004), it is likely that construction injury claims will be increasingly brought on premises liability theories, as well as construction negligence theories. It is important to understand that the premises liability theory depends upon possession of the construction site. Consequently, the theory

appears to be viable only against owners and general contractors, as opposed to downstream subcontractors whose involvement would be defined by Section 414 of the Restatement. Moreover, it remains to be seen whether other divisions of the First District, and other appellate districts, will follow the reasoning in *Clifford* or the more restrictive rationale of *Bieruta* and *Kotecki*.

Endnote

¹ See, Complexities in Construction Negligence Litigation, 13 IDC Quarterly vol. 13, no. 3, page 20 (2003); See also, Recent Developments in Construction Negligence; An Update Of Complexities In Construction Negligence Litigation, 14 IDC Quarterly vol. 14 no. 2, page 41 (2004).

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