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As the Dust Settles— Construction Negligence Litigation After *Carney v. Union Pacific*

This is the eighth article on the subject of construction negligence law under Restatement (Second) of Torts § 414 (1965) since the Structural Work Act (Act) was repealed in 1995. After twenty-five years, the statute has receded into the shadows of history to an extent that the reasons for its adoption, its elements and the cause of its demise are largely forgotten. Nonetheless, it continues to cast a long shadow over the litigious landscape of Illinois through the parochial and liberal interpretation given to section 414 by the appellate courts of this state. As pointed out in our last article, "*Carney v. Union Pacific Railroad Co.—Daylight Comes to Section 414*", from 1995 to the eve of *Carney*, Illinois had sixty-one reported cases under section 414, as opposed to a total of twenty-nine for the six surrounding states. *See* David B. Mueller and Timothy J. Cassidy, *Carney v. Union Pacific Railroad Company: Daylight Comes to Section 414*, *IDC Quarterly*, Vol. 27, No. 2, Feb. 2, 2017. Understandably, liability insurance rates to cover that exposure were between two and three times greater in Illinois than any of its neighbors. *Id.* at p.3. Compounding the uncertainties of that litigious landscape was recognition that the pattern jury instructions which appear in the Chapter 55.00 CONSTRUCTION NEGLIGENCE series (Illinois Pattern Jury Instructions—Civil (2017–2018 Edition) do not state the law. *See Ramirez v. FCL Builders, Inc.*, 2014 IL App (1st) 123663, ¶¶ 162-79; *Lee v. Six Flags Theme Parks, Inc.*, 2014 IL App (1st) 130771, ¶ 86.

From *Larson v. Commonwealth Edison Co*. to *Carney v. Union Pacific R.R. Co.*, a span of over fifty years, decisions under section 414 were limited to the appellate courts. *Larson,* 33 Ill.2d 316, 325 (1965); *Carney v. Union Pacific R. Co.,* 2016 IL 118984. As discussed in preceding articles on the subject[1], there was a lack of uniformity between the various districts, and within the various divisions of the Illinois Appellate Court First District regarding the nature and scope of any duty which is owed and, once a duty is found, the standard of care whereby it is measured. Those issues are discussed in depth in prior article, "*Carney v. Union Pacific Railroad Co. —Daylight Comes to Section 414.*" The purpose of the present discussion is to consider how *Carney* has been applied in subsequent cases, and thereby to predict the future course of section 414 litigation.

What the *Carney* Court Decided

Section 414 was first recognized as a negligence alternative to the Structural Work Act in Illinois Supreme Court case *Larson v. Commonwealth Edison Co.* However, it was seldom used while the statute's strict liability provisions were viable. After the Act was repealed, the common law remedy came into focus as the basis for construction injury recoveries from a variety of causes, including many that are wholly unrelated to "scaffolds, hoists, stays, ladders, [or] supports." 740 ILCS 150/1. It provides:

Section 414 Negligence in Exercising Control Retained by Employer

> 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.

The "bare bones" of that section are then fleshed out by **Comments *a*, *b* and *c*** to yield the structure and substance of the tort, the basic elements of which may be summarized as follows:

- As a general rule, one who hires an independent contractor is not liable for torts committed by the independent contractor in performance of the agreed upon undertaking. *See Gomien v. Wear-Ever Aluminum, Inc.*, 50 Ill.2d. 19 (1971); *see also Lawlor v. North American Corp. of Illinois*, 2012 IL 112530 at ¶ 42. The reason for the rule is evident in the definition of "independent contractor":

  > [A]n independent contractor is one who renders service in the course of an occupation representing the will of the person for whom the work is done only as to the result of the work and not as to the means by which it is accomplished, [citation] and is one who undertakes to produce a given result without being in any way controlled as to the method by which he attains that result. * * * The test of the relationship is the right to control. It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant or agent." *Hartley v. Red Ball Transit Co.*, 344 Ill. 534 (1931).

- An exception exists where the hiring party so controls the contractor's work that the latter is not free to decide *how* the work is done. This is the so-called "control" element of the tort from which the hiring party's duty arises. Interpretation of the term "control" as it is used in section 414, vexed the courts for over fifty years until its meaning was discussed and defined in *Carney*. Until *Carney* ruled it out, a number of courts viewed "control" under section 414 alternately in the context of "vicarious" and "direct" liability. As a consequence of the construction given section 414 by *Carney*, a contractor's exposure is limited to its "direct liability". *Carney,* 2016 IL 118984, ¶ 36.
- Where the requisite "control" exists, a duty is imposed upon the hiring party to exercise that "control" with "reasonable care" as it relates to the "unsafe work condition" or hazardous employment practice. Restatement (Second) of Torts (1965), *cmt. a.*
- "Reasonable care" presupposes that the hiring party knew or had reason to know of the dangerous condition or unsafe work practice. *Id.* at *cmt. b. See also O'Gorman v. F.H. Paschen*, 2015 IL App. (1st) 133472 ¶ 101.

In creating order from chaos and structure from flux, the supreme court in *Carney* defined the term "control" in the context of its criteria. The court recognized, if not recommended, that the issue of a defendant's retained control ". . . may be decided as a matter of law where the evidence is insufficient to create a factual question." *Carney,* 2016 IL 118984, ¶ 41. In that regard, it stated that ". . . the best indicator of whether the defendant retained control sufficient to trigger the potential for liability under section 414 is the written agreement between the defendant and the contractor. *Id.* Of significance to its determination that control was wholly lacking under the contract between Union Pacific and Happs, the court emphasized each of the following points:

(1) The contract identified the relationship as that of owner and "independent contractor";
(2) The contract required the contractor at its own expense to provide "all superintendence" as well as all "labor, tools, equipment, materials and supplies necessary to remove the bridges." There is found that the undertaking did not evince an intent by the railroad to control the contractor's work. To the contrary, ". . . the requirement that [contractor] provide 'all superintendents' placed responsibility for supervision of the bridge removals with [contractor], not [the railroad]"; *Id.* ¶ 45.

Relying upon **Comment *c*** for matters that *do not* evince control, the court rejected the following:

(1) the right to terminate the contract upon a finding that the "contractor's" services were "unsatisfactory";
(2) a provision requiring the work by "contractor" to be done in a workmanlike manner to the satisfaction of [railroad];
(3) a provision giving the railroad the right to stop the work or make changes as its interests may require;
(4) the right to remove any employee or subcontractor's employee who was not acceptable to the railroad;
(5) the right to compel removal of unsafe equipment;
(6) a provision requiring certain protective gear, and
(7) a general right to enforce safety.

Id. ¶¶ 46-47. Of particular significance, the court found that the ***contract placed control of job safety with the [contractor]***. *Id.* ¶ 47 (bold italics supplied) (*emphasis added*). The contractor was required "to keep the jobsite free from safety and health hazards and insure that its employees are competent and adequately trained in all safety and health aspects of the job." *Id.*

Citing the language of **Comment *c***, the court specifically found that in order for section 414 to apply, the defendant must have retained ". . . at least some degree of control over the ***manner*** in which the work is done." *Id.* ¶ 46 (bold italics supplied) (*emphasis added*). General rights to stop or discontinue the work, inspect its progress, receive reports, make suggestions or recommendations which need not necessarily be followed or prescribe alterations or deviations do not define control. Rather, control focuses upon the methods and operative details of the work. *Id.*

In addition to looking at the contract between the defendant and the contractor, the *Carney* court recognizes that evidence of the defendant's conduct is significant. There, as with the pertinent provisions of the contract, the court focused upon the type of active involvement which would be at variance with the contractor's agreement to provide "all superintendence" in connection with the work. Historically, that has been referred to as pervasive supervision of the work. *See Lee*, 2014 IL App. (1st) 130771, ¶¶ 89, 90; *see also Shaughnessy v. Skender Constr. Co.*, 342 Ill. App. 3d 730, 739 (1st Dist. 2003). By definition, that level of supervision requires an actual presence on the jobsite with one or more of the following significant factors: (1) provision of tools or other equipment for the work, (2) giving instruction to the contractor as to how to perform its job responsibilities, and (3) involvement in the specific details of the subcontractor's work, including its safe performance. *Shaughnessy,* 342 Ill. App. 3d at 738; *Cochran v. George Sollitt Constr. Co.*, 358 Ill. App. 3d 865 (1st Dist. 2005). In *Carney* the only persons who were involved with the work were employees of the defendant and the contractor. *Carney*, 2016 IL 118984, ¶ 55. While railroad representatives would come by and "check out the jobs", they never spoke to the actual workers. *Id.* Nor were any Union Pacific employees present at the bridge site at the time of the accident.

The *Carney* court also emphasized that proactive safety efforts and authority, including the right to stop the work or require that it be done in a safe manner, did not establish sufficient control to give rise to a duty under section 414. *Id.* Further, relying upon *Fris v. Personal Products Co.*, the supreme court found that equating an entrusting contractor's

right to require "that the work be done in a safe manner" to "control" would result in strict liability for all injuries to employees of independent contractors. *Id.* at ¶ 61 (citing *Fris v. Personal Prod. Co.,* 255 Ill. App. 3d 916, 924-25 (3d Dist. 1994)).

On the question of duty under section 414, the court's analysis concluded with recognition that "control" within the meaning of section 414 requires the entrusting party's retention or exercise of authority over *how* the contractor does its work. Thus, the court found:

> [B]ecause the record contains no evidence that defendant retained at least some control over the ***manner*** in which Happs performed the bridge removal work, we hold that the trial court did not err in granting summary judgment on plaintiff's retained-control theory of duty and liability.

Carney. 2016 IL 118984, ¶ 62. Whether viewed from the perspective of contract provisions or their onsite implementation, the court in *Carney* recognized the reality that contractors are employed in anticipation that they will bring their specialized "methods of work" and attention to "operative detail" to the job. Therefore, and relying upon **Comment *c*** to section 414, the court requires that a defendant's retained supervision be such that ". . . the contractor is not entirely free to do the work in his own way." *Id.* at ¶ 46.

In the preceding respects, *Carney* is the culmination of a series of decisions which recognize the combination of diverse, specialized trades and skills which is required to bring a construction project to completion. It is well-recognized that delegation of specialized areas of the work is consonant with the customs of the construction industry, in which each subcontractor and trade brings a different skill to the job. That reality was specially recognized in *Rogers v. West Const. Co.*, where the Illinois Appellate Court Fourth District acknowledged that the general contractor was entitled to rely upon the "expertise and experiences" of its subcontractor. *Rogers*, 252 Ill. App. 3d 103, 107 (4th Dist. 1993).

Consistent with the well-recognized delegation of skills in construction, *Oshana v. FCL Builders, Inc.* involved an ironworker employed by the structural steel erection subcontractor, JAK Ironworks. *Oshana v FCL Builders, Inc.,* 2012 IL App. (1st) 101628. He sued the steel fabrication contractor, Suburban Ironworks, Inc., whose agreement with the general contractor, FCL Builders, Inc., included both steel fabrication and erection. In referring to the plaintiff's claims as they related to the FCL/Suburban contract the court stated *inter alia*:

> [S]uburban's scope of work in the initial FCL/Suburban subcontract included both steel fabrication and erection. In that initial subcontract, Suburban agreed to furnish the necessary management and supervision to perform and complete the contract; assumed responsibility to prevent accidents to its agents, invitees and employees; agreed to take all reasonable safety precautions with respect to the work to be performed under the contract; and agreed to maintain at all times a qualified and skilled superintendent or foreman at the site of the work. Plaintiff and FCL contend that those supervisory and safety duties, which Suburban had assumed toward FCL, were not passed on to JAK in the Suburban/JAK subcontract. According to plaintiff and FCL, Suburban was responsible for safety within the scope of its work, and steel erection was included within that scope.

Id. ¶ 24. In affirming summary judgment in favor of Suburban, the court found:

> [I]n response, Suburban acknowledges that it initially undertook, in accordance with industry custom and practice, contractual responsibility for both the steel fabrication and erection work. However, Suburban, in accordance with the terms of its initial subcontract with FCL, subcontracted out the erection work to JAK, a

> competent subcontractor, and thereby delegated the supervisory and safety responsibilities attendant to that erection work to JAK.

Id. ¶ 26. The delegation that is recognized in *Oshana v. FCL Builders, Inc.*, *supra*, and *Rogers v. West Const. Co.*, *supra*, is also in line with numerous opinions that support summary judgment in favor of general contractors who have subcontracted all aspects of the work out of which an accident occurs, retaining only the type of general authority which does not trigger a duty under section 414. *See Steuri v. Prudential Ins. Co.*, 282 Ill. App. 3d 753 (1st Dist. 1996) (finding general contractor delegated responsibility for the details of the work to subcontractor); *Moiseyev v. Rot's Building and Development, Inc.*, 369 Ill. App. 3d 338 (3rd Dist. 2006) (affirming entry of summary judgment in favor of general contractor where it has been shown responsibility for details of the work delegated to subcontractor); *Joyce v. Mastri*, 371 Ill. App. 3d 64 (1st Dist. 2007) (affirming summary judgment in favor of general contractor where subcontractor was contractually responsible for jobsite safety and general contractor took no active role in insuring safety); *Martens v. MCL Const. Corp.*, 347 Ill.App.3d 303, 313 (1st Dis. 2004) (stating that a contractor unknowledgeable about the details of some task usually delegates that work to an independent contractor); *see also O'Gorman v. F.H. Paschen/S.N. Nielsen, Inc.*, 2015 IL App (1st) 133472.

Nor do the provisions of OSHA impose a non-delegable duty on general contractors contrary to Illinois law. As held in *Downs v. Steel & Craft Builders, Inc.*, an exception to that effect "would swallow the rule, because no matter what steps defendant would take to shield itself from liability, the OSHA provisions inevitably would pierce defendant's armor, striking a fatal blow that otherwise would be blocked under the theories advanced by plaintiff." *Downs v. Steel and Craft Builders, Inc.,* 358 Ill. App. 3d 201, 209 (2d Dist. 2005).

Synthesizing the preceding authorities with the rationale in *Carney*, and its reliance upon the clear distinctions in **Comment *c***, leads to the unmistakable conclusion that complicity is an implicit component of the tort. An entrusting party must be so invested in "how" the contractor does its work that it is logically liable for injuries which take place during the performance of that work. Viewed logically, the entrusting party is complicit in the occurrence through its active condonation of the hazard or invidious work practice. Unlike the old Structural Work Act, liability is not strict. There is no duty to seek out unsafe conditions and no liability for failing to discover them.

The Notice Requirement

While *Carney* does not involve the negligence component of section 414, which becomes operative *after* a legal duty is found, that requirement is nonetheless an integral element of the rule. "Control" within the Restatement's meaning of that term is the *sine qua non* before a legal duty arises. However, a finding of "control" is akin to cocking the hammer on a gun. As set forth in the express language of section 414, the controlling "employer owes a duty to exercise reasonable care" and is "subject to liability for physical harm to others . . . which is caused by his failure to exercise his control with reasonable care." Thus, the cocked hammer is triggered by the negligence of the defendant in failing to exercise "his control with reasonable care."

Reasonable care considers the controlling party's actual or constructive knowledge of the hazardous condition or unsafe work practice which caused the injury. In that respect the language of **Comment *b*** *supra* is both instructive and controlling:

> [T]he rule stated in this Section 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. In such a

> situation, the principal contractor is subject to liability if he fails to prevent the subcontractors from doing even the details of the work in a way unreasonably dangerous to others, ***if he knows or by the exercise of reasonable care should know that the subcontractors' work is being so done, and has the opportunity to prevent it by exercising the power of control which he has retained in himself.*** So too, he is subject to liability ***if he 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 cause the subcontractor to do so.

Restatement (Second) of Torts § 414, *cmt. b.* (bold italics supplied). The boldly emphasized language *supra* is intended to highlight the requirement of actual or imputed knowledge of the risk in question as a condition precedent to liability. It is significant to understand that the knowledge which is required to "trigger" the duty to prevent resultant injury is independent of the retained control which permits the defendant to prevent that injury. In this respect the "duty" derived from "control" is remedial as opposed to investigative. That is to say, the drafters of section 414 do not appear to contemplate an obligation on the part of a "controlling" party to affirmatively investigate or seek out hazardous conditions or unsafe work practices with the objective of preventing them.

Appellate decisions under section 414 have consistently required that a controlling defendant have knowledge of the risk before liability would attach. As succinctly stated in *Cochran v. George Sollitt Const. Co.*, "[a]ccording to **Comment b** to section 414, the general contractor's knowledge, actual or constructive, of the unsafe work methods or a dangerous condition is a precondition to direct liability." *Cochran,* 358 Ill. App. 3d 865, 879-80; *see also Shaughnessy,* 342 Ill.App.3d 730; *Martens v. MCL Const. Corp.*, 347 Ill. App. 3d 303 (1st Dist. 2004); *Rangel* v. *Brookhaven Constructors, Inc.,* 307 Ill. App. 3d 835, 839 (1st Dist. 1999); *Calderon v. Residential Homes of America, Inc.*, 381 Ill. App. 3d 333, 335 (1st Dist. 2008).

Whether or not a defendant had actual or constructive knowledge of the dangerous condition or unsafe work practice, therefore turns upon a nature and duration of the hazard and the contractor's exposure to it. Where the condition or practice is open and obvious or it is actually observed by the defendant's superintendent or project manager, it is no defense that those supervisory employees lacked sophistication to appreciate the hazard. *Diaz v. Legat Architects, Inc.*, 397 Ill. App. 3d 13, 37 (1st Dist. 2009). On the other hand, where the defendant contractor lacks the opportunity to observe the danger, knowledge will not be imputed, and liability will not follow. *Lee,* 2014 IL App (1st) 130771.

Issues of control and *ergo* duty, as well as knowledge *ergo* breach are pregnant in the appellate decisions which have been reached following *Carney*. To date, there are only four published opinions on the subject of section 414, all of which come from various divisions of the Illinois Appellate Court First District. They are the subject of the following discussion:

Post *Carney* Decisions Go Both Ways

Since *Carney.* was decided in 2016, four appellate court decisions have considered its implications, and in doing so, predict the future course of section 414 litigation. These are in chronological sequence:

Gerasi v. Gilbane Building Company, Inc., 2017 IL App (1st) 133000;

Snow v. Power Const. Co., LLC, 2017 IL App (1st) 151226;

LePretre v. Lend Lease (US) Const., Inc., 2017 IL App (1st) 162320; and

Foley v. Builtech Const., Inc., 2019 IL App (1st) 180941.

Each of these cases considers both the scope and breadth of the *Carney* holding on the issue of duty and the requirement of notice to trigger that duty, where it exists. Of these, *Snow v. Power Const. Co.* and *LePretre v. Lend Lease (US) Const. Inc.* adhere to the rationale of *Carney* in rejecting "control" as a matter of law. Both also hold that regardless of control, the occurrence and the plaintiff's resultant injuries were not reasonably foreseeable. While the following are unpublished Rule 23 opinions from the Fifth and Sixth Divisions of the First District, they align with *Snow* and *LePretre*, *supra*, in affirming summary judgments in favor of the defendants pursuant to *Carney*. *Puente v. Lopez*, 2018 IL App (1st) 170283-U; *Cruz v. Power Constr. Co., LLC*, 2018 IL App (1st) 171170-U. Thus, for whatever benefit there may be, statistics reflect that four out of the six divisions of the First District follow the admonition of *Carney* that: "The issue of a defendant's retained control may be decided as a matter of law where the evidence is insufficient to create a factual question." *Carney,* 2016 IL 118984, ¶ 41. For those in Cook County it is also worth noting that *LePretre*, *Puente* and *Cruz* were all decided at the trial level by the Honorable Kathy M. Flanagan.

With the exception of *Foley v. Builtech Constr., Inc.*, each of the preceding cases also points out the propriety of summary judgment where the defendant neither knew nor had reason to know of the dangerous condition or work practice. *Foley*, 2019 IL App (1st) 180941. The same is true of *Gerasi v. Gilbane Building Company, Inc. Gerasi*, 2017 IL App (1st) 133000, ¶ 64. Even *Foley v. Builtech* is a split decision, with the dissenting judge pointing out that the defendant neither knew nor had reason to know of a dangerous condition or the plaintiff's election to make it such by the manner he chose to perform his work. *Foley,* 2019 IL App (1st) 180941, ¶¶ 95-112.

A little more than a year after *Carney* was decided, its scope and application were considered in *Gerasi v. Gilbane Building Co., Inc.* 2017 IL App (1st) 133000. There an employee of the electrical subcontractor, Geary, brought a claim under section 414 against the general contractor, Gilbane, for injuries sustained from an "arc flash of electricity" as he was working with a breaker at an AT&T facility. *Gerasi,* 2017 IL App (1st) 133000, ¶ 29. In a typical pattern, the prime contract between AT&T and Gilbane made Gilbane responsible for the safety and protection of workers on the project, and in that regard, required Gilbane to administer the "AT&T/Gilbane safety plan". *Id.* ¶ 9. Gilbane subcontracted the electrical work to Geary under a contract which required Geary to adhere to Gilbane's safety plan, with Geary accepting responsibility ". . . for damage to persons and property resulting from the failure to do so." *Id.* ¶ 11.

At the time of the accident Geary was performing a temporary electrical tie-in to provide power from a breaker which was otherwise disconnected from the power source. As temporary tie-ins did not involve "live" work, Geary electricians customarily performed them without lockout and tagging procedures or personal protective equipment. As he was working with his "bare hands", an "arc flash of electricity" occurred. It was later determined that the breaker had failed for "unknown reasons". *Id.* ¶ 26.

Gilbane sought and obtained summary judgment on the basis that there was "no evidence of actual or constructive knowledge by Gilbane of any unsafe act or condition at the time of, or before plaintiff's injury." *Id.* ¶ 32. No issue regarding "control" under section 414 was raised until Gilbane addressed *Carney* in a supplemental brief and at oral argument. As *Carney* had been recently decided, the court agreed to consider the control issue and in doing so, determined that summary judgment on the question of duty under section 414 is proper where: (1) the contract between the defendant and the contractor or subcontractor placed the subcontractor in charge of worksite safety; (2) the contractor's representative does not oversee the subcontractor's work; (3) the contractor's representative was not on site at the time of the plaintiff's injury, and (4) any post-accident discussions or changes were simply an attempt to promote worker safety and avoid another injury. *Id.* ¶ 49.

By implication, the *Gerasi* court appears to opine that the absence of any of those factors would be a basis to deny summary judgment on the issue of control. In that regard, it found the active involvement and personal presence of representatives of the defendant particularly significant, stating: ". . . Here Gilbane did not personally oversee all the work performed on the project. . ." *Id.* ¶ 51. However, after evaluating the preceding elements from *Carney* and comparing them to the "hands-on" circumstances in *Aguirre v. Turner Constr. Co.*, 501 F.3d 825, 830-31 (7th Cir. 2007) and *Bokodi v. Foster Wheeler Robbins, Inc.*, 312 Ill. App. 3d 1051, 1063 (1st Dist. 2000), the *Gerasi* court determined that it did not have to resolve the "control" issue because there was no evidence that Gilbane had actual or constructive knowledge of a dangerous condition or unsafe work method. *Gerasi,* 2017 IL App (1st) 133000, ¶ 64. Therefore, summary judgment was affirmed without deciding the question of control.

Likewise, the court in *Snow v. Power Constr. Co., LLC*, affirmed summary judgment in favor of Power Construction Company (PCC) and Power Engineering and Contracting Corporation (collectively, Power). *Snow v. Power Const. Co., LLC*, 2017 IL App (1st) 151226. There, the plaintiff, an employee of the "surveying subcontractor", was injured when several sheets of stacked drywall fell on him as he was searching for one of his "benchmarks" behind them. *Snow,* 2017 IL App (1st) 151226, ¶ 4. The prime contract with the owner obligated Power, as the "Contractor" for the "Work", with supervision and coordination of any subcontractors and sub-subcontractors. Power was to be ". . . solely responsible for and have control over construction means, methods, techniques, sequences and procedures. . ." and in that regard was to give specific instructions ". . . concerning construction means, methods, techniques, sequences or procedures . . ." *Id.* ¶ 9. In addition, Power was to evaluate and was ". . . fully and solely responsible for jobsite safety and such means, methods, techniques, sequences or procedures as it required." *Id*. Other provisions obligated Power for the acts and omissions of persons performing portions of the work on its behalf, as well as requiring it to see that any subcontracts contained conduit safety provisions obligating subcontractors to Power to the same extent Power was obligated to the owner. Safety precautions and programs were emphasized, with Power accepting responsibility for the initiation, maintenance and supervision of all safety precautions and programs, as well as providing all necessary protection to prevent injury to persons involved in the project.

The master Subcontractor Agreements between Power and the drywall and surveying subcontractors obligated the subcontractors to provide all labor, materials, equipment and supervision necessary for the proper and complete performance of their work. *Id.* ¶ 15. Article 28 of these master agreements made each subcontractor responsible for its materials, as well as any injury resulting from or in connection with their use. *Id.* ¶ 17. Factually, Power had nothing to do with how the surveyors did their work or the manner by which the drywall subcontractor stored its leftover materials.

Following the *Carney* approach, the court looked first to the Master Subcontracts between Power and the surveyor and the drywall subcontractors. As detailed *supra*, each made the respective subcontractor responsible for the labor, materials, tools, equipment and supervision required for the complete and proper performance of the work. Power reserved nothing more than the general right to stop, start and inspect the progress of the work with each subcontractor having control over ". . . the means and methods of the work performance." *Id.* ¶ 55. Likewise, and consistent with *Carney*, implementation of those provisions was consistent with their language. Under those circumstances, the appellate court found that the plaintiff had failed to raise a material question of fact regarding Power's retention or exercise of control over the manner and methods of the plaintiff's work or that of the drywall contractor. *Id.* ¶ 62.

Nor did Power have reason to know that the drywall was stacked in a dangerous manner or that the plaintiff would attempt to move it. Therefore, even if Power had relevant control over the work of either subcontractor, there was no predicate foreseeability to trigger liability under section 414.

Issues of control and foreseeability were next considered in *LePretre v. Lend Lease (US) Constr., Inc.*, *Lepretre,* 2017 IL App (1st) 162320. There the court affirmed the entry of summary judgment in favor of the defendant, general

contractor, after engaging in an in-depth consideration of the control and notice elements of a section 414 case post *Carney*. In *LePretre*, the plaintiff fell while installing "iron rebar" and sued Lend Lease as the general contractor for the project. Lend Lease subcontracted the concrete work to Adjustable Forms, Inc. (Adjustable) which in turn hired the plaintiff's employer, Bond Steel, ". . . to install and reinforce the iron rebar for the concrete pour." *LePretre,* 2017 IL App. (1st) 162320, ¶ 1.

In typical fashion, the prime contract between Lend Lease as "Contractor" and the owner provided that Lend Lease was solely responsible for and had control over ". . . construction means, methods, techniques, sequences and procedures . . . of the Work. . ." *Id.* ¶ 31. The general conditions also obligated the Contractor to take reasonable precautions for the safety of and ". . . provide reasonable protection to prevent damage, injury or loss to employees on the work and other persons who may be affected thereby. . ." *Id.* ¶ 7. Downstream, the subcontract with Adjustable required the Subcontractor to provide all labor, material, equipment and supervision to complete the Concrete Subcontract in accordance with the Contract Documents. *Id.* ¶ 8. The subcontract also provided that Adjustable was responsible to prevent accidents and to establish and implement safety measures, policies and standards, without regard to whether Lend Lease had a safety program for the entire Project. *Id*. Adjustable also undertook to keep the worksite free from waste materials and debris. *Id.* ¶ 10.

In like fashion, the plaintiff's employer, Bond Steel, agreed with Adjustable that the prevention of accidents and injuries was its primary concern and, in that regard, undertook to ". . . maintain a safe and healthful work environment with its safety program." *Id.* ¶ 11. Bond Steel also agreed to comply with OSHA and to conduct its operations in a safe and healthy manner consistent with the safety and health requirements of Adjustable's safety handbook. *Id.*

Onsite, the plaintiff testified that he took no direction or instruction from anyone employed by Lend Lease regarding how to install the steel, the materials to use, or safety relating to the rebar. *Id.* ¶ 13. The superintendent for Lend Lease testified that its primary function on the job was to coordinate the various subcontractors and monitor progress. *Id.* ¶ 15. He neither knew the plaintiff nor was aware of the incident. Likewise, the superintendent and head of safety for Bond Steel testified that Bond Steel employees had no onsite involvement with Lend Lease regarding either the work generally or any safety concerns. *Id.* ¶¶ 17-18.

The trial court found there was no evidence that Lend Lease retained control ". . . over the means and methods or operative details of the work of Bond Steel and plaintiff." *Id.* ¶ 21. It also found that there was no evidence that Lend Lease retained control over the safety on the job, or that it engaged in the type of pervasive supervision that ". . . affects the means and methods of the work. . ." *Id.* Summary judgment was therefore entered in favor of Lend Lease on the issue of "control". *Id.*

On appeal, the plaintiff contended that ". . . whether a general contractor retained sufficient supervisory control over the work is a question of fact for the jury to decide. . ." *Id.* ¶ 23. Rejecting that contention, the court specifically adhered to the holding and rationale of the supreme court in *Carney*. Starting with the premise that the issue of a defendant's retained control may be decided as a matter of law where the evidence is insufficient to create a factual question. It proceeded to dissect the elements of "control" as articulated in *Carney*. Recognizing the overarching distinctions set forth in **Comment *c*** to section 414, and adopted in *Carney*, between the general rights which are customarily retained by a contracting party, and control over the manner, methods and operative detail of the work, the court placed each of the following in the former category:

> GENERAL RIGHTS WHICH ARE NOT INDICATIVE OF CONTROL OVER THE INCIDENTAL ASPECTS OF THE INDEPENDENT CONTRACTOR'S WORK:

(1) The right to stop the work;
(2) The right to order changes in the work;
(3) The right to inspect the work;
(4) The right to enforce safety;
(5) The existence of a safety program, safety manual or safety director;
(6) The right to ensure that safety precautions are observed and that the work is done safely.

Restatement (Second) Torts § 414, *cmt. c; Carney,* 2016 IL 118984. *See also Joyce v. Mastri*, 371 Ill. App. 3d 64, 74 (1st Dist. 2007); *Rangel v. Brookhaven Constructors, Inc.*, 307 Ill. App. 3d 835, 839 (1st Dist. 1999); *Fonseca v. Clark Constr. Group, LLC*, 2014 IL App (1st) 130308, ¶ 28.

Consistent with the analysis of the supreme court in *Carney*, the *LePretre* court started with consideration of the respective contracts between Lend Lease and the owner and thereafter Lend Lease and its subcontractor. Paralleling what was done in *Fonseca v. Clark Constr. Group, LLC*, the court recognized that ". . . Lend Lease ***delegated*** its site-specific safety and workmanship to the subcontractors. . .". *LePretre,* 2017 IL App (1st) 162320, ¶ 41 (citing *Fonseca,* 2014 IL App. (1st) 130308) (bold italics supplied). By that process, Adjustable, as well as the plaintiff's employer, Bond Steel, accepted responsibility for the means and methods by which they performed their work, including its safe performance and the cleanup and removal of any "debris in the work area." *LePretre,* 2017 IL App (1st) 162320, ¶ 44.

The court also found significant that neither the plaintiff nor any of his crew took direction from Lend Lease as to ". . . how to install steel, what materials to use, or where to work." Nor did Lend Lease provide any safety direction ". . . relating to the installation of the rebar." *Id.* ¶ 46.

It is also significant that the court in *LePretre* recognized the public policy that the general retention of supervisory control over the safety of work on a job does not and should not trigger liability. In that respect, the court states:

> [W]e note, as did our Supreme Court in *Carney*, that "[t]o hold otherwise would penalize a defendant's safety efforts by creating, in effect, strict liability for personal injury to any jobsite employee."

Id. ¶ 45 (citing *Carney,* 2016 IL 118984, ¶ 61 (internal citation omitted)).

On that point, the court goes on to cite with approval *Connaghan v. Caprice*, holding that: "The right to stop the work, tell the contractors to be careful, and change the way something is being done if [the defendant] felt something was unsafe" does not establish sufficient retention of control for the purposes of section 414. *Connaghan v. Caplice*, 325 Ill. App. 3d 245, 250 (2d Dist. 2001). Thus, retention of the general right to require the work to be done in a safe manner, coupled with the ability to stop or change unsafe performance is to be encouraged and not condemned. *LePretre* did not consider the question of whether the defendant had notice of the debris which caused him to fall because the issue was never reached.

In *Foley v. Builtech Constr., Inc.*, summary judgment was entered on "control" and "notice" in favor of the general contractor and thereafter reversed on both issues. *Foley,* 2019 IL App (1st) 180941. There, as in *LePretre v. Lend Lease, supra*, an ironworker was injured because of jobsite conditions. However, where the plaintiff in *LePretre* slipped and fell on debris while installing iron rebar, Foley was injured when he had ". . . to pull the rebar he needed out of a pile, as it was 'hidden' under the pile." *Foley,* 2019 IL App (1st) 180941, ¶ 36. At the time he was employed by Chicago Town, a subcontractor to the general contractor, Builtech Construction, Inc. Chicago Town was to perform concrete services for the foundation which included placing rebar into forms, pouring concrete into the forms and then stripping the forms.

Chicago Town ordered the rebar which was stored in areas designated by Builtech. According to the plaintiff, the pile of rebar was a "tangled mess" and he "twinged" his back while trying to extricate the piece he wanted. *Id.* ¶¶ 18, 36.

The opinion does not include language from the prime contract between Builtech and the owner. The subcontract between Builtech and Chicago Town required the subcontractor to furnish all labor and materials required for the job and contained a conduit provision pursuant to which Chicago Town assumed all the "duties, obligations, liabilities and responsibilities" which Builtech owed the owner. *Id.* ¶ 41. In addition to a hold harmless provision in favor of Builtech, Chicago Town agreed to comply with all safety rules, regulations and requirements, together with responsibility for damages as a result of its fault or negligence. *Id.* ¶ 43. Chicago Town also undertook strict full-time adherence to safety standards to protect the general public and the "workforce" and agreed to ". . . comply with all decisions of [Builtech] or owner relative to safety requirements." *Id.* In that regard, Chicago Town also agreed to take ". . . such additional measures as [Builtech] may determine to be reasonably necessary for the purpose." *Id.* ¶ 44.

Chicago Town specifically discharged Builtech and the owner from any liability for Chicago Town's failure ". . . to take all measures necessary to insure the safety of its employees, agents and other persons at the jobsite for matters related to the work contemplated." *Id.* Consistent with that covenant, Chicago Town exonerated Builtech and the owner from any liability ". . . for Chicago Town's obligation to ensure safety at the jobsite." *Id.* ¶ 43. As respects the receipt, storage and maintenance of materials, presumably including rebar, Chicago Town accepted full responsibility. While Builtech "may cooperate with the unloading of said materials", it would be paid for its services in that regard. *Id.* ¶ 45.

In implementing the agreement, Chicago Town ordered the rebar, scheduled delivery and unloaded it. *Id.* ¶ 14. Builtech's involvement was limited to approving the areas where it was stored. *Id.* ¶ 15. As work progressed, Builtech's supervisor had a storefront office across from the jobsite and inspected the workplace on a daily basis. If he determined that a subcontractor's "means and methods" were unsafe, he had the authority to stop the subcontractor and change the work practice. *Id.* ¶ 11. The same authority was vested in Builtech's safety "auditor" who would periodically inspect the jobsite to identify unsafe work conditions or work methods. *Id.*

Based upon these facts, the trial judge entered summary judgment in favor of Builtech. Based on those same facts, the appellate court reversed. In doing so, it discussed and distinguished the circumstances and reasoning in *Carney v. Union Pac. R.R. Co.*, *Snow v. Power Constr. Co.,* and *LePretre v. Lend Lease*. *Id.* ¶¶ 66, 77. Instead, it preferred the rule and rationale of *Lederer v. Executive Constr., Inc.* to the effect that "a party retaining *some* control over the safety of the work then has a duty to exercise its control with ordinary care." *Id.* ¶ 57 (citing *Lederer v, Executive Const., Inc.,* 2014 IL App (1st) 123170, ¶ 56) (Italics supplied).

Inter alia, that reasoning is suspect in at least two respects. First, the language quoted is taken from Pattern Jury Instruction 55.02. Illinois Pattern Jury Instructions, Civil 2017-2018 Ed.; *Martens v. MCL Constr. Corp.*, 347 Ill.App. 3d 303, 318 (1st Dist. 2004). That language has been held to not accurately state the law. *See Ramirez,* 2014 IL App (1st) 123663, ¶¶ 170-172; *see also Lee,* 2014 IL App. (1st) 130771. Also, paying "lip service" to *Carney*, the *Foley* court neglects both its lesson and public policy underpinnings. Consistent with the contract between Union Pacific and Happs in *Carney*, the agreement between Builtech and Chicago Town obligated the subcontractor to provide all labor and materials required for the work. *Foley,* 2019 IL App (1st) 180941, ¶ 41. Likewise, Chicago Town accepted full responsibility for insuring that the work and workplace were safe and compliant with all applicable safety standards for the protection *inter alia* of its own employees. *Id.* ¶ 43. Builtech's rights to make safety decisions and permissively determine such "additional measures" as may be "reasonably necessary for the purpose" were nothing more than a "general right to enforce safety" which does "not amount to retained control under section 414." *Carney,* 2016 IL 118984, ¶ 47.

Nor does the record, upon which the court relies, evidence any conduct on the part of Builtech which is at variance with its agreement. Nor are facts presented to show that Builtech made decisions which determined the manner, means and/or methods whereby Chicago Town formed, poured or reinforced the concrete structures which it created. Nor is there any evidence that Builtech instructed or directed the plaintiff, or any other Chicago Town employee, regarding how the work was to be done, safely or otherwise. Testimony regarding what Builtech could or might do under hypothetical circumstances, involving fictional safety concerns amounts to nothing more than an expression of the type of benign general control which both *Carney* and **Comment *c*** contemplate.

In a split decision, the *Foley* court also reversed the summary judgment which was entered in favor of Builtech on the question of notice. On that issue, the majority found that genuine issues of material fact existed ". . . as to whether the rebar was stacked in a safe manner or had dirt covering it and whether Builtech's oversight of the jobsite would have revealed an unsafe condition." *Foley*, 2019 IL App (1st) 180941, ¶ 84. As the dissent points out, no Builtech employee noticed, was advised of or had reason to know of any unsafe condition with respect to the rebar stored on the site. Nor, even if it were aware of the tangled pile would that amount to a "dangerous condition". *Id.* ¶¶ 108-109. The only danger arose "when, contrary to his 20 years of experience and training as an ironworker, [Foley] attempted to pull a piece of rebar that had become tangled with other pieces and did so in a way that injured his back." *Id.* ¶ 101.

Conclusion

Of the six appellate cases decided since *Carney v. Union Pacific Ry. Co.*, five have affirmed summary judgment in favor of the defendant in accordance with that decision and the public policies which support it. Of these, four turned on the plaintiff's failure to show that the defendant or defendants had relevant "control" of the work, as that term is used in Restatement (Second) of Torts § 414 and its **Comments**. On that issue the requisite factor is "control" over ***how*** a specialized subcontractor does its work. That looks to the "manner", "means" and "methods" by which the work is performed, as opposed to the end result or general authority possessed by the entrusting party to achieve that result. As described in common parlance by the courts in *Ross v. Dae-Julie, Inc.* and *Connaghan v. Caplice*, for a contractor not to be free to do the required work in his own way, the defendant must control both the "ends and means" of that work. *See Ross,* 341 Ill. App. 3d 1065, 1073 (2003) (cited by the Illinois Supreme Court in *Carney,* 2016 IL 118984 (¶ 40; *Connaghan*, 325 Ill. App. 3d 245, 250 (2001).

On the subject of "notice", the cases are legion that for a contractor to be liable under section 414, it must know or have reason to know of the dangerous condition or unsafe work practice. Restatement (Second) of Torts § 414, *cmt. b; Martens*, 347 Ill. App. 3d at 316-17; *Shaughnessy,* 342 Ill. App. 3d at 734; *Calderon,* 381 Ill. App. 3d at 335. There is no *a priori* obligation to require safe practices or to inspect the work of others to insure compliance with safety standards. *Hutchcraft v. Independent Mechanical Industries, Inc.*, 312 Ill. App. 3d 351, 359 (4th Dist. 2000).

Before *Carney v. Union Pacific* there were more than sixty appellate decisions which interpreted and discussed the requirements for liability under section 414. *Carney* establishes bright line requirements for control. If section 414 and its **Comments** are to have any instructive or precedential significance, they must be preserved as ***legal principles***, as opposed to *ad hoc* questions of fact.

(Endnotes)

[1] Complexities in Construction Negligence Litigation *IDC Quarterly* Vol. 13, No. 3 (13.3.18); Recent Developments in Construction Negligence: An Update of Complexities in Construction Negligence Litigation *IDC Quarterly* Vol. 14, No. 2 (14.2.41); Premises Liability Exposure in Construction Injury Cases *IDC Quarterly* Vol. 15, No. 1 (15.1.50); Continuing Developments in Construction

Negligence: A Further Update of Complexities in Construction Negligence Litigation *IDC Quarterly* Vol. 18, No. 2 (18.2.4); Vicarious Liability In Construction Negligence Cases Misapprehension Leads To Mischief, *IDC Quarterly* Vol. 21, No. 3 (21.3.58); Construction Negligence-Significant Developments Which Affect and Shape the Tort *IDC Quarterly* Vol. 25, No. 4 (25.4.37); *Carney v. Union Pacific Railroad Company*: Daylight Comes to Section 414, *IDC Quarterly* Volume 27, Number 2 (27.2.17).

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