

TORT NOTES
By: James J. Morici, Jr.

SECTION 414 CONSTRUCTION NEGLIGENCE DUTY; FIRST DISTRICT RECONCILES CONFLICT AND PROVIDES GUIDANCE

Since the 1995 repeal of the Illinois Structural Work Act, attorneys representing injured construction workers in third-party lawsuits have relied almost exclusively on the principals of construction negligence provided by Section 414 of the Restatement of Torts 2d. The increased use of Section 414 has led to multiple appellate decisions with sometimes, inconsistent conclusions as to its application.

Practitioners have watched and waited for action by either the Illinois Supreme Court or the Illinois Legislature for guidance and relief, but to date, none has been forthcoming. Under the current state of affairs, it is increasingly important that construction site injuries be carefully analyzed and litigated from the earliest points in the investigation through discovery, motions, and ultimately trial. This has become an area of law that is clearly inappropriate for the uninformed and absolutely off limits to the faint of heart.

In Cochran v. George Sollitt Construction Company, 358 Ill.App.3d 865 832 N.E.2d 355 (1st Dist., 2005), in affirming summary judgment the Court reviewed the previous decade of Appellate Court decisions, identified and attempted to resolve conflicts between some of them, and provide a clarification on the basis of liability. In Cochran, the general contractor admitted that it had general control over its subcontractors work, but denied that it had specific control. The court analyzed Section 414 and delved into its oft quoted comment sections a, b, and c.

In this writer's opinion, the relatively broad interpretation of the term "control" previously utilized by cases on the subject such as Pasko, Weber, Ryan v. Mobil Oil was correct. It was common sense that the defendants' ability to effectuate construction site safety and eliminate hazards showed "control" and created a legal duty. The Cochran Court moved closer to that common sense approach, but noted that while in its opinion, Pasko and Weber were not sustainable under a theory of vicarious liability that they indeed were sustainable under a theory of direct liability. Noting that in both cases, there was evidence of knowledge of the unsafe conditions or the inadequate equipment and that the defendant failed to take steps to remedy the situation or to stop the work. The Court wrote "Such knowledge would provide a sufficient basis for the imposition of direct liability for failure to exercise the general supervisory control with reasonable care."

More importantly, quoting extensively from Weber v. Northern Illinois Gas Company, 295 N.E.2d 41 (1st, 1973), the Court reinforced the principal that a basis for vicarious liability exists where defendant controlled the operative details of the work such that the subcontractor's employees were not entirely free to perform the work in their own way. The Court cited Weber: "We conclude that a fact finder could determine that (the Defendant) met the standards of control expressed in the comments. It did retain the

power to forbid the work being done in a manner dangerous to others. It did fail to prevent subcontractors from doing the details of the work in a dangerous manner when it knew it was so being done. It had more power than to make only suggestions or recommendations, and it did retain such a right of supervision that the subcontractor was not entirely free to the work in its own way.” Citing Weber at 295 N.E.2d,Page 50.

The Cochran case is important for clarifying, the basis of liability under direct liability where the Defendant has knowledge that the work is being done in an unsafe manner or as importantly vicarious liability where there is evidence showing that the subcontractor’s employed were not entirely free to perform the work in their own way. Under either factual scenario, the Defendant in a construction negligence case should be found to have a duty, the breach of which is a question of fact for a jury as to whether in light of that duty they exercise their general supervisory control with reasonable care.

As expressed at the beginning of this article, this is an area of law in which very specialized attention to detail needs to be paid from the moment of the first investigation through discovery, motion and ultimately at the time of trial. Readers with questions are encouraged to contact the author for further discussion.

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