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Marlene Begaye on the behalf of the heirs of Michael Begay v. Big D Construction Corp : Reply Brief

Utah Supreme Court

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REPLY BRIEF OF APPELLANT	
APPEAL FROM A DECISION OF THE THIRD JUDICIAL DISTRICT COURT HONORABLE ROBERT HILDER	

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Summary of the Argument

Big D's argument begins on the flawed premise that a contractor must effectively enter into an employer-employee relationship before any liability can attach.¹ Contrary to Big D's position, liability attaches "where an employer of an independent contractor exercises enough control over the contracted work to give rise to a limited duty of care, but not enough to become an employer."² It is the well established rule that, as goes the ability to control, so goes the requirement to exercise reasonable care in exercising that control. "The duty in such situations is one of reasonable care under the circumstances and is confined in scope to the control asserted."³

Big D retained control over several aspects of their subcontractor Preferred. Big D accepted the sole responsibility for maintaining and supervising all safety precautions, including overall responsibility for compliance with OSHA. (R. 510-12). Controlling sequencing on the job, Big D steered Preferred to begin work on Wall 39. (R. 518, 520-21). Big D could have required a hazard analysis before beginning the unique and unusual Wall 39. (R. 516-19, 649-50). Big D and Preferred jointly reached the decision to begin Wall 39. (R. 518). Big D superintendents could have sent Preferred to work another wall which did not require additional support as did Wall 39, or could have sent

¹ Appellee's Brief at p. 2.

² *Thompson v. Jess*, 1999 UT 22, ¶ 15, 979 P.2d 322; *see, also*, Restatement (Second) of Torts, § 414, cmt. a (1965).

³ *Id.*

Preferred home for the day altogether. (R. 526-27). Instead, Big D chose speed over safety, attempting to advance Preferred's rebar work ahead of Big D formwork. (R. 524). Big D repeatedly and frequently exercised their control over subcontractors by stopping work whenever a subcontractor deviated from safety standards. (R. 514).

The real question in this case involves issues of comparative fault amongst Preferred and Big D, i.e. whether Big D failed to exercise their retained control with reasonable care, a question which must be decided by the fact-finder. Big D's actions establish a genuine issue of fact that they failed to exercise their control over Preferred with reasonable care. Big D sent Preferred to work Wall 39 knowing that no concrete form or other suitable foundation existed to support the rebar. (R. 525). Big D deviated from their own pour sequence, which required installation of a concrete slip form before beginning rebar work. (R. 527).

Big D violated basic principles of constructibility by advancing the rebar work ahead of the formwork. (Id.). Big D directed work on Wall 39, when they could have directed work to other walls which did not require bracing. (R. 523). Big D superintendents failed to reference critical OSHA and ANSI specifications prior to telling Preferred that Wall 39 was where to head next. (R. 761). Big D controlled the concrete forms which would have made work on Wall 39 safety compliant. (R. 522). Once underway, Big D observed the progression of rebar work on the 20ft. high wall, but failed to stop that work despite the lack of adequate bracing. Uncontroverted expert witness

testimony establishes: the areas where Big D did not relinquish control, the failure to exercise reasonable care in those areas, and the fact that had reasonable care been exercised, Mr. Begay most likely would not have been killed. (R. 760-763).

ARGUMENT

I. COEXTENSIVE WITH ANY RETAINED CONTROL EXISTS A DUTY TO EXERCISE THAT CONTROL WITH REASONABLE CARE.

Big D seeks a bright line rule which obliterates the retained control doctrine, shielding all general contractors from liability unless they become the equivalent of an employer. “**Big D cannot be liable** to Mrs. Begay in its capacity as the general contractor on the project **unless Big D effectively became Mr. Begay’s employer** that day and directed the manner and method of bracing the wall that fell on him.”⁴

Big D’s interpretation directly contradicts Utah law holding that “the requisite level of control over the [sub]contractor’s manner or method of work does not rise to the level of creating a master-servant relationship.”⁵ The mistaken reading of retained control eliminates the entire doctrine from the law. Big D exploits the language of *Thompson* and the retained control doctrine generally to create a rule whereby a general contractor could never be held liable unless effectively acting as master. Begaye simply points out that, under the facts of this case, Big D retained control over certain aspects of Preferred’s work but failed to use reasonable care in exercising that control.

⁴ Appellee’s Brief at p. 2 (emphasis added).

⁵ *Thompson*, 1999 UT 22, ¶ 21.

Under Utah law, liability tracks the control which a general contractor retains, not whether they literally became an employer.⁶ In *Dayton v. Free*, the court tied liability to situations “where the will and discretion of the contractor as to the time and manner of doing the work or the means and methods of accomplishing the results were subordinate and subject to that of the [general contractor].”⁷ Again, in 1937, this Court recognized that liability parallels the “right or power of control” over the subcontracted employees.⁸

Here, Big D admittedly retained control over the timing and sequencing of work. Big D also retained superintendent duties over the construction, to a degree which involved interference with subcontractor work whenever the subcontractor engaged in unsafe practices. Finally, Big D actively participated in the construction of walls such as Wall 39 by providing the concrete slip form which gave support to an otherwise freestanding rebar wall as it was erected.

The question before the Court is whether Big D acted with reasonable care in exercising and/or failing to exercise the power and control retained within the areas where it retained control. Such a question presents an issue of fact incapable of resolution on

⁶ Big D asserts that Plaintiff’s counsel ‘conceded’ that the argument against summary judgment ‘consisted of a claim that the wall was not constructed safely as opposed to a claim that Big D controlled the actual construction of the wall.’ (Appellee’s Brief at p. 8, citing R. at 1072, 22). The record does not support such a ‘concession’ and any reading of the transcript demonstrates Plaintiff’s counsel maintained the same theories below as presented here on appeal.

⁷ *Dayton v. Free*, 46 Utah 277, 148 P. 408, 411 (1914).

⁸ *Gleason v. Salt Lake City*, 94 Utah 1, 74 P.2d 1225, 1228 (Utah 1937).

motion for summary judgment. However, because Big D in fact retained control over these areas, the trial court erred in denying summary judgment that Big D owed a duty to act with reasonable care in regard to these powers.

A. CASE AUTHORITY AND THE RESTATEMENT IMPOSE A DUTY TO USE REASONABLE CARE IN EXERCISING THOSE POWERS RETAINED OR RESERVED BY THE GENERAL CONTRACTOR.

Utah law, the Restatement of Torts, and case authorities universally recognize the obligation to exercise reasonable care with respect to any control reserved or retained by the general contractor. Under the Restatement, one who “retains control of any part of the work, is subject to liability... by his failure to exercise his control with reasonable care.”⁹ The commentary to the Restatement recognizes the “supervisory” capacity of a general contractor as giving rise to a duty of reasonable care in exercising that power.

The employer may, however, retain a control less than that which is necessary to subject him to liability as Master. He may retain only the power to direct the order in which the work shall be done, or to forbid it’s being done in a manner likely to be dangerous to himself or others. Such a supervisory control may not subject him to liability under the principles of Agency, but he may be liable under the rule stated in this section unless he exercises his supervisory control with reasonable care so as to prevent the work which he has ordered to be done from causing injury to others.¹⁰

Big D retained power to direct work sequencing as well as the ability to forbid its being done in dangerous manner. Accordingly, Big D owed a duty to act with reasonable care in exercising that power. Big D could have pointed Preferred to begin work on any

⁹ *Restatement (Second) Torts*, § 414 (1965).

¹⁰ *Id.* at cmt. a.

number of walls which did not require reinforcement or support while being erected. By directing Preferred Builders to begin work on a Wall 39 without an adequate means of support available, Big D violated basic principles of constructibility and thereby failed to act with reasonable care in sequencing work in a safe manner. Big D compounded this error when superintendents Dee Jacobson and Kevin Burns stood by as wall 39 was erected, yet failed to exercise reasonable care by stopping the workers as Big D had previously been done when trenching workers failed to have adequate bracing.

Other courts readily recognize general contractor liability for failure to enforce safety for the benefit of subcontractor employees. In *Dilaveris v. W.T. Rich Co., Inc.*, the plaintiff fell from a scaffold and was injured.¹¹ The plaintiff sued the general contractor. In *Dilaveris* the general contractor: (1) accepted the contractual duty to enforce safety on the job site; and, (2) also had an individual supervising the on site work and compliance with safety. The Massachusetts Supreme Court upheld imposition of liability against the general contractor for his failure to ensure compliance with safety standards because the supervisor “had some responsibility for safety... [and] had an opportunity to stop or prevent the use of unsafe scaffolding and his failure to do so makes the issue of Rich's control and negligence questions for the jury.”¹²

Dilaveris also refused to allow the general contractor to sidestep due care based

¹¹ *Dilaveris v. W.T. Rich Co., Inc.*, 424 Mass. 9, 10, 673 N.E.2d 562, 564 (Mass. 1996).

¹² *Id.* at 12-13, 565.

upon subcontract language. Addressing contract language similar to that relied upon by Big D, the court found that active involvement in safety enforcement undermined any notion that the subcontract had shifted the obligation solely to the subcontractor. “The supervisor testified, in part: Q.: That's part of your responsibility to make sure the subcontractors are following safety practices as well, is that right?” A.: Yes.”¹³ Here Big D also assumed the contractual duty, and Big D employees testified almost identically to those in *Dilaveris*. (R. 512-13). Accordingly, no question remains that Big D retained control, the only question which remains is whether Big D failed to use due care in exercising those powers, a question which must be decided by the fact-finder.

Similarly in *Lee Lewis Const., Inc. v. Harrison*, a subcontractor employee was killed when he fell while installing windows on the general contractor’s worksite.¹⁴ Testimony established that the general contractor’s superintendent routinely inspected to ensure that subcontractors properly utilized fall protection equipment and that the superintendent was aware of the inadequate manner the decedent was secured during his work. The court affirmed submission of the case to a jury observing that “[t]he general contractor's duty of care is commensurate with the control it retains over the independent contractor's work.”¹⁵ “Because we conclude that LLC retained the right to control

¹³ *Id.* at n. 4.

¹⁴ *Lee Lewis Const., Inc. v. Harrison*, 70 S.W.3d 778, 784 (Tex. 2001).

¹⁵ *Id.* at 783.

fall-protection systems on the jobsite, we need not address its argument that it did not retain the right to control by contract.”¹⁶

Here also, it is admitted that Big D retained the ability to control subcontractor’s work, including stopping work, when the activity violated OSHA or other safety standards. Wall 39, as erected and observed by Dee Jacobsen and Kevin Burns, failed to conform to those safety standards. Big D’s pervasive and regular enforcement of safety standards demonstrates evidence sufficient to let a fact-finder decide whether Big D failed to exercise their retained control with reasonable care.

By contrast, all of the published decisions by Utah courts found a complete lack of control by the general contractor/employer over the independent contractor. For example, Big D misapprehends the facts in *Dayton v. Free*.¹⁷ Big D contends that the defendant in *Dayton* could, among other things, “require subcontractors to reinforce portions of the tunnel by using the method it saw as most appropriate.”¹⁸ However, just the opposite is the true. Contrary to the contentions of Big D, the *Dayton* court found:

[n]othing is contained in the contract or specifications by which the company reserved or retained the right to direct or control the prosecution of the work, to employ, control, or direct any of the employees ... Nor is there any evidence to show that the company in fact directed, controlled, or superintended the prosecution of the work, or hired or discharged employs, or directed, controlled, or

¹⁶ *Id.* at 784.

¹⁷ *Dayton*, 46 Utah 277, 148 P. 408.

¹⁸ (Appellee’s Brief at p. 11).

superintended them in and about the work.¹⁹

Big D reserved the power to superintend, direct and control the work of subcontractors. Instructions given by Big D to Preferred were considered binding. (R. 515). Big D retained this control not only with respect to results, but also to a degree and extent they actually interfered with the day-to-day procedures and methods used by their subcontractors. (R. 514, 761). Big D further retained power and direction over the specific timing and sequencing of tasks. (R. 514, 520-21). In effect, “the will and discretion of the subcontractors as to the time and manner of doing the work or the means and methods of accomplishing the result were subordinate and subject to that of” Big D.²⁰ Big D owed a duty to exercise reasonable care in exercising their retained power and control over subcontractors, especially for the safety of those subcontractors.

Big D similarly misconstrues *Gleason v. Salt Lake City et. al.*, in order to reach the conclusion that they should not be held accountable for their failure to exercise reasonable care. Big D ignores the finding in *Gleason* that “there is no evidence in the record which tends to prove that the company retained the right to control.”²¹ Big D also ignores the test used by *Gleason*, namely, whether the defendant held the “right or power

¹⁹ *Dayton*, 148 P. at 411.

²⁰ *Id.*

²¹ *Gleason v. Salt Lake City et. al.*, 94 Utah 1, 74 P.2d 1225, 1228 (Utah 1937).

of control of the employees.”²²

Big D also cites *Smith v. Hales & Warner Const., Inc.* As with all the other cases, there is a notable absence of control by the general contractor. In *Smith*, the general contractor only retained the ability to reject a choice in which subcontractors were hired to perform work.²³ Here, Big D remained “solely responsible for initiating, maintaining and supervising all safety precautions and programs.” (R. 510-511). Additionally, in *Smith*, the court found that none of the general contractor employees “exercised any control at the time of the accident as *none were present*.”²⁴ Again, here, Kevin Burns and Preferred reached a ‘joint decision’ to begin work on Wall 39 even though no concrete forms were available for bracing. (R. 518, 788, 793) Further, Kevin Burns and Dee Jacobsen stood by as Wall 39 was erected with inadequate support, in direct violation of OSHA. (R. 519, 631-33, 612-13, 865-66).

In *Thompson v. Jess*, a hotel landowner hired the plaintiff’s employer to deliver a steel pipe to be used as a vertical support for signage.²⁵ On delivery, the owner asked the contractor if he would install the pipe in the vertical position.²⁶ The contractor agreed,

²² *Id.*

²³ *Smith v. Hales & Warner Const., Inc.*, 2005 UT App 38, ¶ 11, 107 P.3d 701.

²⁴ *Id.* at ¶ 12 (emphasis added).

²⁵ *Thompson*, 1999 UT 22, ¶ 2.

²⁶ *Id.* at ¶ 3.

and the woman returned inside.²⁷ However, at that point, the hotel owner’s “involvement in erecting the pipe ceased.”²⁸ Because the hotelier “did not actively participate in or otherwise exercise affirmative control over the manner or method of performance ... she owed [] no duty of care under the retained control doctrine.”²⁹

Big D does nothing to show why the ‘active participation’ standard set forth in *Thompson* should shield their conduct in this case. First, Big D indeed ‘actively participated’ in the method of providing a concrete form to brace freestanding walls. Big D actively participated in the joint decision to build Wall 39 even though no form was available for stabilization. Big D directed Preferred to begin Wall 39 next even while other available rebar projects existed which did not require a concrete form for bracing. Big D’s joint effort of constructing walls and sequencing work demonstrates that they did, in fact, actively participate in the task which killed Michael Begay.

Second, under *Thompson*, this Court expressly withheld any notion that an ‘active participation’ standard would apply to sophisticated contracting parties such as Big D. In distinguishing ‘passive’ retained control from active participation, this Court observed that the passive form of “‘retained control’ may have a more syntactically correct application to sophisticated parties who, by contract, stipulate which party will control the

²⁷ *Id.*

²⁸ *Id.* at ¶ 4.

²⁹ *Id.* at ¶ 26.

manner or method of work or the safety measures to be taken-such as in contracts between general contractors and subcontractors involved in construction projects.”³⁰

Unlike the unsophisticated hotelier who asks for work to be done, then goes inside and leaves the job to the subcontractor, Big D accepted a contractual responsibility to oversee safety on the jobsite; Big D retained control over and actively participated in sequencing; and, Big D actively participated in providing support for rebar walls while sending Preferred to begin Wall 39 when no support was available.

Based on the holding in *Thompson*, Big D’s reliance on the unpublished *Martinez v. Jacobsen Constr. Co., Inc.*, similarly lacks persuasive value. Further, other courts find error in *Martinez’s* reasoning that a general contractor can accept duties in the prime contract and simply pass them on through subcontracts.³¹ “The error in such reasoning is that [the general contractor] assumed some affirmative duties in the prime contract and, inferentially, authority to fulfill them, which could not be dispensed with simply by entering into a subcontract.”³² The unpublished Court of Appeals decision and mechanical reliance on an active participation standard cannot afford Big D shelter where

³⁰ *Thompson*, ¶ 26, n. 3.

³¹ *Martinez v. Jacobsen Const. Co., Inc.*, 2005 UT App 136, 2005 WL 615106.

³² *Smith v. U.S.*, 497 F.2d 500, 512 (C.A .Fla. 1974). Generally speaking, a contractor cannot escape liability for duties assumed under a contract by shifting those duties to a subcontractor. See, e.g., *Farris v. General Growth Development Corp.*, 354 N.W.2d 251, 254 (Iowa App. 1984)(when a “general contractor assumes a duty under its contract with the owner for the safety of the workmen ... this responsibility cannot be delegated even though the general contractor had employed an independent contractor to do the actual work.”)(citation omitted).

they actually inserted themselves into the decision making process.

Big D also criticizes the argument that Restatement § 414 expands common law liability.³³ However, Big D admits that § 414 serves as an ‘exception’ to the common law protection afforded general contractors, ergo expanding common law liability.³⁴ Because Big D retained more than a ‘general’ right to control, Big D can offer only semantic distinctions against the plain import of § 414 and the case law applying that section.

Big D retained control over enforcement and compliance with OSHA and ANSI regulations. (R. 510-11). Big D retained control over timing and sequencing of specific tasks. Big D retained control over the concrete forms, the very method by which Wall 39 could have been safely erected. One who “retains control of any part of the work, is subject to liability... by his failure to exercise his control with reasonable care.”³⁵ Big D’s failure to exercise their control with reasonable care led to the collapse of Wall 39 and the death of Michael Begay. Big D cannot escape liability under any meaningful reading of the Restatement or law as applied to this facts in this case.

General contractors enjoy freedom from liability where “he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to

³³ (Appellee’s Brief at p. 11).

³⁴ *Id.*

³⁵ *Restatement (Second) Torts*, § 414 (1965).

make suggestions or recommendations which need not necessarily be followed.”³⁶ Here, subcontractors were not free to ignore Big D directions. (R. 514-16). A duty attaches when there is “such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.”³⁷

Big D held the power to control subcontractors in minutia of day-to-day work, everything from seat belts to tennis shoes. This Court should not be diverted from the clear facts that Big D not only retained control, but exercised that control pervasively and to a degree which interfered with the will and discretion of the subcontractor as to the time and manner of doing the work as well as the means and methods. Having failed to exercise the control with reasonable care for the benefit of Preferred employees, this Court should reverse the summary judgment in favor of Big D and grant summary judgment in favor of plaintiff with a finding that Big D indeed owed a duty in this case.

B. COMPARATIVE FAULT CANNOT FORM THE BASIS UPON WHICH TO SUSTAIN SUMMARY JUDGMENT IN FAVOR OF BIG D.

Issues of comparative fault must be resolved by the fact-finder, not on motion for summary judgment. “The issues of negligence and the apportionment of fault are clearly factual matters to be determined by the finder of fact.” *Lamkin v. Lynch* 600 P.2d 530, 531 (Utah 1979). Big D argues that Preferred Builders chose an inadequate method for bracing. However, Big D elected to point Preferred to begin work on Wall 39 knowing

³⁶ *Id.* at cmt. c.

³⁷ *Id.*

that no concrete form existed to provide support. Big D could have sent Preferred to begin work on any number of other walls which did not require concrete forms for bracing. Preferred simply followed the direction of Big D. Big D “[t]ells us they want this wall built and this wall built. Q. Then you go build it? A. Yes.” (R. 521). Once underway, Big D failed to stop work and require adequate support as they had previously done when workers entered a trench without adequate support.

While Preferred may have been negligent in the method it chose for bracing, Big D remains negligent in exercising those powers it retained. Because this is a question of comparative fault, Big D cannot escape on summary judgment. There exist no disputed questions of fact that Big D retained control over several aspects of subcontractor work and, accordingly, owed a duty to exercise reasonable care with regard to that control. However, the subsequent question regarding comparative fault between Preferred’s actions versus Big D’s election to send Preferred to work on that wall and failure to terminate work because of inadequate bracing cannot be resolved by summary judgment.

In a case similar to the one currently before the Court, *Hale v. Beckstead*,³⁸ a painter was injured when he fell off a second-floor balcony which lacked a railing. The painter brought an action against the landowner who was acting as his own general contractor.³⁹ In that action, Restatement sections 343 and 343A were at issue regarding

³⁸ *Hale v. Beckstead*, 2005 UT 24, 116 P.3d 263.

³⁹ *Id.* at ¶ 3.

the duty owed by a possessor of land. The trial court dismissed the case finding that the general contractor/landowner “owed no duty of care... because the danger the unprotected balcony posed was open and obvious.”⁴⁰ This court upheld reversal of the trial court’s decision by the Utah Court of Appeals.

Under Restatement § 343A a possessor of land is not liable for open and obvious dangers unless the possessor should anticipate the harm despite such obviousness.⁴¹ In applying § 343A, this Court concluded that the question of summary judgment involved issues of comparative fault, and that 343A defined the duty of care. The Restatement § 343A “defines the duty of care a possessor of land owes to invitees. It does not excuse negligence; it defines it.”⁴² The question then became apportionment of fault among the plaintiff and the defendant whose duty was defined.⁴³

Here also, Restatement § 414 defines the duty of care a general contractor owes. It does not excuse negligence; it defines it. Under Restatement § 414 the general contractor must exercise reasonable care with respect to any control which it retains. Importantly, this Court held that summary judgment was prematurely granted because the plaintiff was entitled to present his theory under the duty as defined by the Restatement.⁴⁴ Here,

⁴⁰ *Id.* at ¶ 1.

⁴¹ Restatement (Second) Torts, § 343A (1965).

⁴² *Hale*, at ¶ 23.

⁴³ *Id.* at ¶¶ 19-23.

⁴⁴ *Id.* at ¶ 37.

Begaye should also be allowed to present her theory, premised in part on unrebutted expert testimony, that Big D breached the duty as defined by the Restatement. The argument that Preferred chose an inadequate method of bracing involves issues of comparative fault and cannot form the basis for summary judgment.

II. BIG D INSERTED THEMSELVES INTO PREFERRED'S DECISION MAKING, CONTROLLED THE DIRECTION OF PREFERRED'S NEXT STEP, AND REGULARLY INTERFERED WITH SUBCONTRACTOR WORK WHICH FAILED TO MEET SAFETY STANDARDS.

Even assuming as true Big D's characterization that they held no more than a "general supervisory" role in this case, they nonetheless owed an obligation to use reasonable care while exercising that authority. Big D exercised their influence over Preferred by steering them to work on Wall 39. Big D was "always pushing" Preferred to stay ahead of the concrete form work and in spite of Big D's own sequencing requirement that form work should precede Preferred's rebar work. (R. 522-23). Big D's mastery over the construction sequence led Preferred to begin work on Wall 39. Big D would instruct Preferred which wall to build and then Preferred would go build it.

Uncontroverted expert evidence demonstrates Big D could, and in fact should, have directed Preferred to begin work on any number of available projects which did not require a concrete form as support. Rather than comply with basic principles of constructibility Big D led Preferred to begin the cooperative effort of building Wall 39.

Cases cited by Big D do more to support Begay's argument than to allow Big D to

escape liability. Specifically, in the unpublished decision *Piper v. Jerry's Homes, Inc.*,⁴⁵ the retained and actual control pale in comparison to the degree and extent of the control exercised by Big D. In *Piper* the general contractor only appeared at the worksite every other day to check up on progress and consult on design modifications.⁴⁶ However, the court did observe that “the key is the amount of control retained over the subcontractors work.”⁴⁷ The general contractor in *Piper* truly did exercise only a generalized supervisory power, supplying only blueprints and lumber while the subcontractor alone was responsible for completion of work. Here, as has been repeatedly set forth, Big D frequently interfered with subcontractor work to a degree such that the subcontractors were not free to perform the work in the manner that they chose.

Similarly, *Martinez v. Asarco Inc.*, is also distinguishable on its facts, but useful in its holding.⁴⁸ Specifically, the defendants in *Martinez* were not general contractors reigning over subcontractor sequencing. Rather, the defendant in *Martinez* was a smelter operator who brought in a subcontractor specializing in blast furnace and smelter maintenance and repair. Nor did the defendant in *Martinez* entirely escape liability. Specifically, the defendant remained liable as a landowner due to the failure to provide a

⁴⁵ 671 N.W.2d 531 (Iowa App. 2003)

⁴⁶ *Id.* at *3.

⁴⁷ *Id.*

⁴⁸ 918 F.2d 1467 (9th Cir. 1990).

safe workplace.⁴⁹

Here, by contrast, Big D acted as a general contractor overseeing both safety and work sequencing which required that the project progress according to fundamental principles of constructibility. Big D exercised control over sequencing which directly deprived Preferred the ability to tie off their freestanding wall to either a previously poured and cured wall, or a concrete form. Big D exercised their control over sequencing in a manner which contributed to the elimination of safe methods, as well as moving Preferred to begin work on a wall requiring support where other walls could have been completed without the requirement for additional bracing.

III. THE PHYSICAL FACTS AND CONTRACTUAL LANGUAGE MANIFEST THE CONTROL RETAINED BY BIG D.

Where the general contractor retains control, the general contractor remains liable for harm arising as a result of negligently exercising that control. In one of the earliest cases to apply Restatement § 414, the court observed “it is apparent that where the employer has retained some element of control of the job, he should be responsible for the harmful consequences of its performance as a concomitant of the control retained.”⁵⁰ In *Giarratano* an 18 year-old man employed by a subcontractor died when he fell 80 feet from a rooftop. In holding the general contractor accountable, the court relied upon both

⁴⁹ *Id.* at 1473-75.

⁵⁰ *Giarratano v. Weitz Co.*, 259 Iowa 1292, 1302, 147 N.W.2d 824, 830 (Iowa 1967).

the contractual agreement by the general contractor with the owner as well as the general contractor's involvement with safety.

There, as here,⁵¹ the contract provided that “the contractor shall take All necessary precautions for the safety of employees on the work, and shall comply with all applicable provisions of federal, state, and municipal safety laws and building codes to prevent accidents or injury to persons on, about or adjacent to the premises where the work is being performed.”⁵² Also there, as here, the general contractor involved itself in safety minutia, including enforcing the hard hat requirement against subcontractor employees.⁵³ Testimony from the subcontractor employees also confirmed the general contractor's control over safety aspects.⁵⁴ The court considered all of this evidence in reaching the conclusion that the general contractor retains sufficient control to recognize a duty.

Relevant evidence is defined as “evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” Utah R. Evid. 401 (West 2007). Although Big D repeatedly claims the evidence and facts presented by Begaye constitute “irrelevant” material, Big D makes no effort to define relevance.

⁵¹ (R. 510-13).

⁵² *Giarratano*, 147 N.W.2d at 828.

⁵³ *Id.*

⁵⁴ *Id.*

Big D repeatedly interfered with subcontractor employee's work whenever that employee deviated from an acceptable safety standard. Big D went so far as to stop work altogether when trenching workers entered a trench without benefit of adequate bracing. The affirmative and repeated interference by Big D into safety aspects of subcontractor work has a tendency to make the existence of the duty owed more or less probable. The question presented to the Court is whether Big D retained any control.

Big D and Preferred entered into the joint decision to work Wall 39. Big D made this joint decision knowing that no concrete forms were available to provide support, and knowing that there did not exist an adjacent wall which could provide support. Big D did so knowing that other areas were available for Preferred to work on and which did not require additional bracing. Finally, choosing speed over safety, Big D directed Preferred to Wall 39, in order to push rebar work ahead of form work, a decision which violated basic principles of constructibility as well as Big D's own sequencing. Each of these facts make it more or less probable that Big D retained control over Preferred.

The only 'irrelevant' facts advanced on appeal are the beliefs and statements of Preferred employees that they acted without any control by Big D. It matters not that Preferred employees thought they were working independently when the reality is that Big D pervasively retained control over the sequence of work and the ability to stop work when it deviated from safety standards. Because Big D retained control over these areas, they owed the concomitant duty to exercise that control with reasonable care.

Accordingly, Begaye respectfully requests that this Court reverse the trial court's grant of summary judgment in favor of Big D with a finding that under these facts Big D did indeed retain control sufficient to impose liability for the negligent exercise or failure to exercise that control.

IV. UNCONTESTED EXPERT EVIDENCE GENERATES ISSUES OF GENUINE FACT INCAPABLE OF RESOLUTION ON MOTION FOR SUMMARY JUDGMENT.

Finally, Big D and the trial court below ignore the existence of expert testimony establishing a genuine issue of material fact in this case. "Only when the expert states a conclusion without identifying supporting facts will summary judgment be appropriate."⁵⁵ Big D's only attack on the value of expert witness testimony offered by Mr. Rigtrup comes for the first time on appeal.⁵⁶ Of course, argument raised for the first time on appeal will not be considered.⁵⁷ Even if Big D could raise an objection regarding the worth of Mr. Rigtrup's opinion at this late date, the objection they raise lacks merit. In nothing more than a conclusory manner, Big D attacks Mr. Rigtrup's opinion because: (1) the opinion does not state that a job hazard analysis directly led to Mr. Begay's death; and, (2) Mr. Rigtrup's opinion is speculation.

With regard to the first matter, Mr. Rigtrup opines that had Big D required a

⁵⁵ *Nay v. General Motors Corp., GMC Truck Div.*, 850 P.2d 1260, 1264 (Utah 1993).

⁵⁶ Appellee's Brief at 22, n. 2.

⁵⁷ *See, e.g., Smith v. Iversen*, 848 P.2d 677 (Utah 1993).

hazard analysis prior to beginning work on the unique and unusual Wall 39, the collapse “most probably” would not have occurred. (R. 761). The standard of proof in a civil case is preponderance of the evidence, in other words the greater weight of evidence. “The standard of proof required is by a preponderance of the evidence, which is further defined as the greater weight of the evidence, or as is sometimes stated, such degree of proof that the greater probability of truth lies therein.”⁵⁸ Mr. Rigtrup’s opinion meets that burden.

With regard to whether Mr. Rigtrup’s opinion is speculation or not, Big D is of course entitled to conduct discovery and present evidence against Mr. Rigtrup’s informed opinion. However, Big D is not entitled, based on nothing more than a bare assertion of speculation, to eliminate the opinion from consideration on motion for summary judgment. “It is not the purpose of the summary judgment procedure to judge the credibility of the averments of parties, or witnesses, or the weight of evidence.”⁵⁹ Big D is free to retain their own expert to contradict Mr. Rigtrup’s opinions, but even under that scenario summary judgment remains inappropriate because such an expert dispute “creates an issue of fact within the province of the jury.”⁶⁰ Accordingly, Mr. Rigtrup’s opinion remains a part of the record and must be considered in resolving any ruling on a

⁵⁸ *Lund v. Phillips Petroleum Co.*, 10 Utah 2d 276, 280, 351 P.2d 952, 954 (1960).

⁵⁹ *W. M. Barnes Co. v. Sohio Natural Resources Co.*, 627 P.2d 56, 59 (Utah 1981)(“it only takes one sworn statement... to dispute the averments on the other side and create an issue of fact.”)(citation omitted).

⁶⁰ *Nay*, 850 P.2d at 1264.

motion for summary judgment.

In addition to the inadequate analysis of the law, Big D also presents an incomplete analysis of Mr. Rigtrup's opinion. Specifically, Mr. Rigtrup relied upon both his extensive experience as a safety officer and OSHA compliance officer as well as publications from the American Society of Civil Engineers, OSHA, and ANSI. (R. 760-63). Mr. Rigtrup's opinion defeats summary judgment because it expresses "conclusions as to the dispositive issues before the finder of fact and [] identif[ies] the specific grounds upon which his [] conclusions are based."⁶¹ Mr. Rigtrup's opinion encompassed more than just the failure of Big D to request and/or conduct a hazard analysis prior to beginning work on Wall 39. Mr. Rigtrup also addressed the involvement of Big D in day-to-day safety issues and their responsibility to exercise reasonable care in that regard.

Additionally, Mr. Rigtrup spoke to the obligations owed by Big D superintendent Kevin Burns to review the OSHA and ANSI standards prior to sending Preferred to work Wall 39. Mr. Rigtrup also offered testimony that Big D, in order to comply with principles of basic constructibility, should have directed Preferred to begin work on walls other than Wall 39, walls which did not require additional bracing and/or support. Finally, Mr. Rigtrup observed Big D actions directly violated publicized and accepted standards of care within the construction industry. The uncontroverted testimony of Mr. Rigtrup makes summary judgment not only inappropriate, but impossible in this case.

⁶¹ *Id.*

CONCLUSION

Choosing speed over safety, Big D pushed Preferred toward building Wall 39 ahead of the available formwork. Big D's decision to send Preferred to Wall 39 deviated from Big D's own sequencing, violated principles of constructibility, and ignored the availability of other walls which did not require bracing. Big D did not request a hazard analysis, nor did Big D reference the appropriate safety standards before directing Preferred toward Wall 39. Once underway, Big D compounded their initial error by failing to exercise the control they retained over safety. Big D previously stopped workers in a trench which lacked adequate bracing, but failed to intervene when Wall 39 was inadequately supported. Big D negligently exercised the control they retained over their subcontractor, leading to the death of Michael Begay.

Because Big D retained control over several aspects of their subcontractor's work, they owed a duty to use reasonable care in exercising that control. Accordingly, Begaye respectfully requests that this Court reverse the grant of summary judgment with a finding that Big D did owe a duty to of due care over those areas wherein it retained control.

DATED this 7th day of March, 2007.

A handwritten signature in black ink, appearing to read 'Peter W. Summerill', written over a horizontal line.

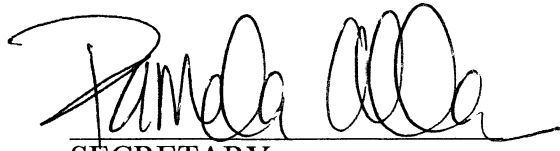
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CERTIFICATE OF MAILING

I hereby certify that on this 7th day of March, 2007, I mailed a true

and correct copy of the above and foregoing Reply Brief, postage prepaid to:

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SECRETARY