

2006

Marlene Begaye, an individually and on behalf of the heirs of Michael Begay v. Big D Construction Corp. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

MARLENE BEGAYE, individually :
and on behalf of the heirs of Michael
Begay,

Plaintiff/Appellant,

vs.

BIG D CONSTRUCTION CORP.,

Defendant/Appellee.

: Utah Supreme Court Case No.
20060572

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BRIEF OF APPELLEE BIG-D CONSTRUCTION CORPORATION

Appeal from Summary Judgment in the Third Judicial District Court
Judge Robert Hilder

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I. STATEMENT OF JURISDICTION

Appellee Big-D Construction Corporation (“Big-D”) agrees with the Statement of Jurisdiction contained in Appellant Marlene Begaye’s principal brief.

II. STATEMENT OF ISSUE PRESENTED FOR REVIEW, STANDARD OF REVIEW AND PRESERVATION BELOW

Did Judge Hilder properly grant summary judgment to Big-D because there was no evidence that Big-D, the general contractor, retained control over the subcontractor’s manner and method of supporting the wall that collapsed on Michael Begaye?

This issue was preserved at R. 227-29. The appellate court reviews the trial court’s grant of summary judgment for correctness. *Machock v. Fink*, 137 P.3d 779, 782 (Utah 2006). There are no statutes that are determinative of this issue.

III. INTRODUCTION

The construction project where Michael Begaye was killed was not atypical from many other large-scale construction projects in how it was structured and how it operated. The project owner contracted with an experienced industrial general contractor, Big-D, to construct a building at the University of Utah. Like the typical general contractor, Big-D had the skills to manage and supervise the project; in short, it was Big-D’s job to make sure the structure was built. Big-D turned to subcontractors with the expertise to handle specific parts of the project. These subcontractors, such as Mr. Begaye’s employer Preferred, knew how to complete their assignment from start to finish. They coordinated with Big-D frequently to make sure the overall project progressed in the most efficient

way, but they were the masters of their day-to-day work on the project. They supervised their crews, told them what to do and how to do it, and provided them the tools and equipment needed to do their job. They had control over their workers and how their workers performed their jobs.

This was not the type of construction project where Big-D insinuated itself into the details of Preferred's work. It did not control the manner and method of Preferred's work, and more importantly, it was not controlling how Preferred erected the wall at the time Mr. Begaye was killed. That was Preferred's job. Preferred was the expert on how to do it.

Big-D cannot be liable to Mrs. Begaye in its capacity as the general contractor on the project unless Big-D effectively became Mr. Begaye's employer that day and directed the manner and method of bracing the wall that fell on him. Because that did not happen, Mrs. Begaye tries on appeal to turn Big-D's normal activities as a general contractor into unique and unusual exertions of control over Preferred's work. She argues that Big-D's powers to ensure overall safety on the project and to move the project forward, which are standard and necessary powers of a general contractor on a large project, trigger the exception to the rule that general contractors are not liable for injuries to a subcontractor's employee. These are arguments that Utah courts and courts in other jurisdictions have previously considered and rejected. This is not one of those rare cases where the

retained control exception to the rule of non-liability applies. Judge Hilder appropriately granted summary judgment to Big-D, and this Court should affirm that ruling.

IV. STATEMENT OF THE CASE, PROCEDURAL HISTORY AND DISPOSITION BELOW

A. Statement of Facts

Marlene Begaye, widow of Michael Begaye, filed a wrongful death lawsuit after her husband Michael Begaye was killed while working on a construction site in Salt Lake City in March 2004. (R. 1-6). Big-D was the general contractor on a construction project to build the Health Sciences Education Building at the University of Utah. (R. 539). Big-D hired Preferred Steel, Inc. (“Preferred”) as the concrete and masonry subcontractor. (R. 822). Michael Begaye was employed by Preferred. (R. 2).

The bid document between Big-D and Preferred described Preferred’s scope of work in part as “furnishing and installing reinforcing steel and accessories for cast in place concrete and furnishing reinforcing steel for unit masonry” (R. 822). Preferred agreed to provide “[a]ll labor, materials, and equipment for complete installation of [the] trade . . .” and to be responsible for “calling for inspections related to [its] trade.” (R. 822). Moreover, Preferred agreed in the Subcontract Agreement to provide a safe workplace for its employees:

At all times while any of your employees, agents or subcontractors are on the Owner’s premises, you are solely responsible for providing them with a safe workplace of employment, and you shall inspect all areas where they may work and promptly take action to correct conditions which are or may become unsafe.

(R. 831). Preferred also promised to adhere “to all safety regulations, including the applicable Occupational Safety & Health Act and all regulations adopted thereunder” (R. 831).

On March 1, 2004, Preferred’s foreman Todd Jex asked Big-D concrete superintendent Kevin Burns if the Preferred crew could begin building the inside face of a rebar wall shown on plans as Wall 39. (R. 192). Mr. Jex was a journeyman ironworker with twenty years experience doing rebar work. (R. 935).

This was not a situation where Mr. Burns or anyone else from Big-D directed or instructed Preferred to begin building Wall 39, and contrary to Mrs. Begaye’s characterization, Big-D did not “send” Preferred’s employees to work on Wall 39. (Appellant’s Brief, p. 2). Rather, Mr. Jex “wanted to make work for his guys,” and he asked Mr. Burns if his crew could “tie up” the wall. (R. 193). Mr. Burns testified as follows:

- Q: As I understand it, before Preferred went to work on this wall they conferred with you? Wall number 39, the wall that collapsed.
A: Correct.
Q: And you told them to go to work on wall number 39 next?
A: I did not.
Q: What did you tell them?
A: He asked.

(R. 192).

Mr. Burns told Mr. Jex that his crew could “go ahead” and build the wall. (R. 193). Mr. Jex, along with three other Preferred employees including Mr. Begaye, began building the wall. (R. 193).

Preferred had complete autonomy and discretion over how it completed the wall.

Mr. Jex testified as follows:

Q: Who was your primary contact person with Big-D?

A: Mine was Kevin, Kevin Burns.

Q: Todd, did Kevin ever give you directions as to the methods you used to put up the rebar?

A: No. Our job was pretty basic.

Q: Can you recall any instance during the three months or so before this accident where Kevin gave you a specific instruction about the way to do your work?

A: No, he didn't, no.

Q: Did anybody else from Big-D give you that kind of instruction?

A: No.

Q: Was there someone from Big-D who was assigned to stay with your crew and watch what your crew was doing?

A: No.

(R. 193, 213-14). One of the Preferred employees, Tony Whitaker, confirmed that

Preferred put up the wall that day without any interference or suggestions from anyone else about how to do it:

Q: Now in terms of the time period that you and the other men were working on this wall, can you testify as to whether or not anyone who was working for Big-D came over and told you something about how to be doing what you were doing?

A: No.

Q: No one did?

A: Nobody.

(R. 194, 219).

As it put up the wall, the Preferred crew supported the wall by using bracing. Big-D was not involved in Preferred's decision to use bracing or in how Preferred used the

bracing; “[t]hey had no say-so in what we did.” (R. 194, 222). Mr. Jex elaborated by testifying:

- Q: Now, Todd, this way that you were doing the bracing, is that something that Big-D told you to do that way?
- A: No. That’s what we have done for years.
- Q: Are you aware of anybody from Big-D even being aware of how you had braced this particular wall as you were putting it up?
- A: Not that I’m aware of.

(R. 194, 215). Big-D did not tell them how to brace, where to tie off the rebar, whether to anchor the wall with guy wiring, or what equipment to use as they were putting up the wall. (R. 195-96, 216).

The manner and method of putting up Wall 39 was exclusively Preferred’s decision, as Mr. Jex elaborated:

- Q: Now this decision, Todd, to go forward with this wall under the circumstances without forms in place, without guy wires and by using the braces only, who made that judgment?
- A: I would say probably myself and then talking to everybody.
- Q: Talking to your crew?
- A: Right.
- Q: Is that a decision that you depended on in any way for Big-D to make for you?
- A: No. That’s what I decided we would do.
- Q: If you had felt that you did not want to go forward with that work without first having the forms in place, could you have made that choice If you felt like you wanted to wait until forms were in place to do that wall, could you have made that choice?
- A: Yes.

(R. 196, 216).

The fact that Preferred used bracing as the way to support Wall 39 was not unusual; according to Mr. Jex, it was “just common practice. We had done some other walls on the other end this way also.” (R. 933). He further testified:

Q: So from your perspective as of the time this happened was there anything unusual about the work situation as of the time of the accident?

A: No. We all felt pretty good about it and it was the last bar we was going to put up for the day and go on the next day.”

(R. 933). Likewise, Tim Elliot, one of the iron workers employed by Preferred to work on Wall 39, stated that Preferred supported the walls on the project by bracing rather than by forms “[m]ost of the time, quite a bit.” (R. 933).

The Preferred employees were in control of the specific safety precautions they took while building Wall 39. Mr. Elliot testified:

Q: When Big-D runs a job site, Big D controls what happens . . .

A: As far as scheduling?

Q: Sure.

A: Well, yeah, they tell us when they want something done.

Q: They control the safety?

A: Not really. They don’t really have too much control over us. They tell us when they want this wall built and this wall built.

Q: Then you go build it.

A: Uh-huh (affirmative). Yes.

(R. 223). Mr. Burns confirmed that each employer is in charge of keeping its own employees safe: “Preferred takes care of their own and I take care of my own.” (R. 196, 206).

As the Preferred crew was putting up the wall, the bracing broke, causing the wall to collapse. (R. 208-10). The collapse threw Mr. Begaye to the ground, and he was killed. (R. 2).

B. Procedural History and Disposition Below

Mrs. Begaye filed a wrongful death lawsuit against Big-D in October 2004, and after more than a year of discovery, Big-D moved for summary judgment on the basis that Big-D did not exert control over the injury-causing aspect of Preferred's work. (R. 1-6, 227-29). Mrs. Begaye responded with a request to conduct more discovery pursuant to Utah Rule of Civil Procedure 56(f). (R. 230-33). During the hearing on Mrs. Begaye's Rule 56(f) motion, her counsel conceded that their argument against summary judgment largely 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. (R. 1072, p. 22). Big-D agreed at the hearing to permit Mrs. Begaye to conduct the limited discovery she wished to conduct before Judge Hilder ruled on the motion for summary judgment. (R. 1072, pp. 30-31).

After Mrs. Begaye completed this discovery, she opposed Big-D's motion for summary judgment and filed her own motion for partial summary judgment on the basis that Big-D owed Mr. Begaye a duty of safety as a matter of law. (R. 508-917). Judge Hilder held oral argument on the parties' motions in May 2006. (R. 1073). Judge Hilder granted Big-D's motion, noting that Mrs. Begaye's arguments regarding overall safety and

job sequencing had nothing to do with whether Big-D controlled the manner and method of putting up the wall. (R. 1073, p. 9). Judge Hilder explained his ruling as follows:

[T]he case law has kept it pretty narrow. It's about operative details, it's about the control over the method, the mode of the actual task. The dilemma, I think, and I think that it's a strong policy dilemma, is we can't get into a situation where an owner or a general who takes seriously safety obligations, which it is very clear Big-D did, is then penalized because they don't supervise every part of the work unless they're controlling the work. And it seems to me that the facts are undisputed that no matter what else Big-D did, it didn't tell the sub how to build the wall, how to brace the wall.

(R. 1073, p. 4). This appeal ensued. (R. 987-88).

V. SUMMARY OF ARGUMENT

POINT A: Utah law is crystal-clear that a general contractor like Big-D cannot be liable for the workplace injury of a subcontractor's employee unless the general contractor exercised affirmative control over the injury-causing aspect of the subcontractor's work. Utah courts have narrowly construed the exception to Restatement (Second) of Torts § 414, under which a general contractor can be liable if he retained control over the subcontractor's work.

It is undisputed that Big-D did not tell Preferred to support Wall 39 by using bracing and that Big-D did not actively participate in the bracing of Wall 39. Indeed, while Mrs. Begaye faults Big-D on appeal for not stopping what she claims was an unwise decision on Preferred's part to support the wall with bracing, this simply bolsters the critical point that Big-D was not directing Preferred's manner and method of erecting the wall. Judge Hilder correctly focused on the facts that were relevant to the pertinent legal

inquiry of control over the manner and method, and he appropriately granted summary judgment to Big-D.

POINT B: The panoply of irrelevant facts that Mrs. Begaye recites to support her position that summary judgment should be reversed strays far from the legal question of whether Big-D retained control over the injury-causing aspect of Preferred's work. These immaterial facts fall into two categories: facts regarding Big-D's scheduling and sequencing of the project to move it forward, and facts regarding Big-D's general supervisory role over project safety. Courts have accurately recognized that these powers of a general contractor are normal and necessary, and that they do not mean the general contractor is micro-managing the details of a subcontractor's work. This Court should not be distracted by evidence that has nothing to do with whether Big-D controlled the manner and method of bracing Wall 39.

VI. ARGUMENT

A. Big-D Cannot Be Held Liable Under Utah Law to a Subcontractor's Employee Where Big-D Did Not Direct the Injury-Causing Aspect of the Subcontractor's Work.

1. UTAH HAS A LONG HISTORY OF LIMITING A GENERAL CONTRACTOR'S LIABILITY TO UNIQUE CIRCUMSTANCES OF ACTIVE PARTICIPATION IN THE INJURY-CAUSING WORK.

While many legal practitioners consider *Thompson v. Jess*, 1999 UT 22, 979 P.2d 322, to be the elucidating Utah case regarding the retained control doctrine, there are two state court cases preceding it where the Utah Supreme Court recognized the concept that a

general contractor or owner should not be responsible for a workplace injury unless it controlled and directed the injury-causing work. In *Dayton v. Free*, 46 Utah 277, 148 P. 408 (1914), a subcontractor's employee was injured while working on a tunnel. He sued a number of parties, including the general contractor, Snake Creek Mining & Tunnel Company ("Snake Creek"). At trial, the court granted Snake Creek's motion for directed verdict because it had no duty to protect the employee from the negligence of its subcontractors. *Dayton*, 148 P. at 409. The Utah Supreme Court affirmed summary judgment even though Snake Creek could require subcontractors to reinforce portions of the tunnel by using the method it saw as most appropriate, could alter the subcontractors' work at its discretion, could require subcontractors to correct insufficient work, could demand that subcontractors fire their employees if it showed reasonable cause, and provided much of the equipment for the project. *Id.* at 410-11. The court discounted these circumstances because the general contractor could only be responsible for the employee's injury where it could

direct or control the work, not only with respect to results, but also with reference to methods of procedure or means by which the result was to be accomplished, where the will and discretion of the [sub]contractor 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 [the general contractor].

Id. at 411.

In *Gleason v. Salt Lake City et al.*, 94 Utah 1, 74 P.2d 1225 (1937), the Utah Supreme Court held that a store that had arranged to have the Salt Lake City Fire

Department pump its flooded elevator shaft was not liable for injuries the plaintiff sustained when she tripped over the Fire Department's hose. *Gleason*, 74 P.2d 1225, 1227. The court agreed that the Fire Department negligently failed to warn pedestrians of the hose but refused to assign liability to the store because the store had no control over the Fire Department's work. *Id.* at 1228. The court restricted "the right to control the manner and means" of the work to the injury-causing event — "the operations of pumping." *Id.* at 1228. Mrs. Begaye acknowledges those early Utah cases on appeal but ignores that the courts refused to impose liability on the contractor or owner despite their control over the workplace in general. There was no evidence in those cases, as there is no evidence here, that the general contractor "gave any instructions or directions respecting the work or the manner in which it should be done." *Id.* at 1227.

Mrs. Begaye similarly approaches *Thompson v. Jess* and this Court's adoption of the retained control doctrine in that case with blinders. She claims that *Restatement (Second) of Torts* § 414 "does not limit the application of liability at common law, it expands it." (Appellant's Brief, p. 13). In reality, § 414 serves as an exception to the "general common law rule that 'the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor of his servants.'" *Thompson*, 979 P.2d at 325. The exception set forth in § 414, the retained control doctrine, "is a narrow theory of liability applicable in unique circumstances where an employer of an independent contractor exercises enough control over the contracted work

to give rise to a limited duty of care” *Id.* at 326. She also mischaracterizes the parameters of the doctrine, vaguely alleging that a general contractor need only exercise “some” control before it becomes liable for the injury. (Appellant’s Brief, p. 13).

Actually, the comment she cites explains that “some degree of control over the manner in which the work is done” is needed to impose liability, meaning that

[i]t is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations or deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail.

Id. at 327, quoting Restatement (Second) of Torts § 414 cmt. c. The court equated “retained control” with “active participation,” meaning that “a principal employer must have exercised affirmative control over the method or operative detail of that work.” *Id.* at 327. Thus, a premises owner who asked a contractor to erect a steel pipe was not liable when a worker was injured during the erection because the owner did not tell the contractor how to erect the pipe; rather, the contractor chose a technique for lifting the pipe, and the worker was injured in that process. The worker was not injured because the owner directed the employer to erect the pipe, but because the employer chose an unsafe method. *Id.* at 328.

Utah courts have reaffirmed the narrowness of the retained control doctrine since *Thompson*. The case of *Smith v. Hales & Warner Constr., Inc.*, 2005 UT App. 38, 107 P.3d 701, involved the strikingly similar situation where three men employed by a

subcontractor were building a wall. During construction, the wall collapsed, killing one of the men. The district court granted summary judgment for the general contractor. The Court of Appeals affirmed, ruling that the general contractor did not actively participate in the subcontractor's work. The court noted that

[o]ther than generally overseeing the work performed by various subcontractors, there is no evidence Mr. Egbert trained or instructed Decedent about how to build or position the wall frames in place

Id. at 705.

The Utah Court of Appeals reiterated the notion that a general contractor's supervisory responsibilities do not create liability, and that something like training the subcontractor's employee on how to do his job would be necessary to create the requisite control, in *Martinez v. Jacobsen Constr. Co., Inc.*, 2005 UT App. 136 (unpublished opinion) (attached at Addendum A). The court's analysis merits quotation at length because it addresses Mrs. Begaye's contention that Big-D's contractual assumption over general workplace safety somehow meant that it was directing Mr. Begaye how to erect Wall 39:

Plaintiff points to Defendant's directives to [subcontractors] Steel Deck Erectors and Truco regarding fall protection, Defendant's safety inspections and checklists, and Defendant's project manager's and superintendent's acknowledgement of responsibility to look for and correct dangerous working conditions, Defendant's monitoring of wind and weather, and Defendant's imposition of overtime. Though these factors, taken together, suggest a general supervisory role by Defendant, they do not rise to the level of control over the "method or operative detail of the injury-causing activity" necessary to impose liability. Indeed, it is undisputed that Defendant did not train Plaintiff and other steel workers on how to do their jobs. In particular,

Defendant did not supervise or train Plaintiff and other steel workers on how to install the tie-off system. Rather, Defendant simply required its subcontractors to perform their work safely and in compliance with the Occupational Safety and Health Administration requirements. “This amounted merely to control over the desired result, which is insufficient to come within the retained control doctrine.” *Thompson*, 1999 UT 22 at ¶ 24.

The Utah appellate courts have not encountered a situation where the narrow retained control exception to the general rule of non-liability would apply. A general contractor would have to insinuate itself actively into a subcontractor’s work in order to retain the requisite level of control. That clearly did not happen with Big-D and Preferred.

2. IT IS UNDISPUTED THAT BIG-D DID NOT DIRECT
PREFERRED ON HOW TO SUPPORT WALL 39.

Big-D simply gave permission to Preferred to achieve a result on the day of the accident. Preferred asked if it could build Wall 39, and Big-D told it to go ahead. Preferred’s job was “pretty basic,” and it knew how to do the job. Preferred did not need anyone from Big-D to watch over and give directions as it was building the wall, and no one from Big-D purported to do this. Importantly, it was up to Preferred to decide how to support Wall 39. If it wanted to use bracing or forms or guy wiring, that was its decision, and it did not need to obtain approval or permission from Big-D beforehand.

The wall collapsed because the bracing broke, and Big-D had no control over this. Big-D did not actively participate in bracing the wall. It was not helping Preferred’s crew put up the wall, and it was not telling the crew how to do it. Mrs. Begaye does not claim,

as she cannot, that Big-D actively directed the manner and method by which Preferred chose to brace Wall 39. Summary judgment should therefore be affirmed.

3. BIG-D IS NOT LIABLE UNDER ANY OTHER RESTATEMENT SECTION.

Mrs. Begaye mentions in passing that if Big-D is not liable under the retained control doctrine, its “involvement in the safety aspects over the course of the project also made Big-D liable under either §§ 323 ‘Negligent Performance Of Undertaking To Render Services’ or 324A ‘Liability To Third Person For Negligent Performance Of Undertaking’” (Appellant’s Brief, p. 19 n.1). She does not set forth any facts or analysis supporting the use of either of these sections. She did not brief this argument to the district court but relegated it to the same fleeting footnote she gives it on appeal. This Court should not seriously consider any argument on appeal that Mrs. Begaye did not seriously pursue below. *Midvale City Corp. v. Halton*, 73 P.3d 334, 339 (Utah 2003).

B. Big-D’s Control Over Sequencing and Workplace Safety Do Not Equate to Control Over the Manner and Method of Preferred’s Bracing of Wall 39.

The fact that Big-D, as a general contractor, had the ability to control and direct certain things on the construction project is not surprising or unusual. A general contractor is in charge of making sure the project gets finished, and it must have concomitant powers to achieve this. If these powers were enough to impose liability on general contractors, they would always be legally responsible for workplace injuries.

Mrs. Begaye points to various abilities that Big-D exercised during the project, but they

are all irrelevant because none of them has to do with control over Preferred's method of bracing Wall 39 on the day of the accident.

1. FACTS INVOLVING CONTROL OVER SEQUENCING DO NOT
 CREATE A DUTY OWED BY A GENERAL CONTRACTOR TO
 A SUBCONTRACTOR'S EMPLOYEE.

Mrs. Begaye acknowledges that Big-D acted in the typical capacity of a general contractor by retaining control "over workflow, timing and sequencing," as well as "direction over subcontractors to coordinate and arrange the timing of tasks." Big-D superintendent Kevin Burns could tell subcontractors "where to go next," and he acceded to Preferred foreman Todd Jex's request that his crew work on Wall 39 because that was "where they would be headed next." (Appellant's Brief, pp. 2, 4-5). Indeed, part of any general contractor's role is to schedule and coordinate the work of subcontractors, as well as to direct them to the next task. Big-D's authority to do so does nothing to imply that Big-D affirmatively participated in the operative detail of Preferred's work on Wall 39 on March 1, 2004.

It is also true that "construction of the walls represented a cooperative effort between Big-D and Preferred." (Appellant's Brief, p. 2). Every part of the construction project called for cooperation between Big-D and the subcontractors, and this is common and necessary in the construction industry. Again, this does not mean that Big-D insinuated itself into the method by which Preferred built Wall 39. Mrs. Begaye claims, however, that because Preferred started building it without a form in place, Big-D allowed

Preferred to build the wall in a way that “deviated from the sequencing and workflow set forth by Big-D’s own schedule.” (Appellant’s Brief, p. 2). First, whether deviations in workflow occurred has nothing to do with whether Big-D controlled Preferred’s work. Second, walls had been erected on the project prior to March 1, 2004, without forms in place, so Preferred’s method of building the wall was not unusual or unprecedented.

The Utah Court of Appeals explained in *Martinez* that a general contractor exercising its general supervisory role is not the same as exercising affirmative control over a particular aspect of a subcontractor’s work. Other courts agree that control over sequencing work does not impose liability on the general contractor for workplace injuries. In *Piper v. Jerry’s Homes, Inc.*, 671 N.W.2d 531 (Iowa App. 2003), the court concluded that a general contractor was not liable to a subcontractor’s employee who fell through an unguarded stairwell because he coordinated the work performed by the subcontractors and check on their progress. The court in *Martinez v. Asarco Inc.*, 918 F.2d 1467 (9th Cir. 1990), accepted plaintiff’s points that the general contractor controlled commencement of the subcontractor’s work, scheduled the work, and determined when the work would end; the court nonetheless granted summary judgment for the general contractor because

all of the asserted Asarco actions concern control over only the sequence of the work. Such control is insufficient to establish liability under section 414 as applied by Arizona courts.

Martinez, 918 F.2d at 1475; *see also Sullins v. Third and Catalina Constructions*

Partnership, 602 P.2d 495, 500 (Ariz. App. 1979) (“The right to program or direct the

sequence of the work . . . does not give defendant the right to control the method or manner of doing the work.”)

Big-D is not responsible for Mr. Begaye’s death merely because it moved the project along and allowed Preferred to build Wall 39 on the day of the accident. It means only that Big-D had a say in when Preferred put up the wall, but Big-D did not participate in the manner and method of putting up the wall.

2. FACTS INVOLVING CONTROL OVER SAFETY DO NOT
 CREATE A DUTY BY A GENERAL CONTRACTOR TO A
 SUBCONTRACTOR.

The next category of facts that Mrs. Begaye points to on appeal, safety measures, are indicia of Big-D’s management of the construction project. They are similarly irrelevant to whether Big-D retained control over the manner and method of erecting Wall 39. Such facts establish only that Big-D had a “general supervisory role” over safety, which is insufficient to create a duty toward a subcontractor’s employee. *Martinez*, 2005 WL 615106 at *2.

a. Safety Provisions in the Owner Contract Are Irrelevant.

Mrs. Begaye starts with the construction contract between Big-D and the project owner, which states that Big-D “shall take reasonable precautions for the safety of . . . employees on the work.” (Appellant’s Brief, p. 5). The contract further provided that Big-D was responsible to ensure subcontractor compliance with OSHA regulations. (Appellant’s Brief, p. 5). The fact that Big-D, the only contractor on the project who

directly contracted with the owner, assured the owner that the workplace would be safe, has nothing to do with control over Preferred's manner and method of erecting the wall. The court in *Martens v. MCL Construction Corp.*, 807 N.E.2d 480 (Ill. App. 2004) recognized this distinction when it affirmed summary judgment for a general contractor who was contractually responsible for implementing a safety program that included citing subcontractors for rules violations and employing a safety director; while this indicated a general statement of control, "[w]e do not, however, equate those safety responsibilities with control over the means and methods of [the subcontractor's] steel erection work" *Martens*, 807 N.E.2d at 490.

Like Mrs. Begaye, the plaintiff in *Martinez* had contended that the general contractor's agreement with the owner to be solely responsible for "all construction methods and for providing a safe work environment on the job site" meant the general contractor retained control over the work that caused his injury. The court rejected this argument, noting that the general contractor's subcontracts required the subcontractors to be responsible for jobsite safety. "Therefore, even if Defendant did have responsibility for safety vis-a-vis the owner, that responsibility was passed on to the various subcontractors." *Martinez* at **1-2. Big-D's subcontract with Preferred made Preferred "solely responsible for providing [its employees] with a safe workplace" and for complying with OSHA regulations applicable to its work. Preferred accepted this responsibility in the contract,

and its foreman acknowledged that it was his duty, not Big-D's, to keep his employees safe on the job.

b. Big-D's Enforcement of Safety Regulation Is Irrelevant.

Next, Mrs. Begaye contends that apart from contractual agreements, Big-D's actual enforcement of enforced safety regulations, from "interfer[ing] with subcontractor work on more than 43 separate occasions" to making workers wear seat belts,¹ makes it liable. (Appellant's Brief, pp. 5-6). The fact that Big-D instructed subcontractors to comply with safety standards and intervened when it observed subcontractors engaging in unsafe practices simply demonstrates that Big-D was a diligent and conscientious general contractor. It does not mean that Big-D interfered with the manner and method of erecting Wall 39. Merely ensuring that safety precautions are observed on a construction project does not create a duty. *See Aguirre v. Turner Construction Co.*, 2006 WL 644009 (N.D. Ill. 2006) (attached at Addendum A)(affirming summary judgment for the general contractor because "[e]nforcement of safety standards does not constitute control over the 'incidental aspects' of subcontractor work.") Moreover, it does not make sense from a

¹She also claims that Big-D stopped work when subcontractors "failed to comply with OSHA bracing requirements." (Appellant's Brief, p. 6). The record cite she gives for this assertion is a page from her Opposition to Big-D's Motion for Summary judgment, where she notes that Big-D stopped plumbers from working in a trench that was not properly reinforced and refused a request by another subcontractor to work in a trench because the subcontractor "must follow OSHA guidelines." (R. 515, 655). Neither of these instances has anything to do with bracing for a wall and does nothing to suggest that Big-D exerted control over Preferred's decision to brace Wall 39 on March 1, 2004.

public policy standpoint to pin liability on a general contractor for the injury of a worker over whom they have no control because the contractor strives to create an injury-free workplace. *Aguirre*, 2006 WL 644009 at *5 (“penalizing a general contractor’s efforts to promote safety and coordinate a general safety program among various independent contractors at a large jobsite hardly serves to advance the goal of work site safety.”) (citation omitted).

c. Big-D’s Omissions Are Irrelevant.

Mrs. Begaye additionally faults Big-D for what it did not do. Relying on testimony from her safety expert, Don Rigtrup, she maintains that Big-D should have reviewed OSHA and ANSI standards before Preferred worked on Wall 39, and that it should have performed a job hazard analysis because the erection of the wall was supposedly an unusually dangerous task.² (Appellant’s Brief, pp. 7-8). Mr. Rigtrup does not explain what OSHA or ANSI standards he is referring to or how review of them would have prevented the accident, and his opinion is too vague to be meaningful. Regarding the job site hazard analysis, Big-D’s Request for Proposal to Preferred simply informs potential subcontractors that “[a]t Big-D’s site superintendent’s request, a job site hazard analysis

²Mr. Rigtrup does not state that the failure to perform a job hazard analysis “directly led” to Mr. Begaye’s death, contrary to Mrs. Begaye’s representation. Instead, he claims that performing such an analysis “would have most probably prevented the overturning of the wall.” (R. 761). This opinion is pure speculation without any basis in fact, and it is insufficient to create a meaningful factual issue. *Thurston v. Workers’ Compensation Fund of Utah*, 83 P.3d 391, 397 (Utah Ct. App. 2003) (expert opinion based on guesswork is inadmissible).

will be required to be submitted 24 hrs before any task, the superintendent considers necessary, is performed” (R. 812). No expert analysis is necessary to determine whether Big-D should have requested a job site hazard analysis because it was in Big-D’s discretion to request it. Furthermore, Mr. Rigtrup offered no foundation to testify that Wall 39 was an “unusually dangerous task.” He is not an expert on rebar walls and is no more qualified to testify about Wall 39 than any of the people who actually built the wall. In any event, Preferred foreman Mr. Jex emphasized that there was nothing unusual or dangerous about building Wall 39 or supporting it with bracing; “that’s what we’ve done for years.”

Hindsight ruminations about what Big-D should have done that might have prevented the accident are irrelevant. They distract from the only issue pertinent to whether Big-D is liable for Mr. Begaye’s death: whether Big-D affirmatively controlled the method or operative detail of Preferred’s work in bracing Wall 39. As the court in *Ruiz v. Herman Weissker, Inc.*, 130 Cal. App. 4th 52 (2005), observed,

a hirer’s failure to correct an unsafe practice of which it was aware, and that it retained the authority to correct, does not “affirmatively contribute” to the employee’s injury and thus will not support the assertion of a claim against the hirer arising out of that injury.

Ruiz, 130 Cal. App. 4th at 65.

By contending that Big-D’s ability to sequence work and monitor job safety should be considered on appeal, Mrs. Begaye is essentially asking this Court to ignore the relevant and intentionally narrow question of whether Big-D controlled the means by which

Preferred braced Wall 39. She wants to hold Big-D liable based on the necessary circumstance that Big-D, as the general contractor, had general responsibility for coordinating and overseeing the work of the subcontractors.

If this Court were to abandon the reasoning in prior Utah cases and agree with Mrs. Begaye that Big-D is liable because of its status, it would hugely expand the scope of general contractors' liability. It would render every general contractor liable not only for the general contractor's own employees, but also all the work of all subcontractors' employees, regardless of whether the general contractor had anything to do with the injury-causing aspect of the subcontractor's work. Employees of subcontractors would effectively become direct employees of general contractors. A general contractor could be liable if an employee of its subcontractor was injured in an accident due to failure to wear a seatbelt, regardless of whether the general contractor knew the employee was driving without a seatbelt. This would make the retained control doctrine all-encompassing rather than the narrow exception to non-liability it is meant to be.

CONCLUSION

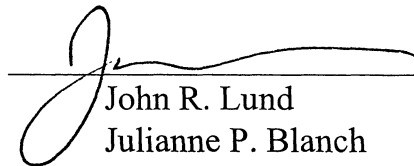
Mrs. Begaye has not presented any reason to reverse Judge Hilder's grant of summary judgment to Big-D. Big-D was not insinuating itself into Preferred's task of erecting Wall 39 on the day of the accident; instead, Preferred went about doing its work as it had before on that project, doing the job it was hired to do and knew how to do.

Big-D cannot be held responsible merely because it acted as a general contractor.

Big-D requests that this Court affirm the trial court's decision.

DATED this 6th day of February, 2007.

SNOW, CHRISTENSEN & MARTINEAU

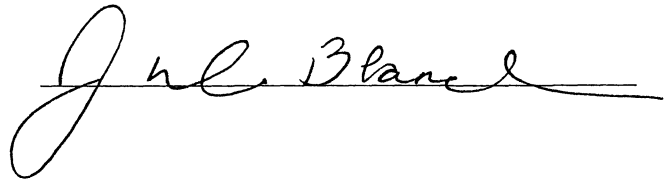


John R. Lund
Julianne P. Blanch

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 6, 2007, I caused a true and correct copy of the foregoing **BRIEF OF APPELLEE BIG-D CONSTRUCTION CORPORATION** to be sent, via U.S. Mail, to the following:

James R. Hasenyager
Peter W. Summerill
HASENYAGER & SUMMERILL
1004 - 24th Street
Ogden, UT 84401

A handwritten signature in black ink, appearing to read "J. R. Hasenyager", written over a horizontal line.

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ADDENDUM A

Not Reported in P.3d, 2005 WL 615106 (Utah App.), 2005 UT App 136
(Cite as: Not Reported in P.3d)

Martinez v. Jacobsen Const. Co., Inc. Utah App., 2005.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Utah.

Russell MARTINEZ, Plaintiff and Appellant,

v.

JACOBSEN CONSTRUCTION COMPANY, INC., a Utah corporation; and John Does 1 through 3, Defendants and Appellees.

No. 20040004-CA.

March 17, 2005.

Third District, Salt Lake Department; The Honorable William B. Bohling.

William J. Hansen, Karra J. Porter, and John E. Hansen, Salt Lake City, for Appellant.
Robert L. Stevens, Salt Lake City, for Appellees.

Before Judges BENCH, GREENWOOD, and ORME.

MEMORANDUM DECISION (Not For Official Publication)

GREENWOOD, Judge:

*1 Plaintiff Russell Martinez appeals the trial court's grant of summary judgment in favor of Defendant Jacobsen Construction Company, Inc. "Summary judgment is proper only when 'there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.'" *Thompson v. Jess*, 1999 UT 22, ¶ 12, 979 P.2d 322 (citation omitted).

Plaintiff, a steelworker employed by a steel erection subcontractor, argues that the trial court erred in granting summary judgment in favor of Defendant because material issues of fact exist as to whether Defendant, as the general contractor for the construction project, retained and exercised a right

of control over worker safety sufficient to create a limited duty under the "retained control" doctrine. "[T]he issue of 'whether a "duty" exists is a matter of law' which we review for correctness." *Fishbaugh v. Utah Power & Light*, 969 P.2d 403, 405 (Utah 1998) (citation omitted).

"Utah adheres to the general common law rule that 'the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.'" *Thompson*, 1999 UT 22 at ¶ 13 (quoting Restatement (Second) of Torts § 409 (1965)). However, a narrow exception to this rule, the "retained control" doctrine, applies when "an employer of an independent contractor exercises enough control over the contracted work to give rise to a limited duty of care ... confined in scope to the control asserted." *Id.* at ¶ 15.

We recently analyzed the "retained control" doctrine, stating that "under *Thompson*, retained control requires active participation in the method or operative detail of the *injury-causing activity* in order to impose liability." *Smith v. Hales & Warner Constr., Inc.*, 2005 UT App 38, ¶ 10, 518 Utah Adv. Rep. 17 (emphasis added).

Plaintiff first asserts that Defendant retained control via the contract between the owner of the construction project and Defendant in which Defendant agreed to be solely responsible for "all construction methods and for providing a safe work environment on the job site." In support of this proposition, Plaintiff cites language from *Thompson*:

The term "retained control" may have a more syntactically correct application to sophisticated parties who, by contract, stipulate which party will control the 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.... The issue, however, of whether a duty of care may be imposed solely as a

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result of such a contractual reservation is not before us.

1999 UT 22 at ¶ 26 n. 3.

Plaintiff's reliance on this language is misplaced. In this case, Defendant subcontracted the steel work on the construction project to Masco, Inc., which subcontracted portions to Steel Deck Erectors, which, in turn, brought in Plaintiff's employer, Truco under a subcontract. The contract that Plaintiff refers to is only between Defendant and the owner of the project. Thus, it is doubtful that the *Thompson* footnote applies to this case. Instead, this case is similar to *Smith*, in which we found further support for refusing to apply the "retained control" doctrine to hold the owner liable to the deceased employee's relatives because "the actual supervisor of Decedent ... had a subcontract with [the rough carpentry subcontractor], which in turn was a subcontractor with the general contractor." 2005 UT App 38 at ¶ 11.

*2 Furthermore, it is undisputed that in all its subcontracts, Defendant required its subcontractors to be responsible for job site safety. The subcontract form was attached to and incorporated into the contract between Defendant and the project owner. Therefore, even if Defendant did have responsibility for safety vis-a-vis the owner, that responsibility was passed on to the various subcontractors.

Plaintiff maintains, however, that there is more than a bare contractual reservation on which to base a duty in this case. Particularly, Plaintiff points to Defendant's directives to Steel Deck Erectors and Truco regarding fall protection, Defendant's safety inspections and checklists, Defendant's project manager's and superintendent's acknowledgment of responsibility to look for and correct dangerous working conditions, Defendant's monitoring of wind and weather, and Defendant's imposition of overtime. Though these factors, taken together, suggest a general supervisory role by Defendant, they do not rise to the level of control over the "method or operative detail of the injury-causing activity," *id.* at ¶ 10, necessary to impose liability. Indeed, it is undisputed that Defendant did not train Plaintiff and other steel workers on how to do their

jobs. In particular, Defendant did not supervise or train Plaintiff and other steel workers on how to install the tie-off system. Rather, Defendant simply required its subcontractors to perform their work safely and in compliance with the Occupational Safety and Health Administration requirements. "This amounted merely to control over the desired result, which is insufficient to come within the retained control doctrine." *Thompson*, 1999 UT 22 at ¶ 24.

In sum, because Defendant did not actively participate in the steel work itself, or the safety system for the steel work, Defendant's participation is insufficient to create a duty under the "retained control" doctrine under Utah law.^{FN1}

FN1. Plaintiff also argues that if Defendant owes Plaintiff a duty of care, summary judgment was improper because material issues of fact exist as to whether Defendant breached this duty and whether such breach is a proximate cause of Plaintiff's injuries. However, because we determine that no duty of care exists in this case, we do not reach these issues.

Accordingly, the judgment of the trial court is affirmed.

I CONCUR: RUSSELL W. BENCH, Associate Presiding Judge.

I CONCUR IN THE RESULT: GREGORY K. ORME, Judge.

Utah App., 2005.

Martinez v. Jacobsen Const. Co., Inc.

Not Reported in P.3d, 2005 WL 615106 (Utah App.), 2005 UT App 136

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Not Reported in F.Supp.2d, 2006 WL 644009 (N.D.Ill.)
(Cite as: Not Reported in F.Supp.2d)

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Briefs and Other Related Documents

Aguirre v. Turner Const. Co.N.D.Ill.,2006.Only the Westlaw citation is currently available.

United States District Court,N.D. Illinois, Eastern Division.

Jose Antonio AGUIRRE, et al. Plaintiffs,

v.

TURNER CONSTRUCTION COMPANY, et al.
Defendants.

No. Civ.A. 05 C 515.

March 9, 2006.

Milo W. Lundblad, Charles E. Webster, Glen Joseph Dunn, Jr., Marvin A. Brustin, Marvin A. Brustin, Ltd., Chicago, Il, Jennifer Marie Hill, Worth, IL, for Plaintiffs.

Jenna Lynn Schoeneman, Bryon D. Knight, Matthew Scott Clark, Knight, Hoppe, Kurnik & Knight LLC, Des Plaines, IL, Jon B. Masini, John M. Schmidt, Margaret Marta Donnell, Scott Alan Ruksakiati, Steven C Swanson, Fisher Kanaris, P.C., Chicago, IL, for Defendants.

MEMORANDUM OPINION AND ORDER

CONLON, J.

*1 Plaintiff Jose Antonio Aguirre was injured while working as a bricklayer during the renovation of Soldier Field when he fell from a scaffold. He and his wife Maria Aguirre filed a fourteen-count personal injury and loss of consortium complaint against contractors involved in the renovation project. All but two of those defendants were dismissed from the case. Dkt.20, 36. The remaining defendants are the construction manager for the project, TBMK, a joint venture, comprised of Turner Construction Company, Barton-Malow Company, and Kenny Construction, as well as Chicago Bears Stadium, Inc. Before the court are the parties' cross motions for summary judgment.

FACTS

The facts material to summary judgment are undisputed unless otherwise noted. TBMK was the construction manager of the Soldier Field renovation project. TBMK's contract with the developer required TBMK to "take all necessary precautions and institute programs necessary to ensure the safety of the public and of workers performing the Work on the job, and to prevent accidents or injury to persons on the Site. Construction Manager shall comply with all Legal Requirements relative to safety and the prevention of accidents." Pl.Ex. E. The contract required TBMK to appoint a safety superintendent to oversee safety on the project.

In furtherance of its obligations, TBMK promulgated an extensive safety program. All subcontractors were "solely responsible for the safety of their employees" and the "train[ing] and educat[ion of] their employees" concerning the safety program. Def. Exh. R. TBMK employed a contractor project safety coordinator and other personnel who oversaw safety on the project. Specifically, the safety coordinator assisted subcontractors in preparing their site safety programs, held monthly safety meetings, audited safety on the project and had the authority to stop work if he detected unsafe conditions. *Id.* TBMK's safety personnel walked the work site daily to evaluate compliance with the safety program. However, the program provided that "[t]he assignment of construction management or insurance safety personnel to monitor responsibilities for safety is not intended to relieve the contractor [sic] of their responsibility for providing a safe and healthy environment for their employees." *Id.* TBMK was empowered to stop work for safety reasons, authority which it sometimes exercised. TBMK could also fine or dismiss subcontractors or subcontractor employees for safety violations. *Id.* Subcontractors were required to make daily safety inspections of the job

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site and ensure that all subcontractor employees followed TBMK's safety program. Subcontractors were required to document weekly safety meetings concerning topics provided by TBMK.

TBMK contracted with A.L.L. Masonry to complete masonry work during the renovation. A.L.L. was required to "perform and furnish all the work, labor, services, materials, plant, equipment, tools, scaffolds, appliances and other things necessary for" the work. Def. Ex. P. A.L.L. "agree[d] that the prevention of accidents to workmen and property engaged upon or in the vicinity of the Work is its responsibility." *Id.* A.L.L. prepared and executed a site-specific safety program and employed a project manager to oversee the project and administer the safety program. Def. Ex. Q. A.L.L. employed two additional full-time safety personnel to ensure that it complied with the safety program.

*2 A.L.L. was required to build, inspect, and approve scaffolding for use by its employees. A.L.L. was required to follow 23 rules for scaffold construction promulgated by TBMK, including the use of fall protection for workers more than six feet off the ground. TBMK could require A.L.L. to correct deficiencies it observed in A.L.L.'s scaffolding. TBMK was not required to inspect all of the scaffolding, but did do so. TBMK imposed specific design requirements on the scaffold where Aguirre fell because the design required deviation from TBMK's general requirements.

Aguirre was employed by A.L.L. as a bricklayer during the Soldier Field renovation. At the time of the accident, Aguirre was laying bricks around garage-style doors on the north end of the field. Aguirre fell from a scaffold around one of the doors to the concrete eight to ten feet below when the foot planks supporting him gave way or flipped. The scaffold was completed and stocked with bricks and mortar earlier that morning by A.L.L. employees.

On cross-motions for summary judgment, each movant must satisfy the requirements of Rule 56. *Clipco, Ltd. v. Ignite Design, LLC*, No. 04 C 5043, 2005 WL 1838436, at *3 (N.D.Ill. Aug.1, 2005) (Conlon, J.). Summary judgment is appropriate when the moving papers and affidavits show there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once a moving party meets its burden, the non-moving party must go beyond the pleadings and set forth specific facts showing there is a genuine issue for trial. Fed.R.Civ.P. 56(e); *Silk v. City of Chicago*, 194 F.3d 788, 798 (7th Cir.1999). The court considers the record as a whole and draws all reasonable inferences in the light most favorable to the party opposing the motion. *Bay v. Cassens Transport Co.*, 212 F.3d 969, 972 (7th Cir.2000). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

II. Chicago Bears Stadium

Aguirre asserts six claims against Chicago Bears Stadium: negligence (Count V); loss of consortium based on negligence (Count VI); *res ipsa loquitur* (Count IX); loss of consortium based on *res ipsa loquitur* (Count X); premises liability (Count XI); and loss of consortium based on premises liability (Count XII). Chicago Bears Stadium moves for summary judgment on all counts. Aguirre does not contest the motion. Therefore, summary judgment shall be entered for Chicago Bears Stadium and against Aguirre on Counts V, VI, IX, X, XI, and XII. *Walker v. McKee*, No. 93 C 5962, 1997 WL 182288, at *1 (N.D.Ill. Apr.9, 1997) (Moran, J.).

III. TBMK

Aguirre asserts four claims against TBMK: negligence (Count 1); loss of consortium based on negligence (Count II); *res ipsa loquitur* (Count IX); and loss of consortium based on *res ipsa loquitur*

ANALYSIS

I. Legal Standard

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(Cite as: **Not Reported in F.Supp.2d**)

(Count X). TBMK moves for summary judgment on all counts.

A. *Res Ipsa Loquitur*

*3 Counts IX and X assert claims based on *res ipsa loquitur*. In Illinois, “[t]he purpose of the doctrine of *res ipsa loquitur* ‘is to allow proof of negligence by circumstantial evidence when the direct evidence concerning cause of injury is primarily within the knowledge and control of the defendant.’” *Kolakowski v. Voris*, 83 Ill.2d 388, 47 Ill.Dec. 392, 415 N.E.2d 397, 400 (Ill.1970). A plaintiff must prove two elements in order to establish an inference of negligence under *res ipsa loquitur*: (1) the injury ordinarily does not occur absent negligence; and (2) the instrumentality of the injury was within the defendant’s exclusive control. *Gatlin v. Ruder*, 137 Ill.2d 284, 148 Ill.Dec. 188, 560 N.E.2d 586, 590 (Ill.1986). TBMK argues that *res ipsa loquitur* should not apply because it never had control over the scaffold that caused Aguirre’s injury. The court agrees. Aguirre argues that the floor boards on the scaffold gave way because it was negligently erected. It is undisputed that A.L.L. owned the scaffold and finished erecting and stocking the scaffold earlier on the morning of the accident. Aguirre fell from the scaffold soon after it was completed. TBMK contributed nothing to assembly of the scaffold and never had control over it. TBMK’s summary judgment motion on Counts IX and X must be granted.

B. Restatement of Torts Section 414

The parties agree that the negligence claim asserted by Aguirre is governed by Section 414 of the Restatement (Second) of Torts. Section 414 provides: “[o]ne 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 (1965). The comments to Section 414 reveal that some degree of control is necessary for

the section to apply. Comment (a) discusses the amount of control that may be maintained without incurring liability:

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 its being done in a manner likely to be dangerous to himself or others.

Id. § 414 cmt. a. Comment b applies to a general contractor that 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.

Id. § 414 cmt. b. Comment c limits the application of section 414:^{*4} In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

Id. § 414 cmt. c. It is a factual issue whether a general contractor retained sufficient control to give rise to a duty of care. *Schreiber v. Idea Eng’g & Fabricating*, No. 99 C 6509, 2003 WL 220971491, at *2 (N.D.Ill. Sept. 5, 2003) (Moran, J.), *aff’d* 117 Fed. Appx. 467 (7th Cir.2004) (unpublished). The question of control should be resolved on summary judgment where the evidence presented is insufficient to give rise to a factual issue.

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Aguirre argues that TBMK's extensive safety program indicates sufficient control to impose a duty on TBMK, citing *Bokodi v. Foster Wheeler*, 312 Ill.App.3d 1051, 245 Ill.Dec. 644, 728 N.E.2d 726 (1st Dist.2000). In *Bokodi*, the plaintiff, a subcontractor employee, was injured while installing metal siding. The general contractor imposed a detailed safety program, which the plaintiff claimed established a duty on the general contractor. *Id.* at 728. The safety plan included weekly safety meetings and 29 specific guidelines that each subcontractor had to follow. *Id.* at 735. The general contractor also employed a project safety manager who inspected the job site to ensure compliance with the program and held weekly safety meetings. *Id.* Any employee of the general contractor was authorized to stop a subcontractor's work if it did not comply with the program. *Id.* The *Bokodi* court agreed with the plaintiff, holding that the pervasive safety program and enforcement by the general contractor indicated "that defendants retained control over the operative details of the work, superintended the entire job, and retained a right of supervision such that the subcontractors were not entirely free to do their work in their own way." *Id.* at 736.

Bokodi does not apply here because it is distinguishable on the facts. The safety program in *Bokodi* is similar to TBMK's safety program. They both included specific guidelines to be followed by subcontractors and provided a substantial enforcement mechanism for the general contractor. However, the contract in this case is distinguishable from the contract in *Bokodi*. The *Bokodi* court noted that the contract provided subcontractors would be in control of the operative details of their work. *Id.* at 735. In contravention to that provision, the general contractor "went to great lengths to enforce the safety standards at the work site." *Id.* The court did not cite any contractual provision that required the subcontractor to control safety. Here, the contract between TBMK and A.L.L. provided that A.L.L. controlled operative work details. The contract also provided that A.L.L. controlled its workers' safety. A.L.L. was contractually required to comply with TBMK's safety program, design its own safety program tailored to TBMK's safety standards, and employ personnel to ensure

compliance. Because A.L.L. was in control of its own safety by contract, *Bokodi* is inapposite.

***5** TBMK points out that the rule in *Bokodi* is not applied consistently by Illinois courts:

[E]ven where the employer or general contractor retains the right to inspect the work done, order changes to the specifications and plans, and ensures that safety precautions are observed and the work is done in a safe manner, no liability will be imposed on the employer or general contractor unless the evidence shows the employer or general contractor retained control over the "incidental aspects" of the independent contractor's work.

Rangel v. Brookhaven Constructors, Inc., 307 Ill.App.3d 835, 241 Ill.Dec. 313, 719 N.E.2d 174, 178 (1st Dist.1999) (emphasis added). Enforcement of safety standards does not constitute control over the "incidental aspects" of subcontractor work. See, e.g., *Martens v. MCL Constr. Corp.*, 347 Ill.App.3d 303, 282 Ill.Dec. 856, 807 N.E.2d 480, 490 (1st Dist.2004) (general contractor's broad safety program with enforcement mechanism did not constitute control over means and methods of subcontractor's work); *Ross v. Dae Julie, Inc.*, 341 Ill.App.3d 1065, 275 Ill.Dec. 588, 793 N.E.2d 68, 72 (1st Dist.2003) (citing *Rangel*); *Beiruta v. Klein Creek Corp.*, 331 Ill.App.3d 269, 264 Ill.Dec. 479, 770 N.E.2d 1175, 1182 (1st Dist 2002) (same); *Fris v. Pers. Prods. Co.*, 255 Ill.App.3d 916, 194 Ill.Dec. 623, 627 N.E.2d 1265, 1272 (3d Dist.1994) (enforcing safety does not constitute control). These cases are more persuasive than *Bokodi* because "[p]enalizing a general contractor's efforts to promote safety and coordinate a general safety program among various independent contractors at a large jobsite hardly serves to advance the goal of work site safety." *Martens*, 282 Ill.Dec. 856, 807 N.E.2d at 492.

TBMK had no duty of care with respect to Aguirre because it did not have control over the incidental details of A.L.L.'s work or its workers' safety. TBMK merely "ensure[d] that safety precautions [were] observed and the work [was] done in a safe manner" in compliance with its standards and A.L.L.'s contractually required safety plan. *Rangel*, 241 Ill.Dec. 313, 719 N.E.2d at 178. This is not

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enough to establish the requisite control under § 414 . Judgement must therefore be granted to TBMK on Counts I and II.

This result is buttressed by decisions by other judges of this court. “The mere retention of a general right to inspect the work, to order it stopped or resumed, to make suggestions or recommendations or prescribe alterations or deviations, or to enforce safety regulations, has been held insufficient” to constitute control over subcontractor work. *Idea Eng'g*, 2003 WL 22071491, at *2 (Moran, J.), *aff'd*, 117 Fed. Appx. 467. In *Idea*, the general contractor required the subcontractor to obey its safety standards. *Id.* at *2. The general contractor also employed two safety supervisors to inspect subcontractor work, hold weekly safety meetings, and stop subcontractor work for failure to comply with safety standards. *Id.* These facts were insufficient to create a duty for the general contractor under § 414. This case is analogous. *See also Pierce v. Chicago Rail Link, L.L.C.*, No. 03 C 7524, 2005 WL 599980, at *15 (N.D.Ill. Mar.15, 2005) (Kennelly, J.) (“[t]he ability to enforce safety regulations ... does not constitute control”); *Taylor v. Facility Constructors, Inc.*, 360 F.Supp.2d 887, 893 (N.D.Ill.2005) (Shadur, J.) (citing *Rangel*); *Dailey*, 2002 WL 31101672, at *3 (enforcing safety regulations does not constitute control over operative details of subcontractor work). Because TBMK owed Aguirre no duty, TBMK's argument that Aguirre's expert testimony should be disregarded need not be reached.

CONCLUSION

*6 Aguirre concedes that Chicago Bears Stadium is entitled to summary judgment. TBMK owed no duty to Aguirre because it did not retain sufficient control over the incidental aspects of A.L.L.'s work. Therefore, defendants' summary judgement motions are granted, and Aguirre's cross-motion for summary judgment is denied.

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