

No. 1-12-2460

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IN THE APPELLATE COURT  
OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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YOLANDA TORRES, individually and as Special ) Appeal from the  
Administrator of the Estate of Jose Torres Sr., ) Circuit Court of  
deceased, ) Cook County

Plaintiff-Appellant, )

v. )

No. 09 L 006851

GUTMANN LEATHER LLC, GRE LLC, GULCO ) Honorable  
CORP., GABRIEL ENVIRONMENTAL ) Diane Larsen,  
SERVICES, WINDY CITY ANTIQUE BRICK ) Judge Presiding.  
CO., )

Defendants-Appellees )

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GUTMANN LEATHER LLC, GRE LLC, GULCO )  
CORP., )

Third Party Plaintiffs, )

v. )

BRANDENBURG INDUSTRIAL SERVICES CO., )

Third Party Defendant. )

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JUSTICE MASON delivered the judgment of the court.  
Justices Neville and Pucinski concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court properly granted summary judgment where defendants did not owe a duty to an independent contractor's day laborer who died after being struck by equipment owned by his employer and operated by another employee. OSHA-generated documents do not create a duty of care where one does not otherwise exist.

¶ 2 Following a construction site accident in which Jose Torres Sr. (Jose) died, plaintiff-appellant Yolanda Torres (Torres), individually and as special administrator of her husband's estate, brought wrongful death, premises liability and survival claims against defendants-appellees Gutmann Leather LLC, GRE LLC, Gulco Corporation,<sup>1</sup> Gabriel Environmental Services (Gabriel) and Windy City Antique Brick Company (Windy City) (collectively referred to as defendants). On appeal, Torres claims that the circuit court erred in granting summary judgment in defendants' favor because genuine issues of material fact exist as to whether defendants owed a duty of care to Jose to provide a safe work environment at the construction site. Torres also claims that the circuit court abused its discretion by refusing to admit various Occupational Safety and Health Administration (OSHA) documents and a video taken by OSHA of the construction site after the accident as exhibits in connection with her opposition to Gutmann's and Windy City's motion for summary judgment. For the reasons that follow, we affirm.

¶ 3 **BACKGROUND**

¶ 4 Starting in the 1870s, Gutmann Leather operated a leather tannery business located at 1511 West Webster in Chicago, Illinois on the east bank of the Chicago River. A separate entity

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<sup>1</sup> For purposes of this appeal, Gutmann, GRE and Gulco will be collectively referred to as "Gutmann" where appropriate.

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named GRE LLC owned the land on which the tannery operated its business. Gulco Corporation is Gutmann's and GRE's parent company. Gutmann eventually made the decision to close the tannery and ceased operations in 2006. Gutmann decided to demolish the buildings located on the property in pursuit of a plan to sell the land to a developer, which required the owners to remediate environmental contamination that resulted from the leather tannery's operations.

¶ 5 To address the environmental issues associated with the demolition project, Gutmann entered into a contract with Gabriel, which is a multi-disciplinary environmental consulting firm. Gabriel provides site assessment services, environmental testing and monitoring, and laboratory analysis. Gutmann hired Gabriel to provide oversight of select environmental remediation services at the tannery.

¶ 6 According to the November 2006 contract, Gabriel was to "furnish management and supervisory services necessary to remediate certain environmental hazards" at the property. Gabriel's responsibilities under the contract were to "be solely responsible for and have control over remediation means, methods, techniques, sequences and procedures, for coordinating all portions of the work under the Agreement and initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Agreement." Gabriel's involvement at the tannery related to environmental testing and environmental issues associated with the phasing out of the tannery.

¶ 7 Gabriel's remediation work was performed before the demolition activities began at the jobsite. Later, Gabriel was also involved with air monitoring of chromium and lead levels once demolition activities began to ensure that air contaminants would not spread to neighboring

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residential and commercial areas. If Gabriel identified an environmental issue after demolition began, it reported the issue to Gutmann and Gutmann reported the issue to the demolition company.

¶ 8 After the remediation work was substantially completed, Gutmann entered into a contract with Brandenburg Industrial Services Company (Brandenburg) to demolish the tannery buildings and clear the underlying land. According to the May 11, 2007 contract, Brandenburg would "provide all the labor, material, equipment and supervision necessary" to accomplish the demolition project. Brandenburg also agreed to "provide, erect and maintain all barricades, traffic control devices, hand railings, toe boards, safety devices, safety measures and security measures necessary for the protection of the public and all of Brandenburg's employees and agents until the completion of work specified under this Agreement." To fulfill its safety responsibilities under the contract, Brandenburg provided its own safety personnel, who created safety plans, conducted safety training meetings and performed safety inspections. Brandenburg also had a dedicated project manager assigned to the demolition project.

¶ 9 As a condition of the contract, with exceptions not relevant here, Brandenburg was entitled to "occupy the entire work area exclusively upon the commencement of Brandenburg's work." Further, Brandenburg was not responsible "for the safety of any person who enters the work area unless such person has been specifically authorized by Brandenburg to enter the work area." The contract's terms also required Brandenburg to comply with all state and federal laws, which included OSHA regulations, and immediately correct any noncompliance with the laws or contract terms after receipt of written notice from Gutmann to correct the noncompliance. The

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contract further required Brandenburg to indemnify, defend and hold Gutmann harmless from any and all claims, judgments and damages "arising out of the performance of the work."

¶ 10 In May 2007, Brandenburg began the demolition work and orally hired Windy City as a subcontractor to: (1) retrieve pre-sorted bricks from the tannery site during the demolition work; (2) palletize the bricks; and (3) haul the bricks away from the site. Windy City's business consists of buying and salvaging used common Chicago brick, which is valuable because the brick is no longer manufactured.

¶ 11 Windy City performed its retrieval work at the jobsite during June and July of 2007 using the labor of independent contractors. A subcontractor of Windy City hired the laborers, performed the retrieval work and supervised the actual stacking of bricks. Brandenburg initially sorted through the demolished rubble to remove all metal, iron and steel from the bricks and using its front-end loader, moved the bricks to a different area. After Brandenburg sorted the bricks, Windy City stacked the bricks by hand on pallets, used a skid steer<sup>2</sup> to move the pallets and a truck then picked up the bricks to transport them off-site. Windy City did not have a front-end loader of its own at the premises to move the brick piles.

¶ 12 According to Brandenburg's project manager, Gutmann, Gabriel and Windy City provided no instructions as to how Brandenburg was to carry out the demolition of the buildings at the tannery. Brandenburg also provided its own personnel to oversee safety at the jobsite and used its own equipment to move the bricks to be stacked by Windy City, which did not provide any equipment to Brandenburg for its use at the jobsite. Gutmann's representative would visit the

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<sup>2</sup> A skid steer is a piece of equipment with a bucket on its front-end that is used to move or lift objects.

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jobsite approximately once or twice a week to check on the job's progress, but he would not enter very far onto the premises as the job could be viewed from the main entrance.

¶ 13 During the concrete removal portion of the demolition work, Brandenburg discovered a tie-back system that was used to stabilize the sea wall along the Chicago River. The tie-backs started at the sea wall and were affixed to the concrete foundation supports of two buildings on the jobsite, which were built after the sea wall was already in place. Because of the risk that the sea wall would deteriorate or collapse if the concrete foundation was removed, Brandenburg suggested to not completely remove the concrete foundation located parallel to the sea wall. Brandenburg instead suggested the removal of the concrete foundation to just below grade and to leave the remaining foundation intact to continue stabilizing the sea wall. Brandenburg, however, requested a formal recommendation from Gutmann regarding the handling of the concrete supporting the sea wall. Gutmann responded that Brandenburg should remove the concrete adjacent to the sea wall to a depth of 10 inches below grade.

¶ 14 Gutmann also requested Brandenburg to pay greater attention to health and safety issues on this job because the tannery was located near a wealthy residential neighborhood. Gutmann wanted to ensure that residents of the neighborhood would not raise concerns over the health issues associated with the tannery's demolition. Consistent with that request, Gutmann required Brandenburg to complete air contamination and similar testing at the jobsite within a specified time-frame and that the results for certain tests be rushed.

¶ 15 Jose worked as one of Brandenburg's day laborers. On July 19, 2007, Jose was sorting construction debris when he was struck and fatally injured by a front-end loader owned by

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Brandenburg and operated by a Brandenburg employee. Jose and the other laborers sorting through the construction debris were not wearing reflective or high visibility clothing. On the day of the accident, Windy City also had eight laborers working at the jobsite.

¶ 16 The accident was reported to OSHA that day. The next day, OSHA visited the jobsite. As part of its investigation, OSHA took a video of the jobsite and the work conducted on the premises. After its investigation, OSHA found that Brandenburg created a hazard by permitting laborers to work at the jobsite without wearing high visibility clothing and laborers of subcontractors working at the jobsite were not trained about demolition safety and hazard awareness. OSHA also found that Windy City created a hazard by allowing its laborers to work at the jobsite without wearing reflective or high visibility clothing. OSHA issued a citation and penalty to Windy City for failing to: (1) instruct its laborers about the recognition and avoidance of unsafe conditions and (2) control or minimize the hazards associated with their work.

¶ 17 On June 11, 2009, Torres filed her complaint against Gutmann, Joel Friedman (Gutmann's representative), Gabriel and Windy City asserting a count against each defendant for: (1) wrongful death; (2) premises liability; and (3) survival. Gutmann thereafter filed a third-party complaint against Brandenburg.

¶ 18 Gutmann, Windy City and Gabriel separately moved for summary judgment. Each defendant attached an affidavit in support of its summary judgment motion. In his affidavit, Joel Friedman, an officer of Gulco, stated that: (1) Brandenburg exclusively occupied the jobsite; (2) no Gutmann employee was on site during the demolition; (3) no Gutmann employee supervised or inspected Brandenburg's work; and (4) Brandenburg was free to complete the demolition work

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in the manner it deemed appropriate. Jeffery Finucane, Windy City's president, averred that Windy City had: (1) no obligation, authority or ability to train, supervise, instruct, manage, direct, inspect, control or organize any portion of Brandenburg's demolition work or any of its laborers, including Jose; (2) no authority or ability to stop Brandenburg's work; (3) never assumed any responsibility regarding the safety of Brandenburg's work or employees; (4) never performed safety evaluations or inspections of Brandenburg's work; (5) never provided any safety training for Brandenburg's employees; (6) never hired Jose as an employee; (7) never hired the driver of the front-end loader that fatally struck Jose; and (8) never owned or leased the front-end loader. In his affidavit, John Polich, Gabriel's president, stated that: (1) Gabriel had no obligation, authority or ability to control, manage, coordinate or supervise Brandenburg's or its subcontractors' work; (2) Jose was not its employee; and (3) the worker who drove the front-end loader that fatally struck Jose was not its employee.

¶ 19 On October 11, 2011, Torres filed 17 exhibits in opposition to defendants' motions for summary judgment. As exhibits, Torres included various documents relating to OSHA's investigation (exhibit 7), a video taken by OSHA of the jobsite following the accident (exhibit 17) and various depositions. Windy City and Gutmann filed motions to strike exhibits 7 and 17 claiming that Torres offered no foundation or authentication for those exhibits.

¶ 20 On January 25, 2012, the circuit court granted the motions to strike and granted Torres leave to submit additional foundation for exhibits 7 and 17. On March 23, 2012, Torres filed a supplemental memorandum and exhibits supporting the authenticity of exhibits 7 and 17. On April 26, 2012, Torres filed a motion to admit exhibits 7 and 17, which was in the form of a motion *in limine*. On May 31, 2012, the circuit court denied Torres' motion finding that there

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still was not an adequate foundation for the two exhibits.

¶ 21 On July 30, 2012, the circuit court held a hearing on the three motions for summary judgment, which were consolidated for hearing, and granted summary judgment in favor of Gutmann, Gabriel and Windy City. Torres timely appealed.

¶ 22 ANALYSIS

¶ 23 A. Summary Judgment - Duty

¶ 24 Torres claims on appeal that the circuit court erred in granting summary judgment in favor of all defendants because genuine issues of material fact exist as to whether defendants retained control over Brandenburg's work at the jobsite, which would create a duty of care to Jose to provide a safe work environment. For the reasons that follow, we disagree.

¶ 25 Summary judgment is proper where "the pleadings, depositions, admissions and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is clearly entitled to judgment as a matter of law." *Schultz v. Illinois Farmers Ins. Co.*, 237 Ill. 2d 391, 399 (2010) (citing 735 ILCS 5/2-1005(c) (West 2008)). If the undisputed facts fail to establish a necessary element of plaintiff's cause of action, summary judgment is appropriate. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). We review a circuit court's ruling on a motion for summary judgment *de novo*. *Schultz*, 237 Ill. 2d at 400.

¶ 26 Illinois law is clear that to succeed on a claim for negligence, a plaintiff must plead and prove: "the existence of a duty owed by the defendant to the plaintiff, a breach of that duty and an injury proximately resulting from the breach." *Deibert v. Bauer Brothers Construction Co.*, 141 Ill. 2d 430, 434 (1990). In this case, the existence of a duty is at issue because Torres claims that

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defendants owed a duty of care to Jose to provide a safe workplace. A duty exists when the relationship between the parties is such that the law imposes on the defendant an obligation of reasonable conduct for the plaintiff's benefit. *Id.* at 437. Relevant considerations in the duty analysis include "the foreseeability of injury, the likelihood of injury, the magnitude of the burden of guarding against the injury, the consequences of placing that burden on the defendant, and the possible seriousness of the injury." *Id.* at 438. Absent the existence of a duty, there can be no recovery. *Joyce v. Mastri*, 371 Ill. App. 3d 64, 73 (2007).

¶ 27 Torres raises two bases for finding the existence of a duty under the circumstances presented here: (1) the duty imposed upon the employer of an independent contractor who retains control over the work performed by the independent contractor pursuant to section 414 of the Restatement (Second) of Torts (1965); and (2) the duty of care property owners owe to invitees relating to the condition of the land pursuant to section 343 of the Restatement (Second) of Torts (1965). On appeal, Torres asserts a section 414 duty against all defendants and a section 343 duty against Gutmann as owner and possessor of the premises. We address each claimed basis for the existence of a duty separately.

¶ 28 Established Illinois law provides that one who hires an independent contractor is not generally liable for the negligence of that independent contractor. *Joyce*, 371 Ill. App. 3d at 73. But under Restatement section 414, an exception exists for those who retain control over the work performed by the independent contractor:

"One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to

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exercise his control with reasonable care." Restatement (Second) of Torts § 414 (1965).

Comment c to section 414 explains the concept of "retained control:"

"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." Restatement (Second) of Torts § 414, Comment c, at 388 (1965).

The parties' contract is the best indicator of whether an individual "retained control" over an independent contractor. *Joyce*, 371 Ill. App. 3d at 74. With these general principles in mind, we determine if a genuine issue of material fact exists as to whether any of the defendants "retained control" over Brandenburg's work or jobsite safety creating a duty of care owed to Jose.

¶ 29 1. Gutmann<sup>3</sup> (Restatement § 414)

¶ 30 Torres claims that Gutmann "retained control" over the demolition work because the

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<sup>3</sup> Torres does not make separate arguments regarding "retained control" by GRE or Gulco in her briefs on appeal. Thus, we will not separately analyze the record for summary judgment purposes to determine whether GRE or Gulco "retained control" to impose a duty of care upon those entities.

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contract<sup>4</sup> between it and Brandenburg required Brandenburg to cease operations upon receipt of written notice from Gutmann that its work failed to comply with the contract or all applicable laws. Based on that contractual "retained control," Torres maintains that a triable issue of material fact exists precluding the granting of summary judgment. We disagree.

¶ 31 In this case, the parties' contract fails to establish that Gutmann "retained control" over either the jobsite's safety or the incidental or operational details of Brandenburg's work, which must exist to establish a duty of care owed to Jose. Importantly, the contract identifies Gutmann as Brandenburg's customer, which clearly establishes that Brandenburg was an independent contractor providing services to Gutmann. The contract also expressly provides that "Brandenburg will provide all labor, material, equipment and supervision necessary to complete the removal work." Although section 5.10 of the contract permitted Gutmann to order Brandenburg to correct work that failed to comply with contractual terms and applicable laws, this right amounts to a general right of supervision and does not equate to "retained control." See *Joyce*, 371 Ill. App. 3d at 74-75. Sections 2.3 and 2.18 also required Brandenburg, and not Gutmann, to provide, erect and maintain all safety devices and safety measures for the protection of the public and all of Brandenburg's employees and agents until completion of the work and to remove the implemented safety measures upon completion of the work. Finally, section 5.1 provides that Brandenburg "shall occupy the entire work area exclusively" once the demolition

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<sup>4</sup> Torres raises a claim as to whether a valid contract exists because the contract was executed by Heartland Capital LLC, as Gutmann's agent, but documentation supporting Heartland's authority to act on Gutmann's behalf was not located. The contract itself, however, rebuts Torres' claim because the contract clearly identifies both Brandenburg and Gutmann as parties to the contract.

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work began. Collectively, these contract provisions clearly establish that Gutmann did not "retain control" over Brandenburg's work or the safety measures associated with its work; instead, Brandenburg was responsible for directing its own work and safety at the jobsite.

¶ 32 Not only does the contract fail to provide for control by Gutmann over Brandenburg's work in connection with the demolition work, but Gutmann's actions equally demonstrate a lack of "retained control" over the jobsite's safety and the incidental aspects or operative details of Brandenburg's work. Although Gutmann visited the jobsite after Brandenburg began the demolition work to check on the work's progress, Torres offered no facts establishing that Gutmann engaged in constant or even periodic monitoring of the jobsite, supervised Brandenburg's workers, inspected Brandenburg's work, dictated how Brandenburg's work should be performed or provided tools for Brandenburg to use in the demolition activities. Visits, even if made daily, to a construction site to check on job progress are insufficient to trigger the imposition of a duty under section 414. *Calderon v. Residential Homes of America, Inc.*, 381 Ill. App. 3d 333, 347 (2008).

¶ 33 Additionally, Gutmann's involvement in determining the proper handling of the discovered sea wall support issue or imposing time deadlines on Brandenburg's testing at the jobsite fail to support a finding of "retained control." Changes to the project's plans and specifications do not create "retained control" for purposes of section 414. See *Fris v. Personal Products Company*, 255 Ill. App. 3d 916, 918, 924 (1994) (no duty under section 414 where an independent contractor's work was stopped in order to make changes to plans and specifications); see also *Bieruta v. Klein Creek Corp.*, 331 Ill. App. 3d 269, 278 (2002); *Connaghan v. Caplice*, 325 Ill. App. 3d 245, 250 (2001); and *Rangel v. Brookhaven Constructors, Inc.*, 307 Ill. App. 3d

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835, 839 (1999) (recognizing the rule of law that no liability under section 414 arises where an employer or general contractor merely orders changes to specifications or plans). Further, it cannot be said that Jose's injuries were in any way related to these aspects of Gutmann's involvement at the site.

¶ 34 Moreover, Gutmann's involvement and interaction with Gabriel related solely to environmental concerns at the jobsite and were not related to how Brandenburg would demolish the buildings at the tannery. Environmental concerns and related decision-making considerations are readily distinguishable from the demolition activities. Taken in context, Gutmann's request that Brandenburg devote more attention to health and safety issues than it normally did on jobs referred to environmental issues and air quality testing at the jobsite and not the safety of actual demolition activities or the manner in which Brandenburg demolished the tannery.

¶ 35 In this case, the evidence showed that Brandenburg was free to complete its demolition work in the manner it deemed appropriate and that it was responsible for the safety of its workers and the jobsite. Brandenburg's project manager stated that neither Gutmann, Windy City nor Gabriel provided him with any instructions regarding the manner Brandenburg was to perform the demolition work. Brandenburg provided its own safety personnel for the demolition project. In fact, Brandenburg had a safety manager who wrote safety plans, performed safety training and performed safety inspections at the jobsite. Brandenburg's supervisors conducted safety meetings in the morning at the jobsite, and Brandenburg erected its own safety devices. Even after construing the record in a light most favorable to Torres, the foregoing facts clearly establish that Gutmann did not "retain control" over the demolition work performed or safety measures at the jobsite; instead, Brandenburg controlled the means and methods of its work, as well as safety at

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the jobsite. *Joyce*, 371 Ill. App. 3d at 75. Consequently, summary judgment in favor of Gutmann was proper.

¶ 36 2. Windy City (Restatement § 414)

¶ 37 As noted, Windy City was a subcontractor hired by Brandenburg to stack and remove bricks from the jobsite. In the claims against Windy City, Torres alleged that Windy City failed to instruct its workers about awareness and the avoidance of hazards in a demolition work environment. Torres maintains that if Windy City had instructed its workers on how to act safely in the presence of Brandenburg's equipment, the workers would have recognized the risk of injury to Jose (a laborer hired by Brandenburg) and prevented the front-end loader from striking him. Torres claims that these assertions create a triable issue of material fact concerning Windy City's duty to Jose.

¶ 38 Windy City's relationship to Jose is too tenuous to give rise to a duty. Jose was not employee of, an independent contractor of or controlled by Windy City. Brandenburg's vice president at the time of the accident, Jack Jasinowski, testified during his deposition that Windy City: (1) had no responsibility for the safety of Brandenburg's workers; (2) had no responsibility or obligation to provide Brandenburg workers with safety equipment; (3) had no control over the methods and means by which Brandenburg workers performed their work on the demolition project; and (4) did not direct Brandenburg's work. Jasinowski reiterated that Windy City was not responsible for the demolition work and its role was limited to salvaging bricks.

¶ 39 Torres offered no facts establishing that Windy City "retained control" over Brandenburg's work, safety measures at the jobsite or that it provided the equipment that fatally struck Brandenburg's laborer, Jose. Similarly it is clear that Windy City's salvaging work did not

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create the hazard resulting in Jose's death. Nothing in the record raises a genuine issue of material fact as to a duty owed by Windy City to Jose and summary judgment in Windy City's favor was therefore proper.

¶ 40 3. Gabriel Environmental Services (Restatement § 414)

¶ 41 Torres similarly claims that a genuine issue of material fact exists as to whether Gabriel had a duty of care to Jose because of its presence at the jobsite and its authority to instruct Brandenburg how to perform the demolition work. Torres also contends that Gabriel had contractual responsibility for the jobsite's safety and supervised Brandenburg's work. Torres claims that these factors created a triable issue regarding Gabriel's liability.

¶ 42 Torres' position fails to recognize the distinction between environmental remediation and demolition activities at the jobsite. The record irrefutably establishes that Gabriel was responsible for remediation activities and Brandenburg for demolition activities. The contract between Gutmann and Gabriel plainly provides that Gabriel's role in the project was limited to the remediation activities and environmental concerns at the jobsite. No provision of Gabriel's contract with Gutmann vests Gabriel with any responsibility for demolition activities. It is undisputed that Jose's injury and death resulted from being struck by Brandenburg's front-end loader operated by a Brandenburg employee during the demolition phase of the project. Gabriel's remediation work was completed prior to the commencement of demolition activities and its remaining responsibility was limited to monitoring air quality during the demolition phase. There is no evidence that Gabriel directed, supervised or was involved with the means, methods, manners or techniques of Brandenburg's work or the implementation of safety measures during demolition. Accordingly, no duty of care arose and the trial court properly granted summary

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judgment to Gabriel.

¶ 43 B. Summary Judgment - Premises Liability<sup>5</sup> (Restatement § 343)

¶ 44 Torres claims that a triable issue as to the premises liability count exists because Gutmann was possessor of the premises where unsafe demolition activities and practices occurred, which lead to Jose's death. Illinois has adopted the premises liability doctrine set forth in section 343 of the Restatement (Second) of Torts (1965). *Clifford v. Wharton Business Group, L.L.C.*, 353 Ill. App. 3d 34, 39 (2004). According to section 343:

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

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger."

Restatement (Second) of Torts § 343 (1965).

The duty of care imposed on an individual as possessor of the premises differs from the duty of care imposed where an individual "retains control" over an independent contractor. *Clifford*, 353 Ill. App. 3d at 41. For liability purposes under section 343, a plaintiff must establish that the

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<sup>5</sup> In the complaint, Torres included a premises liability claim against all defendants. On appeal, Torres limits her claim that summary judgment was improperly granted on the premises liability count as to Gutmann only and makes no claims as to the other defendants. Similarly, Torres discusses no claim of error in her briefs relating to the circuit court's ruling on the survival counts pled in her complaint. We will not independently address claims of error relating to counts not argued on appeal. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

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injury arose from a "condition on the land." *Gregory v. Beazer East*, 384 Ill. App. 3d 178, 191 (2008). If the possessor of land did not create the condition on the land, the plaintiff must then establish that the possessor had either actual or constructive notice of the condition. *Tomczak v. Planetsphere, Inc.*, 315 Ill. App. 3d 1033, 1038 (2000).

¶ 45 Torres' premises liability claim is defective because her allegations of negligence are not based upon a "condition on the land," but rather on Brandenburg's demolition related *activities* occurring on the land. See *Gregory*, 384 Ill. App. 3d at 191 and cases cited therein (recognizing that premises liability is inapplicable where the plaintiff's injuries did not arise from a "condition on the land.") Specifically, Torres alleges that Gutmann was negligent in failing to: (1) provide or supervise safety measures at the jobsite; (2) warn individuals of the operation and proximity of heavy construction equipment; (3) supervise the operation of heavy equipment to ensure individuals working at the jobsite were protected from contact with the equipment; and (4) warn of the dangerous conditions relating to the demolition activities.

¶ 46 As already discussed, Gutmann was not responsible for the safety measures relating to the demolition activities, which were exclusively controlled by Brandenburg both contractually and by its actions. The evidence clearly established that Brandenburg had the responsibility to warn of any dangers associated with demolition activities, and Jose, as Brandenburg's laborer, was under its direction when performing his job. The evidence failed to demonstrate that Gutmann knew or should have known of the potential hazards relating to the lack of safety measures at the jobsite where Brandenburg, and not Gutmann, was responsible for implementing those safety measures.

¶ 47 Moreover, Brandenburg had exclusive possession of the premises during the demolition

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activities when Jose was struck and should have known about the potential risk and danger associated with those activities. Torres acknowledges that Brandenburg created the road that the heavy equipment was traveling back and forth on at the jobsite when it struck Jose and that the heavy equipment was owned and operated by Brandenburg. Consequently, any allegedly unsafe condition of the road would be directly attributable to Brandenburg and not Gutmann. For these reasons, we conclude that summary judgment on this count in favor of Gutmann was proper as a matter of law because no genuine issue of material fact exists concerning a "condition on the land" for premises liability purposes.

¶ 48 C. Motion to Admit Exhibits

¶ 49 Torres contends that the circuit court abused its discretion by denying her motion to admit exhibits numbered 7 and 17, which consisted of various OSHA-generated documents and an OSHA video relating to its investigation of the accident. Torres claims that the exhibits identified the hazards and lack of safety measures existing at the jobsite and provided notice of those hazards. Torres maintains that the circuit court erroneously denied her motion to admit because she laid a proper foundation and established the authenticity of the OSHA documents and video.

¶ 50 In light of our holding that defendants owed no duty of care to Jose, these documents even if considered in connection with summary judgment, would not have raised a genuine issue of material fact as to the existence of a duty. In *Ross v. Dae Julie*, this court reiterated the principle of law that a violation of OSHA regulations does not create a statutory duty. 341 Ill. App. 3d 1065, 1074 (2003). Similar to this case, the *Ross* court concluded that the defendant, a manufacturing plant owner, did not owe a duty of care to an independent contractor's employee

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who was injured following a construction accident at the plant because the defendant did not retain sufficient control over the operative details of the independent contractor's work. *Id.* The court recognized that alleged OSHA violations may reflect a failure to exercise reasonable care, but those violations "do not create a duty where none otherwise exists." *Id.*

¶ 51 Torres seeks to have the OSHA documents and video admitted into evidence essentially to establish that defendants had a duty of care and breached that duty because OSHA safety violations existed at the jobsite. Based on *Ross*, however, those OSHA documents and video would not be sufficient to create a duty where none otherwise exists. See *Wilfong v. L.J. Dodd Construction*, 401 Ill. App. 3d 1044, 1063 (2010) (stating that "OSHA regulations in and of themselves do not create a duty of care.") Accordingly, no error resulted from the circuit court's exclusion of the exhibits.

¶ 52 CONCLUSION

¶ 53 For the reasons stated, we affirm the judgment of the circuit court granting summary judgment in favor of Gutmann, Windy City and Gabriel.

¶ 54 Affirmed.