

No. 1-14-0293

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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LUIS SIGALOS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	
	)	
WALSH CONSTRUCTION COMPANY,	)	No. 11 L 62
	)	
Defendant-Appellee,	)	
	)	
(J.P. Hopkins Sewer Contractors, Inc.,	)	Honorable
	)	Eileen Brewer,
Defendant).	)	Judge Presiding.

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JUSTICE HARRIS delivered the judgment of the court.  
Presiding Justice Delort and Justice Connors concurred in the judgment.

**ORDER**

**Held:** Plaintiff raised sufficient facts showing vicarious liability under section 414 of the Restatement (Second) of Torts to preclude summary judgment on two negligence counts in his second amended complaint. Restatement (Second) of Torts § 414 (1965). The circuit court, however, properly granted summary judgment on plaintiff's premises liability claim because plaintiff failed to present evidence of defendant's knowledge of a dangerous condition under section 343 of the

Restatement (Second) of Torts. Restatement (Second) of Torts § 343 (1965). Plaintiff is procedurally defaulted from raising his voluntary undertaking claim for failing to first raise it in the circuit court.

¶ 1 Plaintiff, Louis Sigalos, a plumber for the city of Chicago (City), suffered injuries when working in a trench box at a Chicago Housing Authority (CHA) residential high rise construction project. Sigalos filed a six-count personal injury action against the construction project's general contractor, defendant Walsh Construction Company (Walsh), and subcontractor, defendant J.P. Hopkins Sewer Contractors, Incorporated (Hopkins). Relevant to this appeal, the circuit court granted Walsh's motion for summary judgment as to counts I through III of Sigalos's second amended complaint in which he raised two claims of negligence and a premises liability claim against Walsh.<sup>1</sup> The circuit court found that Walsh did not owe Sigalos a duty under either section 414 or 343 of the Restatement (Second) of Torts (Restatement). Restatement (Second) of Torts §§ 414, 343 (1965).

¶ 2 Sigalos raises the following issues for our review: (1) whether he raised sufficient facts showing Walsh is either vicariously or directly liable for his injuries under section 414 of the Restatement (Restatement (Second) of Torts §414 (1965)); (2) whether he raised sufficient facts to establish the elements of the tort of premises liability under section 343 of the Restatement (Restatement (Second) of Torts §343 (1965)); and (3) whether Walsh is liable for his injuries under a voluntary undertaking theory of liability. We hold Sigalos raised sufficient facts showing vicarious liability under section 414 of the Restatement to preclude summary judgment as to counts II and III of his second amended complaint. Restatement (Second) of Torts §414 (1965). The circuit court, however, properly granted summary judgment as to Sigalos's

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<sup>1</sup> Counts IV through VI of Sigalos's second amended complaint alleged similar claims against Hopkins, who is not a party to this appeal.

premises liability claim as stated in count I of his second amended complaint because Sigalos failed to present evidence of defendant's knowledge of a dangerous condition under section 343 of the Restatement. Restatement (Second) of Torts § 343 (1965). We hold Sigalos's voluntary undertaking claim is procedurally defaulted for Sigalos's failure to first raise it in the circuit court.

¶ 3

#### JURISDICTION

¶ 4 On January 23, 2014, the circuit court granted Walsh's motion for summary judgment as to counts I through III of Sigalos's second amended complaint. The circuit court entered a finding that there was no just cause to delay enforcement or appeal pursuant to Illinois Supreme Court Rule 304(a). Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). On January 24, 2014, plaintiff timely appealed. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rule 304(a). Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010).

¶ 5

#### BACKGROUND

¶ 6 Sigalos, a plumber employed by the City, filed a six-count second amended complaint against Walsh and Hopkins in connection with injuries he suffered on October 6, 2010, while working on a construction project at a property owned by the CHA at 5040 North Kenmore Avenue, in Chicago, Illinois. Counts I through III contained allegations against Walsh, the general contractor of the construction project while the remaining counts contained allegations against Hopkins, a subcontractor.

¶ 7 Count I of Sigalos's second amended complaint alleged premises liability against Walsh. Specifically, it alleged that Walsh possessed, operated, managed, maintained, and controlled or had the duty to possess, operate, manage, maintain, and control the lot located at 5040 North Kenmore. Sigalos alleged Walsh negligently allowed the premises become and remain a

dangerous condition and knew, or should have known in the exercise of ordinary and reasonable care of the dangerous condition. Sigalos alleged that Walsh committed the following careless and negligent acts or omissions to act which proximately caused his injuries when a trench box shifted and/or collapsed: improperly operated, controlled, managed, maintained and controlled the premises; failed to inspect the trench box; failed to warn Sigalos of the unsecured trench box; failed to properly secure the trench box which exposed him to several dangerous conditions; allowed the excavated trench to remain on the property without ensuring the trench box was secured properly to prevent collapse; failed to properly secure the spreader pipe and pins to stabilize the trench shield walls; failed to properly secure the spreader pins to the spreader pipe with the keeper pin to secure the trench box; failed to properly seat the trench box; violated construction industry health and safety standards; and was otherwise careless and negligent.

¶ 8 Under count II of his second amended complaint, Sigalos alleged Walsh committed construction negligence. Sigalos alleged defendant owned and/or was in charge of the erection, design, construction, repairs, alteration, removal and/or painting of a structure on the lot located at 5040 North Kenmore. Walsh coordinated the work performed, designed various work methods, maintained and checked work progress, scheduled and inspected the work, and had the ability to stop construction if the work performed was done in a dangerous manner. Sigalos alleged Walsh designed, erected, constructed, placed, or operated or caused to be erected, constructed, placed, or operated the trench box where Sigalos sustained his injuries when the trench box shifted and/or collapsed. Sigalos alleged Walsh owed him a duty to exercise reasonable care in the design, erection, construction, placement, or operation of the construction site and the trench. Sigalos alleged that Walsh committed the following careless and negligent acts or omission to act: failed to keep a clean and clear work space; failed to inspect the premises

and the work performed on the premises; improperly managed, operated, maintained, and controlled the premises; failed to supervise the work performed on the premises; failed to warn him about the dangerous condition on the premises; failed to properly secure the trench box; allowed the large trench to remain on the premises without ensuring that the trench box inside the trench was properly secured to prevent collapse; failed to properly secure the spreader pipe with spreader pins to stabilize the trench box; failed to properly secure the spreader pins to the spreader pipe with the keeper pin to secure the trench box; failed to properly seat the trench box; violated construction industry health and safety standards; and was otherwise careless and negligent.

¶ 9 Under Count III of his second amended complaint, Sigalos alleged Walsh committed negligence. Sigalos alleged Walsh possessed, operated, managed, maintained and controlled the construction site, or had a duty to do so. Sigalos alleged Walsh created the trench box at issue and that all relevant times; Walsh had a duty to exercise ordinary care regarding his safety on the site. Sigalos alleged Walsh committed the following careless and negligent acts or omission to act: failed to keep a clean and clear work space; failed to inspect the premises and the work performed on the premises; improperly managed, operated, maintained, and controlled the premises; failed to supervise the work performed on the premises; failed to warn him about the dangerous condition on the premises; failed to properly secure the trench box; allowed the large trench to remain on the premises without insuring that the trench box inside the trench was properly secured to prevent collapse; failed to properly secure the spreader pipe with spreader pins to stabilize the trench box; failed to properly secure the spreader pins to the spreader pipe with the keeper pin to secure the trench box; failed to properly seat the trench box; violated construction industry health and safety standards; and was otherwise careless and negligent.

¶ 10 Walsh filed a motion for summary judgment arguing that it did not owe Sigalos a duty under Restatement sections 414 or 343. Restatement (Second) of Torts §§ 414, 343 (1965). Under section 414, Walsh argued that it was not vicariously liable for Sigalos's injuries because it had no control over the means, manner, or method in which either the City or Hopkins worked on the project. Walsh pointed out that it that it did not have a contract with the City and its subcontract with Hopkins "is silent on the issues of safety." Walsh alleged it did not, and was not expected to, install, maintain, or inspect the trench box, which was installed by Hopkins, and they had no notice of any problems with the trench box or the surrounding ground. Walsh argued that it did not provide the City or Hopkins tools or provide instruction in how to perform the work. Rather, Walsh alleged its role was to simply insure the work was done in a timely manner in conformance with the site plans. Walsh argued that there is no evidence that it was in any way responsible for causing or contributing to Sigalos's accident. According to Walsh, it did not control the manner, means, or methods of the work in the trench and there was no evidence that Walsh should have been aware of the condition. Walsh further argued that it could not be directly liable to Sigalos under section 414 of the Restatement because it did not retain supervisory control over the job site.

¶ 11 In response to Sigalos's premises liability claim, Walsh argued that it did not have actual or constructive notice of a dangerous condition on the job site. According to Walsh, it was not, and could not have been aware of the allegedly defective trench box. Walsh argues that both its employees and Hopkins's employees were unaware of the accident when it occurred and that Sigalos himself testified that he believed the defect was a missing pin in the trench box that was not visible from the top of the trench box. Accordingly, Walsh argued that Sigalos could not

establish premises liability under Restatement section 343. Restatement (Second) of Torts §343 (1965).

¶ 12 As exhibits to its motion for summary judgment, Walsh submitted the following documents: a copy of Sigalos's second amended complaint; its answer and affirmative defenses; the subcontract between Walsh and Hopkins; and deposition testimony from Sigalos, Keith Yarmer, Mike Gibbons, and John Hopkins.

¶ 13 In its answer, Walsh denied all of Sigalos's material allegations and raised four affirmative defenses. First, Walsh argued that Sigalos failed to exercise reasonable care and caution for his own safety for failing to keep a proper lookout, follow safety precautions, make a reasonable inspection, work in a safe manner in the conditions, and was otherwise careless and negligent. Walsh next argued that it was less than 25% at fault and asked that in light of any judgment against it that it be severally liable for less than 25% of the total verdict. Walsh's third and fourth affirmative defenses alleged that Hopkins and the City were the proximate cause of Sigalos's injuries.

¶ 14 The subcontract between Walsh and Hopkins shows that Hopkins agreed to "[f]urnish all labor, materials, equipment, insurance, taxes, and supervision as required to fully fabricate, deliver F.O.B. Project and install all Storm Drainage/Site Utilities \*\*\* in strict compliance with the plans and specifications and as directed by Contractor."<sup>2</sup> Regarding the scope of the work, the subcontract provides:

"Subcontractor shall perform all work and shall furnish all supervision, labor, materials, layout, hoisting, tools, equipment, supplies, shop drawings, samples, bonds, insurance and all other things necessary for the construction and

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<sup>2</sup> The agreement between Walsh and Hopkins refers to Walsh as the contractor.

completion of the work described above and work incidental thereto \*\*\* in strict accordance and full compliance with the Contract Documents (Unless otherwise specified, 'Contract Documents,' consist of this agreement, the Contract between the Owner and Contractor, or Prime Contract, and all conditions, specifications, drawings, and addendum thereto), any Modifications to the contract Documents, and to the satisfaction of Contractor."

Later, in an exhibit, the subcontract incorporates a similar clause stating "All subcontractors are bound to the terms and conditions of the Walsh Construction/CHA prime contract." The subcontract further provides that Walsh will designate an authorized representative that Hopkins would look to for instructions, orders, or directions.

¶ 15 Regarding safety, the subcontract states:

"In addition to safety requirements imposed by law, [Hopkins] shall comply with all safety requirements imposed by [Walsh], Owner or the Architect/Engineer and will conduct operations in a safe manner.\*\*\* [Walsh] may conduct safety inspections from time to time. Such inspections shall not relieve [Hopkins] from [its] obligations to adhere to safety requirements \*\*\*."

The safety provision of the subcontract also provides that before starting work, Hopkins "will provide a comprehensive Health and Safety Plan" which Walsh will keep for its records.

¶ 16 Sigalos testified during his evidence deposition that his left shoulder, lower back, and knee were injured in the October 6, 2010, incident. At the time of the incident, he worked on the "leak crew" repairing broken water mains, broken water services, and responding to emergencies. As part of his training, he completed a trench box training course which taught him trench box safety, shoring, and benching. He agreed that all workers on a job site have a

responsibility for their own safety and testified that he would refuse to work if he felt unsafe. On this particular job, they were to shut down the water main, drain it, do the necessary cuts, and then install tees and valves for a new water hook up to a building. He remembered speaking to some Walsh laborers on the job site, but testified that he would not have taken any direction from them. He would only have taken direction from his foreman, Jack Spellman. The Walsh laborers only asked him about timing, *i.e.*, when the job would be completed. No one from Walsh in any way directed him how to complete the work. He thought maybe three Hopkins employees were also there.

¶ 17 The work was just about complete when he was injured at 10:30 in the morning when he went to measure a pipe. He explained, " I turned around, looked at the area, I put my left hand on the [trench] box. And as I put my left hand on the [trench] box, I took my tape measure out, stuck it over the box. And the ground gave with the [trench] box and then I went straight down 7 feet striking my knee, my back, my shoulder." He fell between the trench box and trench wall, and landed at the bottom of the trench.

¶ 18 Prior to the accident he did not have any concerns with how the trench box was constructed. The aluminum trench box had two spreader bars. Sigalos observed the trench box after his fall, and stated "it seemed like they didn't have all the pins in the spreader bars that hold the box up." He explained there are usually four pins in the spreader bars supporting the trench box but it looked as though two were missing. He would not have been able to see the pins in the spreader bar from his position prior to his fall.

¶ 19 Sigalos believed that after the accident the faulty trench box was removed. He remembered laborers went into the hole after the accident, but he could not remember if they worked for Hopkins or Walsh. Sigalos did not think the trench box was properly assembled

and that it was not dug into the ground as far as it should have been. Sigalos remembered talking to the owner of Hopkins on the day of the accident. Sigalos visually inspected the trench box before his accident and did not see any holes with missing pins.

¶ 20 Keith Yarmer, also a City plumber, was on the job site when Sigalos was injured. He testified that he had undergone trench safety training and had no safety concerns regarding this particular job. He testified that only his foreman instructs him on the job and he did not speak or take direction from representatives of Hopkins or Walsh. Regarding the accident, he testified that "I watched [Sigalos] then lean over to put his hands on the trench box, which I believe he did. And then the ground gave way on the outside of the trench box, and that's when he fell in." He saw Sigalos put both hands on the box before the box moved. Sigalos fell in between the ground and the exterior wall of the trench box.

¶ 21 Michael Gibbons, a superintendent for Walsh at the time of the incident, testified that he has a "[f]air" level of knowledge concerning how trench boxes are to be installed. Gibbons testified that Walsh always subcontracts sewer and water work. Gibbons denied that he had the right to tell subcontractors "to use specific means and methods" to increase efficiency. Rather, it was up to the subcontractor. It is his job as superintendent to coordinate the various subcontractors to insure proper sequencing. If something is unsafe, he would ask his safety person to check on it. Every subcontractor has to give Walsh their own safety plan which the subcontractor reviews with Walsh's safety professional. There was not a designated safety person for the trench boxes or trenches. The designated trench safety person from Hopkins was a man named Kieran, but Gibbons could not remember his last name. Prior to Hopkins starting work, Alex Castillo, a Walsh employee, presented a safety orientation to Hopkins's employees informing them of the safety rules to be followed.

¶ 22 Gibbons denied that Walsh employees had a checklist concerning trench boxes. When shown a checklist, Gibbons testified that the subcontractor would fill it out "just so we know that he has got a dig number on taking somewhat pre-cautionary measures to keep his guys safe, traffic controls, what have you." Gibbons testified that Hopkins completed the checklist which it would then turn into Walsh. No Walsh laborers helped excavate the trenches. Gibbons agreed that he and his team would fill out weekly safety inspection reports issued by Walsh. Gibbons explained that "I would go out there with their foreman and I would make sure that they had the obvious, that they would have a ladder, proper height sticking out, that type of thing, or they would tell me, yes, everything is inspected, were fine." He testified that if the trenches were open, he would check them. He would also check for rails around it so that a bystander would not fall in. He agreed that when a trench was open, they would still need to check it, but not fill out a checklist. He would go out with a Hopkins employee every day to check it, but he would not check if the trench box was properly inserted into the ground.

¶ 23 Gibbons had no knowledge of the accident. He considered the City to be Hopkins's subcontractor that Hopkins would take care of. Kieran from Hopkins would report verbally to Gibbons that the trench boxes were okay. Gibbons testified that any injury had to be reported to him but he did not receive a report regarding Sigalos's injuries. When asked whether Walsh required subcontractors hired by Walsh's subcontractors to go through safety orientation, Gibbons answered "[w]e do that with everyone other than city workers."

¶ 24 James Hopkins testified he owned Hopkins with his brothers. Based on the contract with Walsh, he understood that Hopkins had its own safety manual but they also would have to follow Walsh's safety guidelines. He did not know Sigalos and did not witness the accident.

According to the Hopkins's own safety manual, a Hopkins employee was to inspect trenches daily.

¶ 25 In response, Sigalos argued that summary judgment was inappropriate because Walsh had a direct duty to inspect the trench boxes on the work site. Sigalos pointed out that at various times reports were completed showing trenches on the site were inspected. Walsh, however, failed to produce any reports dated near the time of the accident. Sigalos argued that he can establish a claim under section 414 of the Restatement (Restatement (Second) of Torts § 414 (1965)) because Walsh controlled the operative details of the work performed on the construction site, including frequently stopping work if subcontractors were not in compliance with the Walsh safety plan; appointed an on-site employee in charge of performing trench box inspections; conducted weekly tool box safety talks, including a week on trench safety; its superintendents walked the job site; and Walsh had a contractual duty to control on-site safety. Regarding his premises liability claim, Sigalos argued that Walsh had a duty to inspect the trench box at issue on a daily basis but failed to do so. Sigalos argued that the defective condition would have been discovered in the exercise of reasonable care. Accordingly, Sigalos argued that he established a claim under Restatement section 343. Restatement (Second) of Torts § 343 (1965).

¶ 26 Sigalos submitted numerous documents to his response. Relevant here, Sigalos presented the following documents as exhibits: The contract between the CHA and Walsh; Walsh's environmental, health, and safety plan for the project; Walsh's "Superintendent Weekly Safety Inspection Reports" for various weeks in January, February, March, April, May, and June of 2010; and deposition testimony from Alex Castillo, Brian Stark, Kieran Nestor, Thomas Hopkins, and John Patrick Hopkins.

¶ 27 The contract between Walsh and the CHA included the following clause:

"[Walsh] expressly agrees to be solely responsible for the enforcement of all jobsite and project safety laws, rule, policies and programs applicable to its provision of the Work with respect to its officers, directors, employees, agents, representatives, invitees and subcontractors."

¶ 28 Walsh's environmental, health, and safety plan required that all subcontractors provide a site specific safety plan. The plan indicated that "Safety meetings (Tool Box Talks) will be held a minimum of once per week with all Walsh \*\*\* employees" and that "[a]ll subcontractors are required to hold weekly safety meetings with each of their employees that are on site." The plan required that the documentation of these weekly meetings were to be given to Walsh on a weekly basis. Under the heading "Subcontractor Safety Requirements," the plan stated that "Subcontractors are bound to work safely in accordance with the Health & Safety rules of Walsh Construction." Furthermore, the plan stated that "Walsh \*\*\* site management personnel are charged with the responsibility to insure that ALL subcontractors comply with this requirement." The plan required that "All Walsh \*\*\* employees and all subcontractor employees on the job site must attend a site safety orientation." The plan stated that "[a] safety inspection report must also be completed weekly by the project team."

¶ 29 The "Superintendent Weekly Safety Inspection Reports" attached to Sigalos's motion covered various weeks in January, February, March, April, May, and June of 2010 and various subcontractors. Regarding "Trenches, Excavation, and Shoring," the reports provided boxes for the inspector to check indicating whether the issue was "Adequate at the time of inspection;" "Needs Consideration;" "Needs Immediate Attention;" or is "Not Applicable." The report then provides the following topics regarding "Trenches, Excavation, and Shoring:" (1) "Competent

person inspected trench daily and on hand;" (2) "Excavations are shored, benched or sloped back;" (3) "Materials are stored at least two feet from trench;" (4) "Ladders provided every 25 feet in trench;" "Excavations over 20 feet in depth have engineer approval;" (6) "Equipment is a safe distance from the edge of trench or excavation;" and (7) "Pre-excavation checklist being completed daily."

¶ 30 Alex Castillo testified he worked for Walsh as a carpenter foreman on this project. Amongst his other responsibilities; he was in charge of conducting 30-minute safety orientations to "each person that would come on the job site." This applied to both Walsh employees and subcontractors and would consist of him explaining the safety rules for the job site. Castillo agreed that subcontractors were to comply with both their own and Walsh's safety manual. He testified that Walsh employees do not inspect trenches and that he was not personally responsible for trench safety. He did not recall Sigalos's accident and he did not know if trenches on the job site had to be inspected daily.

¶ 31 Brian Stark, Walsh's project manager for the job site at the time of the accident testified Walsh hired Hopkins to perform the sewer and water work. He recalled that the City came to turn on the water but he could not recall Sigalos's injury. He testified that he would walk the job site once per week, but that the superintendent and project engineer would walk the site every day. Walsh held weekly safety meetings. Hopkins testified that page 18 of the Walsh Construction Safety Manual contained the rules that applied to trenching on the site and applied to Hopkins. Page 18, in turn, provided that "All Walsh \*\*\* employees" were to adhere to the following requirements concerning trenching: "Locate utilities prior to excavation/trenching;" that a "competent person inspect/check all trenches" on a daily basis prior to work starting and after any change in condition; that an engineer design excavations over 20 feet deep; that

competent person approval is required for certain size trenches; spoil piles be set back two feet; that a means of an exit be within 25 feet of travel for a person in a trench deeper than 4 feet deep; that the perimeter be protected; and that "[a]ll employees\*\*\* be trained in safety precautions and associated hazards prior to entry." Stark testified that the competent person inspecting the trenches in this case was someone from the subcontractor, Hopkins. Stark had the authority to correct any safety issues he encountered on the site, but stated that Walsh did not direct Hopkins in how they performed their work and they were free to do as they liked as long as it was in a safe manner.

¶ 32 Kieran Nestor testified he worked for Hopkins as a foreman at the time of the accident. He was responsible for filling out paperwork associated with safety. Hopkins had a rule that trenches were to be inspected daily. He recalled that he submitted reports to Walsh indicating that he had inspected the trenches. He described the forms he would fill out and submit to Walsh as "pre-printed" and "from Walsh" that he would turn in everyday. When he checked trenches, he would "just make sure that everything was intact, the boards, that the spreaders were in, that the boards were on and the height." Nestor recalled that the "boxes" used in the trenches were put in "when the City guys showed up." He could not remember any City workers getting hurt on the job site. He described the paperwork he would fill out for Walsh as follows: "I think they have trench boxes written down and I just check it off like did you check this. It gives the names of all the different equipment and material and I think that's what it gives and we just check it off, you know." The aluminum trench box came preassembled to the site. It was assembled by someone from Hopkins. He visually inspected it from above and saw that it was secure in the trench. After the City completed its work, Nestor got in the trench and did not notice any missing pins, or any shifting of the trench box.

¶ 33 Thomas Hopkins owns Hopkins with his two brothers. He was on the job site when Sigalos was hurt, but could not recall the accident. He estimated the City worked on the site from 8:00 in the morning until 1:30 or 2:00 in the afternoon. Hopkins did not have a contract with the City, only a permit. Hopkins's foreman is supposed to inspect the trench boxes before work started. He admitted that Hopkins was responsible for the safety of the trench box prior to work starting but maintained that it was the City's responsibility for their own safety once they enter the trench box. When asked whether Walsh's safety requirements applied to subcontractors, he answered "their safety director is active and, you know, in their safety for the whole job and it trickles down to all subcontractors too, that, you know, you abide by their safety rules. They have specific rules."

¶ 34 John Patrick Hopkins, Jr., another one of Hopkins's owners, also testified that trench boxes would be checked daily and that Hopkins employees had to follow both their own and Walsh's safety manual. It was his understanding that his foreman would have to submit paperwork to Walsh every day. He did not witness the accident. He testified that Hopkins determined the size and type of trench boxes, what tools to use, and stated that Walsh did not direct Hopkins in how wide to dig the trenches. He agreed that Hopkins determined the means of doing their work.

¶ 35 In reply, Walsh argued that Sigalos failed to meet his burden of presenting a factual basis to deny its motion for summary judgment. Walsh argued that Sigalos failed to show how Walsh entrusted work to Sigalos's employer, the City, as Walsh did not have a contract with the City. Therefore, Walsh argued that section 414 of the Restatement (Restatement (Second) of Torts § 414 (1965)) did not apply because Walsh did not entrust work to the City or retain

control. Walsh further stressed that it owed Sigalos no duty for premises liability because it had no actual or constructive knowledge of any dangerous condition on the land.

¶ 36 On January 23, 2014, the circuit court granted Walsh's motion for summary judgment and found Walsh owed no duty to plaintiff pursuant to either section 414 or 343 of the Restatement (Second) of Torts §§ 414, 343 (1965). The circuit court entered a finding that there was no just cause to delay enforcement or appeal of its findings pursuant to Illinois Supreme Court Rule 304(a). Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). Regarding Hopkins, the court found that the case remained pending against it.

¶ 37 On January 24, 2014, Sigalos filed his notice of appeal.

¶ 38 ANALYSIS

¶ 39 Sigalos raises the following issues for our review: (1) whether he raised sufficient facts showing Walsh is either vicariously or directly liable for his injuries under section 414 of the Restatement (Restatement (Second) of Torts §414 (1965)) to preclude summary judgment; whether he raised sufficient facts to establish the elements of the tort of premises liability under section 343 of the Restatement (Restatement (Second) of Torts §343 (1965)) to preclude summary judgment; and whether Walsh is liable for his injuries under a voluntary undertaking theory of liability.

¶ 40 Summary judgment is proper where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012). "Summary judgment is to be encouraged in the interest of prompt disposition of lawsuits, but as a drastic measure it should be allowed only when a moving party's right to it is clear and free from doubt." *Pyne v. Witmer*, 129 Ill. 2d 351, 358 (1989). The nonmoving

party must present some factual basis that would arguably entitle it to a judgment. *Allegra Services, Ltd. v. Metropolitan Pier & Exposition Authority*, 172 Ill. 2d 243, 256 (1996). In ruling on a motion for summary judgment, the circuit court is to determine whether a genuine issue of material fact exists, not try a question of fact. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). Pleadings are to be liberally construed in favor of the nonmoving party. *Id.* Our review of summary judgment rulings is *de novo*. *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 113 (1995).

¶ 41 Vicarious Liability Under Restatement Section 414

¶ 42 Sigalos argues that the following facts show that Walsh controlled the operative details of Hopkins's work: Walsh's Superintendent's Weekly Inspection reports contained seven requirements Hopkins had to follow when checking the safety of trenches on the job site; that it required Hopkins to perform daily trench safety checks; that Walsh's contract with the CHA required that it retain control over the safety of the job site; and that Walsh had the power to stop work for safety reasons. Accordingly, Sigalos maintains that he presented sufficient facts to establish Walsh's vicarious liability for his injuries under Section 414 of the Restatement. Restatement (Second) of Torts § 414 (1965). In response, Walsh maintains that it retained no operative control over the operative details of Hopkins's work. Rather, Walsh characterizes its role as one of general oversight.

¶ 43 A plaintiff alleging negligence "must establish the existence of a duty, a breach of that duty, an injury that was proximately caused by that breach, and damages." *Jablonski v. Ford Motor Co.*, 2011 IL 110096, ¶ 82. Generally, "one who entrusts work to an independent contractor will not be liable for the acts or omissions of that independent contractor." *Calderon v. Residential Homes of America, Inc.*, 381 Ill. App. 3d 333, 340 (2008). Illinois, however, has

long recognized that Restatement section 414 provides an exception to this general rule. *Id.*; *Larson v. Commonwealth Edison Co.*, 33 Ill. 2d 316, 325 (1965). Section 414 provides:

“ One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.” Restatement (Second) of Torts § 414 (1965).

This court has interpreted section 414 to provide for both direct and vicarious theories of liability. *Cochran v. George Sollitt Construction Co.*, 358 Ill. App. 3d 865, 866-67 (2005). “Vicarious liability is \*\*\*derivative; that is, it is based on the tortuous conduct of another.” *Madden v. F.H. Paschen, S.N.*, 395 Ill. App. 3d 362, 381 (2009). Comment *a* to section 414 explains how a general contractor can be vicariously liable for the negligence of its subcontractors as follows:

“If the employer of an independent contractor retains control over the operative detail of doing any part of the work, he is subject to liability for negligence of the employees of the contractor engaged therein, under the rules of that part of the law of Agency, which deals with the relation of master and servant.” Restatement (Second) of Torts § 414 cmt. a (1965).

Comment *a*, therefore, “clarifies, the general contractor, by retaining control over the operative details of its subcontractor’s work, may become vicariously liable for the subcontractor’s negligence. *Cochran*, 358 Ill. App. 3d at 874. Comment *c* explains the degree of control a general contractor must exercise to be vicariously liable as follows:

“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 cmt. c (1965).

¶ 44 The parties’ contract, if one exists, is the best indicator of whether a general contractor has retained control over a subcontractor’s work. *Joyce v. Mastri*, 371 Ill. App. 3d 64, 74 (2007). Generally, summary judgment is inappropriate where a general contractor agreed to retain control over construction site safety “or where a general contractor goes to great lengths to control safety at the construction site.” *Id.* In contrast, summary judgment in favor of a general contractor is appropriate where a subcontractor, by contract, is responsible for jobsite safety and the general contractor does not take an active role in insuring work site safety. *Id.* Typically, whether a general contractor retains sufficient control is a question of fact. *Wilkerson v. Paul H. Schwendener, Inc.*, 379 Ill. App. 3d 491, 494 (2008). The issue can only be decided as a matter of law where insufficient evidence is presented to create a factual question. *Id.*

¶ 45 After reviewing the evidence in the light most favorable to Sigalos, the nonmoving party, we hold he presented sufficient evidence to create a question of fact regarding whether Walsh

retained sufficient control over Hopkins's work to be vicariously liable for Sigalos's injury. Specifically, we hold that Walsh's control in this matter was not directed at how Hopkins performed the sewer work. Rather, Walsh retained the right to control the safety measures Hopkins had to abide by regarding trenches. This is best shown by the contracts in this matter and the safety policies Walsh imposed on subcontractors, including Hopkins. The CHA entered into a contract with Walsh whereby Walsh agreed "to be solely responsible for the enforcement of all jobsite and project safety laws, rules, policies and programs." In the subcontract between Walsh and Hopkins, they agree that Hopkins is bound by the terms and conditions of the contract between the CHA and Walsh. The subcontract also has a safety provision whereby Hopkins agreed to comply with all safety requirements imposed by Walsh.

¶ 46 Sigalos presented evidence, through both the contracts and deposition testimony, that Walsh required Hopkins to comply with both Hopkins's and Walsh's safety manuals. Walsh's safety manual, specifically page 18 as testified to by Brian Stark, Walsh's project manager, contained specific requirements regarding trenching that Stark testified applied to Hopkins. This included daily inspections by a competent person from Hopkins. Sigalos presented evidence that Walsh required subcontractors to fill out a checklist to be submitted weekly to Walsh. Regarding trenching, the checklist required the signer to assess whether the following actions occurred: (1) "Competent person inspected trench daily and on hand;" (2) "Excavations are shored, benched or sloped back;" (3) "Materials are stored at least two feet from trench;" (4) "Ladders provided every 25 feet in trench;" (5) "Excavations over 20 feet in depth have engineer approval;" (6) "Equipment is a safe distance from the edge of trench or excavation;" and (7) "Pre-excavation checklist being completed daily." Kieran Nestor testified that he would fill out "pre-printed" forms "from Walsh" on a daily basis. We cannot say that Walsh took a hands off

approach to the manner in which Hopkins kept its work area safe where it required Hopkins to abide by Walsh's safety manual and where there is evidence that a detailed safety checklist had to be completed and submitted to Walsh.

¶ 47 We hold Sigalos presented sufficient evidence showing that Walsh retained sufficient control over how Hopkins kept its work area safe such that Hopkins was not free to perform safety measures in its own manner. The contracts between the CHA and Walsh, and Walsh and Hopkins, in addition to Walsh's safety manual and the requirements it imposed on Hopkins, are sufficient evidence to allow a trier of fact to find Walsh vicariously liable for Sigalos's injuries in this matter. The circuit court, therefore, improperly granted Walsh's motion for summary judgment as to the two counts of negligence in Sigalos's second amended complaint, *i.e.*, counts II and III. We note, due to our holding, we need not address Sigalos's claim of direct liability under Restatement section 414. Restatement (Second) of Torts § 414 (1965).

¶ 48 Restatement Section 343

¶ 49 Sigalos next argues that he has stated a cause of action for premises liability under Restatement section 343. Restatement (Second) of Torts § 343 (1965). Sigalos contends that Walsh owed him a duty of care as it knew or should have known of the existence of a dangerous condition on the job site and that it failed to maintain the premises in a reasonably safe condition. In response, Walsh argues that there is no evidence that it knew, or should have known, of the alleged defective trench box in this case.

¶ 50 Section 343 of the Restatement provides:

“A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land 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).

Therefore, "[a] possessor of land can be liable for physical harm caused to his invitees by a dangerous condition on the land *if* the defendant knew or should have known that the condition involved a reasonable risk of harm." (Emphasis in original.) *Wilkerson*, 379 Ill. App. 3d at 497. Where there is no evidence of knowledge of the condition, however, then the possessor of land will not be liable. *Lee v. Six Flags Theme Parks, Inc.*, 2014 Il App (1st) 130771, ¶ 109.

¶ 51 We hold the circuit court properly granted summary judgment as to Sigalos's premises liability claim because Sigalos failed to present any evidence that Walsh knew or should have known of the alleged dangerous trench box. The evidence in the record shows that although Walsh retained a level of control in how Hopkins conducted safety inspections, Hopkins actually performed the inspections and reported their completion to Walsh. Brian Stark, Walsh's project manager, testified that Hopkins was to perform the daily trench inspections pursuant to Walsh's safety manual. Michael Gibbons, Walsh's superintendent, testified that Hopkins's foreman, Kieran Nestor, would report to him that the trench boxes were safe. Gibbons would then fill out weekly safety reports for Walsh. Gibbons had no knowledge of the accident and did not receive a report on the accident. Nestor confirmed that he was responsible for filling out the safety paperwork, including those for the daily safety inspections. He did not remember any workers from the City getting hurt. Nestor also did not notice any problems with the trench box either before or after the City completed its work. Accordingly, the safety procedures put in place by Walsh did not put Walsh on notice because they were dependent on Hopkins, through

its employee Nestor, to report the results of his inspections. Nestor, however, did not notice any problems in the trench box. Therefore, there is no evidence that Walsh had actual notice of the allegedly defective trench box.

¶ 52 Furthermore, Sigalos also failed to present any evidence showing that Walsh should have known of the dangerous condition in this case. As shown above, Walsh retained a degree of control over how its subcontractors conducted job-site safety measures, thus subjecting it to vicarious liability under section 414 of the Restatement. Restatement (Second) of Torts § 414 (1965). Vicarious liability under section 414 of the Restatement, unlike direct liability under that same section or premises liability under section 343, does not have a knowledge requirement. Restatement (Second) of Torts §§ 414, 343 (1965); *Cochran*, 358 Ill. App. 3d 865 ("According to comment *b* to section 414, the general contractor's knowledge, actual or constructive, of the unsafe work methods or a dangerous condition is a precondition to direct liability."). Under his premises liability claim, however, Sigalos has not presented any evidence showing Walsh should have known of the defective condition. He has not shown how Walsh's safety procedures, *i.e.*, relying on its subcontractors to actually perform daily inspections, albeit in accordance with Walsh safety standards, were unreasonable or put Walsh on constructive notice of dangerous conditions. Rather, the evidence presented only shows that Walsh's safety standards may or may not have been properly followed by Hopkins. Either way, Hopkins did not report any safety issues to Walsh. Furthermore, Kieran Nestor's testimony was the only evidence of a timeline of the installation and inspection of the trench box. Nestor testified that the "boxes" used in the trenches were put in "when the City guys showed up." Therefore, the evidence shows that the trench boxes were put in, Nestor presumably inspected them and found no problems, and then the City started working. Based on this timeline, we cannot say that

Sigalos can establish that Walsh should have known of a dangerous condition where any such condition existed for such a short period of time before Sigalos's injury. At best, the evidence shows that Hopkins, through its employee Nestor, may have negligently inspected the trench boxes. This does not however, put Walsh on notice under section 343 of the Restatement. Restatement (Second) of Torts § 343 (1965). Sigalos, as the nonmoving party, had to present at least some evidence that arguably would entitle him to judgment. *Allegro Services, Ltd.*, 172 Ill. 2d at 256. Sigalos, however, failed to present any evidence showing Walsh knew or should have known of the dangerous condition on the job site. Therefore, the circuit court properly granted Walsh's motion for summary judgment as to Sigalos's premises liability claim as stated in count I of his second amended complaint.

#### Voluntary Undertaking Doctrine

¶ 53 Sigalos's final argument is that Walsh owed him a duty under the voluntary undertaking doctrine. Sigalos, however, did not present this issue to the circuit court. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996) ("It is well settled that issues not raised in the trial court are deemed waived and may not be raised for the first time on appeal."). Accordingly, Sigalos is procedurally defaulted from raising this issue before this court.

#### ¶ 54 CONCLUSION

¶ 55 The circuit court properly entered summary judgment in Walsh's favor on count I of Sigalos's second amended complaint. We reverse the entry of summary judgment as to counts II and III of Sigalos's second amended complaint. Accordingly, the judgment of the circuit court of Cook County is affirmed in part and reversed in part. Cause remanded.

¶ 56 Affirmed in part, reversed in part. Cause remanded.