

No. 1-14-1414

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).

**IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT**

DALE FINUCANE and ROBIN FINUCANE,)	Appeal from the
)	Circuit Court of
Plaintiffs-Appellants,)	Cook County
)	
v.)	No. 12 L 001423
)	
WARD CONTRACTING & BUILDING)	
RESTORATION, INC.,)	Honorable
)	Jeffrey Lawrence,
Defendant-Appellee.)	Judge Presiding.

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

ORDER

Held: General contractor not liable for injury suffered by a subcontractor's employee where the contract reserved only a general right of supervision to the general contractor, and the general contractor did not exercise sufficient control over work and safety at the work site to owe a duty of care to the employee.

¶ 1 Plaintiffs, Dale and Robin Finucane, appeal the order of the circuit court granting summary judgment in favor of defendant, WARD Contracting and Building Restoration, Inc. (WARD), on plaintiffs' negligence claim. On appeal, plaintiffs contend the court erred in granting summary judgment because a genuine issue of fact exists as to whether WARD retained the right to exercise control over the means and methods of its subcontractor's work. For the following reasons, we affirm.

¶ 2 JURISDICTION

¶ 3 The trial court granted WARD's motion for summary judgment in an order entered *nunc pro tunc* on April 16, 2014. Plaintiffs filed their notice of appeal on May 14, 2014.¹ Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered below. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

¶ 4 BACKGROUND

¶ 5 WARD entered into a contract with the Archdiocese of Chicago (Archdiocese) to perform restoration work at Holy Name Cathedral (Holy Name). Renovations began in February 2008, during which a fire occurred. The Archdiocese also hired WARD to repair the fire damage. WARD served as the general contractor for the carpentry and masonry work. WARD subcontracted the roofing, scaffolding and sheet metal work to Jones & Cleary Sheet Metal, Inc. (JCS), which in turn subcontracted the roofing work to Jones & Cleary Roofing Company (JCR). JCS subcontracted the scaffolding work to International Scaffolding.

¹ Plaintiffs' brief states that they filed their notice of appeal on July 16, 2014. However, the notice of appeal in the record shows that it was filed on May 14, 2014.

¶ 6 The following portions of the general contract and subcontracts are relevant to the issues on appeal. Article 3, section 3.2.1 of the general contract between the Archdiocese and WARD provides that:

"The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract."

Section 10.2.1, relating to the safety of persons and property, provides that "[t]he contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to employees on the Work and other persons who may be affected thereby." Section 10.2.6 states that the contractor will have a superintendent designated at the work site "whose duty shall be the prevention of accidents."

¶ 7 The subcontractor agreements executed between WARD and JCS used identical forms. Pursuant to those agreements, the subcontractor agreed to "perform all Work for" a particular aspect of the project including "any and all supervision, coordination, labor, materials, supplies and shop drawings to be supplied by the Subcontractor." Regarding "Worksite Safety," the subcontractor agreed "[t]o at all times provide sufficient, safe and proper facilities and worksites, and to make the same available for inspection of the Work by Owner and Contractor."

¶ 8 Plaintiff Dale was an experienced journeyman sheet metal worker at the time of the occurrence. On March 16, 2010, he and another sheet metal worker, Will Rivera, worked on taking down planks and jacks from the roof of Holy Name. Dale also worked with his foreman, Dean Rozek, who gave him instructions about the work to be performed. Also working at the time was the roofing foreman, Eric Otten. All of these workers were employed by JCS or JCR.

¶ 9 In his deposition, Dale stated that while on the job at Holy Name, he would go to his foreman Rozek about any safety concerns. Dale also acknowledged that he participated in safety programs at JCS, which consisted of toolbox talks. He stated that sometimes the talks were conducted by an employee, but "a lot of times [they were] not conducted." Instead, a safety topic was outlined on "a one-page sheet" and given with their paychecks. Employees had to sign that they received the sheet. Dale stated that he did not know whether JCS had someone on the job site who performed safety inspections. Dale had no contact with any superintendent from WARD, nor did he attend any meetings on, or receive materials about, safety from WARD. He did not raise any concerns about safety at the job site with WARD employees.

¶ 10 The planks and jacks Dale worked on were standard equipment used in the industry. The planks support the workers when they are on the roof, support materials stacked on the roof, and prevent workers and materials from falling off the roof. In addition to the planks, there was a support scaffold around the perimeter of the building. At the time of the occurrence, foreman Rozek instructed Dale to remove the planks and brackets because the slate had been installed on the roof. Will Rivera worked with Dale to remove the planks and jacks. Rivera worked on the plank above Dale, removing jacks and then handing them down to Dale. Dale would take the jacks, which were three feet long, and place them on the plank below.

¶ 11 Dale stated that as he squatted to place the jacks on the plank, he believed his hammer got caught between him and the roof causing him to lose his balance and fall. The plank remained stable during the fall and the jacks did not come loose. Dale first stated that he fell six planks below his position but later adjusted the distance to ten feet. He grabbed one of the planks in order to stop his fall.

¶ 12 Rozek testified that he was the sheet metal foreman on the Holy Name project, and has worked as a sheet metal foreman for JCS for 28 years. As foreman, Rozek supervised the crew, made daily assignments, and ensured that the work area was safe and that workers had adequate fall protection. Rozek also completed jobsite safety cards requiring him to inspect the site for potential safety hazards. He stated that Dale attended a safety seminar conducted by Jones & Cleary and received training on how to use the perimeter scaffolding. Rozek stated that Jones & Cleary has its own safety program for its employees, conducts safety seminars, and has a safety person, Tom McKeown. Safety rules and precautions were discussed with their workers every morning during the Holy Name project and during toolbox talks. If Rozek had any questions about safety, he would go to Tom Cleary, the owner of Jones & Cleary. Rozek stated that if he observed any unsafe conditions, he had the authority to stop work.

¶ 13 Rozek opined that at the time of the incident, the planks and brackets complied with applicable safety standards, customs and practice. He and Eric Otten worked to remove the planks and brackets from the roof, and Dale assisted in the work. Rozek stated that he had his back to Dale when he heard a sound. Rozek turned around and saw Dale on the next level below. Dale told him that his hammer got caught between the plank and the roof and he lost his balance. The plank below was about six feet from the place Dale had stood before the fall. Dale ended up on his feet with his back to the roof. Rozek testified that Dale should have been facing the roof while falling to the plank below. In his opinion, the plank performed as it should have by preventing Dale from sliding down the entire roof.

¶ 14 Will Rivera testified that he worked as a sheet metal foreman for JCS on the Holy Name project, and Rozek was the lead foreman. He stated that Rozek conducted weekly toolbox talks, instructed the crew on what they were to do that day, visually inspected the work area for

safety purposes, and ensured that workers had proper fall protection. Rozek had the authority to stop work if he felt it was not safe. Rivera stated that he did not receive instructions from WARD employees, nor did he attend any safety meetings conducted by WARD or the Archdiocese.

¶ 15 At the time of the incident, Rivera was working with Rozek, Dale, and Otten. Planks had been installed to provide fall protection and a place from which to work. There were several rows of planks placed six feet apart. The crew was removing the planks and brackets, following the common practice of removing the planks, handing them to a worker below, and then removing the brackets. All four workers started on the same plank. Rivera asked Dale to move down to the lower plank and while doing so, Dale turned around and lost his balance. He slid down to the lower plank, about six feet, and landed on his feet. Rivera stated that Dale should have been facing the roof while going down instead of having his back to the roof. The other workers could see that Dale was in pain and asked him if he was alright. Dale told them he could continue working and he worked for a couple of hours before he stopped due to pain.

¶ 16 Eric Otten testified that he works as a roofing foreman for JCR. He reports directly to Tom and Bill Cleary at Jones & Cleary. Jones & Cleary has a safety program and safety manager, and conducts annual safety meetings on fall protection and the use of planks and brackets. JCS hired JCR to repair the fire-damaged roof at Holy Name and Otten served as the roofing foreman on the project. He supervised the crew, made assignments for the crew, and made sure they had proper fall protection and attended the weekly toolbox meetings. The foreman also completed jobsite safety cards which required him to inspect the work area and identify any potential hazards. As foreman, Otten had the authority to stop work if he observed an unsafe condition or someone working in an unsafe manner.

¶ 17 At the time of the incident, the workers were removing the planks at his direction. The planks and brackets were supplied and installed by JCR. The use of planks and brackets was customary in the industry, and Otten stated that he has installed planks and brackets "thousands" of times. No one from WARD told him how to install or use the planks, or how to remove them. When the incident occurred, Otten was on the second row plank replacing slate while Rozek, Dale and Rivera were on the third row plank above him. Otten did not witness the accident. He heard something, looked up and was struck in the eye with a bracket. He believed Dale either fell or slid down to the second row plank, facing away from the roof. Dale fell or slid about six feet.

¶ 18 Brian Ward testified that he is part owner of WARD. The Archdiocese hired WARD as the general contractor for the fire restoration work at Holy Name, and to perform carpentry and masonry work. Pursuant to three subcontracts, WARD delegated portions of the work to JCS. JCS, in turn, hired JCR to replace the slate on the roof, and hired International Scaffold to erect and maintain the perimeter scaffold. The subcontracts provided that JCS was responsible for the supervision, means and methods, and work site safety. WARD's foreman, Robert Jager, directed the work of WARD's carpentry crew and scheduled the work of subcontractors. When Mr. Ward visited the job site, he reviewed the progress with Jager and spoke to the engineer, and then he informed the Archdiocese of the progress and schedule. He interacted with subcontractors occasionally to get information on the progress of their work. Mr. Ward stated that he relied on the subcontractors to conduct safety meetings for their employees. Subcontractors did not submit safety plans and procedures to WARD. Mr. Ward further testified that he was not aware of any unsafe conditions regarding work on the roof, and he received no complaints regarding unsafe conditions.

¶ 19 Jager testified that he works as a carpenter and foreman for WARD. He was the foreman on the Holy Name project for WARD, which performed carpentry, masonry and tuckpointing work on the project. He also coordinated the work with the engineers and the subcontractors. Jager held safety meetings for WARD employees only and understood that WARD was responsible for the safety of its employees and not those of the subcontractors. Jager was not aware of any unsafe conditions at the work site. Jager also stated that he did not supervise the work of the subcontractors' employees and he did not tell them how to perform their jobs. He would discuss what needed to be done with the subcontractors' employees, but he would not instruct them on how it should be done. Jager testified that Jones & Cleary employees could perform the work in any manner as long as it complied with the specifications outlined by the engineers. The engineers were responsible for ensuring that the work complied with their specifications.

¶ 20 On February 7, 2012, plaintiffs filed a two-count complaint against WARD and JCR alleging construction negligence and loss of consortium. WARD subsequently filed a third-party complaint for contribution against JCS. On November 18, 2013, WARD filed a motion for summary judgment, arguing it owed no duty to plaintiff because it did not retain control over the safety and means and methods of his work. The trial court granted summary judgment in favor of WARD and plaintiffs filed a motion to reconsider which the trial court denied. Plaintiffs filed this timely appeal.

¶ 21 ANALYSIS

¶ 22 Plaintiffs contend that the trial court erred in granting summary judgment in favor of defendant on plaintiffs' negligence claim. Summary judgment is proper where the pleadings, depositions, admissions and affidavits on file, viewed in the light most favorable to the

nonmoving party, show that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Cochran v. George Sollitt Construction Co.*, 358 Ill. App. 3d 865, 872 (2005). We review the trial court's grant of summary judgment *de novo*. *Id.*

¶ 23 In their complaint for negligence, plaintiffs must show that WARD owed Dale a duty, it breached that duty, and the breach proximately caused Dale's injury. *Kotecki v. Walsh Construction Co.*, 333 Ill. App. 3d 583, 587 (2002). The issue of whether a duty exists is a question of law and if no duty exists, plaintiffs cannot recover. *Downs v. Steel & Craft Builders, Inc.*, 358 Ill. App. 3d 201, 204 (2005). Plaintiffs contend that WARD owed Dale a duty of care pursuant to section 414 of the Restatement (Second) of Torts (Restatement (Second) of Torts § 414 (1965)), because WARD retained contractual control over JCS employees at the work site.

¶ 24 In general, an employer who hires an independent contractor is not liable for the contractor's negligent acts or omissions. *Downs*, 358 Ill. App. 3d at 204-05. However, section 414 provides an exception to the general rule:

"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).

Comment c of section 414 elaborates on the "retains control" element:

"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).

¶ 25 In a construction negligence action involving a contract between the plaintiff and the defendant general contractor, the first issue is whether the general contractor agreed to retain control over safety at the work site. *Joyce v. Jay J. Mastri*, 371 Ill. App. 3d 64, 74 (2007). Whether a general contractor retains such control over a subcontractor's work so as to trigger liability is generally a question of fact "unless the evidence presented is insufficient to create a factual question[]." *Id.* The best indicator of the parties' intent is found in the language of the contract, given its plain and ordinary meaning. *Downs*, 358 Ill. App. 3d at 205. The interpretation of a contract is a matter of law which may be determined on a motion for summary judgment. *Id.*

¶ 26 *Rangel v. Brookhaven Constructors, Inc.*, 307 Ill. App. 3d 835 (1999), is instructive. In *Rangel*, the contract between the general contractor and subcontractor stated that the subcontractor would provide all labor, materials, tools, equipment, full-time supervision and services, and " 'do all things necessary for the proper performance, installation, construction and completion' " of the project. *Id.* The contract further provided that the " 'General Contractor shall have the right to exercise complete supervision and control over the work to be done by the Subcontractor, but such supervision and control shall not in any way limit the obligations of the Subcontractor.' " *Id.* at 838. The court found that the contractual right of supervision over the

subcontractor was merely a "general right," and therefore further evidence that the general contractor controlled the operative details of the work performed, or supervised the safety of the equipment used by the subcontractor's employees, was required for liability to attach. *Id.* at 839. The *Rangel* court held that "even where the employer or general contractor retains the right to inspect the work done, orders 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." *Id.* at 839, quoting *Fris v. Personal Products Co.*, 255 Ill. App. 3d 916, 924 (1994).

¶ 27 Also instructive is *Shaughnessy v. Skender Construction Co.*, 342 Ill. App. 3d 730 (2003). The contract between the employer and general contractor Skender provided that Skender would "supervise and direct the work and be responsible for and control the construction means, methods, techniques, sequences and procedures." *Id.* at 732. Skender also agreed to take responsibility for "initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the contract and to employ a superintendent whose duties included the prevention of accidents." *Id.* at 732-33. The contract between Skender and its subcontractor provided that the subcontractor would furnish all labor, equipment and supervision related to its work. *Id.* at 733. This court found that the contract established only that Skender "reserved a general right to stop, start and inspect the progress of the work." *Id.* at 738. It also found that the undisputed facts showed that plaintiff, the subcontractor's employee, was free to perform work "either in his own way or according to [the subcontractor's] instructions" and therefore he failed to establish that the general contractor retained a sufficient amount of supervision to trigger liability under section 414. *Id.*

¶ 28 The contract here between general contractor WARD and the Archdiocese provided that "[t]he Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract." Regarding the safety of persons and property, the contract provided that "[t]he contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to employees on the Work and other persons who may be affected thereby." Section 10.2.6 stated that the contractor will have a superintendent designated at the work site "whose duty shall be the prevention of accidents." Pursuant to the agreements executed between WARD and its subcontractor JCS, JCS agreed to "perform all Work for" a particular aspect of the project including "any and all supervision, coordination, labor, materials, supplies and shop drawings to be supplied by the Subcontractor." JCS further agreed "[t]o at all times provide sufficient, safe and proper facilities and worksites, and to make the same available for inspection of the Work by Owner and Contractor."

¶ 29 Like the contracts in *Rangel* and *Shaughnessy*, the language in the contract between WARD and the Archdiocese provided only a general right of supervision to WARD over its subcontractor's employees. Although WARD retained the right to supervise and direct the work, and agreed to provide a superintendent of safety and take reasonable precautions for the safety of, and provide reasonable protection to prevent damage, injury or loss to employees on the project, the contract did not give WARD the right to control the "incidental aspects" of JCS's work, or indicate in any way that JCS was not free to perform work in its own way. Therefore, since the terms of the contract itself do not give WARD sufficient control over safety or the incidental aspects of JCS's work to find liability under section 414, we look to the actions of

WARD and whether it went to great lengths to control safety at the work site or to control the work of JCS. See *Bokodi v. Foster Wheeler Robbins, Inc.*, 312 Ill. App. 3d 1051, 1064 (2000) (defendants who controlled the operative details of the work, superintended safety over the entire job, and retained a right to supervision such that the subcontractor could not freely work in its own way, owed a duty to the plaintiff under section 414).

¶ 30 The evidence shows that WARD did not control the manner in which its subcontractors performed their work, nor did it make extensive efforts to control the safety of the work site. The owner of WARD testified that he reviewed the progress of the work with his foreman, Bob Jager, spoke to the engineers, and informed the Archdiocese of the progress. Mr. Ward would occasionally interact with the subcontractors to get information on their progress. He stated that he relied on the subcontractors to conduct safety meetings for its employees and subcontractors did not submit any safety plans or procedures to WARD. Mr. Ward testified that he was not aware of any unsafe conditions regarding the roof work and he received no complaints about the safety of the work site. WARD foreman Jager testified that he coordinated the work with the engineers and the subcontractors. He held safety meetings for WARD employees only and understood that he was responsible for the safety of WARD employees. Jager stated that he was not aware of any unsafe conditions at the work site and he did not supervise the employees of the subcontractors or tell them how to do their job.

¶ 31 Dale and his coworker, Rivera, testified that if they had any safety concerns they would bring them to their foreman, Rozek. JCS provided them with safety instructions, conducted safety programs and toolbox talks, and provided equipment to its employees. Dale and Rivera did not have contact with the WARD superintendent, nor did they attend any safety meetings conducted by WARD. Rozek testified that as foreman for JCS, he made daily assignments for

the JCS crew and completed daily jobsite safety cards requiring him to inspect the work site for potential safety hazards. He discussed safety precautions with his workers every morning and they also had toolbox talks. Rozek had the authority to stop work if he found unsafe conditions. If he had any questions about safety, Rozek would talk to the owner of Jones & Cleary. JCR roofing foreman Otten corroborated Rozek's testimony regarding a foreman's duties, and added that no one from WARD told him how to install or use the planks, or how to remove them.

¶ 32 There is no evidence that WARD oversaw the safety of the entire work site or took responsibility for the safety of all workers at the site. Other than informing the subcontractors about their work schedule and checking on their progress, WARD did nothing to direct the operative details of the roofing work and JCS was free to install and remove the planks in its own way. Therefore, WARD, by its conduct, did not create a duty to Dale by exercising control over JCS's work. *Rangel*, 307 Ill. App. 3d at 837; *Shaughnessy*, 342 Ill. App. 3d at 740.

¶ 33 Furthermore, even if JCS and Dale were engaging in a dangerous practice, there is no evidence that WARD was aware or had notice of the unsafe condition and this court has declined to find liability in such circumstances. See *Joyce*, 371 Ill. App. 3d at 75; *Rangel*, 307 Ill. App. 3d at 837; and *Shaughnessy*, 342 Ill. App. 3d at 740. Since plaintiffs did not allege sufficient facts to establish that WARD retained sufficient control over the safety of JCS employees or their work, they fail to show that WARD owed a duty to Dale. If no duty exists, plaintiffs cannot recover and summary judgment in favor of defendant WARD was appropriate. *Downs*, 358 Ill. App. 3d at 204.

¶ 34 Plaintiffs disagree, citing as support for its position *Bokodi, Moorehead v. Mustang Construction Company*, 354 Ill. App. 3d 456 (2005), and *Moss v. Rowe Construction Company*, 344 Ill. App. 3d 772 (2003). We note that plaintiffs cite these cases for the first time in their

reply brief; therefore consideration of their argument is waived pursuant to Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013) (arguments not raised in appellant's brief "are waived and shall not be raised in the reply brief").

¶ 35 Nonetheless, these cases are distinguishable from the case at bar. In *Bokodi*, defendants "went to great lengths to control the safety standards at the work site," employed a full-time safety manager to conduct weekly meetings on safety and to check for compliance with defendants' safety standards. *Bokodi*, 312 Ill. App. 3d at 1063. In *Moorehead*, the general contractor "initiated a specific safety program and designated an individual whose sole function was investigation for safety hazards." *Moorehead*, 354 Ill. App. 3d at 460. Additionally, the safety manager in *Moorehead* personally observed the dangerous condition causing the plaintiff's injury. *Id.* In *Moss*, the general contract provided that the contractor would furnish a superintendent or supervisor with " 'full authority to direct performance of the work in accordance with the contract requirements, and is in charge of all construction operations (regardless of who performs the work).' " *Moss*, 344 Ill. App. 3d at 774. The subcontractor agreement further provided that " '[t]he subcontractor shall follow the [c]ontractor's directions regarding safety, clean-up[,] and storage of materials on the work site.' " *Id.* at 775. The court in *Moss* found that the defendant contractually agreed to assume the responsibility to control the safety of workers on the project, regardless of whether the work was performed by the contractor or subcontractor. *Id.* at 780. These cases do not apply here where the contractual language provided only a general right to supervision, and there was no evidence that WARD assumed responsibility for the safety of the entire work site or for the safety of all workers at the site. Furthermore, WARD did nothing to direct the operative details of the subcontractors' work and JCS was free to install and remove the planks in its own way.

No. 1-14-1414

¶ 36 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 37 Affirmed.