FOURTH DIVISION
December 7, 2017

No. 1-16-1569

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MARIA SALUDA MEZA, Special Administrator of the Estate of Jose Meza, Deceased, Plaintiff-Appellant, v. F.H. PASCHEN, S.N. NIELSEN/IHC CONSTRUCTION JOINT VENTURE, Defendant-Appellee, (New Holland North America, Inc., and CNH America, LLC, Defendants).	)	Appeal from the Circuit Court of Cook County No. 10 L 4329 Honorable Janet Adams Brosnahan Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Burke and Justice Gordon concurred the judgment.

ORDER

¶ 1 *Held*: Affirmed. Trial court properly entered summary judgment, as defendant did not retain control over any part of subcontractor's work and thus, under section 414 of Restatement, owed no duty to subcontractor's employee, who was fatally injured.

¶ 2 Plaintiff Maria Saluda Meza, Special Administrator of the Estate of Jose Meza, Deceased, sued several defendants, including defendant F.H. Paschen, S.N. Nielsen/IHC Construction Joint Venture (Paschen), after her husband, Jose Meza (Meza), sustained fatal injuries while working at a construction site. Plaintiff alleged negligence against Paschen, the general contractor of the construction project.

¶ 3 Paschen's motion for summary judgment was denied, but its motion to reconsider was granted. Plaintiff appeals the trial court's order granting summary judgment in favor of Paschen.

¶ 4 For the reasons that follow, we affirm the trial court's judgment.

¶ 5 I. BACKGROUND

¶ 6 The Metropolitan Water Reclamation District of Greater Chicago (MWRD) entered into a contract with Paschen to serve as the general contractor on a construction project located at the Calumet Water Reclamation Plant in Chicago (the Project). Paschen entered into a subcontract with Industrial Fence, Inc. (Industrial Fence) to fabricate, deliver and install fencing, gates, and guardrail at the east entrance of the Calumet Water Reclamation Plant.

¶ 7 On November 30, 2009, Meza, an employee of Industrial Fence, was working as an ironworker on the Project. At the time of Meza's accident, he was operating a skid steer loader manufactured by defendants New Holland North America, Inc., and CNH America, LLC. Because Meza also had to use a ladder periodically, he was wearing a safety harness and lanyard (fall protection gear), but he was not wearing his seatbelt which instead had been buckled behind him. Meza's injuries occurred when he was run over and dragged by the skid steer loader. Meza sustained fatal injuries. No witness actually saw how Meza came to be outside of the skid steer loader.

¶ 8 Plaintiff filed a complaint on April 11, 2010, against Paschen and defendants, New Holland North America, Inc. and MWRD. Plaintiff filed a first amended complaint on June 2, 2010, adding defendant CNH America, LLC.

¶ 9 Count I of the first amended complaint alleged wrongful death against Paschen; Count II was a survival action. Plaintiff alleged that Paschen "had a duty to exercise reasonable care in its supervision, operation and control of the installation process at [the] construction site so as to

prevent injury generally to those engaged in work on [the] construction site and specifically, the Plaintiff's decedent." Plaintiff further alleged that, at the time of the accident, Meza was operating the skid steer loader when his "body harness became entangled with the right drive control of the *** skid steer loader causing him to be thrown to the ground and crushed by [the skid steer loader], which caused him to sustain fatal injuries." The complaint contained additional allegations of specific negligent acts or omissions, including the allegation that Paschen "[i]mproperly operated, managed, maintained and controlled the installation of industrial fencing and gates."

¶ 10 On May 21, 2014, Paschen moved for summary judgment, arguing that, pursuant to section 414 of the Restatement (Second) of Torts, plaintiff could not establish that Paschen owed a duty to Meza. Paschen additionally argued that plaintiff could not prove that Paschen proximately caused Meza's accident. On July 29, 2014, the trial court denied Paschen's motion for summary judgment.

¶ 11 On March 8, 2016, Paschen filed a motion to reconsider. Paschen contended that the trial court had erred in its application of the law on both issues—duty and proximate cause. On May 5, 2016, the circuit court granted Paschen's motion to reconsider and entered summary judgment in its favor. Plaintiff appealed.

¶ 12 II. ANALYSIS

¶ 13 A. Standard of Review

¶ 14 Summary judgment is proper only 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 a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012). The court must strictly construe the pleadings, depositions, admissions, and

affidavits against the movant and liberally construe them in favor of the opponent. *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 49. Because summary judgment is a drastic means of disposing of litigation, it should be granted only when the moving party's right is clear and free from doubt. *Id*. A trial court may deny a motion for summary judgment and later change its position and grant the same motion. *Pence v. Northeast Illinois Regional Commuter R.R. Corp*., 398 Ill. App. 3d 13, 16 (2010).

¶ 15 The purpose of summary judgment is not to try a question of fact, but rather to determine whether a genuine issue of material fact exists. *Adams v. Northern Illinois Gas Co*., 211 Ill. 2d 32, 42-43 (2004). A genuine issue of material fact exists where the material facts are disputed or the material facts are undisputed but reasonable persons might draw different inferences from those undisputed facts. *Carney v. Union Pacific Railroad Co*., 2016 IL 118984, ¶ 25. The nonmoving party need not prove her case at the summary judgment stage, but must present a factual basis that would arguably entitle her to a judgment at trial. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12. Mere speculation, conjecture, or guess is insufficient to survive summary judgment. *O'Gorman v. F.H. Paschen, S.N. Nielsen, Inc*., 2015 IL App (1st) 133472, ¶ 82.

¶ 16 The purpose of a motion to reconsider is to bring to the trial court's attention newly discovered evidence that was not available at the time of the hearing, changes in the law, or errors in the court's previous application of existing law. *Pence*, 398 Ill. App. 3d at 16. We review *de novo* the trial court's grant of summary judgment pursuant to a motion to reconsider. *Id.* (whether court has erred in previous application of existing law is reviewed *de novo*).

¶ 17 B. Whether Paschen Owed a Duty to Meza

¶ 18 A general contractor's liability for injury to an independent subcontractor's employee at a worksite is based on common law negligence principles. *Rangel v. Brookhaven Constructors*,

Inc., 307 Ill. App. 3d 835, 836 (1999). A plaintiff who seeks recovery based on a defendant's negligence 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 caused by the breach. *Carney*, 2016 IL 118984, ¶ 26. Unless a duty is owed, there is no negligence. *Washington v. City of Chicago*, 188 Ill. 2d 235, 239 (1999).

¶ 19 The threshold issue in this case is whether a duty existed, which is a question of law appropriate for a court to decide on summary judgment. *Carney*, 2016 IL 118984, ¶ 26; *Forsythe v. Clark USA, Inc*., 224 Ill. 2d 274, 280 (2007). "In the absence of a showing from which the court could infer the existence of a duty, no recovery by the plaintiff is possible as a matter of law and summary judgment in favor of the defendant is proper. [Citation.]" (Internal quotation marks omitted.) *Carney*, 2016 IL 118984, ¶ 26; accord *Pence*, 398 Ill. App. 3d at 17 (if court finds no duty exists, summary judgment for defendant is proper).

¶ 20 In its motion to reconsider, in support of its argument that it did not owe a duty to Meza, Paschen relied on this court's opinion in *O'Gorman v. F.H. Paschen, S.N. Nielsen, Inc.*, 2015 IL App (1st) 133472. Paschen noted that, in *O'Gorman*, this court had affirmed summary judgment in favor of Paschen, the same defendant in this case and, further, that the subcontracts at issue in *O'Gorman* and the instant case contain identical language. Paschen argued that *O'Gorman* involved indistinguishable evidence, the testimony in both cases confirmed that the subcontractor was free to perform its work in its own way, and, in both cases, Paschen had no notice of the allegedly unsafe work practices or conditions that caused the accident at issue.

¶ 21 More recently—in fact, four months after plaintiff filed her notice of appeal in the instant case—the Illinois Supreme Court issued its opinion in *Carney v. Union Pacific Railroad Co.*, 2016 IL 118984, which clarified the issue of the existence of a duty on the part of one who hires

a subcontractor in the context of a construction-related injury. In *Carney*, the Illinois Supreme Court expressly adopted section 414 of the Restatement (Second) of Torts for negligence cases involving construction-related injuries. *Carney*, 2016 IL 118984, ¶¶ 33-36.

¶ 22 Generally, one who hires an independent contractor is not liable for harm caused by the independent contractor's acts or omissions, because the hiring entity has no control over the details and methods of the independent contractor's work, and, therefore, it is not in a good position to prevent negligent performance. *Carney*, 2016 IL 118984, ¶¶ 31-32. Section 414 provides an exception and states:

> "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).

Thus, pursuant to section 414, where the hiring entity retains *some* control over the independent contractor, the hiring entity may be liable for its *own* negligence. *Carney*, 2016 IL 118984 ¶ 33. Previous appellate court opinions had interpreted section 414 as providing a basis for imposing *vicarious* liability against one who hired an independent contractor. See *Carney*, 2016 IL 118984, ¶ 36 (listing cases.). But the court in *Carney* clarified that section 414 applies only to a hiring entity's direct liability for its *own* negligence. *Id*. ¶¶ 36, 39. In other words, while Paschen might be liable for its own negligence based on its retained control over Industrial Fence or its work, if any, it is clear after *Carney* that, under section 414, Paschen cannot be held vicariously liable for Industrial Fence's own negligence. *Id*. ¶ 39.

¶ 23 The "retained control" basis of liability is limited by comment c to section 414, which explains:

> "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*." (Emphasis added.) Restatement (Second) of Torts § 414 cmt. c (1965).

¶ 24 The court in *Carney* relied on comment c to section 414 in rejecting the defendant's argument that certain provisions in the parties contract (allowing defendant to terminate the contract if it deemed the independent contractor's services to be unsatisfactory; requiring that the independent contractor's work be done in a workmanlike manner to defendant's satisfaction; and giving defendant the right to stop the work or make changes, as the interests of defendant may require) had given the defendant "unfettered control" over the independent contractor there. *Id.* ¶ 46. The court explained that those provisions were merely "part of the general rights reserved to someone, like defendant, who employs a contractor, rather than evidence that defendant retained control over the manner in which work by [that contractor] was performed." *Id.*; accord *Rangel v. Brookhaven Constructors, Inc.*, 307 Ill. App. 3d 835, 838-39 (1999) (even where general contractor retains right to inspect work done, order changes to specifications and plans, and

ensures that safety precautions are observed and work is done in safe manner, no liability will be imposed on general contractor unless evidence shows general contractor retained control over "incidental aspects" of independent contractor's work).

¶ 25 Plaintiff acknowledges *Carney* but argues that, while the opinion "is likely to streamline the analysis of Section 414 cases, it does not effectuate any substantive change in the essential elements to section 414 liability." Plaintiff also argues that *Carney* is factually distinguishable and relies primarily on pre-*Carney* appellate court cases in support of her contention that Paschen had a duty to Meza under section 414. To the extent they are relevant, we will discuss these cases below. But we begin with *Carney*'s blueprint for courts to follow when analyzing the existence of a duty based on section 414.

¶ 26 Pursuant to *Carney*, we "confine our analysis to whether [Paschen] retained control over the work of [Industrial Fence] such that direct liability might attach under section 414." *Id.* ¶ 40. "The issue of a defendant's retained control may be decided as a matter of law where the evidence is insufficient to create a factual question." *Id.* ¶ 41.

¶ 27 1. Contract Between Paschen and Industrial Fence

¶ 28 As the court in *Carney* explained: "The best indicator of whether the defendant retained control sufficient to trigger the potential for liability under section 414 is the written agreement between the defendant and the contractor." *Id.* ¶ 41. Thus, we begin our duty analysis with the written contract between Paschen and Industrial Fence.

¶ 29 Paragraph 1 of the contract describes the work to be done by Industrial Fence:

> "Subcontractor shall perform and furnish all the work, labor, supervision, services, insurance, plant equipment, tools, scaffolds, appliances, materials, and

> all other things necessary for the incorporation into the Project of the work described in Schedule A."

According to Schedule A, the work was "to fabricate, deliver and install all chain link fence, gates, and IDOT spec guardrail as indicated on the contract documents *** in this subcontract agreement."

¶ 30 Paragraph 15, titled "INSPECTION AND DEFECTIVE WORK," addresses the parties' responsibilities regarding Industrial Fence's work:

> "Subcontractor agrees and understands that neither Contractor [Paschen] nor Architect will provide continuous or exhaustive inspection of Subcontractor's Work and that *Subcontractor is fully responsible for the materials, procedures, methods and techniques utilized* and for providing completed Work to the full satisfaction of the Contractor and Architect. Neither failure to inspect the Work nor, upon inspection, failure to uncover defects in the Work shall be deemed acceptance of the Work by Contractor or Architect." (Emphasis added.)

¶ 31 Paragraph 19, titled "SAFETY," states, in relevant part:

> "b) Subcontractor understands and agrees that neither Contractor nor Architect will make continuous or exhaustive inspections to assure Subcontractor's compliance with applicable safety rules, regulations or requirements. *Subcontractor shall be solely responsible to assure the safety of its own equipment, appliances, material, and working conditions, techniques, and procedures, and Contractor is not responsible in any manner for the safety of Subcontractor's Work*. If the Subcontractor fails to correct unsafe procedures, acts or conditions within a reasonable time of notification by Contractor, however,

> Contractor may (but has no contractual obligation to do so) correct the unsafe practice and backcharge the Subcontractor for these costs. Repeated failures to correct unsafe practices may result in the termination of this Agreement. In the event Contractor receives a penalty from OSHA as a result of a violation of OSHA by Subcontractor and Contractor is cited under the multi-employer worksite rule, Subcontractor agrees to defend, indemnify and hold harmless Contractor for the imposition of any fines and/or penalties." (Emphasis added.)

¶ 32 Thus, similar to the contract at issue in *O'Gorman* (which also involved Paschen's subcontract language), as well as the contract analyzed in *Carney*, nothing within the four corners of the contract here established that Paschen retained control over any part of Industrial Fence's work.

¶ 33 2. Whether Paschen's Conduct was at Variance with Written Contract

¶ 34 As the court in *Carney* further explained, even if the agreement between the defendant and the subcontractor provides no evidence of retained control by the defendant, the control may still be shown by evidence that the defendant's conduct was at variance with the terms of the agreement. *Carney*, 2016 IL 118984 ¶ 41, 53. In *Carney*, the court carefully reviewed the record and determined there was no evidence of retained control through conduct, as one of the subcontractor's employees testified that: other individuals directed their work and were in charge; they received no instructions from defendant; they never spoke to anyone from defendant prior to the accident in question; and no representative of defendant was present at the time of the accident. *Id*. ¶ 53-54. And the only individual who had any interaction with a representative of the defendant testified only that he "would come by and 'check out the jobs.' " *Id*. ¶ 55. But,

as the court in *Carney* explained, a "[d]efendant's mere presence at the job site, without more, is insufficient evidence of retained control for purposes of section 414." *Id*.

¶ 35 As Paschen notes, this court in *O'Gorman*, in circumstances similar to this case, also found no evidence of retained control based on conduct at variance with the agreement. *O'Gorman*, 2015 IL App (1st) 133472, ¶ 95. The relevant evidence there showed that Paschen "never directed the manner in which [the subcontractor's] employees performed their work." *Id*. Although Paschen's superintendent observed the subcontractor's workers, it was only to make sure they were on site doing what he needed. *Id*. The subcontractor's owner testified that the Paschen superintendent "did not tell [the subcontractor] how to do its work and did not direct the means and methods of the work." *Id*. We also noted that the subcontractors' employees testified that they did not speak to anyone from Paschen's office and received direction only from the subcontractor's superintendent. *Id*.

¶ 36 We must determine whether the evidence in the record here demonstrates that Paschen's conduct was at variance with the agreement, *i.e.*, whether Paschen, despite the subcontract's language, *actually* retained some degree of control over the manner in which Industrial Fence's work was done such that Industrial Fence was "not entirely free to do the work in [its] own way." Restatement (Second) of Torts § 414 (1965), cmt. c (1965). We have carefully reviewed the evidence in the record, which we describe in detail below, and find no evidence that Paschen's conduct varied from the terms of the agreement it had with Industrial Fence. Thus, there is no evidence in this record that Paschen retained control over Industrial Fence's subcontracted work.

¶ 37 At the time of his accident, Meza was working with two other Industrial Fence employees, Jesus Rodriguez and Baudelio Ortego. The three of them had arrived at the site

together that morning, and their task that day had been to correct a clearance problem with a gate that was dragging and hitting the concrete due to a problem with the overhead steel support beam, which was sagging in the middle. Kevin Brown was the project manager for Industrial Fence who had met with the men at Industrial Fence's shop before they went to the site; Kevin Brown also visited the site that day. All three Industrial Fence employees were deposed.

¶ 38 Baudelio Ortego was working as an apprentice on the day of Meza's accident. He testified that the three men were trying to change the position of the beam and were using the skid steer loader, which also had a pipe welded to the bucket; they were using the pipe to lift the beam. The pipe had been welded to the bucket on the jobsite that day by Meza, with assistance from Rodriguez and him. (Although there was conflicting evidence in the record as to which Industrial Fence employee actual welded the pipe onto the bucket, there is no dispute that using the skid steer loader in this manner was an unsafe practice.)

¶ 39 The crew had arrived at the job site at around 8 or 9 a.m. Meza had operated the skid steer loader with the welded pipe for approximately two hours before the men broke for lunch at noon. Lunch ended at 12:30 p.m., and Meza's accident occurred at 1p.m. Ortego testified that Industrial Fence's supervisor, Kevin Brown, had arrived at 11 a.m. and talked to the three employees about adjusting the gate. Brown left sometime after lunch and was not there when the accident occurred.

¶ 40 Ortego testified that, although he saw one Paschen employee who was present in the area of the site where they were using the skid steer loader that day, Ortego could not recall if the employee spoke to the three men, did not know who that employee was, and could describe him only as a white man, perhaps in his 50s. But Ortego was not certain if that employee had seen the

welded pipe on the skid steer loader, and he also did not know if any Paschen employee had witnessed the accident.

¶ 41 Jesus Rodriguez testified in his deposition through a translator. On the date of Meza's accident, he met with Meza at the Industrial Fence shop at 6 a.m. They spoke to Kevin Brown, who told them that they were going to be putting up a steel cable so that the beam would be straighter, and they would be using a cable jack. Neither Brown nor Meza told him they would be using the skid steer loader to straighten the cable or lift the steel beam.

¶ 42 Rodriguez arrived at the construction site around 7 a.m., and the skid steer loader was already there, but he did not know when it had arrived. Rodriguez started setting up the ladder, provided by Industrial Fence, to enable him to climb up to the cable. Ortego was holding the ladder. At the time, there were three Paschen employees working on concrete about 100 feet away, but he did not speak to any of them before Meza's accident. He had never spoken to any Paschen employee at the project.

¶ 43 Rodriguez stated that, on the day of the accident, all decisions regarding how he and his coworkers would perform their work were determined only by Industrial Fence employees. Rodriguez, who is not fluent in English, testified that he took his orders regarding how and where to do his work from Meza, who was the foreman of the crew that day.

¶ 44 Regarding safety on the job, Rodriguez directed all of his questions to Meza. Although Rodriguez attended one safety meeting run by the water department, it concerned contamination of the soil; there was no discussion about the methods that Industrial Fence would use to tighten the cable or lift the steel beam. Rodriguez also testified that there were inspectors going back and forth, but he did not know whether they worked for the water department or Paschen. According to Rodriguez, these inspectors told them they had to use gloves, safety glasses and hard hats.

¶ 45 According to Rodriguez, Meza was using the skid steer loader at the time of his accident. But Rodriguez also stated that, when the accident happened, he was on the ladder looking up and did not know what Meza was doing below. Rodriguez also testified that he did not see the pipe attached to the bucket until after the accident, did not know how the pipe got onto the bucket, did not know who had attached it, and had no idea how long the pipe was on the bucket before the accident. He also testified that, had he seen Meza operating the skid steer loader with the pipe before the accident, he would have told Meza not to do it, because it was dangerous.

¶ 46 Rodriguez recalled that Kevin Brown came to the construction site before the accident. According to Rodriguez, when Brown arrived, he looked at the job and left. Rodriguez did not speak to Brown at that time but, after Meza's accident, he called Brown and told him to come back.

¶ 47 Kevin Brown, Industrial Fence's project superintendent at the time of Meza's accident, testified that his title was operations manager and his job responsibilities included scheduling the crews, making a materials list and equipment list, having the shop get the materials and trucks ready for the crew, giving the employees the work orders, going out to the jobs and making sure that the employees were doing the installation "in the right place and in the correct method." On the day of Meza's accident, Brown had spoken to Meza and Rodriguez at the shop a little after 6 a.m. about installing the cables and turnbuckles on the sagging overhead beam.

¶ 48 As for Meza's specific job function on the site that day, Brown testified that Meza "was supposed to put some cables on the top of this I-beam that held the overhead gate up and take some turnbuckles out there, attach the cable to the top of the I-beam, and tighten that up to take the sag *** out of the beam so it became level, and the gate would travel consistently across it." Brown also testified that no device was supposed to be used to secure and stabilize the 60-foot

expanse of beam and, instead, his instructions to the crew that day were to go out there and attach guy wires and tighten up the trusses until the beam expanse became level. He testified that he told the crew to do this because it was "just the next step in completing this project."

¶ 49 On the day of Meza's accident, Brown was at the site about 20 minutes. He testified that the men were at lunch when he arrived, and also when he left. Industrial Fence owned the skid steer loader that Meza was operating at the time of his accident. But although Brown had seen the skid steer loader while at the site, he stated that it had been across the street at the time, and he had assumed it was one that belonged to Paschen. Brown testified that after he left the jobsite, Rodriguez called him and told him to come back. When he saw the skid steer loader, he asked Rodriguez why it was there because Brown had not assigned it, and it was not on the equipment list. He also asked Rodriguez why they had a pipe welded to it. According to Brown, Rodriguez told him that he and Meza thought it would be easier to tighten the turnbuckle up on the cable. Brown also testified that Rodriguez told him that he went to a welder in Industrial Fence's shop that morning and had asked him to weld the pipe so the crew could do this task.

¶ 50 Industrial Fence provided training to its employees who operated the skid steer loaders before they went out in the field to use them. Brown stated that inspection of the Industrial Fence equipment, including the skid steer loader, was the sole responsibility of Industrial Fence employees, and was not the responsibility of any other company's employees, including the Paschen superintendent. Brown was not aware of Paschen ever providing the crew with any equipment. He stated that it was the duty of Meza and Rodriguez, both of whom were foremen, to make sure that all members of the Industrial Fence crew were performing work in a safe, suitable, and proper manner, and to determine the safe, suitable, and proper means and methods to perform their work on the date of the accident. Right after Meza's death, Industrial Fence

retrained the employees to make sure that everyone was familiar with the machines and that nothing like this happened again.

¶ 51 Brown testified that Paschen had a superintendent on the jobsite every day whom Brown believed "was in some way monitoring the work of [the Industrial Fence crew] while they were performing their job" at the gate, and that, if there was a problem with the crew or the way they were doing their job, the Paschen superintendent would call Industrial Fence. But Brown had no knowledge of him ever calling anyone.

¶ 52 Brown had spoken to Paschen's superintendent a few times, when he had requested that Brown come out to the site to look at conditions. He had requested that Brown come out to the site on the day of Meza's accident, before the accident, but it was not because of the sagging beam. It concerned a separate issue regarding a larger-than-normal gap at the bottom of the fence, and he wanted to see if there was some way that Industrial Fence could close it with some type of fencing. Brown gave the Paschen superintendent two options on how to close the gap, adding a piece to the bottom of the gate or adjusting the grade. The Paschen superintendent said he would think about it, talk to other people, and let Brown know. The only other time that the Paschen superintendent had called Brown out to the site was to determine what the elevation of some concrete curbs was supposed to be in relation to the gate elevation.[1]

¶ 53 Brown testified that his conversation with the Paschen superintendent regarded the separate issue of the gap and not the beam, but the Paschen superintendent had also asked Brown if the sagging beam would be level when the crew was finished that day. Brown told him yes, and that the sagging should be resolved once the truss cables were tightened up with the

[1] Brown stated that, although Paschen was the general contractor, Industrial Fence was communicating with a person from IHC (Illinois Hydraulic Corporation). But IHC was part of the joint venture, the party to the subcontract, and the party in this case.

turnbuckles. According to Brown, the Paschen superintendent did not express any concerns about the way the Industrial Fence crew was doing its job that day. Brown did not know if the Paschen supervisor was present in his trailer or the area when the work was going on. Nobody told him that the Paschen superintendent was actually present when the crew was using the skid steer loader to support the beam. And the Paschen superintendent had not told him that the skid steer loader was being used in this fashion.

¶ 54 Similar to the testimony of the subcontractor's employees in *Carney*, none of Industrial Fence's employees received any instructions from Paschen on how to do their work; the work was instead directed by Industrial Fence's employees; the crew never spoke to anyone from Paschen before Meza's accident; and no Paschen employee witnessed Meza's accident. While Paschen employees may have been at the jobsite, a defendant's "mere presence at the job site, without more, is insufficient evidence of retained control for purposes of section 414." *Carney*, 2016 IL 118984, ¶ 55. Nothing in the testimony of the Industrial Fence employees shows that Paschen retained any control over Industrial Fence's work, but instead shows that Industrial Fence was solely responsible for the methods, means, and operative details to perform the subcontracted work.

¶ 55 Nothing in the additional evidence in the record showed any conduct at variance with the subcontract that would show retained control by Paschen over Industrial Fence's work. Industrial Fence's president, Miguel Saltijeral, testified that Industrial Fence did not look to Paschen to tell it how to do its work and that Industrial Fence "solely determined what type of equipment to use and what type of work procedures to use when putting in that gate and that I-beam and that fence at the [Project]." There was no evidence whatsoever that anyone from Paschen instructed Industrial Fence's employees on how to perform their work.

¶ 56 In sum, there was no evidence that Paschen's conduct was at variance with the agreement and actually retained control over any part of Industrial Fence's work or instructed them on how to do their work.

¶ 57 3. General Contract Between Paschen and MWRD

¶ 58 Plaintiff argues that *Carney* is distinguishable on the facts. We agree; each case will have its own facts to be considered. We have carefully considered the facts of this case. And the factual distinctions in *Carney* noted by plaintiff are distinctions without a difference. But we briefly address one of these.

¶ 59 Plaintiff notes that Paschen entered into *two* contracts. In addition to the subcontract at issue, Paschen had a contract with the owner, MWRD (the general contract). Plaintiff contends that we must construe the general contract and its provisions as establishing retained control on the part of Paschen over the subcontractors. This court has already rejected that argument. See *O'Gorman*, 2015 IL App (1st) 133472, ¶ 94 (trial court did not err in giving subcontract more weight than general contract; although general contract made defendant responsible for safety of work, subcontract delegated this duty to subcontractor, and general contract did not prohibit delegation). Similarly to *O'Gorman*, the express language of the subcontract discussed earlier delegated responsibility for jobsite safety to Industrial Fence and made it responsible for its own work. Plaintiff has pointed to no provision in the general contract prohibiting such delegation. We conclude that nothing in the general contract establishes any retained control by Paschen over Industrial Fence's work.

¶ 60 The language of the subcontract further supports this conclusion. Paragraph 3 of the subcontract, titled "RELATIONSHIPS," states, in relevant part:

> "The Contractor and Subcontractor shall be mutually bound by the terms of this Agreement and, to the extent that provisions of the General Contract apply to the Work of the Subcontractor, the Contractor shall assume toward the Subcontractor all obligations and responsibilities that the Owner, under the General Contract, assumes toward the Contractor, *and the Subcontractor shall assume toward the Contractor all obligations and responsibilities which the Contractor, under the General Contract, assumes toward the Owner and Architect*." (Emphasis added.)

¶ 61 In sum, nothing in the contract between Paschen and MWRD establishes any retained control by Paschen over the subcontracted work of Industrial Fence.

¶ 62 4. Job Safety Measures

¶ 63 Much of plaintiff's argument that Paschen retained control over Industrial Fence's work rests on contentions regarding job safety measures taken by Paschen. Plaintiff notes that Paschen had project managers and safety technicians who walked the site every day, as well as a safety contractor, Sheffield Safety, that worked alongside them. Plaintiff points to testimony from Paschen employees that they could approach subcontractors about work practices perceived as unsafe and could stop the work.

¶ 64 Here, paragraph 19(b) of the subcontract expressly provided that Industrial Fence "shall be solely responsible to assure the safety of its own equipment, appliances, material, and working conditions, techniques, and procedures, and Contractor is not responsible in any manner for the safety of Subcontractor's Work." Saltijeral testified that this is "a customary and regularly-followed practice for construction sites," and it was "the custom and practice followed on this [Project]." There is no contrary evidence in the record, nor any evidence that Paschen's conduct was at variance with the contractual provisions regarding job safety.

¶ 65 As the court in *Carney* explained, general job safety provisions in the parties' contract are insufficient to impose a duty on the defendant premised on retained control. *Carney*, 2016 IL 118984, ¶ 47. "A general right to enforce safety *** does not amount to retained control under section 414." *Id*. Under section 414, as noted earlier: "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." Restatement (Second) of Torts § 414 cmt. c (1965).

¶ 66 Plaintiff also relies on safety meetings and a jobsite orientation that Industrial Fence workers were required to attend. But this court has explained that "[p]enalizing a general contractor's efforts to promote safety and coordinate a *general* safety program among various independent contractors at a large jobsite hardly serves to advance the goal of work site safety." (Emphasis added.) *Martens v. MCL Const. Corp.*, 347 Ill. App. 3d 303, 318 (2004); accord *Calderon v. Residential Homes of America, Inc.*, 381 Ill. App. 3d 333, 343 (2008). Thus, "the existence of a safety program, safety manual or safety direction does not constitute retained control *per se*." *Martens*, 347 Ill. App. 3d at 318. A section 414 analysis must still be done to determine if the defendant's safety program sufficiently affected the subcontractor contractor's means and methods of doing its work. *Id*.

¶ 67 Plaintiff cites several pre-*Carney* cases, including *Wilkerson v. Paul H. Schwendener, Inc*., 379 Ill. App. 3d 491 (2008), *Moorehead v. Mustang Construction Co*., 354 Ill. App. 3d 456 (2004), and *Bokodi v. Foster Wheeler Robbins, Inc*., 312 Ill. App. 3d 1051 (2000). We find them distinguishable. In *Bokodi*, 312 Ill. App. 3d at 1063, the general contractor "went to great lengths

to control the safety standards at the work site," including employing a site manager, a field superintendent, and a safety manager who held weekly meetings to discuss safety, conducted regular walkthroughs of the site, and required subcontractors to abide by 29 different safety measures. The general contractor "constantly monitor[ed] this work site" and "instruct[ed] the subcontractors' employees to comply with safety standards in even the most minute details." *Id.*

¶ 68 In *Wilkerson*, 379 Ill. App. 3d at 497, the general contractor "retained more than a general right of supervision" in that the subcontractor was contractually obligated to comply with the general contractor's list of 21 safety procedures and to submit a site-specific safety plan, and the minutes from its own safety meetings, for the general contractor's approval. In *Moorehead*, 354 Ill. App. 3d at 460, the general contractor "was responsible for initiating, maintaining, and supervising all safety procedures," and to that end, "initiated a specific safety program," designated an individual whose only role was to investigate safety hazards, and "inspected the site on a weekly basis to ensure compliance with safety standards."

¶ 69 Here, in contrast, Paschen did not give Industrial Fence a list of specific safety measures, procedures, or regulations, nor did it prepare a site specific safety plan that Industrial Fence was required to follow. Paschen did not conduct weekly subcontractor safety meetings, never shut down Industrial Fence's work, and never threatened to shut it down. Paschen had no employee specifically charged with monitoring subcontractor safety.

¶ 70 5. Paschen's Notice of Industrial Fence's Alleged Negligence

¶ 71 There is no evidence that Paschen knew that Meza or other Industrial Fence employees were performing their work negligently (assuming they were negligent). But plaintiff argues that it is irrelevant whether Paschen had actual knowledge of Industrial Fence's alleged negligence.

Plaintiff claims that constructive notice is sufficient to impose liability on Paschen, relying on comment b to section 414, which states:

> "[T]he principal contractor is subject to liability if he fails to prevent the subcontractors from doing even the details of the work in a way unreasonably dangerous to others, if he knows or by the exercise of reasonable care should know that the subcontractors' work is being so done, and has the opportunity to prevent it by exercising the power of control which he has retained in himself. So too, he is subject to liability if he knows or should know that the subcontractors have carelessly done their work in such a way as to create a dangerous condition, and fails to exercise reasonable care either to remedy it himself or by the exercise of his control cause the subcontractor to do so." Restatement (Second) of Torts § 414 cmt. b (1965).

¶ 72 This court has recently explained, however, that the question of constructive notice is irrelevant under *Carney* if the court determines, as a matter of law, that the contractor did not retain control over the subcontractor's work. See *Gerasi v. Gilbane Building Co., Inc.*, 2017 IL App (1st) 133000, ¶ 45 ("When the hiring entity has retained some degree of control over the manner in which the work is done by the subcontractor, comment b of section 414 comes into play."), ¶ 54 ("Because *Carney* found, as a matter of law, that the owner did not retain control over the subcontractor's work, our supreme court was not required to address the issue of notice, *which is relevant only if retained control is found to exist*.") (emphasis added).

¶ 73 We agree with *Gerasi* on this point. Comment b cannot be read in isolation. As comment c to section 414 states: "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." And, as noted, the language of section 414 itself states:

> "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." (Emphasis added.) Restatement (Second) of Torts § 414 (1965).

¶ 74 Thus, the question of constructive notice is irrelevant to our consideration, given our previous conclusion that, as a matter of law, Paschen did not retain control of the work in question.

¶ 75 But even if constructive notice were relevant, there is no evidence of constructive notice in the record. There was no evidence that Meza had used the skid steer loader to lift the beam before the day of his accident. As Paschen notes, on the day of his accident, Meza had used the skid steer loader for a short time, approximately two hours before the accident occurred. As the trial court noted in its ruling, "there is simply no evidence that [Paschen] knew what was going on, that they had any notice of what Meza and his coworker was [*sic*] doing and they had the opportunity to stop it after becoming aware of it."

¶ 76 Because there was no evidence, contractual or otherwise, that Paschen retained control over any part of Industrial Fence's subcontracted work, liability under section 414 cannot be imposed. The court properly entered summary judgment for Paschen on the question of duty.

¶ 77 In view of our disposition on the question of duty, we need not consider plaintiff's argument that the evidence raised questions of fact as to the element of proximate cause.

¶ 78 III. CONCLUSION

¶ 79 For all of these reasons, we affirm the circuit court's judgment.

¶ 80 Affirmed.