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Recent Decisions

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Illinois Supreme Court Rules Utility Owes Consumer a Duty to Warn of Dangerous Product Not in Its Control

Christy Adams v. Northern Illinois Gas Company, 2004 WL 637926 (Ill. S. Ct., April 1, 2004)

Decedent, Janice Adams, lived in a house in Calumet City. On the evening of December 7, 1995, she arrived home, opened the door and stepped inside. The house exploded and was engulfed in flames, causing her death. Following an investigation, it was unanimously determined the explosion and fire was caused by the failure of a flexible brass gas connector that connected the kitchen range to the gas supply. The brand name of the connector was "Cobra."

The plaintiff, one of decedent's daughters, brought a wrongful death action in a two-count complaint. Count II named Northern Illinois Gas Company (NI-Gas) as a defendant. The plaintiff alleged that NI-Gas knew that Cobra brand natural gas appliance connectors were defective and prone to failure resulting in natural gas leaks and explosions. The plaintiff alleged that NI-Gas had a duty to warn its customers, including the decedent, about the existence of these defective products and the dangers of gas leaks, explosions and fires associated with them.

The Cobra Hose Company, which has been out of business since 1979, manufactured the connector. The connector is a corrugated flexible brass tube with threaded brass connectors at each end that connect a gas appliance to the hard pipe gas source. The threaded connectors were fastened to the ends of the corrugated brass tube by a process known as brazing. The compound used in the brazing process is composed of phosphorized brazing alloys containing a substantial amount of phosphorus and a high percentage of copper.

Natural gas, in its original state, is odorless. Consequently, NI-Gas is required by law to odorize natural gas with a sulfur component. When sulfur is added to natural gas, a chemical reaction begins to occur between the phosphorus brazing alloy and the sulfur. This chemical reaction causes the brazed joint to corrode and deteriorate and, over time, the deterioration will cause the brazed connector to fail.

In 1968, the American National Standards Institute (ANSI) revised its standards on gas connectors and banned phosphorus brazing. NI-Gas was aware of this and the danger presented by Cobra connectors. In 1979, the United States Consumer Products Safety Commission informed the American Gas Association (AGA) that Cobra connectors caused a number of fires in homes. NI-Gas is a member company of the AGA. In "Consumer News" notices that NI-Gas sent to its customers in the late 1970s and early 1980s, NI-Gas warned that old connectors could crack, creating an unsafe condition when the appliance is moved. It also warned that certain appliance connectors manufactured prior to 1968 may be unsafe.

NI-Gas was also aware that failed Cobra connectors were determined to have caused many explosions and fires within its service area, including Aurora, Evanston and Rockford. NI-Gas received a specific warning in the 1970's in its Glenwood district office, the district that includes the decedent's home, about brazed connectors causing fires. NI-Gas also instructed its service members on the potential danger of Cobra connectors. When a NI-Gas employee encountered a brazed connector, the employee was required to tag the connector and advise the customer that the connector needed to be replaced as soon as possible. The record reflected NI-Gas had been present in the decedent's home to read the gas meter in the utility room and to check a gas leak related to the installation of a new clothes dryer. There was no evidence in the record that NI-Gas was specifically aware the decedent was using a Cobra connector.

NI-Gas moved for summary judgment contending it did not owe the decedent a duty to warn her the Cobra connector was potentially hazardous because the decedent owned the connector and not NI-Gas. The circuit court granted the motion and the plaintiff appealed. The appellate court initially affirmed the circuit court's decision but then, in a modified opinion, reversed itself. The appellate court held as a matter of law a utility company that has actual knowledge of a dangerous condition associated with the use of its product has a responsibility to its customers to warn them of that danger. The Illinois Supreme Court then allowed NI-Gas' petition for leave to appeal and affirmed the appellate court's decision.

A gas company must exercise the requisite degree of care, which can range from "reasonable" to "high," so that no injury occurs in the distribution of gas while it is under the company's control. Such responsibility is limited to the time the gas is in the company's own pipes. In the absence of notice of defects it is not incumbent upon a gas company to exercise reasonable care to ascertain whether or not service pipes under the control of the property owner or the consumer are fit for the furnishing of gas.

The common law rule of no duty of a gas company with respect to consumer's pipes or fittings is premised on the gas company's lack of knowledge or notice of a gas leak. Where it appears, however, a gas company has knowledge gas is escaping in a building occupied by one of its consumers, it has a duty to shut off the gas supply until the necessary repairs have been made, even though the defective pipe or apparatus does not belong to the company and is not in its charge or custody. The knowledge that would impose such a duty is not limited to actual knowledge, but may include constructive knowledge or notice. It is sufficient if the gas company received facts, which would have made the defects known to an ordinary prudent person. This duty is applicable not only to actual gas leaks, but also to defects.

There is no dispute NI-Gas had actual knowledge of the danger related to Cobra connectors. It was aware the sulfides in the gas corroded brazed connectors, ultimately causing the connectors to leak gas. The only real question was when the connector would fail. Based on its superior knowledge and the fact it helped to create the dangerous condition, the Illinois Supreme Court held that NI-Gas owed a common law duty of reasonable care with respect to the brazed connectors. Since the plaintiff during oral argument expressly stated the extent of NI-Gas' duty of reasonable care should be to warn its customers of the dangers in question, the court limited its holding to the warning issue. It did not express a specific opinion regarding a duty to inspect, but the body of the opinion suggests the distinct possibility it may find such a duty in the right case. Finally, the court ruled the public utility tariff filed by NI-Gas with the Illinois Commerce Commission did not preclude the plaintiff's cause of action.

First District Affirms *Rangel* Analysis

Martens v. MCL Construction Corporation, 2004 WL 369143 (Ill. App. 1st Dist. Feb. 27, 2004)

The plaintiff was an ironworker employed by F.K. Ketler Company. He fell from a steel beam and sustained injuries. He then filed suit against MCL Construction Corporation, the construction manager, and Shelco Steel Works, Inc., a subcontractor hired to fabricate and erect the steel for a multi-story condominium. Shelco entered into a sub-subcontract with Ketler to perform the actual steel erection work.

MCL did not perform any construction work. Rather, it hired qualified, union-licensed contractors who were in charge of how they performed their own work. MCL supervised only its own work, not the work of the subcontractors. MCL's contract with the owner stated it had responsibility for and had control over "construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work . . . unless the Contract Documents give other specific instructions concerning these matters." MCL was also responsible for initiating, maintaining and supervising all safety precautions and programs relative to the work.

According to the contract between MCL and Shelco, Shelco was responsible for providing materials, equipment and labor with proper supervision of the steel fabrication and erection. Shelco excluded responsibility for OSHA safety cables from the contract. Pursuant to its contract with Shelco, Ketler was responsible for furnishing the required field labor and facilities to unload and erect structural steel in accord with the plans and specifications. Ketler was also responsible for OSHA safety cables. All applicable OSHA requirements were part of the subcontract along with the American Institute of Steel Construction (AISC) Code of Standard Practice. According to the AISC Code, the fabricator was not responsible for erection safety if others erected the structure. Ketler provided a safety manual to MCL describing its fall protection procedures and stating its foreman had the greatest burden of responsibility for putting the safety rules into practice. The plaintiff, an ironworker with 22 years of experience, took all his directions from Ketler foremen.

MCL had a project manager on site on a daily basis. It also had a safety director who visited this site weekly. Through these individuals, MCL could make safety recommendations and impose fines, but they could not stop the work. MCL's project manager ran progress and safety meetings on a regular basis on site. When he observed ironworkers walking on beams without tying off, he discussed this with a Ketler foreman. Shelco did not have a regular presence on site. Its project manager visited the jobsite for a couple of hours once a week. It relied on Ketler as the expert in steel erection and did not inspect Ketler's work. Shelco's project manager could not supervise the ironworkers or tell them how to do their job.

On the day of the accident, the plaintiff fell from a beam on the seventh floor of the structure to the fifth floor where decking was in place. The plaintiff had a safety line with him but was not tied off because he had to move freely as part of the job. The Ketler safety manual provided that those "working aloft on skeleton steel shall tie off their safety lines except when moving from one point to another." Ketler had no tie off requirement of its own and simply followed the OSHA and union rules regarding ironworkers tying off at heights more than two floors or 25 feet above a deck. Because the plaintiff was working two floors and less than 25 feet above the fifth floor decking, there was neither a requirement nor a need for him to tie off. Ketler's foreman supervised the plaintiff's work and at no time consulted with anyone from MCL or Shelco regarding the operative details of that work.

MCL and Shelco filed motions for summary judgment arguing that they lacked a duty to the plaintiff as they did not retain sufficient control over Ketler's work. Those motions were granted and the plaintiff appealed. The appellate court affirmed.

As a general rule, one who employs an independent contractor is not liable for the acts or omissions of the latter. The rationale for the general rule is that a principal generally does not supervise the details of an independent contractor's work and thus, is not in a good position to prevent negligent performance. The essence of employment is that the employee submits to the employer's right to monitor and direct the details of the work in exchange for wages. An independent contractor's

employees are compensated for the risks of their employment by a combination of wages, benefits and entitlement to workers' compensation in the event of an accident. Because the principal pays for that compensation indirectly by the contract price, the principal is motivated to ensure safe working conditions to reduce contract costs and contingent liability if the contractor fails to carry workers' compensation insurance and pay those benefits itself.

An exception to the general rule that a principal is not liable for the acts or omissions of an independent contractor, is set forth in Section 414 of the Restatement (Second) of Torts. Under this exception, one who entrusts work to an independent contractor, but 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 its failure to exercise his control with reasonable care. The demarcation between retained control and the lack thereof is not clear-cut. When a principal contractor entrusts a part of the work to subcontractors but superintends the entire job through a foreman, the principal contractor is subject to liability if he (1) fails to prevent the subcontractors from doing even the details of the work in a way unreasonably dangerous to others, (2) knows or should know the work was being so done, and (3) had the opportunity to prevent it by exercising his retained power of control. However, the contractor is not liable where 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. There must be such a retention of right of supervision that the contractor is not entirely free to do the work in his own way.

Here, the court found that the plaintiff failed to raise a question of fact on whether MCL or Shelco the retained a right of control over Ketler or exercised sufficient supervision or operational control over Ketler to be held liable. The court rejected the plaintiff's argument that the defendant's contractual relationship created an issue of retained control. The court found the contract between the owner and MCL established only that MCL reserved a general right to control the work. Although MCL was responsible for initiating and supervising its safety program, the court refused to equate those safety responsibilities with control over the means and methods of Ketler's steel erection work since Ketler maintained contractual control over the supervision and safety of its ironworkers. In its discussion of the contracts, the court was critical of the Fourth District Appellate Court's decision in *Moss v. Rowe Construction Co.*, 344 Ill. App. 3d 772 (2003).

The court further found that the plaintiff failed to establish the defendants supervised Ketler's work or maintained and extensive work-site presence. Shelco simply did not have a regular presence on the jobsite. Similarly, MCL's safety director visited the site only twice a week, although its project manager was onsite on a daily basis. Although the Shelco and MCL representatives could raise safety concerns to Ketler's foremen, they could not stop the work or instruct or supervise the ironworkers. Moreover, there was no evidence that the iron erection work was done in an unreasonably dangerous manner where the plaintiff was working on an interior bay and complying with the OSHA tie-off standard, the ironworker standards, MCL's and Ketler's safety manuals, and the instructions and supervision of Ketler's foremen.

The court rejected the plaintiff's assertion that the central issue was the defendants' ability to affect worker safety. Instead, the court opined the central issue is retained control of the independent contractor's work, whether contractual, supervisory, operational, or some mix thereof. The party who retains control is the logical party upon whom to impose a duty to ensure worker safety. Penalizing a general contractor's efforts to promote safety and coordinate a general safety program among various independent contractors at a large jobsite hardly serves to advance the goal of work site safety. A party who retains some control over the safety of the work has a duty to exercise that control with ordinary care. Nevertheless, the existence of a safety program, safety manual or safety director does not constitute retained control *per se;* the court must still conduct an analysis pursuant to Section 414.

The court recognized, however, that if a defendant's safety program sufficiently affected a contractor's means and methods of doing its work, then that program could bring the defendant within the ambit of the retained control exception.

Second District Appellate Court Limits Fireman's Rule to Negligence Claims Only

Randich v. Pirtano Construction Co., 346 Ill. App. 3d 414, 804 N.E.2d 581, 281 Ill. Dec. 616 (2d Dist. 2004)

The defendants in this case were construction contractors. On April 29, 1999, they were working for Western Cable Communications installing underground television cable along a public utility easement granted to Western in Romeoville, Illinois. The defendants' employees laid the cable underground through the use of a directional boring machine. During this work, a natural gas main was punctured. Northern Illinois Gas Company ("NICOR") employees and members of the Lockport Fire Protection District were dispatched to the scene. The plaintiff, a member of the LFPD, was in the vicinity of the leaking gas when it was ignited by an unknown source and was injured in the resulting explosion.

The plaintiff filed a complaint alleging negligence and willful and wanton misconduct on the part of the defendants. The plaintiff's negligence claim alleged the defendants failed to determine the location of the underground gas mains where they were working, to properly expose the gas main by hand digging before boring into the ground, or to arrange with NICOR in advance to turn off the gas prior to digging. The willful and wanton claim set forth the same general facts but added the allegation that the defendants acted with actual knowledge that a gas main was located within the utility easement where the defendants were conducting their drilling activities. The trial court granted the defendants' motion to dismiss, and dismissed the claims on the ground the fireman's rule prohibited plaintiff's cause of action. The plaintiff asserted on appeal, *inter alia,* that the defendants could not avail themselves of the fireman's rule because the rule did not bar actions based on willful and wanton misconduct and the defendants are not considered owners or occupiers of Western's utility easement.

The court noted that there was conflicting authority in Illinois as to whether the fireman's rule bars a cause of action based on willful and wanton misconduct, and then traced the history of the rule from its adoption in Illinois in 1892 through the present. The current rule provides that while a landowner owes a duty of reasonable care to maintain his property so as to prevent injury occurring to a fireman from a cause independent of the fire, he is not liable for negligence in causing the fire itself. Accordingly, a firefighter can recover for injuries that result from an act unrelated to the specific reason he was summoned to the scene, but not from negligent acts that cause the emergency. This rule begs the question of whether a fireman can recover for willful and wanton misconduct that causes an emergency. The court pointed out that in 1975 the Third District held that a fireman may recover where the injuries were caused by the willful and wanton misconduct of the owner or occupant of the premises where the fire occurred. However, in 1984 the First District held that a homeowner was not liable for willful and wanton misconduct that caused the fire in question.

The Second District rejected the contention that prior case law erected a wall separating recovery for willful and wanton misconduct between independent causes of harm and acts that caused the emergency itself. In the court's view, the decisions of the Illinois Supreme Court do not create a bar to claims of willful and wanton conduct when they related to the cause of the emergency. Moreover, the court found that the current trend in the law favored amelioration of the harsh effects of the rule. Therefore, the court found that the fireman's rule is as follows: While an owner or occupier owes a

duty of reasonable care to maintain his property so as to prevent injury occurring to a fireman from a cause independent of the fire, he is not liable for negligence in causing the fire itself. However, the immunity of the fireman's rule does not protect the defendant whose willful and wanton misconduct created the emergency or danger that caused injury to a fireman. The court therefore reversed the trial court's dismissal of the plaintiff's willful and wanton claim.

The plaintiff also argued on appeal that the defendants' status as contractors working on behalf of the landowner precluded them from availing themselves of the protections of the fireman's rule. The court agreed that in order for someone to be an occupier of land, he must occupy the land with the intent to control it, but disagreed with the plaintiff's conclusion that the defendants did not fit within that description. Under Section 383 of the Restatement (Second) of Torts, one who does an act or carries on an activity upon land on behalf of the possessor is subject to the same liability, and enjoys the same freedom from liability, for physical harm caused to others upon and outside of the land as though he were the possessor of the land. Here, in accordance with Section 383, the defendants were carrying on their drilling activity to lay cable within the utility easement on behalf of Western, the possessor of the land, and thus share the same freedom from liability as that entity. Accordingly, the court concluded that the defendants come within the scope of the protections of the fireman's rule.

Parent Entitled to Recover Reasonable Value of Services Rendered to Child Injured as Result of Defendant's Negligence, But Not Lost Wages

Worley v. Barger, 2004 WL 692673 (Ill. App. 5 Dist., March 31, 2004)

Kelli Worley is the mother and custodial parent of her minor child, Kelly Barger. On June 28, 1999, Kelly Barger was a passenger in an automobile operated by the defendant, Kara Barger. The automobile left the road and overturned, resulting in injuries to Kelly. A settlement was reached on behalf of Kelly against the defendant. After the settlement, the plaintiff, Kelli Worley, filed a complaint attempting to recover for lost wages she claimed to have sustained in order to provide care for Kelly as a direct result of the negligence of the defendant. The defendant filed a motion to dismiss pursuant to Section 2-619 of the Code of Civil Procedure claiming the defendant owed no duty to the plaintiff that would allow her to collect the claimed lost wages. After a dismissal and the filing of an amended pleading, the trial court entered an order finding that the plaintiff's amended complaint did not state a cause of action. The plaintiff appealed.

Although the motion to dismiss was filed as a Section 2-619 motion, the court chose to analyze it as a motion based on Section 2-615, since the motion challenged the legal sufficiency of the complaint. At the outset, the court stated that there was surprisingly little case law addressing the issue of whether a parent has a right to recover the wages lost while caring for a child who was injured as a result of a defendant's negligence. However, it noted it was well established that a parent is allowed to recover the child's loss of earnings and medical and caretaking expenses during the child's minority, and cited the Comment to Illinois Pattern Jury Instruction 30.08, which states the loss of earnings and medical caretaking expenses during the child's minority are recoverable by the parents in actions for damages arising out of an injury to an unemancipated minor. The court also cited to 1897 and 1899 appellate opinions in support of its conclusion.

Section 703 of the Restatement (Second) of Torts provides that one who is liable to a minor child for bodily harm is subject to liability to the parent who is under a legal duty to furnish medical treatment and for any expenses reasonably incurred or likely to be incurred for the treatment during the child's minority. According to Comment *g* of the Restatement, medical expenses may include the

reasonable value of services of a parent who misses work to care for the child. In *Doe v. Montessori School of Lake Forest*, 287 Ill. App. 3d 289 (2nd Dist. 1997), the appellate court determined that although parents do not have a primary cause of action against a defendant for injuries to their child, it was universally recognized that parents may maintain an action in their own right for any impairment of parental rights caused by the injuries, particularly for any pecuniary losses suffered as a result of the injuries. The court also cited to cases of other jurisdictions in support of its conclusion that a parent has his or her own cause of action for the reasonable value of such caretaking services. Since a minor plaintiff would be entitled to recover for such damages, there is no valid reason that a parent could not do so.

The court, however, rejected the plaintiff's request for loss wages, finding that it would insert a level of unforeseeability that is not necessary in order for a plaintiff to receive a reasonable recovery for the care of the minor child.

Seventh Circuit Questions Validity of Northern District Local Rule On Removal

Rubel v. Pfizer, Inc, 361 F.3d. 1016 (7th Cir. 2004)

Janet Wrobel filed a state court action complaining that the defendants had improperly promoted a prescription drug for off-label uses and sought restitution of the amount she had paid for the drug, an injunction forbidding alleged improper promotion of the product, disgorgement of all profits made from product sales, punitive damages and national class certification. Neurontin was the medication involved. The complaint did not attempt to estimate the amount in controversy.

The defendants removed the case to federal court asserting diversity jurisdiction. The notice of removal asserted in conclusory fashion that the amount in controversy exceeded $75,000. The court noted that while it is certainly plausible that the amount in controversy exceeded $75,000, the defendants did not attempt to quantify the losses to which it would be exposed, and the case was remanded back to state court. In particular, the defendants failed to comply with the Northern District of Illinois' local rule 81.2(a), which requires a notice of removal to include: (1) a statement by each of the defendants that it is his, her or its good faith belief that the amount in controversy exceeds $75,000 and (2) an acknowledgement (or a refusal to deny) from at least one plaintiff in the action that the amount in controversy exceeds $75,000. The local rule also states:

> Where the defendant or defendants do not include the statement required by paragraph (1) of this rule, or do not comply with one of the alternatives described in paragraph (2) of this rule, the action will be subject to remand to the state court for failure to establish a basis of federal jurisdiction.

The defendants appealed the district court's remand. The Seventh Circuit dismissed the appeal, stating that 28 U.S.C. Section 1447(d) does not permit an appeal of a district court's remand when it is based on a defect in the removal procedure or a lack of subject matter jurisdiction. However, the court did seem to call into question the validity of Local Rule 81.2 and suggested it should be considered by the Judicial Counsel of the Seventh Circuit. The court stated that the Northern District of Illinois did not comply with 28 U.S.C. Section 2071(d) by presenting the new rule to the Counsel after it was promulgated in 1997. It also failed to respond to the Circuit Executive's request for further information on the rule, which was sought in May of 2000. Accordingly, the court stated that the validity of the rule has yet to be properly evaluated.

Also of note is the court's statement that although the rule initially requires removing parties to submit both the defendants' statement that the amount in controversy exceeds the jurisdictional amount and at least one plaintiff's acknowledgement of that fact, the final sentence of the rule, set forth above, implies that either will suffice. Accordingly, even if no plaintiff concedes the stakes exceed $75,000 or refuses to accept a cap on recovery, a defendant can satisfy the rule by supplying a statement by each of the defendants that the amount in controversy exceeds the jurisdictional amount.

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