

55.01 Construction Negligence--Work Entrusted To Another

A[n] [owner] [contractor] [other] who entrusts work to a [subcontractor] [contractor] [other] can be liable for injuries resulting from the work if the [owner] [contractor] [other] retained some control over the safety of the work and the injuries were proximately caused by the [owner's] [contractor's] [other's] failure to exercise that control with ordinary care.

Notes on Use

This instruction should be given as an introduction to the subject of construction negligence.

Comment

For the relevant cases see: *Jones v. DHR Cambridge Homes, Inc.*, 381 Ill.App.3d 18, 885 N.E.2d 330, 319 Ill.Dec. 59 (1st Dist. 2008); *Diaz v. Legat Architects, Inc.*, 397 Ill.App.3d 13, 920 N.E.2d 582, 336 Ill.Dec. 373 (1st Dist. 2009); *Calloway v. Bovis Lend Lease, Inc.*, 2013 IL App (1st) 112746, 995 N.E.2d 381, 374 Ill.Dec. 242. *But see Ramirez v. FCL Builders, Inc.*, 2014 IL App (1st) 123663, 6 N.E.3d 193, 379 Ill.Dec. 116; *Lee v. Six Flags Theme Parks, Inc.*, 2014 IL App (1st) 130771, 10 N.E.3d 444, 381 Ill.Dec. 359.

In addition, see *Restatement (Second) of Torts* § 414 (West 2000), and the Introduction to this section.

The use of the IPI 55.00 Series instructions has been upheld in *Jones v. DHR Cambridge Homes, Inc.*, 381 Ill.App.3d 18, 885 N.E.2d 330, 319 Ill.Dec. 59 (1st Dist. 2008); *Diaz v. Legat Architects, Inc.*, 397 Ill.App.3d 13, 920 N.E.2d 582, 336 Ill.Dec. 373 (1st Dist. 2009) and *Calloway v. Bovis Lend Lease, Inc.*, 2013 IL App (1st) 112746, 995 N.E.2d 381, 374 Ill.Dec. 242.

In *Jones v. DHR Cambridge Homes, Inc.*, 381 Ill.App.3d 18, the defendant general contractor appealed, in part, the trial court's refusal to give a non-pattern jury instruction that had been patterned on the holding from *Martens v. MCL Constr.*, 347 Ill.App.3d 303, 807 N.E.2d 480 (1st Dist. 2004). See *Jones*, 381 Ill.App.3d at 37. The non-pattern jury instructions proposed by the defendant general contractor replaced "safety" with "the means and methods or operative detail" in IPI 55.01-55.02.

In upholding the trial court's denial to give the non-pattern instructions, the *Jones* court rejected the general contractor's argument that the construction negligence instructions no longer reflect the common law on construction negligence. *Jones*, 381 Ill.App.3d at 38. The *Jones* court stated that the *Martens* court's citation to the pattern instructions on construction negligence did not suggest that the court intended its decision to mean that the pattern instructions no longer reflected an accurate statement of the law. *Id.* at 39-40. The court further noted that the *Martens* court referred to IPI 55.02 (2005) ("A party who retains some control over the safety of the work has a duty to exercise that control with ordinary care.") without criticism. *Id.* at 37-38.

In *Diaz v. Legat Architects, Inc.*, 397 Ill.App.3d 13, 920 N.E.2d 582, 336 Ill.Dec. 373 (1st

Dist. 2009), defendant Boller appealed the trial court's refusal to give non-pattern jury instructions. The non-pattern jury instructions proposed by the Defendant replaced "safety" of the work with "manner" in which the work was done in IPI 55.01-55.03. Defendant further objected to the giving of IPI 55.04. *Diaz*, 397 Ill.App.3d at 37-39.

Boller tendered a modified IPI 55.02 (2006), which defined "retained control" using the language from Comment C of the *Restatement (Second) of Torts* § 414 as follows:

"A party who retained some control over the manner in which the work is done, has a duty to exercise that control with ordinary care.

When I use the words, 'retained control' the party must have retained at least some degree of control over the manner in which the work is done. To be liable, a party must have more than 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 a right of supervision that the contractor is not entirely free to do the work his own way."

Diaz, 397 Ill.App.3d at 38.

The Appellate Court rejected defendant's argument that the IPI instructions on construction negligence do not accurately state the law because they failed to qualify the term "some control over the work." The Court concluded that "the IPI construction negligence instructions continue to reflect an accurate statement of the law." *Id.* at 39.

In *Calloway v. Bovis Lend Lease, Inc.*, 2013 IL App (1st) 112746, 995 N.E.2d 381, 374 Ill.Dec. 242, Defendant Bovis claimed that the trial court abused its discretion when it gave the jury the IPI 55.00 (2006) Series instructions. The court noted that the instructions are based upon § 414 of the *Restatement* and informed the jury what plaintiffs had to prove in order for Bovis to be found liable. Plaintiffs had to prove that Bovis retained some control over the safety of the work and that Bovis acted or failed to act in a number of ways, including failing to stop Junior and Senior from working in the unprotected trench. The court held that the evidence supported giving the IPI 55.00 (2006) Series instructions and that the trial court did not abuse its discretion by doing so. *Calloway*, 995 N.E.2d at 419-20.

Recently, in 2014, the use of IPI 55.01 was challenged in *Ramirez v. FCL Builders, Inc.*, 2014 IL App (1st) 123663, 6 N.E.3d 193, 379 Ill.Dec. 116 and *Lee v. Six Flags Theme Parks, Inc.*, 2014 IL App (1st) 130771, 10 N.E.3d 444, 381 Ill.Dec. 359.

In *Ramirez v. FCL Builders, Inc.*, 2014 IL App (1st) 123663, 6 N.E.3d 193, 379 Ill.Dec.116, the Defendant argued that it was error to give IPI 55.01. The court stated that the language in IPI 55.01 requiring only that the contractor retain "some control" over the safety of the work is not an accurate statement of the law as language in § 414 of the *Restatement (Second) of Torts* states that the section applies when one who entrusts work retains "the control" of any

part of the work. The court opined that the “use of the phrase ‘the control,’ then, implies that there is only one person or entity exercising control over a part of the work, something that is not true of the pattern instruction's requirement of ‘some control.’” *Ramirez*, 6 N.E.3d at 225-26.

The court reached this opinion without citation to any prior precedent or reference to IPI 55.04, which reads “One or more persons may have some control over the safety of the work. Which person or persons had some control over the safety of the work under the particular facts of this case is for you to decide.”

The court further concluded that the IPI language does not include the explanation of "retained control" found in the Comments to § 414. The court quoted Comment C in support of its rejection of the use of the “some control” language of IPI 55.01, but in its analysis and reasoning it omitted and did not comment on the first sentence of Comment C which reads “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.” *Restatement (Second) of Torts* § 414, cmt. c (emphasis added).

The court acknowledged the correctness of the comments of the IPI committee concerning “safety” contained in the Introduction to the 55.00 Series instructions, stating:

The committee's statement that "[i]t would appear that the ability to stop unsafe work and not permit it to be resumed until done to the satisfaction of the controlling entity" would bring the contractor under the purview of section 414 is likely an accurate statement of the law because, under that scenario, the contractor would have the power to affect the methods by which the subcontractor alleviated the safety problem. See, e.g., *Calloway*, 2013 IL App (1st) 112746, [995 N.E.2d 381, 374 Ill.Dec. 242] (general contractor's authority included right "to stop any work that they saw being done in an unsafe manner and to direct that the work be done in a different manner"); *Bokodi v. Foster Wheeler Robbins, Inc.*, 312 Ill.App.3d 1051, 1063, 728 N.E.2d 726, 245 Ill.Dec. 644 (2000) (general contractor's authority included right to "shut down the work of the subcontractors until a safety breach was alleviated to defendants' satisfaction").

Ramirez, 6 N.E.3d at 225.

Despite the court’s statement that IPI 55.01 is not an accurate statement of the law, the court held that the issuance of the improper instruction did not result in serious prejudice and thus was not reversible error. *Id.* at 227.

In *Lee v. Six Flags Theme Parks, Inc.*, 2014 IL App (1st) 130771, 10 N.E.3d 444, 381 Ill.Dec. 359, the court agreed with the reasoning of *Ramirez v. FCL Builders, Inc.*, 2014 IL App (1st) 123663, 6 N.E.3d 193, 379 Ill.Dec.116, which held that IPI 55.01 does not accurately state the law of construction negligence.

Comment approved January 2015.