

2016 IL App (1st) 152462-U

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THIRD DIVISION
June 22, 2016

NO. 1-15-2462

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

WILLIAM WOJCIK,)	
)	Appeal from the
Plaintiff-Appellant,)	Circuit Court
)	of Cook County,
v.)	Illinois.
)	
IHC CONSTRUCTION COMPANIES, LLC,)	No. 10L8055
and INDEPENDENT MECHANICAL INDUSTRIES INC.,)	
)	The Honorable
Defendants-Appellees.)	Larry Axelrood,
)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Mason and Pucinski concur in the judgment.

ORDER

- ¶ 1 Held: Summary judgment affirmed where plaintiff, an employee injured on a construction worksite, failed to raise a genuine issue of material fact as to retained control by general contractor and subcontractor. Affirmed.
- ¶ 2 Plaintiff William Wojcik appeals from the grant of summary judgment in favor of defendants IHC Construction Companies, LLC (IHC) and Independent Mechanical

Industries, Inc. (IMI) in a suit brought in negligence to recover for an injury sustained while working on a construction site. On appeal, plaintiff contends the trial court erred in granting summary judgment because genuine issues of material fact remain regarding whether defendants breached their duties to ensure that necessary material handling equipment was provided at the worksite and whether defendants breached their duty to properly coordinate and sequence the mechanical work at deliveries to the worksite. For the following reasons, we affirm.

¶ 3

BACKGROUND

¶ 4

The following facts and procedural history are taken from depositions and pleadings below. The accident from which this cause stems occurred at a worksite at the Metropolitan Water Reclamation District of the Greater Calumet project site at 400 East 130th Street in Chicago (the worksite) in November 2007. IHC was the general contractor for the project. It had subcontracted IMI to handle the mechanical installations for the project, and IMI had subcontracted with Jameson Sheet Metal (Jameson) to fabricate and install heating and ventilation equipment for the project. Plaintiff was employed by Jameson to fabricate and install heating and ventilation equipment at the worksite. Plaintiff suffered a back injury on November 7, 2007, when attempting to unload a heavy object from a flatbed truck.

¶ 5

In November 2011, plaintiff filed a two-count first amended complaint against defendants seeking damages for injuries sustained while performing construction work at the worksite. Count I is directed at IHC, and count II is directed at IMI. Both counts sound in negligence.

¶ 6

Count I alleges that, although IHC had a duty of ordinary care to provide a safe jobsite for plaintiff, IHC was negligent in that it failed to implement its own safety rules for the site;

failed to enforce its own safety rules for the site; failed to enforce its own safety rules for material handling for the site; failed to stop IMI's work regarding unsafe material handling when it knew or had reason to know that the unsafe acts, means and methods of material handling were hazardous to the health and safety of the workers; and failed to stop Jameson's work when IHC knew or had reasons to know that the unsafe acts, means and methods of material handling were hazardous to the health and safety of the workers.

¶ 7 Count II alleges that, although it had a duty of reasonable care to provide a safe work place, safe work conditions, safe work surface, and safe material handling equipment for plaintiff, IMI was negligent in that it failed to provide a safe work place; failed to provide safe work conditions; failed to provide safe work surfaces; failed to remove and eliminate unsafe work conditions; failed to stop unsafe work practices and material handling procedures which were known to be dangerous to the health and safety of the workers, including plaintiff; failed to provide proper and safe material handling equipment; failed to provide correct, proper and safe industrial trucks, lifts and other proper equipment for the Jameson work in progress when they knew, or should have known that working on site without such safe material handling equipment was unsafe for all Jameson employees on the site; authorized and approved work by Jameson to go forward without safe equipment when they knew or should have known that such authorization and approval put Jameson workers in harm's way, and created and maintained unsafe worksite conditions; and violated provisions of accepted and standard worksite safety practices, provisions of the Restatement of Torts, and provisions of the Associated General Contractors of America by failing to have present on site the required equipment to complete their jobs safely.

¶ 8 In his deposition, plaintiff testified he was hired by Jameson in June 2005. Most of his time with Jameson was spent driving and making deliveries for the company as well as working in the shop cutting insulation and "other things of that nature." Although plaintiff never reached the level of journeyman while working for Jameson, he did become a journeyman sheet metal worker in 2011. When he worked "in the field," he would lift things, move things around, and follow the journeyman's instructions on the worksite. When on the worksite, including at the Calumet site, he would take direction from the Jameson journeymen who were on the project. He testified that the main journeymen at the Calumet site were Wade Mitchell and John Kapidis. Plaintiff never read the contract between IMI and Jameson, as it was not his job to do so. Plaintiff was never involved in any conversations between IHC or IMI regarding work on the Calumet project, but he did overhear conversations on occasion regarding "the job in general, sheet metal, pipe fitting, different things, schedules." He was unable to identify anybody from IMI who had communications with Jameson on the project, but could describe the physical characteristics of some IMI stick welders and pipe fitters. Plaintiff assumed IHC had meetings with Jameson on the Calumet project, but admitted he had no actual personal knowledge that these meetings occurred. On the day of the injury, plaintiff overheard a conversation between a person he believes was an IHC supervisor, Jameson acting foreman Wade Mitchell, John Kapidis, and an individual from IMI.

¶ 9 On the day of the injury, plaintiff was working as a second-year apprentice to become a journeyman sheet metal worker. He drove a box truck to the Calumet site to make a delivery. He was instructed to stay on the site and to report to Mitchell for a flat bed delivery. Plaintiff testified his "day-to-day boss at Jameson," Jim Huffman instructed him to

"tak[e] the box truck out, meet Mitchell and Kapidis. There's going to be a delivery of elbows, stay on-site and report to Wade." Jameson did not provide plaintiff with instructions regarding lifting prior to the injury. Plaintiff manually loaded the box truck prior to delivery, and he expected to unload it manually once at the worksite.

¶ 10 Plaintiff testified Jameson had hired a separate trucking company to deliver stainless steel elbows by flatbed truck. The flatbed truck had not yet arrived when plaintiff got to the worksite in the box truck. Kapidis, Mitchell, and plaintiff unloaded the box truck together. The flatbed truck arrived while they were doing so, and parked close to the box truck. Kapidis and Mitchell discussed the "best way" to unload the steel elbows from the flatbed truck. Plaintiff testified the conversation included him "to a certain extent." No other individuals were included in the discussion regarding how to move the steel elbows. He explained that "the elbows are bolted together *** so [Kapidis and Mitchell] had to go up [on the flatbed] and take the nuts and bolts off." Plaintiff estimated the elbows were 6 to 7 square feet in size and weighed over 200 pounds each. The flatbed itself was approximately four feet off of the ground.

¶ 11 After unbolting and unstrapping the elbows, Kapidis and Mitchell discussed how to move the steel elbows off of the truck. They looked around the worksite to see if there was a forklift onsite, but did not find one. Plaintiff agreed that he did not know of anybody denying Jameson the ability to use a forklift, and explained that there just was not one on the site on the day in question. Plaintiff testified Kapidis and Mitchell decided to "try to go ahead and [manually] move the elbow closer to the edge of the flatbed," meaning the back end of the flatbed. Plaintiff climbed up on the back of the flatbed truck to push from there,

and Kapidis and Mitchell stayed on the ground, and attempted to move the elbow from there. He testified Mitchell instructed him:

"[PLAINTIFF:] A. *** What do you want me to do. Go up there. What are we going to do. We're going to try to move it. I had my feet there on the flatbed. It's a typical flatbed, wooden planks there. I had my hands on the elbow. He says, Okay, we're going to push here. So I push [with both hands] and I hear a pop [in my lower back.]"

As soon as he heard and felt his back pop, he informed Mitchell, the on-site foreman, that he hurt his back. Plaintiff, Mitchell, and Kapidis continued working and successfully moved the two steel elbows off of the flatbed truck by hand. The steel elbows were then moved to another truck and up to the mezzanine level of the building. This was apparently accomplished, after a determination between IHC and Jameson, by assistance from IMI workers who removed a sheet metal accessory known as a louver and delivered the elbows through an opening created when the louvers were removed.

¶ 12 Plaintiff explained that, at the time he was instructed to push the elbow, he had "no idea" how much the elbow weighed. Plaintiff re-affirmed in his testimony that Mitchell and Kapidis made the decision as to how the elbows would be moved.

¶ 13 Plaintiff eventually had back surgery, after which he reported some pain relief. He has received steroid injections in his back. He testified he still has back and leg pain, but is able to work through the pain.

¶ 14 IMI president Victor Giometti testified that he signed the subcontract between IMI and Jameson. He explained that IMI subcontracted a number of areas on the Calumet project. IMI subcontracted the manufacturing and installation of the heating and ventilation to

Jameson because it had the expertise required to perform the work. When IMI would subcontract work, it relied on its subcontractors to ensure that their own workers performed the work safely. Giometti signed the contract between IHC and IMI and the contract between IMI and Jameson. According to the contract between IMI and Jameson, it was Jameson's responsibility to determine what labor, materials, equipment, services, supervision, tools, and scaffolding were necessary to complete their work. Giometti testified that IMI placed no restrictions or limitations on the means and methods of Jameson's work, but allowed Jameson to do its work as it saw fit, so long as it was in compliance with OSHA rules, codes, ordinances, and government regulations. He also testified that IHC had no responsibility for the offloading of any equipment for IMI's subcontractor.

¶ 15 The record on appeal includes a number of written proposals from Jameson to IMS which list various jobs, such as "Install new fire dampers" and "Fabricate & deliver duct transition." Each of these proposals include the following statement:

"Pursuant to your recent request we are pleased to present the following proposal. Jameson Sheet Metal, Inc. will provide the labor, materials, tools and equipment to complete the following items[.]"

¶ 16 The record on appeal also includes a contract between IHC as contractor and IMI as subcontractor, signed in February 2006, by which IMI is required to: "furnish all of the labor, materials, equipment, and services, including, but not limited to, competent supervision, shop drawings, samples, tools, and scaffolding as are necessary for the proper performance of the Subcontractor's work[.]"

¶ 17 The record also includes a contract between IMI and Jameson, dated February 1, 2006. By it, Jameson, as a subcontractor, is required to provide: "all labor, material, equipment, tools of the trade and supervision to complete all ventilation work at [the Calumet] jobsite[.]"

¶ 18 Jameson vice president James Joyce testified at deposition that he never visited the Calumet site. According to Joyce, if Jameson were to deliver materials that required a forklift or other machinery to remove it from the truck to the worksite, a Jameson project manager would "talk to a foreman on the job and they would come up with a plan and get the equipment they need out there." The Jameson foreman and project manager would decide what equipment was needed to make a delivery to a worksite. Jameson's role in the Calumet project was to fabricate and install a ventilation system. The pieces were fabricated at Jameson's plant and then delivered to the worksite by Jameson trucks or by trucks provided by an outside vendor.

¶ 19 IHC project manager Michael Carroll testified at deposition that he was assigned to the Calumet project as a project manager and was the senior person on site most every day. Generally, he walked the work site each day in order to stay familiar with the progress of the work. Although he did not recall doing so on a specific instance at the Calumet site, he testified that, if he saw a worker doing an unsafe act, part of his job would be to tell the worker what he was doing was unsafe. Carroll had no personal knowledge of plaintiff's injury. IHC generally held weekly safety talks and sometimes a daily review of the work to be performed on that day that its foremen were required to attend. Carroll did not know if IMI conducted safety meetings, and he was not responsible to review or monitor what IMI was doing regarding safety on the worksite. With regard to unloading flatbeds, the following testimony transpired:

"[IHC ATTORNEY TOBIN:] Q. With regard to whether or not there was a need for any type of hoisting equipment or a forklift or anything to aid in the removal or taking something off a flatbed, was IHC in anyway involved in that?

[CARROLL: A. Not that I'm aware of.

Q. That would be something that would be left to the subcontractor?

A. Yes."

¶ 20 Carroll testified he did not know who scheduled delivery of the steel elbows. He explained that, in general, "[t]he subcontractor normally will schedule delivery of materials to the jobsite and coordinate that with any other contractors working for them."

¶ 21 IMI project manager William Wilke testified that, when IMI subcontracts out its work, it does not assign an employee to watch over the subcontractor's work. Rather, it was Jameson's responsibility as IMI's subcontractor to determine the means or methods as to how to complete the work or what parts and equipment were needed to complete the work. Wilke testified it was Jameson's responsibility to determine how to get the steel elbows off of the flatbed truck. Wilke also testified that Jameson was not required to schedule deliveries through IMI, as IMI did not control Jameson's work so long as the work was completed.

¶ 22 By affidavit, plaintiff's safety expert Frank Burg opined that the manual unloading of the elbows was an unsafe work practice. Additionally, Burg attested that the general contractor is responsible for coordinating and sequencing the delivery and installation of heavy materials and for ensuring that the material and equipment can be delivered and unloaded in a safe manner.

¶ 23 Both defendants filed motions for summary judgment under section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 2012)). After a full briefing, the trial court granted summary judgment in favor of both IHC and IMI.

¶ 24 Plaintiff appeals.

¶ 25 ANALYSIS

¶ 26 On appeal, plaintiff contends the trial court erred in granting summary judgment in favor of IHC and IMI. Specifically, plaintiff argues that summary judgment was improper because a question of fact remains as to whether IHC and IMI breached their duties to provide a safe workplace for plaintiff where they failed to properly sequence the delivery of the steel elbows and the louvers, which breach allegedly resulted in the unavailability of necessary equipment, which in turn resulted in plaintiff's injury. We disagree.

¶ 27 Summary judgment is proper when the pleadings, affidavits, depositions and admissions of record, construed strictly against the moving party, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012). A party opposing a motion for summary judgment "must present a factual basis which would arguably entitle him to a judgment." *Allegro Services, Ltd. v. Metropolitan Pier & Exposition Authority*, 172 Ill. 2d 243, 256 (1996). "Although the burden is on the moving party to establish that summary judgment is appropriate, the nonmoving party must present a *bona fide* factual issue and not merely general conclusions of law." *Morrissey v. Arlington Park Racecourse, LLC*, 404 Ill. App. 3d 711, 724 (2010). When determining whether a genuine issue of material fact exists, courts construe the pleadings liberally in favor of the nonmoving party. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). A genuine issue of material fact exists where the facts are in

dispute or where reasonable minds could draw different inferences from the undisputed facts. *Morrissey*, 404 Ill. App. 3d at 724. The purpose of summary judgment is not to try a question of fact, but to determine whether one exists. *Williams*, 228 Ill. 2d at 417; *Golden Rule Insurance Co. v. Schwartz*, 203 Ill. 2d 456, 462 (2003); *Mann v. Producer's Chemical Co.*, 356 Ill. App. 3d 967, 972 (2005) ("Factual disputes cannot be decided as a matter of law [citation]; therefore, where reasonable persons could draw divergent inferences from the undisputed material facts or where there is a dispute as to a material fact, summary judgment should be denied and the issue decided by the trier of fact [citation].").

¶ 28 "Summary judgment is to be encouraged in the interest of prompt disposition of lawsuits, but as a drastic measure it should be allowed only when a moving party's right to it is clear and free from doubt." *Pyne v. Witmer*, 129 Ill. 2d 351, 358 (1989). "If the plaintiff fails to establish any element of the cause of action, summary judgment for the defendant is proper." *Governmental Interinsurance Exchange v. Judge*, 221 Ill. 2d 195, 215 (2006). We review summary judgment rulings *de novo* (*Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 113 (1995)) and we will only disturb the decision of the trial court where we find that a genuine issue of material fact exists. *Addison v. Whittenberg*, 124 Ill. 2d 287, 294 (1988). A reviewing court can affirm the entry of summary judgment on any basis appearing in the record, regardless of whether the trial court relied on that basis or if its reasoning was correct. *Cabrera v. ESI Consultants, LTD*, 2015 IL App (1st) 140933, ¶ 91.

¶ 29 To properly state a cause of action for negligence, the plaintiff must show that the defendant owed him a duty, that the defendant breached that duty, and that this breach was the proximate cause of his resulting injuries. See *Heastie v. Roberts*, 226 Ill. 2d 515, 555-56 (2007); *Bermudez v. Martinez Trucking*, 343 Ill. App. 3d 25, 29 (2003). Thus, duty is an

essential element of a negligence claim; unless the plaintiff can demonstrate that a duty is owed, namely, that he and the defendant stood in such a relationship that the law imposes an obligation on the defendant to act reasonably for his protection, there can be no negligence imposed upon the defendant. See *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 436 (2006); *American National Bank & Trust Co. of Chicago v. National Advertising Co.*, 149 Ill. 2d 14, 26 (1992). In *Marshall*, our supreme court, after recognizing the complex nature of a duty analysis, explained:

"The touchstone of this court's duty analysis is to ask whether a plaintiff and a defendant stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff. [Citations.] This court often discusses the policy considerations that inform this inquiry in terms of four factors: (1) the reasonable foreseeability of the injury, (2) the likelihood of the injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing that burden on the defendant. [Citations.]" *Marshall*, 222 Ill. 2d at 436-37.

These four duty factors encompass the "relationship" between the plaintiff and the defendant, and the court must determine whether the plaintiff and the defendant stood in such a relationship that the law imposed upon the defendant an obligation of reasonable conduct for the plaintiff's benefit. *Simpkins v. CSX Transportation, Inc.*, 2012 IL 110662, ¶ 18. "The determination of such a 'relationship,' as sufficient to establish a duty of care, requires considerations of policy inherent in the consideration of these four factors and the weight accorded each of these factors in any given analysis depends on the circumstances of the case at hand." *Simpkins*, 2012 IL 110662, ¶ 18.

¶ 30 Here, then, to sustain a cause of action for negligence, plaintiff must establish that IHC and IMI owed him a duty of care; that is, he is required to show that he and IHC and/or he and IMI stood in such a relationship to one another that the law imposed upon IHC and/or IMI an obligation of reasonable conduct for the benefit of plaintiff. See *Bonner v. City of Chicago*, 334 Ill. App. 3d 481, 483 (2002) (listing elements of negligence claim, all of which must be proven in order to impose liability); see also *Kirk v. Michael Reese Hospital & Medical Center*, 117 Ill. 2d 507, 525 (1987). Unless plaintiff demonstrates that a duty is owed, there can be no liability imposed upon IHC or IMI. See *American National Bank & Trust Co. of Chicago v. National Advertising Co.*, 149 Ill. 2d 14, 26 (1992) (duty is essential element of negligence claim); accord, *LaFever v. Kemlite Co.*, 185 Ill. 2d 380, 388-89 (1998) (unless a duty is owed by the defendant, the plaintiff cannot prevail on a negligence action).

¶ 31 Generally, one who employs an independent contractor is not liable for the independent contractor's acts or omissions. *Pestka v. Town of Fort Sheridan Co., LLC*, 371 Ill. App. 3d 286, 300 (2007); *Martens v. MCL Construction Corp.*, 347 Ill. App. 3d 303, 313 (2004). This is because the general contractor generally does not supervise the details of the independent contractor's work and, thus, is not in a good position to prevent negligence, whereas the independent contractor's employees have submitted to the independent contractor's right to monitor and direct such details as their employer. See *Pestka*, 371 Ill. App. 3d at 300; *Martens*, 347 Ill. App. 3d at 313-14. However, section 414 of the Restatement (Second) of Torts presents the "retained control exception" to this general rule. This exception provides:

"One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others

for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." Restatement (Second) of Torts § 414 (1965), at 387.

¶ 32 Section 414, therefore, renders the retention of control key in imposing liability. See, e.g., *Martens*, 347 Ill. App. 3d at 315 (whether a duty exists under section 414 "turns on whether the defendant controls the work in such a manner that he should be held liable"). The comments accompanying section 414 discuss "a continuum of control" from which our courts have gleaned the necessary degree of control a defendant must exercise to be subject to liability under this section." *Martens*, 347 Ill. App. 3d at 314. In particular, Comment *c* states that:

"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 (1965), Comment *c*, at 388.

For this exception to apply, "it must be shown that the general contractor retained sufficient control over the work of the subcontractor so that the law recognizes the existence of a duty to exercise that 'supervisory control with reasonable care.' " *Garcia v. Wooton Const., Ltd.*,

387 Ill. App. 3d 497, 505 (2008) (quoting *Aguirre v. Turner Construction Co.*, 501 F. 3d 825, 831 (7th Cir. 2007)). Whether defendants retained a level of control sufficient to give rise to a duty of reasonable care is a question of law. *Garcia*, 387 Ill. App. 3d at 505; *Rangel v. Brookhaven Constructors, Inc.*, 307 Ill. App. 3d 835, 837 (1999).

¶ 33

i. Liability of General Contractor IHC

¶ 34

We first consider the question of defendant IHC's liability in the instant cause. Plaintiff on appeal argues that summary judgment as to IHC was in error because IHC failed in its duty, as general contractor, to ensure a safe workplace for plaintiff by, in relevant part, improperly coordinating and sequencing mechanical work and deliveries (*e.g.*, the delivery of the elbows and louvers), which resulted in the necessary material handling equipment not being available at the time the steel elbows were delivered. He argues that this duty exists both pursuant to Restatement Section 414 (the retained control exception) and independent of Restatement Section 414. Plaintiff argues that a question of fact remains regarding IHC's duty to coordinate and sequence, and that "[b]ecause IHC failed to ensure that necessary material handling equipment was available at the time of the delivery, Plaintiff and the Jameson Crew had to manually unload and move the elbows[,] resulting in plaintiff's injury.

¶ 35

IHC was the general contractor on the worksite. As noted above, a general contractor is not usually liable for the independent contractor's acts or omissions. *Pestka*, 371 Ill. App. 3d at 300. However, Section 414 of the Restatement provides that if a contractor retains control over the work of its subcontractor, the contractor can be held vicariously liable for the negligence of the subcontractor. *Cochran v. George Sollitt Construction Co.*, 358 Ill. App. 3d 865, 874 (2005). Pursuant to section 414, the retention of control by the contractor is the key in imposing liability. *Martens*, 347 Ill. App. 3d at 315.

¶ 36 Here, plaintiff fails to show that IHC retained any sort of control over Jameson's work. IHC subcontracted the mechanical work to IMI, which then subcontracted a portion of its work to Jameson. IMI president Victor Giometti testified that he signed the subcontract between IHC and IMI, as well as the contract between IMI and Jameson. When IMI subcontracted work, it relied on its subcontractors to ensure that their own workers performed the work safely. He testified that, according to the contract between IMI and Jameson, it was Jameson's responsibility to determine what labor, materials, equipment, services, supervision, tools, and scaffolding were necessary to complete its work. Giometti testified that IMI placed no restrictions or limitations on the means and methods of Jameson's work, but allowed Jameson to do its work as it saw fit, so long as it was in compliance with OSHA rules, codes, ordinances, and government regulations. He also testified that IHC was not responsible for the offloading of any equipment for IMI's subcontractor.

¶ 37 In addition, IMI project manager Wilke testified that it was Jameson's responsibility to determine the means or methods regarding how to complete the work, as well as what parts and equipment were needed on the job. Wilke specifically testified it was Jameson's responsibility to determine how to get the steel elbows off of the flatbed truck. Wilke also testified that Jameson was not required to schedule deliveries through IMI, as IMI did not control Jameson's work so long as the work was completed.

¶ 38 According to plaintiff's deposition testimony, Jameson employees alone determined how to get the steel elbows off of the truck. He testified that the flatbed truck carrying the steel elbows arrived while he, Mitchell and Kapidis were unloading the box truck. Then, Mitchell and Kapidis, who were the journeymen at the worksite, discussed how to move the steel elbows from the flatbed truck. No other individuals or representatives of IHC were

involved in the discussion. They looked around the worksite to determine if there was a forklift available to be used and, when they determined no forklift was available, decided the three men would move the elbows manually. Plaintiff injured his back when he attempted to move the steel elbow from the flatbed truck.

¶ 39 Plaintiff also admitted he was not aware of IHC's involvement in any decision-making as to how to remove the elbows from the flatbed:

"[IHC ATTORNEY LYNCH:] A. So you're not aware of IHC being involved in any decision-making process regarding how these elbows were going to be moved off of the flatbed on the day of the accident, is that fair?

[WITNESS WOJCIK:] A. Right, at that time. I mean, I know now through my experience that, obviously, poor planning and materials handling. I wish it was in place there to have some type of plan to move this material. At that time, I didn't know, but now, through my experience in the trade and industry, I mean, there should have been a plan in place to be able to move those elbows in a safe manner."

¶ 40 Where plaintiff provided no evidence that IHC controlled, oversaw or gave instructions to Jameson or any other subcontractor for any task incidental to the delivery, movement or unloading of a subcontractor's equipment, plaintiff failed to raise a genuine issue of fact regarding IHC's retained control of its subcontractor's work. Summary judgment for IHC was proper.

¶ 41 In addition, we think plaintiff's argument regarding IHC's involvement in the decision-making process to move the steel elbows is immaterial to the question here because it relates to the time directly after plaintiff suffered his injury. To be clear, plaintiff injured his back

when first attempting to move the steel elbows when they were on the back of the flatbed truck. After the injury, he, Mitchell, and Kapidis continued working. They completed the removal of the elbows from the flatbed truck. Then, another decision had to be made regarding how to get the steel elbows up to the Mezzanine floor of the building. To do that, other equipment was brought in, louvers were removed from the building, and the elbows were mechanically moved from the ground floor of the building through the opening created by the removal of the louvers on the mezzanine level of the building.

¶ 42

To show that IHC was involved in the decisions made regarding moving the steel elbows, plaintiff quotes the following deposition testimony:

"[IHC ATTORNEY LYNCH:] Q. Were you ever present for any sort of conversation between anybody from Jameson and anybody from IHC on this Calumet project?

[WITNESS WOJCIK:] A. Yes.

We had to get permission to remove something from the building. So Wade, as the acting foreman, asked them to come out. They came out and surveyed and approached him, told him the situation, what was to be done, if it's okay.

The only way that they came up with, the idea was to remove louvers from the existing building with the permission of the general contractor. That's the way it was done.

Wade had to get permission from IHC to go ahead and remove an existing part of the structure that was already installed in order to get the elbows into the building to where they needed to go.

Q. Was there one person from IHC there?

A. Yes.

Q. What did the individual from IHC say during the course of this conversation?

A. Wanted to know what we thought, could be a solution to our problem.

Q. Okay. So Wade approached this person and asked if the louver could be removed so that the elbows could be passed through that space, right?

A. Right. Wade went to the trailer and asked if we need someone on-site to visually inspect and go over,

Q. And the IHC person ultimately gave the authority that the louver be removed?

A. Yes."

Essentially, there were two steps to this process: (1) the decision regarding how to move the steel elbows from the flatbed truck, made by Jameson employees only; and (2) the decision regarding how to move the steel elbows, now sitting on the ground floor of the building, up to the Mezzanine level of the building, a decision which included IHC employees. Only the first, which solely involved Jameson employees, related to plaintiff's injury.

¶ 43 We note here that plaintiff has provided no evidence to show—and in fact does not argue—that IHC should be directly liable pursuant to Restatement Section 414 for the failure to exercise its supervisory control with reasonable care. See, e.g., *Lee v. Six Flags Theme Parks, Inc.*, 2014 IL App (1st) 130771, ¶ 99 (a contractor may be subject to liability for

failing to prevent its subcontractors from doing "even the details of the work in a way unreasonably dangerous to others, if it knew or by the exercise of reasonable care should have known the contractors' work was being so done, and had the opportunity to prevent it by exercising the power of control which the [contractor] retained"). Accordingly, we also do not address that issue here.

¶ 44 Plaintiff argues on appeal that this issue should be decided not on the concept of retained control found in Restatement Section 414, as both this court and the trial court below have done, but rather, through common law tort theory to determine "whether IHC breached its contractual duty to provide material handling equipment, which arises independent of Restatement 414." It is plaintiff's contention that defendants should be held responsible for his injury because they were responsible for the sequencing of equipment arrival, and equipment arrived on-site on the day of injury without the proper mechanisms in place to move that equipment. Plaintiff supports this argument by pointing to the fact that the louvers which had previously been fastened to the building had to be removed in order for the steel elbows to be moved in through the opening created by their removal. He argues that, had defendants properly timed the arrival of equipment and deliveries, the steel elbows would have been delivered prior to the installation of the louvers. Specifically, plaintiff argues:

"Of critical importance, the louvers were already installed when the elbows were delivered. IHC employee Michael Carroll admitted that large material/product (such as steel elbows) is often brought into the building through the louver opening. But that once the louvers are installed, they are a permanent fixture and not intended to be thereafter removed. Wilke, from IMI, also testified that the louvers cannot be removed once installed. *** This testimony from

Carroll and Wilke establishes that the sequencing of the delivery and installation of the louvers and elbows was faulty. Clearly, any large material/product such as elbows that required entry through the louver openings should have been delivered and installed concurrently with (or within a few weeks of the delivery of) the louvers."

¶ 45 All of this may be true, and perhaps the louvers and the steel elbows should have been delivered and installed concurrently, but this does not offer support to plaintiff's argument that IHC should be held responsible for his injury. Instead, plaintiff manually loaded the Jameson box truck at the Jameson facility. He then drove the box truck to the worksite with the expectation that he would unload it there. At the worksite, plaintiff, Mitchell, and Kapidis unloaded the box truck together. While they were doing so, a flatbed truck driven by a different company arrived carrying the large steel elbows. As discussed above, there were essentially two decisions made after the flatbed truck arrived: (1) the decision regarding how to move the steel elbows from the flatbed truck, made by Jameson employees only; and (2) the decision regarding how to move the steel elbows, now sitting on the first floor of the building, up to the Mezzanine level of the building, a decision which included IHC employees and other machinery. Only the first, which solely involved Jameson employees, related to plaintiff's injury. Plaintiff's argument that the sequencing of deliveries and installation caused his injury is simply untenable, as his injury did not occur when removing the louvers or moving the steel elbows up to the Mezzanine level of the building. Rather, his injury occurred during the first step, that is, when he pushed against the steel elbow while he, Mitchell, and Kapidis moved the elbow from the flatbed to the floor. The injury was caused

by plaintiff pushing on the elbow while on the flatbed, and was not related to the sequencing of the work.

¶ 46 In addition, plaintiff argues that, "if properly sequenced, Jameson likely would have arranged for a lift device to be available to move the elbows." This argument is unpersuasive to us, as it is pure speculation both that, had deliveries and installation been sequenced differently, there would have been other equipment available to move the steel elbows from the flatbed truck, and that the Jameson employees would have elected to use that equipment.

¶ 47 ii. Liability of Subcontractor IMI

¶ 48 We next consider the question of defendant IMI's liability in the instant cause. Plaintiff on appeal contends that summary judgment as to IMI was in error because there is a question of fact as to whether IMI had and breached a duty to ensure that material handling equipment was available to the Jameson crew in relation to the delivery and installation of the elbows and louvers. Plaintiff argues that this poor sequencing and coordination as to the mechanical work and deliveries resulted in the necessary material handling equipment not being available for the delivery of the steel elbows, which in turn resulted in plaintiff's injury. Plaintiff admits there is no contract provision requiring IMI to so coordinate, but argues that arranging the necessary material handling equipment was the industry "standard of care."

¶ 49 For all of the reasons stated above in our discussion regarding IHC's responsibility, we also find that summary judgment is appropriate as to IMI, where plaintiff failed to raise a genuine issue of fact regarding IMI's retained control of Jameson's work, as he provided no evidence that IMI controlled, oversaw or gave instructions to Jameson for any task incidental to the delivery, movement or unloading of the steel elbows.

¶ 50 CONCLUSION

¶ 51 For all of the foregoing reasons, the decision of the circuit court of Cook County is affirmed.

¶ 52 Affirmed.