2014 IL App (2d) 140417-U
No. 2-14-0417
Order filed December 19, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JERRY HUSS and LAURIE HUSS, Plaintiffs-Appellants, v. JAMES C. RATOS, PARKWAY, LLC, and JAMES G. RATOS, Defendants-Appellees.	))))))))))	Appeal from the Circuit Court of Kendall County. No. 07-L-60 Honorable Timothy J. McCann, Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not err in granting summary judgment in favor of property owner and general contractor on certain construction-related negligence claims brought by subcontractor's employee but should not have granted summary judgment as to portion of claim against property owner sounding in premises liability.

¶ 2 The plaintiffs, Jerry and Laurie Huss, brought suit after Jerry Huss (Huss) was injured on a construction site. The circuit court of Kendall County entered summary judgment in favor of the defendants: Parkway, LLC, James G. Ratos (Elder Ratos), and James C. Ratos (Younger Ratos). Huss appeals. We affirm in part and reverse in part, and remand.

¶ 3 BACKGROUND

¶ 4 The following facts are taken from the exhibits submitted by the parties in connection with the defendants' motions for summary judgment. Except as noted, they are undisputed. Additional facts will be set forth as needed for particular aspects of the analysis.

¶ 5 Parkway was a limited liability company that, among other things, acted as the general contractor on construction projects. Elder Ratos managed the company; his wife and son, Younger Ratos, had passive interests in the company but were not involved in its operation. Younger Ratos did not work in construction; he was a cook and restaurant manager.

¶ 6 Younger Ratos owned the property at 1406-1408 Cannonball Trail in Yorkville. In 2006, he entered into an oral agreement with Parkway to construct a duplex on the property. Parkway was the general contractor for all aspects of the construction. In deposition, Elder Ratos testified that he directed the work on behalf of Parkway.

¶ 7 On June 6, 2006, Elder Ratos applied to Yorkville for a building permit. The permit listed Elder Ratos as the general contractor and Younger Ratos as the property owner. On the permit, Elder Ratos signed a statement to the effect that he would construct the building in compliance with the Yorkville building codes.

¶ 8 Parkway hired subcontractors for the job, including Oswego Excavating, which was hired to do the excavation work. None of the contracts between Parkway and its subcontractors were in writing. Oswego was to dig the foundation and the trenches necessary for the water and sewer lines, make the water and sewer connections, supply gravel, and perform the final grading. Under Illinois law, connecting the water lines with the water main ("tapping the main") required a licensed plumber. Parkway did not inquire whether Oswego had employees who were licensed to perform that connection.

¶ 9 Huss was a union laborer who had worked for Oswego since 1983, delivering and operating heavy equipment, flagging, measuring grade, and doing underground work such as installing sewers and water mains. His underground work did not include tapping water mains.

¶ 10 On July 13, 2006, Huss was working for Oswego at the worksite. A trench was dug and the water main was exposed. Scott Wheeler (the son of Oswego's owner) tapped the water main, but the tapper malfunctioned. Water shot out of the main into the sides of the trench and the air, filling the trench. Yorkville city staff was called, but it took from 45 minutes to an hour to shut off the water. The water in the trench was then pumped out, a process that took 20 minutes.

¶ 11 After the flooding of the trench, Huss refused to enter the trench because he believed the trench was unsafe. Wheeler entered the trench to complete the water connections. While Wheeler was in the trench, the walls began to collapse. Huss attempted to help Wheeler out of the trench by holding a ladder that extended into the trench. As Wheeler was climbing up the ladder and jumping to safety, the walls collapsed against the ladder Huss was holding and Huss's back was seriously injured.

¶ 12 At the time of the accident, Yorkville had not yet issued a building permit for the construction. The permit was issued six days later, on July 19, 2006.

¶ 13 Huss testified that Younger Ratos was present at the worksite on the morning that the trench was dug and the accident occurred. Younger Ratos has not denied that he was present, although he testified in deposition that he did not know anyone had been hurt until he was named in the present lawsuit. The record does not establish exactly when Younger Ratos was present or whether he witnessed the flooding of the trench or the accident. There is no evidence that Younger Ratos was directing or supervising the construction at the time of the accident.

¶ 14 The plaintiffs filed suit in 2007, and filed their second amended complaint on July 9, 2008. Count III was directed against Younger Ratos, and alleged that he was negligent in two

ways, as a general contractor and as the property owner. Count IV (against Parkway) and count VII (against Elder Ratos) alleged that they were liable as the general contractor for the construction. Parkway and Elder Ratos filed an answer, but Younger Ratos did not.

¶ 15 In August 2011, Younger Ratos filed a motion for summary judgment. In his motion, he argued that he was not the general contractor for the construction, supporting his argument with an affidavit and excerpts from his deposition. The plaintiffs responded that, because Younger Ratos had never filed an answer to the second amended complaint, all of the allegations must be deemed admitted and those admissions were sufficient to make summary judgment inappropriate. In January 2012, the trial court granted summary judgment in favor of Younger Ratos, finding that his failure to file an answer did not amount to an admission of the truth of the allegations.

¶ 16 In January 2013, Parkway and Elder Ratos moved for summary judgment. They argued that the evidence showed that they relied on Oswego's specialized knowledge of trenching and water line work, and did not retain sufficient control over Oswego's work to be liable for the accident. Instead, pursuant to the oral agreement between Parkway and Oswego, Oswego was solely responsible for directing its employees in their performance of the work and ensuring the safety of its employees. The plaintiffs disputed this, noting Elder Ratos's deposition testimony that he was on the jobsite every day or two; he directed "all of the work"; and he could and would stop work if he saw an unsafe condition. The trial court granted summary judgment in favor of Parkway and the Elder Ratos in June 2013. After some additional proceedings addressing the remaining claims raised by the plaintiffs, the trial court entered a final order in April 2014. The plaintiffs filed a timely notice of appeal.

¶ 17 ANALYSIS

¶ 18 On appeal, the plaintiffs argue that the trial court erred in granting summary judgment in favor of Parkway, Elder Ratos, and Younger Ratos. We begin by reviewing the summary judgment granted on the claim against Younger Ratos (count III).

¶ 19 A motion for summary judgment is properly granted where the pleadings, depositions, admissions, and affidavits establish that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005 (West 2008); *Gaylor v. Village of Ringwood*, 363 Ill. App. 3d 543, 546 (2006). "The purpose of summary judgment is to determine whether a genuine issue of material fact exists, not to try a question of fact." *Thompson v. Gordon*, 241 Ill. 2d 428, 438 (2011). "In determining whether a genuine issue as to any material fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent." *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). A triable issue precluding summary judgment exists where material facts are disputed or where the material facts are undisputed but reasonable persons might draw different inferences from the undisputed facts. *Id*.

¶ 20 At trial, the plaintiffs would bear the burden of proving that the defendants were negligent. Accordingly, in order to defeat a motion for summary judgment, the plaintiffs must show the existence of facts which could support judgment in their favor on this issue. "Although the nonmoving party is not required to prove his case in response to a motion for summary judgment, he must present a factual basis that would arguably entitle him to judgment." *Land v. Board of Education for the City of Chicago*, 202 Ill. 2d 414, 432 (2002). In reviewing a trial court's grant of summary judgment, we do not assess the credibility of the testimony presented but, rather, only determine whether the evidence presented was sufficient to create an issue of fact. See *Jackson v. Graham*, 323 Ill. App. 3d 766, 779 (2001). We review the grant of summary judgment under a *de novo* standard (see *Thompson*, 241 Ill. 2d at 438), and will reverse

if we find that a genuine issue of material fact exists.

¶ 21 In count III, the plaintiffs asserted two types of negligence claims against Younger Ratos: negligence in the supervision of the construction project (construction claim) and liability based on Younger Ratos's status as the property owner (premises liability claim). We begin with the construction claim.

¶ 22 To prevail on a negligence claim, a plaintiff must show that the defendant owed him a duty that the defendant breached, and that the breach proximately caused the plaintiff's injuries. The existence of a duty is a question of law to be decided by the court. *Downs v. Steel and Craft Builders, Inc.*, 358 Ill. App. 3d 201, 204 (2005). In his motion for summary judgment, Younger Ratos produced evidence (an affidavit and deposition testimony) that he was not a general contractor for the construction, and thus owed Huss no duty in that capacity. The plaintiffs' argument in response rests solely on (1) the allegations in count III that Younger Ratos was a general contractor for the construction job, and (2) Huss's deposition testimony that Younger Ratos was on the construction site on the morning of the accident.

¶ 23 As to the allegations of the complaint, the plaintiffs argue that they constitute binding judicial admissions because Younger Ratos never filed an answer to the second amended complaint. The plaintiffs are correct that "[a] failure to answer admits well pleaded facts." *Florsheim v. Travelers Indemnity Co. of Illinois*, 75 Ill. App. 3d 298, 309 (1979); see also 735 ILCS 5/610(b) (West 2010). However, that is all the effect that a failure to answer has: it does not admit the truth of legal conclusions alleged, or admit that the facts alleged amount to a valid cause of action. *Id.*; *Charter Bank v. Eckert*, 223 Ill. App. 3d 918, 924 (1992).

¶ 24 Here, the allegation that Younger Ratos "was acting as the general contractor" for the construction at the time of the accident was a conclusion, to be determined from the consideration of the evidence. See, *e.g.*, *Grillo v. Yeager Construction*, 387 Ill. App. 3d 577, 591

(2008) (treating the issue of whether a particular defendant was the general contractor on a construction project as a conclusion to be determined through weighing of evidence). The allegation that Younger Ratos "retained direct control over the manner and method of the work performed by all subcontractors" was likewise a conclusion. The complaint did not contain any allegations of facts which, taken as admitted, would compel these conclusions. It did not allege that Huss observed Younger Ratos directing the work performed by Oswego or others at the worksite, or that Younger Ratos's contract with Parkway reserved a right to control the manner and method in which the work was performed, or any other fact necessary to establish that Younger Ratos was, in fact, acting as the general contractor. Conclusions that are unsupported by specific facts lack evidentiary value and may be disregarded by the court. *Cain v. Joe Contarino, Inc.*, 2014 IL App (2d) 130482, ¶¶ 62-64. Accordingly, even taking the factual allegations of the complaint as admitted, the plaintiffs have not produced any evidence to counter the evidence that Younger Ratos was not the general contractor.

¶ 25 The plaintiffs point to the undisputed evidence that Younger Ratos was a partner in Parkway and was present at the worksite on the morning of the accident. However, without more, neither of these facts gives rise to an inference that Younger Ratos was acting as a general contractor. There is no evidence that Younger Ratos ever acted as Parkway's agent in performing the duties of a general contractor on any of Parkway's construction jobs. To the contrary, both Younger and Elder Ratos testified that Elder Ratos was the managing partner of Parkway and performed all general contractor duties for Parkway's jobs. Moreover, as the property owner, Younger Ratos was entitled to be present on his property whenever he liked. His presence on the morning of the accident thus cannot give rise to an inference that he was performing general contractor duties on that day. The plaintiffs have failed to come forward with evidence showing that Younger Ratos owed Huss a duty as the general contractor for the

construction work. *Land*, 202 Ill. 2d at 432. Accordingly, the trial court did not err in granting summary judgment for Younger Ratos on this basis.

¶ 26 The plaintiffs also alleged that Younger Ratos was negligent in hiring Oswego to perform the water connection without ensuring that it would employ a qualified person to do so. However, the defendants produced evidence that Younger Ratos was not involved in hiring Oswego; rather, the selection of subcontractors to work on the site was wholly the responsibility of Parkway and Elder Ratos. The plaintiffs did not produce any contrary evidence. Instead, they again point to Younger Ratos's failure to contest the allegations of the complaint. However, the factual allegations that were thereby deemed admitted do not make out a valid cause of action for negligent hiring. For instance, the complaint does not allege any valid source of a duty that Younger Ratos allegedly owed in connection with Oswego's hiring. The plaintiffs allege that Younger Ratos owed a duty as a general contractor to engage qualified persons to tap the water main, but as we have held, the evidence is uncontested that Younger Ratos was not a general contractor. Accordingly, the allegations of negligent hiring do not prevent the entry of summary judgment.

¶ 27 Lastly, the plaintiffs argue that, even if the construction claim asserted in count III cannot stand, the trial court erred in granting summary judgment because count III also contains a premises liability claim that was not attacked in Younger Ratos's motion for summary judgment. "[A] reviewing court can uphold the decision of the circuit court on any grounds which are called for by the record regardless of whether the circuit court relied on the grounds and regardless of whether the circuit court's reasoning was correct." *Ultsch v. Illinois Municipal Retirement Fund*, 226 Ill. 2d 169, 192 (2007). Thus, we consider whether the trial court's grant of summary judgment should be affirmed despite its failure to consider the premises liability claim—that is, whether summary judgment on that claim is appropriate as a matter of law.

¶ 28 To hold a property owner liable for negligence that occurred on his property, a plaintiff must show that the property owner: (1) knew or should have known that a condition on the property involved an unreasonable risk of harm to persons coming onto the property; (2) should have expected that such persons would not discover or realize the danger, or would fail to protect themselves against it; and (3) nevertheless failed to exercise reasonable care to protect such persons against the danger. *Grillo*, 387 Ill. App. 3d at 595 (citing the Restatement (Second) of Torts § 343 (1965)). As a general rule, a property owner is not liable when the danger is open or obvious to persons on the property. *Id.* at 595-96 (citing the Restatement (Second) of Torts § 343A (1965)). In that situation, the property owner generally owes no duty because harm is not legally foreseeable: it is reasonable to expect that persons coming onto the property will take care to avoid an obvious danger. *Bruns v. City of Centralia*, 2014 IL 116198, ¶ 34. However, under the "rescue doctrine," a property owner may be liable to one who deliberately encounters a known risk in order to rescue a third party placed in peril through the property owner's negligence. See *Reed v. Ault*, 2012 IL App (2d) 110744, ¶ 42.

¶ 29 Here, although the dangers posed by the recently-flooded trench were obvious**,** as conceded by Huss himself, neither the open-and-obvious doctrine nor the rescue doctrine were argued to the trial court, and the evidence contained in the record does not resolve all possible questions of fact that may arise with respect to these doctrines. Accordingly, we cannot affirm summary judgment with respect to the premises liability claim. The trial court's judgment with respect to that portion of count III is reversed.

¶ 30 In summary, as to count III we affirm the trial court's grant of summary judgment in favor of Younger Ratos with respect to the construction claim but reverse the entry of summary judgment on the premises liability claim, and remand for further proceedings on the latter claim.

¶ 31 We next consider whether the trial court erred in granting summary judgment for Parkway and Elder Ratos. As to these defendants, there is no question about whether they acted as the general contractor for the construction: they have admitted that they did. The question is whether they retained sufficient control over the safety of the worksite or the manner in which Oswego performed its contractual duties to be potentially liable for Oswego's failure to maintain a safe worksite with respect to the trench it dug.

¶ 32 Generally speaking, one who employs an independent contractor to perform work is not liable for the negligence of that independent contractor. *Downs*, 358 Ill. App. 3d at 204-05. Thus, a general contractor usually will not be liable for the negligent acts or omissions of a subcontractor. However, Illinois has adopted an exception to this rule that is based on section 414 of the Restatement (Second) of Torts: a general contractor may be liable for an independent subcontractor's negligence if the general contractor retained sufficient control over the details of the work performed by the independent subcontractor. *Id*. at 205 (citing Restatement (Second) of Torts § 414, at 387 (1965)). Whether a general contractor retained sufficient control to be held liable under section 414 is usually a question of fact. *Grillo*, 387 Ill. App. 3d at 594. However, this question may be resolved via summary judgment if the evidence is undisputed or the plaintiff fails to present evidence of retained control. *Id*.

¶ 33 Under section 414, a general contractor may be held either directly liable or vicariously liable. See *Lee v. Six Flags Theme Parks, Inc.*, 2014 IL App (1st) 130771, ¶¶ 99 & 73. We begin by considering whether Parkway and Elder Ratos can be held directly liable under the evidence produced by the parties.

¶ 34 To be directly liable for the injury of a person on the worksite, a general contractor must: (1) have known or reasonably should have known that his agents (including subcontractors) were performing work in a manner that was unreasonably dangerous; (2) have had the power to

prevent or remedy the dangerous situation; and (3) have failed to take reasonable measures to prevent or remedy the danger. *Id*. ¶ 99 (citing Restatement (Second) of Torts § 414, comment b, at 387-88 (1965)). The general contractor's "knowledge, actual or constructive, of the unsafe work methods or a dangerous condition is a precondition to direct liability." *Cochran v. George Sollitt Construction Co.*, 358 Ill. App. 3d 865, 879-80 (2005).

¶ 35 Here, there was no evidence that Parkway or Elder Ratos had actual or constructive knowledge that Oswego was working in an unsafe manner on the morning of the accident. The plaintiffs argue that Elder Ratos should reasonably have anticipated the dangers that would be caused by the open trench because he was experienced in construction and knew that Oswego would have to dig a trench to install the water and sewer lines. However, the dangerous condition in this case was not the trench itself, but Oswego's failure to use a trench box once the trench had been flooded. The plaintiffs have not presented any evidence showing that Parkway and Elder Ratos should have anticipated either that Oswego would flood the trench or that Oswego would then continue working in the trench without a trench box. To the contrary, Elder Ratos testified that he had employed Oswego on several jobs and had never had any problems with their work.

¶ 36 In considering this issue, we find instructive *Lee*, 2014 IL App (1st) 130771, in which an amusement park hired an independent contractor to dismantle one of its rides that included a platform 43 feet above the ground. The evidence in that case showed that the contractor was well aware of the need to provide protection from falls and in fact provided its employees with harnesses and tethers for that purpose. Further, the park operator was aware of and relied on the contractor's safety measures. However, as the contractor's employees were dismantling the platform, they chose to remove a piece of machinery first, thereby creating a hole in the platform. Shortly thereafter, the plaintiff's decedent, an experienced worker, removed his safety

tether (apparently because it did not allow him to move across the entire platform) and fell through the hole to his death. None of the park operator's employees were nearby or observed these events; the two park employees who monitored the progress of the contractor's work were on the other side of the park at the time. The court held that, although the park knew that the contractor's employees would be working high in the air, it could not reasonably have known either that the manner in which the contractor disassembled the platform would create a hole in the platform or that the decedent would fail to use the safety measures provided. *Id.* ¶¶ 105-06. Accordingly, the trial court appropriately granted summary judgment in favor of the park operator on the plaintiff's direct liability theory. *Id.* ¶ 107.

¶ 37 In *Lee*, the park operator's knowledge of a general risk (the performance of work high in the air) could not render it liable where it could not reasonably have known that the contractor's acts would create a greater danger (the hole in the platform) or that the plaintiff's decedent would fail to use available safety measures. By the same token, in this case, the knowledge possessed by Elder Ratos regarding the general danger posed by trenches cannot serve as knowledge of the dangerous condition (the flooded trench) caused by Oswego shortly before the accident, or that Oswego would fail to use proper safety measures (a trench box) with respect to that danger.

¶ 38 The plaintiffs also argue that Parkway had a contractual obligation to ensure the safety of all the workers on the construction site. They assert that, once Parkway had assumed this duty, it could not delegate the responsibility for safety to its subcontractors. Instead, it should have ensured that safety through closer monitoring and enforcing appropriate safety measures.

¶ 39 The terms of the contracts entered into by a general contractor (with the property owner, and with subcontractors) are relevant to show the nature of the duty undertaken by him. *Downs*, 358 Ill. App. 3d at 205. If a general contractor has agreed that he will be fully and solely responsible for worksite safety, it is generally inappropriate to enter summary judgment in favor

of the contractor. *Id*. at 206 (citing *Moorehead v. Mustang Construction Co.*, 354 Ill. App. 3d 456, 461 (2004), and *Moss v. Rowe Construction Co.*, 344 Ill. App. 3d 772, 777 (2003)). In such circumstances, where the general contractor has agreed that he alone will ensure workplace safety, that duty may be nondelegable. See *Moorehead*, 354 Ill. App. 3d at 461. However, summary judgment for the general contractor may be appropriate if the subcontractor is contractually responsible for worksite safety and the general contractor has no active role in ensuring safety. *Downs*, 358 Ill. App. 3d at 206.

¶ 40 Here, all of the relevant contracts were oral, and thus the only evidence regarding their terms was supplied through various parties' deposition testimony. As to the contract between Parkway and the property owner, Elder Ratos testified that he agreed that Parkway would manage the construction site and would ensure the safety of the site "as it pertained to [Parkway's] job." However, in the contract between Parkway and Oswego, Oswego agreed to be solely responsible for the safety of its employees. Thus, Parkway effectively delegated to Oswego its safety-related duties toward Oswego's employees.[1]

¶ 41 Contrary to the plaintiffs' argument, nothing prevented Parkway from transferring its safety-related duties in this manner. The plaintiffs argue that Parkway's safety duties were nondelegable, citing *Moorehead*, but that is true only where the general contractor promised the

[1] The plaintiffs also argue that Elder Ratos and Parkway agreed (in the building permit application) to abide by the Yorkville building code, which includes the following provision: "It shall be the duty of every person doing any construction *** in this city to do the same with proper care for the safety of persons and property." However, this provision does not impose any greater duty than that imposed under the common law of negligence, and therefore we need not consider it separately.

owner that he would be fully and solely responsible for worksite safety. See *Downs*, 358 Ill. App. 3d at 206 (discussing and distinguishing *Moorehead* and *Rowe*). Here, there is no evidence that Parkway agreed with anyone that it would be solely responsible for workplace safety. Accordingly, it was not prevented from delegating to Oswego its safety-related duties toward Oswego's employees.

¶ 42 The plaintiffs also argue that their claims against Parkway and Elder Ratos included allegations of negligent hiring. Negligent hiring is another manner in which a master may be held directly liable for an agent's negligence. *Van Horn v. Muller*, 185 Ill. 2d 299, 311 (1999). However, one of the requirements for such a claim is proof that the hirer knew or should have known that the person or company hired was unfit to perform the particular duties of the job. *Id.* at 310. The plaintiffs have not presented any evidence showing that Parkway or Elder Ratos had any such knowledge regarding Oswego. To the contrary, Elder Ratos testified that Parkway had employed Oswego on several previous construction jobs and Oswego had performed the same general duties as here without any problems. Indeed, Huss acknowledged that Oswego employees had performed water main connections without a license in the past, apparently without incident. The plaintiffs argue that Parkway had a duty to familiarize itself with the requirement that a licensed plumber perform water main connections and then to ensure that Oswego would employ such a person for this job, but they have not identified any justification for imposing such a duty. Rather, the responsibility for knowing the specific work requirements applicable to water main connections was wholly within the scope of Oswego's employment as an independent contractor, and the plaintiffs have not shown any legal basis for imposing that duty upon Parkway. Accordingly, Elder Ratos and Parkway cannot be held directly liable for Huss's injury under section 414. We next consider whether Huss raised a factual issue regarding the vicarious liability of Elder Ratos and Parkway under section 414.

¶ 43 For a general contractor to be held vicariously liable, the general contractor "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 prescribe alterations and deviations." (Emphasis added.) Restatement (Second) of Torts § 414, comment c, at 388 (1965).

¶ 44 In this case, Elder Ratos testified that he "directed all of the work" on the construction job "from excavation to roofing" and "determined what went on at the jobsite and when." He explained that this meant that he supervised the work flow, visiting the worksite every day or two. If he saw an unsafe practice, he would mention it to the subcontractor working on that aspect of the construction. However, the subcontractors had control over how they performed their work; Parkway had no control over this. Oswego's president also testified that Oswego used its own methods to perform the work it was contracted to do, and Parkway did not have the right to control the details of the work. By contrast, Huss did not testify that he ever saw Elder Ratos directing the details of a subcontractor's work or enforcing specific safety measures.

¶ 45 The evidence thus shows that Parkway retained at most only a general right of supervision and did not control the method and manner of Oswego's work. So long as the subcontractor is "free to perform the work in its own way," the general contractor cannot be vicariously liable under section 414. *Lee*, 2014 IL App (1st) 130771, ¶¶ 96-97. Here, the plaintiffs have failed to put forward evidence that Oswego was not free to perform its work in its own way.

¶ 46 The plaintiffs argue that the evidence shows a factual dispute over whether Parkway retained Oswego to tap the water main, and that therefore the issue of Parkway's control over the tapping remains to be resolved. We disagree. Elder Ratos testified that Parkway retained Oswego do to all the excavation and water and sewer installation and connections. The plaintiffs

assert that Huss's testimony contradicted this evidence, but the record does not support their assertion. Although Huss testified that tapping a water main required a licensed plumber, he also testified that he had been on the job when Oswego employees performed such tapping, and that Oswego occasionally "used" another company's plumbing license when tapping. Thus, his testimony does not actually contradict the testimony that Parkway retained Oswego to perform all the water line connections, including tapping the water main. Accordingly, the plaintiffs have not shown that Parkway controlled the details of Oswego's work such that Oswego was not free to perform its work in its own way, and have failed to show that Parkway or Elder Ratos could be vicariously liable for Oswego's negligence.

¶ 47 CONCLUSION

¶ 48 For all of the foregoing reasons, the judgment of the circuit court of Kendall County is affirmed in part and reversed in part, and remanded. The trial court did not err in granting summary judgment in favor of Elder Ratos, and Parkway on counts IV and VII. Likewise, we affirm the trial court's judgment in favor of Younger Ratos as to the construction claim contained in count III. However, we reverse the judgment with respect to the premises liability claim against Younger Ratos.

¶ 49 Affirmed in part and reversed in part, and remanded.