

Survey of Construction Law Cases

First District Affirms Plaintiff's Obligation to Identify Specific Defect to Avoid Summary Judgment on Premises Liability/Trip and Fall Case

In *Aalbers v. LaSalle Hotel Properties*, the Illinois Appellate Court First District affirmed and reinforced the obligation of “slip and fall” plaintiffs to provide evidence of an identifiable defect to survive summary judgment. In *Aalbers*, the plaintiff was injured after she tripped and fell shortly after exiting an elevator in a recently renovated hotel lobby. She filed suit against the hotel owner, as well as the construction manager and general contractor involved in the renovation. The owner filed a third-party action against the flooring contractor involved in the renovation. The defendants and third-party defendant moved for summary judgment on the basis that the plaintiff failed to offer evidence of an identifiable defect that caused her to fall.

The evidence before the trial court on summary judgment was plaintiff's testimony that the lobby floor was tiled, but the area in front of the elevators was carpeted. According to the plaintiff, she tripped on “a piece of something” “like a ledge” in the area where the carpet met the tile. However, the plaintiff admitted she was not looking down at the time of her fall and did not know exactly where she fell. She could not identify anything specific, including any defect, that caused her fall. Post-occurrence inspections did not identify any defect either. Relying heavily on *Kimbrough v. Jewel Cos., Inc.*, 92 Ill. App. 3d 813 (1st Dist. 1981), the trial court granted summary judgment in favor of the defendants and the third-party defendant because the plaintiff could not identify what caused her fall and was unable to connect any of the defendants to the occurrence.

On appeal, the plaintiff argued that the trial court misapplied *Kimbrough*. In affirming summary judgment, the *Aalbers* court emphasized the sound logic of the *Kimbrough* decision and reinforced the notion that, in order to survive summary judgment, a plaintiff must present some factual or evidentiary basis to support her claim. A plaintiff cannot meet this burden in a trip and fall/premises liability case if she cannot point to an identifiable defect that caused her fall.

Aalbers v. LaSalle Hotel Properties, 2022 IL App (1st) 210494.

Subcontractor Has Right to File Suit under Mechanics Lien Act on Lien Made by its Subcontractor

In *American Steel Fabricators, Inc. v. K&K Ironworks, LLC*, the Illinois Appellate Court First District held that a subcontractor had authority under § 34 of the Mechanics Lien Act (Act) to file suit based on a lien made by the subcontractor's subcontractor. 770 ILCS 60/34. The appellate court held that the subcontractor, American Steel Fabricators, Inc., fit the statutory definition of a lienor under § 34 of the Act and had the ability to commence suit.

In November 2019, American Steel, a structural steel erection company, entered into a contract with the general contractor, Maris Construction, LLC, to perform structural steel work. American Steel subsequently entered into a sub-subcontract with K&K Ironworks, LLC for additional work on the project where American Steel would provide the raw materials and K&K would install the steel. As the construction progressed, a dispute arose between American Steel and K&K regarding whether K&K was performing its contractual obligations. American Steel alleged that K&K had fallen significantly behind in the construction schedule while K&K contested that it had substantially completed all work and was owed money. K&K ultimately stopped work on the project, claiming that American Steel still owed it approximately \$1,000,000.

Thereafter, K&K recorded a mechanics lien against title to the premises, claiming money owed to it by American Steel or Maris. An attorney representing American Steel sent a demand letter to K&K asking K&K to foreclose on its mechanics lien. K&K did not respond to the letter or foreclose on its mechanics lien. The attorney for American Steel then sent another demand letter to K&K asking it to release K&K's lien pursuant to §35 of the Mechanics Lien Act. After K&K did not release the mechanics lien, American Steel filed a complaint seeking to clear title on the property pursuant to § 35 of the Act. Shortly thereafter, K&K successfully moved to dismiss American Steel's complaint by arguing that American Steel was attempting to enforce rights it did not possess under Illinois law.

The appellate court analyzed the Act's construction and definitions and ruled for American Steel. Section 34 authorizes a suit by “the owner, lienor, a recorder under § 3-5010.8 of the Counties

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Code, or any person interested in the real estate . . .” *Id.* at § 34. The court noted that the Act’s definitions of contractor and subcontractor both explicitly contained language recognizing lienholder rights. *Id.* at §§ 1(a) and 21(a). K&K argued that no lien exists—and thus no lienor—until the party with a right to assert a lien is actually owed something. It further argued that as American Steel never alleged that any monies were owed to it, its complaint to clear title did not demonstrate that it was a lienor at the time it sent its § 34 demand. The Court rejected this argument because no one receiving a § 34 notice would be able to determine if the notice was valid unless the person receiving the notice was also privy to the financial records of the entity sending the notice. K&K also attempted to make additional arguments regarding qualifications of a lienor by attempting to create a distinction between an “inchoate Mechanics lien” and a “fully developed lien.” The court rejected this argument by noting that the word lien was used in the statute without any qualifiers.

Am. Steel Fabricators, Inc. v. K&K Ironworks, LLC, 2022 IL App (1st) 220181.

Duty of Care Based on Section 414 Retained Control and Section 343 Premises Liability

In *Ellis v. ICC Group Inc. d/b/a Illinois Constructors Corporation et.al.*, 2022 IL App (1st) 211581-U, the plaintiff, an electrician, was injured while working on a project to modify a dam located in a Cook County forest preserve. ICC Group Inc. was the general contractor. The plaintiff worked for an electrical subcontractor, Lyons & Pinner. The work was divided into two stages, with the construction of a gate for the west half of the dam being installed first, followed by a gate for the east half of the dam. A new approximately eight feet wide concrete platform was built and the dam gate was then installed on top of that platform. The gate was a curved steel structure, approximately five feet in height. The plaintiff and another Lyons electrician, McLaughlin, accessed the platform by a ramp that ran from a road above to the platform’s north side. Once there, the plaintiff could not find a method to access the platform’s south side. In order to do so, he tied two ladders together using mule tape and used them to climb across the gate to the south side of the platform. After completing his work, the plaintiff attempted to return to the north side of the platform by climbing the ladders to cross the gate. As he was doing so, he lost his balance and fell onto a concrete ledge and into the water below, sustaining serious injuries.

The plaintiff filed a three-count complaint against ICC. Count I pled general negligence and alleged that ICC had a duty to exercise reasonable care in ensuring that the project site was a safe workplace and that it breached that duty by allowing workers to use unsecured ladders to cross the gate. Count II pled a claim under section 414 of the Restatement (Second) of Torts, alleging negligence by failing to exercise control over jobsite activities. Count III pled a claim under premises liability.

ICC filed a motion for summary judgment arguing that the evidence was insufficient to show that it had “retained control” over the work done by the Lyons electricians sufficient to impose a duty under Section 414. ICC argued that its subcontract with Lyons showed that Lyons had full control over the means and methods of its own work, and there was no evidence of ICC’s employees retaining control over the safety or the details of the subcontractors’ work. It also argued that the evidence did not support a claim for premises liability because the undisputed evidence showed that ICC was not the possessor of the premises, that the incident did not involve a condition of the land, that it did not have notice of any unsafe condition, and that the plaintiff’s ladder set-up was itself an open and obvious danger. ICC further argued that there was no evidence to satisfy the element of proximate cause.

In granting ICC’s motion for summary judgment, the trial court found that ICC did not owe a duty of care to the plaintiff under either a “retained control” theory or a premises liability theory of negligence. It found that ICC had no actual or constructive notice of any dangerous condition and that there were no facts supporting an inference that ICC retained the degree of control, supervision, or monitoring of the jobsite comparable to cases in which a duty under section 414 had been imposed. The court further found no proximate cause between any alleged negligence and the plaintiff’s injuries and that the dam gate was a “condition” rather than the “cause” of the injury, and that the cause was the plaintiff’s own conduct. Furthermore, the court found no evidence of foreseeability to satisfy the “legal cause” aspect of the proximate cause analysis.

In reversing the grant of summary judgment, the appellate court found that ICC owed a duty to the plaintiff as a possessor of land under a theory of premises liability but that it did not sufficiently retain control of Lyons’ work to impose duty under section 414.

As to the plaintiff’s section 343 theory that ICC had a duty as a “possessor” of the land, the court found that the evidence showed that ICC was a possessor of the dam platform where the injury occurred. ICC was hired as a general contractor to install a cofferdam upon which it erected a concrete platform and installed the dam gate. By doing this and acting as general contractor over-

seeing the completion of work, ICC effectively created the site where the plaintiff's injury occurred and exercised control over it during construction.

The court rejected ICC's argument that it owed no duty to the plaintiff under section 343 because the plaintiff's injury was not caused by a "condition on the land" but the plaintiff's own conduct. The court reasoned that this argument was effectively a proximate causation or comparative fault, and not one addressing its duty of care.

The court further found sufficient circumstantial evidence to create a question of fact concerning ICC's actual or constructive notice that tradesmen were using ladders to cross to the south side of the platform. In addition to other evidence, McLaughlin testified that following the gate's installation, he observed workers from various trades crossing the gate by hopping over it or by using a ladder to climb over it.

The court did reject the plaintiff's argument that ICC retained control over the manner in which Lyons performed its work. There was nothing in the contract provisions that demonstrated that ICC retained control over Lyons' work or that it was not free to do the work in its own way.

Ellis v. ICC Group, Inc., 2022 IL App (1st) 211581-U.

Proximate Cause and Cause in Fact in a Blind Construction Accident

In *Huston v. P. J. Hoerr, Inc. v. SNS Construction Services, Inc.*, Jeremy Huston, the plaintiff's decedent, was working on a scaffold installing drywall for his employer, SNS Construction Services, Inc. He was working with his foreman, Jason Ariana. The scaffold, which was on wheels, was fully erected. The two men took turns cutting pieces of drywall and then handing the drywall to the other man on the scaffold. Ariana left the room to tend to other work, leaving Huston alone in the room. Approximately 20 minutes later, Ariana heard Huston yell and heard a crashing sound. Ariana ran back into the room and found Huston and the scaffold on the floor. Huston died without ever regaining consciousness.

A two-count complaint was filed by Huston's estate under the Wrongful Death Act. (740 ILCS 180/1, 2 (2016)). Count I was brought under sections 1 and 2 of the Act and alleged that the general contractor, P.J. Hoerr, Inc. (PJH), was negligent in its control, supervision, coordination, and inspection of the construction site, including the scaffold used by Huston. The complaint alleged that the scaffold tipped over and caused Huston to fall to the ground and

strike his head, resulting in death. Count II alleged that due to his injuries, Huston was prevented from attending to his usual duties and affairs and incurred monetary damages.

PJH filed an answer and a third-party complaint for contribution against SNS alleging that SNS was the entity that committed the negligent acts or omissions alleged in plaintiff's complaint. PJH and SNS filed motions for summary judgment on plaintiff's complaint and PJH's third-party complaint for contribution, respectively. The circuit court found that plaintiff could not prove the proximate cause of the accident and granted summary judgment for PJH. The court also dismissed PJH's third-party complaint as moot. The trial court found there was no genuine issue of material fact that could be presented to a jury and further concluded that the court could not find any way that proximate cause could ever be shown against PJH or SNS.

On appeal, plaintiff argued that the circuit court erred when it (1) granted summary judgment in favor of PJH, and (2) found that PJH did not retain control over the construction site.

In a Supreme Court Rule 23 opinion affirming the grant of summary judgment, the Third District Appellate Court reviewed PJH's contract with the site owner, PJH's subcontract with SNS, and eight deposition transcripts of workmen who were on the site. The court noted that the question of proximate cause has two distinct elements: cause in fact and legal cause. Cause in fact refers to whether the defendant's conduct is a material factor in bringing about the plaintiff's injury such that it would not have occurred in the absence of the defendant's conduct. Legal cause implicates the question of foreseeability. Proximate cause typically presents a question of fact. However, courts may determine a proximate cause issue as a matter of law if the evidence proves the plaintiff would never be entitled to a recovery. Proximate cause cannot be based on speculation, surmise or conjecture. While "circumstantial evidence can be sufficient to establish proximate cause if reasonable inferences may be drawn from that evidence," such circumstantial evidence must be of such a nature and so related as to make the conclusion more probable as opposed to merely possible.

The plaintiff argued that the evidence showed that debris was placed in the room where Huston was working at the direction of PJH. This created an uneven floor surface and an unsafe work condition that was left unmitigated by PJH and prevented Huston from using a lift which would have prevented his fall. Plaintiff argued that it is reasonable to infer from the circumstantial evidence that PJH proximately caused Huston's fatal injuries after debris became entangled in the scaffold's wheels, causing it to tip over.

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The court disagreed, finding that this circumstantial evidence was insufficient to survive summary judgment. The court found that “[s]peculation and conjecture are insufficient to establish proximate cause unless the circumstances are so related that the argued-for interpretation of an incident is the only probable one.”

Huston v. P. J. Hoerr, Inc., 2022 IL App (3d) 200541-U.

Subcontractor Borrowing Employer under Section 5(a) of the Workers’ Compensation Act

Leman v. Volmut involved a personal injury negligence action resulting from an automobile accident. The plaintiff, a union carpenter, sued various defendants, including Intren, LLC. Intren was a contractor engaged in a project in the area of the accident. The plaintiff worked directly for Intren, but was paid by another entity, Pinto Construction. Pursuant to a Master Services Agreement (MSA), Pinto was to provide carpentry services to Intren on the project. Per the MSA, Pinto provided all personnel, labor, tools, and equipment necessary to perform its work for Intren. The MSA further specified that Pinto was solely responsible for implementing the means, methods, and operative details of its carpentry work. Pinto acknowledged in the MSA that its employees were independent contractors and not Intren employees. The facts revealed that the plaintiff worked exclusively for Intren for seven years, with Intren assigning him to projects, supervising his work, and providing him with applicable safety training.

Intren filed a motion for summary judgment in the circuit court, arguing that it was the plaintiff’s “borrowing employer” and thus entitled to the protection of the exclusive remedy provision of Section 5(a) of the Illinois Workers’ Compensation Act (820 ILCS 305/5(a)). The trial court granted the motion, and the plaintiff appealed. The Illinois Appellate Court First District analyzed the MSA and agreed that a borrowed employment relationship existed between the plaintiff (an employee) and Intren (the plaintiff’s *de facto* employer) as a matter of law despite the fact that the MSA characterized the plaintiff as an independent contractor. The appellate court found that Intren clearly possessed the right to direct and control the manner in which the plaintiff performed his work, and that it exercised that right throughout the relevant time period. The court further concluded that the plaintiff acquiesced to employment with Intren and that, at a minimum, an implied contract of employment existed between them. Because no other inferences could be drawn from the undisputed facts in the record, the appellate court affirmed the circuit court’s summary judgment order.

Leman v. Volmut, 2023 IL App (1st) 221792.

Appeal by Subcontractor against Illinois State Toll Highway Authority Dismissed for Lack of Subject Matter Jurisdiction: Toll Highway Authority was Within its Discretion to Revoke Subcontractor’s Approval

Omega Demolition Corporation filed suit against the Illinois State Toll Highway Authority (ISTHA) after Omega was unable to work on tollway projects after ISTHA revoked Omega’s A15 subcontractor approval. In an amended complaint, Omega alleged that its due process rights were violated as the revocation was without notice or hearing. ISTHA moved to dismiss under 735 ILCS 5/2-615 and 2-619 and the trial court granted the motion to dismiss, with prejudice, under section 2-615 for failure to state a claim.

The facts revealed that ISTHA requires every subcontractor to complete an A15 subcontractor approval form before it can work on any tollway project. Omega’s A15 form was approved but, following a fatal accident involving one of Omega’s employees, ISTHA revoked the approval and Omega was suspended from work on any tollway project.

Among its arguments on appeal, Omega asserted that an A15 approval is not unlike a government license and, therefore, Omega was entitled to the same due process prior to its revocation, as is afforded to any other government licensee.

The appellate court affirmed the trial court’s dismissal of the action, but for a very different reason. It analyzed and agreed with ISTHA’s 2-619 motion. That motion, brought pursuant to section 2-619(a)(9) but regarded by the court as employing 2-619(a)(1), asserted that Section 32 of the Tollway Highway Act grants ISTHA discretionary powers not subject to judicial review in the absence of bad faith, fraud, corruption, manifest oppression, or a clear abuse of discretion. At no time did Omega allege that any of the exceptions applied. Instead, it argued that revocation of A15 approval did not constitute one of ISTHA’s discretionary powers. The appellate court disagreed and found that ISTHA acted within its statutory authority. It vacated the trial court’s order and dismissed the appeal for lack of subject matter jurisdiction.

Omega Demolition Corp. v. Illinois State Toll Highway Auth., 2022 IL App (1st) 210158.

Department of Insurance has Authority to Resolve Dispute between Insured and Insurer Regarding Payment of Additional Premiums on Workers' Compensation Policy

The Illinois Supreme Court, reversing the decision of the appellate court, held that the Department of Insurance (DOI) possessed authority under Section 462 of the Illinois Insurance Code to determine whether Prate Roofing and Installations, LLC owed additional premiums on its workers' compensation policy to its insurer, Liberty Mutual Insurance Corporation, arising out of Prate's subcontractors' failure to maintain workers' compensation insurance.

Prate, a roofing and construction installations contractor, obtained workers' compensation coverage from Liberty through the Illinois Assigned Risk Plan, which provides coverage through a risk pool administered by the National Council on Compensation Insurance. After Prate renewed its policy in October 2014, Liberty audited Prate's records and found that one of its subcontractors, ARW Roofing, LLC, did not have workers' compensation insurance. Liberty therefore assessed Prate an additional premium of \$127,305 because Liberty was exposed to more liability than it bargained for.

Prate appealed but the Illinois Workers' Compensation Appellate Board declined to rule and advised Prate to refile its dispute with the DOI. Prate appealed to the DOI under section 462 of the Illinois Insurance Code. 215 ILCS 5/462. The DOI agreed with Liberty on all issues. The circuit court affirmed the DOI's decision. The appellate court, however, vacated the decision, relying on *CAT Express, Inc. v. Muriel*, 2019 IL App (1st) 181851, which held that the Workers' Compensation Commission lacked jurisdiction over an employment status dispute between an insurer and its insured.

On appeal to the supreme court, Liberty argued that the appellate court erred in relying on *CAT Express* and that the DOI had the authority to resolve this dispute under section 462. The supreme court construed section 462 pursuant to principles of statutory interpretation and held that the plain language of section 462 gives the DOI the express authority to resolve a dispute involving the manner in which Illinois Assigned Risk Plan rule 2-H is applied in connection with the insurance provided to an insured.

Prate Roofing & Installations, LLC v. Liberty Mut. Ins. Corp., 2022 IL 127140.

Settlements Following Mechanics Liens Do Not Violate Prohibition on Confessions of Judgment

In *Sopris Concrete, LLC v. Meeks*, the Illinois Appellate Court Second District, upheld the trial court's decision that a settlement agreement negotiated following the recording of a mechanics lien was valid and did not violate the ban on confessions of judgment as set forth in § 2-1301(c) of the Illinois Code of Civil Procedure. 735 ILCS 5/2-1301(c).

Between November 15, 2016 and March 21, 2017, the plaintiff contractor performed masonry work at the defendant's property. Subsequently, the plaintiff recorded a mechanics lien, claiming that the defendant owed it approximately \$17,300. Approximately two years later, the parties entered into a settlement agreement that contained a confession of judgment clause. In the settlement agreement, the defendant agreed to pay the plaintiff \$7,750 before May 20, 2019. In exchange, the plaintiff agreed to release the mechanics lien. In August 2020, the plaintiff filed suit, alleging that the defendant made only partial payments of the \$7,750 owed.

In considering the plaintiff's argument that the settlement agreement was a consumer transaction in violation of the ban on confessions of judgment, the appellate court initially noted that only two Illinois appellate cases have considered whether a transaction was a consumer transaction for purposes of the statute. Neither case addressed the specific issue at hand, that is, whether a settlement agreement was considered a consumer transaction when the settlement resolved a mechanics lien arising out of a consumer transaction.

In making its determination, the appellate court considered the statutory language, legislative history, and rulings from other jurisdictions. Section 2-1301(c) of the Code of Civil Procedure bans confessions of judgment and defines a consumer transaction as "a sale, lease, assignment, loan, or other disposition of an item of goods, consumer service, or an intangible to an individual for purposes that are primarily personal, family, or household." The court held that the settlement agreement did not satisfy any of those definitions and, thus, the statute did not apply. Its conclusion is consistent with the legislative history, as state representatives were concerned with disparities and sophistication and bargaining power in consumer transactions. The appellate court noted that the defendant in this case did not purchase a faulty product. Additionally, there was no disparity in bargaining power between the parties: the defendant received favorable treatment under the settlement agreement because the plaintiff agreed to accept approximately sixty percent of what it was owed. The court also observed that courts in New Mexico and

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Texas ruled that settlement agreements do not constitute consumer transactions in similar circumstances.

The appellate court rejected the defendant's argument that multiple instruments may constitute a single contract such that the settlement agreement merged into the original consumer transaction. Instead, it pointed to specific language in the settlement agreement stating that it superseded all prior agreements and did not merge into them. It likewise rejected the defendant's contention that the settlement agreement was unenforceable for lack of consideration because the mechanics lien was facially defective and not properly perfected. The appellate court stated that a promise to forego legal action is valid consideration when made in good faith, even if the claim is ultimately shown to be invalid. In this case, the defendant did not argue that the plaintiff acted in bad faith in pursuing its mechanics lien or entering into the settlement agreement. Although there were purported technical defects with the mechanics lien, the promise to forego perfection of such lien was valid consideration. It followed that the settlement agreement was valid.

Sopris Concrete, LLC v. Meeks, 2022 IL App (2d) 210331.

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