

Trial Briefs

The newsletter of the Illinois State Bar Association's Section on Civil Practice & Procedure

***Antonicelli v. Rodriguez:* Revisiting the impact of “good faith” settlements under the Joint Tortfeasor Contribution Act**

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faith” settlements under the
Joint Tortfeasor Contribution
Act
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**General contractor not liable
for injury to subcontractor's
employee
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BY RICHARD LEE TURNER, JR., TURNER & SACKETT, LLC, SYCAMORE AND GENEVA

An ongoing tactical problem for defendants occurs where a co-defendant, with seemingly a major portion of the fault but a dearth of insurance coverage or available assets to satisfy a judgment,

determines to settle out for available policy limits with the plaintiff, then leaves the remaining defendant or defendants holding the exposure for a significant

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General contractor not liable for injury to subcontractor's employee

BY ANDREA L. KMAK AND KIMBERLY A. DAVIS, SPYRATOSDAVIS LLC, CHICAGO AND LISLE, IL

In June 2017, the First District Appellate Court issued a key ruling in a general contractor liability case. In *LePretre v. Lend Lease (US) Construction, Inc.*,¹ the court examined when a general contractor may owe a duty to employees of

subcontractors, and the facts that can give rise to such a duty.

Plaintiff filed a nine-count complaint in the Circuit Court of Cook County, after he slipped and fell while installing

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Antonicelli v. Rodriguez

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verdict at trial, knowing that the settling co-defendant will not appear on the verdict form. Allowing the remaining defendant or defendants a set-off after the verdict for the usually meager policy limits does not serve to alleviate their concerns. The recent decision of the Illinois Supreme Court in *Antonicelli v. Rodriguez*,¹ does nothing to change their tactical position. In a decision with two concurrent opinions, as well as a dissent by Chief Justice Karmeier, the Court leaves for the Legislature to determine whether or not a non-settling defendant should be included on a verdict form for what Justice Garman calls, in her concurring opinion, a “truthful apportionment of relative fault.”

In the early morning hours of November 2, 2013, Daniel Rodriguez, while under the influence of cocaine and traveling westbound on I-88, made an improper U-turn through the median and collided with the vehicle in which plaintiff, Angela Antonicelli, was a passenger. Karl Browder, operating a semi-tractor and trailer for Chicago Tube and Iron Co. (hereinafter “the Browder defendants”), following the vehicle in which Antonicelli was a passenger, was unable to stop his semi and rammed the passenger side of her vehicle, causing severe and permanent injuries to her.

Antonicelli and Rodriguez entered into a settlement for the available insurance coverage limits of \$20,000 on the Rodriguez vehicle, and Rodriguez filed a motion for a good-faith settlement, indicating to the trial court that the insurance policy limits were his only material asset and that the settlement was contingent on the UIM insurer’s consent to the settlement. The Browder defendants objected, arguing that Rodriguez acted “intentionally” in causing the accident (because of his intoxication at the time of the collision), taking the position that section 2 of the Contribution Act² does not permit the finding of a good-faith settlement with an intentional tortfeasor. The trial court granted Rodriguez’s petition for a finding of good faith and dismissal, and dismissed the non-

settling Browder defendants’ counterclaim for contribution as barred by the finding of good faith, but allowed them the right to credit \$20,000 against any future judgment in Antonicelli’s favor.

On appeal, the Browder defendants not only argued that the Contribution Act does not permit a finding of a good-faith settlement with an intentional tortfeasor, but also contended that the trial court’s finding of good faith was erroneous in that the court below failed to consider the rights of the Browder defendants under section 2 – 1117 of the Code of Civil Procedure,³ limiting the liability of minimally responsible defendants.

Section 2 of the Contribution Act provides:

§ 2. Right of Contribution.

- (a) Except as otherwise provided in this Act, where 2 or more persons are subject to liability in tort arising out of the same injury to person or property, or the same wrongful death, there is a right of contribution among them, even though judgment has not been entered against any or all of them.
- (b) The right of contribution exists only in favor of a tortfeasor who has paid more than his *pro rata* share of the common liability, and his total recovery is limited to the amount paid by him in excess of his *pro rata* share. No tortfeasor is liable to make contribution beyond his own *pro rata* share of the common liability.
- (c) When a release or

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EDITOR

James J. Ayres

MANAGING EDITOR / PRODUCTION

Katie Underwood

✉ kunderwood@isba.org

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covenant not to sue or not to enforce judgment is given in good faith to one or more persons liable in tort arising out of the same injury or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide but it reduces the recovery on any claim against the others to the extent of any amount stated in the release or the covenant, or in the amount of the consideration actually paid for it, whichever is greater.

- (d) The tortfeasor who settles with a claimant pursuant to paragraph (c) is discharged from all liability for any contribution to any other tortfeasor.
- (e) A tortfeasor who settles with a claimant pursuant to paragraph (c) is not entitled to recover contribution from another tortfeasor whose liability is not extinguished by the settlement.
- (f) Anyone who, by payment, has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full his obligation to the tortfeasor, is subrogated to the tortfeasor's right of contribution. This provision does not affect any right of contribution nor any

right of subrogation arising from any other relationship.

(740 ILCS 100/2 (West 2012)).

In the majority opinion, Justice Kilbride discussed the dual public policies which the Contribution Act seeks to promote: The encouragement of settlement and the equitable apportionment of damages among tortfeasors. However, he also pointed out that the Browder defendants could cite no authority whatsoever for the proposition that an accident caused by an intoxicated driver constitutes an "intentional tort," and therefore outside of the provisions of the Contribution Act permitting a finding of good faith and dismissal of the settling defendant. The courts below appropriately disregarded the allegation that Rodriguez behaved intentionally and therefore the claim of absence of good faith could be disregarded. The settling parties have the initial burden of making a preliminary showing of good faith; and this initial burden is met with proof of a legally valid settlement agreement. The nonsettling defendants must then prove the absence of good faith by a preponderance of evidence, which might be established through evidence of collusion, fraud or other wrongful conduct sufficient to meet this burden.⁴ A separate evidentiary hearing is not required and a trial court need not decide the merits of the tort case or rule upon the relative liabilities of the parties before making a good-faith determination. A court is capable of ruling on 'good faith' without a precise determination of the overall damages suffered by the plaintiff and the settling tortfeasor's proportionate liability.

The majority opinion also rejected the contention of the Browder defendants that, from a procedural standpoint, section 2 - 1117 of the Code comes into play before the Contribution Act, and that the trial court must consider "the equitable apportionment of damages among tortfeasors in arriving at a good faith finding." This particular provision provides as follows:

Except as provided in Section 2-1118, in actions on account of bodily injury or death or physical

damage to property, based on negligence, or product liability based on strict tort liability, all defendants found liable are jointly and severally liable for plaintiff's past and future medical and medically related expenses. Any defendant whose fault, as determined by the trier of fact, is less than 25% of the total fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third party defendant except the plaintiff's employer, shall be severally liable for all other damages. Any defendant whose fault, as determined by the trier of fact, is 25% or greater of the total fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third party defendants except the plaintiff's employer, shall be jointly and severally liable for all other damages.

735 ILCS 5/2 - 1117 (West 2012).

The court agreed with the appellate court below that requiring the trial court to make a determination as to each defendant's fault before finding that a settlement agreement was entered into in good faith would be impracticable and would defeat the purpose of section 2 of the Contribution Act of encouraging compromise and settlement in the absence of bad faith, fraud or collusion. Therefore, in the opinion of the majority, the trial court did not abuse its discretion when it found that the settlement between Rodriguez and Antonicelli satisfied the good-faith settlement requirement of the Contribution Act.

The issue of relative fault and comparing relative fault has been on the front burner for nearly 10 years, and the source of dispute among the members of the Illinois Supreme Court, since the decision in *Ready v. United/Goeddecke Services, Inc.*⁵ Justice Thomas, in his separate concurring opinion, indicates that this case provides the Legislature with another opportunity to clarify whether it intended the phrase "the defendants sued by the plaintiff" in section 2 - 1117 to include settling defendants,

such that settling defendants should appear on the verdict form for purposes of apportionment of fault between the defendants. He indicates that it is “time for the Legislature to step in and answer this question definitively once and for all.”

In her separate concurring opinion, Justice Garman reaffirms that the Contribution Act seeks to promote the twin public policy goals of the encouragement of settlements and equitable apportionment of damages among tortfeasors, but now the court’s decisions in *Ready I*, and for that matter in the case at bar, favor one policy goal and sacrifices the other.

In a lengthy dissent, Justice Karmeier asks what basis there can be, in fairness or reason, to argue that a fair and equitable apportionment of fault can be accomplished with the principal actor in an accident’s absence from the verdict form by which the jury will determine percentages of responsibility? He indicates that he is

convinced that the holding in *Ready I* does not reflect the intent of the Legislature to provide for fair apportionment of liability among tortfeasors or an equitable, comprehensive apportionment of fault by the trier of fact and that a broader construction of what constitutes “good faith” in this context could have rectified the inequity wrought by the earlier decision.

So, for the practitioner, whether at the plaintiff’s table or defense table, the fact remains that the defendant who might be deemed to be the primary negligent actor, even if intoxicated, but who settles for the available limits on his or her insurance policy, and enters into a “good-faith” settlement agreement under section 2 of the Contribution Act, will not appear on the jury verdict form for purposes of apportionment of fault. That defendant’s intoxication will not be deemed to rise to the level of an intentional tort to take him or her out of the protections afforded by

the Act. Nor will section 2 – 1117 of the Code of Civil Procedure change the picture for the remaining defendant(s), despite the argument from the remaining defendant(s) that the settling defendant’s fault should be apportioned by the jury on the verdict form in accordance with this statutory provision. As counsel for Browder recently commented, when you have significant injuries, \$20,000 doesn’t make much of a difference, and with respect to the settling defendant, “the whole ballgame is whether he is on the verdict form.”⁶ ■

1. 2018 IL 121943, opinion filed February 16, 2018.

2. 735 ILCS 100/2 (West 2012).

3. 735 ILCS 5/2-1117 (West 2012).

4. Citing to *Johnson v. United Airlines*, 203 Ill. 2d 121 (2003); *In re Guardianship of Babb*, 162 Ill. 2d 153 (1994).

5. Commonly cited as *Ready I*, 232 Ill.2d 369 (2008).

6. A. Maloney, “Tort Question Splits Justices Over Liability,” *Chicago Daily Law Bulletin*, Feb. 21, 2018.

General contractor not liable for injury

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an iron rebar in a construction site. Defendant Lend Lease was the general contractor for the project, and hired several subcontractors to perform work on the site. Lend Lease hired Adjustable Forms (Adjustable) as the concrete subcontractor; Adjustable then subcontracted with plaintiff’s employer, Bond Steel, to install and reinforce the iron rebar.²

Plaintiff alleged that Lend Lease had a duty to keep the construction site safe, inspect the premises, and warn of dangerous conditions. Plaintiff argued that Lend Lease’s failure to do so caused him to fall and injure himself. In his deposition, Plaintiff attributed his injury to three factors: “The rebar pieces that he was installing were too long, the workspace he was in was too confined, and there was loose, falling dirt.”³ Plaintiff also argued that Lend Lease retained control over the “means and methods and operative details”

of the work in that its safety professional was present on the site at all times and had the authority to inspect and stop work for safety reasons.⁴

Lend Lease filed a motion for summary judgment, maintaining that it owed no duty to Plaintiff under section 414 of the Restatement (Second) of Torts. As a general rule in Illinois, a party who entrusts an independent contractor will not be held vicariously liable for tortious acts or omissions by the independent contractor.⁵ Section 414 carves out an exception to this rule and provides that if a general contractor retains the control of any part of the work, it is subject to liability for physical harm to others for whose safety it owes a duty to exercise reasonable care, which is caused by its failure to exercise said control with reasonable care.⁶ The comments to this rule contain an exception to this exception, which provides that in

order for Section 414 to apply, the employer must have retained at least some degree of control *over the manner in which the work is done*.⁷ It is not enough that a general contractor has the mere right to order work stopped or resumed, to inspect progress, to make suggestions or recommendations, or to prescribe alterations and deviations.⁸

In its summary judgment motion, Lend Lease argued that while it retained some general supervisory control over the site by virtue of its subcontracts, “it did not control the incidental aspects of the work of Adjustable or Bond Steel,” and therefore owed no such duty to Plaintiff.⁹ Specifically, it reasoned that the contract between Lend Lease and Adjustable and the contract between Adjustable and Bond Steel showed that Lend Lease did not retain any control over the rebar length, the work space, or the removal of debris, and it did not direct or control any of Plaintiff’s day-to-day

work.¹⁰ To support its position, Lend Lease incorporated deposition testimony and the relevant contract provisions into its summary judgment motion.

The trial court found that there was no evidence that Lend Lease retained control over the means and methods and operative details of the work of Plaintiff and his employer, and further determined that there existed no evidence that Lend Lease retained control over the safety of the specific job.¹¹ The court reasoned that having the authority to stop any work on the site, maintaining a safety program, or having a safety director on site, “without more, are merely the general responsibilities of a general contractor” and were insufficient to establish that Lend Lease maintained control over Plaintiff’s work.¹² Thus, the trial court found that Lend Lease did not have a duty to Plaintiff, and granted its motion for summary judgment.

The First District reviewed *de novo* the circuit court’s ruling on summary judgment. In doing so, it assessed whether Lend Lease owed a duty to the Plaintiff by examining the degree of control that Lend Lease retained over its subcontractors. Plaintiff argued that the issue of whether a general contractor retained sufficient supervisory control over the work was a question of fact for the jury to decide.¹³ Lend Lease maintained that it did not control the “means and methods” of the work, which became evident during discovery, and therefore it was not liable for Plaintiff’s injuries.¹⁴

The reviewing court examined a series of related rules and cases regarding general contractor liability. The court stated that the rule in Illinois is that a party who entrusts an independent contractor “will not be held vicariously liable for tortious acts or omissions committed by the independent contractor” under the master-servant theory of agency law.¹⁵ However, if the employer retains control over the operative detail of the work the independent contractor is doing, the employer is subject to *vicarious* liability under agency law.¹⁶

A general contractor may be held *directly* liable in negligence for a subcontractor employee’s injuries if the general contractor

retains less than that degree of control that would subject it to liability as a master, but a certain degree of supervisory control over the subcontractor’s work.¹⁷ A general contractor may retain the power to direct the order in which work is performed and to forbid work from being done in a manner that is likely to be dangerous, without being subject to direct liability for a subcontractor’s employee’s injuries.¹⁸ Further, the general right to order work “stopped or resumed,” inspect the progress of work, or to make suggestions or recommendations is not enough to subject a contractor to direct liability under this theory.¹⁹

The issue of whether a general contractor retained sufficient control to establish a duty to a subcontractor is fact-specific. The First District in the instant case began its analysis by examining the written agreements between Lend Lease and its subcontractors, and reviewing Lend Lease’s conduct as it relates to its supervisory responsibilities.²⁰ In assessing the written agreements at play in this case, the court found that there was no contract between Lend Lease and Plaintiff’s employer, Bond Steel. Accordingly, it analyzed Lend Lease’s contract with Adjustable and Lend Lease’s contract with the owner of the building where construction was taking place, ClarGran.

ClarGran’s contract with Lend Lease provided that Lend Lease would be solely responsible for and have control over “construction means, methods, techniques, sequences, and procedures and for coordinating all portions of the work under the contract.”²¹ It also stated that Lend Lease was responsible for safety and was required to provide reasonable protection to prevent damage and injury, and was required to establish a safety program to effectuate the same.

Plaintiff cited these provisions and argued that they were sufficient to establish that Lend Lease owed him a duty. The court disagreed, and found that the above provisions are simply the basic rights reserved to a general contractor like Lend Lease to oversee all of the work and operations at a job site. The court further observed that while

Lend Lease was permitted to have a safety professional present at the site to provide general safety oversight, its contract with Adjustable placed control of day-to-day and job-specific safety with Adjustable.²² More specifically, subcontractors were responsible for not only their own means and methods of completing their specific work for which they were hired, but were also required to take any “trade-specific” safety measures.²³

To that same end, the court assessed Lend Lease’s actions and conduct during the relevant construction job. For instance, the court found it notable that Lend Lease’s safety professional never stopped Bond Steel’s work for safety reasons and did not provide any safety direction specifically relating to the installation of the rebar.²⁴ The court also found that Lend Lease did not order work to be done in any specific way, and that Plaintiff and his co-workers reported to Adjustable’s superintendent when on the job, rather than Lend Lease personnel.²⁵

After considering the foregoing, the court found that the relevant contract provisions and deposition testimony did not provide sufficient facts to establish that Lend Lease had a duty to Plaintiff.²⁶ The court reasoned that to hold otherwise in a case with similar facts would create strict liability for personal injury on any job site employee.²⁷

Plaintiff also argued that Defendant was vicariously liable to Plaintiff through the laws of agency. However, for the reasons explained above, the degree of control retained by Lend Lease over its subcontractors did not give rise to a master-servant relationship.²⁸ The court found it important to note that the rule in Section 414 articulates a basis for imposing direct liability against a general contractor, and not vicarious liability under agency law.²⁹ For a general contractor to be liable for negligence under agency law, it would have had to retain control over the operative detail of doing any part of the work, and would be liable under the master-servant theory.³⁰ If the employee retains less control than that necessary to subject him to liability as a master, but

retains “supervisory control” as provided in section 414, the employee may be directly liable for negligence, as opposed to vicariously liable under the master-servant theory. However, neither of these theories applied to Lend Lease in this case, and the trial court’s ruling was affirmed.

The *LePretre* case seems to be a continuation of a recent trend of Illinois courts moving away from imposing liability against general contractors.³¹ The First District has even articulated public policy reasons for not shifting liability to a general contractor.³² Given the continued interpretation of the doctrine set forth in section 414 by Illinois courts and the fact-intensive analysis involved in assessing each of these cases, it will be interesting to see if and how this doctrine will develop in years to come, and if this trend will continue. ■

1. *LePretre v. Lend Lease (US) Construction, Inc.*, 2017 IL App (1st) 162320.
 2. *Id.* at ¶ 3.
 3. *Id.* at ¶ 5.
 4. *Id.* at ¶ 20.

5. *Madden v. F.H. Paschen/ S.N. Nielson, Inc.*, 395 Ill. App. 3d 362, 381 (1st Dist. 2009).
 6. See Restatement (Second) of Torts, §414 (1965).
 7. Restatement (Second) of Torts, §414 cmt. c (1965).
 8. *Id.*
 9. *LePretre* at ¶ 5.
 10. *Id.*
 11. *Id.* at ¶ 21.
 12. *Id.*
 13. *Id.* at ¶ 23.
 14. *Id.*
 15. *Madden v. F.H. Paschen/ S.N. Nielson, Inc.*, 395 Ill. App. 3d 362, 381 (1st Dist. 2009).
 16. See Restatement (Second) of Torts, §414 cmt. a (1965).
 17. *Id.*
 18. *Id.*
 19. See Restatement (Second) of Torts, §414 cmt. c (1965).
 20. *LePretre* at ¶ 30.
 21. *Id.* at ¶ 31.
 22. *Id.* at ¶ 34 (Adjustable “shall establish and implement safety measures, policies, and standards” and at its own expense keep the premises at all times free from waste materials and “other debris accumulated in connection with the work. . .”; see also *Joyce v. Mastri*, 371 Ill. App. 3d 64, 74 (1st Dist. 2007) (“the mere existence of a safety program, safety manual, or safety director is insufficient to trigger [section 414]”).

23. *LePretre* at ¶ 44.
 24. *Id.* at 44.
 25. *Id.*
 26. *Id.* at ¶ 45.
 27. *Id.*
 28. *Id.* at ¶ 47. See also *Carney v. Union Pacific R.R. Co.*, 2016 IL 118984, ¶ 38 (“if the control retained by the employer is such that it gives rise to a master-servant relationship, the employer may be liable for the negligence of the contractor’s employees under the laws of agency, however, agency law is not the same as when an employer is directly liable for its own negligence – so ‘section 414 takes over where agency law ends.’”).
 29. *LePretre* at ¶ 28-29.
 30. *Id.* at 47.
 31. See *Calderon v. Residential Homes of Am., Inc.*, 381 Ill. App. 3d 333 (1st Dist. 2008) and *Madden v. F.H. Paschen, S.N. Nielson, Inc.*, 395 Ill. App. 3d 362 (1st Dist. 2009).
 32. See *Martens v. M.C.L. Construction, Corp.*, 347 Ill. App. 3d 303, 318 (explaining that penalizing a general contractor’s efforts to maintain some broad degree of control over the safety of a jobsite and the implementation of a safety program among various independent contractors “hardly serves to advance the goal of work site safety.” Thus, the existence of a safety program, safety manual, or safety director does not constitute retained control per se, and the court must still examine the facts under the Section 414 retained control exception).



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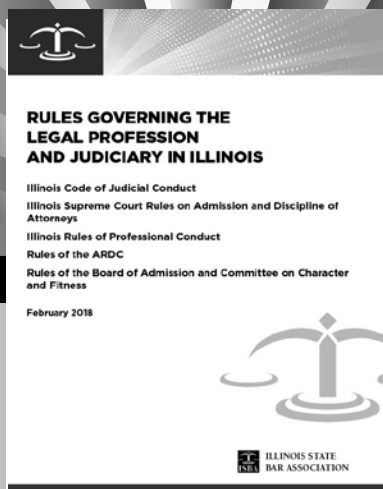
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