



ILLINOIS STATE BAR ASSOCIATION

TORT TRENDS

The newsletter of the Illinois State Bar Association's Section on Tort Law

Editor's note

By John L. Nisivaco, Boudreau & Nisivaco, Chicago

The first article of this edition, written by Bridget Duignan, discusses the Illinois Supreme Court's decision in *O'Connell v. Turner Construction*, and the court's interpretation of Section 414 in construction negligence cases.

The second article is written by Dennis Berkblinger and provides some helpful advice for plaintiff attorneys confronted with the trend of hospi-

tals, clinics, and other medical providers refusing to submit their bills and charges to their clients' health insurance carriers, preferring, instead, to pursue liens against the clients' recoveries under the Health Care Services Lien Act.

Thank you to all of the contributors. The articles are excellent and we hope you find the materials helpful. ■

O'Connell v. Turner Construction, Inc. and Section 414 of the Restatement (Second) of Torts

By Bridget Duignan, Latherow Law Office, Chicago

Before its repeal in 1994, the Structural Work Act was a significant vehicle through which workers sought relief for construction-related injuries. Legislative attempts to revive the Act have been unsuccessful, the most recent in 2008. See HB 2094 'Construction Safety Act.' Section 414 of the Restatement (Second) of Torts, said to be the Structural Work Act's "common law negligence corollary," survived that repeal and currently serves as the criterion under which construction-related injuries are analyzed. *Bokodi v. Foster Wheeler Robbins, Inc.*, 312 Ill.App.3d 1051, 1057-1058 (1st Dist. 2000). Section 414 states that 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. Section 414 is the exception to the general rule that one who employs an independent contractor is not liable for his acts or omissions. *Rangel v. Brookhaven Constructors, Inc.*, 307 Ill.

App.3d 835, 838 (1st Dist. 1999). The most hotly contested issue within these claims is the degree of retained control necessary to create a duty of care. The demarcation between retained control and the lack thereof is not clear-cut and the Illinois Supreme Court has not revisited this issue since it first recognized Section 414 as a statement of Illinois law, over 45 years ago. *Larson v. Commonwealth Edison Co.*, 33 Ill.2d 316 (Ill. 1965); *Martens v. MCL Construction, Corp.*, 347 Ill.App.3d 303, 314 (1st Dist. 2004). There has been a lack of consensus among the appellate districts, most significantly regarding control, but also regarding direct and vicarious liability claims within this context. See e.g., *Moiseyev v. Rot's Building and Development, Inc.*, 369 Ill.App.3d 338, 350 (3rd Dist. 2006) ("in order to establish liability...a defendant must retain control over routine and incidental aspects of the work, which includes an operative detail analysis"); *Diaz v. Legat Architects, Inc.*, 397 Ill.App.3d 13, 39 ("controlling the

Continued on page 2

INSIDE

Editor's note 1

O'Connell v. Turner Construction, Inc. and Section 414 of the Restatement (Second) of Torts 1

A strategy for dealing with medical providers who refuse to submit their bills to health insurance..... 3

Upcoming CLE programs 6



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O'Connell v. Turner Construction, Inc. and Section 414 of the Restatement (Second) of Torts

Continued from page 1

operative details of the subcontractors' work is necessary for vicarious liability; direct liability stems from the failure to exercise general supervisory control"); *Wilfong v. L.J. Dodd Construction*, 401 Ill.App.3d 1044, 1061 (2nd Dist. 2010) ("to prevail under a section 414 claim...[a defendant must] have control over the means and methods of an independent contractor's work"). We can probably blame the comments of *Section 414* for some of that confusion. Nonetheless, the lack of uniformity as it related to the degree of retained control was ironically predictable in that practitioners knew how the summary judgment motion would read. That is, until *O'Connell v. Turner Construction, Inc.*, 2011 Ill.App.LEXIS 531 (1st Dist. 2011).

Lawrence O'Connell was injured while working on a new high school campus for Grayslake Community High School District 127. *O'Connell* at 3-4. At the time of the incident he was employed by Linden Erectors, which was a subcontractor hired by Waukegan Steel. Waukegan Steel contracted directly with the school district. The school district also separately contracted with Turner Construction. *O'Connell* at 4. Turner had designated itself 'construction manager' at the construction site. *O'Connell* at 7. As construction manager, Turner assisted the school district in drafting the contracts and handled the bidding process for hiring subcontractors, which included advising the school district about which bids to accept. *O'Connell* at 9. Although Turner disclaimed direct responsibility over the subcontractors for job site safety and construction means and methods, it was contractually obligated to review the subcontractors' safety programs and coordinate these programs among the contractors. *O'Connell* at 2.

The plaintiff filed suit and his claims against Turner were premised on *Sections 343 and 414 of the Restatement (Second) of Torts*. *O'Connell* at 1. With regard to the *Section 414* Count, the plaintiff maintained that Turner was liable for his injuries because it "exercised significant operational and/or supervisor control over the trade contractors, particularly with respect to safety, but also as to the details of construction means and methods." *O'Connell* at 4. The trial court dis-

agreed and granted Turner summary judgment. *O'Connell* at 4. On appeal, the plaintiff asserted that summary judgment was improper because the scope of Turner's control at the construction site was a material issue of fact and the determining factor for liability under *Section 414*. *O'Connell* at 6. Although the former may have been true, the court stated that control alone does not trigger liability. *O'Connell* at 6; citing *Haberer v. Village of Sauget*, 158 Ill.App.3d 313, 319 (1987). In an unprecedented analysis of *Section 414*, the court focused on whether Turner entrusted the work to the plaintiff as, it stated, "entrustment of the work to an independent contractor by the defendant is a prerequisite for the application of *Section 414*." *O'Connell* at 6-7. The court clarified that in previous cases, retained control was the determining factor in *Section 414* claims because the parties' relationship had not been at issue. *O'Connell* at 7. Here, it appears that the contractual dynamic between the parties was the proverbial elephant in the room. Specifically that Linden, the plaintiff's employer, was not directly or indirectly hired or contracted by Turner. Linden was hired by Waukegan Steel, which contracted with the school district. Turner had a separate contract with the school district. The school district, not Turner, signed the contract. *O'Connell* at 8. Notwithstanding the absence of a contract between Linden and Turner, the court stated that because Turner did not select the subcontractors, particularly Linden, it could not be said that Turner entrusted them with the work. *O'Connell* at 8. The court refused to consider the plaintiff's assertion that Turner voluntarily assumed a duty of care outside of *Section 414* based upon its conduct on the site, as it was not raised before the trial court. *O'Connell* at 8-9. As an aside, the court also found no premises liability under *Section 343 Restatement (Second) of Torts*. It distinguished between Turner's control over the people or activities on the site and a dominion over the land. *O'Connell* at 11-12. Turner was not the possessor of the construction site and the court found that the plaintiff also failed to demonstrate that Turner controlled or intended to control the land at issue. *O'Connell* at 15.

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Approximately two months later, the Northern District of Illinois may have shed some light as to how *O'Connell* could influence future interpretation of *Section 414*. *Sojka v. Bovis Lend Lease, Inc.*, 2011 U.S. Dist. LEXIS 56952 (N.D. Ill. 2011). There, Christopher Sojka, Jr., an employee of McHugh Construction, filed suit against Bovis, the construction manager on the project, after he was injured while working at Trump Tower. *Sojka* at 3-4. Like the defendant in *O'Connell*, Bovis contracted with the owner, as did McHugh. *Sojka* at 13. Although Bovis and McHugh did not directly contract with each other for the work, Bovis signed the contract between the owner and McHugh, as the owner's agent. Bovis invoked *O'Connell* and maintained that

there can be no entrustment of the work by Bovis to McHugh absent that contractual link. *Sojka* at 13. The court disagreed and distinguished *O'Connell*. It found it significant that in *O'Connell*, Linden was "one step removed" from Turner and the school district. *Sojka* at 14-15. In other words, Bovis lacked its own 'Waukegan Steel.' The court also clarified that a direct contract between Bovis and McHugh is unnecessary to show entrustment. *Sojka* at 14-15. Bovis' contract with the owner was much broader in scope than that in *O'Connell*. For example, Bovis had significant authority to act as the owner's agent over the selection of trade contractors and specifically, the selection of McHugh. *Sojka* at 14-15. The opposite was true in *O'Connell*,

where Turner did not select the contractors. Although the court found that the plaintiff established that Bovis entrusted the work to McHugh, summary judgment was granted to Bovis on other grounds. *Sojka* at 23.

It cannot be said that the decision in *O'Connell* completely changed how plaintiffs prosecute and defendants defend *Section 414* claims. There still remains the blurred line as it concerns retained control and the confusion surrounding direct versus vicarious liability within this context. Further, I suspect that the appellate districts will have a different view, based upon the facts before it, as to what constitutes entrustment of the work. We will have to wait and see how the analysis evolves. ■

A strategy for dealing with medical providers who refuse to submit their bills to health insurance

By Dennis L. Berkbighler, Effingham

Attorneys who represent plaintiffs in personal injury cases are all too familiar with the trend of hospitals, clinics, and other medical providers refusing to submit their bills and charges to their clients' health insurance carriers, preferring, instead, to pursue liens against the clients' recoveries under the Health Care Services Lien Act. In cases where they believe a tort recovery by the patient is likely, the medical providers are trying to avoid the often substantial discounts that are typically applied to their bills when they are submitted to health insurance carriers. But, there are a number of situations where the personal injury client may benefit more by having his or her medical expenses paid by health insurance rather than out of the tort recovery.

When faced with this situation, the following letter, or some variation of it, may be used in an attempt to induce the recalcitrant provider to comply with the demand to submit the client's bills to his or her health insurance. While the legal theories expressed in the letter may have not been court tested, nearly all of the medical providers to whom it has been sent have complied with the demand within a short time.

Sample Letter

"ABC Hospital"

Gentlemen:

This firm represents John Doe in connection with his personal injury claims arising from a vehicle collision on [date], in which he sustained serious injuries. He received treatment and was hospitalized at your facility for those injuries as a result of which you are claiming an amount due from Mr. Doe of \$73,083.74.

At the time of the collision and Mr. Doe's treatment at your facility, he was covered by a health or medical insurance policy issued by XYZ Insurance. Mr. Doe's insurance coverage information was provided to you at the time of his admission and treatment. Your facility is, and at all relevant times has been, a preferred provider in the XYZ network. Mr. Doe had obtained this health insurance coverage precisely so that in the event he required medical care and treatment, the cost of such care and treatment would be paid or

largely defrayed by his insurance.

In spite of the foregoing, ABC Hospital has thus far steadfastly refused to submit my client's bills related to the vehicle collision to XYZ for payment, instead taking the position that the liability insurance policy covering the driver of the vehicle that collided with Mr. Doe is "primary" coverage, and that Mr. Doe's health or medical insurance coverage is secondary. You have obviously taken this position to maximize your income by attempting to avoid the discounts (voluntarily negotiated and agreed to by your management in order to become a member of the XYZ Insurance provider network) that would be applied to your bills and charges if they are submitted to XYZ as one of its network providers. Apparently in the hope of collecting the entire amount of your charges at your full "rack rates," ABC Hospital has instead claimed a lien upon my client's claim for damages against the at fault driver that collided with him and his liability insurance carrier by serving a lien notice pursuant to the Illinois Health Care

mu • tu • al [myoo'choo el] *adj.* -
1 held in common 2 for each other 3 shared



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Services Lien Act.

In prior phone calls to you, I demanded that you submit my client's charges to his health insurance carrier for payment. You have thus far refused to do so, citing your "policy" to regard the liability insurance as "primary" coverage. Some of the reasons you may want to change your position and comply with this demand include the following.

1. THE MAXIMUM AMOUNT YOU MAY COLLECT BASED ON YOUR LIEN CLAIM IS FAR LESS THAN WHAT YOU WILL COLLECT BY SUBMITTING YOUR BILLS TO MY CLIENT'S HEALTH INSURANCE CARRIER. The per person liability limit on the liability policy covering my client's injury claim is \$100,000.00. In addition to your lien claim of \$73,083.74, DNR Hospital has asserted a lien claim for \$26,924.15, and ABC Clinic has asserted a lien claim for \$9,886.60, making the total liens asserted against my client's recovery thus far \$109,894.49.

Under the Illinois lien statute, the total of all liens may not exceed 40% of the settlement, and no individual category of health care provider may receive more than one-third of the total settlement (770 ILCS 23/10). Thus, the two hospitals claiming liens cannot receive more than a combined total of \$33,333.33 from the proposed settlement in satisfaction of their liens. According to my calculations, the maximum amount ABC Hospital can receive on its lien claim is therefore \$24,359.33.

I am confident that you will recoup substantially more than that amount by submitting your charges to XYZ Insurance as we have demanded, even though the amounts paid will presumably be discounted in accord with your agreement or contract with them.

2. MY CLIENT IS A THIRD-PARTY BENEFICIARY OF THE AGREEMENTS BETWEEN ABC HOSPITAL AND XYZ INSURANCE PROVIDING FOR DISCOUNTED PAYMENTS IN SATISFACTION OF

THE PATIENT'S ACCOUNTS. The law is clear that a third-party beneficiary of such a contract is entitled to enforce the contract and sue for damages for its breach. By refusing to submit his medical bills to my client's health insurance carrier, you are depriving him of the benefits of the discounts and other provisions of the negotiated agreement between the hospital and XYZ whereby ABC Hospital became a member of the provider network. My client's damages for this breach are, at a minimum, the amounts you would have been paid if the charges had been submitted to health insurance as we have demanded, and the satisfaction of my client's remaining liability for any additional charges other than deductibles and co-pays that may apply. Additional damages may be applicable.

My client is prepared to initiate legal action for breach of contract should you not promptly comply with our demand.

3. THE INTENTIONAL REFUSAL TO SUBMIT MY CLIENT'S CHARGES TO HIS HEALTH INSURANCE FOR PAYMENT CONSTITUTES AN ACTIONABLE TORTIOUS INTERFERENCE WITH HIS CONTRACT WITH HIS HEALTH INSURANCE PROVIDER. As mentioned earlier, Mr. Doe had the foresight to purchase health insurance coverage to protect him in the event he was injured or became ill with the expectation that covered medical expenses would be paid by that insurance. He has paid premiums to obtain that insurance coverage.

By willfully and intentionally refusing to submit my client's medical bills arising from this occurrence to his health insurance carrier, ABC Hospital is depriving him of the benefits of his contract with his health insurance carrier. Compensatory damages recoverable for this tort include the amounts that the hospital would have been

paid, plus the fact that my client's liability for the medical expenses would be satisfied by the discounted payments, other than deductibles or co-pays that might apply. Consequential damages, including my client's attorney fees and expenses, and punitive or exemplary damages are also recoverable in a tortious interference with contract cause of action.

Again, my client and I are fully prepared to initiate this litigation if ABC Hospital persists in its refusal to promptly comply with our demand.

Sincerely,

If there is or may be questionable liability, even with adequate liability insurance coverage, the substantial risks and delays associated with continuing to pursue their lien rights instead of being paid by the client's health insurance need to be brought to the provider's attention as well. So far at least, just the threat of the litigation set forth in the letter has provided sufficient leverage to induce the health provider involved to comply with the demand. Perhaps soon, some court will rule on the theories outlined in the foregoing letter. ■



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Thursday, 3/1/12- Chicago, ISBA Chicago Regional Office—eTechnology in the Courthouse: Present and Future. Presented by the ISBA Bench and Bar Section. 1:30-4:45.

Thursday, 3/1/12- Live Webcast—eTechnology in the Courthouse: Present and Future. Presented by the ISBA Bench and Bar Section. 1:30-4:45.

Friday, 3/2/12- Chicago, ISBA Chicago Regional Office—Legal Trends for Non-Techies: Topics, Trends, and Tips to Help Your Practice. Presented by the ISBA Committee on Legal Technology. 9-4:30.

Monday, 3/5/12- Chicago- ISBA Chicago Regional Office—Foundations, Evidence and Objections. Presented by the ISBA Tort Law Section. 9-12:30.

Monday, 3/5/12- Webcast—Clients, Ethics and Negotiations. Presented by the Alternative Dispute Resolution Section. 1:30-3:00.

Monday, 3/5/12- Webinar—Introduction to Legal Research on FastCase. Presented by the Illinois State Bar Association. 2:30-3:30.

Tuesday, 3/6/12- Teleseminar—Defending Against IRS Audits & Collections, Part 1. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 3/7/12- Webinar—Advanced Tips for Enhanced Legal Research on FastCase. Presented by the Illinois State Bar Association. 2:30-3:30.

Wednesday, 3/7/12- Teleseminar—Defending Against IRS Audits & Collections, Part 2. Presented by the Illinois State Bar Association. 12-1.

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Wednesday, 3/14/12- Chicago, ISBA Chicago Regional Office—Medical CO-Ops: A Plan for Physicians to Contract Directly with Patients and Employers to Become their Health Insurer. Presented by the ISBA Health Care Section. 11-12.

Wednesday, 3/14/12- LIVE Webcast—Medical CO-Ops: A Plan for Physicians to Contract Directly with Patients and Employers to Become their Health Insurer. Presented by the ISBA Health Care Section. 11-12.

Wednesday, 3/14/12- LIVE Webcast—Protecting Personal Information: What Businesses and Consumers Should Know. Presented by the Standing Committee on Racial and Ethnic Minorities and the Law and the ISBA Government Lawyers Section. 1-3.

Thursday, 3/15/12- Chicago- ISBA Chicago Regional Office—Litigating, Defending and Preventing Employment Discrimination Cases: Practice Updates for the Illinois Human Rights Act. Presented by the ISBA Human Rights Section. 9-4

Friday, 3/16/12- Bloomington, Double Tree—A Roadmap to the New Illinois Religious Freedoms and Civil Union Act. Presented by the Standing Committee on Sexual Orientation and Gender Identity; co-sponsored by the ISBA Family Law Section. 1:55-5.

Monday, 3/19/12- LIVE Studio Webcast—Judgments and Enforcement. Presented by the Commercial Banking, Collections and Bankruptcy Section. 11-1.

Tuesday, 3/20/12- Teleseminar—Drafting Employment Agreements. Presented by the Illinois State Bar Association. 12-1.

Thursday, 3/22/12- Teleseminar—Forming a New Non-Profit Organization. Presented by the Illinois State Bar Association. 12-1.

Thursday, 3/22/12- Peoria, Four Points Sheraton—Family Law Spring Training 2012- From Rookie to Major League. Presented by the ISBA Family Law Section. 8-5.

Monday, 3/26/12- Webinar—Fast Case Boolean (Keyword) Search for Lawyers. Presented by the Illinois State Bar Association-Complimentary to ISBA Members. 2:30-3:30.

Tuesday, 3/27/12-Saturday, 3/31/12- Chicago, ISBA Chicago Regional Office—40 Hour Mediation/Arbitration Training. Presented by the Illinois State Bar Association. 8-5 daily.

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Thursday, 3/29/12- Teleseminar—Lawyer Marketing: An Ethics Guide. Presented by the Illinois State Bar Association. 12-1.

April

Tuesday, 4/3/12- Teleseminar—Portability of the Estate and Gift Tax Exemptions-Planning in 2012. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 4/4/12- Webinar—Advanced Tips for Enhanced Legal Research on FastCase. Presented by the Illinois State Bar Association. 9-10am.

Friday, 4/6/12- STUDIO TAPING—Economic Development Tools: What are the Options for Local Government. Presented by the Local Government Law Section. 9:30-11:30.

Monday, 4/9/12- Webinar—Introduction to Legal Research on FastCase. Presented by the Illinois State Bar Association. 9-10.

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