

From: Julia C. Williams jwilliams@williamslawchicago.com 

Subject: Fwd: Legal Research

Date: October 17, 2020 at 10:14 AM

To: Paul Dulberg paul_dulberg@comcast.net, Paul Dulberg pdulberg@comcast.net, ed@clintonlaw.net, marywinch@clintonlaw.net

JW

Paul,

Here is Jared's research. It should have been in the flash drive.

All the other discovery produced to the other side is that folder I listed yesterday on my response.

We wish you the best of luck.

Best regards,

Julia Williams
Attorney
111 W. Washington, Ste. 1437
Chicago, IL 60602
312-508-3376
jwilliams@williamslawchicago.com

Sent from my iPhone.

This message may be privileged or confidential. If you are not the intended recipient, please notify the sender and delete this message immediately.

Begin forwarded message:

From: Jared Stromer <jaredmstromer@gmail.com>
Date: March 6, 2020 at 10:26:17 AM CST
To: Julia Williams <juliawilliams@clintonlaw.net>
Subject: Re: Legal Research

Good Morning.

Attached please find my case findings as well as my analysis of such regarding Research Assignment 1.

I labeled the two Estoppel cases I founded accordingly and left the Homeowner issue cases as is to avoid confusion.

Although I did use mainly a few cases I wanted you to be aware of all the research I used to formulate and assist in my analysis.

Please let me know if you have follow-up questions or if there is anything further needed.

Thank you,

Jared M. Stromer
Phone: (312) 622-6450

On Wed, Feb 26, 2020 at 2:47 PM Julia Williams <juliawilliams@clintonlaw.net> wrote:
Great. Thanks.

Julia Williams
Of Counsel
The Clinton Law Firm
111 W. Washington, Ste. 1437
Chicago, IL 60602
P:312.357.1515
F: 312.201.0737
juliawilliams@clintonlaw.net

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On Feb 26, 2020, at 2:23 PM, Jared Stromer <jaredmstromer@gmail.com> wrote:

Good Afternoon Julia,

My apologies I did receive the first email which stated you guys would be sending the login information shortly and I did not see the follow-up email.

I have added your firm's email to my "No Spam" folders and saved you as a contact so I will ensure to see all your correspondence.

I think that March 6 should be fine.

I will look over this in the coming days and go from there.

I appreciate the opportunity again and thank you for making sure no conflicts, makes my life easier.

Please let me know if there are any other updates or things further.

Talk to you soon,

Jared M. Stromer
Phone: (312) 622-6450

On Wed, Feb 26, 2020, 11:03 Julia Williams <juliawilliams@clintonlaw.net> wrote:

Dear Jared,

Did you received this and are you going to be able to meet the March 6 deadline?

Best Regards,

Julia Williams
Of Counsel
The Clinton Law Firm
111 W. Washington, Ste. 1437
Chicago, IL 60602
P:312.357.1515
F: 312.201.0737
juliawilliams@clintonlaw.net

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> On Feb 21, 2020, at 3:07 PM, Julia Williams <juliawilliams@clintonlaw.net> wrote:

>

> Dear Jared,

>

> The login in is JPRKJNS; Margaret5555=

>

> www.advance.lexis.com

>

> Best Regards,

>

> Julia Williams

> Of Counsel

> The Clinton Law Firm

> 111 W. Washington, Ste. 1437

> Chicago, IL 60602

> P:312.357.1515

> F: 312.201.0737

> juliawilliams@clintonlaw.net

>

> This message may be privileged and confidential. If you are not the intended recipient, please delete the email and notify the sender immediately.

>

>> On Feb 21, 2020, at 1:03 PM, Julia Williams <juliawilliams@clintonlaw.net> wrote:

>>

>> Dear Jared,

>>

>> I have attached a legal research project for you. We will pay \$20 per hour. Please just send us our time at the end of the project.

>>

>> We would like to have something no later than Thursday, March 5.

>>

>> I am purposefully not providing the client name or specific name information so you can worry less about the conflicts.

>>

>>
 >> I will get you the lexis login shortly.
 >>
 >> Please let me know if you have questions.
 >>
 >>
 >> Julia Williams
 >> Of Counsel
 >> The Clinton Law Firm
 >> 111 W. Washington, Ste. 1437
 >> Chicago, IL 60602
 >> P:312.357.1515
 >> F: 312.201.0737
 >> juliawilliams@clintonlaw.net
 >>
 >> This message may be privileged and confidential. If you are not the intended recipient, please delete the email and notify the sender immediately.
 >> <Dulberg Memo to Jared re research 2020 Feb 21.docx>
 >



Assignment 1
 Research.docx



Estoppel Issue -
 McCart...upt.pdf



Estoppel Issue -
 Webb...ch.pdf

**Stromer, Jared 3/5/2020
 For Educational Use Only**

Burhenn v. Kyger, 13 Ill.App.3d 767 (1973)
 300 N.E.2d 589

13 Ill.App.3d 767
 Appellate Court of Illinois, Second District.

Betty BURHENN, Plaintiff-Appellant,
 v.
 Walter A. KYGER and Shirley M.
 Kyger, Defendants-Appellees.

No. 72-103.
 |
 Aug. 21, 1973-

recklessness or carelessness when it could have
 been discovered by the exercise of ordinary care.

[2] **Negligence**
 Care Required in General

An occupant of premises does not owe duty to
 licensees to discover unsafe conditions thereon,
 though he is under a duty to disclose or
 warn against hidden dangers of which he has
 knowledge.

Synopsis

Action against homeowners for injuries allegedly sustained
 as result of fall on ice patch. The Circuit Court, Lee County,
 James M. Allen, J., directed a verdict for defendants, and
 plaintiff appealed. The Appellate Court, Thomas J. Moran, J.,
 held that homeowners who did not intend to injure neighbor

[3] **Negligence**
 Snow and Ice

Homeowners who did not intend to injure
 neighbor and who did not have any knowledge
 of icy condition at rear entrance of their home

and who did not have any knowledge of icy condition at rear entrance of their home or that condition was hidden were not liable for injuries received by neighbor who after visiting homeowners stepped out back door and slipped on patch of ice and fell on porch.

Affirmed.

West Headnotes (3)

[1] **Negligence**

 Willful or Wanton Conduct

The essence of a willful or wanton injury is that it must have been intentional or that it must have been committed under circumstances exhibiting a reckless disregard for the safety of others, such as a failure, after knowledge of impending danger, to exercise ordinary care to prevent it or a failure to discover danger through

or that condition was hidden were not liable for injuries received by neighbor who after visiting homeowners stepped out back door and slipped on patch of ice and fell on porch.

Attorneys and Law Firms

****590 *767** Wm. J. Sturgeon, Dixon, for plaintiff-appellant.

Henry S. Dixon, Dixon, for defendants-appellees.

Opinion

THOMAS J. MORAN, Justice.

(Publish abstract only.)

All Citations

13 Ill.App.3d 767, 300 N.E.2d 589

End of Document

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To: JCW

From: Jared M. Stromer

Re: Research Assignment 1 - Personal Injury - Estoppel and Homeowner Liability

Question 1:

Is client estopped from suing prior attorney for low damages settlement amount?

Yes and No. Under the law suing for the fake of low settlement amounts is generally barred. Public policy dictates that allowing such claims to go through without a trial opens the door to unlimited liability to attorneys who may not get settlements in the amounts that plaintiffs expect. Generally speaking, for this reason trials based off new claims or issues of fact that occur after settlement usually warrant these types of suites. However, if the settlement was made fraudulently or without the knowledge of the plaintiff or very directed facts omitted or kept from the plaintiff which further damages plaintiffs claim, then there is obvious recourse for a malpractice claim.

Current case law dictates that “To properly state a cause of action for legal malpractice, plaintiffs must allege in their complaint: (1) the existence of an attorney-client relationship that establishes a duty on the party of the attorney; (2) a negligent act or omission constituting a breach of that duty; (3) proximate cause establishing that “but for” the attorney's negligence, the plaintiffs would have prevailed in the underlying action; and (4) damages. Webb v. Damisch, 362 Ill. App. 3d 1032, 1037–38 (Ill. App. 1st Dist. 2005). The proximate cause element of a legal malpractice claim requires that the plaintiffs must plead facts sufficient to show that, but for the attorneys' malpractice, the clients would have been successful in the undertaking the attorneys were retained to perform. Id. This is provided that there is very direct evidence showing the fraud or misguided/damaging circumstances which lead to malpractice which in this case is a low settlement figure. Generally, without this direct evidence a plaintiff is barred from recovery in a malpractice claim for low settlement. The only exception to evidence is if the case shows that the malpractice was so egregious that a lay person would find malpractice. This does not seem like the case here given the facts presented.

The case law which backs this up is attached and states that if there is reason for a low settlement amount and the claim does get settled with the knowledge of the plaintiff who ends the case through settlement then there is no claim for further damages unless further damages can be shown without speculation on actual damages lost in the low settlement. Further, a trial on the merits is almost always recommended in these situations as the merits of the case weigh heavily towards damages and causation of those damages by counsel.

“Only a trial on the merits can fully and fairly resolve the issue of whether an attorney is liable for malpractice despite the fact that the underlying case was settled.” *McCarthy*, 250 Ill.App.3d at 172, 190 Ill.Dec. 228, 621 N.E.2d 97. The *McCarthy* court pointed out that “[t]o hold otherwise could create ethical problems where an attorney, knowing that he mishandled a case, encourages his client to settle in order to shelter himself from a malpractice claim. Id.

Settlement by successor counsel does not necessarily bar a malpractice action against prior counsel. *McCarthy*, 250 Ill.App.3d at 172, 190 Ill.Dec. 228, 621 N.E.2d 97. Further, an attorney malpractice action should be allowed where the plaintiff can show that he settled for a lesser amount than he could reasonable expect without the malpractice. *Brooks v. Brennan*, 255 Ill.App.3d 260, 270, 193 Ill.Dec. 67, 625 N.E.2d 1188 (1994). Id.

Question 2:

What is homeowners’ liability if sued?

Little to none. Since the son is akin to an independent contractor and therefore was not under the control Homeowners, the liability assessed would fall with the Son who directed and instructed Neighbor to hold, pickup and work with the branches as he saw fit. Principals generally are not liable for the negligence of independent contractors. Restatement (Second) of Torts § 409 (1965). Frieden v. Bott, 4-19-0232, 2020 WL 290455, at *4 (Ill. App. 4th Dist. Jan. 21, 2020). Independent contractors are people who render services for a principal but are only controlled as to the result of their work and not the means by which that result is accomplished. *Carney*, 2016 IL 118984, ¶ 31, 412 Ill.Dec. 833, 77 N.E.3d 1. Id.

Homeowners who did asses the progress and safety to their own property, did not make attempts to dictate the process or work by which the Son performed. Nor did Homeowners make it a point

to give permission or interfere with the volunteer Neighbor who was injured. Whether the law imposes a duty of reasonable care upon a defendant for the benefit of the plaintiff depends upon the nature of their relationship. *Simpkins v. CSX Transportation, Inc.*, 2012 IL 110662, ¶ 18, 358 Ill.Dec. 613, 965 N.E.2d 1092. When determining whether a duty exists, courts primarily consider the four traditional duty factors, which are (1) the likelihood of injury, (2) the reasonable foreseeability of injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing that burden on the defendant. *Frieden v. Bott*, 4-19-0232, 2020 WL 290455, at *3 (Ill. App. 4th Dist. Jan. 21, 2020).

Because the hiring entity has no control over the details and methods of the independent contractor's work, it is not in a good position to prevent negligent performance, and liability therefor should not attach. Rather, the party in control—the independent contractor—is the proper party to be charged with that responsibility and to bear the risk.” *Carney*, 2016 IL 118984, ¶ 32, 412 Ill.Dec. 833, 77 N.E.3d 1. *Id.* ‘In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.’ ” *Carney*, 2016 IL 118984, ¶ 46, 412 Ill.Dec. 833, 77 N.E.3d 1 (quoting Restatement (Second) of Torts § 414, cmt. c, at 388 (1965)). *Id.* One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care. *Restatement of Torts* § 414.

Because Son is an independent contractor and he allowed Neighbor to assist, the Neighbor was an employee and also directly under the control of Son, the independent contractor. For section 414 to apply to this case, plaintiff must still establish that (1) defendant had control over the work, (2) defendant caused harm to another, and (3) it was his negligent use of his control that

caused the harm. Frieden v. Bott, 4-19-0232, 2020 WL 290455, at *4 (Ill. App. 4th Dist. Jan. 21, 2020)

The level of control that could be exercised over him was less than that which could be exercised over a paid worker. A direction given to a volunteer does not control a volunteer to the same degree as it would a paid worker because nothing prevents the volunteer from simply walking off the job. In this regard, we know of no case in which section 414 has been applied to a case involving a volunteer. Frieden v. Bott, 4-19-0232, 2020 WL 290455, at *5 (Ill. App. 4th Dist. Jan. 21, 2020). This makes Neighbor akin to an employee of the independent contractor and therefore Homeowners would not be liable.

Further, even if Neighbor was not an employee he functions as a volunteer and thus would not be a guest by which a duty of ordinary care is required. Generally, a landowner is under no duty to protect invitees from open and obvious perils. Frieden v. Bott, 4-19-0232, 2020 WL 290455, at *5 (Ill. App. 4th Dist. Jan. 21, 2020). The deliberate encounter exception applies when the possessor of land has reason to expect that an invitee or licensee will proceed to encounter a known or obvious danger because a reasonable person in plaintiff's position would do so. Id. Here, that is not the case. This person as on the land deliberately and as such would have assumed the dangers and the liability having either signed up as a n employee of the independent contractor or as a volunteer to do hazardous work.

The Homeowners would not be liable for the injuries sustained in either case and means that the employee/volunteer assumed the risks with the open and obvious dangers associated with branch removal and the use of heavy machinery to assist in branch removal.

McCarthy v. Pedersen & Houpt, 250 Ill.App.3d 166 (1993)

621 N.E.2d 97, 190 Ill.Dec. 228



KeyCite Yellow Flag - Negative Treatment

Distinguished by [Webb v. Damisch](#), Ill.App. 1 Dist., December 19, 2005

250 Ill.App.3d 166

Appellate Court of Illinois,
First District, Fifth Division.

[Daniel F. McCarthy](#), Plaintiff–Appellee,
v.

PEDERSEN & HOUP, a Professional
Corporation, Arthur M. Holtzman and
Donald J. Moran, Defendants–Appellants.

No. 1–92–3250.

|
July 23, 1993.

Synopsis

Former client brought legal malpractice action against trial counsel. The Circuit Court, Cook County, Lester A. Bonaguro, J., denied counsel's summary judgment motion, and appeal was taken. The Appellate Court, [McNulty](#), J., held that client was not precluded, as matter of law, from bringing malpractice claim by fact that he had settled underlying action after settlement agreement had been reviewed by independent counsel.

Affirmed.

Procedural Posture(s): Motion for Summary Judgment.

West Headnotes (1)

[1] **Attorneys and Legal Services**

🔑 **Compromise, settlement, and release**

Client was not precluded, as matter of law, from bringing malpractice claim against trial counsel by fact that he had settled underlying action after settlement agreement had been reviewed by independent counsel; fact of settlement did not resolve dispute as to whether counsel had negligently handled case.

[20 Cases that cite this headnote](#)

Attorneys and Law Firms

****98 *166 ***229** Ross & Hardies, Chicago ([Gary L. Starkman](#) and [Steven B. Rissman](#), of counsel), for defendants-appellants.

David K. Anderson, Skokie, and Phil Horn, for plaintiff-appellee.

Opinion

Justice [McNULTY](#) delivered the opinion of the court:

Defendants Pedersen & Houpt, Arthur M. Holtzman and Donald J. Moran appeal from the denial of their summary judgment motion in this legal malpractice suit filed against them by plaintiff Daniel F. McCarthy. The circuit court certified for appeal the issue of “whether the settlement of a lawsuit by a plaintiff, in the undisputed facts and circumstances of this case, precludes a subsequent complaint against his trial counsel for attorney malpractice.”

The relevant facts are as follows. In 1985, defendants filed *McCarthy v. PaineWebber, Inc.*, 85 C 3328, asserting commercial litigation claims on plaintiff's behalf in the United States District Court for the Northern District of Illinois. The case went to trial in 1989, and after the close of evidence, but before the jury returned its verdict, plaintiff agreed to settle the case. After plaintiff had an independent attorney, not associated with the defendant law firm, review the ***167** settlement agreement, the settlement agreement and mutual general release were executed.

Plaintiff then brought suit in the circuit court of Cook County asserting attorney malpractice against the defendants, the attorneys who represented plaintiff in the underlying lawsuit. The complaint alleged that the attorneys failed to file a timely claim under the Commodities Exchange Act and negligently selected an unqualified expert. Defendants filed a summary judgment motion asserting that plaintiff's voluntary decision to settle the underlying case, particularly in light of the intervention of independent counsel, precluded the instant attorney malpractice claim. The circuit court denied the motion, stating that it could not determine as a matter of law that plaintiff's suit was barred. However, due to the fact that there was no Illinois case law addressing the issue

McCarthy v. Pedersen & Houpt, 250 Ill.App.3d 166 (1993)

621 N.E.2d 97, 190 Ill.Dec. 228

of whether a plaintiff who settles an underlying claim may then sue the attorney who represented him in that claim for malpractice, the circuit court certified the question for appeal under [Supreme Court Rule 308\(a\)](#). 134 Ill.2d R. 308(a).

As the circuit court correctly noted, the issue that has been certified is one of first impression in Illinois. We therefore look for guidance outside of Illinois. As defendants point out, several other jurisdictions have held that the settlement of the underlying suit bars a plaintiff's malpractice action against the attorney who handled the underlying claim.

In [Mitchell v. Transamerica Insurance Co.](#) (Ky.App.1977), 551 S.W.2d 586, plaintiffs brought a malpractice suit against their attorney, alleging that the attorney allowed the statute of limitations to run on plaintiffs' personal injury suit. The Court of Appeals of Kentucky found that because plaintiffs were able to bring the same cause of action in another jurisdiction that had a longer statute of limitations, and ultimately received a substantial settlement there, plaintiffs failed to prove they suffered any damages as a result of the attorney's ***99 ***230 malpractice. The court explained that:

"The [plaintiffs] argue that they could have received more damages if the case had been tried in Kentucky. However, the evidence, in our opinion, on this point is a matter of conjecture and speculation. It may have been a different case if the [plaintiffs] had tried their case in Indiana and had come away with patently inadequate damages. The fact is that they settled their case for \$60,000. * * * It seems to us that the [plaintiffs'] argument as to damages is an exercise in the pyramiding of an inference upon an inference. Trying to predict what a jury might *168 do at any given time or place is hazardous and is one of the vagaries of life." ([Mitchell](#), 551 S.W.2d at 588.)

See also [Douglas v. Parks](#) (1984), 68 N.C.App. 496, 315 S.E.2d 84 (wherein the North Carolina Court of Appeals held that because plaintiff affirmed the settlement agreement, he was precluded from bringing a malpractice suit against the attorney who represented him in that original action); [Glenna v. Sullivan](#) (1976), 310 Minn. 162, 245 N.W.2d 869 (wherein the supreme court of Minnesota held that, "To allow a client who becomes dissatisfied with a settlement

to recover against an attorney solely on the ground that a jury might have awarded them more than the settlement is unprecedented"); [Davenport v. Stone](#) (Fla.App.1988), 528 So.2d 45 (wherein the court of appeals of Florida held that plaintiff could not maintain a lawsuit for attorney malpractice since plaintiff voluntarily entered into a settlement agreement in the underlying suit, was fully advised by competent counsel and suffered no damages).

In [Schlomer v. Perina](#) (1991), 163 Wis.2d 889, 473 N.W.2d 6, the court of appeals of Wisconsin determined that it was against public policy to allow the plaintiff to bring suit against his attorney for malpractice on the theory that the attorney's three years' inactivity caused a lesser settlement and caused the client loss of use of money from an earlier and larger settlement. To allow such a claim, the court stated, would open the door to malpractice claims whereby there is no just or sensible stopping point.

The plaintiff here, in turn, claims that the Illinois Supreme Court decision in [McLane v. Russell](#) (1989), 131 Ill.2d 509, 137 Ill.Dec. 554, 546 N.E.2d 499, is directly on point and resolves this issue in favor of plaintiff. We fail to see how this case has any bearing on the issue of whether a plaintiff who settled his underlying case may then sue the attorney who represented him in that underlying suit for malpractice. Although plaintiff has cited no other cases to support his position, our research has revealed several cases from outside this jurisdiction that have held that a plaintiff may sue his attorney for malpractice despite the fact that plaintiff signed a settlement agreement in the underlying suit.

Several New York cases addressing this issue have found that where a plaintiff alleges that he was forced to settle the underlying case due to his attorney's mishandling of that case, plaintiff may sue his attorney for malpractice. In [Becker v. Julien, Blitz & Schlesinger, PC](#) (1977), 95 Misc.2d 64, 406 N.Y.S.2d 412, modified on other grounds (1978), 66 A.D.2d 674, 411 N.Y.S.2d 17, the court stated that:

*169 "In many, if not most instances involving an alleged malpractice by attorneys, the underlying litigation has been terminated—by allowing the

McCarthy v. Pedersen & Houpt, 250 Ill.App.3d 166 (1993)

621 N.E.2d 97, 190 Ill.Dec. 228

Statute of Limitations to lapse, by suffering a default or dismissal and the like. Often it is the very fact of termination of the action which gives rise to the claim for malpractice. Where the termination is by settlement rather than by a dismissal or adverse judgment, malpractice by the attorney is more difficult to establish, but *a cause of action can be made out if it is shown that assent by the client to the settlement was compelled because prior misfeasance or nonfeasance by an attorney left no other recourse.* * * * [T]he cause of action for legal malpractice must stand or fall on its own merits, with no automatic waiver of a plaintiff's right to sue for malpractice merely because plaintiff had voluntarily agreed to enter into a stipulation of ***100 ***231 settlement.” (Emphasis added.) ( [Becker](#), 406 N.Y.S.2d at 413–14.)

However, based on the particular facts in that case, the court granted summary judgment in favor of the defendant attorneys since plaintiff did not show that he settled only because his attorney's misconduct left him no other alternative. Furthermore, the court noted that plaintiff failed to provide any evidence that the value of his underlying claim exceeded that in which he settled for.

The courts in [Wolstencroft v. Sassower](#) (1986), 124 A.D.2d 582, 507 N.Y.S.2d 728 and  [Cohen v. Lipsig](#) (1983), 92 A.D.2d 536, 459 N.Y.S.2d 98 did find the plaintiffs' legal malpractice claims to be viable despite the settlement of the underlying suits. Both decisions were based on the fact that the complaints alleged that the settlements were effectively compelled by the mistakes of the defendants, plaintiffs' former attorneys. But see  [Kerson Co. v. Shayne, Dachs, Weiss, Kolbrenner, Levy](#) (1977), 59 A.D.2d 551, 397 N.Y.S.2d 142 (wherein the court held that an action based upon alleged mistakes of counsel prior to settlement

could not be brought since plaintiff's settlement terminated the underlying litigation);  [Carmel v. Lunney](#) (1986), 119 A.D.2d 50, 505 N.Y.S.2d 735 (wherein plaintiff brought suit against his criminal defense lawyer for malpractice after plaintiff had voluntarily pled guilty to the criminal charges and the court found that any causal connection between the attorney's malpractice and plaintiff's conviction was broken by plaintiff's own voluntary act resulting in conviction).

Jurisdictions other than New York have also refused to state that as a matter of law, a plaintiff who has settled his underlying case is barred from suing his attorney for malpractice. In  [Lowman v. Karp](#) *170 (1991), 190 Mich.App. 448, 476 N.W.2d 428, plaintiff claimed that after she informed defendant that she did not want to settle, defendant flatly refused to try the case. The court of appeals of Michigan concluded that plaintiff's settlement of the underlying action should not act as a bar to a subsequent legal malpractice action since the matter arose so close to the trial date that it would have been nearly impossible for plaintiff to obtain another attorney and plaintiff's settlement was therefore her only reasonable choice. See also  [Espinoza v. Thomas](#) (1991), 189 Mich.App. 110, 472 N.W.2d 16 (wherein the Michigan Court of Appeals held that the pleadings and evidence were sufficient to at least raise an inference that the low settlement award and plaintiff's acceptance of the award were caused by defendant's malpractice).

In  [Braud v. New England Insurance Co.](#) (La.App.1988), 534 So.2d 13, plaintiffs claimed that as a result of the attorney's negligence, they were forced to settle the case for less than it was worth. Defendant moved for summary judgment stating that it was plaintiffs' settlement with the defendant in the underlying suit that caused the loss and not the attorney's negligence. The Louisiana Court of Appeals noted that if the attorney's negligence caused plaintiffs to settle the suit, then it also caused the loss. The court stated that:

“It begs the question to argue that the settlement rather than the attorney's negligence caused the loss when the same negligence is allegedly the only reason that the [plaintiffs] were put

McCarthy v. Pedersen & Houpt, 250 Ill.App.3d 166 (1993)

621 N.E.2d 97, 190 Ill.Dec. 228

in the position of having to consider settlement.”

The court therefore, reversed the summary judgment motion that had been granted in defendant's favor, stating that only a trial on the merits can fully and fairly resolve this issue.

Furthermore, in *Bill Branch Chevrolet, Inc. v. Burnett* (Fla.App.1990), 555 So.2d 455, plaintiff sued for malpractice claiming that three weeks before trial, it discovered that the attorney failed to investigate or conduct discovery necessary to adequately prepare for trial and faced with a claim for punitive damages and no trial preparation, plaintiff was forced to settle the case for a sum greater than its actual liability. The court of appeals of Florida could not determine as a matter of law that the settlement of the underlying case negated any legal malpractice as a proximate cause of loss and also concluded that the question of ****101 ***232** whether plaintiff can prove damages beyond speculation is an issue for the trier of fact.

Likewise, in *Fishman v. Brooks* (1986), 396 Mass. 643, 487 N.E.2d 1377, the plaintiff claimed that he settled the underlying case ***171** shortly before trial knowing that the attorney was not prepared to try the case. The supreme court of Massachusetts noted that “The typical case of malpractice liability for an inadequate settlement involves an attorney who, having failed to prepare his case properly or lacking the ability to handle the case through trial (or both), causes his client to accept a settlement not reasonable in the circumstances.” (*Fishman*, 487 N.E.2d at 1380.) The court therefore upheld a jury verdict finding the attorney liable for negligently causing a client to settle a claim for an amount below what a properly represented client would have accepted.

Other courts allow such suits to survive the summary judgment stage only when the plaintiffs can show that they would have recovered more had the case gone to trial.

See *Carlson v. Fredrikson & Byron* (Minn.App.1991), 475 N.W.2d 882 (court of appeals of Minnesota found that summary judgment was properly granted in favor of defendants where plaintiff failed to show that had defendants more vigorously represented him, he would have received

a better settlement or the case would have gone to trial and he would have received a more favorable result there);

Sanders v. Townsend (Ind.App.1987), 509 N.E.2d 860 (the court of appeals of Indiana determined that summary judgment was properly granted in attorney's favor since plaintiff failed to show that had the attorney not been negligent, the settlement or verdict award would have been greater).

At least one court allows plaintiffs to sue their attorneys for malpractice even after settling the underlying suit, only when the complaint alleges that the attorneys acted fraudulently.

The Pennsylvania Supreme Court in *Muhammad v. Strassburger McKenna, Messer, Shilbod & Gutnick* (1991), 526 Pa. 541, 587 A.2d 1346 concluded that when a plaintiff has agreed to a settlement, he may not sue his attorney for malpractice based on negligence and or contract principles. Rather, only cases of fraud should be actionable. The court explained that if a lawyer knowingly commits malpractice, but does not disclose the error and convinces the client to settle in order to avoid the discovery of such error, then the plaintiff's agreement was fraudulently obtained. The court reached this decision because of its long-standing public policy encouraging settlement.

The supreme court of New Jersey in *Ziegelheim v. Apollo* (1992), 128 N.J. 250, 607 A.2d 1298, expressly disagreed with the Pennsylvania decision, stating that although New Jersey also has a long standing policy that encourages settlement, a dissatisfied plaintiff may bring suit against his attorney for malpractice in negotiating a settlement even in the absence of a showing of actual fraud.

***172** We are faced with the limited question of whether, under the undisputed facts and circumstances of this case, plaintiff's legal malpractice case is barred due to the fact that plaintiff settled the underlying action. The undisputed facts in the instant case are that the underlying suit was settled and independent counsel reviewed the settlement agreement before it was signed by plaintiff. What remains disputed, however, is whether defendants were negligent in their handling of the underlying case and whether plaintiff was damaged by such negligence. Furthermore, the parties dispute the extent of independent counsel's involvement in the settlement. Certainly plaintiff should be permitted to

McCarthy v. Pedersen & Houpt, 250 Ill.App.3d 166 (1993)

621 N.E.2d 97, 190 Ill.Dec. 228

develop these facts at trial. Although there is no Illinois case law on this issue, we are persuaded by those cases from outside this jurisdiction holding that only a trial on the merits can fully and fairly resolve the issue of whether an attorney is liable for malpractice despite the fact that the underlying case was settled. To hold otherwise could create ethical problems where an attorney, knowing that he mishandled a case, encourages his client to settle in order to shelter himself from a malpractice claim. The rule espoused here will avoid such ****102 ***233** conflicts of interest, and allow a malpractice claim to succeed or fail on its merits. Accordingly, we conclude that based on the facts and

circumstances presented here, the trial court properly refused to grant summary judgment in favor of defendants.

Affirmed.

GORDON, P.J., and [MURRAY](#), J., concur.

All Citations

250 Ill.App.3d 166, 621 N.E.2d 97, 190 Ill.Dec. 228

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Distinguished by [In re Hearthside Baking Co., Inc.](#), Bankr.N.D.Ill., February 27, 2009

362 Ill.App.3d 1032
Appellate Court of Illinois,
First District, First Division.

Sherry WEBB, Ronald McCoy, a Minor, By and
Through His Mother, Guardian, and Next Friend,
Sherry Webb, and [Phillip McClain](#), a Minor, By
and Through His Mother Guardian, and Next
Friend, [Margie Webb](#), Plaintiffs–Appellants,
v.

Mark W. DAMISCH and A. Hayes Barclay d/
b/a [Damisch and Damisch](#) and/or [Barclay
and Damisch, Ltd.](#), Defendants–Appellees.

No. 1–04–3823.

|
Dec. 19, 2005.

Synopsis

Background: Former clients brought legal malpractice action against attorneys that represented clients in automobile accident case, alleging that attorneys were negligent for failing to bring a products liability action against car manufacturer and in failing to secure car for use as evidentiary material. The Circuit Court, Cook County, [Lynn M. Egan](#), J., granted attorneys' motion to dismiss. Clients appealed.

Holdings: The Appellate Court, [McBride](#), J., held that:

[1] attorneys' alleged malpractice in failing to bring products liability suit did not cause former client to lose her right to sue manufacturer, and

[2] attorneys' alleged malpractice in failing to secure car as evidence did not result in clients losing full value of their recovery against manufacturer in products liability action brought by successor counsel.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (18)

[1] Pretrial Procedure

🔑 Nature and scope of remedy in general

Pretrial Procedure

🔑 Affirmative Defenses, Raising by Motion to Dismiss

A motion to dismiss under section providing for dismissal of complaint based on defects or defenses which avoid or defeat claims allows for a threshold disposition of questions of law and easily proven issues of fact. S.H.A. 735 ILCS 5/2–619.

3 Cases that cite this headnote

[2] Appeal and Error

🔑 Dismissal and Nonsuit in General

Appeal and Error

🔑 Failure to State Claim, and Dismissal Therefor

Appeal and Error

🔑 Pleading

Pretrial Procedure

🔑 Availability of relief under any state of facts provable

Pretrial Procedure

🔑 Construction of pleadings

Under section providing for motions to dismiss complaint based on defects or defenses which avoid or defeat claims, a motion to dismiss should be granted if after construing the pleadings and supporting documents in the light most favorable to the nonmoving party, the trial court finds that no set of facts can be proved upon which relief could be granted; this process does not require the trial court to weigh facts or determine credibility and as a result, the Appellate Court does not defer to the trial court's judgment. S.H.A. 735 ILCS 5/2–619.

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8 Cases that cite this headnote

[3] **Appeal and Error**

🔑 **Dismissal and Nonsuit in General**

On review of a grant of dismissal under section providing for motions to dismiss complaint based on defects or defenses which avoid or defeat claims, the Appellate Court considers whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal was proper as a matter of law. S.H.A. 📄 735 ILCS 5/2–619.

3 Cases that cite this headnote

[4] **Appeal and Error**

🔑 **De novo review**

Appeal and Error

🔑 **Dismissal or nonsuit**

The Appellate Court reviews de novo motions to dismiss under section providing for dismissal of complaint based on defects or defenses which avoid or defeat claims; the Court may sustain the trial court's dismissal for any basis found in the record. S.H.A. 📄 735 ILCS 5/2–619.

1 Cases that cite this headnote

[5] **Pretrial Procedure**

🔑 **Affirmative Defenses, Raising by Motion to Dismiss**

The term “affirmative matter” under section providing for motions to dismiss complaint based on the ground that a claim asserted is barred by other affirmative matter avoiding the legal effect of or defeating the claim includes a defense that completely negates the asserted cause of action. S.H.A. 📄 735 ILCS 5/2–619(a)(9).

2 Cases that cite this headnote

[6] **Pretrial Procedure**

🔑 **Affirmative Defenses, Raising by Motion to Dismiss**

The affirmative matter asserted by the defendant must be apparent on the face of the complaint or supported by affidavits or other evidentiary materials in a motion to dismiss a complaint based on the ground that a claim asserted is barred by other affirmative matter avoiding the legal effect of or defeating the claim. S.H.A. 📄 735 ILCS 5/2–619(a)(9).

2 Cases that cite this headnote

[7] **Pretrial Procedure**

🔑 **Affirmative Defenses, Raising by Motion to Dismiss**

A trial court may properly dismiss a complaint where the affirmative matter refutes crucial conclusions of law or material fact that are unsupported by allegations of specific facts; the affirmative matter must be more than evidence offered to refute a well-pleaded fact in the complaint as such well-pleaded facts must be taken as true. S.H.A. 📄 735 ILCS 5/2–619(a)(9).

2 Cases that cite this headnote

[8] **Pretrial Procedure**

🔑 **Affidavits or other showing of merit**

If the opponent to a motion to dismiss under section providing for dismissal of complaint based on the ground that a claim asserted is barred by other affirmative matter avoiding the legal effect of or defeating the claim does not counter the proofs offered in support of the motion and the movant's showing of undisputed facts would entitle the movant to judgment as a matter of law, a dismissal is proper. S.H.A. 📄 735 ILCS 5/2–619(a)(9).

[9] **Attorneys and Legal Services**

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🔑 Malpractice or negligence in general;
nature and elements

To properly state a cause of action for legal malpractice, plaintiffs must allege in their complaint: (1) the existence of an attorney-client relationship that establishes a duty on the part of the attorney; (2) a negligent act or omission constituting a breach of that duty; (3) proximate cause establishing that “but for” the attorney's negligence, the plaintiffs would have prevailed in the underlying action; and (4) damages.

6 Cases that cite this headnote

[10] **Attorneys and Legal Services**

🔑 Malpractice or negligence in general;
nature and elements

The basis of a legal malpractice claim is that had it not been for negligence on the part of plaintiff's attorney, plaintiff would have been compensated for an injury caused by a third party.

4 Cases that cite this headnote

[11] **Attorneys and Legal Services**

🔑 Litigation

When an attorney's negligence is alleged to have occurred during the representation of a client in the underlying action, plaintiff must prove that counsel's negligence resulted in the loss of the underlying action.

[12] **Attorneys and Legal Services**

🔑 Relief obtained; amount of recovery

If the underlying cause remained actionable at the time plaintiffs hired successor counsel, plaintiffs in a legal malpractice action can prove no set of facts that connect attorneys' conduct with any damage plaintiffs sustained.

1 Cases that cite this headnote

[13] **Attorneys and Legal Services**

🔑 Compromise, settlement, and release

Attorneys and Legal Services

🔑 Pleadings and filings

Attorneys' alleged malpractice in failing to bring a products liability action against car manufacturer did not cause former client to permanently and irrevocably lose her right to sue manufacturer as required to maintain client's legal malpractice action against attorneys, where client was a party to products liability suit filed by successor counsel, and successor counsel successfully negotiated a settlement with manufacturer in which client received \$15,000.

1 Cases that cite this headnote

[14] **Pretrial Procedure**

🔑 Well-pleaded facts

Where a party moving to dismiss a case under section providing for dismissal of complaint based on the ground that a claim asserted is barred by other affirmative matter avoiding the legal effect of or defeating the claim presents affirmative matter containing well-pleaded facts, and the party opposing the motion does not file any supporting documentation countering the facts, the moving party's affirmative matter is accepted as true despite any contrary assertions in the opposing party's pleading. S.H.A. 735 ILCS 5/2–619.

1 Cases that cite this headnote

[15] **Attorneys and Legal Services**

🔑 Compromise, settlement, and release

Attorneys and Legal Services

🔑 Weight and Sufficiency

Attorneys' alleged legal malpractice in failing to secure car that was involved in accident for use as evidentiary material did not result in clients losing the full value of their recovery against car manufacturer in products liability action that was brought by successor counsel, even if clients' medical bills amounted to more than money received in the products liability settlement, where clients referred to the amount obtained

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in settlement agreement as fair and reasonable, and clients did not present any evidence that their medical bills were paid or that they were associated with their damages from accident.

[1 Cases that cite this headnote](#)

[16] **Attorneys and Legal Services**

🔑 **Pleadings**

The proximate cause element of a legal malpractice claim requires that the plaintiffs must plead facts sufficient to show that, but for the attorneys' malpractice, the clients would have been successful in the undertaking the attorneys were retained to perform.

[3 Cases that cite this headnote](#)

[17] **Attorneys and Legal Services**

🔑 **Compromise, settlement, and release**

Settlement by successor counsel does not necessarily bar a legal malpractice action against prior counsel.

[2 Cases that cite this headnote](#)

[18] **Attorneys and Legal Services**

🔑 **Compromise, settlement, and release**

An attorney malpractice action should be allowed where the plaintiff can show that he settled for a lesser amount than he could reasonable expect without the malpractice.

[5 Cases that cite this headnote](#)

Attorneys and Law Firms

****142 Timothy R. Tyler** of Timothy R. Tyler & Associates, P.C., for Plaintiffs–Appellants.

Richard J. Jacobson, Michael J. Flaherty and **Stephen D. Sharp** of Flaherty, Jacobson & Youngerman, P.C., for Defendants–Appellees.

Opinion

Justice **McBRIDE** delivered the opinion of the court:

***403 *1033 Appellants Sherry Webb, Ronald McCoy, Phillip McClain, and Margie Webb (collectively Plaintiffs), appeal the trial court's order dismissing appellants' legal malpractice case against Appellees Mark Damisch and A. Hayes Barclay, d/b/a Damisch & Damisch and/or Barclay & Damisch, Ltd (collectively Defendants). Plaintiffs hired defendants to represent them in recovering damages for plaintiffs' injuries suffered in an August 1997 automobile accident. Plaintiffs sued defendants for *1034 legal malpractice alleging that defendants were negligent in failing to sue General Motors (GM) for strict liability of a manufacturing defect in the automobile in which plaintiffs were traveling. Defendants filed a motion to dismiss the legal malpractice suit pursuant to sections 2–619(a)(4) and (a)(9) of the Code of Civil Procedure (735 ILCS 5/2–619(a)(4), (a)(9) (West 2000)). Defendants asserted plaintiffs could not establish either the proximate causation or damages elements of legal malpractice because plaintiffs' successor counsel sued GM for strict liability and negotiated a settlement in plaintiffs' favor for \$2,265,000. The trial court granted ***404 **143 defendants' motion to dismiss under section 2–619(a)(9). Plaintiffs appeal the trial court's dismissal. For the reasons that follow, we affirm.

Sherry Webb, Ronald McCoy and Phillip McClain were involved in an automobile accident on August 17, 1997, in which they sustained injuries. Sherry Webb is the mother of Ronald McCoy (a minor). Margie Webb is the mother of Phillip McClain (a minor). It is unclear from the record how Sherry and Margie Webb are related.

The parties do not dispute that the 1988 Oldsmobile Cutlass Supreme Sherry Webb was driving was the sole cause of the accident. Ronald McCoy and Phillip McClain were passengers in the car at the time of the accident. Sherry Webb was driving southbound on Indianapolis Boulevard near 103rd street in Chicago, Illinois. Without warning, Sherry Webb lost control of the car. The steering and brakes of the car completely failed. The car in which plaintiffs were traveling struck an automobile next to it, crossed over into northbound lanes and struck another automobile head on.

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The Oldsmobile manufacturer, GM, had issued recall notices for numerous defects with the Oldsmobile, including an October 1990 recall for the front shoulder belt anchor and a March 1995 Safety Campaign Bulletin pertaining to cracks that may develop in the wheel mounting surface. The March 1995 Safety Campaign Bulletin states in part:

“These vehicles may exhibit a condition in which cracks develop in the wheel mounting surface and, should the cracks become severe enough, the wheel could completely separate from the vehicle. If this were to occur while the vehicle was in motion, steering and braking control of the vehicle could be affected, and a vehicle crash could result without prior warning.”

This Safety Campaign Bulletin was issued for all 1988 Oldsmobile Cutlass Supremes falling between a certain Vehicle Identification Number (VIN) range. The Oldsmobile driven by Sherry Webb fell within the subjected range.

In late August or early September 1997, defendants were retained *1035 to represent plaintiffs in an effort to obtain compensation for the injuries suffered during the automobile accident. Defendants filed suit against the seller of the Oldsmobile, Sierra Auto Sales (Sierra), but subsequently voluntarily dismissed the suit. The record does not contain any information pertaining to the lawsuit Defendants filed against Sierra, such as when Sierra was sued, what the cause of action was against Sierra, or why the case was voluntarily dismissed.

Although defendants were given a copy of the March 1995 Safety Campaign Bulletin by Margie Webb sometime in or around September 1997, they did not pursue a cause of action against GM. At some point after September 1997, defendants stopped representing plaintiffs. Again, the record does not indicate when or how this relationship ended. The record does not indicate when successor counsel actually began representing plaintiffs, but on April 12, 2002, McCoy and

McClain, represented by successor counsel, sued GM in the circuit court of Cook County for strict liability, asserting that manufacturing defects in the Oldsmobile contributed to the accident and plaintiffs' injuries. On July 12, 2002, Sherry Webb, represented by the same successor counsel, was added as a plaintiff to the strict liability suit against GM. On February 21, 2003, the two sides pursued mediation and the strict liability lawsuit settled for \$2,265,000, which was referred to in the settlement agreement as “fair and reasonable.” The settlement amount was divided amongst the plaintiffs. ***405 **144 Sherry Webb received \$15,000; Ronald McCoy received \$250,000; and Phillip McClain (who was rendered a paraplegic as a result of the accident) received \$2 million.

On May 17, 2004, plaintiffs, represented by the same successor counsel that negotiated their settlement with GM, filed a second amended complaint against defendants for legal malpractice resulting from defendants not filing suit against GM for strict liability. In particular, Sherry Webb alleged that as a result of defendants' failure to timely file suit on her behalf, the applicable statute of limitations expired and she permanently and irrevocably lost her right of filing a strict liability action against GM. McCoy and McClain both alleged that defendants were negligent in failing to secure the Oldsmobile for use as evidentiary material on the issue of whether a manufacturing defect caused the August 1997 accident. As a result, McCoy and McClain claimed they lost the full value of recovery against GM and incurred additional attorney fees and expenses addressing the issue. Sherry Webb, Ronald McCoy and Phillip McClain each prayed for judgment against defendants in excess of \$50,000. Because Sherry Webb's claim of legal malpractice differs from that of McCoy and McClain, we will address Webb's claim first and will address McCoy and McClain's claims together as they are identical.

*1036 Defendants moved to dismiss Plaintiffs' legal malpractice complaint under  sections 2–619(a)(4) and  (a)(9). Defendants argued that Sherry Webb was not time-barred from bringing a strict liability suit against GM primarily because of the July 12, 2002, complaint (which was attached to their motion) showing Sherry Webb as a plaintiff in a strict liability suit against GM. Additionally, defendants argued that McCoy and McClain could not establish that the loss of the car prevented them from securing the full

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value of their suit because GM settled the strict liability suit with Sherry Webb, Ronald McCoy and Phillip McClain for \$2,265,000. The settlement agreement between plaintiffs and GM detailed the terms of the settlement and was entered by the trial judge in the circuit court of Cook County and was attached to their motion to dismiss.

In responding to the defendants' motion, plaintiffs argued that a review of their attached exhibits (a police report from the August 1997 accident, a signed witness statement from Chicago police officer James Bartkowiak, and the March 1995 General Motors Safety Campaign Bulletin) showed clear proof that defendants caused plaintiffs' damages. Plaintiffs also pointed to their medical expenses as further evidence of damages. Plaintiffs alleged that Sherry Webb accrued \$113,564.07 in medical bills, Ronald McCoy accrued \$89,776.97 in medical bills, and Phillip McClain accrued \$202,160.93 in medical bills. The record, however, does not contain any medical bills. Plaintiffs repeated their charge that because of defendants' negligence, they lost the full value of their claim and that a partial settlement of the underlying case did not bar plaintiffs from pursuing the legal malpractice action against defendants.

Defendants' reply addressed plaintiffs' failure to controvert the proofs offered in support of defendants' motion to dismiss.

The trial court granted defendants motion to dismiss pursuant to  [section 2-619\(a\)\(9\)](#), which permits a dismissal when “[t]he claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim.”  [735 ILCS 5/2-619\(a\)\(9\)](#) (West 2000). Plaintiffs appeal the trial court's dismissal.

****145 ***406** We review whether the trial court properly granted defendants' motion to dismiss plaintiffs' legal malpractice case pursuant to  [section 2-619\(a\)\(9\)](#). Plaintiffs contend that only a trial on the merits will fully and fairly decide whether an attorney is liable for malpractice despite the fact that the underlying case was settled. Defendants maintain that plaintiffs sustained no damages as a result of defendants' representation because plaintiffs ultimately sued GM for strict liability and settled their strict liability lawsuit with GM for a “substantial sum * * * which all parties deemed fair and reasonable.”

[1] [2] [3] [4] ***1037** A motion to dismiss under

 [section 2-619](#) “allow[s] for a threshold disposition of questions of law and easily proven issues of fact.”  [Mio v. Alberto-Culver](#), 306 Ill.App.3d 822, 824, 239 Ill.Dec. 864, 715 N.E.2d 309 (1999). Under  [section 2-619](#), a motion to dismiss should be granted if after construing the pleadings and supporting documents in the light most favorable to the nonmoving party, the trial court finds that no set of facts can be proved upon which relief could be granted.  [Mio](#), 306 Ill.App.3d at 825, 239 Ill.Dec. 864, 715 N.E.2d 309. This process does not require the trial court to weigh facts or determine credibility and as a result, this court does not defer to the trial court's judgment.  [Mio](#), 306 Ill.App.3d at 825, 239 Ill.Dec. 864, 715 N.E.2d 309. Therefore, upon review we consider whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal was proper as a matter of law.  [Mio](#), 306 Ill.App.3d at 825, 239 Ill.Dec. 864, 715 N.E.2d 309. We review motions to dismiss under  [section 2-619 de-novo](#).  [Mio](#), 306 Ill.App.3d at 825, 239 Ill.Dec. 864, 715 N.E.2d 309. We may sustain the trial court's  [section 2-619](#) dismissal for any basis found in the record.  [Mio](#), 306 Ill.App.3d at 825, 239 Ill.Dec. 864, 715 N.E.2d 309.

[5] [6] An action may be dismissed under  [section 2-619\(a\)\(9\)](#) on the ground that a claim asserted is barred by other affirmative matter avoiding the legal effect of or defeating the claim.  [735 ILCS 5/2-619\(a\)\(9\)](#) (West 2000). The term “affirmative matter” includes a defense that completely negates the asserted cause of action.  [Serafin v. Seith](#), 284 Ill.App.3d 577, 583, 219 Ill.Dec. 794, 672 N.E.2d 302 (1996). Affirmative matter asserted by the defendant must be apparent on the face of the complaint or supported by affidavits or other evidentiary materials. [Epstein v. Chicago Board of Education](#), 178 Ill.2d 370, 383, 227 Ill.Dec. 560, 687 N.E.2d 1042 (1997).

Defendants' motion included copies of plaintiffs' second amended complaint against GM and the settlement agreement in that case. This supporting material will suffice to support

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consideration of Defendants' motion. See [Geick v. Kay](#), 236 Ill.App.3d 868, 874, 177 Ill.Dec. 340, 603 N.E.2d 121 (1992).

[7] [8] A trial court may properly dismiss a complaint where the affirmative matter refutes crucial conclusions of law or material fact that are unsupported by allegations of specific facts. [Serafin](#), 284 Ill.App.3d at 583, 219 Ill.Dec. 794, 672 N.E.2d 302. The affirmative matter must be more than evidence offered to refute a well-pleaded fact in the complaint as such well-pleaded facts must be taken as true. [Serafin](#), 284 Ill.App.3d at 583, 219 Ill.Dec. 794, 672 N.E.2d 302. Further, if the opponent to a [section 2–619](#) motion does not counter the proofs offered in support of the motion and the movant's showing of undisputed facts would entitle the movant to judgment as a matter of law, a dismissal pursuant to [section 2–619](#) is proper. [Wood v. Village ***407 **146 of Grayslake](#), 229 Ill.App.3d 343, 350, 170 Ill.Dec. 590, 593 N.E.2d 132 (1992).

[9] [10] [11] [12] To properly state a cause of action for legal malpractice, plaintiffs must allege in their complaint: (1) the existence of an ***1038** attorney-client relationship that establishes a duty on the part of the attorney; (2) a negligent act or omission constituting a breach of that duty; (3) proximate cause establishing that “but for” the attorney's negligence, the plaintiffs would have prevailed in the underlying action; and (4) damages. [Cedeno v. Gumbiner](#), 347 Ill.App.3d 169, 174, 282 Ill.Dec. 600, 806 N.E.2d 1188 (2004). The basis of such a claim is that had it not been for negligence on the part of plaintiff's attorney, plaintiff would have been compensated for an injury caused by a third party. [Cedeno](#), 347 Ill.App.3d at 174, 282 Ill.Dec. 600, 806 N.E.2d 1188. When an attorney's negligence is alleged to have occurred during the representation of a client in the underlying action, plaintiff must prove that counsel's negligence resulted in the loss of the underlying action. [Cedeno](#), 347 Ill.App.3d at 174, 282 Ill.Dec. 600, 806 N.E.2d 1188. This means that plaintiff must prove a “case within a case.” [Cedeno](#), 347 Ill.App.3d at 174, 282 Ill.Dec. 600, 806 N.E.2d 1188. If the underlying cause remained actionable at the time plaintiffs hired successor counsel, plaintiffs can prove no set of facts that connect defendants'

conduct with any damage plaintiffs sustained. [Cedeno](#), 347 Ill.App.3d at 174, 282 Ill.Dec. 600, 806 N.E.2d 1188.

We first address Sherry Webb's claim of legal malpractice.

[13] Sherry Webb alleged in her malpractice action that as a result of defendants' failure to timely sue GM for a manufacturing defect, she permanently and irrevocably lost her right to timely sue GM for strict liability as a result of the August 1997 accident. Defendants' submissions, however, which are not contested, show that Sherry Webb was a party to a strict liability suit against GM; that the strict liability suit was filed on July 12, 2002 by successor counsel after defendants were no longer representing plaintiffs; and successor counsel successfully negotiated a settlement with GM in the strict liability case.

Sherry Webb did not dispute that she was a named plaintiff in the July 12, 2002, complaint against General Motors for strict liability; she did not dispute that the strict liability suit was timely filed; or that she received \$15,000 in the settlement with GM. What she claims, without any documentary evidence or specific fact, is that the \$15,000 settlement she received was not enough. The settlement agreement indicates that the sum received was fair and reasonable.

Contrary to the undisputed facts, the language of Sherry Webb's complaint states that she “permanently and irrevocably lost her right of action against General Motors due to the expiration of the applicable statute of limitations.” However, based on the evidence presented in the record, specifically, the July 2002 complaint in which Sherry Webb was named as a plaintiff in a strict liability suit against GM and the settlement agreement in that case, it is clear that Sherry Webb did not “permanently and irrevocably [lose] her right of action against General Motors.”

1039** Moreover, the underlying case remained actionable at the time successor counsel began representing Sherry Webb, and successor counsel successfully settled the case on Sherry Webb's behalf. Sherry Webb cannot prove any facts that would connect defendants' conduct with any damage she sustained. [Cedeno](#), 347 Ill.App.3d at 174, 282 Ill.Dec. 600, 806 N.E.2d 1188; [408 **147 Land v. Greenwood](#), 133 Ill.App.3d 537, 88 Ill.Dec. 595, 478 N.E.2d 1203 (1985)

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(noting that because the cause of action remained viable at the time defendant was discharged as counsel, and plaintiff hired new counsel, plaintiff could not connect defendant's conduct to any of plaintiff's damages).

[14] Where a party moving to dismiss a case pursuant to  [section 2-619](#) presents affirmative matter containing well-pleaded facts, and the party opposing the motion does not file any supporting documentation countering the facts, the moving party's affirmative matter is accepted as true despite any contrary assertions in the opposing party's pleading. *Wood*, 229 Ill.App.3d at 349-50, 170 Ill.Dec. 590, 593 N.E.2d 132. Therefore, we conclude that because Sherry Webb was able to file a strict liability cause of action against General Motors, has presented no facts to support her claim that the settlement was anything but fair and reasonable, or that the running of a statute of limitations resulted in the dismissal of her action or resulted in her settling the case for a lesser amount of damages the trial court properly granted Defendants' motion to dismiss Sherry Webb's claim of legal malpractice.

We now turn to Ronald McCoy's and Phillip McClain's claim of legal malpractice. We address these claims together as they are identical.

[15] McCoy and McClain both alleged that defendants were negligent in failing to secure the Oldsmobile for use as evidentiary material on the issue of whether a manufacturing defect caused the August 17, 1997, accident. As a result, McCoy and McClain claim they lost the full value of recovery against GM and incurred additional attorney fees and expenses addressing the issue. As pointed out above, defendants' motions to dismiss were supported by the strict liability complaint McCoy and McClain filed against GM, but also the settlement agreement in that case. Additionally, defendants pointed out that plaintiffs and GM referred to the settlement amount was "fair and reasonable."

McCoy and McClain responded by directing the court to their medical expenses, but did not submit documentary evidence of medical bills in their response. They did not counter with any exhibits to show that the medical bills were paid, that they were associated with their damages, or that the amount they received in the settlement with GM was not fair and reasonable.

The settlement agreement shows that Ronald McCoy received *1040 \$250,000 from GM and Phillip McClain received \$2 million from GM, but there is nothing in the record to contradict that the settlement with GM was for anything less than full value of plaintiffs' claim. In fact, plaintiffs' settlement agreement with GM refers to the settlement as "fair and reasonable." Where a party moving to dismiss

a case pursuant to  [section 2-619](#) presents affirmative matter containing well-pleaded facts, and the party opposing the motion does not file any supporting documentation countering the facts, the moving party's affirmative matter is accepted as true despite any contrary assertions in the opposing party's pleading. *Wood*, 229 Ill.App.3d at 349-50, 170 Ill.Dec. 590, 593 N.E.2d 132. Based upon the above, we can only conclude that defendants' failure to secure the Oldsmobile for evidentiary material on the issue of manufacturing defect did not prevent McCoy and McClain from receiving full value from GM.

[16] We also point out that the proximate cause element of a legal malpractice claim requires that the plaintiffs must plead facts sufficient to show that, but for the attorneys' malpractice, the clients would have been successful in the undertaking ***409 **148 the attorneys were retained to perform.  *Serafin*, 284 Ill.App.3d at 587, 219 Ill.Dec. 794, 672 N.E.2d 302. The facts before this court, when viewed in a light most favorable to the plaintiffs, show that in spite of defendants failure to file a strict liability claim against GM, plaintiffs by way of successor counsel were able to file a strict liability claim against GM. Plaintiffs' new counsel filed multiple strict liability claims against GM. Additionally, plaintiffs' new counsel was successful in recovering damages on the strict liability claims against GM and negotiated a "fair and reasonable" settlement for plaintiffs consisting of what Margie Webb described as a "substantial sum" of money (\$2,265,000).¹

Plaintiffs argue that their settlement with GM represents only a "partial settlement," but presented no facts to support this claim. Plaintiffs contend that had defendants initially brought a strict liability claim against GM, plaintiffs would have been able to recover more damages. In support of their "partial settlement" claim, plaintiffs point to the recovery amounts each received and contrast *1041 that with the medical bills for each. Plaintiffs, however, failed to present

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any facts that their settlement with GM was anything other than a full settlement for injuries suffered as a result of the August 17, 1997, automobile accident. It is simply not enough for plaintiffs to indicate these amounts represent plaintiffs' medical bills and therefore the settlement is not full, fair, or reasonable. Consequently, plaintiffs did not suffer any damages as a result of defendants' failure to secure the Oldsmobile or defendants' failure to sue GM earlier than successor counsel.  [Cedeno](#), 347 Ill.App.3d at 174, 282 Ill.Dec. 600, 806 N.E.2d 1188.

Finally, plaintiffs argue that this case is controlled by  [McCarthy v. Pedersen & Houpt](#), 250 Ill.App.3d 166, 190 Ill.Dec. 228, 621 N.E.2d 97 (1993). In *McCarthy*, the defendants filed commercial litigation claims on plaintiff's behalf in federal court.  [McCarthy](#), 250 Ill.App.3d at 166, 190 Ill.Dec. 228, 621 N.E.2d 97. The case went to trial, and after the close of evidence but before the jury returned a verdict, plaintiff agreed to settle the case.

 [McCarthy](#), 250 Ill.App.3d at 166, 190 Ill.Dec. 228, 621 N.E.2d 97. After plaintiff had an independent attorney review the settlement agreement, the settlement agreement was executed.  [McCarthy](#), 250 Ill.App.3d at 166–67, 190 Ill.Dec. 228, 621 N.E.2d 97. The independent attorney plaintiff had review the settlement agreement was not associated with the defendant law firm.  [McCarthy](#), 250 Ill.App.3d at 166–67, 190 Ill.Dec. 228, 621 N.E.2d 97.

After the settlement agreement was executed, plaintiff sued defendants in the circuit court of Cook County asserting attorney malpractice.  [McCarthy](#), 250 Ill.App.3d at 167, 190 Ill.Dec. 228, 621 N.E.2d 97. The plaintiff in *McCarthy* alleged that the defendant law firm failed to file a timely claim under the Commodities Exchange Act and negligently selected an unqualified expert.  [McCarthy](#), 250 Ill.App.3d at 167, 190 Ill.Dec. 228, 621 N.E.2d 97. The defendants filed a motion for summary judgment alleging that plaintiff voluntarily decided to settle the underlying ***410 **149 case, particularly in light of independent counsel's review of the settlement agreement, thereby precluding a claim of attorney malpractice.  [McCarthy](#), 250 Ill.App.3d at 167, 190 Ill.Dec. 228, 621 N.E.2d 97. The circuit court denied the summary judgment motion because it could not determine as

a matter of law that plaintiff's malpractice suit was barred.

 [McCarthy](#), 250 Ill.App.3d at 167, 190 Ill.Dec. 228, 621 N.E.2d 97.

The *McCarthy* court affirmed the trial court's denial of summary judgment stating that there were factual disputes that amounted to genuine issues of material fact that plaintiff should be allowed to develop at trial (particularly the level of independent counsel's involvement in the settlement, whether defendants were negligent, and plaintiff's damages.) The court determined that plaintiffs' malpractice claim was not automatically barred by settlement of the underlying matter. The *McCarthy* court determined that “only a trial on the merits can fully and fairly resolve the issue of whether an attorney is liable for malpractice despite the fact that the underlying case was *1042 settled.”  [McCarthy](#), 250 Ill.App.3d at 172, 190 Ill.Dec. 228, 621 N.E.2d 97. The *McCarthy* court pointed out that “[t]o hold otherwise could create ethical problems where an attorney, knowing that he mishandled a case, encourages his client to settle in order to shelter himself from a malpractice claim.”  [McCarthy](#), 250 Ill.App.3d at 172, 190 Ill.Dec. 228, 621 N.E.2d 97.

[17] [18] We agree with *McCarthy* that settlement by successor counsel does not necessarily bar a malpractice action against prior counsel.  [McCarthy](#), 250 Ill.App.3d at 172, 190 Ill.Dec. 228, 621 N.E.2d 97. Further, an attorney malpractice action should be allowed where the plaintiff can show that he settled for a lesser amount than he could reasonable expect without the malpractice.  [Brooks v. Brennan](#), 255 Ill.App.3d 260, 270, 193 Ill.Dec. 67, 625 N.E.2d 1188 (1994). But, such is not the case here.

Plaintiffs cannot establish that they were damaged by defendants. Defendants presented evidence that plaintiffs were able to pursue a strict liability suit against GM, that plaintiffs settled the strict liability case for \$2,265,000, and that plaintiffs referred to the settlement amount as “fair and reasonable.” Plaintiffs failed to present any evidence in their response to the motion to dismiss controverting defendants' showing. Where a party moving to dismiss a case pursuant to  [section 2–619](#) presents affirmative matter containing well-pleaded facts, and the party opposing the motion does not file any supporting documentation countering the facts, the

Webb v. Damisch, 362 Ill.App.3d 1032 (2005)

842 N.E.2d 140, 299 Ill.Dec. 401

moving party's affirmative matter is accepted as true despite any contrary assertions in the opposing party's pleading. [Wood](#), 229 Ill.App.3d at 349–50, 170 Ill.Dec. 590, 593 N.E.2d 132. Here plaintiffs did not offer any documentation in response to show that they settled for a lesser amount than could be reasonably expected without the malpractice. Thus, the trial court properly dismissed the action.

Affirmed.

[CAHILL](#), P.J., and [BURKE](#), J., concur.

All Citations

The decision of the circuit court of Cook County is affirmed.

362 Ill.App.3d 1032, 842 N.E.2d 140, 299 Ill.Dec. 401

Footnotes

- 1 Margie Webb (Phillip McClain's mother) filed a petition for protective order as part of the process for establishing a special needs trust and a “structured disbursement” plan for Phillip McClain's settlement (\$2 million). In the petition for protective order, Margie Webb, represented by the same successor counsel that negotiated plaintiffs' settlement with General Motors and filed the legal malpractice action against defendants, states that the parties in the strict liability suit with General Motors “reached a settlement agreement for a substantial sum.” Margie Webb's petition was also attached to defendants' motion to dismiss.

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Burhenn v. Kyger, 13 Ill.App.3d 767 (1973)

300 N.E.2d 589

13 Ill.App.3d 767
Appellate Court of Illinois, Second District.

Betty BURHENN, Plaintiff-Appellant,
v.
Walter A. KYGER and Shirley M.
Kyger, Defendants-Appellees.

No. 72-103.

|
Aug. 21, 1973.

Synopsis

Action against homeowners for injuries allegedly sustained as result of fall on ice patch. The Circuit Court, Lee County, James M. Allen, J., directed a verdict for defendants, and plaintiff appealed. The Appellate Court, Thomas J. Moran, J., held that homeowners who did not intend to injure neighbor and who did not have any knowledge of icy condition at rear entrance of their home or that condition was hidden were not liable for injuries received by neighbor who after visiting homeowners stepped out back door and slipped on patch of ice and fell on porch.

Affirmed.

West Headnotes (3)

[1] Negligence

 Willful or Wanton Conduct

The essence of a willful or wanton injury is that it must have been intentional or that it must have been committed under circumstances exhibiting a reckless disregard for the safety of others, such as a failure, after knowledge of impending danger, to exercise ordinary care to prevent it or a failure to discover danger through

recklessness or carelessness when it could have been discovered by the exercise of ordinary care.

[2] Negligence

 Care Required in General

An occupant of premises does not owe duty to licensees to discover unsafe conditions thereon, though he is under a duty to disclose or warn against hidden dangers of which he has knowledge.

[3] Negligence

 Snow and Ice

Homeowners who did not intend to injure neighbor and who did not have any knowledge of icy condition at rear entrance of their home or that condition was hidden were not liable for injuries received by neighbor who after visiting homeowners stepped out back door and slipped on patch of ice and fell on porch.

Attorneys and Law Firms

****590 *767** Wm. J. Sturgeon, Dixon, for plaintiff-appellant.

Henry S. Dixon, Dixon, for defendants-appellees.

Opinion

THOMAS J. MORAN, Justice.

(Publish abstract only.)

All Citations

13 Ill.App.3d 767, 300 N.E.2d 589

Anderson v. Marathon Petroleum Co., 801 F.2d 936 (1986)

 KeyCite Yellow Flag - Negative Treatment
Distinguished by [Central Trust and Sav. Bank v. Toppert](#), Ill.App. 3 Dist.,
May 31, 1990

801 F.2d 936
United States Court of Appeals,
Seventh Circuit.

LaDonna ANDERSON as Executor of the
Estate of Donald Anderson, Plaintiff-Appellant,
v.
MARATHON PETROLEUM COMPANY, f/k/
a Marathon Oil Company, Defendant-Appellee.

No. 85-3016.
|
Argued May 29, 1986.
|
Decided Sept. 16, 1986.

Synopsis

Employee of independent contractor hired by oil company to sandblast its storage tanks brought personal injury action against oil company, alleging that company's negligence contributed to employee's silicosis. The United States District Court for the Southern District of Illinois, James L. Foreman, Chief Judge, entered directed verdict in favor of oil company, and employee appealed. The Court of Appeals, Posner, Circuit Judge, held that: (1) sandblasting of oil tanks was not so abnormally dangerous as to render oil company vicariously liable for silicosis of independent contractor's employee, and (2) oil company was not directly negligent in regard to employee's injuries.

Affirmed.

Swygert, Senior Circuit Judge, dissented and filed opinion.

Procedural Posture(s): On Appeal; Motion for Judgment as a Matter of Law (JMOL)/Directed Verdict.

West Headnotes (8)

[1] Federal Courts

 State or local law in general

Court of Appeals will give some deference to determinations of law of state by district judge sitting in that state.

[8 Cases that cite this headnote](#)

[2] Labor and Employment

 Work of Independent Contractor

Under Illinois law, principal is generally not liable for independent contractor's torts, even if they are committed in performance of contract and even though principal is liable under doctrine of respondeat superior for torts of his employees if committed in furtherance of their employment; reason for rule is that, by definition, principal does not supervise details of independent contractor's work and is not in good position to prevent negligent performance, whereas essence of contractual relationship known as employment is that employee surrenders to employer right to direct details of work.

[20 Cases that cite this headnote](#)

[3] Labor and Employment

 Hazardous Work

Under Illinois law, general rule that principal is not liable for torts of independent contractor is not applied when activity for which independent contractor was hired is "abnormally dangerous" or "ultrahazardous," i.e., if activity might very well result in injury even if conducted with all due skill and caution.

[8 Cases that cite this headnote](#)

[4] Labor and Employment

 Construction cases

Sandblasting of oil storage tanks was not so abnormally dangerous, as to render oil company vicariously liable, under Illinois law, for death by silicosis of employee of independent contractor hired by oil company to do sandblasting.

[5 Cases that cite this headnote](#)

Anderson v. Marathon Petroleum Co., 801 F.2d 936 (1986)

[5] Labor and Employment

 Peculiar Risk Doctrine

Under Illinois law, principal is not liable for injury to employee of independent contractor merely because risk of particular injury suffered by employee was in some sense inherent or peculiar to work performed.

[7 Cases that cite this headnote](#)

[6] Labor and Employment

 Weight and sufficiency

Evidence that oil company may have had knowledge that employee of independent contractor hired to sandblast oil storage tanks did not have adequate protection against silicon dust did not establish that oil company was negligent in hiring independent contractor initially.

[2 Cases that cite this headnote](#)

[7] Labor and Employment

 Work of Independent Contractor

Under Illinois law, injured employee of independent contractor may not recover damages against contractor's principal merely because principal discovers, contrary to its initial assessment, that contractor is careless, and yet takes no steps to correct contractor's unsafe practices or to terminate contractor.

[8] Federal Courts

 Unsettled or Undecided Questions

Resident litigants who seek adventurous departures in state common law should sue in state rather than federal court.

[11 Cases that cite this headnote](#)

Attorneys and Law Firms

***937** Robert Brown, Ronald Tulin, Ltd., Charleston, Ill., for plaintiff-appellant.

Gary E. Snodgrass, Brown James & Rabbitt, P.C., St. Louis, Mo., for defendant-appellee.

Before BAUER and POSNER, Circuit Judges, and SWYGERT, Senior Circuit Judge.

Opinion

POSNER, Circuit Judge.

This diversity personal-injury suit pits two residents of Illinois (Donald Anderson, who died while the case was on appeal, and his widow) against a nonresident corporation, Marathon Petroleum Company. ***938** The district judge granted a directed verdict for Marathon at the close of the plaintiffs' case on the ground that the plaintiffs had failed to show a breach of duty by Marathon.

Anderson was an employee of Tri-Kote, Inc., which had a contract with Marathon to clean the inside of Marathon's oil storage tanks by sandblasting. The evidence, viewed most favorably to the Andersons, shows that sandblasting in a confined space creates clouds of silicon dust, which if breathed in over a long period of time cause silicosis, a serious lung disease from which, in fact, Anderson died. Anderson had begun working for Tri-Kote in 1970 as a sandblaster, mostly on the Marathon contract, and quit in 1983 when he was diagnosed as suffering from silicosis. During this period he averaged three or four days a week sandblasting Marathon storage tanks. Until 1980 the only form of mask that Tri-Kote supplied Anderson to protect him from silicon dust was a so-called "desert hood." It had no fresh-air hose but only a wire mesh in front of the nose and mouth, and the dust could get in through the mesh. Supervisory personnel of Marathon often saw Anderson coming out of a storage tank with dust on his face after sandblasting and they knew that Tri-Kote had supplied him with just the patently inadequate "desert hood." Yet Marathon did nothing to try to get Tri-Kote to protect its workers better. The two employees of Tri-Kote who sandblasted Marathon's storage tanks before Anderson came on the scene also died of silicosis.

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[1] The issue is the tort duty of a principal to the employees of his independent contractor. The duty could be vicarious or direct: vicarious if the principal is not himself at fault in the accident to the employee, direct if he is. Mrs. Anderson makes both sorts of claim, though her emphasis is on the former, and that is the one we shall discuss first. The district judge rejected both claims, and our practice is to give some deference to determinations of the law of a state by a district judge sitting in that state.  *Enis v. Continental Illinois Nat'l Bank & Trust Co.*, 795 F.2d 39, 40 (7th Cir.1986).

[2] Generally a principal is not liable for an independent contractor's torts even if they are committed in the performance of the contract and even though a principal is liable under the doctrine of respondeat superior for the torts of his employees if committed in the furtherance of their employment. See, e.g., *Gomien v. Wear-Ever Aluminum, Inc.*, 50 Ill.2d 19, 21, 276 N.E.2d 336, 338 (1971);  *Kouba v. East Joliet Bank*, 135 Ill.App.3d 264, 267, 89 Ill.Dec. 774, 777, 481 N.E.2d 325, 328 (1985). The reason for distinguishing the independent contractor from the employee is that, by definition of the relationship between a principal and an independent contractor, the principal does not supervise the details of the independent contractor's work and therefore is not in a good position to prevent negligent performance, whereas the essence of the contractual relationship known as employment is that the employee surrenders to the employer the right to direct the details of his work, in exchange for receiving a wage. The independent contractor commits himself to providing a specified output, and the principal monitors the contractor's performance not by monitoring inputs—i.e., supervising the contractor—but by inspecting the contractually specified output to make sure it conforms to the specifications. This method of monitoring works fine if it is feasible for the principal to specify and monitor output, but sometimes it is not feasible, particularly if the output consists of the joint product of many separate producers whose specific contributions are difficult (sometimes impossible) to disentangle. In such a case it may be more efficient for the principal to monitor inputs rather than output—the producers rather than the product. By becoming an employee a producer in effect submits himself to that kind of monitoring, receiving payment for the work he puts in rather than for the output he produces.

Since an essential element of the employment relationship is thus the employer's monitoring of the employee's work, a principal *939 who is not knowledgeable about the details of some task is likely to delegate it to an independent contractor. Hence in general, though of course not in every case, the principal who uses an independent contractor will not be as well placed as an employer would be to monitor the work and make sure it is done safely. This is the reason as we have said for not making the principal vicariously liable for the torts of his independent contractors. See Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 Yale L.J. 499, 545 (1961).

[3] The rule is not applied, however, when the activity for which the independent contractor was hired is “abnormally dangerous,” see *Restatement (Second) of Torts* § 427A (1964), or in an older terminology “ultrahazardous,” see, e.g., *Cities Service Co. v. State*, 312 So.2d 799, 802 (Fla. Dist. Ct.App. 1975)—i.e., if the activity might very well result in injury even if conducted with all due skill and caution. When an activity is abnormally dangerous, it is important not only that the people engaged in it use the highest practicable degree of skill and caution, but also—since even if they do so, accidents may well result—that the people who have authorized the activity consider the possibility of preventing some accidents by curtailing the activity or even eliminating it altogether.  See *Bethlehem Steel Corp. v. EPA*, 782 F.2d 645, 652 (7th Cir.1986); Shavell, *Strict Liability versus Negligence*, 9 J. Legal Stud. 1 (1980). On both scores there is an argument for making the principal as well as the independent contractor liable if an accident occurs that is due to the hazardous character of the performance called for by the contract. The fact that a very high degree of care is cost-justified implies that the principal should be induced to wrack his brain, as well as the independent contractor his own brain, for ways of minimizing the danger posed by the activity. And the fact that the only feasible method of accident prevention may be to reduce the amount of the activity or substitute another activity argues for placing liability on the principal, who makes the decision whether to undertake the activity in the first place. The electrical utility that has to decide whether to transport nuclear waste materials by motor or rail may be influenced in its choice by the relative safety of the modes—if it is liable for the consequences of an accident.

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True, the principal would in any event be liable indirectly if the price it paid the independent contractor fully reflected the dangers of the undertaking; but this condition would be fulfilled only if the contractor were fully answerable for an accident if one occurred. And though fully liable in law, the independent contractor would not be fully liable in fact if a damage judgment would exceed his net assets. The likelihood of the independent contractor's insolvency is greater the more hazardous the activity; by definition, expected accident costs are greater. Another thing making them greater is that the contractor will be strictly liable for accidents caused by the abnormally dangerous character of his activity, see *Restatement, supra*, § 427A, comment, a, and therefore his expected legal-judgment costs will be higher than those of a contractor liable only for negligence. With the exposure of the independent contractor to liability so great, it may be necessary to make the principal liable as well in order to ensure that there is a solvent defendant. This is important not only to provide compensation for accident victims but also to reduce the number of accidents. Without such liability a principal might hire judgment-proof independent contractors to do his dangerous jobs, knowing that the contractors would have an incentive to cut corners on protecting safety and health and that this would reduce the cost of the contract to him. See Sykes, *The Economics of Vicarious Liability*, 93 *Yale L.J.* 1231, 1241–42, 1272 (1984).

[4] Is sandblasting abnormally dangerous? A district judge in Louisiana, in the only case we have found on the question, held not.  *Touchstone v. G.B.Q. Corp.*, 596 F.Supp. 805, 815 (E.D. La. 1984). In the absence of any precedent establishing the *940 abnormal dangerousness of sandblasting, the plaintiffs in this case were obliged to lay a factual basis for an inference that people engaged in sandblasting cannot prevent a serious risk of injury by taking precautions. They did not do this. So far as the record shows (an important qualification), if the sandblaster is equipped not with the ridiculous “desert hood” but with a proper face mask to which a fresh-air hose is attached, so that the worker is breathing fresh air rather than air filled with silicon dust, the worker is in no danger, nor anyone else. The design of an effective hood may be more difficult than we are assuming it to be, cf. *Byrd v. Hunt Tool Shipyards, Inc.*, 650 F.2d 44, 48 (5th Cir.1981), but in the absence of precedent or data we cannot just assume that the protection of the worker is so difficult that sandblasting should be classified as abnormally dangerous.

Mrs. Anderson presses on us cases which suggest that something less than abnormal danger may be enough to take a case out of the rule that a principal is not liable for the torts of its independent contractors. An example is *Johnson v. Central Tile & Terrazzo Co.*, 59 Ill.App.2d 262, 276–77, 207 N.E.2d 160, 167 (1965), which says that “if one employs another to do work which he should recognize as involving some peculiar risk to others unless special precautions are taken, the one doing the employing will remain liable if harm results because these precautions are not taken,” even though the person “employed” is actually an independent contractor.

See also  *Donovan v. Raschke*, 106 Ill.App.2d 366, 370, 246 N.E.2d 110, 113 (1969); 5 Harper, James & Gray, *The Law of Torts* § 26.11, at pp. 88–89 (2d ed. 1986). The words “peculiar risk” bring to mind section 416 of the Restatement. And the closely related section 427 speaks of a danger that is “inherent,” a concept apparently distinguishable in the restaters' minds from the “abnormally dangerous” concept of 427A (an *a fortiori* ground for not allowing the principal to shift his duty of care to the independent contractor). This

concept, too, is echoed in Illinois cases, such as  *Clark v. City of Chicago*, 88 Ill.App.3d 760, 763–64, 43 Ill.Dec. 892, 895, 410 N.E.2d 1025, 1028 (1980)—but *Clark* seems to treat the terms as synonymous. On the general question see the lucid discussion in Prosser and Keeton on the Law of Torts § 71, at pp. 512–15 (5th ed. 1984).

The distinction between an abnormal risk on the one hand and a peculiar or inherent risk on the other hand is easiest to understand in situations where the activity, though not always or generally hazardous, is so in the particular case.

Thus in  *Donohue v. George W. Stiles Construction Co.*, 214 Ill.App. 82, 89–91 (1919), discussed and distinguished in *Johnson*, the prime contractor hired a subcontractor to do structural steel repair work in a post office, right over the heads of the postal employees—and sure enough, one of them was injured. The present case is dissimilar. And even if the present case is within the “peculiar risk” or “inherent danger” exception as recognized by the Illinois cases, Mrs. Anderson must lose. With rare exceptions, some based on statutes such as the omnipresent scaffolding acts (see, e.g., Ill.Rev.Stat. ch. 48, ¶¶ 60 *et seq.*) that impose strict liability on contractors for injuries to their subcontractors' employees caused by hazardous working conditions, the cases that make principals

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vicariously liable for the torts of their independent contractors involve injuries to third parties rather than employees; and the general though not uniform view is that the employee has no common law tort right against his employer's principal in such a case. See, e.g.,  *Conover v. Northern States Power Co.*, 313 N.W.2d 397, 404–06 (Minn.1981);  *Sloan v. Atlantic Richfield Co.*, 552 P.2d 157, 159–60 (Alaska 1976);  *Johns v. New York Blower Co.*, 442 N.E.2d 382, 386–88 (Ind.App.1982); Prosser and Keeton on the Law of Torts, *supra*, at 514 n. 63; 5 Harper, James & Gray, *supra*, § 26.11, at p. 82 n. 47 (third paragraph of note). Granted,  *Fried v. United States*, 579 F.Supp. 1212 (N.D.Ill.1983), is an exception, and it purports to be an interpretation of Illinois law; but the only cases on which *941 the court relied involved injuries to nonemployees, see  *id.* at 1216, and the court did not seem aware that this might make all the difference. There are other exceptional cases, but the majority view as we have said is against such liability.

There is a reason for the distinction between the plaintiff who is an employee of the independent contractor and the plaintiff who is not. If a nuclear reactor blows up and thousands of people are irradiated, we would not allow the reactor company to slough off all liability for the accident onto a careless independent contractor, who, not having the resources to compensate the victims of his tort, had lacked adequate incentives to take care. Similarly, we would not want Marathon to be able to avoid liability to its neighbors caused by its hiring contractors, who turn out to be careless, to perform abnormally dangerous jobs. But the only people endangered in this case were the contractor's employees; and they are compensated for the risks of their employment by a combination of wages, benefits, and entitlement to workers' compensation in the event of an accident. The principal pays for the package indirectly, in the contract price, which is calculated to cover the contractor's labor as well as other costs. Moreover, as we shall see, if the contractor does not carry workers' compensation insurance and proves unable to pay benefits out of its own pocket, the principal must pay the benefits. The principal thus has every incentive to assure safe working conditions in order to reduce its contract costs and its contingent liability for workers' compensation; so there is no danger of the shell game that is played when the firm causing the accident is insolvent and its principal is not liable because

the tortfeasor was an independent contractor rather than an employee.

Since the principal is the indirect employer of its contractor's employees, to make the principal liable in common law tort for the accidents befalling those employees would be inconsistent with the bedrock principle that workers' compensation rights are exclusive of common law tort rights. It is true that workers are allowed to maintain product liability suits against the suppliers of machines that injure them on the job, thereby bypassing in an economic if not legal sense the exclusivity of workers' compensation rights. See, e.g.,  *Dukes v. J.I. Case Co.*, 137 Ill.App.3d 562, 91 Ill.Dec. 710, 483 N.E.2d 1345 (1985). But the supplier of a machine is not an indirect employer of the workers who man the machine; the employer's principal is.

Mrs. Anderson presses on us the Illinois Supreme Court's decision in  *Chicago Economic Fuel Gas Co. v. Myers*, 168 Ill. 139, 146, 48 N.E. 66, 68 (1897), which applied in favor of an employee of the independent contractor an “inherently dangerous” exception to the rule that a principal is not liable for its independent contractor's torts. But the case was decided before the first workmen's compensation law was enacted in Illinois and is in any event distinguishable from the present case because the “independent” contractor was an alter ego of the principal, cf.  *Northern Indiana Public Service Co. v. Carbon County Coal Co.*, 799 F.2d 265, 271 (7th Cir.1986).

[5] The position urged by Mrs. Anderson would bring about profound changes in liability for industrial accidents. Firms engaged in activities that are dangerous if proper precautions are not taken (and which activity is not?) would become the virtual insurers of their contractors' employees. Indeed, imagine a case where a homeowner hired a contractor to fix the roof, and one of his workers fell off the roof and was injured. The risk of falling would be in some sense inherent in or peculiar to the work; could the worker therefore sue the homeowner? That would be a revolution in liability. Even if the principal's vicarious liability to its independent contractors' employees were confined to firms, there would be (besides the problems already discussed) the problem of reconciling such liability with the provision of Illinois workmen's compensation law that any firm which engages in “extra hazardous” activities, including “maintaining ...

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any structure” (which would appear to cover *942 what Anderson was doing, cf. [Fefferman v. Industrial Comm'n](#), 71 Ill.2d 325, 16 Ill.Dec. 935, 375 N.E.2d 1277 (1978)) is liable to the independent contractor's employees for workers' compensation benefits if the contractor himself turns out not to be insured. See Ill.Rev.Stat. ch. 48, ¶¶ 138.1(a)(3), 138.3(1), 138.11. It would be odd if the principal, while liable at most for workmen's compensation benefits if the contractor was not insured, would be liable for common law tort damages—which are usually much greater than workers' compensation benefits—if the contractor was insured.

[6] Up to now we have treated the case as one in which the principal is alleged to be vicariously liable for its contractors' torts, but Mrs. Anderson also argues that there was enough evidence of Marathon's negligence to make the directed verdict improper even if Tri-Kote's negligence cannot be imputed to Marathon. Supervisory employees of Marathon testified that on occasion they had seen Mr. Anderson coming out of the storage tanks with dust on his face, and they knew he did not have an adequate mask. Even so, this does not show that Marathon was negligent in hiring Tri-Kote initially; so this conventional avenue of principal's liability, see, e.g., [Gomien v. Wear-Ever Aluminum, Inc.](#), *supra*, 50 Ill.2d at 21, 276 N.E.2d at 338; [Restatement](#), *supra*, § 411; Prosser and Keeton on the Law of Torts, *supra*, at 510, is cut off.

[7] [8] But suppose that a principal, having hired an independent contractor after a careful investigation which showed that the contractor was careful and responsible, discovers that he is careless yet takes no steps to correct his unsafe practices or terminate him; can the victim of the contractor's carelessness get damages from the principal? We assume the answer is “yes” if the victim is a third party, but Mrs. Anderson has cited no case in which an Illinois court has allowed an employee of the independent contractor to recover damages on this basis. The majority view is that he may not. See [Eutsler v. United States](#), 376 F.2d 634 (10th Cir.1967); [Hess v. Upper Mississippi Towing Corp.](#), 559 F.2d 1030, 1033–34 (5th Cir.1977); [Futo v. Lykes Bros. S.S. Co.](#), 742 F.2d 209, 214 (5th Cir.1984). Again the reason is that the employee is protected by his workers' compensation rights; again there is a division of authority (see the comprehensive discussion in [Nelson v. United States](#), 639 F.2d 469 (9th Cir.1980)); again we have no reason to think that Illinois

would adopt the minority view. It might; but federal court is not the place to press innovative theories of state law. This precept is particularly *appropos* in a case such as this where residents file suit in federal court against a nonresident defendant. The choice of the federal forum in such a case cannot be laid to fear of prejudice against a nonresident. The plaintiff is not the nonresident—the defendant is. (It would be different if the Andersons had filed this suit in state court and Marathon had removed it to federal court.) The plaintiffs' appellate counsel could not remember why this suit was brought in federal rather than state court, so we take this occasion to remind that resident litigants who seek adventurous departures in state common law are advised to sue in state rather than federal court.

AFFIRMED.

SWYGERT, Senior Circuit Judge, dissenting.

The majority's cost/benefit analysis does not provide an adequate basis for rejecting the holding in [Chicago Economic Fuel Gas Co. v. Myers](#), 168 Ill. 139, 146, 48 N.E. 66, 68–69 (1897), in which the Illinois Supreme Court held that employers of independent contractors owe a nondelegable duty to the contractor's employees when those employees are involved in inherently dangerous work or work which carries with it a peculiar risk of injury. Although the majority is correct that *Myers* involved a finding of *alter ego*, that finding was merely an alternative holding to the one set forth above and therefore does not undermine its validity.

*943 The majority suggests that the position taken by the Illinois Supreme Court in *Myers* is now untenable in light of recent developments, most notably the advent of worker's compensation. But other jurisdictions have continued to adhere to the rule reiterated in *Myers* even after worker's compensation developed, the reason being that there are policy considerations apart from worker's compensation coverage that come to play in cases such as the one at bar. See discussion in [Johns v. New York Blower Co.](#), —Ind.App. —, —, 442 N.E.2d 382, 387 (1984) (quoting [Van Arsdale v. Hollinger](#), 68 Cal.2d 245, 66 Cal.Rptr. 20, 25, 437 P.2d 508, 513 (1968)); see also [Johns](#), —Ind.App. at —, 442 N.E.2d at 388 (Staton,

Anderson v. Marathon Petroleum Co., 801 F.2d 936 (1986)

J., concurring) (“[C]overage by Workmen's Compensation is irrelevant to the issue of liability. If there is a nondelegable duty, a third party is liable for the injuries and damages resulting regardless of Workmen's Compensation coverage.... Workmen's Compensation coverage in many cases may be grossly inadequate where a nondelegable duty is involved.”).

Given this, we ought to think very carefully before rejecting *Myers* out of hand. This is particularly true since another district court sitting in Illinois found, although admittedly without much explanation, that under Illinois law the employer's nondelegable duty runs to the contractor's employees. See  [Fried v. United States](#), 579 F.Supp. 1212, 1216 (N.D.Ill.1983). Moreover, application of *Myers* only gives the plaintiff a cause of action. It does not subject Marathon to automatic liability. The jury must first determine that the sandblasting involved here was “inherently dangerous” and that Marathon breached its nondelegable duty before Marathon will be held liable. Thus, the majority's dire prediction that homeowners will be subject to unlimited liability is highly unlikely to come true since juries are unlikely to find that routine household maintenance is an inherently hazardous activity.

Thus, the question becomes whether sandblasting is “peculiarly or inherently dangerous.” In Illinois the question whether an instrumentality or conduct is inherently or peculiarly dangerous is not answered by looking solely at its inherent nature, but also at the manner of its particular use at the time and place of the occurrence. See  [Donovan v. Raschke](#), 106 Ill.App.2d 366, 370, 246 N.E.2d 110, 113 (1st Dist.1969); [Snow v. Judy](#), 96 Ill.App.2d 420, 423, 239 N.E.2d 327 (4th Dist.1968); [Johnson v. Central Tile & Terrazzo Co.](#), 59 Ill.App.2d 262, 276–77, 207 N.E.2d 160, 167 (1965). At trial the plaintiffs presented the following expert testimony. Their medical expert testified that

silica in the lungs is a toxic poison, and that in an area of really intense exposure, where there is not good ventilation, where the particle concentration is extremely high, the only acceptable kind of prevention is an external air source used throughout the procedure with a tight fitting hood [and] external oxygen source or backpack oxygen ... [where the concentration of silica particles is intense], you have to use more and more rigorous methods to protect against exposure.

In this case, there was also additional evidence that Anderson sandblasted three to four times a week in tanks no more than twelve feet in diameter and fifteen feet high, using approximately 2000–2500 pounds of sand, and that Anderson used only a tarpaulin head covering with no fresh air supply. In Illinois, the question of whether an activity is inherently or peculiarly dangerous is one for a jury, see, e.g., [Snow](#), 96 Ill.App.2d at 423–24, 239 N.E.2d at 329–30, and the Andersons certainly presented sufficient evidence to reach the jury on this issue.

Thus, because I agree with the majority that there was insufficient evidence of Marathon's negligent retention of the independent contractor, the order of the district court directing a verdict in favor of Marathon on the issue of its alleged breach of its nondelegable duty should be reversed and the cause remanded for a new trial.

All Citations

801 F.2d 936

Northrup v. Allister Const. Corp., 163 Ill.App.3d 221 (1987)

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KeyCite Yellow Flag - Negative Treatment

Called into Doubt by [Vroegh v. J & M Forklift](#), Ill.App. 1 Dist., August 20, 1993

163 Ill.App.3d 221

Appellate Court of Illinois,
First District, Third Division.

Donna NORTHRUP, Plaintiff–Appellant,

v.

ALLISTER CONSTRUCTION COMPANY, an
Illinois Corporation, Defendant–Counterplaintiff–
Appellant, National Homes Corporation, an Indiana
Corporation, Defendant, (Carl and Mary Midland,
Defendants–Appellees–Counterdefendants).

Nos. 86–0155, 86–3065.

|

Nov. 4, 1987.

Synopsis

Social guest brought action against homeowners and builder for personal injuries sustained when guest fell down flight of stairs in home. The Circuit Court, Cook County, Thomas E. Hoffman, J., granted homeowners' motions for summary judgment, and guest and builder appealed. The Appellate Court, White, J., held that: (1) homeowners were not liable to social guest for injuries resulting from their ordinary negligence; (2) homeowners' failure to warn guest of clothes on staircase did not constitute willful and wanton misconduct, where guest saw clothes while she was walking down staircase; and (3) homeowners who were not liable to social guest were not liable to builder to contribution in claim against builder for negligent failure to install railing along curve in staircase.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (7)

[1] Negligence

🔑 Social Guests

Social guests are considered “licensees” for purposes of determining degree of care which landowner owes social guests on his property.

[3 Cases that cite this headnote](#)

[2] Negligence

🔑 Care Required in General

Landowner owes his licensees duty not to engage in wilful or wanton conduct which injures licensees, and this duty includes duty to warn licensees of any concealed hazards of land.

[1 Cases that cite this headnote](#)

[3] Negligence

🔑 Relative Degrees of Care

Landowner may be liable to invitee for ordinary negligence, but he cannot be held liable to licensee for ordinary negligence.

[4] Negligence

🔑 Constitutional, Statutory and Regulatory Provisions

Premises Liability Act would not be applied retroactively. S.H.A. ch. 80, ¶ 301 et seq.

[1 Cases that cite this headnote](#)

[5] Negligence

🔑 Social Guests

Homeowners were not liable to social guest for injuries sustained as result of their ordinary negligence.

[6] Negligence

🔑 Substances and Objects

Homeowners' failure to warn social guest of clothing on staircase was not willful and wanton misconduct for which guest could recover, where guest saw pile of clothes while she was walking down staircase.

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[1 Cases that cite this headnote](#)

[7] Contribution

🔑 [Particular Torts or Wrongdoers](#)

Homeowners who left clothing on staircase were not liable to builder for contribution in social guest's action against builder for negligently failing to install railing along curve in staircase, where homeowners met their legal duty of care to social guest. S.H.A. ch. 70, ¶ 302(a).

[5 Cases that cite this headnote](#)

Attorneys and Law Firms

****587 ***432 *222** Laser, Schostok, Kolman & Frank, Chicago (Michael Lee Tinaglia, of counsel), for Northrup.

Smith & Tamillow, Chicago (Patrick J. Liston, of counsel), for Allister Const.

Judge & Knight, Ltd., Park Ridge (Kristine A. Karlin, of counsel), for Carl and Mary Midland.

Opinion

Justice WHITE delivered the opinion of the court.

Plaintiff Donna Northrup sued defendants Allister Construction Company, National Homes Corporation, and Carl and Mary Midland, alleging that defendants' negligent acts caused plaintiff to fall down a flight of stairs in the Midlands' home. The Midlands moved for summary ***223** judgment and the trial court granted the motion. Plaintiff appealed in docket 86-0155. Allister countersued the Midlands for contribution, and the trial court granted the Midlands' motion for summary judgment on the countersuit. Allister appealed in docket 86-3065. The cases were consolidated for oral argument.

I

Northrup alleged in her complaint that she was a social guest of the Midlands on July 6, 1981, and she spent the night at

their home. Around 8 a.m. on July 7, as she came downstairs, Northrup tripped on some clothes left on the staircase. In her complaint she alleged that the Midlands negligently left clothes on the stairs and failed to warn her of the dangerous condition of the stairs.

The Midlands moved for summary judgment and they supported their motion with a transcript of Northrup's deposition. The Midlands' staircase consists principally of rectangular stairs, each following the other in a straight line, but near the bottom the staircase curves, and the two steps which form the curve are nearly triangular. Northrup testified in her deposition that when she descended the staircase on the morning of July 7, 1981, she saw a pile of clothes on the wide end of the stairs which form the curve. She placed a foot on the narrow end of the stair in order to avoid stepping on the clothes. She felt that her footing was precarious, so she brought her other foot down. It caught the clothing. She reached to brace herself, but there was no handrail around the curve. Her feet slipped out from under her and she flew down the remaining stairs. She found herself at the bottom of the staircase in excruciating pain.

[1] [2] [3] On appeal, Northrup contends that the Midlands could be found guilty of negligence. Under the law in effect in Illinois at the time of the accident, the degree of care which a landowner owed to a person on his property was determined by that person's status as invitee, licensee, or trespasser. ([Pashinian v. Haritonoff](#) (1980), 81 Ill.2d 377, 380, 43 Ill.Dec. 21, 410 N.E.2d 21.) Social guests, like plaintiff herein, are considered licensees. ([Gregor v. Kleiser](#) (1982), 111 Ill.App.3d 333, 336, 67 Ill.Dec. 38, 443 N.E.2d 1162.) A landowner owes his licensees a duty not to engage in wilful or wanton conduct which injures the licensees ([Ellguth v. Blackstone Hotel, Inc.](#) (1951), 408 Ill. 343, 347, 97 N.E.2d 290), and this duty includes a duty to warn licensees of any concealed hazards on the land. ([Latimer v. Latimer](#) (1978), 66 Ill.App.3d 685, 688, 23 Ill.Dec. 471, 384 N.E.2d 107.) The landowner may be liable to an invitee for ordinary negligence, but he cannot be held liable to a licensee for ordinary negligence. (***224** [Langford v. Cook County](#) (1984), 127 Ill.App.3d 697, 700, 82 Ill.Dec. 801, 469 N.E.2d 335.) In the eyes of the common law, "[a] licensee's privilege to enter is a gift." (Restatement (Second) of Torts (1965), sec. 342 comment d.) "[T]here is a common

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understanding that the guest is expected to take the premises as the possessor himself uses them * * *.” Restatement (Second) of Torts (1965), sec. 330, comment h, illustration 3.

[4] [5] Under the Premises Liability Act (Ill.Rev.Stat.1985, ch. 80, par. 301 *et seq.*), effective September 12, 1984, “[t]he distinction under the common law between invitees and licensees as to the duty owed by an owner or occupier of any premises to such entrants is abolished.” (**588 ***433 Ill.Rev.Stat. 1985, ch. 80, par. 302.) Plaintiff asks us to apply this act retroactively to the accident at issue in this case. The act affects substantive rights and duties, not merely matters of procedure or remedy, and it does not state on its face that it is to be applied retroactively. (See  *Maiter v. Chicago Board of Education* (1980), 82 Ill.2d 373, 390, 47 Ill.Dec. 721, 415 N.E.2d 1034, *cert. denied* (1981), 451 U.S. 921, 101 S.Ct. 2000, 68 L.Ed.2d 312.) Therefore, the Premises Liability Act will not be applied retroactively. (*Grimwood v. Tabor Grain Co.* (1985), 130 Ill.App.3d 708, 711, 86 Ill.Dec. 6, 474 N.E.2d 920;  *Zimring v. Wendrow* (1985), 137 Ill.App.3d 847, 851, 92 Ill.Dec. 667, 485 N.E.2d 478.) Under the law in effect at the time of the accident, the Midlands could not be liable to Northrup for ordinary negligence because Northrup was only a licensee, and not an invitee, at their home. The trial court properly granted the Midlands summary judgment against Northrup insofar as Northrup attempted to state a cause of action for negligence.

[6] Northrup next claims that in her complaint and her deposition, she has stated facts adequate to support a cause of action for wilful and wanton misconduct. The landowner's conduct is considered “wilful and wanton” if he fails to warn social guests of concealed dangers, or latent defects, but the “licensee must avoid open or obvious danger at his peril.” (*Lorek v. Hollenkamp* (1986), 144 Ill.App.3d 1100, 1003, 99 Ill.Dec. 232, 495 N.E.2d 679.) The dangerous condition in the case at bar was obvious to Northrup, as she stated in her deposition that she saw the pile of clothes while she was walking down the staircase. Since the plaintiff has not alleged any latent defect, the Midlands' failure to warn plaintiff cannot constitute wilful and wanton misconduct. *Lorek*, 144 Ill.App.3d 1100, 1103–04, 99 Ill.Dec. 232, 495 N.E.2d 679.

 *Latimer*, 66 Ill.App.3d 685, 23 Ill.Dec. 471, 384 N.E.2d 107, is not to the contrary. In that case the defendant placed a separate section of carpeting in front of his bathroom. The section, which was not tacked down, matched the remainder of the carpeting, which was tacked down. The edges of the section had curled slightly, and defendant *225 had tripped on the edge himself. He did not warn the plaintiff, a social guest, that the section was loose. Plaintiff tripped on the edge of the section. The appellate court ruled that the separate section of the carpet could constitute a hidden danger about which defendant had a duty to warn plaintiff.  *Latimer*, 66 Ill.App.3d 685, 689, 23 Ill.Dec. 471, 384 N.E.2d 107.

In *Latimer* the plaintiff was not aware of the loose carpeting; in the case at bar, on the other hand, Northrup was aware that there were clothes on the staircase. She was even aware that the clothes constituted a hazard: she testified that she stepped on the smaller end of the stairs on the curve in order to avoid stepping on the clothes. We find that the Midlands owed Northrup no duty to warn her of the clothes on the stairs because the clothes did not constitute a latent defect. We also find that the act of placing a pile of clothes on the stairs does not constitute wilful and wanton misconduct. The facts stated in the complaint and the deposition cannot support a finding that the Midlands were guilty of wilful and wanton misconduct. We hold that the trial court properly granted the Midlands' motion for summary judgment against Northrup.

II

Northrup sued Allister, alleging that Allister negligently failed to install a railing along the curve in the staircase. Allister countersued the Midlands for contribution, alleging that their negligent acts of placing clothes on the staircase and failing to warn Northrup of the danger also caused Northrup's injury. According to the “Act in relation to contribution among joint tortfeasors” (Contribution Act),

where 2 or more persons are subject to liability in tort arising out of the same injury * * *, there is a right of contribution among them * * *.

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(Ill.Rev.Stat.1981, ch. 70, par. 302(a).) The trial court granted the Midlands' motion for summary judgment against Allister on the grounds that the Midlands were not "subject to liability in tort" for the injury.

[7] Allister contends on appeal that the Midlands were subject to liability in tort **589 ***434 because their actions were one of the proximate causes of Northrup's injury, citing  *Doyle v. Rhodes* (1984), 101 Ill.2d 1, 77 Ill.Dec. 759, 461 N.E.2d 382. However, in that case our supreme court stated that "the Contribution Act focuses * * * on the culpability of the parties * * *." ( *Doyle*, 101 Ill.2d 1, 14, 77 Ill.Dec. 759, 461 N.E.2d 382.) In order to find the Midlands culpable in this case, as in any tort case, the court would need to find that the Midlands owed plaintiff a duty of care and that they failed to act in accordance with that duty. (*Culhane v. Ludford* (1986), 148 Ill.App.3d 763, 770, 102 Ill.Dec. 129, 499 N.E.2d 686.) The duty of care which the Midlands *226 owed Northrup is clear: they had a duty to avoid wilful and wanton misconduct, and thus they had a duty to warn Northrup of concealed hazards. (*Lorek*, 144 Ill.App.3d 1100, 1103, 99 Ill.Dec. 232, 495 N.E.2d 679.) We have already found that the facts stated in Northrup's complaint and deposition could not support a finding that the Midlands failed to meet their duty of care to her. Allister's response to the Midlands' motion for summary judgment includes no additional allegations of misconduct. Since the Midlands met their legal duty of care, their conduct cannot be considered legally culpable, and thus, under *Doyle*, they are not subject to liability in tort to Northrup. ( 101 Ill.2d 1, 14, 77 Ill.Dec. 759, 461 N.E.2d 382.) Therefore, because Midlands have no liability in tort to Northrup, they may not be held liable to McAllister for contribution.  *J.I. Case v. McCartin-McAuliffe Plumbing & Heating* (1987) 118 Ill.2d 447, 461-462, 114 Ill.Dec. 105, 516 N.E.2d 260.

Allister contends that the fact that Northrup cannot recover from the Midlands should not affect its right to contribution. Allister cites a number of cases in which contribution was allowed despite the fact that the party from whom contribution was sought had been sued by the plaintiff and found not liable because of a statutory immunity. In  *Stephens v. McBride* (1983), 97 Ill.2d 515, 74 Ill.Dec. 24, 455 N.E.2d 54, our supreme court held that plaintiff's

failure to comply with the notice provisions of the Local Governmental and Governmental Employees Tort Immunity Act (Ill.Rev.Stat.1979, ch. 85, pars. 8-102, 8-103) did not render the defendant village immune from another defendant's countersuit for contribution. ( 97 Ill.2d 515, 520, 74 Ill.Dec. 24, 455 N.E.2d 54.) Similarly, in  *Wirth v. City of Highland Park* (1981), 102 Ill.App.3d 1074, 58 Ill.Dec. 294, 430 N.E.2d 236, this court held that defendant's interspousal immunity from suit by plaintiff did not constitute a defense to a countersuit for contribution brought by a third party.  102 Ill.App.3d 1074, 1081, 58 Ill.Dec. 294, 430 N.E.2d 236.

Allister cites no case in which the defendant was found to be liable for contribution even though he had fulfilled his duties to the plaintiff. The defendants in the contribution actions cited by Allister were immune from suit, but their culpable actions rendered them subject to liability in tort. ( *Doyle*, 101 Ill.2d 1, 9, 77 Ill.Dec. 759, 461 N.E.2d 382.) In the eyes of the law, the Midlands' actions towards Northrup were not culpable, and therefore Allister's suit for contribution must fail.

Finally, Allister argues that in this case there is a conflict between the principles underlying the Contribution Act and the principles which support the common law of landowner's liability to licensees. We see no conflict: the Contribution Act renders one tortfeasor liable to another when both have committed wrongful acts which caused the *227 harm. The common law of landowner's liability established the landowner's duties to licensees and thereby defined the acts which could be considered wrongful. Since the Midlands met their duties to Northrup, their acts are not legally wrongful. Since the Midlands are not tortfeasors, the principles underlying the Contribution Act authorize no contribution from them.

For the reasons stated above, the judgments of the trial court granting the Midlands' motions for summary judgment against Northrup and Allister are affirmed.

AFFIRMED.

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McNAMARA, P.J., and RIZZI, J., concur.

All Citations

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Frieden v. Bott, --- N.E.3d ---- (2020)

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NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Appellate Court of Illinois, Fourth District.

Pete F. FRIEDEN, Plaintiff-Appellant,

v.

Dennis BOTT, Defendant-Appellee.

NO. 4-19-0232

|

Filed January 21, 2020

Synopsis

Background: Worker brought negligence action against homeowner for injuries incurred in fall from homeowner's roof. The Circuit Court, Champaign County, [Jason M. Bohm](#), J., granted homeowner's motion for summary judgment. Worker appealed.

Holdings: The Appellate Court, [Steigmann](#), J., held that:

[1] homeowner did not owe a duty to exercise reasonable care to worker, and

[2] deliberate encounter exception to the open and obvious rule did not apply.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (13)

[1] Judgment



A “genuine issue of material fact” exists for purposes of summary judgment if the facts are disputed or, if they are undisputed, reasonable

people might draw different inferences from the undisputed facts. 735 Ill. Comp. Stat. Ann. 5/2-1005(c).

[2] Negligence



To state a claim for negligence, a plaintiff must allege (1) duty, (2) breach, (3) causation, and (4) damages.

[3] Negligence



The duty inquiry in a claim for negligence focuses on whether defendant and plaintiff stood in such a relationship to one another that the law imposed upon defendant an obligation of reasonable conduct for the benefit of plaintiff.

[4] Negligence



When determining whether a duty to exercise reasonable care exists, courts primarily consider the four traditional duty factors, which are (1) the likelihood of injury, (2) the reasonable foreseeability of injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing that burden on the defendant; courts also consider public policy.

[5] Negligence



If a duty of reasonable care is found to exist on a defendant, the general rule is that a defendant owes his or her invitees and licensees a duty of reasonable care under the circumstances.

[6] Labor and Employment



“Independent contractors” are people who render services for a principal but are only controlled as

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to the result of their work and not the means by which that result is accomplished.

[7] **Negligence**



Homeowner did not owe a duty to exercise reasonable care to worker, who fell while performing construction work on homeowner's roof, under rule imposing such duty upon employers who retained some degree of control over manner in which worker entrusted to independent contractor was done, even though homeowner bought supplies, was present on the worksite, chose what part of the roof work would be done on, and dictated when the work would start and stop; worker was an unpaid volunteer, brought his own tools, and worked without specific direction. [Restatement \(Second\) of Torts § 414](#).

[8] **Labor and Employment**



Generally, one who employs an independent contractor is not liable for the acts or omissions of the independent contractor.

[9] **Labor and Employment**



Because the hiring entity has no control over the details and methods of the independent contractor's work, it is not in a good position to prevent negligent performance, and liability therefor should not attach; rather, the party in control of the independent contractor is the proper party to be charged with that responsibility and to bear the risk.

[10] **Negligence**



Deliberate encounter exception to the open and obvious rule, which imposed on landowners a

duty to protect invitees from open and obvious perils when the landowner had reason to expect that invitee would encounter perils because a reasonable person in invitee's position would do so, did not apply in negligence action brought by worker who sustained back injuries in fall while working on roof of homeowner, who was worker's brother-in-law; worker was a volunteer, and an alternative path was available, namely, worker could have walked away, rather than attempting to perform work.

[11] **Negligence**



Generally, a landowner is under no duty to protect invitees from open and obvious perils.

[12] **Negligence**



A condition on the land is "open and obvious," for purposes of a negligence claim, when a reasonable person in the plaintiff's position, exercising ordinary perception, intelligence, and judgment, would recognize both the condition and the risk involved.

[13] **Negligence**



Normally, for purposes of a negligence claim, the open and obvious doctrine applies to conditions like fire or bodies of water; however, it can extend to other conditions, such as sidewalk defects.

Appeal from the Circuit Court of Champaign County, No. 16L100, Honorable [Jason M. Bohm](#), Judge Presiding.

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Attorneys and Law Firms

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Stanley E. Freeman, of Law Office of Stanley E. Freeman, P.C., of Champaign, for appellee.

OPINION

PRESIDING JUSTICE STEIGMANN delivered the judgment of the court, with opinion.

*1 ¶ 1 In June 2016, plaintiff Pete Frieden sued defendant Dennis Bott alleging that Bott's negligence caused Frieden to suffer a back injury. Specifically, the complaint alleged that, in October 2015, plaintiff volunteered to work on the roof of defendant's home, and, in the course of that work, plaintiff fell from the roof, suffering a serious and permanent back injury.

¶ 2 In January 2019, defendant moved for summary judgment, arguing that (1) the undisputed evidence showed that he did not owe plaintiff a duty of care or, alternatively, (2) plaintiff was more than 50% at fault for his own injuries. In March 2019, the trial court issued a detailed written order granting defendant's motion.

¶ 3 Plaintiff appeals, arguing that the trial court erred by granting summary judgment because (1) a genuine issue of material fact exists regarding whether defendant retained sufficient control to have a duty to plaintiff and (2) plaintiff can recover under a theory of premises liability. We disagree and affirm.

¶ 4 I. BACKGROUND

¶ 5 A. The Complaint

¶ 6 In June 2016, Frieden sued Bott, alleging that Bott's negligence caused Frieden to suffer a back injury. The complaint alleged that in October 2015 Bott was doing construction work on the roof of his residence. Frieden, who is Bott's brother-in-law, agreed at Bott's request to assist with the construction of the roof. While Frieden was working on

the roof, he fell to the ground and allegedly suffered a serious and permanent back injury.

¶ 7 The complaint alleged that defendant owed a duty of care to plaintiff and breached that duty by (1) failing "to provide plaintiff with a safe, suitable and proper harness, anchorage and/or lifeline with which to conduct his roofing work," (2) permitting "the [p]laintiff to work without" the aforementioned safety equipment, and (3) permitting "the [p]laintiff to work in an elevated position above the ground and to pull damaged wood when the circumstances required" the aforementioned safety equipment to protect "the life and limb of those on the roof such as the [p]laintiff." The complaint further alleged that, as a result of defendant's negligence, plaintiff suffered a back injury and multiple related damages.

¶ 8 In July 2016, defendant answered the complaint, essentially denying all of the material allegations. Defendant also asserted the affirmative defense that plaintiff acted negligently, was more than 50% at fault for his injuries, and was therefore barred from recovery.

¶ 9 B. Defendant's Motion for Summary Judgment

¶ 10 In January 2019, defendant moved for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (2018)), arguing that there was no genuine issue of material fact that (1) he did not owe plaintiff a duty of care or, alternatively, (2) plaintiff was more than 50% at fault in contributing to his own injuries. In support of his motion, defendant attached transcripts of discovery depositions of plaintiff and defendant, and the following information is taken from their testimony in those depositions.

*2 ¶ 11 Defendant planned the roof replacement project and purchased all the required materials. Defendant asked his family members and plaintiff to help him with the project. Defendant confirmed that it was his project, and he decided when the project would be worked on. He also testified that he "gave direction" to the people working on the roof by telling them how to complete tasks like removing shingles and nails or rolling the tar paper.

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¶ 12 Plaintiff did not know what part of the roof needed repairs before arriving at the house. He worked at the direction of defendant but was not obligated to stay and work. He was a volunteer and did not expect to be paid.

¶ 13 Plaintiff stated that there was no discussion about fall protection, but he did not express any concerns related to the absence of fall protection. He knew he could slip off the roof.

¶ 14 Plaintiff was asked who made the decision regarding the work sequence, and plaintiff said “I think—it was just, you know—I guess [defendant]. I mean, nobody really said do this one first, do that first. Just do it.”

¶ 15 Plaintiff testified that defendant told people what section of the roof to work on. He also testified that, if defendant had told him how to do the incidentals of his work, he would have listened to him.

¶ 16 Later in January 2019, plaintiff filed his response to defendant's motion, in which he asserted that the record contains sufficient facts to support a finding of both direct liability and premises liability against defendant.

¶ 17 In February 2019, the trial court conducted a hearing on defendant's motion for summary judgment. At that hearing, plaintiff acknowledged that an employer-employee relationship did not exist between plaintiff and defendant, but he argued that defendant nonetheless owed a duty to plaintiff because defendant was “in control of a work site” and therefore needed “to ensure that there's worker safety,” whether or not the workers were compensated. Plaintiff also argued that he could recover under a premises liability theory. Plaintiff conceded that the risk he faced was open and obvious; however, he argued that the deliberate encounter exception should apply.

¶ 18 C. The Order Granting Summary Judgment

¶ 19 In March 2019, the trial court issued a detailed written order granting summary judgment in favor of defendant. In doing so, the court concluded that defendant owed no duty to plaintiff because defendant did not retain sufficient control to support a duty under section 414 of the Restatement (Second) of Torts. See [Restatement \(Second\) of Torts § 414 \(1965\)](#). The

court also concluded that the deliberate encounter exception under section 343A of the Restatement does not apply. See *id.* § 343A.

¶ 20 The trial court noted that neither plaintiff nor defendant were professional roofers, but both had some experience with volunteer roofing projects. Plaintiff did not expect any compensation for his work. Plaintiff did hope that, if he had a similar project in the future, defendant would be willing to return the favor by helping him. Plaintiff and defendant did not discuss the project at length before work began. Plaintiff did not discuss with defendant any concerns about falling. Defendant did not provide specific direction to plaintiff. About two hours into the work, plaintiff slipped and fell off the roof and was taken to the hospital. Later, defendant finished the project with the help of his adult children, who brought safety harnesses after plaintiff had fallen off the roof.

*3 ¶ 21 The trial court concluded that defendant did not retain sufficient control over plaintiff's work to support a duty under [section 414](#) because plaintiff worked independently. The court explained that, for a principal to have sufficient control to assume liability pursuant to [section 414](#), the principal must control the manner in which the work is done such that the worker is not entirely free to do the work his own way. The court concluded no genuine issue of material fact existed that (1) plaintiff was entirely free to perform the work in the manner he chose and (2) defendant did not direct the operative details of how plaintiff worked.

¶ 22 The trial court also concluded that the deliberate encounter exception did not apply. Citing [Hastings v. Exline, 326 Ill. App. 3d 172, 175, 260 Ill.Dec. 220, 760 N.E.2d 993, 996 \(2001\)](#), the court noted that this exception applies when a landowner has reason to expect that an invitee will proceed to encounter a known or obvious danger because, to a reasonable man in his position, the advantages of doing so outweigh the apparent risk. However, the court decided that, because there was no genuine issue of material fact that plaintiff did not stand to benefit economically or otherwise by working on the roof, the evidence did not support this exception. The court granted summary judgment in favor of defendant, and this appeal followed.

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¶ 23 II. ANALYSIS

¶ 24 Plaintiff appeals, arguing that the trial court erred by granting summary judgment because (1) a genuine issue of material fact exists regarding whether defendant retained sufficient control to have a duty to plaintiff and (2) plaintiff can recover under a theory of premises liability. For the reasons that follow, we disagree and affirm.

¶ 25 A. Summary Judgment and the Standard of Review

[1] ¶ 26 Summary judgment is appropriate if “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” 735 ILCS 5/2-1005(c) (West 2014). To determine whether a genuine issue of material fact exists, a reviewing court construes all facts against the moving party and liberally in favor of the opponent. *Carney v. Union Pacific R.R. Co.*, 2016 IL 118984, ¶ 25, 412 Ill.Dec. 833, 77 N.E.3d 1. A genuine issue of material fact exists if the facts are disputed or, if they are undisputed, reasonable people might draw different inferences from the undisputed facts. *Id.* Summary judgment rulings are reviewed *de novo*. *Id.*

¶ 27 B. Negligence and Duty Generally

[2] [3] ¶ 28 To state a claim for negligence, a plaintiff must allege (1) duty, (2) breach, (3) causation, and (4) damages.

Id. ¶ 26. “The duty inquiry focuses on ‘whether defendant and plaintiff stood in such a relationship to one another that the law imposed upon defendant an obligation of reasonable conduct for the benefit of plaintiff.’ ” *Id.* ¶ 27 (quoting *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 140, 143 Ill.Dec. 288, 554 N.E.2d 223, 226 (1990)).

[4] [5] ¶ 29 Whether the law imposes a duty of reasonable care upon a defendant for the benefit of the plaintiff depends upon the nature of their relationship. *Simpkins v. CSX*

Transportation, Inc., 2012 IL 110662, ¶ 18, 358 Ill.Dec. 613, 965 N.E.2d 1092. When determining whether a duty exists, courts primarily consider the four traditional duty factors, which are (1) the likelihood of injury, (2) the reasonable foreseeability of injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing that burden on the defendant. *Id.* Courts also consider public policy when determining whether a duty exists. *Id.* ¶ 17. If a duty is found to exist, the general rule is that a defendant owes his or her invitees and licensees a duty of reasonable care under the circumstances. *Grant v. South Roxana Dad's Club*, 381 Ill. App. 3d 665, 673, 319 Ill.Dec. 780, 886 N.E.2d 543, 551 (2008).

¶ 30 C. Section 414 Does Not Apply to This Case

*4 [6] ¶ 31 Plaintiff first argues a factual question exists regarding whether defendant retained sufficient control to have a duty to plaintiff under section 414 of the Restatement (Second) of Torts. However, principals generally are not liable for the negligence of independent contractors. Restatement (Second) of Torts § 409 (1965). Independent contractors are people who render services for a principal but are only controlled as to the result of their work and not the means by which that result is accomplished. *Carney*, 2016 IL 118984, ¶ 31, 412 Ill.Dec. 833, 77 N.E.3d 1.

[7] ¶ 32 Section 414 is an exception to section 409 because section 414 states that principals who exercise control over independent contractors are directly liable if they exercise their control in a negligent manner. Restatement (Second) of Torts § 414 (1965). Plaintiff asserts that, on the facts of this case, a genuine issue of material fact exists as to whether he can recover through section 414. We disagree.

¶ 33 1. The Applicable Law

[8] [9] ¶ 34 Generally, “one who employs an independent contractor is not liable for the acts or omissions of the independent contractor.” *Wilkerson v. Paul H. Schwendener, Inc.*, 379 Ill. App. 3d 491, 493, 318 Ill.Dec. 653, 884 N.E.2d 208, 210 (2008).

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“Because the hiring entity has no control over the details and methods of the independent contractor's work, it is not in a good position to prevent negligent performance, and liability therefor should not attach. Rather, the party in control—the independent contractor—is the proper party to be charged with that responsibility and to bear the risk.”

 *Carney*, 2016 IL 118984, ¶ 32, 412 Ill.Dec. 833, 77 N.E.3d 1.

¶ 35 However, Illinois courts have adopted section 414 of the Restatement (Second) of Torts, which states as follows:

“One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.” *Restatement (Second) of Torts* § 414 (1965).

¶ 36 In determining whether control was sufficient for section 414 to apply, the supreme court has quoted section 414, comment C, as follows:

“ ‘In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.’ ”  *Carney*, 2016 IL 118984, ¶ 46, 412 Ill.Dec. 833, 77 N.E.3d 1 (quoting *Restatement (Second) of Torts* § 414, cmt. c, at 388 (1965)).

¶ 37 2. *This Case*

¶ 38 Plaintiff is correct that section 414 sets forth a theory of direct liability.  *Id.* ¶ 36. Nonetheless, for section 414 to apply to this case, plaintiff must still establish that (1)

defendant had control over the work, (2) defendant caused harm to another, and (3) it was his negligent use of his control that caused the harm. See  *id.* ¶ 33. Plaintiff's claim fails because defendant did not retain sufficient control.

¶ 39 As the trial court correctly noted, the fact that defendant had a general right to order the work to begin or stop, to inspect its progress, or to make nonbinding suggestions, is insufficient.  *Id.* ¶ 46. Instead, defendant (who was the principal) would have needed to control the work in such a way that plaintiff (who was the independent contractor) was not entirely free to do the work his own way.  *Id.*

*5 ¶ 40 Here, although defendant did buy supplies, was present on the worksite, chose what part of the roof work would be done on, and dictated when the work would start and stop, he did not control the incidentals of plaintiff's work. Plaintiff brought his own tools and worked without specific direction. This is precisely what makes an independent contractor “independent”—the principal sets the objective, but the independent contractor works to complete it in his own way.  *Id.* ¶ 31.

¶ 41 An important fact that distinguishes this case from all the cases the parties cited and this court could find is that plaintiff here was an unpaid volunteer. The level of control that could be exercised over him was less than that which could be exercised over a paid worker. A direction given to a volunteer does not control a volunteer to the same degree as it would a paid worker because nothing prevents the volunteer from simply walking off the job. In this regard, we know of no case in which section 414 has been applied to a case involving a volunteer.

¶ 42 Additionally, we note that this case was decided by the trial court based upon *how* to apply the language of section 414, not the question of *whether* that section applies at all. Defendant argues section 414 does not apply at all, citing  *Grillo v. Yeager Construction*, 387 Ill. App. 3d 577, 592, 326 Ill.Dec. 1002, 900 N.E.2d 1249, 1265 (2008).  *Grillo* explains that section 414 addresses the duty owed by an employer to others, such as employees of an independent contractor and other third parties. However,  *Grillo* also held that nothing in section 414 imposes a

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duty upon employers that inures to an independent contractor.

 *Id.* Although we view  *Grillo* as well reasoned, we need not address that case further because (1) the trial court did not grant summary judgment on that basis and (2) we can affirm the trial court's judgment without addressing this topic. We are aware that we can affirm on any basis shown in the record; however, in this instance we choose to review only the analysis of the trial court.

¶ 43 D. The Deliberate Encounter
Exception Does Not Apply to This Case

[10] ¶ 44 Next, plaintiff argues that the trial court erred by granting defendant's motion for summary judgment because he can recover under a theory of premises liability. Plaintiff contends that the court erred by finding the open and obvious rule barred his action against defendant as a matter of law. Plaintiff asserts there were facts sufficient to raise the deliberate encounter exception. We disagree.

¶ 45 1. *The Open and Obvious Doctrine*

[11] [12] [13] ¶ 46 As the trial court correctly noted, “[g]enerally, a landowner is under no duty to protect invitees from open and obvious perils.” *Hastings*, 326 Ill. App. 3d at 173, 260 Ill.Dec. 220, 760 N.E.2d 993. A condition on the land is “open and obvious” when a reasonable person in the plaintiff's position, exercising ordinary perception, intelligence, and judgment, would recognize both the condition and the risk involved. *Winters v. MIMG LII Arbors at Eastland, LLC*, 2018 IL App (4th) 170669, ¶ 51, 425 Ill.Dec. 727, 115 N.E.3d 282. Normally, the open and obvious doctrine applies to conditions like fire or bodies of water; however, it can extend to other conditions, such as sidewalk defects. *Id.*

¶ 47 2. *The Deliberate Encounter Exception*

¶ 48 An exception to the open and obvious doctrine is the “deliberate encounter” exception, derived from section 343A of the Restatement (Second) of Torts and adopted by the Illinois Supreme Court in  *LaFever v. Kemlite Co.*, 185 Ill.

2d 380, 391, 235 Ill.Dec. 886, 706 N.E.2d 441, 448 (1998). This court recently analyzed this exception in *Winters*, in which we stated that “[t]he deliberate encounter exception applies when the possessor of land has reason to expect that an invitee or licensee will proceed to encounter a known or obvious danger because a reasonable person in plaintiff's position would do so.” *Winters*, 2018 IL App (4th) 170669, ¶ 70, 425 Ill.Dec. 727, 115 N.E.3d 282. As the Illinois Supreme Court stated, the possessor of the land has this expectation because the “advantages of [the reasonable person's] doing so would outweigh the apparent risk.” (Internal quotation marks omitted.)  *LaFever*, 185 Ill. 2d at 391, 235 Ill.Dec. 886, 706 N.E.2d 441. This advantage often comes in the form of economic compulsion—in other words, the person encounters the danger because his employment requires it. *Winters*, 2018 IL App (4th) 170669, ¶¶ 71-72, 425 Ill.Dec. 727, 115 N.E.3d 282.

*6 ¶ 49 In *Winters*, the plaintiff was not employed by the defendant but instead took a dangerous path through the snow-filled parking lot of his apartment complex and suffered an injury. *Id.* ¶ 69. In *Winters*, we concluded that the deliberate encounter exception did not apply because plaintiff faced no economic compulsion and was aware of reasonable alternative routes. *Id.* ¶¶ 74-76.

¶ 50 3. *This Case*

¶ 51 As an initial matter, we agree with the parties that the danger in this case—falling from a roof—was open and obvious. Therefore, the issue is whether the “deliberate encounter” exception applies, and we conclude that it does not.

¶ 52 Plaintiff was merely a volunteer and therefore was under no compulsion, economic or otherwise, to encounter the obvious danger of being on a roof with no safety equipment. Plaintiff cites two cases that he claims show that the deliberate encounter exception can be applied in situations outside of economic compulsion:  *Simmons v. American Drug Stores, Inc.*, 329 Ill. App. 3d 38, 44-45, 263 Ill.Dec. 286, 768 N.E.2d 46, 53 (2002), and  *Rusch v. Leonard*, 399 Ill. App. 3d 1026, 1036, 339 Ill.Dec. 775, 927 N.E.2d 316, 326 (2010). However, both of these cases involve situations in

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which the plaintiff was injured while using the only method of movement available to him—the only available exit in  *Simmons*, and the only stairwell to move between floors in  *Rusch*.

¶ 53 Although plaintiff is correct that a person need not be *economically* compelled to encounter the danger at issue, there nonetheless must be some sort of driving force that will cause a person to encounter the obvious danger “because to a reasonable man in his position the *advantages* of doing so would outweigh the apparent risk.” (Emphasis added.) *Restatement (Second) of Torts* § 343A, cmt. f (1965). However, this case does not present a situation in which plaintiff would gain any advantage by going on the defendant's roof.

¶ 54 This case is much more like *Hastings* or *Winters*, both of which were cases in which a person was injured because the person took a less safe path despite reasonable alternatives. In *Hastings*, defendant requested the plaintiff to use the back door instead of the front door to exit, despite knowing the back exit's steps were dangerous. *Hastings*, 326 Ill. App. 3d at 173, 260 Ill.Dec. 220, 760 N.E.2d 993. The trial court granted summary judgment in favor of defendant, and this court affirmed because the deliberate encounter exception did not apply. We held that the plaintiff failed to show “a reasonable person in her position would have found greater utility in choosing to use [defendant's] back door than in using her front door, given the respective conditions of these two exits.” *Id.* at 177, 260 Ill.Dec. 220, 760 N.E.2d 993. In *Winters*, we reached the same result because “plaintiff * * * failed to demonstrate that a reasonable person in his position

would have found greater utility in choosing to walk over the snow pile instead of using one of the alternative paths.” *Winters*, 2018 IL App (4th) 170669, ¶ 75, 425 Ill.Dec. 727, 115 N.E.3d 282.

¶ 55 In the present case, an alternative path was also available—namely, plaintiff could have simply walked away. Although plaintiff tries to fashion some kind of “family obligation” he needed to fulfill by working on the roof, we decline to extend the notion of “advantage” necessary for the deliberate encounter exception to apply to mere personal feelings of obligation.

¶ 56 In closing, we thank the trial court for its careful consideration of the arguments and for its detailed written order, which this court found particularly helpful to the resolution of this case.

¶ 57 III. CONCLUSION

*7 ¶ 58 For the reasons stated, we affirm the trial court's judgment.

¶ 59 Affirmed.

Justices *Cavanagh* and Holder White concurred in the judgment and opinion.

All Citations

--- N.E.3d ----, 2020 IL App (4th) 190232, 2020 WL 290455

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635 N.E.2d 997, 200 Ill.Dec. 658

263 Ill.App.3d 694
Appellate Court of Illinois,
First District, Fifth Division.

Michael R. STEPHEN, Plaintiff–Appellant,
v.
Margaret SWIATKOWSKI, Defendant–Appellee.

No. 1–92–0547.

|
May 27, 1994.

Synopsis

Television soundman brought personal injury action against homeowner whose house fire was subject of news report. The Circuit Court, Cook County, Odas Nicholson, J., entered summary judgment for homeowner. Soundman appealed. The Appellate Court, Gordon, J., held that: (1) soundman was licensee rather than invitee; (2) board with protruding nail on which soundman was injured was open and obvious condition; and (3) any representation of safety by homeowner did not impose duty of care on her.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (23)

[1] Judgment

🔑 Presumptions and Burden of Proof

Judgment

🔑 Existence or Non-Existence of Fact Issue

Summary judgment is proper only where, construing pleadings, affidavits, admissions, and depositions strictly against movant and liberally in favor of opponent, there is no genuine issue as to any material fact and movant is entitled to judgment as matter of law. Ill.Rev.Stat.1983, ch. 110, ¶ 2–1005(c).

7 Cases that cite this headnote

[2] Judgment

🔑 Absence of Issue of Fact

Even where facts are undisputed, triable issue exists precluding summary judgment if fair-minded persons could draw different inferences from facts. Ill.Rev.Stat.1983, ch. 110, ¶ 2–1005(c).

3 Cases that cite this headnote

[3] Judgment

🔑 Necessity That Right to Judgment Be Free from Doubt

Summary judgment should be entered only where movant's right to judgment is clear and free from doubt. Ill.Rev.Stat.1983, ch. 110, ¶ 2–1005(c).

[4] Negligence

🔑 Rejection of Status Distinctions

Statute abolishing distinction between licensee and invitee in establishing duty of care owed by owner or occupier of premises to those who enter did not apply when injury occurred prior to effective date of statute. S.H.A. 740 ILCS 130/2.

1 Cases that cite this headnote

[5] Negligence

🔑 Care Required in General

Owner or occupier of property has duty to invitees to use reasonable care to maintain premises in reasonably safe condition.

[6] Negligence

🔑 Who Are Licensees

“Licensee” is one who enters upon premises of another by permission for his own purposes.

1 Cases that cite this headnote

Stephen v. Swiatkowski, 263 Ill.App.3d 694 (1994)

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[7] **Negligence**

🔑 **Care Required in General**

Possessor of land has no general duty of reasonable care to make premises safe for licensee or to discover unsafe condition; only duty owed is to refrain from willfully or wantonly injuring licensee.

[1 Cases that cite this headnote](#)

[8] **Negligence**

🔑 **Distinctions Between Types of Entrants**

Whether visitor is licensee or invitee turns on nature of business that brings him there, rather than on words or acts of property owner which precede his coming.

[9] **Negligence**

🔑 **Distinctions Between Types of Entrants**

Determinative factor in distinguishing between invitee and licensee is purpose of entry, or, in other words, whether plaintiff enters only for his own purpose or for purpose of transacting business of mutual interest to parties or to promote some material, financial, or economic interest of defendant.

[10] **Negligence**

🔑 **Who Are Invitees**

To be “invitee” person must come on premises to transact business in which parties are mutually interested.

[11] **Negligence**

🔑 **Premises Liability**

In instances where facts are undisputed, premises liability plaintiff's status as licensee or invitee may be determined as matter of law.

[1 Cases that cite this headnote](#)

[12] **Negligence**

🔑 **Premises Liability**

Personal injury plaintiff's status as licensee or invitee becomes question of fact to be resolved by jury only where facts are disputed, or where facts are not in dispute but different inferences may be drawn from those undisputed facts.

[2 Cases that cite this headnote](#)

[13] **Negligence**

🔑 **Who Are Invitees**

Negligence

🔑 **Who Are Licensees**

Television soundman was licensee in home of property owner whose house fire was subject of news report, where soundman went to owner's home to prepare news report about possibility that fire was deliberate and racially motivated, visit was intended to fulfill purpose connected with soundman's business of reporting newsworthy events to public, and owner received no remuneration; possibility that homeowner would benefit from publicity was too remote and speculative to confer invitee status upon soundman.

[14] **Negligence**

🔑 **Willful or Wanton Conduct**

“Willful and wanton conduct” involves course of action which shows either deliberate intention to harm or utter indifference to or conscious disregard for safety of others.

[15] **Negligence**

🔑 **Care Required in General**

Occupier of land has no duty to licensee to make premises safe or to discover unsafe condition.

[16] **Negligence**

Stephen v. Swiatkowski, 263 Ill.App.3d 694 (1994)

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🔑 [Care Required of Persons with Knowledge; Avoidance of Danger and Voluntary Exposure](#)

While failure to warn licensee of concealed danger known to possessor of land may constitute willful and wanton conduct, licensee must avoid open or obvious danger at his peril.

[17] **Negligence**

🔑 [Open and Obvious Dangers](#)

“Open and obvious condition” is where condition and risk are apparent to and would be recognized by reasonable person in position of visitor, exercising ordinary perception, intelligence, and judgment. [Restatement \(Second\) of Torts § 343A](#), comment B.

[1 Cases that cite this headnote](#)

[18] **Negligence**

🔑 [Defect or Dangerous Conditions Generally](#)

Board with protruding nail, on which television soundman was injured while in burned-out house for purpose of preparing news story on possible arson, was “open and obvious condition” in house, such that homeowner’s failure to warn soundman, as licensee, of any danger was not wilful and wanton conduct sufficient to impose liability on homeowner for soundman’s injuries, where soundman admitted that he would have seen protruding nail had he only looked down at it; fact that it was dark in room where injury occurred did not render condition a concealed one.

[2 Cases that cite this headnote](#)

[19] **Negligence**

🔑 [Knowledge or Notice in General](#)

Negligence

🔑 [Miscellaneous Particular Cases](#)

Even if board with protruding nail was concealed condition in house, homeowner was not liable for injuries sustained by television soundman who was in house to do story on arson fire,

absent evidence that homeowner knew of danger, or that she had access to information to which soundman, as licensee, did not have equal access; even if homeowner should have foreseen that soundman would be distracted from noticing board and nail because he was carrying heavy equipment, duty to warn would arise in such circumstances only as to invitees. [Restatement \(2d\) Torts § 343](#).

[20] **Negligence**

🔑 [Care Required in General](#)

Duty to warn licensee of concealed condition on property is premised on possessor’s superior knowledge of condition, and there is duty to warn licensee of dangerous condition on land only where condition is concealed from licensee but known to possessor.

[2 Cases that cite this headnote](#)

[21] **Negligence**

🔑 [Buildings and Structures](#)

Even assuming that homeowner told visitor that burned house was safe to enter, homeowner was not liable for injuries suffered by visitor due to dangerous condition in house, since statement did not impose duty of care on homeowner for protection of visitor, absent affirmative acts on part of homeowner beyond mere representation of safety, and visitor was able to observe condition of house, such that any reliance on homeowner’s representations would have been unreasonable.

[22] **Negligence**

🔑 [Voluntarily Assumed Duties](#)

Where one assumes voluntary undertaking, there is duty to exercise due care and such competence and skill as one possesses.

[1 Cases that cite this headnote](#)

Stephen v. Swiatkowski, 263 Ill.App.3d 694 (1994)

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[23] Negligence

🔑 Breach of Duty

Where duty of care is imposed by reason of voluntary undertaking, breach of that duty can be found only where there is misfeasance rather than nonfeasance, unless plaintiff can show that he reasonably relied on defendant for protection.

6 Cases that cite this headnote

Attorneys and Law Firms

****999 ***660 *695** James N. Vail, Chicago, for plaintiff-appellant.

Rigsby & McAuley, Chicago (John G. McAuley, of counsel), for defendant-appellee.

Opinion

Justice **GORDON** delivered the opinion of the court:

Plaintiff, Michael R. Stephen, filed this action in the circuit court of Cook County seeking damages for personal injuries allegedly sustained as a result of the negligence of defendant, Margaret Swiatkowski. Plaintiff appeals from the circuit court's order granting summary judgment in defendant's favor.

Facts

Except as noted below, the facts in this case are undisputed. On or about August 8, 1984, the home of defendant, Margaret Swiatkowski, was damaged by fire. Defendant extended an invitation to the National Broadcasting Company (NBC) to visit the premises to present a television news report on the fire which was thought to have been deliberately set for racial reasons. On August 10, 1984, plaintiff, Michael R. Stephen, and two fellow NBC employees, a cameraman and a reporter (hereinafter "the news team"), were assigned to cover the story. Plaintiff was the sound man. His on site duties were to record the video signals from the camera and "mix the audio for interviews or extraneous noise." This necessitated his carrying a 32-pound videotape recorder connected by cable to the camera which the cameraman held.

The news team arrived at defendant's house on the morning of August 10, approximately ten to fifteen minutes before defendant and John Danno arrived. John Danno was a realtor allegedly involved in Mrs. Swiatkowski's purchase of the house. While the news team waited, plaintiff noticed that the structure appeared intact, except for a hole in the left side of the roof. The windows were boarded and there was burned clothing and furniture on the front lawn. When defendant and Mr. Danno arrived, the news team filmed the exterior of ***696** the house and conducted an interview with defendant on the front lawn.

According to plaintiff's deposition, upon being asked about the condition of the interior, defendant stated that it was "burned out but still able to enter" and that she and Mr. Danno had been inside. Defendant then invited the news team to go inside and told them it was safe to go into the house. According to plaintiff's deposition, when the back door was opened he saw charred walls and hanging electrical wires. He then asked defendant if she was sure it was safe to enter. Defendant answered, "Yes, it is." Although defendant's unverified answer denies that she made any representation as to the safety of the premises, we note that this disputed fact is not dispositive on the question of whether summary judgment was proper.

It is undisputed that the news team walked with defendant through the kitchen, where plaintiff noticed no debris on the floor. They then proceeded to the dining room. There, plaintiff noticed that the walls had been severely charred, the windows were boarded, and the room was "fairly dark." At this point, plaintiff first noticed charred debris on the floor. Plaintiff stated in his deposition that he could not clearly see the floor, but he noticed no nails or metal on its surface. Except for a small amount of sunlight coming around the window boards, the only light in the room was a small 30-volt, 120-watt light bulb, like a small spotlight, attached to the camera. The camera light illuminated only the space directly ahead of them but not the ****1000 ***661** floor at their feet. When the cameraman finished filming in the dining room, he wanted to proceed to the living room at the front of the house. Plaintiff was leading the cameraman who, because of the equipment he was carrying, could not see where he was going. Plaintiff, taking a step backward in preparation to lead the cameraman into the next room, stepped on a nail protruding approximately one inch from a board on the floor.

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The nail penetrated plaintiff's shoe and foot, causing nerve damage to the foot.

When asked during his deposition why he asked defendant for reassurance as to the safety of the house before entering, plaintiff stated, "Because I don't go into burned down buildings, and I know what could possibly happen." Plaintiff also stated that he entered the dining room cautiously with an awareness of potential danger, watching the entire room. When asked if he exercised caution of his own and didn't rely completely on defendant's statement, plaintiff replied "Based on my years of experience of being out doing different stories, I have exercised my own judgment." Plaintiff also admitted that, if he had looked directly at the floor where he stepped, he would have noticed the nail protruding from the board.

***697** Plaintiff filed a complaint against defendants Margaret Swiatkowski and John Danno alleging damages from injury proximately caused by defendants' negligently maintaining the premises in a dangerous condition by permitting a board containing a nail to remain on the floor and by failing to warn plaintiff about it. A voluntary dismissal was subsequently granted as to John Danno. Defendant filed a motion for summary judgment to which plaintiff's deposition was attached. The trial court granted the motion, finding that plaintiff was a licensee on defendant's premises and that the board with the protruding nail was an open and obvious condition. This appeal followed denial of plaintiff's motion to reconsider.

Opinion

On appeal, plaintiff contends that the trial court erred in determining as a matter of law that plaintiff's status was that of licensee rather than invitee and that the nail in the board was an open and obvious condition. Plaintiff also contends that, even if the latter determination had been correct, defendant nevertheless had a duty of reasonable care toward plaintiff because defendant should have anticipated that plaintiff would be distracted from noticing the dangerous condition. Lastly, plaintiff contends that by assuring plaintiff that the premises were safe, defendant voluntarily assumed a duty of care independent of plaintiff's status.

[1] [2] [3] Summary judgment is proper only where, construing the pleadings, affidavits, admissions, and depositions strictly against the movant and liberally in favor

of the opponent, "there is no genuine issue as to any material fact" and the movant is "entitled to judgment as a matter of law." (Purtill v. Hess (1986), 111 Ill.2d 229, 240, 95 Ill.Dec. 305, 489 N.E.2d 867 (citing Ill.Rev.Stat.1983, ch. 110, par. 2-1005(c)); see also Gatlin v. Ruder (1990), 137 Ill.2d 284, 293, 148 Ill.Dec. 188, 560 N.E.2d 586.) "[I]t is a remedy to be awarded with some caution so as not to preempt the right to a trial by jury or the right to fully present the factual basis of a case wherein a material dispute may exist." (Schoondyke v. Heil, Heil, Smart & Golee, Inc. (1980), 89 Ill.App.3d 640, 642, 44 Ill.Dec. 802, 411 N.E.2d 1168.) Even where the facts are undisputed, a triable issue exists if fair-minded persons could draw different inferences from the facts. (Schoondyke, 89 Ill.App.3d at 642, 44 Ill.Dec. 802, 411 N.E.2d 1168.) Summary judgment should be entered only where the movant's right to judgment is "clear and free from doubt." Gatlin, 137 Ill.2d at 293, 148 Ill.Dec. 188, 560 N.E.2d 586.

[4] We note at the outset that in 1984 the Illinois General Assembly abolished the distinction between licensee and invitee in establishing the duty of care owed by an owner or occupier of a premises to those who enter. By statute an owner or occupier now ***698** owes the duty of reasonable care under the circumstances (740 ILCS 130/2 (West 1992).) However, that statute does not apply in the present case because the injury occurred prior to the September 12, 1984, effective date of that statute. (See ****1001 ***662 Lorek v. Hollenkamp** (1986), 144 Ill.App.3d 1100, 1102-03, 99 Ill.Dec. 232, 495 N.E.2d 679; **Zimring v. Wendrow** (1985), 137 Ill.App.3d 847, 851, 92 Ill.Dec. 667, 485 N.E.2d 478.) Because the distinction between a licensee and an invitee remains material to this appeal, it must first be determined whether plaintiff's status as either licensee or invitee is ascertainable in this case as a matter of law.

[5] An invitee has been defined as "a person who goes upon the premises of another by an express or implied invitation to transact business in which he and the owner have a mutual interest or to promote some real or fancied material, financial, or economic interest of the owner." (Trout v. Bank of Belleville (1976), 36 Ill.App.3d 83, 87, 343 N.E.2d 261.) An owner or occupier of property has a duty to invitees to

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use reasonable care to maintain the premises in a reasonably safe condition.  *Deibert v. Bauer Brothers Construction Co.* (1990), 141 Ill.2d 430, 437, 152 Ill.Dec. 552, 566 N.E.2d 239;  *Ward v. K Mart Corp.* (1990), 136 Ill.2d 132, 141, 143 Ill.Dec. 288, 554 N.E.2d 223.

[6] [7] A licensee, on the other hand, is “one who enters upon the premises of another by permission for his own purposes.” (*Kapka v. Urbaszewski* (1964), 47 Ill.App.2d 321, 325, 198 N.E.2d 569. See also  *Trout*, 36 Ill.App.3d at 87, 343 N.E.2d 261.) The possessor of land has no general duty of reasonable care to make the premises safe for a licensee or to discover an unsafe condition. The only duty owed is to refrain from wilfully or wantonly injuring a licensee. *Schoen v. Harris* (1969), 108 Ill.App.2d 186, 190, 246 N.E.2d 849.

[8] While it is true that an invitee enters upon the premises in response to an express or implied invitation to do so, that fact alone does not determine the duty of a possessor of land. (*Kapka*, 47 Ill.App.2d at 324, 198 N.E.2d 569.) Often a licensee also has an invitation to enter. (See, e.g., *Schoen*, 108 Ill.App.2d at 190, 246 N.E.2d 849 (social guest who was invited by the possessor was a licensee).) Whether a visitor is a licensee or an invitee “turns on the nature of the business that brings him there, rather than on the words or acts of the owner which precede his coming.” ( *Pauckner v. Wakem* (1907), 231 Ill. 276, 280, 83 N.E. 202.) See also *Jones v. 20 North Wacker Drive Building Corp.* (1947), 332 Ill.App. 382, 385, 75 N.E.2d 400.

[9] [10] The determinative factor in distinguishing between an invitee and a licensee is the purpose of the entry, i.e., whether the plaintiff enters only for his own purpose or for the purpose of transacting business of mutual interest to the parties or to promote some material, financial, or economic interest of defendant. (See  *699 *Trout*, 36 Ill.App.3d at 87, 343 N.E.2d 261.) To be an invitee, a person must come on the premises to transact business in which the parties are mutually interested. (*Olsen v. Chicago Dock & Canal Co.* (1972), 5 Ill.App.3d 1105, 1108, 284 N.E.2d 443.) In *Olsen*, the plaintiff was permitted to use a portion of defendant's plant for plaintiff's business without paying any rent. Although the plaintiff was also a customer of defendant, his presence on defendant's premises was that of licensee because the rent-free arrangement stemmed

from the friendship of the parties rather than from their business relationship. See also *Madrazo v. Michaels* (1971), 1 Ill.App.3d 583, 274 N.E.2d 635, wherein the court stated the rule in Illinois:

“[T]he trend in modern English and American law is away from economic activity or benefit as the exclusive test of invitee status on the land of another. * * *

Illinois decisional law supports the rule that a person is an invitee on the land of another if (1) he enters by invitation, express or implied, (2) his entry is connected with the owner's business or with an activity the owner conducts or permits to be conducted on his land and (3) there is a mutuality of benefit or a benefit to the owner. [Citations.] The status of an invitee does not depend on whether the invited person is to gain an advantage or benefit from his entry; it is sufficient that he go on the land in furtherance of the owner's business or an activity he conducts or permits on the premises.”

(*Madrazo*, 1 Ill.App.3d at 587, 274 N.E.2d 635.) In *Madrazo*, owners of a home had asked a relative to assist them in moving into the home. The relative was considered an **1002 ***663 invitee because she came in furtherance of an activity the owners were conducting on the property (the moving activities) and the owners benefited from her labor. See *Madrazo*, 1 Ill.App.3d at 588, 274 N.E.2d 635.

Defendant contends that the news report did not further her economic or other material interests. Plaintiff admitted in his deposition that defendant would have received no remuneration from NBC. At the hearing on the summary judgment motion, defendant showed the trial court, without objection, a videotape containing some of the footage shot at the house that day. While the videotape is not part of the record, a one page transcript of the conversation on the tape is in the record. In that transcript, the reporter states “Mrs. Swiatkowski says she plans to rebuild immediately on the property.” Plaintiff contends that this statement demonstrates that defendant's purpose in inviting the news team to her house was to achieve a material and economic benefit, namely to safeguard her home from future incidents during the rebuilding process by garnering public attention to the fire and its cause. Based on this purpose plaintiff concludes he was an invitee.

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***700** [11] [12] In instances where the facts are undisputed, a plaintiff's status as licensee or invitee may be determined as a matter of law. (See, e.g., *Lorek*, 144 Ill.App.3d at 1102, 99 Ill.Dec. 232, 495 N.E.2d 679 (trial court justified in finding plaintiff to be licensee as a matter of law where there was no dispute that a meeting in the defendant's home was solely for the purpose of discussing church business rather than any business of the defendant).) It is only, where facts are disputed, or where the facts are not in dispute but different inferences may be drawn from those undisputed facts, that a plaintiff's status becomes a question of fact to be resolved by the jury. (*Avery v. Moews Seed Corn Co.* (1971), 131 Ill.App.2d 842, 845–46, 268 N.E.2d 561; *Drews v. Mason* (1961), 29 Ill.App.2d 269, 273–74, 172 N.E.2d 383.) Since the facts which bear on the determination of plaintiff's status in this case are undisputed, we must determine whether reasonable minds could differ as to the inferences to be derived from those facts.

[13] Here, it is undisputed that plaintiff came to defendant's home to prepare a news report about the possibility that defendant's home had been deliberately torched for racial motives. There is no question that the visit was intended to fulfill a purpose connected with plaintiff's business of reporting newsworthy events to the public, since a report of this nature is of apparent public interest and concern. It is also undisputed that defendant received no remuneration. Although plaintiff contends that defendant's motivation was to protect her property from subsequent damage because she planned to rebuild, there is nothing in the record to support that contention, other than the remote inference to be derived from the bland assertion of the reporter in the aforementioned one-page transcript of his news coverage. Even if defendant were possibly to gain some future incidental protection of her property through the resultant publicity, the benefit to be derived would be too remote and uncertain to lead to the conclusion that plaintiff entered defendant's premises for a material or economic purpose of defendant.

The case of *Jones v. 20 North Wacker Drive Building Corp.*, (1947), 332 Ill.App. 382, 75 N.E.2d 400, is illustrative. There, the defendant opera house allowed the plaintiff, a member of the drama league, to sell war bonds in its lobby. The plaintiff contended that she was an invitee because the defendant had a pecuniary interest in the sale of the government bonds because it risked loss of good will and patronage if it did not

allow such sales on its premises. (*Jones*, 332 Ill.App. at 386, 75 N.E.2d 400.) The reviewing court found the plaintiff to be a licensee, noting that there was no support in the record for the contention that the defendant was obliged to allow the sale of bonds to promote good will. (*Jones*, 332 Ill.App. at 388, 75 N.E.2d 400.) The court, in concluding that the ***701** defendant's interest was the same as that of the public in general, wrote:

“[T]he entry of the person upon the premises of another must be in connection with the business of the owner conducted thereon to transform a licensee into an invitee. This necessarily means the personal business ****1003 ***664** of the owner or occupant of the land and not the general business of the public in which the interest of the owner or occupant can be no greater or different than that of others constituting the general public.”

Jones, 332 Ill.App. at 387, 75 N.E.2d 400.

The Missouri case of *Roe v. St. Louis Independent Packing Co.* (1920), 203 Mo.App. 11, 217 S.W. 335, is also similar to the present case. In *Roe*, a group of children sponsored by the YMCA toured the defendant's packing plant. It was admitted that the purpose of their visit was educational. However, the plaintiff, a child injured during the visit, contended that he should be considered an invitee because the defendant stood to derive an advertising benefit from the visit by virtue of the fact that the visitors were potential future customers and would tell other potential customers of the health measures used in the plant. The court found that this alleged benefit was not sufficient to raise the visitors' status from licensee to invitee. (*Roe*, 217 S.W. at 337.) See also *Dent v. Great Atlantic & Pacific Tea Co.* (1955), 4 Ill.App.2d 500, 503–04, 124 N.E.2d 360 (plaintiff who parked in grocery store lot after store hours was licensee although store manager knew lot was used regularly after hours and believed such use had advertising value for the store).

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Here, too, as in the cases cited above, the nature of prospective benefit to defendant as urged by plaintiff is too remote and speculative to confer invitee status upon plaintiff. The only conclusion warranted from the submissions of the parties is that the benefit derived by defendant was substantially the same benefit as that derived by members of the public who viewed the report on television. Thus the trial court correctly found, as a matter of law, that plaintiff was a licensee.

[14] [15] [16] Having determined that plaintiff was a licensee, we turn to the question of whether, as a matter of law, it can be determined that defendant did not breach the duty of care owed to a licensee. As stated earlier, that duty is merely the duty to refrain from wilfully or wantonly injuring a licensee. (*Schoen*, 108 Ill.App.2d at 190, 246 N.E.2d 849.) Wilful and wanton conduct involves “a course of action which shows either deliberate intention to harm or utter indifference to or conscious disregard for the safety of others.” (*O'Donnell v. Electro-Motive Division* (1986), 148 Ill.App.3d 627, 635, 102 Ill.Dec. 51, 499 N.E.2d 608; *Kapka*, 47 Ill.App.2d at 324, 198 N.E.2d 569.) The occupier of land has *702 no duty to a licensee to make the premises safe or to discover an unsafe condition. (*Schoen v. Harris* (1969), 108 Ill.App.2d at 190, 246 N.E.2d 849.) While the failure to warn a licensee of a concealed danger known to the possessor of land may constitute wilful and wanton conduct, “a licensee must avoid open or obvious danger at his peril.” *Lorek*, 144 Ill.App.3d at 1103, 99 Ill.Dec. 232, 495 N.E.2d 679.

[17] A condition is considered to be open and obvious where “the condition and the risk are apparent to and would be recognized by a reasonable [person] in a position of the visitor, exercising ordinary perception, intelligence, and judgment.” (*Deibert*, 141 Ill.2d at 435, 152 Ill.Dec. 552, 566 N.E.2d 239 (quoting *Restatement (Second) of Torts*, § 343A, comment b (1965)).) Examples of open and obvious conditions include a tire rut at a construction site, (*Deibert*, 141 Ill.2d at 438, 152 Ill.Dec. 552, 566 N.E.2d 239), a missing pier plank, although hidden by darkness, (*Hessler v. Cole* (1972), 7 Ill.App.3d 902, 906, 289 N.E.2d 204), a chain habitually placed across a parking lot entrance at night, (*Trout*, 36 Ill.App.3d at 89, 343 N.E.2d 261), and a drop-off from a sloping driveway in a parking lot. *Dent*, 4 Ill.App.2d at 501, 124 N.E.2d 360.

[18] In the present case, plaintiff admitted in his deposition that he would have seen the protruding nail if he had only looked down at it. (See *Deibert*, 141 Ill.2d at 434, 152 Ill.Dec. 552, 566 N.E.2d 239 (tire rut on construction site was open and obvious where plaintiff stated he would have seen it if he had watched where he was walking).) There is no indication that the danger was hidden in any way. That it was dark in the room where the injury occurred does not render the condition a concealed one. See *O'Donnell*, 148 Ill.App.3d at 635, 102 Ill.Dec. 51, 499 N.E.2d 608 (“our courts have repeatedly **1004 ***665 held that it is not wilful and wanton misconduct for a landowner to fail to warn a licensee of a dangerous condition concealed only by darkness since such a danger is not considered hidden”); *Hessler*, 7 Ill.App.3d at 906, 289 N.E.2d 204; *Dent*, 4 Ill.App.2d at 506, 124 N.E.2d 360 (quoting Justice Holmes in *Reardon v. Thompson* (1889), 149 Mass. 267, 21 N.E. 369, “An open hole, which is not concealed otherwise than by the darkness of night, is a danger which a licensee must avoid at his peril.”))

We conclude that reasonable minds could not differ that the board with the protruding nail and the risk threatened by it were apparent and would have been recognized by a reasonable person in the exercise of “ordinary perception, intelligence and judgment.” (See *Deibert*, 141 Ill.2d at 435, 152 Ill.Dec. 552, 566 N.E.2d 239.) Thus, the trial court did not err in finding as a matter of law that the board with the protruding nail was an open and obvious condition.

[19] [20] Furthermore, even if the condition had been concealed, we note that there is no basis in the record from which to infer that defendant had any knowledge of the danger. Nor is there any showing *703 that defendant had access to information to which the plaintiff did not have equal access. The duty to warn a licensee of a concealed condition is premised on the possessor's superior knowledge of the condition. (*Mentesana v. LaFranco* (1979), 73 Ill.App.3d 204, 209, 29 Ill.Dec. 153, 391 N.E.2d 416 (no duty to warn licensee where licensee had same knowledge of the condition as possessor or any other person would have had).) Only where the dangerous condition is concealed from the licensee, but known to the possessor of land is there a duty to warn the

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licensee. See *Schoen*, 108 Ill.App.2d at 191, 246 N.E.2d 849; *Kapka*, 47 Ill.App.2d at 325, 198 N.E.2d 569.

Plaintiff urges that defendant had a duty to find the danger and warn him of it because a reasonable person should have foreseen that plaintiff could be distracted from noticing the board and nail because he was carrying heavy equipment and leading the cameraman. While several cases impose such a duty on a possessor of land, we note that this duty is owed only to invitees. See *Shaffer v. Mays* (1986), 140 Ill.App.3d 779, 782, 95 Ill.Dec. 83, 489 N.E.2d 35; *Ward*, 136 Ill.2d at 148, 143 Ill.Dec. 288, 554 N.E.2d 223; Restatement (Second) of Torts, § 343 (1965) (“A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness”). (Emphasis added.) Since we have already determined that plaintiff was not an invitee, this argument fails.

[21] Finally, plaintiff contends that, regardless of his status on defendant's premises, defendant owed him a duty of reasonable care because she stated that the house was safe to enter. While we note that defendant in her answer denied making any statement that the house was safe to enter, that there may be a dispute as to whether the statement was made is not dispositive of the motion for summary judgment. For purposes of determining whether the summary judgment was proper, we shall assume that defendant made the statement.

[22] Plaintiff relies on Illinois cases which state that “liability can arise from the negligent performance of a voluntary undertaking.” (*Nelson v. Union Wire Rope Corp.* (1964), 31 Ill.2d 69, 74, 199 N.E.2d 769; *Martin v. McDonald's Corp.* (1991), 213 Ill.App.3d 487, 490, 157 Ill.Dec. 609, 572 N.E.2d 1073.) Where one assumes a voluntary undertaking, there is a duty to exercise due care and “such competence and skill as one possesses.” (*Cross v. Wells Fargo Alarm Services* (1980), 82 Ill.2d 313, 317, 45 Ill.Dec. 121, 412 N.E.2d 472; *Nelson*, 31 Ill.2d at 74, 199 N.E.2d 769.) Plaintiff contends that a statement that the house was safe can, by itself, impose this duty on defendant for the protection of plaintiff.

*704 In each of the cases cited by plaintiff where such a duty is imposed, the defendant has done more than merely make a representation of safety. For instance, in *Martin*, defendant McDonald's Corp. had designated a corporate branch to deal with security problems at its lessee restaurants, had prepared a security procedures manual, and had undertaken security inspections and follow up at the various restaurants. The court **1005 ***666 held that McDonald's had voluntarily assumed a duty of care by these actions. (*Martin*, 213 Ill.App.3d at 492, 157 Ill.Dec. 609, 572 N.E.2d 1073.) In *Cross*, 82 Ill.2d 313, 45 Ill.Dec. 121, 412 N.E.2d 472, defendant housing authority had voluntarily assumed a duty of care for tenants by hiring a security service to protect them. Similarly, in *Slager v. Commonwealth Edison Co.* (1992), 230 Ill.App.3d 894, 172 Ill.Dec. 427, 595 N.E.2d 1097, defendant had encouraged independent pipefitters to cross a picket line by assuring their safety and securing the presence of police to protect them. (See also *Phillips v. Chicago Housing Authority* (1982), 89 Ill.2d 122, 59 Ill.Dec. 281, 431 N.E.2d 1038, (defendant housing authority assumed voluntary duty of care by closing off certain floors of building where criminal acts had previously taken place); *Nelson*, 31 Ill.2d at 69, 199 N.E.2d 769 (insurer assumed voluntary duty of care by making regular inspections of insured's premises, recommending safety measures, and by advertising its safety expertise available to its insureds).) In each case where a duty was imposed based on a voluntary undertaking, there were affirmative acts taken by defendant and allegations of negligent performance of those undertakings, not merely a representation of safety. As such, those cases are distinguishable from the present case where no affirmative acts were undertaken.

[23] Furthermore, where a duty of care is imposed by reason of a voluntary undertaking, breach of that duty can be found only where there is misfeasance rather than nonfeasance, unless plaintiff can show that he reasonably relied on the defendant for protection. This distinction between nonfeasance and misfeasance was discussed in *Chisolm v. Stephens* (1977), 47 Ill.App.3d 999, 7 Ill.Dec. 795, 365 N.E.2d 80. In that case, plaintiff, a tenant in defendant's building, fell when she stepped on icy steps which had not been cleared. The defendant had, for the preceding fifteen years, always cleared the steps before the

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tenant left for work. The court found that, had defendant begun clearing the steps that day, he would have had a duty to perform that task with reasonable care and liability would have resulted from misfeasance, the negligent performance of the task. (📄 [Chisolm, 47 Ill.App.3d at 1006, 7 Ill.Dec. 795, 365 N.E.2d 80.](#)) However, the court stated that “liability for nonfeasance in connection with a gratuitous undertaking may arise where the beneficiaries had relied on its performance.” (📄 *705 [Chisolm, 47 Ill.App.3d at 1007, 7 Ill.Dec. 795, 365 N.E.2d 80.](#)) The court noted that to justify reliance, a plaintiff must be “unaware of actual circumstances and not actually capable of determining such facts.” (📄 [Chisolm, 47 Ill.App.3d at 1007, 7 Ill.Dec. 795, 365 N.E.2d 80.](#)) The court, in finding that there was no liability because the plaintiff's reliance on prior acts by the defendant was not justified or reasonable under the circumstances, noted, “Defendants did nothing to prevent plaintiff from obtaining information as to the conditions or from taking precautionary steps on her own behalf.” 📄 [Chisolm, 47 Ill.App.3d at 1008, 7 Ill.Dec. 795, 365 N.E.2d 80.](#)

In the present case, plaintiff seeks to impose liability for defendant's failure to make the premises safe or warn plaintiff of the dangerous condition, rather than for defendant's

negligent performance of that undertaking. Defendant did nothing to prevent plaintiff from observing the condition of the premises. Plaintiff, in his deposition, gave detailed information as to what he observed about the condition of the house, including dangling electrical wires, charred walls, and debris on the floor. Plaintiff stated in his deposition that he exercised his own judgment when he went through the home, based on his experience in covering news events and his awareness of the potential dangers in a burned out house. It is clear under these circumstances that reasonable minds could not differ in concluding that any reliance upon defendant's representations, in the face of what plaintiff observed, would not have been reasonable.

For the foregoing reasons, the judgment of the circuit court of Cook County granting summary judgment in defendant's favor is affirmed.

AFFIRMED.

MURRAY, P.J., and [COUSINS, J.](#), concur.

All Citations

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