Survey of Construction Law Cases

Contractor Not Liable Under Restatement Sections 414 and 343 Because the Condition Was Open and Obvious

In *Wiberg v. Metro Storage, LLC*, the appellate court upheld summary judgment for a defendant general contractor Metro Storage, LLC (Metro). While working for a carpentry subcontractor, the plaintiff used a concrete jettison as a ladder to get into and out of a trench, despite ramps into and out of the trench being available. When a piece of the concrete jettison broke, the plaintiff stepped into the trench and was injured.

Under the subcontract between the general contractor, Metro, and the subcontractor, Brandonisio & Company (B&C), the subcontractor owed the general contractor all the obligations and responsibilities which the general contractor owed to the owner. The subcontractor also was required to ensure that the work complied with all applicable laws, OSHA regulations, and change orders. Lastly, the subcontractor allowed the general contractor to stop work if it was completed in an unsafe manner.

The appellate court noted that, as a general rule, a general contractor is not liable for a subcontractor's torts. However, section 414 of the Restatement (Second) of Torts establishes that one "who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." Restatement (Second) of Torts § 414 (1965). The appellate court noted comments a. and c. of the section were instructive. Comment a. notes that an employer may retain less control than what is necessary to subject it to liability. An employer may retain only the power to correct the order in which work is done or to forbid work from being done in a dangerous manner. Comment c. states, "It is not enough that [the general contractor] 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."

The subcontract required B&C, the plaintiff's employer, to comply with all laws and OSHA regulations, maintain insurance coverage, and keep the premises free of waste and debris, demonstrating B&C retained control over the plaintiff's work rather than Metro.

The court also considered the open and obvious doctrine, which functions as an exception to liability under Section 343 of the Restatement (Second) of Torts. Four factors determine whether to impose liability: 1) the reasonable foreseeability of the injury; 2) the likelihood of injury; 3) the magnitude of the burden of guarding against injury; and 4) the consequences of placing that burden on the defendant. The open and obvious doctrine affects the first two factors of the duty analysis—that is, where the condition is open and obvious, the reasonable foreseeability and likelihood of injury are slight.

In this case, there is no dispute as to the physical condition of the protruding concrete from the embankment of the trench. The court determined that a reasonable person in the plaintiff's position would have recognized that such a piece of concrete protruding from the soil could collapse under pressure.

Wiberg v. Metro Storage, LLC, 2024 IL App (1st) 240271.

Developer Banned from Bringing Declaratory Judgment Action but Tortious Interference Action Survives

In *RSA Props. Mission Hills, P.C. v. Mission Hills Homeowners Ass'n*, the Illinois Appellate Court First District upheld in part and reversed in part the lower court's granting of a motion to dismiss in an action brought by a developer against a homeowner's association.

The underlying case involved an action by the developer seeking: 1) a declaration that both the lien asserted by the homeowner's association at the 12th hour of the sale and the accompanying release were void; 2) the return of the $35,000 allegedly paid to release the lien under duress; and 3) damages for tortious interference with a sales contract.

After the circuit court dismissed the entire complaint pursuant to section 2-615 of the Illinois Code of Civil Procedure, the developer appealed. The appellate court noted that, with regard to declaratory actions, the court may "in cases of actual controversy, make binding declarations of rights, having the force of final judgments" including "the construction of any . . . contract or other written instrument, and a declaration of the rights of the parties interested." 735 ILCS 5/2-701(a). The court noted the other aspects of the declaratory judgment framework, including that the statute should be liberally construed but that the court must comport with the rule that courts cannot pass judgment on abstract propositions of law, render advisory opinions, or give legal advice as to future events. Furthermore, if the controversy is theoretical rather than actual, the claim is premature. Additionally, there must be at least some future conduct that the declaration will guide.

The appellate court ruled that the developer established that there was an actual, rather than a theoretical, controversy concerning the validity of the release and the lien. However, the developer had not established that some future conduct would be guided by a declaratory judgment. Although payments made under duress are generally recoverable under the law, the developer could not revive the claim in this case because there was no future conduct between the parties. Although the developer pointed to many cases where money paid under duress was recoverable, those cases involved an ongoing practice that remained in the books rather than a backwards looking pronouncement regarding prior conduct. Those cases involved ongoing contractual relationships rather than single transactions.

The appellate court affirmed the dismissal of the claim for declaratory relief because it would serve no practical purpose as there was no future conduct that could be remedied.

With regard to the tortious interference claim, the court noted that the elements for a tortious interference claim include 1) the existence of a valid and enforceable contract between the plaintiff and another party; 2) the defendant's awareness of this contractual relation; 3) the defendant's intentional and unjustifiable inducement of a breach of the contract; 4) a subsequent breach by the other party, caused by the defendant's wrongful conduct; and 5) damages.

In this circumstance, the only element that the circuit court found missing was a breach caused by the association's allegedly wrongful conduct. The association argued that the purchase meant that no breach of contract occurred. The appellate court agreed with the developer that the purchase that occurred was not the one originally contemplated. Not only did the purchase not occur on the date originally contemplated, but the amended contract contained a new material term: namely, a release that the developer alleged was required because of the unauthorized lien placed on the property.

In sum, the dismissal of the declaratory judgment claim was upheld, but this matter was remanded for further proceedings regarding the tortious interference claim.

RSA Props. Mission Hills, P.C. v. Mission Hills Homeowners Ass'n, 2024 IL App (1st) 231526.

Summary Judgment Improperly Granted Due to Genuine Issues of Material Fact as to the Existence of Borrowed Employee Relationship

The plaintiff sued the defendants Odum Concrete Products, Inc., Ready Mix Solutions, LLC, and Roy Rodgers for negligence. The plaintiff, an employee of third-party defendant Millstone Weber, LLC, the general contractor on a repaving project, alleged he suffered injuries following an incident at the work site. For the grinding operation, cement trucks owned by Ready Mix, a subsidiary of Odum, were rented by Millstone. Millstone paid Ready Mix for the use of its trucks and operators. Roy Rodgers, a Ready Mix employee, received an assignment to work on the repaving project. When he appeared on site, he received instruction from Ron Beasley, a Millstone employee. Beasley advised Rodgers that he would assist that day in the grinding operation. Rodgers was to drive the cement truck in tandem with the grinder in a straight direction.

After the first pass, Beasly spoke with Rodgers to reiterate the instructions. During the second pass, the cement truck and the grinder collided. When the incident occurred, a hose came loose striking the plaintiff in the shoulder and causing injuries to the plaintiff. He then filed suit against the defendants alleging negligence and argued that Rodgers was an agent and employee of defendants Odum and Ready Mix. The defendants filed a third-party claim against Millstone alleging that the plaintiff was an agent of Millstone at the time of the incident as it directed and controlled the plaintiff at the site. In its answer and affirmative defenses, Millstone stated that the plaintiff was an employee of Millstone and that the Workers' Compensation Act (Act) governed their relationship.

The defendants filed a motion for summary judgment on the basis that Rodgers was a borrowed employee of Millstone and under its direction and control. The defendants noted that compensation under the Act was an employee's exclusive remedy for negligence claims against co-employees for injuries resulting from or in the course of employment. In response, the plaintiff argued that Rodgers acted as an employee of Ready Mix at the time of the occurrence. The trial court granted summary judgment in favor of the defendants, finding that Rodgers was a borrowed employee of Millstone, and the plaintiff appealed. The plaintiff argued that summary judgment should not have been entered for the defendants as there were questions of fact as to whether Rodgers was a borrowed employee.

On appeal, the court noted that if Rodgers was a borrowed employee of Millstone at the time of the incident, then the plaintiff's injuries were due to the actions of a co-employee, and the Act would limit any recovery for the plaintiff. The court continued that, given the many factors at issue in each fact pattern, Illinois courts have generally held that whether a borrowed-employment relationship exists is a question of fact. Only when there is a single inference can it be determined as a matter of law.

The appellate court found that Ready Mix provided Rodgers with training as to the cement truck. Rodgers received his work assignment from the Ready Mix dispatcher. Millstone did not provide any tools, equipment, or materials for Rodgers to perform his work that day. Beasly gave Rodgers minimal instruction, and a trier of fact could find or infer that Rodgers worked in cooperation with, as opposed to a subordinate to, Beasley. The court found there was no evidence that Rodgers consented to the loaned employee relationship or that he accepted that Millstone would control and direct his work. The appellate court ultimately held that there were genuine factual disputes regarding the claimed borrowed employee relationship such that summary judgment was improperly granted in favor of the defendants.

Tolbert v. Odum Concrete Products, Inc., 2025 IL App (5th) 230548-U.

Failure to Include the Date of Work Completion in a Recorded Mechanics Lien

In *Bulletproof Plumbing Corp. v. Thomas Ohlson*, the court took up the issue of whether Section 7 of the Mechanics Lien Act, 770 ILCS 60/7 (the Act) bars a lien foreclosure claim where the contractor's recorded lien did not state its last day of work.

The plaintiffs Bulletproof Plumbing Corporation (Bulletproof) and James D'Amico, d/b/a Custom Cut Construction (D'Amico) entered into a contract with a general contractor to perform work on residential property owned by the Ohlsons. When they were not paid, Bulletproof and D'Amico filed a lien foreclosure action against the Ohlsons and Morgan Chase Bank (Chase), whom they believed held a mortgage on the property. The lien that Bulletproof filed with the Recorder of Deeds did not include the date on which it completed its work.

Chase was dismissed after it was shown that Chase had previously released its mortgage on the property and no longer had an interest in it. The plaintiffs then filed an amended complaint. The Ohlsons filed a motion for judgment on the pleadings pursuant to 735 ILCS 5/2–615(e), arguing that both liens were invalid because the liens did not indicate the last date of work on the project. The trial court granted the motion for judgment on the pleadings, finding that the claims were defective because the recorded liens failed to include the respective work completion dates of both contractors. The trial court focused on the words "*or*" and "*prejudice*" in the phrase "[no] contractor shall be allowed to enforce such lien against *or* to the *prejudice* of any other creditor or incumbrancer or purchaser, unless within 4 months after completion" they "bring an action to enforce" or "file in the office of the recorder . . . a claim for lien[.]" The court found that as long as a creditor, incumbrancer or purchaser may be prejudiced by a failure to comply with the four-month deadline to file a lien claim or record a lien with the County Recorder of Deeds, the claim would fail as to the owner as well.

The trial court later reinstated the D'Amico lien foreclosure claim when it was presented with evidence that D'Amico's recorded lien did state the date his work was substantially completed.

Bulletproof appealed the trial court's granting of the motion for judgment on the pleadings, and the Ohlsons cross-appealed the denial of their motion for judgment on the pleadings against D'Amico.

In a Rule 23 order, the appellate court noted that there was a split in the appellate districts as to whether Section 7 of the Act requires a contractor to state its last date of work in the recorded lien when bringing a lien foreclosure action against a third party creditor, incumbrancer, or purchaser. *See Merchants Environmental Industries v. SLT Realty Limited Partnership*, 314 Ill. App. 3d 848, 869 (2000) and *National City Mortgage v. Bergman,* 405 Ill. App. 3d 102, 108, 112 (2010). The appellate court, however, noted that this split related only to cases in which a contractor seeks to enforce a lien against, or to the prejudice of, a third-party creditor, and did not apply when a contractor seeks to enforce a lien solely against the owner. As Chase had previously released its mortgage and no longer had an interest in the property, the court erred in granting the Ohlsons' motion for judgment on the pleadings against Bulletproof.

The appellate court also dismissed on jurisdictional grounds the Ohlsons' cross-appeal of the trial court's denial of its motion for judgment on the pleadings against D'Amico. The court noted that the denial of a motion for judgment on the pleadings is an interlocutory order. Because a Rule 304(a) finding does not make an interlocutory order appealable, the appellate court was without jurisdiction to hear the Ohlsons' cross-appeal.

Bulletproof Plumbing Corp. v. Ohlson, 2025 IL App (1st) 232007-U.

Condominium Owner's Homeowner's Insurance Not Considered a Collateral Source When It is Required

In *Board of Directors of 1212 Lake Shore Drive Condominium Association v. List, et al.,* the List defendants were owners of a condominium unit at 1212 Lake Shore Drive. Their unit started experiencing water leaks shortly after they moved in. Efforts to locate the source of the water intrusion were unsuccessful until their bedroom ceiling collapsed, causing significant flooding and making the unit uninhabitable.

Some repairs were performed, but many more repairs were needed. A dispute arose over who would select the workers to perform the remaining repairs. The Board of Directors of 1212 Lake Shore Drive Condominium Association (the Association) filed suit against the Lists seeking injunctive relief. The injunctive part of the litigation was eventually resolved, and the remainder of the suit was transferred to the Law Division on the Lists' counterclaim for money damages.

Prior to the litigation, the Lists submitted insurance claims to their homeowner's carrier, Liberty Mutual (Liberty) for which they were paid over $254,000. The Association filed a motion for summary judgment, arguing that since the Association was entitled to a setoff for payments the Lists had previously received from Liberty, the Lists had no recoverable damages. The Association also argued that the collateral source rule did not apply because the Lists were required to maintain that insurance pursuant to the condominium's governing declaration and because Liberty had no right of subrogation.

The Lists countered by arguing that the Liberty payments were a collateral source, which would bar any set off in favor of the Association. The Lists further argued that genuine issues of material fact existed as to the nature and extent of damages they had sustained.

The trial court granted the Association's motion for summary judgment, finding that the Liberty payments were not a collateral source because the condominium declaration required the Lists to obtain insurance and because the condominium declaration also prevented subrogation claims. Therefore, if the Lists recovered damages from the Association after being compensated for their damages by Liberty, it would result in a double recovery.

The appellate court found that issues involving the amount of a setoff based on payments received from a third party are generally premature at the summary judgment stage and require a trial. Without a trial, a court cannot determine whether a plaintiff has, in fact, obtained a double recovery. Nevertheless, the appellate court did take up the issue of whether the Liberty payments were a collateral source because it felt that it would materially advance the litigation.

On appeal, the Lists argued that the controlling factor in deciding if Liberty's payments were a collateral source, is whether property coverage for individual unit owners was mandatory or optional for the Association. The Lists maintained that the language in the condominium declaration was a non-mandatory warning advising owners to obtain such coverage. The court disagreed, and found that even if this were true, it is clear that at least part of the intent behind such coverage was to secure a benefit to the condominium association of which the unit owner is a member. The court found that the overall intent of the provision in the declaration demonstrates an intent to shift the risk of loss from such events to insurance, thereby lessening the likelihood that the condominium association or its constituent unit owners will become engaged in disputes or in litigation with one another. Thus, the Liberty coverage was not "wholly independent of, and collateral to" the Association and was not a collateral source.

Since genuine issues of material fact remained as to the value of the Lists' remaining damages and because the collateral source rule was not applicable, the appellate court reversed the trial court's ruling in part and returned the case to the trial court for further proceedings.

Board of Directors of 1212 Lake Shore Drive Condominium Association v. List, 2025 IL App (1st) 240638–U.

Invalidating a Mechanics Lien for Fraud—Operative Date of the Fraud

In *Englewood Construction, Inc. v. J.P. McMahon Properties, LLC*, Englewood Construction, LLC (Englewood) appealed the partial grant of McMahon's motion for summary judgment invalidating Englewood's mechanics lien recorded against McMahon's property.

Englewood was a general contractor for the construction of a building on McMahon's property. Following a dispute, Englewood ceased work on the property and sent a notice of default to McMahon for nonpayment. McMahon notified Englewood of Englewood's own default because of construction defects and demanded repairs. Both parties terminated their written contract.

On February 24, 2021, Englewood recorded a mechanics lien against McMahon's property in the amount of $1,692,467.81. McMahon's attorney later informed Englewood's attorney that McMahon was paying the subcontractors directly. Englewood's attorney asked for proof of the payments and said that he would amend the amount of the lien if the proofs of payment were valid.

Of the numerous proofs of payment that were provided, only two named Englewood as the subcontractors' employer. Englewood filed a first amended lien which amended the contract dates but retained the $1,692,467.81 amount claimed.

Englewood filed a three-count complaint against McMahon seeking foreclosure of its mechanics lien and other relief. McMahon filed a three-count counterclaim against Englewood, seeking invalidation of the lien as fraudulent under section 7(a) of the Mechanics Lien Act (the Act), 770 ILCS 60/0.01, *et seq*.

McMahon filed a motion for summary judgment on its counterclaim against Englewood, arguing that (a) the lien waivers that were delivered to Englewood were valid, and (b) pursuant to a February 5, 2021, letter from Englewood to one of the subcontractors, McMahon had assumed direct responsibility for the balance of the work. The trial court granted partial summary judgment, finding that Englewood's lien claims were fraudulent pursuant to section 7(a) of the Act.

The appellate court found that the core issue raised on appeal was whether the trial court erred in partially granting McMahon's motion for summary judgment and invalidating Englewood's lien under section 7(a) of the Act. Englewood argued that the validity of its lien should be measured as of the date its original lien was recorded. Because Englewood indisputably did not have any knowledge of the payments McMahon made to any subcontractors as of that date, Englewood could not have acted with intent to defraud. Alternatively, Englewood argued that a genuine issue of material fact existed to preclude summary judgment, *i.e.*, what role, if any, documents tendered by McMahon on March 15, 2021, and September 16, 2021, played in determining whether Englewood acted fraudulently. McMahon contended that the amended lien recorded on March 15, 2021, was invalid as fraudulent because McMahon had previously provided Englewood *prima facie* evidence of McMahon's payments to the subcontractors.

The court looked to the language of the Act, which states, "No such lien shall be defeated to the proper amount thereof because of an error or overcharging on the part of any person claiming a lien therefore under this Act, unless it shall be shown that such error or overcharge is made with intent to defraud[.]" The court noted that section 7 of the Act is intended to protect an honest lien claimant who makes a mistake, rather than a dishonest claimant who knowingly makes a false statement. The court further noted that the Act references invalidating a lien based upon intent to defraud in relation to the intent of an individual claiming a lien, not an individual enforcing a lien by filing a lien foreclosure action. Moreover, section 17(c) of the Act separately provides consequences for a lien claimant who brings "an action under this Act without just cause or right[.]" Therefore, in order to invalidate a lien pursuant to section 7(a) of the Act, the lien claimant must have acted with an intent to defraud at the time the lien claim was filed.

After reviewing the facts of the case, the appellate court held that assuming McMahon's lien waivers were valid (which Englewood contested), a material fact remained—whether Englewood made a mistake in recording its first amended lien rather than knowingly or fraudulently filing a false statement. The court held that this issue was ultimately a credibility issue, which warranted a trial. Therefore, the court's invalidation of Englewood's lien and partial grant of McMahon's motion for summary judgment was improper.

Englewood Construction, Inc. v. J.P. McMahon Properties, LLC, 2025 IL App (3d) 240389.

Winning Liability is Not Enough: Plaintiffs Must Prove Damages with Competent, Non-Speculative Evidence Tied to the Correct Measure of Damages

In February 2019, the plaintiff Raymond Winkler hired the defendant Danna Pools, Inc. (DPI) to build an in-ground pool at his home for $98,000. The contract provided a warranty for materials and workmanship for a period of 14 months from the date the pool was filled. The contract also stated the warranty would be void if "maintenance, service, or warranty work" were performed by anyone other than DPI. The pool was filled in July 2019 and was used that season. DPI performed multiple maintenance visits during 2019 and winterized the pool at the end of the season.

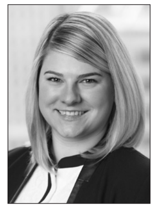
In April 2020, when the plaintiff opened the pool for the next season, he noticed a crack in the pool foundation. According to the plaintiff, DPI inspected the crack and suggested that they open the pool anyway and address the crack at the end of the season. The plaintiff, not wanting to run out the warranty period, drained the pool himself and found additional cracking. He hired a contractor who estimated damages between $40,000 (repair) and $100,000 (replacement). In July 2020, DPI ultimately denied responsibility, asserting the plaintiff had voided the warranty by refusing DPI maintenance and performing work himself. The plaintiff sued for breach of contract, alleging DPI failed to honor the warranty and repair the pool. DPI asserted two affirmative defenses: (1) failure to mitigate damages and (2) invalidation based on plaintiff's failure to actually repair the cracks, despite obtaining estimates to do so, and for servicing the pool himself.

In its ruling, the trial court found that the cracks were attributable to DPI's use of poor quality cement or lack of compaction of the underlying backfill, as testified to by the plaintiff's expert. The trial court also found that the plaintiff's independent pool maintenance did not void the warranty or cause the cracking. However, the trial court went on to state that "the analysis does not end there. The real question is the assessment of damages." The court explained that there "are two possible ways to prove damages: costs of repair or replacement of the pool" and that if "correction of the defects would entail an unreasonable destruction of the builder's work, the proper measure of damages is the reduction in value of the property." However, the plaintiff presented no evidence as to the cost of repair nor as to the cost of replacement. The plaintiff also failed to establish that repair was not an option, insisting instead that the only option was replacement. No testimony was offered as to the diminution in value, either. As such, the plaintiff was awarded $0 in damages, and thus, he appealed. On appeal, the plaintiff argued that the appropriate measure of damages is the cost of replacement and that his damages were proven through the original contract price of $98,000. Speaking to the general rule for measuring damages, the appellate court noted that plaintiffs have the burden of establishing both damages and a reasonable basis to compute those damages. The appellate court affirmed, noting that the plaintiff cannot arbitrarily select a remedy but, rather, the remedy is limited to that which places him in the same position had DPI performed adequately under the contract. Moreover, despite the plaintiff's desire for the court to do so, courts cannot utilize speculation, conjecture, or "common sense" assumptions about what repairs would work, without evidence of what was necessary to remedy the breach.

Winkler v. Danna Pools, Inc., 2025 IL App (3d) 240424-U.

About the Authors

C. William Busse is the President of *Busse & Busse, P.C.* He has over 40 years of experience in litigating insurance coverage, construction, trucking, premises liability, and fire and explosion cases. Mr. Busse served on the Board of Directors of the IDC for 14 years and has been a past chairman of the Civil Practice Committee and Co-chair of the Legislative Committee. He has been the recipient of the IDC's President's and Distinguished Member Awards and is a frequent contributor to IDC publications.



Amy Doig is an attorney in *Cozen O'Connor's* Commercial Litigation Department. She represents architects and engineers in litigated matters often concerning disputes such as breach of contract, property damage, personal injury, design defects, construction defects, construction management, and design professionals' work. Ms. Doig also practices in the area of insurance coverage with a concentration on errors and omissions, directors and officers, property and general liability insurance policies.

Katie A. Fulara Vinge is a partner at *HeplerBroom LLC* in its Chicago, Illinois office. Her practice focuses on defense of multi-party commercial construction litigation involving construction injury, construction defects, risk transfer and construction contracts. She is licensed in Illinois and is an IDC Construction Law Committee member. She earned her B.A. from The University of Iowa and earned her J.D. from University of Illinois Chicago School of Law.

Kevin H. Young is an associate attorney in the Chicago office of *Cassiday Schade LLP*. Mr. Young focuses his practice on a wide range of civil litigation defense and has extensive experience handling transportation and construction matters. Prior to joining Cassiday Schade, Mr. Young worked as an attorney where he honed his litigation skills in the areas of premises and products liability. Mr. Young earned his J.D. from Loyola University School of Law and is a member of the Illinois bar.

ILLINOIS DEFENSE COUNSEL
P.O. Box 588 | Rochester, IL 62563-0588

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