Docket No. 124283

IN THE ILLINOIS SUPREME COURT

BECKY ANDREWS, as plenary guardian of the person and estate of JEFFREY ANDREWS, a disabled person; and BECKY ANDREWS, individually,	)	On Appeal from the Illinois Appellate Court, First Judicial District
Plaintiffs-Appellees,	)	Appellate Docket No. 1-17-0336
v.	)	There Heard on Appeal from the Circuit Court of Cook County,
METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO,	)	Illinois County Department, Law Division
	)	Docket No. 12 L 000048
Defendant-Appellant.	)	The Honorable William E. Gomolinski, Judge Presiding

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AMICUS CURIAE BRIEF OF ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL

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Points and Authorities

Argument

Illinois law has long recognized that a public entity's decision to adopt "a plan in the making of public improvements, such as constructing sewers and drains," is an exercise of governmental discretion, afforded absolute immunity against tort damages arising therefrom. *City of Chicago v. Seben*, 165 Ill. 371, 377 (1897); Illinois Tort Immunity Act, 745 ILCS 10/2-109, 2-201 (the Act). The Metropolitan Water Reclamation District of Greater Chicago's (MWRD) project to upgrade its water treatment facility is one such example, suggesting that immunity flows to the MWRD against plaintiff's claims.

It is equally well-established common law in Illinois that the public entity's agreement with an independent contractor to construct, for instance, a sewer system exemplifies the entity's ongoing exercise of supervisory discretion over the project. *See, e.g., In re Chicago Flood Litigation*, 176 Ill.2d 179 (1997), holding that the City's contractual authority to supervise the location of wood pilings in the Chicago River during the project's completion was an act of discretion for which the Act provided immunity; *Cabrera v. ESI Consultants, Ltd.*, 2015 IL App (1st) 140933, holding a contract allowing the entity to reject or require modification of a bridge-painting contractor's procedures, methods or equipment was evidence of the city's discretionary supervision over the contractor, granting the city immunity from injury claims made by a contractor employee.

Your amicus Illinois Association of Defense Trial Counsel recognizes that the parties in this matter are likely to discuss and argue at some length about how

the appellate court's opinion discounts the controlling holdings in *In re Chicago Flood Litigation* and *Cabrera*. This brief seeks to direct the court's attention to what might be an unintended consequence of the appellate court's decision, one which would likely place the public entities at an immunity ***disadvantage*** as they pursue defenses under the Tort Immunity Act.

In brief, the same language in a written construction contract that confers discretionary absolute immunity under *In re Chicago Flood Litigation* and *Cabrera* may also confer tort "control" defenses under Section 414 of the Restatement of Torts (2d) for all public and private defendants. But under the appellate court's holding here, a public entity would be forced to engage in "control" over the independent contractor's work in a manner that obviates its Section 414 defenses in order to secure evidence sufficient to establish its discretionary immunity under the Act.

Your amicus submits that if the purpose of the Tort Immunity Act is to treat public entities as like all other tortfeasors where immunities do not exist, then the public entity should not see its non-immunity defenses effectively diminished under the Act. The potential for absolute immunity under the Act should not come with a Hobson's choice on broader civil defenses, sacrificing one for the other, and possibly losing both if a court finds a question of fact.

A. Governmental units are liable in tort on the same basis as private tortfeasors unless an immunity statute imposes conditions upon that liability.

Until this court abolished sovereign immunity in 1959, the doctrine of sovereign immunity immunized governmental units from tort liability. *Molitor v. Kaneland Community Unit District No. 302*, 18 Ill.2d 11 (1959). In response to *Molitor*, the legislature in 1965 enacted the Tort Immunity Act (745 ILCS 10/1-101 *et seq.*), which adopted the general principle that local governmental units are liable in tort, but limited this liability with an extensive list of immunities based on specific government functions. *Barnett v. Zion Park District*, 171 Ill.2d 378, 386 (1996).

The Act does not impose on a governmental unit any new duties. Rather, the Act codifies those duties existing at common law, to which the subsequently-delineated immunities apply. *West v. Kirkham*, 147 Ill.2d 1, 14 (1992). Thus, courts look to the common law and other statutes to determine whether the public-entity defendant owes the plaintiff a duty. *Barnett*, 171 Ill.2d at 386.

B. At common-law, the MWRD did not owe Jeffrey Andrews a duty of care.

In *Carney v. Union Pacific Railroad Co.*, 2016 IL 118984 (2016), this court resolved that Section 414 of the Restatement of Torts (2d) applied to allegations of direct negligence and liability against those who hire independent contractors, and the opinion offered a lengthy discussion of the Section in the construction-contract context. Generally, 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. Instead, the party in control—the independent contractor—is the proper party to be charged with that responsibility and to bear the risk. *Id.*, ¶32.

Section 414 non-liability arises from the hiring party's decision to contractually confer to the independent contractor control over the methods and details of the described work. *Id.*, ¶32. But the *Carney* opinion warns that this does not mean that "one who hires an independent contractor is absolutely immune from tort liability for a plaintiff's injuries."[1] Instead, Section 414 explains that a hiring entity may yet be liable for its own negligence where "it retains some control over the independent contractor." *Id.*, ¶33.

In *Carney*, the defendant had engaged a scrap metal contractor to remove three abandoned railroad bridges. After an employee of the contractor was injured during the second bridge's removal, he sought damages under Section 414 against the railroad. *Id.*, ¶¶10, 28.

1. Language in the independent contractor agreement is the best indicator of retained control.

The best indicator of whether the hiring party retained control is the written agreement between defendant and the independent contractor. *Id.*, ¶41. In *Carney*, the agreement identified the scrap company as an independent

[1] Note that the *Carney* opinion itself even labels the Section 414 tort "control" defense an immunity.

contractor who agreed to provide all the labor, tools, and material necessary for the bridge removals. *Id.*, ¶6. The agreement also included provisions allowing defendant to terminate the contract if defendant deemed the contractor's services to be unsatisfactory; required the work be done in a workmanlike manner to the satisfaction of defendant; and gave the defendant the right to stop the work or make changes, as the interests of defendant may require. *Id.*, ¶46. The agreement required the independent contractor "to keep the job site free from safety and health hazards and ensure that its employees are competent and adequately trained in all safety and health aspects of the job." *Id.*, ¶47.

This court found as a matter of law that under the four corners of the agreement the *Carney* defendant had not retained control such that the independent contractor was unable to do the work in its own way. *Id.*, ¶48. The court regarded the cited provisions as part of the general rights reserved to someone who hires a contractor, rather than "evidence of retained control" over how the work was performed. *Id.*, ¶46.

In this case, the MWRD's contract with the joint venture includes language substantially similar as the agreement in *Carney*. For instance, the agreement's General Specifications here required the joint venture to "determine the procedure and methods and also design and furnish all temporary" structures, tools and equipment; allowed the MWRD's engineer to reject any "which seem to him to be unsafe for the work hereunder;" and made the joint venture "responsible for the Contractor's employees" and to "provide all necessary and

appropriate safety equipment" when work was performed in tunnels. *R.C3633-36.*

Finally, another contract provision stated, "The Contractor is solely responsible for all means and methods required to construct the Work as shown in these Project Specifications and Plans." *R.C835*

Again, your amicus recognizes that the issue of "retained control" is not at issue before this court, and no request is made for such a ruling as in *Carney*. This language is merely highlighted to show that MWRD facially had the contractual right to expect the joint venture to create and maintain a safe worksite for its employees and other personnel on the project as part of its overall control over the means and methods of its work. MWRD was not contractually required to inspect or approve of the safety equipment inside the settling tank or any other specific aspect of the work, or to record each safety review.

2. The defendant's acts and omissions can be evidence of retained control even in spite of the independent contractor relationship.

The *Carney* plaintiff further argued, however, that the defendant's pre- and post-injury activities at the sites, including the degree of project direction given and frequency of visits, varied from the agreement and established defendant had retained control of the project. *Id.*, ¶¶53-55. Ultimately, this court resolved there was no evidence that the defendant gave instructions to the contractor's employees even though an employee of the defendant would regularly come by and "check out the jobs." *Id.*, ¶55.

Similarly, here the resident MWRD engineer Greg Florek walked the project daily to check the work's progress and see that proper materials were being used. *R.C2156; R.C2221-22.* Two joint venture managers testified that MWRD did not dictate safety conditions because safety was delegated to the joint venture. *R.C1466; R.C2822.* The appellate opinion likewise does not state that any act or omission by Florek exhibited retained control under the *Carney* holding.

Therefore, there is at the very least an arguable conclusion that Florek and the MWRD as a whole acted in line with the defendant in *Carney*, not undertaking actions that would have exposed it to Section 414 liability.

The MWRD's legal conundrum, though, is that according to the appellate court's opinion MWRD's compliance with the agreement's retained-control terms left it unable to document the "discretion" Florek exercised with regard to the ladder configuration. The appellate court's focus on discretion as a specific, essentially daily risk-by-risk exercise not only ignores the precedents of *In re Chicago Flood Litigation* and *Cabrera*, but it leaves public entities with a choice, to pursue their Section 414 defenses by staying above the finest details of how the independent contractor conducts its work; or pursue immunity under the Act by seeking out and documenting every acceptance or rejection on safety conditions.

If the purpose of the Act is to have public entities be liable in tort "on the same basis as a private tortfeasor absent an immunity statute," then the appellate court opinion cannot stand. *In re Chicago Flood Litigation,* 176 Ill.2d at 192. Private

parties are not put in such a conundrum, and there is no reason to place such a burden on public entities either.

C. The appellate court's opinion, focusing discretion on every specific potential safety risk forces a public entity to exercise control properly conferred to an experienced independent contractor, depriving the entity of its contract and statutory immunity rights.

The appellate court reversed the granting of summary judgment because the MWRD did not produce evidence "documenting any decision or refusal to decide to use the ladder configuration." *Opinion*, ¶24. One presumes that had another joint venture employee sustained an injury after slipping on a muddy floor, or tripping over an unkempt stack of pipes, the panel would likewise have denied the MWRD immunity under the Act if it could not have produced documentation that Florek had considered and rejected directing the joint venture to fix those hazards as well.

The scale of gathering and producing such evidence to satisfy the public entity's potential exposure across a large construction project is alone a proper basis to reverse the appellate court's opinion. But if the appellate court's opinion stands, a public entity would be at "retained control" cross purposes.

In order to preserve its Section 414 defenses, the entity could allow the independent contractor to determine the means and methods of its work, including potentially unsafe structures and conditions for work, as specifically stated in the agreement.

Or, the entity could abandon its contractual defenses under Section 414 and exercise control beyond what is dictated in the agreement, solely to be able to document its specific exercise of discretion over each and every circumstance heightening the risk of an employee's injuries.

Public entities face this Hobson's choice if this court does not follow its precedent from *In re Chicago Flood Litigation* and *Cabrera*, which correctly resolve the exercise of discretion to have been the public entity's decision to enter into a written agreement charging control to the independent contractor. The appellate court's opinion, which treats the entity's on-site employee (who is not even a party to the action) as the decider of discretion not only ignores that precedent, but places the focus of control away from the four corners of the written agreement – where it begins in a Section 414 retained-control analysis under *Carney*.

The only sound policy is for this court to link the public entity's Section 414 and Act immunities to the same occurrence, the execution of its agreement with an independent contractor. Executing the agreement is the recognized exercise of discretion, as is the entity's employees thereafter acting in accordance with its terms on the responsibilities for the means and methods of safety. No common law should force the public entity to abandon its rights under the agreement in order to come forward with evidence to support an immunity claim under the Act. In addition to being an unworkable open-ended task, forcing employees to seek out and record infinite "discretionary" circumstances to support an

immunity under the Act would obviate the retained-control terms and conditions of the independent contractor agreement - which has been until the appellate opinion here the expression of discretion under Illinois law.

The appellate court opinion wrongly differentiates private and public defendants in a Section 414 case - and forces the public entity to forgo its Section 414 defenses in order to establish its absolute immunity under the Act. There is no basis for curtailing defenses and immunities available to public entities.

Conclusion

Amicus Illinois Association of Defense Counsel respectfully requests that the appellate court's decision be reversed; and that this Court affirm the entry of summary judgment in favor of the Metropolitan Water Reclamation District of Greater Chicago.

Respectfully submitted,

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Rule 341(c) Certificate of Compliance

I certify that this brief conforms the requirements of Rules 341(a) and (b). The number of words in this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, and the Rule 341(c) certificate of compliance, is 2,361 words.

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