IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Sean Magee,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 18 L 12489
	)	
The Douglas Company, Heritage Carpentry, Inc., and Lumber Specialties-US LBM, LLC,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Summary judgment is appropriate only if there exist no questions of material fact. In this case: (1) a contract plainly reserves direction over a work site to a general contractor; (2) there is an open question as to which defendant supplied or repaired an allegedly defective stud wall; and (3) the stud wall was a product for purposes of a strict liability cause of action. For these reasons, the defendants' summary judgment motions must be denied.

Facts

FSP-DeerPark, LLC, owned property in Deer Park, Cook County, on which three buildings known as the Solana Deer Park project were under construction. The owner had previously engaged the Douglas Company as the Solana project's general contractor. Douglas, in turn, entered into a subcontract with Heritage Carpentry to supply carpentry work. Lumber Specialties-US LBM, LLC, supplied some of the prefabricated two-by-four wooden stud walls for the project.

On April 18, 2014, Douglas entered into another subcontract agreement with Norman Mechanical for plumbing work. The Douglas-Norman agreement contained various provisions that are relevant here:

- "[Norman] shall perform the work at the time and in a manner directed by [Douglas] and shall coordinate the performance of the work with all other subcontractors and material suppliers, and as directed by [Douglas] so that construction of the entire project will be completed as required."

- "No representations of any kind have been made by [Douglas] to [Norman] regarding the condition of the area over which the Work is to be

done. [Norman] hereby assumes full responsibility for the . . . completion of the Work as provided in the Contract Documents regardless of any latent or unknown conditions."

- "In performance of this Subcontract, [Norman] shall operate as an independent contractor."

- "[Norman] shall schedule all required rough and final inspections and perform all required tests."

- "[Norman] is responsible for all equipment required to perform any item in this scope of work."

- "Each subcontractor is responsible for the safety and health of employees and work areas under their control. It shall be the responsibility of all subcontractors to initiate and maintain such programs as may be necessary to comply with requirement set forth by OSHA and any other local, state and federal regulations. A copy of the subcontractor's site-specific safety program shall be submitted to The Douglas Company prior to commencement of any work."

- "[Norman is] required to designate a competent person to administer its onsite safety program."

- "The competent person designated by the subcontractor shall make frequent and regular inspections of the jobsite. Unsafe acts and/or conditions noted during inspections shall be corrected immediately."

The agreement also required Norman to adhere to minimum safety requirements imposed by Douglas as well as requiring Norman to submit its site-specific safety program to Douglas for approval before starting any work. Finally, the Douglas-Norman agreement required Norman and its employees to attend safety meetings. Norman's failure to comply with the safety requirements could result in a series of penalties up to and including being prohibited from the work site.

In addition to the Douglas-Norman subcontract, Douglas relied on a safety manual that contained more than 500 safety rules and requirements for which Douglas employees were responsible. The safety rules explicitly laid out the responsibilities for Douglas's safety director, project manager, assistant project manager, general superintendent, and project superintendent. These rules included responsibilities for field employees safety training as well as monitoring and enforcing safety compliance by employees and subcontractors. In particular, the project superintendent had

the authority to stop any work immediately if a subcontractor failed to follow OSHA construction standards and to prohibit any future work until the safety issue had been corrected.

Before February 5, 2015, Heritage had installed various stud walls in one of the Solana buildings. The stud walls consisted of horizontal two-by-fours at the ceiling and the floor with vertical two-by-fours nailed to the horizontal ones. The vertical members were supposed to support a lateral load of at least 200 pounds.

Norman employed Sean Magee. For at least four months before and before February 5, 2015, Norman had assigned Magee and his co-workers to drill holes into the top rails of two-by-four stud walls to create openings for plumbing pipes. By February 5, 2015, Magee and his co-workers had drilled hundreds of holes into various stud walls. The work had to be done overhead while standing on an A-frame ladder and using a two-handed drill. Such overhead drilling work did not permit Magee to hold onto the ladder, a situation that violates the so-called "three-points-of-contact rule" under which a worker is to have three points of contact with a ladder at all times. Given that Magee could not keep a hand on the ladder while performing the two-handed drilling, he leaned his back against a nearby stud wall for support. While Magee was drilling above his head, the stud wall gave way. Magee fell to the floor and suffered serious injuries.

On June 5, 2020, Magee filed his second amended complaint against the defendants. Counts one and two are directed against Douglas. Count one is based on Restatement (Second) of Torts section 414, retained control, while count two is based on Restatement section 343, premises liability. Counts three through six are directed against Heritage. Count three is based on Restatement section 343; count four is a cause of action for negligence; and count five is based on Restatement section 414. Count six is a negligence cause of action directed against Lumber Specialties. Count seven is a strict liability cause of action directed against Heritage.

The case proceeded to discovery. The record indicates that Lumber Specialties mass produces two-by-four stud walls and made some for the Solana project. A video supplied by Lumber Specialties shows that the vertical studs are nailed to the top rails by a nail machine straight through the top rail and into the vertical stud. The nail machine does not drill nails at an angle. Lumber Specialties did not install or erect any stud walls on site.

At the Solana project, Heritage constructed some stud walls in the field and installed them. Heritage also fixed loose or wobbly stud walls. If any

stud walls were damaged in handling, Heritage would fix them by hand by nailing them back together. The record indicates that the stud wall against which Magee had been leaning was not nailed to the top rail in the way in which Lumber Specialties manufactured and nailed its stud walls. Rather, the nails in the stud wall that gave way were nailed diagonally thorough the thin sides of the stud at 45-degree angles.

Magee testified that he weighed 250 pounds on the day he was injured, but that he was leaning only one-quarter to one-third of his weight against the stud wall when it gave way. Magee and his co-workers testified that they all had to lean against the stud walls while performing the drilling work during the four months on the job. One of Magee's co-workers, Christopher Bratanick, and Norman's foreman, Michael Toribio, testified that after Magee's fall, his ladder was on the floor next to a stud that had become disconnected from the rest of the wall panel.

Magee testified that he did not interact with Douglas employees at the work site except for the occasional greeting. Magee did not see any Douglas employees advise Norman employees on how to perform their work. Various Norman co-workers and supervisors confirmed that fact. Toribio added that Douglas employees rarely came out of their office, but when they did it was to check on work progress and general safety issues, such as whether workers were wearing hard hats and safety glasses. Magee further testified that he also did not know what Douglas employees, if any, were at the Solana site on February 5, 2015.

Heritage and Douglas each filed summary judgment motions. In his response briefs, Magee indicates that he does not oppose summary judgment as to counts two, three, and five. In other words, the dispute for purposes of the summary judgment motions concerns only count one against Douglas—retained control—and counts four and seven against Heritage—negligence and strict liability.

Analysis

Douglas and Heritage bring their respective summary judgment motions pursuant to the Code of Civil Procedure. The statute authorizes the issuance of summary judgment "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. The purpose of summary judgment is not to try a question of fact, but to determine whether one exists that would preclude the entry of judgment as a matter of law. *See Land v. Board of Educ. of the City of Chicago*, 202 Ill. 2d 414, 421, 432 (2002).

A defendant moving for summary judgment may disprove a plaintiff's case by establishing that the plaintiff lacks sufficient evidence to establish an element essential to a cause of action; this is the so-called "*Celotex* test." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), *followed Argueta v. Krivickas*, 2011 IL App (1st) 102166, ¶ 6. A court should grant summary judgment on a *Celotex*-style motion only when the record indicates the plaintiff had extensive opportunities to establish his or her case but failed in any way to demonstrate he or she could do so. *Colburn v. Mario Tricoci Hair Salons & Day Spas, Inc.*, 2012 IL App (2d) 110624, ¶ 33. Both Douglas and Heritage present *Celotex*-style motions.

If a defendant presents facts that, if not contradicted, are sufficient to support summary judgment as a matter of law, the nonmoving party cannot rest on the complaint and other pleadings to create a genuine issue of material fact. *See Harrison v. Hardin Cnty. Cmty. Unit Sch. Dist. No. 1*, 197 Ill. 2d 466, 470 (2001). Rather, a plaintiff creates a genuine issue of material fact only by presenting enough evidence to support each essential element of a cause of action that would arguably entitle the plaintiff to judgment. *Prostran v. City of Chicago*, 349 Ill. App. 3d 81, 85 (1st Dist. 2004). To determine whether a genuine issue as to any material fact exists, a court is to construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the opponent. *See Adams v. Northern Ill. Gas Co.*, 211 Ill. 2d 32, 43 (2004). The inferences drawn in favor of the nonmovant must, however, be supported by the evidence. *Destiny Health, Inc. v. Connecticut Gen'l Life Ins. Co.*, 2015 IL App (1st) 142530, ¶ 20. A triable issue precluding summary judgment exists if the material facts are disputed, or if the material facts are undisputed but a reasonable person might draw different inferences from the undisputed facts. *Id.* On the other hand, if no genuine issue of material fact exists, a court has no discretion and must grant summary judgment as a matter of law. *See First State Ins. Co. v. Montgomery Ward & Co.*, 267 Ill. App. 3d 851, 854-55 (1st Dist. 1994).

Count 1—Douglas, Retained Control

Douglas argues that it owed Magee no duty because Douglas did not retain control over his or Norman's work. It is fundamental that to recover in a construction negligence cause of action, the plaintiff must present sufficient evidence establishing that the defendants owed the plaintiff a duty. *Wojdyla v. City of Park Ridge*, 148 Ill. 2d 417, 421 (1992). Whether a duty exists is a question of law to be decided by the court. *Id.*

In Illinois, a person or entity employing an independent contractor is generally not liable for the independent contractor's acts or omissions.

Gomien v. Wear-Ever Aluminum, Inc., 50 Ill. 2d 19, 21 (1971). The reasoning behind this rule is long established:

> An independent contractor is one who renders service in the course of an occupation representing the will of the person for whom the work is done only as to the result of the work and not as to the means by which it is accomplished, and is one who undertakes to produce a given result without being in any way controlled as to the method by which he attains that result. . . . The test of the relationship is the right to control. It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant of agent.

Hartley v. Red Ball Transit Co., 344 Ill. 534, 538-39 (1931) (citations omitted). If the hiring entity does not control the details and methods of the independent contractor's work, "[the hiring entity] 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 v. Union Pac. R.R. Co.*, 2016 IL 118984, ¶ 32 (citing cases).

A hiring entity may, however, still be subject to liability for its own negligence if it retains some control over the independent contractor. *Id.* at ¶ 33. As provided:

> 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). Illinois has adopted this so-called "retained control" exception to the general rule. *Larson v. Commonwealth Edison Co.*, 33 Ill. 2d 316, 325 (1965).

The Douglas-Norman agreement explicitly provides that in performing under the agreement, Norman operated as an independent contractor. Further, Norman was responsible for all equipment required to perform any item in its scope of work. Norman was responsible for all rough and final inspections of its work and to have a competent person at the site to conduct such inspections. Norman was also responsible for meeting all OSHA guidelines. These various contract provisions do not express or even suggest Douglas's intent to retain control over Norman's work.

Yet the agreement also provides that Norman was to perform its work at a time and in a manner directed by Douglas. Further, Douglas required Norman to coordinate its work performance with all other subcontractors and material suppliers as directed by Douglas so that the entire project would be completed as required. In addition to these explicit contractual provisions, Douglas incorporated its imposing safety manual into the Douglas-Norman contract. The safety manual called on Douglas to conduct safety training in the field and made Douglas responsible for enforcing safety compliance by subcontractors.

These provisions indicate that Douglas retained control over Norman's work in various ways. First, Douglas directed Norman's work as to time and manner of completion. Second, Douglas directed Norman to coordinate its work in conjunction with other subcontractors. Third, by incorporating Douglas's safety manual into the Douglas-Norman agreement, Douglas also assumed the responsibility to enforce safety compliance by subcontractors. These provisions go well beyond the general reservation of rights to stop work, make changes, and enforce safety that are generally retained by a contractor employing a subcontractor. *Cf. Carney*, 2016 IL 118984, ¶¶ 46-47.

These contract provision are placed in greater context by referring to comment *c* to section 414. In expanding on what constitutes retained control, the Restatement provides that:

> [F]or 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 that need not necessarily be followed, or to prescribe alternations and deviations. Such as 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.

Thus, a contractor may be negligent by retaining the right to supervisory control over a subcontractor's work but failing to exercise that right by following through and supervising the work. *See also Weber v. Northern Ill. Gas Co.*, 10 Ill. App. 3d 625, 641 (1st Dist. 1973); *Moorehead v. Mustang Constr. Co.*, 354 Ill. App. 3d 456, 461 (3d Dist. 2004); *Brooks v. Midwest Grain Prods, of Ill., Inc.*, 311 Ill.App.3d 871, 875 (3d Dist. 2000).

It is equally true, however, that a contractor cannot be held liable unless it knew or had reason to know of danger to the contractor's workers. *Cochran v. George Sollitt Constr. Co.*, 358 Ill. App. 3d 865, 877, 879-80 (1st Dist. 2005) (knowledge of unsafe ladder set up only one hour before plaintiff's injury insufficient to impose liability on contractor). *See also Calderon v. Residential Homes of America, Inc.*, 381 Ill. App. 3d 333, 347 (1st Dist. 2008) (because defendant had "insufficient opportunity to observe unsafe working conditions . . . , knowledge will not be inferred and direct liability will not ensue"). Here, the record suggests that Douglas did not know of the specific unsafe condition—leaning against the stud wall while conducting two-handed drilling—under which Magee was operating before his accident. Indeed, the record indicates that the Douglas employees at the site rarely came out of their office to inspect or supervise the site work. Such lack of knowledge would, initially, suggest that Douglas has no liability.

The record indicates, however, that Magee and others from Norman had been conducting two-handed drilling above their heads for approximately four months before Magee's accident. Given that fact, Douglas certainly had reason to know of the unsafe practices under which Norman employees, including Magee, had been conducting their work over a long period of time. While the record is plain that Douglas employees rarely came out of their site office to inspect the work site, they did inspect to see that workers were wearing hard hats and safety glasses. If Douglas employees checked for those safety compliance, it remains unexplained why they did not inspect for safety violations related to Norman employees' two-handed drilling.

Two final points need emphasis. First, although Douglas may not have directed Norman's work or inspected for safety compliance, the Douglas-Norman agreement plainly calls for such direction and monitoring. Douglas cannot at this point seek to avoid the terms of its agreement with Norman under which Magee operated. Second, the unsafe condition at issue here is not limited to Magee leaning against an allegedly defective stud wall. Rather, the safety violation is that Magee and others were conducting over-the-head, two-handed drilling without a hand on the ladder, necessitating Magee and his co-workers to lean against stud walls for support. In sum, the record is not free from doubt as to the extent to which Douglas had a duty and potentially breached its duty for failing to direct Magee's work.

Count 4—Heritage, Negligence

Heritage argues that summary judgment is appropriate as to count four—direct liability—because Heritage owed Magee no duty and there exists no proximate cause linking its supply of the stud wall and Magee's fall. Duty is, of course, a question of law to be decided by the court, *Choate v. Indiana*

Harbor Belt R.R., 2012 IL 112948, ¶ 22, and is, therefore, appropriately determined by summary judgment. *Harlin v. Sears Roebuck & Co.*, 369 Ill. App. 3d 27, 32 (1st Dist. 2006). If, however, the existence of a duty is dependent on disputed underlying facts, the existence of those relevant facts is a question for a trier of fact to resolve. *Combs v. Schmidt*, 2012 IL App (2d) 110517, ¶ 32.

To determine a defendant's duty, if any, courts are to determine whether the parties stood in such a relationship that the law would impose an obligation on the defendant to act reasonably for the plaintiff's protection. *Ziemba v. Mierzwa*, 142 Ill. 2d 42, 47 (1991). That relationship is shorthand for the four factors comprising a duty: (1) the reasonable foreseeability of injury; (2) the reasonable likelihood of injury; (3) the magnitude of the burden that guarding against injury places on the defendant; and (4) the consequences of placing that burden on the defendant. *See Bucheleres v. Chicago Park Dist.*, 171 Ill. 2d 435, 456 (1996). If no duty exists, there exists no cause of action. *American Nat'l Bank & Trust Co. v. National Advertising Co.*, 149 Ill. 2d 14, 26 (1992).

It is reasonably foreseeable that an allegedly improperly repaired stud wall would not support the laterally imposed weight it should normally be expected to withstand. That conclusion must be true because the record permits the reasonable inference that even a lateral force of less than 200 pounds could have caused the stud wall's failure. It is also reasonably likely that a worker standing on a ladder and leaning against an allegedly defective stud wall could suffer injury if the stud wall failed. The magnitude of the burden on Heritage to have repaired the stud wall with through-end nails rather than those at a 45-degree angle is minimal. Finally, the consequences of placing that on Heritage is proper considering that it was responsible for repairing defective stud walls. In sum, Heritage owed Magee a duty of care.

Heritage also argues that the stud wall's condition did not proximately cause Magee's injury because his use of the wall was an intervening cause. To that end, Heritage argues that Magee, at six feet, three inches tall and weighing 250 pounds, should not have been leaning against a stud wall designed to withstand only 200 pounds of lateral weight. The facts Heritage points to are significant, but ultimately go to the question of comparative fault, not proximate cause.

A proximate cause is one that produces an injury through a natural and continuous sequence of events unbroken by any effective intervening cause. *Crumpton v. Walgreen Co.*, 375 Ill. App. 3d 73, 79 (1st Dist. 2007). Proximate cause contains two elements: (1) cause in fact; and (2) legal cause. *Krywin v. Chicago Transit Auth.*, 238 Ill. 2d 215, 225-26 (2010). Cause in fact

requires that the defendant's conduct be a material and substantial factor in bringing about the plaintiff's injury, or that, in the absence of the defendant's conduct, the injury would not have occurred. *Id.* at 226. As to cause in fact, courts generally employ either the traditional "but for" test or the "substantial factor" test. *See Nolan v. Weil-McLain*, 233 Ill. 2d 416, 431 (2009). Under the "but for" test, "'a defendant's conduct is not the cause of an event if the event would have occurred without it.'" *Id.* (quoting *Thacker v. UNR Industries, Inc.*, 151 Ill. 2d 343, 354 (1992)). Under the "substantial factor" test, "the defendant's conduct is said to be a cause of an event if it was a material element and a substantial factor in bringing the event about." *Id.* (internal quotation marks omitted).

Legal cause exists if the injury is of the type that a reasonable person would see as a likely result of his or her conduct. *First Springfield Bk. & Trust v. Galman*, 188 Ill. 2d 252, 257-58 (1999); *Simmons v. Garces*, 198 Ill. 2d 541, 558 (2002); *Abrams v. City of Chicago*, 211 Ill. 2d 251, 258 (2004). In other words, legal cause involves an assessment of foreseeability. *Lee v. Chicago Transit Auth.*, 152 Ill. 2d 432, 456 (1992). Courts ask whether the injury is the type that a reasonable person would see as a "likely result" of his or her conduct, or whether the injury is so "highly extraordinary" that imposing liability is not justified. *Id.* "The question is one of policy—How far should a defendant's legal responsibility extend for conduct that did, in fact, cause the harm?" *Id. See also Prodromos v. Everen Securities, Inc.*, 389 Ill. App. 3d 157, 171 (1st Dist. 2009) ("Because the consequences of every action stretch forward endlessly through time and the causes of every action stretch back to the dawn of human history, the concept of proximate cause was developed to limit the liability of a wrongdoer to only those injuries reasonably related to the wrongdoer's actions.").

The current record supports the conclusion that there exists more than one potential cause in fact of Magee's fall. First, it is uncontested that a stud wall is supposed to be able of to withstand 200 pounds of lateral pressure. Given that this particular stud wall collapsed, the collapse may have been caused by Magee exerting more than 200 pounds of lateral pressure. Second, it is also possible that the stud wall could not withstand 200 pounds of lateral pressure because it had been improperly repaired. If that is true, then the stud wall could also have been a cause of Magee's fall and injury. This is a substantial question of fact because Magee testified that he was not leaning his entire weight against the stud wall when it gave way. Moreover, this was not the first stud wall that Magee had leaned against, meaning that the record permits an inference that this stud wall was able to withstand less lateral pressure than others, perhaps because it had been improperly repaired. Those competing facts mean that Heritage's comparative negligence argument is reserved for a jury.

As to legal cause, Magee's fall and injury are certainly the type a reasonable person could foresee as a likely result of Heritage's conduct, Magee's conduct, or both. It is not extraordinary for a worker such as Magee to lean against an adjacent stud wall for support when having to conduct two-handed drilling above his head. In sum, the record supports the existence of both cause in fact and legal cause; consequently, the question of proximate cause is one for the jury.

Count 7—Heritage, Strict Liability

Heritage argues that summary judgment is warranted as to Magee's strict liability cause of action in count seven because the collapsed stud wall "formed part of the structural skeleton of the new building and [was] not a product for the purpose of strict liability." As a matter of law, Heritage's argument reflects the position of Illinois courts that have consistently held that "buildings and indivisible component parts of the building structure itself, such as bricks, supporting beams and railings, are not deemed products for the purpose of strict liability in tort." *Martens v. MCL Constr. Corp.*, 347 Ill. App. 3d 303, 320 (1st Dist. 2004) (quoting *Trent v. Brasch Mfg. Co.*, 132 Ill. App. 3d 586, 590-92 (1st Dist. 1985)). The mere fact that an article is attached to or installed in real estate "is not the ultimate test; rather an analysis in terms of the policy considerations supporting the imposition of strict liability must be employed to determine whether [the object] constitutes a 'product.'" *Trent*, 132 Ill. App. 3d at 592 (citing cases) (HVAC system). As one court explained: "The question of whether something is a product is determined by looking to the policies supporting the strict liability in tort doctrine[;] . . .the manufacturer's special responsibility to buyers, the need to protect helpless buyers, and the cost-spreading capacity of the manufacturer." *Moorman Mfg. Co. v. National Tank Co.*, 92 Ill. App. 3d 136, 146 (4th Dist. 1980). *See also Board of Educ. of City of Chicago v. A, C & S, Inc.*, 131 Ill. 2d 428, 451 (1989) (dangerous products—asbestos plaster, tile, insulation, and fireproofing—existed separately from building structure). Some of the policy issues a court may consider include: (1) the public's interest in life and health; (2) the manufacturer's solicitations to purchase the product; (3) the justice of imposing the loss on the manufacturer who created the risk and reaped the profit; (4) the superior ability of the commercial enterprise to distribute the risk of injury as a cost of doing business; (5) the disparity in bargaining power that forces the consumer to depend entirely on the manufacturer; (6) the difficulty in requiring the injured party to trace back along the channel of trade to the source of the defect in order to prove negligence; and (7) whether the product is in the stream of commerce. *Id.* at 1315 (citations omitted).

These policy issues are insightful here. First, the public certainly has an interest in the life and health of workers, such as Magee, who work in potentially dangerous settings and who may suffer a substantial physical injury. Second, although there is no evidence demonstrating that Heritage solicited its stud walls, it is plain that Douglas purchased them to fulfill a specific purpose. Third, each of the defendants profited to some extent from the sale, potential repair, and installation of the allegedly defective stud wall. *See Bittler v. White Inc.,* 203 Ill. App. 3d 26, (1st Dist. 1990) ("imposition of strict liability hinges on whether the party in question has any 'participatory connection, for [its] personal profit or other benefit, with the injury-producing product and with the enterprise that created consumer demand for and reliance upon the product'") (citing cases). Fourth, because the defendants are businesses and Magee is an individual, they have superior abilities to distribute the risk of injury as a cost of doing their business. Fifth, Magee had no bargaining power in the use of the stud wall. His work assignment required two hands on a drill, giving him no option but to lean against the stud wall for balance. Sixth, in this case, unlike many others, Magee has traced the defect to a limited number of potentially negligent contributors. Seventh, the stud wall was in the stream of commerce because it was sold and purchased for the Solana project. Even so, it is recognized that a defendant does not have to be in a product's distribution chain to be strictly liable. *Gilliland v. Rothermel,* 83 Ill. App. 3d 116, 118 (2d Dist. 1980) ("Participation in the profits from placing a defective product in the stream of commerce 'presents the same public policy reasons for the application of strict liability which supported the imposition of such liability on wholesalers, retailers and lessors.'") (quoting *Connelly v. Uniroyal Inc.,* 75 Ill. 2d 393, 410-11 (1979).

These policy considerations illuminate the specifics of this case—the stud wall was a product. Lumber Specialties certainly had a responsibility to build a structurally sound stud wall. If the wall had, in fact, been damaged and repaired, Heritage had a responsibility to repair the damaged product for all persons, including Magee, who would use it. As the Illinois Supreme Court explained long ago: "one engaged in the construction of a building owes to another not in his employ, engaged in the same work and exercising due care for his own safety, the duty of using reasonable care to avoid injuring him." *Ziraldo v. Lynch Co.,* 365 Ill. 197, 201 (1936). "Thus, a contractor whose servants are engaged upon work about which the servants of another contractor are engaged owes the duty of ordinary care in performing his work in such a way as not negligently to injure the servants of the other." *Cozza v. Culinary Foods, Inc.*, 311 Ill. App. 3d 615, 622 (1st Dist. 2000) (citing *Zebell v. Saufnauer,* 38 Ill. App. 2d 289, 297 (1st Dist. 1962) (Bryant, P.J., dissenting) (citing cases).

In addition to the policy considerations underlying strict liability, the facts of this particular incident do not support Heritage's argument that the stud wall was not a product because it was a structural part of the building as in *Martens.* There is, in fact, no evidence in the record, including the two deposition citations, supporting the conclusion that the stud wall formed part of the building's structural skeleton. Despite that lack of evidentiary support, Heritage argues that the stud wall was an indivisible component of the building because it had been installed. That conclusion is too facile.

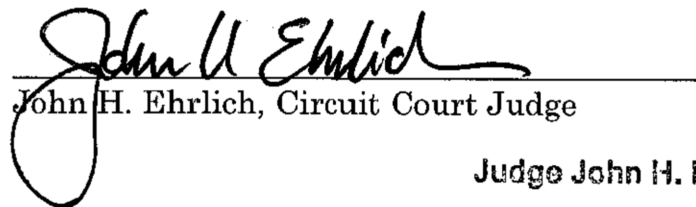
In *Martens*, the plaintiff fell from a steel beam that had already been bolted to vertical columns forming part of the building's structural skeleton. 347 Ill. App. 3d at 308. In contrast here, the stud wall was not part of the building's structural skeleton; indeed, the stud wall could not have been structural because the was a ceiling already in place where the stud wall was later located. In other words, rather than a structural component, the stud wall was merely inserted between the floor and the ceiling. The allegedly defective stud wall could have been placed anywhere between the floor and the ceiling and the result for Magee would have been the same since the alleged defect was in the stud wall as a product and not the floor or ceiling.

The applicable policy justifications and the specific facts of this case lead to the inexorable conclusion that there is a question of material fact as to Heritage's participation in placing a defective product into the stream of commerce. Given that question, Magee's cause of action for strict liability is appropriate and is an issue for a jury.

<u>Conclusion</u>

For the reasons presented above, it is ordered that:

1. Based on the plaintiff's concession, summary judgment is granted as to counts two, three, and five;
2. Counts two, three, and five are dismissed with prejudice;
3. Douglas's summary judgment as to count one is denied; and
4. Heritage's summary judgment motion as to counts four and seven is denied.



John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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