

2006

Marlene Begaye v. Big D Construction Corp : Brief of Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

MARLENE BEGAYE, individually and
on behalf of the heirs of Michael Begay,

Plaintiff/Appellant,

vs.

BIG D CONSTRUCTION CORP.,

Defendants/Appellee.

Utah Supreme Court Case No: 20060572

BRIEF OF APPELLANT

APPEAL FROM A DECISION OF THE THIRD JUDICIAL DISTRICT COURT
HONORABLE ROBERT HILDER

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UTAH APPELLATE COURTS
DEC 06 2006

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STATEMENT OF JURISDICTION

This is an appeal from an order of the Third Judicial District Court in a civil case wherein the court granted a motion for summary judgment. This Court has jurisdiction pursuant to Utah Code Annotated § 78-2-2(3)(j) (West 2006).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Because the trial court granted dismissal pursuant to Utah Rule Civil Procedure 54, this Court reviews the “facts and inferences therefrom in the light most favorable to” the appellant and “in deciding whether the trial court properly granted judgment as a matter of law to the prevailing party, we give no deference to the trial court's view of the law; we review it for correctness.” *Utah State Coalition of Sr. Citizens v. Utah Power and Light Co.*, 776 P.2d 632, 634 (Utah 1989).

Issue #1:

A general contractor retaining control over any part of an independent contractor's work must exercise that power with **reasonable** care. Big-D retained control over and actively participated in the method and timing of work done by Preferred Builders.

Issue #2:

A general contractor with supervisory power to forbid work being done in a dangerous manner must use reasonable care in exercising that supervisory control. Big-D retained **and exercised control over safety** by enforcing subcontractor compliance with safety regulations.

Statutes at Issue

None at issue in this case.

STATEMENT OF THE CASE

As Wall 39 began to collapse on the afternoon of March 1, 2004, Big D superintendents Kevin Burns and Dee Jacobson stood watching. (R. 519, 631-33, 612-13, 865-66). They continued watching as four workers rode the wall to the ground. (Id.). After the collapse of the wall, three workers walked away virtually unscathed, while Michael Begay lost his life. (Id.).

Earlier that day, Kevin Burns sent the four workers, employees of subcontractor Preferred Builders, to work on Wall 39. (R. 865). Big D Construction, acting as the general contractor over the project, retained control over workflow, timing and sequencing. (R. 514, 520-21). Big D's control extended to direction over subcontractors to coordinate and arrange the timing of tasks. (R. 521). However, at the time Kevin Burns directed Preferred to begin work on wall 39, his instruction and permission to begin work on that wall deviated from the sequencing and workflow set forth by Big D's own schedule. Specifically, walls were to be erected by (1) placing a concrete form and imbeds by Big D; followed by, (2) installation of reinforcing steel by Preferred; and, completed by (3) placing another concrete form and pouring the cement by Big D. (R. 527 and 910-911). Big-D superintendents uniformly agree that construction of the walls represented a cooperative effort between Big-D and Preferred Builders. (R. 524-525).

At the time Kevin Burns directed Preferred Builders to begin working on wall 39 the interior form had not yet been placed and, indeed, no form was even available to be placed. (R. 525). By erecting an interior form, Big-D provided a stable platform to which the otherwise freestanding rebar steel could be tied as Preferred Builders worked upwards. (R. 524). Another method which provided support while a freestanding rebar wall was erected involved waiting for an adjacent wall to have concrete poured and cured, and then tie off to that wall. (R. 525-526, 899 at 19:19-21:12). No wall was available to which wall 39 could be tied off.

A central and basic principle in construction work involves whether a particular task is considered “constructible.” The constructibility principle is defined as “the optimum use of construction knowledge and experience in planning, design, engineering, procurement, and field operations, to achieve overall project objectives.” (R. 762). Obviously, the project objectives do not include unintentional collapse of structures during construction. (Id.). Big D project manager Layne Murray understood constructibility principles as follows: “Q. [I]t’s kind of hard to put a roof up if you don’t have something to support it. A. Exactly... you can’t have a roof without walls in place or a structure in place to support it and that’s exactly what I mean.” (R. 527).

By directing Preferred Builders to begin work on wall 39 Kevin Burns sent Preferred to build without a structure in place to support the construction, he violated basic principles of constructibility. (R. 527, 762). Importantly, at the time Kevin Burns

directed Preferred Builders to begin working on wall 39, Big D could have instructed Preferred Builders to either: (1) go home for the day; or, (2) go to work installing reinforcing rebar steel on a wall which was not tall enough to supporting structures. (R. 523).

Big D retained the ability to direct and control Preferred Builders workflow, sequence, and timing. (R. 520). In exercising this control, Kevin Burns generally directed Preferred Builders where to go next. (R. 520-21). Preferred Builders employee Todd Jex testified that “Q. You understood Big D’s position to be one where they could issue directions to you and you had to follow them? A. that’s pretty much what I did the whole job.” (R. 514). Any instructions given by Big D to Preferred Builders were considered binding. (R. 515-16). Big D regularly exercised their control over subcontractors work flow, sequence, and timing. (R. 521-22).

Preferred employee Todd Jex understood that Big D superintendent Kevin Burns “was over getting the forms and that up for us, you know, getting things ready, and we would follow behind him and do whatever he needed to do to make a pour.” (R. 522). However, Todd Jex testified regarding wall 39 that they began working wall 39 in order to keep ahead of Big D’s operations. (Id.). Moreover, it was not unusual for Big D to push Preferred Builders rebar work to stay ahead of Big D carpenters. “You know, they was always pushing us to keep ahead and keep ahead.” (R. 522-23).

Kevin Burns gave direction to begin working on wall 39 because that was “where

they would be headed next.” (R. 518-19, 865). According to Preferred employee Todd Jex, Big D “[t]ells us they want this wall built and this wall built. Q. Then you go build it? A. Yes.” (R. 521). Todd Jex went to work on wall 39 in order to “get ahead of [Big D]” because according to Kevin Burns that was “his next plan of attack.” (R. 787, 865-66). Big D and Preferred jointly decided to begin wall 39 ahead of the forms. “[W]e just agreed that would be a good place to go.” (R. 788).

Similar to the control and authority Big D assumed over subcontractor workflow, timing and sequencing, Big D also assumed and retained control over enforcement of safety regulations on site. As general contractor on site Big D remained solely responsible for initiating, maintaining and supervising all safety precautions and programs. (R. 510-11). Under the construction contract Big D “shall take reasonable precautions for the safety of, and shall provide reasonable protection to prevent damage, injury or a loss to: (1) employees on the work and other persons who may be affected thereby.” (Id.). Big D also acknowledged, and it remained uncontroverted in the trial court below, that they, the prime contractor, carried responsibility for subcontractor compliance with OSHA regulations. (R. 512-13). Ultimately, under the contract, “in no case shall the prime contractor be relieved of overall responsibility for compliance with the requirements” regarding safety regulations and enforcement. (R. 512).

Big D routinely undertook to enforce safety regulations. During the course of construction, Big D interfered with subcontractor work on more than 43 separate

occasions. (R. 514). Whenever a subcontractor engaged in work which created an unsafe condition or violated an OSHA standard, Big D asserted its authority. (R. 513-15). Big D actively inserted itself in all manner of subcontractor work minutia, including wearing seat belts while operating equipment and actively checking subcontractor equipment to make sure backup alarms were functioning. (R. 513). Big D intervened in subcontractor trenching work a total of 12 different times. (Id.). On these occasions, Big D actually stopped work and refused subcontractors the ability to continue working where their work failed to comply with OSHA bracing requirements. (R. 515).

Wall 39 collapsed as a result of bracing which violated both OSHA and ANSI regulations. (R. 520). Both Kevin Burns and Dee Jacobsen stood watching as wall 39 was being built had the OSHA and ANSI standards available for their reference. (R. 519-20). Further, Dee Jacobsen agreed that it was his particular job to predict and eliminate hazards, even for the benefit of subcontractors. (R. 512). Big D superintendent Kevin Burns similarly agreed that it was his job to bring subcontractors into compliance with OSHA and ANSI standards. (R. 513). Big D employees and safety personnel agree that, absent the ability to complete work in compliance with ANSI and OSHA, work should be stopped until it can be brought into compliance. (R. 523). Instead, Kevin Burns led Todd Jex to wall 39, a quicker method and sequence. (R. 524). Following the collapse of wall 39 and death of Michael Begay, Big D erected a form for support in order to complete wall 39. (R. 526).

Finally, Kevin Burns had at his disposal the ability to request Preferred Builders conduct a “Hazard Analysis” prior to beginning work on wall 39. Prior to beginning any new or unusual task, Big D could ask subcontractors to perform a “Hazard Analysis.” (R. 516). According to Big D’s safety employee Todd Manley, “what we are looking for in doing a hazard analysis is principal steps, hazards associated with those principal steps, and controls to put in place to reduce, eliminate, or minimize hazards associated with the principal steps of that task.” (R. 516).

Big D superintendents, such as Kevin Burns, understood that a hazard analysis should be conducted whenever something out of the ordinary course of construction was about to be undertaken. (R. 516-17). Wall 39 was considered to be a task “odd to the standard of the job.” (R. 518). Kevin Burns, before directing Preferred Builders to begin work on wall 39, understood wall 39's unique and out of the ordinary nature. (R. 517-19, 649-50). Big D did not request a hazard analysis before sending Preferred to work wall 39. (R. 519). More unfortunate, if Big D had requested a hazard analysis, the deficient method of bracing would most likely have been discovered and remedied. (R. 519, 761).

Don Rigtrup, a compliance safety and health officer with experience working for Utah State Industrial Commission, Division of Occupational Safety and Health, reviewed the facts, documents, and depositions in this case. On completing his review, Mr. Rigtrup concluded that Big D pervasively involved itself in its subcontractor safety. (R. 761). Mr. Rigtrup concluded that Big D’s failure to request a job hazard analysis directly led to

the collapse of wall 39 as the deficiencies in bracing would have been discovered if a hazard analysis had been conducted. (Id.). Mr. Rigtrup further concluded that Kevin Burns failure to review the ANSI and OSHA standards prior to sending Big D to work wall 39 also contributed to the collapse of the wall. (Id.). Mr. Rigtrup also concluded that Kevin Burns should have directed Big D to begin work on walls which did not require additional bracing. (R. 762). Similarly, by deviating from Big D's own concrete pour schedule, Kevin Burns directed Preferred Builders to begin working on a wall which was doomed to fail from the outset, thereby violating principles of constructibility. (Id.). Finally, Mr. Rigtrup relied upon a publication by the American Society of Civil Engineers in concluding that because Big D controlled the equipment (forms), and controlled the sequence (both in the construction of individual walls and the sequence of which wall would be worked on next), Big D remained primarily responsible for maintaining the safety of Preferred Builders employees. (R. 762-63).

SUMMARY OF THE ARGUMENT

Big D's retention of control over workflow and sequencing required that Big D exercise that control with reasonable care. In this case, Big D directed Preferred Builders to begin working on a freestanding rebar wall for which no adequate support existed. Big D could have sent Preferred to work other walls which did not need support. Instead, Big D steered Preferred to work wall 39 because that is where Big D would be headed next. Big D controlled the means by which freestanding rebar walls could be supported,

erection of one side of the concrete form. Big D's direction to begin work on wall 39 without the benefit of adequate support from an adjoining wall or concrete forms violated basic principles of constructibility. In directing Preferred Builders to begin work on wall 39, Big D breached their duty to exercise their retained powers with reasonable care.

Big D also oversaw and controlled on-site safety regulation. Prior to the collapse of wall 39 Big D regularly and frequently interfered with subcontractor work on-site. Whenever Big D superintendents and safety personnel observed a subcontractor performing work in a manner which violated either OSHA, ANSI or general safety standards, Big D would either require the subcontractor to come into compliance or stop the subcontractors work in its entirety until safety compliance could be achieved. In this case, Big D failed to fulfil their continuing duty to ensure and oversee safety compliance where wall 39 collapsed as direct consequence of failure to comply with OSHA and ANSI.

ARGUMENT

Introduction and Background

Originally, the legal doctrine of *respondeat superior* "made negligence of a servant committed in pursuance of his employment the negligence of the master." *Globe Grain & Milling Co. v. Industrial Commission*, 91 P.2d 512, 514 (Utah 1939). The independent contractor exception to the general rule of liability was based on "freedom from control in methods and means." *Id.* In short, an employer should not be responsible where no right

of control over the employee existed because of the inability to control the methods or means of the independent contractor. *Id.*

Globe Grain observed that this exception to *respondeat superior* led to creation of independent contractors in word only, not in spirit. “An old servant who knew his master's wants and desires as to how things should be done might be made an independent contractor in legal form.” *Id.* Similarly, a “cotton picker could be given the aspect of an independent contractor.” *Id.* Accordingly, and in spite of an apparent status as an independent contractor, the court held that “[i]n such cases the principle of *respondeat superior* might still apply.” *Id.*

Again in 1937 Utah courts acknowledged the ability to control as the deciding factor in determining whether an employer may be held liable, despite any alleged independent status. In *Gleason v. Salt Lake City*, a store requested Salt Lake City Fire Department (“SLCFD”) to pump water from an elevator shaft and SLCFD agreed to do so. SLCFD ran a hose across the public sidewalk. Plaintiff tripped on the hose and claimed negligence against the store. The store won on directed verdict at close of Plaintiff's evidence. On appeal, Plaintiff argued that the test to determine if the store remained liable must be whether the store held the “right or power of control of the [SLCFD] employees.” *Gleason v. Salt Lake City*, 94 Utah 1, 74 P.2d 1225, 1228 (Utah 1937). The court agreed that the store could be liable if there existed a right or power of control over the employees. “Plaintiff is correct in stating the law, but there is no

evidence in the record which tends to prove that the company retained the right to control.” *Id.*

Going back to 1914 Utah courts recognized that a general contractor may be held liable where they retain control. Employers of independent contractors remain liable where “the employer reserved or exercised the right to superintend, direct or control the work... where the will and discretion of the contractor as to the time and manner of doing the work or the means and methods of accomplishing the results were subordinate and subject to that of the [general contractor].” *Dayton v. Free*, 46 Utah 277, 148 P. 408, 411 (1914). It is undisputed in this case that Big D retained and actively exercised the right to superintend, direct and control the work of Preferred.

The common and consistent thread throughout all of these cases, and reaffirmed in modern decisions, is that the ability to control the subcontractor remains the key in determining whether liability may be imposed against the employer. “[A] principal employer is subject to liability for injuries arising out of its independent contractor’s work if the employer is actively involved, *or asserts control over*, the manner of performance of the contracted work.” *Thompson v. Jess*, 1999 UT 22, ¶ 18, 979 P.2d 322 (emphasis added). The principle by which the employer may be held liable for injuries to an independent contractor is still referred to as the “Retained Control Doctrine.” *Id.* at ¶ 14.

Big D admittedly controlled the workflow, timing and sequence of Preferred Builders. Big D employees agreed that building walls was a cooperative effort and Big D

frequently provided forms on which to tie off a freestanding rebar wall for support. Big D further controlled and enforced safety on the jobsite, regularly interfering with subcontractor work to the point of prohibiting any further work from being done. Big D's failure to exercise reasonable care in both sequencing and the enforcement of safety regulations led directly to the collapse of wall 39.

The directions and control exerted by Big D left Preferred Builders with no real choice in the bracing method. Big D directed Preferred Builders to work on wall 39. Big D could have sent Preferred Builders home for the day. Big D could have directed Preferred to work on another wall which did not require bracing. Big D knew that no form was available to provide support for wall 39. Big D wanted to keep the rebar work progressing ahead of the formwork in order to save time. So, Big D directed Preferred to begin work on wall 39. Big D created the environment and conditions which led to the collapse. By instructing Preferred where to work next, Big D violated basic principles of constructibility.

In negligence cases, summary judgment is "appropriate only in the most clear-cut case." *Bowen v. Riverton City*, 656 P.2d 434, 436 (Utah 1982)

[W]hen it comes to determining negligence, contributory negligence, and causation, courts are not in such a good position to make a total determination for here enters a prerogative of the jury to make a determination of its own, and that is: Did the conduct of a party measure up to that of the reasonably prudent man, and, if not, was it a proximate cause of the harm done?

Bowen, 656 P.2d at 436-37. At best, Big D's motion for summary judgment raises an

issue regarding apportionment of fault between Big D and Preferred Builders. Further, the uncontested affidavit and testimony of Don Rigtrup raises genuine issues of material fact regarding whether Big D acted reasonably in exercising their retained control. Accordingly, the trial court erred when it granted Big D's motion because Big D must be held to account for their negligent actions leading to the death of Michael Begay. Additionally, in light of the uncontroverted evidence presented regarding Big D's retention and exertion of control, the trial court erred in denying the Plaintiff's motion for summary judgment that, as a matter of law, Big D indeed owed a duty in this case.

I. BIG D'S CONTROL OVER AND PARTICIPATION IN SUBCONTRACTOR WORK REQUIRED THE EXERCISE OF REASONABLE CARE.

When a general contractor retains control over any aspect of a subcontractor's work, they must exercise reasonable care. Under the Restatement of Torts, § 414 “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... caused by his failure to exercise his control with reasonable care.” Restatement (Second) of Torts, § 414 (1969). Importantly, the plain language of § 414 does not limit the application of liability at common law, it expands it. The commentary itself notes that only “some” control is needed before liability will attach. *Id.* at cmt. b. This Court adopted Section 414 in *Thompson*, 1999 UT 22.

The level or degree of control does not need to rise to the same level which an

employer would have over their employees. Rather, “the typical instance in which such an exertion of control might occur is ‘when a principal contractor entrusts a part of the work to subcontractors, but himself or through a foreman superintends the entire job.’” *Thompson*, 1999 UT 22, ¶ 21 (quoting Rest. 2d Torts § 414, cmt. b). Big D not only superintended the entirety of the job, they actually participated in the cooperative effort of building a wall.

Big D controlled and directed the timing and sequencing of subcontractors. Specifically, Big D retained the ability to control and direct Preferred’s work schedule. “Work must comply with project managers schedule.” (R. 520). Kevin Burns was the Big D employee who directed Preferred Builders where to go next. “[Y]ou mean Kevin would be able to direct Preferred as to where to go next? THE WITNESS: Yes.” (Id.). Preferred employee Todd Jex testified: “Q. You understand Big-D's position to be one where they could issue directions to you and you had to follow them? A. That's pretty much what I did the whole job.” (R. 514). Finally, any instructions given by Big D to Preferred Builders were considered binding. (R. 515-16). Not only did Big D control the direction and work sequence of subcontractors, they actually exercised that control over the subcontractors. (R. 521).

Preferred employee Todd Jex understood that Kevin Burns “was over getting the forms and that up for us, you know, getting things ready, and we would follow behind him and do whatever he needed to do to make a pour.” (R. 522). Todd Jex testified

regarding wall 39 specifically that they began working in order to keep ahead of Big D's concrete pour operations. (Id.). Further, Big D pushed Preferred Builders rebar workers to stay ahead of Big D carpenters. "You know, they was always pushing us to keep ahead and keep ahead." (R. 522-23). Before beginning work on wall 39, Big D superintendent Kevin Burns gave guidance to Preferred that wall 39 was 'where they would be headed next' and directed Preferred to begin work on that wall. (R. 518). Superintendent Kevin Burns knew that no forms were available or in place which could support the freestanding rebar. (R. 526).

Prior to the collapse of wall 39, several rebar walls had been erected by using Big D forms for stabilization during the build. (R. 525). However, the faster method of construction is to erect the rebar without benefit of a form for stabilization. By building the rebar ahead of the forms, Big D carpenters are "not waiting on us [Preferred Builders]." (R. 524). Big D superintendents agreed that building walls was a "cooperative effort" between the rebar subcontractor, Preferred, and Big D. (Id.). "Q. Big D and Preferred are essentially working together to build a wall? A. Yes." (R. 525). Following the collapse of wall 39 and death of Michael Begay, Big D erected a form for support in order to complete wall 39. (R. 526).

Big D's "Concrete Pour Schedule" set the sequence for building walls. The schedule called for placing an interior concrete form, Big D's job. (R. 527). Next, Big D's schedule called for installation of rebar, Preferred's task, followed by placement of

another concrete form by Big D. (Id.). “Set interior form and miscellaneous imbeds. Install reinforcing steel. ... Set exterior form and pour.” (Id.). However, Kevin Burns directed Preferred Builders to begin work on wall 39 knowing that no form was available to provide support. (R. 525). Erecting the interior form first provides a stable platform on which to tie off the otherwise freestanding rebar. (R. 524). By deviating from their own schedule, Big D’s superintendent Kevin Burns violated basic principles of constructibility. (R. 527).

Big-D Project Manager Layne Murray testified that failing to follow basic constructibility principles is like trying to build a roof without any walls for support. “Q. [I]t's kind of hard to put a roof up if you don't have something to support it. A. Exactly... You can't have a roof without walls in place or a structure in place to support it, and that's exactly what I mean.” (Id.).

Another method of sequencing the work to create a stable platform on which to build the rebar involved waiting until concrete was poured and cured on an adjacent wall. However, that sequencing remained within the control of Big D, not Preferred Builders. (R. 525-26). By directing the construction of wall 39 next, Big D ignored constructibility principles. According to Plaintiff’s expert Don Rigtrup, by violating these basic principles of constructibility and sequencing, Kevin Burns directed Preferred Builders to begin working on a wall which was doomed to fail from the outset because of inadequate support. (R. 527).

A contractor who retains control over a subcontractor's work is actively participating in that subcontractor's work. "Under the 'active participation' standard, a principal employer is subject to liability for injuries arising out of its independent contractor's work if the employer is actively involved in, or asserts control over, the manner of performance of the contracted work." *Thompson*, 1999 UT 22, ¶ 19. In *Thompson*, this Court relied on *Redinger v. Living, Inc.*, 689 S.W. 2d 415 (Tex. 1985).

In *Redinger*, the general contractor retained control over subcontractors, specifically, "the power to direct the order in which the work was to be done and to forbid the work being done in a dangerous manner." *Id.* at 418. A supervisor for the general contractor directed a subcontractor to go to work in a particular location, leading to the injury of another subcontractor's employee. A jury apportioned fault to *both* the general contractor and the allegedly independent subcontractor. The Texas Supreme Court affirmed because of the evidence that the general contractor "retained the power to direct the order in which the work was done." *Id.*

Here, similarly, there exists an issue of comparative fault between Big D and Preferred Builders. Issues of fault apportionment should be left to the jury, not decided on summary judgment. *Bowen*, 656 P.2d at 436-37. Big D could have sent Preferred Builders home for the day. (R. 523). Big D could have directed Preferred to work on another wall which did not require a form for bracing. Big D knew that no form was available to provide support for wall 39. Big D wanted to keep the rebar work

progressing ahead of the formwork in order to save time. So, Big D directed Preferred to begin work on wall 39. The directions and control exerted by Big D left Preferred Builders with no real choice in the bracing method. Big D created the environment and conditions which led to the collapse. By instructing Preferred where to work next, Big D violated basic principles of constructibility. Accordingly, the trial court erred when it dismissed Big D because Big D failed to exercise, with reasonable care, the control which it retained over the method, sequencing and manner of Preferred Builder's work.

II. BY EXERCISING CONTROL OVER ENFORCEMENT OF SAFETY REGULATIONS, BIG D OWED AN OBLIGATION TO EXERCISE THEIR CONTROL WITH REASONABLE CARE.

General contractors over a construction project remain liable for maintaining the safety of both their own employees as well subcontractor employees. The scope and breadth of the duty created by the OSHA standards regarding general contractors has been set out by the Occupational Safety and Health Review Commission. In the cases of *Anning - Johnson Co.*, OSHRC Docket Nos. 3694 and 4409, 1975-1976 CCH OSHD paragraph 20690 4 BNA OSHC 1193; and *Secretary of Labor v. Dynamic Painting Corp.* (1995, OSHRC ALJ) 17 BNA OSHC 1086 the commission has ruled and reaffirmed that the general contractor may be held in violation of safety regulations, even though it had no employees at the job site, since the general contractor normally has the responsibility and means to assure that other contractors fulfill their obligations with respect to employee safety. "Each employer at a multiemployer worksite, whether in the

construction industry or otherwise has the duty to abate hazardous conditions under its control and to prevent its employees from creating hazards.” *Harvey Workover, Inc.*, OSHRC Docket No. 76-1408, 1979 CCH OSHD Paragraph 23830. Big D’s pervasive control and intervention in subcontractor work practices for safety purposes conclusively demonstrates that Big D remains liable for maintaining the safety of Preferred Builders employees.¹

Under Restatement (Second) of Torts, § 414, where the general contractor superintends the entirety of the job he is:

subject to liability if he fails to prevent the subcontractors from doing even the details of the work in a way unreasonably dangerous to others, if he knows or by the exercise of reasonable care should know that the subcontractors' work is being so done, and has the opportunity to prevent it by exercising the power of control which he has retained in himself.

Restatement (Second) of Torts, § 414, cmt. b.

As general contractor Big D remained “solely responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the” HSEB. (R. 510-11). Big D agreed they “shall take reasonable precautions for the safety

¹ As argued below to the trial court, even absent these well-established principles of general contractor liability, Big D’s involvement in the safety aspects over the course of the project also made Big D liable under either sections 323 ‘Negligent Performance Of Undertaking To Render Services’ or 324A ‘Liability To Third Person For Negligent Performance Of Undertaking’ of the Restatement (Second) of Torts. Under either of these sections Big D owed a duty to exercise reasonable care in overseeing the safety aspects of the HSEB project once they assumed that obligation by their at large and intimate involvement with subcontractor safety.

of, and shall provide reasonable protection to prevent damage, injury or loss to: (1) employees on the Work and other persons who may be affected thereby.” (Id.). Big D further agreed that they “shall comply with all applicable provisions of Federal, Owner and municipal safety laws, rules and regulations as well as building codes to prevent accidents or injury to persons on, about, or adjacent to the premises where the Work is being performed.” (Id.). Big D acknowledged, and it remained uncontroverted in the trial court below, that they, the prime contractor, carried responsibility for subcontractor compliance with OSHA. (R. 512-13). “In no case shall the prime contractor be relieved of overall responsibility for compliance with the requirements of this part for all work to be performed under the contract.” (R. 512).

Not only did Big D accept a contractual duty to oversee, superintend and control safety enforcement on-site, Big D in fact exerted their ability to control subcontractor work with regard to safety regulation. Big D regularly and repeatedly controlled the work of subcontractors whenever those subcontractors created unsafe conditions through their work. Big D asserted its authority in all manner of work minutia, including that subcontractors wear their seatbelts while operating equipment. (R. 513). Big D also checked backup alarms on subcontractor equipment. Subcontractors were “required to meet all OSHA requirements including chaps, back up alarms on equipment.” (Id.). Big D superintendent Kevin Burns removed subcontractors from the job-site even for wearing tennis shoes, as opposed to work boots. (R. 514). Big D safety logs indicate that Big D

controlled or involved itself in the safety of subcontractors on over 43 separate occasions. (R. 514). Preferred employee actually believed that Big D was ultimately looking out for the safety of subcontractors. (R. 801).

Prior to beginning any new or unusual task, Big D retained the ability to require subcontractors perform a “Hazard Analysis” to identify any risks associated with the new task. (R. 516). According to Big D employee Todd Manley: “What we're looking for in doing a hazard analysis is principal steps, hazards associated with those principal steps, and controls to put in place to reduce, eliminate, or minimize the hazards associated with the principal steps of that task.” (Id.). Big D superintendents understood that a hazard analysis should be conducted whenever something out of the ordinary course of construction was undertaken. (R. 516-17). Steve Holt referred to wall 39 as “odd to the standard of the job.” (R. 518). Kevin Burns, prior to directing Preferred Builders to begin work on Wall 39, understood that wall 39 was unique and out of the ordinary. (R. 517-19). Big D did not request a hazard analysis before sending Preferred to work wall 39. (R. 519). Moreover, had Big D requested a hazard analysis, the deficient method of bracing would most likely have been discovered and remedied. (Id.).

Prior to the collapse of wall 39 Big D requested, on at least two occasions, that subcontractors conduct a hazard analysis. (R. 517). Following the collapse of wall 39, Big D requested and received a hazard analysis from Preferred Builders for an unrelated task. (Id.). Big D’s failure to request a job hazard analysis prior to beginning work on

the unusual and unique wall number 39 violated their own rules. (R. 519). Big D's pervasive involvement in subcontractor safety mandated that, at the very least, they comply with their own rules and request a job hazard analysis prior to beginning work on the unique and unusual wall number 39. (Id.).

Finally, Big D intervened when subcontractors violated OSHA standards while engaging in trenching operations. For the time frame June 18, 2003 through April 14, 2004, Big D interfered with a subcontractor's trenching work a total of 12 different times. (R. 513). On these occasions, Big D stopped work when subcontractors worked in a trench in a manner that violated OSHA standards. Superintendents Dee Jacobson and Layne Murray, on separate occasions, each stopped subcontractors from working where the trench failed to comply with OSHA bracing requirements. (R. 515).

Wall 39 collapsed as a result of bracing which violated both OSHA and ANSI regulations. (R. 520). In *Tallman v. City of Hurricane*, 1999 UT 55, ¶ 23 985 P.2d 892 this Court held that “[v]iolations of legislative or regulatory standards [OSHA] adopted by this court constitute negligence.” Both Burns and Jacobson had available for their reference the OSHA and ANSI standards. (R. 519-20). Both Jacobson and Burns stood by and watched as Preferred worked wall 39, and were watching just prior to collapse. (R. 519, 865). Jacobson and Burns failed to exercise their control over safety with reasonable care. Big D superintendent Dee Jacobson agreed that it was his particular job to predict and eliminate hazards, even for the benefit of subcontractors. (R. 512). Big D

superintendent Kevin Burns similarly agreed that it was his particular job to bring subcontractors into compliance with OSHA and ANSI standards. (R. 513). Yet, neither undertook any steps to correct the situation arising as wall 39 was built.

Big D employees and safety personnel agree that, absent the ability to complete work in compliance with ANSI and OSHA, work should be stopped until it can be brought into compliance. (R. 523). Because no form was available to provide stability and no other walls were available which could be used as tie off support, wall 39 was not erected in a manner which complied with ANSI and OSHA.

Big D superintendents removed subcontractors for wearing tennis shoes as a safety hazard. Big D owed a duty to act with reasonable care in exercising their retained control over safety. Failing to reference the ANSI and OSHA standards prior to sending Preferred to work wall 39, and failing to intervene to correct the violation of those standards represents a failure to exercise reasonable care. Accordingly, summary judgment was appropriate, if at all, in favor of Plaintiff with a finding that Big D did in fact breach their duty, thus leaving only the issues of comparative fault, causation and damages for the jury to decide.


CONCLUSION

Big D's pervasive interference with subcontractor workflow, sequencing, methods and safety demonstrates retained control in this case. The degree and amount of control exerted by Big D led to creation of independent contractors in word only. The

subcontractors knew their master's wants and desires and were bound to work in accordance with the master's direction, including how and when things should be done. In such cases, the exception which shields a general contractor from liability to the subcontractor employees does not apply because the general contractor retained control sufficiently for liability to attach, even though the control does not rise to a level of employer/employee.

Big D would tell Preferred which wall to build and Preferred would go build it. On March 1, 2004, Big D told Preferred wall 39 was the direction to take because that is where Big D was headed next. Big D could have sent Preferred home for the day. Big D could have sent Preferred to work a wall which did not require additional bracing. Big D ignored OSHA and ANSI requirements, choosing instead to advance reinforcing steel work ahead of their carpenter work, sacrificing safety for speed. Big D's failure to exercise their retained control with reasonable care created the situation which killed Michael Begay. Accordingly, Appellant Marlene Begaye respectfully requests that this Court reverse the trial court's grant of summary judgment in favor of Big D and remand with directions that Big D be found to owe a duty as a matter of law based on their pervasive interference with subcontractor work.

DATED this 6th day of December, 2006.

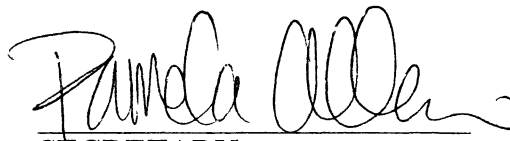


PETER W. SUMMERILL
Attorney for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that on this 6th day of December, 2006, I mailed a true and correct copy of the above and foregoing Brief of Appellant, postage prepaid to:

John R. Lund
Snow, Christensen & Martineau
10 Exchange Place, Eleventh Floor
Salt Lake City, UT 84145


SECRETARY

ADDENDUM 1

**TT-115 University of Utah Health Sciences Building
Concrete Foundation / Shear Wall Pour Description**

East Foundation Walls (poured full height)

Pour E-1	Cl's. "A-2" to "A-3.5"
Pour E-2	Cl's. "A-3.5" to "A-5.25"
Pour E-3	Cl's. "A-5.25" to "A-5.75"
Pour E-4	Cl's. "B-2" to "B.6-2"
Pour E-5	Cl's. "A-5.75" to "A-7.5"
Pour E-6	Cl's. "A-7.5" to "A-9.5"
Pour E-7	Cl's. "A-9.5" to "A-11.5"
Pour E-8	Cl's. "A-11.5" to "A-13.5"
Pour E-9	Cl's. "A-13.5" to "A-15.5"
Pour E-10	Cl's. "A-15.5" to "A-17"

West Foundation Walls

Pour W-1	Cl's. "C-2" to "D.7-2"
Pour W-2	Cl's. "D.7-2" to "E-3"
Pour W-3	Cl's. "E-3" to "E-5.5"
Pour W-4	Cl's. "E-5.5" to "E-7.5"
Pour W-5	Cl's. "E-7.5" to "E-10"
Pour W-6	Cl's. "E-10" to "F-11.5"
Pour W-7	Cl's. "F-11.5" to "F-13"
Pour W-7A	Cl's. "E-14" to "F-14"
Pour W-8	Cl's. "E-14" to "E-16.5"
Pour W-9	Cl's. "E-16.5" to "D.7-17"
Pour W-9A	Cl's. "C.75-17" to "C-17"
Area "A"	Cl's. "A" to "E" & Cl's. "1" to "2" (approx. 7 pours based on best formwork utilization)
Area "B"	Cl's. "A" to "C" & Cl's. "17" to "20" (approx. 7 pours based on best formwork utilization)

Shear Walls

Pour S-1	Cl's. "B.6-2" to "C-2" (poured full height)
Pour S-2	Cl's. "A-2" to "B-2" (poured full height)
Pour S-3	Cl's. "C-4" to "C-5" (poured monolithic w/ S-4)
Pour S-4	Cl's. "B.6-5" to "C-5" (poured monolithic w/ S-5)
Pour S-5	Cl's. "A-5" to "B-5"
Pour S-6	Cl's. "A-7" to "B-7"
Pour S-7	Cl's. "B.6-7" to "C-7"
Pour S-8	Cl's. "C-9" to "C-10"
Pour S-9	Cl's. "B.6-11" to "C-11"
Pour S-10	Cl's. "D.7-10" to "E-10"
Pour S-11	Cl's. "C-12" to "C-13"
Pour S-12	Cl's. "A-11" to "B-11"
Pour S-13	Cl's. "F-13" to "F-14"
Pour S-14	Cl's. "D.7-14" to "E-14"
Pour S-15	Cl's. "B.6-17" to "C-17" (poured full height)
Pour S-16	Cl's. "A-17" to "B-17" (poured full height)
Pour S-17	Cl's. "A-14" to "B-14"
Pour S-18	Cl's. "B.6-14" to "C-14"
Pour S-19	Cl's. "C-15" to "C-16"

ADDENDUM 2

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY STATE OF UTAH	
MARLENE BEGAYE, individually and on behalf of the heirs of Michael Begay, Plaintiffs, vs. BIG D CONSTRUCTION CORP., and, DOES I through V, Defendants.	AFFIDAVIT OF DON L. RIGTRUP Civil No: 040921248 Judge Robert Hilder

STATE OF UTAH)
 :ss
 County of)

Don L. Rigtrup being first duly sworn upon his oath, deposes and states as follows:

Don L. Rigtrup, being duly sworn, hereby states and deposes as follows:

1. I have been retained as an expert by the plaintiff in the above captioned matter.
2. I am a Safety Engineer at IM Flash Technologies, Inc. (formerly Micron Technology, Inc.) in Utah County. I am a workplace safety expert and have been qualified as such in both the state and federal courts of Utah. See Attached C.V.
3. The opinions expressed in this affidavit are my own.

4. I have had the opportunity to review the written and visual record, including (but not limited to) depositions, exhibits, photographs, standards, codes, and standards of care.

5. Based on my review of these documents, I provide the following opinions and the basis for such opinions:

A. FIRST OPINION: The safety logs provided by Big-D clearly show a pervasive involvement in its sub-contractor's safety. Big-D controlled or involved itself in the safety of subcontractors on over 43 separate occasions. (See, Big-D Safety Logs and Big-D Safety Logs Supplemental)

B. SECOND OPINION: Big-D's failed to request a job hazard analysis prior to beginning work on the unusual and unique wall number 39 violated their own rules. Wall number 39 was both free standing (not connected to existing structure) and an "inside out" design (the vertical or supporting reinforcing steel was smaller than the horizontal reinforcing steel).

C. THIRD OPINION: Performing the steps involved in a job hazard analysis prior to the construction of wall number 39 would have most probably prevented the overturning of the wall which caused the death of Mr. Michael Begay.

D. FOURTH OPINION: Although Kevin Burns had available to him both the ANSI and OSHA standards, his failure to reference and comply with the requirements of the standards prior to giving permission to begin work on wall 39 further compounded the unreasonable risk that wall 39 would collapse. (See, deposition Kevin Burns 55:18, 57:13)

E. FIFTH OPINION: At the time that Kevin Burns permitted Preferred Builders to begin work on wall 39, a number of other incomplete rebar walls which did not require bracing were available for rebar work. Thomas Walters, confirmed this in his deposition. Any wall from “Line 17 to Line C” could have been built on the day Mr. Begaye was killed. There was not a need to work on the “inside out” wall without a supporting form. (See, deposition Tomas Walters 16:16, 29:17)

F. SIXTH OPINION: A common definition of constructability is: “The optimum use of the construction knowledge and experience in planning, design, engineering, procurement, and field operations, to achieve overall project objectives.” Safety is a vital “project objective”. By directing Preferred builders to begin work on wall number 39, Kevin Burns failed to follow basic principals of constructability e.g. Planning (1) There were no forms available to support wall number 39 at the time the Preferred Builders crew began to work on the wall. (2) In Big-D’s “Concrete Pour Schedule” the sequence is: Set interior form and miscellaneous imbeds. Install reinforcing steel. ... Set exterior form and pour. If the reinforcing steel on wall number 39 had been supported by an interior form – it would not have fallen. By violating these basic principles of constructability and sequencing, Kevin Burns directed Preferred Builders to begin working on a wall which was doomed to fail from the outset because of inadequate support.

G. SEVENTH OPINION: The American Society of Civil Engineers (ASCE) Policy Statement #350 – Construction Site Safety states: (1) Contractors have responsibility for: Maintaining the safety of their employees, their subcontractors’

employees, and for others in their work area, based on the contractors' control of workers, equipment, methods, techniques, sequence of work, and schedule; and (2) ASCE believes that site safety responsibility should be assigned to the general contractor, construction manager, or other organization with the required expertise and resources, who is in control of the project site. The ASCE PS #350 describes the role Big-D took on this project. They controlled the sub-contractors (Preferred Builders), they controlled the equipment (Forms), they controlled the sequence (both in the construction of individual walls and the sequence of which wall would be worked on next). (See Attachment – ASCE Policy Statement #350)

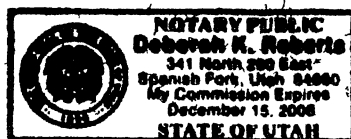
I base these opinions on a review of the written and visual record, recognized standards, codes, and “standards of care”; and many years of employment as a safety professional and OSHA Compliance Officer. I reserve the right to add to or alter any opinions should more information become available.


DATED this 18th day of May, 2006.


DON L. RIGTRUP
Affiant

Subscribed and sworn to before me this 18th day of May,

2006.




NOTARY PUBLIC
Residing at: 2136 N 1200E Cabin UTAH
My Commission Expires: 12-15-08

ADDENDUM 3

DESCRIPTION OF OPERATIONS:

This job site is a new building for the University of Utah Health Sciences Department. Big D Construction is the general contractor with an on-site job office/trailer, and on-site supervision of the construction activities. Preferred Builders is a specialty contractor hired to assemble/build/erect the reinforcing bar for structural walls and columns on the job site.

ACCIDENT DESCRIPTION:

Four employees finished up with the work they were doing and were looking for another project to get started. Due to snow removal and other activities in the immediate vicinity of the walls they had been working on, they were not able to work on the next scheduled wall. They conferred with Kevin Burns of Big D Construction, obtained permission to start work on the southern-most wall of the building (reported to be the next wall section to be built after the area they had been working, and on the opposite end of the construction site from where they had been working). This wall will be a basement wall with dirt backfill against it. The building area inside this wall will be a large open mechanical area housing an emergency generator system for the building. The building plans specify that the wall is to be built as a "Type D" (built with the horizontal rebar on the outside of the vertical rebar). The wall sits on a footing with #6 rebar on 12 inch centers projecting out of the footing. The vertical rebar is specified as #6 rebar attached to each, with the inside face 24 ft tall. The workers decided to build the inside face of the wall first, then build the outside face and attach it to the inside as they worked their way up. The horizontal bars are #9 rebar. For the first 12 feet these are installed on 6 inch centers (total of 24), then an additional seven #9's on 12" centers. All of these horizontal bars are specified as 33 ft long. Above this, the rebar is specified to be 31 ft 8 inches long, with an additional four #9's on 12 inch centers. The workers were working from the north face of the wall. At the time of the accident all 24 of the #9 bars on 24 inch centers had been installed, the first 3 of the #9 bars on 12 inch centers had been installed. The workers had installed six supports made from 2" X 4" boards at about equal intervals vertically along the wall to provide some vertical stabilization (bottom 2 X 4's were 16 feet long, with shorter 2 X 4's spliced to them, with overlap of several feet, to reach the top of the vertical rebar). The support on the east end of the wall had two 2" X 4" boards together for the full vertical height, to provide additional support. At the east end, the workers had also installed a 16 foot 2" X 4' board diagonally at approximately a 45 degree angle on the north side of the wall, to add stability (worker interviews indicate that this diagonal brace had been installed just before the accident, because the worker on that end had felt that the wall was swaying too much). The wall had been listing a little toward the west. The workers had installed a come-a-long on the wall, to pull it horizontally back approximately plumb vertically from east to west (not intended to support the wall north-south). The come-a-long was attached to a piece of rebar connected to bars sticking out of the foundation about the middle of the wall, with the other end attached to the wall assembly 5 bars horizontally to the west on the 2nd bar up from the base. The workers had come down off the wall, and picked up the next piece of #9 rebar to be installed (a 31 ft 8 inch piece, to be placed 5 ft above the top most bar they had installed). They climbed up to the work position, with the bar resting across their arms as they climbed (a common industry practice). The workers were positioned on the wall with one on the western-most 2" X 4', one on the eastern most, and the other two on the 2" X 4" boards closest to the middle of the wall. When they reached the work position, they connected their positioning chains around the 2' X 4" board (and the vertical #6 rebar the board was parallel to), then rested the rebar there. They then tied the 2" by 4" board to the vertical rebar. They proceeded to lift the piece of rebar into place, and were nearly completed tying it in when the accident happened. The next step would have been for two of the workers to move to the other two 2" X 4" vertical boards to tie them in to the vertical rebar (the 2" X 4" vertical supports were tied in up to the bar the workers were standing on). At that moment, the wall became overbalanced on the west end, with the wall starting to fall over. The diagonal brace on the east end held as the wall started fall. When it snapped, the east end of the wall whipped to the ground, where the worker on that end struck a stack of building materials and was fatally injured. The other three workers all ended up under the mat, but between obstructions. The center of the rebar mat was held up by a large dirt pile (covered in snow) with an empty 55 gallon drum sitting on it (likely acting to decelerate the three workers who received only minor bruises).

Chlos

Kevin Burns and Dee Jacobsen of Big D Construction were standing on the dirt access ramp to the work area, immediately west of the wall when it fell. They had watched the workers climb up the wall with the last piece of rebar. Both stated that they had not seen any problem with the work/the wall prior to the accident. Kevin Burns had been in and out of the area throughout the work day, and had noted the workers using their fall protection gear and had not noted any stability problem with the wall. The workers confirmed that they had not conferred with anyone about guying or bracing the wall. The workers were positioned on the wall from west to east as follows: Tony Whitaker, Todd Jex, Tim Elliott and Mike Begay.

An engineering review of the building structural plans and the rebar wall as built at the time of the accident was conducted by Dr. Warren K. Lucas, PhD, PE. The results of that review are attached. The wall, as it was at the time of the accident, was unstable and prone to collapse. Two feasible methods to provide stability during erection are discussed, including horizontal bracing perpendicular to the face of the wall, or building both faces of the wall simultaneously. During the investigation, some individuals who were interviewed speculated that if the rebar in the foundation and the vertical rebar attached thereto were #9 rebar, it would have provided better stability of the wall during erection. Although the wall would have been more stable, the review found that the wall would still have been outside of good engineering practice, and would have been unstable and prone to potential collapse.

WALKAROUND:

03/02/04 We viewed the site of the accident from the ramp to the west of the wall that fell. The rebar on the south side of where the rebar assembly fell did not have safety caps in place. Big D employees were able to find caps they were installed before we went down into the construction site to look at the wall and 2 X 4's that had been used to support it. We walked around the site of the accident. After viewing the accident scene, we looked at the remainder of the stack of lumber available for use as needed on the site (I was told the 2 X 4 braces used on the wall came from this stack).

03/05/04 I obtained a copy of the police report and looked at the photos taken by the police at the scene. It was apparent from those photos that the job site had not been altered prior to my initial site inspection. The photos did not provide any additional evidence as to the cause of the accident. In the afternoon, I returned to the job site and interviewed several employees.

03/11/04 I met with Steve Holt at our office.

03/12/04 I returned to the job site to conduct additional employee interviews.

04/08/04 I returned to the job site to conduct an additional employee interview.

04/09/04 I returned to the job site to interview Layne Murray.

05/06/04 I met with Dr. Warren K. Lucas, PhD, PE, provided him with copies of plans for the wall and a copy of the video of the walkaround portion of the inspection.

05/19/04 Dr. Lucas provided a copy of his findings (see attached).

CLOSING CONFERENCE:

A closing conference was held with Don Holt, President, Randy Thurber, Vice President, Brad Holt, Controller, Steve Holt, Vice President on 5/21/04 at the Preferred Steel shop offices. Todd Manley of Big D Construction also attended the closing conference at the invitation of Preferred Builders. We discussed the accident, the conditions surrounding the accident, and the apparent violative condition found during the inspection. Methods of abatement and abatement dates were discussed. All standard closing conference topics were covered.