

ILLINOIS CIVIL DISCOVERY PRACTICE 2003

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IICLE

This handbook revises and replaces the 1996 edition of the same title and its 1999 supplement.

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Special Considerations in a Construction Injury Case

CURT N. RODIN

Anesi, Ozmon, Rodin, Novak & Kohen, Ltd.
Chicago

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Special Considerations in a Construction Injury Case

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I. [13.1] INTRODUCTION

A construction negligence case is grounded in common law negligence principles. However, Illinois has adopted §§343 and 414 of the RESTATEMENT (SECOND) OF TORTS (1965). See *Genaust v. Illinois Power Co.*, 62 Ill.2d 456, 343 N.E.2d 465 (1976); *Weber v. Northern Illinois Gas Co.*, 10 Ill.App.3d 625, 295 N.E.2d 41 (1st Dist. 1973). Section 414 of the RESTATEMENT is the strongest theory under which to pursue a construction negligence case and in many ways is analogous to the repealed Structural Work Act. One needs to establish similar elements under a construction negligence theory as would be required under a Structural Work Act theory. In essence, the relevant inquiry revolves around the term “control.” Control over the safety of the work by the defendant gives rise to a duty to exercise that control with ordinary care. *Bokodi v. Foster Wheeler Robbins, Inc.*, 312 Ill.App.3d 1051, 728 N.E.2d 726, 245 Ill.Dec. 644, (1st Dist. 2000).

The purpose of this chapter is to suggest discovery vehicles helpful in proving a construction negligence case. For a more thorough discussion of the law of construction negligence, the reader is directed to Bruce M. Kohen, Ch. 7, *Construction Negligence*, ILLINOIS CAUSES OF ACTION — ELEMENTS, FORMS & WINNING TIPS: TORT ACTIONS (Ill. Inst. for CLE, 2002).

II. [13.2] INTERROGATORIES

In January 1996, the Illinois Supreme Court approved a number of changes regarding discovery rules. According to Supreme Court Rule 213(c), as modified, a party may serve no more than 30 interrogatories, including subparts, without leave of court. Interrogatories, therefore, must be chosen very carefully.

In many construction injury cases, the cast of characters may be very large. The entities involved may include an owner, an architect, an engineer, and numerous contractors and subcontractors engaged on one jobsite. Therefore, one primary purpose of interrogatories is to ascertain the identity of those entities most closely involved with the work in which the plaintiff was engaged at the time of his or her injury. Therefore, any set of interrogatories in a construction injury case must seek to identify the owner of the property on which the injury occurred, the general contractor, the architect, and the engineers, as well as the names of any and all contractors working in the area near the injury site. In addition, interrogatories must make standard requests found in any civil case. However, they must be carefully worded and selectively used given the limitations imposed by the Supreme Court.

The following suggested interrogatories are designed to elicit initial information necessary to begin discovery in a construction injury case. The number is limited to comply with the recently amended Supreme Court rules governing discovery.

INTERROGATORIES

DEMAND IS HEREBY MADE UPON YOU, pursuant to the provisions of Rule 213 of the Supreme Court of Illinois, to answer fully in writing and under oath within 28 days of service hereof on you the following Interrogatories propounded by the Plaintiff:

1. State the names, addresses, and telephone numbers of all persons you believe to have been present at the scene of the occurrence immediately before, at the time of, or immediately subsequent to the occurrence referred to in the Complaint, and if any are employees of your company, state their present positions.

2. State the names, addresses, and telephone numbers, if known, of all supervisory personnel whom you employed at the time and place of the occurrence and for 30 days prior thereto as described in the Complaint.

3. State the names and all known addresses of each and every contractor, whether an individual, corporation, or other form of entity and whether performing by virtue of a written or oral contract, on the premises surrounding the area where the occurrence took place on the date of the occurrence and for 30 days prior thereto.

4. State the name and all known addresses of the general contractor on the jobsite at the time and place described in the Complaint.

5. State the name and address of every architectural or engineering firm engaged to perform any service on this project.

6. State the name and address of any person making an inspection of the area where the Plaintiff was injured within a ten-day period of time prior and subsequent to the occurrence.

7. State the name and address of any person who took any statements from the Plaintiff or any witness regarding the occurrence.

8. Identify any information you have showing that the Plaintiff was treated for any physical or mental condition other than personal injury within the last five years.

9. Identify any information you have showing that the Plaintiff has suffered any personal injury or serious illness prior or subsequent to this occurrence.

10. Identify any other lawsuits of any kind for personal injury filed by the Plaintiff of which you are aware.

11. State with whom and the date on which you entered into any contracts for the purpose of repair, maintenance, or new construction of the property described in the Complaint.

12. State the name and address of the owner of the premises as described in the Complaint.

13. State the names and addresses of every lay witness who will testify at trial, identifying the specific subject matter of each lay witness' testimony.

14. State the names and addresses of every independent expert witness who will testify at trial, identifying the specific subject matter of each independent expert witness' testimony and the opinions you expect to elicit from each witness.

15. State the name and address of every controlled expert witness who will testify at trial and with respect to each,

- a. state the subject matter on which the witness is expected to testify;**
- b. state the conclusions and opinions of the witness and the bases therefor;**
- c. state the qualifications of the witness; and**
- d. provide all reports prepared by the witness.**

You are hereby requested to seasonably supplement or amend any prior answer or response whenever new or additional information subsequently becomes known, in compliance with Supreme Court Rule 213(i).

III. [13.3] PRODUCTION REQUESTS

The amendments by the Supreme Court limiting the number of interrogatories that may be asked makes a thorough and comprehensive production request all the more important. Although the number of interrogatories a party may issue is limited, there is no limitation on the number of requests to produce a party may make.

A detailed understanding of the contractual documents for the jobsite involved is essential for the proper preparation of any construction injury case. Depending on the complexity of the construction involved, the amount of documents to be produced may be quite voluminous. Although the contract itself may be nothing more than a simple purchase order, it will invariably allude to plans, specifications, general conditions, special conditions, bids, and proposals. The average "contract" may include not only the contract itself, but also any and all documents that have become part of the complete set of contractual documents for the particular jobsite.

Very often, the contractual obligations of a party involved in a construction project may encompass more than the party's actual physical involvement on the jobsite. The policy reflected in numerous cases is that the right and duty to control the work under RESTATEMENT §414 as defined in *Weber v. Northern Illinois Gas Co.*, 10 Ill.App.3d 625, 295 N.E.2d 41 (1st Dist. 1973), is as important as the actual control of the work on the jobsite. As a logical concomitant, contractual duties and obligations must be thoroughly explored.

Finally, the production request should concentrate on all employment records, time sheets, and progress reports to reveal and verify the names of all individuals who may be involved in the particular occurrence that resulted in the plaintiff's injury. In addition, with the importance that has been placed on safety on the jobsite, any and all documents that relate to job safety should be requested. For example, safety manuals, standards, minutes of safety meetings, minutes of progress meetings, inspection reports, and job logs for the particular job involved should all be secured.

The following suggested request to produce is designed to identify all relevant documents and to ascertain their location in order to assist in identifying relevant parties to a construction injury case. The request to produce also seeks documents that were previously commonly sought through interrogatories in order to comply with the stricter discovery rules.

PRODUCTION REQUEST

Pursuant to Supreme Court Rule 214, you are hereby requested to produce the requested documents as they are kept in the usual course of business or organized and labeled to correspond with the categories in the request and all retrievable information in computer storage in printed form at the office of the attorneys for Plaintiff within 28 days (together with any transcripts, reports, memoranda, or recordings purporting to reflect but not to evaluate these documents):

- 1. any statement a party has given to some person or entity other than [his] [her] attorney or insurer, to be produced by the person or entity to whom the statement was given or transferred;**
- 2. the statement of any other witness, whether signed or unsigned, in word-for-word fashion or in summarized fashion, relating to the issues of liability, the issue of damages, or an issue of impeachment, except parties to this action and other participants who may yet be sued because of the occurrence alleged;**
- 3. all photographs, slides, or motion pictures taken subsequent to the alleged occurrence of Plaintiff, of any item involved, or of the scene of the alleged occurrence;**
- 4. all data, medical reports, hospital records, and letters of correspondence from or to all physicians, surgeons, hospitals, clinics, or other medical personnel or medical institutions concerning the health and physical and mental condition of Plaintiff, inter alia, injuries sustained in other accidents, whether prior or subsequent to the alleged occurrence.**
- 5. all names, addresses, and telephone numbers of any witnesses who claim to have relevant knowledge regarding the health and physical and mental condition of Plaintiff;**
- 6. any and all employment records, payroll records, and medical records of Plaintiff in the possession of any party to this lawsuit;**

7. any and all accident reports, investigative reports, and inspection reports pertaining to the injuries sustained by any party to this lawsuit, except those documents that fall under the protection of privilege or work product, containing factual material concerning the date of the occurrence that is the subject matter of this lawsuit;
8. any and all insurance policies and/or agreements, both primary and excess, and any and all insurance certificates in force and effect for a 90-day period of time prior to the date of the occurrence and for a 30-day period of time subsequent thereto;
9. all activity and/or surveillance reports relating to Plaintiff;
10. any and all contract documents between the parties to this lawsuit, and each of them, and/or with any other entity, and/or with Plaintiff's employer, including but not limited to (a) notices to bidders; (b) special instructions to bidders; (c) general instructions to bidders; (d) proposals; (e) special conditions of contract; (f) general conditions of contract; (g) contract specifications, including project and general specifications; (h) contract drawings, including all drawings listed or described in the special conditions of the contract; (i) field drawings; (j) bonds; (k) insurance certificates and policies referred to in the foregoing documents; (l) any and all other documents included or referred to in the foregoing documents; and (m) any and all addenda to the foregoing documents in effect for a 90-day period of time prior to and for a 30-day period of time subsequent to the occurrence that is the subject matter of this lawsuit;
11. any and all time sheets, payroll records, and other records showing names and addresses of all employees working for any party to this lawsuit on the date of the occurrence and for a 30-day period of time prior thereto;
12. any and all work progress reports, job logs, and minutes of safety meetings for a 90-day period of time prior to the date of the occurrence that is the subject matter of this lawsuit and for a 30-day period of time subsequent thereto;
13. any and all daily reports by any personnel of any party to this lawsuit for a 90-day period of time prior to the date of the occurrence that is the subject matter of this lawsuit and for a 30-day period of time subsequent thereto;
14. any and all change orders for a 90-day period of time prior to the date of the occurrence that is the subject matter of this lawsuit and for a 30-day period of time subsequent thereto; and
15. any and all safety manuals in force and effect on the date of the occurrence that is the subject matter of this lawsuit and for a 90-day period of time subsequent thereto.

IV. [13.4] DEPOSITIONS

Before taking any deposition, the practitioner should first have a working knowledge of all contractual documents for the jobsite. As mentioned in §13.3, this package should include the specifications, the general conditions, the special conditions, and any other documents that may make up the total contract. In addition, it is necessary to be thoroughly familiar with the operation involved in the plaintiff's injury, *e.g.*, what kind of crane was involved, what the crane was doing, who was giving signals, etc. It is often necessary for the practitioner to become an expert on a particular construction practice in order to prepare and try a successful construction injury case. There is no substitute for a thorough discussion of the construction practice with an expert in the field.

A seldom used but nonetheless productive discovery device in a construction injury case is a rider attached to the notice of deposition. Of course, this rider will often repeat many items contained in the production request. However, because it is not uncommon for a deposition to proceed before the time that a party has fully complied with production request, the addition of a rider to the deposition notice will at least produce requested items contemporaneously with the deposition. A sample deposition rider that includes the suggested items is as follows:

DEPOSITION RIDER

The deponent is required to bring the following:

- 1. any and all contracts entered into by and between the parties pertaining to the erection and construction of the building located at the construction site;**
- 2. any and all plans and specifications, including general and special conditions and specifications pertaining to the erection and construction on the premises described above;**
- 3. any and all change orders, progress reports, and time sheets of all employees for 90 days prior to the date of the occurrence and for 30 days subsequent to the occurrence;**
- 4. any and all corrections to work, field memoranda, and any other notes pertaining to the erection and construction on the premises described above; and**
- 5. any and all accident reports regarding the injuries sustained by the Plaintiff on the date of the occurrence.**

The purpose of the deposition, of course, is to establish those items necessary to prove a construction injury case. In addition, the deposition also provides an opportunity to discover any conduct by the plaintiff that may have contributed to his or her injuries, as this is relevant inquiry under a negligence theory. In addition, thorough inquiry should be made regarding any other entities not named, but who may have contributed to or caused the occurrence, to ensure all potential defendants have been named. Note that in most cases, there is a four-year statute of limitations in cases based on RESTATEMENT §414. A suggested form of questions for a construction injury deposition follows.

CONSTRUCTION INJURY DEPOSITION CHECKLIST

Case _____ v. _____

Scene _____ D/A _____

Deponent _____

Instrumentality involved _____

Name _____ D/O/B _____

Address _____

Social Security # _____

Married _____ Spouse _____

Children _____

Education: _____ 8th Grade _____

High School _____

College _____

Degree _____

Graduate Study _____

Occupation now? _____

On d/a? _____

Title on d/a? _____

How long? _____

Prior job experience? _____

Union? _____

Trainee? _____ When? _____

How long in the trade? _____

Other jobs before construction? _____

Corporate employer: _____

Always been a corporation? _____

Principal offices? _____

Do you hold financial interest in corporation? _____

Number of shares? _____ **When acquired?** _____

Officers' names? _____

Other shareholders? _____

Contracts: _____

General? _____

Subcontracts? _____

Number of subcontractors? _____

Other prime contracts? _____

What was being constructed? _____

Where? _____

Owner? _____

Who first directed you to work there? _____

When? _____

You were referred to this job in what capacity? _____

How did you first become aware you or your company would be working at the jobsite?

Your immediate supervisor on and before d/a? _____

You reported to? _____

You were in charge of how many workers on d/a? _____

Who prepared plans and specs? _____

Drawings? _____

With whom did you coordinate work? _____

With whom did you review plans and specs? _____

Construction trailers on site? _____

Whose? _____

Where located? _____

Who did you meet there? _____

How often? _____

Schedule work there? _____

Discuss drawings and plans there? _____

Other personnel on site: _____

Supervisors? _____

Foremen? _____

Other personnel? _____

Owner? _____

Contractors, executives? _____

Did anyone else contact you regarding plans? _____

Regarding specs? _____

When? _____ Where? _____

How long to prepare plans and specs? _____

Plans and specs submitted to whom for approval? _____

Where are plans now? _____

Specs? _____

Drawings? _____

When did your work begin at the jobsite? _____

Presence on jobsite: _____

When were you the first there? _____

Daily? _____

How often? _____

Progress meetings? _____

Held? _____

Where? _____

Regularly scheduled? _____

Who attended? _____

Whose decision to meet? _____

Minutes kept? _____

Progress reports made? _____

By whom? _____

Where are progress reports now? _____

Progress photos? _____

By whom? _____

To whom did they go? _____

Any other reports, written or oral? _____

How long to build? _____

Did you ever see work done: _____

Improperly? _____

Unsafely? _____

What would you do? _____

Advise contractors to work safely? _____

Safety meetings? _____

Where? _____

Regular? _____

Who attended? _____

Who arranged? _____

Correction orders? _____

Change orders? _____

In writing? _____

Initiated by? _____

Approved by? _____

Total number of changes on this job? _____

Your contract duties and responsibilities: _____

You were hired to? _____

Did you? _____

Right to stop work? _____

Refuse materials? _____

Inspect materials? _____

Schedule work? _____

If you felt there was an unsafe job condition caused by another contractor, what would you do? _____

Scaffolding:

Did you observe scaffolding on this job? _____

Any occasion to complain about scaffolding? _____

When? _____

Unsafe conditions remedied? _____

Any changes after plaintiff's injury? _____

Date of occurrence:

Present on jobsite? _____

Arrived when? _____

Witness injury? _____

When arrived at scene of injury? _____

Plaintiff there? _____

Observe injuries? _____

Talk to plaintiff? _____

Other conversations? _____

Make any report of injury? _____

Any knowledge that the plaintiff caused or contributed to this occurrence? _____

What acts? _____

Did you observe them? _____

When? _____

Who told you? _____

How did they contribute to this occurrence? _____

Are you aware of any other persons or entities not named who contributed to or caused this occurrence? _____

How? _____

When? _____

How do you know? _____

What acts did they do? _____

Pass by scene that day? _____

Before injury? _____

Interested in:

Manner of work being done? _____

Completed work? _____

Done in professional manner? _____

Safety? _____

Watching over job? _____

Taking care of job? _____

Work done to your approval? _____

Of course, this outline is not intended to limit the questioning in a construction negligence deposition. It is designed to cover only the essential elements. It is the responsibility of the interrogator to elaborate on the particular responses that will best enable him or her to achieve the specific goals of any discovery deposition, to find out as much as he or she can about a case, and to extract from the defendant admissions that will prove to be important at the time of trial.

V. [13.5] ILLINOIS SUPREME COURT RULE 237

When all of the discovery is finished (*i.e.*, interrogatories and requests to produce pursuant to S.Ct. Rule 214), the items, documents, and people to be produced at trial should be known. The production of these documents and people at trial is essential to proving your case. Supreme Court Rule 237 provides the opportunity to have these documents produced at trial and, furthermore, to have necessary employees of the defendants produced at trial and examined pursuant to §2-1102 of the Code of Civil Procedure, 735 ILCS 5/1-101, *et seq.* Thus, unlike S.Ct. Rule 214, S.Ct. Rule 237 provides for the production not only of documents, but also of people.

A notice to produce under S.Ct. Rule 237 should include the elements previously enumerated in the S.Ct. Rule 214 request. However, under the recently amended Supreme Court rules, an attorney may no longer ask a party to produce at trial documents and information that were not properly pursued in discovery. S.Ct. Rule 237(b). Thus, a S.Ct. Rule 237 notice expressly covers only items requested during the discovery process. An attorney may no longer use a S.Ct. Rule 237 request in lieu of discovery that should have already been completed.

The following paragraph should be included in the S.Ct. Rule 237 request relating to the production of persons:

Pursuant to Supreme Court Rule 237, the Defendant to whom this notice is directed is required to produce, at the inception of the trial of this cause, those following named individuals who, under the applicable rules or case law, are under the control of that Defendant by reason of being or having been employed by or related to that Defendant: [list the names of those persons requested].

VI. [13.6] DISCOVERY FOR THE DEFENDANT

This chapter deals primarily with the plaintiff's discovery in a construction injury case. Discovery for a defendant is not unlike that for a plaintiff. Although the defendant may possess the particular contractual documents pertaining to his or her client, it is essential that the defendant obtain all contractual documents relevant to the issues in the case. In addition, although the practitioner must be aware of the role that his or her client played on the jobsite, the practitioner must not neglect the participation of other contractors, architects, and engineers, as well as of the owner. This information may be partially gained through a subpoena of workers' compensation records, which is a standard form of discovery in a construction injury case. However, interrogatories, production requests, and depositions are vital to the defendant's discovery. Quite often, the party who knows the least about the rights, duties, and responsibilities of various entities involved in the jobsite is the plaintiff, so the defendant cannot hope to gain this information solely through a deposition of the plaintiff. As a result, it is often necessary for the defendant to seek the requisite discovery from a codefendant. In discovery among codefendants, the suggestions regarding discovery of a plaintiff in a construction injury case will be applicable.

VI. [13.7] CONCLUSION

Before initiating any discovery in a construction injury case, it is essential that counsel have a thorough knowledge of both the RESTATEMENT (SECOND) OF TORTS (1965), especially §§343, 343A, and 414, and the applicable case law interpreting the RESTATEMENT. Since the Structural Work Act has been repealed, practitioners should be prepared for any changes in the case law that govern construction work site injuries.

The manner in which a construction injury case should be approached from a discovery standpoint should not change much, if at all, as a result of the changes in tort law. The construction injury case affords attorneys the opportunity to become involved with highly detailed and complex discovery. Of course, even extensive use of discovery vehicles should never be a substitute for a detailed and thorough investigation of the case by the practitioner.