



# Ready for the Defense

Local government's defenses to suits for failure to supervise contractor

**L**OCAL GOVERNMENT frequently hires a contractor to perform work for it and occasionally such contractor will be sued for injuries or damages from an accident which allegedly resulted from the contractor's work. And, as a result, local government will also be sued, for failure to supervise the contractor's work.

A couple of examples will illustrate common situations where local government is sued for alleged negligent failure to supervise the work of an independent contractor hired to do work for local government.

## Sewer Back-Up Claim

Local government contracts with a sewer debris and blockage removal service to service sewer problems. A homeowner experiences a sewer back-up, calls local government, who calls in the sewer service. The sewer service uses the water jet procedure to remove the blockage. Unfortunately, the blockage is removed, but proceeds further down the line and re-forms, resulting in a continued back-up and more than \$50,000 damage to the homeowner's residence.

The sewer service is sued for negligence in not removing the blockage. Local government is sued for negligent failure to supervise the sewer service and assure the work was properly done.

## Culvert Collapse Claim

Local government contracts with a construction contractor to replace a collapsed culvert across its road. The newly-constructed culvert collapses under the weight of a dump truck, the truck driver is injured and sues. He sues the construction contractor for negligent construction of the new culvert and local government for negligent failure to supervise the work of the contractor and assure it was properly performed.

## Defenses Of Local Government To Failure To Supervise Claims

Does local government have defenses to the two negligent failures to supervise lawsuits?

The answer is that local government has two defenses to such alleged negligent failure to supervise suits: (1) § 3-108, failure to supervise immunity, of

the Tort Immunity Act (745 ILCS 10/3-108); and (2) the common law defense that a property owner or general contractor is not liable for the negligence of a hired contractor unless it "controls the means, methods and operative details" of the hired contractor's work which caused the accident.

## § 3-108 Supervision Immunity

§ 3-108, supervision immunity, of the Tort Immunity Act, reads as follows:

### 3-108. Supervision Immunity

§ 3-108(a). Except as otherwise provided in this Act, neither a local public entity nor a public employee who undertakes to supervise an activity on or the use of any public property is liable for an injury unless the local public entity or public employee is guilty of willful and wanton conduct in its supervision proximately causing such injury.

§ 3-108(b). Except as otherwise provided in this Act, neither a local public entity nor a public employee is liable for an injury caused by a failure to supervise an activity on or the use of any public property unless the employee or the local public entity has a duty to provide supervision imposed by common law, statute, ordinance, code of regulation, and the local public entity or public employee is guilty of willful and wanton conduct in its failure to provide supervision proximately causing such injury. (745 ILCS 10/3-108(a)(b)).

Supervision immunity under § 3-108 takes three forms depending upon the factual circumstances involved:

- (1) Where supervision is actually undertaken, there is immunity from negligence, but not from willful and wanton conduct.
- (2) Where the law requires supervision (a statute or code says supervision "shall" be provided), there is immunity from negligence, but not from willful and wanton conduct.
- (3) Where no supervision is provided and no law requires supervision, there is absolute, unconditional immunity.

Two cases illustrate the application of supervision immunity:

- (1) *Epstein v. Chicago Board of Education*, 178 Ill.2d 370, 687 N.E.2d 1042 (1997) (School Board immune from liability for injuries to construction worker at school for failure to supervise contractor's work under § 3-108, supervision immunity).
- (2) *In re Chicago Flood Litigation*, 176 Ill.2d 179, 680 N.E.2d 265 (1997) (City of Chicago found immune under § 3-108, supervision immunity, for failing to supervise dredging contractor who punctured underground tunnel causing flooding to Chicago Loop).

In *Epstein v. Chicago Board of Education*, 178 Ill.2d 370, 687 N.E.2d 1042 (1997), the Supreme Court reaffirmed that § 3-108 applies to allegations concerning oversight, the set up, and use of equipment and the supervision of work on public property. There, the Plaintiff sought recovery against the Board of Education for injuries he sustained when he fell from a ladder during a renovation project at a Chicago Public School. The Plaintiff alleged that the Board of Education had violated the Structural Work Act by allowing the Plaintiff to use a ladder instead of a scaffold, as well as by failing to perform other Acts such as stopping the Plaintiff's grinding work, informing the Plaintiff's employer that a scaffold should have been used, enforcing OSHA measures, requiring the grinding work to be performed on a scaffold, and furnishing the Plaintiff with a scaffold or other suitable support.

The Supreme Court in *Epstein* held § 3-108, supervision immunity, protects local government from liability for failure to supervise the activities of others on its property:

§ 3-108(a) thus constitutes a carefully crafted and limited exception to liability, which bars Plaintiff's claims against local governmental units for their failure to supervise the activities of others. This express legislative intent must prevail. (178 Ill.2d at 379, 687 N.E.2d at 1047).

### **No Control Over Means & Methods Of Contractor's Work**

In addition to supervision immunity as a defense to suits alleging negligent failure to supervise, local government, as well as others hiring contractors to do work, cannot be liable for accidents and injuries caused by a hired contractor's activities unless local government "controls the means, methods and operative details" of the hired contractor's work. Generally, local government hires work done, controlling the

"result" (e.g., contractor hired to paint the barn red).

But, local government does not control the "how the work is done"—the means, methods and operative details the hired contractor uses to accomplish the work. (E.g., the hired contractor is not told the number of personnel, the types of ladders, the types of paint brushes, etc., to use.)

Among the cases holding no liability for failure to control the work of a hired contractor are the following:

- (1) *Rangel v. Brookhaven Constructors, Inc.*, 307 Ill. App. 3d 835, 719 N.E.2d 174 (1st Dist. 1999) (general contractor not liable for injuries to employee of subcontractor who fell off of subcontractor's scaffold and sustained injuries because general contractor did not control the "means, methods and operative details" of the subcontractor erecting the scaffold).
- (2) *Ross v. Dae Julie, Inc.*, 341 Ill.App.3d 1065, 793 N.E.2d 68 (1st Dist. 2003) (candy company owner and manager of construction on its premises not liable for injuries to employee of pipefitter subcontractor who fell from ladder because the owner/manager did not control the means, methods or operative details of the subcontractor's work and owed plaintiff no duty, despite its right to inspect, make change orders, and order safety precautions as to the subcontractor's work on the job site).

Illustrating a construction situation accident where the owner/general contractor was not liable for the activities of a subcontractor because it did not control the "means, methods and operative details" of the sub's work causing the accident is the *Ross* case.

In *Ross v. Dae Julie, Inc.*, 341 Ill.App.3d 1065, 793 N.E.2d 68 (1st Dist. 2003), plaintiff Robert Ross was an employee and foreman of the pipefitting subcontractor, Hill Mechanical Group, hired to do pipefitting work on the premises of the defendant candy company owner and general contractor, Dae Julie, Inc. Plaintiff Ross was on a ladder doing pipefitting and welding work when the ladder fell and he sustained injuries. Plaintiff Ross contended that, as the owner and general contractor, defendant Dae Julie owed him a duty to provide him a safe place to work. He contended that defendant Dae Julie had the right to schedule the work and order changes and order safety precautions—a general ability to supervise. However, plaintiff's employer, Hill Mechanical, furnished the ladder and the equipment and conducted "tool box safety meetings," and controlled the operative details of Ross' welding work.

Concluding that Dae Julie owed no duty to plaintiff Ross because it did not control his work or the use

of the ladder, the Appellate Court in *Ross v. Dae Julie, Inc.*, 341 Ill.App.3d 1065, 793 N.E.2d 68 (1st Dist. 2003), explained:

Behrouz (owner/general) stated that he had the authority to stop work if he believed it to be unsafe, and discussed fall protection with Hill. However, such a general right to ensure that safety precautions are observed and that work is done in a safe manner will not impose liability on the general contractor unless the evidence shows that the general contractor retained control over the means and methods of the independent contractor's work. *Rangel v. Brookhaven Constructors, Inc.* ... Here, there is no evidence presented to suggest that Hill employees were not entirely free to perform their work in their own way. Ross admitted in his deposition that nobody from Dae Julie instructed him on the operative details of his work or supplied him with tools necessary to do his work assignments. (341 Ill.App.3d at 1071, 793 N.E.2d at 72).

## **Conclusion**

Local government does have strong defenses to lawsuits and claims attempting to impose liability on it for failure to supervise others doing work on its property.