

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

MICHAEL BARSICH,

Plaintiff,

v.

ALDRIDGE ELECTRIC, INC., THOMAS P.  
ADAMSON, JR. & ASSOCIATES, and  
RITEWAY-HUGGINS CONSTRUCTION  
SERVICES, INC.,

Defendants.

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CIRCUIT COURT OF COOK  
COUNTY OF ILLINOIS  
LAW DIVISION

No.: 2013-L-006986

**735 ILCS 5/2-1005(b) MOTION OF DEFENDANT, RITEWAY-HUGGINS  
CONSTRUCTION SERVICES, INC., FOR SUMMARY JUDGMENT  
AGAINST PLAINTIFF, MICHAEL BARSICH**

Defendant, RITEWAY-HUGGINS CONSTRUCTION SERVICES, INC. (hereafter, "RITEWAY"), pursuant to 735 ILCS 5/2-1005(b), moves this honorable court for summary judgment on Count X (Retained Control), Count XI, (Premises Liability), and Count XII (General Negligence) of MICHAEL BARSICH'S **October 8, 2013** First Amended Complaint.

Under Count X (Retained Control), Plaintiff has not established RITEWAY used unistruts, allowed unistruts to accumulate in BARSICH'S work space or retained control of any part of BARSICH'S work. Under Count XI (Premises Liability), Plaintiff has not established RITEWAY knew or should have known of the alleged unistrut hazard in BARSICH'S work site. Under Count XII (General Negligence), Plaintiff has not established RITEWAY breached any duty to MICHAEL BARSICH or was the proximate cause of BARSICH'S fall.

Counts X, XI, and XII of Plaintiff's Amended Complaint do not establish RITEWAY was the general contractor for the 31<sup>st</sup> Street Harbor-Landside Project. (Exhibit C at 22, 137,

164; Exhibit D at 7, 17, 22-23, 47, sub-exhibit 1; Exhibit E at 18, 26, 34-36, 44; Exhibit F at 15, 50; Exhibit G at 24, sub-exhibit 1; Exhibit H at 18).

**I.**  
**THE PARTIES**

The Plaintiff is MICHAEL BARSICH (hereinafter “BARSICH”). On Monday, **July 11, 2011**, at 7:45 a.m., BARSICH fell on a loose pile of unistruts atop of the 31<sup>st</sup> Street parking garage deck, sustaining a right ankle injury.

On **July 11, 2011**, BARSICH was an iron worker employee of Third-Party Defendant, JAMES MCHUGH CONSTRUCTION COMPANY (hereafter “MCHUGH”). MCHUGH was the general contractor for the 31<sup>st</sup> Street Harbor-Landside Project (hereafter, “Project”).

To complete the Project, MCHUGH entered into subcontracts with Defendants, ALDRIDGE ELECTRIC, INC., THOMAS P. ADAMSON, JR. & ASSOCIATES, and RITEWAY. ALDRIDGE ELECTRIC, INC. was responsible for electrical work, THOMAS P. ADAMSON, JR. & ASSOCIATES was responsible for plumbing work, and RITEWAY was responsible for earthwork and excavation.

**I.**  
**BACKGROUND**

On **April 13, 2010**, MCHUGH contracted with the Public Building Commission of Chicago under CONTRACT NO. 1504 for completion of the Project located at 3155 South Lake Shore Drive in Chicago, Illinois. The Project involved new lakefront breakwater construction, boat slips, and a marina boat parking garage.

On **July 7, 2010**, MCHUGH entered into SUBCONTRACT AGREEMENT with RITEWAY for earthwork, cast in place concrete, and furnishing and assembly of boat dockages. On Monday, **July 11, 2011**, at 7:45 a.m., MCHUGH’s iron worker, BARSICH, was working on the

deck of the Project's parking garage, carrying 4 foot long spacers. While carrying a bundle of spacers over his right shoulder, BARSICH stepped over a construction beam onto five to ten unattached unistruts, injuring his right ankle. Unistruts are long square objects electricians and plumbers use to hold their cables and pipes before a concrete pour.

On **October 8, 2013**, BARSICH filed a twelve count Amended Complaint at Law (Exhibit 'A'). Counts X, XI, and XII are directed to RITEWAY. On **October 23, 2013**, RITEWAY filed an Answer to BARSICH's First Amended Complaint. (Exhibit 'B').

### **III. STATEMENT OF FACTS**

#### **A. Deposition of Michael Stewart Barsich, II**

On **August 11, 2014**, BARSICH was deposed. (Exhibit 'C'). On **July 11, 2011**, BARSICH arrived at the Project at 6:30 a.m. (*Id.* at 38, 39, 51). At the Project, BARSICH's scheduling and work directions came from MCHUGH supervisors, Josh Gain and Jim McGeever. (*Id.* at 23, 24, 26, 27, 43). Only MCHUGH employees, Josh Gain and Jim McGeever, could stop BARSICH's work. (*Id.* at 33). On **July 11, 2011**, MCHUGH was directing BARSICH's work activities. (*Id.* at 43). BARSICH said, no other trades gave him instructions on how to do his work (*Id.*). BARSICH was free to perform his job as instructed by MCHUGH. (*Id.*). No other trades affected BARSICH's ability to do his work. (*Id.*). The general contractor, MCHUGH, supplied BARSICH's tools and materials and chose BARSICH's work crew. (*Id.* at 44-49, 51, 64).

The morning of **July 11, 2011**, Josh Gain from MCHUGH told BARSICH to *go to the deck and put rebar where it belongs and lay spacers.* (*Id.* at 54). The rebar needed to be moved into the section requiring concrete completion. (*Id.* at 55). BARSICH performed this task many

times before and BARSICH did not need anyone to tell him how to do that specific task. (*Id.* at 55-56, 161). He did not request assistance in picking up the rebar. (*Id.* at 58, 59, 60).

BARSICH completed three rebar drops at one bay and then laid down his spacers and applied spacers in that bay. (*Id.* at 57, 58, 62-63). BARSICH said spacers are used to keep the rebar away from concrete. (*Id.* at 64). BARSICH was carrying a bundle of 4 foot long spacers over his right shoulder and was walking to the next bay to drop these spacers when he fell. (*Id.* at 64, 65-66, 68, 160). Describing his fall, BARSICH said, he stepped off a beam onto the unistrut with his right foot. (*Id.* at 81, 95-96, 103). The unistrut on which BARSICH stepped was in a random pile of five to ten unattached unistruts laying on the plywood deck. (*Id.* at 81-83, 132). BARSICH described unistrut as a long square object electricians and plumbers use to hold their piping underneath the concrete after the concrete is poured; it is a piece of steel three inches wide, ten inches long with metal prongs coming out the top. (*Id.* at 81, 82, 84, 113).

While stepping off of the beam, BARSICH said, he was walking straight, looking ahead, and was not distracted. (*Id.* at 79, 80, 132, 167). BARSICH said, other than his foot landing on the unistrut, no other conditions contributed to his fall. (*Id.* at 163). At the time of his fall, BARSICH said, he was facing south and was on the southwest part of the deck. (*Id.* at 143, 162). BARSICH offered no further description where he fell. (*Id.* at 110-113).

Prior to his accident, BARSICH never made any complaints about safety issues on site. (*Id.* at 104). Working the Friday before his **July 11, 2011** at the same job location, BARSICH said, he had no clue if the unistrut was in his work area. (*Id.* at 142).

As to RITEWAY's involvement with BARSICH's fall, BARSICH said, RITEWAY did not direct BARSICH's work when BARSICH fell on the loose pile of unistruts. (*Id.* at 137, 169). BARSICH never saw RITEWAY installing unistruts on the job. (*Id.* at 137). BARSICH was not

aware how long the unistrut on which he stepped had been on the ground and he had no personal knowledge RITEWAY left the unistruts in the area where he fell. (*Id.* at 142, 143, 145). BARSICH never told RITEWAY they were leaving unistruts at the scene. (*Id.* at 145). At the time BARSICH fell, he was unsure what work RITEWAY was doing at the job site. (*Id.*).

Plaintiff did not notify RITEWAY that RITEWAY was leaving construction debris at the work site and/or in the vicinity where BARSICH fell. (*Id.*, sub-exhibit 5, answer no. 2). BARSICH has no statements or records from any person or entity RITEWAY placed construction debris on the south side deck area of the job site where BARSICH fell. (*Id.*, sub-exhibit 5, answer no. 4). BARSICH does not know if RITEWAY placed any construction materials, a bracket, or debris on the south side deck area of the job site, causing BARSICH to fall. (*Id.*, sub-exhibit 5, answer no. 6). BARSICH also did not tell any person or entity that RITEWAY was responsible for his fall. (*Id.*, sub-exhibit 5, answer no. 7).

### **B. Deposition of Maya Garcia**

On **August 18, 2015**, Maya Garcia was deposed. (Exhibit 'D'). Maya Garcia was RITEWAY's project manager at the Project. (*Id.* at 11, 16). RITEWAY was a concrete subcontractor for MCHUGH. (*Id.* at 17, 49). For the Project, Joe Porter was RITEWAY's superintendent. (*Id.* at 19). MCHUGH was responsible for overall project safety. (*Id.* at 23). If there was a safety hazard, RITEWAY would bring it to the attention of MCHUGH. (*Id.* at 27). Garcia was on site to check work progress. (*Id.* at 28). At no time at the Project, did Garcia see any debris that was a safety hazard. (*Id.* at 29). Unistruts were installed after RITEWAY completed RITEWAY's work. (*Id.* at 32). Following BARSICH's fall, RITEWAY did not conduct any investigation on BARSICH's fall. (*Id.* at 38). RITEWAY never made any safety complaints to MCHUGH. (*Id.* at 43).

Each subcontractor had to keep their own area clean and was responsible for the safety of its own employees. (*Id.* at 45). Under the SUBCONTRACT AGREEMENT, CLARIFICATIONS AND STIPULATIONS, CLEAN UP, ¶12, RITEWAY was required to clean up its own work area. (*Id.* at sub-exhibit 1 at 3). There was no requirement RITEWAY clean the work area of other contractors. (*Id.*)

RITEWAY did not direct BARSICH's work or tell BARSICH how to do his work. (*Id.* at 47). The unistrut on which BARSICH fell was not supplied by RITEWAY as RITEWAY does not use unistruts. (*Id.* at 32, 48). Within 5 days of the **July 11, 2011** accident, Garcia received no complaints RITEWAY was leaving debris at the Project. (*Id.*). She has no personal knowledge RITEWAY allowed a piece of unistrut to exist causing BARSICH to fall. (*Id.* at 49).

### **C. Deposition of Andre Johnson**

On **August 18, 2015**, RITEWAY's employee, Andre Johnson, was deposed. (Exhibit 'E'). On **July 11, 2011**, Johnson was one of RITEWAY's superintendents for the Project, along with Joe Porter. (*Id.* at 17). RITEWAY was hired for parking lot excavation and placing the concrete. (*Id.*). The general contractor, MCHUGH, hired RITEWAY. (*Id.* at 18). Johnson never complained to MCHUGH about the Project safety. (*Id.* at 26).

Andre Johnson, along with Mack Williams and Joe Porter, could stop RITEWAY's work if they saw a safety hazard. (*Id.* at 29-31). If a hazardous condition was noted, it would be directed to MCHUGH. (*Id.* at 34). Johnson never saw any debris at the Project and was not aware of any safety hazards at the Project. (*Id.* at 37). RITEWAY did not use unistruts in its concrete work. (*Id.* at 56). Unistruts are used by HVAC people, electricians, and plumbers. (*Id.* at 39-40).

Johnson never reported any hazards to MCHUGH and did not investigate BARSICH's

fall. (*Id.* at 37, 47). He had no knowledge the unistrut upon which BARSICH fell was supplied by RITEWAY. (*Id.* at 55). He did not know how long the unistrut was at the job site before BARSICH fell. (*Id.*). Within 5 days of the **July 11, 2011** accident, he is not aware of any complaints RITEWAY was leaving debris at the scene. (*Id.* at 56). He had no knowledge RITEWAY left a piece of unistrut in BARSICH's path. (*Id.*). He had no knowledge the unistrut was in BARSICH's work area when BARSICH fell. (*Id.*). He had no information RITEWAY had notice of a unistrut in BARSICH's path, nor knowledge of any complaints RITEWAY was in control of a pile of unistruts where BARSICH fell. (*Id.*).

#### **D. Deposition of Joseph Porter**

On **September 22, 2015**, former RITEWAY's supervisor, Joseph Porter, was deposed. (See Exhibit 'F'). Porter said, unistruts are used for piping, conduit piping. (*Id.* at 7, 8, 10, 60). RITEWAY did not use unistruts on the parking deck and RITEWAY did not use unistruts in its concrete work. (*Id.* at 50, 62).

For the Project, RITEWAY was MCHUGH's subcontractor. (*Id.* at 50). RITEWAY's job was excavation, including the parking garage. (*Id.* at 15-16, 50). On **July 11, 2011**, RITEWAY was performing stripping work. (*Id.* at 39). Porter did not investigate BARSICH's accident. (*Id.* at 49). He never received any complaints about RITEWAY's housekeeping at the Project. (*Id.* at 50). For the work on the deck, RITEWAY did not control the work of any other trades. (*Id.* at 51).

Before BARSICH's **July 11, 2011** accident, Porter did not receive complaints RITEWAY was leaving unistruts on the parking deck. (*Id.* at 62). RITEWAY never received OSHA citations or charge backs from MCHUGH for leaving debris or trash on the deck. (*Id.*). RITEWAY never directed BARSICH's activities, selected BARSICH's work crew nor

scheduled BARSICH's work. (*Id.* at 63, 64). RITEWAY could stop work of its employees, but not employees of other trades. (*Id.* at 63).

#### **E. Deposition of Larry Huggins**

On **October 5, 2015**, RITEWAY's president, Larry Huggins, was deposed. (Exhibit 'G'). Larry Huggins was president of RITEWAY and visited the project once or twice a week. (*Id.* at 9, 10). Huggins finalized and identified the SUBCONTRACT AGREEMENT. (*Id.* at 27). RITEWAY was MCHUGH's subcontractor, hired for excavation of concrete and installation of the docks. (*Id.* at 12, 24).

Huggins said, RITEWAY does not use unistruts in its construction. (*Id.* at 18, 25). For the Project, RITEWAY's work was never stopped. (*Id.* at 19). RITEWAY did not oversee other subcontractor's workers. (*Id.* at 20). RITEWAY never received any complaints about the presence of unistruts on the deck. (*Id.* at 23). RITEWAY had no knowledge of any complaints about unistruts on the walkways. (*Id.*). Huggins received no complaints RITEWAY was leaving unistruts or debris at the scene and had no knowledge of any job hazard or fall hazards where BARSICH fell. (*Id.* at 26).

At no time, did RITEWAY direct BARSICH's work. (*Id.* at 24). RITEWAY did not tell BARSICH where to go or how to do his work. (*Id.*). RITEWAY did not control the way BARSICH was carrying rebars. (*Id.*). RITEWAY never supervised MCHUGH employees on the parking deck nor told other MCHUGH employees how to do their job. (*Id.* at 25). RITEWAY never gave job assignments to MCHUGH or BARSICH. (*Id.*). RITEWAY did not control MCHUGH's job site safety. (*Id.*). RITEWAY was not required to inspect BARSICH's work nor monitor BARSICH's work progress. (*Id.*). Huggins has no personal knowledge RITEWAY was ever in control of a pile of unistruts where BARSICH fell. (*Id.* at 26).

### **F. Deposition of Mackrel Williams**

On **October 5, 2015**, RITEWAY's foreman, Mackrel Williams, was deposed. (Exhibit 'H'). MCHUGH was the general contractor. (*Id.* at 14). At the Project, RITEWAY's work was not stopped for safety concerns. (*Id.* at 19). Williams has not worked with unistruts and RITEWAY does not use unistruts. (*Id.* at 24). While on site at the Project, Williams never saw unistruts that were in a pile. (*Id.* at 30). RITEWAY did not investigate BARSICH's fall. (*Id.* at 34). Williams said, BARSICH was an employee of MCHUGH and RITEWAY did not have any control over either MCHUGH or BARSICH. (*Id.* at 39). Prior to BARSICH's fall, Williams had no knowledge unistruts were left on the deck of the parking garage and RITEWAY was never in control of any unistruts that caused BARSICH to fall. (*Id.* at 40).

### **G. Riteway-Huggins' Subcontract Agreement**

The **July 7, 2010** SUBCONTRACT AGREEMENT between MCHUGH and RITEWAY was identified as true and accurate. (Exhibit G at 27-28). Under SCOPE OF WORK, RITEWAY was to complete all earthwork, cast in place concrete, and furnishing and assembling of dock systems. (Exhibit D, sub-exhibit 1 at 1; Exhibit G, sub-exhibit 1 at 1). Under SCOPE OF WORK, RITEWAY was to provide clean-up, safety, maintenance, and quality control for its subcontract work. (*Id.* ).

Under CLARIFICATIONS AND STIPULATIONS, CLEAN UP, ¶12, RITEWAY was responsible for "*daily cleaning of Subcontractor's work area.*" (Exhibit D, sub-exhibit 1 at 3; Exhibit G, sub-exhibit 1 at 3). Additionally, under CLARIFICATIONS AND STIPULATIONS, STIPULATIONS, ARTICLE 16, RITEWAY was required to "*keep the premises and the surrounding area free from accumulation of waste materials, rubbish, debris and surplus material caused by the performance of the Subcontractor's Work.*" (Exhibit D, sub-exhibit 1 at 9; Exhibit G, sub-exhibit 1 at 9).

Further, under SCHEDULE 'B', EXHIBIT "A", SUBCONTRACT INFORMATION AND REQUIREMENTS, EMPLOYEE SAFETY COMPLAINTS, RITEWAY was required to "keep their work areas clean and their materials stored properly." (Exhibit D, sub-exhibit 1, Schedule 'B' at 4; Exhibit G, sub-exhibit 1, Schedule 'B' at 4).

**IV.**  
**STANDARD FOR SUMMARY JUDGMENT BASED ON**  
**RETAINED CONTROL, PREMISES LIABILITY, AND GENERAL NEGLIGENCE**

A grant of summary judgment is appropriate if the pleadings, depositions, admissions, and affidavits on file, liberally construed in favor of the nonmoving party, show no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law. *O'Gorman v. F.H. Paschen, S.N. Nielsen, Inc.*, 29 N.E.3d 1150 (Ill. App. 1st Dist. 2015); 735 ILCS 5/2-1005(b). Unsupported complaint allegations do not create fact issues. *Kimborough v. Jewel Companies*, 92 Ill. App. 3d 813, 416 N.E.2d 328 (1st Dist. 1981).

Under Count X (Retained Control), to survive a motion for summary judgment, Plaintiff must show RITEWAY entrusted work to an independent contractor and (2), RITEWAY retained control of any part of the work. *Martens v. MCL Constr. Corp.*, 347 Ill. App. 3d 303, 314, 807 N.E.2d 480, 489 (1st Dist. 2004); *O'Connell v. Turner Constr. Co.*, 409 Ill. App. 3d 819, 949 N.E.2d 1105 (1st Dist. 2011). Under Count X, RITEWAY cannot be liable to Plaintiff unless Plaintiff shows RITEWAY's control over BARSICH's construction activities.

Under Count XI (Premises Liability), to survive a motion for summary judgment, Plaintiff must show RITEWAY knew or should have known a premises defect existed which involved an unreasonable risk of harm. RITEWAY cannot be liable to Plaintiff where there is no evidence RITEWAY knew of the dangerous condition. *Joyce v. Mastri*, 371 Ill. App. 3d 64, 79-80, 861 N.E.2d 1102, 1114 (1st Dist. 2007).

Under Count XII (General Negligence), to survive a motion for summary judgment, Plaintiff must establish the existence of a duty owed by the Defendant to Plaintiff, the breach of that duty, and the injury proximately caused by that breach. *O'Gorman v. F.H. Paschen, S.N. Nielsen, Inc.*, 29 N.E.3d 1150 (Ill.

App. 1st Dist. 2015). RITEWAY cannot be liable to Plaintiff unless Plaintiff shows both a breach of duty and proof, with reasonably certainty, RITEWAY's acts caused Plaintiff's fall. *Kimborough v. Jewel Companies*, 92 Ill. App. 3d 813, 416 N.E.2d 328 (1st Dist. 1981).

**V.**

**ARGUMENT**

**A. UNDER COUNT X (RETAINED CONTROL) OF PLAINTIFF'S AMENDED COMPLAINT, RITEWAY IS ENTITLED TO SUMMARY JUDGMENT AS PLAINTIFF HAS NOT ESTABLISHED RITEWAY'S §414 RETAINED CONTROL OVER PLAINTIFF'S WORK ACTIVITIES**

In Plaintiff's First Amended Complaint, Count X, Plaintiff alleges RITEWAY's §414 (Retained Control) liability, which in relevant part states:

“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, COMMENT C, AT 388 (1965).

Under §414, an employer of a contractor can be subject to vicarious liability for the contractor's negligence if the employer retains control over the operative details of the contractor's work. (*Id.*).

To factually establish a claim under §414, Plaintiff must show RITEWAY entrusted work to BARSICH and retained control of any part of BARSICH's work. *O'Connell v. Turner Constr. Co.*, 409 Ill. App. 3d 819, 949 N.E.2d 1105 (1st Dist. 2011). Here, Plaintiff has not shown RITEWAY entrusted any work to BARSICH. (Exhibit C at 137; Exhibit D at 47; Exhibit F at 63-64; Exhibit G at 24-25; Exhibit H at 38-39). BARSICH was an iron worker employee of MCHUGH and was never a RITEWAY employee. (Exhibit C at 19-22, 43, 51; Exhibit D at 38-39; Exhibit G at 24; Exhibit H at 38). BARSICH's **July 11, 2011** work orders came directly from MCHUGH, not RITEWAY. (Exhibit C at 21, 23, 24, 26-27, 43, 50-51, 137).

Further, the best indicator of whether RITEWAY controlled BARSICH's work is RITEWAY's SUBCONTRACT AGREEMENT. *Cochran v. George Sollitt Constr. Co.*, 358 Ill. App.

3d 865, 832 N.E.2d 355 (1st Dist. 2005). Here, neither the SUBCONTRACT AGREEMENT nor RITEWAY's ongoing construction activity show any contractual, supervisory or operational control by RITEWAY over BARSICH's work. (Exhibit C at 23-24, 43, 137; Exhibit D at 47; Exhibit F at 62-64; Exhibit G at 24-26; Exhibit H at 38-39).

Plaintiff has not factually established RITEWAY selected BARSICH's work crew, instructed BARSICH on work methods or retained any degree of control of BARSICH's **July 11, 2011** work activities and/or his work space. (Exhibit C at 23, 26-27, 43, 50-51, 54, 59 137; Exhibit D at 47, 49; Exhibit E at 56; Exhibit F at 62-64; Exhibit G at 24-26; Exhibit H at 38-39). RITEWAY did not give directions to either MCHUGH or BARSICH on how BARSICH should do his work and RITEWAY did not direct MCHUGH or BARSICH on safety. (Exhibit C at 26-29, 31-32, 35-37, 50). RITEWAY did not provide BARSICH with supplies, equipment, work schedules or any safety instructions. (Exhibit C at 44-48). BARSICH was free to do his work his own way. (Exhibit C at 43). BARSICH said, his **July 11, 2011** assignment came from MCHUGH. (Exhibit C at 54, 137). At the time BARSICH fell, RITEWAY was not directing BARSICH's work. (*Id.*).

Whether a duty exists under §414 depends on whether RITEWAY entrusted work to either MCHUGH or BARSICH and whether RITEWAY retained control over the operative details of BARSICH's work. Here, there is no factual showing RITEWAY entrusted BARSICH's rebar and spacer work to either MCHUGH or BARSICH. MCHUGH hired BARSICH as an ironworker and MCHUGH separately hired RITEWAY as an excavation/concrete subcontractor. (Exhibit G at 24). Because MCHUGH did not entrust BARSICH's rebar and spacer work to RITEWAY, RITEWAY could never have controlled BARSICH's work. (Exhibit C at 24). *O'Connell v. Turner Constr. Co.*, 409 Ill. App. 3d 819, 949 N.E.2d 1105 (1st Dist. 2011) [holding: absent entrustment of work to independent contractor, no retained control and summary judgment proper]. Absent factual proof of entrustment and

control, Plaintiff cannot meet his burden under §414.

RITEWAY respectfully requests a summary judgment be entered against Count X (Retained Control) of Plaintiff's Amended Complaint and in favor of Defendant, RITEWAY.

**B. UNDER COUNT XI (PREMISES LIABILITY) OF PLAINTIFF'S  
AMENDED COMPLAINT, RITEWAY IS ENTITLED TO  
SUMMARY JUDGMENT AS PLAINTIFF HAS NOT ESTABLISHED  
A §343 PREMISES LIABILITY CLAIM AGAINST RITEWAY**

According to §343(a):

“A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees.”

RESTATEMENT (SECOND) OF TORTS §343(a) (1965).

For §343 liability purposes, BARSICH must establish RITEWAY had either *actual or constructive notice of the condition*. *Cochran v. George Sollitt Constr. Co.*, 358 Ill. App. 3d 865, 832 N.E.2d 355 (1<sup>st</sup> Dist. 2005). Here, BARSICH's §343 premises liability claim is defective because, as discussed in RITEWAY's III STATEMENT OF FACTS, pgs. 5-6, there is no proof RITEWAY knew or should have known of any unistrut hazard in BARSICH's work space. BARSICH never identified the location of the unistrut in his work space, the precise day unistruts were left in his work space or how long they were present before BARSICH's fall. (Exhibit C at 142-143, 162).

BARSICH has not established any RITEWAY employee used unistruts or allowed any accumulation of unistruts in his work space. (Exhibit C at 81, 85-86, 137, 145, 162; Exhibit D at 48; Exhibit E at 38-40, 45, 49, 55-56; Exhibit F at 59, 62; Exhibit G at 15-16, 25, 27-28; Exhibit H at 24-25, 40). No one testified he or she was present when the unistruts were left in BARSICH's work space. Plaintiff has not established any RITEWAY employee was present

when BARSICH fell or that RITEWAY knew any accumulation of unistruts created a work hazard. (Exhibit C at 145; Exhibit D at 48-49; Exhibit E at 55; Exhibit F at 62; Exhibit G at 23, 26; Exhibit H at 40). In the absence of any evidence establishing actual or constructive knowledge of the unistrut hazard, there can be no §343 liability against RITEWAY.

RITEWAY respectfully requests a summary judgment be entered against Count XI (Premises Liability) of Plaintiff's Amended Complaint and in favor of Defendant, RITEWAY.

**XII**  
**C. UNDER COUNT XII (GENERAL NEGLIGENCE) OF PLAINTIFF'S**  
**AMENDED COMPLAINT, RITEWAY IS ENTITLED TO SUMMARY**  
**JUDGMENT AS PLAINTIFF HAS NOT ESTABLISHED ANY BREACH**  
**OF DUTY NOR RITEWAY'S RESPONSIBILITY FOR PLAINTIFF'S FALL**

Count XII differs little from Count X of Plaintiff's First Amended Complaint; however, Count XII alleges common law construction negligence and RITEWAY's breach of its duty of ordinary care.

The elements of a cause of action for common-law negligence are the existence of a duty owed by the defendant to the plaintiff, the breach of that duty, and the injury caused by that breach. *Cochran v. George Sollitt Constr. Co.*, 358 Ill. App. 3d 865, 832 N.E.2d 355 (1<sup>st</sup> Dist. 2005). Here, not one witness said RITEWAY used unistruts, allowed unistruts to accumulate in Plaintiff's work space, had knowledge the unistruts created hazard and/or that RITEWAY failed to remove them from Plaintiff's work space. Plaintiff has not provided any evidence, video, photographic or otherwise showing the unistrut on which he fell was created by RITEWAY. (Exhibit C at 142, 143, 145). In Count XII, ¶3, Plaintiff alleges RITEWAY was performing work in Plaintiff's work site. However, BARSICH had no knowledge where RITEWAY was working when he fell. (Exhibit C at 145). In Count XII, ¶6, Plaintiff alleges a duty of reasonable care to prevent injury to Plaintiff. However, BARSICH has not established RITEWAY's breach of

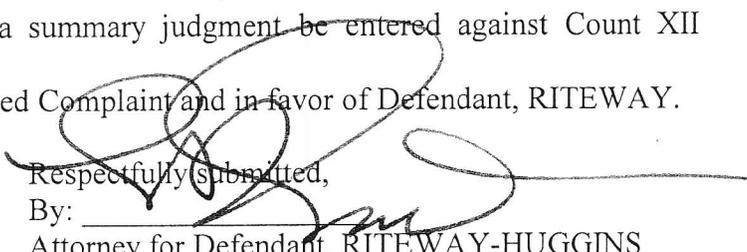
ordinary care as BARSICH has not shown RITEWAY used unistruts, allowed their accumulation in BARSICH's work site, knew of their existence, knew they were a hazard or otherwise did anything that was a proximate cause of BARSICH's fall. Plaintiff has not demonstrated any negligent acts or omissions by RITEWAY.

Based on the RITEWAY's SUBCONTRACT AGREEMENT, RITEWAY did not have a duty to instruct BARSICH on safety, inspect his work site or clean BARSICH's work site. (Exhibit D, sub-exhibit 1 at 3, 4, 9; Exhibit G, sub-exhibit 1 at 3, 4, 9). Plaintiff has not established he fell in any common construction walkway; much less a walkway used or maintained by RITEWAY. (Exhibit C at 110-113).

In Count XII, ¶8(f), Plaintiff alleges RITEWAY failed to warn of the trip and fall hazard. However, a duty to warn exists "where there is unequal knowledge, actual or constructive, and the defendant possessed of such knowledge, knows or should know that harm might or could occur if no warning is given." *Schaefer v. Universal Scaffolding & Equip., LLC*, 2015 WL 326876 (S.D.Ill. 2015). Here, Plaintiff has not established any basis against RITEWAY for failure to warn.

RITEWAY respectfully requests a summary judgment be entered against Count XII (General Negligence) of Plaintiff's Amended Complaint and in favor of Defendant, RITEWAY.

Respectfully submitted,

By:   
Attorney for Defendant, RITEWAY-HUGGINS  
CONSTRUCTION SERVICES, INC.

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