
CONSTRUCTION ACCIDENTS: LANDOWNER AND CONSTRUCTION MANAGER LIABILITY REVISITED

In the recent case of Farabaugh v. Pennsylvania Turnpike Commission, 911 A.2d 1264 (Pa. 2006) the Pennsylvania Supreme Court once again addressed the duties and responsibilities of landowners, and in this case, construction managers, for work site safety. Under the particular circumstances presented in the *Farabaugh* case, the Court held that the landowner (Pennsylvania Turnpike Commission) owed no duties to an employee of the general contractor who was killed in a work site accident, but that the construction manager (Trumbull Corporation) had contractually undertaken safety duties which exposed it to potential liability.

FACTS OF THE CASE

In December 1999, James Farabaugh sustained fatal injuries while driving an off-highway dump truck during the course of his employment for the general contractor on a construction site owned by the Pennsylvania Turnpike Commission. In a lawsuit filed by his widow, it was contended that the Turnpike Commission and construction manager were liable for the unsafe condition of a haul road over which the decedent was required to operate a heavy duty, off-highway dump truck of a type which he had never operated before at this work site.

LANDOWNER LIABILITY

Asserting an exception to the immunity generally afforded to Commonwealth agencies, the Plaintiff contended that a valid common law cause of action could be stated against the Turnpike Commission as a landowner based on a landowner's duties to the employees of an independent contractor. The Plaintiff asserted three distinct theories of liability, each of which was addressed by the Court.

Section 343, Dangerous Conditions Known to or Discoverable by Possessor

Under this section of the Restatement (Second) of Torts, the Plaintiff alleged that the haul road was inherently dangerous due to the existence of coal seams, and as such the Turnpike Commission was obligated to protect the decedent from the non-obvious danger of the instability of the hillside upon which the general contractor had built the haul road.

Although the Court recognized that a landowner must use “reasonable care to make the premises safe or give adequate and timely warning of dangers known to him but unknown to the contractor or his employees”, Crane v. I.T.E. Circuit Breaker Company, 443 Pa. 442, 278 A.2d 362, 364 (Pa. 1971), the Court ultimately declined to accept this argument because the possessor of land will not be held responsible for the conditions of the land if they are the product of the independent contractor’s work. Engle v. Reider, 366 Pa. 411, 77 A.2d 621, 624 (Pa. 1951). In rejecting the Plaintiff’s argument on this point, the Court found that the general contractor had indisputably constructed the haul road, and thus the conditions would be the product of an independent contractor’s work.

Section 414, Negligence in Exercising Control Retained By Employer

The Plaintiff argued that, despite the general proposition that landowners employing independent contractors are not liable for injuries to the contractor’s employees, absent an exercise of control over the means and methods of the work, in this case there was evidence that the Turnpike Commission retained control by employing an on-site safety inspector and contracting with Trumbull for construction management services. Restatement (Second) of Torts §414 (1965).

Following the longstanding rule articulated in Hader v. Coplay Cement Manufacturing Company, 410 Pa. 139, 189 A.2d 271 (Pa. 1963), the Court held that retaining a manager to monitor compliance with contractual provisions did not constitute an assumption of control

over the work. The Court declined to impose liability on the Turnpike Commission for hiring a contractor to specifically supervise safety issues on-site in addition to requiring its general contractor to be responsible for safety under its own contract with the Turnpike Commission. The Court concluded that the Turnpike Commission had turned over control of the work site to the general contractor, and thus did not retain control over the general contractor's means and methods of work.

Sections 416 and 427, Peculiar Risk/Inherently Dangerous Work

Under Sections 416 and 427 of the Restatement (Second) of Torts, a contractor may be subject to liability, even in the absence of retaining control over the work, if the work involves a peculiar risk of physical harm to others unless special precautions are taken, or if the landowner employs a contractor to do work involving a special danger to others. In this instance, the Plaintiff argued that it was foreseeable that the work to be performed on the haul road would be exceptionally risky, and thus these two provisions should apply.

The Court accepted the Turnpike Commission's argument that the peculiar risk and special danger exceptions did not apply because the risk was not foreseeable at the time the contract was executed, and because the work did not involve more than the usual and ordinary risk associated with construction work. Citing cases for the proposition that the risk of operating an off-highway dump truck over a haul road is not different from the usual and ordinary risks associated with construction work, the Court rejected the Plaintiff's arguments and upheld the entry of summary judgment in favor of the Turnpike Commission.

CONSTRUCTION MANAGER LIABILITY

Citing the case of Leonard v. Commonwealth Dept. of Transportation, 565 Pa. 101, 771 A.2d 1238 (Pa. 2001), the construction manager, Trumbull Corporation, argued that it owed no duty to the decedent because it did not exercise control over the work site, and the

deceased worker's employer had assumed responsibility for safety compliance.

The Supreme Court recognized that, in prior decisions, it had viewed the role of construction manager to be similar to that of an architect and other professional services provider for which quality of service is of paramount concern. The Court declined, however, to exempt construction managers from liability under all circumstances, but instead focused on the particular contract in the case. In this case, Trumbull's contract with the Turnpike Commission included a specification which created an obligation to "develop, implement, maintain and monitor a comprehensive project safety/insurance program".

Relying on § 324A of the Restatement (Second) of Torts, the Court held that the construction manager could be potentially liable to third persons for negligently undertaking its contractual obligations. Even though the construction manager may have exercised no control over the means and methods of the work, the Court determined that there was at least a factual question as to whether the construction manager had carried out its contractual responsibility with respect to safety monitoring.

LESSON TO BE LEARNED

Construction managers, and possibly higher-tier contractors, will remain at risk of liability for accidents arising from unsafe conditions on construction sites, unless their contracts specify that they have no duties to inspect or monitor for safety, or that they have completely delegated safety responsibilities to a lower-tier contractor. Insurance professionals and counsel must recognize that it is not the status of the party which controls, but instead the terms of the contract.

Landowners, and others in possession of land, will remain exempt from liability, so long as they do not exercise excessive control over the means and methods of the work, including safety procedures employed by independent contractors.

Frederick T. Lachat, Jr.
Margolis Edelstein
The Curtis Center, 4th Floor
Independence Square West
Philadelphia, PA 19106-3304
Phone: 215-922-1100, Ext. 5850
Direct Dial: 215-931-5850
Fax: 215-922-1772
Email: flachat@margolisedelstein.com