

**[J-8-2006]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**WESTERN DISTRICT**

JANE A. FARABAUGH, INDIVIDUALLY	:	No. 37 WAP 2005
AND AS ADMINISTRATOR OF THE	:	
ESTATE OF HENRY J. FARABAUGH,	:	
DECEASED,	:	Appeal from the Order of the
	:	Commonwealth Court entered September
Appellees	:	13, 2004 at No. 2086 CD 2003 reversing
	:	the Order of the Court of Common Pleas
v.	:	of Allegheny County entered May 29,
	:	2003 at No. GD00-13497 and remanding.
	:	
PENNSYLVANIA TURNPIKE	:	
COMMISSION AND TRUMBULL	:	
CORPORATION,	:	
	:	
Appellants	:	ARGUED: February 28, 2006

**CONCURRING AND DISSENTING OPINION**

**MR. JUSTICE SAYLOR**

**DECIDED: DECEMBER 28, 2006**

I join Part I of the majority opinion but respectfully differ with the majority's reasoning and holding as to Part II, concerning Trumbull Corporation's duties under its contract as construction manager.

The majority extensively recognizes the limitations on the duties of a landowner when it yields control of its property to an independent contractor for construction purposes. See Majority Opinion, slip op. at 16-18 (citing, inter alia, Hader v. Coplay Cement Mfg. Co., 410 Pa. 139, 189 A.2d 271 (1963)). Ultimately, the majority holds that no duty of care is placed on the owner relative to the independent contractor's employees, so long as the owner does not assume control of the work. See id. at 17-

18. For public policy reasons, the majority further indicates that the retention of a construction manager and/or the monitoring of construction-site safety does not represent an assertion of control such as would support the imposition of a duty of care running to third parties. See id. As noted, I support the majority's reasoning and holding in these regards.

The majority's approach, however, takes a different turn with respect to the owner's delegated entitlement to coordinate and monitor work performance and safety at a construction site when considering the obligations of its construction manager. In a number of respects the majority suggests that, by acting as the owner's representative in this sort of coordination and monitoring, a construction manager is invested with a duty to third-party employees of an independent contractor that was not owed by the owner in the first instance. See Majority Opinion, slip op. at 30.

From my perspective, the owner and its representative, here Trumbull as construction manager, should be treated similarly in the above respects, consistent with the common pleas court's approach. See Majority Opinion, slip op. at 23-24. Particularly given the sophisticated nature of modern, large-scale construction, owners reasonably should be permitted to delegate their entitlement to coordinate and monitor various aspects of the work among multiple contractors and facilitate overall safety without creating new duties in their representatives. Further, I believe that this should hold true so long as no actual control is assumed over the methods of work and/or operative details beyond that which is inherent in coordination, compliance monitoring, and advancing overall safety consistent with the obligations of the independent contractors that are otherwise in force. As Appellants highlight, such an approach would be in line with that of a number of other jurisdictions. See, e.g., Buccini v. 1568 Broadway Assoc., 673 N.Y.S. 2d 398, 401 (N.Y. App. Div. 1998) (affirming an award of

summary judgment in favor of a construction manager and stating that “[t]he general duty to supervise the work and ensure compliance with safety regulations does not amount to supervision and control of the worksite such that the supervisory entity would be liable for the negligence of the contractor who performs the day-to-day operations” (citation omitted).

Here, I believe that the nearest that Trumbull’s contract with the Commonwealth comes to supporting a conclusion that the construction manager assumed control of the manner of an independent contractor’s (NESL’s) work is in the specification of an obligation to “develop, implement, maintain and monitor a comprehensive project safety/insurance program.” From my perspective, however, absent further proof that this responsibility was exercised in a way that redirected the performance of NESL’s work in some material fashion, such activities if performed by an owner would not represent the sort of control of the work or job site that would create new duties running to third parties. Rather, I regard them as consistent with an owner’s residual prerogatives relative to its property, particularly where, as here, the independent contractor in control of the work has accepted full responsibility for job-site safety.<sup>1</sup>

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<sup>1</sup> My position is in line with the following discussion of the principle investing those who control the work on a construction project with safety obligations:

[T]he principle is intended to apply where there is retention of control over the operative detail of the work. . . . It is not enough that [the owner] has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to [owners], but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of

(continued . . .)

Again, since I do not believe that these activities would create duties in the owner running to third parties, it is my position that they should also not be deemed to create such obligations in the owner's representative retained to accomplish them.

For the above reasons, I would apply the rationale in Part I of the majority opinion both to the Turnpike Commission and to Trumbull, and, therefore, I would reinstate the judgment of the common pleas court in its entirety.

Mr. Chief Justice Cappy and Mr. Justice Castille join this concurring and dissenting opinion.

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(...continued)

supervision that the contractor is not entirely free to do the work in his own way.

Brady v. Ralph M. Parsons Co., 609 A.2d 297, 301 (Md. 1992) (citing Restatement (Second) of Torts §414). I believe that any duty in a construction manager should derive generally from the owner's retention of such control and employment of the construction manager to act as the owner's representative in exercising it.