NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

JASON BEAM AND HIS WIFE, KRISTIE BEAM	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	
THIELE MANUFACTURING, LLC, FORMERLY KNOWN AS THIELE INC., FORMERLY KNOWN AS TYT HOLDING, INC.	
APPEAL OF: JASON BEAM	No. 514 WDA 2013

Appeal from the Order February 28, 2013
In the Court of Common Pleas of Somerset County
Civil Division at No(s): 1041 CIVIL 2008

BEFORE: BENDER, P.J.E., LAZARUS, J., and MUNDY, J.

MEMORANDUM BY MUNDY, J.: **FILED FEBRUARY 07, 2014**

Appellant Jason Beam appeals from the February 28, 2013 order granting summary judgment in favor of Appellee, Thiele Manufacturing, LLC (Thiele), and dismissing Appellant's complaint.[1] After careful review, we reverse and remand for proceedings consistent with this memorandum.

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[1] Appellant purports to appeal from the order dated February 25, 2013, and April 11, 2013. We note that on appeal, "[t]he date of entry of an order in a matter subject to the Pennsylvania Rules of Civil Procedure shall be the day on which the clerk makes the notation in the docket that a notice of entry of the order has been given as required by Pa.[R.C.P.] 236(b)." Pa.R.A.P. 108(b). Herein, the trial court's order granting summary judgment and dismissing Appellant's complaint was entered on February 28, 2013, when the clerk docketed said order. As this order disposed of all of the claims in
(Footnote Continued Next Page)

The trial court summarized the relevant facts of this case as follows.

> The instant matter arises out of an accident which occurred on December 12, 2006[,] in which [Appellant] was injured while working in the course and scope of his employment with American Roofing, Inc. ("American Roofing") after falling through a fiber glass skylight on the roof of a building owned by [Thiele]. Thiele is a Pennsylvania corporation engaged in manufacturing dump trucks and has no expertise in roofing. On October 17, 2006[,] Thiele and American Roofing entered into a construction contract where American Roofing would perform work and replace existing skylights on the roof of a building owned by Thiele. At all times material hereto, American Roofing was an independent contractor by virtue of the contract that it had entered into with Thiele, and [Appellant] was an employee of American Roofing. On December 12, 2006[,] at approximately 2:13 PM, while working on a skylight pursuant to the construction contract, [Appellant] fell through one of the skylights and sustained serious injuries.
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> At deposition, [Appellant] testified that he was an "experienced roofer[,]"[] and when asked if he considered the subject roof to be out of the ordinary from a danger standpoint or if he considered it to be more dangerous than other roofs he had worked on in the past, [Appellant] stated: "No. No. I'd look at them - - I knew it was a dangerous job, my job in general. So I look at them all the same, I use the same precautions. No." [Appellant] admitted that Thiele did not supervise or control his work or the work of American Roofing, and further, that no one

(Footnote Continued) ————————————————

the underlying litigation, it was appealable as a final order. Pa.R.A.P. 341(a); ***Weible v. Allied Signal, Inc.***, 963 A.2d 521, 525 (Pa. Super. 2008) (concluding that the trial court's orders granting summary judgment were final orders for Pa.R.A.P. 341 purposes because all of the parties to the underlying litigation were either settled, bankrupted, or dismissed by the grant of summary judgment). We have adjusted the caption accordingly.

> from Thiele was present on the roof or at the worksite. To the contrary, [Appellant] testified that American Roofing supervised his work.

Trial Court Opinion, 4/12/13, at 1-2 (footnotes containing citations to deposition transcript omitted).[2]

Following discovery, Thiele filed a motion for summary judgment on December 5, 2012. On February 28, 2013, the trial court granted said motion and dismissed the instant action.[3] This timely appeal followed.[4]

On appeal, Appellant raises the following issue for our review.

> I. Did the trial court err in granting [Thiele's] motion for summary judgment where the work [Appellant] was performing at the time of his injury involved a peculiar risk of harm under the Restatement (Second) of Torts § 416,
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> Where:
>
> a. Work on the saw-tooth fiberglass roof was specially [sic] dangerous and peculiarly risky given its rare and unique design, and
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> b. [Thiele] knew and foresaw the risk but failed to ensure that [Appellant's] employer took the special precautions necessary to protect his safety?

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[2] We note that the trial court opinion does not contain pagination. Therefore, we have assigned each page a corresponding page number for ease of reference.

[3] On March 21, 2013, Appellant unnecessarily praeciped for judgment to be entered before he filed his notice of appeal. ***See supra*** n.1.

[4] Appellant and the trial court have complied with Pa.R.C.P. 1925.

Appellant's Brief at 8.

We begin by noting our well-settled standard of review. "[O]ur standard of review of an order granting summary judgment requires us to determine whether the trial court abused its discretion or committed an error of law[,] and our scope of review is plenary." ***Petrina v. Allied Glove Corp.***, 46 A.3d 795, 797-798 (Pa. Super. 2012) (citations omitted). "We view the record in the light most favorable to the nonmoving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party." ***Barnes v. Keller***, 62 A.3d 382, 385 (Pa. Super. 2012), *citing* ***Erie Ins. Exch. v. Larrimore****,* 987 A.2d 732, 736 (Pa. Super. 2009) (citation omitted). "Only where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to a judgment as a matter of law will summary judgment be entered." ***Id.*** The rule governing summary judgment has been codified at Pennsylvania Rule of Civil Procedure 1035.2, which states as follows.

> **Rule 1035.2. Motion**
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> After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law
>
> > (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or

> (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.C.P. 1035.2.

"Where the non-moving party bears the burden of proof on an issue, he may not merely rely on his pleadings or answers in order to survive summary judgment." ***Babb v. Ctr. Cmty. Hosp.***, 47 A.3d 1214, 1223 (Pa. Super. 2012) (citations omitted)*, appeal denied*, 65 A.3d 412 (Pa. 2013). Further, "failure of a non-moving party to adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof establishes the entitlement of the moving party to judgment as a matter of law." ***Id.***

> Thus, our responsibility as an appellate court is to determine whether the record either establishes that the material facts are undisputed or contains insufficient evidence of facts to make out a prima facie cause of action, such that there is no issue to be decided by the fact-finder. If there is evidence that would allow a fact-finder to render a verdict in favor of the non-moving party, then summary judgment should be denied.

Id., *quoting* ***Reeser v. NGK N. Am., Inc.***, 14 A.3d 896, 898 (Pa. Super. 2011).

Herein, Appellant argues that the trial court erred in its grant of summary judgment in favor of Thiele. Specifically, Appellant claims that Thiele should be held liable for his injury because:

> [t]he unique and unusual saw-tooth design of [Thiele's] turn of the century industrial roof, coupled with the brittle and dingy colored fiberglass skylights, located on a slanted pitch w[h]ere worker's [sic] would walk, as opposed to a 90 degree upright angle, rendered the circumstances surrounding the specific work especially dangerous and peculiarly risky.
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> ...
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> As such, [Thiele's] failure to take reasonable measure[s] to ensure special precautions were taken, subjects them to liability [] under the Restatement (Second) of Torts §§ 416 and 427. As such, the [t]rial [c]ourt's grant of [s]ummary [j]udgment should be reversed and the matter remanded for trial.

Appellant's Brief at 10-11. Upon our careful review, we agree.

> The standard of care a possessor of land owes to one who enters upon the land depends on whether the latter is a trespasser, licensee, or invitee. Employees of independent contractors... are "invitees" who fall within the classification of "business visitors." ... The duty of care owed to a business invitee (or business visitor) is the highest duty owed to any entrant upon land. The landowner must protect an invitee not only against known dangers, but also against those which might be discovered with reasonable care.
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> 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, and
> >
> > (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
> >
> > (c) fails to exercise reasonable care to protect them against the danger.
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> Pennsylvania law imposes no general duty on property owners to prepare and maintain a safe building for the benefit of a contractor's employees, who are working on that building. Rather, our law generally insulates property owners from liability for the negligence of independent contractors and places responsibility for the protection of the contractor's employees on the contractor and the employees themselves.

Gutteridge v. A.P. Green Servs., Inc., 804 A.2d 643, 655-656 (Pa. Super. 2002) (citations omitted), *appeal denied*, 829 A.2d 1158 (Pa. 2003).

At the time of the incident, Appellant was an employee of Thiele's independent contractor, American Roofing. Second Amended Civil Complaint, 6/29/09, at ¶ 11. As such, Appellant was an "invitee" of Thiele. ***See Gutterridge***, ***supra*** at 655. Accordingly, Thiele should be insulated from liability for injuries caused to Appellant through the negligence of its independent contractor, American Roofing. ***See id.*** at 656.

However, Appellant contends that Thiele is liable under the "peculiar risk" or "special danger" exception to this general rule regarding premises liability.[5] Appellant's Brief at 13. Our Supreme Court adopted this exception in ***Phila. Elec. Co. v. James Julian, Inc.***, 228 A.2d 669 (Pa. 1967), from sections 416 and 427 of the Restatement (Second) of Torts, which are quoted hereafter.

> **§ 416 Work Dangerous in Absence of Special Precautions**
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> One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a **peculiar risk of physical harm to others unless special precautions are taken**, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.
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> ...
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> **§ 427 Negligence as to Danger Inherent in the Work**
>
> One who employs an independent contractor to do work **involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work**, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the

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[5] In describing this exception, the terms "peculiar risk" and "special danger" have been used interchangeably. ***Steiner v. Bell of Pennsylvania***, 626 A.2d 584, 587 n.3 (Pa. Super. 1993). For the purposes of our review, we will refer to this exception as the peculiar risk exception.

> contractor's failure to take reasonable precautions against such danger.

Restatement (Second) of Torts, §§ 416, 427 (1965) (emphasis added).

Accordingly, a peculiar risk exists under the following circumstances.

> (1) [When] a risk is **foreseeable** to the employer of an independent contractor at the time the contract is executed (that is, if a reasonable person in the position of the employer would foresee the risk and recognize the need to take special measures); and
>
> (2) the risk is **different from the usual and ordinary risk** associated with the general type of work done (that is, the specific project or task chosen by the employer involves circumstances that are substantially out-of-the ordinary).

Gutteridge, ***supra*** at 656-657 (emphasis added), *citing* ***Ortiz v. Ra-El Dev. Corp.,*** 528 A.2d 1355, 1358 (Pa. Super. 1987).

> In order for the [peculiar risk exception] to apply, it is not essential that the work which the contractor is employed to do be in itself an extra-hazardous or abnormally dangerous activity, or that it involve a very high degree of risk to those in the vicinity. It is sufficient that it is likely to involve a peculiar risk of physical harm unless special precautions are taken, even though the risk is not abnormally great. ... It is not essential that the peculiar risk be one which will necessarily and inevitably arise in the course of the work, no matter how it is done. It is sufficient that it is a risk which the employer should recognize as likely to arise in the course of the ordinary and usual method of doing work, or the particular method which the employer knows that the contractor will adopt.
>
> [The peculiar risk exception] is thus applicable only in situations in which the negligence of the independent contractor consists of the failure to take the precautions necessary for the safe performance

> of a task. The risk of harm must arise from the peculiar or inherent nature of the task or the manner of performance, and not the ordinary negligence which might attend the performance of any task. Liability does not ordinarily extend to so called "collateral" or "casual" negligence on the part of the contractor ... in the performance of the operative details of the work. The negligence for which the employer of a general contractor is liable ... must be such as is intimately connected with the work authorized and such as is reasonably likely from its nature.

McDonough v. U.S. Steel Corp., 324 A.2d 542, 546 (Pa. Super. 1974) (citation and some quotation marks omitted).

As an exception to the general rule of premises liability, the peculiar risk exception should be construed narrowly. ***Emery v. Leavesly McCollum***, 725 A.2d 807, 814 (Pa. Super. 1999) (*en banc*). Additionally, "the determination of whether the facts of a particular case constitute a peculiar risk is a mixed question of law and fact and [] the trial judge may make this determination as a matter of law in clear cases." ***Drum v. Shaull Equip. and Supply Co.***, 787 A.2d 1050, 1061 (Pa. Super. 2001) (internal quotation marks omitted), *quoting* ***Emery***, ***supra***, *appeal denied*, 803 A.2d 735 (Pa. 2002).

Instantly, Appellant argues that the peculiar risk exception applies because "the work [performed by Appellant] was done under unusually dangerous circumstances." Appellant's Brief at 20. In particular, Appellant claims that the work done for Thiele "did not involve a general deteriorating flat roof, but a unique and increasingly rare saw tooth design with dingy

brittle skylights, [constituting] an unusual, unique and peculiar risk, which is governed by specific provisions of [Occupational Safety and Health Administration (OSHA)]." ***Id.*** Additionally, Appellant maintains, "Thiele knew [American Roofing] had not and was not again complying with OSHA's requirements of fall protection for skylights." ***Id.*** Appellant asserts, "the facts as presented clearly raise an issue of material fact that [Thiele's] roof work was specially [sic] dangerous and particularly risky, of which [] Thiele was well aware, yet failed to ensure its contractor [(American Roofing)] took the appropriate precautions for [Appellant's] safety." ***Id.*** at 29.

In reaching its decision that no peculiar risk of harm existed on Thiele's roof, the trial court reasoned as follows.

> The nature of the roof was clearly evident to [American Roofing] as well as [Appellant] at the outset of the work. Indeed, [American Roofing] had previously been engaged in prior years to perform work on the roof and was noted to have been in the roofing business for 25 years. Working on any elevated structure is inherently dangerous due to the risk of falling some distance. Roofers are always aware that a sloped roof is more dangerous than a flat roof, and the steeper the slope of the roof - - - the greater the chance of a slip and fall without a protective harness to catch the worker. It is further abundantly clear that the corrugated metal roof areas provide greater structural stability than the translucent fiberglass panels which allowed the sun's illumination to enter the building. In other words, there was nothing "unique" or posing a peculiar risk of harm that was not abundantly clear to even an untrained worker regarding the risk of fall from the roof in this case. [] Thiele as owner of the premises should not be subject to exceptions from the general rule that an owner engaging an independent

> contractor to take possession of [the] premises for the completion of work should be liable for the injuries to the contractor's employees.

Trial Court Opinion, 4/12/13, at 8. In addition, the trial court relied upon the following portion of Appellant's deposition testimony when granting Thiele's motion.

> Q: ... Did you consider this [roof] to be a more dangerous roof than other roofs you had worked on in the past?
>
> A: No. No. I'd look at them - - I knew it was a dangerous job, my job in general. So I look at them all the same, I use the same precautions. No.
>
> Q: So roofing is a dangerous job?
>
> A: Yeah, roofing is a dangerous occupation.

N.T., 2/18/10, at 37; ***see also*** Trial Court Opinion, 4/12/13, at 2.

Upon reviewing the record in the light most favorable to Appellant and resolving all doubts as to the existence of a genuine issue of material fact against Thiele, we conclude material issues of fact exist that preclude the award of summary judgment in the instant proceedings. ***See Barnes***, ***supra***. As the trial court focused its decision upon the second prong of the peculiar risk test, *i.e.*, "the risk is different from the usual and ordinary risk associated with the general type of work done[,]" we will discuss that prong first. ***See Gutteridge***, ***supra*** at 657.

Appellant retained Michael C. Wright – PE (Professional Engineer), CSP (Certified Safety Professional), CPE (Certified Plant Engineer), and President

of Safety through Engineering, Inc., to author a report regarding the uniqueness of the roof on Thiele's building. Supplemental Brief in Opposition to Motion for Summary Judgment, 2/22/13, Ex. 7. Within his report, Wright described the roof as follows.

> In the subject 19th-Century Saw-Tooth roof building design, the roof was constructed with fiberglass roof deck panels which were integrated into standard metal roof deck panels, in order, to permit natural sun light to penetrate into the building. ... However, this factory building design concept was very unique and did create a peculiar risk and became inherently dangerous through the time exposure of the UV sun light. The subject factory building roof skylight design concept was very unique because most roof skylight design and installations were done with the skylights being vertical or nearly vertical. Also the roof skylight would typically be above the roof approximately four feet in order that the workers would not accidentally fall through the skylight.
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> However, the subject 19th-Century Saw-Tooth roof building design and construction was very unique and did create a peculiar risk of harm to the workers. With the metal roof deck being sloped and the fiberglass roof deck panels matching the same roof slope as the metal roof deck panels, this created a deception as being the same strength as the metal roof panels. Since the skylight roof deck panels were vertical or nearly vertical, the workers could not walk on them or even place heavy tools or equipment weights on the skylight roof deck panels. So normally the 19th-Century Saw-Tooth roof building design and construction would be safe for the workers and not create a safety hazard for the roofing workers.
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> ...
>
> I am very familiar with these types of factory buildings and their 19th-Century Saw-Tooth roof

> designs throughout the USA. I have performed many different types of structural engineering renovation projects within these types of building structures throughout the US. Based on my past knowledge of these types of buildings, I would estimate the subject building was designed and built as early as the 1890s. I have observed that normally these types of factory buildings with their 19th-Century Saw-Tooth roof designs would almost always have a nearly vertical/sloped part of their roof system that would integrate this type of skylight clear roof panels and/or skylight glass roof panels and/or skylight fiberglass roof panels into its standard metal decking roof panels. I have not observed any similar type of building design with its roof metal decking system that would allow/permit persons/workers to walk directly onto these skylight types of roof decking panels. I have observed that normally these types of skylight panels were designed and/or built above the roof's normal walking surface to make it difficult to walk on them; so that an elevated/sloped skylight surface would produce a possible warning and/or a possible alert to the person/worker of a possible safety concern; if walking on this skylight surface. In fact, I have not seen/observed – in my past 35 years as a structural engineer – any similar type of building roof design/construction that integrated similar types of skylight fiberglass roof decking panels into its roof system surface, which would allow/permit persons/workers to walk directly onto these types of skylight fiberglass roof decking panels.

Id. at 17-18.

Upon Wright's review of a portion of this record, including deposition testimony that will be further discussed herein, he expressed a number of opinions regarding the risks associated with Thiele's saw-tooth roof and the foreseeability of these risks to Thiele. Specifically, Wright opined as follows.

6. It is my opinion the integration of skylight fiberglass roof decking panels into its standard metal decking roof system did create a particular risk and/or unique risk and/or unique type of roof safety hazard and/or [] unique safety hazard of falling through the roof deck – and not the normal roof hazard of falling off the roof edges – at the time of the accident.

7. It is my opinion due to saw-tooth construction and existence of fiberglass roof deck skylights, the risk of [Appellant] falling through the fiberglass skylights was or should have been highly foreseeable to [] Thiele and that a peculiar risk of physical harm to others, including [Appellant], would occur unless special precautions were taken such as fall arrest protection equipment being utilized.

8. It is my opinion the work on unique type of fiberglass roof deck skylights posed a peculiar risk of harm for which special precautions should have been taken by [] Thiele but was not.

...

10. It is my opinion Thiele knew or should have known that its plant facility maintenance personnel, including Mr. Robert Spencer, were on the subject roof and were required to wear fall protection equipment, to install anchorage locations for their fall protection systems and to be connected to these fall arrest protection anchorages when working around the subject fiberglass roof deck skylights prior to the time of the accident (Robert Spencer Dep., 17-18, October 4, 2012).

...

12. It is my opinion the subject skylight fiberglass roof deck panel did create a peculiar risk and/or unique risk and/or unique roof safety

> hazard of falling though the fiberglass roof deck – and not the normal roof safety hazard of falling off the roof edges – at the time of the accident.
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> ...
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> 21. It is my opinion the subject sloped roof was an old outdated saw-tooth construction that integrated fiberglass roof deck skylights into the roof. This created a unique fiberglass skylight safety hazard which rendered the circumstances surrounding the specific task especially dangerous.

Id. at 5-8.

In addition to Wright's expert report, the parties deposed a number of individuals involved with the Thiele roofing project regarding the special design of Thiele's saw-tooth roof. Larry McCaulley, President of American Roofing, testified, "there's very few [saw-tooth roofs] around." N.T., 10/4/12, at 8-9, 33-34. McCaulley stated that these types of roofs are, "old day - - - way old day roofs, and there's - - - very seldom are we on a roof like that." ***Id.*** at 34. When asked if working on this type of saw-tooth roof creates unusual working conditions, McCaulley responded, "[y]eah, anything out of the ordinary creates some kind of problem." ***Id.*** at 34.

When describing the roof itself, Appellant testified the roof was a hodgepodge of "wood, metal, shingle, rubber, skylights, steep, [and] flat [surfaces.]" N.T., 2/18/10, at 34. Specifically, he testified as follows.

> It's a little bit of all of that. To me it looked like it was a building that had a bunch of additions on it and different pitches. There was some steep, some

> flat, but it had all been - - looked like maybe it was shingles underneath. There was [sic] different layers underneath, but it had looked like at one time, it had gone over with a uniform material. But it was different pitches, valleys, dead valleys. Just it looked like something that - - it just didn't - - looked like just a maze almost, is what you could say.

Id. at 34-35. Appellant fell while working on a "transition area" of the roof, where an 8/12 pitch ran into a 5/12 pitch. ***Id.*** at 35. He testified that, as an experienced roofer, he did not consider this pitch to be steep. ***Id.*** at 33, 36.

Appellant's testimony coincides with the testimony of Joseph Romano, Jr., an owner of the Thiele building, who made the following comments regarding the state of the building's roof and the reasons for the renovations.

> A: ... it was a very big roof, multiple roofs. Some of it was shingled. Some of it had rubber roofing on. Some had just half lap paper on. ...
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> A: The way they had done the construction, the original Thiele, was they tied everything together. So you had multiple pitched roofs with valleys. The valleys were always giving us trouble.
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> ...
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> A: And then they had like a fiberglass skylight, like the old mills used to do.
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> ...
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> A: Skylight-type material. And we were trying to get rid of - - we were trying to lessen those [skylights]. They had them in big, long rows and then we started taking them out. We were trying to

> make it safer so you could walk up there easier between the skylights or service the skylights. So we took out the long rows and we were putting in segmented. So we'd have maybe two sheets of plywood, one skylight, two sheets of plywood, one skylight.

N.T., 5/15/12, at 17-19. Based upon the foregoing, we conclude that a material issue of fact exists as to whether the risk presented by Thiele's saw-tooth roof was "different from the ordinary and usual risk associated with [repairing a roof.]" ***See Gutteridge***, ***supra***.

Turning to the foreseeability prong of the peculiar risk test, an owner and an employee of Thiele testified that the risks presented by its saw-tooth roof were apparent to Thiele at the time it contracted with American Roofing. ***See id.*** at 656. Romano testified that when he first purchased the building "he realized there was some bad sections" of the roof and "the roofer warned [him] about [those sections]." N.T., 5/15/12, at 56. Additionally, Robert Spencer, who performed maintenance for Thiele, testified that he would use safety precautions, at times, while on the roof performing spot repairs. N.T., 10/4/12, at 17.

> Q: [D]uring the time that [Thiele] started doing the roof replacement section by section, were you still repairing or doing spot repairs on the roof?
>
> A: Occasionally.
>
> Q: Okay. And when you went up to do the spot repairs on the roof, did you have to use any type of safety harness, or safety equipment or anything when you went up there?

> A: Occasionally it was [i]n my discretion, if I had to or not.
>
> Q: Okay. Okay. And tell me about that, when would you use something, or when would you use and when would you not?
>
> A: Usually if I was on the main section of the roof away from the skylights and that, I would not - - - if I worked around the sky lots [sic], I - - - skylights, I would usually tie off.
>
> ...
>
> Q: Why would you tie down in the areas around the skylights?
>
> A: Just for safety sake.

Id. at 17-19.[6] Based upon the foregoing, we conclude that a material issue of fact also exists as to the foreseeability of the risk inherent in this saw-tooth roof to Thiele when it contracted with American Roofing. ***See Gutteridge***, ***supra***.[7]

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[6] Following Appellant's incident, Spencer also fell through Thiele's roof. ***Id.*** at 39-40.

[7] Within its brief, Appellee cites to a number of cases in support of its position, which are readily distinguishable and/or non-precedential. ***See Edwards v. Franklin & Marshall College***, 663 A.2d 187 (Pa. Super. 1995); ***Fedor v. Van-Note Harvey Assocs.***, 2011 U.S. Dist. LEXIS 28865 (E.D. Pa. 2011); ***Szojaka v. Denenberg***, 1994 Phila. Cty. Rprt. LEXIS 55 (June 28, 1994). Of note, Appellee relies upon this Court's decision in ***Edwards***, where we affirmed the trial court's refusal to apply the peculiar risk doctrine to a fall through a transite roof. ***See Edwards***, ***supra*** at 188. In that case, the injured worker claimed that the roof presented a peculiar risk to him based upon its deteriorating condition and potential safety code violations. On review, we agreed with the trial court that "the risk [of

(Footnote Continued Next Page)

When viewing the record in the light most favorable to Appellant and resolving all doubts as to the existence of a genuine issue of material fact against Thiele, we conclude the trial court improvidently granted summary judgment in favor of Thiele. ***See Barnes***, ***supra***. Upon our review of Appellant's expert report and the deposition testimony presented to us, we believe evidence exists that could allow a fact-finder to render a verdict in favor of Appellant. ***See Babb***, ***supra***. Sufficient evidence of record exists to support Appellant's peculiar risk theory to permit it to be presented to the fact-finder. Accordingly, we conclude the trial court abused its discretion when it granted summary judgment in favor of Thiele. ***See id.***

Furthermore, we conclude that the trial court erred as a matter of law when it granted Thiele's motion for summary judgment. ***Petrina***, ***supra***. In granting this motion, the trial court stated as follows.

> Now, something that caught my attention in [Appellant's] supplemental brief was the statement to say that [Appellant's expert witness] indicates

(Footnote Continued) ————————————————

stepping through this roof] was not different from the usual and ordinary risks associated with the general type of [renovation] work being done." ***Id.*** at 191. The facts of the present case are distinguishable from ***Edwards***. In the instant matter, Appellant's peculiar risk claim is based upon the unique and rare 19th-century saw-tooth design of Thiele's roof, not its deteriorating condition. ***See*** Appellant's Brief at 20. Moreover, Appellant obtained an expert report stating that the design of Thiele's roof, specifically the integration of skylight fiberglass roof decking panels into the standard metal decking roof system, created an extraordinary risk for an individual working on the roof to fall through it. Supplemental Brief in Opposition to Motion for Summary Judgment, 2/22/13, Ex. 7.

> that it is clearly foreseeable that by not using fall protection equipment this incident was likely to happen.
>
> To me, that takes it right out of the peculiar risk doctrine if it's clearly foreseeable. [American Roofing] is a company that's been doing roofing work for 25 years. [It has] been on this particular roof before. **It's clearly foreseeable that this danger exists**.
>
> ...
>
> **In my opinion, the risk was apparent**. [American Roofing] had been on this roof before. Whether [it] did or did not use safety equipment before, maybe [it] felt that [it] had a good experience with the roof and [it] didn't need safety equipment. That was a bad judgment obviously in hindsight, but suffice it to say there was nothing surprising about this roof. It was a pitch roof. [American Roofing] knew the risks of working on roofs, that people fall off of roofs. This does not strike me as being a peculiar risk.

N.T., 2/25/13, at 18-19 (emphasis added). Thus, the trial court found that a peculiar risk did not exist **because** the risk was foreseeable. ***Id.*** This conclusion explicitly contravenes the test set forth in ***Gutteridge***. ***See Gutteridge***, ***supra*** at 656. Therefore, we conclude the trial court erred as a matter of law when it granted summary judgment on this ground. ***See Petrina***, ***supra***.

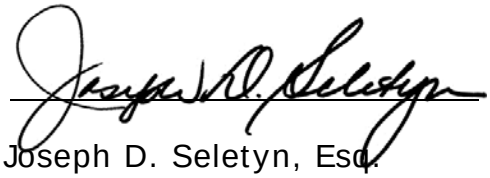
Based on the foregoing, we conclude the trial court abused its discretion and committed an error of law when it granted Thiele's motion for summary judgment. ***See Petrina***, ***supra*** at 797-798. Accordingly, the trial court's February 28, 2013 order is reversed, the March 21, 2013 judgment is

vacated, and the case is remanded for further proceedings consistent with this memorandum.

Order reversed. Judgment vacated. Case remanded. Jurisdiction relinquished.

P.J.E. Bender Notes Dissent.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/7/2014