[J-164-2000]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

HAROLD LEONARD, and ANGELA LEONARD, HIS WIFE,	:	No. 8 M.D. Appeal Docket 2000
Appellants	:	
v.	:	Appeal by allowance from the order of Commonwealth Court, at No. 1013 C.D. 1997 of December 30, 1998, affirming the order of April 3, 1997 of the Court of Common Pleas of Delaware County, at No. 92-002971 denying motion to remove orders of non-suit and the entry of judgments in favor of all defendants
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION; and PERINI, CORP.; and PETER KIEWIT AND SON COMPANY; and KIEWIT EASTERN CO., incorrectly identified as KIEWIT EASTERN CORPORATION; and KIEWIT/PERINI, A JOINT VENTURE; and HIGH STEEL STRUCTURES, INC.; and CORNELL AND COMPANY; and CONSTRUCTION METHODS AND COORDINATION, INC. (CMC),	:	723 A.2d 735 (Pa.Cmwlth. 1998)
Appellees	:	ARGUED: December 4, 2000

OPINION OF THE COURT

MR. CHIEF JUSTICE FLAHERTY **DECIDED: May 22, 2001**

This is an appeal by allowance from an order of Commonwealth Court which affirmed an order of the Court of Common Pleas of Delaware County denying a motion to vacate compulsory nonsuits and directed verdicts in a personal injury action. The action sought compensation for injuries that Harold Leonard, appellant, sustained while employed as an iron worker at a bridge construction site. Appellees, the defendants in this action, are

the Pennsylvania Department of Transportation (PennDOT) and various contractors and subcontractors who were responsible for construction of the bridge.

In 1988, PennDOT entered into a contract with Kiewit Eastern Company and Perini Corporation (collectively, Kiewit/Perini) for the improvement of Interstate 476 in Delaware County. Kiewit/Perini, as general contractor, agreed to demolish existing structures and rebuild various bridges along the highway. Kiewit/Perini entered a subcontract with High Steel Structures, Inc. (High Steel) to fabricate and erect steel for the bridges. In turn, High Steel subcontracted with Cornell and Company (Cornell) for erection of all of the steel. In addition, PennDOT contracted with Construction Methods and Coordination, Inc. (CMC) for certain supplemental inspection and safety monitoring services.

While working on the Chester Road Bridge, Leonard, an employee of Cornell, fell approximately forty feet to the ground. Leonard sustained injuries to his back and right elbow. There was no safety net below the work area. Although Leonard was wearing a safety belt, the belt was not connected to any safety device. There was no static safety line in place. There was, however, an inspector's handrail on the steel girder from which Leonard fell, but he had not attached himself to it.

A negligence action against PennDOT, Kiewit/Perini, High Steel, Cornell, and CMC ensued. Leonard averred that his injuries resulted from dangerous conditions at the work site that were attributable to inadequate safety equipment and procedures. It was asserted that each defendant had a duty to provide a safe workplace, and that each negligently breached that duty. At trial, compulsory nonsuits or directed verdicts were granted in favor of all defendants.

In granting the compulsory nonsuits and directed verdicts, the trial court reasoned that sovereign immunity protected PennDOT from liability; that Cornell, as Leonard's employer, was responsible for work-related injuries under the Workmen's Compensation Act, 77 P.S. § 1 et seq. and therefore not subject to negligence claims; that CMC was contractually obligated to provide supplemental safety inspections wherever PennDOT directed, but that PennDOT had not asked CMC to inspect the structural steel work area of the bridge, and, hence, that CMC had no duty there. Further, with regard to Kiewit/Perini and High Steel, the court reasoned that such parties had no involvement in erection of the steel, that they had no personnel assigned to the site, and that they exercised no control over Leonard or his working conditions because such work, including compliance with safety requirements, had been contractually delegated to Cornell. It was held, therefore, that Kiewit/Perini and High Steel had no duty as to safety of the work site.

On appeal, Commonwealth Court affirmed, applying the well established principle that one who engages an independent contractor is not vicariously liable for the negligence of that contractor. Hader v. Coplay Cement Mfg. Co., 410 Pa. 139, 150-54, 189 A.2d 271, 277-79 (1963). It is because an independent contractor is not subject to control by the one hiring him that there is no basis to hold the latter party liable for his acts. Id.; Brletich v. United States Steel Corp., 445 Pa. 525, 530-32, 285 A.2d 133, 135-36 (1971) (no liability for negligent acts of an independent contractor whose work is not subject to control). Thus, inasmuch as Kiewit/Perini and High Steel had no presence or involvement at the work site and maintained no control over the manner in which work was performed by Cornell, they were deemed not responsible for any injuries caused to Leonard by Cornell's failure to maintain a safe work site.

We granted allowance of appeal limited to the questions of whether a general contractor or subcontractor who was not "present" at the work site may nevertheless be in "control" of the work site pursuant to contract or law so as to have a duty to make the site safe, and whether such a contractor or subcontractor may delegate such a duty to a subordinate subcontractor. Hence, our review focuses on Commonwealth Court's rationale that Kiewit/Perini and High Steel had no duty to Leonard, in that they had no actual involvement in erection of the steel, they had no presence or control with respect to the work site, they had no control over the manner in which Leonard performed his job, and they had contractually delegated all safety responsibility and control over the work site to Cornell.

The decision of Commonwealth Court is in accord with established law that a contractor is not liable for injuries resulting from work entrusted to a subcontractor. As we stated in Duffy v. Peterson, 386 Pa. 533, 539, 126 A.2d 413, 416 (1956),

> Comment d under Section 384 [Restatement, Torts] states: "A possessor of land may put a number of persons severally in charge of the particular portions of the work of erecting a structure or creating any other condition upon the land. Again, a general contractor employed to do the whole of the work may, by the authority of his employer, sublet particular parts of the work to subcontractors. In such a case, the rule stated in this Section applies to subject the particular contractor or subcontractor to liability for only such harm as is done by the particular work entrusted to him."

(Emphasis added). See also McKenzie v. Cost Bros., Inc., 487 Pa. 303, 307-08, 409 A.2d 362, 364 (1979) (noting that Pennsylvania has adopted the Restatement (Second) of Torts,

§ 384).[1] Thus, Cornell, as the subcontractor entrusted with the work of erecting steel, would normally be the only party liable for injuries occurring in that pursuit.

Leonard contends, however, that Kiewit/Perini and High Steel had regulatory and contractual duties to provide a safe workplace for employees of subcontractors, and that such duties could not be avoided through contractual provisions delegating responsibility to an independent subcontractor, i.e., Cornell. Specifically, it is asserted that Kiewit/Perini and High Steel were obligated to secure compliance with various Occupational Safety and Health Administration (OSHA) regulations governing work site safety, particularly those dealing with safety lines and nets. See 29 C.F.R. § 1926.104 (safety lines); 29 C.F.R. § 1926.105 (safety nets). Whether there were in fact any violations of OSHA regulations and whether Leonard's injuries were proximately caused thereby are matters that are disputed by the parties.

To place responsibility on both Kiewit/Perini and High Steel, Leonard relies on 29 C.F.R. § 1926.10(a), which provides that "no contractor or subcontractor contracting for any part of the contract work shall require any laborer or mechanic employed in the performance of the contract to work in surroundings or under working conditions which are . . . hazardous, or dangerous to his health or safety . . . ." Leonard further cites 29 C.F.R. § 1926.16(c), which states, "[T]he prime contractor assumes the entire responsibility under

[1] The Restatement (Second) of Torts, § 384 states:

> One who on behalf of the possessor of land erects a structure or creates any other condition on the land is subject to the same liability, and enjoys the same freedom from liability, as though he were the possessor of the land, for physical harm caused to others upon and outside of the land by the dangerous character of the structure or other condition while the work is in his charge.

the contract and the subcontractor assumes responsibility with respect to his portion of the work. With respect to subcontracted work, the prime contractor and any subcontractor or subcontractors shall be deemed to have joint responsibility." (Emphasis added). In holding that these provisions do not establish liability of a contractor for injuries to subcontractors' employees, Commonwealth Court concluded that the provisions do not deal with the assignment of liability among contractors. Rather, the court held that the regulations establish which parties are subject to OSHA enforcement provisions. We agree. The regulations cited by Leonard expressly state that they concern the scope of enforcement of OSHA requirements. In particular, 29 C.F.R. § 1926.16(d) states: "Where joint responsibility exists, both the prime contractor and his subcontractor or subcontractors, regardless of tier, shall be considered subject to the enforcement provisions of the Act." (Emphasis added). The fact that OSHA requirements were applicable to the project does not, however, mean that Kiewit/Perini or High Steel had a presence at the site or control over the work done by Cornell. Absent those elements, liability does not attach.[2]

Leonard next asserts that the contracts between PennDOT and Kiewit/Perini and,

[2] Several lower court decisions are cited by Leonard for the proposition that a contractor bears liability for injuries caused by OSHA violations that occur during the course of a subcontractor's work. E.g., Donaldson v. Department of Transportation, 141 Pa.Cmwlth. 474, 596 A.2d 269 (1991), appeal denied, 530 Pa. 667, 610 A.2d 46, and 531 Pa. 648, 612 A.2d 986 (1992); Woodburn v. Consolidation Coal Co., 404 Pa.Super. 359, 590 A.2d 1273 (1991), appeal denied, 529 Pa. 633, 600 A.2d 953, 529 Pa. 635, 600 A.2d 954, and 529 Pa. 636, 600 A.2d 955 (1991); Egan v. Atlantic Richfield Co., 389 Pa.Super. 290, 566 A.2d 1249 (1989), appeal denied, 525 Pa. 630, 578 A.2d 925, 525 Pa. 634, 578 A.2d 929, and 525 Pa. 636, 578 A.2d 930 (1990). Some of these cases can be distinguished from the present one based on the presence or control of the contractor relative to the work site. For example, in Donaldson the contractor supplied defective scaffolding materials to the work site and these caused injuries to a subcontractor's employee. In Woodburn and Egan, however, the extent of the contractor's presence or control at the work site is not clear. To the extent, however, that the decisions may be interpreted as recognizing liability without there being any presence or control by the contractor, such decisions are in error.

in turn, High Steel stated that work would be conducted in accordance with safety requirements, and that the contracts thereby created a duty towards him that provides a basis of liability. The contracts in question, as is usual with contracts for federally funded construction projects, included language mandated by the United States Department of Transportation Federal Highway Administration. That language incorporated specifications that there would be compliance with OSHA requirements and that the contractor would at all times "[k]eep direct control of the contract and see that the work is properly supervised . . . ." The subcontract between High Steel and Cornell, in turn, provided:

> [Cornell] agrees to conduct and carry on its work in such manner as to avoid injury or damage to persons or property including its own work and be strictly responsible for damage to persons or property by failure so to do or by [Cornell's] negligence, and shall assume as to its work hereunder all obligations imposed on [High Steel] under the provisions of the General Contract and shall indemnify and hold harmless [High Steel] against such obligations in the same manner that [High Steel] is obligated to indemnify [Kiewit/Perini] and [PennDOT].

Thus, Cornell, under its subcontract for erection of steel, assumed all of the contractors' responsibilities for safety compliance with respect to its portion of the work. Having fully delegated to Cornell the task of erecting steel, the contractors higher in tier no longer had control over the manner in which that work was done. The contract with Cornell provides no basis to conclude that control over Cornell's work methods was being retained. The mere fact that contracts initially placed responsibility on Kiewit/Perini and High Steel does not make that responsibility nondelegable; nor does it give them a presumed presence at the site or control over the manner in which the subcontractor performed its work. To hold otherwise would mean that one could subcontract for the performance of work but not successfully delegate the safety responsibility that normally accompanies that work. Logically, safety responsibility best rests on the subcontractor doing the work, for

that party is most familiar with the work and its particular hazards. As we stated in Hader v. Coplay Cement Mfg. Co., 410 Pa. at 151, 189 A.2d at 277 (quoting Silveus v. Grossman, 307 Pa. 272, 278, 161 A. 362, 364 (1932)), "'How can the other party control the contractor who is engaged to do the work and who presumably knows more about doing it than the man who by contract authorized him to do it? Responsibility goes with authority.'" Thus, a subcontractor who undertakes a task is in the best position to provide for the safe accomplishment thereof, and delegation of safety responsibility to that subcontractor does not deviate from the contractor's duty.

Kiewit/Perini and High Steel are not, therefore, liable to Leonard with respect to the safety of work performed by Cornell. Accordingly, Commonwealth Court properly affirmed the judgments entered below.

Order affirmed.

Mr. Justice Nigro files a dissenting opinion in which Mr. Justice Saylor joins.