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

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

CONCURRING AND DISSENTING OPINION

MADAME JUSTICE NEWMAN **DECIDED: DECEMBER 28, 2006**

I join Part II of the Majority Opinion because I agree that Trumbull owed a duty to perform its safety obligations pursuant to its contract with the Pennsylvania Turnpike Commission (PTC) so as not to injure Decedent. I dissent, however, from Part I because I believe that PTC did owe New Enterprise Stone and Lime Company (NESL) employees a duty to ensure their safety while traveling upon the haul roads located on the construction site. In particular, I disagree with the Majority's application in Part I, Section 3 of the peculiar risk doctrine to the facts *sub judice*.

Pursuant to Section 31.00 of the contract between PTC and NESL (NESL-PTC Agreement), "Contractor [NESL] is solely responsible for the safety and welfare of his [sic] employees and for the protection of property . . . . [NESL] will furnish, erect, and maintain all barricades, warning signs and other protective devices to protect the public and employees from the job site safety hazards." (Reproduced Record (R.R.) at 228a.) The Section also provided that NESL was to develop a written safety program, which was to give "special attention" to "[f]all protection" and "[e]xcavation trenching cave-in protection." (Id. at 229a.) Section 31.00 further states that PTC's engineer's "acceptance of [NESL]'s Safety Program shall not relieve or decrease the liability of [NESL] for Safety" and provides that

> [n]o provision of these contract documents shall act to make [PTC], the Engineer or any other party other than [NESL] solely responsible for safety. The Contractor Indemnity provided under Special Provision 30.00 entitled "Contractor's Insurance," shall apply to protect, indemnify, defend and hold harmless all parties referred to herein from any and all actions, damages, fines, suits and losses arising from [NESL]'s failure to meet all safety requirements and/or provide a safe work site.

(Id. at 230a.)

On February 6, 1996, PTC entered into a contract with Trumbull, pursuant to which Trumbull would act as the construction manager of the Project. The contract, entitled the Open-End Inspection Agreement (Trumbull-PTC Agreement), included the following language in Paragraph 12 of its "Technical Proposal" section:

> Safety is of paramount importance to [Trumbull] in every activity we perform. On the basis that PTC will purchase and maintain a "Wrap-up" insurance program for this project, we will provide a Safety / Insurance Monitor to oversee the program. Our Safety / Insurance Monitor will be PTC's agent and representative in matters of construction safety and the project Wrap-Up

> Insurance Policy at the work site. We will review and approve contractor emergency procedures and site safety plans, interview applicants for contractors' Safety Representatives and make recommendations, monitor the Safety Representatives' performance, and monitor the contractors' compliance with O.S.H.A. and other applicable regulations at all work operations. Monitoring will be frequent and on a regular schedule. We will organize monthly walk-through safety tours with PTC, Insurance carrier, and contractor representatives and arrange and conduct other safety / insurance meetings as required. . . .
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> * * *
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> We will continually monitor the performance of all contractors' workers and recommend removal from work any employee deemed unsuitable for reasons of safety and loss control.

(Id. at 258a-59a.)

At approximately two o'clock on the afternoon of December 1, 1999, Decedent, an NESL employee, was driving a dump truck on a haul road[1] on the Section 52H construction site when the truck fell down a twenty-eight-foot embankment and landed upside-down in approximately four feet of water, killing him.[2] On August 7, 2000, Decedent's widow, Jane A.

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[1] A haul road is an unpaved dirt road built into a hillside to allow construction vehicles to haul dirt and other materials from one part of a construction project to another.

[2] Neither of the lower court Opinions provides further details of the accident. According to Appellants, however:

> [t]he accident occurred after [Decedent] had picked up a load, and was traveling uphill on the subject haul road. As he ascended the road, an NESL employee in a grader was coming down the road in the opposite direction. Although [Decedent] had the right of way, he began moving the truck over to the right. Another [truck] driver, Dennis Speck, was on another haul road above [Decedent] and witnessed [Decedent] moving further and further to the right, even though there was room to pass the grader. Mr. Speck then saw [Decedent] drive off the haul road.

(continued…)

Farabaugh (Appellee), individually and as administratrix of the estate of Decedent, filed wrongful death and survival actions against PTC and Trumbull (collectively, "Appellants") alleging, *inter alia*, that the haul road on which Decedent was driving collapsed and caused his truck to fall and that PTC and Trumbull were negligent for failing to ensure the safety of the road.

Following extensive discovery, on March 4, 2003, PTC and Trumbull each filed a Motion for Summary Judgment. The trial court granted both Motions on May 29, 2003, thereby dismissing Appellee's claims against Appellants. With respect to Appellee's negligence action against Trumbull, the trial court first determined that Trumbull did not owe a duty of care to Decedent because the evidence showed that: (1) "Trumbull had no control over the construction or maintenance of the haul roads;" (2) Trumbull "did not control the manner or method in which NESL performed its work;" and "NESL was contractually responsible for safety on the job site." Farabaugh v. Pa. Turnpike Comm'n, No. GD 00 - 13, at 11 (C.P. Pa. Allegheny Dec. 5, 2003) (hereinafter "trial ct. Op.") In addition, the trial court held that, even if Trumbull did owe Decedent a duty, Trumbull would still be entitled to summary judgment because Appellee had "failed to produce any evidence from which a reasonable juror could find that Trumbull caused [Decedent]'s accident." Id. at 12.

Similarly, as for Appellee's negligence action against PTC, the trial court concluded that PTC did not owe a duty to Decedent based on the general rule of law that the employer of an independent contractor is not liable for physical harm caused to another by an act or

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(…continued)
(Brief of Appellants at 12.) Appellee presented evidence at trial refuting that Decedent drove off the haul road and suggesting instead that the edge of the hill upon which the road was situated collapsed. Nevertheless, Appellee does not dispute the other details of the accident as described by Appellants above.

omission of the independent contractor. The trial court further determined that, in any event, sovereign immunity protected PTC from liability for the accident.

On appeal, a panel of the Commonwealth Court filed a Memorandum Opinion and Order on September 13, 2004, reversing the Order granting summary judgment in favor of Trumbull and PTC. With respect to the action against Trumbull, emphasizing that Trumbull's safety representatives had the power to stop work if they noticed safety problems, the Commonwealth Court concluded that the trial court erred in determining that Trumbull did not owe Decedent a duty of care. The Commonwealth Court also disagreed with the conclusion of the trial court that there was insufficient evidence to support a finding that Trumbull had caused the accident.

Similarly, as for the action against PTC, the Commonwealth Court concluded that the trial court erred in determining that PTC did not owe Decedent a duty because PTC retained control over Section 52H, at least through its agent Trumbull. The Commonwealth Court also disagreed with the trial court's conclusion that PTC was immune from suit because Appellee had alleged facts stating "a claim of injury due to a defective condition of land," thus rendering the so-called "real estate exception" to sovereign immunity applicable. Farabaugh v. Pa. Turnpike Comm'n, No. 2086 C.D. 2003, at 2-3 n.1 (Pa. Cmwlth. Dec. 13, 2004).

On September 1, 2005, we granted allowance of appeal limited to the following two issues: (1) whether guidance by this Court is necessary because the scope of a construction manager's duty to a contractor's employee is an issue of first impression in the Commonwealth; and (2) whether the Commonwealth Court erred in holding that the Pennsylvania Turnpike Commission had a common law duty to warn the decedent's

employer of any obvious conditions created by the general contractor. Farabaugh v. Pa. Turnpike Comm'n, 882 A.2d 1003 (Pa. 2005).[3]

In Section 3 of Part I of its Opinion, the Majority concludes that the work that Decedent was performing at the time of the accident did not involve a "peculiar risk" or "special danger" within the meaning of Sections 416 and 427 of the *Restatement (Second) of Torts*. These Sections, which embody the so-called peculiar risk doctrine, are concerned not with the taking of routine precautions, which are the responsibility of the contractor but, rather, with:

> special risks, peculiar to the work to be done, and arising out of its character, or out of the place where it is to be done, against which a reasonable man would recognize the necessity of taking special precautions. . . . 'Peculiar' does not mean that the risk must be one which is abnormal to the type of work done, or that it must be an abnormally great risk. It has reference only to a special, recognizable danger arising out of the work itself.

Restatement (Second) of Torts § 413 cmt. b; id. at § 416 cmt. b (declaring Comment b following Section 413 applicable to Sections 416 and 427).

Although the applicability of the peculiar risk doctrine is a mixed question of law and fact, the trial judge may decide the issue as a matter of law, but only in "clear cases." Emery v. Leavesly McCollum, 725 A.2d 807, 814 (Pa. Super. 1999) (*en banc*) (citing Mentzer v. Ognibene, 597 A.2d 604, 610 n.6 (Pa. Super. 1991), petition for allowance of appeal denied, 609 A.2d 168 (Pa. 1992)). Therefore, summary judgment in favor of PTC is inappropriate unless the peculiar risk doctrine is clearly inapplicable.

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[3] Importantly, we thereby denied allowance of appeal from the Commonwealth Court's reversal of the trial court's determinations that: (1) Appellee had produced insufficient evidence of causation on the part of Trumbull; and (2) sovereign immunity protected PTC from liability for the accident.

Comment (c) following Section 427 presents as an example of a "peculiar risk" one that is highly analogous to that posed by the allegedly unstable hillside in the case *sub judice*: "[A]n excavation in the highway, although it is not a highly dangerous activity and calls for no special skill, involves a recognizable risk that some one may fall into the excavation unless it is properly guarded." Similarly, the haul road presently at issue was flanked by embankments twenty-eight feet in height. (Trial ct. Op. at 2.) Furthermore, viewing the testimony in the light most favorable to Appellee as the non-moving party, the road had been built upon a coal seam, which is inherently unstable, and there was no berm where the accident occurred. (See R.R. at 504a.) Finally, the photographic evidence that Appellee submitted provides additional support for her contention that Decedent and other NESL employees subjected themselves to a "peculiar" or "special" risk by driving upon the haul road at issue. (See id. at 530a-33a.)

Appellee thus presented sufficient evidence at trial to show that the peculiar risk doctrine is not clearly inapplicable to this case. Viewing the evidence in the light most favorable to Appellee, the risk of such an accident as Decedent's arose out of the place where his work was to be done and was of such a nature that a reasonable person would have recognized the need to take special precautions, such as constructing a berm, to prevent it. See *Restatement* § 413 cmt. (b). Therefore, I believe that Appellee succeeded in overcoming the general presumption against a duty on the part of a landowner toward the employees of a general contractor. Accordingly, I would hold that the Commonwealth Court did not err in reversing the determination of the trial court that PTC did not owe Decedent and other NESL employees a duty to ensure their safety while traveling upon the haul roads located on the Section 52H construction site.

As for Part II of the Majority Opinion, I agree that Appellee has met her burden of showing that Trumbull owed Decedent a duty of care to protect him and other NESL employees from harm on the haul roads upon which they drove. When viewed in the light most favorable to Appellee as the non-moving party, the evidence *sub judice* compels the conclusion that Trumbull undertook to inspect the haul roads. Pursuant to the Trumbull-PTC Agreement, Trumbull specifically agreed to "monitor the contractors' compliance with O.S.H.A. and other applicable regulations at all work operations." (R.R. at 259a.) The haul roads were subject to these inspections. (R.R. at 503a.)

Moreover, I join the Majority in "declin[ing] to provide a rigid definition of a construction manager or impose a correspondingly static duty on all construction managers." (Majority Slip Op. at 30.) In doing so, I recognize that, in granting allowance of appeal with respect to the instant claim, we framed the issue broadly in terms of the scope of a construction manager's duty toward the employee of a contractor. The Brief of Appellants, however, is essentially fact-dependent and fails to present a colorable argument in support of the recognition of a special rule applicable to the duties of construction managers. (See Brief of Appellants at 17 ("This case calls for a review of the role of a construction manager. Construction management has been defined as the process of professional management applied to a construction program from conception to completion for the purpose of controlling time, costs and quality. . . . This description of the role of a construction manager is consistent with the facts of this case as they relate to the relationship between [PTC] and Trumbull.") (internal quotation marks and internal citations omitted).) In the absence of such an argument, we must assume that a construction manager's duty, like that of any other construction professional, arises from its contract; therefore, the Majority properly declines to impose a special rule with respect thereto.

Accordingly, I would affirm the Order of the Commonwealth Court reversing the trial court's grant of summary judgment in favor of Trumbull as well as PTC and remand the case for further proceedings involving both Appellants.