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Liability of Construction Managers/Design Professionals to Injured Employees of Contractors: Pennsylvania Supreme Court Takes another Look

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Introduction

In *Farabaugh v. Pennsylvania Turnpike Comm.*, 911 A.2d 1264 (Pa. 2006), the Pennsylvania Supreme Court addressed the scope of a construction manager's duties of safety owed to a contractor's employee. The Court ultimately concluded that, under the construction management contract at issue, the construction manager had safety supervision responsibilities and could be held liable to the deceased employee of the contractor. In addition to its specific ruling, the Court demonstrated the dire consequences that can result to the unsuspecting construction manager or design professional who fails to carefully draft its contract so as to limit safety responsibilities.

Factual Background

In December 1999, James Farabaugh sustained fatal injuries while driving a dump truck during the course of a construction project on a site owned by the Pennsylvania Turnpike Commission ("PTC"). At the time of the accident, Mr. Farabaugh was acting in the scope of his employment with New Enterprise Stone and Lime ("NESL"), the general contractor on the project. Following the accident, Mr. Farabaugh's estate filed a lawsuit against PTC and Trumbull Corporation ("Trumbull"), which acted as the construction manager on the project.

The trial court granted summary judgment to both PTC and Trumbull prior to trial. In an unpublished decision, the Commonwealth Court reversed summary judgment in favor of Trumbull, concluding that Trumbull owed a duty of care to the decedent. Thereafter, the Supreme Court granted an allowance of appeal and addressed two issues, including whether Trumbull owed a duty of care to protect Mr. Farabaugh from dangerous conditions.

In its ruling, the Supreme Court refused to establish a standard rule as to safety responsibilities of a construction manager. Rather, the Court turned to the contractual language, which defined the construction manager's duties on this specific project, and made its decision based on those terms.

Terms of the Construction Management Agreement

The Court first considered the terms of the contract between PTC and Trumbull. The Court noted that under the contract, Trumbull was to "[d]evelop, implement, maintain and monitor a comprehensive project safety/insurance program in accordance with the 'wrap-up' insurance guidelines. Monitor each contractor and subcontractor for compliance with the contractors' insurance provisions in the contract documents. Quarterly safety/insurance review meetings will be required."

The Court also reviewed the Technical Proposal submitted by Trumbull to the PTC. This document stated:

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.... We will review and approve contractor emergency procedures and site



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safety plans, interview applicants for contractors' Safety Representatives, and make recommendations, monitor the Safety Representatives' performance, and monitor the contractors' compliance with OSHA. 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.... We will continually monitor the performance of all contractor's workers and recommend removal from work any employee deemed unsuitable for reasons of safety and loss control.

In addition, Trumbull had distributed a safety videotape which stated that Trumbull was "looking after your interests as well as the owner's [interests]."

As for the General Contract between NESL and PTC, it stated that PTC, its Engineer or other authorized Safety Representatives "have the authority to suspend work in progress when necessary to enforce mandatory safety requirements until the condition is corrected." Under the General Contract, NESL further agreed that "the acceptance of NESL's Safety Program shall not relieve or decrease the liability of [NESL] for safety" and that "no provision of these contract documents shall act to make [PTC], the Engineer or any party other than [NESL] solely responsible for safety."

Supreme Court Analysis

In arguing that it owed no duty, Trumbull sought application of Pennsylvania case law which found no duty owed by general contractors out of possession of property. See *Leonard v. Commonwealth Dept. of Transp.*, 771 A.2d 1238 (Pa. 2001). However, the Court found these cases inapplicable, explaining that, while the *Leonard* line of cases involved the delegation of oversight obligations by the general contractor, this matter involved the assumption of safety supervision duties by the defendant construction manager. The Court further reasoned that the role of construction managers are more aligned to that of an engineer or architect, as opposed to a general contractor.

With that in mind, the Court referred to the case of *Marshall v. Port Auth. of Allegheny County*, 568 A.2d 931 (Pa. 1990) and compared the contractual undertakings by the engineer in *Marshall* to those of Trumbull . In *Marshall*, an engineering firm was found to owe no duty to an injured employee of the general contractor on a Port Authority construction project. The *Farabaugh* Court noted that, in *Marshall*, while the engineer had construction management duties, the engineer's on-site safety role involved passive duties, such as the collection of written safety programs and reports. According to the Supreme Court, this was in contrast to the active role assumed by Trumbull in assuring safety through the development of a safety plan and monitoring the contractor's compliance with the safety regulations on a frequent and regular schedule. The Court concluded that these contractual responsibilities assumed by Trumbull could form the basis for Trumbull owing a duty to protect the plaintiff-decedent from unsafe conditions at the site. The case was therefore remanded to the trial court.

Comparison to Marshall

This decision reinforced the holding in *Marshall* that determining whether a duty is owed

to third parties by an engineer or construction manager is governed primarily by the contractual responsibilities assumed in the agreements. At the same time, the ruling highlighted how thin the line is

between a construction manager successfully insulating itself from third party claims and a construction manager exposing itself to substantial claims by injured workers.

The Court in *Farabaugh* provided a cursory overview of the relevant language in the engineering contract in *Marshall* and distinguished the language in the Trumbull / PTC Agreement. However, closer inspection of the language in *Marshall* and *Farabaugh* reveals that there were significant similarities between the contract language.

Both Trumbull and the *Marshall* engineer had the ability to stop the work when unsafe conditions were detected. Likewise, in both cases, the general contract stated that safety was the sole responsibility of the general contractor. Interestingly, the Court in *Marshall* placed great weight on this fact, stating that "imposing a duty on Baker to be actively involved in procedures for safety compliance would be inconsistent with the provision in the PAT-Mosites contract stating that Mosites shall supervise and direct the work and be solely responsible for all construction means." On the other hand, the *Farabaugh* Court, while recognizing the contractor's assumption of sole responsibility in its factual summary, appeared to discount this fact in arriving at its conclusion.

In the agreement between the defendant and the owner, both Trumbull and the engineer in *Marshall* had obligations related to safety programs. The prime distinction was that Trumbull was required to develop a safety program and monitor it, while the Marshall defendant only agreed to assure that the contractors submitted their own safety programs. Granted, the duties for safety assumed by Trumbull in *Farabaugh* were greater than the safety obligation contractually undertaken by the engineer in *Marshall*. However, a complete comparison of the facts demonstrates that both defendants had safety obligations and the difference in these safety responsibilities were not drastically different.

Lessons Learned

From the standpoint of a construction manager or design professional, this ruling could prove extremely important. Undertaking responsibilities for project safety should not be done lightly. The Pennsylvania Workers' compensation law generally immunizes the contractor from tort claims of its employees. Therefore, if a contractor's employee is injured at a project, the construction manager or design professional could be the primary target in a personal injury lawsuit. Careful attention to the terms used in defining the responsibilities towards safety could mean the difference between liability immunity and high exposure.

According to the recent ruling in *Farabaugh*, the Court will determine the duties owed by the professional by focusing on the contractual provisions, as opposed to whether the company adopts the role of construction manager, engineer, architect, clerk-of-the-works or some other title. Furthermore, the decision indicated that the controlling provisions will be found in the agreement with the owner, rather than the specifications or other contract documents. When drafting the agreement, the construction manager or design professional might be best served if responsibilities towards safety are wholly avoided. However, to the extent clients require that some duties of safety are accepted, the construction manager or design professional should adhere to the more limited scope of work outlined in the *Marshall* case, and not the safety tasks accepted by the construction manager in *Farabaugh*. Agreeing simply to assure submission of safety plans by contractors, while avoiding responsibilities for developing safety programs and performing site inspections, should help to greatly limit liability.



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