

# *Beil v. Telesis* and the Retained Control Exception

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Property owners often engage independent contractors to perform construction and renovation projects on their properties. If an employee of the independent contractor is injured on the property, the owner may be liable to the employee for his injuries, regardless of whether the worksite is a home, a multi-million dollar lab renovation or a residential construction project.

While it is well settled in Pennsylvania that a property owner who engages an independent contractor is not responsible for the acts or omissions of the independent contractor or his employees, there are two exceptions to this general rule that may expose the owner to liability: (1) the owner retains significant control over the contractor's work or (2) the work involves a peculiar risk. See *Beil v. Telesis Construction, Inc.*, 11 A.3d 456, 466 (Pa. 2011); *Hader v. Coplay Cement Mfg. Co.*, 189 A.2d 271 (Pa. 1963); *Pender v. Raggs*, 35 A. 1135 (Pa. 1896); *Restatement (Second) of Torts* § 409.

The Pennsylvania Supreme Court in *Beil* recently upheld the Superior Court's entry of a judgment notwithstanding the verdict in favor of the property owner, Lafayette College, finding that, as a matter of law, the owner was not subject to liability to an employee of an independent contractor under this general rule as no exception applied.

In *Beil*, plaintiff David Beil, an employee of a roofing subcontractor, fell approximately 30 feet from a scaffold that had been erected by the masonry subcontractor, according to the opinion. He initiated a personal injury action against the owner, the construction manager and the masonry subcontractor. The owner employed a daily on-site project manager, controlled access to certain portions of the building and implemented worksite safety rules. Nevertheless, the construction manager acknowledged that it was in complete control of the project and responsible for the safety of its subcontractors, including the roofing subcontractor's employees.

The Supreme Court, in reviewing the Superior Court's ruling, analyzed whether the court: (1) misapplied case law regarding the retained control exception; (2) misapplied § 414 of the *Restatement (Second) of Torts*; and (3) failed to view the evidence in the light most favorable to Plaintiffs.

The plaintiffs asserted that the "retained control" exception should apply to the property owner. They asserted that the owner retained control by (1) controlling on-site safety with the authority to stop work and (2) controlling access to building locations that subcontractors could use.

Historically, Pennsylvania courts found that the retention of control must be such that the owner asserts control over the method in which the contractor performs its work. See, e.g., *Farabaugh v. Pennsylvania Turnpike Commission*, 911 A.2d 1264 (Pa. 2006); *Hader*, 189 A.2d at 277-78. Mere control over building access, prescribing alterations or changes or regulating work-site safety are not sufficient to impose liability on the owner, according to the opinion in *Beil*.

The court relied upon the test set forth in the *Restatement (Second) of Torts* § 414, which speaks to the degree of control necessary for owner to liability. Comment (a) to Section 414 underscores that the owner's control over the work must involve "control over the operative detail" of the contractor's work. Further, Comment (c) of Section 414 provides that for an owner to be liable, it must retain control over the manner of the work being done.

The court found that an owner who retains control over safety and worksite access does not automatically fall within the purview of the "retained control" exception to the general rule. Notably, the on-site daily presence of an owner's employee does not necessarily impose liability if no control is asserted over the means and methods of the contractor's work.

Specifically, the court found that "a property owner retaining a certain degree of authority over safety issues, such as supervising and enforcing safety requirements, and even imposing its own safety requirements at a work site, does not constitute control for purposes of imposing liability." It further held that the owner's regulation of the "access to, and use of, certain areas of the premises" is not the type of conduct that constitutes

control as contemplated by the *Restatement*. Thus, the court found that the owner was not liable for the employee's injuries.

The dissenting opinion in *Beil*, however, opines that the majority improperly found the absence of liability solely because the owner did not control the subcontractor's operative work itself. Instead, the dissent states that the owner's control over how the subcontractor accessed the work area – in this case the roof – was sufficient control over the contractor's work to impose liability on the owner.

## **PRACTICAL APPLICATION**

The result of the majority opinion permits property owners to control certain peripheral aspects of the worksite but enjoy insulation from liability to a subcontractor's employee. In practical application, the majority opinion does not require owners to relinquish complete control over their properties to a general contractor or construction manager. An analysis of this decision and its impact on three kinds of property owners – an individual, a corporation and a land developer – is reviewed below.

## **THE INDIVIDUAL HOMEOWNER**

A homeowner will likely exert limited control over the safety aspects of a home renovation project, but may exert significant control over access to rooms or other areas of the home without knowledge of the effect that it may have on the subcontractor's work. Consider a homeowner who prevents access to his bedroom because he does not want subcontractors tracking dirt into this room. Although this room may provide easier access to the roof through a balcony or other means of egress, the subcontractor must

now access the roof by using a scaffold, a tool common to the industry.

Should the homeowner be subject to liability if, while utilizing the scaffold to access the roof, the subcontractor falls off of the scaffold to the ground below? Under *Biel*, the owner is not liable because the owner did not exert control over the operative methods in which the subcontractor performed his or her work. However, according to the dissent, the owner's control over access to the worksite which prevented the subcontractor from utilizing an arguably easier, and perhaps safer, means of accessing the roof could expose the owner to liability. Nevertheless, the simple application of *Biel* permits owners to retain limited control over their own properties without being subject to civil liability to injured workers.

#### **THE CORPORATION**

Should the sophistication of the owner be considered when determining the amount of control? A pharmaceutical company performs a multimillion-dollar renovation of laboratories and office spaces. The company hires a general contractor to oversee and manage the work, but has its own employee monitor the progress to ensure limited interference with company operations.

Because of the presence of company employees, subcontractors are only permitted access to the work area through the basement door. The company's project manager retains the right to correct safety violations and stop work if issues are not remediated. The company further enforced various rules, such as prohibiting on-site smoking and profanity.

A veteran painter, while utilizing a four-foot baker scaffold to paint the walls of the new

laboratory, slips and falls. The employee chose to use the scaffold, which had no noticeable defects. Applying the *Beil* dissent, the control over on-site safety, rules and access would leave the owner potentially liable. In other words, to avoid liability, the owner would be forced to limit its involvement in the construction process to the design aspect, despite the potential impact the work could have on its business operations.

The majority decision, however, does not prohibit the owner from exerting this control and ensuring that the company's operations are minimally impacted.

#### **THE LAND DEVELOPER**

Similarly, a residential land developer is a more sophisticated and knowledgeable owner. The construction and development of his property are part of his normal business operations. Nevertheless, he retains a general contractor who hires and monitors the subcontractors. The developer's superintendent walks the site daily to oversee the construction progress and review on-site safety. The developer controls all customized requests by the potential buyers. Prior to beginning work, all subcontractors are required to complete the owner's safety course.

While laying shingles on a house under construction, a roofer slips and falls to the ground. The worker was not tied off and installed no fall protection. The general contractor admits that it maintained control over the worksite for the purposes of completing construction. As with other owners discussed above, the lack of control over the operative detail of the roofer's work should insulate the developer from liability

under *Beil*. This decision encourages owners to monitor subcontractor worksite safety and still hire, and rely upon, general contractors to control the project and maintain responsibility for overall worksite safety.

### **BEIL'S IMPACT**

Pursuant to *Beil*, the property owner, despite his level of sophistication, who exerts control over the worksite, but not over the means and methods in which the contractor

performs his or her work, will not be subject to liability for a subcontractor's injuries under the "retained control" exception to the general rule that insulates a property owner from liability for a subcontractor's employee's injuries. As the property owner argued in *Beil*, to hold otherwise would send "the message to the owners . . . that they are better off closing their eyes to construction activity and allowing contractors to work with no input or observation from" owners than encouraging safe work practices. •

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