

In Pennsylvania, Contractors Can Be Liable to Third Parties for Obvious Defects in Completed Work

Michael DeBona
The Subrogation Strategist
6.13.23

In *Brown v. City of Oil City*, No. 6 WAP 2022, 2023 Pa. LEXIS 681 (2023), the Supreme Court of Pennsylvania (Supreme Court) recently held that a contractor can be liable for dangerous conditions it creates even if the hazard is obvious or known by the property owner. In *City of Oil City*, the City of Oil City (Oil City) contracted with Harold Best and Struxures, LLC and Fred Burns, Inc. (collectively Contractors) to reconstruct the concrete stairs to the city library. Contractors completed their work at the end of 2011. In early 2012, Oil City received reports of issues with the stairs. Oil City notified Contractors that it considered the stairs dangerous and that Contractors' defective workmanship created the condition. Neither Oil City or Contractors took any action to fix the stairs or warn of the danger and the stairs' condition worsened with time.

On November 23, 2015, David and Kathryn Brown exited the library. Kathryn Brown tripped on one of the deteriorated steps, falling and striking her head. Kathryn suffered a traumatic head injury and passed away six days later. The Estate of Kathryn Brown and David Brown, individually (collectively, the Browns), sued Oil City as the owner of the library and Contractors. With respect to Contractors, the Browns asserted that Contractors' work on the stairs created a dangerous condition that presented an unreasonable risk of harm to those using the steps.

After discovery, Contractors filed motions for summary judgment. Contractors argued that pursuant to Section 385 of the Restatement (Second) of Torts and comment c to that section, a contractor who is out of possession of property cannot be liable for a dangerous condition it created on the property unless the condition is "undiscoverable or latent." Section 385, entitled, "Persons Creating Artificial Conditions on Land on Behalf of Possessor: Physical Harm Caused After Work has been Accepted," provides, in full:

One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to liability to others upon or outside of the land for physical harm caused to them by the dangerous character of the structure or condition after his work has been accepted by the possessor, under the same rules as those determining the liability of one who as manufacturer or independent contractor makes a chattel for the use of others.

Restatement (Second) of Torts § 385 (1965).

Comment c to Section 385, in turn, provides:

A manufacturer of a chattel who puts it upon the market knowing it to be dangerous and having no reason to expect that those who use it will realize its actual condition is liable for physical harm caused by its use (see § 394). As the liability of a servant or an independent contractor who erects a structure upon land or otherwise changes its physical condition is determined by the same rules as those which determine the liability of a manufacturer of a chattel, it follows that such a servant or *contractor who turns over the land with knowledge that his work has made it dangerous in a manner unlikely to be discovered by the possessor* is subject to liability both to the possessor, and to those who come upon the land with the consent of the possessor or who are likely to be in its vicinity.

Restatement (Second) of Torts § 385, cmt. c (comment c) (emphasis added).

Trial Court Grants Summary Judgment for Contractors

The trial court granted summary judgment in favor of Contractors. In interrupting Section 385 and comment c, the trial court relied on the reasoning of the Superior Court of Pennsylvania (Superior Court) in *Gresik v. Pa. Partners, L.P.*, 2009 Super 253 (Pa. Super. 2009) (*Gresik I*). *Gresik I* involved a negligence suit against a prior owner of a steel plant for modifications it made to the plant during its ownership. In particular, the prior owner removed a drawbridge that workers used to escape if molten steel breached the sides of the furnace. After the prior owner sold the plant without the drawbridge, a steelworker died when he had no means of escaping. Suit was brought against the prior owner for creating the dangerous condition. However, the Superior Court concluded that a precondition for liability under Section 385 is showing that the danger was unlikely to be discovered by the possessor of the property. Because the plant's current owner knew of the removal of the drawbridge and the hazards this created, *Gresik I* upheld summary judgment for the prior owner that removed the drawbridge.

Based on the reasoning in *Gresik I*, the trial court in *City of Oil City* determined that Contractors could not be liable to the Browns because Oil City was aware of the dangers presented by the stairs. Summary judgment was thus granted for Contractors. Thereafter, the Browns reached a settlement with Oil City for \$500,000 – the maximum amount of liability of a local agency under the damages cap of the Political Subdivision Tort Claims Act – and appealed the entry of summary judgment for Contractors.

Commonwealth Court Reverses Summary Judgment

The Commonwealth Court reversed, relying on two Pennsylvania cases that imposed liability on a contractor for harm its workmanship caused to third parties. The first was *Prost v. Caldwell Stores*, 409 Pa. 421 (1963), which establishes that a party to a contract has a broader duty to all individuals to perform the contract without injuring third parties. The second was *Gilbert v. Consolidated Rail Corp.*, 154 Pa. Commw. 249 (1993) — which, unlike *Gresik I*, imposed third-party liability on a contractor despite the property owner being aware of the dangerous condition.

In *Gilbert*, the Consolidated Rail Corporation (Conrail) constructed a track crossing for its rails. After Conrail surrendered the property to Southeastern Pennsylvania Transit Authority (SEPTA), a train struck an individual who was using the crossing. Although the dangerous condition was open and obvious to the possessor, SEPTA, *Gilbert* held that Conrail could be liable for creating the risk. In contrast to *Gresik I*, the Commonwealth Court in *Gilbert* determined that the dangerous condition did not need to be undiscoverable or latent to make a contractor liable to third parties. Likewise, SEPTA's knowledge of the dangerous condition did not absolve Conrail from liability for creating it.

Supreme Court Affirms Commonwealth Court's Reversal of Summary Judgment

On appeal, the Supreme Court was faced with following *Gresik I*, which reasons that a danger must be patent or latent for a contractor to be liable to third parties, or to follow *Gilbert*, which has no such requirement and allows for liability even if the danger is open and obvious or known by the property owner. The Supreme Court concluded that a contractor's liability under Section 385 does not turn on whether the defective condition the contractor caused was latent or undiscoverable.

Like the Commonwealth Court did below, and previously in *Gilbert*, the Supreme Court interpreted Section 385 as imposing liability on contractors for injuries to third parties arising from *all* defective conditions created by the contractor. The Supreme Court concluded that comment c's reference to liability for work "unlikely to be discovered by the possessor" does not apply to claims brought by third parties. Rather, it applies only to claims brought by possessors. Stated differently, a contractor can be liable to third parties for

125th
ANNIVERSARY

White and
Williams LLP

dangerous conditions it creates regardless of the nature of the dangerous condition. On the other hand, a possessor of land can pursue a contractor in tort for dangerous conditions created by the contractor only if the possessor neither knew nor should have known of the dangerous condition. Therefore, the Supreme Court held that a contractor may be liable to third parties for damages caused by a dangerous condition it creates even if the condition is obvious or apparent in nature, and even if the dangerous condition is known by the property owner.

City of Oil City is an important decision because it makes clear that contractors can be liable to third parties regardless of whether the dangerous conditions it creates are appreciated by the property owner or readily apparent to third parties. Under *City of Oil City*, an open and obvious danger only bars the possessor of property from recovering against the contractor – it does not bar third parties from recovering. Although *City of Oil City* addressed a wrongful death case, subrogation professionals should consider whether its analysis applies when a contractor creates a dangerous condition that injures the property of a third party.

This correspondence should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only and you are urged to consult a lawyer concerning your own situation and legal questions.

