IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District Docket No. 21 EAP 2015
Allocatur Docket No. 582 EAL 2014

VINCENT P. NERTAVICH, JR.

Plaintiff/Appellant

V.

PPL ELECTRIC UTILITIES CORPORATION, et al.

Defendant/Appellee

OPENING BRIEF OF APPELLANT

On Appeal from the Opinion Entered on August 27, 2014 in the Superior Court of Pennsylvania, reversing and remanding the Judgment Entered December 5, 2012 in the Court of Common Pleas of Philadelphia County, in the Case Docketed at September Term, 2009, No. 2316

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND OTHER AUTHORITIES

I. STATEMENT OF JURISDICTION

This action began under the jurisdiction of the Court of Common Pleas of Philadelphia County with judgment entered in favor of Plaintiff/Appellant Vincent P. Nertavich, Jr. ("Nertavich"), which was reversed and remanded by the Pennsylvania Superior Court. This Court has jurisdiction over this appeal pursuant to 42 Pa. C.S.A. § 724 because this Court granted, in part, Nertavich's Petition for Allowance of Appeal on May 14, 2015. *See 2401 Pennsylvania Avenue Corp. v. Federation of Jewish Agencies of Greater Philadelphia*, 489 A.2d 733, 734 (Pa. 1985).

II. ORDER OR OTHER DETERMINATION IN QUESTION

On August 27, 2014, a majority of a panel of the Superior Court of Pennsylvania reversed and remanded the Order of the Honorable Mark I. Bernstein, denying Defendant/Appellee PPL Electric Utilities Corporation's ("PPL") Post-trial Motions, including a Motion for Judgment Notwithstanding the Verdict. R. 8771a-8756a.

III. STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

Judgment notwithstanding the verdict ("JNOV") is a drastic remedy. *Atwell v. Beckwith Machinery Co.*, 872 A.2d 1216, 1221 (Pa. Super. 2005) (quoting *Education Resources Institute, Inc. v. Cole*, 827 A.2d 493, 497 (Pa. Super. 2003),

appeal denied, 847 A.2d 1286 (Pa. 2004)). Appellate courts will reverse the trial court's grant or denial of JNOV only when the court finds an abuse of discretion or an error of law. *Reott v. Asia Trend, Inc.*, 55 A.3d 1088, 1093 (Pa. 2012) (citations omitted). JNOV can be entered only in a clear case, when viewing the evidence and all reasonable inferences to be drawn in a light most favorable to the verdict winner, there can be no doubt that the movant is entitled to judgment as a matter of law. *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 351 (Pa. 2014) (citations omitted). All unfavorable testimony and inferences are rejected. *Birth Center v. St. Paul Companies, Inc.*, 787 A.2d 376, 383 (Pa. 2001) (citations omitted). JNOV should only be entered when it is clear that no two reasonable minds could fail to agree that the verdict was improper from the facts. *Tincher*, 104 A.3d at 351 (citations omitted).

When examining questions of law, the scope of review is plenary and the standard of review is *de novo*. *Reott*, 55 A.3d at 1093 (citations omitted). However, questions of credibility and conflicts in the evidence are for the trial court and the appellate court should not reweigh the evidence. *Adamski v. Miller*, 681 A.2d 171, 173 (Pa. 1996).

IV. STATEMENT OF THE QUESTIONS INVOLVED

1. In the face of the trial court's cumulative review of and conclusion that the record evidence of PPL's operative control of the contractor's work was

sufficient to allow the issue of PPL's liability to be presented to the jury, does the majority opinion of the Superior Court panel conflict with *Beil v. Telesis Construction, Inc.*, 11 A.3d 456 (Pa. 2011) and § 414 of the Restatement (Second) of Torts?

Suggested Answer: Yes.

2. Did the majority of the Superior Court panel err in adding an element of proof for imposing liability on a property owner under § 414 of the Restatement (Second) of Torts that was not contained in and is in conflict with *Beil v. Telesis Construction, Inc.*, 11 A.3d 456 (Pa. 2011)?

Suggested Answer: Yes.

V. STATEMENT OF THE CASE

On September 23, 2009, Nertavich commenced this action by Writ of Summons against, among others, PPL[1] in the Philadelphia Court of Common Pleas. R. 0101a-0105a. Nertavich was an employee of QSC, a company hired by PPL to paint 90-foot poles that PPL used to support energized, high voltage power lines. R. 5042a-5071a; 5326a. Nertavich fell while painting one of PPL's poles. R. 5335a. The PPL contract with QSC included painting specifications from PPL that were mandatory and QSC was required to follow them in order to obtain the

[1] PPL is the only party subject to this appeal.

painting job. R. 5254a-5256a. PPL supplied the ladders that Nertavich used to climb the poles. R. 5250a. However, PPL failed to provide the necessary set bolts to affix the ladders solidly to the poles. R. 5251a; 5423a-5424a; 5538a-5539a.

Nertavich was painting the pole in accordance with the application technique required by PPL at the time of his fall. R. 5336a-5339a; 5063a-5066a. He was standing on the ladder and adjusting his lanyard, having leaned out to his left against the lanyard to paint the back side of the pole, when the ladder wobbled and the lanyard restraining him to the ladder and pole slipped off the rung of the ladder. R. 5336a-5339a. Nertavitch, who was not wearing a safety harness, fell 40 feet to the ground causing serious and permanent injuries. R. 5339a. Nertavich testified that he was told he did not need to wear a safety harness. R. 5352a. Nor was he disciplined or corrected by anyone for not using a harness. R. 5329a; 5354a. While in hindsight, and as reflected in the jury verdict, this was a cause of his fall, Nertavitch's use of the lanyard was consistent with his training. R. 5338a.

At trial, Nertavich presented two theories of liability against PPL, but the only one at issue in this appeal is that PPL faced liability under Restatement (Second) of Torts § 414, as interpreted by this Court in *Beil,* for the negligence of its contractor because PPL exerted sufficient control over how the contractor performed the work. PPL argues that it owed no duty to Nertavich because it contracted with QSC, an independent contractor and Nertavich's employer, to

paint the poles. The trial court rejected PPL's argument each time it was raised: (1) Summary Judgment (denied by Judge Quinones, R. 1378a); (2) Compulsory Non-suit (denied by Judge Bernstein, R. 5658a); (3) Directed Verdict, (denied by Judge Bernstein, R. 5753a); (4) New Trial, (denied by Judge Bernstein, R. 8456a-8479a); and (5) JNOV (denied by Judge Bernstein, R. 8456a-8479a).

In denying PPL's motion for directed verdict, the Honorable Mark I. Bernstein found that Nertavich had presented sufficient evidence of PPL's operational control over the painting work it hired QSC to perform, which warranted this matter being presented to the jury. R. 5753a. The jury returned a verdict in favor of Nertavich, finding PPL 51% responsible for Nertavich's injuries and Nertavich 49% responsible. R. 8300a-8302a. After the verdict, the trial judge's opinion denying JNOV carefully reviewed the entire record regarding PPL's "control of the work" in accordance with *Beil* and § 414 of the Restatement (Second) of Torts, and catalogued the following cumulative proof of PPL's control over how QSC did its work:

- The PPL contract with QSC prescribed every step for how QSC must paint the poles including details on how to clean the poles, how to paint the poles, what brushes, brush strokes, other modes of paint application may be used and method of touch-up or spot painting. Moreover, the contract gave PPL's representatives the right to inspect, remove and replace workers' tools. R. 8457a-8458a; 8471a; 5057a-5071a;[2] 5255a.

[2] The PPL contract with PPL's Specification was admitted in evidence as Ex. P-83. For ease of reference, handwritten page numbers were added to the bottom right of each page of this Exhibit

- PPL controlled the worksite through its field representative,[3] who was "the daily source of contact...in the areas of any question, materials, quality assurance, general safety, work procedures and schedule." R. 8459a; 5054a; 5245a.

- "[I]f the PPL Field Representative observes an unsafe work practice involving a direct threat or imminent danger, the field Representative immediately will direct that all work stop." R. 8459a; 4787a.

- PPL's field representative knew it was his duty to monitor the painting work and ensure it was conducted safely, including the duty to stop work until an unsafe condition was corrected. R. 8461a; 5281a.

- PPL's field representative also acknowledged that part of his job was to monitor that the painters wore appropriate fall protection and to stop work if they did not. R. 8461a-8462a; 5281a.

- PPL required that the transmission poles be painted while the lines above were energized. Therefore, to avoid the risk of electrocuting the painters, PPL had to set circuit breakers and put a green tag on the poles before a QSC employee could climb the pole to paint. R. 8458a-8459a; 5245a.

- PPL's contract administrator for the QSC job testified that PPL retained a duty to monitor the work, and that the field representative had the duty to monitor the workers and ensure that they were wearing full body harnesses and properly tying off to the pole. R. 8462a-8463a; 5259a-5261a. He also testified that failure to wear the body harness was a serious safety violation and that the field representative was responsible for halting operations if he saw a worker without a harness. R. 8464a; 5262a.

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as pages 1-30; similarly, the Exhibit's pages were Bates labeled at the bottom right as P83.001-P83.030.

[3] PPL's field representative for the QSC contract was Wayne Grim.

In addition to PPL's admissions, the contract and specification documents and testimony from QSC employees, Nertavich offered expert testimony that PPL's exercise of control was standard practice in the electric utility field because of the dangers of working near lines energized with high voltage electricity and working on poles at great heights. R. 5380a; 5385a-5386a. An occupational health and safety expert opined that PPL breached its duty to monitor QSC worker safety at the job site in various respects, and "at the very least PPL should have provided QSC with the bolts to secure the ladders to the pole." R. 8464a-8465a; 5551a; 5558a; 5562a- 5564a; 5569a. More specifically, as noted by the trial judge in his opinion denying PPL's Motion for JNOV:

> Because PPL kept the power lines energized, PPL did not allow QSC to use aerial lifts or other poles that would come in proximity to the power lines, leaving QSC with only the option to use the single-rail ladders.

R. 8465a.

A second expert testified that PPL "had a duty under industry practices, the National Electrical Safety Code (NESC), and PPL's own internal safety operating guidelines, to monitor worker safety" referred to as General Safety Protocol 19 (GSP 19). R. 8465a-8466a; 5383a. He also testified that these safety guidelines could not be contracted to an independent contractor nor could PPL to ignore its responsibilities. R. 5385a.

After the trial judge denied PPL's Motion for JNOV and New Trial, judgment was entered in favor of Nertavich and against PPL in the amount of $2,494,542.35. R. 8429a-8434a.

PPL appealed the judgment on four bases: (1) PPL's lack of control over QSC; (2) whether the issue of direct negligence was properly submitted to the jury; (3) whether the trial court properly instructed the jury on liability; and (4) the trial court's refusal to present PPL's assumption of the risk defense to the jury. R. 8435a-8447a; 8579a-8710a.

On August 27, 2014, a majority of the panel of the Superior Court of Pennsylvania reversed the Order of the Honorable Mark I. Bernstein denying PPL's Post-trial Motions finding that "the evidence, viewed in the light most favorable to Nertavich, did not establish that PPL retained sufficient control over the job site, based on the contract provisions and actual control, to subject it to liability for Nertavich's injuries pursuant to § 414 of the Restatement (Second) of Torts. R. 8711a-8755a. The majority also opined that a jury verdict based on the overall quantum of evidence of property owner control is not sufficient to hold an owner liable under § 414. *Id.* Rather, the majority held that § 414 liability requires proof of a direct relationship between a specific element of the property owner's control and the injury to justify imposition of liability on a property owner. *Id.*

These elements of the Superior Court's majority opinion are at the heart of this appeal.

Judge Strassburger filed a dissent and would have affirmed the trial court's November 27, 2012 Order. R. 8756a.

Nertavich filed a timely Motion for Reargument Before the Superior Court *En Banc*, which was denied on October 30, 2014. R. 8757a-8915a.

On November 26, 2014, Nertavich filed a Petition for Allowance of Appeal Before the Supreme Court of Pennsylvania, which was granted in part, as to two of the issues raised in the Petition that are the subject of this brief. R. 8920a-9178a.

VI. SUMMARY OF ARGUMENT

Nertavich respectfully requests reversal and vacation of the opinion of the majority panel of the Superior Court of Pennsylvania for two reasons: (1) the majority opinion did not follow *Beil* and § 414 of the Restatement (Second) of Torts, which requires a cumulative review of all the elements of control rather than the examination of selective pieces of evidence, viewed in isolation from the balance of the record, that was employed by the appellate court; and (2) instead of upholding the right of the jury to make the determination of PPL's liability under § 414 based on all of the evidence, the majority opinion created a new standard as a matter of law requiring a direct relation between a particularized element of PPL's control and Nertavich's injuries, which is neither required by, nor consistent with

Beil, and which, was nevertheless satisfied by evidence presented by Nertavich but overlooked by the Superior Court majority opinion.

The trial court and the Superior Court took very different approaches to applying the *Beil* standard of control to the evidence presented in this case. Under *Beil,* for liability to attach under § 414, the independent contractor's injured worker must introduce evidence that the owner "retains the control of any part of the work" either through "contractual provisions giving the premises owner control over the manner, method and operative details of the work" or by demonstrating "that the land owner exercised actual control over the work." *Beil,* 11 A.3d at 466-67. If the plaintiff presents such evidence, "the question of the quantum of retained control necessary to make the owner of the premises liable is a question for the jury." *Id.* at 467.

In conformity with the standards laid down in *Beil, and* as found by the trial court, Nertavich presented extensive proof of the many ways that PPL controlled not only safety, but the operational conduct of its contractor that, in quality and quantity stood in stark contrast to that of Lafayette College in *Beil.* The detailed trial court opinion denying PPL's Motion for JNOV followed *Beil* and reviewed the evidence of control on a cumulative basis, setting forth PPL's all-encompassing, specific operational control of QSC's painting work, access to the poles and safety supervision and explained why, in accordance with *Beil*, the issue

of PPL's liability was properly presented to the jury. *See, e.g., Bullman v. Giuntoli*, 761 A.2d 566, 577 (Pa. Super. 2000), *appeal denied*, 775 A.2d 800 (Pa. 2001) (In determining whether a property owner retained control over an independent contractor for the imposition of § 414 liability, the Court viewed "the *whole of the record.*") (emphasis added).

Second, the majority of the Superior Court added an element of proof to the retained control exception neither prescribed nor consistent with Pennsylvania Supreme Court precedent and prior Pennsylvania Superior Court decisions. In *Beil*, this Court held that the threshold inquiry of a property owner's exposure to liability under § 414 liability was whether the owner retained sufficient control over *how the independent contractor did its work.* The majority opinion of the Superior Court erroneously extended that inquiry to require proof of control of the precise element of the work task in which the plaintiff was engaged when injured. That is not the law of this Commonwealth nor is this requirement found in § 414. Liability attaches under *Beil* and § 414 of the Restatement (Second) of Torts, if "the employer ... retained at least *some degree* of control over the manner in which the work is done....There must be such a retention of a right of supervision that the contractor *is not entirely free to do the work in his own way.*" Comment (c) to §414. (emphasis added). Causation is a question of fact for the jury because rarely does a single event cause an injury and "the fact that some other cause concurs

with the negligence of the defendant in producing an injury does not relieve the defendant from liability unless he can show that such other cause would have produced the injury independently of his negligence." *Hamil v. Bashline*, 392 A.2d 1280, 1285 (Pa. 1978) (citations and quotation marks omitted).

Even were proof of such targeted control required, the Superior Court overlooked Nertavich's evidence that PPL's control was directly related to the work he was doing when he fell.

There was sufficient evidence to submit the case to the jury, the jury was properly instructed on the law and the jury made a fair and logical decision holding PPL liable under § 414, allocating PPL 51% at fault for the injuries and Nertavich 49% at fault.

VII. ARGUMENT

A. APPELLANT SATISFIED THE STANDARD REQUIRED BY § 414 OF THE RESTATEMENT (SECOND) OF TORTS AND *BEIL* THAT PPL CONTROLLED THE OPERATIVE DETAILS OF THE CONTRACTOR'S WORK

Again before the Court is the issue of the proof required for the "retained control" exception to the general rule that a property owner who hires an independent contractor is not liable for the injuries to the employee of that contractor. When last addressed by this Court in *Beil,* the Court held that a property owner may be liable for injuries to the employee of an independent contractor if the property owner retained sufficient control of the contractor's work

(manner, method and operative details) either through the contract or actual control. Where the trial court, in the exercise of its discretion, finds that plaintiff presented such evidence, the "question of the quantum of retained control necessary to make the owner of the premises liable is a question for the jury." *Beil,* 11 A.3d at 467. In reversing the trial court's Order denying JNOV, the Superior Court majority opinion erred because it looked in isolation at only parts of the cumulative array of evidence establishing that PPL retained operative control of the manner in which the contractor (QSC) performed its work.

The trial court denied PPL's Motion for JNOV because the evidence established that PPL retained and exercised sufficient control over the operative details of the work being done on its utility poles by Nertavich's employer to warrant the exception to a property owner's immunity from liability as set forth in *Beil* and Restatement (Second) of Torts § 414. The trial judge found:[4]

- "Here, PPL through its contract and specifications told QSC workers what paint to use, and every step of how to use it."
- "The contract also called for safety provisions to be followed and established the position of the PPL contract field representative" who "was at the worksite every day, and knew it was his duty to stop work if he saw an unsafe condition, even if he was not knowledgeable enough to know when such a condition existed."
- "Also, PPL exerted great control over access to the property. Through its green tag procedure, PPL retained control of the property, and

[4]The totality of facts of PPL's contractual control and control by conduct over QSC's painting are set forth at R. 8457a-8466a; 8471a-8472a; 8475a-8476a.

significantly limited worker access to the poles because of the live electric wires."

- "Also, the available ways to scale the poles were essentially limited to the single-rail ladders because the poles were energized, and there were no other attachment points on the poles to rig other climbing devices."

- "QSC had to request these ladders from PPL to climb the poles."

- PPL supplied the ladders to QSC to climb the poles but did not supply the safety bolts necessary to keep the ladders from wobbling.

R. 8471a-8472a; 8476a.

Nertavich established further that PPL's contract with QSC, including the Specification document, detailed precisely how PPL's contractor (QSC) was to perform each step of its work (R. 5057a-5071a) from set up around the poles, (R. 5254a; 5062a) the type of primer and paint to be used, (R. 5254a); whether and how the paint could be thinned, mixed and stirred, (R. 5063a); how the poles were to be prepared for painting, (R. 5254a; 5062a); the technique for application of paint (brush, mitt, or roller; spray only if approved by PPL), (R. 5063a-5064a); thickness and color of each coat applied, (R. 5064a); method of touch up or spot painting, (R. 5255a; 5054a); the way to clean up, (R. 5255a; 5066a-5067a), among other things. As confirmed by PPL's contract administrator for the QSC project, these contract provisions were mandatory directives and too much disagreement by QSC would have resulted in QSC not obtaining the job. R. 5254a-5256a.

PPL also required a contract field representative, Wayne Grim, to be "the daily source of contact ... in the areas of any questions, materials, quality assurance, general safety, work procedures and schedule." R. 5054a; 5245a. Grim was required to approve the painting of energized structures and PPL only permitted QSC workers on the energized poles after issuing a "green tag permit." *Id.* As such, Grim determined every day when the QSC worker could access the poles and which poles would be painted by issuing the green tag permit. *Id.*

PPL also controlled the means by which QSC climbed the poles to paint them. PPL supplied QSC with all of the portable, single rail ladders QSC used to work on the poles, and PPL understood QSC was going to use these ladders to do the work, but failed to provide the bolts for the single rail ladders. R. 5251a; 5269a. Nertavitch proved as well that PPL provided no other attachment points on the poles to rig other climbing devices such as a secondary lifeline and thus, no additional safety attachment could be used by QSC employees. R. 8472a.

Beyond mere operational control, the record is replete with substantial evidence of PPL's exercise of specific control over safety on the job and worksite. PPL had superior knowledge of how to safely climb the poles because its employees were climbing the poles every day. R. 5204a; 5386a.

Viewing the record as a whole, as required under *Beil* and *Bullman*, the trial judge concluded that the evidence established that PPL controlled QSC's

performance of the pole painting work and QSC did not have unfettered discretion to work as it saw fit. Based on the record, the trial court found that PPL failed to meet its burden of proving that the jury's verdict was unsupportable:

> These facts, especially the way in which PPL dictated how QSC workers were to perform their painting work coupled with evidence of control over safety and access, evince the quality of control that the Supreme Court found lacking in *Beil.* The qualitative element being present, it was for the jury to determine if the quantity of control necessary to make PPL liable existed. There were ample facts in evidence, including the contract and testimony from PPL's own employees, for the jury to determine that the necessary quantum of control existed as they did.

R. 8472a.

In contrast, the majority of the Superior Court panel chose selected facts, assessed them in isolation from one another and the other evidence of record, and concluded that each fact *on its own* did not constitute sufficient evidence of control as a matter of law. The impact of this error is compounded by the majority panel ignoring the following significant evidence of PPL's control over how QSC performed its work:

- PPL's painting specifications including that PPL controlled the set up around the poles, the thinning mixing and stirring of the paint, the thickness and color of each coat applied and the tools to be used for each task;

- The contract provisions providing for the painting specifications were mandatory and that disagreement by QSC would result in QSC not obtaining the job;

- By providing the painting specifications and that the poles only permitted one access point, which were the single rail ladders, PPL controlled how QSC was to access the poles and told QSC how to do the work;

- PPL had superior expertise in climbing electrical poles, which is confirmed by the training provided by PPL to employees in climbing the poles and the requirements in PPL's internal safety guidelines (GSP), which could not be contracted to an independent contractor;

- PPL's internal safety guidelines (GSP 19) provided guidelines for how PPL was to work with contractors; its contract field administrator was the PPL person who directly oversaw the daily activities of its contractors. PPL was required to follow the guidelines;

- The green tag procedure was a requirement provided by PPL that controlled how QSC accessed the poles and when because QSC employees could not access the pole until PPL placed a green tag on the pole;

- In supplying the single rail ladders to QSC, PPL failed to provide the bolts for the rungs that would have prevented the rungs from wobbling.

Rather than viewing the record as a whole, the Superior Court majority focused on discrete parts of the element of control and, in effect, substituted its judgment for that of the jury that fairly and properly considered the issues of liability in this case. This insular approach conflicts with the court's prior rulings. *See, e.g., Bullman v. Giuntoli*, 761 A.2d 566, 577 (Pa. Super. 2000), *appeal denied*, 775 A.2d 800 (Pa. 2001), and *Hargrove v. Frommeyer & Co.*, 323 A.2d 300 (Pa. Super. 1974).

At its core, and as applied by the courts of this Commonwealth, Restatement (Second) of Torts § 414 essentially provides a test to determine whether it is fair to subject a property owner to liability for injurious conduct of contractors it hires. Typically, a property owner is immune from liability for injuries on its property caused by the conduct of an independent contractor. Where a contractor is truly independent from the owner, Pennsylvania courts hold that theories of vicarious liability are inapplicable to impose liability on the hiring property owner. *Beil*, 11 A.3d at 466. Moreover, the property owner has been relieved of vicarious liability where it actually turns control of the property over to an independent contractor, more expert in the manner of safely performing the work than the owner. *Id.*

However, when the property owner steps into more active control of the work, it may be subject to liability under § 414 depending on the quantum and quality of the evidence. *Id.* at 466-67. In *Hader v. Coplay Cement, Mfg., Co.*, this Court outlined a framework for determining whether a contractor was truly independent which, in turn, would inform whether the party hiring the contractor was immune from liability. *Hader*, 189 A. 2d 271, 276 (Pa. 1963). The factors outlined in *Hader*, suggest that the issue of control of the work would take into account not only the provisions of the contract but the relative expertise and experience of the parties. Those factors include:

- Control of the manner work is to be done;

- Terms of the agreement;
- Responsibility for result only;
- Nature of the work or occupation;
- Skill required for performance;
- Whether one employed is engaged in a distinct occupation or business;
- Which party supplies the tools;
- Whether payment is by the time or by the job;
- Whether work is a part of regular business of the employer; and
- Right of employer to terminate the employment at any time.

Hader, 189 A.2d at 277.

This analytical construct logically immunizes a property owner such as Lafayette College in *Beil,* from liability where, as essentially a routine consumer, it relies on the expertise of its contractor. In contrast, the record developed during the trial demonstrated not only the significant level of operational control PPL retained over how QSC was to paint its poles, but that the level of control was a byproduct of PPL's experience climbing the poles, working at heights and its non-delegable duty to those working around energized, high voltage power lines.

In *Beil*, Lafayette College hired a general contractor to renovate a classroom building. The general contractor hired a subcontractor to do the roofing work. Mr. Beil, an employee of the roofing subcontractor with which the college had no direct relationship, fell while carrying materials to the roof. The college's restriction on general access to college property and how to access the classroom building roof and general rules of decorum were "reasonable restrictions to

safeguard the College's students, faculty and property....[and] did not rise to the level of control required to impose liability." *Beil*, 11 A.3d at 458-59. There was no evidence in *Beil* that the college set exacting specifications for the contractor's work or had any knowledge of how to perform the work. The Pennsylvania Supreme Court found that this failure to control "the substantive work of the contractor" was fatal to Beil's claim. *Id.* at 471. The Court concluded that a property owner's general concern for safety on its premises and enforcement of safety rules alone does not constitute control for purposes of imposing liability. However, the Court specifically noted that "[w]e do not rule out the possibility that, *in certain circumstances not present in this matter, a property owner's actions concerning safety matters could constitute sufficient control over the manner in which work was done such that the owner is subject to liability.*" *Id.* at 469 n. 4 (emphasis supplied).

This case, falls squarely within the type contemplated in footnote 4 as the record establishes PPL's control over how the work was to be done and PPL's control over safety matters well beyond the ordinary.

The degree of control is an obvious byproduct of the fact that the work was being done around live electric wires and at great heights. As the trial court and jury learned, utility companies such as PPL have superior knowledge about working at great heights and around energized power lines. R. 5380a; 5385a-

5386a. Electrical utilities have standards in place to protect employees, and training programs for climbing poles. R. 5386a. In fact, the standard for utilities companies is to protect not only its own employees, but the public and its contractors' employees. PPL's safety policies and procedures for protection of its contractors were articulated in GSP 19. R. 5380a-5381a. An electric utility such as PPL cannot contract away these safety responsibilities in GSP 19 to its independent contractors. R. 5385a. Moreover, PPL's expertise and experience in safely climbing poles was demonstrated by proof that it conducts trainings for climbing the electrical poles at the Walbert Training Center in Lehigh, including fall protection with the use of lanyards and harnesses, and that section 2 of PPL's GSP is devoted solely to fall protection. R. 5203a-5205a.

Nertavich set forth sufficient evidence that PPL controlled the manner, methods and operative detail in which the painting work was performed and their requirements directed QSC how to perform the work. Thus, the record provided a solid foundation for the jury verdict that PPL controlled the work supporting the jury verdict and the trial court's denial of JNOV.

Not only was the verdict against PPL supported by the record at trial, but public policy supports recognizing PPL's duty under these circumstances given its superior knowledge about dangers of working around live electric wires and working at heights. *See Densler v. Metropolitan Edison Co.*, 345 A.2d 758, 761

(Pa. Super. 1975) (supplier of electrical power owes highest duty of care to anyone who may be working near its energized wires). The record here paints a far different picture than that of a property owner who has a general concern about safety. This Court in *Beil* expressed the concern that the imposition of liability against an ordinary property owner under § 414 could deter general concerns for safety. That concern does not arise here as PPL is a sophisticated owner who chose to exercise control of the work because of its experience, expertise and duty to its contractors. Upholding the jury's allocation of responsibility here: 51% to PPL and 49% to Nertavitch himself will not chill an owner's general interest in safety of an independent contractor's work on its premises.

Nertavich, following *Beil,* established a record of PPL's extensive, intentional control over how QSC was to do its work. The record contained proof that control such as PPL's in this case was standard for an electric utility not only because of its experience and knowledge but also that it owed a non-delegable duty to assure safety around the live high voltage wires. Consequently, the trial court properly submitted the issue to the jury and, in accordance with *Beil* and *Bullman* properly denied PPL's motion for JNOV. Accordingly, this Court should reverse and vacate the Superior Court of Pennsylvania and reinstate the verdict entered in favor of Nertavich and against PPL before the Philadelphia Court of Common Pleas.

B. THE MAJORITY OPINION ADDED AN ELEMENT OF PROOF REQUIRING A DIRECT CONNECTION BETWEEN THE OWNER'S CONTROL AND INJURY THAT WAS NOT PRESCRIBED BY *BEIL*

The majority opinion held that Nertavich failed to establish PPL's liability under § 414 as a matter of law because he supposedly offered no evidence that PPL retained control over the task in which he was engaged when he fell. The majority opinion should be reversed because such a degree of control test prescribed in the majority opinion is not the law of the Commonwealth. But even if it were, the Superior Court majority overlooked evidence presented by Nertavich that satisfied this burden.

The Pennsylvania Supreme Court in *Beil* unambiguously articulated the test of the retained control exception to a property owner's immunity from liability for an independent contractor's negligence as "whether the property owner hirer of the independent contractor retained sufficient control of the work to be legally responsible for the harm to the plaintiff." *Beil*, 11 A.3d at 466. If a property owner retained sufficient control over how the independent contractor performed its work, then the exception to the owner's immunity from liability is warranted. Nowhere did the Pennsylvania Supreme Court in *Beil* include in its legal standard that the plaintiff must tie his injuries directly to a specific act or omission of control exercised by the owner. In addition, § 414 of the Restatement (Second) of Torts

does not contain this requirement. To the contrary, § 414 focuses on the owner's control of "any part of the work."

In explanation of this standard, comment (c) to § 414 states that the owner "must have retained at least some degree of control over the manner in which the work is done" such that "the contractor is not entirely free to do the work in his own way." Because liability is imposed when control is established under § 414, there is no place for the additional particularized requirement added by the majority of the Superior Court panel. Rather, the jury makes the decision on liability based on the entire quantum of control evidence presented to it. *See Janowicz v. Crucible Steel Co.*, 249 A.2d 773, 776 (Pa. 1969).

To support its interpretation of *Beil*, the panel majority cited the Pennsylvania Commonwealth Court case of *LaChance v. Michael Baker Corp.*, 869 A.2d 1054 (Pa. Commw. 2005) as instructive but not binding. David LaChance was an employee of the Michael Baker Corporation which had secured a contract with PennDot to lay underground reinforced concrete pipes that were approximately six feet in diameter. While grouting the outside of one of the pipes, Mr. LaChance died as a result of injuries suffered when the trench in which he was working collapsed, crushing him against the pipe. The Commonwealth Court affirmed the entry of summary judgement in favor of PennDot based upon the trial court's finding that PennDot had not retained control of the work of its

subcontractor nor did the work create a special danger or peculiar risk for which PennDot could be liable.

In doing so, the court began with the observation that the accident was caused by a failure of the trench, work completed earlier and, while part of the same contract, independently from the grouting of the pipe that had been laid. The court went on to evaluate the contract between PennDot and Baker as well as PennDot's activities on the job site before concluding "the evidence of PennDot's control over [the project], *generally*, and over the trenching, in particular, was not sufficient to allow the Estate to impose liability under Section 414." *LaChance*, 890 A.2d at 1062 (emphasis supplied). Thus, while arguably dicta, the distinction made by the court in *LaChance* is inapposite here where the task of climbing the pole, remaining on the single ladder and the painting are so intimately woven together as the work being done.

Furthermore, *LaChance* stands alone as the only Pennsylvania appellate court retained control opinion that suggests the control exercised must relate directly to the method of injury. The *LaChance* additional direct relation element has no precedential value and should not have been relied upon by the Pennsylvania Superior Court because it has never been adopted by the Pennsylvania Supreme Court. The Pennsylvania Supreme Court should find that a

direct relation requirement is unwarranted and conflicts with § 414 and the Court's holding in *Beil.*

Even were this legal standard applied, there was sufficient evidence that PPL's control related *directly* to the cause of Nertavich's injuries. First, PPL did not provide manufacturer supplied safety bolts with its ladders to keep them secured to the pole, and Nertavich fell when this unbolted ladder wobbled. R. 5339a; 5423a-5424a; 5538a; 5667a. Second, at the time Nertavich fell, he was painting the pole in accordance with the technique for application approved and required by PPL, which resulted in Nertavich being off-balance. R. 5063a-5064a; 5336a-5339a. Nertavich was required to use a brush, mitt, or a roller. Just before his fall, Nertavich leaned out around the pole and reached around the pole to paint the area using a mitt. R. 5336a-5339a. After he did so, he stood on the ladder and had to adjust his belt at which time the ladder wobbled and Nertavich fell. R. 5336a-5339a. Third, PPL had its safety representative on site specifically to monitor QSC's workers' safety on a daily basis and PPL's safety representative admitted that he had a right and duty to stop work for "severe or repeated safety violations" by QSC, such as a worker's not wearing a harness. R. 5261a-5262a; 5283a. Fourth, PPL controlled QSC's access to the poles everyday by use of the green tag procedure. R. 5054a; 5245a.

Furthermore, "'the element of causation is normally a question of fact for the jury'" and can only be removed from the jury's consideration when reasonable minds could not differ. *Summers v. Certainteed Corp.*, 997 A.2d 1152, 1163-64 (Pa. 2010) (quoting *Hamil*, 392 A.2d at 1284-85). Rarely does a single event cause an injury and "the fact that some other cause concurs with the negligence of the defendant in producing an injury does not relieve the defendant from liability unless he can show that such other cause would have produced the injury independently of his negligence." *Hamil*, 392 A.2d at 1285 (citations and quotation marks omitted). As both the trial court and jury found that PPL exercised control over QSC sufficient to impose § 414 liability, failed to exercise that control reasonably and PPL's failure was a direct cause of Nertavich's injuries, it cannot be said that reasonable minds could not differ. R. 8471a-8472a.

VIII. CONCLUSION

For all of the reasons set forth above, Plaintiff/Appellant Vincent P. Nertavich, Jr., respectfully requests this Honorable Court reverse and vacate the Superior Court of Pennsylvania and reinstate the verdict entered in favor of Nertavich and against PPL before the Philadelphia Court of Common Pleas.

Respectfully submitted,

COHEN, PLACITELLA & ROTH, P.C.

DATE: June 24, 2015 BY: _____

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Pa. R.A.P. 2135(a) CERTIFICATION

This brief complies with the word limit for principal briefs contained in Pa. R.A.P. 2135(a), as it contains 6791 words.

COHEN PLACITELLA & ROTH
A Professional Corporation

By: _____
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CERTIFICATION OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Appellant was served on this 24th day of June, 2015 upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.App.P. 121:

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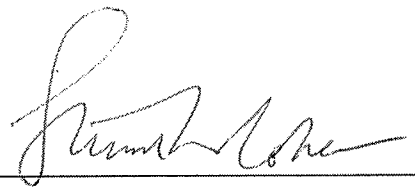
By: 

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APPENDIX

'N THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
CIVIL TRIAL DIVISION

VINCENT P. NERTAVICH, JR., Plaintiff, vs. PPL ELECTRIC UTILITIES, KTA, KTA-TATOR, INC., KTA/SET ENVIRONMENTAL, S-E TECHNOLOGIES, INC., ALEXANDER ANDREW, INC., d/b/a FALLTECH, ALEXANDER ANDREW, INC., FALLTECH, THOMAS & BETTS CORPORATION, THOMAS & BETTS CORPORATION, d/b/a or t/a MEYER STEEL STRUCTURES, f/k/a I.T.T. – MEYER INDUSTRIES, f/k/a MEYER INDUSTRIES, MEYER STEEL STRUCTURES, f/k/a I.T.T. – MEYER INDUSTRIES, f/k/a MEYER INDUSTRIES, MEYER STEEL STRUCTURES, ITT MEYER INDUSTRIES, MEYER INDUSTRIES, MEYER MACHINE, INC., and WINOLA INDUSTRIAL, INC., Defendants.	SEPTEMBER TERM, 2009 Case No.: 2316

OPINION

Plaintiff Vincent Nertavich, Jr. suffered catastrophic injuries when he fell 40 feet from a electric transmission pole that he was painting owned by Defendant PPL. He sued Defendant PPL and the manufacturer of the ladder he used to climb the pole, Defendant Thomas & Betts Corporation. After an eleven day trial, the jury found in favor of the Plaintiff and against Defendant PPL in the amount of $4,613,150. The jury found Plaintiff 49 percent causally negligent and Defendant PPL 51 percent causally negligent. Defendant Thomas & Betts was found not liable. Defendant PPL makes this timely appeal.

Defendant PPL owns 90-foot-high, 10-foot-in circumference tubular steel electric transmission poles. Some of these poles need to be repainted from time to time to prevent structural decay. PPL contracted with QSC Corporation, Plaintiff's employer, to paint the poles. The contract called for work to begin in August 2007 and be completed by November 2007.[1] It directed that "[a]ll work shall be performed according to the attached PPL EU 'Specification for the Maintenance Painting of Transmission Structures' revision dated 8/3/07."[2]

That PPL Specification document contained a variety of detailed requirements about the job. It prescribed each step how to paint the poles. The paint, a special type specified in the contract, would arrive at the worksite compounded and ready for use, could only be thinned with the approval of PPL's field representative, and had to be mixed and stirred frequently.[3] First, the poles had to be cleaned and dried.[4] Tarps had to be laid out on the ground beneath the poles in all directions to catch debris.[5] Before painting QSC workers were to clean and prepare the poles with solvents, hand tools, and power tools so that no loose rust, dirt, oil, or other material was on the pole.[6] Second, the poles were to be painted:

> Paint shall be applied by roller, brush, and/or mitt. When brushing is used, all brush marks and laps shall be concealed and joints between successive days' work shall not be visible. All paint shall be applied without runs or sagging of the paint. Additional coats shall be applied when undercoats, stains, or other conditions show through the final coat of paint, until the paint film is of uniform finish, color, appearance and thickness.[7]

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[1] Contract for Transmission Structure Painting between PPL Electric Utilities Corp. and QSC Painting, Aug. 30, 2007, pg. 1 (Ex. P-83).
[2] Attachment A to Contract for Transmission Structure Painting between PPL Electric Utilities Corp. and QSC Painting, Aug. 30, 2007, ¶ 1 (Ex. P-83).
[3] Specification for the Maintenance Painting of Transmission Structures, Aug. 3, 2007, appended to Contract for Transmission Structure Painting between PPL Electric Utilities Corp. and QSC Painting, Aug. 30, 2007, §§ 8.2, 8.3, 8.4 (Ex. P-83).
[4] Specification for the Maintenance Painting of Transmission Structures § 8.5 (Ex. P-83).
[5] Attachment A to Contract for Transmission Structure Painting between PPL Electric Utilities Corp. and QSC Painting, Aug. 30, 2007, ¶ 11 (Ex. P-83).
[6] Specification for the Maintenance Painting of Transmission Structures § 6.0 (Ex. P-83).
[7] Specification for the Maintenance Painting of Transmission Structures § 8.6 (Ex. P-83).

The workmen were to be extremely careful to paint all hard to reach surfaces.[8] They could only use spray paint with approval of PPL's authorized representative, and even then the representative could require the workers to demonstrate the painting method first.[9] All of the workmen's tools were subject to PPL's authorized representative's inspection, and the representative could require tools removed and replaced.[10]

Third, once a coat of paint had been applied, it had to be allowed to "dry firm and hard before the succeeding coat is applied," and each successive coat had to be a lighter shade than the last.[11] Fourth, the paint materials had to be labeled with a full description and manufacturer information, and then stored in a separate structure.[12] Fifth, the PPL authorized representative was to walk around the work area with the workmen and dispose of any paint containers, rages, debris, or refuse.[13] Finally, the PPL authorized representative would measure the film thickness of the paint, ensure that it was uniform, and direct the workers to repaint or make spot repairs to any areas that were defaced or not uniform.[14] The contract required that "[t]he periphery of the existing coating surrounding spot repair areas shall be feathered-edged for a distance of approximately 1" to provide for a smooth coating transition."[15]

While the workmen painted, power might continue to surge through the lines attached to the poles.[16] As a result, the workers had to take "extra precautions when painting near insulators, making sure that paint does not splatter or drip onto insulators," and the workers would not be

[8] Specification for the Maintenance Painting of Transmission Structures § 8.7 (Ex. P-83).
[9] Specification for the Maintenance Painting of Transmission Structures § 8.10 (Ex. P-83).
[10] Specification for the Maintenance Painting of Transmission Structures § 9.0 (Ex. P-83).
[11] Specification for the Maintenance Painting of Transmission Structures § 8.8 (Ex. P-83).
[12] Specification for the Maintenance Painting of Transmission Structures § 13.0 (Ex. P-83).
[13] Specification for the Maintenance Painting of Transmission Structures § 14.0 (Ex. P-83).
[14] Specification for the Maintenance Painting of Transmission Structures § 15.0 (Ex. P-83).
[15] Attachment A ¶ 17 (Ex. P-83).
[16] Attachment A ¶ 4 (Ex. P-83).

allowed to wipe paint off the insulators.[17] Also, PPL maintained control over the worksite: PPL supplied an "Authorized Representative," also known as a contract field representative, for the project who was "the daily source of contact . . . in the areas of any question, materials, quality assurance, general safety, work procedures and schedule."[18] PPL had to go to the power substations and set the circuit breakers so that the workers would not be electrocuted.[19] PPL employed a "green tag" procedure where the PPL representative would not allow workers on the poles until the lines were set.[20]

Pursuant to PPL's internal guidelines for safety and health procedures, the PPL field representative had the duty to "monitor the contractor to ensure that safety requirements of the contract are adhered to. The PPL contract filed representative will, as warranted by the nature of the work being performed and the contractor's record of performance, observe the contractor's performance."[21] The PPL field representative had the authority to "stop the contractor's work for severe or repeated safety violations," and "if the PPL Field Representative observes an unsafe work practice involving a direct threat or imminent danger, the field Representative immediately will direct that all work stop[.]"[22]

PPL's poles dated from the 1980s.[23] The poles were custom ordered from Defendant Thomas & Betts, with PPL establishing their specifications.[24] The pole specifications included the dimensions of the pole, its paint, and the number and type of attachment points.[25] PPL was

[17] Attachment A ¶ 2 (Ex. P-83).
[18] Attachment A ¶ 6 (Ex. P-83).
[19] N.T. 02/29/12, pg. 14 line 2 – pg. 15 line 5.
[20] N.T. 02/29/12, pg. 15 line 25 – pg. 16 line 5.
[21] General Safety & Health Procedures Section 19, "Contractor Safety," Revised January 2005, pg. 8, § 7.2 (Ex. P-68).
[22] Id.
[23] N.T. 02/29/12, pg. 17, lines 6-8.
[24] N.T. 02/29/12, pg. 21 line 5 – pg. 22 line 15.
[25] N.T. 02/29/12, pg. 22 line 16 – pg. 24 line 4.

aware that the poles would need repainting every 15 to 20 years.[26] PPL did not specify that the poles should have any vangs[27] welded onto them so that a worker's lanyard or other suspension device could attach to the pole.[28] The only attachment points on the poles, beside those at the top of the poles and on the arms for electrical wires, were a series of brackets running up one side of the pole.[29] These brackets served as attachment points for removable single-rail ladders, known as "chicken" ladders.[30] They are known as "chicken" ladders because they are unstable and wobble, frightening workers.[31] There was no place for a worker climbing the pole to attach a lanyard or lifeline, except for somewhere on these ladders.[32] There were two types of ladders.[33] Both consisted of a central metal beam with metal pegs protruding out to the left and right. The first, termed a working ladder, had parallel pegs on each side to give the appearance of a straight bar across the rail so that a worker could stand level. The second type, the climbing ladder, had alternating pegs staggered at regular intervals up each side of the rail. The ladders came from the manufacturer with two bolts that attach through their bottom to secure them to the pole.[34] QSC, not having another means of lifting its workers into place to paint the pole, asked PPL for the removable ladders.[35] PPL provided QSC with the ladders, but not with the bolts.

On September 23, 2007, Plaintiff Vincent Nertavich was 40 feet off the ground working on a PPL pole. More experienced workers were painting the pole above him. He was standing on one of the climbing ladders. QSC provided Plaintiff with a pole belt, a body harness, and two

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[26] N.T. 02/29/12, pg. 19, lines 6-14.
[27] A vang is a welded-on piece of metal to which a worker can attach a lanyard or other fall protection. N.T. 03/29/12, pg. 29 line 25 – pg. 30 line 3.
[28] N.T. 02/29/12, pg. 29 line 24 – pg. 30 line 19.
[29] N.T. 02/29/12, pg. 26 line 10 – pg. 27 line 21.
[30] N.T. 02/29/12, pg. 26 line 18 – pg. 27 line 7.
[31] N.T. 03/07/12, pg. 169 line 2 – pg. 170 line 17.
[32] N.T. 02/29/12, pg. 29, lines 13-18.
[33] N.T. 02/29/12, pg. 36 line 3 – pg. 37 line 9. See also Ex. P-52.
[34] N.T. 02/29/12, pg. 37 line 24 – pg. 38 line 6; N.T. 03/02/12, pg. 40, lines 8-12.
[35] N.T. 02/29/12, pg. 33, lines 7-20.

lanyards.[36] One lanyard was to attach to the pole belt, and the other was to attach to the body harness to serve as a lifeline.[37] Plaintiff used only the pole belt and one lanyard.[38] He testified at trial that on previous jobs he had used only the pole belt and one lanyard, and that no one told him he had to use the harness as well.[39] The one lanyard he used was coated in dried paint.[40] Plaintiff tied the paint-coated lanyard to the ladder above him, a working ladder, by looping it around a left peg.[41] Plaintiff, holding on to the lanyard, leaned out to his left to slap paint on a hard-to-reach spot on the back of the pole.[42] The ladder above him to which he was tied off wobbled several inches to the left. The lanyard unlooped. Plaintiff fell 40 feet, landing on his feet.[43] The fall fractured his feet, dislocated his ankles, fractured his knee, his right femur, his right hip, and burst several of his lumbar spine disks.[44] Plaintiff lost 3 inches in height as his body literally compacted from the fall.

PPL's field representative for the QSC job was Wayne Grim. At trial, Grim testified that the QSC job was his first as a PPL field representative for a pole painting operation.[45] He admitted that he was familiar with PPL's guidelines for safety and health procedures.[46] He knew that it was his duty to monitor the work and ensure it was performed in a safe manner.[47] He understood that if something unsafe occurred, he had a duty to stop the work until the unsafe condition was corrected.[48] He conceded that part of his job was to monitor that the workers wore

[36] N.T. 03/07/12, pg. 160, line 4.
[37] N.T. 02/29/12, pg. 159, lines 12-20.
[38] N.T. 03/01/12, pg. 24, lines 2-5.
[39] N.T. 03/01/12, pg. 33, lines 3-22.
[40] N.T. 03/01/12, pg. 73 line 24 – pg. 75 line 8.
[41] N.T. 03/01/12, pg. 57 line 22 – pg. 61 line 20.
[42] N.T. 03/01/12, pg. 65 line 24 – pg. 71 line 11.
[43] N.T. 03/01/12, pg. 75 line 6 – pg. 76 line 9.
[44] N.T. 03/01/12, pg. 80 line 16 – pg.84 line 25.
[45] N.T. 02/29/12, pg. 154, lines 7-13.
[46] N.T. 02/29/12, pg. 154 line 23 – pg. 155 line 3.
[47] N.T. 02/29/12, pg. 158, lines 9-14.
[48] N.T. 02/29/12, pg. 158, lines 15-25.

appropriate fall protection, and to stop work if they did not.[49] However, Grim had no experience in climbing a transmission pole, and no training on PPL's own internal requirements of fall protection, which included a requirement that a locking hook be used to attach a lanyard to an anchor point.[50]

Grim was at the worksite every day.[51] He observed the QSC workers while they were on the poles.[52] On multiple occasions Grim observed Plaintiff working on the poles.[53] He observed the fall protection Plaintiff used, how Plaintiff was tied on to the pole, and how Plaintiff used only one lanyard to secure himself.[54] Grim did not think anything was improper.[55] He testified that he did not think there was anything wrong with a worker using only one lanyard, and that he would not stop work because of it. He did not think anything was wrong with a worker only wrapping their lanyard around one of the pegs of the ladders, and would not stop work because of it.[56] Grim had never discussed use of safety equipment with the workers before work began.[57] Over the course of days of observation, Grim never told Plaintiff that he was doing anything improper.[58]

Another PPL employee, Gallus Wukitsch, also testified at trial. He was a senior engineer in 2007, and PPL's contract administrator for the QSC job.[59] Wukitsch was asked about PPL's control over the job through contractual provisions. He was questioned about the contract

[49] N.T. 02/29/12, pg. 159 line 25 – pg. 160 line 9.
[50] N.T. 02/29/12, pg. 154 line 14 – pg. 156 line 5.
[51] N.T. 02/29/12, pg. 157, lines 12-13.
[52] N.T. 02/29/12, pg. 159, lines 2-7.
[53] N.T. 02/29/12, pg. 167, lines 16-22. He observed Plaintiff with great enough detail to remember an occasion on which he saw Plaintiff smoking a cigarette while on the pole. N.T. 02/29/12, pg. 184 line 21 – pg. 185 line 9.
[54] N.T. 02/29/12, pg. 167 line 23 – pg. 168 line 4.
[55] N.T. 02/29/12, pg. 168, lines 5-14.
[56] N.T. 02/29/12, pg. 169 line 2 – pg 170 line 19.
[57] N.T. 02/29/12, pg. 172 line 23 – pg. 173 line 8.
[58] N.T. 02/29/12, pg. 168, lines 5-14.
[59] N.T. 02/29/12, pg. 79, lines 13-15.

provision that required the workers to take extra precaution when painting around a insulator, and prohibiting them from wiping paint off the insulators:

> Q: That was, in other words, telling QSC how, in one manner, how they were going to be doing their work around the insulators on the poles; is that right?
>
> A: Yes.[60]

He was asked about the contract provision requiring workers to lay out tarps before work began to catch debris:

> Q: [T]hat's how you're telling them in the contract how they're supposed to do this part of the work[?]
>
> A: Yes.[61]

He was also asked about the contract provision mandating how spot repairs had to be feathered-edged:

> Q: So this was basically telling QSC, in one respect, how they were to do the actual touch-up work, spot painting work; is that right?
>
> A: Yes.[62]

Mr. Wukitsch also testified about PPL's role in ensuring job site safety. He admitted that under the terms of the contract and PPL's internal operating documents, PPL retained a duty to monitor the work during the existence of the contract.[63] He testified that Mr. Grim, as PPL's field representative, had the duty to observe the workers, and ensure that they were wearing full body harnesses and were properly tying off to the pole.[64] Further, Mr. Grim had the duty to ensure safety meetings were held every day at the worksite.[65] Mr. Grim had the ability and duty

[60] N.T. 02/29/12, pg. 52, lines 7-11.
[61] N.T. 02/29/12, pg. 54 line 23 – pg. 55 line 2.
[62] N.T. 02/29/12, pg. 56, lines 9-12.
[63] N.T. 02/29/12, pg. 70, lines 18-22.
[64] N.T. 02/29/12, pg. 78, lines 4-24.
[65] N.T. 02/29/12, pg. 79, lines 10-19.

to shut down the work if he saw that it was not being done safely.[66] Failure of a worker to wear a safety harness while climbing was a severe safety violation.[67] Mr. Grim was responsible for halting operations if he saw a worker without a harness.[68] Mr. Wukitsch was the PPL manager who put in a request for a field representative for the QSC job, and set out the specifications. In his specifications he did not request someone trained in pole climbing, or who knew anything about tying off.[69] Nonetheless, even though Mr. Grim had no specific training, Mr. Wukitsch believed that Mr. Grim was qualified to fulfill his duties.[70]

At trial Plaintiff called Stephen Estrin as an expert on occupational safety and health.[71] Estrin testified that PPL had a duty under the Occupational Safety and Health Act (OSHA) to monitor QSC worker safety at the worksite.[72] Estrin opined that PPL breached that duty in various respects. First, the standard industry practice under OSHA prohibits the use of single-rail ladders.[73] PPL should have gone to the worksite and stopped any work being done on the single-rail ladders.[74] At the very least, PPL should have provided QSC with the bolts to secure the ladders to the pole.[75] Second, it was inappropriate under OSHA and PPL's internal safety and health guidelines for workers to attach their lanyards to the ladders.[76] PPL should have ensured that there was a proper way for the workers to be able to tie off and proper anchorage points on the pole.[77] Third, PPL had a duty under OSHA and good construction site practice to

[66] N.T. 02/29/12, pg. 73 line 22 – pg. 74 line 7.
[67] N.T. 02/29/12, pg. 81, line 8-12.
[68] N.T. 02/29/12, pg. 82, lines 5-12.
[69] N.T. 02/29/12, pg. 83 line 13 – pg. 84 line 9.
[70] N.T. 02/29/12, pg. 85 line 24 – pg. 86 line 16.
[71] N.T. 03/06/12, pg. 48 line 20 – pg. 55 line 23.
[72] N.T. 03/06/12, pg. 119, lines 19-20.
[73] N.T. 03/06/12, pg. 70, lines 10-13.
[74] N.T. 03/06/12, pg. 120, lines 21-23.
[75] N.T. 03/06/12, pg. 97, lines 10-16.
[76] N.T. 03/06/12, pg. 116, lines 16-18.
[77] N.T. 03/06/12, pg. 120 line 24 – pg. 121 line 2.

ensure that the workers were using proper fall protection.[78] The duty obliged the PPL representative to examine Plaintiff's equipment before Plaintiff climbed the pole.[79] Fourth, OSHA and industry practice required PPL to provide a competent person on the job site to evaluate worker safety.[80] In Estrin's opinion, Mr. Grim was not a competent person for the job.[81] Mr. Grim had no experience and inadequate training in fall protection procedure; he did not even know what safety concerns to look for.[82]

Plaintiff also presented an electrical consulting engineer, Gregory Booth, as an expert in engineering design and project management.[83] Booth testified that PPL had a duty under industry practices, the National Electrical Safety Code (NESC), and PPL's own internal safety operating guidelines, to monitor worker safety.[84] An electric utility company, which has thousands or even hundreds of thousands of utility poles which its employees climb every day, necessarily knows the best and most appropriate way to protect workers climbing the poles.[85] Because PPL kept the power lines energized, PPL did not allow QSC to use aerial lifts or other poles that would come in proximity to the power lines, leaving QSC with only the option to use the single-rail ladders. PPL should have held a pre-work conference with the QSC workers to tell them about NESC standards for fall protection, and the specific dangers of working on the ladders.[86] Instead, PPL field representative Mr. Grim, held what Booth considered an

[78] N.T. 03/06/12, pg. 143, lines 22-25.
[79] N.T. 03/06/12, pg. 143, lines 2-8.
[80] N.T. 03/06/12, pg. 122, lines 19-22.
[81] N.T. 03/06/12, pg. 123, lines 5-11.
[82] N.T. 03/06/12, pg. 123, lines 14-22.
[83] N.T. 03/01/12, pg. 200, lines 11-18.
[84] N.T. 03/01/12, pg. 249 line 20 – pg. 250 line 10.
[85] N.T. 03/01/12, pg. 261, lines 3-14.
[86] N.T. 03/02/12, pg. 18 line 13 – pg. 19 line 18.

incomplete pre-work conference, where Mr. Grim only discussed the green-tag procedure with the workers but made no mention of fall protection.[87]

According to Booth, Mr. Grim as PPL field representative had overlapping safety obligations with QSC's supervisor at the worksite, including the obligation to stop work whenever he observed a worker endangering their life or the life of others.[88] Under industry practice, the NESC, or PPL's internal safety guidelines, a worker tying off by wrapping his lanyard on the peg of a ladder constitutes a serious safety violation that the field representative should recognize warrants the stop of work.[89] Mr. Grim, not having been properly trained in climbing poles and having no experience, was not qualified to serve as PPL's contract field representative. In Booth's opinion, PPL breached its standard of care merely by having Mr. Grim serve as contract field representative on the job.[90]

PPL claims multiple errors it believes entitle it alternately to judgment notwithstanding the verdict or a new trial. Judgment notwithstanding the verdict, or JNOV, is the court directing verdict in favor of the losing party despite a verdict to the contrary.[91] JNOV is an extreme remedy which is properly entered by the trial court only where, viewing the evidence in the light most favorable to the verdict winner, the facts are so clear that no two reasonable minds could disagree that the verdict was improper,[92] or the movant is entitled to judgment as a matter of law.[93]

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[87] N.T. 03/02/12, pg. 21 line 20 – pg. 22 line 14.
[88] N.T. 03/01/12, pg. 255 line 19 – pg. 256 line 9.
[89] N.T. 03/01/12, pg. 232, lines 17-22.
[90] N.T. 03/02/12, pg. 29, lines 5-16.
[91] Green Valley Dry Cleaners, Inc. v. Westmoreland Cnty. Indus. Dev. Corp., 861 A.2d 1013, 1016 (Pa. Commw. Ct. 2004).
[92] Rohm & Haas Co. v. Cont'l Cas. Co., 732 A.2d 1236, 1248 (Pa. Super. Ct. 1999) aff'd, 566 Pa. 464, 781 A.2d 1172 (2001).
[93] Moure v. Raeuchle, 604 A.2d 1003, 1007 (Pa. 1992).

Grant of a new trial is an extraordinary remedy.[94] The decision of whether to grant a new trial rests in the discretion of the trial judge.[95] The trial court follows a two-step process: the trial court must decide whether one or more mistakes occurred at trial, and then it must determine whether any mistake was a sufficient basis for granting a new trial.[96] A new trial should only be granted when "the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail,"[97] or the moving party demonstrates to the trial court that he or she has suffered prejudice from a legal mistake.[98] A new trial is not warranted merely because some irregularity occurred during the trial or another trial judge would have ruled differently.[99]

Many of the claimed errors overlap.

A. PPL's Negligence was Properly Submitted to and Determined by the Jury under the Retained Control Exception to Landowner Liability.

PPL argues that it cannot be held liable for Plaintiff's injuries. Particularly PPL relies on Pennsylvania Supreme Court's decision in Beil v. Telesis Construction, Inc.[100] to categorically argue that as the hirer of an independent contractor to perform work on its property, PPL owed Plaintiff no duty.

Generally, a landowner who employs an independent contractor owes only the duty of reasonable care to have the property in a safe condition for work, and to warn of known defects, but is not otherwise vicariously liable for injuries to the independent contractor's employees.[101]

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[94] Criswell v. King, 834 A.2d 505, 512 (Pa. 2003).
[95] Armbruster v. Horowitz, 813 A.2d 698, 702 (Pa. 2002).
[96] Harman ex rel. Harman v. Borah, 756 A.2d 1116, 1122 (Pa. 2000).
[97] Renna v. Schadt, 64 A.3d 658, 670 (Pa. Super. Ct. 2013) (internal citations omitted).
[98] Harman, 756 A.2d at 1122.
[99] Id.
[100] 11 A.3d 456 (Pa. 2011).
[101] Celender v. Allegheney County Sanitary Auth., 222 A.2d 461, 463 (Pa. Super. Ct. 1966).

Section 414 of the Restatement (Second) of Torts provides the retained control exception to the no-duty rule:

> One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.[102]

The comments to § 414 further outline the exception. Comment (a) explains "[i]f the employer of an independent contractor retains control over the operative detail of doing any part of the work, he is subject to liability for the negligence of the employees of the contractor engaged therein[.]"[103] This is so even if the owner retains only limited control over the work:

> The employer may, however, retain a control less than that which is necessary to subject him to liability as master. He may retain only the power to direct the order in which the work shall be done, or to forbid its being done in a manner likely to be dangerous to himself or others. Such a supervisory control may not subject him to liability under the principles of Agency, but he may be liable under the rule stated in this Section unless he exercises his supervisory control with reasonable care so as to prevent the work which he has ordered to be done from causing injury to others.[104]

Comment (c), however, explains that the owner must exercise at least some modicum of control over the way and means that the contractor performs:

> In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail.

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[102] Restatement (Second) of Torts § 414 (1965).
[103] Restatement (Second) of Torts § 414 com. (a).
[104] Id.

> There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.[105]

The Pennsylvania Supreme Court applied the retained control exception to determine a landowner was liable for a contractor's injuries in Byrd v. Merwin.[106] The contractor testified at trial that the owner controlled when and where work began and the order in which the work was to be completed, and that the contractor was not in complete control of the project.[107] Rather, the owner exercised some command. The Court found that those facts aligned with the descriptions of control described in Comment (a) to § 414, in particular the owner's control over the order in which work was performed.

In two subsequent cases, the Supreme Court determined that the retained control exception did not apply. In Farabaugh v. Pennsylvania Turnpike Commission, the landowner showed a safety videotape to the contractor's workers before work began, and hired a construction manager to supervise safety issues for the project and conduct safety inspections.[108] But the landowner completely turned over control of the worksite to the contractor in all other respects, and there was no evidence that the landowner exerted any control over how the work was to be performed. The Court noted that it would be against public policy to impose liability on the landowner merely for hiring a manager to supervise safety and showing a safety video to the contractor's workers because it would discourage safety measures, and held that the plaintiff had not presented sufficient evidence to prove that the landowner "retain[ed] control over [the contractor's] means and methods for purposes of a Section 414 analysis."[109] However, the Court

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[105] Restatement (Second) of Torts § 414 com. (c).
[106] 317 A.2d 280 (Pa. 1974).
[107] Id. at 282.
[108] Farabaugh v. Pennsylvania Turnpike Com'n, 911 A.2d 1264, 1271 (Pa. 2006).
[109] Id. at 1275. See also LaChance v. Michael Baker Corp., 869 A.2d 1054 (Pa. Commw. Ct. 2005) (holding that retained control exception did not apply where landowner contractually retained and exercised right to safety inspections, but did not exercise any other control over the manner or operational details of the project, because

held that the manager could potentially be liable to the plaintiff because it took an active role in ensuring worksite safety.[110]

The Supreme Court most recently addressed the retained control exception in Beil.[111] There the landowner was a college that hired a contractor to renovate its engineering building, including roofing, siding, and masonry work. The contractor, in turn, hired subcontractors to perform the work. The plaintiff was a worker injured when he fell from scaffolding while carrying materials to the roof without wearing any fall protection. In its agreement with the contractor, the landowner retained the ability to set limitations on use of the property, and made the contractor agree to comply with any safety direction or rules reasonably issued by the landowner to prevent injuries.[112] The landowner also had a project manager who controlled worker access to the engineering building because part of it was being used by students. The landowner did not allow smoking in the building, and did not allow the workers to take breaks in front of the building after a worker made offensive comments to a female student.[113] However, there was no evidence that the landowner exercised any control, contractually or in fact, over how the workers performed the masonry and roofing work.

The Court stated that the control required to meet § 414's retained control exception can be demonstrated through contractual provisions that give the landowner control over the manner, method, and operative details of the work, or can be demonstrated by actual control over the work.[114] However, "the question of the quantum of retained control necessary to make the

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contract language was standard and it was against public policy to impose liability on landowner for addressing safety in the contract).

[110] Id. at 1282.

[111] 11 A.3d 456 (Pa. 2011).

[112] Id. at 462.

[113] Id. at 465.

[114] Id. at 467.

owner of the premises liable is a question for the jury."[115] The evidence of control in this case fell into two broad categories: safety and access. Regarding safety, the Court held that a landowner who retains some control over safety, like the landowner college, has not exercised sufficient control.[116] However, the Court did not "rule out the possibility that, in certain circumstances not present in this matter, a property owner's actions concerning safety matters could constitute sufficient control over the manner in which work is done such that the owner is subject to liability."[117] Turning to access, the Court examined both Comment (a) and (c) to § 414 to determine that for access to be evidence of control, it had to impact the operational detail or manner in which work was completed. The landowner college's regulation of access to the engineering building was tangential to the work of the contractors and was not qualitatively sufficient.[118]

Here, PPL through its contract and specifications told QSC workers what paint to use, and every step of how to use it. It told the workers to lay out tarps beneath the poles, to mix and stir the paint, to clean and dry the poles, to paint the poles with rollers, brushes, and mitts, to let the paint dry hard and firm, then to apply successive coats, to clean up the work area by disposing of paint containers and debris, and finally to make spot repairs—in a specific feather-edged manner—when directed to do so by PPL. PPL's own contract manager testified at trial that these provisions told QSC workers how to perform the operative details of their job.

The contract also called for safety provisions to be followed, and established the position of the PPL contract field representative. PPL's contract field representative, Mr. Grim, was at the worksite every day, and knew that it was his duty to stop work if he saw an unsafe condition,

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[115] Id. See also Hargrove v. Frommeyer & Co., 323 A.2d 300, 304 (Pa. Super. Ct. 1974)(holding that evidence of landowner supervising design and construction of building sufficient ot submit issue of control to the jury).
[116] Id. at 469.
[117] Id. at 469 n. 4.
[118] Id. at 471.

even if he was not knowledgeable enough to know when such a condition existed. Mr. Grim was supposed to hold safety meetings every day for the workers, even though he did not. He had the duty to inspect worker fall protection.

Also, PPL exerted great control over access to the property. Through its green tag procedure, PPL retained control of the property, and significantly limited worker access to the poles because of the live electric wires. Workers could not get on the poles until Mr. Grim let them. Also, the available ways to scale the poles were essentially limited to the single-rail ladders because the poles were energized, and there were no other attachment points on the poles to rig other climbing devices. QSC had to request these ladders from PPL to climb the poles.

These facts, especially the way in which PPL dictated how QSC workers were to perform their painting work coupled with evidence of control over safety and access, evince the quality of control that the Supreme Court found lacking in Beil.[119] The qualitative element being present, it was for the jury to determine if the quantity of control necessary to make PPL liable existed. There were ample facts in evidence, including the contract and testimony from PPL's own employees, for the jury to determine that the necessary quantum of control existed as they did.

B. The Jury Charge, Based on the Standard Instructions, Accurately Provided the Jury with the Law Necessary to Determine the Factual Issues Presented.

Defendant PPL claims multiple errors in the jury charge related to negligence on the basis that it inaccurately conveyed the principles of Beil.[120] The Court charged the jury as follows:

> This is a negligence case. And the first question is: was PPL Electric Utilities Corporation negligent? And it has a place for you to check yes or no. The legal term negligence, otherwise known as carelessness, is the absence of ordinary care that a reasonably prudent person would use under the circumstances presented. Negligent conduct may consist of an act or or a failure to act when

[119] Plaintiff's claim survived a motion for summary judgment, a motion for compulsory nonsuit, and a motion for directed verdict, all of which were based on the argument that the claim could not survive under the Beil analysis.
[120] Defendant alleges the same defects in the jury verdict sheet.

> there is a duty to do something. . . . Now, you've heard two weeks, I guess, of testimony about PPL and [QSC]. And that's what we call an independent contractor. PPL hired [QSC], an independent contractor. The employer of an independent contractor—and all that means is PPL—is not usually responsible for any negligent conduct of the contractor or its employees. The exception is where the employer, PPL, retains control over any part of the work. Also, you should know that a person or a corporation, PPL, who undertakes to provide services necessary for the safety of somebody else, assumes a duty to use reasonable care in performing those services.[121]

While acknowledging that it constitutes the standard jury instruction, Defendant PPL argues that the portion of the charge explaining the retained control exception, and the sentence of the charge that explains that an individual who provides services necessary for the safety of another assumes a duty to perform those services non-negligently are erroneous. Instead, Defendant PPL contends that the Court should have given its proposed jury charges, consisting of five verbose and repetitive pages containing multiple citations to and quotes taken from Beil.[122]

A court's primary duty when charging a jury is to clarify the issues so that the jury may understand the questions to be resolved.[123] The court is free to formulate and express the charge in any way the court sees fit so long as it fairly and accurately relates the law to the jury.[124] The court may be guided by standard jury instructions, but is not required to use any prescribed language.[125] The jury charge is taken as a whole, against the backdrop of all the evidence.[126] The court may refuse to give a requested point for charge if the point has already been adequately and sufficiently covered by another general or specific instruction.[127] Also, the court need not give a point for charge that requires modification, qualification, or refinement because it

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[121] N.T. 03/08/12, pg. 296 line 21 – pg. 298 line 23.
[122] These were Defendants proposed charges 19 through 23.
[123] Com. v. Beach, 264 A.2d 712, 714 (Pa. 1970).
[124] Butler v. Kiwi, S.A., 604 A.2d 270, 273 (Pa. Super. Ct. 1992).
[125] Hawthorne v. Dravo Corp., Keystone Div., 508 A.2d 298, 303 (Pa. Super. Ct. 1986).
[126] Buckley v. Exodus Transit & Stroage Corp., 744 A.2d 298, 305 (Pa. Super. Ct. 1999).
[127] Id. at 306.

is not the duty of the court to restate points that are inadequate as stated.[128] Because the purpose of the jury charge is to clarify issues for the jury, it is axiomatic that a court does not need to give a confusing proposed point for charge.[129]

Here, the Court gave the jury, almost verbatim, the suggested standard civil jury charge related to the retained control exception.[130] The Court instructed the jury that the retained control exception applied if PPL "retained control over any part of the work." Section 414 of the Restatement (Second) of Torts provides that the exception applies if the landowner "retains the control of any part of the work." Comment (a) to § 414 explains the exception applies if the landowner "retains control over the operative detail of doing any part of the work." The Supreme Court in Beil relied on both § 414 and Comment (a) as accurate statements of the law. The Supreme Court's statement in Beil that the exception applies when the "owner retains control over the manner in which the work is done"[131] is substantially the same as saying that the owner must control any part of the work. This Court used language calculated to accurately and concisely convey to the jury the main concept behind § 414. The five pages worth of instructions that Defendant PPL argues should have been given would have only served to confuse the issues.

Likewise, Defendant mistakenly argues that the Court erred by giving the portion of the charge explaining that one that provides a service for another's safety must do so with reasonable care.[132] It has long been Pennsylvania law that one who assumes a duty, for whatever reason,

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[128] Id.

[129] See Quinby v. Plumsteadville Family Practice, Inc., 907 A.2d 1061, 1069-70 (Pa. 2006) ("A charge will be found adequate unless the issues are not made clear to the jury or the jury was palpably misled by what the trial judge said or unless there is an omission in the charge which amounts to a fundamental error.").

[130] See SSJI 6.140 (2003).

[131] Beil, 11 A.3d at 466.

[132] For this proposition, at oral argument Defendant relied upon dicta in Fulmer v. Duquesne Light Co., 543 A.2d 1100, 1105 (Pa. Super. Ct. 1988), that a landowner need not take every precaution to prevent injury to a contractor's

and negligently performs that duty so that another is harmed is liable for the harm.[133] Even if a defendant does not initially owe the plaintiff any legal duty to perform an act, the defendant will be liable if he acts negligently.[134] Evidence was presented at trial that PPL had assumed responsibility for QSC worker safety contractually and actually. It was for the jury to determine if PPL breached its duty.

Thus, the Court's jury charge was sufficient and proper.

C. The Court Properly Admitted Evidence of Defendant PPL's Negligence, Including Industry Standards and the Specifications PPL Dictated for its Poles.

Defendant PPL asserts a bevy of alleged errors related to evidence of its negligence. PPL argues that the Court impermissibly allowed evidence of PPL's OSHA and NESC violations, that QSC did not properly train and institute safety precautions for its workers, Mr. Grim's lack of knowledge and experience regarding safety issues, the design specifications of the pole and the ladders, and alternative methods of climbing the poles. PPL contends this evidence was irrelevant because PPL did not owe Plaintiff any duty.

A claim of negligence consists of a duty, a breach of that duty, causation, and damages.[135] A plaintiff may proceed against a defendant on a theory of of direct liability, vicarious liability, or both.[136] A defendant landowner may be vicariously liable for the negligent acts or omissions of a contractor under the retained control exception, and may also be directly liable for his own negligent acts.[137] A defendant may have a preexisting legal duty, or may assume a duty to act with reasonable care by providing services to protect people or their

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employees. However, that case says nothing that negates a landowner's duty to act with reasonable care if the landowner does in fact endeavor to take a precaution to prevent worker injuries.

[133] Feld v. Merriam, 485 A.2d 742, 746 (Pa. 1984).

[134] Pascarella v. Kelley, 105 A.2d 70, 73 (Pa. 1954).

[135] Grossman v. Barke, 868 A.2d 561, 566 (Pa. Super. Ct. 2005).

[136] Scampone v. Highland Park Care Ctr., LLC, 57 A.3d 582, 597 (Pa. 2012).

[137] Chenot v. A.P. Green Servs., Inc., 895 A.2d 55, 63 n.6 (Pa. Super. Ct. 2006).

property.[138] A defendant can take on duties to supervise safety oversight by contract or practice and be held liable for negligent performance.[139] Generally, industry standards and regulations are relevant and admissible on the issue of negligence.[140]

Here, Plaintiff presented evidence that Defendant PPL was directly negligent. PPL's internal operating procedures required that its contract field supervisor to monitor worksite safety. PPL's field contract supervisor Mr. Grim knew that he had duties to monitor the worksite. He knew he had to stop work if he saw an unsafe condition. He knew that he was supposed to ensure that the workers wore proper fall protection. PPL's contract administrator Mr. Wukitsch confirmed Mr. Grim's duties to monitor safety, and added that Mr. Grim was supposed to make sure there were daily safety meetings.

PPL set out specifications for its poles that ensured limited access and tie-off points for anyone attempting to scale the pole, even while knowing that the pole would have to be re-painted. The only way to climb the pole was by the single-rail ladders, and the only place for a worker to tie-off is on the ladder itself. Having created this condition, PPL then did not give QSC the bolts to secure the ladders to the pole. Had these bolts been used, the ladders would not have shifted several inches to each side as the worker moved. PPL field representative Mr. Grim should have been aware of the dangers posed by the job to the QSC workers, and admittedly had a duty to ensure the workers knew of the dangers and were prepared to face them. However, neither before awarding the contract nor after work commenced did PPL discern QSC workers' knowledge, training, or preparedness on how to climb and tie-off on its pole.

Plaintiff's experts testified that under industry practice, which included OSHA and the NESC, Defendant PPL breached its duties. PPL should not have allowed QSC workers to tie off

[138] Feld, 485 A.2d at 746.
[139] See Health v. Huth Enigineers, Inc., 420 A.2d 758, 759 (Pa. Super. Ct. 1980).
[140] Birt v. Firstenergy Corp., 891 A.2d 1281, 1290 (Pa. Super. Ct. 2006).

to the single-rail ladders, and at the very least should have given QSC the bolt to secure the ladders. PPL had a duty to provide a competent field representative. But, they provided Mr. Grim, who knew so little about climbing a transmission pole that he did not even know Plaintiff was tied-off incorrectly. Mr. Grim did not inspect QSC worker equipment, or ensure safety meetings were held.

This evidence of PPL's direct negligence was admissible to prove PPL breached a duty owed to Plaintiff.

D. The Court Properly Found that Assumption of the Risk did not Apply Where There was no Evidence that the Plaintiff Appreciated a Risk and Incurred it Anyway.

Defendant PPL contends that the Court should have granted it judgment on the basis that Plaintiff assumed the risk of his fall, or alternatively put the issue to the jury.

Assumption of the risk is an affirmative defense that arises when a plaintiff apprehends a danger, and then consciously decides to tempt fate and face the danger.[141] It is a judicially created doctrine developed during the industrial revolution to relieve employers from bearing the full cost that necessarily will accrue when workers must perform dangerous jobs.[142] Assumption of the risk is essentially a form of estoppel in the context of tort, barring the plaintiff from recovery.[143] Over time, the policies underlying the doctrine have eroded, and assumption of the risk has all but been abolished and replaced with comparative negligence except in specialized circumstances.[144] Those circumstances are very narrow.[145] A defendant must establish beyond question the two components to the doctrine: the plaintiff must have perceived the risk, and then the plaintiff must have voluntarily faced the risk.[146] To be voluntary, the circumstances must

[141] Bullman v. Giuntoli, 761 A.2d 566, 570 (Pa. Super. Ct. 2000).
[142] Staub v. Toy Factory, Inc., 749 A.2d 522, 527-28 (Pa. Super. Ct. 2000).
[143] Bullman, 761 A.2d at 570.
[144] Staub, 749 A.2d at 528.
[145] Bullman, 761 A.2d at 571.
[146] Barrett v. Fredavid Builders, Inc., 685 A.2d 129, 131 (Pa. Super. Ct. 1996).

show that the plaintiff manifested a willingness to accept the risk, over and above mere contributory negligence, so that the plaintiff has gone so far as to abandon his right to complain.[147]

Assumption of the risk is a question for the court to decide and not a matter for the jury.[148] The court can only decide that the plaintiff has assumed the risk where it is beyond question that the plaintiff voluntarily and knowingly faced an obvious danger.[149] The court must decide that reasonable minds could not differ as to whether the plaintiff assumed the risk.[150] If the court does not as a matter of law decide that the plaintiff assumed the risk, then the jury is only to be given a comparative negligence charge.[151]

The doctrine has been severely limited except for the most egregious situations where the plaintiff has clearly taken on the risk. The seminal example of assumption of the risk is Carrender v. Fitterer, where our Supreme Court determined that a woman who knowingly chose to park her car in an icy area of a parking lot, even though there were other areas free of ice and snow, assumed the risk when she slipped and fell on the ice, and was barred from recovery.[152] However, a plaintiff will not be considered to have assumed the risk merely because he has a

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[147] Staub, 749 A.2d at 529.

[148] Struble v. Valley Forge Military Academy, 665 A.2d 4, 8 (Pa. Super. Ct. 1995). Defendant cites to Long v. Norriton Hydraulics, 662 A.2d 1089 (Pa. Super. Ct. 1995), to argue that Pennsylvania law is unsettled regarding whether assumption of the risk is an issue for the judge or the jury. The Long opinion does not hold, as Defendant implies, that assumption of the risk is a jury matter. The Superior Court in Long found that the trial court improperly granted summary judgment on the basis of assumption of the risk because it was not beyond question that plaintiff knowingly and voluntarily faced an obvious danger, and that the case should proceed to trial. 662 A.2d at 1091. The Superior Court did not, however, state that the issue of assumption of the risk should go to the jury. In Struble, an opinion issued approximately four months after Long and authored by the same judge, the Superior Court explicitly stated "that the question of whether a litigant has assumed the risk is a question of law and not a matter for jury determination," and further made clear that "once the trial court decides that assumption of the risk is not the basis for a compulsory nonsuit, the jury is to be charged only on comparative negligence." Struble, 665 A.2d at 8.

[149] Long v. Norriton Hydraulics, 662 A.2d 1089, 1091 (Pa. Super. Ct. 1995).

[150] Staub, 749 A.2d at 529-30.

[151] Struble, 665 A.2d at 8.

[152] 469 A.2d 120, 125 (Pa. 1983).

dangerous job. In Staub v. Toy Factory, Inc., [153] a worker was injured while installing roof insulation when he stepped in a hole that he knew existed but did not know its exact location. The Superior Court held assumption of the risk was inapplicable. Specifically, the Superior Court held that in the context of workplace negligence with a dangerous job, the worker's "conduct is better judged by its reasonableness, that is, by negligence principles. A trial court should not, therefore, decide the issue as one of duty or lack thereof; instead, the issue should go to the jury as one of comparative negligence."[154]

Here, Plaintiff testified that he performed his job in the same way that he always had previously, and that he did not know that he was tied off improperly. He testified that he did not know the danger that he was in. He did not know that he needed to wear a harness. His job, which included reaching out and slapping paint on to the back of a pole, was dangerous. But there was no evidence presented that Plaintiff subjectively expected that his lanyard would slip, and yet faced the risk anyway. Defendant did not prove that, as a matter of law, Plaintiff assumed the risk. The case properly went to the jury for determination based on comparative negligence principles. Thus, the Court properly denied Defendant's request that the jury be given an assumption of the risk charge.

For the reasons set forth above, post-verdict motions were denied.

BY THE COURT,

6/14/13
DATE

MARK I. BERNSTEIN, J.

[153] Staub v. Toy Fatcory, Inc., 749 A.2d 522 (Pa. Super. Ct. 200).
[154] Id. at 530(internal quotes and citation omitted).

2014 PA Super 184

VINCENT P. NERTAVICH, JR.

v.

PPL ELECTRIC UTILITIES, KTA, KTA-TATOR, INC., KTA/SET ENVIRONMENTAL, S-E TECHNOLOGIES, INC., ALEXANDER ANDREW, INC., D/B/A FALLTECH, ALEXANDER ANDREW, INC., FALLTECH, THOMAS & BETTS CORP., THOMAS & BETTS CORP., D/B/A OR T/A MEYER STEEL STRUCTURES, F/K/A I.T.T. - MEYER INDUSTRIES, F/K/A MEYER INDUSTRIES, MEYER STEEL STRUCTURES F/K/A I.T.T.- MEYER INDUSTRIES, F/K/A MEYER STEEL STRUCTURES, ITT-MEYER INDUSTRIES, MEYER INDUSTRIES, MEYER MACHINE, INC. AND WINOLA INDUSTRIAL, INC.

APPEAL OF: PPL ELECTRIC UTILITIES CORPORATION

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 3415 EDA 2012

Appeal from the Judgment Entered December 5, 2012
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): No. 2316 Sept. Term 2009

BEFORE: FORD ELLIOTT, P.J.E., OTT, J., and STRASSBURGER, J.*

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* Retired Senior Judge assigned to the Superior Court.

OPINION BY OTT, J.: **FILED AUGUST 27, 2014**

PPL Electric Utilities, Corporation ("PPL") appeals from the judgment of $2,494,542.35, entered December 5, 2012, in the Philadelphia County Court of Common Pleas, in favor of Vincent P. Nertavich, Jr., for the injuries he sustained when he fell 40 feet while working as the employee of an independent contractor[1] hired to paint PPL's electric transmission poles.[2] On appeal, PPL argues the trial court erred in failing to grant judgment notwithstanding the verdict (j.n.o.v.) or a new trial. For the reasons set forth below, we conclude that PPL was entitled to the grant of j.n.o.v., and, accordingly, reverse the judgment entered in favor of Nertavich.

The facts underlying this appeal are summarized by the trial court as follows:

> Defendant PPL owns 90-foot-high, 10-foot-in circumference tubular steel electric transmission poles. Some of these poles need to be repainted from time to time to prevent structural decay. PPL contracted with QSC [Painting, Nertavich's] employer, to paint the poles. The contract called for work to begin in August 2007 and be completed by November 2007. It directed that "[a]ll work shall be performed according

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[1] QSC Painting ("QSC") was Nertavich's employer.

[2] Nertavich's claims against the named defendants, with the exception of PPL and Thomas & Betts Corp., were either dismissed by the trial court or settled prior to trial. Thomas & Betts was the manufacturer of both the electric transmission pole and ladder upon which Nertavich was working when he fell. Nertavich's products liability claim with respect to the manufacture and sale of the pole was dismissed pretrial by summary judgment. His claim with respect to the ladder proceeded to trial, but the jury found Thomas & Betts was not negligent.

to the attached PPL EU 'Specification for the Maintenance Painting of Transmission Structures' revision dated 8/3/07."

That PPL Specification document contained a variety of detailed requirements about the job. It prescribed each step how to paint the poles.

. . . .

While the workmen painted, power might continue to surge through the lines attached to the poles. As a result, the workers had to take "extra precautions when painting near insulators, making sure that paint does not splatter or drip onto insulators," and the workers would not be allowed to wipe paint off the insulators. Also, PPL maintained control over the worksite: PPL supplied an "Authorized Representative," also known as a contract field representative, for the project who was "the daily source of contact ... in areas of any question, materials, quality assurance, general safety, work procedures and schedule." PPL had to go to the power substations and set the circuit breakers so that the workers would not be electrocuted. PPL employed a "green tag" procedure where the PPL representative would not allow workers on the poles until the lines were set.

Pursuant to PPL's internal guidelines for safety and health procedures, the PPL field representative had the duty to "monitor the contractor to ensure that safety requirements of the contract are adhered to ... [and] observe the contractor's performance." The PPL field representative had the authority to "stop the contractor's work for severe or repeated safety violations," and "if the PPL Field Representative observes an unsafe work practice involving a direct threat or imminent danger, the field Representative immediately will direct that all work stop[.]"

PPL's poles dated from the 1980s. The poles were custom ordered from Defendant Thomas & Betts, with PPL establishing their specifications. The pole specifications included the dimensions of the pole, its paint, and the number and type of attachment points. PPL was aware that the poles would need repainting every 15 to 20 years. PPL did not specify that the poles should have any vangs[, *i.e.*, pieces of metal,] welded onto them so that a worker's lanyard or other suspension device could attach to the pole. The only attachment points on the poles, besides those at the top of the poles and on the arms for electrical wires, were a series of brackets running up one side of

the pole. These brackets served as attachment points for removable single-rail ladders, known as "chicken" ladders. They are known as "chicken" ladders because they are unstable and wobble, frightening workers. There was no place for a worker climbing the pole to attach a lanyard or lifeline, except for somewhere on these ladders. There were two types of ladders. Both consisted of a central metal beam with metal pegs protruding out to the left and right. The first, termed a working ladder, had parallel pegs on each side to give the appearance of a straight bar across the rail so that a worker could stand level. The second type, the climbing ladder, had alternating pegs staggered at regular intervals up each side of the rail. The ladders came from the manufacturer with two bolts that attach through their bottom to secure them to the pole. QSC, not having another means of lifting its workers into place to paint the pole, asked PPL for the removable ladders. PPL provided QSC with the ladders, but not with the bolts.

On September 23, 2007, ... Nertavich was 40 feet off the ground working on a PPL pole. More experienced workers were painting the pole above him. He was standing on one of the climbing ladders. QSC provided [Nertavich] with a pole belt, a body harness, and two lanyards. One lanyard was to attach to the pole belt, and the other was to attach to the body harness to serve as a lifeline. [Nertavich] used only the pole belt and one lanyard. He testified at trial that on previous jobs he had used only the pole belt and one lanyard, and that no one told him he had to use the harness as well.[3] The one lanyard he used was coated in dried paint. [Nertavich] tied the paint-coated lanyard to the ladder above him, a working ladder, by looping it around a left peg. [Nertavich], holding on to the lanyard, leaned out to his left to slap paint on a hard-to-reach spot on the back of the pole. The ladder above him to which he was tied off wobbled several inches to the left. The lanyard unlooped. [Nertavich] fell 40 feet, landing on his feet. The fall fractured his feet, dislocated his ankles, fractured his knee, his right femur, his right hip, and burst several of his lumbar spine disks.

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[3] Indeed, Nertavich admitted that his body harness was in his truck on the day of his accident. N.T., 3/1/2012, at 129-130.

> [Nertavich] lost 3 inches in height as his body literally compacted from the fall.

Trial Court Opinion, 6/14/2013, at 2-6 (footnotes and record citations omitted).

Nertavich initiated this personal injury/products liability action by *writ* of summons on September 23, 2009. After filing a complaint and first amended complaint, Nertavich filed a second amended complaint on April 21, 2011. The named defendants included the "product defendants" – Falltech, Thomas & Betts, and Winola Industrial, Inc. – which designed, manufactured, and/or sold fall protection equipment, the electric transmission poles, and the single-rail ladders[4] – and the "utility defendants" – PPL and KTA/Set Environmental, the owner of the utility poles and an engineering consulting company hired to oversee the painting work, respectively. Nertavich raised claims of general negligence, professional negligence, strict liability, and breach of warranty, as well as sought punitive damages.

PPL filed a motion for summary judgment on July 5, 2011, which the trial court denied on September 1, 2011.[5] The case proceeded to a jury

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[4] These ladders were also referred to as "chicken ladders," "climbing assists," and "McGregor ladders" throughout the trial.

[5] The other defendants also filed motions for summary judgment. Relevant to this appeal, Thomas & Betts filed a motion for partial summary judgment, arguing that Nertavich's products liability claim with respect to the manufacture and design of the transmission pole was barred by the statute
(Footnote Continued Next Page)

trial, commencing in February of 2012. PPL moved for a nonsuit at the conclusion of Nertavich's case-in-chief, and a directed verdict at the close of all testimony, both of which were denied by the trial court.[6] On March 9, 2012, the jury returned a verdict in favor of Nertavich in the amount of $4,613,150.00. However, the jury found PPL 51% causally negligent for Nertavich's injuries, and Nertavich, himself, 49% causally negligent for his injuries. The jury also found that the ladder designed by Thomas & Betts was not defective.[7]

Both parties sought post-trial relief. On March 13, 2012, Nertavich filed a motion for delay damages, and, on March 19, 2012, PPL filed post-trial motions seeking j.n.o.v. or a new trial. The trial court granted Nertavich's motion, and, on April 9, 2012, entered a molded verdict in the amount of $2,494,542.35 in favor of Nertavich and against PPL.[8] Thereafter, on November 26, 2012, the trial court denied PPL's post-trial motion, and on

(Footnote Continued) ———————

of repose. ***See*** 42 Pa.C.S. § 5536. The trial court agreed, and dismissed that claim. ***See*** Order, 9/1/2011.

[6] The trial court did, however, grant PPL's motion for a nonsuit with regard to Nertavich's claim for punitive damages. N.T., 3/7/2012, at 137.

[7] Accordingly, Thomas & Betts has not filed a brief in this appeal.

[8] The molded verdict reflects both a reduction in the total award based upon the jury's finding Nertavich 49% liable, and the addition of delay damages.

December 5, 2012, judgment was entered on the verdict. This timely appeal followed.[9]

PPL raises the following four issues on appeal:

> (1) Is PPL entitled to judgment notwithstanding the verdict for injuries sustained by an employee of an independent contractor when controlling Pennylvania law, as reflected in Beil v. Telesis Construction, Inc., 608 Pa. 273, 11 A.3d 456 (Pa. 2011), requires that PPL exercise significant control over the manner, methods, means, and operative detail of the portion of the independent contractor's work that is specifically related to the accident, and the evidence at trial established that the independent contractor itself directed and exercised control over its work?
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> (2) Is PPL entitled to a new trial on liability when the Court improperly permitted Nertavich to introduce evidence of PPL's other purported duties – including such things as PPL's internal guidelines, OSHA, NESC, the duties of PPL's onsite safety representative, and a common law duty to hire competent contractors – when those purported duties are inconsistent with Beil or otherwise inapplicable under the law?
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> (3) Is PPL entitled to a new trial on liability when the Court instructed the jury contrary to Beil?
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> (4) Is PPL entitled to judgment notwithstanding the verdict when the evidence established that Nertavich assumed the risk of his fall?

PPL's Brief at 3-4. Because we conclude that PPL is entitled to j.n.o.v. on its first issue, we need not address its remaining claims.

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[9] The trial court did not direct PPL to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b).

First, PPL contends it is entitled to j.n.o.v. because Nertavich failed to establish that it retained control over the manner, methods, means, and operative detail of the work of Nertavich's employer that was sufficient to overcome the general rule that an owner owes no duty to the employees of an independent contractor.

"A [j.n.o.v.] can be entered upon two bases: (1) where the movant is entitled to judgment as a matter of law; and/or, (2) the evidence was such that no two reasonable minds could disagree that the verdict should have been rendered for the movant." ***Egan v. USI Mid-Atl., Inc.***, 92 A.3d 1, 19-20 (Pa. Super. 2014) (citation omitted). Our review of a trial court's decision granting or denying a post-trial motion for j.n.o.v. is well-established:

> When a court reviews a motion for judgment n.o.v., the reviewing court considers the evidence in the light most favorable to the verdict winner, who must receive the benefit of every reasonable inference of fact arising therefrom, and any conflict in the evidence must be resolved in his or her favor. A judgment n.o.v. should only be entered in a clear case.

Beil v. Telesis Const. Inc., 11 A.3d 456, 462 (Pa. 2011) (citations omitted). Further, we will not substitute our judgment for that of the fact finder when it comes to questions of credibility and weight of the evidence. ***Egan***, ***supra***, 92 A.3d at 20 (citation omitted).

In ***Beil***, the case upon which PPL relies for support of its appeal, the Pennsylvania Supreme Court reiterated the century old "accepted and general rule ... that a landowner who engages an independent contractor is

not responsible for the acts or omissions of such independent contractor or his employees." ***Beil***, ***supra***, 11 A.3d at 466 (emphasis supplied).

> This foundational law is based upon the long-standing notion that one is not vicariously liable for the negligence of an independent contractor, because engaging an independent contractor "implies that the contractor is independent in the manner of doing the work contracted for. 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." ***Silveus v. Grossman***, 307 Pa. 272, 278, 161 A. 362, 364 (1932).

Id.

However, this general rule is subject to certain exceptions. Relevant to the present case is the "retained control" exception set forth in Section 414 of the Restatement (Second) of Torts:

> One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

Restatement (Second) of Torts § 414 (1965).

The ***Beil*** Court discussed the degree of control necessary to hold an owner liable for injuries suffered by an employee of an independent contractor under Section 414:

> The primary question in many premises cases, as is the issue before us, is whether the property owner hirer of the independent contractor retained sufficient control of the work to be legally responsible for the harm to the plaintiff. Comment c to Section 414 provides the most commonly used test for determining whether an employer/landowner retained sufficient control. More precisely, comment c speaks to the degree of

control necessary for the exception to overcome the general rule against liability. Comment c makes manifest that the right of control must go beyond a general right to order, inspect, make suggestions, or prescribe alterations or deviations, but that there must be such a retention of the right of supervision that it renders the contractor not entirely free to do the work in his own way:

> In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. **Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.**

Restatement (Second) of Torts § 414, cmt. c (emphasis added); ***see also Hader***[***v. Coplay Cement Mfg. Co.***, 410 Pa. [139,] 150–52, 189 A.2d [271,] 277–78 [(1963] (rejecting assertion that site visitation and provision of technical advice regarding installation of machinery did not demonstrate control of workplace). **The control required to implicate the exception to the general rule against liability can be demonstrated in two ways. First, a plaintiff may point to contractual provisions giving the premises owner control over the manner, method, and operative details of the work. Alternatively, the plaintiff may demonstrate that the land owner exercised actual control over the work.** As a general proposition, the question of the quantum of retained control necessary to make the owner of the premises liable is a question for the jury. When, however, the evidence fails to establish the requisite retained control, the determination of liability may be made as a matter of law.

Id. at 466-467 (emphasis supplied in part). The Court also noted that, in prior decisions, it construed the "retained control" exception narrowly. ***Id.***

at 467, *citing* ***Hader, supra***; ***Farabaugh v. Pennsylvania Turnpike Com'n***, 911 A.2d 1264 (Pa. 2006).

In the present case, the trial court found the quality of control PPL exercised over the jobsite was sufficient to submit to the jury the question of whether the "quantity of control necessary to make PPL liable existed." Trial Court Opinion, 6/14/2013, at 17. Specifically, the court determined that Nertavich presented sufficient evidence to find that PPL controlled the "operative details" of QSC's work:

> Here, PPL through its contract and specifications told QSC workers what paint to use, and every step of how to use it. It told the workers to lay out tarps beneath the poles, to mix and stir the paint, to clean and dry the poles, to paint the poles with rollers, brushes, and mitts, to let the paint dry hard and firm, then to apply successive coats, to clean up the work area by disposing of paint containers and debris, and finally to make spot repairs – in a specific feather-edged manner – when directed to do so by PPL. PPL's own contract manager testified at trial that these provisions told QSC workers how to perform the operative details of their job.
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> The contract also called for safety provisions to be followed, and established the posisiton of the PPL contract field representative. PPL's contract field representative, Mr. Grim, was at the worksite every day, and knew that it was his duty to stop work if he saw an unsafe condition, even if he was not knowledgeable enough to know when such a condition existed. Mr. Grim was supposed to hold safety meetings every day for the workers, even though he did not. He had the duty to inspect worker fall protection.
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> Also, PPL exerted great control over access to the property. Through its green tag procedure, PPL retained control of the property, and significantly limited worker access to the poles because of live electric wires. Workers could not get on the poles until Mr. Grim let them. Also, the available ways to scale the poles were essentially limited to the single-rail ladders

> because the poles were energized, and there were no other attachment points on the poles to rig other climbing devices. QSC had to request these ladders from PPL to climb the poles.
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> These facts, especially the way in which PPL dictated how QSC workers were to perform their painting work coupled with evidence of control over safety and access, evince the quality of control that the Supreme Court found lacking in ***Beil***. The qualitative element being present, it was for the jury to determine if the quantity of control necessary to make PPL liable existed. There were ample facts in evidence, including the contract and testimony from PPL's own employees, for the jury to determine that the necessary quantum of control existed as they did.

Id. at 16-17 (footnote omitted).

Conversely, PPL argues the type of control Nertavich claims it retained over the jobsite in this case is the same type of control the Supreme Court found insufficient in ***Beil***. Moreover, PPL contends that Nertavich's attempt to "end-run ***Beil*** through a so-called theory of 'direct negligence'" also fails. PPL's Brief at 34. Accordingly, it asserts that it is entitled to j.n.o.v. as a matter of law. We agree.

Beil is the Supreme Court's most recent, and arguably most relevant, decision on the issue of landowner liability for injuries sustained by the employee of an independent contractor. A discussion of the facts and disposition in ***Beil*** will be helpful to our resolution of the present case. They are as follows.

Lafayette College ("the College") hired Telesis Construction, Inc. ("Telesis") as the general contractor to renovate an engineering building. Telesis subcontracted the roofing work to Kunsman Roofing and Siding ("Kunsman"). Beil was an employee of Kunsman. The College also

contracted separately with Masonary Preservation Services, Inc. ("MPS") to restore stonework on the exterior of the building. On the day of the accident, Beil was installing flashing on the roof. He used scaffolding erected by MPS, after consultation with the College, to access the roof. While ascending the ladder with 15 pounds of flashing, he fell 30 feet, and sustained serious injuries. Beil subsequently filed a personal injury action against the College, Telesis, and MPS. A jury awarded damages of $6.8 million, and apportioned liability as follows: Telesis 50% liable, the College 35% liable, MPS 10% liable and Beil 5% liable. The College appealed, and this Court reversed and remanded for the entry of j.n.o.v. in favor of the College. Beil then petitioned the Supreme Court for allowance of appeal. ***See Beil***, ***supra***, 11 A.3d at 458-462. On appeal, the Supreme Court affirmed the decision of the Superior Court, holding that "the College did not retain sufficient control of the premises to subject it to liability pursuant to Section 414 of the Restatement (Second) of Torts[.]" ***Id.*** at 472.

Specifically, the Supreme Court rejected Beil's claim that the College retained control of the premises in two broad categories: safety and access. ***Id.*** at 467. With regard to safety, Beil argued the College "controlled safety matters at the site with respect to Telesis and Kunsman, as well as MPS[.]" ***Id.*** He presented the following evidence in support of that claim: (1) Telesis was contractually obligated to comply with the safety directives of the College; (2) the College's on-site project manager was consulted as to where to place the scaffolding; (3) the College's project manager admitted in

a post-accident email that the roofers were working in a potentially unsafe manner and stated the College's desire for a safe work environment; and (4) expert testimony that the College controlled safety at the site. ***Id.*** With regard to access, Beil similarly claimed that "the College's denial of access to certain areas stands as evidence of its control over the renovation work." ***Id.*** at 469. In support of this contention, he produced evidence that: (1) the College denied the roofers access to certain areas of the building; (2) the subcontractors had to obtain written permission to enter the building; and (3) the College hired MPS, whose scaffolding was used, and the College was consulted as to where to place the scaffolding. ***Id.*** at 469-470.

However, the Supreme Court held that a property owner may retain a certain degree of authority over safety issues, as well as regulate the use of and access to buildings, without "retaining control" of the premises for liability purposes. With regard to safety, the Court held "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." ***Id.*** at 469 (footnote omitted). Rather, a property owner's interest in monitoring the safety of its contractors constitutes sound public policy. ***Id.*** at 468.

Furthermore, with regard to access, the Court held the College's regulation of the use of and access to the building was "tangential to the substantive work of the contractor, and subcontractor[,]" and "did not

control the way the workers did their work." ***Id.*** at 471. Rather, the Court explained,

> the College's conduct regarding placement of MPS' scaffolding [did] not directly relate to the decision of Kunsman's employees to use MPS' ladders and scaffolding instead of Kunsman's own equipment, which Kunsman contracted to provide, and Telesis contracted to ensure was safe. While MPS permitted the Kunsman roofers to use its scaffolding, Telesis did not anticipate or rely upon the use of MPS scaffolding for access to the roof, and access was for Kunsman to determine.

Id. Accordingly, the ***Beil*** Court concluded that "although the College exercised certain authority regarding safety and regulated access to, and use of, certain areas of the premises, this is not the type of conduct that constitutes control as contemplated by the Restatement." ***Id.*** at 472.

In the present case, however, the trial court opined that the facts presented by Nertavich "especially the way in which PPL dictated how QSC workers were to perform their painting work coupled with evidence of control over safety and access, evince the quality of control that the Supreme Court found lacking in ***Beil***." Trial Court Opinion, 6/14/2013, at 17 (footnote omitted). Nertavich agrees, arguing that "PPL was intimately involved in, or had the right to be, in every aspect of the operational detail of QSC's performance[,]" as evident both in the contract provisions, as well as PPL's actual exercise of control at the jobsite. Nertavich's Brief at 23. Conversely, PPL contends that the "categories of supposed 'control' [the trial court found to be sufficient in the present case] are the very same theories of control

rejected by ***Beil*** and its ancestors." PPL's Brief at 21. For the reasons that follow, we agree.

With respect to the contract provisions,[10] the trial court first found that PPL's painting specifications – which included such details as the specific type of paint to use, how to apply the paint (*i.e.*, by concealing brush marks, without runs, by applying a uniform finish and thickness, etc.), and the requirement of "feather-edg[ing]" for spot repairs[11] – constituted control over the operative details of QSC's work sufficient to find it "retained control" of the job site for liability purposes. However, PPL contends these "quality specifications" do not evince sufficient control over QSC's work to hold it liable for Nertavich's injuries. More importantly, these quality specifications had nothing to do with Nertavich's accident. Indeed, PPL argues "Nertavich presented no evidence at trial that PPL ever instructed or directed QSC workers how to tie off to the pole, how to climb the pole, or which equipment to use." PPL's Brief at 23.

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[10] "The fundamental rule in contract interpretation is to ascertain the intent of the contracting parties. In cases of a written contract, the intent of the parties is the writing itself." ***Lesko v. Frankford Hospital-Bucks County***, 15 A.3d 337, 342 (Pa. 2011) (quotation omitted).

[11] ***See*** Contract, 8/30/2007, Attachment A, at 2, ¶ 17.

The Commonwealth Court's decision in ***LaChance v. Michael Baker Corp.***, 869 A.2d 1054 (Pa. Commw. 2005), is instructive.[12] In that case, Michael Baker Corp. ("Baker") was awarded a contract by PennDOT to improve a section of Route 6015 in Tioga County, which included laying reinforced concrete pipes, six feet in diameter, underground. LaChance, an employee of Baker, suffered fatal injuries when the trench he was working in collapsed as he was grouting the outside of these pipes. ***Id.*** at 1055. LaChance's Estate filed a wrongful death and survival action against both Baker and PennDOT, arguing the latter was negligent in failing to supervise Baker and inspect the trench that collapsed. The trial court granted summary judgment in favor of PennDOT, finding, *inter alia*, that the Estate failed to establish PennDOT "retained control" of the job site sufficient to overcome the general rule that a landowner is not liable for the negligence of its contractors. ***Id.*** at 1056.

On appeal, the Commonwealth Court affirmed the grant of summary judgment. First, the Court concluded that the terms of the contract did not support the Estate's claim that PennDOT retained control of the job site. While the contract referred to a "partnering agreement" between the

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[12] "Although decisions by the Commonwealth Court are not binding on this Court, they may be persuasive." ***Little Mountain Cmty. Ass'n, Inc. v. S. Columbia Corp.***, 92 A.3d 1191, 1198 n.14 (Pa. Super. 2014) (citation omitted). That is particularly so with respect to the Commonwealth Court's decision in ***LaChance***, which the Supreme Court cited favorably in both ***Beil, supra***, and ***Farabaugh, supra***.

contractor and PennDOT, the agreement placed all responsibility for job site safety upon the contractor, *i.e.*, Baker, and specifically stated that Baker would "keep direct control of the contract[.]" ***Id.*** at 1060 (citation and emphasis omitted). Further, the Commonwealth Court concluded that PennDOT's right to inspect for safety violations, including the right to suspend work, did not establish that it "retained control" of the jobsite, or "make PennDOT the guarantor of the safety of Baker's employees." ***Id.*** at 1060-1061. Relevant to this appeal, the Court stated, "**Baker's contract performance had to meet PennDOT's contract specifications, but Baker controlled the manner of performance. This is how contractual relationships work.**" ***Id.*** at 1061 (emphasis supplied).

Lastly, the Commonwealth Court considered the Estate's claim that PennDOT's actual conduct on the jobsite demonstrated its control. Specifically, the Estate argued that PennDOT's field inspector directed that the pipe be grouted on the outside, when, as the Estate claimed, the contract provided for grouting only on the inside of the pipe. The Commonwealth Court rejected this argument holding:

> More to the point, PennDOT's directive to grout the outside of the pipe did not cause the accident. Rather, it was the method of digging, benching, bracing or shoring that trench that caused Decedent's fatal injuries. Responsibility for the trench belonged with Baker, which had absolute discretion in when and how to secure a trench. ...
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> There is simply no evidence that PennDOT retained or exercised any control over the manner of the trenching or the operational details of the trenching, which was the proximate cause of Decedent's injuries.

Id. at 1062.

In the present case, the contract provided quality specifications for the painting of the transmission poles.[13] However, Nervatich's fall had nothing to do with these quality specifications. Rather, Nervatich fell when the ladder he tied off on wobbled, and the single lanyard he used as fall protection slid off the rung.[14] Moreover, Nertavich has failed to identify any **contractual provisions** that instructed QSC how to climb the poles safely to complete the painting work.[15] Rather, the contract specifically provided that the contractor was "responsible for all climbing assist and rigging equipment necessary to complete this painting contract in an efficient manner[,]" and that it "shall be responsible to provide all personal protective equipment for all contractor personnel." Contract, 8/30/2007, Attachment

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[13] Gallus Wukitsch, who at the time of the accident was a senior engineer in PPL's transmission and substation maintenance group, testified as on cross-examination during Nertavich's case-in-chief. He explained why the contract included detailed requirements, such as the type of paint to use: "[T]his Keeler and Long product, you don't pick up at, you know, Lowe's or Home Depot. This is a specially mixed paint just for transmission utility poles." N.T., 2/29/2012, at 51. Further, he testified "[w]e wanted to make them understand that the paint we were specifying had certain requirements by the paint manufacturer and they had to follow that." ***Id.*** at 53.

[14] During closing arguments, Nertavich's counsel stated that Nertavich fell "because[, one,] his lanyard slipped off the peg. And he fell, two, because he didn't have a second lanyard attached which is how he had been working all week." N.T., 3/8/2012, at 225-226

[15] As we will discuss *infra*, Nertavich also contends that PPL actually controlled how QSC climbed the poles.

A, at 3, ¶¶ 23 and 26. As PPL's senior engineer, Wukitsch testified, "[w]e were hiring them as the experts to do the painting work. We don't do that work." N.T., 2/29/2012, at 118. Therefore, we conclude the quality specifications set forth in the contract did not establish that PPL "retained control" of the operative details of the work which led to Nertavich's accident.[16]

Secondly, with regard to the terms of the contract, the trial court also found that PPL "retained control" of the job site over safety issues. ***See*** Trial Court Opinion, 6/14/2013, at 16-17. Specifically, the court noted that (1) the contract specified safety provisions to be followed, and (2) created the position of a PPL contract field supervisor, Wayne Grim, whose duty it was to monitor safety conditions at the work site and hold daily safety meetings.[17]

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[16] Nertavich argues that "PPL's glib mischaracterization of the operational detail in its contract as 'quality specifications that directed QSC what to do, not how to do it,' is insufficient to mask the reality and importance PPL placed on its requirements." Nertavich's Brief at 28. We disagree. Clearly, the contract provided specific, detailed painting specifications. However, how QSC was to achieve those specifications was up to the company, itself. John Pateras, the owner of QSC, testified that the PPL job was "a typical job for QSC" and it had done "many jobs like that" in the past. N.T., 2/28/2012, at 146; Videotaped Deposition of John Pateras, 7/22/2010, at 31. More importantly, as discussed ***supra***, the contract did not specify how QSC was to access the poles, which was the cause of Nertavich's accident.

[17] As became evident during trial, Mr. Grim had no training or experience climbing steel transmission poles. N.T., 2/29/2012, at 154. However, he testified that the QSC workers "were the experts on doing this work." ***Id.*** at 170. Indeed, Nertavich confirmed that **no one** from PPL directed the painters as to how to do their jobs, and QSC had its own foreman, Mike Healy, who rotated between three or four QSC painting crews on the PPL
(Footnote Continued Next Page)

Accordingly, the trial court opined that Mr. Grim "had the duty to inspect worker fall protection[,]" but failed to do so. Trial Court Opinion, 6/14/2013, at 17.

However, the ***Beil*** Court made clear that a property owner who retains "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." ***Beil, supra***, 11 A.3d at 469. Moreover, the terms of the contract in the present case clearly placed responsibility for job site safety upon QSC. The contract explicitly provided:

> The purpose of this article is to define Contractor's safety responsibilities under this Contract while performing Work on Company's work site. Although Company may monitor Contractor's safety performance, may review safety performance with Contractor's safety contact person, may suspend the Work for safety-related reasons, these actions are for the primary purpose of protecting Company personnel and property. **Contractor shall remain solely responsible for the safe performance of the Work under this Contract.** The provisions of this article shall be interpreted and construed in a manner consistent with Contractor's status as an independent contractor.

Contract, 8/30/2007, at 6-7, ¶ M (emphasis supplied). ***See id.*** at 5, ¶¶ D ("Contractor shall have safety program and work and safety rules for the

(Footnote Continued) ———————————

job. N.T., 3/1/2012, at 161-163. Nertavich's co-worker Ryan Wheeler testified that Healy would yell at the painters if they were not using fall protection on a pole. ***See*** N.T., 2/27/2012, at 132; Videotaped Deposition of Ryan Wheeler, 7/21/2010 at 90.

Work[.]");[18] E ("Contractor shall take all reasonable precautions for the safety of all Contractor personnel engaged in the Work and shall continuously maintain adequate protection of all its Work, Company's work site, and persons to prevent damage, injury or loss."). ***See also id.*** at Attachment A, at 2, ¶ 12 ("Contractor must identify which structures can not be safely painted in [their] entirety prior to start of work on that structure."); Attachment A at 3, ¶ 26 ("The Contractor shall be responsible to provide all personal protective equipment for all contractor personnel.").

Furthermore, although the contract did give PPL "the right, from time to time, to undertake a safety performance audit of [QSC's] services," as well as the authority to suspend work for "safety-related reasons[,]"[19] that type of safety oversight was the same which the Supreme Court found permissible in ***Beil***. ***See Beil***, ***supra***, 11 A.3d at 469 ("[W]e hold 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."). ***See also LaChance***, ***supra***, 869 A.2d at 1060-1061 (stating that landowner's "inspection rights, exercised to assure itself that [independent contractor] performed its work safely, as [it] had

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[18] The contract listed the "Work Description" as "Transmission Structure Painting – Lehigh Region." Contract, 8/30/2007, at 1.

[19] ***See*** Contract, 8/30/2007, at 5-6, ¶ F.

agreed in its contract, did not make [landowner] the guarantor of the safety of [independent contractor's] employees[;]" parties' contract made safety the "contractual responsibility" of independent contractor).

Moreover, with respect to the contract, the trial court also found PPL "retained control" over safety issues through its specific designation of a contract field representative. The parties' contract specified that this representative would be "the daily source of contact to the Contractor in the areas of any questions, materials, quality assurance, general safety, work procedures and schedule." Contract, 8/30/2007, Attachment A at 2, ¶ 6. Moreover, the trial court reviewed PPL's internal safety guidelines, referred to as GSP-19, which stated that the contract field representative was to "monitor the contractor to ensure that safety requirements of the contract are adhered to." General Health & Safety Procedures, Section 19 (Revised-January 2005) at ¶ 7.2. Therefore, the trial court found that the PPL's establishment of the position of contract field representative demonstrated that it "retained control" over safety issues on the job site, including Nertavich's failure to use proper fall protection.

However, in ***Farabaugh v. Pennsylvania Turnpike Com'n***, 911 A.2d 1264 (Pa. 2006), the Supreme Court rejected a similar claim that a landowner's hiring of an on-site safety supervisor established that the landowner retained control over the worksite.

In that case, the Pennsylvania Turnpike Commission ("PTC") hired New Enterprise Stone & Lime ("NESL") as general contractor for the construction

of a section of an expressway in western Pennsylvania. PTC also hired Trumbull Corporation ("Trumbull") as the "construction manager," responsible to administer and oversee several projects, as well as monitor the safety procedures of the other contractors. ***Id.*** at 1268. Farabaugh, an employee of NESL, was fatally injured when he drove a loaded, off-highway dump truck up a hill and the haul road he was traveling on collapsed due to instability in the hill. His Estate argued at trial that the haul road did not comply with safety measures. ***Id.*** at 1269. The trial court granted summary judgment in favor of PTC and Trumbull, and the Commonwealth Court reversed. ***Id.*** at 1270-1271.

On appeal, the Supreme Court reversed the Commonwealth Court's decision with respect to PTC's liability.[20] Farabaugh's Estate argued that PTC "retained control" over safety at the jobsite in three ways: (1) by showing a safety orientation videotape to all those employed on the jobsite, (2) by

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[20] The Supreme Court, however, affirmed the Commonwealth Court's reversal of summary judgment with respect to Trumbull, concluding:

> [u]nder the relevant contract language, ... Trumbull owed a duty of care to Decedent based upon its contractual obligation to perform safety inspections and other monitoring functions. A determination of the scope of the duty and whether this duty was breached, however, requires further development of the record regarding Trumbull's role on the jobsite and the proximate cause of the accident.

Id. at 1267. Unlike in the present case, Trumbull was contractually obligated to monitor safety on the job site.

employing an on-site safety inspector, and (3) by contracting with Trumbull to provide construction management services. ***Id.*** at 1273-1274. However, the Supreme Court rejected the Estate's claims, relying primarily on the Commonwealth Court's language in ***LaChance***, that "[s]ound public policy ... dictates that [a landowner] monitor the safety of its highway construction projects and continue to pay its contractors to conduct safe job sites." ***Id.*** at 1275, *quoting* ***LaChance***, 869 A.2d at 1064. Furthermore, the ***Farabaugh*** Court held:

> **It would likewise disserve public policy to impose liability on PTC for going one step further and hiring a contractor specifically to supervise safety issues on site in addition to requiring its general contractor to be responsible for safety under its own contract with PTC.** Instead, we conclude that under NESL's contract with PTC, PTC turned over control of the worksite to its general contractor, NESL, and did not retain control over NESL's means and methods for purposes of a Section 414 analysis.

Id. at 1275.

The same logic applies here. PPL's designation of a contract field representative, responsible for, *inter alia*, monitoring the contractor's safety practices, did not evidence its retention of control over all matters of work site safety. As clearly specified in the contract, QSC was "solely responsible for the safe performance of the Work under [the] Contract." Contract, 8/30/2007, at 7 ¶ M.

Further, we find the trial court's reliance on PPL's internal safety guidelines, or GSP's, to establish its retention of control of safety issues is misplaced. The GSP's are **internal** company documents that set forth safety

guidelines for PPL's employees to follow. N.T., 2/28/2012, at 50-51. In particular, while GSP 19, which governs contractor safety, states that the contract field representative "[w]ill monitor the contractor to ensure that safety requirements of a contract are adhered to[,]" the document also unequivocally states that "[t]he contractor is ultimately responsible for the safe performance of their employees[.]" General Safety & Health Procedures Section 19 (Revised–January 2005) at ¶¶ 5.4, 7.2. ***See also id.*** at ¶ 7.1. Therefore, although GSP 19 encourages PPL employees to monitor the safety of its independent contractors, it does not require PPL's control over all safety matters on the job site. Moreover, as stated above, the GSP's are internal documents, which are not provided to the independent contractors or their employees. N.T., 2/29/2012, at 136. Accordingly, we conclude that the evidence failed to establish PPL "retained control" of the job site based upon the "contractual provisions" between the parties. ***See Beil, supra***, 11 A.3d at 467.

Turning to the second part of the ***Beil*** control test, PPL may still be found liable for Nertavich's injuries if it "retained control" over the job site based on its actual conduct. ***Id.*** While the trial court found PPL "exerted great control over access to the property,"[21] sufficient to find it liable for Nertavich's injuries, we again disagree.

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[21] Trial Court Opinion, 6/14/2013, at 17.

Here, the trial court determined PPL "retained control" over access to the property in three ways: (1) by implementation of its "green tag" procedure; (2) by limiting QSC's access to the poles to the use of single-rail ladders; and (3) by providing these ladders to QSC without the necessary bolts to secure them to the transmission poles. ***See*** Trial Court Opinion, 6/14/2013, at 17, 21. PPL argues, conversely, that none of this evidence demonstrated its retention of control over the job site.

First, with respect to the implementation of the "green tag" procedure, it was PPL's method to ensure that QSC's workers would not come in contact with live electrical lines while painting the transmission poles. PPL's senior engineer, Wukitsch described the procedure as follows:

> Green tag procedure allows us to work on facilities. And what happens with the electric grid is when there's lightning or a bird contacts a line or some other thing, the lines trip out and automatically reclose.
>
> So if you're in your house, maybe occasionally over your lifetime you've seen your lights flicker real fast. Lines trip and reclose. They're designed to trip and reclose multiple times before there's a permanent fault on the line and they lock out.
>
> With a green tag permit, we actually go to the end points at the substations, at the circuit breakers. We change the condition of those circuit breakers so that if at any time those electrical lines would trip for any reason, they would automatically go to lockout and they wouldn't reclose.

N.T., 2/29/2012, at 14-15. Nertavich's expert witness, Stephen Estrin, testified that the procedure was necessary to ensure that QSC workers were painting a pole that was "no longer energized." N.T. 3/6/2012, at 104.

However, he opined that this procedure necessarily limited QSC's access to the job site:

> QSC was not given unfettered discretion of when, where and how to work. They had to get this tag before they could work. So if they arrived on the job site at 0700 and PPL had not issued the green tag, they could not access the pole and perform work. They would have to wait till [PPL] issued them the tag.

Id. at 105.

PPL contends, however, that this argument is similar to the controlled access claim rejected by the Supreme Court in ***Beil***. In ***Beil***, the College limited Beil's access to the building, and consulted with MPS as to where to erect its scaffolding, which Beil later used to access the roof. Nonetheless, the ***Beil*** Court held that the College's actions in regulating the use of, and access to, the building were not "qualitatively, conduct which evinces control over the manner, method, means, or operative detail in which the work is performed." ***Beil***, 11 A.3d at 471. The Court opined:

> They are tangential to the substantive work of the contractor, and subcontractor. Simply stated, the College did not control the way the workers did their work.
>
> Moreover, the College's conduct regarding placement of MPS' scaffolding **does not directly relate to the decision of [the subcontractor's] employees to use MPS' ladders and scaffolding instead of [its] own equipment, which [it] contracted to provide, and [the general contractor] contracted to ensure was safe.** While MPS permitted the [subcontractor] roofers to use its scaffolding, [the general contractor] did not anticipate or rely upon the use of MPS scaffolding for access to the roof, and access was for [the subcontractor] to determine.

Id. (emphasis supplied and record citation omitted).

Similarly, here, the green tag permit simply indicated to QSC that the pole was not energized, and it was safe for QSC to perform its painting work, pursuant to the contract, by whatever means it saw fit. Indeed, the permit procedure did not directly relate to the decision of QSC concerning how its employees would climb the poles. As the ***Beil*** Court stated, "it would be a novel, if not absurd, interpretation of Section 414 if an independent contractor ... could run amok at the work site without any limitations and without consideration of consequences." ***Id.*** at 470. Furthermore, the issuance of a green tag permit for the pole had nothing to do with the Nertavich's accident.[22] Accordingly, we find that the green tag permit procedure did not establish that PPL "retained control" over the job site sufficient to assign it liability for Nertavich's accident.

Second, the trial court also concluded that PPL controlled QSC's access to the poles by limiting the available ways to scale the poles to the use of single rail ladders. Trial Court Opinion, 6/14/2013, at 17. Indeed, Nertavich states that PPL "did not offer, provide, or even suggest any other means for QSC's access to its poles, such as an aerial lift." Nertavich's Brief at 30.

This finding, however, ignores the specific terms of the contract that QSC "shall provide all supervision, labor, services, materials, tools and

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[22] Had Nertavich been electrocuted as a result of the improper issuance of a green tag permit, we would be inclined to conclude that PPL maintained control over that aspect of the job site, and was subject to liability.

equipment" to complete the project, including all necessary "climbing assist and rigging equipment[.]" Contract, 8/30/2007, Attachment A at 1, 3, ¶ 23. Moreover, the contract provided that it was "the responsibility of the Contractor to field locate the structures designated for painting" and gave the bidding contractors the opportunity to "visit each individual structure in order to develop the bid." ***Id.*** at 1. The contract also stated that the contractor was responsible for identifying "which structures can not be safely painted in [their] entirety prior to the start of work on that structure." ***Id.*** at 2, ¶ 12. Accordingly, the terms of the contract placed all responsibility for determining how to access the transmission poles upon the knowledgeable independent contractor, QSC.

Furthermore, the testimony at trial supports PPL's contention that QSC, the experienced contractor, not PPL, determined how to climb the transmission poles. Indeed, QSC's owner, John Pateras, testified that the PPL project was "a typical job" for QSC. N.T., 2/28/12, at 146; Videotaped Deposition of John Pateras, 7/22/2010, at 31. He confirmed that the painters' use of "removable climbing assists," or single-rail ladders, to access the poles was a "typical occurrence," and there was nothing "unusual or peculiar about the job for PPL[.]"[23] ***Id.*** at 32. ***See also*** N.T., 2/27/2012, at

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[23] We note that Nertavich argues PPL was negligent for not questioning QSC about a provision in QSC's safety manual that stated, "Single rail ladders must not be used." QSC Painting, Inc. Corporate Worker Safety and Health Program (Revision No. 3), 11/27/1995, at 61. However, the above
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132; Videotaped Deposition of Ryan Wheeler, 7/21/2010, at 97 (Nertavich's co-worker testfying that the use of "removable climbing devices" was not an "uncommon or unusual way to access that type of pole[.]").

Nertavich argues, however, that PPL "retained control" because it did not "offer, provide or even suggest any other means for QSC's access to its poles, such as an aerial lift." Nertavich's Brief at 30. However, this argument ignores the reality that QSC was the expert painting contractor, with 16 years of experience in industrial painting, and most of its experience working for power companies, such as PPL. N.T., 2/28/12, at 146; Videotaped Deposition of John Pateras, 7/22/2010, at 14-15. In fact, Wukitsch testified that all of the contractors who attended the pre-bid meeting, including QSC, understood that they would be accessing the transmission poles using "climbing ladders," and all the contractors told him they had used them before. N.T., 2/29/2012, at 110-111. PPL provided the job specifications, and deferred to the specialized expertise of the contractor to determine how to safely complete the work. Accordingly, we conclude PPL's failure to suggest or provide alternative means to access the transmission poles is not evidence of its retention of control over the job site.

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testimony by QSC's owner contradicts that provision, and we find that PPL was entitled to rely on the expertise of the independent contractor it hired to perform this specialized work.

Lastly, the trial court found PPL "retained control" of the project by supplying the single-rail ladders to QSC. The court opined that "QSC had to request these ladders from PPL to climb the poles." Trial Court Opinion, 6/14/2013, at 17. However, the trial court's focus on the fact that PPL "supplied" QSC with the ladders, ignores the fact that QSC asked PPL to supply their ladders only after it was unable to obtain them itself. Pateras described the circumstances surrounding QSC's request as follows:

> But I do remember in the bidding process that originally we were supposed to furnish the climbing devices. I called the company that we were supposed to buy it off of and they said they can't furnish it. Then I believe I had spoke[n] to PP&L and told them about the problem. And PP&L furnished some climbing devices.

N.T., 2/28/12, at 146; Videotaped Deposition of John Pateras, 7/22/2010, at 71. Pateras testified that he was at the warehouse when his employees picked up PPL's ladders, which he agreed were "appropriate for the work," and described as "perfectly normal." ***Id.*** at 73. Moreover, Wukitsch testified that after PPL located the single-rail ladders,

> [w]e showed [QSC] what we had and said: We would make these available for your use. **But it's your responsibility to look at them, to check them, make sure they're in good working order.** They were the ones who picked them up and took them out to the job site, installed them.

N.T., 2/29/2012, at 35 (emphasis supplied). Indeed, Wukitsch testified that PPL added the provision to the contract that "the contractor was responsible for all climbing assist and rigging equipment" after QSC requested to use PPL's ladders. ***Id.*** at 114-115. ***See also*** Contract, 8/30/2007, Attachment A at 3, ¶ 23. He explained that the language was added to make clear that

it was QSC's "responsibility to inspect the ladders, carry them, put them on, take them off." ***Id.*** at 115.

Therefore, while PPL made available to QSC the actual ladders the contractor used to climb the transmission poles, we do not find that, by doing so, PPL "retained control" of the job site. PPL only made the ladders available when QSC was unable to obtain them on its own. Significantly, there was no evidence that PPL **mandated** that QSC use these particular ladders to climb the transmission poles. Indeed, the language of the contract was clear: "Contractor is responsible for all climbing assist and rigging equipment necessary to complete this painting contract in an efficient manner." Contract, 8/30/2007, Attachment A at 3, ¶ 23. QSC, after inspection of the ladders, was free to reject them, or choose a different means to climb the poles. Accordingly, we conclude the trial court erred in finding that PPL's action in supplying the single-rail ladders Nertavich used the climb the transmission poles established its retention of control over the job site.[24]

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[24] We do not find that the decision of the Pennsylvania Supreme Court in ***Byrd v. Merwin***, 317 A.2d 280 (Pa. 1974), mandates a different result. In that case, Byrd was an employee of an electrical subcontractor hired to perform renovation work in Olin's building. Merwin was the general contractor on the job. Byrd was injured when one of Merwin's teenaged sons dropped a section of a prefabricated staircase on Byrd's leg while Byrd was installing electrical wiring. The usual procedure in such situations was to install the staircase prior to wiring the house. ***Id.*** at 518.

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Because we conclude that the evidence, viewed in the light most favorable to Nertavich, did not establish that PPL retained sufficient control over the job site, based on the contract provisions and actual control, to subject it to liability for Nertavich's injuries pursuant to Section 414 of the Restatement (Second) of Torts, we find the trial court erred in denying PPL's motion for j.n.o.v.

However, we are compelled to address Nertavich's alternative theories concerning PPL's "direct liability." Specifically, Nertavich contends that, regardless of PPL's liability, or lack thereof, pursuant to Section 414, he also presented evidence that PPL was directly liable for his injuries. He argues "***Beil*** did not extinguish a landowner's **direct liability** when the landowner,

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Byrd sued both Olin and Merwin, and a jury returned a verdict in his favor. However, the trial court granted Olin's motion for j.n.o.v., finding Byrd failed to establish Olin "retained control" of the work site pursuant to Section 414 of the Restatement. On appeal, the Supreme Court reversed, finding that Byrd established that Olin "exercised control as to supervision of the project" by instructing the electrical contractor "when to begin his work ... and in what area to begin." ***Id.*** at 282. Further, Merwin, the general contractor, testified "that he was not in complete control of the project, but rather he was second in command to Olin." ***Id.*** The Court emphasized "[i]t must be remembered that it was Olin who ordered electrical work started before the staircase was installed." ***Id.***

First, we note that ***Byrd*** was a plurality decision, with three justices joining the majority, two justices concurring in the result, and one justice dissenting. In addition, the facts in ***Byrd*** were clear that the owner retained control of the work site and actually instructed the subcontractor when and where to begin his work. There is no such degree of control in the present case.

as here, engages in its own, independent negligent conduct that directly contributes to a worker's injuries." Nertavich's Brief at 32 (emphasis in original). While we agree that Nertavich's argument is a correct statement of law, we conclude that his claims of direct negligence in the present case fail.[25]

Nertavich claims PPL was directly liable for his injuries based on the following theories: (1) "gratuitous undertaking" pursuant to Section 323 of the Restatement (Second) of Torts, because PPL provided single-rail ladders,

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[25] We note that both the trial court and Nertavich cite ***Chenot v. A.P. Green Services, Inc.***, 895 A.2d 55 (Pa. Super. 2006), for the proposition that a land owner may be directly liable to the employee of an independent contractor for its own negligent acts. Trial Court Opinion, 6/14/2013, at 20 n.137; Nertavich's Brief at 32. However, we disagree that ***Chenot*** stands for such a broad principal of law. Indeed, the ***Chenot*** Court simply found that the "peculiar risk" doctrine applied.

In that case, Chenot was exposed to asbestos dust while working as an employee of Philip Carey, an independent contractor retained by Koppers Company to install new insulation in one of its manufacturing facilities. Chenot later contracted mesothelioma as a result of this exposure. ***Chenot, supra***, 895 A.2d at 58. In concluding that Koppers owned a duty of care to Chenot, this Court found that an owner who possesses "superior knowledge" of a danger on his premises has a duty to warn an independent contractor of that danger, whether or not the contractor exercises full control over the premises. ***Id.*** at 64.

Therefore, rather than stand for the broad proposition that a landowner may be directly liable to the employee of an independent contractor for its own negligence, Chenot applied the limited "peculiar risk" doctrine, a doctrine which the trial court found inapplicable in the present case. ***See*** N.T., 3/7/2012, at 95 (trial court sustaining objection to "peculiar risk" jury charge).

without accompanying bolts to secure the ladders to the transmission poles, and provided an unqualified contract field representative to monitor safety practices on the job site; (2) negligent design of the transmission poles, because PPL failed to require the pole manufacturer to include lifeline attachment points on the poles; and (3) PPL's violations of OSHA[26] and the National Electric Safety Code (NESC). For the reasons that follow, we conclude that none of these theories should have been presented to the jury.

With respect to Nertavich's claim regarding "gratuitous undertaking," Section 323 of the Restatement (Second) of Torts, commonly known as the "Good Samaritan Law,"[27] imposes liability when one gratuitously undertakes to perform a service for another:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts § 323 (1965).

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[26] Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.*

[27] ***Filter v. McCabe***, 733 A.2d 1274, 1276 (Pa. Super. 1999), *appeal denied*, 758 A.2d 1200 (Pa. 2000).

First, Nertavich contends that when PPL "gratuitously" chose to supply QSC with the single-rail ladders, it did so negligently when it failed to also provide the bolts to secure the ladders to the transmission poles. We disagree. There is simply no evidence that PPL's failure to supply the bolts increased the risk of harm to Nertavich or that Nertavich, or, in fact, QSC, relied upon PPL's actions to their detriment. QSC was intimately familiar with the single-rail ladders supplied by PPL, and, indeed, had requested them. QSC's employees had used these ladders many times in the past, and were aware that the ladder could be secured to the transmission pole with a bolt. For example, another QSC painter, Donald Thompson, testified that he was involved in the PPL job, and actually "pegged" and "depegged" the ladders in question. N.T., 3/7/2012, at 157. He explained that he had painted more than 5,000 poles, and while some had ladders permanently attached, "most of the time" he would peg the ladders himself. ***Id.*** at 157-158. He also testified why he never used bolts when he installed the single-rail ladders:

> We wouldn't be able to get them back out because the primer, it gets hard. The red primer was 6000 primer. It sets in there, and you have to sometimes beat them out to get it to come back out.

Id. at 158. He reiterated that he only used the bolts "when it's stationary, where they're not coming off" and "never" in a removable application, such as their use on the PPL job. ***Id.*** Moreover, Nertavich, himself, testified that prior to the PPL job, he had painted approximately two dozen similar

transmission poles, and had used "chicken ladders" to climb six poles, including the one in question. N.T., 3/1/2012, at 23, 25-26. He testified he had never seen a bolt attaching the ladder to the poles on any job. ***Id.*** at 36-37.

Therefore, we fail to see how PPL's failure to supply the bolts with the climbing ladders increased Nertavich's risk of harm, particularly, when his own co-worker acknowledged that QSC **never** used bolts to attach the single-rail ladders to the poles in a temporary application, and Nertavich, himself admitted he never saw a bolt attaching the ladder to the pole on any job. Moreover, because Nertavich's employer was an **industrial painting expert**, he cannot establish that his accident resulted from **QSC's reliance** upon PPL's failure to supply the bolts.

Second, Nertavich argues PPL was directly liable for his injuries when it chose to provide an on-site contract field representative to ensure job site safety procedures were being followed, but then negligently appointed Grim to the position, who had no training or experience on the proper way to climb and tie-off on a transmission pole. We conclude, however, this argument runs counter to the dictates of ***Beil***, ***Farabaugh***, and ***LaChance***, as well as the parties' written contract.

As our sister court stated in ***LaChance***, "[s]ound public policy ... dictates that [a landowner] monitor the safety of its ... construction projects and continue to pay its contractors to conduct safe job sites." ***LaChance***, ***supra***, 869 A.2d at 1064. Furthermore, in ***Farabaugh***, the Supreme Court

concluded that when a landowner goes "one step further and hir[es] a contractor to supervise safety issues on site," the same public policy concerns dictate that such actions do not constitute an owner's control of safety issues at the job site. ***Farabaugh***, ***supra***, 911 A.2d at 1275. Moreover, in ***Beil***, the Supreme Court reiterated that a property owner who maintains "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." ***Beil***, ***supra***, 11 A.3d at 469 (footnote omitted). To hold that an owner who designates an, albeit inexperienced, on-site safety representative may be held liable under Section 323 of the Restatement, would undercut the case law cited above, as well as the general rule that a landowner is generally not responsible for the acts or omissions of his independent contractor.[28] ***Id.*** at 466.

Furthermore, the imposition of liability under these circumstances would run contrary to the clear terms of the parties' contract. While the contract provided for the designation of a contract field representative, who would be "the daily source of contact to the Contractor in the areas of any

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[28] Our conclusion might be different if there was any evidence that Grim provided instructions or directions to Nertavich or the other QSC employees. However, the testimony was undisputed that Grim provided no direction at all.

questions, materials, quality assurance, general safety, work procedures and schedule[,]"[29] it also clearly stated that the "Contractor shall remain ***solely responsible*** for the safe performance of the Work under this Contract." Contract, 8/30/2007, at 7, ¶ M (emphasis supplied). Therefore, we conclude PPL could not have been liable under the theory of a "gratuitous undertaking" pursuant to Section 323 of the Restatement (Second) of Torts.

Next, Nertavich claims PPL was directly liable for his injuries because it failed to require the transmission pole manufacturer, Thomas & Betts, to include lifeline attachment points, or vangs, on the poles. He argues:

> PPL was responsible to advise Thomas & Betts of any attachment points it wanted on its poles because PPL was in the best position to know what it needed to do on its poles by way of access and maintenance. PPL knew that its poles would need to be repainted. PPL knew that workers would need to access its poles to paint them. PPL, by ordering the ladders to access and work on its poles, knew that workers would need to climb the poles to perform the work. PPL, by reviewing QSC's safety manual submitted as part of QSC's bid to do the work, knew or should have known, that QSC prohibited the use of single rail ladders. PPL knew or should have known that such ladders did not provide adequate safe tie-offs for the lifelines needed by the workers to perform their duties safely and were also proscribed by OSHA.

Nertavich's Brief at 34 (record citations omitted).

Nertavich's argument, which avers PPL's negligent design of the transmission pole, attempts to end-run the trial court's pretrial determination that the statute of repose barred any claim based upon the

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[29] Contract, 8/30/2007, Attachment A, at 2, ¶ 6.

pole's manufacture or design. Indeed, prior to trial, the trial court granted pole manufacturer, Thomas & Betts's, motion for partial summary judgment based on Thomas & Betts's contention that any claim challenging the design or manufacture of the transmission pole was barred by the statute of repose, 42 Pa.C.S. § 5536. The statute mandates, in relevant part, that any action brought against a person "furnishing the design, planning, supervision or observation of construction, or construction of any improvement to real property must be commenced within 12 years after completion of construction of such improvement[.]"[30] 42 Pa.C.S. § 5536(a). Therefore, any challenge to **PPL's** design of the pole should be similarly barred.[31]

In fact, during argument at the close of testimony, Nertavich's counsel agreed that the "[t]he pole is not [at issue] in this case." N.T., 3/8/2012, at

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[30] Wukitsch testified that the transmission pole that Nertavich was painting at the time of the accident was purchased by PPL from Thomas & Betts "in the mid-'80s, '86, '87." N.T., 2/29/2012, at 17. Therefore, it had been in place more than 20 years on September 23, 2007, the date of the accident.

[31] In a footnote in his brief, Nertavich addresses PPL's claim that the jury was tainted by hearing evidence of the defective pole, which was not an issue in the case. He claims that the only evidence he produced regarding the pole design was "PPL's negligent failure to specify lifeline attachment points" and that PPL's counterclaim against Thomas & Betts, in which PPL asserted the pole was defective, was not dismissed. Nertavich's Brief at 33 n.7. However, PPL did not assert a claim against Thomas & Betts claiming that the pole was defective. Rather, its counterclaims asserted only allegations of joint and several liability and contribution/indemnification. ***See*** Answer of Defendant, PPL Electric Utilities Corporation to Plaintiff's Second Amended Complaint, May 11, 2011, at ¶¶ 119-120.

190. Counsel explained: "There was summary judgment granted on the pole, on any design defect claims about the pole on the grounds of the statute of repose, Your Honor. So, the pole is not in this case. It's just the ladder." ***Id.*** Therefore, the jury should not have considered any negligent design claim with regard to PPL's purported direct liability.[32]

Lastly, Nertavich argues the jury could have found PPL directly liable based upon its alleged violations of OSHA and NESC. Indeed, the trial court opined that Nertavich's expert witnesses, Stephen Estrin and Gregory Booth, "testified that under industry practice, which included OSHA and the NESC, Defendant PPL breached its duties[,]" and this evidence of "PPL's direct negligence was admissible to prove PPL breached a duty owed to [Nertavich]." Trial Court Opinion, 6/14/2013, at 21-22. While we agree that testimony concerning industry standards and regulations may be admissible to determine the standard of care in a particular case, we conclude that, here, the experts improperly opined on the primary question as to whether or not PPL owed a duty to Nertavich.[33]

At trial, both Estrin and Booth testified that under OSHA and NESC, respectively, PPL had a **duty** to monitor QSC worker safety at the job site.

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[32] Furthermore, as discussed above, these type of transmission poles were typical of the kind QSC regularly contracted to paint. ***See*** N.T., 2/28/2012, at 146; Videotaped Deposition of John Pateras, 7/22/2010, at 31-32.

[33] It is well-established that "[t]he existence of a duty is a question of law for the court to decide." ***R.W. v. Manzek***, 888 A.2d 740, 746 (Pa. 1987).

N.T., 3/6/2012, at 119; 3/1/2012, at 250. However, as we have already determined, PPL, as a landowner who hired an independent contractor, did not retain sufficient control over the "methods of work, or as to operative detail" to "implicate the exception to the **general rule** against liability[.]" ***Beil, supra***, 11 A.3d at 467 (emphasis supplied in part and omitted in part), citing Restatement (Second) of Torts § 414 cmt. c.

In support of his contention that the expert testimony was admissible in the present case, Nertavich cites a decision of the federal appeals court in ***Rolick v. Collins Pine Co.***, 975 F.2d 1009 (3rd Cir. 1992), *cert. denied*, 507 U.S. 973 (1993). In that case, Rolick, an independent contractor, was hired by Kane Hardwood Division to cut and haul timber that Kane had purchased from the United States Forest Service. Rolick sustained serious injuries when a branch from a rotten birch tree struck him from behind as he was measuring another tree that he had just felled. Rolick filed a negligence action against Kane based upon Pennsylvania law. However, the jury returned a verdict for the defendant. ***Id.*** at 1011.

On appeal, Rolick argued, *inter alia*, that the trial court erroneously excluded "material evidence of the standard of care owed by defendants to plaintiff[,]" specifically, expert testimony concerning Kane's purported violation of an OSHA regulation. ***Id.*** at 1012. The Third Circuit Court agreed, concluding:

> We can think of no reason under the Federal Rules of Evidence why the OSHA regulation is not relevant evidence of the standard of care **once it is determined, as we have done,**

> **that under Pennsylvania law the defendants could owe plaintiff a duty of care.** It is important to reiterate that to use the OSHA regulation as evidence here is not to apply the OSHA itself to this case. Rather, it is to "borrow" the OSHA regulation for use as evidence of the standard of care owed to plaintiff. This is precisely how the Pennsylvania state courts had employed OSHA regulations. ***See e.g. Brogley v. Chambersburg Eng'g Co.***, 306 Pa.Super. 316, 452 A.2d 743, 746 (1982).

Id. at 1014 (emphasis supplied). Therefore, the Third Circuit concluded evidence of the violation of an OSHA regulation was relevant to the issue of the standard of care, **only after** the court first determined that the defendant owed a duty of care to the plaintiff.

In that case, the Court found that Kane owed a duty to Rolick pursuant to Section 343 of the Restatement (Second) of Torts, which provides that "a possessor of land must exercise reasonable care to protect invitees from non-obvious dangerous conditions on the land." ***Id.*** at 1011. The Court recognized that,

> [a]lthough the duty owed to an independent contractor **varies depending upon the control the possessor maintains over the work** ... it is a general rule that a possessor of the land must still use reasonable care to make the premises safe or give adequate and timely warning of **dangers known to him but unknown to the contractor**....

Id. (citation omitted and emphasis supplied). Section 343, however, is inapplicable in the present case because none of the purported causes of Nertavich's fall — *i.e.*, the failure to use a second lanyard, the use of a "chicken ladder," — constituted dangers known to PPL, but unknown to Nertavich or his employer, QSC. Moreover, as discussed *supra*, we conclude

that the evidence presented by Nertavich did not establish that PPL "retained control" of the work site sufficient to confer liability. Accordingly, because we conclude that PPL owed no duty to Nertavich, the employee of an independent contractor, it would have been improper for the jury to consider evidence concerning PPL's purported violations of industry standards. As such, we find Nertavich's alternative arguments for relief based upon PPL's purported "direct liability," unavailing.

Therefore, because we conclude that PPL was entitled to judgment as a matter of law, we conclude the trial court erred in failing to grant PPL's post trial motion for j.n.o.v. ***See Egan, supra***. Accordingly, we reverse the judgment entered against PPL, and remand for the entry of j.n.o.v. Because our disposition of PPL's first issue is dispositive, we need not address its remaining claims.

Judgment reversed. Case remanded for entry of j.n.o.v. Jurisdiction relinquished.

Strassburger, J., files a Dissenting Opinion.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 8/27/2014

J-A02017-14

2014 PA Super 184

VINCENT P. NERTAVICH, JR.	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
PPL ELECTRIC UTILITIES, KTA, KTA-TATOR, INC., KTA/SET ENVIRONMENTLA, S-E TECHNOLOGIES, INC., ALEXANDER ANDREW, INC., D/B/A FALLTECH, ALEXANDER ANDREW, INC., FALLTECH, THOMAS & BETTS CORP., THOMAS & BETTS CORP., D/B/A OR T/A MEYER STEEL STRUCTURES, F/K/A I.T.T. – MEYER INDUSTRIES, F/K/A MEYER INDUSTRIES, MEYER STEEL STRUCTURES F/K/A I.T.T. – MEYER INDUSTRIES, F/K/A MEYER STEEL STRUCTURES, I.T.T.-MEYER INDUSTRIES, MEYER MACHINE, INC. AND WINOLA INDUSTRIAL, INC.	:	
APPEAL OF: PPL ELECTRIC UTILITIES CORPORATION	:	No. 3415 EDA 2012

Appeal from the Judgment Entered December 5, 2012
in the Court of Common Pleas of Philadelphia County
Civil Division at No(s): No. 2316 Sept. Term 2009

BEFORE: FORD ELLIOTT, P.J.E, OTT and STRASSBURGER,* JJ.

DISSENTING OPINION BY STRASSBURGER, J.: **FILED AUGUST 27, 2014**

I respectfully dissent. I would affirm on the opinion of the learned trial judge, the Honorable Mark I. Bernstein.

* Retired Senior Judge assigned to the Superior Court.