

SUPREME COURT OF PENNSYLVANIA

No. 21 EAP 2015

VINCENT P. NERTAVICH, JR.

Plaintiff-Appellant

v.

PPL ELECTRIC UTILITIES CORPORATION

Defendant-Appellee

Brief of Amici Curiae National Federation of Independent Business Small Business Legal Center, Pennsylvania Chamber of Business and Industry, and Chamber of Commerce of the United States of America, in Support of Appellees

On Appeal from the Judgment of the
Superior Court of Pennsylvania at
No. 3415 EDA 2012, entered August 27, 2014

Of Counsel:

Karen R. Harned
National Federation for
Independent Business Small
Business Legal Center
1201 F Street N.W. Suite 200
Washington, D.C. 20004
(202) 314-2061

*Counsel for Amicus Curiae National
Federation of Independent Business Small
Business Legal Center*

Of Counsel:

Warren Postman
Sheldon Gilbert
U.S. Chamber Litigation Center
1615 H Street NW
Washington, DC 20062-2000
(202) 463-5337

*Counsel for Amicus Curiae Chamber
of Commerce of the United States of
America*

Robert L. Byer
Sarah O’Laughlin Kulik
Duane Morris LLP
30 South 17th Street
Philadelphia, PA 19103
(215) 979-1000

*Counsel for Amici Curiae
National Federation of
Independent Business Small
Business Legal Center,
Pennsylvania Chamber of Business
and Industry, and Chamber of
Commerce for the United States of
America*

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST OF AMICI	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT	3
I. The Retained-Control Exception Imposes Liability Only Where There is a Causal Relationship between the Injury and the Control Retained.....	3
II. Expansion of the Retained-Control Exception would Harm the Economy by Undermining Independent Contracting.....	5
A. Independent Contracting Is Beneficial to the Economy.....	6
B. Expanding the Retained Control Exception Undermines Independent Contracting.....	7
CONCLUSION	10

TABLE OF AUTHORITIES

Cases

<i>Beil v. Telesis Const., Inc.</i> , 11 A.3d 456 (Pa. 2011).....	4-5
<i>Byrd v. Merwin</i> , 317 A.2d 280 (Pa. 1974)	5
<i>Hader v. Coplay Cement Mfg. Co.</i> , 189 A.2d 271 (Pa. 1963).....	3
<i>LaChance v. Michael Baker Corp.</i> , 869 A.2d 1054 (Pa. Cmwlth. 2005)	4
<i>Leonard v. Commonwealth Dep’t of Transp.</i> , 771 A.2d 1238 (Pa. 2001)	5

Other Authorities

John Bruntz, <i>The Employee/Independent Contractor Dichotomy: A Rose Is Not Always A Rose</i> , 8 HOFSTRA LAB. L.J. 337, at 339-341 (1991)	9
Rutheford B. Campbell, Jr., <i>The New Regulation of Small Business Capital Formation: The Impact-If Any-of the Jobs Act</i> , 102 Ky. L.J. 815, 818 (2014).....	8
Rutheford B Campbell, Jr., <i>Regulation A: Small Businesses’ Search for “A Moderate Capital”</i> , 31 Del. J. Corp. L. 77, 85 (2006)	9
Steven Cohen & William B. Eimicke, <i>Independent Contracting: Policy and Management Analysis</i> , Columbia School of International Affairs, 9 (Aug. 2013)	6-7
Jeffrey Eisenach, <i>The Role of Independent Contractors in the U.S. Economy</i> , Navigant Economics, at ii (Dec. 2010)	8-9
Anne E. Polivka, <i>Into Contingent and Alternative Employment: By Choice?</i> , Montly Lab. Rev., Oct. 1996, at 55–74	6-7
Restatement (Second) of Torts § 414.....	4
Restatement (Second) of Torts § 414, cmt. c.....	4

STATEMENT OF INTEREST OF AMICI

The National Federation of Independent Business Small Business Legal Center (“NFIB Legal Center”) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation’s courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (“NFIB”) is the nation’s leading small business association, representing members in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB’s mission is to promote and protect the rights of its members to own, operate and grow their businesses. NFIB represents 350,000 member businesses nationwide, and its membership spans the spectrum of business operations ranging from sole proprietor enterprises to firms with hundreds of employees. The NFIB counts among its members both small businesses that act as independent contractors and small businesses that hire independent contractors. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

The Pennsylvania Chamber of Business and Industry (“Pennsylvania Chamber”) is the largest broad-based business association in Pennsylvania. Thousands of members throughout the Commonwealth employ more than 50% of Pennsylvania’s private workforce. The Pennsylvania Chamber’s mission is to improve

Pennsylvania's business climate and increase the competitive advantage for its members.

The Chamber of Commerce of the United States of America (“U.S. Chamber”) is the world’s largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country, including Pennsylvania. More than 96% of the Chamber’s members are small businesses with 100 or fewer employees. An important function of the U.S. Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation’s business community. This is such a case.¹

SUMMARY OF ARGUMENT

The general rule in Pennsylvania is that a property owner who hires an independent contractor to perform work may not be held liable for any injury to the independent contractor’s employees. A very narrow exception allows a property owner to be held liable only if the owner has “retained control” over significant aspects of the contractor’s work, and only if the injury to the contractor’s employee was caused by the property owner’s retained-control. This longstanding, narrowly-

¹ No Party’s counsel authored this brief in whole or in part. No person, aside from amici curiae, their members, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

crafted exception promotes the efficient allocation of liability between the property owner and the independent contractor by imposing liability only on the party with the best ability to prevent the injury. The rule also facilitates independent contracting by providing both businesses and independent contractors with clear lines for allocating the risk of injuries. However, the plaintiff's proposed rule would hold property owners liable if the property owner exercises *any* control whatsoever over the independent contractor, even if that control bears no relationship whatsoever to the plaintiff's injury.

The plaintiff's theory, if adopted by this Court, would not only run counter to longstanding precedent, it would also unsettle the independent contracting business model by radically altering the allocation of risk between landowners and independent contractors. By undermining independent contracting, the plaintiff's proposed expansion of the retained-control exception risks higher unemployment, slower economic growth and reduced economic welfare. For these reasons, the Court should affirm the opinion of the Superior Court.

ARGUMENT

I. The Retained-Control Exception Imposes Liability Only Where There is a Causal Relationship between the Injury and the Control Retained

Under Pennsylvania law, a property owner who hires an independent contractor is exempted from liability for any injury to the independent contractor's employees. *See Hader v. Coplay Cement Mfg. Co.*, 189 A.2d 271, 277 (Pa. 1963) ("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?"); *LaChance v. Michael Baker Corp.*, 869 A.2d 1054, 1057 (Pa. Cmwlth. 2005). This case centers on a narrow exception to this general rule—the retained-control exception. *See* Restatement (Second) of Torts § 414. Under the retained-control exception, a hirer of an independent contractor who retains significant control of the “methods of work” and “operative detail” performed by the contractor may be held liable for injuries sustained by the independent contractor’s employee. Restatement (Second) of Torts § 414, cmt. c.; *Beil v. Telesis Const., Inc.*, 11 A.3d 456, 466 (Pa. 2011).

As the Restatement and the cases interpreting it make clear, a necessary element of imposing liability under the retained-control exception is that the manner of the exercise of control must have caused the plaintiff’s injury. *See* Restatement (Second) of Torts § 414 (“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 . . . which is caused by [the hirer’s] failure to exercise its control with reasonable care”) (emphasis added). That is, the harm to the plaintiff must relate to the alleged control retained. *See Beil*, 11 A.3d at 466.

To illustrate, in this Court’s decision in *Beil*, the alleged control retained by defendant Lafayette College was control over general safety considerations and access to the college building. This Court noted that “responsibility follows authority” and the control retained by Lafayette College was not “authority” over the installation and

use of the scaffolding which caused plaintiff's injury. This Court held therefore held the retained-control exception to be inapplicable. *See Beil*, 11 A.3d at 466; *cf. Byrd v. Merwin*, 317 A.2d 280, 282 (Pa. 1974) (holding landowner may be held liable because the landowner insisted on the independent contractor's method which resulted in the plaintiff's injury). The retained-control exception maximizes efficiency by allocating risk to the party best able to prevent harm. *See Leonard v. Commonwealth Dep't of Transp.*, 771 A.2d 1238, 1242 (Pa. 2001) ("a subcontractor who undertakes a task is in the best position to provide for the safe accomplishment thereof."). *Id.*

Yet the purported "control" that plaintiffs allege that the defendant retained over the independent contractor in this case—such as the performance requirements for the contract, including use of a particular type of paint and painting technique—bears no relationship to the plaintiff's injury, which was caused by his failure to comply with the independent contractor's safety standards.

II. Expansion of the Retained-Control Exception would Harm the Economy by Undermining Independent Contracting

Imposing liability on defendants for injuries over which the defendants have no control is an inefficient allocation of risk that makes independent contracting less attractive. The plaintiff's proposed expansion of the "retained-control exception" threatens to harm the Pennsylvania economy by undermining the incentives for companies to hire independent contractors.

A. Independent Contracting Is Beneficial to the Economy

In choosing whether to work as, or hire, an independent contractor, a would-be hiring business and a would-be independent contractor each face a set of tradeoffs and benefits. In determining whether to engage the services of an independent contractor, a business must decide whether to perform a function itself, or to buy the good or service from another party. *See* Steven Cohen & William B. Eimicke, *Independent Contracting: Policy and Management Analysis*, Columbia School of International Affairs, at 9 (Aug. 2013).² Hiring an independent contractor necessarily requires that a business forego the extensive control that otherwise would come with hiring an employee – but it also allows the businesses to reduce capital requirements, shift some of the risk (and reward) to a separate business, and avoid the many costs of the employment relationship, including the rigidity of federal and state employment laws. *See* Anne E. Polivka, *Into Contingent and Alternative Employment: By Choice?*, *Monthly Lab. Rev.*, Oct. 1996, at 55–74.

Certainly, individuals who choose to be independent contractors do so at a cost: for example, they do not benefit from certain contractual commitments that employers only give their employees; and they may not claim certain rights under state and federal employment laws that apply only to employees. Yet many workers are willing to trade away the benefits of employment for the wide array of benefits

² Available at http://www.columbia.edu/~sc32/documents/IC_Study_Published.pdf

offered by independent contracting, including the ability to form their own businesses. In addition, “the flexibility and independence” that the self-employed have “to choose [their] own hours, clients and manner in which the work is completed” are among “the most frequently cited benefits of engaging in independent contracting.” Cohen & Eimicke, *supra*, at 16. And, for certain individuals “who are constrained by conditions outside of the labor market (for example, those with family or school obligations),” self-employment provides “an opportunity to work that they might not otherwise have.” Anne Polivka, *supra*, at 74. Because “independent contractors choose their own jobs and clients, the quantity and quality of work is better correlated with the amount of money they make.” Cohen & Eimicke, *supra*, at 16. Thus, “often highly motivated contractors are more likely to earn more money than regular employees.”

Id.

B. Expanding the Retained Control Exception Undermines Independent Contracting

Imposing liability on a contracting company for the injuries to an independent contractor’s employee that are caused by factors outside of the contracting company’s control would diminish the benefits of independent contracting to both the independent contractors and the businesses that hire them. It would make little sense for a company to cede control to an independent contractor, only to retain liability for injuries caused by the independent contractor’s exercise of autonomy. And without knowing, *ex ante*, what practices might give rise to injury, a company seeking to reduce

liability for the acts of an independent contractor would be forced to exercise control over virtually all aspects of the contractor's job. That, in turn, would deprive hiring companies of the core benefits of independent contracting, which would have a chilling effect on the demand for independent contractors. As a consequence, those workers who would otherwise prefer the autonomy afforded by independent contracting would instead be required to yield to more rigid employer-employee relationships.

Legal and policy rules that curtail independent contracting are likely to result in higher unemployment, slower economic growth and reduced economic welfare. *See* Jeffrey Eisenach, *The Role of Independent Contractors in the U.S. Economy*, Navigant Economics, at ii (Dec. 2010).³ Many small businesses are independent contractors, and many other small businesses rely on independent contractors. Would-be independent contractors are discouraged from entering the market when demand for independent contractors is depressed. Similarly, would-be hirers of independent contractors face increased start-up costs, which is a significant barrier to entry for new businesses. *See* Rutheford B. Campbell, Jr., *The New Regulation of Small Business Capital Formation: The Impact-If Any-of the Jobs Act*, 102 Ky. L.J. 815, 818 (2014). By discouraging companies from hiring independent contractors, the plaintiff's theory risks reducing the formation of new small businesses.

³ Available at http://www.aei.org/wp-content/uploads/2012/08/-the-role-of-independent-contractors-in-the-us-economy_123302207143.pdf

This reduced rate of small business formation has significant economic consequences, such as a reduction in job creation. Independent contractors start small businesses and create jobs that are vital to the economy. *See, e.g.,* Rutheford B Campbell, Jr., *Regulation A: Small Businesses' Search for "A Moderate Capital"*, 31 Del. J. Corp. L. 77, 85 (2006)(noting that in the year 2000, 36% of all jobs are provided by companies with less than 100 employees). It therefore follows that with less business formation would come less job creation, resulting in a higher unemployment rate. *Cf.* Eisenach, *supra*, at 36 (noting that about 20% of independent contractors have at least one paid employee).

In addition, higher costs associated with engaging independent contractors would reduce competition and increase prices for consumers. Independent contractors serve an important function for businesses of all sizes, including providing decreased start-up costs and flexibility. John Bruntz, *The Employee/Independent Contractor Dichotomy: A Rose Is Not Always A Rose*, 8 HOFSTRA LAB. L.J. 337, at 339-341 (1991). As a result, independent contracting has the potential to facilitate greater competition and to drive down costs, to the benefit of consumers. *See* Eisenach, *supra*, at 37. Higher costs for independent contracting reduces their benefits to businesses and consumers alike. *See id.* at 38.

CONCLUSION

This Court should affirm the opinion of the Superior Court to maintain the economic benefits provided by a robust independent contractor economy.

Respectfully Submitted,

DUANE MORRIS LLP

By: /s/Robert L. Byer

Robert L. Byer

Pa. I.D. No. 25447

Sarah O'Laughlin Kulik

Pa. I.D. No. 318534

30 South 17th Street

Philadelphia, PA 19103

(215) 979-1000

Of Counsel:

Karen R. Harned

NFIB Small Business Legal Center

1201 F Street N.W., Suite 200

Washington, D.C. 20004

(202)314-2061

Counsel for Amicus Curiae NFIB

Small Business Legal Center

Warren Postman

Sheldon Gilbert

U.S. Chamber Litigation Center

1615 H Street NW

Washington, DC 20062-2000

(202) 463-5337

Counsel for Amicus Curiae

Chamber of Commerce of the

United States of America

Dated: August 7, 2015

*Counsel for Amici Curiae Chamber of
Commerce of the United States of
America, Pennsylvania Chamber of
Business and Industry, and National
Federation of Independent Business
Small Business Legal Center*