

BENNETT, BRICKLIN & SALTZBURG LLC

Subject: Summary of Cases Reported in Pa Law Weekly of October 5, 2009

Date: October 6, 2009

1. Premises liability

Claimed by an employee of a subcontractor

McDonald v. Lowes U.S.D.C. Ed. Pa. opinion by Pollak, J filed September 24, 2009 (2009WL3060413)

McDonald was an employee of DDP Holdings which had a contract with Lowes whereby DDP provided merchandise servicing to various Lowes stores. That agreement provided that DDP's employees were not considered employees of Lowes, that DDP had the authority to hire, fire, supervise and control its employees and was responsible for all acts of its employees. At her deposition, McDonald testified that she did not have to take any direction from Lowes' employees.

On April 18, 2007, McDonald was working as a merchandiser and sustained injury when she attempted to move a metal grate in order to re-arrange the shelving in an aisle of the store. As she was pulling it toward her, it slid forward and fell into her left leg. Plaintiff asserted that moving steel shelving grates was not listed explicitly in her job description, that she was never trained in how to handle steel shelving and that she understood that she was not required to move steel grates. On the day in question, Lowes did not specifically ask her to move the grates, but was aware that she would have to move the grates to complete the other tasks that Lowes assigned her to prepare for an inspection.

Plaintiff asserted that Lowes was liable to her on three theories:

1. That she was owed a duty as an independent contractor;
2. That she was owed a duty as a business invitee;
3. That she was owed a duty as a casual employee.

The Court rejected all of her claims and granted defendant's summary judgment. In light of its ruling, the Court did not have to rule on defendant's claim that it was entitled to the statutory employer defense.

1. As to the duty owed the plaintiff as an independent contractor, the Court held that as a general rule a hiring party owes no duty to employees of independent contractors and is not subject to liability for injuries sustained by those employees.

Two exceptions to the rule are:

- A. If the hiring party retains control over the means and methods of the independent contractors work; and
- B. If the work performed poses a special danger or a peculiar risk of harm.

On reviewing all of the evidence, the Court held that the right of control exception did not apply in the case and McDonald conceded that the special danger or peculiar risk exception was not applicable based upon the facts of the case.

2. Plaintiff asserted that she was owed a duty as a business invitee on the Lowes Property. After announcing the criteria for establishing liability upon a possessor by a business invitee, the Court noted that the plaintiff must establish that the defendant should expect that the invitee would not discovery or realize the danger or would fail to protect himself against it. The Court found as a matter of law that there was no evidence that the allegedly defective condition was unknown to the plaintiff at the time of her injury and that therefore the plaintiff's claim as a business invitee must fail.
3. Plaintiff claimed that she was owed a duty of care as "casual employee" of Lowes. The Court held that for it to rule that Lowes owed McDonald a duty when she was injured, it must first find that McDonald was conducting duties of some kind for Lowes that were distinct from her duties as an employee of DDP, the general contractor, citing Ashman v. Sharon Steel Corp., 448 A.2d 1054 (Pa. Super. 1982). The Court found that the record did not suggest that McDonald was working for Lowes, as opposed to working for DDP when she moved the metal shelves. The Court held that the evidence showed that the moving of the shelf that injured the plaintiff was a job undertaken by her employer, DDP, regardless of whether handling steel shelves was strictly part of McDonald's job description. Therefore, the casual employment doctrine did not apply.

JPF/jmk