

Is county liable for recycling center injury?

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It is up to a trial court to determine if the extent of control Monroe County exercised over a recycling center is enough to hold it liable for injuries suffered by a worker.

The county maintains it had relinquished all control of the recycling center on Lee Road to Metro Waste Paper Recovery U.S. Inc. under a 2002 maintenance and operations agreement.

John Gronski, a former Metro Waste employee, was seriously injured in August 2003 when a bale of paper, weighing nearly a ton, fell on him. He and his wife Nancy sued the county, claiming the stacked bales were not properly placed in a designated storage area.

They claimed the county, as owner of the recycling center, was negligent for several reasons, including failure to maintain a safe work environment and failure to properly train and supervise

employees.

Their suit was dismissed by Supreme Court Justice Thomas A. Stander, whose March 2009 decision in favor of the county was unanimously affirmed in May 2010 by the Appellate Division, Fourth Department.

The state Court of Appeals, in a split decision, recently reversed the two lower courts, allowing the Gronskis to proceed with their suit against Monroe County.

The Gronskis are represented by attorney Elizabeth A. Wolford of The Wolford Law Firm LLP. She said the decision clarifies the law, clearly establishing for premise liability purposes, that the landowner must also be the landlord for out-of-possession standards to apply.

She said the county compared itself to a landlord, saying it had divested itself of responsibility for injuries on the property, but it could not do that unless it had created a leasehold arrangement.

Noah Lebowitz, the county's director of communications, declined to comment on the decision.

The main issue, according to the Court of Appeals, was whether the county exercised control over the property and, if so, to what extent.

Metro Waste, under a 2002 operations and maintenance agreement with the county, was designated an independent contractor with complete charge and responsibility for, among other things, the facility, site, equipment and personnel. The county had limited review authority.

Judge Stander agreed the county, as an out-of-possession landlord, had relinquished all control over the maintenance and operations of the recycling center and had met its burden to show it was not liable to Gronski under the general law applicable to landlord-tenant relationships with written agreements.

Wolford claimed the county was negligent because it retained control of the premises and had a legal duty to ensure they were safe.

Judge Stander ruled the Gronskis' attempt to expand the duties and obligations of the county was not supported by the terms of the agreement.

"Inasmuch as defendant did not retain operational control over the facility, we reject plaintiffs'

further contention that defendant, as the landowner, owed a nondelegable duty to provide for plaintiff's safety," the Appellate Division affirmed, citing *cf. Bart v. Universal Pictures* 277 AD2d 4, 5.

The Court of Appeals reversed both courts in its 4-3 decision, filed Nov. 17.

"We reject the out-of-possession landlord standard as applied by the courts below as no leasehold was created by the agreement," the higher court ruled.

The main issue is control. The Court of Appeals acknowledged in *Ritto v. Goldberg*, 27 NY2d, 887, 889 [1970] that a landowner who has transferred possession and control is generally not liable for injuries caused by dangerous conditions on the property. In a more recent decision, *Butler v. Rafferty*, 100 NY2d, 265, 272 n 3 [2003], it notes the duty to maintain property in a reasonably safe condition is premised on the landowner's exercise of control over the property as being best able to identify and prevent harm to others.

In the current case, it concludes it follows to not only look at the terms of the written agreement between the landowner and who actually possesses the property, "but to the parties' course of conduct — including, but not limited to the landowner's ability to access the premises — to determine whether the landowner in fact surrendered control over the property such that the landowner's duty is extinguished as a matter of law."

The decision notes that while the agreement between Monroe County and Metro Waste assigned safety responsibility to Metro Waste, it also vested the county with ultimate authority over Metro Waste's operation procedures.

"Moreover, an examination of the county's conduct indicates that it maintained both a visible and vocal presence at the recycling center," the majority ruled. "Unlike the defendant in *Butler*, who was entirely excluded from his co-tenant's portion of the property, the agreement granted the county supervisory rights and unfettered access to the facility."

Testimony revealed a county employee regularly conducted public tours at Metro Waste and another routinely conducted unannounced inspections. Though the latter's testimony regarding authority to monitor and remedy unsafe issues was contradictory, he did note specific examples in which he would take action, such as upon observing workers without hard hats.

As such, the Court of Appeals said it cannot agree with the lower courts that the county relinquished complete control of the recycling center to Metro Waste. The Court of Appeals found the lower courts erred in focusing exclusively on the terms of the agreement to designate the county free from any duty owed to Gronski and by not giving "due weight" to the county's course of conduct.

The opinion was written by Judge Carmen B. Ciparick with Chief Judge Jonathan Lippman and Judges Victoria A. Graffeo and Theodore T. Jones concurring.

Joining Judge Eugene F. Pigott in his dissent were Judges Susan P. Read and Robert S. Smith. They agreed it is undisputed that control is the measuring test for responsibility and that a landlord who relinquishes control may still be held liable for injuries if engaged in a "course of conduct" from which a jury could infer the landlord intervened in the operation of the premises to the point that it was relied on by those using the property.

Judge Pigott's view is that Gronski failed to produce any evidence to show the county intervened in how the recycling center was run to the point where it should be held liable. He notes there is no evidence that the county's employees told Metro Waste or its employees how the bales should have been stacked.

"The dissent places similar emphasis on the agreement, though it ignores the supervisory rights the agreement reserves to the county and the fact that the county enjoyed wide access to the facility," the decision read.

It noted the issue left to be resolved is whether the county, through its course of conduct, exercised sufficient control over the facility to owe plaintiff a duty to prevent and fix the kind of situation that resulted in his injury.

Wolford said the next step is to schedule a trial in Supreme Court. She expects Judge Stander

will preside.

Gronski is seeking an unspecified amount of damages. Wolford said those will be formulated once the case gets to trial. She said Metro Waste was not named in the suit because under Workers' Compensation Law, employees may not sue their employers. Under the agreement, Metro Waste's insurance carrier covers any liability on the part of the county.

Lebowitz said the coverage includes defense and indemnification of the county so there will be no cost to taxpayers for the defense of the matter or any potential settlement. The recycling center continues to be operated by Metro Waste under its agreement with the county.

The county was represented by Vincent A. Oliveri of the Buffalo firm Gibson, McAskill & Crosby LLP, who was retained by Metro Waste's insurance carrier.

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