IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

JAMES HEIVLY and FAYE HEIVLY, Individually and as husband and wife, Plaintiffs	:	NO. 18-1370
vs.	:	CIVIL ACTION – LAW
SANTANDER BANK, N.A., Defendant	:	*Motion in Limine*

O R D E R

AND NOW, following argument held August 24, 2021 on Plaintiffs' Motion *in Limine* to Exclude All Evidence, Reference, Argument, and/or Testimony as to Any Alleged Negligence of Jones Lang LaSalle Americas, Inc. ("Motion *in Limine*"), the Court hereby issues the following ORDER.

Background

James Heivly and Faye Heivly ("Plaintiffs") initiated the foregoing action on September 18, 2018 by the filing of a Complaint. The Complaint alleges that on June 24, 2017, James Heivly, sustained an injury in the course of performing maintenance work at a Santander Bank, N.A. ("Defendant") subsidiary located at 20 South Main Street, Muncy, Lycoming County, Williamsport, Pennsylvania ("Premises"). Specifically, the Complaint alleges that while James Heivly climbed a ladder affixed to the Premises to access an HVAC unit on the roof for preventative maintenance work, one of the ladder rungs broke, causing James Heivly to fall. At the time, James Heivly was acting within his scope of employment with Jones Lang LaSalle Americas, Inc. ("JLL"), which had contracted with Defendant to perform maintenance services at the Premises. James Heivly was therefore on the Premises as a business visitor.[1]

Procedural History

On August 29, 2019, Defendant filed a Joinder Complaint against JLL, alleging that pursuant to the Real Estate Services Agreement entered into by Defendant and JLL on May 13, 2016, JLL was required to maintain the Premises, which would include

[1] *Gutteridge v. A.P. Green Servs., Inc.*, 804 A.2d 643, 655 (Pa. Super. 2002) (citations omitted) ("[I]ndependent contractors. . .are 'invitees' who fall within the classification of 'business visitors.'").

repair and maintenance of the ladder. On July 27, 2020, Defendant, Plaintiffs, and JLL stipulated to the dismissal of JLL with prejudice.

Plaintiffs filed their Motion *in Limine* on January 15, 2021.[2] Within this Motion, Plaintiffs seek to preclude Defendant from presenting evidence, testimony, or argument at trial that JLL was responsible under the parties' contract for maintaining the Premises, and was therefore solely or comparatively negligent for failing to maintain the ladder. Plaintiffs cite to the Pennsylvania Supreme Court's decision in *Heckendorn v. Consolidated Rail Corp.* for the proposition that third-party defendants are prohibited from seeking an apportionment of fault against a plaintiff's employer pursuant section 303(b) of the Pennsylvania Worker's Compensation Act.[3] Plaintiffs assert, "[a] strict reading of Pennsylvania's Comparative Negligence Act establishes that the legislature did not contemplate an apportionment of liability between one or more third party tortfeasors (against whom recovery may be had) and plaintiff's employer (against whom recovery may neither be sought nor allowed)."[4] Plaintiffs further assert that allowing the jury to consider the conduct of non-parties against whom damages cannot be apportioned would introduce untenable complexity to the proceedings.[5] Finally, Plaintiffs argue that under the Defendant and JLL's Real Estate Services Agreement, Defendant agreed to indemnify JLL concerning claims arising from "any structural or latent defects" upon the Premises.[6]

On July 8, 2021, Defendant filed a Response in Opposition to Plaintiffs' Motion *in Limine*, in conjunction with a supportive Memorandum of Law. Defendant contends within its Response that JLL is liable for the broken ladder pursuant to the Real Estate Services Agreement entered into by Defendant and JLL. Specifically, JLL agreed within

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[2] The Court originally set argument on this Motion for March 2, 2021. The Court thereafter rescheduled this date upon the parties' agreement to a continuance of all deadlines.
[3] *See* Plaintiffs' Motion *in Limine* to Exclude All Evidence, Reference, Argument, and/or Testimony as to Any Alleged Negligence of Jones Lang LaSalle Americas, Inc. ("Motion *in Limine*") ¶¶ 15-16 (Jan. 15, 2021) (citing *Heckendorn v. Consol. Rail Corp*., 465 A.2d 609 (Pa. 1983)).
[4] Motion *in Limine* ¶ 19 (quoting *Heckendorn v. Consol. Rail Corp.*, 439 A.2d 674, 677 (Pa. Super. 1981)).
[5] *See* Motion *in Limine* ¶¶ 20-21.
[6] Motion in Limine ¶ 26 (quoting ¶ 142.5 of the Real Estate Services Agreement). The Real Estate Service Agreement is attached as Exhibit B to the Response in Opposition of Defendant, Santander Bank, N.A, (Improperly Pled as "Santander Holdings, USA, Inc. d/b/a Santander Bank and Santander Bank f/k/a Sovereign Bank" to Plaintiffs' Motion *in Limine* to Exclude All Evidence, Reference, Argument, and/or Testimony as to Any Alleged Negligence of Jones Lang LaSalle Americas, Inc. ("Defendant's Response in Opposition").

the "Scope of Services" provision of the Agreement to assume responsibility for the management and maintenance of, *inter alia*, "fixtures" and "bank equipment" on the Premises.[7] Plaintiffs also assert that pursuant to the deposition testimony of a JLL representative, James Heivly did not complete the "ladder safety" training as required by JLL.[8] Defendant therefore alleges that JLL failed to properly supervise and train James Heivly.

Relevant Caselaw

The central issue for the Court's determination is the scope of section 303 of the Worker's Compensation Act ("WCA"). Section 303 provides:

> (a) The liability of an employer under this act shall be exclusive and in place of any and all other liability to such employes, his legal representative, husband or wife, parents, dependents, next of kin or anyone otherwise entitled to damages in any action at law or otherwise on account of any injury or death as defined in section 301(c)(1) and (2) or occupational disease as defined in section 108.
>
> (b) In the event injury or death to an employe is caused by a third party, then such employe, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to receive damages by reason thereof, may bring their action at law against such third party, <u>but the employer, his insurance carrier, their servants and agents, employes, representatives acting on their behalf or at their request shall not be liable to a third party for damages, contribution, or indemnity in any action at law, or otherwise, unless liability for such damages, contributions or indemnity shall be expressly provided for in a written contract entered into by the party alleged to be liable prior to the date of the occurrence which gave rise to the action.</u>[9]

Prior to the February 5, 1975, effective date of section 303, third parties sued by an injured employee could obtain contribution or indemnity from the employer to the

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[7] Memorandum of Law in Support of the Response in Opposition of Defendant, Santander Bank, N.A, (Improperly Pled as "Santander Holdings, USA, Inc. d/b/a Santander Bank and Santander Bank f/k/a Sovereign Bank" to Plaintiffs' Motion in Limine to Exclude All Evidence, Reference, Argument, and/or Testimony as to Any Alleged Negligence of Jones Lang LaSalle Americas, Inc. ("Defendant's Memorandum of Law") at pg. 2 (July 8, 2021) (quoting ¶ 1 of the Real Estate Services Agreement).

[8] Defendant's Memorandum of Law at pg. 3 (citing the deposition testimony of Joseph Martira, pg. 46, lns. 17-24; pg. 47, lns. -2). Joseph Matira's deposition testimony is attached as Exhibit C to Defendant's Response in Opposition.

[9] 77 P.S. § 481 (emphasis added).

extent of the employer's statutory compensation limits under the WCA.[10] However, the the legislature's enactment of 303(b) "foreclosed the adjudication of the liability of the employer[,]" and thereby an employer is immune from joinder to an action by the third party.[11] This immunity from joinder does not merely apply to instances where the third party seeks indemnity or contribution from the employer, but will also apply when the third party seeks to apportion fault to the employer under the Comparative Negligence Act.[12] Defendant's contention, however, is that while 303(b) will preclude a third party from bringing an action for apportionment in tort against an employer, it will not preclude a defendant from presenting evidence, argument, or testimony at trial that the negligence of plaintiff's employer contributed to his injury.[13] Defendant's proposition relies heavily on the Philadelphia Court of Common Pleas' recent decision in *Timmonds v. Agco Corp.*, as affirmed in a memorandum opinion by the Superior Court.

In *Timmonds*, plaintiff was injured when attempting to jumpstart a tractor while it was in gear. Plaintiff thereafter filed suit against AGCO Corporation, the tractor's manufacturer, MM Weaver, the tractor's seller, and a group of defendants collectively referred to as the "Turf Defendants," the tractor's previous owners. Prior to trial, plaintiff filed a Motion *in Limine* to preclude any evidence, argument, or testimony that plaintiff's employer, George E. Ley, was negligent. The trial court denied this motion on the basis that Mr. Ley's conduct was relevant to the factual cause of the accident. While plaintiff's theory against AGCO related to a defectively designed product, his theories against both MM Weaver and the Turf Defendants posited that these defendants had removed a safety guard from the tractor prior to selling or reselling it. MM Weaver and Turf Defendants presented evidence at trial that it was in fact Mr. Ley or one of plaintiff's co-workers who had removed the safety guard from the tractor.

With the jury's verdict favorable to the defendants, plaintiff filed a post-trial motion requesting a new trial based on several points of error. Among plaintiff's claims of error

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[10] *Bell v. Koppers Co.*, 392 A.2d 1380, 1381 (Pa. 1978) (citing *Socha v. Metz*, 123 A.2d 837 (Pa. 1956); *Maio v. Fahs*, 14 A.2d 105 (Pa. 1940)).
[11] Id. at 1382 (citing Hefferin v. Stempkowski, 372 A.2d 869 (Pa. Super. 1977)).
[12] See *Heckendorn*, *supra* n.3; *Kelly v. Carborundum Co.*, 453 A.2d 624 (Pa. Super. 1982), aff'd, 470 A.2d 969 (Pa. 1984); *Jones v. Carborundum Co.*, 515 F. Supp. 559 (W.D. Pa. 1981).
[13] Defendant's Memorandum of Law at pg. 5.

was the trial court's allowing admission at trial of evidence regarding the employer's negligence. The trial court found no error:

> [Plaintiff] mischaracterize the available Pennsylvania caselaw regarding these evidentiary issues in an attempt to manufacture a precedent that evidence of an employer's conduct is inadmissible at trial. This is simply not the case. Plaintiff has relied upon the Supreme Court's holdings in *Bell v. Koppers Co.*, 458, 392 A.2d 1380 (Pa. 1978), *Tsarnas v. Jones & Laughlin Steel Corp.*, 412 A.2d 1094 (Pa. 1980), and *Heckendorn v. Consolidated Rail Corp.*, 465 A.2d 609 (Pa. 1983); however, these decisions were all rendered with regard to the disposition of preliminary objections to the joinder of an employer for contribution and indemnification wherein the Court held that Section 303(b) of the Workers' Compensation Act prohibited such cause of action. None of these cases addressed the admissibility of evidence of an employer's conduct to defend on the issue of the cause of the incident at issue, nor do these cases provide authority for Plaintiff's claim that evidence of an employer's conduct is inadmissible at trial. By contrast, our federal jurisprudence has explicitly held that an employer's statutory immunity from suit "does not per se preclude admission of employer or co-worker negligence in a suit against a third party."[14]

The trial court found that no bright-line rule precludes evidence of an employer's negligence, but rather the admissibility of such evidence should be considered utilizing weighing factors of Rule 403 of the Pennsylvania Rules of Evidence.[15] The Superior Court affirmed on appeal, providing, "section 303(b) does not preclude the introduction, in a case seeking damages from a third party, of evidence regarding an employer's negligence, where such evidence is relevant to defenses raised by the third party. Rather, the statute simply precludes a third party from either bringing an action or seeking apportionment against an employer."[16]

Plaintiffs provides as a counterexample the Superior Court's recent memorandum opinion in *Beam v. Thiel Manufacturing, LLC*. In *Beam*, plaintiff while working in the course of his employment with American Roofing, Inc., fell through a fiberglass skylight on the roof of a building owned by defendant, Thiele Manufacturing,

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[14] Timmonds v. Agco Corp., No. 03681, 2019 WL 7249164, at *25 (Phila. Cty. Aug. 27, 2019) (quoting *Kern v. Nissan Indus. Equip. Co.*, 801 F. Supp. 1438, 1445 (M.D. Pa. 1992)).
[15] *See* id.

LLC. On appeal to the Superior Court from a jury award in favor of plaintiff, the defendant asserted that the trial court had erred, *inter alia*, in granting plaintiffs' motion *in limine* precluding defendant from presenting evidence of any negligence by the employer. The Superior Court held that pursuant to *Heckendorn*, the trial court had properly omitted testimony of comparative negligence of an employer falling within the scope of the WCA.[17] The *Beam* Court further opined, "allowing the jury to consider the conduct of non-parties whom the plaintiff either cannot or does not seek to hold liable would introduce virtually unmanageable complexity to the determination of negligence."[18]

Analysis

The Court notes that an employer is not vicariously liable for the negligence of an independent contractor, i.e., "one who employs an independent contractor is not liable for physical harm caused by a negligent act or omission of the contractor."[19] Further, the protections that an employer must afford an independent contractor's employees is not equivalent to those duties owed to business invitees generally. "Pennsylvania law imposes no general duty on a property owner to prepare and maintain a safe building for the benefit of a contractor's employees who are working on that building."[20] Exceptions to the doctrine apply when "the negligence of its employee/independent contractor where the work to be performed by the independent contractor involves a special danger or peculiar risk[,]"[21] or when the owner retains control over the manner in which the work is to be done.[22] There is a two-factor test for assessing whether "peculiar risk" exists: ''(1) whether the risk is foreseeable to the owner at the time the contract is executed, i.e. would a reasonable person foresee the risk and recognize the

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[16] Timmonds v. AGCO Corp., 253 A.3d 276 (Table) (Pa. Super. 2021), reargument denied (June 15, 2021).
[17] *See* Beam v. Thiele Mfg., LLC, No. 1374 WDA 2016, 2018 WL 2049135, at *7 (Pa. Super. May 2, 2018).
[18] Id. (quoting *Tysenn v. Johns–Manville Corp*., 517 F. Supp. 1290, 1295 (E.D. Pa. 1981) (citations and quotation marks omitted)).
[19] *Dunkle v. Middleburg Mun. Auth.*, 842 A.2d 477, 481 (Pa. Commw. 2004) (citing *Moles v. Borough of Norristown*, 780 A.2d 787, 791 (Pa. Commw. 2001); Restatement (Second) of Torts § 409 (1965)).
[20] *Mentzer v. Ognibene*, 597 A.2d 604, 608 (Pa. Super. 1991).
[21] *Drum v. Shaull Equip. & Supply Co.*, 760 A.2d 5, 12–13 (Pa. Super. 2000) (citations omitted) (emphasis added); *see also* Restatement (Second) of Torts §§ 416 and 427A.

need to take special measures; and (2) whether the risk is different from the usual and ordinary risk associated with the general type of work done."[23]

Defendant's liability in *Beam*, discussed *supra*, was predicated on the jury's finding that the large fiberglass skylights on Defendant's roof created a "peculiar risk" distinct from risks that would be typically present in roofing repair work.[24] The *Beam* case also discussed the applicability of "collateral negligence" in the "peculiar risk" analysis. In order for there to be a peculiar risk, "it must not be a risk created solely by the contractor's 'collateral negligence'. . . [i.e.,] negligence consisting wholly of the improper manner in which the contractor performs the operative details of the work."[25] The *Beam* Court considered on appeal the defendant employer's objection that the trial court had erred by not allowing evidence of the contractor's collateral negligence for the purpose of the peculiar risk analysis. The *Beam* Court found no error, reasoning that because the jury had assigned 45% of the negligence to plaintiff, the risk could not have been created solely by the contractor's collateral negligence.[26]

However, the Court is of an opinion that "collateral negligence," significantly also referred to as "causative negligence," involves a causation analysis and not an apportionment of liability as under the Comparative Negligence Act. To hold otherwise would effectively foreclose an employer from raising a "collateral negligence" defense in a suit brought by a contractor's employee when the contractor is covered by the WCA, which the Court does not believe is supported either by the plain language of Section 303(b) of the WCA or by precedent. As previously noted, the *Timmonds* Court persuasively concluded, "section 303(b) does not preclude the introduction, in a case seeking damages from a third party, of evidence regarding an employer's negligence, where such evidence is relevant to defenses raised by the third party."[27] This Court agrees. The Court therefore holds that Defendant shall not be foreclosed from presenting evidence or testimony that JLL assumed responsibility for the maintenance and repair of the subject ladder under the Real Estate Services Agreement, and was

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[22] *See Mentzer v. Ognibene*, 597 A.2d 604, 613 (Pa. Super. 1991). An employer may also be liable for negligently hiring the contractor, but only to an injured third party. *Id.* at 608.
[23] *Id.* at 13 (quoting . Emery v. Leavesly McCollum, 725 A.2d 807, 814 (Pa.Super.1999)
[24] *See* Beam, 2018 WL 2049135, at *4.
[25] Id. at *7 (quoting *Edwards v. Franklin & Marshall Coll.*, 663 A.2d 187, 190 (Pa. Super. 1995)).
[26] *See* id. at *8.

therefore collaterally negligent for its failure to properly maintain or repair the ladder, or to properly supervise or train James Heivly.

The Court further does not agree with Plaintiffs' argument that interpretation of the indemnity clause in Defendant and JLL's Real Estate Services Agreement would create untenable complexity in trying this case. Indeed, the Court finds the indemnity provision irrelevant. The indemnity provision may provide JLL a basis to file a claim against Defendant to reimburse any damages Plaintiffs recovers against JLL related to the foregoing accident.[28] The indemnity provision, however, does not enable Plaintiffs, non-parties to the contract, to hold Defendant liable for JLL's negligence, especially when Plaintiffs may seek recovery directly against JLL under the WCA.

Pursuant to the foregoing, Plaintiffs' Motion *in Limine* is DENIED.

IT IS SO ORDERED this 17th day of September 2021.

BY THE COURT,

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Eric R. Linhardt, Judge

ERL/cp

cc: Andrea Cohick, Esq.
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[27] Timmonds, 2019 WL 7249164, at *25.
[28] Section 319 of the WCA also provides that an employee's judgment against a third party will be subrogated to the employer to the extent the employer paid compensation under the WCA. The purpose of this provision is to prevent double-recovery to the employee. *See Kennedy v. W.C.A.B. (Henry Modell & Co.)*, 74 A.3d 343, 345 (Pa. Commw. 2013) (quoting 77 P.S. § 671).