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Site Safety and Protecting the Public

INDUSTRY SAFETY CUSTOMS DO NOT DEFINE STANDARD OF CARE

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There is no question that contractors performing overhead work have a duty to protect pedestrians and passersby from falling objects. A recent Connecticut Supreme Court decision makes clear, however, the scope and extent of that duty are apparently less certain, and contractors might still be found liable to third parties injured by falling objects, despite having complied with the customary site safety practices established within their industry.

In *McDermott v. State of Connecticut*, 316 Conn. 601 (2015), the Connecticut Supreme Court rejected the notion that customary industry practices conclusively establish the scope and extent of a contractor's duty to keep pedestrians safe, holding

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that the standard for general negligence should be used to determine both the standard of care owed to the public by persons performing overhead work and whether that standard has been violated. The plaintiff, Madeline McDermott, brought suit against the state on her own behalf and as administratrix for the estate of her deceased husband, claiming wrongful death and loss of consortium after her husband was killed from injuries he sustained while a pedestrian on the site of a roadside tree-removal project being performed by employees of the Connecticut Department of Transportation (DOT).

The project involved the removal of a 55-foot tree located in the grass strip between a road and adjacent pedestrian sidewalk. To remove the tree, the DOT crew first removed all of its limbs and then removed the remaining trunk in sections from the top down. Before any work was performed, the crew placed safety cones on the sidewalk at locations 85 feet south and 100 feet north of the tree, which were not moved at any time thereafter. The decedent was killed after one of the remaining trunk sections fell and hit a previously removed limb, which was then propelled into the air, struck the decedent in the head and caused him



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to fall and hit his head on the sidewalk. Having walked past the southern sidewalk safety cone, the decedent was approximately 55 feet from the tree when struck by the limb, a distance more than twice the height of the remaining trunk.

Following a bench trial, the state was found liable. The trial court determined that the exact circumstances that caused

the decedent's death were not reasonably foreseeable and that the decedent's distance from the tree at the time of his death was consistent with the prevailing custom in the tree removal industry that persons not involved in the tree removal should be at least two tree lengths away. Importantly, the trial court also determined that the prevailing safety standard was trade custom which did not absolve the state of liability, that the state voluntarily assumed a duty greater than that imposed by law because the DOT crew could have, but did not, move the cones closer to the tree as sections were removed, and that the general nature of the injury was foreseeable. The trial court concluded that the DOT crew established the limits of its duty to the decedent in demarcating the limits of the work zone, and breached its duty of care by allowing the decedent to stand within the demarcated work zone during the removal operation.

On appeal by the state, the Appellate Court disagreed with the trial court's conclusion that the state voluntarily assumed the duty to remove the decedent from where he was standing simply based on the location of the cones. The Appellate Court reversed and remanded with direction to enter judgment for the state, holding that there were insufficient findings to support the trial court's conclusion that the state assumed a greater duty and that the state's conduct was not the proximate cause of death under the circumstances.

On appeal, the Supreme Court considered (1) the propriety of the trial court's finding that the state assumed a greater duty of care than reflected in industry custom or standards; and (2) whether the Appellate Court properly concluded that the state's conduct did not proximately cause the decedent's death. The plaintiff argued that the Appellate Court improperly held that courts are to apply the industry standard for workers to claims by pedestrians in the absence of a spe-

cific finding that the industry standard is unreasonable. The state argued that the Appellate Court properly reversed the trial court's determination that the state voluntarily assumed a greater duty of care, and that the reasonable industry standard was the proper standard to use to evaluate the bounds of the state's duty to the decedent.

The Supreme Court agreed with the Appellate Court's conclusion that the trial court applied an improper standard in evaluating the plaintiff's claim by incorrectly applying Section 323 of the Restatement (Second) of Torts in determining that the state voluntarily assumed a duty of care perhaps not otherwise imposed by law. The court reasoned that because there were no findings by the trial court that the decedent relied on the placement of the cones or that the state's voluntary act (not moving the southerly cone closer to the tree as portions of the trunk were removed) increased the risk to the decedent of being hit by debris, the trial court did not make requisite factual findings needed to properly conclude that, under the standard set forth in Section 323 of the Restatement (Second) of Torts, the state voluntarily assumed a duty greater than legally required.

The Supreme Court, however, disagreed with the Appellate Court's judgment remanding the case with direction to enter judgment for the state, concluding that a new trial was required so that the parties could present their cases, and the trial court could evaluate the merits, with a mind to the correct standard. The state conceded that it had a duty under the circumstances of the case to at least keep the decedent a safe distance from the tree cut being made while he was present.

In considering the scope of that duty, the court rejected the state's argument that the industry standard of a two tree-lengths protected work zone should be the applicable standard of care for this

particular case, such that the state owed no duty to persons outside that distance, including the decedent. Rather, the court agreed with the plaintiff and the trial court that trade custom, while admissible, is not conclusive on the issue of the standard of care, and that industry standards are never binding on a civil court, reasoning that the industry standard is but one item of evidence to be considered by the trier of fact in evaluating whether the state breached the standard of care.

The court held that the standard of care to be used is the "general negligence standard" of duty, breach, causation and actual injury. The court further held that the Appellate Court improperly decided the issue of proximate cause as a matter of law. The court reasoned that, under the circumstances, the issue of foreseeability of the decedent's injuries was debatable among reasonable persons and could not be resolved through application of an industry standard that neither applies to pedestrians nor is conclusive evidence of negligence or lack thereof. As such, the court concluded that the foreseeability of the decedent's injuries must be decided by the trier of fact.

McDermott makes clear that a contractor's compliance with industry safety customs is not conclusive on the issue of its liability for injuries to pedestrians and passersby who are not involved in the performance of overhead work which could result in injury. Like other claims of general negligence, the liability of contractors for such injuries will be decided through after-the-fact determinations made by the trier of fact. Consequently, for such contractors *McDermott* may undermine their ability to use customary industry site safety and injury prevention practices to prospectively mitigate risk and avoid potential liability for such injuries with any degree of certainty and predictability.