At a term of the Supreme Court held in and for the County of Wyoming, at the Courthouse in Warsaw, New York, on the 15th day of October, 2007.

PRESENT: HONORABLE MARK H. DADD
Acting Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT : COUNTY OF WYOMING

SHAWN DRYSDALE, as Administratrix of the Estate of DAVID DRYSDALE, deceased
Plaintiff

v.

PERRY CENTRAL SCHOOL DISTRICT, PERRY CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, PERRY SENIOR HIGH SCHOOL, CHRISTA CONSTRUCTION, LLC., and DAVID CHRISTA CONSTRUCTION, INC.
Defendants

ORDER

Index No. 34087

The above-named defendants, having moved for orders pursuant to CPLR 3212 granting them summary judgment dismissing the complaint as without merit, and said motions having duly come on to be heard.

NOW, on reading the pleadings of the parties, and on reading and filing the May 1, 2007 notice of motion for defendants Christa Construction, LLC., and David Christa Construction, Inc., supported by the affirmations of Gary H. Abelson, dated May 1, July 20, and October 2, 2007, and the affidavits of Richard A. Camping, sworn to on February 28, 2007, and Thomas Caruso, sworn to on February 28, 2007, together with the annexed exhibits, the May 1, 2007 notice of motion for defendants Perry Central School District, Perry Central School District Board of Education, and Perry Senior High School, supported by the affidavits of William G. Bauer, Esq., sworn to on May 1, 2007, and John P. Coniglio,

sworn to on April 24, and October 1, 2007, together with the annexed exhibits, and the opposing affidavits of Peter A. Tasca, sworn to on July 2, 2007, and John A. Collins, sworn to on July 12, 2007, together with the annexed exhibits submitted by the plaintiff, and after hearing Gary H. Abelson, Esq., attorney for defendants Christa Construction, LLC. and David Christa Construction, Inc., William G. Bauer, Esq., attorney for defendants Perry Central School District, Perry Central School District Board of Education, and Perry Senior High School, and John A. Collins, Esq., attorney for the plaintiff, and due deliberation having been had, the following decision is rendered.

Plaintiff's decedent, David Drysdale, was killed in an accident on a construction site on March 18, 2002. The property was owned by the defendant school district. The school district had hired David Christa Construction, Inc. to be the construction manager on the renovation of a gymnasium, including the construction of a pool. The school also hired Horning Construction as the general contractor and Thomann Asphalt Paving as a contractor. Thomann, Drysdale's employer, was involved in site preparation and excavation. Drysdale was operating a Bomag Roller owned by Thomann. The roller slid down an embankment and pinned Drysdale underneath.

The parties initially agree that all claims against Christa Construction, LLC. must be dismissed because that defendant was not formed until after the accident. Plaintiff has also abandoned its original claims under Labor Law §240(1). The remaining claims are under Labor Law §241(6), §200, and common law negligence. Plaintiff contends that the roller should have been provided with roll over protection and proper "footing" under the Industrial Code. It is further contended that Drysdale was not provided with a safe place to work due to the grade of the embankment which the roller slid on.

David Christa Construction, Inc. has established that it is entitled to summary judgment because it did not have control over work performed at the construction site. The contracts presented in said defendant's motion papers show that the prime contractors were solely responsible for supervising and controlling work (see §1.2.2, §3.3.1 and §4.6.6 to Exhibit A of Caruso's February 28, 2007 affidavit). Christa's contract with the school district

provided for administrative and management services (see Exhibit M, §1.1.4, §2.3.3). Its authority to review and coordinate the contractor's safety programs did "not extend to direct control over or charge of the acts or omissions of the Contractors, Subcontractors, agents or employees of the Contractors or Subcontractors, or any other persons performing portions of the work and not directly employed by the Construction Manager" (§2.3.12). Furthermore, the submitted testimony from the examinations before trial show that Christa did not exercise any control over Drysdale's work.

Plaintiff cites Sheridan v. Albion Central School District (41 A.D.3d 1277 [2007]) in support of its claims against Christa because it allegedly had authority to stop unsafe work practices. The instant case is distinguishable on its facts. Plaintiff relies on §2.3.15 of Exhibit M to support this argument. However, that section only gave Christa authority to advise the owner and contractor of improper practices and emphasized that Christa had no control over the work and was not responsible for safety precautions. Such a limited duty to report problems does not support a claim against a construction manager who did not control work at the site (see Titus v. Kirst Construction, Inc., __ A.D.3d __, decision filed by the Appellate Division for the Fourth Department dated September 28, 2007, 2007 NY App. Div. LEXIS 10248; Buccini v. 1568 Broadway Associates, 250 A.D.2d 466 [1998]; Sikorski v. Springbrook Fire District, 225 A.D.2d 1041 [1996]; Warnitz v. Liro Group, Ltd., 254 A.D.2d 411 [1998]).

The plaintiff's claims against all defendants under Labor Law §200 and for negligence must be dismissed. Neither the construction manager nor the school district controlled Drysdale's work (see Comes v. New York State Electric and Gas Corporation, 82 N.Y.2d 876 [1993]; D'Antuono v. Goodyear Tire & Rubber Company, 231 A.D.2d 955 [1996]). Plaintiff has attempted to evade dismissal by alleging that the accident resulted from a defect in the premises and not just the manner of work. The alleged defect is the slope of the embankment. The record, however, shows that Drysdale's employer deposited the removed earth into spoiler piles adjacent to a paved road near the embankment. It does not appear that the embankment itself constituted a dangerous condition. Questions are

presented as to why Drysdale operated the roller near the slope and if the manner of work and the safety of the machine caused the accident. Thus, the defendants have shown a lack of control over the work or notice of a dangerous condition they could have rectified (see Lombardi v. Stout, 80 N.Y.2d 290 [1992]).

Triable issues of fact do preclude an award of summary judgment to the school district for the alleged breach of its nondelegable duty under Labor Law §241(6). Plaintiff evidently no longer relies upon an alleged violation of 12 NYCRR §23-1.5, which is not sufficiently specific to support a claim (see Basile v. ICF Kaiser Engineers, Corp., et al, 227 A.D.2d 959 [1996]). Three other cited regulations, 12 NYCRR §23-9.2(a), §23-9.2(h); and §23-9.5(a) do present sufficiently specific standards which are applicable to an excavating machine. The record includes issues of fact, including conflicting expert opinion, as to whether the roller was used as a grader and constituted an "excavating machine" under 12 NYCRR §23-1.4(b)(18). Thus, there are triable issues of fact as to whether the cited regulations are applicable to the facts of this case (see Piazza v. Ciminelli Construction Co., Inc., 2 A.D.3d 1345 [2003]). There are also questions of fact as to the proximate cause of the accident.

The defendants have also relied upon a decision dated April 9, 2004, whereby the Occupational Safety and Health Review Commission determined that Thomann was not required to use a roll over protection device on the roller under the Occupational Safety and Health Act. Plaintiff was not a party to that administrative proceeding and is not bound thereby. Furthermore, although New York regulations were considered, the decision was ultimately based upon an interpretation of the federal statute. The decision also recognized that roll over protection should be used on rollers under certain circumstances. Thus, the decision does not establish that the defendants are entitled to summary judgment on the Labor Law §241(6) cause of action.

NOW, THEREFORE, it is hereby

ORDERED that the complaint against Christa Construction, LLC. is dismissed pursuant to CPLR 3211; and it is further

ORDERED that defendant David Christa Construction, Inc. is granted summary judgment dismissing the complaint together with the costs and disbursements of this action; and it is further

ORDERED that the plaintiff's claims against the remaining defendants under Labor Law §240(1), §200, and for common law negligence are dismissed; and it is further

ORDERED that any claim based upon 12 NYCRR §23-1.5 is dismissed; and it is further

ORDERED that the school district and related defendants are otherwise denied summary judgment on the claim under Labor Law §241(6).

DATED: October 15, 2007

Acting Supreme Court Justice