

COURT CLARIFIES GENERAL CONTRACTOR'S LIABILITY FOR SUBCONTRACTOR INJURIES

Construction Law Practice Group

May 1, 2008

The Michigan Supreme Court recently clarified the focus of a general contractor's responsibility for injuries to employees of independent subcontractors under the so-called "common work area" doctrine.

Specifically, the court in *Latham v Barton Malow Company*, held that the proper danger upon which a court should focus when analyzing a claim against a general contractor under the "common work area" doctrine is whether a significant number of workers are exposed to the exact risk the plaintiff allegedly faced.

It is not enough that the "danger" or "risk" faced by the plaintiff is the unavoidable, perilous nature of the construction site itself. Rather, a plaintiff must prove that a significant number of workers were exposed to the particular danger to which the injured worker was exposed.

In the 1974 Michigan Supreme Court decision of *Funk v General Motors*, the high court carved out a new exception to the general rule that property owners and general contractors are normally not responsible for injuries to employees of independent subcontractors. This exception became known as the so-called "common work area" doctrine.

According to the Funk "common work area" doctrine, an injured independent subcontractor employee may sue the general contractor if it can show that the general contractor failed to take steps within its supervisory and coordinating authority to guard against readily observable and avoidable dangers, which create a high degree of risk to a significant number of workers.

Over the years, Michigan courts have parsed the "common work area" doctrine into four distinct elements, consisting of the following: (1) the general contractor failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workers (4) in a common work area. A plaintiff must satisfy all four of these elements in order to establish a legal duty owed by the general contractor.

In *Latham*, the plaintiff was a carpenter for a subcontractor on a construction site for which the defendant was the general contractor. On the day of the plaintiff's accident, he and a co-worker were moving sheets of drywall from a scissor lift to the mezzanine level of the project. In order to enter their work area, the plaintiff and his co-worker raised the lift to a height of the mezzanine and removed a cable safety barrier that surrounded the perimeter of the mezzanine.

When they began carrying the first sheet of drywall from the lift to the mezzanine, the sheet of drywall cracked, causing the plaintiff to lose his balance and fall 13 to 17 feet to the floor below. Although it was contrary to jobsite rules, the plaintiff was not wearing a fall-protection harness at

the time of his accident. It was undisputed that his accident would not have occurred if he had been wearing the required fall protection.

The plaintiff sued alleging, among other theories of liability, the defendant's negligence under the "common work area" doctrine. The plaintiff asserted that the defendant failed to ensure that he would use proper fall protection while working on the lift and the mezzanine.

The defendant moved for summary disposition, contending that the plaintiff could not establish that any worker, other than the plaintiff, failed to wear personal fall protection and, therefore, no such "readily observable and avoidable" danger existed on the construction site.

The trial court denied the motion, concluding that the plaintiff had sufficiently created a question of fact as to whether he faced the danger of working on an elevated mezzanine that did not have any permanent perimeter protection to prevent a worker from falling while loading materials onto the mezzanine. The trial court identified "working at heights on the mezzanine without perimeter protection" to be the "readily observable and avoidable danger" against which the defendant was to protect construction workers on the site.

The Michigan Court of Appeals affirmed the trial court's finding and indicated that it properly focused on the mezzanine's lack of perimeter protection, not the plaintiff's failure to use personal fall protection. The appellate court determined that a significant number of workers from other trades would be exposed to the same hazard of having to use the unprotected mezzanine opening when entering and leaving the lift.

In reversing the lower courts, the Supreme Court first noted that the fundamental issue presented in this case was identifying the "readily observable and avoidable danger," creating a risk that is the focus of the general contractor's responsibility. The high court ruled that the correct "readily observable and avoidable danger" was whether construction workers were required to work at dangerous heights without any fall protection. Indeed, the defendant required all workers to wear personal fall protection when working at heights, but the plaintiff did not follow the rule.

The court observed that heights are generally an unavoidable condition of construction work and, in and of themselves, cannot be the "readily observable and avoidable danger," which general contractors have an obligation to protect workers against. Accordingly, the "danger" that created a high degree of risk should have been correctly characterized as the danger of "working at heights without fall-protection equipment."

The Latham decision clarifies and reinforces that an injured subcontractor employee must prove that a significant number of workers on the construction site were also exposed to the precise danger to which the injured worker was exposed.

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