How Well Do You Know Your Construction Job Site?

A Recent Application (and Perhaps Expansion) of the "Common Workplace Doctrine"

By Patrick Sweeney

Fast Facts:

The "common workplace doctrine" allows employees and subcontractors to hold owners or general contractors liable for injuries on work sites where the owner or general contractor failed to take reasonable steps to guard against observable and avoidable dangers that created a risk to a significant number of workers in a common work area.

Courts have struggled when it comes to defining the "risk" to which a significant number of workers were allegedly exposed.

An unsafe practice employed by only a handful of workers could potentially subject the owner or general contractor to liability by virtue of the common workplace doctrine.

In 1974, the Michigan Supreme Court created a significant exception to the common-law rule that a general contractor or property owner may not be held liable for negligence of its independent subcontractors and their employees.[1] This exception became known as the "common workplace doctrine," and it has been employed extensively by workers in the construction industry injured by conditions on their job sites.

The rationale supporting the doctrine is quite sensible: individuals in positions of actual control over job sites have a duty to take reasonable steps to avoid unreasonably dangerous conditions on those sites. To invoke the common workplace doctrine in a negligence action against a general contractor, a plaintiff must show that:

> (1) the defendant, either the property owner or 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 workmen (4) in a common work area.[2]

The elements of the doctrine illustrate the kind of situations it was created to prevent. It seeks to provide a remedy

in cases where many workers are exposed to an unnecessary hazard, and where the defendant could have taken steps to remove the hazard. The doctrine was not created to provide recovery to a worker injured through a freak accident or by a hazardous condition the *worker* actually created. Rather, the danger must result from a failure to employ "reasonable safety measures," and the failure must be persistent or systematic and not an "occasional lapse."[3]

The common workplace doctrine is, at its core, a duty that the courts impose on general contractors to make job sites safe. It requires a court to determine what, if anything, a general contractor should have done differently to prevent an injury.

If any single case represents the difficulty inherent in drawing the fine distinctions required to apply the common workplace doctrine, that case is *Latham v Barton Malow Company*.[4] The long and tortured journey of the *Latham* case demonstrates that the interaction between the doctrine's elements can prove confusing and problematic. Specifically, the courts in *Latham* struggled with defining the actual hazard the plaintiff had faced as well as the number of workers that had been exposed to the hazard.

The plaintiff, Douglas Latham, fell from the mezzanine level of a construction project—a distance of approximately 17 feet—and was seriously injured. The mezzanine was accessible by one six-foot-wide gap in the protective barrier surrounding it, and the only way to reach the gap was by using a ladder or a lift. While moving drywall onto the mezzanine, the plaintiff used a scissor lift to raise the drywall, his partner, and himself to the entrance. Although laborers from several occupations worked atop the mezzanine, many did not use a scissor lift to transport materials to that level. Workers frequently raised materials with a forklift, and then accessed the mezzanine using a ladder. On one of the plaintiff's trips to the mezzanine, the scissor lift was parked in such a manner that there was an 18-inch gap between the mezzanine and the floor of the lift. Job site rules required that any worker crossing elevated gaps wear fall protection; the plaintiff had none. The plaintiff nonetheless attempted to traverse the space, but the drywall broke and the plaintiff slipped and fell through the gap to the ground.

The plaintiff filed suit against the general contractor, arguing that the common workplace doctrine was applicable to his injury. The defendant moved for summary disposition, which the trial court denied, and the defendant appealed. The Court of Appeals affirmed, explaining that the danger posed by the elevated mezzanine's lack of complete perimeter protection—the six-foot gap through which the mezzanine could be accessed—was shared by all employees who frequently worked on the mezzanine.[5]

The Michigan Supreme Court reversed the Court of Appeals and remanded the case to the trial court.[6] The Court criticized the Court of Appeals' analysis for failing to adequately define the risk that caused the plaintiff's injury. It was not, as the Court of Appeals had suggested, the fact that he was working at an elevated height; it was that he was working at an elevated height *without fall protection*. In other words, the plaintiff was not at risk of injury simply because he worked at an elevated height; he was at risk because he was not using any kind of fall protection while he was at that elevation. In a footnote, the Court explained that the height, on its own, could not be the relevant risk, since working at heights is an *unavoidable* risk inherent in construction projects, and the common workplace doctrine only applies to avoidable risks. Therefore, a worker cannot state a claim under the common workplace doctrine by simply alleging that his injury occurred because he was forced to work at a height above ground.[7]

The case eventually went to trial, and the plaintiff largely prevailed; the jury found that the defendant was 55 percent responsible for his injuries. The trial court denied the defendant's request for judgment notwithstanding the verdict, and the Court of Appeals affirmed.[8] It found that the defendant failed to reasonably require that the plaintiff or the plaintiff's employer install fall protection that could be used when traversing between the scissor lift and the mezzanine. Furthermore, the court explained that because there was evidence that many workers would use the mezzanine and some would likely access it via the scissor lift, a "significant" number of workers were exposed to the danger.

When the Michigan Supreme Court denied leave to appeal in 2015, the saga of *Latham* finally came to an end. However, in a dissenting statement, Justice Markman argued that the outcome in *Latham* represented a substantial, and unwise, expansion of the common workplace doctrine.[9] He pointed out that the plaintiff had *chosen* to use a method of ascending to

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the mezzanine that required fall protection even though another method that did not require fall protection (the forklift and ladder) was available. The plaintiff had also failed to offer evidence that a significant number of workers had chosen to ascend to the mezzanine using the scissor lift. The Court of Appeals' analysis, in Justice Markman's view, signaled that:

> a general contractor can now be held liable for a workplace injury arising from a risk faced by no other workers as long as the risk can either be defined in a sufficiently encompassing manner to bring within its scope workers who in all reality have faced a distinctive risk from that of the injured plaintiff or aggregated with other risks by clever exercise in classification.

In *Latham*, a general contractor was held liable for an injury suffered by a subcontractor's employee; the injury was the result of the employee's decision to engage in an expedient but unsafe course of conduct, which the plaintiff knew violated the rules of the construction site, while a safer alternative was available. The plaintiff was not required to show that a significant number of workers were engaged in the specific conduct that harmed him; rather, he merely showed that a significant number of employees were working in the same area and some were engaging in this unsafe behavior. In other words, the general contractor had an obligation to discern whether an unsafe and prohibited practice was occurring on the worksite, and then take steps to make that practice safer. The duty apparently existed regardless of how many workers were employing the specific unsafe practice that injured the plaintiff.

Whether it was ultimately decided correctly or incorrectly, *Latham* should serve as a cautionary tale to general contractors and their attorneys. General contractors face liability for workplace injuries under a judicial doctrine that still generates significant confusion and disagreement among the courts in this state. The most effective defense is proactive management and safety enforcement. *Latham* suggests that general contractors need to be aware of the practices and procedures employed by workers on their job sites, and immediately put a stop to any prohibited or unsafe behavior they observe. This requires regular observation of workplace conditions. Furthermore, general contractors should take steps to mitigate their potential liability through indemnification agreements with property owners and subcontractors. All general contractors know that a construction site is hazardous; they may not be aware, however, of the liability they may personally face if those hazards injure workers on their watch. ■

Patrick Sweeney is an associate practicing with Rhoades McKee, PC, in Grand Rapids. He concentrates in commercial litigation and dispute resolution, the defense of physicians and professionals, and appellate practice. Before joining Rhoades McKee, he served as a law clerk for the Michigan Supreme Court. He has worked on numerous construction cases and provides support for the Builders Exchange of Grand Rapids and West Michigan.

ENDNOTES

1. *Funk v Gen Motors Corp*, 392 Mich 91, 104; 220 NW2d 641 (1974).
2. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 54; 684 NW2d 320 (2004).
3. *Funk*, 392 Mich at 103.
4. *Latham v Barton Malow Co*, unpublished per curiam opinion of the Michigan Court of Appeals, issued October 17, 2006 (Docket No. 264243).
5. *Id.* at 3.
6. *Latham v Barton Malow Co*, 480 Mich 105, 114; 746 NW2d 868 (2008).
7. *Id.* at 114 n 24.
8. *Latham v Barton Malow Co*, unpublished per curiam opinion of the Michigan Court of Appeals, issued February 4, 2014 (Docket Nos. 312141 and 313606), p 12.
9. *Latham v Barton Malow Co*, 497 Mich 993; 861 NW2d 614 (2015) (Markman, J., dissenting).