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Court of Appeals underscores that the Common Work Area doctrine is a limited exception, and the Plaintiff has burden of establishing each element

By: Drew W. Broaddus **July 20, 2015**

SECREST WARDLE NOTES

Cronk reminds us that when a general contractor is sued by an employee of a subcontractor, *Latham* and related decisions continue to provide a powerful defense.

While *Funk* creates an exception to the general rule of non-liability for general contractors in these cases, it is a narrow exception. As *Cronk* reflects, it is the plaintiff's burden to establish all four *Funk* elements.

When deciding whether there was a "danger to a significant number of workers," courts may not speculate as to how many workers *might have* been exposed to the danger. Courts may only look at who actually had access to the area at the time of the plaintiff's fall. *Cronk,* unpub op at 6 n 2. The Court of Appeals has held that as many as four workers in a given area is not a "significant number" for the purposes of the fourth *Funk* factor. *Hughes v PMG Building, Inc*, 227 Mich App 1, 8-9 (1997).

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Under Michigan law, subcontractors on a construction job site are responsible for ensuring that the site is safe for their employees. Conversely, a general contractor is not responsible for a subcontractor's employee's safety. The policy behind this is simple: a subcontractor is in the best position to supervise those it directly employs. "[T]he general rule [is] that, in the absence of its own active negligence, a general contractor is not liable for the negligence of a subcontractor or a subcontractor's employee and that the immediate employer of a construction worker is responsible for the worker's job safety." *Latham v Barton Malow Co,* 480 Mich 105, 112 (2008). However, the Supreme Court created an exception to this rule in *Funk v General Motors Corp,* 392 Mich 91 (1974), known as the "common work area" doctrine.

The policy reasons for this exception were explained by the Supreme Court in *Funk* as follows:

> We regard it to be part of the business of a general contractor to assure that reasonable steps within its supervisory and coordinating authority are taken to guard against readily observable, avoidable dangers in common work areas which create a high degree of risk to a significant number of workmen. … [A]s a practical matter in many cases only the general

> contractor is in a position to coordinate work or provide expensive safety features that protect employees of many or all of the subcontractors. . . . [I]t must be recognized that even if subcontractors and supervisory employees are aware of safety violations they often are unable to rectify the situation themselves and are in too poor an economic position to compel their superiors to do so. *Funk*, 392 Mich at 104.

When the four-part test set forth in *Funk* is satisfied, a general contractor may be held liable for the negligence of employees of an independent subcontractor. To invoke the doctrine, the 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. *Cronk v De Jager Construction*, unpublished opinion per curiam of the Court of Appeals, issued July 16, 2015 (Docket No. 322310), pp 2-3.

The Court of Appeals recently applied this test in *Cronk.* In *Cronk*, the plaintiff was a subcontractor hired to install a security system in a cosmetics store that was being remodeled. He slipped and fell from his own step-ladder as he was descending it, then stumbled for several steps before allegedly striking his head on this second ladder. Plaintiff sought to impose liability upon the general contractor under the "common work area" doctrine. The general contractor – represented in the trial court and on appeal by Secrest Wardle – moved for motion for summary disposition, arguing that the plaintiff had not satisfied *any* of the four elements needed to invoke the "common work area" doctrine. The trial court agreed and dismissed the suit. Plaintiff appealed by right.

The Court of Appeals disagreed with the general contractor and the trial court with respect to the first element, finding that "defendant was the general contractor and exerted what appears to be complete control over the worksite, including the coordination of plaintiff's work." *Cronk*, unpub op at 3. Therefore, there was "at least a question of fact regarding whether defendant could have taken reasonable steps within its supervisory and coordinating authority to guard against the alleged hazard." *Id.* This made no difference, however, and the panel nonetheless affirmed after finding that the plaintiff had not met his burden as to the other three elements. As to the second element, the panel held: "It is not a readily observable and avoidable danger for a worker to stumble, six to nine feet away, off of a ladder and then somehow strike his head on a seemingly secure ladder that may have been part of a stack of ladders. In sum, plaintiff contends that the mere fact that there was equipment such as ladders on the worksite – even though they posed no obvious risk and were not obstructing any obvious work area – should be sufficient to establish a readily observable and avoidable danger." *Cronk*, unpub op at 5. While the plaintiff had claimed that stacking the ladders in this area violated various MIOSHA regulations, the panel accepted the defendant's argument that these regulations are irrelevant because they only deal with areas where "worker traffic is heavy and work materials may not be secure." *Id.* at 4.

As to the last two elements (which the panel did not need to address, but did so anyway), the Court rejected Plaintiff's position as follows:

> Here, despite plaintiff's assertion that the risk or danger was that the rows of ladders could be displaced, the precise danger at issue was the risk falling off of a ladder by one's own volition, stumbling six to nine feet away, and then hitting one's head and body on one ladder that may have been part of a stack of ladders. While plaintiff produced evidence that other contractors worked in the room, he did not produce evidence that other contractors used a

ladder to work in a similar fashion. He did not even know for how long the ladder he fell into had been there. In other words, plaintiff did not produce any evidence that a significant number of workers were exposed to the alleged danger to which he was exposed. *Cronk*, unpub op at 5-6.

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