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08.12.11

"Is It Just Me, Or Is This Thing Dangerous?" Court of Appeals Considers What Is Dangerous To A "Significant Number Of Workers" In Common Work Area Case

By Drew Broaddus

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 whom 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.

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. For a general contractor to be held liable, 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.

SECREST WARDLE NOTES:

Felty 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 *Felty* reflects, it is the plaintiff's burden to establish all four *Funk* elements.

When deciding whether there is 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 injury. 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).

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, supra* at 646.

The fourth element – "in a common work area" – proved to be dispositive in *Felty v Skanska USA Bldg, Inc,* unpublished per curiam opinion of the Court of Appeals, decided 7/19/11. Plaintiff's decedent, Felty, sustained fatal injuries when he fell from a scaffold while performing masonry work. Defendant Skanska was the general contractor for the project. Felty worked for a subcontractor, Davenport Masonry. Plaintiff nonetheless sought to impose liability on the general contractor (Skanska), arguing that the absence of a guardrail on the scaffold created a high degree of risk to a significant number of workers.

Skanska moved for summary disposition under a long line of cases that includes *Latham, supra.* The trial court granted Skanska's motion, finding that Plaintiff failed to establish that the absence of a guardrail on the scaffold created a high degree of risk to a significant number of workers. The record showed that this was a hazard created by employees of a single subcontractor, Davenport, and that only two Davenport employees were exposed to the risk. This was not a case where a general contractor required multiple trades to work at heights without any available fall protection. Davenport's own job foreman directed two Davenport employees to move the scaffold for use by two other Davenport employees (including Felty). The Davenport employees who moved the scaffold were "competent persons" to erect and move scaffolding on the job site. Their failure to install the guardrail on this occasion placed only Felty and one other Davenport worker at risk.

The Court of Appeals affirmed, and further explained that courts must evaluate the "danger to a significant number of workers" based upon the circumstances *at the time Plaintiff was injured.* Here, the area was roped off to prevent others from walking underneath the scaffold, and no other trades were using the scaffold when this occurred.

The Court of Appeals also reiterated that liability can be imposed upon a general contractor in such circumstances *only* when *all four* of the *Funk* factors are established. It was Plaintiff's burden to establish all four. Thus, Plaintiff's failure to establish the fourth factor was dispositive, and the *Felty* opinion did not address the other three factors.

CONTACT US

Farmington Hills
30903 Northwestern Highway, P.O. Box 3040
Farmington Hills, MI 48333-3040
Tel: 248-851-9500 Fax: 248-851-2158

Mt. Clemens
94 Macomb Place, Mt. Clemens, MI 48043-5651
Tel: 586-465-7180 Fax: 586-465-0673

Lansing
6639 Centurion Drive, Ste. 130, Lansing, MI 48917
Tel: 517-886-1224 Fax: 517-886-9284

Grand Rapids
2025 East Beltline SE, Ste. 209, Grand Rapids, MI 49546
Tel: 616-285-0143 Fax: 616-285-0145

www.secrestwardle.com

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CONTRIBUTORS

Construction Practice Group Chair
Robert G. Chaklos

Editor
Bonny Craft

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