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April 2008

**The Michigan Supreme Court  
Clarifies the “Avoidable Danger” element  
to the Common Work Area Exception for  
General Contractor Liability Matters**

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***CARDELLI, LANFEAR  
& BUIKEMA, P.C.***

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322 W. Lincoln  
Royal Oak, Michigan 48067  
(248) 544-1100  
(248) 544-1191 (FAX)

5537 Glenwood Hills Parkway, SE  
Suite 201  
Grand Rapids, Michigan 49512  
(616) 285-3800  
(616) 285-1150 (FAX)

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# PRACTICE POINTERS

April 2008

## Anthony F. Caffrey III

Attorney Caffrey is the partner managing the firm's appellate group, and specializes in appellate law, insurance coverage, and dispositive motion practice. Attorney Caffrey has participated in over 40 pending and resolved appeals.

### *Summary:*

**The Michigan Supreme Court clarifies the “avoidable danger” element to the “common work area” exception to general contractor liability matters.**

Under Michigan law, the general rule is that a general contractor is not liable for an injury to a subcontractor. An exception to that rule is found in the “common work area” exception, which applies where the following four elements are satisfied: (1) the defendant 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. In a recent decision, the Michigan Supreme Court upheld this firm's contention that the plaintiff must prove that the “danger” cannot be the physical characteristics of the worksite and must be truly “avoidable danger.”<sup>1</sup>

The plaintiff was an experienced carpenter for a subcontractor on a large project. He fell while moving from a scissor lift to an elevated mezzanine area. He had removed the protective cable encircling the mezzanine area so that he could access it, but did not wear personal fall protection that was required by the defendant general contractor. He fell approximately twelve

<sup>1</sup> *Latham v Barton Malow*, \_\_\_ Mich \_\_\_ (Docket No. 135036, issued April 14, 2008).

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feet, suffering severe heel injuries.

The defendant moved for summary disposition contending that the plaintiff could not establish that any worker other than the plaintiff also failed to wear personal fall protection—as necessary to show that a significant number of workmen were placed in danger. The trial court denied the motion, accepting the plaintiff's argument that subcontractors would have accessed the mezzanine area both before and after the plaintiff. The Michigan Court of Appeals affirmed, rejecting the contention that the plaintiff needed to show that a significant number of workers both accessed the mezzanine area and failed to wear personal fall protection.

The Michigan Supreme Court reversed, observing that the “danger” at

issue could not be merely accessing an elevated area. Instead, the dangerous condition was accessing an elevated area without wearing fall protection. It is the wearing of personal fall protection that converts a “danger” into an “avoidable danger.” Because the plaintiff did not submit evidence indicating that any other worker was exposed to the “avoidable danger” of not wearing personal fall protection, Plaintiff could not establish the “significant number of workers” element. As such, both lower courts erred in not granting the defendant's motion for summary disposition.

It is noteworthy that five Justices joined in the majority opinion and only two Justices dissented. This deviates from the recent trend of four-judge majority rulings.