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July 9, 2007

Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: Latham v Barton Malow
Supreme Court No. 132946
Court of Appeals No. 264243
Oakland County Circuit Court No. 04-059653-NO
Our File No. 07-10-0980

FILED
JUL 11 2007
CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

Dear Mr. Davis:

Enclosed for filing in the above-referenced matter are an original and seven copies of:

- 132946
enata
- Revised Page 22 of Plaintiff-Appellee's Supplemental Brief and
 - Proof of Service.

The revision was necessitated by the circumstances of filing this Supplemental Brief as set forth in the pending Motion to Extend Time to file that brief. I was unclear whether the deposition of David Brayton was part of the lower court record at the time of the denial of Defendant's Motion for Summary Disposition. Mr. Caffrey has pointed out, by letter dated July 5, and a telephone conversation with Mr. Garrett confirms that the deposition was not part of the lower court record. For the record, I emphasize that the references in the Supplemental Brief at page 22 in footnote 18 correctly reflected Mr. Brayton's assertions during his deposition:

"Plaintiff's expert, David Brayton, explained that safer and sturdier anchor points were necessary so that workers could be safe from falling during the inevitable times when the safety cable was down. (BRAYTON, 38, 40). He estimated that the gap through which Plaintiff fell was nine feet wide. (BRAYTON, 26)."

However, given the fact that the deposition itself was not part of the lower court record at the time of the denial of Defendant's Motion for Summary Disposition, it is appropriate to remove

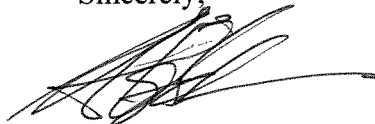
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those references from the Supplemental Brief. **Accordingly, please remove page 22 from the Supplemental Brief as originally filed and replace it with the Revised Page 22 (deleting footnote 18) enclosed herewith.**

I apologize for any inconvenience that the filing of this Revised Page 22 may cause this Court, its Clerk's Office and any of the Justices. Please note that the responsibility for the original inclusion is mine alone.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'S.G. Silverman', with a long horizontal flourish extending to the right.

Steven G. Silverman

SGS/kj

Enclosures

cc: Anthony F. Caffrey, III, Esq.

“The trial court properly concluded that a question of fact existed as to whether defendant took reasonable steps within its supervisory and controlling authority to guard against an avoidable danger. **Even if plaintiff would not have taken instruction from defendant on how to perform his job, this did not prevent defendant from asserting its authority regarding safety on the job.**^[17] Defendant’s superintendent admitted that he had the authority to tell an individual to stop working if he was doing something in an unsafe manner. Defendant was responsible for ensuring that the safety cable on the mezzanine was in place to protect against falls, but **it was foreseeable that each subcontractor that worked on the mezzanine would have to remove that cable to access the mezzanine. A jury could find that defendant should have taken other steps to ensure that all workers accessing the mezzanine were adequately protected from falls when the safety cable had to be removed.**”

Latham v Barton-Malow Company, unpublished opinion per curiam of the Court of Appeals, issued October 17, 2006 (Docket No. 264243) (Exhibit 9 to Defendant’s Answer), 4 (emphasis added).

2. **"High Degree of Risk to a Significant Number of Workers" Element**

In addition, the hazard identified by Defendant’s construction superintendent posed a high degree of risk to a significant number of workers. Plaintiff’s Answer at 2-7. Once again, reference to the Court of Appeals opinion is appropriate:

¹⁷To the extent that Defendant could prove that Plaintiff did not follow the safety instructions promulgated by Defendant and/or that Plaintiff did not avail himself of the safety features mandated by Defendant, a jury could find Plaintiff comparatively negligent to some degree. Reaffirming the historical interpretation of the *Funk-Ormsby* test, an interpretation that comports with policy and logic, does not mean that any party is being held liable for negligence that is not uniquely theirs. Personal responsibility still plays an important role in the ultimate outcome of the litigation. Finally, the injured worker cannot “double-dip” as he would be required, in the event of a damages award in his favor, to pay back from that award workers’ compensation benefits hitherto paid on the basis of the collateral source rule.

