RECENT DEVELOPMENT

C & M BUILDERS, LLC V. STRUB: A DUTY OF CARE UNDER THE MULTI-EMPLOYER WORKPLACE DOCTRINE DID NOT EXTEND LIABILITY TO A SUBCONTRACTOR THAT CREATED A HAZARD BUT EXERCISED NO CONTROL OVER THE WORKSITE AT THE TIME OF THE ACCIDENT; ASSUMPTION OF RISK WAS ESTABLISHED AS A MATTER OF LAW AND MOTION FOR JUDGMENT WAS IMPROPERLY DENIED.

By: Shannon Laymon-Pecoraro

The Court of Appeals of Maryland held that neither the Maryland Occupational Safety and Health Act ("MOSHA") nor the Federal Occupational Safety and Health Act ("OSHA") extends a duty of care to a non-employee after the employer has left the worksite and lacks control over worksite conditions. *C & M Builders, LLC v. Strub,* 420 Md. 268, 22 A.3d 867 (2011). The Court of Appeals of Maryland further held assumption of the risk is established as a matter of law when the facts are undisputed. *Id.* at 291, 22 A.3d at 880.

Bayside Builders, Inc. ("Bayside") subcontracted C & M Builders, LLC ("C & M") to construct floors, roofs, and walls on multiple floors of a three-story row home in Baltimore. C & M constructed staircase openings in the floors, as stipulated by the contract, and installed temporary ladders to facilitate movement of workers and materials between floors. Upon completion, C & M removed and trashed the ladders, and pursuant to Bayside's request, left floor openings uncovered.

Three weeks later, Bayside subcontracted Comfort Masters Cooling and Heating, Inc. ("Comfort") to install HVAC equipment and duct work. Two days after executing the contract, Comfort sent Wayne Nocar ("Nocar") and two other employees to work on the property, with knowledge that stairs were not yet installed. Comfort's employees, however, found that the discarded ladders were reinstalled, and utilized them to perform their duties. Although the employees realized that their work on the third floor could not be completed, because they failed to bring parts necessary for completion, Nocar remained on the third floor by himself after his co-workers descended to other floors of the house. A ladder was unavailable when Nocar was ready to leave the third floor, so he impatiently stated to his co-workers that he would just climb down. Shortly thereafter, Nocar fell from the third story to his death.

Kelly Lynn Strub ("Strub"), the mother of Nocar's son, sued C & M for negligence, relying on MOSHA and OSHA to establish a statutory

duty of care. At trial, C & M successfully moved *in limine* to preclude expert testimony regarding the statutory duty of care owed by C & M under MOSHA and OSHA. C & M also filed a motion for judgment, arguing that Nocar assumed the risk and was contributorily negligent. The trial judge, rather than making a judgment as a matter of law, sent the case to jury. The jury found in favor of C & M and Strub subsequently appealed. The Court of Special Appeals of Maryland affirmed in part and reversed in part, concluding that the case was properly submitted to the jury, the expert testimony was erroneously excluded, and C & M had a duty to maintain a safe workplace. C & M petitioned for a writ of certiorari to the Court of Appeals of Maryland.

Reviewing the case *de novo*, the Court of Appeals of Maryland first stated that MOSHA section 5-104(a) imposes a statutory duty on an employer to maintain a safe workplace for their employees. *C & M Builders,* 420 Md. at 278-79, 22 A.3d at 872-73. Since Nocar was not C & M's employee, the court concluded that the intermediate appellate court was erroneous in holding that C & M owed such a duty to Nocar. *Id.* at 278-79, 22 A.3d at 872-73. The Court of Appeals of Maryland instead looked to the specific duty clauses of MOSHA section 5-104(b) and OSHA section 654(a)(2), which "creates a specific duty to comply with standards for the good of all employees on a multi-employer worksite." *Id.* at 279, 22 A.3d at 873 (quoting *Solis v. Summit Contractors, Inc.,* 558 F.3d 815, 818 (8th Cir. 2009)). To help establish what duty, if any, an employer owes to a non-employee on a multi-employer worksite, the court looked to federal case law. *C & M Builders*, 420 Md. at 280-81, 22 A.3d at 874. In doing so, the court found that a duty extends to non-employees when evidence demonstrates that a creating employer has a foreseeable duty to maintain and remedy the danger created. *Id.* (citing *Brennan v. OSHRC,* 513 F.2d 1032, 1037-39 (2d Cir. 1975)).

The Court of Appeals of Maryland then focused on the exclusion of expert testimony, finding such testimony is proper to establish a duty of care under MOSHA when an injured party is a member of a protected class and the injury is one the law is intended to prevent. *C & M Builders,* 420 Md. at 281, 22 A.3d at 874. Furthermore, a violation of MOSHA and OSHA, according to the court, does not establish negligence *per se*, but may serve as evidence of that employer's breach of the industry standard. *Id.* at 282, 22 A.3d at 875.

The court, however, expressly rejected application of the "creating employer" doctrine in this case, finding MOSHA and OSHA inapplicable to establish the duty of care. *C & M Builders,* 420 Md. at 281, 22 A.3d at 874. In rejecting this doctrine, the court noted that the Fourth and Fifth Circuits have also declined to accept it. *Id.* at 284, 22 A.3d at 876. Further, circuits that adopt the doctrine limit its application to the review

of administrative actions where evidence demonstrates a "creating employer" maintained or controlled the hazardous area. *Id.* Therefore, a "creating employer" owes a duty to non-employees when there is "evidence of a continued presence, responsibility, maintenance, etc. at the worksite." *Id.* at 285, 22 A.3d at 877. In this case, while C & M created the staircase openings, C & M maintained no control over the site, completed its contract, and left the worksite before the accident. *Id.* at 286, 22 A.3d at 877. As a result, the Court of Appeals of Maryland concluded that the intermediate appellate court erred in adopting and applying the "creating employer" doctrine, and that the trial court correctly excluded the expert testimony. *Id*. at 286-87, 22 A.3d at 878.

The Court of Appeals of Maryland then turned to C & M's motion for judgment based on assumption of the risk. *C & M Builders,* 420 Md. at 289, 22 A.3d at 879. The court noted that, when a defendant moves for judgment on an affirmative defense, the trial court must determine if, in considering evidence and reasonable inferences in a light most favorable to the opposing party, there is a factual question for the jury. *Id.* at 290-91, 22 A.3d at 880. To prove assumption of the risk, a party must demonstrate that the plaintiff had knowledge of, appreciated, and voluntarily faced the risk. *Id.* at 293, 22 A.3d at 881-82. The standard requires the trial court to determine whether a person of average intelligence would have understood the danger if they were in the plaintiff's position. *Id.* at 294, 22 A.3d at 882.

The court noted that anyone of adult age must appreciate certain dangers, such as falling through unguarded openings. *C & M Builders,* 420 Md. at 295, 22 A.3d at 883 (citing *Morgan State Univ. v. Walker*, 397 Md. 509, 515, 919 A.2d 21, 25 (2007)). According to the court, evidence in this case clearly demonstrated Nocar voluntarily continued to work on the third floor and was aware of the openings below him. *C & M Builders*, 420 Md. at 298-99, 22 A.3d at 884-85. Additionally, the hazards and potential injury stemming from the opening would be obvious to anyone of average intelligence. *Id.* at 299, 22 A.3d at 885. As a result, Nocar knew of, appreciated, and voluntarily confronted the risk. *Id.* The court determined that in such situations, where the standard is satisfied by undisputed facts, the matter is an issue for the court. *Id*. The Court of Appeals of Maryland accordingly held that Nocar assumed the risk and the trial court erred in denying C & M's motion. *Id.*

In *C & M Builders*, the Court of Appeals of Maryland rejected a broad application of the "creating employer" doctrine. Instead, the court placed a duty on those in control of the worksite, thus decreasing the incentive for subcontractors to address hazards, and potentially imposing liability on the general contractor. While general contractors typically incorporate indemnity provisions into contracts, attorneys should ensure provisions cover situations of shifting liability to hold subcontractors liable for the

dangers created by them. On the other hand, plaintiffs' attorneys should closely analyze contracts to see who may be held liable for injuries, and, if necessary, determine that a subcontractor still maintained control over the worksite.