

# Broadening of the Recalcitrant Worker Defense in Labor Law Actions

Labor Law §240(1) imposes liability on owners and general contractors for injuries incurred by workers who suffer a gravity-related accident. Among the few defenses to this statute is the so-called "recalcitrant worker defense," a circumscribed defense that had previously been unavailing to defendants except in the most extreme cases.

In the past, this affirmative defense required a defendant to prove that the injured worker refused to use an available safety device after being specifically and immediately instructed to do so and that this refusal proximately caused the accident.

In a recent line of cases, however, courts across New York State have begun to broaden the applicability of this defense, which is sometimes subsumed under the more popular "sole proximate cause" theory.

In *Blake v. Neighborhood Housing Services of New York City*,<sup>1</sup> the Court of Appeals reiterated that liability under the Scaffold Law is contingent upon a finding of a statutory violation that proximately caused the plaintiff's injury. Accordingly, where an employee is provided with adequate safety equipment, the "sole proximate cause" of the accident must be the plaintiff's own conduct.

Sole proximate cause breaks down into two distinct areas: worker misuse of a proper safety device, as in *Blake*, or the refusal to use available safety equipment. The latter of the two, i.e., the refusal to use available safety equipment, essentially equates to the recalcitrant worker defense.<sup>2</sup>

The weakening of the necessity of close temporal proximity between an order to use the safety equipment and the occurrence of an accident began in the Court of Appeals case *Cahill v. Triborough Bridge and Tunnel Authority*.<sup>3</sup> In



By  
**Andrea M.  
Alonso**



And  
**Kevin G.  
Faley**

*Cahill*, plaintiff was employed in the rehabilitation of the Triborough Bridge. His work required him to climb wall-like structures on the bridge known as "forms." A manlift was sometimes available for this purpose, but when it was unavailable, employees were expected to climb and descend using safety lines affixed to the forms.

Several weeks prior to the accident, plaintiff's supervisor observed him climbing a form

A circumscribed defense that had previously been unavailing to defendants except in the most extreme cases gains traction.

without using a safety line and corrected his behavior. On the day of the accident, however, plaintiff opted not to use a safety line while descending and suffered a fall of 10 to 15 feet.

The Appellate Division, First Department, found the recalcitrant worker defense inapplicable because the defendant did not show that plaintiff had "disobeyed an immediate instruction to use a harness or other actually available safety device."<sup>4</sup> (Emphasis supplied.) The Court of Appeals reversed, finding "in this case... where an employer has made available adequate safety devices and an employee has been instructed to use them, the employee may not recover under Labor Law §240(1) for injuries caused solely by his violation of those instructions, even though the instructions were given several weeks before the accident occurred"<sup>5</sup> (emphasis added).

Significantly, the Court found it

unnecessary to show that plaintiff disregarded an immediate instruction: "[Plaintiff] was not the less recalcitrant because there was a lapse of weeks between the instructions and his disobedience of them." The Court set forth the standard for the recalcitrant worker defense in future cases: a defendant must prove plaintiff "had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured."

The Court of Appeals continued to expand the recalcitrant worker defense in *Montgomery v. Federal Express Corp.*, 4 N.Y.3d 805, 795 N.Y.S. 490 (2005). In *Montgomery*, the plaintiff sustained injuries when he jumped down to the roof level of a building from an elevator motor room located approximately four feet above the roof. Although stairs from the roof to the room had been removed and there was no ladder in the immediate vicinity, ladders were available at the job site. The plaintiff climbed to the motor room by standing on an inverted bucket. However, when the plaintiff was leaving the motor room, the plaintiff jumped down to the roof, injuring his knee.

The Court, in affirming the Appellate Division, noted that "since ladders were readily available, plaintiff's 'normal and logical response' should have been to go get one. Plaintiff's choice to use a bucket to get up, and then to jump down, was the sole cause of his injury."

Courts will allow juries to infer the availability of additional safety equipment from the mere fact that other employees on site were using them. In *Mulcaire v. Buffalo Structure Steel Construction Corp.*, 45 A.D.3d 1426, 846 N.Y.S.2d 838 (4th Dept. 2007) the plaintiff was injured while installing floor decking in a building under construction. The plaintiff slipped and fell through an uncovered opening 18 feet to the floor below. The defendants established that there were extra sheets of decking available to the plaintiff for safety purposes.

ANDREA M. ALONSO and KEVIN G. FALEY are partners at Morris Duffy Alonso & Faley. CHRISTOPHER POLIZANO, a paralegal at the firm, assisted in the preparation of this article.

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The court, in denying plaintiff's motion for summary judgment, found a question of fact as to whether the plaintiff "based on his training, prior practice and common sense, knew or should have known to cover the opening and similar openings."

In *Ortega v. Catamount Construction Corp.*,<sup>8</sup> the lower court found an issue of fact when plaintiff claimed there was no scaffolding in the area where he was working, but admitted that other workers were using a scaffold, whereas he was using a ladder. Plaintiff could offer no explanation why he was only using a ladder when the other workers were all using the scaffolding. On appeal, the court held the defendant had met its burden of establishing available proper safety equipment in the area where the accident occurred and that there was an issue of fact for the jury as to whether plaintiff was a recalcitrant worker.

## Burden on Defendant

It should be noted that it is the defendant's burden to present evidence sufficient to raise an issue of fact whether or not a plaintiff knew or should have known to use an available safety device.

In *Ganger v. Anthony Clamato/ACP Partnership*, 53 A.D.3d 1051, 862 N.Y.S.2d 670 (4th Dept. 2008), the plaintiff fell through a skylight hole while installing roofing on a

home under construction. While the defendant contended that the plaintiff should have covered the skylight holes with two-by-six foot scaffolding planks, the defendants presented no evidence that they provided planks to plaintiff or instructed him to use them to cover the skylight holes. Defendants also failed to raise an issue of fact whether plaintiff's "normal and logical response" should have been to go get the scaffolding planks (citing *Montgomery*) or whether plaintiff, based on his training, prior practice and common sense knew or should have known to cover the opening with scaffolding planks (citing *Mulcaire*).

In *Morin v. Machnick Builders, Ltd.*,<sup>7</sup> plaintiff, a painter employed by a subcontractor, was injured in a work-related accident when the extension ladder upon which he was standing kicked out from underneath him. A worker at the site testified at an examination before trial that the sidewalk was covered by ice, that he warned plaintiff not to utilize a ladder in those icy conditions, and that he advised plaintiff to tie it down or brace it against a truck to secure it if he decided to climb it. Plaintiff told him he would put a sheet of plywood underneath the ladder. After the accident, the coworker saw the piece of plywood near the fallen ladder, which had apparently slid off the plywood.

The court found that the worker's use of an unsecured ladder with no safety devices without waiting for assistance from his colleague did not render him recalcitrant,

what evidence is sufficient to create a question of fact as to whether or not the plaintiff made use of available safety devices. In *Gallagher v. New York Post*,<sup>9</sup>

the plaintiff was cutting through steel decking with a gas powered circular cutter saw when the saw became bound up in the decking. This, in turn, caused the plaintiff to be thrown a distance of approximately 14 feet into an

opening in the floor were to be in a harness tied off. The court found that this evidence was sufficient, at least at that juncture, to raise issues of fact whether the plaintiff was provided with adequate safety devices, was instructed to use them and declined to do so, thus rendering his actions the sole proximate cause of his injuries. Additionally, the testimony of a co-worker that contradicts the version of the accident as testified to by the plaintiff may be sufficient to create a question of fact and deny a motion for summary judgment under §240(1) of the Labor Law.

## In *Pedigrew v. St. Martin's Cement, Inc.*

In *Pedigrew v. St. Martin's Cement, Inc.*,<sup>10</sup> the plaintiff claimed that he had tied off his safety harness and lanyard (a connection between the harness and an anchor) to a pad eye (a piece of iron or steel with a hole cut in the middle and welded to a metal surface for use as a tie off) while he was working atop a scaffold removing spider beams. The scaffold collapsed and the plaintiff was granted summary judgment at the trial level.

The Appellate Division, Third Department reversed based on the testimony of plaintiff's coworker. The co-worker testified at his deposition that as the plaintiff was cutting a beam, the beam fell on top of the plaintiff, knocking the plaintiff and scaffold to the ground. The plaintiff was pinned to the ground under the spider beam. When the co-worker lifted the spider off the plaintiff

opening in the floor. The plaintiff testified that he was not provided with any safety devices and this was corroborated by the affidavit of the plaintiff's co-worker and the testimony of the plaintiff's own foreman.

In opposition to the motion for summary judgment, the defense provided the testimony of the plaintiff's employer's assistant project manager who testified that the ironworkers were required to use certain safety devices, such as lanyards, cables or harnesses, when working near open areas; that these devices were used to prevent injury in case a worker fell through an opening or off an elevated surface; that the safety devices were available on the job site the day the plaintiff was injured; and that a standing order was in place that all workers operating around any

## Evidence Needed

Recently, the First Department addressed the issue of

and removed the plaintiff's harness and lanyard, the co-worker discovered that the lanyard was not attached to the harness (and probably not attached to the pad eye, either).

The recalcitrant worker defense denies the statutory protection to workers who have adequate safety devices available but refuse to use them. It has evolved from a defense of limited value to one of broader application, as workers will no longer be permitted to excuse themselves from using available safety equipment and courts continue to hold workers responsible, at least to a certain extent, for their own safety.

1. N.Y.3d 280, 803 N.E.2d 757, 771 N.Y.S.2d 484 (2003).

2. The merger of these two prongs, misuse and refusal, is illustrated in the case of Robinson v. East Medical Center. In Robinson, an employee knew that he needed an eight-foot ladder to perform his task and knew where such ladders were located at the job site, but chose to use a six-foot ladder instead. The Court of Appeals found that "It is held liable, an owner or contractor must breach the statutory duty under the Scaffold Law to provide a worker with adequate safety devices, and this breach must proximately cause the worker's injuries; these prerequisites do not exist if adequate safety devices are available at the job site, but the worker either does not use or misuses them" (emphasis added).

3. 4 A.D.3d 236, 771 N.Y.S.2d 655 (1st Dept. 2004).

4. 4 A.D.3d 241, 771 N.Y.S.2d 659 (1st Dept. 2004).

5. 4 N.Y.3d 75, 823 N.E.2d 639 (2004).

6. 226 A.D. 2d 154, 640 N.Y.S.2d 99 (1st Dept. 1996).

7. 4 A.D.3d 668, 772 N.Y.S.2d 388 (3d Dept. 2004).

8. 19 A.D.3d 1176, 798 N.Y.S.2d 813 (4th Dept. 2005).

9. 55 A.D.3d 488, 866 N.Y.S.2d 178 (1st Dept. 2008).

10. 57 A.D.3d 1266, 870 N.Y.S.2d 556 (3d Dept. 2008).