

STATE OF MICHIGAN
IN THE SUPREME COURT

DOUGLAS LATHAM,

Plaintiff-Appellee,

Supreme Court Nos. 148928
148929

v

BARTON MALOW CO.,

Defendant-Appellant,

Court of Appeals Nos. 312141
313606

Oakland County Circuit
Court No. 04-059653-NO

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**PLAINTIFF-APPELLEE'S ANSWER TO DEFENDANT-APPELLANT
BARTON MALOW COMPANY'S APPLICATION FOR LEAVE TO APPEAL**

ORAL ARGUMENT REQUESTED

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**STATEMENT EXPLAINING WHY BARTON MALOW'S
APPLICATION FOR LEAVE SHOULD BE DENIED**

MCR 7.302(B) requires that an Application for Leave to Appeal must show one or more of the reasons enumerated therein. It is there that the analysis of whether Barton Malow's Application for Leave to Appeal should be granted or denied must begin. While six reasons are listed in the sub-rule, some can be ruled out summarily. This case does not involve the validity of a legislative act. MCR 7.302(B)(1). This case does not involve the State of Michigan, a state agency or subdivision or an officer of the state, a state agency or subdivision. MCR 7.302(B)(2). This case does not involve an appeal from the Attorney Discipline Board. MCR 7.302(B)(6). Barton Malow's Application for Leave to Appeal is not brought prior to a decision by the Court of Appeals. MCR 7.302(B)(4).

That leaves two possibilities for Barton Malow. In the section of its Application entitled, "Statement of Why Leave Should Be Granted," Defendant mentions both remaining alternatives (Defendant's Application at vii-xii). Accordingly, in this section of Plaintiff's Answer to Defendant's Application, Plaintiff will examine the putative applicability of MCR 7.302(B)(3) and MCR 7.302(B)(5) to the issues presented in Defendant's Application. Such examination will demonstrate, of itself, why Barton Malow's Application should be denied by this Court.

MCR 7.302(B)(5) requires Barton Malow to establish that the Court of Appeals decisions at issue are "clearly erroneous and will cause material injustice or the decisions conflict with a Supreme Court decision or another decision of the Court of Appeals." The terms "material injustice" and "clearly erroneous" are not defined by the sub-rule. Plaintiff submits that those terms must be viewed in the context of the case from which a pending application stems.

At bottom, the dispositive question in this case is the applicability of the common work area liability doctrine. The common work area liability doctrine is a creature of common law. It

is, therefore, appropriate to review the origin and development of the common work area liability doctrine.

The common work area liability doctrine was announced by this Court in *Funk v General Motors Corporation*, 392 Mich 91; 220 NW2d 641 (1974). There, Ellis Funk had been ordered to move piping on the superstructure of a General Motors plant. This Court continued:

To move the piping, Funk climbed onto the beams just as he had when they were initially hung. From this position he hammered the hooks holding the piping. Because of roof slabs which by then had been added, he was unable to reach some of the hooks and went onto the roof. He removed some slabs and was injured when he lost his balance and fell more than 30 feet to the ground.

The immediate cause of the accident was the manner in which Funk chose to complete the assigned task. By removing the roof slabs, he opened a hole in the roof and then slipped through the opening. This case, says General Motors, “is a classic example of the man who, in a sense, dug a hole and regrettably fell into it”.

Id. at 100 (emphasis added). The Court of Appeals seized on that fact in granting a judgment notwithstanding the verdict to the defendants, general contractor Darin & Armstrong and the plant owner, General Motors. *Id.* at 99.

This Court reversed, announcing the common work area liability doctrine:

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.

Id. at 104 (emphasis added).

That is the portion of *Funk* that is most often quoted and cited to. But that iteration of the common work area liability doctrine did not spring from whole cloth. There was a carefully considered policy behind it. It is that policy that is significant here:

The policy behind the law of torts is more than compensation of victims. It seeks also to encourage implementation of reasonable safeguards against risks of injury.

Placing ultimate responsibility on the general contractor for job safety in common work areas will, from a practical, economic standpoint, render it more likely that the various subcontractors being supervised by the general contractor will implement or that the general contractor will himself implement the necessary precautions and provide the necessary safety equipment in those areas.

*Id.*¹

Indeed, safety in the workplace is even more paramount on construction sites as this

Court recognized:

Mishaps and falls likely occurrences in the course of a construction project. To completely avoid their occurrence is an almost impossible task. However, relatively safe working conditions may still be provided by implementing reasonable safety measures to prevent mishaps from causing aggravated injuries such as those suffered by Funk. Funk's injuries probably would have been kept to a minimum or avoided altogether if there had been provided either suspending nets, scaffolding, bucket cranes, safety belts or harnesses.

* * * *

This was not an unusual construction job. The risk--slip and fall--was not unique. Reasonable safeguards against injury could readily have been provided by taking well-recognized safety measures.

Id. at 102-103, 110.

This Court also recognized that the fact that Funk was the only person injured due to his creation of the hole through which he eventually fell was not dispositive as to the liability of the general contractor:

On the same analysis, even though Funk fell from the roof, and not the beams, the jury could properly conclude that the failure to provide any safety equipment anytime anywhere for men working over 30 feet above the ground was the cause in fact of Funk's injury.

Id. at 115-116.

¹From a societal perspective, preventing injuries is the best possible outcome from both a humanistic and economic standpoint. Once a loss has occurred, a loss has occurred. Any ensuing litigation merely allocates the costs of the loss.

The next milestone decision by this Court regarding the common work area liability doctrine was *Groncki v Detroit Edison Company*, 453 Mich 644; 557 NW2d 289 (1996). The opinion covered three cases consolidated for decision. One of those cases was *Bohnert v Detroit Edison Company*. The plaintiff's decedent, Wendell Bohnert, was electrocuted at a home construction site. Defendant Carrington Homes was the general contractor. This Court described how the accident occurred:

No one was on the site when Mr. Bohnert arrived, so he began to unload his truck unsupervised. In doing so, despite the presence of specific warnings on the truck, Mr. Bohnert deployed the boom of his truck beneath power lines. Unfortunately, the boom touched the power lines and Mr. Bohnert was killed.

Id. at 652.

Carrington Homes was granted summary disposition in the trial court. The Court of Appeals reversed. *Id.* at 653-654. This Court affirmed, finding questions of fact as to the elements of the common work area liability doctrine. *Id.* at 664-665.

Eight years after it decided *Groncki*, this Court decided *Ormsby v Capital Welding, Inc.*, 471 Mich 45; 684 NW2d 320 (2004). In describing the origin of the common work area liability doctrine, this Court explained its application to the facts of *Funk*:

Applying these new doctrines to the facts in *Funk*, the Court noted that Funk had largely created his own circumstances because he essentially “dug a hole and ... [he] fell into it,” *id.* at 100, 220 NW2d 641. The general contractor, Darin, was fully knowledgeable of the subcontractor's failure to implement reasonable safety precautions for a readily apparent danger where such precautions likely would have prevented Funk's fall.

Id. at 55.

It is instructive that this Court in *Ormsby* made mention of Justice COLEMAN's dissent in *Funk* and her concern that the common work area liability doctrine would “devolve in practice into a strict liability regime where the entity with supervisory and coordinating authority would

be responsible for any common work area injury that an employee of an independent subcontractor suffers.” *Id.* at 56. This Court observed that her concerns “have not come to fruition.” *Id.* (footnote omitted).

The most recent significant decision from this Court regarding the common work area liability doctrine is *Ghaffari v Turner Construction Company*, 473 Mich 16; 699 NW2d 687 (2005), decided almost precisely one year after *Ormsby*. The question before this Court was whether the “open and obvious danger” doctrine can be applied to a construction site and in an action against an entity with supervisory and coordinating authority. In a unanimous opinion, this Court held that it could not. It is the reasoning of this Court in support of its holding that is significant here.

This Court quoted extensively from *Funk* in laying out both the iteration of the doctrine and the policy that underlays the doctrine. *Id.* at 20, 20-21. This Court then enumerated the elements of the doctrine as set forth by this Court in *Ormsby*. *Id.* at 21. After discussing the “open and obvious” doctrine applicable to premises liability causes of action, this Court explained how the doctrines serve “different objectives:”

First, our jurisprudence makes clear that the two doctrines are applicable in entirely different contexts. The open and obvious doctrine is specifically applicable to a premises possessor. The common work area doctrine, meanwhile, is not applicable to the premises possessor, but rather to a **general contractor whose responsibility it is to coordinate the activities of an array of subcontractors**.

Id. at 23 (citations omitted) (emphasis added).

This Court continued:

A second distinction between the two doctrines that our cases make apparent concerns the issue of worker safety. We note that the application of the open and obvious doctrine in the construction setting would conflict with the reasoning underlying this Court’s holding in [*Hardy v Monsanto Enviro-Chem Systems, Inc.*, 414 Mich 29; 323 NW2d 270 (1982)], because **it would largely**

nullify the doctrine of comparative negligence in the construction setting, and effectively restore the complete bar to a contractor's liability abolished when *Hardy* eliminated contributory negligence in that setting.

Id. at 25-26 (emphasis added).

Yet even more important to this case is the third distinction identified by this Court:

As a third distinction between the two doctrines, we offer a final observation grounded in the nature of the different harms confronted in the realms in which each doctrine is applicable. In particular, there exist **unique and distinct attributes of the construction setting** that would make the rules applicable in the typical premises liability setting inappropriate.

Id. at 27-28 (emphasis added).

This Court then delineated just what those “unique and distinct attributes of the construction setting consist:

Construction sites typically involve the coming and goings of multiple subcontractors and their materials, a physical venue that is constantly being subjected to alteration, with any number of open hazards that are evolving by the moment. The hazards existing at construction sites are numerous and may typically come from any one of three dimensions, including from above. These hazards may often be in motion. Loud and sudden noises may surround and distract the construction worker, with many of these noises emanating from the dangerous activities carried out by fellow workers who may be near. Nonetheless, at the same time that he or she is confronted with such an environment, the construction worker must move at a business-like pace in order to carry out his or her job--one that may require considerable physical exertion, and require attention to detail and compliance with demanding professional standards--in a timely manner.

Id. at 28.

This Court thus observed:

While the construction worker still bears the responsibility of carrying out his or her work in a reasonable and prudent manner, the worker will typically encounter more dangers of a more diverse character and more distractions coming from more directions, than will persons shopping in retail establishments or walking in parking lots or visiting the residences of others, and will generally be less able to avoid a given hazard than the typical invitee or licensee, even if the hazard may be seen after the fact as open and obvious.

Id. at 28-29.

Accordingly, this Court concluded:

It is the general contractor who has the **coordinating power and supervisory authority** to ensure that this unusual array of physical risks does not devolve into chaos, and it is the general contractor upon whom ultimate responsibility for the safe completion of a project rests. **As the overall coordinator of this activity, the general contractor is best situated to ensure workplace safety at the least cost. Because of this position, the duty to keep common work areas safe reasonably falls on the general contractor.**

Id. at 29 (emphasis added).

It is instructive to compare this paragraph to that formulated by this Court in *Funk* over thirty years prior:

Placing ultimate responsibility on the general contractor for job safety in common work areas will, from a practical, economic standpoint, render it more likely that the various subcontractors being supervised by the general contractor will implement or that the general contractor will himself implement the necessary precautions and provide the necessary safety equipment in those areas.

392 Mich at 104 (emphasis added). The two statements of the policy behind the common work area liability doctrine are functionally identical and most recently decided by unanimous decision. This Court has consistently maintained this policy and its decisions do not manifest any indication that the policy should be altered. Indeed, if *Funk* and *Bohnert* were being decided contemporaneously with *Ghaffari*, the results should be the same as when they were actually decided.

Accordingly, Plaintiff submits that the substantive issues presented by Barton Malow's Application for Leave to Appeal should be analyzed in the light of the policy that constitutes the conceptual basis for the common work area liability doctrine.

In Issue I of its Application, Barton Malow contends that its contractual designation as a "construction manager" should absolve it from any liability under the common work area

liability doctrine. Barton Malow contends that this Court should revisit this Court's statement in *Ghaffari* that, "[a]lthough, under the terms of its contract with the premises owner, Turner was in fact a 'construction manager', and not a 'general contractor', **the distinction is one without a difference** for purposes of our analysis in this case." 473 Mich at 19, n 1 (emphasis added).

As more fully set forth in Issue I of this Answer, the nomenclature used by Barton Malow is not relevant because Barton Malow assumed and carried out the duties of a general contractor as defined by this Court in *Funk* and *Ghaffari*. Of equal importance, however, is the fact that adoption of Barton Malow's argument would wholly gut the policy behind the common work area liability doctrine as the term "general contractor" would exit the lexicon used in construction contracts. On that basis, the question presented by Barton Malow in Issue I neither "involves legal principles of major significance to the state's jurisprudence" nor is the decision of the Court of Appeals – which is consistent with this Court's opinions – "clearly erroneous" to the point that it would "cause material injustice." MCR 7.302(B)(3); (B)(5).

Similarly, in Issue II of its Application, while couching its argument in terms of an erroneous or conflicting jury instruction given by the trial court, the gravamen of Barton Malow's argument is a disagreement as to the appropriate interpretation of element 3 of the common work area liability doctrine: that created a high degree of risk to a significant number of workmen. Seizing upon one sentence contained in a footnote in *Ormsby*, Barton Malow contends that the determination of whether there exists the requisite number of workers exposed to the risk must be made in a "snapshot" taken at the precise moment the injury occurs.

As more fully set forth in Issue II of this Answer, Barton Malow's contention has been explicitly rejected in opinions of the Michigan Court of Appeals and the United States Court of Appeals for the Sixth Circuit. Once again, however, of equal importance is the fact that Barton

Malow's argument would, if adopted, severely undermine the policy that is the basis of the common work area liability doctrine, as liability would be imposed in a wholly capricious manner without any relation to the actual factual context of the situation. As with Issue I, on that basis, the question presented by Barton Malow in Issue I neither "involves legal principles of major significance to the state's jurisprudence" nor is the decision of the Court of Appeals – which is consistent with this Court's opinions – "clearly erroneous" to the point that it would "cause material injustice." MCR 7.302(B)(3), (B)(5). Further, the Court of Appeals opinion does not conflict with a decision of this Court or of the Court of Appeals. MCR 7.302(B)(5). Indeed, the opinion of the Court of Appeals is consistent with the decisions of this Court previously identified in this Statement.

Issue III of Barton Malow's Application is a straightforward argument that it is entitled to a directed verdict or judgment notwithstanding the verdict. The fact that Barton Malow found it necessary to reargue its case by highlighting only evidence it felt aided its position and, for all intents and purposes, ignored the other evidence in the case of itself demonstrates that the opinion of the Court of Appeals in this regard is not "clearly erroneous" to the point that it would "cause material injustice." MCR 7.302(B)(5).

Finally, in Issue IV of its Application, Barton Malow takes issue with an earlier opinion of the Court of Appeals in this case in which that court concluded that the trial court abused its discretion in ruling that this Court's Order of remand in *Latham v Barton Malow*, 480 Mich 105 (2008), mandated that the scope of its review was limited to the record pending before the trial court at the time of oral argument on its original motion for summary disposition. The Court of Appeals found that the trial court's Opinion and Order Regarding Defendant's Motion for Summary Disposition of January 23, 2009 was based upon a mistake of law. A court can abuse

its discretion through a mistake of law. The Court of Appeals opinion in question was not “clearly erroneous” to the point that it would cause “material injustice” and does not involve a legal principle “of major significance to the state’s jurisprudence.” MCR 7.302(B)(3), (B)(5).

In light of the foregoing and as amplified by the remainder of this Answer. Plaintiff-Appellee, DOUGLAS LATHAM, requests that this Court **deny** Barton Malow’s Application for Leave to Appeal.

CONCURRENCE IN STATEMENT OF JURISDICTION

Plaintiff-Appellee, DOUGLAS LATHAM, concurs in the Statement of Jurisdiction set forth in Defendant Barton Malow Company's Application for Leave to Appeal.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

- I. DID THE NOMENCLATURE BY WHICH BARTON-MALOW SOUGHT TO ESCAPE LIABILITY AS A MATTER OF LAW UNDER THE COMMON WORK AREA LIABILITY DOCTRINE CONSTITUTE A DISTINCTION WITHOUT A DIFFERENCE?

Plaintiff-Appellee contends that the answer should be "Yes".

Defendant-Appellant contends that the answer should be "No".

The Court of Appeals answered "Yes".

- II. DID THE TRIAL COURT PROPERLY INSTRUCT THE JURY REGARDING THE ELEMENTS OF THE COMMON WORK AREA LIABILITY DOCTRINE?

Plaintiff-Appellee contends that the answer should be "Yes".

Defendant-Appellant contends that the answer should be "No".

The Court of Appeals answered "Yes".

- III. DID THE TRIAL COURT PROPERLY DENY DEFENDANT'S 2011 MOTION FOR SUMMARY DISPOSITION, DEFENDANT'S MOTION FOR DIRECTED VERDICT AND DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT WHERE THE EVIDENCE ESTABLISHES THAT A GENUINE ISSUE OF MATERIAL FACT EXISTED AS TO EACH ELEMENT OF THE COMMON WORK AREA LIABILITY DOCTRINE?

Plaintiff-Appellee contends that the answer should be "Yes".

Defendant-Appellant contends that the answer should be "No".

The Court of Appeals answered "Yes".

IV. DID THE TRIAL COURT ABUSE ITS DISCRETION IN RULING THAT THIS COURT'S ORDER OF REMAND IN *LATHAM v BARTON MALOW*, 480 MICH 105 (2008) MANDATED THAT THE SCOPE OF ITS REVIEW WAS LIMITED TO THE RECORD PENDING BEFORE THE TRIAL COURT AT THE TIME OF ORAL ARGUMENT ON THE ORIGINAL MOTION FOR SUMMARY DISPOSITION?

Plaintiff-Appellee contends that the answer should be "Yes".

Defendant-Appellant contends that the answer should be "No".

The Court of Appeals answered "Yes".

COUNTER-STATEMENT OF FACTS

MCR 7.212(C)(6) requires that “[a] statement of facts * * * must be a clear, concise and chronological narrative” in which “[a]ll material facts, both favorable and unfavorable, must be fairly stated without argument or bias.” These requirements are especially important in an appeal where one of the issues is whether the trial court properly denied motions for summary disposition, directed verdict and judgment notwithstanding the verdict since the evidence is to be reviewed in the light most favorable to the non-moving victorious party. The Application for Leave to Appeal submitted to this Court by Defendant-Appellant, BARTON MALOW COMPANY (“Defendant’s Application”) falls woefully short of those standards and necessitates the preparation of this Counter-Statement of Facts.

Historical Facts

In its most recent opinion, the Court of Appeals set forth the operative historical facts in this case:

Plaintiff, a carpenter employed by B & H Construction (B & H), was working on the Oakview School project in Lake Orion, Michigan, when the accident at issue occurred. He and his work partner were informed that their task for that day was to transport drywall boards upward on a scissor lift and install the drywall on a mezzanine. Before they did so, defendant's superintendent approached them to verify that they had the appropriate license to use the scissor lift.

Plaintiff and his partner loaded the drywall boards onto the lift, and entered the lift to approach the mezzanine. Plaintiff parked the lift at a slight angle as he was taught, because the movement of material off of the lift would cause the weight to shift, and it would be dangerous if it was parked flush. According to plaintiff, he parked the lift only a couple of inches from the mezzanine, and the end of the lift was almost touching the mezzanine.

The guard cable on the mezzanine was taken down, and neither man was wearing any fall protection. As the men were moving a board of drywall onto the mezzanine from the lift, the board snapped, and plaintiff fell. According to plaintiff, his right foot was on the mezzanine and his left foot was in the air. While his partner yelled for him to grab onto the lift, plaintiff could not do so and

fell to the ground. Plaintiff landed on his feet, and broke his left heel in four places and fractured his right one.

Latham v Barton Malow Company, unpublished opinion per curiam of the Court of Appeals issued February 4, 2014 at 1. (Docket No. 312141) (Appendix A).

Barton Malow's Application for Leave to Appeal, instead of following the factual outline of the Court of Appeals in its most recent opinion, instead of including "[a]ll material facts, both favorable and unfavorable," Barton Malow has chosen to re-argue its case to this Court. The Statement of Facts contained in Barton Malow's Application represents the antithesis of that required by the sub-rule, including only facts favorable to its position. Of itself, that should disqualify Barton Malow's narrative from this Court's consideration.

However, Barton Malow has gone beyond the inclusion of only favorable facts. Barton Malow has, at best, raised incorrect inferences that it asks this Court to draw. One of those situations requires clarifications up front.

Barton Malow argues repeatedly throughout its Application that application of the common work area liability doctrine to it is inappropriate because it did not have any functional control over safety on the jobsite. E.g., Defendant's Application at 28-29. However, the *only* document attached to the contract between Barton Malow and the school district is the Construction Management Division of Responsibility Matrix ("Responsibility Matrix") (Appendix F). Pursuant to the Responsibility Matrix, Barton Malow had *sole* responsibility to administer the safety program on the job site. (Appendix F at 6.) Barton Malow's Statement of Facts contains no mention of this most salient of facts.

It is also necessary to include, for purposes of balance, some of the testimony in the record omitted from Barton Malow's Statement of Facts as to each of the elements of the common work area liability doctrine.

As to the question of whether Barton Malow has supervisory and coordinating authority over the worksite, Ted Crossley, a superintendent of Barton Malow testified that Barton Malow scheduled, supervised and coordinated all contractors. (Tr II, 47, 102.) Barton Malow had the responsibility to conduct regular on-site inspections. (Jordan 5/3/2012, 13.) In conjunction therewith, Barton Malow had the responsibility to report anything that was not in conformity with industry standards or any MIOSHA rules and regulations. (Jordan 5/3/2012, 13.) Mr. Crossley “walk[ed] the whole job site every day.” (Tr II, 57.)

Prior to Mr. Latham’s fall, Barton Malow was responsible for the installation of safety cables around all mezzanines. (Tr II, 57, 74, 75.) The safety cable was originally installed by Barton Malow after the steel workers erected the rough framework at each mezzanine location. (Tr II, 74, 75.) Mr. Crossley noticed that the cable was down on the day of the accident. (Tr II, 57.) After Mr. Latham’s fall, Barton Malow required that the cable be reinstalled because the failure to have a cable was a safety hazard. (Tr II, 57.)

In fact, if the company responsible for the installation failed to do so, Barton Malow would put it up and bill the company in light of the fact that the failure to have a cable installed was a safety hazard. (Tr II, 57.) Barton Malow had the power to direct any contractor to cease any unsafe activity until the activity was brought into compliance with the safety procedures mandated for the job site. (Tr II, 87, 88.) Barton Malow’s contract manual required that all safety rules must be obeyed at peril of strict disciplinary action. (Tr II, 91.) Barton Malow was, in fact, exclusively responsible to administer the safety program on this job. (Tr II, 96-97) (Jordan 5/3/2012, 8).

As to whether Barton Malow failed to take reasonable steps to guard against readily observable and avoidable dangers, on the day of the accident, prior to Mr. Latham and co-worker

accessing the mezzanine via the scissors lift, Mr. Crossley asked to see the certificates or licenses of anyone who would be using the scissors lift to make sure that the operators of the lift were qualified to do so. (Tr II, 99-100, 143-144.) Those inquires included Mr. Latham. (Tr II, 99, 144.) Other Barton Malow employee witnesses also provided relevant testimony. At the time of Mr. Latham's fall, Gary Jordan was the safety manager for Barton Malow. (Jordan, 5/1/2012, 6.) Mr. Jordan testified that Mr. Latham's fall occurred, at least in part, due to inadequate fall protection. (Jordan, 5/1/2012, 40.) Mr. Jordan had seen the mezzanine prior to Mr. Latham's fall. (Jordan, 5/1/2012, 40.) Barton Malow was aware of the dangers of working at heights. (Jordan, 5/1/2012, 40.) Indeed, the dangers associated with working on the mezzanine were so manifest that Ted Crossley, Barton Malow's superintendent on the site, acknowledged that Barton Malow was responsible for the original fall protection of all mezzanines. (Tr II, 46, 75.) As soon as the platform of the mezzanine was completed, Barton Malow would put up a safety cable. (Tr II, 75.) Barton Malow was also aware that when workers were unloading building materials on to the mezzanine, the cable would have to be lowered, negating whatever safety protection it provided when it was up. (Tr II, 75-76.) In any event, Barton Malow was aware that if there were workers on the mezzanine or accessing the mezzanine, one perimeter cable did not constitute sufficient fall protection. (Jordan, 5/1/2012, 43.) It would be necessary to have other fall protection devices available.

Barton-Malow's own on-site safety manual required the project superintendent, Mr. Crossley, was to ensure that the use of safety belts, harnesses, securely attached to an approved anchorage point when working from unprotected high places was mandatory. (Tr II, 91.) Barton Malow, however, failed to provide Mr. Crossley with a copy of its own manual. (Tr II, 92.) Mr. Crossley testified that he considered that to constitute a breakdown in communications on the

part of Barton Malow. (Tr II, 93.) To further complicate matters, Mr. Crossley had never worked on a job where anchor points were utilized as part of a fall protection system. (Tr II, 97). In fact, there were no anchor points on this job site. [Tr II, 9]. Even if Barton Malow had installed anchor points, Mr. Crossley would have had no idea how they would be used. (Tr II, 97).

In any event, there were no anchor points installed prior to Mr. Latham's fall and subsequent injury. (Tr II, 105, 120.) There were no anchor points installed subsequent to Mr. Latham's fall. (Tr II, 120.) There were never any anchor points installed on the mezzanine. (Tr II, 121.)

As to whether Barton Malow failed to take reasonable steps to guard against observable and avoidable dangers that created a high degree of risk to a significant number of workers, Mr. Crossley explained the process of constructing a mezzanine in the following colloquy:

Q Okay. And how many workers would go up originally? What would be the first thing that they would do?

A First ones would be the **ironworkers** would actually set up all the beams and flooring and decking, and then the **concrete** people would go up there and pour a floor. And then they would start building the walls, metal walls.

Q And then the **drywallers** would come in?

A And then the drywall, and then they'd put the equipment up there, and then they'd go up and **paint** and all.

Q And the electricians would have to come in?

A The **electricians** would be before the walls went up. They'd put in the conduit.

Q They'd put in the rough?

A Yes.

Q Rough electrical. And the plumbers would come in also before and they'd put in the rough plumbing?

A Sometimes, not necessarily. Most of the times, it was exposed in those areas because they weren't meant for people to go up there other than maintenance people.

Q Okay, and we'll get to that. And then the **HVAC people** would also be going up there?

A Yes, sir.

(Tr II, 52-53) (emphasis added).

Finally, as to whether Mr. Latham's accident occurred in a common work area, the trial testimony set forth in the prior subsection establishes that two or more subcontractors would eventually work on the mezzanine.

Procedural Chronology

This case stems from injuries suffered by Mr. Latham suffered at the beginning of 2002 and a lawsuit filed in 2004. Clearly, much has happened in the intervening years to bring this matter to this Court at this time. It is not necessary, however, to dwell on every procedural twist and turn. Plaintiff-Appellee's recitation of the procedural chronology of this case will, therefore, focus on those matters that have a bearing on this Court's consideration of the present appeal.

In May 2005, the trial court, Judge Michael Warren of the Oakland County Circuit Court, denied Barton Malow's motion for summary disposition alleging that Plaintiff could not establish a genuine issue of material fact as to one or more elements of the common work area liability doctrine. Barton Malow sought leave to appeal to the Court of Appeals from that decision. The Court of Appeals granted leave to appeal.

In its 2006 decision, the Court of Appeals affirmed Judge Warren. *Latham v Barton Malow Company*, unpublished opinion per curiam of the Court of Appeals issued October 17,

2006 (Docket No. 264243) (Appendix C). In its opinion, the Court of Appeals specifically rejected Barton Malow's claim that the question of whether the third element of the common work area doctrine – that the observable and avoidable dangers that the defendant failed to guard against “created a high degree of risk to a significant number of workmen” – should be analyzed at the moment of the plaintiff's injury:

Contrary to defendant's argument, while the common work area doctrine required plaintiff to prove that the condition that caused his injury would affect a significant number of other employees, plaintiff was not required to prove that a significant number of other employees were at risk at the same time plaintiff was injured. The doctrine focuses on the risk to other workers during the construction phase. Thus, the focus is on whether the condition that caused the plaintiff's injury would expose a significant number of other workers to the same risk of danger when they would be required to work in the same area.

(Appendix C at 3.)

Barton Malow sought leave to appeal to this Court. On April 14, 2008, the Supreme Court reversed the Court of Appeals. *Latham v Barton Malow Company*, 480 Mich 105; 746 NW2d 686 (2008). This Court held that the Court of Appeals did not correctly apprehend the “danger” in this case that could create a high degree of risk to a significant number of workmen.” *Id.* at 114-115. This Court concluded, “[w]e therefore reverse the judgment of the Court of Appeals and remand this case to the trial court for further proceedings consistent with this opinion.” *Id.* at 115.

To Barton Malow, this Court's language constituted a coded directive for the trial court to grant summary disposition in its favor. Indeed, the trial court granted summary disposition to Barton Malow. This time, it was Mr. Latham who appealed to the Court of Appeals.

On December 7, 2010, the Court of Appeals issued an opinion reversing the trial court and remanding for further proceedings. *Latham v Barton-Malow Company*, unpublished opinion

per curiam of the Court of Appeals issued December 7, 2010 (Docket No. 290628) (Appendix B). The Court of Appeals concluded that Mr. Latham had presented sufficient evidence to create genuine issues of material fact as to each element of the common work area liability doctrine. (Appendix B at 10-14.) This Court denied Barton-Malow's application for leave to appeal. *Latham v Barton-Malow Company*, 489 Mich 899 (2011).

Trial in this matter occurred between April 30 and May 8, 2012, at the conclusion of which the jury returned a verdict in favor of Mr. Latham. The jury found Barton Malow 55% liable. It also found that Mr. Latham was comparatively negligent in the amount of 22.5%. It also found that Mr. Latham's employer was also comparatively negligent in the amount of 22.5%. On May 29, 2012, the trial court entered an Order of Judgment in favor of Mr. Latham in the amount of \$1,118,142.73. On August 10, 2012, the trial court entered orders denying Barton Malow's motions for new trial and judgment notwithstanding the verdict. Barton Malow filed a Claim of Appeal therefrom (Court of Appeals No. 312141).

On November 19, 2012, the trial court issued an Opinion and Order Regarding Plaintiff's Revised Motion for Taxation of Costs and Case Evaluation Sanctions. Subsequently, on November 29, 2012, the trial court entered an Order for Award of Interest on Attorney Fees and Taxable Costs and Recognizing Stay of Execution Regarding Same. Barton Malow filed another Claim of Appeal. (Court of Appeals No. 313606.)

The Court of Appeals consolidated the two claims of appeal for briefing and disposition. On February 4, 2014, the Court of Appeals issued an unpublished opinion affirming the orders appealed from. (Appendix A.)

Barton Malow now brings this Application for Leave to Appeal to this Court.

STANDARDS OF REVIEW

Defendant's Application contains four substantive issues requiring a response thereto. Defendant first claims that the trial court committed reversible error in denying its motion for summary disposition because Plaintiff sued under the common work area liability doctrine and there was no genuine issue of material fact as to whether Barton Malow functionally qualified as a "general contractor" for purposes of applying that doctrine in this case as well as some of the other elements of the doctrine.

This Court reviews a trial court's ruling regarding a motion for summary disposition pursuant to MCR 2.116(C)(10) *de novo*. *Dresser v Ameribank*, 468 Mich 557, 564 (2003); *Meridian Township v Ingham County Clerk*, 285 Mich App 591, 586; 777 NW2d 452 (2009). Summary disposition should only be granted if the evidence fails to establish a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Meridian Township, supra*. A genuine issue of material fact exists when reasonable minds could differ after drawing reasonable inferences from the record. *West v General Motors Corporation*, 469 Mich 177, 183; 665 NW2d 468 (2003). The pleadings, affidavits, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. *Corley v Detroit Board of Education*, 470 Mich 274, 278; 681 NW2d 342 (2004).

Defendant also contends that the trial court improperly instructed the jury. Claims of instructional error are also reviewed *de novo*. *Cox v Board of Hospital Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002). In *Case v Consumers Power Co*, 463 Mich 1; 615 NW2d 17 (2000), this Court explained:

[W]e examine the jury instructions as a whole to determine whether there is error requiring reversal. The instructions should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them. Instructions must not be extracted piecemeal to establish

error. Even if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury. We will only reverse for instructional error where failure to do so would be inconsistent with substantial justice.

Id. at 6. *Accord: Alpha Capital Management, Inc v Rentenbach*, 287 Mich App 589, 627; 792 NW2d 344 (2010), quoting *Jimkowski v Shupe*, 282 Mich App 1, 9; 763 NW2d 1 (2008).

Defendant also contends that the trial court committed reversible error by denying its motions for directed verdict and for judgment notwithstanding the verdict. A denial of either motion is also reviewed *de novo*. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998); *Coates v Bastian Brothers, Inc*, 276 Mich App 498, 502; 741 NW2d 539 (2007); *Smith v Jones*, 246 Mich App 270, 273-274; 632 NW2d 509 (2001). In both circumstances, the evidence is reviewed in the light most favorable to the non-moving party, including reasonable inferences to be drawn therefrom. *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000); *Orzel v Scott Drug Co*, 449 Mich 550, 557; 537 NW2d 208 (1995); *Unibar Maintenance Services, Inc v Saigh*, 283 Mich App 609, 618; 769 NW2d 911 (2009). A motion for directed verdict or for a judgment notwithstanding the verdict should be granted only if the evidence viewed in this manner fails to establish a claim as a matter of law. *Sniecinski v Blue Cross and Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003); *Alpha Capital Management, Inc, supra*, 287 Mich App at 599.

Finally, Barton Malow takes issue with an earlier opinion of the Court of Appeals in this case in which that court concluded that the trial court abused its discretion in ruling that this Court's Order of remand in *Latham v Barton Malow*, 480 Mich 105 (2008), mandated that the scope of its review was limited to the record pending before the trial court at the time of oral argument on its original motion for summary disposition. The test for determining whether an abuse of discretion occurs is when the decision of a trial court falls "outside the principled range

of outcomes.” *E.g.*, *Nelson v Dubose*, 291 Mich App 496, 500; 806 NW2d 333 (2011); *Woods v SLB Property Management, LLC*, 277 Mich App 622, 625; 750 NW2d 228 (2008).

ARGUMENT

I. FOR THE REASONS SET FORTH IN THE COURT OF APPEALS OPINION OF FEBRUARY 4, 2014 (DOCKET NO. 312141), THE NOMENCLATURE BY WHICH BARTON MALOW SOUGHT TO ESCAPE LIABILITY AS A MATTER OF LAW UNDER THE COMMON WORK AREA LIABILITY DOCTRINE CONSTITUTED A DISTINCTION WITHOUT A DIFFERENCE.

In Issue I of its Application, Barton Malow contends that because the contract between it and the Lake Orion School District specified that it would serve in the role of “construction manager” and not “general contractor” on the Oakview Middle School construction project, it cannot be subject to liability pursuant to the common work area liability doctrine as a matter of law. (Defendant’s Application at 22-31). In the trial court, Judge Warren rejected that argument in his Opinion and Order Denying Defendant’s Second Motion for Summary Disposition After Remand from the Supreme Court entered on November 3, 2011. (Order Denying Second Motion). His analysis and conclusion was affirmed by the Court of Appeals. (Appendix A at 3-7). The decisions of both courts were correct and do not necessitate reexamination by this Court.

Judge Warren carefully framed the issue as “[w]hether the Defendant is entitled to summary disposition simply because of its title as ‘construction manager’ rather than ‘general contractor’ when a prior Court of Appeals panel has flatly rejected this argument, albeit in an unpublished decision, upon which the Supreme Court denied leave to appeal and where *dicta* in other Supreme Court decisions indicate that the title alone does not warrant a finding against common work-area liability.” (Order Denying Second Motion, 2). Judge Warren concluded that Defendant was not so entitled. (Order Denying Second Motion, 3-6).

Judge Warren began his analysis by noting that the Court of Appeals had rejected Barton Malow's argument in a relatively recent unpublished opinion in which Barton Malow was, as here, the defendant. *Debeul v Barton Malow Company*, unpublished opinion *per curiam* of the Court of Appeals issued February 15, 2011 (Docket No. 296094) (Appendix D). In that case, in the words of the Court of Appeals, Barton Malow "was the manager of a construction project at Southfield High School pursuant to a contract with Southfield Public Schools." (Appendix D at 1). The plaintiff, an employee of a plumbing contractor, tripped over rebar and was injured. He sued Barton Malow under the common work area liability doctrine. (Appendix D at 1.)

As in this case, Barton Malow sought summary disposition "arguing that it was not subject to liability under the common-work-area doctrine because it was only a contract manager, not a general contractor." (Appendix D at 1.) This Court rejected that argument. Quoting this Court's decision in this case, *Latham v Barton Malow Co*, 480 Mich 105, 112; 746 NW2d 868 (2008), the Court of Appeals observed:

"Essentially, the rationale behind [the common-work-area] doctrine is that the law should be such as to discourage those in control of the worksite from ignoring or being careless about unsafe working conditions resulting from the negligence of subcontractors or the subcontractors' employees."

(Appendix D at 2.)

From that premise, the Court of Appeals rejected the argument that mere nomenclature could upset that rationale. Quoting from this Court's opinions in *Funk v General Motors Corporation*, 392 Mich 91, 104; 220 NW2d 641 (1974) and *Ghaffari v Turner Construction Co*, 473 Mich 16; 699 NW2d 687 (2005), the Court of Appeals noted that "[t]he premise for imposing liability on a contractor under the common-work-area doctrine is the contractor's supervisory and coordinating authority over the worksite." (Appendix D at 2-3.) Applying that premise to the facts in *Debeul*, the Court of Appeals explained:

In this case, defendant's contract with Southfield Public Schools provided it with responsibility for coordinating the activities and responsibilities of the various other contractors on the project, including the sequence of construction and assignment of space in areas where the other contractors are performing work. Defendant was also responsible for reviewing the various other contractors' safety programs and coordinating the safety programs with those of the other contractors. In addition, defendant was required to regularly monitor the work of the other contractors on the project. **Under these circumstances, defendant's title as "contract manager", as opposed to "general contractor", is a distinction without a difference for purposes of the common-work-area doctrine.** See *Ghaffari*, 473 Mich at 19 n 1 (under the terms of the defendant's contract with the premises owner, the defendant's title as a "construction manager" and not "general contractor" was a distinction without a difference for purposes of the common-work-area doctrine).

(Appendix D at 3 (emphasis added). See also Order Denying Second Motion, 4.

In addition to noting the disposition of the Court of Appeals of this precise question in *Debeul*, Judge Warren also referred to this Court's earlier opinion in this case:

Even in this case, the Supreme Court did not limit the common-work-area doctrine to the title "general contractor"; rather, the Supreme Court explained that the doctrine applies to the one ultimately in control of a construction project worksite. See e.g., *Latham*, 480 Mich at 111-112 ("In *Funk*, this Court, exercising its common-law authority, expanded the duties of those ultimately in control of a construction project worksite (**most often** the general contractor) by creating the common-work-area doctrine").

(Order Denying Second Motion, 5) (emphasis added).²

Judge Warren then reviewed the record and concluded that "the Plaintiff has provided sufficient evidence – which reviewed most favorably to the Plaintiff – reflects that the Defendant was provided with the supervisory and coordinating authority as a general contractor, thereby making its title of or status as construction manager 'a distinction without a difference for purposes of the common-work-area [liability doctrine].'" (Order Denying Second Motion, 5) (footnote omitted).

²The emphasized language more than suggests that this Court recognized that it was the substance of the duties of the controlling entity rather than the title that is dispositive.

In the footnote whose citation was omitted in the previous paragraph, Judge Warren enumerated that evidence:

“See e.g., Plaintiff’s Ex.2 (Defendant’s Answer to Interrogatory No. 46 which states, in relevant part: “. . . . With regard to Barton Malow, Ted Crossley, Project Superintendent has the responsibility of coordinating and supervising the work of the various contractors.” See also Response to Interrogatory No. 47 which incorporates the response to No. 46); Plaintiff’s Ex 5 (Crossley’s deposition testimony, *inter alia*, that part of his job was scheduling and coordinating the trades on this project, together with the project manager; that Gary Jordan was the safety officer for the Defendant and on the site on a regular and consistent basis; that the Defendant solicited the bids and determined/recommended who the contractors would be; that he was required to write a daily report that included all the contractors’ daily reports [pages 8-13]); Plaintiff’s Ex 6 at 35 (deposition testimony of Gerald Nutt, Project Manager for the Plaintiff’s employer B&H wherein Nutt testified it was his understanding, that Ted Crossley was supervising the various trades working on the project).

(Order Denying Second Motion, 5 n 1) (emphasis added).

It should be noted at this juncture that the evidence adduced at trial corroborated and supplemented the evidence relied upon by Judge Warren pretrial. **Ted Crossley, a superintendent of Barton Malow testified that Barton Malow scheduled, supervised and coordinated all contractors. (Tr II, 47, 102). Barton Malow had the responsibility to conduct regular on-site inspections. (Jordan 5/3/2012,13.) In conjunction therewith, Barton Malow had the responsibility to report anything that was not in conformity with industry standards or any MIOSHA rules and regulations. (Jordan 5/3/2012, 13.)** It was in that light that Mr. Crossley asked to see the certificates or licenses of anyone who would be using the scissors lift to make sure that the operators of the lift were qualified to do so. (Tr II, 99-100, 143-144). Those inquires included Mr. Latham. (Tr II, 99, 144.)

Prior to Mr. Latham’s fall, Barton Malow required that a safety cable had to be installed around the mezzanine. (Tr II, 57.) The safety cable was originally installed after the steel workers erected the rough framework at each mezzanine location. The single cable itself failed to

comply with MIOSHA. (Jordan 5/3/12, 28) (Williams 5/7/12, 61) (Tr II, 75). Mr. Crossley noticed that the cable was down on the day of the accident. (Tr II, 57.) After Mr. Latham's fall, Barton Malow required that the cable be reinstalled because the failure to have a cable was a safety hazard. (Tr II, 57.) In fact, if the company responsible for the installation failed to do so, Barton Malow would put it up and bill the company in light of the fact that the failure to have a cable installed was a safety hazard. (Tr II, 57.)

Barton Malow had the power to direct any contractor to cease any unsafe activity until the activity was brought into compliance with the safety procedures mandated for the job site. (Tr II, 87, 88.) Barton Malow's contract manual required that all safety rules must be obeyed at peril of strict disciplinary action. (Tr II, 91.) Barton Malow was, in fact, exclusively responsible to administer the safety program on this job. (Tr II, 96-97) (Jordan 5/3/2012, 8).³

Accordingly, in light of pertinent case law and the evidence proffered for Judge Warren's consideration at the time of the ruling (and, in hindsight today, anticipating the testimony adduced at trial), Judge Warren ruled:

In short, neither the law nor the evidence before the Court supports the Defendant's novel position--and the authority before the Court, although non-binding, strongly indicates that the position, as argued, would be rejected. Summary disposition on the construction manager issue therefore is denied.

(Order Denying Second Motion, 5-6.).

The Court of Appeals agreed with Judge Warren. (Appendix A at 3-7.) The Court of Appeals commented on the evidence demonstrating supervisory and coordinating authority of Barton Malow on the jobsite:

³Prior to the trial transcript being transcribed chronologically, Gary Jordan's testimony was transcribed. Mr. Jordan testified on May 1, 2012 and May 3, 2012. References to his trial testimony on May 1, 2012 will be identified as "Jordan 5/1/2012, [PAGE]". References to Mr. Jordan's testimony on May 3, 2012 will be identified as "Jordan, 5/3/2012 [PAGE]".

While defendant's superintendent denied that he was in charge of supervising, he also admitted that if he saw something unsafe, he had the authority to contact the worker's employer and have the work stopped. Defendant's safety manager/coordinator also disclaimed the label of supervisory control, but admitted that defendant had the authority to direct work to be stopped, was exclusively responsible to administer the safety program, and had the responsibility to do regular onsite inspections. He further testified that defendant was responsible for coordinating the subcontractors or contractors, and monitoring their work. Therefore, while defendant's employees disavowed the term "supervisory control", their explanation of defendant's role onsite was consistent with having supervisory control.

(Appendix A at 4-5.)

The Court of Appeals also observed that Barton Malow's reliance on the language of the contract with the school district was, at best, selective. The Court of Appeals noted that Barton Malow relied upon sections 2.3.12 and 2.3.15 (reproduced at notes 7 and 8 of the Court of Appeals opinion. (Appendix A at 5.) The Court of Appeals observed that "absent from defendant's analysis is Article 14 of its contract with the school." (Appendix A at 6.) The opinion quoted sections 14.3, 14.4, 14.5 and 14.7. (Appendix A at 6.) Section 14.3 required Barton Malow to report to the Owner any non-conformity with industry standards for "construction means, methods, techniques, sequences or procedures." (Appendix A at 6.) Section 14.4 required Barton Malow to inform the Owner, among others, "of any observed defects or deficiencies in the quality of workmanship of the various contractors." (Appendix A at 6.) Section 14.5 required Barton Malow to "provide daily full-time on-site field supervision at the new middle school site during the entire construction phase." (Appendix A at 6.) Finally, section 14.7 required Barton Malow to "inspect the work of the trade contractors on the project as it is being performed until final completion * * * that the work performed and the materials furnished are in accordance with contract documents and that work on the project is progressing on schedule." (Appendix A at 6.) In addition, the *only* document attached to the contract between

Barton Malow and the school district is the Construction Management Division of Responsibility Matrix (“Responsibility Matrix”) (Appendix F). Pursuant to the Responsibility Matrix, Barton Malow had *sole* responsibility to administer the safety program on the job site. (Appendix F at 6.) Barton Malow’s Statement of Facts contains no mention of this most salient of facts.

Further, Gary Jordan, safety expert for Barton Malow, testified that “Barton Malow’s responsibility for safety on this job is actually not complete until the job is complete.” (Jordan 5/3/12, 103.)

In light of the trial testimony and the language of the entire contract between Barton Malow and the school district, the Court of Appeals commented that the trial court properly concluded that “[t]he trial court did not err in denying defendant dispositive relief based on its claim that as a construction manager, it could not be liable under the common work area doctrine.” (Appendix A at 7.)⁴

The arguments that Barton Malow makes in Issue I of its Application are generally a rehash of the arguments to the trial court and the Court of Appeals. Two matters contained therein require a brief response, however.

First, Barton Malow attempts to conjure a dire picture of economic unfairness to construction managers should they be exposed to liability pursuant to the common work area

⁴ Barton Malow attempts to minimize the significance of the analysis of the Court of Appeals in *Debeul* by noting that “the *Debeul* matter was a summary disposition ruling, whereas this matter involves rulings after trial testimony by expert witnesses to provide additional, helpful analysis for this Court’s resolution of the issue. (Defendant’s Application at 27). Yet, Barton Malow’s rationale rests substantially on its interpretation of the contract between it and the school district, something that existed from the inception of the relationship between Barton Malow and the district. Furthermore, Barton Malow seeks dispositive relief as well. (Defendant’s Application at 28-31). The holdings of the trial court and the Court of Appeals did not grant dispositive relief to Barton Malow as to the first element of the common work area liability doctrine. Nor did the trial court and the Court of Appeals grant dispositive relief to Mr. Latham.

liability doctrine. (Defendant's Application at 23-28.) The core of the argument is the following:

More property owners are choosing to save money by not hiring general contractors and instead hiring construction managers. In exchange, as in the instant matter, the parties contractually agree that the construction manager will have far less responsibility over the trades that the property owner hires separately.

(Defendant's Application at 27-28). Accordingly, from the perspective of a "construction manager," it faces the same liability as a general contractor but is being paid less.

To the extent that a "construction manager" finds itself in that situation, the responsibility is wholly that of the "construction manager." There are any number of ways by which a "construction manager" can avoid it. The most obvious of those ways is to include an indemnification clause requiring the property owner to indemnify the "construction manager" for damages incurred as a result of being found liable under the common work area liability doctrine. Should the property owner refuse to include such a clause in a contract, the putative "construction manager" is faced with an economic choice. Whatever its ultimate option, its decision does not implicate the wisdom of ignoring nomenclature and applying the remaining elements of the common work area liability doctrine to an entity that had "supervisory and coordinating authority" over a construction site.

Finally, Barton Malow vigorously contends that, in reality, it did not exercise any practical oversight of safety on the site, despite the fact that it had the sole responsibility to do so pursuant to the Responsibility Matrix (Appendix F at 6) (Defendant's Application at 28-31). However, as the foregoing citations to the record and the testimony referred to by the Court of Appeals demonstrate, that simply is not the case. Indeed, Barton Malow not only concerned itself with safety issues but micro-managed them, as the following colloquy from the testimony of Ted

Those courts simply found that the record supported the finding of a genuine issue of material

Crossley, Barton Malow's superintendent, graphically illustrates:

Q Let me focus on Mr. Latham. When's the first time you saw him on the job?

A I don't remember seeing him maybe a day or so before the accident.

Q Okay. All right. And did you have any discipline issues relative to Mr. Latham that you can recall?

A **I think I had a shoe issue with him once.**

Q What do you mean, a shoe issue?

A **I think there was cowboy boots on, and I asked him to put on regular work boots.**

(Tr II, 150) (emphasis added).

In the end, this is a situation in which the conclusions evoked by pertinent case law as applied to the factual record in this case rightly paraphrase an old aphorism in order that complex job sites do not fall into anarchical chaos with no central leadership and control: If it walks like a general contractor, talks like a general contractor and acts like a general contractor, by exercising supervisory control and coordinating authority over the project and jobsite, for purposes of applying the common work area liability doctrine, it is a general contractor. The record, based on documents produced by Barton Malow and the testimony of Barton Malow witnesses, conclusively establishes that whatever it called itself, Barton Malow had the supervisory and coordinating authority normally exercised by a general contractor on the job site where Douglas Latham sustained his injuries. Certainly, a genuine issue of material fact was presented.

fact to be decided by the trier of fact.

II. FOR THE REASONS SET FORTH IN THE COURT OF APPEALS OPINION OF FEBRUARY 4, 2014 (DOCKET NO. 312141), WHEN READ AS A WHOLE AND IN CONTEXT, THE TRIAL COURT PROPERLY INSTRUCTED THE JURY REGARDING THE ELEMENTS OF THE COMMON WORK AREA LIABILITY DOCTRINE.

In Issue II of its Application, Barton Malow contends that the trial court improperly instructed the jury regarding the elements of the common work area liability doctrine. (Defendant's Application at 32-39.) The Court of Appeals appropriately noted that this issue actually involved two almost distinct sub-parts. First, Barton Malow contends that a special jury instruction read to the jury "impermissibly blurred the lines between the elements of the common work area doctrine, namely, the 'high degree of risk to a significant number of workmen' and the 'common work area element.' (Appendix A at 8.) Second, Barton Malow contends "that the instruction impermissibly contravened the law that the high degree of risk to a number of workers must exist at the time plaintiff was injured." (Appendix A at 9.)

The trial court instructed the jury:

For the Plaintiff to prevail in proving that the Defendant Barton Malow was negligent, the Plaintiff must prove the following:

1. Barton Malow failed to take reasonable steps within its supervising and coordinating authority.

2. To guard against readily-observable and avoidable damages [dangers] (sic).

3. That created a, quote, "high degree of risk", quote to a, quote, "significant number of workers", unquote.

And 4. In a common work area.

A, quote, "readily-observable and avoidable danger", unquote is an avoidable danger to which a significant number of workers are exposed, which in this case is whether a significant number of workers were exposed to an avoidable injury by being required to work at dangerous heights without fall protection equipment in a common work area. A, quote, "significant number of workers,"

unquote, is not defined, but six workers does not constitute a significant number of workers.

Quote, “The high degree of risk to a significant workers must exist when the Plaintiff is injured, not after construction has been completed”, unquote. There’s a citation there for the lawyers’ sake, not for you.

Quote, “It has not--it is not necessary that other subcontractors be working on the same site at the same time. It merely requires that employees of two or more subcontractors work in the area”, unquote. Again, another citation, which you don’t need to worry about.

A, quote, “common work area”, unquote, is defined as the same area where two or more trades would eventually work.

(Tr VI, 11-12.)

Plaintiff will adopt the division of this issue as laid out by the Court of Appeals. Accordingly, Plaintiff will initially focus on the propriety of the Court of Appeals that “the instruction adequately and fairly presented the elements of the common work area doctrine to the jury.” (Appendix A at 9.)

A. The Special Jury Instruction at issue adequately and fairly presented the elements of the common work area doctrine to the jury.

To set the procedural context for the legal analysis to follow, prior to trial, on April 25, 2012, Judge Warren issued his Rulings and Order Regarding Counter Motions Objecting to Certain Jury Instructions Proposed by Each Party. (Rulings and Order Regarding Jury Instructions #1.) The jury instruction at issue here was styled Special Jury Instruction No. 1, regarding the common work area liability doctrine. The parties could not agree on the wording of the instruction and, in fact, both Plaintiff and Barton Malow submitted competing language for the trial court’s consideration. The trial court “decline[d] to use the Plaintiff’s proposed Jury Instruction No. 1 in its entirety, and shall use portions of the Defendant’s counter proposed Jury

Instruction No. 1 with the revisions indicated.” (Rulings and Order Regarding Jury Instructions #1, 4-5.)

Judge Warren explained how the instruction would read. Judge Warren commented:

Based on the fact that the Plaintiff has no particular objection to the *initial section* of the Defendant’s proposed Special Jury Instruction No. 1 which numbers the elements and indicates that the Plaintiff bears the burden of proof on same, together with the authority cited by the Defendant in its Objection to Plaintiff’s counter proposed Special Jury Instruction No. 1, the Court finds that the initial section of the Defendant’s proposed instruction prevails. As formatted and worded, the initial section is a concise, accurate and unslanted instruction concerning the elements of the common work area exception and accurately states that the Plaintiff bears the burden of proof on them--i.e., the section accurately states the law applicable to the facts of this case.

(Rulings and Order Regarding Jury Instructions #1, 5-6) (emphasis in the original).

Judge Warren then turned to the language defining the elements. As to the element regarding a “significant number of workers,” Judge Warren found that Barton Malow’s proposed language to be “concise, accurate, and unslanted and, therefore, PREVAILS AS IS.” (Rulings and Order Regarding Jury Instructions #1, 6.) As to the element regarding “common work area,” Judge Warren ruled that Barton Malow’s definition “IS REVISED TO ACCARATELY [sic] REFLECT THE LAW (as indicated below).” (Rulings and Order Regarding Jury Instructions #1, 7.) Specifically as to the issue presented in this Application:

[T]he Court sustains the Plaintiff’s objection to the Defendant’s definition of the “common work area” element as additionally requiring that two or more contractors “be exposed to the same danger”. The “common work area” element focuses on the “area”--not the danger. Although the Defendant is correct that the workers must be exposed to the same danger, that is better addressed by a separate paragraph defining the “**observable and avoidable dangers**” element as indicated below * * *. The Court further incorporates the Plaintiff’s analysis in support of his proposed Jury Instruction #2 and citation to the Court of Appeals’ second decision in *this* case in which the Court cited its decision in *Hughes, supra* to find “It is not necessary that other contractors be working at the same time; the common work area rule merely requires that employees of two or more subcontractors eventually work in the area.” *Latham v Barton Malow Co,*

unpublished opinion per curiam of the Court of Appeals, issued December 7, 2010 (Docket No. 2390628); 2010 Mich App LEXIS 2322 * 26.

(Rulings and Order Regarding Jury Instructions #1,7) (*italics and emphasis in the original*).

Accordingly, Judge Warren concluded:

In short, **nowhere has the Court of Appeals defined the “common work area” element, itself, to include the additional requirement that the workers be exposed to the same danger** (the same danger arguably is addressed by another element). That the jury should and will be instructed on the danger via Plaintiff’s Special Jury Instruction #3 as adopted with revision *infra* allays the “same danger” concern.

(Rulings and Order Regarding Jury Instructions #1, 7-8) (*emphasis added*).

Given that the jury had to be instructed on each of the elements comprising the common work area liability doctrine and given the fact that the elements are separate and distinct, it was eminently logical for Judge Warren to define them separately. Each element of the doctrine was properly defined in accordance with controlling case law. Far from “blurr[ing] the lines between the elements of the common work area doctrine” (Appendix A at 8), Judge Warren took pains to make sure that each element was defined individually. There the matter should rest.

The Court of Appeals agreed, finding that the language used to define a “common work area” was “consistent with *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 6; 574 NW2d 691 (1997), where this Court stated ‘It is not necessary that other subcontractors be working on the same site at the same time; the common work area rule merely requires that employees of two or more subcontractors eventually work in the area.’” (Appendix A at 8.)

Accordingly, even acknowledging that if viewed in isolation, the language about which Barton Malow complains could theoretically have led to the sort of confusion envisioned by Barton Malow, that is not the test for instructional error as the Court of Appeals held:

[J]ury instructions must be reviewed as a whole, as they “must not be extracted piecemeal to establish error”. *Case*, 463 Mich at 6. **As a whole, the instruction adequately informed the jury of the respective elements of the common work area doctrine.** Consistent with the instruction, a high degree of risk to a significant number [of] workers will not be satisfied with just six employees of one subcontractor, *Alderman v JC Dev Communities, LLC*, 486 Mich 906; 780 NW2d 840 (2010), and for “a common work area to exist there must be an area where the employees of two or more subcontractors will eventually work[.]” *Groncki v Detroit Edison Co*, 453 Mich 644, 5663; 557 NW2d 289 (1996).

(Appendix A at 8-9) (emphasis added).

This sub-issue, however, is not the focus of Barton Malow’s ire here.

B. Barton Malow’s “snapshot” theory as to how to determine “high degree of risk to a significant number of workmen” is unsupported by law, logic or policy.

As in the trial court and the Court of Appeals, Barton Malow seeks to convince this Court that the determination of whether the “high degree of risk to a significant number of workmen” element of the “common work area liability” doctrine must be made at the instant that the injury to the plaintiff occurred. Barton Malow’s proposed formulation is, however, unsupported by law, logic, or policy.

As in the previous sub-issue, to set the procedural context for the ensuing analysis, at the conclusion of the trial, on May 14, 2012, Judge Warren issued his Rulings and Order Regarding Unresolved “Objections” to Instructions Concerning “Significant Number of Workers” and Plaintiff’s Newly Proposed/Revised MI Civ JI 3.13. (Rulings and Order Regarding Jury Instructions #2.)

The rulings included disposition of Barton Malow’s contention “that footnote 12 in *Ormsby v Capital Welding, Inc*, 471 Mich 45 (1995) and unpublished decisions applying it require the reading of an instruction explaining that the calculation of the ‘high degree of risk to a significant number of workers’ (or third) element” be made at the precise moment of the injury

to the plaintiff. ((Rulings and Order Regarding Jury Instructions #2, 4.) Judge Warren observed that Barton Malow “focuse[d] exclusively on the last sentence of n 12 – ‘The high degree of risk to a significant number of workers must exist when the plaintiff is injured; not after construction has been completed.’ ((Rulings and Order Regarding Jury Instructions #2, 5.)

Judge Warren began his analysis by observing that:

Not included among the unpublished decisions, and perhaps (conveniently) overlooked, are the unpublished Court of Appeals decisions in this very case that have rejected the Defendant’s proposed instruction as written. More particularly, the panel in the 2006 Opinion (*Latham v Barton Malow Co*, 2006 Mich App Lexis 3026 [*Latham I*’]) specifically found that the Defendant had misinterpreted footnote 12 in *Ormsby, supra*, and therefore rejected the Defendant’s argument that this Court misapplied the common work area doctrine because it did not properly determine if there was a high degree of risk to a significant number of workers *at the time of plaintiff’s injury*[.]

((Rulings and Order Regarding Jury Instructions #2, 5-6) (italics in the original).

In that opinion, the Court of Appeals concluded:

We believe that defendant has read footnote 12 out of context. In footnote 12, the Court was responding to Justice Kelly’s dissent, so the footnote must be read in the context of Justice Kelly’s dissenting opinion. Properly viewed, our Supreme Court did not limit the doctrine to only those situations where other workers are also exposed to a high risk at the same time the plaintiff was injured. **Instead, the test requires that a significant number of workers must work in the same area and be subjected to the same risk at some point during construction.**

(Appendix C at 2) (citations omitted) (emphasis added).

There the Court of Appeals continued:

Contrary to defendant’s argument, while the common work area doctrine required plaintiff that the condition that caused his injury would affect a significant number of other employees, **plaintiff was not required to prove that a significant number of other employees were at risk at the same time plaintiff was injured.** The doctrine focuses on the risk to other workers during the construction phase. **Thus, the focus is on whether the condition that caused the plaintiff’s injury would expose a significant number of other workers to the same risk of danger when they would be required to work in the same area.**

(Appendix C at 3) (emphasis added).

Judge Warren then noted, “[s]ignificantly, the Supreme Court in *Latham v Barton Malow Co*, 480 Mich 105, 121 (2008) (“*Latham II*”) did not reverse this portion of *Latham I*. Rather, the Supreme Court appeared to concur with the Court of Appeals on the issue.” (Rulings and Order Regarding Jury Instructions #2, 6.) There, the Court of Appeals specifically noted:

The lower courts correctly noted that workers from several trades had to work at the mezzanine level at the same time. Hence, an issue of fact was created concerning whether the mezzanine was a common area. Various subcontractors needed to get onto the mezzanine numerous times **over several days** in order to work and load materials and equipment. * * * After the wooden frame for the drywall was put in, there were only two ways to reach the mezzanine; by ladder and by scissor lift. **All these workers faced the danger of falling from the mezzanine while loading materials or equipment.** Accordingly, an issue of material fact arose whether a significant number of workers employed by various subcontractors were exposed to the same risk.

(Appendix C at 3) (emphasis added).

Finally, Judge Warren also referred to the 2010 opinion of the Court of Appeals in this case. There, the Court of Appeals reversed Judge Warren’s grant of summary disposition in favor of Barton Malow. This Court noted:

The primary question placed in dispute by defendant’s renewed summary disposition motion is whether plaintiff presented evidence that a significant number of workers from different trades faced an avoidable risk of working at dangerous heights without fall protection. *Latham*, 480 Mich at 107. To survive defendant’s summary disposition motion, plaintiff must also produce evidence that “the failure of a significant number of workers to take safety precautions was readily observable and that the failure was avoidable,” and “that the defendant failed to take reasonable steps to ensure compliance and that the danger existed in a common work area.” *Id.* at 115 n 25.

(Appendix B at 11-12).

Judge Warren then concluded:

This Court finds the *Latham* lineage compelling--especially given that the Defendant cites not one published decision to support its construction of *Ormsby*

or the additional language the Defendant now proposes. The unpublished decisions the Defendant cites are non-binding and unpersuasive (unlike the *Latham* decisions *supra*, they offer no analysis and no discussion of the context in which Ormsby's footnote 12 was rendered).

* * * *

The additional language [to which Barton Malow objects] is taken directly from two published cases--*Ormsby* and *Hughes* [*v PMG Bldg, Inc*, 227 Mich App 1 (1997)], *supra*--and is organized in the fashion/context **used by the Court of Appeals in this very case** in its 2010 decision recognizing that the question on remand from the Supreme Court was whether the plaintiff produced evidence reasonably tending to show the third or "high degree of risk" to a "significant number of workers" element and *global* discussion of the common work area *doctrine*. **To deviate from the wording of published decisions (or the context fashioned by the Court of Appeals in this very case) in favor of the wording proposed by the Defendant runs the risk of failing to properly inform the jurors of the applicable law.**

(Rulings and Order Regarding Jury Instructions #2, 9) (italics in the original) (emphasis added).

It is evident from the foregoing that the argument that Barton Malow makes to this Court at this time is a reprise of the same argument that it made to the Court of Appeals and this Court on prior occasions during the course of this case.⁵

The law of the case doctrine was succinctly explicated by this Court in *C.A.F. Investment Co v Township of Saginaw*, 410 Mich 428, 301 NW2d 164 (1981):

The law of the case doctrine dispenses with the need for this Court to again consider legal questions determined by our prior decision and necessary to it. As generally stated, the doctrine is that if an appellate court passes on a legal question and remanded to the case for further proceedings, the legal question thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same.

Id. at 454. *Accord: Shade v Wright*, 291 Mich App 17, 21; 805 NW2d 1 (2010); *Kidder v Ptacin*, 284 Mich App 166, 170; 771 NW2d 806 (2009); *New Properties, Inc v George D. Newpower*,

⁵The Court of Appeals also recognized that "defendant has raised this issue before." (Appendix A, 9.)

Jr., Inc., 282 Mich App 120, 132; 762 NW2d 178 (2009); *Ashker v Ford Motor Company*, 245 Mich App 9, 13; 627 NW2d 1 (2001).

In this case, this issue involves a legal question: the proper interpretation of footnote 12 in *Ormsby, supra*. As Judge Warren noted, both the Court of Appeals and this Court have decided this question in favor of Mr. Latham and against Barton Malow. Clearly, the facts have not changed since those decisions were rendered. Accordingly, pursuant to the law of the case doctrine, this Court should consider itself bound by its prior rulings in this case as to that legal question.

Nevertheless, it should be emphasized that even if the prior decisions of the Court of Appeals and this Court were to be ignored, Barton Malow's proposed interpretation of footnote 12 in *Ormsby* is simply wrong. The Court of Appeals explained:

Defendant's interpretation of *Ormsby* is flawed. Even ignoring the context of the footnote, which was a response to the dissent, the isolated sentence defendant focuses on reads as follows: "The high degree of risk to a significant number of workers must exist when the plaintiff is injured; not after construction has been completed." *Ormsby*, 471 Mich at 60 n 12. While defendant focuses on the phrase, "exist when the plaintiff is injured", it ignores the second part of the sentence, namely, "not after construction has been completed". *Id.* In divorcing the first part of the sentence from the second, defendant overlooks that the Court was referencing the time during which construction was ongoing not after it was completed.

(Appendix A at 10.) The Court of Appeals further noted that the United States Court of Appeals for the Sixth Circuit has come to the same conclusion in *Richter v American Aggregates Corp*, 522 Fed Appx 253 (CA 6, 2013), where the defendant in that case raised the same argument as does Barton Malow here.⁶ The Sixth Circuit concluded:

⁶The Court of Appeals was careful to recognize that "[w]hile federal law is not binding on state courts, it can be considered persuasive. *Wilcoxon v Minnesota Min & Mfg Co*, 235 Mich App 347, 360 n 5; 597 NW2d 250 (1999)." (Appendix A, 10.)

AAC interprets this language to suggest that the number of workers and subcontractors must be measured at the exact moment that the worker is injured. But this interpretation would ignore the second half of the sentence. Read as a whole, the sentence is consistent with the rest of the *Ormsby* opinion and with the prior opinions in *Hughes*, *Groncki*, and [*Candelaria v BC Gen Contractors*, 236 Mich App 67; 600 NW2d 348, 353 (1999)]. The comparison to “after the work is completed” suggests that the time “when the plaintiff is injured” refers to the time *period* during the ongoing construction--not to a specific moment. When a construction phase is over, the nature and the extent of the risk presumably changes, and is no longer the “same risk.”

Id. at 263 (italics in the original).⁷

Barton Malow’s “snapshot” theory lacks legal support. However, the theory’s deficiencies do not end there. As a matter of sheer logic, the “snapshot” theory does not survive reasoned scrutiny. A simple hypothetical will so establish. Assume the following: (1) Twelve workers of four different trades will work on an elevated platform seventeen feet above the floor of a building. (2) On the day in question, seven tradespersons are working on the platform. (3) In violation of safety rules, a tarp obscures a hole in the floor of the platform whose circumference is big enough for an adult to fall through. (4) At lunch, each tradesperson descends from the platform, one after the other. (5) Then, one of the tradespersons finds that his lunch is back on

⁷The Sixth Circuit amplified:

Of course, discerning the relevant time period need not involve a binary choice--during, or after, construction. Rather, it follows from *Ormsby* and its predecessors that the relevant time is the time period during which the hazardous activity is occurring or will occur--whether it lasts one hour, one day, or for the duration of a particular construction stage.

Id. As more fully explored in Issue III, the Court of Appeals concluded that, in this case:

Considering evidence that other workers accessed the mezzanine without fall protection, and the superintendent’s admission that he did not even know fall protection was needed, there was sufficient evidence that there was a high degree of risk to a significant number of workers.

(Appendix A, 14.)

the platform and returns to retrieve it. (6) On their way to the lunch area, the seven tradespersons are reminded that they can't leave their tools on the platform. (7) It is not necessary for all of the tradespersons to return to the platform to comply with that directive. (8) Four of the seven tradespersons return to the platform and collect all of the tools and then descend one after the other.

Under Barton Malow's "snapshot" theory, if one of the tradespersons falls through the hole prior to the initial descent, the element of "high degree of risk to a significant number of workers" is met; the entity with supervisory and coordinating authority OWES a duty. However, if after the first tradesperson reaches the floor, one of the remaining tradespersons on the platform falls through the hole, the element of "high degree of risk to a significant number of workers" is not met, because, at most, only six or fewer tradespersons were exposed to the risk at the exact moment of the fall; the entity with supervisory and coordinating authority DOES NOT OWE a duty. Similarly, for the same reason, if the tradesperson who returned for his lunch fell through the hole while retrieving it, the element of "high degree of risk to a significant number of workers" is not met; the entity with supervisory and coordinating authority DOES NOT OWE a duty. In the same vein, for the same reason, if only four tradespersons returned to collect the tools and one of them falls through the hole while doing so, the element of "high degree of risk to a significant number of workers" is not met; the entity with supervisory and coordinating authority DOES NOT OWE a duty. However, if all seven tradespersons returned to collect the tools and one of them fell through the hole while doing so, the element of "high degree of risk to a significant number of workers" is once again met; the entity with supervisory and coordinating authority OWES a duty.

As this hypothetical demonstrates, application of the “snapshot” theory could easily end in consequences that could serve as the very definition of “arbitrary and capricious.” Nowhere is there any suggestion that it was the intent of this Court to create such a situation. Barton Malow asks this Court to impose a floating duty, applicable at the time of a worksite injury only under certain circumstances, circumstances that could change instantaneously on an arbitrary and/or capricious basis.⁸ Or, more succinctly, Barton Malow asks this Court to replace the rule of law with a roll of cosmic dice.

The legal and logical deficiencies enumerated are not, however, the greatest imperfection of the “snapshot” theory. The most significant flaw is that the “snapshot” theory is wholly inimical to the policy underlying the promulgation of the common work area liability doctrine in the first place, a policy that has stood the test of time over several decades, from *Funk*, through *Groncki* and *Ormsby*, to *Ghaffari*.⁹ The cornerstone of that policy is, as it should be, worker safety. The goal of the policy is to reduce, if not eliminate, jobsite injuries. Therefore, a duty is imposed upon the entity with supervisory and coordinating authority when the elements of the common work area liability doctrine are met, elements that include guarding against readily observable and avoidable dangers in a common work area that create a high degree of risk to a significant number of workers.

There is, however, no way to implement reasonable safeguards against risks of injury if an entity with supervisory and coordinating authority (or an entity acting as a general contractor)

⁸It would also eviscerate any protection to workers afforded by the common work area liability doctrine as owners and general contractors could simply mandate that the maximum number of employees of subcontractors who could be present in a common work area would be six.

⁹Indeed, the same justices who comprised the majority in *Ormsby* concurred in Justice MARKMAN’s reaffirmation of *Funk* in his opinion in *Ghaffari*.

has no way of predicting whether a duty will be imposed until *after* an injury occurs. As a practical matter, only by interpreting the common work area doctrine in light of the policy that is the basis of the doctrine can the doctrine serve the purpose for which it was developed. Thus, as the Court of Appeals recognized in its 2006 opinion in this case, “defendant has read footnote 12 out of context.” (Appendix C at 2.) In its latest decision, the Court of Appeals properly reaffirmed its earlier conclusion. (Appendix A at 10.) In light of the foregoing, there is no need for this Court to reexamine that conclusion.

As with Issue I, the arguments that Barton Malow makes in Issue II of its Application is generally a rehash of the arguments to the trial court and the Court of Appeals. Coincidentally, as with Issue I, two matters contained therein require a brief response, however.

First, Barton Malow states that the “snapshot” theory “has become so entrenched in Michigan jurisprudence since *Ormsby* that the Michigan Court of Appeals has quoted the ‘must exist when the plaintiff is injured’ in a summary disposition context in five unpublished decisions involving summary disposition.” (Defendant’s Application at 36.) Accordingly, Barton Malow complains, “Defendant stands alone in having *Ormsby* applied differently.” (Defendant’s Application at 36.)

Leaving aside the hyperbole in characterizing five *unpublished* decisions¹⁰ as “entrenching” a legal theory in Michigan jurisprudence, the short answer to Barton Malow’s argument was presented by defense counsel at the most recent oral argument in the Court of Appeals to the effect that it is important to “get things right” and not rush to finality because of the time that has elapsed since Mr. Latham’s injury.

¹⁰MCR 7.215(C)(1) states that “[a]n unpublished opinion is not precedentially binding under the rule of stare decisis.”

Plaintiff concurs. This Court has never shied away from overruling published cases – that do constitute binding precedents – where necessary to “get things right.” *E.g., Hamed v Wayne County*, 490 Mich 1; 803 NW2d 237 (2011); *Rowland v Washtenaw County Road Commission*, 477 Mich 197; 731 NW2d 41 (2007); *Nowell v Titan Insurance Company*, 466 Mich 478; 648 NW2d 157 (2002). The reason why this Court need not revisit the Court of Appeals opinion appealed from is not because of the mere passage of time. Instead, the reason why Barton Malow’s Application should be denied is precisely because the Court of Appeals “got it right.” The reason why Barton Malow is not entitled to the application of the “snapshot” theory is not because Barton Malow should be treated differently than other general contractors. Instead, the reason is because the Court of Appeals “got it right” in its analysis of the “snapshot theory” as “flawed,” as indeed it is on legal, logical and policy grounds. That is all there is to it.

Additionally, Barton Malow attempts to present a picture wherein the “snapshot” theory is required to avoid unfairness to general contractors:

In other words, if the injured worker is the fourth person to encounter a condition, it is not yet known whether liability will attach. If the plaintiff is “lucky,” additional workers will encounter the condition, allowing a significant number of workers to be satisfied. If not, the defendant is the “lucky” party and escapes liability. Without a temporal limitation, the plaintiff’s ability to satisfy elements is not yet known at the time of the injury. This is the equivalent of having a duty apply retroactively.

(Defendant’s Application at 38).

Barton Malow’s attitude toward jobsite safety, as exemplified by its elevation of the avoidance of liability above all other considerations in the quotation reproduced immediately above, is simply wrong on so many levels. The need for the common work area liability doctrine enunciated by this Court in *Funk* and most recently reaffirmed by this Court in *Ghaffari* could not be better illustrated. As the policy underlying the doctrine makes clear, this Court’s focus

should be, has been, and continues to be, on the avoidance or, at least, minimization of workplace injury. This Court's effort is a serious business, not a game. When a worker is injured on the job, no one should feel "lucky," even an entity with supervisory and coordinating authority in a situation where the common work area liability is found not to apply. It is particularly callous to suggest that an injured worker will feel "lucky" if only his or her fellow workers encounter the same hazardous condition with the attendant potential to be injured as a result thereof.

The policy to avoid or minimize workplace injury requires, as this Court has consistently recognized, that it is the entity with supervisory and coordinating authority over the worksite that is in the best position to enforce workplace safety. This Court's recognition was not based on a whim and was not based on some vendetta to punish general contractors. Contrary to the implication left by the quotation, the only entity with a global perspective of a construction project is the entity that has supervising and coordinating authority over the project, expressed in this case by Article 14 of the contract between Barton Malow and the school district. It is sheer sophistry for Barton Malow to feign surprise as to whether any other trades will be working in an area of the project, or the types and number of subcontractor employees. It is disingenuous for Barton Malow to suggest ignorance of the sequencing of skilled trades on the site. It is unconscionable for Barton Malow to intimate that it would not know of the existence of a continuing hazardous condition on the jobsite. Pursuant to the common work area liability doctrine and the policy that is the conceptual underpinning of the doctrine, the liability of a general contractor is not imposed retroactively. Indeed, it is quite the opposite. If an entity that has supervisory and coordinating authority over the worksite wants to avoid liability under the doctrine, the doctrine prescribes how to do so: The entity should guard against readily-

observable and avoidable dangers that create a high degree of risk to a significant number of workers in a common work area. Contrary to Barton Malow's repeated claims that it is being subjected to strict liability (Defendant's Application at 48), "guard against" is not the equivalent of "ensure." It does not mean that the actions of the injured person are not taken into account (as in this case, where the jury found comparative negligence against both Plaintiff and his employer, leaving Barton Malow only 55% liable).

Throughout the history of the common work area liability doctrine, it has served its purpose as intended by this Court in its decisions discussing it. There is absolutely no reason why the "snapshot" theory should be permitted to functionally dismantle it. The Court of Appeals so recognized. There is no reason to disturb that court's analysis.

III. FOR THE REASONS SET FORTH IN THE COURT OF APPEALS OPINION OF FEBRUARY 4, 2014 (DOCKET NO. 312141), THE TRIAL COURT PROPERLY DENIED BARTON MALOW'S MOTION FOR DIRECTED VERDICT AND BARTON MALOW'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT WHERE THE EVIDENCE ESTABLISHES THAT A GENUINE ISSUE OF MATERIAL FACT EXISTED AS TO EACH ELEMENT OF THE COMMON WORK AREA LIABILITY DOCTRINE.

To paraphrase Judge Warren in his ruling regarding the proper interpretation of *Ormsby's* footnote 12 (see Issue II, *supra*), not included in Barton Malow's argument that the trial court committed reversible error in denying Barton Malow's motions for summary disposition, directed verdict and judgment notwithstanding the verdict, and perhaps (conveniently) overlooked, was any acknowledgment of the standard of review of such rulings. Plaintiff has delineated that standard of review in the text, *supra* at 9-11. It bears repeating, with respect for rulings on each of those motions, that a common element in that standard of review is that in determining whether there exist genuine issues of material fact as to all elements of a Plaintiff's cause of action, the evidence and all reasonable inferences therefrom are to be viewed in the light

most favorable to the non-moving party. *Corley v Detroit Board of Education, supra; Wilkinson v Lee, supra; Orzel v Scott Drug Co, supra; Unibar Maintenance Services, Inc v Saigh, supra.*

The Court of Appeals reached the identical conclusion as to the scope of the standard of review:

As stated above, this Court reviews de novo the trial court's denial of a directed verdict, viewing the evidence in the light most favorable to plaintiff and drawing all reasonable inferences in plaintiff's favor. [*Aroma Wines and Equipment, Inc v Columbia Distribution Services, Inc*, 303 Mich App 441; ___ NW2d ___ (2013)]. All conflicts in the evidence are decided in plaintiff's favor, and the motion only should be granted if no factual questions exist on which reasonable minds could differ. *Id.* This Court also reviews de novo a trial court's denial of a JNOV motion. [*Wiley v Henry Ford Cottage Hospital*, 257 Mich App 488, 491; 668 NW2d 402 (2003).] All of the evidence and legitimate inferences are viewed in the light most favorable to plaintiff, and the motion should be granted only if the evidence failed to establish a claim as a matter of law. *Id.* at 492.

(Appendix A at 11).

However, as in the Court of Appeals, an examination of Barton Malow's submission as to this issue establishes the contrary. Rather than look at the record in the light most favorable to Plaintiff, Barton Malow has simply reargued its case, both in its Statement of Facts (Defendant's Application at 9-21) and in this issue (Defendant's Application at 39-49). Accordingly, although as appellee, it nominally is Plaintiff's role to refute the arguments made by Defendant, it serves no purpose here. Instead, Plaintiff will demonstrate the propriety of the conclusion of the Court of Appeals that, applying the appropriate standard of review, "Plaintiff produced sufficient proofs at trial to prevail under the common work area doctrine." (Appendix A at 12.)

A. Barton Malow had supervisory and coordinating authority over the worksite.

As set forth in Issue I, *supra*, at the very least, a genuine issue of material fact exists as to whether Barton Malow had supervisory and coordinating authority over the worksite. The Court of Appeals concluded:

As discussed *supra*, defendant's argument that it lacked supervisory and coordinating authority is without merit. Further, defendant's superintendent and safety manager/coordinator both admitted that defendant had the authority to order that work be stopped if it was being performed unsafely, and to require subcontractors to instruct their employees to comply with safety regulations. Defendant had the authority to do onsite inspections, to administer the safety program, and to report to the owner any procedures that did not appear in conformity with industry standards.

(Appendix A at 12).

More specifically, Ted Crossley, a superintendent of Barton Malow testified that Barton Malow scheduled, supervised and coordinated all contractors. (Tr II, 47, 102.) Barton Malow had the responsibility to conduct regular on-site inspections. (Jordan 5/3/2012, 13.) In conjunction therewith, Barton Malow had the responsibility to report anything that was not in conformity with industry standards or any MIOSHA rules and regulations. (Jordan 5/3/2012, 13.) Mr. Crossley "walk[ed] the whole job site every day." (Tr II, 57.)

Prior to Mr. Latham's fall, Barton Malow was responsible for the installation of safety cables around all mezzanines. (Tr II, 57, 74, 75.) The safety cable was originally installed by Barton Malow after the steel workers erected the rough framework at each mezzanine location. (Tr II, 74, 75.) Mr. Crossley noticed that the cable was down on the day of the accident. (Tr II, 57.) After Mr. Latham's fall, Barton Malow required that the cable be reinstalled because the failure to have a cable was a safety hazard. (Tr II, 57.)

In fact, if the company responsible for the installation failed to do so, Barton Malow would put it up and bill the company in light of the fact that the failure to have a cable installed was a safety hazard. (Tr II, 57.) Barton Malow had the power to direct any contractor to cease any unsafe activity until the activity was brought into compliance with the safety procedures mandated for the job site. (Tr II, 87, 88.) Barton Malow's contract manual required that all safety rules must be obeyed at peril of strict disciplinary action. (Tr II, 91.) Barton Malow was, in fact,

exclusively responsible to administer the safety program on this job. (Tr II, 96-97) (Jordan 5/3/2012, 8). See also Responsibility Matrix (Appendix F at 6).

B. Barton Malow failed to take reasonable steps to guard against readily observable and avoidable dangers.

This element is logically divided into two parts: (1) the existence of observable and avoidable dangers (2) that the entity with supervision and coordinating authority failed to take reasonable steps to guard against. Sufficient evidence was adduced as to each of those interrelated segments of this element to at least create the requisite genuine issue of material fact.

1. There were observable and avoidable dangers on the jobsite that caused Mr. Latham's fall and subsequent injuries.

In its earlier opinion in this case, this Court defined the danger in this case: "the danger that created a high degree of risk is correctly characterized as the danger of *working at heights without fall-protection equipment*." 480 Mich at 114 (emphasis in the original.) The Court of Appeals commented:

As confirmed by defendant's safety manager/coordinator, working at heights is one of the top four causes of fatalities on jobsites. Before plaintiff and his partner accessed the mezzanine in this case, defendant's superintendent approached them to ensure that they had the appropriate license. At no time did he instruct or ask them if they planned on using fall protection. He admitted that he was aware the workers planned on going up to the mezzanine, the cable had to come down when that happened, and that was when the hazard of working at heights without fall protection was created. Plaintiff's expert also testified that based on his review and the superintendent's admission that there were no anchor points, the hazard was readily observable, and no one took reasonable steps to protect workers from the serious risk of injury.

(Appendix A at 12-13.)¹¹

More specifically, on the day of the accident, prior to Mr. Latham and co-worker accessing the mezzanine via the scissors lift, Mr. Crossley asked to see the certificates or licenses

¹¹As more fully explained below, fall protection in the form of a harness system required

of anyone who would be using the scissors lift to make sure that the operators of the lift were qualified to do so. (Tr II, 99-100, 143-144.) Those inquires included Mr. Latham. (Tr II, 99, 144.) Other Barton Malow employee witnesses also provided relevant testimony. At the time of Mr. Latham's fall, Gary Jordan was the safety manager for Barton Malow. (Jordan, 5/1/2012, 6.) Mr. Jordan testified that Mr. Latham's fall occurred, at least in part, due to inadequate fall protection. (Jordan, 5/1/2012, 40.) Mr. Jordan had seen the mezzanine prior to Mr. Latham's fall. (Jordan, 5/1/2012, 40.) Barton Malow was aware of the dangers of working at heights. (Jordan, 5/1/2012, 40.) Indeed, the dangers associated with working on the mezzanine were so manifest that Ted Crossley, Barton Malow's superintendent on the site, acknowledged that Barton Malow was responsible for the original fall protection of all mezzanines. (Tr II, 46, 75.) As soon as the platform of the mezzanine was completed, Barton Malow would put up a safety cable. (Tr II, 75.) Barton Malow was also aware that when workers were unloading building materials on to the mezzanine, the cable would have to be lowered, negating whatever safety protection it provided when it was up. (Tr II, 75-76.) In any event, Barton Malow was aware that if there were workers on the mezzanine or accessing the mezzanine; one perimeter cable did not constitute sufficient fall protection. (Jordan, 5/1/2012, 43.) It would be necessary to have other fall protection devices available.

Given that Mr. Latham and his partner were using a scissor lift to transport the drywall to the mezzanine and given the fact that safety cable would provide no protection because it had to be taken down, Mr. Jordan acknowledged that they should have had adequate fall protection when exiting the lift. (Jordan, 5/3/2012, 24.) Part of that fall protection would include anchor points so that workers could tie off safety belts or lanyards--without which such fall protection

anchor points to which the system could be attached. See Appendix A at 12.

equipment would be functionally useless. (Jordan, 5/3/2012, 24, 97.) Mr. Crossley was aware that Mr. Latham and his partner were going to be using the manlift and did not observe any harnesses or lanyards. (Tr II, 102, 103). Mr. Jordan explained that the reason why Mr. Latham fell was that he exited the lift without functional fall protection. (Jordan, 5/3/2012, 34).

The Court of Appeals also took note of Barton Malow's attempt to circumvent this Court's definition of the danger or hazard at issue in this case:

Defendant, however, contends that the danger was not readily observable because **plaintiff alone created the hazard**, which was a combination of the dangerously parked scissor lift, plaintiff's refusal to wear protection, and his decision to walk from the scissor lift to the mezzanine. However, as noted above, our Supreme Court has already defined the danger in this case as "the danger of working at heights without fall-protection equipment", *Latham*, 480 Mich at 114 (emphasis in original). Defendant's superintendent also admitted that he knew this danger would result when plaintiff and his partner accessed the mezzanine with the removed cable. Defendant's safety manager/coordinator conceded that had plaintiff used fall protection, the accident would not have occurred. Plaintiff's expert concurred, explaining that the only cause of plaintiff's fall was the lack of fall protection.

(Appendix A at 13) (emphasis added).¹² (The plaintiff in *Funk* could also be considered to have "alone created the hazard." Certainly, the defendants in that case so argued.)

¹²This misconception surfaced again in Barton Malow's argument that an insufficient number of workers were exposed to a high degree of risk from readily observable and avoidable dangers. The Court of Appeals was careful to correct it:

Defendant, however, argues that no other worker was exposed to the precise danger of walking from a crookedly parked scissor lift to a mezzanine without fall protection. Yet, as noted above, the Supreme Court defined the danger more broadly in this case[.] * * * Furthermore, the superintendent referenced significant materials that the other trades were installing or constructing on the mezzanine, and there was significant evidence that such workers were not using fall protection when transporting such workers were not using fall protection when transporting such materials or equipment.

(Appendix A at 14.)

Barton Malow's argument here is, once again, at best ironic given its claim that it is being subject to strict liability. (Defendant's Application at 48.) Application of the common work area liability doctrine did not result in Barton Malow being subject to strict liability. Instead, Barton Malow wishes to subject Mr. Latham to contributory negligence (the functional equivalent of strict liability for plaintiffs) by claiming that the common work area liability doctrine does not apply here unless Mr. Latham did not contribute in any way to the accident.

It should be remembered that, in *Ghaffari*, one of the reasons that this Court unanimously refused to apply the "open and obvious" doctrine to the construction site setting was "the application of the open and obvious doctrine in the construction setting would conflict with the reasoning underlying this Court's holding in [*Hardy v Monsanto Enviro-Chem Systems, Inc.*, 414 Mich 29; 323 NW2d 270 (1982)], because **it would largely nullify the doctrine of comparative negligence in the construction setting, and effectively restore the complete bar to a contractor's liability abolished when *Hardy* eliminated contributory negligence in that setting.**" 473 Mich. at 25-26 (emphasis added). Subsequent to *Ghaffari*, in its prior opinion in this case, this Court recognized that everyone working on a construction site cannot be required, as a matter of law, to never make a mistake:

Essentially, the rationale behind [the common-work-area] doctrine is that the law should be such as to discourage those in control of the worksite from ignoring or being careless about **unsafe working conditions resulting from the negligence of subcontractors or the subcontractors' employees.**

480 Mich at 112 (emphasis added). The "observable and avoidable dangers" element of the common work area liability doctrine should be evaluated according to the standards laid out by this Court in its prior opinion.

2. Barton Malow failed to take reasonable steps to guard against those observable and avoidable dangers.

After delineating the “observable and avoidable dangers” in this case, the Court of Appeals then focused on whether Barton Malow had taken “reasonable steps to guard against” them:

* * * [Barton Malow] did none of that. It did not instruct plaintiff or his employer that fall protection was needed, nor did it attempt to stop plaintiff from accessing the mezzanine in an unsafe fashion. Moreover, as plaintiff acknowledged, donning a harness system would have been useless in this instance as neither defendant nor anyone else had established anchor points.

Because, defendant did not instruct B&H that the employees had to wear safety protection or that plaintiff and his partner had to stop working without it, defendant “failed to take reasonable steps within its supervisory and coordinating authority[.]” *Latham*, 480 Mich at 109.

(Appendix A at 12.)

More specifically, Barton-Malow’s own on-site safety manual required the project superintendent, Mr. Crossley, was to ensure that the use of safety belts, harnesses, securely attached to an approved anchorage point when working from unprotected high places was mandatory. (Tr II, 91.) Barton Malow, however, failed to provide Mr. Crossley with a copy of its own manual. (Tr II, 92.) Mr. Crossley testified that he considered that to constitute a breakdown in communications on the part of Barton Malow. (Tr II, 93.) To further complicate matters, Mr. Crossley had never worked on a job where anchor points were utilized as part of a fall protection system. (Tr II, 97). In fact, there were no anchor points on this job site. [Tr II, 9]. Even if Barton Malow had installed anchor points, Mr. Crossley would have had no idea how they would be used. (Tr II, 97). The Court of Appeals observed to like effect:

Furthermore, the superintendent detailed the extent of his lack of knowledge regarding fall protection, even at the time of trial, as follows: he never received defendant’s safety regulations; he did not know that one of defendant’s onsite safety requirements in their loss program was for every worker working at

heights over six feet to have a safety belt and harness; he was further unaware that people working at heights needed fall protection; and he did not know that, as a superintendent, he was required to make sure workers used safety belts, harnesses and lanyards.

(Appendix A at 14.)

In any event, there were no anchor points installed prior to Mr. Latham's fall and subsequent injury. (Tr II, 105, 120.) There were no anchor points installed subsequent to Mr. Latham's fall. (Tr II, 120.) There were never any anchor points installed on the mezzanine. (Tr II, 121.)

C. Barton Malow's failure to take reasonable steps to guard against observable and avoidable dangers created a high degree of risk to a significant number of workers.

The necessity to access the mezzanine was not limited to Mr. Latham and his partner.

Mr. Crossley explained the process of constructing a mezzanine in the following colloquy:

Q Okay. And how many workers would go up originally? What would be the first thing that they would do?

A First ones would be the **ironworkers** would actually set up all the beams and flooring and decking, and then the **concrete** people would go up there and pour a floor. And then they would start building the walls, metal walls.

Q And then the **drywallers** would come in?

A And then the drywall, and then they'd put the equipment up there, and then they'd go up and **paint** and all.

Q And the electricians would have to come in?

A The **electricians** would be before the walls went up. They'd put in the conduit.

Q They'd put in the rough?

A Yes.

Q Rough electrical. And the plumbers would come in also before and they'd put in the rough plumbing?

A Sometimes, not necessarily. Most of the times, it was exposed in those areas because they weren't meant for people to go up there other than maintenance people.

Q Okay, and we'll get to that. And then the **HVAC people** would also be going up there?

A Yes, sir.

(Tr II, 52-53) (emphasis added).¹³ The Court of Appeals quoted the testimony of Mr. Crossley reproduced here in its opinion. (Appendix A at 13).

All of those trades were going to be working at heights. Mr. Jordan testified that working at heights was very dangerous--to the point of being one of the leading causes of workplace fatalities. (Jordan, 5/1/2012, 21, 40.) Mr. Jordan also agreed that a fall from 13 feet from a mezzanine to a cement floor would cause injury. (Jordan, 5/1/2012, 21.) He acknowledged that, at the very least, working at heights constitutes a sufficiently serious danger to those involved as to warrant serious attention to safety. (Jordan, 5/1/2012, 22.) Mr. Jordan unequivocally stated that "[w]hen workers on exposure on that level, they should be protected." (5/3/2012, 104.) Mr. Crossley agreed that "if something is unsafe in that environment, then it not only puts the one person at risk, but it puts potentially everybody else around them at risk." (Tr II, 100.)

¹³Although not necessary of itself to sustain Plaintiff's burden of proof as to the "significant number of workers" portion of this element, the testimony at trial indicated that prior to the accident on several other days, there were many workers from many trades on the mezzanines. In addition, to Mr. Latham, there were four other co-workers from his employer, B&H. (Tr III, 40) (Tr IV, 4). None of them had fall protection. (Tr IV, 4). In addition, there were at least two electricians. (Tr III, 40). Plumbers had left equipment on other mezzanines, indicating a presence. (Tr III, 40.) There were at least two HVAC workers as well. (Tr III, 41.) None of the individuals that Mr. Latham could see had any fall protection either. (Tr III, 41.) Scott Schewe, a drywaller, also testified that he and his partner accessed the mezzanine by a scissors lift without fall protection. (Tr III, 17, 19.) No harness or double lanyard or retractable

The Court of Appeals concluded:

Considering evidence that other workers accessed the mezzanine without fall protection, and the superintendent's admission that he did not even know that fall protection was needed, there was sufficient evidence that there was a high degree of risk to a significant number of workers, Latham, 480 Mich at 109.

(Appendix A at 14.) As set forth above, the conclusion of the Court of Appeals was amply supported by the record.

D. The observable and avoidable dangers that created a high degree of risk to a significant number of workers existed in a common work area.

In *Hughes v PMG Building, supra*, the Court of Appeals explained that for a given space on a jobsite to be considered a "common work area":

It is not necessary that other subcontractors be working on the same site at the same time. The common work area rule merely requires that employees of two or more subcontractors eventually work in the area.

Id. at 6. The trial testimony set forth in the prior subsection establishes that two or more subcontractors would eventually work on the mezzanine. See text, *supra*, at 43-45.

The Court of Appeals reached the same conclusion by reference to this Court's decision in *Groncki*:

Lastly, there was significant evidence that a common work area existed. The Michigan Supreme Court has stated that for "a common work area to exist there must be an area where the employees of two or more subcontractors will eventually work". *Groncki*, 453 Mich at 663. Here, the mezzanine was not an isolated or particularized area in which only few or particular trades worked. Rather, the superintendent detailed the numerous workers from different trades that worked on the mezzanines, which suffices as evidence of a common work area.

(Appendix A at 14).

lanyard was ever offered. (Tr III, 18.) Mr. Schewe testified that he also saw HVAC workers on the mezzanine. (Tr III, 20.)

E. Conclusion

As the Court of Appeals found, more than enough evidence was presented at trial to create the requisite genuine issues of material fact as to each of the elements of the common work area liability doctrine. In light thereof, there is no need for this Court to revisit that court's conclusion.

IV. FOR THE REASONS SET FORTH IN THE COURT OF APPEALS OPINION OF DECEMBER 7 2010 (DOCKET NO. 290268), THE TRIAL COURT ABUSED ITS DISCRETION IN RULING THAT THIS COURT'S ORDER OF REMAND IN *LATHAM v BARTON MALOW*, 480 MICH 105 (2008) MANDATED THAT THE SCOPE OF ITS REVIEW WAS LIMITED TO THE RECORD PENDING BEFORE THE TRIAL COURT AT THE TIME OF ORAL ARGUMENT ON THE ORIGINAL MOTION FOR SUMMARY DISPOSITION.

Defendant spends eleven lines at the end of its Application arguing that the Court of Appeals committed reversible error in finding that the trial court abused its discretion in ruling that this Court's order of remand contained in its earlier opinion in this case, *Latham v Barton Malow*, 480 Mich 105, *supra*, mandated that the scope of its review was limited to the record pending before the trial court at the time of oral argument on the original motion for summary disposition.¹⁴ (Defendant's Application at 49-50.) An examination of the painstaking analysis undertaken by the Court of Appeals in its opinion of December 7, 2010 (Appendix B) establishes the propriety of its conclusion.

¹⁴Especially given the fact that reply briefs to Answers to Applications for Leave to Appeal to this Court, to treat this issue as does Barton Malow violates the spirit of the court rule. MCR 7.302(E). Barton Malow can now argue that it preserved the issue and is, therefore, entitled to respond to whatever Mr. Latham states here. However, when the original submission of Barton Malow is as brief as it is, Barton Malow is able to avoid any substantive argument until the filing of its Reply Brief when Mr. Latham cannot reply. While this conduct should not be condoned, Plaintiff maintains that its response here, tracking the Court of Appeals opinion, is sufficient. Should Barton Malow actually follow through by taking advantage of the apparent loophole in the court rule and this Court would require a further response from Mr. Latham, he requests that this Court afford that opportunity to him.

The trial court held:

Having carefully reviewed and weighed the parties' submissions, together with the Supreme Court's decision, *supra*, this Court is constrained to find that, for the reasons, analysis and authorities cited by the Defendant, the Motion must be granted. * * * Consistent with this finding, the Shreve Affidavit must be struck as it impermissibly expands the record and violates this Court's Order dated 11/10/08 denying the Plaintiff's motion to reopen discovery and amend his witness list (to include, *inter alia*, testimony by Mr. Shreve). Likewise, for the reasons stated in the Defendant's Reply, the Plaintiff's Affidavit also cannot be considered as it also attempts to improperly expand the record.

1/23/09 Opinion and Order Regarding Defendant's Motion for Summary Disposition, 2.

It is the trial court's rationale supporting its conclusion that is critical to the disposition of this issue:

The Supreme Court's remand directive, coupled with this Court's denial of the Plaintiff's motion to reopen discovery, confirm that **the scope of this Court's review is limited to the record pending before this Court at the time of oral argument on the original motion for summary disposition.**

1/23/09 Opinion and Order Regarding Defendant's Motion for Summary Disposition, 2 (emphasis added).¹⁵

¹⁵In its opinion, this Court remanded with instructions on two separate occasions:

Because both lower courts misapprehended the appropriate danger to examine and decided the case on that erroneous basis, they also erred on the issue of whether a significant number of workers would be exposed to the relevant peril. With the appropriate danger clarified, we reverse the judgment of the Court of Appeals and remand this case to the trial court for further proceedings consistent with this opinion.

* * * *

[T]he trial court and the Court of Appeals erred by misidentifying the danger and inevitably erred in the subsequent analysis regarding how many other workers were exposed to the risk. We therefore reverse the judgment of the Court of Appeals and remand this case to the trial court for further proceedings consistent with this opinion.

Id. at 108, 115.

Thus, all of the trial court's rulings were based on that supposition.

The Court of Appeals reversed. (Appendix B.) It held that “[c]ontrary to the circuit court’s opinion and order granting defendant’s renewed motion for summary disposition, the Supreme Court simply in no respect limited the scope of review on remand.” (Appendix B at 5.)

The Court of Appeals continued:

Nor does case law support any constraint on a trial court’s authority to consider additional evidence on remand. When an appellate court remands a case, the proceedings on remand “are limited to the scope of the remand order”. *People v Canter*, 197 Mich App 550, 567; 496 NW2d 336 (1992). “The power of the lower court on remand is to take such action as law and justice require so long as it is not inconsistent with the judgment of the appellate court”. *Sokel v Nickoli*, 356 Mich 460, 464; 97 NW2d 1 (1959). Here, consideration of additional evidence would not have conflicted with the Supreme Court’s judgment in *Latham*, 480 Mich 105.

(Appendix B, 5.)¹⁶

The decision of the trial court that was reversed by the Court of Appeals was the result of a misapprehension of the legal principles attendant to an order of remand – in other words, a mistake of law. It is now well-settled that a trial court abuses its discretion when it reaches a decision that falls “outside the principled range of outcomes.” *E.g., Nelson v Dubose, supra*;

¹⁶The Court of Appeals also included a supplementary rationale for its decision:

Moreover, the Supreme Court’s denial of defendant’s motion for rehearing additionally supports that the Supreme Court lacked any intent to circumscribe the evidence available to the circuit court on remand. Defendant argued in its rehearing motion that the Supreme Court should simply “modif[y]” its opinion “to clarify that the proper disposition of this matter on remand is to enter an Order granting Defendant’s motion for summary disposition”. Yet, the Supreme Court denied the motion for rehearing, signaling that it intended for the circuit court to conduct future proceedings in accordance with the clarified rule of law that the Supreme Court had announced.

(Appendix B, 5-6) (footnote omitted).

Woods v SLB Property Management, LLC, supra. Committing legal error is a result that falls “outside the principled range of outcomes.” *Schienke v Bennett*, unpublished opinion per curiam of the Court of Appeals issued February 12, 2004 (Docket No. 242386) (“The trial court abused its discretion through a mistake of law.”) (Appendix E). *See: Miller v Varilek*, 117 Mich App 165; 323 NW2d 637 (1982). Accordingly, the Court of Appeals properly concluded that the trial court’s rulings surrounding the scope of the order of remand by this Court constituted an abuse of discretion. As with Issues I-III, the conclusion of the Court of Appeals does not bear re-examination, much less reversal.

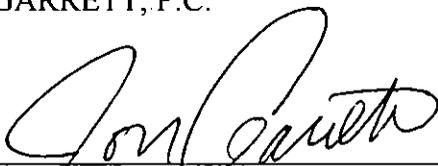
RELIEF REQUESTED

Plaintiff-Appellee, DOUGLAS LATHAM, requests that this Court DENY Defendant-Appellant’s Application for Leave to Appeal.

Respectfully submitted,

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By:



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