

STATE OF MICHIGAN,  
IN THE MICHIGAN SUPREME COURT  
(On Appeal from the Oakland County Circuit Court and the Michigan Court of Appeals)

DOUGLAS LATHAM,  
Plaintiff-Appellee,

MSC Docket No. \_\_\_\_\_  
*opa 2-4-14*  
COA Docket Nos. 312141 & 313606

v

BARTON MALOW CO.,  
Defendant-Appellant. *ok*

Lower Court No. 04-059653-NO

*Oakland*  
*M. Warren*

DEFENDANT BARTON MALOW COMPANY'S  
APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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## STATEMENT OF WHY LEAVE SHOULD BE GRANTED

This is the third time this case has reached this Court. As a reminder, Plaintiff Douglas Latham seeks damages for an injury suffered while employed by non-party B&H Construction (“B&H”) on a school project for another non-party, the Lake Orion School District (“Lake Orion”). Lake Orion did not hire a general contractor for the project. Instead, Lake Orion chose to save money by contracting with each of the trades separately. Lake Orion also contracted with Defendant Barton Malow Company as a construction manager to coordinate and schedule the trades. Defendant did not directly contract with any other trades.

Although Plaintiff originally sued under the theory that Defendant failed to provide him personal fall protection, discovery after the second remand and before the trial in 2012 revealed that Plaintiff’s employer had fall protection systems on the construction site. Plaintiff testified at trial that he had never used fall protection on any construction site. This lawsuit moved forward under a new theory that there was no location on the elevation for Plaintiff to anchor a personal fall protection device (that he had never used before).

Discovery also revealed that Plaintiff did not require personal fall protection while either riding on the scissor lift or working on the elevation at issue. The trial testimony confirmed same. Despite these new facts, as well as the absence of other workers facing the same risk as Plaintiff, the trial court denied Defendant’s motion for summary disposition, motion for directed verdict, and post-trial motions. The trial court compounded that error with erroneous jury instructions that substantially affected Defendant’s right to a fair trial. Following a jury verdict in Plaintiff’s favor, Defendant has appealed as of right.

The first error below was the lower court’s failure to recognize the material distinction between a general contractor and a construction manager, as well as the absence of any authority

that would extend the “common work area” exception to a construction manager. Here, Lake Orion used its contractual arrangements to retain control over the work site, choosing not to hire a general contractor. Plaintiff did not sue Lake Orion under a “retained control” theory. Instead, Plaintiff limited his lawsuit to Defendant, adopting the fiction that Defendant should be treated as a “general contractor” because “somebody” needs to be ultimately responsible for a construction site. Unlike a general contractor, Defendant did not agree to construct the entire project and subcontract with other entities to perform portions of the work. Lake Orion and Defendant further agreed that Defendant would not be responsible for the acts and omissions of the trades. Nevertheless, the lower courts have adopted Plaintiff’s invitation to blur the material distinctions between general contractors and construction managers.

This Court has not previously extended the “common work area” exception to anyone other than general contractors or property owners. The lower courts have erred in denying Defendant’s motions for dispositive relief on this issue. At a minimum, the propriety of making such an extension is an issue of such significant importance to Michigan jurisprudence that this Court should grant Defendant’s application for leave to appeal pursuant to MCR 7.302(B)(3) and/or MCR 7.302(B)(5), invite amicus brief participation in the issue, and ultimately resolve the issue in Defendant’s favor by ruling that the “common work area” exception does not apply to a construction manager that is not in contractual privity with the trade employing the injured worker.

Second, even if the “common work area” exception did apply to Defendant, other important errors requiring reversal occurred. In fact, the Michigan Court of Appeals agreed that the trial court erred in instructing the jury as follows:

Quote, “The high degree of risk to a significant number of 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 eventually 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.**

As this Court can see from the highlighted language, the trial court instructed the jury that the “high degree of risk to a significant number of workmen” could be satisfied by showing that “employees of two or more subcontractors eventually work in the area.” There is no case in Michigan that supports the instruction.

To be sure, the language used by the trial court was pertinent to whether an area is a “common work area,” not whether there are a significant number of workers are involved. While the Court of Appeals essentially deemed this error “harmless,” the jury was given erroneous instructions regarding an element of Plaintiff’s cause of action. Even worse, this error allowed essentially the same facts (“employees of two or more subcontractors eventually work in the area” and “two or more trades would eventually work”) to satisfy two different elements. This was not mere “harmless error,” and was instead clear error causing material injustice to Barton Malow. It was also inconsistent with other appellate decisions, as necessary to justify this Court’s intervention by leave granted or peremptory reversal. MCR 7.302(B)(5).

The Court of Appeals also erred by not finding instructional error with respect to this sentence: “It has not—it is not necessary that other subcontractors be working on the same site at the same time.” In five prior cases in the Michigan Court of Appeals, each general contractor was granted summary disposition because the plaintiff could not show that a significant number of workers were in danger at the time of the incident. In providing an instruction that widened the temporal determination of the “significant number of workers element,” the lower courts have

failed to follow this Court's decision in *Ormsby v Capital Welding, Inc*, 471 Mich 45; 684 NW2d 320 (2004) and the five prior Michigan Court of Appeals applying *Ormsby* consistently with Defendant's interpretation. This conflict also justifies this Court's intervention pursuant to MCR 7.302(B)(5). In addition, application of the elements of the "common work area" exception is a legal issue of significance to Michigan jurisprudence. The confusion regarding the instructions is illustrative of a need for this Court's clarification, justifying this Court's intervention pursuant to MCR 7.302(B)(3).

Third, Defendant was also erroneously denied dispositive relief. Defendant first briefing in this Court was based on the trial court's erroneous conclusion that it could determine the "significant number of workers" solely by referencing the employees that "worked at elevations." This Court reversed, noting that the real issue was whether the workers "worked at elevations *without fall protection*." After the second remand, the parties redeposed all witnesses. It was ultimately determined that merely working at heights does not require fall protection. As an example, fall protection is not required when using a ladder to access an elevation. The expert witnesses also agreed that fall protection is not required when riding a scissor lift. Plaintiff's expert testified that Plaintiff would not have needed fall protection while working on the elevation. Indeed, there are many construction tasks at elevations that do not require fall protection. Defendant urged the trial court to grant dispositive relief because Plaintiff failed to prove that any of the other workers at elevations from other trades worked at an elevation without required fall protection. The trial court refused to do so, inaccurately ruling that the law of the case doctrine precluded revisiting this issue. The trial court reached this decision, even though this Court's most recent ruling in this case recognized that further discovery would be undertaken and further summary disposition motions would be filed.

In addition, the lower courts continue to struggle with the elements of the common work area exception. As noted above, although the Michigan Court of Appeals has adjudicated the liability of general contractors in a summary disposition context based on the number of workers in alleged danger *at the time of the incident*, Defendant's liability has been adjudicated based on a broader timeline—including subsequent events. Moreover, even with various other broader timelines and interpretations of the danger, Defendant was still entitled to dispositive relief based on the absence of evidence that a significant number of workers encountered the same risk as Plaintiff. The lower court also erroneously construed the "common work area" element, failing to follow this Court's ruling in *Ormsby*, which recognized that a trade working in isolation on a construction site is not in a common work area. Plaintiff's trade was working in isolation at the time of the incident. Defendant was erroneously denied dispositive relief. At a minimum, this Court should intervene to clarify the timing and danger-defining rules applicable to determining whether a significant number of workers are at risk, as well as the "common work area" element.

The end result is that Defendant was held liable in what is tantamount to strict liability. Separately, and certainly collectively, the above errors involve issues of significant importance to Michigan jurisprudence, as this Court recognized when granting leave to appeal several years ago. MCR 7.302(B)(3). There is significant confusion regarding the elements. This Court's clarification of the common work area exception and its elements is overdue and necessary to provide guidance to lower courts and future litigants. Further, the errors in question are clearly erroneous, causing manifest injustice to Defendant and conflicting with other appellate decisions. MCR 7.302(B)(5). Thus, as will be explained below, Defendant respectfully requests that this Honorable Court grant leave to appeal pursuant to MCR 7.302(B)(3) and/or MCR 7.302(B)(5),

ultimately reversing the lower courts and remanding for either an order of judgment for Defendant or a new trial.

## STATEMENT OF JURISDICTION

On February 4, 2014, the Michigan Court of Appeals issued the pertinent opinion in this matter (Opinion, Attachment 1). The trial court orders in question are also attached as Attachment 2. This application is filed within 42 days of the Michigan Court of Appeals' ruling. Therefore, this application is timely pursuant to MCR 7.302(C).

**STATEMENT OF QUESTIONS PRESENTED**

- I. SHOULD THIS GRANT LEAVE TO APPEAL TO CONSIDER WHETHER, AND ULTIMATELY RULE THAT, THE LOWER COURTS HAVE COMMITTED ERRORS REQUIRING REVERSAL IN RULING THAT DEFENDANT COULD BE SUED UNDER THE COMMON WORK AREA EXCEPTION APPLICABLE TO GENERAL CONTRACTORS AND SOME PROPERTY OWNERS, DESPITE ITS CONTRACTUAL AGREEMENT TO SERVE AS A CONSTRUCTION MANAGER AND THE ABSENCE OF A CONTRACTUAL OBLIGATION TO ASSUME RESPONSIBILITY FOR SAFETY VIOLATIONS BY TRADES HIRED DIRECTLY BY THE PROPERTY OWNER?**

Appellant answers:	Yes
The trial court would answer:	No
The Court of Appeals would answer:	No
Appellee will answer:	No

- II. SHOULD THIS GRANT LEAVE TO APPEAL TO CONSIDER WHETHER, AND ULTIMATELY RULE THAT, THE LOWER COURTS HAVE COMMITTED ERRORS REQUIRING REVERSAL REGARDING THE PROPRIETY OF A JURY INSTRUCTION THAT BLURRED THE IMPORTANT DISTINCTION BETWEEN THE “COMMON WORK AREA” ELEMENT AND THE “SIGNIFICANT NUMBER OF WORKERS” ELEMENT, AND ALSO MISCONSTRUED THE TIMING OF THE “SIGNIFICANT NUMBER OF WORKERS” ELEMENT?**

Appellant answers:	Yes
The trial court would answer:	No
The Court of Appeals would answer:	No
Appellee will answer:	No

**III. SHOULD THIS GRANT LEAVE TO APPEAL TO CONSIDER WHETHER, AND ULTIMATELY RULE THAT, THE LOWER COURTS HAVE COMMITTED ERRORS REQUIRING REVERSAL WITH RESPECT TO THE DENIAL OF DEFENDANT'S DISPOSITIVE MOTIONS, WHERE THE LAW OF THE CASE DOCTRINE DID NOT APPLY, WHERE THE TRUE "DANGER" WAS FURTHER REFINED BY ADDITIONAL DISCOVERY AFTER REMAND, AND WHERE THE TESTIMONY AND EVIDENCE SIMPLY DID NOT SUPPORT A CONCLUSION THAT THERE WERE MATERIAL QUESTIONS OF FACT AS TO MULTIPLE ELEMENTS OF THE COMMON WORK AREA EXCEPTION?**

Appellant answers:	Yes
The trial court would answer:	No
The Court of Appeals would answer:	No
Appellee will answer:	No

**IV. TO THE EXTENT NECESSARY TO FULLY AND FAIRLY RESOLVE THE ISSUES PRESENTED IN THIS APPEAL, DID THE MICHIGAN COURT OF APPEALS CLEARLY ERR IN DOCKET 290268, CAUSING MATERIAL INJUSTICE TO DEFENDANT, IN RULING THAT THE TRIAL COURT (A) ABUSED ITS DISCRETION IN PRECLUDING PLAINTIFF FROM INTRODUCING NEW WITNESSES AND RECORD EVIDENCE IN 2008, AND (B) ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION?**

Appellant answers:	Yes
The trial court would answer:	Yes
The Court of Appeals would answer:	No
Appellee will answer:	No

## STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

### *Introduction*

This is the third time this case has reached this Court. Plaintiff Douglas Latham seeks to recover damages for an injury suffered in 2002 while working on a construction site. His theory has evolved between 2004 and present, but has essentially focused on his failure to wear personal fall protection. After the second remand in 2011, Plaintiff admitted in discovery and similarly testified during trial that there were personal fall protection devices on the construction site for him to use, but that he had never worn personal fall protection on any construction site. His theory had shifted to the absence of a place to affix the personal fall protection that he had never worn on any job.

Defendant moved for dispositive relief under these new facts before, during, and after trial. Defendant argued that the “common work area” exception had not previously applied to a mere construction manager and that Defendant’s liability should instead be based on active negligence (or lack thereof). Defendant also argued that Plaintiff could not establish the common work area exception elements. The trial court denied these motions. The trial court also erroneously instructed the jury—conflating the “common work area” and “significant number of workers” elements of the “common work area” exception, and failing to recognize the “time of the incident” limitation this Court has added to the “significant number of workers” element.

Because of these errors, Plaintiff was able to persuade the jury to award him damages. Defendant contends that the rulings below were clearly erroneous, causing manifest injustice and conflicting with other appellate decisions, justifying this Court’s intervention pursuant to MCR 7.302(B)(5). In addition, as this litigation has demonstrated, there is substantial confusion and uncertainty regarding how to apply the elements of the “common work area” exception. The elements are not being applied consistently. Thus, Defendant further contends that the proper

application of the common work area exception and its elements is a legal issue of significance to Michigan jurisprudence, as necessary for this Court to intervene pursuant to MCR 7.302(B)(3). Defendant respectfully requests that this Honorable Court ultimately reverse the lower courts and remand for a new trial or judgment in Defendant's favor.

### *Procedural History*

Because this is the third appeal of this lawsuit, Defendant will begin by reviewing the procedural history of this litigation.<sup>1</sup> The first appeal arose out of the denial of Defendant's motion for summary disposition based on the "common work area" exception. *Latham v Barton Malow Co* ("Latham I"), unpublished per curiam opinion of the Michigan Court of Appeals (Docket No. 264243, issued October 17, 2006 (Attachment 3), rev'd by *Latham v Barton Malow Co* ("Latham II"), 480 Mich 105; 746 NW2d 868 (2008). In reversing, this Court noted the following summary of the facts:

Plaintiff was a carpenter employed by B & H Construction to work on the construction of a new school building. Defendant Barton Malow Company was the construction manager on the project. On the day of plaintiff's injury, plaintiff and a coworker were moving sheets of drywall from a scissors lift to the mezzanine level of the project. They raised the lift to the height of the mezzanine and removed the cable barrier around the perimeter of the mezzanine, an action required to allow ingress. When they began carrying the first sheet of drywall from the lift to the mezzanine, plaintiff was not wearing a fall-protection harness, contrary to jobsite rules of which he was aware. As plaintiff was moving onto the mezzanine, the sheet of drywall cracked and plaintiff lost his balance, falling 13 to 17 feet to the floor. He was injured, but undisputedly would not have been had he been wearing the required protective harness. [*Latham II, supra* at 113.]

The quoted paragraph also contained footnote 3, which stated as follows: "For purposes of its summary disposition motion, defendant conceded that it served as general contractor for the project.

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<sup>1</sup> The undersigned has been advised by this Court's clerk's office to use attachments sparingly. References to an "Appendix" will refer to those documents appended to Defendants' Brief on Appeal in the Michigan Court of Appeals. The documents that are appended to this brief will be titled "Attachments." If this Court desires copies of any documents, it should not hesitate to ask.

Accordingly, the trial court made no decision regarding that issue.” The “issue” was whether Defendant, a construction manager, could even be sued under the “common work area” exception.

The *Latham II* decision reversed, rather than affirm, the lower court’s decisions to deny summary disposition. *Id.* at 108, 115. In so ruling, this Court made several notable observations to guide the parties and lower courts during future proceedings:

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. [*Latham II, supra* at 112, quoting *Funk v General Motors Corp*, 392 Mich 91, 102-104; 220 NW2d 641 (1974).]

The [*Funk*] doctrine is understood as an exception to the general rule that, in the absence of its own active negligence, a general contractor is not liable for the negligence of a subcontractor or a subcontractor’s employee and that the immediate employer of a construction worker is responsible for the worker’s job safety. [*Latham II, supra* at 112, citing *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52; 684 NW2d 320 (2004) and *Funk, supra* at 52.]

The Court in *Funk* was clear that the danger at issue was not the height itself, but the fact that the men were required to work “at dangerous heights *without any protection from falls.*” To hold that the unavoidable height itself was a danger sufficient to give rise to a duty would essentially impose on a general contractor strict liability for any injury resulting from a fall from an elevated common work area. This has never been the law. Moreover, because working at heights is generally an unavoidable condition of construction work, it cannot, by itself, be the avoidable danger *Funk* described. Hazards, including dangerous heights, are commonplace in construction worksites. [*Latham II, supra* at 113.]

With the relevant danger correctly perceived, the error of the lower courts’ analyses becomes apparent. While defendant’s motion for summary disposition identified the correct danger and further raised the issue that plaintiff’s own failure to wear a fall-protection device did not create a high degree of risk to a significant number of workers, the 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. [*Latham, supra* at 114-115.]

In light of the reversal, this matter was remanded to the trial court for further rulings consistent with the opinion. Although Defendant also sought reconsideration to have this Court rule that summary disposition was mandated on remand, this Court denied same.<sup>2</sup>

After remand, the trial court allowed Plaintiff to move for leave to amend his witness list and expand the record. See *Latham v Barton Malow Co* (“Latham III”), unpublished per curiam opinion of the Michigan Court of Appeals (Docket No. 290268, issued December 7, 2010 (Attachment 4), lv den *Latham v Barton Malow Co* (“Latham IV”), 489 Mich 899; 796 NW2d 253 (2011)). Defendant opposed this motion, noting that Plaintiff had six months to prepare for the hearing on the motion for summary disposition, as well as this Court’s recognition that Defendant had identified the correct danger in the original motion. Moreover, Plaintiff certainly had not shown “good cause” to expand the record, which was required by local court rule. The trial court, in an exercise of sound discretion, agreed with Defendant and denied Plaintiff’s motion. Defendant renewed its original motion for summary disposition. Plaintiff filed a responsive brief that wholly ignored the trial court’s order and unilaterally expanded the record. The trial court granted Defendant’s motion, recognizing that the record as it had been submitted prior to the first appeal supported Defendant’s entitlement to summary disposition.

Plaintiff appealed as of right in *Latham III*. The Michigan Court of Appeals inexplicably concluded that the trial court abused its discretion in refusing to allow Plaintiff to amend the proofs in 2009 to respond to an argument raised by Defendant in 2004. *Latham III, supra*. This Court also ruled that, based on the new evidence, there was a question of fact and that summary disposition was improperly granted. *Id.* Defendant filed an application for leave to appeal, which was denied by the Supreme Court. *Latham IV, supra*. However, despite denying leave, this Court noted that the issue

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<sup>2</sup> *Latham v Barton Malow Co*, 481 Mich 882, 748 NW2d 878 (2008).

should be deferred until after a remand to the trial court. See *Latham IV, supra*. This Court expressly contemplated further discovery and dispositive motion practice. *Id.*

In fact, after the remand in 2011, Plaintiff amended his Complaint. Plaintiff's original theory in 2004 was that Defendant had failed to "guard" the area where Plaintiff was working (2004 Complaint, ¶ 11). In 2011, Plaintiff changed his theory and alleged that there was no anchorage point for Plaintiff to affix personal fall protection<sup>3</sup> (2011 Complaint, ¶ 14). This issue was not part of the litigation in 2004 and 2005. This, of course, is why Plaintiff had to amend his witness list and proofs in between the first two appeals. Plaintiff reiterated that he was injured when moving from a scissor lift to a mezzanine level (*Id.* at ¶ 7). Plaintiff continued to allege that Defendant should be held liable under the "common work area" exception as a general contractor<sup>4</sup> (*Id.* at ¶ 8).

The parties re-deposed nearly every witness and deposed Scott Schrewe (the belatedly-disclosed individual who replaced Plaintiff on the job site) for the first time. At the conclusion of discovery, Defendant filed a motion for summary disposition.<sup>5</sup> Defendant's motion raised two grounds: (i) it was a construction manager, not a general contractor, preventing application of the common work area exception; and (ii) in the alternative, Plaintiff could not satisfy all of the elements of the common work area exception. In regard to the latter, Defendant observed that Plaintiff was working in isolation at the time of the incident—a circumstance where the "common work area exception" generally does not apply, *Hughes v PMB Building*, 227 Mich App 1, 7; 574 NW2d 691

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<sup>3</sup> Plaintiff's summary disposition briefing before the 2005 hearing never raised an issue with the anchorage point; rather, Plaintiff's position was that he should have been provided fall protection and/or been reminded to use it.

<sup>4</sup> Defendant's answer to this new Complaint denied that it was a general contractor (2011 Answer, ¶ 4). Defendant dutifully raised affirmative defenses applicable to its status as a mere construction manager, but also observed that—even treated as a general contractor—liability was precluded because of Plaintiff's inability to satisfy common work area elements (2011 Affirmative Defenses, ¶¶ 11-13).

<sup>5</sup> Defendant's 2011 summary disposition brief, Appendix F.

(1997)(*Id.* at 16). Defendant also observed that Plaintiff's specific work at the time of the incident did not require personal fall protection (*Id.* at 16). In fact, working on the mezzanine did not require fall protection (*Id.*). In defining the danger as broadly as "merely working at heights without fall protection," Plaintiff disregarded the specific risk he actually encountered by parking his scissor lift crookedly; regardless, with a narrow or broad definition of the alleged hazard, Plaintiff could not establish that a significant number of workers encountered the same risk (*Id.*).

Plaintiff's response argued that *Latham III* prevented the trial court from considering Defendant's motion for summary disposition under the "law of the case" doctrine (Plaintiff's 2011 summary disposition brief, 1-4). Plaintiff also claimed that he could unilaterally define the danger broadly as "working at heights without fall protection," without analyzing the specific danger Plaintiff actually encountered (*Id.*, 5-18). Defendant filed a reply brief noting that the law of the case doctrine does not apply to a summary disposition reversal or where the facts materially change.<sup>6</sup> Defendant further noted that Plaintiff's position ignored the more detailed factual record obtained after remand—which confirmed that the task that Plaintiff was performing did not require fall protection (*Id.* at 3-5).

The trial court dispensed with oral argument and denied Defendant's motion.<sup>7</sup> The trial court ruled that there was insufficient authority to conclude that Defendant's status as a construction manager prevented Plaintiff from pursuing a recovery under the common work area exception (*Id.* at 3-6). The trial court also ruled that the discussion of the facts by the appellate courts when remanding "defined" the danger for purposes of subsequent litigation on remand, essentially

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<sup>6</sup> Defendant's 2011 reply brief, Appendix I, 1-2.

<sup>7</sup> 11/3/2011 Opinion, Appendix G.

accepting Plaintiff's law of the case doctrine argument (*Id.* at 7-10). From there, the trial court concluded that there were material questions of fact as to the disputed elements (*Id.* at 7-12).<sup>8</sup>

With the motion for summary disposition denied, the parties moved towards trial. Among the more contentious issues was how the jury would be instructed. As this Court will see, the trial court record is full of proposed instructions, objections, motions, and responses. One of the main issues to be decided was how to instruct the jury regarding the common work area elements. The trial was conducted from April 30, 2012, to May 8, 2012.<sup>9</sup> During the trial, the trial court ruled that the following special instruction would be provided to supplement the elements of the "common work area" exception:

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 number of 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 eventually work in the area," unquote. Again, another citation, which you don't need to worry about.

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<sup>8</sup> Defendant filed a motion for reconsideration observing that numerous cases from the Michigan Court of Appeals have ruled that the "significant number of workers element" looks to the time of the incident (Defendant's motion for reconsideration, Appendix H). The trial court denied this motion.

<sup>9</sup> For ease of reference, and in light of the court reporter's rather confusing break-up of the testimony, Defendant will refer to the trial transcripts as follows: "Tr I" (transcript of April 30, 2012, trial); "Tr II" (transcript of the May 1, 2012, trial, except for Gary Jordan's testimony); "Tr IIA" (transcript of the Gary Jordan testimony on May 1, 2012); "Tr IIIA" (transcript of the Gary Jordan testimony on May 3, 2012); "Tr III" (transcript of May 3, 2012, trial, except for Gary Jordan's testimony); "Tr IV" (transcript of May 4, 2012, trial); "Tr V" (transcript of May 7, 2012, trial, excluding Steven Williams); "Tr VA" (transcript of testimony of Steven Williams on May 7, 2012); and "Tr VI" (transcript of May 8, 2012, trial).

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

After the trial, and in light of all of the briefing on this issue, the trial court issued a written opinion retroactively explaining its basis for providing the instruction regarding the “significant numbers of workers” element.<sup>10</sup> This explanation cited: (a) the *Latham I* decision, which was reversed by this Court (*Id.* at page 5-6); (b) the dissenting opinion of this Court in *Latham II* (*Id.* at page 6-7); and (c) a *Latham III* quote of the language from *Hughes* regarding the common work area element (*Id.* at 8).

Defendant moved for a directed verdict on the last full day of trial (Tr V, 34).<sup>11</sup> The trial court denied the motion (Tr V, 39-40). As it relates to the instruction regarding the common work area elements, Defendant objected on the record to the trial court’s conflating of the “significant number of workers” and “common work area” elements (Tr V, 70). The trial court rejected Defendant’s objection (Tr V, 70-73). The jury was ultimately so instructed (Tr VI, 12).

The jury awarded Plaintiff past economic and non-economic damages of \$338,276 and \$250,000, respectively (Tr VI, 40-42). The trial court also awarded Plaintiff future economic damages of \$31,325 per year and future non-economic damages of \$24,000 per year, through 2029 (Tr VI, 40-42). But the jury also found that Plaintiff was 22.5% comparatively at fault, and that his employer was also 22.5% at fault (Tr VI, 40-41), leaving Defendant at 55% at fault (Tr VI 40). After adjusting for the fault, and including judgment interest (for the nearly 9 years that this matter was pending), the resulting judgment was for \$1,118,142.73.<sup>12</sup>

Defendant filed a motion for judgment notwithstanding the verdict (“JNOV”), as well as a separate motion for new trial.<sup>13</sup> With respect to the JNOV motion, Defendant argued that judgment

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<sup>10</sup> 5/14/12 opinion, Appendix I.

<sup>11</sup> Directed Verdict motion and brief, Appendix O.

<sup>12</sup> Judgment of May 29, 2012, Appendix A; Attachment 2.

<sup>13</sup> See Appendix P and Appendix Q.

in Defendant's favor was proper because (a) the common work area exception does not apply to a construction manager; and (b) Plaintiff failed to establish all of the elements of the common work area exception, including the significant number of workers element and the common work area element. Defendant's motion for new trial raised these grounds, as well as the trial court's erroneous jury instructions. The trial court denied both motions shortly after receiving Plaintiff's responses and without even holding a hearing.<sup>14</sup>

Defendant timely filed a claim of appeal with the Michigan Court of Appeals in Docket No. 312141.<sup>15</sup> Following briefing, the Michigan Court of Appeals issued its opinion on February 4, 2014, affirming the trial court's rulings. *Latham v Barton Malow Co* ("Latham V"), unpublished per curiam opinion of the Michigan Court of Appeals (Docket Nos. 312141 and 313606, issued February 14, 2014)(Attachment 1). The substance of this opinion will be addressed within the individual issues raised in this application for leave to appeal.

### ***Material Facts***

Although there was discovery in 2004 and 2005, the depositions of all material witnesses were retaken in 2011 and 2012. The most pertinent testimony to several of the issues on appeal involves the trial testimony. Defendant will endeavor to provide an overview of the trial testimony necessary to assist this Court in the review of the issues raised on appeal.

### ***The Trial: Expert Witnesses***

One of the important issues was the contract between Defendant and Lake Orion (the property owner), which set forth the terms obligating Defendant to perform its construction manager role on

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<sup>14</sup> See Appendix A; see also Attachment 2.

<sup>15</sup> Shortly thereafter, Plaintiff filed a motion for case evaluation sanctions. That issue was ultimately resolved after an evidentiary hearing involving expert testimony. The trial court awarded Plaintiff \$357,352.78 in case evaluation sanctions, taxable costs, and interest (Appendix B). Defendant timely filed a claim of appeal with the Michigan Court of Appeals in Docket No. 313606.

the construction site. Defendant presented the expert testimony of Steven Williams to explain the important difference between a construction manager and a general contractor (Tr VA, 4). Williams testified that he reviewed the pertinent contracts in this matter: the contract between Lake Orion Schools and Defendant,<sup>16</sup> as well as the contract between Lake Orion Schools and B&H Construction, Plaintiff's employer<sup>17</sup> (Tr VA, 12).

Williams explained that construction managers typically "take care of all of the paperwork" and usually do not have workers on site performing (Tr VA, 14). Williams further explained:

[C]onstruction managers are managers that basically keep the project going. They are responsible for the schedule. They are responsible for the meetings. They are responsible for ensuring that everybody's qualified to do the scope of work that they have bid upon, and they are accountable to the owner. They're basically functioning kind of like an owner's rep. [Tr VA, 14.]

Williams noted that the contract between Lake Orion Schools and Defendant did not even allow Defendant to have *any* control (Tr VA, 16). Specifically, Williams referred to § 2.3.12 of the contract, which stated that Defendant was responsible for reviewing the safety programs developed by the trades, but that Defendant's responsibilities "for coordination of safety programs shall not extend to direct control over or charge of the acts or omissions of the contractor or subcontractor's agents or employees of the contractors" (Tr VA, 16). Williams explained that this meant that Defendant did not have any control over the subcontractors, other than coordinating their work to not interfere with each other (Tr VA, 16-17).

Defendant had responsibility for preventing one contractor from, as an example, ensuring that there was ventilation so that one trade's work did not harm another trade (Tr VA, 17). Defendant also needed to ascertain whether the trades had a safety program, which it did (Tr VA, 17). But Defendant was not contractually responsible for supervising the trades to ensure that they selected the

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<sup>16</sup> Plaintiff's trial exhibit 2, Appendix J.

safest method to perform their work (Tr VA, 17, 20). Indeed, § 2.3.15 of the contract was clear in stating that Defendant was not responsible for the “means, methods, techniques, sequences, or procedures for safety precautions and programs in connection with the work of each of the contractors since these are solely the contractor’s responsibility under the contract for construction” (Tr VA, 19).

Williams further explained that, under the contracts, B&H Construction would determine how best to erect drywall on a mezzanine, not Defendant (Tr VA, 20). Williams noted that B&H Construction should have planned all of this before it submitted its bid (Tr VA, 23-24). Williams also noted that the size of the project precluded Defendant from being everywhere on the site (Tr VA, 28). Defendant was simply not contractually obligated to watch any individual worker, such as Plaintiff, perform his work to ensure that he and his employer chose the safest method (Tr VA, 34).

Williams observed that Plaintiff’s employer created a documented safety program, which Plaintiff reviewed and signed (Tr VA, 34). Williams testified that Plaintiff’s employer was solely responsible for Plaintiff’s safety because it was the entity that exposed Plaintiff to the potential for danger by choosing a less safe method to perform a task (Tr VA, 35-36). Williams ultimately opined that Plaintiff and his employer were responsible for choosing the means and methods of getting themselves and the material onto the mezzanine (Tr VA, 37). They were negligent by choosing a less safe method of doing so (Tr VA, 38).

Williams testified that the best way to get the materials onto a mezzanine is with a “loll,” an articulating forklift (Tr VA, 39). Because it can turn 90 degrees and can articulate, this forklift would have been able to place the drywall right in the center of the mezzanine (Tr VA, 39). Williams noted that contractors usually have one or two lolls (Tr VA, 41). Another option for getting the materials

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<sup>17</sup> Defendant’s trial exhibit S, Appendix K.

on the mezzanine was a portable conveyor system (Tr VA, 40). Once the materials were on the mezzanine, Plaintiff needed to only ascend a ladder (Tr VA, 40). Plaintiff would not have required personal fall protection with all of these options (Tr VA, 41).

During cross-examination, Williams disagreed that Defendant was “responsible for coordinating and supervising the work of the various contractors” (Tr VA, 42-43). Williams agreed that Defendant was contractually responsible to make observations on the work site, and to report to the “owner” construction means, methods, techniques, and sequences that were not in conformity with industry standards (Tr VA, 45). Defendant also had to observe for defects and deficiencies in the quality of the workmanship and prepare on-site inspections (Tr VA, 46). Williams agreed that Plaintiff’s method of exiting the scissor lift onto a mezzanine required fall protection (Tr VA, 61-62). Williams disagreed, however, that Defendant was responsible for each trade’s safety obligations because the contracts at issue placed that responsibility onto the contractors (Tr VA, 54-55).

Plaintiff also presented an expert witness, Alton David Brayton (Tr IV, 90). The essence of Brayton’s testimony was his opinion, without authority, that there always has to be an entity that is responsible for safety (Tr IV, 140). He opined that, in this case, it was Defendant (Tr IV, 140). He further opined that Defendant was responsible for coordinating the work and coordinating the safety on the project (Tr IV, 140-141). It was his opinion that Defendant was responsible for providing anchorage points for workers to tie-off to (Tr IV, 143). Brayton disagreed that it was the responsibility of the trades to provide their own anchorage points (Tr IV, 148). He concluded that there was no fall protection for workers to use when exiting a machine to get onto the mezzanine area (Tr IV, 152).

During cross-examination, Brayton agreed that the contract between Defendant and the project owner stated that the “construction manager’s responsibility for coordination of safety

programs shall not extend to direct control over or charge of the acts or omissions of the contractors, subcontractors, agents or employees of the contractors . . . or any of the other persons performing portions of the work and not directly employed by the construction manager” (Tr IV, 161, citing § 2.3.12 of the contract). Brayton noted that this provision was “common,” and that Plaintiff’s employer was obviously responsible for the safety of its workers (Tr IV, 161).

Brayton also agreed that the contract between Defendant and the project owner specifically stated that the “construction manager shall not have control over or charge of and shall not be responsible for construction means, methods, techniques, sequences or procedures or for safety precautions and programs in connection with the work of the contractors because these are solely the contractor’s responsibility under the contract for construction” (Tr IV, 162-163, cutting § 2.3.15). Brayton further agreed that a carpentry contractor is responsible for figuring out how they are going to do their work (Tr IV, 163).

Relative to MIOSHA, Brayton testified that both Plaintiff and his employer violated same for exposing Plaintiff to a fall hazard without protection (Tr IV, 164). He also opined that it was unsafe for Plaintiff to position the scissor lift with a gap between it and the mezzanine<sup>18</sup> (Tr IV, 170).

Importantly, Brayton agreed that fall protection was not required while operating the scissor lift (Tr IV, 173). Brayton also agreed that the mezzanine edge could be guarded with cables or other barriers, or it could be sectioned off with sawhorses or even yellow caution tape (Tr IV, 175).

Perhaps most importantly, Brayton specifically confirmed that no fall protection was required while Plaintiff was working on the mezzanine because it would “impede the work operation” (Tr IV, 177). Brayton further noted that only Plaintiff and his partner were exposed to a risk of exiting a

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<sup>18</sup> Brayton acknowledged that § 32048 of MIOSHA was inapplicable to this case because it involved aerial lifts (Tr IV, 172). There had been questioning of Gary Jordan regarding this irrelevant subsection of MIOSHA.

crookedly parked scissor lift (Tr IV, 178). Brayton agreed that there was no reason why Plaintiff's employer could not have erected the anchorage points or barricading necessary to protect Plaintiff (Tr IV, 180). Brayton testified that an articulating forklift would have allowed the drywall to have been placed safely in the center of the mezzanine area (Tr IV, 183).

***The Trial: Barton Malow Employees***

Ted Crossley testified that he was a superintendent on the project (Tr II, 47). He was responsible for coordinating the job—ensuring that the various trades worked in proper sequence (Tr II, 47, 49-50). Crossley testified that he recalled there being multiple “mezzanines” (also referred to as elevated islands) on the project (Tr II, 52). He explained the sequence of constructing these mezzanines, which trades would perform various tasks, and in what order as the mezzanines were completed (Tr II, 52-53, 127-130).

Crossley testified that, on the date of Plaintiff's incident, he filled out a daily report noting where the various trades were working on the project (Tr II, 56). Crossley testified that before Plaintiff and his partner began to work that day, he confirmed that one of them had a certificate to operate the scissor lift that Plaintiff's employer had on site (Tr II, 102). But Crossley never saw the scissor lift with material in it, much less being used by Plaintiff and his partner (Tr II, 102, 105).

Crossley agreed that there was a potential hazard if the protective cable to the mezzanine area was taken down by Plaintiff to allow him access to the mezzanine, but did not agree that it was absolutely necessary for the cable to come down (Tr II, 77, 103). He could not recall a specific tie-off point on the mezzanine (Tr II, 105, 121). Crossley testified that he had 30 years of experience as a journeyman carpenter (like Plaintiff), including work on the Silver Dome (Tr II, 123). As part of his training, he was instructed on the use of fall protection, such as harnesses and lanyards (Tr II,

123). Crossley noted that it is the employer's responsibility to determine where to tie-off (i.e. affix the anchorage point)(Tr II, 125).

Regardless, his coordination of the trades certainly did not extend to telling the trades how to do their jobs or what equipment to use to get the job done (Tr II, 132-133). As it relates to the means and methods of getting drywall and personnel onto the mezzanine area, this was within Plaintiff's employer's discretion (Tr II, 133-134). When an owner (as in this case) or a general contractor (as in other cases) hires a trade, it is expected that they will have the "means and methods" to do their job (Tr II, 134). Crossley noted that Plaintiff's employer could have used a forklift to elevate the drywall and ladders to access the mezzanine area (Tr II, 139). Alternatively, they could have used the scissor lift to elevate the drywall, as it can be operated from the ground (Tr II, 139-140). In such circumstances, personal fall protection (a harness and lanyard) would not be required (Tr II, 140). If Plaintiff's employer wanted to use the scissor lift to put people on the mezzanine (rather than a ladder or another method), it was incumbent on Plaintiff's employer to ensure that there was a suitable tie-off point and install same (Tr II, 141).

Crossley testified that, on the date of the incident, Plaintiff, his partner, and their immediate supervisor were the only ones (i.e. the only trade) working in Area 100 of the construction project (Tr II, 142-143; see also Tr II, 151). But Crossley testified that, when other trades accessed the mezzanines, the 15 or 20 workers for those trades did not require personal fall protection because they used ladders for personnel and lifting equipment for the materials (Tr II, 148). Thus, Crossley's testimony confirmed that no other workers required personal fall protection.

Gary Jordan testified that he has been employed as a safety manager for Defendant for approximately 12 years (Tr IIA, 6). Jordan agreed that Defendant was responsible for administering the safety program (Tr IIA, 31-32). But Jordan explained that this meant Defendant had to ensure

that each trade had a safety program in place, which it did (Tr IIA, 33, 38). Jordan noted that Plaintiff's employer (B&H Construction) had a contract with Lake Orion Schools to perform carpentry work (Tr IIIA, 47-48). This contract required B&H Construction to designate a project manager; have a safety plan to protect their employees; and designate a safety representative (Tr IIIA, 48-53). Jordan noted that Plaintiff's employer did, in fact, have a safety plan (Tr IIIA, 59). This let Defendant—and, more importantly, the property owner—know that Plaintiff's employer was training its workers properly and had safety issues addressed (Tr IIIA, 61-62).

As part of Plaintiff's employer's safety plan, Plaintiff had to personally sign a document noting that he would "rope off or barricade a danger area" and use safety belts when working at "unprotected high places" (Tr IIIA, 64-65). Plaintiff did so before starting work on the project (Tr IIIA, 68, 70-71).

Jordan also noted that the columns on the mezzanine were a suitable anchor point for a person using a lanyard/harness to tie-off to (Tr IIA, 46). Jordan noted that he, like Crossley and Latham, was a journeyman carpenter (Tr IIIA, 77). He reiterated that each journeyman carpenter is trained how to use personal fall protection, such as a safety harness and lanyard (Tr IIIA, 77). Jordan, a MIOSHA instructor, noted that it is an employer's responsibility to provide fall protection under MIOSHA (Tr IIIA, 82-86, 96).

In regard to Plaintiff's incident, Jordan testified that the mezzanine could only be accessed by a ladder or lift (Tr IIIA, 85-86). Because of that, there was no requirement for guarding or cabling (Tr IIIA, 86). But once a trade decided to put people on the otherwise inaccessible mezzanine, it was that trade and employee's responsibility to first make sure that there is adequate guarding for the task chosen (Tr IIIA, 87). It is not Defendant's responsibility (Tr IIIA, 87).

With respect to Plaintiff and his employer accessing this mezzanine, they could have used many different methods (Tr IIIA, 87). Jordan noted that the materials could be lifted onto the mezzanine from ground-level using the controls on the scissor lift—Plaintiff did not have to ride up with the materials at all (Tr IIIA, 87). Instead, Plaintiff could have used a ladder to access the mezzanine area, and no personal fall protection, such as a harness or lanyard, would have been required (Tr IIIA, 87). Using a lift truck and scissor lift also does not require the use of fall protection (Tr IIIA, 87).

Jordan testified that he was informed during his initial investigation that Plaintiff and his partner had parked the scissor lift crooked, leaving a gap (Tr IIIA, 89). He was told this by Plaintiff's partner, Tom Clingenpeel (Tr IIIA, 90). As it relates to using a lanyard, Jordan observed that it is the responsibility of a trade to erect an anchor point to tie-off to (Tr IIIA, 92). He did not dispute that, had Plaintiff been wearing a double-lanyard at the time of the incident, Plaintiff would not have fallen (Tr IIA, 17). However, Jordan also testified that other methods that Plaintiff's employer could have used to safely perform the tasks, included using "planking," accessing the mezzanine from a ladder, and using a hydraulic lift for the materials (Tr IIIA, 43). In any event, a trade that erects an anchorage point should also take it down afterwards to avoid liability<sup>19</sup> (Tr IIIA, 92). Simply stated, each trade decides what safety equipment is prudent for its own specialized work.

### ***The Trial: Scott Schrewe***

Scott Schrewe testified that he has been a carpenter for 25 years and had known Plaintiff for 20 of those years (Tr III, 10). Schrewe and Plaintiff worked for B&H Construction at the time of the

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<sup>19</sup> See e.g. *Frommert v Teera Construction Co*, unpublished per curiam opinion of the Michigan Court of Appeals (Docket No. 292097, issued October 25, 2011)(Appendix L), where a defendant contractor was sued for active negligence based on allowing another trade to use its scaffolding, which was ultimately not properly stabilized.

incident in January 2002 (Tr III, 10). Schrewe testified that he first performed work on the school construction project the day after Plaintiff's injury<sup>20</sup> (Tr III, 11).

Schrewe testified that he used the scissor lift to get the rest of the drywall on the mezzanine (Tr III, 17). Using the same means and methods as Plaintiff had the day before, Schrewe performed the tasks without incident (Tr III, 18). Like Plaintiff, he did not wear fall protection and took the cable down to access the mezzanine (Tr III, 19). He did not "believe" that there was an anchor point to tie a lanyard to (Tr III, 19). He recalled HVAC workers working on the mezzanine without fall protection (Tr III, 21). But there was no discussion as to how these workers accessed the mezzanine (see Tr III). During cross-examination, Schrewe admitted that he did not even know what a lanyard was until his deposition in this case (Tr III, 23). He also claimed that he had never been taught how to use a safety harness, but noted that it might have been covered in a safety video provided by B&H Construction (Tr III, 24). He conceded that he never wears a safety harness (Tr III, 24). He also testified that he parked the scissor lift flush with the mezzanine and that it would be dangerous to park it crookedly or with a gap (Tr III, 26). He concluded by testifying that he and his partner were the only two people on the mezzanine when performing their work (Tr III, 26-27).

#### ***The Trial: Plaintiff's Testimony***

Plaintiff testified that he began doing construction work as a carpenter in 1989, eventually becoming a journeyman carpenter (Tr III, 33-34). He was hired by B&H Construction in January 2002 and worked for approximately one week before the incident in question (Tr III, 35). He

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<sup>20</sup> Defendant objected to Schrewe providing testimony about what he observed because it transpired after Plaintiff's incident (Tr III, 12). The trial court sustained the objection (Tr III, 12). Plaintiff simply re-asked a similar question, leading to another objection (Tr III, 12-13). Plaintiff argued that the temporal determination is based on when the hazard is abated; while Defendant argued that the analysis looks to the time of the incident when determining if a significant number of workers were present (Tr III, 13-16). The trial court reviewed the law and relied on case law discussion of the

testified that he was familiar with personal fall protection systems at that time (Tr III, 37). He testified that he discussed fall protection with his partner, Tom Clingenpeel, on the date of the incident, but concluded that there was nowhere to tie off to<sup>21</sup> (Tr III, 37).

Plaintiff noted that he accessed another mezzanine in the week before the incident (Tr III, 39-40). On this first mezzanine, he accessed it with a ladder (consistent with the testimony of Jordan and Crossley)(Tr III, 39-40). He testified that he observed two electricians, four B&H employees, and two HVAC workers on the mezzanine over time (Tr III, 40-41). He testified that he did not observe any of these 8 people wearing fall protection (Tr III, 41). Of course, Plaintiff never performed work on the mezzanine himself and did not discuss how these other 8 workers accessed the mezzanine (see generally Plaintiff's testimony).

On the date of the incident, Plaintiff and his partner were going to erect drywall on the mezzanine (Tr IV, 6). Plaintiff testified that they loaded the drywall onto a scissor lift, which he operated (Tr IV, 7). He testified that he parked the scissor lift crookedly, but claimed that it was only two or three inches from flush<sup>22</sup> (Tr IV, 7). Plaintiff confirmed that there was a cable guarding the entrance to the mezzanine, which his partner took down (Tr IV, 9-10). He testified that his partner walked off first and that the drywall they were carrying cracked before Plaintiff could get his second foot onto the mezzanine (Tr IV, 10). Plaintiff fell, suffering injuries (Tr IV, 10).

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common work area element, rather than the "significant number of workers" element, of the common work area exception rule to overrule the objection (Tr III, 16).

<sup>21</sup> Plaintiff did not raise this issue before the trial court's summary disposition ruling in 2005.

<sup>22</sup> As it relates to Plaintiff's credibility, he testified that he had been performing engine repair work since the incident, making a "couple" thousand dollars a year (Tr IV, 32). On cross-examination, Plaintiff noted that he also did some construction estimating jobs (Tr IV, 36-37). He did not report this income on his tax returns (Tr IV, 36-38). Similarly, although he testified that he applied for 80 jobs, he admitted that during his deposition in 2011 that he had not applied for jobs in four years (Tr IV, 42). He admitted that he did not have a reason (Tr IV, 43).

During cross-examination, Plaintiff testified that he completed job site safety orientation before starting work for his employer, B&H Construction (Tr IV, 47). He agreed that the orientation covered personal protection equipment and fall protection (Tr IV, 48). He agreed that fall protection included barricades, housekeeping to avoid trip hazards, ladders, scaffolds, and lifts (Tr IV, 48). Plaintiff also admitted that he signed the form acknowledging his awareness of B&H Construction's safety policies (Tr IV, 50). He testified that his employer did not threaten or coerce him into doing something unsafe (Tr IV, 51). Plaintiff also agreed that he would not look to other trades to provide him the tools or equipment to perform his job (Tr IV, 48).

In fact, contrary to Plaintiff's theory of litigation before 2011, Plaintiff testified that he knew that there was fall protection—including safety harnesses and lanyards—in the B&H Construction "gang box" on the construction site (Tr IV, 49). Plaintiff noted that he had been trained on how to use personal fall protection and had many opportunities where he should have worn same, but that he had never used one on a construction site (Tr IV, 52). Simply stated, Plaintiff voluntarily chose to never use personal fall protection on any site, ever (Tr IV, 52-53).

As it relates to accessing the mezzanines, Plaintiff reiterated that he accessed the first mezzanine by ladder (Tr IV, 55). As it relates to the mezzanine on the date of the incident, he claimed that he did not see a tie-off point from ground-level (Tr IV, 56). However, he also noted that he did not contact his supervisor (Gerald Nutt) or the safety representative for his employer to inquire about fall protection (Tr IV, 57-58). Instead, he just decided to proceed (Tr IV, 58). Plaintiff also elaborated that they were working in isolation on the mezzanine area that day (Tr IV, 70). He and his partner were the only people to use the scissor lift (Tr IV, 71).

Plaintiff admitted that he could have used the scissor lift to elevate only the drywall to the mezzanine (Tr IV, 71). He also admitted that he could have accessed the mezzanine by ladder (Tr IV, 71). He had also seen fork lifts used to elevate materials onto a mezzanine (Tr IV, 72).

***The Trial: Tom Clingenpeel***

The final lay witness<sup>23</sup> to provide testimony was Tom Clingenpeel, Plaintiff's partner on the date of the incident (Tr V, 7-8). Notably, Clingenpeel, a journeyman carpenter with nearly 30 years of experience, was called by Defendant rather than Plaintiff (Tr V, 7). Clingenpeel testified that Plaintiff parked the scissor lift with a 12 to 16 inch gap between the scissor lift and the mezzanine (Tr V, 9). Photographs introduced into evidence also demonstrate the angle that Plaintiff parked the scissor lift.<sup>24</sup> He noted that there was no reason why Plaintiff could not have parked the scissor lift flush with the mezzanine (Tr V, 10). Plaintiff controlled the scissor lift (Tr V, 16).

Clingenpeel testified that he had installed drywall on elevated areas on numerous occasions (Tr V, 12). He noted that he had used fork lifts to get materials on an elevation (Tr V, 12). He had used scissor lifts from ground level to get materials on an elevation (Tr V, 13). He had used ladders to access elevations (Tr V, 12). On the date in question, Plaintiff and Clingenpeel were instructed by their supervisor, Gerald Nutt, as to how to perform the job (Tr V, 13). Clingenpeel denied that he and Plaintiff discussed personal fall protection on the date of the incident (Tr V, 23).

During cross-examination, Clingenpeel agreed that he did not measure the gap and that it might have been 8 to 10 inches (Tr V, 30). He was asked if they would have worn fall protection if Defendant had mandated it, and Clingenpeel explained that he would have had to check with his supervisor first (Tr IV, 32).

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<sup>23</sup> There is no need to discuss the medical expert witnesses or the vocational rehabilitation witnesses.

<sup>24</sup> See also diagram, Trial Exhibit Q, Appendix M. See Photographs, Trial Exhibits 9A through 9F, Appendix N. Clingenpeel noted that he moved the scissor lift backwards to descend. Tr IV, 19-20.

## ARGUMENT

- I. THIS COURT SHOULD GRANT LEAVE TO APPEAL TO CONSIDER WHETHER, AND ULTIMATELY DETERMINE THAT, THE LOWER COURTS HAVE COMMITTED ERRORS REQUIRING REVERSAL IN RULING THAT DEFENDANT COULD BE SUED UNDER THE COMMON WORK AREA EXCEPTION APPLICABLE TO GENERAL CONTRACTORS AND SOME PROPERTY OWNERS, DESPITE ITS CONTRACTUAL AGREEMENT TO SERVE AS A CONSTRUCTION MANAGER AND THE ABSENCE OF A CONTRACTUAL OBLIGATION TO ASSUME RESPONSIBILITY FOR SAFETY VIOLATIONS BY TRADES HIRED DIRECTLY BY THE PROPERTY OWNER.

### *Introduction*

Defendant filed a motion for summary disposition in November 2004, expressly noting that it was a construction manager and not a general contractor. However, Defendant's motion was based on the fact that, even if treated as a general contractor, Plaintiff could not establish the elements of the "common work area" exception. Plaintiff's theory of recovery was factually unsupportable. In fact, in *Latham II*, this Court expressly observed that Defendant was a construction manager, rather than a general contractor. *Latham II, supra* at 108. This Court noted that Defendant had not yet raised the issue of whether Plaintiff could rely on the common work area exception when suing a construction manager: "For purposes of its summary disposition motion, defendant conceded that it served as general contractor for the project. Accordingly, the trial court made no decision regarding that issue." *Id.* at 108 n 3.

After the remand in 2011, and subsequent re-opening of discovery, Defendant moved for summary disposition based on its status as a construction manager, rather than general contractor. There is no dispute that Defendant was not a general contractor on the project. Defendant was a construction manager—and one with even more limited responsibilities than an ordinary construction manager. Plaintiff was injured because he and his employer—presented with multiple options as to how to perform a task—opted to not use an available, safe method. Because Defendant was not

obligated to tell any of the trades how to choose its means and methods in its role as construction manager on this project, and given that Defendant did not engage in active negligence, the trial court erred as a matter of fact and law in denying Defendant's motion for summary disposition and other dispositive relief based on same.<sup>25</sup>

Defendant respectfully contends that this Court should grant Defendant's application for leave to appeal to determine whether and under what circumstances, a construction manager can have its liability adjudged under the common work area exception. In fact, this Court could peremptorily reverse the denial of dispositive relief based on the inapplicability of the common work area exception. MCR 7.302(B)(3); MCR 7.302(B)(5).

***This Court Should Grant Defendant's Application for Leave to Appeal***

As noted above, in *Latham II* this Court recognized that there was an "issue" with respect to whether a construction manager may be treated like a general contractor (i.e. be liable where the common work area elements are established). The time has come for this Court to address the issue—both as it relates to these parties and as it relates to the fabric of Michigan jurisprudence.

It is well established that there are differences between a general contractor and a construction manager. In *Hartford Ins Co v American Automatic Sprinkler Sys*, 201 F3d 538, 542 (CA4, 2000), the Court recognized that the American Institute of Architects "recommends a different contract form

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<sup>25</sup> This Court reviews *de novo* a trial court's ruling on a motion for summary disposition pursuant to MCR 2.116(C)(10). *O'Donnell v Garasic*, 259 Mich App 569, 572; 676 NW2d 213 (2003). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v General Motors*, 469 Mich 177, 182; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id.* This Court similarly reviews *de novo* a decision denying either a motion for directed verdict or judgment notwithstanding the verdict. *Taylor v Kent Radiology, PC*, 286 Mich App 490, 499; 780 NW2d 900 (2009); *Sniecinski v Blue Cross Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). As with a motion for summary disposition, the facts for such a motion are construed in the non-moving party's favor. *King v Reed*, 278 Mich App 504, 523 n 5; 751 NW2d 525 (2008).

for each participant in a construction project, including the architect, general contractor, construction manager, and subcontractor, reflecting the distinct role each performs.” It is plausible for there to be a general contractor and a construction manager on a construction site.<sup>26</sup>

A general contractor is retained by a property owner to perform construction work for the owner. The general contractor assumes the responsibility of completing all of that construction work. To further the completion of that construction work, the general contractor may or may not subcontract work to subcontractors that have more skill in a particular trade. But the trade is directly answerable to the general contractor, who bears ultimate responsibility for the work being done. As an example, if the electrician’s work is substandard, the general contractor is ultimately responsible to the owner as if the electrician’s work was its own.

But not every property owner chooses to incur the expense of hiring a general contractor. To save money or retain additional control over a project (or both), an owner can hire the trades directly. It then may choose to hire a construction manager to assist with scheduling and coordinating the trades so that they do not interfere with each other. However, if a trade fails to perform its work properly, it is the trade—and not the construction manager—that is answerable to the property owner.

When there is an injury to an employee of a trade in any state, the worker may or may not be able to sue an entity other than the immediate employer or the trade that created a danger. In other states, Restat 2d of Torts, § 414 applies to recognize that there are limited circumstances where a general contractor will be liable for the negligence of a subcontractor’s employee: “One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable

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<sup>26</sup> Defendant hopes that this Court will invite amicus curiae to participate in this appeal.

care, which is caused by his failure to exercise his control with reasonable care.” However, Comment C section to this restatement cautions:

In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

In other words, “control” is essential to the determination that a general contractor will be responsible for the negligence of a subcontractor. Not just passing control, but absolute control. The “control” that a “construction manager” has simply does not fall within the realm of “control” necessary to trigger responsibility under the restatement.

In *Ormsby v Capital Welding, Inc*, 471 Mich 45; 684 NW2d 320 (2004), this Court recognized the four, well-established elements to support liability against a general contractor in Michigan. Under the common work area exception: “To establish the liability of a general contractor under *Funk*, a plaintiff must prove four elements: (1) that the defendant contractor failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area.” In *Funk*, this Court was clear in noting that even a general contractor is not necessarily subject to liability under the common work area exception:

In some instances, as to some risks, it will appear unwarranted to impose the responsibility on anyone other than the immediate employer of the workman, whether he be a subcontractor or general contractor. In other circumstances, as here, it will appear, by reason of additional factors, that responsibility should be imposed on the general contractor. In still others, nothing short of imposition of complete enterprise responsibility on the owner will be consistent with the developing policies of the law of torts. [*Funk, supra* at 110-111.]

Indeed, even a purported general contractor can undertake an obligation that is so different from the ordinary general contractor role that liability should not attach under the “common work area” exception. Certainly, *Funk* fairly anticipates factual circumstances where an entity incurs far fewer obligations than a typical general contractor.

Moreover, this is not a circumstance where any contractor having *some* control over another contractor is alone sufficient to extend the common work area exception to the first contractor. In *Ormsby*, this Court considered several aspects of the “common work area” exception. *Ormsby, supra* at 57. As part of its ruling, this Court considered whether the “common work area” exception could apply to a non-general contractor, Capital Welding, Inc (“Capital”). *Id.* at 56-57. This Court rejected that argument, noting that the exception “is simply inapplicable to Capital in this case because Capital was neither the property owner nor the general contractor.” *Id.* at 58.

The dissenting opinion in *Ormsby* believed that it was a question of fact as to whether the “common work area” exception could apply to Capital. *Id.* at 62. The dissenting opinion opined that Capital, despite not being a “general contractor,” engaged in the following activities: (i) contracting with the subcontractor (Abrey) that employed the plaintiff; (ii) instructing Abrey how to perform its work; (iii) instructing the plaintiff how to perform the work; (iv) incurring the contractual obligation to “undertake safety precautions”; and (v) retaining the authority to remove a subcontractor from the work site for deviating from safety procedures. *Id.* at 63-65. Notwithstanding these facts, the *Ormsby* majority ruled that “*Funk* only authorized claims against owners and general contractors. Capital is neither.” *Id.* at 58 n 10.

Here, Defendant is not an owner or general contractor. Whether the common work area exception should extend to all construction managers is an issue not directly addressed by this

Court.<sup>27</sup> Defendant acknowledges that this Court denied an application for leave to appeal from an unpublished opinion rejecting Defendant's argument in a prior case. *Debeul v Barton Malow Co*, 489 Mich 982; 799 NW2d 176 (2011). However, there is no indication from the facts of *Debeul* that Defendant, under the facts of that matter and in contrast with this matter, was operating under a contract specifically stating that it (a) did not have supervisory authority over the work of the subcontractors; and (b) did not have control over means and methods. In addition, the incident in the *Debeul* matter was caused by protruding rebar from concrete—meaning that one trade was sent in to perform work before the other trade had properly and completely finished its work. This type of incident may be more fairly attributable to a construction manager—the active negligence of authorizing the plaintiff's employer to proceed in an area where the construction work preceding same was incomplete. Finally, 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 respectfully contends that this issue is of significant importance to Michigan jurisprudence. MCR 7.302(B)(3). 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

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<sup>27</sup> In *Ghaffari v Turner Constr Co*, 473 Mich 16; 699 NW2d 687 (2005), this Court considered the interplay between the common work area exception and the open and obvious doctrine. Although the entity in that case was a construction manager, the Court deemed this different status irrelevant for purposes of addressing the issues before it. *Id.* at 19 n 1. Indeed, this Court concluded that “the distinction is one without a difference for purposes of our analysis in this case.” *Id.* The ruling of the *Ghaffari* Court involved the legal interplay between two doctrines, and did not require an analysis of the facts relating to the defendant. Under the circumstances, the *Ghaffari* commentary was simply dicta as to the present issues. See *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 597-598; 374 NW2d 905 (1985). Moreover, in *Latham II*, this Court noted that the issue of whether a construction manager could be sued under the common work area exception was not before it yet. If the distinction was not material, such foreshadowing would not have been necessary.

trades that the property owner hires separately. In those cases, application of the “retained control” aspect of construction liability may be prudent. *Ormsby, supra*. But if courts are going to ignore the contracts between the parties under a misguided belief that some entity in a lawsuit must be a proverbial “deep pocket” for any injury, it should be this Court making such a policy decision. Defendant respectfully contends that this Court should, at a minimum, grant leave to entertain this important public policy issue—soliciting amicus curiae briefing from all the potentially impacted entities. MCR 7.302(B)(3).

***As a Construction Manager, Defendant Was Entitled to Dispositive Relief***

The trial testimony confirmed that Plaintiff should not have been able to sue Defendant, a construction manager, under the common work area exception. Here, not only was Defendant not a general contractor, but Defendant’s relationship to Plaintiff’s employer fell well short of the typical property owner/construction manager relationship. Defendant’s role also fell below that which has previously been determined by this Court to not be sufficient to impose liability on a non-general contractor. For all these reasons, it was clear error causing manifest injustice for the lower courts to deny Defendant dispositive relief based on its status as a mere construction manager.

Defendant’s expert testified that he reviewed the pertinent contracts in this matter, such as the contract between Lake Orion and Defendant; and the contract between Lake Orion and B&H Construction, Plaintiff’s employer. Tr VA, 12. Williams noted that the contract between Lake Orion Schools and Defendant designated Defendant as the construction manager, an entity that will, at most, “take care of all of the paperwork” and usually will not have workers on site performing. Tr VA, 14. Williams further explained that a construction manager’s role is to keep the project going, by coordinating the trades and scheduling same. *Id.* Williams testified that the contract between

Lake Orion and Defendant did not even allow Defendant to have any of the control normally reserved for construction managers. *Id.* at 16.

For example, Williams referred to § 2.3.12 of the contract, which stated that Defendant was responsible for reviewing the safety programs developed by the trades, but that Defendant's responsibilities "for coordination of safety programs shall not extend to direct control over or charge of the acts or omissions of the contractor or subcontractor's agents or employees of the contractors." *Id.*; emphasis added. Williams explained that this meant that Defendant did not have any control over the subcontractors, other than coordinating their work so as to not interfere with each other. *Id.* at 16-17. Defendant had responsibility to prevent one contractor from, as an example, ensuring that there was ventilation so that one trade's work did not harm another trade. *Id.* at 17. Defendant also needed to ascertain whether the trades had a safety program, which it did. *Id.* at 17. But, unlike a general contractor, Defendant was not responsible for supervising the trades to ensure that they selected the safest method to perform their work. *Id.* at 17, 20. Lest there be any doubt, § 2.3.15 of the contract was clear in stating that Defendant was not responsible for the "means, methods, techniques, sequences, or procedures for safety precautions and programs in connection with the work of each of the contractors since these are solely the contractor's responsibility under the contract for construction." *Id.* at 19.

In contrast, Plaintiff's expert provided an "opinion" that Defendant should be responsible because *someone* has to be responsible—this opinion required Plaintiff to ignore "common" provisions making Plaintiff's employer exclusively responsible for Plaintiff's safety. Tr IV, 161. The expert also agreed that the contract obligating Defendant to perform work *did not* require Defendant to control the work of the subcontractors. *Id.*, 161, citing § 2.3.12 of the contract. The expert further agreed that the contract expressly stated that Defendant did not have "control over or

charge of and shall not be responsible for construction means, methods, techniques, sequences or procedures or for safety precautions and programs in connection with the work of the contractors because these are solely the contractor's responsibility under the contract for construction." *Id.* at 162-163, citing § 2.3.15 of the contract. Finally, the expert agreed that a carpentry contractor is responsible for figuring out how they are going to do their work. *Id.* at 163. Thus, both experts agreed that Defendant was not contractually obligated to tell Plaintiff or his employer the means and methods to use to perform their work on the project.

In fact, if this were a matter involving Restatement § 414, comment c would plainly apply to prevent Defendant from being liable. Defendant did not have anywhere near the "control" necessary to support liability.

Returning to Michigan law, Defendant did not even have the control that Capital had over its subcontractor (Abay) in *Ormsby*. As an example, Defendant and Plaintiff's employer were not in contractual privity. Unlike Capital in *Ormsby*, there is absolutely no suggestion that Defendant ever provided instruction to Plaintiff's employer regarding the "means and methods" of performing the job. Quite the contrary, the contract did not require Defendant to do so. In fact, Defendant was *precluded* from interfering with Plaintiff's employer's work.

The Michigan Court of Appeals affirmed based on contract addendums, § 14.3 to § 14.7. *Latham V*, \*13-\*14. The Michigan Court of Appeals erred in suggesting that Plaintiff's expert deemed them relevant—he testified that these provisions were pertinent to being on site daily to review the "quality of workmanship" (Tr IV, 186-187). It had nothing to do with safety. Moreover, the provisions themselves reference reporting defects to the owner of the project, confirming the control of the project retained by the owner. After all, Plaintiff's employer contracted directly with the project owner and incurred contractual obligations without regard to the existence of Defendant.

And Defendant certainly did not give instruction to Plaintiff as to how to perform any aspect of the work. Given that Defendant's relationship to Plaintiff's employer was far more attenuated than the relationship in *Ormsby*, this Court can and should rule that it was error for Defendant to be denied dispositive relief.

Defendant's contractual obligations simply were not the equivalent of those of a general contractor. Not only was Defendant not required to monitor the means and methods used by the contractors, it was expressly agreed by the experts that Defendant *would not* have to do this. Accordingly, Defendant's role as a construction manager was significantly different than that of a general contractor. To be sure, there is some overlap of responsibilities for tasks such as scheduling and inspecting the work to determine whether the next trade could move into an area. But this small overlap does not convert a construction manager into a general contractor. There were means and methods for Plaintiff to perform the work safely. It is not a construction manager's job to serve as the "guardian angel" on a project to ensure that every trade chooses only the safe means and methods when working in isolation.<sup>28</sup>

In sum, it was error for the trial court to conclude that Plaintiff could sue Defendant under the "common work area" exception applicable to general contractors. Because Defendant was a construction manager, rather than a general contractor, the trial court erred in allowing this matter to proceed to a jury trial, a jury verdict, and in not vacating the jury's verdict in the post-trial motion.<sup>29</sup> The Michigan Court of Appeals similarly erred in affirming the trial court result below. This Court should grant leave to appeal based on an error causing manifest injustice for Defendant to be denied dispositive relief on this issue. MCR 7.302(B)(5).

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<sup>28</sup> The Court of Appeals also recognized that there is no basis for a ruling that every construction manager should be held liable under a "common work area" exception. Defendant agrees.

**II. THIS COURT SHOULD GRANT LEAVE TO APPEAL TO CONSIDER WHETHER, AND ULTIMATELY RULE THAT, THE LOWER COURTS HAVE COMMITTED ERRORS REQUIRING REVERSAL REGARDING THE PROPRIETY OF A JURY INSTRUCTION THAT BLURRED THE IMPORTANT DISTINCTION BETWEEN THE “COMMON WORK AREA” ELEMENT AND THE “SIGNIFICANT NUMBER OF WORKERS” ELEMENT, AND ALSO MISCONSTRUED THE TIMING OF THE “SIGNIFICANT NUMBER OF WORKERS” ELEMENT.**

The trial court ultimately selected language for a “special jury instruction” that impermissibly blurred the distinction between the “common work area” element and the “significant number of workers” element. In fact, both parties objected to the instruction. But the jury was provided that erroneous instruction. The trial court also denied Defendant’s motion for new trial arising out of the error in providing that instruction. The Michigan Court of Appeals reached the unremarkable conclusion that the instruction was erroneous, but then concluded that the error was essentially harmless. *Latham V, supra* at \*18-19. The trial court further instructed the jury that the “significant number of workers” element could be satisfied without regard to time or geographical scope, contrary to *Ormsby* and five Michigan Court of Appeals applying same. As will be explained below, Defendant respectfully requests that this Honorable Court either grant leave to appeal to consider the propriety of the instructions and ultimately remand for a new trial, with proper instructions.<sup>30</sup>

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<sup>29</sup> This issue was raised in Defendant’s 2011 motion for summary disposition (Appendix F), Defendant’s directed verdict motion (Appendix O), and Defendant’s JNOV motion (Appendix P).

<sup>30</sup> This Court reviews claims of instructional error de novo. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). As it relates to jury instructions that are *not* encompassed by the model instructions, MCR 2.512(D)(4) provides as follows: “Additional instructions when given must be patterned as nearly as practicable after the style of the model instructions, and must be concise, understandable, conversational, unslanted, and non-argumentative.” But additional instructions “need not be given if they would add nothing to an otherwise balanced and fair jury charge nor enhance the ability of the jury to decide the case intelligently, fairly, and impartially.” *Central Cartage Co v Fewless*, 232 Mich App 517, 528; 591 NW2d 422 (1998). The instruction must accurately state the law. *Wengel v Herfert*, 189 Mich App 427, 431; 473 NW2d 741 (1991). Reversal for a new trial is required where the failure to reverse would be inconsistent with substantial justice. MCR 2.613(A).

In *Ormsby*, this Court recognized the four elements of the common work area exception: “To establish the liability of a general contractor under *Funk*, a plaintiff must prove four elements: (1) that the defendant contractor failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area.” *Ormsby, supra* at 57. This Court further noted that it “is potentially confusing and, indeed, may have misled some courts, that a test with four elements has been referred to by only one of its elements--the ‘common work area.’” *Id.* at 59 n 11. The trial court and the Michigan Court of Appeals continue to struggle with the application of these similar, but distinct, elements.

This issue on appeal arises out of the trial court’s instruction to the jury regarding the aforementioned common work area elements.<sup>31</sup> After providing the elements of the “common work area” exception, over both parties’ objections, the trial court instructed the jury as follows:

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 number of 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 eventually work in the area," unquote. Again, another citation, which you don't need to worry about.**

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<sup>31</sup> See Special Jury Instruction #1, Appendix T; see also Tr VI, 11-12. In Appendix I, the trial court confirmed Defendant’s written objections to the instruction. See also Tr V, 70-73 (Defendant’s oral objection to the instruction).

**A, quote, "common work area," unquote, is defined as the same area where two or more trades would eventually work. [See *Latham V, supra* at 16-17; emphasis added.]**

Defendant has two issues with these special instructions.

The first error occurs with the emphasized text above--which contained two almost identical sentences. In so instructing the jury, the trial court confused the "high degree of risk to a significant number of workers" and "common work area" elements. As instructed, if multiple workers from multiple trades would eventually work in the same area, it would lead to the satisfaction of both distinct elements. This Court emphasized in *Ormsby*, all four elements of the common work area exception must be satisfied. *Id.* at 59. As instructed, evidence for one element erroneously satisfied two elements.

After the trial concluded, the trial court provided a written opinion explaining its decision to provide the Special Jury Instruction #1.<sup>32</sup> In support of the instruction given at trial, the trial court quoted portions of the *Latham III* opinion. At that point in the *Latham III* opinion, the Michigan Court of Appeals was not analyzing any specific element. *Latham III, supra* at \*26-27. Only later in the *Latham III* opinion is there discussion of the elements of the common work area exception. Instead, the portion of the *Latham III* opinion that was quoted by the trial court was language from the *Hughes* decision's analysis of the "common work area" element, not the "high degree of risk to a significant number of workmen" element. See *Latham III, supra* at 26, quoting *Hughes, supra* at 6. The discussion of the "high degree of risk to a significant number of workmen" element appears later in the *Hughes* decision. *Latham III, supra; Hughes, supra* at 6-10. The trial court's instruction to the jury rather plainly was an erroneous quote that allowed the jury to use facts that would satisfy the

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<sup>32</sup> See Appendix I. The trial court also inexplicably cited to the dissenting opinion in *Latham II* and the decision in *Latham I* that was reversed by this Court in *Latham II*.

“common work area” element to improperly satisfy the separate element of a “high degree of risk to a significant number of workers.”

The Michigan Court of Appeals acknowledged the error. *Latham V, supra* at \*18-19. But the Court concluded that reversal for a new trial was not required because, on balance, the instructions fairly presented the issues. *Latham V, supra* at \*19. Defendant is perplexed by the Michigan Court of Appeals’ conclusion that misstating the facts necessary to satisfy an element can be deemed “harmless error.”

In *Cox v Bd of Hosp Managers*, 467 Mich 1, 14-15; 651 NW2d 256 (2002), this Court recognized that instructional error that impacts the proof requirements in a case is an error requiring reversal. In *Cox*, the issue was the failure of the jury instructions to specify the agents and standards for purposes of a hospital’s potential vicarious liability. It is certainly inconsistent with substantial justice to erroneously instruct the jury regarding the elements. The jury is tasked with determining whether a plaintiff satisfies its burden of proof. When the jury instructions allow the jury to use improper proofs to satisfy an element, it is the very definition of inconsistent with substantial justice.

This Court long ago recognized that “[i]n considering the effect of conflicting instructions, one of which is erroneous, we presume that the jury may have followed that which was erroneous.” *In re Bailey's Estate*, 186 Mich 677.” *Frye v Gilomen*, 360 Mich 682, 687; 104 NW2d 813 (1960). Indeed, this Court has recognized—albeit more commonly in a criminal context—that a jury is presumed to follow its instructions. See e.g. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). The jury is presumed to have followed the erroneous instruction.<sup>33</sup>

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<sup>33</sup> “While not all instructional error requires reversal, reversal is mandated where the result might well have been different without the error.” *Shepard v MB Constr*, unpublished per curiam opinion of the Michigan Court of Appeals (Docket No. 261484, issued September 19, 2006 (Attachment 6), lv gtd 477 Mich 1018, 726 NW2d (2007), app dismissed by parties 478 Mich 851; 730 NW2d 737

Here, regardless of any accurate portion of the instructions, the jury was instructed that it could find the significant number of workers element satisfied if “employees of two or more subcontractors eventually work in the area.” This was an erroneous instruction. The trial court erroneously borrowed it from the *Latham III* decision, which could not have intended that its quote of the *Hughes* decision regarding the “common work area” would later be applied to analysis of the “significant number of workers” element. An appellate court must assume that the jury followed the erroneous instruction provided by the trial court. This was clear error causing manifest injustice to Defendant, as necessary to justify peremptory reversal for a new trial or leave granted under MCR 7.302(B)(5).

This was not the only error in the instruction. Although the trial court could have allowed the jury to decide how to determine the “significant number of workers” element, the trial court provided instructions on how to determine the “significant number of workers.” In *Ormsby*, this Court ruled that 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, supra* at 59 n 12. In so ruling, the *Ormsby* majority rejected the dissent’s position that the “high-degree of risk to a significant number of workers” element should be broadly construed. This ruling 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.<sup>34</sup> Defendant stands alone in having *Ormsby* applied differently.

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(2007), quoting *Body Rustproofing, Inc v Michigan Bell Telephone Co*, 149 Mich App 385, 392; 385 NW2d 797 (1986). In *Shepard*, the Michigan Court of Appeals found reversible error.

<sup>34</sup> *Felty v Skanska USA Building, Inc*, unpublished per curiam opinion of the Michigan Court of Appeals (Docket No. 297991, issued July 19, 2011); *Goodfallow v Glennwood Custom Builders, Inc*, unpublished per curiam opinion of the Michigan Court of Appeals (Docket No. 296155, issued April 12, 2011); *Hamm v Phoenix Contractors, Inc*, unpublished per curiam opinion of the Michigan Court of Appeals (Docket No. 278040, issued June 5, 2008); *Veness v Town Center Development*,

Defendant has not asked that new law be invented for its benefit. Instead, Defendant merely seeks to have the *same* law that applied to other general contractors (assuming Defendant may even be treated like a general contractor) apply to it. There is one rule of law that has been applied to Skanska USA Building, Inc.; Glennwood Custom Builders, Inc.; Phoenix Contractors, Inc.; and Spence Brothers. With those entities, the determination that a significant number of workers were exposed to a risk was decided on summary disposition and limited to the time of the incident based on this Court's ruling in *Ormsby*. Here, the trial court provided the *Ormsby* language, but then negated it with an instruction that it is not necessary that the workers be working at the same time. This is not only inconsistent with *Ormsby*, it is confusing.

The law in Michigan is that the significant number of workers element looks to the time of the incident. In *Alderman*, relying generally on *Ormsby*, this Court reversed the Michigan Court of Appeals, which noted that the significant number of workers element could include "workers at risk over the course of the project." *Alderman v JC Development Communities, LLC*, unpublished per curiam opinion of the Michigan Court of Appeals (Docket No. 285744, issued August 25, 2009 (Attachment 5), rev'd *Alderman v JC Development Communities, LLC*, 486 Mich 906; 780 NW2d 840 (2010). This Court's reversal in *Alderman* confirms that this Court did not intend a broad temporal scope for this element.

Defendant observes that it makes great sense that the "significant number of workers" analysis is limited to the time of the incident. What takes place *after* an incident cannot be anticipated at the time of the incident. There is certainly no other cause of action that allows post-

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unpublished per curiam opinion of the Michigan Court of Appeals (Docket No. 273298, issued July 31, 2007 (further noting that the cause of the injury was the use of fall protection); *Shawl v Spence Brothers*, unpublished per curiam opinion of the Michigan Court of Appeals (Docket No. 301314, issued February 16, 2012 (opinions attached as Appendix U).

incident events to determine liability for an already-occurred incident. Either a defendant owed a duty at the time of the incident or it did not. Any legal issue that allows post-incident conduct to determine legal responsibility for an already-completed incident is fundamentally flawed and invites shenanigans. In other words, if the injured worker is the fourth person to encounter a condition, it is not yet known by anyone 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 anticipates that Plaintiff will claim that *Funk* did not look to the time of the incident. However, in *Funk*, there was an admitted construction-wide failure of anyone to wear fall protection at any elevation. Under the circumstances, it was not necessary for this Court to delve into greater detail as to the specifics of any person and fall protection. Inherent in *Funk* is that the timing would not have made a difference. Regardless, *Ormsby* has clarified and limited *Funk*. The common law is dynamic. A court cannot disregard *Ormsby*, merely because it clarified *Funk* and limited its application. Assigning relevance to post-incident events leads to strict liability, which this Court recognized in *Latham II* must be avoided. *Latham II, supra* at 113-114. And this Court has also recognized that the “common work area” exception should not be construed in a manner that would allow the exception to swallow the rule (a rule of nonliability). *Ormsby, supra* at 57 n 9, quoting *Hughes, supra* at 8-9. To the extent that *Ormsby* and its progeny limited the “significant number of workers” analysis to the time of the incident, such a limitation is logical, fair, and proper.

At the very least, this is an issue that requires further analysis by this Court. The lower courts and parties require guidance as to whether and how to construe the temporal requirements of the

“significant number of workers” element. Defendant has been held to one standard, while several general contractors (and the plaintiffs that sued them) have been held to a different standard and dismissed via summary disposition. At minimum, this Court should grant Defendant’s application for leave to appeal to allow this Court to seek comment from interested groups on how this law should be clarified. If Defendant’s interpretation and the other Michigan Court of Appeals decisions are correct, a remand for a new trial is appropriate and necessary under MCR 7.302(B)(5). If this Court is inclined to believe that Defendant’s interpretation is incorrect, the confusion on this issue is sufficiently important that further guidance from this Court is necessary, including amicus briefing. In any event, this is certainly an issue of significant importance to Michigan jurisprudence. MCR 7.302(B)(3).

**III. THIS COURT SHOULD GRANT LEAVE TO APPEAL TO CONSIDER WHETHER, AND ULTIMATELY RULE THAT, THE LOWER COURTS HAVE COMMITTED ERRORS REQUIRING REVERSAL WITH RESPECT TO THE DENIAL OF DEFENDANT’S DISPOSITIVE MOTIONS, WHERE THE LAW OF THE CASE DOCTRINE DID NOT APPLY, WHERE THE TRUE “DANGER” WAS FURTHER REFINED BY ADDITIONAL DISCOVERY AFTER REMAND, AND WHERE THE TESTIMONY AND EVIDENCE SIMPLY DID NOT SUPPORT A CONCLUSION THAT THERE WERE MATERIAL QUESTIONS OF FACT AS TO MULTIPLE ELEMENTS OF THE COMMON WORK AREA EXCEPTION.**

***Introduction***

As this Court is aware, this 2002 incident has involved substantial litigation. Defendant was granted summary disposition, only to have that reversed for a trial that took place more than ten years after the incident. Although the litigation in this matter has taken a significant time, it is the obligation of the court system to “get it right,” not to “get it over.” After all these years and all these appeals, the court system has still not “gotten it right.” Defendant posits that these errors can be avoided in the future (for the parties and other litigants) if this Court intervenes to clarify and explain the elements of the “common work area” that have led to significant confusion and conflict between

decisions. Defendant respectfully contends that the “common work area” exception—if it is to be maintained as Michigan law—is a legal principle of major significance to this state’s jurisprudence, as necessary for this Court’s intervention to grant leave to appeal pursuant to MCR 7.302(B)(3). Additionally, or alternatively, the lower courts errors below is sufficiently apparent that this Court can and should intervene pursuant to MCR 7.302(B)(5) based on clear error causing manifest injustice to Defendant and conflicts with other appellate decisions.

***The Law of the Case Doctrine Error***

As a preliminary matter, Defendant must address the “law of the case” issue. It bears repeating that Defendant first moved for summary disposition in 2004. At that time, Defendant contended that Plaintiff failed to show that a significant number of workers were exposed to a danger. Plaintiff’s response referenced the number of workers that would have worked at heights. Defendant noted and argued that Plaintiff failed to show that any of the workers at heights did not wear the fall protection that Plaintiff claimed that he should have been provided. The trial court and Michigan Court of Appeals denied summary disposition to Defendant, noting that other workers worked at elevations. The error was based on confusion between the proofs necessary to satisfy the distinct elements of a “common work area” and a “high degree of risk to a significant number of workers.” In *Latham II*, this Court clarified that working at heights was not the danger, it was working at heights without fall protection.

During discovery leading up to trial, Plaintiff testified that, contrary to his theory for several years, there was fall protection equipment in his employer’s gang box on the construction site (see Tr IV 49). Plaintiff’s theory shifted to the absence of a place to affix the fall protection. Plaintiff also admitted during trial that in his entire career as a journeyman carpenter he never wore personal fall

protection (Tr IV, 52-53). This bears repeating—Plaintiff did not wear fall protection on any construction site, any site within a construction site, on any occasion.

Discovery also revealed that, upon further review, working at heights does not, alone, mean that fall protection is required. In exploring Plaintiff's new theory, it became apparent that Plaintiff was not even required to wear fall protection at this time of the incident. During trial, Plaintiff's expert conceded that Plaintiff did not require fall protection while riding the scissor lift. (Tr IV, 173) Plaintiff's expert further confirmed that no fall protection was required while Plaintiff was working on the mezzanine because it would "impede the work operation" (Tr IV, 177). Of course, riding the scissor lift was unnecessary because Plaintiff could have used an articulating forklift to place the drywall safely in the center of the mezzanine area (Tr IV, 183). Simply put, further factual development before trial confirmed that Plaintiff was not even required to wear fall protection.

The discovery leading up to trial, and the trial testimony, confirmed that working at heights without fall protection is not necessarily a danger unless the work being performed is such that fall protection is required for the task. This is a matter of common sense. When this Court convenes oral argument in the Hall of Justice, nobody is required to wear fall protection. Working at heights without fall protection is only part of the story. As this litigation has continued, the facts have been refined significantly.

In denying Defendant's motion for summary disposition in 2011, which recognized that discovery had shown that working at heights without fall protection was an incomplete analysis, the trial court ruled that the "law of the case doctrine" had established the danger as "working at heights without fall protection."<sup>35</sup> The trial court specifically found that the appellate courts had defined the

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<sup>35</sup> Appendix G, 6-10.

“danger” in this lawsuit as “working at heights without fall protection.”<sup>36</sup> When denying Defendant’s motion for directed verdict, the trial court also ruled that the law of the case doctrine mandated that it conclude that there was a material question of fact (Tr V, 39-40). The trial court erred in so ruling.

The law of the case doctrine holds that a question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). The Michigan Court of Appeals has also observed as follows:

When this Court reverses a case and remands it for a trial because a material issue of fact exists, the law of the case doctrine does not apply because the first appeal was not decided on the merits.. In this case, the first appeal was remanded to the trial court because a material issue of fact existed. Therefore, the law of the case doctrine did not preclude the trial court from revisiting this issue. [*Brown v Drake Willock Int’l*, 209 Mich App 136, 144; 530 NW2d 510 (1995), lv den on other grounds 454 Mich 880; 562 NW2d 198 (1997).]

Thus, the law of the case doctrine does not apply to a summary disposition ruling. In addition, the law of the case doctrine will not apply if the facts materially change. *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981). Both of these principles confirm that the trial court erred in deeming itself bound by the law of the case doctrine.

Here, every prior appellate ruling involved a summary disposition ruling by Defendant. To the extent that appellate decisions found a material question of fact, this was not a decision on the merits for which the law of the case doctrine would apply. The law of the case doctrine is further inapplicable because of the material change in the facts. *CAF Investment Co, supra*. Here, Plaintiff’s response to Defendant’s first motion for summary disposition filed in 2004 contended that Defendant was negligent for not providing personal fall protection. Plaintiff amended his Complaint in 2011. Then, during discovery before and again during the 2012 trial, Plaintiff testified that there was fall

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<sup>36</sup> *Id.* at 3, quoting *Latham II, supra* at 108

protection in his employer's "gang box" on the construction site. Plaintiff also admitted that in his entire career as a journeyman carpenter, he never once wore personal fall protection. Plaintiff's testimony confirmed that this was not a matter of being provided fall protection—disavowing his theory of the case as of 2004 and 2005. The prior appellate decisions all accepted as beyond dispute Plaintiff's version of the events—that he had not been provided fall protection. In fact, in ruling that leave need not be granted at that time, this Court noted in *Latham IV* that additional discovery would be conducted. This Court further observed that "the Court of Appeals decision places no limits on the trial court's discretion to allow the parties to conduct further discovery and/or file renewed motions for summary disposition, if appropriate." *Latham IV, supra*. Not only was it not surprising that the facts of this matter continued to evolve after the remand, it was *expected* that the facts would evolve. It was also expected that Defendant would renew its motion for summary disposition after discovery. The lower courts' blind adherence to the prior appellate court rulings failed to appreciate this Court's order and any of these new factual developments. The lower courts erred as a matter of law in allowing the law of the case doctrine to preclude Defendant's dispositive motions.

#### ***The Common Work Area Elements***

Turning to the elements at issue, there continues to be significant confusion regarding same. The first confusion, and ensuing error, arises out of the "common work area" element of the "common work area" exception. In moving for summary disposition in 2011, Defendant alerted the trial court to the *Hughes* decision, where the Michigan Court of Appeals opined as follows:

We believe that a contrary conclusion would swallow the "rule" espoused in *Funk, supra*. If the top of the overhang or even the overhang in its entirety were considered to be a "common work area" for purposes of subjecting the general contractor to liability for injuries incurred by employees of subcontractors, then virtually no place or object located on the construction premises could be considered not to be a common work area. We do not believe that this is the result the Supreme Court intended. This Court has previously suggested that the Court's use of the phrase "common work area" in *Funk, supra*, suggests that the Court desired to limit the scope

of a general contractor's supervisory duties and liability. See, e.g., *Erickson, supra* at 336. **We thus read the common work area formulation as an effort to distinguish between a situation where employees of a subcontractor were working on a unique project in isolation from other workers and a situation where employees of a number of subcontractors were all subject to the same risk or hazard. See *Plummer, supra* at 667. In the first instance, each subcontractor is generally held responsible for the safe operation of its part of the work.** In the latter case, where a substantial number of employees of multiple subcontractors may be exposed to a risk of danger, economic considerations suggest that placing ultimate responsibility on the general contractor for job safety in common work areas will “render it more likely that the various subcontractors . . . will implement or that the general contractor will himself implement the necessary precautions and provide the necessary safety equipment in those areas.” *Funk, supra* at 104. We do not feel that such considerations dictate the result in the present case. [*Hughes, supra* at 8-9.]

This ruling in *Hughes* was expressly adopted by this Court in *Ormsby*. *Ormsby, supra* at 57 n 9. It is Michigan law. It is also consistent with this Court’s position that the “common work area” exception not be construed in a manner leading to strict liability. See *Latham II, supra* at 113-114.

Here, Plaintiff and his partner were working in isolation at the time of the incident. No other trade was tasked with putting drywall onto an elevation—the task that Plaintiff ultimately performed in the least safe way possible. Plaintiff and his employer had a variety of safe options for performing the “operation,” but chose a riskier method. As all witnesses agreed at trial, Plaintiff could have used an articulating forklift to get the materials on the elevation. Alternatively, Plaintiff could have used the scissor lift to elevate the drywalls and a ladder to climb onto the elevation (as he had done in the past). If so, and as argued below, fall protection would not have been required.

There was no evidence that any other trade used a scissor lift to put any materials on an elevation. There was no evidence that any other trade parked a scissor lift crookedly. Aside from the crooked parking, no other trade did what Plaintiff’s employer did.

Instead, the evidence was uncontroverted that the other trades all accessed the elevations by ladder—which does not require fall protection (Tr II, 148). Plaintiff even used a ladder to access the first elevation on this job site (Tr IV, 55, 71). The injury at issue arose because two workers from

one trade, while working in isolation, selected a different and less appropriate method for performing their work than other workers from other trades. Because Plaintiff and his partner were working in isolation, and there is no indication that any other trade or worker encountered the same danger, *Hughes* and *Ormsby* confirm that the incident in question did not occur in a common work area. The trial court committed an error requiring reversal in denying Defendant dispositive relief.<sup>37</sup>

Second, as discussed in Issue II, *infra*, there is a significant conflict in the Michigan Court of Appeals regarding the meaning of this Court's decision in *Ormsby* regarding the temporal relationship to a calculation of a "high degree of risk to a significant number of workers." This has also been an error with respect to denying dispositive relief.<sup>38</sup> Demonstrating the substantial confusion regarding the element and the inconsistency in the Michigan Court of Appeals' interpretation of the *Ormsby* decision, Defendant continues to stand alone in having summary disposition denied on this issue by the Michigan Court of Appeals.

The determination that a danger poses a "high degree of risk to a significant number of workmen" simply is not satisfied by looking to the entire duration of the construction without regard to whether construction is "completed." A construction site is constantly evolving—the same location involves numerous trades completing their respective piece of the construction, which then changes the nature of the site.<sup>39</sup> The elevated island in question was very different after Plaintiff's employer hung drywall than it was when the steel workers were there. It is entirely logical that there must be a high degree of risk to a significant number of workmen at the time of the incident. In *Ormsby*, this Court observed as follows regarding the risk to a significant number of workmen at the time of the injury:

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<sup>37</sup> See also Defendant's directed verdict motion (Appendix O, 14-15), JNOV motion (Appendix P, 14-15)

<sup>38</sup> Appendix F, 18; Appendix O, 10-13; Appendix P, 11-15.

The fact that one worker was below plaintiff when he fell certainly does not establish a genuine issue of material fact regarding whether a high degree of risk to a significant number of workers existed. Justice Kelly's vague reference to "any worker" being exposed to danger if the structure was not competently constructed is likewise insufficient to create a genuine issue of material fact. 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, supra* at 61 n 12.]

This Court certainly placed significant emphasis on the fact that only the plaintiff and one other worker were at risk at the time of the incident. This is, again, Michigan law. See *Alderman, supra*. It has been the law for the five other general contractors that raised this issue in a summary disposition context. See *Issue II, infra*.

Plaintiff's primary response has been that *Ormsby* cannot mean what it says because the *Funk* decision involved counting workers over a longer period of time. However, *Ormsby* is a subsequent decision limiting *Funk*. There is nothing atypical or unusual about a decision from the 1970's being clarified or interpreted differently many decades later. As construction liability law has evolved, the "common work area" exception—an exception to the general rule of complete nonliability—has been further limited by this Court. Here, it is undisputed that only Plaintiff and his co-worker were at risk at the time of the incident. The trial court should have granted dispositive relief to Defendant. The lower courts have erred in refusing to apply *Ormsby* and its progeny to the instant matter. At a minimum, there is substantial confusion within the lower courts regarding this element that requires this Court's intervention to clarify same.<sup>40</sup> MCR 7.302(B)(3).

Third, Defendant raised other alternatives measures of construing this element below. In the alternative, Defendant also argued that, Plaintiff could not establish that more than six other workers

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<sup>39</sup> Again, amicus curiae briefing would be helpful for this Court's analysis of construction sites.

<sup>40</sup> See also (Tr III, 12-16)(trial court struggling with evidentiary issues based on this element.

were exposed to the same danger.<sup>41</sup> The pre-trial evidence and trial testimony both established that Plaintiff was injured while walking from a scissor lift to an elevation. Plaintiff's partner testified that there was a significant gap between the scissor lift and the edge of the elevation. There is no evidence that any other worker—other than these two—encountered the danger of having to cross “air” to go from a scissor lift to an elevation. This Court must also appreciate that even Plaintiff's own expert, Brayton, agreed that it was “really unsafe” for Plaintiff to position the scissor lift with a gap between it and the mezzanine (Tr IV, 170). Brayton also testified that only Plaintiff and his partner were exposed to a risk of exiting a crookedly parked scissor lift (Tr IV, 178). There is no testimony to the contrary. This alone should have entitled Defendant to a dispositive relief, as only Plaintiff and his partner were exposed to this risk.

As yet another alternative, even if this Court were to ignore the reckless parking of the scissor lift and allow mere use of a scissor lift for personnel to access the mezzanine area to qualify as the danger—Plaintiff still could not satisfy the “significant number of workers” analysis. Of course, Brayton also agreed that fall protection was not required while operating the scissor lift (Tr IV, 173). Regardless, counting Plaintiff, Scott Schrewe, and their respective work partners, that is four workers from one trade—entitling Defendant to summary disposition pursuant to *Alderman*. Lest there be any doubt, the uncontroverted evidence was that the workers for every other trade accessed elevations by ladder (Tr II, 148). Plaintiff admitted that even his prior encounter with an elevation was by ladder (Tr IV, 55, 71). There is no dispute that fall protection was not required when using a ladder to access an elevation (Tr IIIA, 87). Even broadening the risk, Defendant was still entitled to dispositive relief because only four workers were exposed to a risk.

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<sup>41</sup> See Defendant's 2011 motion for summary disposition, Appendix F, 16-18; Defendant's directed verdict motion, Appendix O, 13-14; Defendant's JNOV motion, Appendix P, 15-16.

As yet another alternative, if this Court were to consider merely working on the elevation, Plaintiff's expert agreed that no fall protection was required while Plaintiff was working on the elevation because it would "impede the work operation" (Tr IV, 177). However, the trial court and Michigan Court of Appeals concluded that summary disposition was not required because other trades performed work on elevations without wearing fall protection. The lower courts disregarded the testimony that fall protection was not always necessary. In fact, Plaintiff's expert confirms the error in this analysis because working at this specific elevation did not require fall protection. At the very least, Plaintiff failed to present any evidence that any other worker on this or any other elevation failed to wear fall protection that was required for the task. Defendant was entitled to dispositive relief and it was clear error causing manifest injustice to deny same. MCR 7.302(B)(5).

Defendant has essentially been held strictly liable for this incident. The evidence against Defendant is that Plaintiff did not wear fall protection when being one of four workers to have moved from a scissor lift to the elevated island. The evidence was that every other worker beyond those four did not require fall protection when accessing the elevation by ladder or when working on the elevated island. There is simply no way to properly construe the elements and find a material question of fact to submit to the jury. Instead, it was the fact of Defendant being a construction manager and an injury occurring on site that has led to liability. This is strict liability. In *Latham II*, this Court emphasized that the "common work area" exception is not a strict liability tort. *Latham II*, *supra* at 113-114. At the very least, the trial court's denial of dispositive relief to Defendant has improperly allowed the elements to be construed in a manner where the exception swallows the rule, which was rejected in *Hughes* and *Ormsby*. There is no liability where, as here, a trade works in isolation. There is no liability where, as here, the risk does not pose a risk to a significant number of workers. Each of these circumstances is sufficient to preclude applicability of the common work area

exception. In the instant matter, all of these circumstances applied. The trial court's denial of Defendant's dispositive relief was clear error causing manifest injustice, as necessary to justify this Court intervening pursuant to MCR 7.302(B)(5).

Alternatively, these errors reflect the need for this Court to intervene to provide guidance on issues of significant importance to Michigan jurisprudence. MCR 7.302(B)(3). The *Ormsby* decision was issued in 2004. In 2007, this Court granted leave in *Shepard*; however, the parties stipulated to a dismissal before this Court could rule. *Shepard, supra* at 851. In 2008, this Court issued the *Latham II* decision, which has—in fairness—not clarified the legal landscape for the parties involved. The *Ormsby* decision has been interpreted differently by Court of Appeals panels. The most recent decision was *Alderman* in 2010. The continued confusion regarding the similar, but distinct, elements of the common work area exception requires this Court's intervention to clarify same. The above errors provide an opportunity for this Court to grant leave, solicit amicus curiae briefing, and clarify the "common work area" exception for the parties and future litigants. MCR 7.302(B)(3).

**IV. THE MICHIGAN COURT OF APPEALS CLEARLY ERRED IN DOCKET 290268, CAUSING MATERIAL INJUSTICE TO DEFENDANT, IN RULING THAT THE TRIAL COURT (A) ABUSED ITS DISCRETION IN PRECLUDING PLAINTIFF FROM INTRODUCING NEW WITNESSES AND RECORD EVIDENCE IN 2008, AND (B) ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION.<sup>42</sup>**

Defendant continues to assert that, for the reasons set forth in its application for leave to appeal following *Latham III* (Attachment 7, without exhibits), which is part of the record in this matter, the Michigan Court of Appeals erred in reversing the trial court's motion for summary disposition. In denying leave, this Court stated that "we are not persuaded that the questions presented should be reviewed by this Court prior to the completion of the proceedings ordered by the

Court of Appeals.” *Latham IV, supra*. The contemplated proceedings are now complete. Defendant reiterates its position that the trial court’s exercise of discretion was proper and not an abuse of discretion. For the reasons set forth in Defendant’s application for leave to appeal, Defendant reiterates its position that the trial court’s exercise of discretion was proper and certainly not an abuse of discretion. Defendant raises this issue to ensure that there is full preservation of these issues for this Court’s review, including the vacating of *Latham III* to the extent necessary to provide full and complete relief to Defendant.

**CONCLUSION AND REQUEST FOR RELIEF**

Defendant respectfully requests that this Honorable Court grant its leave to appeal pursuant to MCR 7.302(B)(3) and/or MCR 7.302(B)(5), ultimately reversing the lower courts and remanding for either an order of judgment for Defendant or a new trial.

Respectfully submitted,

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<sup>42</sup> As it relates to reopening discovery, a “trial court’s decision to grant or deny discovery is subject to reversal only if there has been an abuse of discretion.” *Nuriel v YMCA of Detroit*, 186 Mich App 141, 146; 463 NW2d 206 (1990).