

STATE OF MICHIGAN  
IN THE SUPREME COURT

DOUGLAS LATHAM,

Plaintiff-Appellee,

v

BARTON MALOW CO.,

Defendant-Appellant.

Docket No. 132946

COA Docket No. 264243

Lower Court No. 04-059653-NO

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**DEFENDANT BARTON MALOW CO.'S SUPPLEMENTAL BRIEF**

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Suppl  
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Submitted by:

*Anthony F. Caffrey III (P60531)*  
*CARDELLI, LANFEAR & BUIKEMA, P.C.*  
*Appellate Counsel for Defendants-Appellees*  
*5537 Glenwood Hills Pkwy SE; Suite 201*  
*Grand Rapids, MI 49512*  
*(616) 285-3800*  
*(616) 285-1150 (facsimile)*

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**DEFENDANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS  
APPLICATION FOR LEAVE TO APPEAL**

**INTRODUCTION**

In scheduling this matter for oral argument, this Court has directed the parties to focus on two issues: (1) whether the proofs submitted at trial were sufficient to satisfy the standard for general contractor liability that is set forth in *Ormsby v Capital Welding, Inc.*, 471 Mich 45, 54 (2004); and (2) whether the trial court should have granted summary disposition in the defendant's favor based on this issue. Defendant files this brief to further support its contention that, on the proofs submitted below, the trial court should have granted its motion for summary disposition. This Court should peremptorily reverse the lower courts and rule that Defendant was entitled to summary disposition.

**STATEMENT OF FACTS**

This Court has directed the parties to brief whether the evidence submitted below was sufficient to satisfy the standard for general contractor liability set forth in *Ormsby*. In *Ormsby*, this Court reiterated the general rule that a general contractor may only be held liable under the "common work area doctrine," if the plaintiff shows that "(1) the defendant, either the property owner or general 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." *Id.* at 54; see also *id.* at 59.

In moving for summary disposition below, Defendant contended that reasonable minds could not disagree in finding that Plaintiff was unable to establish elements (1)

and (3) above. Specifically, Defendant contended that the incident did not create a high degree of risk to a significant number of workmen. Further, Defendant contended that its supervisory and coordinating authority did not extend to ensuring that Plaintiff wore personal fall protection at all times. In the absence of a material question of fact as to both elements, the lower courts erred in refusing to grant Defendant's motion for summary disposition.

As an initial matter, both parties' briefs below have established that the site of the incident was an **elevated island**. During Plaintiff's deposition, he testified that the workers referred to this elevated island as a "mezzanine" (Latham deposition, 32). The parties adopted this nomenclature, despite its technical inaccuracy. Strictly speaking, a mezzanine area is usually a balcony-type structure. The elevated island in the instant matter should certainly not be confused with the mezzanine tier, level, or balcony that one might find at a large theater or arena. Thus, an "elevated island" is a much more accurate description of where the incident occurred.

Plaintiff testified that his purpose in accessing the elevated island was to hang approximately forty sheets of drywall on the rough carpentry that his employer had previously installed (see Latham deposition, 46-47). The plan was to put all the drywall on the elevated island first and then hang it. Unfortunately, Plaintiff fell as he and his partner were loading the very first piece of drywall from the scissor lift to the elevated island (Latham deposition, 46).

Plaintiff confirmed that there was nothing unusual about the task at hand<sup>1</sup> (Latham deposition, 49). Plaintiff testified that he and his partner began by loading

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<sup>1</sup> Plaintiff further testified that he would not have taken instruction from Defendant as to how to do this particular task (Latham dep, 48). In fact, Plaintiff confirmed that he never once took instruction from

approximately twelve sheets of drywall onto a scissor lift (Latham dep, 57). Plaintiff noted that the drywall was longer than the scissor lift (Latham dep, 54). Thus, Plaintiff elevated the scissor lift approximately four feet away from the elevated island to a height higher than the elevated island, then drove the scissor lift so that it was nearly flush with the elevated island, and then lowered the scissor lift so that three or four feet of each piece of drywall was essentially resting on the elevated island (See Latham dep, 54-57, 59). Plaintiff specifically testified that he maneuvered the scissor lift to one or two inches from the elevated island (Latham dep, 56).

Plaintiff noted that the plan was to simply “walk” each piece of drywall onto the elevated island one at a time (Latham dep, 55). Plaintiff’s partner stepped onto the elevated island for the purpose of holding onto the far end of the first piece of drywall and then picked up the first piece of drywall (Latham dep, 58-59). Plaintiff described the fall as follows:

I picked up my side of the drywall and we proceeded to walk it off or walk it onto the mezzanine, and basically as soon as I stepped onto the mezzanine, I lost my balance and fell off. I didn’t even have, I don’t believe I even had both feet on the mezzanine at that time. [Latham dep, 59.]

Plaintiff further noted that the drywall sheet may have cracked during the unloading process, causing him to lose his balance (Latham dep, 63). Plaintiff did not know why the drywall cracked (Latham dep, 63). Plaintiff confirmed that there was ample room to walk and no need to make any turns—he and his partner were simply walking straight (Latham dep, 63).

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Defendant (Latham dep, 50). Instead, he took all necessary instructions from either his foreman, Gerald Nutt, or his partner, Tom Clingenpeel (Latham dep, 48-49). Plaintiff conceded that this applied to both the means and methods of performing his job, as well as safety (Latham dep, 51).

Plaintiff later explained that he had centered the scissor lift at the opening to the elevated island<sup>2</sup> (Latham dep, 67). Plaintiff guessed that the opening was approximately six feet wide, which would have left approximately one and a half feet on either side of the scissor lift (Latham dep, 67).

Plaintiff did not believe that there was anything he could have done to prevent the incident (Latham dep, 68). He noted that his employer could have preloaded the drywall before putting the rough carpentry up (Latham dep, 68-70). Plaintiff did not know if there was anything that Defendant could have done to prevent the incident (Latham dep, 71).

However, Defendant's Safety Supervisor, Gary Jordan, testified that there was a basic safety procedure that should have been followed to prevent the incident:

B&H [Plaintiff's employer], as far as from a safety perspective, B&H was responsible for that if they took the guard railing down. What they should have done was they should have followed their training and used a personal fall protection device which would have been a body belt with double lanyards, two lanyards.

Typically, what happens in the process when a work platform is elevated and have to leave this, you have to leave this platform, the safest way and the way that you're properly trained is you hook a lanyard to the basket, you step off, out of the equipment. You hook a lanyard up to—in that circumstance, a stud wall would have probably sufficed, at least held a man, and then you unhook the lanyard from the basket. That's called a double lanyard system. [Deposition of Gary Jordan, 25.]

Interestingly, Defendant introduced a document below establishing that Plaintiff's employer had educated Plaintiff on the need to use a fall protection device when working at an elevation (see Appendix B). Plaintiff initialed that he was familiar with the requirements of such a safety procedure (Appendix B, ¶¶ 27, 62).

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<sup>2</sup> Defendant's construction superintendent on the job, Ted Crossley, testified that the purpose of leaving the opening was to allow a large piece of air handling (heating and cooling) equipment to be installed

The “guard railing” noted above, refers to steel cabling that crossed the opening of the elevated platform when it was not in use. Although Plaintiff’s counsel attempted to elicit testimony from Jordan indicating that the steel cabling was insufficient under MIOSHA, Jordan specifically testified as follows:

Technically, Jon, you didn’t even need a perimeter cable across this top here because this mezzanine was not accessible to anybody other than the person going up there to do the specific job with a lift. What I’m saying is there was no other way that a person like, say, you or I, just making a tour could have stumbled out there by accident. It was completely elevated and closed off to other trades. [Jordan dep, 40-41.]

Thus, Jordan’s testimony established that there was no need for a cable across the opening because anyone accessing the elevated island would be doing so for the purpose of working on the elevated island and wearing personal fall protection.<sup>3</sup>

Plaintiff’s briefing below focused on Jordan’s testimony that, *where a steel cable is required under MIOSHA*, the steel cable is doubled up (Jordan dep, 43-44). However, Jordan had already testified that such a protective barrier across the opening was not necessary. Accordingly, this hypothetical testimony is irrelevant.

Even worse, the type of barrier across the opening was of absolutely no consequence to this incident. Regardless of what kind of barrier could have or even should have crossed the opening, Plaintiff testified that his fall occurred while walking onto the elevated island with materials. No matter what barrier could have been across the opening before Plaintiff began the unloading process, it would have been removed to allow access to the elevated island. Whether it was one cable, two cables, three cables, twenty cables, a wooden door, a concrete slab, or any other barrier that can be

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(Crossley dep, 25).

contemplated, if Plaintiff was going to access the elevated platform with the sheets of drywall, there had to be a complete opening. This, of course, is why a personal fall protection device was required during the moving of the drywall to the elevated island.

Indeed, Plaintiff's supervisor, Gerald Nutt, testified that the accident occurred because Plaintiff "misstepped" while walking onto the elevated island (Nutt dep, 12-13). He further explained that the type of railing across the opening was irrelevant because the incident occurred while walking onto the elevated island (Nutt dep 20-23). Nutt specifically testified regarding the obvious—whatever railing or guard across the opening would have been removed to allow access through the opening (Nutt dep, 20-21, 23).

Nutt also confirmed that neither he, nor his employer, would have taken instruction from Defendant as to how to "do their work" (Nutt dep, 23). He specifically stated that the incident at issue involved work under his supervision and not under Defendant's supervision (Nutt dep, 24).

Although Plaintiff elicited testimony from various deponents that multiple trades would have accessed the elevated island over time, Plaintiff did not introduce any evidence establishing that any other trade failed to wear personal fall protection when doing so. Thus, Defendant's summary disposition below was not premised on whether the elevated island could be deemed a common work area. Indeed, Plaintiff's failure to present any evidence that Plaintiff's failure to wear personal fall protection placed any other worker at risk, much less a significant number of workers at risk, was fatal to his claim.

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<sup>3</sup> There is no evidence, much less admissible evidence, establishing any procedure other than personal fall protection. Defendant's motion for summary disposition was the time and place for Plaintiff to offer its

Moreover, a general contractor's supervisory and coordinating authority does not extend to monitoring every single employee of every subcontractor working in isolation to ensure that they do not harm themselves through carelessness. The lower courts have focused on the fact that the general contractor has the power to stop work if a danger is imminent. However, this does not mean that a general contractor must observe every task being performed by every worker at every time. If so, the "supervisory and coordinating authority" element in *Ormsby* is merely illusory because every injured worker could point to this power to establish the general contractor's failure to prevent the dangerous condition. Accordingly, as will be explained below, the lower courts erred in refusing to grant Defendant's motion for summary disposition.

## ARGUMENT

### **I. DEFENDANT WAS ENTITLED TO SUMMARY DISPOSITION UNDER *ORMSBY* BECAUSE THE FACTS OF THIS MATTER DO NOT REVEAL AN INCIDENT THAT PLACED A SIGNIFICANT NUMBER OF WORKERS AT RISK**

The lower courts erred in failing to grant Defendant's motion for summary disposition under *Ormsby* because Plaintiff failed to introduce sufficient facts indicating that a significant number of workers were placed at risk by the allegedly dangerous condition at issue.

Importantly, this incident did not occur in an area where any person could unintentionally confront the elevated island. To access the elevated island, a person would have to use a scissor lift or ladder (or perhaps scaffolding). Simply put, some "tool of the trade" was required for any worker to find himself or herself on the elevated island.

And, equally important, this incident did not occur because Plaintiff was working on the elevated island and somehow fell off the side. Defendant remains perplexed by the Court of Appeals reference to “perimeter protection.” This lawsuit has always been about “personal fall protection” while accessing the elevated island, not the perimeter protection around the island.

This incident occurred because Plaintiff attempted to walk from a scissor lift onto the elevated island without wearing a personal fall protection device. The trial court recognized as follows:

There is no serious contest that the danger at issue was readily avoidable if a fall safety device had been used. In fact, viewing the evidence in a light most favorable to the Plaintiff, the deposition testimony of the Defendant’s Safety Supervisor confirms that the fall would have been avoided if the Plaintiff had used a personal fall protection device (Response at 14, quoting Defendant’s Safety Supervisor’s Dep at 25). [Trial Court Opinion, attached as Appendix A.]

Thus, there is no real dispute that the “danger” at issue was Plaintiff’s failure to use a personal fall protection device.

Plaintiff contended that it Defendant should be liable for Plaintiff’s failure to wear a personal fall protection device—either for not providing that device for him or not specifically instructing him to wear it. Defendant contended that ***Plaintiff’s*** act of not wearing a personal fall protection device cannot establish that a significant number of workers were placed at risk. Indeed, even allowing the inference that Plaintiff’s partner was not wearing personal fall protection, there is absolutely no evidence in the record that any other worker failed to wear personal fall protection when accessing any elevation at any time.

Because Plaintiff lacks evidence that more than two persons failed to wear personal fall protection, Plaintiff's briefing has focused on the fact that *multiple trades* accessed the elevated island area over time. This issue has never been in dispute. Inasmuch as the elevated island was an area that would be accessed by multiple trades over time, there was a question of fact as to whether the elevated island was a "common work area."

Again, however, Plaintiff did not introduce any evidence below to establish that any other workers from any of these other trades failed to wear personal fall protection on the elevated island at issue at any time (or any other elevated area at any other time). Apparently, Plaintiff would have the courts simply conclude that, because Plaintiff did not wear personal fall protection, no other employee of any other trade would have worn personal fall protection. However, Defendant's motion for summary disposition was the time and place for Plaintiff to submit its evidence showing that a significant number of workers were placed at risk. MCR 2.116(G)(4). Having failed to introduce evidence that any worker from any other trade accessed any elevation without wearing personal fall protection, Plaintiff simply failed to meet his evidentiary burden.

Plaintiff's other strategy was to suggest that some other form of "opening" or "barrier" across the six-foot mezzanine area should have been used. This is a red-herring. Whether there was a steel cable, two steel cables, twenty steel cables, a wooden door, or a metal door providing a barrier across the six-foot opening, that barrier would have to come down to allow Plaintiff to access the mezzanine area. Plaintiff's own supervisor conceded as much (Nutt dep, 20-23).

At the risk of being further repetitive, Defendant must re-emphasize this point. Plaintiff is essentially contending that a barrier designed to protect people on the inside of an area was insufficient, even though he fell when try to access the inside of that area from the outside. Whatever barrier would have protected someone from falling *from the inside*, would also have prevented someone from the outside from entering.

In other words, assume for the sake of argument that Defendant had gone above and beyond its duty and had one of its own employees permanently install a double steel cable across the opening to the elevated island. If so, there would be no question that there was ample fall protection for anyone on the elevated island. The problem, of course, is that nobody could actually get *onto* the elevated island to complete the work! Thus, a temporary barrier system is required. But, when the temporary barrier system is removed, (i) the trade that removes it must replace the barrier with some sort of substitute safety system (Jordan dep, 25; Crossley dep, 59-60); and (ii) the sufficiency of the temporary barrier system is no longer relevant (See Nutt dep, 20-23). To argue otherwise is to argue a factual and logical absurdity.

So, again, this lawsuit really boils down to the following dangerous condition: Plaintiff not using personal fall protection while walking from a scissor lift to the elevated island. Plaintiff's own careless act did not put anyone else in danger. Thus, at the exact time of the incident, the dangerous condition did not put any other worker in danger. See *Ormsby, supra* at 57, fn 9 (adopting the Court of Appeals analysis in *Hughes v PMG Building*, 227 Mich App 1, 8-9; 574 NW2d 691 (1997), recognizing that the purpose of the common work area exception is to prevent a general contractor from being held liable under the common work area exception based on one trade working in

isolation); see also *Ormsby*, *supra* at 61, fn 12 (recognizing that the high degree of risk to a significant number of workers must exist at the time the Plaintiff is injured).

And, even looking broader from a temporal or geographical basis, Plaintiff failed to introduce evidence that any other worker failed to wear fall protection while accessing (or working on) any elevation. Even if other trades worked on the very elevated island at issue, there is no evidence that this work posed any risk because of a lack of personal fall protection. To conclude otherwise is not merely to speculate, but to invent facts.<sup>4</sup> Accordingly, the lower courts erred in concluding that there was a material question of fact as to whether Plaintiff's failure to wear a personal fall protection device created a risk to a significant number of workers. Consequently, Defendant was entitled to summary disposition under *Ormsby*.

**II. DEFENDANT WAS ENTITLED TO SUMMARY DISPOSITION UNDER *ORMSBY* BECAUSE DEFENDANT'S ABILITY TO STOP WORK ON THE PROJECT CANNOT BE ELEVATED TO MEAN THAT OBSERVING PLAINTIFF WORKING IN ISOLATION WAS WITHIN ITS SUPERVISORY AND COORDINATING AUTHORITY**

The lower courts erred in failing to grant Defendant's motion for summary disposition under *Ormsby* because the common work area exception does not convert a

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<sup>4</sup> This matter is certainly distinguishable from *Funk v General Motors Corp*, 392 Mich 91, 103, 104; 220 NW2d 641 (1974). In *Funk*, employees of multiple subcontractors were seen daily working at substantial elevations without any type of fall protection in place, including both personal fall protection devices and general fall protection devices. Here, Plaintiff has sought to recover based solely on evidence of his own careless act of not wearing personal fall protection. He has failed to introduce evidence of others neglecting to do so.

Plaintiff's theory is that a general contractor must be omnipresent, monitoring every employee to ensure that he or she is performing his job in the safest method possible. But this Court's decisions from *Funk* to *Ormsby* have never been read to require a general contractor to watch every employee on the job site to ensure that he or she does not hurt himself.

general contractor's authority to stop work into having the supervisory and coordinating authority to prevent every individual worker from harming himself.

In denying Defendant's motion for summary disposition on this issue, the trial court opined as follows:

The Defendant also argues that the Plaintiff cannot establish the second factor of the common work are exception—i.e. that the Defendant failed to take reasonable steps within its supervisory and coordinating authority to guard against readily observable and avoidable dangers.

There is no factual dispute that throughout the mezzanine's construction, a safety cable of some nature had been in place. On the incident date a safety cable covering the 6-foot opening to the mezzanine was in place; however, the cable was required to be removed by workers to allow them to enter and exit the work area. There is also no dispute that the Plaintiff or his co-worker removed the cable on the incident date, and that the Plaintiff had no personal fall protection device. See deposition of Defendant's Safety Supervisor at 43 (Supervisor testifying that either the Plaintiff or his co-worker removed the safety cable and Plaintiff's counsel agreeing).

In controversy is whether there is a general issue of material fact regarding whether the Defendant failed to take reasonable steps within its supervisory and coordinating authority to guard against a readily observable and avoidable danger. There is no serious contest that the danger at issue was readily avoidable if a fall safety device had been used. In fact, viewing the evidence in a light most favorable to the Plaintiff, the deposition testimony of the Defendant's Safety Supervisor confirms that the fall would have been avoided if the Plaintiff had used a personal fall protection device (Response at 14, quoting Defendant's Safety Supervisor's Dep at 25). Likewise a reasonable trier of fact could conclude that the Defendant certainly knew or should have known that at some time that, for purposes of ingress and egress, the safety cable would have to be removed, making the opening unguarded, and that the risk of falling was attendant to ingress and egress of the work area at issue. Further, viewing the evidence in the light most favorable to the non-moving party, the Defendant had full authority to stop the Plaintiff and his employer from conducting any work if a "red flag" involving safety was noticed by the Defendant and the Defendant issued such a command.<sup>4</sup>

<sup>4</sup> Although the Plaintiff admitted that he only took instruction from his B&H supervisor and that he would not have taken any orders from the Defendant as to how to do his work (Defendant's Ex C at 48-49), the

Defendant certainly had the ability to halt all work and require appropriate safety precautions be taken by the Plaintiff's employer.

Although the Defendant presents significant and substantial evidence that seriously challenges the Plaintiff's assertion that the Defendant acted unreasonably under the circumstances, the weight and credibility is appropriately within the province of the jury. Stated another way, whether the Defendant acted reasonably or unreasonably under the circumstances presents a genuine issue of material fact. Accordingly, the Defendant is not entitled to summary disposition on this issue. [Appendix A, 2, 5-8.]

Thus, the trial court denied Defendant's motion for summary disposition because Defendant had the authority to stop Plaintiff and his partner from performing work without wearing their personal fall protection devices.

At the outset, it should be noted that there is no evidence of a rampant, construction-wide failure to wear personal fall protection. The evidence only establishes that Plaintiff and his partner, declined to wear personal fall protection.

And there is certainly no evidence that Defendant observed any worker, including Plaintiff, accessing an elevation without personal fall protection. Thus, Plaintiff's theory is that Defendant should have been monitoring Plaintiff to ensure that he was, in fact, wearing personal fall protection. Of course, this would extend Defendant duty to having to watch every worker on the project at all times to prevent a potentially self-inflicted injury. However, in *Ormsby*, this Court noted that the purpose of the common work area exception was not to require the general contractor to monitor a trade working in isolation, but to monitor for harmful conditions impacting multiple trades. See *Ormsby, supra* at 57 n 9. Where, as here, a subcontractor is working in isolation on a project, the common work area exception is inapplicable.

Oddly, Plaintiff argues that Crossley's act of inquiring of Plaintiff whether he was qualified to operate a scissor lift supports an assertion that Crossley should have further

inquired whether Plaintiff planned to use his personal fall protection. If anything, the converse is true. Crossley fairly determined that Plaintiff was competent to operate the scissor lift based on having the requisite qualifications.

In a sense, Plaintiff's argument is equivalent to a police officer stopping an automobile driver to ensure that he is licensed, and then being deemed responsible for failing to ask whether that licensed driver was planning to wear a seat belt. If you are a licensed automobile driver, there is no doubt that you have been made aware of the protective nature of seat belts. Similarly, a licensed scissor lift operator does not need to be made aware of the need to wear a personal fall protection device while working at an elevation. As Jordan noted, Plaintiff should have applied his training. Instead, he disregarded it.

And, lest there be any doubt, Plaintiff's employment documentation from his initial employment with B&H confirms that he was expressly aware of the need to use a personal fall protection device while working at an elevation (Appendix B). So this is not a case of *Plaintiff* being unaware of personal fall protection. Moreover, this is not a case of *Plaintiff's employer* being unaware of the need for personal fall protection.<sup>5</sup> This is a case of Plaintiff and/or his employer refusing to follow their training while working in isolation on a job. Based on the evidence submitted below, this was a one-time lapse in

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<sup>5</sup> Of course, even Plaintiff's exhibits confirm that it was Plaintiff's or B&H Construction's duty to provide fall protection. Exhibit 14 to Plaintiff's motion for summary disposition, Defendant's On-Site Project Safety and Loss Control Program, stated as follows: "Each Contractor and Subcontractor is responsible for the safety and loss control of employees and work areas under their control." Section 2.02(B)(16)(h) states that each subcontractor "will supply the proper equipment, take the necessary precautions to maintain the equipment according to current regulations and specifications, and accept responsibility to ensure that the necessary safety equipment is supplied and used when required." Section 2.04(B)(32) adds: "**The use of safety belts/harnesses and lanyards securely attached to an approved anchorage point when working from unprotected high places is mandatory.**"

safety. The hearing on Defendant's motion for summary disposition was, of course, the time and place for Plaintiff to offer his evidence to the contrary. MCR 2.116(G)(4).

Finally, Defendant notes that its authority to stop work is not tantamount to having the supervisory and coordinating authority over the performance of every event that takes place on a work site. Again, this Court has previously recognized that a trade working in isolation does not fall within the purview of the common work area exception. *Ormsby, supra* at 57, fn 9.

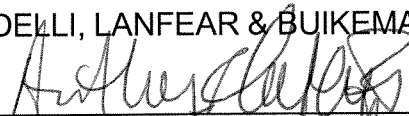
Moreover, the "stop work" logic is faulty from a practical standpoint. While a general contractor may have the authority to stop work if there is a dangerous undertaking, a general contractor cannot stop a dangerous undertaking that it does not observe. If the lower courts' interpretation of the law is correct, Michigan now requires a general contractor to *anticipate* a failure to use garden variety safety equipment before it happens. If one employee of one subcontractor fails to wear personal fall protection, safety goggles, or protective gloves, the general contractor will be deemed liable because it had the authority to stop the worker. Quite obviously, applying a "stop work" rationale will convert the "common work area" exception into strict liability for the general contractor. At the very least, the "supervisory and coordinating authority" element would be rendered illusory. Under the circumstances, it is plainly apparent that Defendant was entitled to summary disposition under *Funk* and *Ormsby*.

**CONCLUSION AND REQUEST FOR RELIEF**

Long ago, this Court established that the general rule was that a general contractor could not be deemed liable for an injury to a worker, unless the "common work area" exception was satisfied. Here, Plaintiff has failed to introduce sufficient evidence to establish that a significant number of workers were placed at risk by his own failure to wear a personal fall protection device. As such, the lower courts have erred in failing to grant Defendant's motion for summary disposition. And the lower courts have compounded the error by concluding that Defendant's ability to stop work on the project gave it the supervisory and coordinating authority to know that Plaintiff, working in isolation, would fail to protect himself. As noted above, these facts simply cannot support the application of the common work area exception. Therefore, Defendant respectfully requests that this Court peremptorily reverse the lower courts and remand for an Order granting Defendant's motion for summary disposition.

Respectfully submitted,

CARDELLI, LANFEAR & BUIKEMA, PC



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Anthony F. Caffrey III (P60581)  
Attorney for Defendant-Appellant  
5537 Glenwood Hills Pkwy SE  
Suite 201  
Grand Rapids, MI 49512  
(616) 285-3800

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