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

DEFENDANT BARTON MALOW CO.'S REPLY BRIEF IN SUPPORT OF ITS APPLICATION FOR LEAVE TO APPEAL

132946
reply

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REPLY BRIEF

INTRODUCTION

The instant matter arises out of an injury on a construction worksite. Although Plaintiff received workers' compensation benefits arising out of this injury, the instant lawsuit is Plaintiff's attempt to also recover from the construction manager[1] of the work site, Defendant Barton Malow Company. It is beyond dispute that Plaintiff is precluded from recovering from Defendant unless he can satisfy an exception to the *general rule* that a general contractor is *not* liable for an injury to an employee of a subcontractor. That exception, the common work area exception, requires a plaintiff to satisfy four elements to pursue a claim. Plaintiff cannot satisfy all four elements of this exception. Consequently, the lower courts have erred in refusing to grant Defendant's motion for summary disposition.

ARGUMENT

I. THE TRIAL COURT AND MICHIGAN COURT OF APPEALS ERRED AS A MATTER OF FACT AND LAW IN ITS APPLICATION OF THE "HIGH DEGREE OF RISK TO A SIGNIFICANT NUMBER OF WORKMEN" ELEMENT OF THE COMMON WORK AREA EXCEPTION BY SOLELY CONSIDERING THE NUMBER OF TRADES THAT WOULD HAVE ACCESSED THE AREA OVER THE COURSE OF THE CONSTRUCTION AND NOT CONSIDERING THE ABSENCE OF ANY EVIDENCE THAT ANY OTHER WORKER WAS EVER EXPOSED TO THE ALLEGEDLY DANGEROUS CONDITION—THE ABSENCE OF PERSONAL FALL PROTECTION

[1] Both B&H Construction, Plaintiff's employer, and Defendant Barton Malow separately contracted with the owner of the property.

The Common Work Area Exception is an Exception

Plaintiff's brief takes the sensational position that Defendant is urging an analysis of the common work area exception that would allow the exception to swallow the rule (See Plaintiff's brief, iv). This inaccuracy is ironic because the common work area exception is the exception. The general rule is that a general contractor is not liable for an injury to an employee of its subcontractor. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004).

The common work area exception to that general rule of nonliability allows that a general contractor may be liable for an injury to an employee of its subcontractor if the employee can prove all four of the following elements "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.* If the Plaintiff cannot establish any one of these four elements, then summary disposition is appropriate.

The Instant Dispute Does Not Involve the "Common Work Area" Element

One of the issues that Plaintiff has improperly, but successfully, blurred below is which specific elements Defendant is contending that Plaintiff has not established. Importantly, Defendant is not challenging whether the instant incident occurred in a common work area. This Court may fairly ignore Plaintiff's repeated references to Defendant's effort to "balkanize" the worksite (See Plaintiff's Brief, 18, 31). This Court should also ignore the bulk of Plaintiff's analysis (See Plaintiff's brief, 15-31). Despite

Plaintiff's attempt to blur these issues, Defendant's application simply does not challenge whether Plaintiff can establish that the mezzanine area in question was a common work area. For purposes of this application, this Court may assume that the injury in question occurred in a common work area—an area where multiple trades would eventually work.

There is no Evidence of a "Significant Number of Workmen" at Risk

Defendant has repeatedly tried to have the lower courts focus on element (3) above; that is, whether there was a danger that created a high degree of risk to a significant number of workmen. Unfortunately, Plaintiff has been successful to date in encouraging the lower courts to blur elements (3) and (4). Plaintiff is forced to do this because he has not cited and cannot cite <u>any evidence</u> that <u>any other worker</u> on the <u>entire</u> construction site <u>ever</u>[2] confronted the same danger that Plaintiff allegedly encountered. As noted in §II(D) of Defendant's Application for Leave to Appeal, even if this Court accepts Plaintiff's contention that it need not limit the inquiry to the specific time of the incident, there is still no evidence that any other worker ever faced the same allegedly dangerous condition as Plaintiff.

Instead, Plaintiff references the fact that multiple workers accessed the elevated mezzanine area at various points in time. But, again, this evidence is only relevant to whether the mezzanine area was a common work area. It is not relevant to whether any other worker confronted the same condition that Plaintiff did. Some additional

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[2] In other words, even if this Court rejects Defendant's alternate contention that courts must look to the time of the incident to determine if a significant number of workers were placed at risk, there is no evidence that any other employee was <u>ever</u> placed at risk on this <u>entire</u> construction site.

evidence is required to establish that other workers—a significant number of other workers—were exposed to the same condition that Plaintiff allegedly was.

And, as noted in Defendant's primary brief in support of this application, Michigan's appellate courts have found that four workers is not sufficient to establish that the significant number of workers element. See *Hughes v PMG Building,* 227 Mich App 1; 574 NW2d 691 (1997). The absence of any evidence indicating that any other employee was exposed to the same condition as plaintiff necessarily prevents a plaintiff from establishing that at least four workers were exposed to that condition. Thus, Plaintiff's failure to produce evidence that at least four workers faced the same condition that Plaintiff allegedly did is fatal to his lawsuit.

The Allegedly Dangerous Condition: Absence of Personal Fall Protection

Plaintiff further blurs the issue of the dangerous condition. Plaintiff suggests that his own removal of a steel cable created the dangerous condition. However, the only evidence on this issue is that a steel cable was not even required[3] for the mezzanine area (Deposition of Gary Jordan, 39-40). Moreover, the cable only crossed the six-foot opening to the mezzanine area; the rest of the mezzanine area was encircled by a stud frame that would eventually support the drywall. In any event, this cable had to be removed to access the mezzanine area. If there had been a door across this opening, the door would have been opened to allow Plaintiff to access the mezzanine area. In order to allow Plaintiff to access the mezzanine area, there had to be some opening—

[3] Plaintiff misleadingly cites Jordan's testimony indicating that if a cable is required by MIOSHA, the cable should be doubled up (Jordan dep, 44). However, Jordan's testimony was that a cable was not required for the mezzanine area at issue (Jordan dep, 40). There is no evidence to the contrary.

be it steel cable or wooden door. The removal of the steel cable[4] is plainly a red herring.[5]

Instead, Plaintiff's contention has always been that the dangerous condition was his access of the mezzanine area *without a personal fall protection device* (See Plaintiff's Brief, 13 ("A safety system to protect the worker when the worker lowered the [steel] cable to enter onto the mezzanine and to unload materials or tools was required."). Plaintiff's lawsuit is premised on a contention that he should have been provided a personal fall protection device by Defendant or warned to use such a device. Plaintiff contends that Defendant "failed to assure" that there was personal fall protection available for Plaintiff (See Plaintiff's Brief, 33).

Indeed, Jordan testified that a personal fall protection device, such as a double lanyard system, is <u>the</u> method for protecting an employee working at such heights (Jordan dep, 25). There is no evidence in the record of any other method to protect a worker <u>accessing</u> an elevation.

But Plaintiff does not have any evidence that any other employee of any other subcontractor accessed this or any other elevation at any other time without using a personal fall protection device. Plaintiff asks this Court to assume or speculate that other workers must have also failed to use personal fall protection devices[6] when

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[4] To the extent that the Court of Appeals opinion placed any emphasis on the removal of the steel cable, this was a misconstruction of the facts and an error requiring reversal. See Defendant's Application, Exhibit T.

[5] Even if this Court were to consider the removal of the steel cable as a dangerous condition, Defendant was still entitled to summary disposition. Plaintiff did not introduce any evidence that any other worker accessed the mezzanine area by removing the steel cable <u>and</u> failed to protect himself or herself with a personal fall protection device.

[6] In contrast, in See *Funk v General Motors,* 392 Mich 91, 103-104; 220 NW2d 641 (1974), there was testimony that many workers accessed a variety of elevations without any fall protection whatsoever. Thus, while Plaintiff argues that Defendant is contending that this Court should disregard *Funk*,

accessing the mezzanine area (See Plaintiff's brief, 33). The fact that other workers accessed the mezzanine area, however, does not mean that they accessed the mezzanine area without the protection of a personal fall protection device, such as a double lanyard system. Thus, the fact that other trades accessed the mezzanine area supports a finding that the mezzanine area was a "common work area," but does not support a finding that a high degree of workers were exposed to the alleged of accessing the mezzanine area without using a personal fall protection device.

Plaintiff contends that Defendant should be deemed liable for his own failure to wear a personal fall protection device while working at an elevation. Plaintiff contends that Defendant should have supplied the personal fall protection device or mandated that Plaintiff stop working until his employer provided him one. Even accepting this as true, Plaintiff has wholly failed to demonstrate that any other worker also failed to wear a personal fall protection device. Accordingly, the lower courts have erred in finding a question of fact as to whether a significant number of workers were placed at risk by Plaintiff's singular act of failing to wear personal fall protection. Consequently, even accepting Plaintiff's construction of the high degree of risk to a significant number of workers, Defendant was nevertheless entitled to summary disposition. See Defendant's Application Brief, § I(D).

Defendant Raises Multiple Arguments

Plaintiff's brief seemingly ignores the fact that Defendant's argument is twofold as it related to the high degree of risk to a significant number of workers. Defendant

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Defendant is actually arguing that this Court should dismiss Plaintiff's lawsuit for failing to create a material question of fact on an issue that the plaintiff in *Funk* successfully created through evidence of

respectfully contends that the law is unclear as to whether the high degree of risk to a significant number of workers must look to the specific time of the incident. For example, in *Ormsby*, this Court opined: "The high degree of risk to a significant number of workers must exist **when the plaintiff is injured**; not after construction has been completed." *Orsmby, supra* at 61 n 12 (emphasis added). Regardless, Defendant has also plainly argued the alternative argument that, even if the analysis of whether a significant number of workers is temporally broader in time, Plaintiff is nevertheless entitled to summary disposition. Indeed, unlike *Funk*, there is no evidence of any other worker failing to use personal fall protection while accessing an elevation. To survive summary disposition, Plaintiff was required to establish that multiple other workers also faced that dangerous condition. While Plaintiff has apparently created a question of fact as to whether multiple other trades would access the mezzanine area, he has not offered a shred of evidence that other workers accessed the mezzanine area <u>without personal fall protection</u>. As such, under any interpretation of the temporal requirements of the significant number of workers element, Defendant was entitled to summary disposition.

As Interpreted, the Exception is Now "Swallowing the Rule"

As noted above, it is ironic that Plaintiff is arguing that Defendant's construction of the common work area exception would allow the exception to "swallow the rule." After all, the general rule is that a general contractor is not liable for the injury to a subcontractor. The common work area exception is an exception to that rule. The exception was formulated to address those situations where it would be prudent to have

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rampant lack of personal fall protection.

the general contractor promptly step in to remedy a dangerous condition in a common work area that poses a high degree of risk to a significant number of workers. The instant matter is not, however, one of those circumstances.

Plaintiff's injury was caused by his unilateral decision to walk off a scissor lift without wearing a personal fall protection device. Although Plaintiff's employment records indicate that he acknowledged his awareness of the need to use such a device at an elevation, he declined to do so (See Defendant's Application, Appendix P, 3, ¶ 62).

Plaintiff's interpretation of the common work area exception is that it should cover the situation where a person injures himself through neglect or carelessness. Plaintiff contends that a general contractor must step in to prevent an employee from injuring himself. Plaintiff is simply wrong. The exception only applies where there is a condition that poses a high degree of risk to a *significant* number of persons. Plaintiff's failure to wear his personal fall protection device only placed him at risk.[7]

And, as previously noted, Plaintiff has failed to introduce any evidence that any other worker failed to wear his or her own personal fall protection device at any elevation at any time! Plaintiff does not even have evidence that any other worker accessed the mezzanine area at issue without wearing a personal fall protection device. So even if Plaintiff is correct that the risk to a significant number of workers can be viewed as broadly as suggested by Plaintiff, he has still failed to create a question of fact on this issue. If Plaintiff can proceed to trial on a theory that <u>one</u> person on a construction site who fails to wear personal fall protection may sue the general contractor, then indeed the "common work area" exception is no longer an exception at

all. Although it should not be necessary with a faithful application of the common work area exception, this Court must grant Defendant's application for leave to appeal to clarify that the high degree of risk to a significant number of workers element must be proven and that it cannot be satisfied by proof that a plaintiff failed to wear a personal fall protection device.

II. THE TRIAL COURT AND MICHIGAN COURT OF APPEALS ERRED AS A MATTER OF FACT AND LAW IN RULING THAT THERE WAS A QUESTION OF FACT WITH RESPECT TO THE "FAILED TO TAKE REASONABLE STEPS WITHIN ITS SUPERVISORY AND COORDINATING AUTHORITY" ELEMENT OF THE COMMON WORK AREA EXCEPTION

Plaintiff's Brief fails to address the fact that the "supervisory and coordinating authority" element is a separate and distinct element. This Court decided long ago that a Plaintiff would be required to prove that the general contractor had supervisory and coordinating authority over a trade. See *Funk, supra.*

By imposing such a requirement, this Court plainly did not intend for a general contractor to always have supervisory and coordinating authority over a trade. If that were true, then the element would be unnecessary.

A general contractor may have a duty to prevent one worker from injuring himself *and* a significant number of other workers. Defendant does not have a duty to prevent one worker from injuring only himself. In those circumstances, the duty falls on the worker's employer. See *Hughes, supra* at 6; *Funk, supra* at 101-102.

Here, Plaintiff and his supervisor both testified that they did not take instruction from Defendant as to how to do their work. Moreover, the allegedly dangerous condition did not involve multiple workers, much less multiple trades. There was no

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[7] See *Funk, supra* at 103-104.

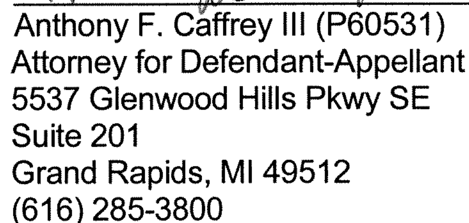
need to coordinate Plaintiff's work with another trade. Therefore, there is further support for a ruling that the lower courts erred in refusing to dismiss Plaintiff's lawsuit.

CONCLUSION AND REQUEST FOR RELIEF

The trial court also erred as a matter of law in denying Defendant's motion for summary disposition under two elements of the "common work area" exception. Although the Michigan Court of Appeals granted Defendant's application for leave to appeal, the Court ended up rubber stamping the trial court's decision. Defendant respectfully requests that this Court grant Defendant's Application for Leave to Appeal and/or peremptorily reverse the trial court's denial of Defendant's motion for summary disposition.

Respectfully submitted,

CARDELLI, LANFEAR & BUIKEMA, PC



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