STATE OF MICHIGAN

COURT OF APPEALS

DOUGLAS LATHAM, Plaintiff-Appellee,	UNPUBLISHED February 4, 2014
v BARTON MALOW, CO., Defendant-Appellant.	No. 312141 Oakland Circuit Court LC No. 2004-059653-NO

DOUGLAS LATHAM, Plaintiff-Appellee,	
v BARTON MALOW, CO., Defendant-Appellant.	No. 313606 Oakland Circuit Court LC No. 2004-059653-NO

Before: STEPHENS, P.J., and M. J. KELLY and RIORDAN, JJ.

PER CURIAM.

In docket no. 312141, defendant Barton Malow, Co., appeals as of right the trial court order entering the jury's verdict in favor of plaintiff, Douglas Latham, an employee of B&H Construction, in a construction accident matter involving the common work area doctrine. In docket no. 313606, defendant appeals as of right the trial court order awarding interest on attorney fees and taxable costs in favor of plaintiff. On December 13, 2012, these cases were consolidated for appellate review. We affirm.

I. FACTUAL BACKGROUND

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

superintendent approached them to verify that they had the appropriate license to use the scissor lift.

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

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

II. PROCEDURAL BACKGROUND

Plaintiff initiated the instant suit against defendant, and relevant for this appeal, alleged that defendant was liable under the common work area doctrine. A long and complex procedural history ensued. Defendant filed its first motion for summary disposition on November 29, 2004, contending that plaintiff's claim failed under the common work area doctrine, as the danger at issue did not pose a high degree of risk to a significant number of workers. The trial court ultimately denied defendant's motion with respect to the common work area doctrine. Defendant appealed, and a panel of this Court affirmed. *Latham v Barton Malow Co*, unpublished opinion per curiam of the Court of Appeals, issued October 17, 2006 (Docket No. 264243).[1] The defendant appealed to the Michigan Supreme Court, who granted leave and reversed the Court of Appeals. *Latham v Barton Malow Co*, 480 Mich 105; 746 NW2d 868 (2008).

The Court found that the lower courts "erred by misidentifying the danger," and that "the danger that created a high degree of risk is correctly characterized as the danger of *working at heights without fall-protection equipment.*" *Latham*, 480 Mich at 114 (emphasis in original). After remand, defendant filed a second motion for summary disposition,[2] arguing that plaintiff failed to present any evidence that workers accessed the elevated mezzanine without fall protection. The trial court granted defendant's motion for summary disposition.

However, plaintiff appealed as of right in this Court, and in an unpublished, per curiam opinion, a panel of this Court reversed. *Latham v Barton Malow Co*, unpublished opinion per

[1] This will be referred to as *Latham I*.

[2] The parties disputed whether this was a "second" motion for summary disposition or merely a "renewed" first motion for summary disposition. For the purposes of clarity, it will be referred to as a second motion for summary disposition.

curiam of the Court of Appeals, issued December 7, 2010 (Docket No. 290268).[3] The panel found, *inter alia*, that there was a genuine issue of material fact regarding whether the evidence satisfied the elements of the common work area doctrine. *Id.* The Michigan Supreme Court denied leave to appeal although it recognized that further discovery or motions for summary disposition were permitted, if appropriate. *Latham v Barton Malow Co*, 489 Mich 899; 796 NW2d 253 (2011).

After remand, defendant filed a third motion for summary disposition. Defendant argued that it was the construction manager, not general contractor, so it could not be found liable under the common work area doctrine. Defendant further argued that plaintiff could not satisfy the elements of the common work area doctrine. The trial court denied defendant's motion, and the case proceeded to trial. After a lengthy trial with several witnesses, the jury returned a verdict finding that defendant was 55 percent negligent, B&H was 22.5 percent negligent, and plaintiff was 22.5 percent negligent. The trial court had previously denied defendant's motion for a directed verdict, and subsequently denied defendant's motions for JNOV and new trial, and granted plaintiff taxable costs and sanctions. Defendant now appeals.

III. CONSTRUCTION MANAGER

A. STANDARD OF REVIEW

Defendant first challenges the trial court's denial of dispositive relief based on defendant's role as a construction manager, not a general contractor.[4] As this Court recently articulated:

> We review de novo the trial court's grant or denial of a directed verdict. When evaluating a motion for directed verdict, the court must consider the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in the nonmoving party's favor. Conflicts in the evidence must be decided in the nonmoving party's favor to decide whether a question of fact existed. A directed verdict is appropriately granted only when no factual questions exist on which reasonable jurors could differ. [*Aroma Wines and Equipment, Inc v Columbia Distrib Servs, Inc*, __Mich App__; __NW2d__ (2013)

[3] This will be referred to as *Latham II*.

[4] While this issue broadly refers to the denial of "dispositive relief," defendant specifically references its motion for summary disposition. Yet, the evidence cited in support of defendant's argument is testimony from the subsequent trial. As this Court has stated, when reviewing a motion for summary disposition, "[r]eview is limited to the evidence presented to the trial court at the time the motion was decided." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 193; 729 NW2d 898 (2006). Since the thrust of defendant's argument is based on the trial testimony, this issue is most accurately characterized as a challenge to the trial court's ruling on the directed verdict and JNOV motions.

(Docket No. 311145, issued December 17, 2013) (slip op at 3) (quotation marks and citations omitted).]

"This Court reviews de novo the trial court's decision on a motion for JNOV." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491; 668 NW2d 402 (2003). We review all of the evidence and legitimate inferences in the light most favorable to the nonmoving party, and the motion should be granted only if the evidence failed to establish a claim as a matter of law. *Id.* at 492.

B. ANALYSIS

The trial court properly determined that the common work area doctrine applied in the instant case as defendant had supervisory and coordinating authority during the project.

The traditional rule governing contractor liability was that a general contractor was not liable for the negligence of independent subcontractors. *Ghaffari v Turner Const Co*, 473 Mich 16, 20; 699 NW2d 687 (2005). However, the common work area doctrine evolved to modify this precept. *Id.* As the Michigan Supreme Court has emphasized, "[w]e regard it to be part of the business of a general contractor to assure that reasonable steps within its supervisory and coordinating authority are taken to guard against readily observable, avoidable dangers in common work areas which create a high degree of risk to a significant number of workmen." *Id.* (quotation marks, citation, and emphasis omitted). The theory behind the application of the common work area doctrine is that "the law should be such as to discourage those in control of the worksite from ignoring or being careless about unsafe working conditions resulting from the negligence of subcontractors or the subcontractors' employees." *Latham*, 480 Mich at 112.

In *Ghaffari*, the Supreme Court discussed at length the common work area doctrine, as well as the interplay with the open and obvious doctrine. Relevant for this case, the Court also included the following footnote: "Although, under the terms of its contract with the premises owner, [the defendant] was in fact a 'construction manager,' and not a 'general contractor,' the distinction is one without a difference for purposes of our analysis in this case." *Ghaffari*, 473 Mich at 19 n 1. The Court provided no further analysis of this issue.[5]

The evidence at issue in this case likewise indicates that despite defendant's argument to the contrary, because it had supervisory and coordinating authority on the jobsite, its title as a construction manager was therefore irrelevant for purposes of the common work area doctrine.[6] While defendant's superintendent denied that he was in charge of supervising, he also admitted

[5] While defendant also cites to *Bethlehem Rebar Indus, Inc v Fidelity & Deposit Co of Maryland*, 582 A2d 442, 443 n 1 (RI, 1990), the court in that case specifically recognized: "[T]he mere self-serving label of CM or general contractor will not in and of itself determine a party's legal status."

[6] See also *Debeul v Barton Malow Co*, 489 Mich 982; 799 NW2d 176 (2011), where the Court denied leave on a case involving defendant, which involved this exact issue.

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

Defendant argues that the applicable contractual language suggests otherwise. Defendant's expert testified that defendant only was responsible for coordination, not control, of the subcontractors. He relied on section 2.3.15 of the contract,[7] to conclude that defendant lacked control in this case because subcontractors had the responsibility for their own means and methods and the safety of their people, and the construction manager was not responsible for a contractor's failure to carry out the work nor did it have control over a contractor's acts or omissions. He further pointed to section 2.3.12 of the contract,[8] which stated that defendant's responsibility for coordination of safety programs did not extend to direct control over the acts or omissions of subcontractors. However, he conceded that based on this contract language, defendant had the overarching responsibility to ensure that B&H had a safety program, and to report to the owner any procedures that did not appear to be in conformity with industry standards. He further admitted that he was unaware that in its interrogatories, defendant stated that its superintendent was responsible for coordinating and supervising the work of various contractors.

Moreover, plaintiff's expert testified that because defendant was the designee for administering the safety program, defendant was the controlling contractor responsible for overall jobsite safety, regardless of any contract language to the contrary. He further opined that "[t]here always has to be one entity that's ultimately responsible for safety. And it's very clear

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[7] "2.3.15 With respect to each Contractor's own Work, 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 each of the Contractors, since these are solely the Contractor's responsibility under the Contract for Construction. The Construction Manager shall not be responsible for a Contractor's failure to carry out the Work in accordance with the respective Contract Documents. The Construction Manager shall not have control over or charge of acts or omissions of the Contractors, Subcontractors, or their agents or employees, or any other persons performing portions of the Work not directly employed by the Construction Manager."

[8] "2.3.12 The Construction Manager shall review the safety programs developed by each of the Contractors for purposes of coordinating the safety programs with those of the other Contractors. The Construction Manager's responsibilities 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 Subcontractors, or any other persons performing portions of the Work and not directly employed by the Construction Manager."

in this case that that was [defendant]." He testified that defendant's superintendent "ha[d] the responsibility for coordinating supervision of the work of various contractors. That's the function of a construction manager or a general contractor." He claimed that it was "ludicrous" for the superintendent to testify that he did not know he had supervising authority on the job site.

Merely because defendant's control was limited in certain respects does not negate the evidence that it had significant supervisory authority over the project. Moreover, while defendant certainly is correct that there can be differences between a construction manager and a general contractor, that does not translate to mean that a construction manager is never liable under the common work area doctrine. See *Ghaffari*, 473 Mich at 19 n 1. Further, absent from defendant's analysis is Article 14 of its contract with the school, which in pertinent part states:

> 14.3 On the basis of its regular on-site observations, Construction Manager will report to the Owner any construction means, methods, techniques, sequences, or procedures that do not appear to conform with industry standards, and shall also report to Owner any work that appears not to be in conformance with contract documents.
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> 14.4 The Construction Manager shall timely inform both the Owner and the Architect of any observed defects or deficiencies in the quality of workmanship of the various contractors.
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> 14.5 The Construction Manager *shall provide daily full-time on-site field supervision*[9] at the new middle school site during the entire construction phase. The Owner reserves the right to approve the identity of the Construction Manager's field supervisor, and to require the replacement of the field supervisor upon two (2) weeks' notice.
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> ***
>
> 14.7 The Construction Manager shall inspect the work of the trade contractors on the project as it is being performed until final completion and acceptance of the project by the Owner to assure, insofar as the CM is reasonably able, that the work performed and the materials furnished are in accordance with the contract documents and that work on the project is progressing on schedule. In the event that the quality control testing should indicate that the work, as installed, does not meet the requirements of this project, the Architect shall determine the extent of the work that does not meet the requirements and the Construction Manager shall direct the trade contractor(s) to take appropriate corrective action, and advise the Owner of the corrective action.

As plaintiff's expert testified, these sections were significant as they implicated who had ultimate authority for the jobsite, and whether there were readily observable dangers.

[9] (Emphasis added).

The trial court did not err in denying defendant dispositive relief based on its claim that as a construction manager, it could not be liable under the common work area doctrine.

IV. JURY INSTRUCTION

A. STANDARD OF REVIEW

Defendant next argues that the trial court improperly instructed the jury regarding the elements of the common work area doctrine.[10] Claims of instructional error are reviewed de novo. *Cox ex rel Cox v Bd of Hosp Managers for City of Flint*, 467 Mich 1, 40; 651 NW2d 356 (2002). "However, to the extent that the review requires an inquiry into the facts, we review the trial court's decision on underlying factual issues for an abuse of discretion." *Id.* An abuse of discretion occurs when the result of the trial court's decision falls outside the range of reasonable and principled outcomes. *Nelson v Dubose*, 291 Mich App 496, 500; 806 NW2d 333 (2011). "Instructional error warrants reversal if it resulted in such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be inconsistent with substantial justice." *Ward v Consol Rail Corp*, 472 Mich 77, 84; 693 NW2d 366 (2005) (quotation marks and citation omitted).

"A trial court's decision regarding a motion for a new trial is reviewed for an abuse of discretion." *McManamon v Redford Twp*, 273 Mich App 131, 138; 730 NW2d 757 (2006). "An abuse of discretion occurs when a court chooses an outcome that is not within the principled range of outcomes." *Id*

B. ANALYSIS

Defendant is not entitled to relief based on any error in the special jury instruction.

As our Supreme Court has explained, jury "instructions should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). We review jury instructions as a whole, and they "must not be extracted piecemeal to establish error." *Id.* "Even if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury." *Id.*

In the instant case, the trial court read the following instruction to the jury:

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

[10] Defendant does not challenge that a special jury instruction was warranted, but merely argues that the instruction given did not adequately represent the law.

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

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

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

And 4. In a common work area.

A, quote "readily-observable and avoidable danger," unquote, is an avoidable danger to which a significant number of workers are exposed, which in this case is whether a significant number of workers were exposed to an avoidable injury by being required to work at dangerous heights without fall protection equipment in a common work area. A, quote, "significant number of workers," unquote, is not defined, but six workers does not constitute a significant number of workers.

Quote, "The high degree of risk to a significant 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.

Defendant first argues that this instruction impermissibly blurred the lines between the elements of the common work area doctrine, namely, the "high degree of risk to a significant number of workmen" and the "common work area element." Defendant focuses on the following part of the instruction: "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." This language is consistent with *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 6; 574 NW2d 691 (1997), where this Court stated: "It is not necessary that other subcontractors be working on the same site at the same time; the common work area rule merely requires that employees of two or more subcontractors eventually work in the area."

Viewed in isolation, this sentence may lead to the confusion defendant suggests. However, jury instructions must be reviewed as a whole, as they "must not be extracted piecemeal to establish error." *Case*, 463 Mich at 6. As a whole, the instruction adequately informed the jury of the respective elements of the common work area doctrine. Consistent with the instruction, a high degree of risk to a significant number workers will not be satisfied with just six employees of one subcontractor, *Alderman v JC Dev Communities, LLC*, 486 Mich 906; 780 NW2d 840 (2010), and for "a common work area to exist there must be an area where the employees of two or more subcontractors will eventually work[,]" *Groncki v Detroit Edison Co*,

453 Mich 644, 663; 557 NW2d 289 (1996). Even if somewhat imperfect, reversal is not warranted because on balance, the instruction adequately and fairly presented the elements of the common work area doctrine to the jury. See *Case*, 463 Mich at 6.

Defendant also contends that the instruction impermissibly contravened the law that the high degree of risk to a significant number of workers must exist at the time plaintiff was injured. Defendant focuses on one sentence in a footnote in the Michigan Supreme Court's opinion in *Ormsby v Capital Welding, Inc*, 471 Mich 45, 60 n 12; 684 NW2d 320 (2004), which states: "The high degree of risk to a significant number of workers must exist when the plaintiff is injured; not after construction has been completed." From this sentence, defendant concludes that the focus must be at the exact time of plaintiff's injury, and that the jury instruction in this case did not properly reflect that.

Of initial significance is that the instruction in this case included the *Ormsby* language, stating "[t]he high degree of risk to a significant number of workers must exist when the Plaintiff is injured, not after construction has been completed." Moreover, as plaintiff notes, defendant has raised this issue before. In *Latham I*, defendant raised this same issue, and the panel responded as follows:

> Defendant maintains that the Supreme Court in *Ormsby* held that the plaintiff's injury must result from a condition that posed a high risk of danger to a significant number of other workers at the time of the plaintiff's injury. We believe that defendant has read footnote 12 out of context. In footnote 12, the Court was responding to Justice Kelly's dissent, so the footnote must be read in the context of Justice Kelly's dissenting opinion. Properly viewed, our Supreme Court did not limit the doctrine to only those situations where other workers are also exposed to a high risk at the same time the plaintiff was injured. Instead, the test requires that a significant number of workers must work in the same area and be subjected to the same risk at some point during construction. Contrary to defendant's argument, while the common work area doctrine required plaintiff to prove that the condition that caused his injury would affect a significant number of other employees, plaintiff was not required to prove that a significant number of other employees were at risk at the same time plaintiff was injured. The doctrine focuses on the risk to other workers during the construction phase. Thus, the focus is on whether the condition that caused the plaintiff's injury would expose a significant number of other workers to the same risk of danger when they would be required to work in the same area.
>
> In this case, plaintiff faced the danger of working on an elevated platform that did not have any permanent perimeter protection to protect him from falling while loading materials onto the mezzanine. The trial court was properly aware of the danger to plaintiff when it noted that other workers, like plaintiff, "required fall protection as the area was accessible only by ladders or lifts and the Defendant's Construction Supervisor testified that, like the Plaintiff, these workers also had to remove existing safety cabling for entry and exiting purposes. Moreover, the trial court correctly concluded that there was a genuine issue of material fact whether the mezzanine was a common work area that several

> workers would need to access to complete their work. There was evidence that employees of two or more other subcontractors, including plumbers, electricians, and painters, had to access the mezzanine to perform their work. Like plaintiff, these workers also had to reach that area using a ladder or lift without perimeter protection. Thus, these other workers were exposed to the same risk of falling from the mezzanine while loading materials onto it. [*Latham I*, unpub op at 2-3 (citations omitted).]

While the Supreme Court granted leave and reversed based on this Court's incorrect identification of the danger, the Court also stated:

> The lower courts correctly noted that workers from several trades had to work at the mezzanine level at the same time. Hence, an issue of fact was created concerning whether the mezzanine was a common area. Various subcontractors needed to get onto the mezzanine numerous times over several days in order to work and load materials and equipment. By a rough estimate, a dozen workers, including carpenters, electricians, plumbers, painters, and at least four people to load heating, ventilation, and cooling equipment needed to get onto the mezzanine. After the wooden frame for the drywall was put in, there were only two ways to reach the mezzanine: by ladder and by scissor lift. All these workers faced the danger of falling from the mezzanine while loading materials or equipment. Accordingly, an issue of material fact arose about whether a significant number of workers employed by various subcontractors were exposed to the same risk. [*Latham*, 480 Mich at 121.]

Therefore, plaintiff correctly notes that the Michigan Supreme Court seemingly agreed with the panel's analysis in *Latham I* regarding the appropriate time frame to consider. The jury instruction in the instant case was consistent with that interpretation.[11]

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

The 6th Circuit recently adopted the same analysis. While federal case law is not binding on state courts, it can be considered persuasive. *Wilcoxon v Minnesota Min & Mfg Co*, 235 Mich App 347, 360 n 5; 597 NW2d 250 (1999) ("Though not binding on this Court, federal precedent

[11] While defendant argues that the law of the case doctrine does not apply in cases involving summary disposition as they merely raise questions of fact, the legal issue of what time period to consider is not a question of fact.

is generally considered highly persuasive when it addresses analogous issues."). The 6th Circuit held as follows:

> In *Ormsby*, the court also stated 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.' [The defendant] interprets this language to suggest that the number of workers and subcontractors must be measured at the exact moment that the worker is injured. But this interpretation would ignore the second half of the sentence. Read as a whole, the sentence is consistent with the rest of the *Ormsby* opinion and with the prior opinions . . . . The comparison to 'after the work is completed' suggests that the time when the plaintiff is injured' refers to the time *period* during the ongoing construction—not to a specific moment. When a construction phase is over, the nature and extent of the risk to workers presumably changes, and is no longer the 'same risk.'
>
> Of course, discerning the relevant time period need not involve a binary choice—during, or after, construction. Rather, it follows from *Ormsby* and its predecessors that the relevant time is the time period during which the hazardous activity is occurring or will occur—whether it lasts one hour, one day, or for the duration of a particular construction stage. The length of the relevant time period is defined by the continued existence of the same risk of harm in the same area. [*Richter v American Aggregates Corp*, 522 Fed Appx 253, 263 (CA 6, 2013) (emphasis in original) (quotation marks and citation omitted).]

Therefore, defendant has failed to demonstrate any instructional error requiring reversal.

V. COMMON WORK AREA DOCTRINE

A. STANDARD OF REVIEW

Lastly, defendant argues that the trial court erred in denying it dispositive relief based on plaintiff's failure to satisfy the elements of the common work area doctrine. As stated above, this Court reviews de novo the trial court's denial of a directed verdict, viewing the evidence in the light most favorable to plaintiff, and drawing all reasonable inferences in plaintiff's favor. *Aroma Wines and Equipment, Inc*, __Mich App at __ (slip op at 3). All conflicts in the evidence are decided in plaintiff's favor, and the motion only should be granted if no factual questions exist on which reasonable minds could differ. *Id.* This Court also reviews de novo a trial court's denial of a JNOV motion. *Wiley*, 257 Mich App at 491. All of the evidence and legitimate inferences are viewed in the light most favorable to plaintiff, and the motion should be granted only if the evidence failed to establish a claim as a matter of law. *Id.* at 492.

B. ELEMENTS OF THE DOCTRINE

Plaintiff produced sufficient proofs at trial to prevail under the common work area doctrine.[12]

The elements of the common work area doctrine are: "(1) 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 workers (4) in a common work area." *Latham*, 480 Mich at 109. Only when all elements of this test are satisfied may a general contractor be held liable for the alleged negligence of the employees of independent subcontractors. *Ghaffari*, 473 Mich at 21.

1. FAILURE TO TAKE REASONABLE STEPS WITHIN AUTHORITY

As discussed *supra*, defendant's argument that it lacked supervisory and coordinating authority is without merit. Further, defendant's superintendent and safety manager/coordinator both admitted that defendant had the authority to order that work be stopped if it was being performed unsafely, and to require subcontractors to instruct their employees to comply with safety regulations. Defendant had the authority to do onsite inspections, to administer the safety program, and to report to the owner any procedures that did not appear in conformity with industry standards. Yet, defendant did none of that. It did not instruct plaintiff or his employer that fall protection was needed, nor did it attempt to stop plaintiff from accessing the mezzanine in an unsafe fashion. Moreover, as plaintiff acknowledged, donning a harness system would have been useless in this instance, as neither defendant nor anyone else had established anchor points.

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

2. READILY OBSERVABLE AND AVOIDABLE DANGER

Our Supreme Court has defined the danger in this case as follows: "the danger that created a high degree of risk is correctly characterized as the danger of *working at heights without fall-protection equipment.*" *Latham*, 480 Mich at 114 (emphasis in original).[13] As

[12] Defendant contends the law of the case doctrine does not apply to this issue. Regardless of whether that argument has any merit, the trial court properly denied defendant's directed verdict and JNOV motions based on the evidence produced at trial. While defendant again references its motion for summary disposition and cites to that brief, the evidence it relies on in this section is from trial, not evidence from the summary disposition motion. Thus, this will be reviewed as a challenge to the trial's court's ruling on the directed verdict motion and the JNOV.

[13] While defendant contends that after remand plaintiff's theory changed because he admitted he had access to fall protection, this does not alter the identification of the danger. Regardless of whether plaintiff had access to fall protection, it was not used, nor did defendant instruct him or

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

Defendant, however, contends that the danger was not readily observable because plaintiff alone created the hazard, which was a combination of the dangerously parked scissor lift, plaintiff's refusal to wear fall protection, and his decision to walk from the scissor lift to the mezzanine. However, as noted above, our Supreme Court has already defined the danger in this case as "the danger of *working at heights without fall-protection equipment.*" *Latham*, 480 Mich at 114 (emphasis in original). Defendant's superintendent also admitted he knew this danger would result when plaintiff and his partner accessed the mezzanine with the removed cable. Defendant's safety manager/coordinator conceded that had plaintiff used fall protection, the accident would not have occurred. Plaintiff's expert concurred, explaining that the only cause of plaintiff's fall was the lack of fall protection. Furthermore, while plaintiff may have contributed to the danger in not using the fall protection gear available to him, that is consistent with the jury's verdict that plaintiff was partially at fault. That does not, however, absolve defendant from its responsibility in administering the safety programs to ensure that safety protection was utilized on the construction site.

Therefore, the evidence supports the jury's finding of a readily observable and avoidable danger. *Latham*, 480 Mich at 109.

3. HIGH DEGREE OF RISK TO A SIGNIFICANT NUMBER OF WORKERS

There also was evidence of a high degree of risk to a significant number of workers. As our Supreme Court has articulated, six employees of one subcontractor does not constitute a significant number of workers. *Alderman*, 486 Mich at 906. In the instant case, when asked how many workers had to access the mezzanines, the superintendent testified as follows:

> First ones would be the ironworkers would actually set up all the beams and flooring and decking, and then the concrete people would go up there and pour a floor. And then they would start building the walls, metal walls. . . . And then the drywall, and then they'd put the equipment up there, and then they'd go up and paint and all. . . . The electricians would be before the walls went up. They'd put in the conduit.

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order otherwise, so the danger remained of "*working at heights without fall-protection equipment.*" *Latham*, 480 Mich at 114 (emphasis in original).

He further testified that plumbers and HVAC workers also accessed the mezzanines. Thus, the jury could have concluded that this constituted a significant number of workers, especially as it was correctly instructed that "significant number" had to be more than six.

Defendant, however, argues that no other worker was exposed to the precise danger of walking from a crookedly parked scissor lift to a mezzanine without fall protection. Yet, as noted above, the Supreme Court defined the danger more broadly in this case, as "the danger of *working at heights without fall-protection equipment.*" *Latham*, 480 Mich at 114 (emphasis in original). Furthermore, the superintendent referenced significant materials that the other trades were installing or constructing on the mezzanine, and there was significant evidence that such workers were not using fall protection when transporting such materials or equipment. Scott Schrewe, a carpenter for B&H, testified that after plaintiff's accident, he was called to fill the absence. He and his partner used the lift to access the mezzanine and likewise had to remove the cable in order to move materials to the mezzanine. Schrewe testified that no one discussed with him any type of fall protection needed to exit the lift onto the mezzanine, and that he and his partner never used any type of fall protection. This evidence demonstrates that despite plaintiff's accident, the workers continued to access the mezzanine without fall protection.

Furthermore, the superintendent detailed the extent of his lack of knowledge regarding fall protection, even at the time of trial, as follows: he never received defendant's safety regulations; he did know did not know that one of defendant's onsite safety requirements in their loss program was for every worker working at heights over six feet to have a safety belt and harness; he was further unaware that people working at heights needed fall protection; and he did not know that, as a superintendent, he was required to make sure workers used safety belts, harnesses, and lanyards.

Considering evidence that other workers accessed the mezzanine without fall protection, and the superintendent's admission that he did not even know fall protection was needed, there was sufficient evidence that there was a high degree of risk to a significant number of workers. *Latham*, 480 Mich at 109.[14]

4. COMMON WORK AREA

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

Defendant also generally challenges that the specific work plaintiff performed did not require fall protection and that at least 15 to 20 other workers accessed elevations using an

[14] While defendant again raises the issue of the proper time period in which to evaluate this risk, that was addressed above.

alternate method, such as a ladder. Defendant produced witnesses who testified that plaintiff could have performed his task differently, in a way that did not require the use of safety measures such as a double harness system. However, there also was evidence indicating otherwise. Most significant, while defendant places great emphasis on the fact that plaintiff could have used a ladder to access the mezzanine and the lift to transport materials, as other trades had done, consistent with plaintiff's testimony, this overlooks the obvious: plaintiff still would have had to go onto the lift to remove the drywall boards. Plaintiff's partner confirmed that he could not think of another available method to perform the job that day. Plaintiff also testified that the only realistic method of moving the material to the mezzanine would be to take down the guard cable, and the superintendent knew that would happen.

VI. CONCLUSION

Defendant's role as a construction manager was not fatal to plaintiff's claim, as defendant had supervisory and coordinating authority. The jury instruction regarding the elements of the common work area doctrine, when viewed as a whole, adequately conveyed the elements of the doctrine to the jury. Furthermore, defendant is not entitled to relief based on the trial court's denial of dispositive relief regarding plaintiff's evidence under the common work area doctrine.[15] We affirm.

/s/ Cynthia Diane Stephens
/s/ Michael J. Kelly
/s/ Michael J. Riordan

[15] We note that defendant raises issues regarding *Latham II* only for purposes of preserving it for appeal, and to the case evaluation sanctions only in the event that we were to vacate the verdict. Therefore, we decline to address these alternate arguments.