STATE OF MICHIGAN

COURT OF APPEALS

DOUGLAS LATHAM,

Plaintiff-Appellant,

v

BARTON MALOW COMPANY,

Defendant-Appellee.

UNPUBLISHED
December 7, 2010

No. 290268
Oakland Circuit Court
LC No. 2004-059653-NO

Before: K.F. KELLY, P.J., and WILDER and GLEICHER, JJ.

PER CURIAM.

In this construction site injury case filed by plaintiff Douglas Latham against defendant Barton Malow Company, plaintiff appeals as of right a circuit court order granting defendant summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand for further proceedings.

I. UNDERLYING FACTS & PROCEDURAL HISTORY

This case arose after plaintiff fell from an elevated island in a middle school construction site in Lake Orion. The island would eventually house heating and cooling (hvac) equipment. Stud walls enclosed the island on three sides, and a stud wall also partially enclosed the fourth side. A six-foot-wide opening remained in the fourth wall, through which workers could access the inside of the elevated island and deliver the hvac equipment. A removable cable stretching across the opening served as the fall protection device for workers on the island. Defendant managed the construction project, and plaintiff worked as a carpenter for subcontractor B & H Construction.

On the day of plaintiff's fall, he and a coworker ascended to the island on a scissors lift, carrying about 12 sheets of drywall. When the lift arrived at the island, plaintiff's coworker removed the cable barrier to permit the workers to step onto the island. The coworker entered the island first, carrying one end of a sheet of drywall. Plaintiff stepped onto the island holding the other end of the drywall in his hands. As plaintiff did so, the sheet of drywall cracked and he lost his balance and fell. Plaintiff filed a complaint in July 2004, alleging that his injury occurred in a common work area and that defendant breached its duty to provide a reasonably safe work place. Plaintiff's claim centers on his position that defendant failed to employ an adequate safety system to prevent falls when workers entered and exited the elevated island.

In November 2004, defendant sought summary disposition of the complaint under MCR 2.116(C)(10), which the circuit court denied. This Court affirmed the circuit court's denial of summary disposition. *Latham v Barton Malow Co*, unpublished per curiam opinion of the Court of Appeals, issued October 17, 2006 (Docket No. 264243). However, the Michigan Supreme Court reversed this Court's decision and remanded the case "to the trial court for further proceedings consistent with this opinion." *Latham v Barton Malow Co*, 480 Mich 105, 108, 115; 746 NW2d 868 (2008). The Supreme Court held that both this Court and the circuit court had misapprehended the danger plaintiff confronted while working on the elevated island:

> Accordingly, in this case … the danger that created a high degree of risk is correctly characterized as the danger of *working at heights without fall-protection equipment.* It is this danger to which a significant number of workers must be exposed in order for a claim to exist.
>
> * * *
>
> With the relevant danger correctly perceived, the error of the lower courts' analyses becomes apparent. While defendant's motion for summary disposition identified the correct danger and further raised the issue that plaintiff's own failure to wear a fall-protection device did not create a high degree of risk to a significant number of workers, the trial court and the Court of Appeals erred by misidentifying the danger and inevitably erred in the subsequent analysis regarding how many other workers were exposed to the risk. [*Id*. at 114-115 (emphasis in original, footnotes omitted).]

In a footnote to this text, the Supreme Court elaborated its holding by invoking the Court's prior opinion in *Funk v Gen Motors Corp*, 392 Mich 91; 220 NW2d 641 (1974), overruled on other grounds in *Hardy v Monsanto Enviro-Chem Systems, Inc*, 414 Mich 29; 323 NW2d 270 (1982):

> Heights on construction projects, we conclude, as did the *Funk* Court, are not avoidable. Thus, heights are not by themselves hazards addressed by *Funk.* We have never said what fall-protection gear is needed at heights. *The question is whether fall protection was available and whether the general contractor took reasonable steps to see that it was used*. [*Latham*, 480 Mich at 114 n 24 (emphasis added).]

In another footnote premised on *Funk*, the Supreme Court further explained:

> Although we focus here on only one of the common-work area elements, we note that plaintiff must satisfy all the elements that give rise to a duty owed by a general contractor. *Funk* also requires plaintiff to show that the failure of a significant number of workers to take safety precautions was readily observable and that the failure was avoidable. Finally, the plaintiff must, of course, also show that the defendant failed to take reasonable steps to ensure compliance and that the danger existed in a common work area. [*Id*. at 115 n 25.]

On April 29, 2008, just over two weeks after the Supreme Court decided *Latham*, 480 Mich 105, defendant filed in the circuit court a proposed order of dismissal pursuant to MCR

2.602(B)(3). On May 5, 2008, defendant sought rehearing in the Supreme Court, urging that the Court "modify its original Opinion to clarify that the trial court should enter an Order granting Defendant's motion for summary disposition upon remand." Plaintiff objected to the entry of the proposed order of dismissal, and on May 6, 2008 the circuit court issued an order "granting" plaintiff's objections to dismissal, offering the following rationale:

> Because the Supreme Court's decision in this matter did not order this Court to close the case but only found that the Court utilized the incorrect analysis, the presented order is erroneous and is rejected. In addition, the Court's April 24, 2008 order regarding re-briefing of the issues governs. (The Court will hold a pretrial/status conference if the parties desire.)

On May 28, 2008, the Supreme Court denied defendant's motion for rehearing. *Latham v Barton Malow Co*, 481 Mich 882.

On July 2, 2008, the circuit court entered an order briefly explaining its position with respect to a potential renewed motion for summary disposition:

> [I]n light of the Supreme Court ruling … , *new briefing is required* and, therefore, should the Defendant desire to renew its motion for summary disposition in light of the Supreme Court's decision, the DEFENDANT is DIRECTED to file a *revised* Motion and Supporting Brief for Summary Disposition consistent with the Supreme Court's ruling. [Emphasis added.]

After a pretrial conference in October 2008, the circuit court entered an amended scheduling order instructing that the parties file any motions to reopen or extend discovery by November 5, 2008. The order further envisioned that "to the extent dates are *not* extended/amended or reopened," defendant "is directed to file a revised Motion and Supporting Brief for Summary Disposition consistent with" the Supreme Court's opinion in *Latham*, 480 Mich 105.

Plaintiff timely filed a motion to reopen discovery and amend his witness list. Plaintiff hoped to add one witness, Scott Schrewe. Schrewe had replaced plaintiff on the job site after plaintiff's fall. Plaintiff submitted Schrewe's affidavit, in which Schrewe attested that he never wore personal fall protection equipment while on the elevated island "because there was nothing, I believed, in which to attach personal fall protection to." Defendant opposed the addition of Schrewe to plaintiff's witness list, insisting that "[t]here is absolutely no authority to support Plaintiff's request for additional discovery after this Court has already ruled on Defendant's motion once and the already-length [sic] discovery period has long been closed," and "[i]t would be inconsistent with the Supreme Court's order to allow Plaintiff to now introduce new evidence." On November 10, 2008, the circuit court entered an order dispensing with oral argument and denying an adjournment, in part on the basis that "there is no good cause or unforeseen/exceptional circumstance."

Defendant renewed its motion for summary disposition in late November 2008, and plaintiff filed a timely response brief. Plaintiff attached to the response several depositions, including his own 2004 deposition, and a December 2008 affidavit signed by plaintiff. In January 2009, the circuit court entered a written opinion and order granting defendant's motion, which reasoned in pertinent part:

> Having carefully reviewed and weighed the parties' submissions, together with the Supreme Court's decision *supra*, this Court is constrained to find that, for the reasons, analysis and authorities cited by the Defendant, the Motion must be granted. (The Court incorporates the Defendant's Renewed Motion and briefing as though fully stated herein.) Consistent with this finding, the Schrewe Affidavit must be struck as it impermissibly expands the record and violates this Court's Order dated 11/10/08 denying the Plaintiff's motion to reopen discovery and amend his witness list (to include, *inter alia*, testimony by Mr. Schrewe). Likewise, for the reasons stated in the Defendant's Reply, the Plaintiff's Affidavit also cannot be considered as it also attempts to improperly expand the record. *The Supreme Court's remand directive, coupled with this Court's denial of the Plaintiff's motion to reopen discovery, confirm that the scope of this Court's review is limited to the record pending before this Court at the time of oral argument on the original motion for summary disposition*. [Emphasis added.][1]

II. CIRCUIT COURT'S INTERPRETATION OF SUPREME COURT'S REMAND DIRECTIVE

Plaintiff initially contends on appeal that the circuit court misinterpreted the remand instructions given by the Michigan Supreme Court in *Latham*, 480 Mich 105. Plaintiff challenges as incorrect the circuit court's ruling that the Supreme Court's decision and remand instructions foreclosed further factual development of the proper peril issue. In plaintiff's view, because the parties previously focused on an incorrect peril, the record demanded further development concerning the central issue identified by the Supreme Court, whether a significant number of workers were exposed to the danger of working at height without fall protection.

"It is the duty of the lower court or tribunal, on remand, to comply strictly with the mandate of the appellate court." *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 532; 730 NW2d 481 (2007) (internal quotation omitted). "Interpreting the meaning of a court order involves questions of law that we review de novo on appeal." *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 460; 750 NW2d 615 (2008).

In granting defendant's renewed motion for summary disposition, the circuit court expressed that it had limited the scope of its review on remand to the evidence before it at the time the parties originally argued defendant's summary disposition motion. However, the Supreme Court's opinion in *Latham*, 480 Mich 105, plainly did not specifically mandate that the circuit court limit the proceedings on remand to the same record as that already developed, and contained no specific direction whatsoever with respect to the proceedings on remand. Rather, the Supreme Court instructed only as follows:

> Because both lower courts misapprehended the appropriate danger to examine and decided the case on that erroneous basis, they also erred on the issue

---

[1] Defendant subsequently filed a motion for taxable costs and case evaluation sanctions, which the circuit court denied.

> whether a significant number of workers would be exposed to the relevant peril. With the appropriate danger clarified, we reverse the judgment of the Court of Appeals and remand this case to the trial court for further proceedings consistent with this opinion. [*Id*. at 108.]
>
> . . . [T]he trial court and the Court of Appeals erred by misidentifying the danger and inevitably erred in the subsequent analysis regarding how many other workers were exposed to the risk. We therefore reverse the judgment of the Court of Appeals and remand this case to the trial court for further proceedings consistent with this opinion. [*Id*. at 115.]

Contrary to the circuit court's opinion and order granting defendant's renewed motion for summary disposition, the Supreme Court simply in no respect limited the scope of review on remand.

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

The circuit court in July 2008 recognized that in light of the Supreme Court's clarification of the applicable law, "new briefing [wa]s required." In denying defendant's later motion for costs and case evaluation sanctions, the circuit court reasoned that

> [t]he area of the law addressed by the parties was less than settled and has significant jurisprudential value. Witness the Michigan Supreme Court's decision to grant leave in the case and issue a thorough opinion reversing the Court of Appeals. Moreover, even the Supreme Court could not resolve this case forthrightly. . . . Indeed, this Court required additional briefing even after the remand by the Supreme Court to resolve this case.

These findings evidence that resolution of defendant's summary disposition motion necessitated a fresh review of the entire record and the consideration of new arguments flowing from the Supreme Court's opinion.

Moreover, the Supreme Court's denial of defendant's motion for rehearing additionally supports that the Supreme Court lacked any intent to circumscribe the evidence available to the circuit court on remand. Defendant argued in its rehearing motion that the Supreme Court should simply "modif[y]" its opinion "to clarify that the proper disposition of this matter on remand is to enter an Order granting Defendant's motion for summary disposition." Yet, the

Supreme Court denied the motion for rehearing, signaling that it intended for the circuit court to conduct future proceedings in accordance with the clarified rule of law that the Supreme Court had announced.[2]

III. AMENDMENT OF PLAINTIFF'S WITNESS LIST

Plaintiff next challenges the circuit court's ruling that he failed to show good cause for adding Schrewe to his witness list, emphasizing that Schrewe's testimony "goes right to the heart of the purpose of the remand," and that his deposition would not have meaningfully delayed the proceedings. We review for an abuse of discretion a circuit court's decision whether to allow amendment of a witness list. *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1992). To the extent that resolution of this issue also involves court rule interpretation, we consider de novo this legal question. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009).

According to MCR 2.401(I)(2), "The court may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown." The circuit court did not entertain argument on plaintiff's motion to add Schrewe to his witness list, but in a form order offered several reasons for denying the motion:

> There is no good cause asserted or the reason asserted for the adjournment does not constitute good cause warranting adjournment. MCR 2.503(B)(1) and/or (B)(2)(b).
>
> There is no unforeseen or exceptional circumstance asserted or the reasons asserted for the adjournment do not constitute such circumstances. LAO 2004-6(D).
>
> The Motion or Stipulation fails to state whether other adjournments have been granted in the proceeding, and, if so, the number granted in violation of MCR 2.503(B)(2) and LAO 2004-6(D)(2).
>
> The Motion or Stipulation fails to comply with MCR 2.503(B)(3) and LAO 2004-6(D)(3) because the entitlement (motion caption) fails to specify whether it is the first or a later request.
>
> Other: For the reasons articulated in portions of the Defendants' [sic] Response, most particularly in the Argument section of the Response, there is no good cause or unforeseen/exceptional circumstance.

---

[2] In the order granting argument on defendant's application for leave to appeal, the Supreme Court directed the parties to brief "whether the trial court should have granted summary disposition in the defendant's favor based on this issue." *Latham v Barton Malow Co*, 477 Mich 1118 (2007). That the Supreme Court declined to rule that summary disposition should have been granted further reflects that the Court anticipated further argument on this issue in the circuit court.

The circuit court selected an outcome falling outside the range of principled and reasonable outcomes when it declined to permit plaintiff to add Schrewe as a witness who had knowledge of the issue defined by the Supreme Court as dispositive of this case. *Taylor v Kent Radiology, PC*, 286 Mich App 490, 524; 780 NW2d 900 (2009). While not abundantly clear, the circuit court's order denying plaintiff's motion appears to rest in large measure on its untimeliness. Although the circuit court had authority to bar Schrewe's testimony, "the fact that such action is discretionary rather than mandatory necessitates a consideration of the circumstances of each case to determine if . . . a drastic sanction is appropriate." *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990). "[T]he mere fact that a witness list was not timely filed does not, in and of itself, justify the imposition" of a sanction that occasions the dismissal of the case. *Id*. "[W]hile rules of practice give direction to the process of administering justice and must be followed, their application should not be a fetish to the extent that justice in a particular case is not done." *Id*. A ruling whether to let a party add a witness should consider relevant factors like

> (1) whether the violation was willful or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the defendants; (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice; (5) whether there exists a history of plaintiff's engaging in deliberate delay; (6) the degree of compliance by the plaintiff with other provisions of the court's order; (7) an attempt by the plaintiff to timely cure the defect; and (8) whether a lesser sanction would better serve the interests of justice. This list should not be considered exhaustive. [*Id*. at 32-33.]

"The record should reflect that the trial court gave careful consideration to the factors involved and considered all its options in determining what sanction was just and proper in the context of the case before it." *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999), overruled in part on other grounds in *Dimmitt & Owens Financial, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618, 628; 752 NW2d 37 (2008). Where justice requires, a court "should not be reluctant to allow" an unlisted witness to testify. *Pastrick v Gen Tel Co of Michigan*, 162 Mich App 243, 245; 412 NW2d 279 (1987). "[J]ustice is best served where an unlisted witness can be permitted to testify while the interests of the opposing party are adequately protected," because neither party endures prejudice and "the jury is afforded a fuller development of the facts surrounding the case." *Id*. at 246. Generally, a court should impose appropriate and reasonable conditions that prevent prejudice and enable the opposing party to meet the testimony of the new witness. *Id*.

Plaintiff's failure to list Schrewe in his initial witness list derives from plaintiff's misapprehension of the proofs necessary to establish his common work area claim. The circuit court and three judges of this Court shared an identical misapprehension. Although the Supreme Court did not *change* the law, it indisputably clarified it and redirected the focus of the proofs. No evidence of record suggests that plaintiff willfully neglected to name Schrewe as a witness before the Supreme Court's ruling, or that plaintiff had engaged in any discovery abuse. Other

than a brief delay of the summary disposition hearing for the purpose of deposing Schrewe, defendant has not identified any prejudice.[3]

The record nowhere substantiates that the circuit court considered any of the factors listed in *Dean*, 182 Mich App at 32-33. Because defendant would not suffer any discernible prejudice arising from the addition of Schrewe to plaintiff's witness list, and because Schrewe's testimony would afford the jury "a fuller development of the facts surrounding the case," we conclude that the circuit court abused its discretion in refusing to permit Schrewe's addition to plaintiff's witness list. *Pastrick*, 162 Mich App at 246.

IV. DISREGARD OF PLAINTIFF'S AFFIDAVIT

Plaintiff next challenges the circuit court's decision to disregard his affidavit, which plaintiff filed with his response to defendant's renewed motion for summary disposition. The sole reason mentioned by the circuit court for its rejection of plaintiff's affidavit was that the affidavit "attempts to improperly expand the record." As discussed in Part II, *supra*, no rational basis exists for this conclusion given that the Supreme Court did not limit the circuit court's scope of review on remand. Nor does it enhance fairness or justice to have permitted defendant to file a "revised" motion for summary disposition, while limiting plaintiff to the evidence submitted in support of his earlier response.

In plaintiff's December 2008 affidavit, he averred the following:

> 1. In my deposition taken on June 22, 2004, I testified that the week before my accident I worked with two other coworkers (Tom and Gerald) on another mezzanine installing drywall that had already been unloaded and placed on the mezzanine level. (Page 37.)
>
> 2. In my deposition I further testified that the mezzanine level was similar to the mezzanine from which I fell. (Page 39.)
>
> 3. If asked, I would have testified that the height [sic] of the two mezzanines were approximately the same.
>
> 4. I testified at my deposition that the opening of the mezzanine in which I worked for a week prior to my fall from the second mezzanine was approximately the same size as that opening in the mezzanine from which I fell and would have testified, if I had been asked, that there was no barricade of any

[3] Throughout defendant's brief on appeal, it repeatedly emphasizes that, unlike plaintiff, the circuit court, and this Court, defendant properly understood the relevant legal issue all along. In light of this fact, defendant contends that plaintiff should not be permitted to add any new witnesses. Defendant's prescience may be commendable, but we fail to comprehend how it should entitle defendant to foreclose consideration of new evidence submitted after the Supreme Court's vindication of defendant's argument.

> type or nature across the opening of the mezzanine through which men and material had to cross to gain access or to exit. (Page 48.)
>
> 5. In my deposition I testified that we gained access to the mezzanine on which I worked the week before my accident via a ladder (p. 38) because the drywall had already been placed on the mezzanine level (p. 41). If asked, I would have testified that we climbed carrying our tools and one of us would be on the mezzanine to receive our tools as we climbed from the ladder to the mezzanine level, and not one of us had any fall protection.
>
> 6. In my deposition I testified that while working in the other mezzanine the week before my accident, I worked alongside with hvac people installing ductwork. (Page 84.) If asked, I would have testified that there were 4 or more different hvac workers present at various times during that week and that I personally observed the hvac workers on different occasions at the unbarricaded opening, receiving or lowering material, equipment or tools, without benefit of any fall protection.

The averments in plaintiff's affidavit do not contradict his deposition testimony; defendant objects to plaintiff's affidavit because it omits the names of any hvac workers and "expands the record," essentially constituting a "'backdoor' method of circumventing the trial court's original scheduling order."

Pursuant to MCR 2.116(G):

> (2) Except as to a motion based on subrule (C)(8) or (9), affidavits, depositions, admissions, or other documentary evidence may be submitted by a party to support or oppose the grounds asserted in the motion.
>
> * * *
>
> (5) The affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties, must be considered by the court when the motion is based on subrule (C)(1)-(7) or (10). . . .
>
> (6) Affidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on subrule (C)(1)-(7) or (10) shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion.

Plaintiff's affidavit satisfies the criteria contained in MCR 2.116(G)(6) because it consisted of his first-person, nonhearsay accounts of information relevant to the circuit court's proper focus on remand from the Supreme Court, whether (1) "a significant number of workers" had exposure to "the danger of working at heights without fall-protection equipment," (2) "the failure of a significant number of workers to take safety precautions was readily observable and that the failure was avoidable," and (3) "the danger existed in a common work area." *Latham*, 480 Mich at 114 (emphasis omitted), 115 n 25; MRE 401. Plaintiff's first-hand observations of

his work environment amount to admissible evidence, irrespective whether he knew the names of the hvac workers he saw. Furthermore, plaintiff's neglect to volunteer the expanded detail reflected in his affidavit in the course of his prior deposition does not constitute a ground for striking his affidavit.[4] The circuit court thus should have considered the affidavit as plainly directed by MCR 2.116(G)(5).

V. PROPRIETY OF SUMMARY DISPOSITION

Plaintiff next challenges the merits of the circuit court's decision to grant defendant's renewed motion for summary disposition. When considering a motion for summary disposition under MCR 2.116(C)(10), a court must view the evidence submitted in the light most favorable to the party opposing the motion. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*. A genuine issue of material fact exists when the evidence submitted "might permit inferences contrary to the facts as asserted by the movant." *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 360; 320 NW2d 836 (1982). When a court affords "the benefit of reasonable doubt to the opposing party" and identifies an issue about which reasonable minds "might differ," summary disposition cannot be granted. *West*, 469 Mich at 183. "[I]f reasonable minds could disagree about the conclusions to be drawn from the facts, a question for the factfinder exists." *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).[5]

In *Funk*, 392 Mich 91, the Supreme Court announced the common work area doctrine, which it described as follows:

> We regard it to be part of the business of a general contractor to assure that reasonable steps within its supervisory and coordinating authority are taken to guard against readily observable, avoidable dangers in common work areas which create a high degree of risk to a significant number of workmen. [*Id*. at 104.]

The elements of a common work area claim "are: (1) the defendant contractor failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily

---

[4] Defendant cites *Setterington v Pontiac Gen Hosp*, 223 Mich App 594, 604-605; 568 NW2d 93 (1997), and *Foehr v Republic Automotive Parts, Inc*, 212 Mich App 663, 670; 538 NW2d 420 (1995), as supporting the circuit court's discretionary rejection of plaintiff's affidavit. We view those cases as distinguishable; here, plaintiff's offering of additional detail of matters discussed during discovery does not equate to the discovery violations the trial courts found in *Setterington*, 223 Mich App at 604-605, and *Foehr*, 212 Mich App 670, which prompted the courts to exclude proffered evidence at trial.

[5] In analyzing whether the circuit court should have granted summary disposition, we take into account plaintiff's recent affidavit, which the court erroneously neglected to consider.

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.[6]

The question presented on remand is whether plaintiff produced evidence reasonably tending to show that defendant's "failure to reasonably ensure that workers were observing safety procedures resulted in a significant number of workers being exposed to a high degree of risk in a common work area." *Latham*, 480 Mich at 113. The common work area doctrine "distinguish[es] between a situation where employees of a subcontractor were working on a unique project in isolation from other workers and a situation where employees of a number of subcontractors were all subject to the same risk or hazard." *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 8; 574 NW2d 691 (1997). "[W]here a substantial number of employees of *multiple subcontractors* may be exposed to a risk of danger," public policy considerations allow a court to impose liability on the general contractor. *Id*. at 8-9 (emphasis added). "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 v Capital Welding, Inc*, 471 Mich 45, 60 n 12; 684 NW2d 320 (2004). "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." *Hughes*, 227 Mich App at 6.

Although defendant's alternative arguments maintain that the elevated island was not a common work area, plaintiff has produced substantial evidence to the contrary. Ted Crossley, one of defendant's superintendents, testified at his deposition that in addition to the B & H employees applying drywall, other trades working on the island included electricians ("[u]sually, one or two"), and men delivering the heating and cooling equipment ("[f]our or five, at the most"). Gerald Nutt, the B & H project supervisor, testified that after the drywall work concluded, painters, electricians, and mechanical contractors would work on the island. Gary Jordan, the safety supervisor for defendant's public education group, testified that electricians, drywallers, and plumbers worked on the island at various times. This testimony supports that at least six workers from four different trades spent time working on the elevated island. And this number of workers from different trades suffices to create a question of fact for the jury about whether the elevated island constituted a common work area. See *Groncki v Detroit Edison Co*, 453 Mich 644, 664; 557 NW2d 289 (1996).

The primary question placed in dispute by defendant's renewed summary disposition motion is whether plaintiff presented evidence that a significant number of workers from different trades faced an avoidable risk of working at dangerous heights without fall protection. *Latham*, 480 Mich at 107. To survive defendant's summary disposition motion, plaintiff must also produce evidence that "the failure of a significant number of workers to take safety

---

[6] For the purpose of the original summary disposition motion, defendant conceded that it served as the general contractor for the school construction project. *Id*. at 108 n 3. Documentary evidence attached to plaintiff's brief supports that defendant maintained supervisory and coordinating authority over the project, including as to safety. Defendant's renewed summary disposition motion does not contradict its earlier general contractor status concession or contest its possession of power to enforce project safety rules.

precautions was readily observable and that the failure was avoidable," and "that the defendant failed to take reasonable steps to ensure compliance and that the danger existed in a common work area." *Id*. at 115 n 25.

The fall protection readily available on the elevated island work area consisted of a six-foot-long perimeter cable barrier, which Crossley described as having been "strung from stud to stud" across the opening of the unfinished structure on the island. This cable came down each time a worker entered or exited the island or loaded equipment or tools into the space. When the cable came down, the work area was unprotected and posed a fall danger.

The parties agree that a worker's use of a personal fall prevention system could have remedied the fall danger during ingress and egress from the mezzanine. Jordan testified as follows regarding fall protection when the cable came down:

> *Q*. When that cable was taken down what could have been done to ensure fall protection for the workers unloading the materials is my question to you.
>
> *A*. What could have been done?
>
> *Q*. Yes.
>
> *A*. Are we talking about on B & H's part?
>
> *Q*. Yes. Anybody's part.
>
> *A*. Well, B & H … 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 you 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 in the basket. That's called a double lanyard system.

Defendant's "On-Site Project Safety and Loss Control Program" announces on the last page, "The use of safety belts/harnesses and lanyards securely attached to an approved anchorage point when working from unprotected high places is mandatory. Always maintain less than six feet of slack in your lanyard." A "Job Site Safety Orientation Video" checklist on which defendant obtained plaintiff's signature states under the "Fall Protection" section heading:

> Any floor or wall opening that exposes an employee to a fall of 6 ft. or more must be protected by fall protection.
>
> For most large openings, a guard rail system is used for fall protection.

Guard rail consists of a top rail, mid-rail, and toe board.

Guard rail must be capable of withstanding a force of at least 200 lbs.

* * *

If you are unfamiliar with a personal fall arrest system, ask your supervisor for a demonstration before using the equipment.

The tie-off point for a personal fall arrest system must be capable of supporting 5,000 lbs. per employee attached. [Emphasis added.]

Aside from the cable at the entrance to the island, the record mentions only one alternative fall protection device: the double lanyard system. However, the evidence conflicted concerning whether the double lanyard system could have been used on the elevated island. David Brayton, plaintiff's construction site safety expert, testified at his deposition that, contrary to Jordan's suggestion that the double lanyard system would have offered adequate fall protection, the metal studs available as anchors for the lanyards would not have supported enough weight to satisfy governmental safety standards. According to Brayton, MIOSHA standards dictate that the anchorages withstand "at least 5,000 pounds per employee attached," which the metal studs would not have done.[7]

In light of this testimony, a factfinder could reasonably infer that despite defendant's recognition of the need for personal fall protection when the six-foot cable came down, defendant failed to offer a reasonable method of anchoring the double lanyards. Plaintiff's affidavit attesting that neither his coworkers nor the hvac workers utilized personal fall protection equipment while entering and exiting the island supports that defendant neglected to provide a reasonably safe common work area for a significant number of workers.

Plaintiff also presented evidence that the failure of the workers to use personal fall protection would have appeared obvious to defendant. Crossley recounted that he daily contacted all the contractors and "physically view[ed] the site twice a day," and that Jordan visited the job site regularly. Crossley could correct safety violations or direct the workers to stop working if he saw something that that "put a red flag up" with regard to worker safety. On the morning of plaintiff's fall, Crossley observed plaintiff and his coworker preparing to use the scissors lift, and asked for an operator's license to verify their ability to use the equipment. Crossley also knew that when the barrier cable was lowered, a hazard existed. Crossley admitted awareness that the workers would require some manner of fall protection when the cable came down. The failure of the workers to utilize the double lanyard system would have been an obvious safety hazard that Crossley could have remedied had he attempted to ensure compliance with defendant's safety rules.

---

[7] Although we need consider it for purposes of our summary disposition analysis, we note that Schrewe's affidavit lent support to Brayton's opinion. Schrewe stated that he had seen "nothing … in which to attach personal fall protection to."

In summary, considering plaintiff's affidavit and the deposition testimony and documentary evidence submitted to the circuit court, plaintiff put forward sufficient evidence to give rise to genuine issues of fact with respect to whether (1) the elevated island qualified as a common work area, (2) fall protection was available, and (3) defendant took reasonable steps to ensure that fall protection was used. Consequently, the circuit court improperly granted defendant's renewed motion for summary disposition, and we reverse and remand for further proceedings.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Kurtis T. Wilder
/s/ Elizabeth L. Gleicher