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LIABILITY FOR CONSTRUCTION ACCIDENTS IN MICHIGAN

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I. The General Rule: The Immediate Employer of the Construction Worker is Responsible for the Worker's Job Safety

As a general rule, the immediate employer of a construction worker is responsible for the worker's job safety:

> [W]here the person who does the injury exercises an independent employment, the party employing him is clearly not liable. [*DeForrest v Wright*, 2 Mich 368, 370 (1852).]
>
> The immediate employer of a construction worker . . . is immediately responsible for job safety. [*Funk v General Motors Corp*, 392 Mich 91, 102; 220 NW2d 641 (1974), overruled in part on other grounds by *Hardy v Monsanto Enviro-Chem Systems Inc*, 414 Mich 29; 323 NW2d 270 (1982).[1]]
>
> It has been long established in Michigan that a person who hires an independent contractor is not liable for injuries that the contractor negligently causes. [*DeShambo v Nielson*, 471 Mich 27; 684 NW2d 332 (2004).]
>
> Accordingly, we conclude that, on the basis of this Court's analysis in *Funk,* the "common work area doctrine" and the "retained control doctrine" are not two distinct and separate exceptions. Rather, the former doctrine is an exception to the general rule of nonliability of property owners and general contractors for injuries resulting from the negligent conduct of independent subcontractors or their employees. [*Ormsby v Capital Welding*, 471 Mich 45, 55-56; 684 NW2d 320 (2004).]
>
> [T]he common work area doctrine "is an exception to the general rule of nonliability for the negligent acts of independent subcontractors and their employees," under which "an injured employee of an independent subcontractor [may] sue the general contractor...." [*Ghaffari v Turner*, 473 Mich 16, 29; 699 NW2d 687 (2005) quoting *Ormsby,* 471 Mich at 49.]
>
> The [common work area] doctrine is understood as an exception to the general rule that, in the absence of its own active negligence, a general contractor is not liable for the negligence of a subcontractor or a subcontractor's employee and that the immediate employer of a construction worker is responsible for the worker's job safety. [*Latham v Barton Mallow Co*, 480 Mich 105, 112; 746 NW2d 868 (2008).]
>
> Further, a general contractor is not liable for a subcontractor's negligence. [*Shawl v Spence Bros, Inc*, 280 Mich App 213, 234; 760 NW2d 674 (2008).]

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[1] *Hardy* dealt with the application of comparative negligence. Formerly, comparative negligence could not be applied in cases dealing with the provision of adequate safety devices. *Hardy* overturned *Funk* on this point. *Hardy*, 414 Mich at 38-39.

The Supreme Court has created narrow exceptions to this general rule: 1) the common work area doctrine; and 2) the inherently dangerous activities doctrine.

> A general contractor is ordinarily not liable for the negligence of independent subcontractors and their employees. *Ghaffari v Turner Construction Co,* 473 Mich 16, 20; 699 NW2d 687 (2005). However, there are two exceptions to this rule. The first exception to the nonliability of a general contractor involves dangers occurring in common work areas. . . . The second exception to the nonliability of the general contractor involves work that constitutes an "inherently dangerous activity." *DeShambo v Anderson,* 471 Mich 27, 31; 684 NW2d 332 (2004). [*Whiteye v Lanzo Constr Co*, unpublished opinion per curiam of the Court of Appeals, issued December 22, 2005 (Docket Nos. 258095, 258098), slip op p 7.]

II. Theories of Liability

A. Negligent Hiring

No cause of action exists for the negligent hiring of a subcontractor. See: *Campbell v Kovich*, 273 Mich App 227, 235; 731 NW2d 112 (2006) "Michigan recognizes no cause of action for the negligent hiring of an independent contractor." and *Reeves v Kmart Corp*, 229 Mich App 466, 475-476; 582 NW2d 841 (1998) "Michigan has not recognized a duty requiring an employer to exercise care in the selection and retention of an independent contractor. Furthermore, we hold that such a duty does not exist."

B. Hiring A Subcontractor Does Not Make A Subcontractor A General Contractor

A question exists if, simply by hiring its own subcontractors, a subcontractor then becomes a general contractor. The Court of Appeals addressed a similar issue in *Krause v Grace Community Church*, unpublished opinion per curiam of the Court of Appeals, issued May 22, 2008 (Docket No. 276173). In that case, Grace hired Monahan to act as its general contractor in building a church. Grace separately contracted with American Seating to install seats. American Seating subsequently subcontracted with Great Lakes. Great Lakes installed some bolts into the ground, which the plaintiff, the employee of another subcontractor of Monahan, stepped on. *Id.* at slip op p 1. American argued that it was not a general contractor despite hiring its own subcontractor. The Court of Appeals agreed based on supervision and control of the worksite.

> With respect to American Seating, we agree with the trial court that plaintiffs' reliance on various Internet definitions of "general contractor" and "prime contractor" is unavailing. American's direct contract with Grace to

> produce and install seating for Grace's expansion and renovation project did not give American general supervisory or coordinating authority over the project work or the worksite. Rather, Grace contracted with Monahan to perform that function as its construction manager for the project. Although American Seating retained significant control over Great Lakes in its subcontract regarding the actual installation of the seating, the subcontract required Great Lakes to submit to the safety directives of the general contractor, in this case, Monahan. Moreover, all witnesses, including plaintiffs' safety expert, testified that Monahan, not American Seating, was the general contractor with supervisory and coordinating authority over the project. Consequently, the trial court did not err in granting American Seating summary disposition under plaintiffs' common work area theory of liability. [*Id.* at slip op p 5.]

The Court of Appeals handling of this issue is consistent with the intent behind the common work area. The basic idea was to hold the party most capable of controlling the safety of a work area responsible for known dangers. "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." *Funk*, 392 Mich at 104.

C. The Common Work Area Doctrine

The Michigan Supreme Court created a narrow exception to the general rule of nonliablity in *Funk*. *Funk* created the exception commonly referred to as the "common work area doctrine":

> 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. [*Funk*, 392 Mich at 104.]

The common work area doctrine only deals with worksite safety. Its purpose is to put the burden of providing a safe work environment onto the party that is best able to ensure safety. "Essentially, the rationale behind the *Funk* 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. The idea is that the general contractor can best protect the safety of the workers:

> "[A]s a practical matter in many cases only the general contractor is in a

> position to coordinate work or provide expensive safety features that protect employees of many or all of the subcontractors.... [I]t must be recognized that even if subcontractors and supervisory employees are aware of safety violations they often are unable to rectify the situation themselves and are in too poor an economic position to compel their superiors to do so." [*Ghaffiri*, 473 Mich at 20-21, quoting *Ormsby*, 471 Mich at 54.]

The elements of the cause of action 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. Even though it is commonly referred to by only one of the listed elements, "common work area," all of the elements must be established. "What is commonly referred to as the 'common work area doctrine,' however, has four separate elements, *all* of which must be satisfied before that doctrine may apply." *Ormsby*, 471 Mich at 59 n11 (2004) (emphasis original); "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." *Latham*, 480 Mich at 115 n25 (emphasis added). Therefore, if a plaintiff fails to demonstrate any one of the elements of the cause of action, he or she has not showed that the general contractor owes him or her a duty, and summary disposition is appropriate.

As an exception to the common law rule of non-liability, the scope of the liability created by the common work area doctrine is limited. The Court of Appeals explained in *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 8; 574 NW2d 691 (1997): "This Court has previously suggested that the Court's use of the phrase 'common work area' in *Funk, supra,* suggests that the Court desired to limit the scope of a general contractor's supervisory duties and liability." The Court went on to give a detailed explanation of what is meant by a common work area.

> We thus read the common work area formulation as an effort to distinguish between a situation where employees of a subcontractor were working

> on a unique project in isolation from other workers and a situation where employees of a number of subcontractors were all subject to the same risk or hazard. . . In the first instance, each subcontractor is generally held responsible for the safe operation of its part of the work. In the latter case, where a substantial number of employees of multiple subcontractors may be exposed to a risk of danger, economic considerations suggest that placing ultimate responsibility on the general contractor for job safety in common work areas will "render it more likely that the various subcontractors ... will implement or that the general contractor will himself implement the necessary precautions and provide the necessary safety equipment in those areas." *Funk, supra* at 104, 220 NW2d 641. [*Hughes*, 227 Mich App at 8.]

The Supreme Court later adopted *Hughes*'s conclusion as the correct statement of the law. *Ormsby*, 471 Mich at 57 n9.

1. THE COMMON WORK AREA DOCTRINE DOES NOT APPLY TO SUBCONTRACTORS

In *Funk*, the case recognizing the common work area doctrine in Michigan, the Supreme Court specifically stated: "Nor would this analysis be applicable where the employee of a subcontractor seeks to recover from another subcontractor." *Funk*, 392 Mich at 104 n6. *Funk* cited to *Klovski v Martin Fireproofing Corp*, 363 Mich 1; 108 NW2d 887 (1961), to support this conclusion. The *Klovski* Court stated: "There was ***no duty upon*** defendant Martin, ***one of the roofing subcontractors, to make the premises safe*** for all who might work there, if, indeed, this were possible of accomplishment in a building under construction." *Id.* at 5-6.

The Court of Appeals reiterated this rule in *Hughes*:

> Plaintiff's final argument on appeal is that a genuine issue of fact existed regarding its negligence claim against State Carpentry. We disagree. The "common work area" exception under *Funk,* which can impose liability on a general contractor, does not apply where the employee of one subcontractor seeks to recover from another subcontractor. *Funk, supra* at 104 n 6, 220 NW2d 641. Instead, the immediate employer of a construction worker is generally responsible for job safety. [*Hughes*, 227 Mich App at 12.]

The Supreme Court drove the point home in *Ormbsy*. In that case, the property owner hired Monarch Building Services, Inc. as a general contractor. Monarch subcontracted the steel fabrication and erection work to Capital Welding, Inc. Capital subcontracted the steel erection

work to Abray Steel Erectors. Ormsby worked for Abray and claimed injury in the erection work. *Ormbsy*, 471 Mich at 50. Ormsby brought claims against Capital under the common work area theory and the retained control theory. The Court of Appeals reversed the trial court's grant of summary disposition to Capital. *Id.* at 52. But the Supreme Court reversed the Court of Appeal's decision and held that the claims were completely untenable against Capital as it was merely a subcontractor. The Court explained:

> Indeed, the instant opinion by the Court of Appeals outlined that progression and proceeded to erroneously conclude that even an entity that is neither a property owner nor a general contractor (subcontractor Capital) can be liable under *Funk*.
>
> * * *
>
> *Funk* is simply inapplicable to Capital in this case because Capital was neither the property owner nor the general contractor. Thus, the trial court's order granting it summary disposition was proper. Accordingly, we reverse the judgment of the Court of Appeals and reinstate the trial court's order granting summary disposition for Capital. [*Id.* at 56-58.]

See also: *Searfoss v Christmas Co, Inc*, unpublished opinion per curiam of the Court of Appeals, issued November 18, 2004 (Docket No. 249925), slip op p 4 ("However, even after plaintiff amends his pleadings, we note that the common work area exception can only apply to Christman, the general contractor. It cannot extend liability to an intermediate subcontractor. *Ormsby, supra,* 58. Therefore, summary disposition under MCR 2.116(C)(8) is appropriate as to Douglas Steel."); *Rihani v Greeley & Hansen of Michigan, LLC*, unpublished opinion per curiam of the Court of Appeals, issued October 25, 2005 (Docket Nos. 256921, 256941), slip op p 4 ("[O]ur Supreme Court modified the common law by establishing the common work area doctrine as an exception to the general rule of nonliability in cases involving construction projects. This exception, however, does not extend to cases where an employee of a subcontractor injured at a worksite seeks to recover from another subcontractor working on the same general project."); and *Krause v Crace Community Church*, unpublished opinion per

curiam of the Court of Appeals, issued May 22, 2008 (Docket No. 276173), slip op p 5, ("[The common work area] exception, however, does not extend to subcontractors, i.e. to cases in which a construction worker of one subcontractor injured at a worksite seeks to recover from another subcontractor working on the same general project. . . . Rather, a construction employee's immediate employer is generally responsible for job safety.").

2. HIGH DEGREE OF RISK

In *Funk*, the Court did not require the general contractor to guard against all risk. Instead, it stated that the general contractor must guard against "readily observable, avoidable dangers in common work areas ***which create a high degree of risk***". *Funk*, 392 Mich at 104. Subsequent courts have picked up on the high degree of risk requirement.

In *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, unpublished opinion per curiam of the Court of Appeals, issued October 1, 1999 (Docket No. 210112), rev'd in part on other grounds, 466 Mich 11 (2002),[2] the plaintiff worked for a painting subcontractor. He slipped and fell on some snow or ice while nailing two-by-fours onto the roof. *Id.* at slip op pp 1-2. The roof was regularly accessed by numerous other trades, but the Court still found that the common work area doctrine did not apply. In doing so, it commented on the limited height of the roof.

> However, the evidence presented is insufficient to show that a genuine issue of material fact exists as to whether the danger in the work area involved a high degree of risk to a significant number of workers where the roof of the residential home was only twenty feet from the ground, it was icy/frosty based on the weather conditions that morning, and the number of workers is not significant. [*Id.* at slip op p 3]

In *Davis v Barton-Malow Co*, unpublished opinion per curiam of the Court of Appeals, issued June 1, 2001 (Docket No. 219643), the Court of Appeals dealt with the issue in more detail. The plaintiff was a security guard at a construction site. She was injured when she

[2] The Supreme Court reversed on a portion of the case dealing with premises liability and the open and obvious doctrine. The common work area issue was not appealed.

attempted to step across two metal beams or pipes lying on the ground. *Id.* at slip op p 2.

> Although plaintiff argues that the "degree of risk" pertains only to the likelihood of injury, rather than to the severity of any possible resulting harm, our reading of *Funk* and its progeny lead us to disagree.
>
> In discussing the "high degree of risk factor," the Court in *Funk* stated:
>
> > Mishaps and falls are likely occurrences in the course of a construction project. To completely avoid their occurrence is an almost impossible task. However, relatively safe working conditions may still be provided by implementing reasonable safety measures to prevent mishaps from causing *aggravated injuries* such as those suffered by Funk. [*Funk, supra* at 102-103 (emphasis added).]
>
> The proposition that a "high degree of risk" involves a risk of harm that is somewhat out of the ordinary, and would entail something more than a common occurrence involving someone tripping over construction materials, is supported by subsequent cases discussing the retained control doctrine. *Groncki, supra* at 664 (liability for electrocution of workman who was delivering masonry supplies by contact with uninsulated power lines); *Plummer v Bechtel Constr Co,* 440 Mich 646, 653-654; 489 NW2d 66 (1992) (injury sustained from falling twenty feet from a catwalk, striking a steel girder and then falling ten more feet onto a work shed); *Phillips v Mazda Motor Mfg (USA) Corp,* 204 Mich App 401, 405; 516 NW2d 502 (1994) (decedent pinned by seven ton steel truss and cut in half).
>
> In light of plaintiff's deposition testimony, we do not believe that the metal beams created "a high degree of risk to a significant number of workers." Plaintiff admits that the beams over which she tripped were visible and that she was aware of their location and existence. Additionally, although plaintiff maintains that she was required to negotiate her way around the beams to complete her rounds, she also testified that she had walked over the beams at least once and around the beams twice on the day of her accident, thus indicating that the beams were navigable and avoidable. Under the circumstances, we conclude that the risk of injury here, that of tripping over building materials on the ground at a construction site, did not constitute the requisite "high degree of risk" to impose liability. [*Davis*, at slip op pp 3-4.]

In *Gilmore v Sorensen Gross Constr Co, Inc*, unpublished opinion per curiam of the Court of Appeals, issued March 23, 2006 (Docket No. 258033), the Court found that working at a modest elevation did not constitute a "high risk." "The third element, a high degree of risk to a significant number of workers, is not supported by the evidence. There is no evidence that plaintiff was at an extremely high elevation. Rather, plaintiff was at a modest elevation, which

does not present a high risk of injury." *Id.* at slip op p 3.

3. REASONABLE STEPS TO GUARD AGAINST A READILY OBSERVABLE DANGER

Funk indicated that it was the general contractor's duty under the common work area doctrine to ensure "reasonable steps within its supervisory and coordinating authority are taken to guard against readily observable, avoidable dangers." *Funk*, 392 Mich at 104. Courts have discussed the "reasonable steps" requirement. In *Hardy*, 414 Mich at 29, the majority indicated that it concurred in the result reached by the dissenting opinion of Justice Moody. Justice Moody's opinion contained a long discussion of "reasonable steps:"

> Second, Leonard posits that, assuming it had a duty under *Funk*, it discharged that duty as a matter of law. It asserts that the plywood covers were clearly adequate safety devices. Further, Leonard contends that installation of the nailed-down covers and the daily inspections by Leonard employees left no doubt that Leonard took reasonable steps to insure worker safety.
>
> Sufficient evidence was presented in support of various theories to raise a question of fact concerning the adequacy of the plywood covers as safety devices and the reasonableness of Leonard's actions. For example, alternate safety devices could have been utilized. Thus, the jury could have concluded that the devices selected were inadequate. Further, the safety devices selected were deemed adequate only when secured and if properly secured. Leonard knew that people would be working on the roof and that the covers would have to be removed to complete the roofing work. While Leonard employees made inspections, generally in the early morning and late afternoon, the jury could have concluded that Leonard was negligent in not taking certain steps to insure that the covers were resecured while men were actually working on the roof.
>
> Furthermore, there was evidence indicating that Leonard did not instruct J&L employees concerning the procedure to follow in replacing covers. Leonard held no safety meetings with the subcontractors, and Leonard did not supply J&L roofers with large nails to be used in resecuring the covers. In addition, it is not clear that Leonard employees inspected the covers on a regular basis during the working day when unsecured covers would pose the highest risk of danger to workmen.
>
> Indeed, the testimony at trial revealed that a good deal of confusion existed concerning whose responsibility it was, between Leonard and J&L, to resecure covers during the working day. If the jury concluded that the covers were adequate safety devices only when secured, the jury could have further concluded that Leonard failed to take reasonable steps toward either maintaining the covers as adequate safety devices itself or requiring the subcontractor to do so.

> The jury could have also found that had the general contractor properly coordinated efforts to resecure these covers, the accident would not have occurred. J&L's roofing employees would have had reason to know which covers had been removed and not yet resecured since these employees actually removed the covers during their work. Employees of other subcontractors, such as Mr. Hardy, would not necessarily realize that these covers were safety devices, nor know which covers were unsecured.
>
> Finally, the jury could have reasonably believed that the covers were adequate safety devices only if properly secured with certain types of nails to prevent accidental displacement or removal. Testimony of Leonard and J&L employees concerning the type of nails used to secure covers and the type of nails depicted in the photographs of the accident scene differed markedly. There was sufficient evidence to support a conclusion that some or all of the covers on the roof were inadequately secured. [*Hardy*, 414 Mich at 67-69 (Moody, J., dissenting in part and concurring in part).]

While this analysis would not be binding precedent, it is a result that was unanimously supported by the Supreme Court at that time.

In *Schmaltz v Michigan Tractor & Machinery Co*, unpublished opinion per curiam of the Court of Appeals, issued May 22, 2003 (Docket Nos. 237991, 237992), the plaintiff was injured when a manlift he was working in tipped over due to uneven ground. The Court found a question of fact on the "reasonable steps" issue.

> First, it is undeniable that defendant had supervisory and coordinating authority over the job site. See *Ormbsy, supra* at 57. As we noted in our previous opinion, "defendant was responsible for establishing and enforcing safety policies on the job site, employed a safety director on the site who was responsible for ensuring adherence to state safety regulations, had the right to stop work if safety precautions were ignored, and had the right to exclude workers from the site if they did not follow the safety rules." *Schmaltz, supra,* slip op at 2. Defendant also had the sole authority to order that the ground surface be graded and graveled and had, in fact, performed or caused to be performed some attempt at accomplishing a better ground surface to aid the delivery of an elevator. In light of the additional evidence to be discussed below, there is at least a question of fact as to whether defendant's actions consisted of "reasonable steps," i.e., were sufficient. [*Schmaltz v Michigan Tractor & Machinery Co (On Remand)*, unpublished opinion per curiam of the Court of Appeals, issued January 4, 2005 (Docket Nos. 237991, 237992), at slip op p 3.]

In *Porter v DaimlerCrysler Corp*, unpublished opinion per curiam of the Court of

Appeals, issued May 19, 2005 (Docket No. 253025), plaintiff was pinned between a wall and a rack that was being installed in defendant's plant by use of an overhead crane. *Id.* at slip op 1. In finding no evidence that the defendant failed to take reasonable steps, the Court noted the use of the barricades and the fact that there was no evidence that the use of the crane was required.

> In the instant case, the submitted evidence establishes that a barricade was placed around the area where plaintiff was working, and plaintiff testified that he took all his orders and directions from an IICC foreman. Although plaintiff asserts that defendant required IICC to use defendant's cranes when they were available, he fails to provide appropriate citations to the record to support this assertion. In any event, the project supervisor testified that use of defendant's cranes was permitted, but not required, for the project. Thus, plaintiff has failed to present any evidence that defendant failed to take reasonable steps within its supervisory and coordinating authority to guard against readily observable and avoidable dangers. [*Id.*]

In *Faulman v American Heartland Homebuilders, LLC*, unpublished opinion per curiam of the Court of Appeals, issued January 4, 2007 (Docket No. 269287), the Court noted that plaintiff carried the burden of demonstrating what reasonable steps should have occurred. It also noted the fact that the plaintiff indicated that he would not have done anything different.

> Plaintiff testified that this was his second or third time lifting a wall, and that he would not have done anything that he considered dangerous. The record contains no indication that either the wall or the manner of its raising constituted an observable or avoidable danger; nor does it contain any evidence regarding the "reasonable steps" that should have been taken by defendant to guard against such a danger. The testimony demonstrates that JAG's foreman, Todd Ramsey, had sole control over the manner in which walls would be raised, and there is no evidence that defendant's employees had any knowledge of the wall or of the JAG crew's attempt to raise it by hand. Plaintiff's bare assertion that "[t]he lifting of a 30 foot by 15 foot [gable] wall by hand is clearly a readily observable and certainly avoidable danger" is not sufficient to create a fact issue. [*Id.* at slip op p 2.]

4. READILY OBSERVABLE DANGER

In *Ghaffari*, the Supreme Court explained that "readily observable" is equivalent in meaning to open and obvious. "Yet, one could replace the phrase 'readily observable and avoidable' as used in *Ormsby* with the phrase 'open and obvious' without significantly changing

the meaning of this passage." *Ghaffari*, 473 Mich at 22. "'Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger on casual inspection.'" *Royce v Chatwell Club Apartments*, 276 Mich App 389, 392; 740 NW2d 547 (2007), quoting *Teufel v Watkins*, 267 Mich App 425, 427; 705 NW2d 164 (2005).

In *Samhoun v Greenfield Constr Co, Inc*, 163 Mich App 34; 413 NW2d 723 (1987), the plaintiff was working on the construction of a tunneling machine needed immediately for a tunneling project. He was injured when he was having a crane move a sheet of steel into place so that he could weld it. The sheet swung at him unexpectedly, and he twisted his back as he moved out of the way. *Id.* at 37. The Court concluded that the risk was not readily observable because it was not like the risk presented to the workers in *Funk*.

> First, the danger to which plaintiff in the instant case was subjected was not readily observable. In *Funk,* workers such as the plaintiff therein could be seen working high off the ground without safety devices. In the instant case, plaintiff was injured when he moved a steel sheet with a crane. This was not a situation which Greenfield could readily observe as being dangerous. [*Id.* at 46.]

In *Pavia v Ellis-Don Michigan Inc*, unpublished opinion per curiam of the Court of Appeals, issued November 27, 2001 (Docket No. 224327), the Court found that the risk was not readily observable because the plaintiff and his coworkers could not really describe what he tripped over.

> The hazard was easily visible and avoidable to people exercising ordinary and reasonable caution while walking. But the condition was insufficiently remarkable to allow any of Pavia's co-workers to describe it accurately or consistently, even assuming that they were each describing the same thing. The condition also failed to impress Pavia or any of his fellow workers or supervisors to the point that they would notify supervisors or the general contractor that it existed. Thus, although observable, the object did not create a high degree of risk necessary to invoke the retained control doctrine. [*Id.* at slip op p 6.]

In *Lulanaj v Multi-Bldg Co Inc*, unpublished opinion per curiam of the Court of Appeals,

issued May 10, 2002 (Docket No. 230422), the plaintiff was assaulted by another tradesman working on the project. The Court explained that an intentional tort or assault could not be a readily observable danger.

> To be sure, the law imposes upon a general contractor that retains control over the work performed by subcontractors an affirmative duty to take reasonable precautions to avoid "readily observable" dangers in common work areas. An intentional tort inflicted upon a third party plaintiff by a subcontractor's contractor is certainly not a "readily observable" danger arising in a common work area that would necessarily create a "high degree of risk to a significant number of workmen." *Funk, supra* at 104. The reason, of course, is that plaintiff did not sustain injury due to the negligent conduct of another or by virtue of a dangerous condition existing in or arising out of a common work area located on the site itself. On the contrary, plaintiff was the victim of an intentional tort; indeed a criminal assault. Thus, by definition, the danger posed by defendant Christian's tendency to engage in assaultive conduct was not a "readily observable danger" existing in a common work area for purposes of liability premised on the theory of retained control. [*Lulanaj*, slip op p 5.[3]]

In *Konenski v Pulte Homes of Michigan Corp*, unpublished opinion per curiam of the Court of Appeals, issued May 11, 2004 (Docket No. 245244), the plaintiff fell on incomplete stairs at a home construction project. The Court noted that the other elements of the common work area were present, but it found no common work area because the danger was not readily observable.

> However, as the trial court also observed, there was no evidence that the incomplete installation was a "readily observable" danger. While plaintiff's foreman believed that plaintiff and the other framers knew, from "the way they were in there," that the staircase was not finished, plaintiff testified that he did not notice anything unusual when he walked up the stairs. Similarly, another framer testified that he used the stairs all day and believed they were finished. Additionally, defendant's construction manager testified that, unless you were specifically looking, it would not be obvious whether the stairs had been fully installed. Therefore, although there may have been clues that could have alerted an observant person to the fact that installation had not been completed, there is no evidence that the incomplete installation was "readily observable." Therefore, the trial court properly dismissed plaintiff's common work area claim. [*Id.* at slip

[3] *Lulanaj* is somewhat questionable precedent because it inappropriately focuses on the retained control theory and applies it to a general contractor. It is still instructive given that it was focusing on the elements of the common work area doctrine. But it should not be taken as a completely correct statement of the law.

op p 4.]

In *Darcangelo v Walbridge Aldinger Co, Inc*, unpublished opinion per curiam of the court of Appeals, issued September 28, 2004 (Docket No. 247631) the plaintiff was hit in the head by a flange that fell off a truck he was standing next to. The plaintiff attempted to argue that the danger presented in the case was the failure to wear hardhats. The Court rejected this and stated that the actual danger was the part falling off the truck onto the plaintiffs head. This danger was unknown to the defendant and not readily observable.

> Plaintiff stated that there was no indication that the clamp holding the metal flange was going to break. Plaintiff also stated that defendant's foreman did not touch, operate, inspect, or tell him how to operate the truck that the metal flange broke off of. Plaintiff did not think that defendant's foreman did anything to cause the clamp to break, nor did he know it was going to break. The clamp breaking was not a readily observable danger. [*Id.* at slip op p 5.]

In *Surant v Heartland Wisconsin Corp*, unpublished opinion per curiam of the Court of Appeals, issued April 4, 2006 (Docket No. 263433), the plaintiff was electrocuted when unloading trusses from a delivery truck. A large puddle of water covered a large portion of the worksite and pushed the deliveries closer to the power lines. Under those facts, the Court found a readily observable danger.

> In this case, plaintiff established the existence of "readily observable and avoidable dangers" (*See Funk, supra*) via photographic evidence of the construction site and testimony. A large puddle of water covered about 30 percent of the property in front of the home and Detroit Edison power lines ran along the road at the edge of the construction site. The water obstructed the workers' access to the home, and therefore, placed the workers equipment in close proximity to the power lines. [*Id.* at slip op p 4.]

In *Faulman v American Heartland Homebuilders, LLC*, unpublished opinion per curiam of the Court of Appeals, issued January 4, 2007 (Docket No. 269287), the Court noted that, if the plaintiff stated that he would not have done anything that he considered dangerous, then the fact that he undertook the task leading to the injury negated the contention that the danger was readily

observable.

> Plaintiff has failed to come forward with evidence demonstrating that defendant failed to take reasonable steps to guard against a readily observable and avoidable danger. Plaintiff testified that this was his second or third time lifting a wall, ***and that he would not have done anything that he considered dangerous.*** The record contains no indication that either the wall or the manner of its raising constituted an observable or avoidable danger. [*Id.* at slip op p 2 (emphasis added).]

In *Veness v Town Center Dev LLC*, unpublished opinion per curiam of the Court of Appeals, issued July 31, 2007 (Docket No. 273298), the plaintiff fell while working on a balcony installing vinyl siding. The Court noted that not even the plaintiff recognized the danger.

> Even plaintiff conceded in his deposition that the balcony's unguarded condition did not appear to pose any significant threat to his safety. Therefore, plaintiff has failed to present a material issue of fact about whether the lack of a guardrail on the second-floor balcony posed a high degree of risk to a significant number of workers, and his common work area claim fails as a matter of law. [*Id.* at slip op p 2.]

In *Hamm v Phoenix Ctrs Inc*, unpublished opinion per curiam of the Court of Appeals, issued June 5, 2008 (Docket No. 278040), the Court explained that, if the plaintiff could not recognize the danger presented, it could not be readily observable. *Id.* at slip op pp 2-3. In that case, the plaintiff was working near a piece of plywood that was swept up by a gust of wind and crashed into him. *Id.* at slip op p 1. The Court explained.

> Plaintiff asserts only that the plywood itself was readily observable because it was in plain view. However, the common work area doctrine requires that the danger be readily observable. Plywood alone is not inherently dangerous. The record contains no indication that either the large piece of plywood lying on the rubberized track as a protective cover or that the sudden gust of wind constituted a readily observable danger. Moreover, plaintiff conceded in his deposition that the plywood's condition did not appear to pose any significant threat to his safety. Plaintiff stated, "I didn't believe it [the plywood] would cause me any danger." [*Id.* at slip op pp 2-3.]

5. SIGNIFICANT NUMBER OF WORKERS

There has not been a definitive case that specifically defines what is meant by "a

significant number." But there have been several cases that have commented on the number of workman involved. In *Plummer*, the Supreme Court found a common work area, but that case involved a truly significant number. The Court noted that there were 2,500 workers on the job. *Plummer*, 440 Mich at 651. In *Latham*, the Supreme Court addressed the other extreme. The Supreme Court noted that a danger presented to only the plaintiff did not involve a significant number of workers: "plaintiff's own failure to wear a fall-protection device did not create a high degree of risk to a significant number of workers." *Latham*, 480 Mich at 115. In *Ormsby*, the Court noted that two workers were insufficient: "The fact that one worker was below plaintiff when he fell certainly does not establish a genuine issue of material fact regarding whether a high degree of risk to a *significant* number of workers existed." *Ormsby*, 471 Mich at 59 n12 (emphasis original).

In *Samhoun*, the Court of Appeals rejected the application of the common work area doctrine where only the plaintiff faced the risk of a steel sheet he was having a crane move for him. "In the instant case, only plaintiff was endangered when the steel swung towards him." *Samhoun*, 163 Mich App at 46.

In *LaPrad v Woodland Hts Models*, unpublished opinion per curiam of the Court of Appeals, issued February 18, 1997 (Docket No. 189076), the Court of Appeals concluded that the other workers in the kitchen area where the plaintiff was working were not in the same work area because they were not working on the platform the plaintiff created. Because plaintiff worked alone on the platform, there was not a significant number of workers involved. "[T]he *platform* was plaintiff's work area, and was not part of the 'common area' because it was not used by anyone except plaintiff." *Id.* at slip op p 1 (emphasis original).

In *Hughes*, the Court of Appeals concluded that four workers were not a "significant

number."

> We find this case to be distinguishable from *Funk, supra,* and its progeny. Liability was imposed on the general contractor in *Funk* because Funk fell from a highly visible superstructure that was part of the common work area, was within the control of the defendant, and posed a risk to thousands of other workers. In *Funk,* the Court employed a risk analysis, finding that liability should not be imputed unless the dangers in the work area involve "a *high degree* of risk to a *significant number* of workers." *Funk, supra* at 104, 220 NW2d 641 (emphasis added). See *Plummer v Bechtel Constr Co,* 440 Mich. 646, 651, 489 NW2d 66 (1992) (the plaintiff fell from an interconnecting catwalk/platform system at a construction project involving 2,500 workers and a number of subcontractors); *Erickson, supra* at 337, 249 NW2d 411 (the plaintiff fell from a roof used by numerous subcontractors when he slipped on oiled metal roof sheets). Here, it is uncontroverted that plaintiff ***was one of only four men who would be working on top of the overhang***. Accordingly, we conclude not only that plaintiff's injury did not arise in a "common work area," but that defendant did not breach its duty to guard against a danger posing a "high degree of risk to a significant number of workmen." *Funk, supra.* [*Hughes*, 227 Mich App at 7-8 (emphasis added).]

In *Sprague v Toll Bros*, 265 F Supp 2d 792 (ED Mich, 2003), the District Court for the Eastern District of Michigan found that no common work area existed because a significant number of workers no longer needed to work in the common work area. This is despite the fact that, at one time, numerous workers were on the roof in question.

> The Court finds that Plaintiff's claim fails because the second element of the test from *Funk* has not been met. The Court finds that there is evidence that demonstrates that the employees of a number of different contractors were on the greenhouse roof area while the bulk of construction was being performed on the house. But, most of the work on the house was completed at the time of the incident at issue. Apparently, the skylight in the greenhouse roof was installed in an off-center fashion. After the skylight was centered, it needed to be flashed, which is what Mr. Sprague was doing at the time of his fall. There is no evidence that demonstrates that the contractor that actually moved the skylight did so while on the greenhouse roof. In fact, its clear that there would have been very few workers, if there were any at all, that would have done any work on the greenhouse roof area at the time of the incident. For instance, Mr. Scott Carrow testified: "The house was sided at that point. The house was roofed. Possibly completion of the brick was done or close to it. The siding was done on the back of the home, so nobody else would have been on the roof the day Eric was up there." *See* Resp. to Def.'s Mot. for Summ. J., Ex. 9, 31. In short, while the greenhouse roof area may have been a "common work area" at one time, there is no evidence to demonstrate that it was at the time of the incident.

> While it is true that Michigan case law states that it is not necessary for employees of more than one contractor to be working in a location at one time to have a common work area, *see Phillips v. Mazda Motor Mfg (USA) Corp,* 204 Mich App 401, 516 NW2d 502, 507 (1994), it is not true that a location always remains a common work area. Even if there is an obvious danger in a particular location, there becomes a point at which there is no longer a "high degree of risk to a significant number of workers," because the workers have ceased working in the common work area. In the present action, assuming that there were a significant number of workers on the greenhouse roof area at one time, the construction work on the house was nearing completion, and there no longer was a "significant number" of workers that would be in danger from being on the greenhouse roof area. Therefore, the Court finds this theory of liability to be inapplicable. [*Srauge*, 265 F Supp 2d at 800-801.]

In *Martin v Iafrate*, unpublished memorandum opinion of the Court of Appeals, issued April 26, 2002 (Docket No. 229304) slip op p 2, the Court stated: "[T]he trial court found that the danger did not create a high degree of risk to a significant number of workmen. Given that plaintiff was only one of three or four men who did or would work on the roof, the trial court's finding was not erroneous."

In *Berry v Barton-Malow Co*, unpublished opinion per curiam of the Court of Appeals, issued July 22, 2003 (Docket No. 235475) the Court indicated that the plaintiff bore the burden of establishing the existence of the significant number of workers.

> In addition, plaintiff presented no evidence concerning the number of workers potentially subjected to this danger. In *Hughes,* the Court found that where only four workers were exposed to the same danger as the plaintiff as a matter of law this was not a "significant" number. *Hughes, supra* at 7-8. Because a common work area cannot exist where the danger fails to present a high degree of risk to a significant number of workers, *Funk, supra* at 104, plaintiff has not demonstrated a genuine issue of material fact on her claim that the common work area exception applies. [*Berry*, slip op pp 5-6.]

In *Klienebreil v Prezzato*, unpublished opinion per curiam of the Court of Appeals, issued December 11, 2003 (Docket No. 242740), the plaintiff was injured while working in the trench. The Court upheld summary disposition because the plaintiff offered no evidence that other workers had to work in the trench. *Id.* at slip op p 5.

In *Schmaltz v Michigan Tractor & Machinery Co (On Remand)*, unpublished opinion per curiam of the Court of Appeals, issued January 4, 2005 (Docket Nos. 237991, 237992), the plaintiff was injured when a manlift he was working in tipped over due to uneven ground. The Court found that a question of fact existed as to the number of workers issue.

> Third, we conclude that plaintiff established a question of fact as to whether the ground surface conditions created a high degree of risk to a significant number of workmen. See *Ormbsy*, *supra* at 57. The evidence included that several subcontractors were working at the site, in the immediate vicinity of plaintiffs, and most were engaged in work that required the use of machinery, including mechanical manlifts or other equipment that required a firm level surface. The users of the equipment were not the only workers subjected to the risks associated with the poor surface conditions, but workers in close proximity to the equipment were also at serious risk of injury from falling equipment, materials, debris, and workers if the equipment failed or became unstable because of the ground surface conditions. [*Id.* at slip op p 3.]

In *Porter v DaimlerCrysler Corp*, unpublished opinion per curiam of the Court of Appeals, issued May 19, 2005 (Docket No. 253025), the plaintiff was injured when installing racks to be used in the defendant's plant. The Court found no common work area because other workers were not let into the specific area of danger where the plaintiff was located when injured.

> Further, plaintiff does not identify any evidence indicating that other workers were subjected to the same hazard, or that there was a high risk of injury to a significant number of other workers, as required by *Funk. Ormsby, supra* at 57. Although plaintiff testified that defendant's employees were allowed inside the barricade, he explained that nobody else was allowed in the immediate area and that people were kept out of the way of the shelving racks and crane while the racks were being installed. [*Porter*, slip op p 2.]

In *Patty v Granger Constr Co*, unpublished opinion per curiam of the Court of Appeals, issued February 23, 2006 (Docket No. 263215), the plaintiff was working on constructing a staircase. He fell from a two-by-six board used to cover the top of the staircase landing. The Court found a question of fact where potentially 49 workers faced the same risk.

> Plaintiff submitted below defendant's work records for the date of his

> accident, as well as for dates surrounding his accident. Defendant's work records for the day of the accident state that there were thirty-nine employees of subcontractors on site, and ten foremen. Plaintiff testified that the area he was working on and injured on was used by electricians and masons, and others, and that he observed "other trades" using the stairway to gain access to the roof. Defendant's records indicate that on the date of the accident there were five electricians and sixteen masons at the job site. Defendant Granger's field superintendent, Mark Storey, testified on deposition that plaintiff's deposition testimony that trades other than carpenters (of which plaintiff and his co-worker were), including masons and roofers and possibly tin knockers, used the incompleted stairs on which plaintiff was injured to gain access to the roof area, was "probably a true statement." A project engineer of defendant's, who testified he was at the site approximately once a week, testified that to his knowledge, the area plaintiff was injured in was "an isolated area," and that there were masons and other workers present, but not in the specific area plaintiff was working in.
>
> We agree with the circuit court that plaintiff established a question of fact as to whether the two-by-six created a high degree of risk to a significant number of workers in a common work area. In the instant case, plaintiff presented evidence below from which a reasonable fact-finder could conclude that significantly more workers than present in *Hughes,* used the stairway plaintiff was injured on. [*Patty*, slip op p 3.]

In *Gilmore v Sorensen Gross Constr Co, Inc*, unpublished opinion per curiam of the Court of Appeals, issued March 23, 2006 (Docket No. 258033), the Court found that the plaintiff failed to meet the third element because the plaintiff had not established how many of the 21 potential workers faced the same risk.

> The third element, a high degree of risk to a significant number of workers, is not supported by the evidence. There is no evidence that plaintiff was at an extremely high elevation. Rather, plaintiff was at a modest elevation, which does not present a high risk of injury. Further, there is no evidence that a significant number of workers were at risk of falling due to shifting joists. Defendant presented evidence that only plaintiff and his steel erection coworkers were on site at the time of the accident. Although plaintiff argues that defendant had supervisory authority over twenty-one subcontractors, there is no evidence regarding how many of those subcontractors would have workers at risk of falling. Accordingly, plaintiff also fails to satisfy the fourth element required for the common work area doctrine. [*Id.* at slip op p 3.]

In *Shepard v M&B Constr LLC*, unpublished opinion per curiam of the Court of Appeals, issued September 19, 2006 (Docket No. 261484), the plaintiff fell from a roof of a building he

was working on. The Court found that eight to ten men was enough to create a question of fact regarding a significant number of workers.

> Here, plaintiff explained that, on the morning of his fall, he was one of eight or nine workers on the roof-four, including himself in his section and four or five in another section. Further, plaintiff noted that at the time of his fall, his foreman, Tom Maddock, had just climbed to the roof to tell plaintiff and the other workers to get off of the roof because of the weather conditions. Thus, plaintiff has shown that at least eight to ten men were on or around the roof when he fell. Moreover, Jay Parks, defendant's president, admitted that he was aware that Conquest's employees were working on the roof without fall protection even though fall protection was required for this type of work. Therefore, viewing this evidence in the light most favorable to plaintiff, a genuine issue of material fact existed regarding whether plaintiff had shown that a high degree of risk to a significant number of workmen existed at the time of his injury. [*Id.* at slip op p 5.]

In *Fuller v Shooks*, unpublished opinion per curiam of the Court of Appeals, issued October 24, 2006 (Docket No. 269886), the plaintiff slipped and fell on snow while making deliveries to a construction site. The Court noted that the plaintiff was the only worker to face the risk of slipping on the snow and affirmed summary disposition.

> Here, defendant testified that the construction of the house, with the exception of the installation of some tile and a few fixtures, had been completed by January of 2004. Further, there were no workers at premises on day of plaintiff's accident. Similarly, plaintiff testified that there was no one else at the home when he made the delivery. Regardless of whether defendant failed to take reasonable steps to guard against the danger presented by a snow-covered driveway, the parties agree that plaintiff was the only person present. Consequently, the hazardous condition could not have created a high degree of risk to a significant number of workmen and plaintiff cannot recover under the common work area doctrine. [*Id.* at slip op pp 2-3.]

In *Wallington v City of Mason*, unpublished opinion per curiam of the Court of Appeals, issued December 28, 2006 (Docket Nos. 267919, 269884), the Court found two workers insufficient. "Because plaintiff can establish that only two individuals were at risk of the harm he suffered, he has failed to establish the third element of the common work area doctrine. And the failure to establish any one of these elements is fatal to plaintiff's claim." *Id.* at slip op p 3.

In *Faulman v American Heartland Homebuilders, LLC*, unpublished opinion per curiam of the Court of Appeals, issued January 4, 2007 (Docket No. 269287), the Court held that 15 workers did not constitute a significant number. "[O]nly 15 JAG employees were present when the wall was being raised. There is no indication that any danger existed prior to or after the unsuccessful attempt to raise the wall. Thus, it cannot be said that there was ever any 'high degree of risk to a significant number of workmen.' See *Hughes, supra* at 8." *Faulman*, slip op p 3.

In *Mayworm v JG Morris*, unpublished opinion per curiam of the Court of Appeals, issued March 27, 2007 (Docket No. 273397), the Court stated that three or four present workers could not be a significant number.

> Nevertheless, even though plaintiff presented sufficient evidence to survive summary disposition under MCR 2.116(C)(10) on three of the four elements of the common work area doctrine, the trial court did not err in granting defendant's motion. The evidence did not establish that the danger created a high degree of risk for a *significant* number of workers.
>
> In *Hughes, supra,* 3, the plaintiff suffered an injury after falling from a porch overhang. This Court concluded that, because the plaintiff was one of only four men who would be working on the overhang, the defendant did not breach its duty to guard against a danger posing a high degree of risk to a significant number of workmen. *Id.,* 7-8.
>
> In the instant case, plaintiff asserts there were at least seven people present at the work site on the day the wall collapsed. This figure is based on plaintiff's testimony that he believed DiClaudio's carpenter crew of four people (including himself), DiClaudio's foreman, Matheson, and a crane operator were present at the site. Plaintiff argues that, unlike the four workers in *Hughes,* seven people is enough to create a genuine issue of material fact as to whether a significant number were exposed to danger.
>
> In *Ormsby, supra,* 59, our Supreme Court noted that the high degree of risk to a significant number of workers must exist at the time of the plaintiff's injury. Here, although plaintiff testified that he spoke with Matheson at some point during his employment with DiClaudio, he did not state that the project manager was present at the time of the collapse. Matheson's uncontroverted testimony established that he was not at the site when the accident occurred.
>
> Further, defendant argues, and the trial court found, that the crane operator, because he was in a protected place inside the cab of his vehicle, should

> not be included in the number of workers exposed to danger. We note, however, that an examination of the evidence reveals that the crane operator, like Matheson, was no longer at the site when the collapse occurred. Although both Matheson and plaintiff testified that the crane operator had been there earlier in the day, they agreed that all of the trusses, along with the temporary bracing, had been installed before the collapse. According to Matheson's descriptions, the only work left-the installation of the permanent bracing-did not require use of the crane. Additionally, Matheson specifically testified that only DiClaudio's foreman and workers were at the site when the structure collapsed.
>
> More importantly, plaintiff testified that at the time of the accident only he and two other carpenters were working inside the building. Rather than assisting them, DiClaudio's foreman observed their progress from a seat inside a truck parked outside the structure. Like the four men working on the porch overhang in *Hughes,* only the three workers in the structure were exposed to a high degree of risk at the time of plaintiff's injury. Thus, the trial court did not err in determining that as a matter of law this did not constitute a significant number of workers. Because plaintiff failed to establish all four elements of a claim under the common work area doctrine, we affirm the trial court's order granting Morris' motion for summary disposition. [*Mayworm*, slip op p 3 (emphasis original).]

In *Veness v Town Center Dev LLC*, unpublished opinion per curiam of the Court of Appeals, issued July 31, 2007 (Docket No. 273298), the plaintiff fell while working on a balcony installing vinyl siding. The Court stated: "[P]laintiff's case fails to meet the third prong of the exception as a matter of law. On the day in question, plaintiff was the only individual on any of the building's several balconies." *Id.* at slip op p 2

In *Hamm v Phoenix Ctrs Inc*, unpublished opinion per curiam of the Court of Appeals, issued June 5, 2008 (Docket No. 278040), the plaintiff was struck by a piece of plywood that was picked up by a gust of wind. The Court found no common work area despite the fact that numerous workers walked over the same piece of plywood. "The danger to a significant number of workers is generally calculated at the time the plaintiff was injured. *Ormsby, supra* at 59-60 n 12. Plaintiff failed to demonstrate that the plywood represented a high degree of risk to a significant number of workers at the time the injury was sustained. Notably, at the time of the accident there were only three other individuals present at the renovation site." *Id.* at slip op p 3.

In *Wallace v RJ Pitcher Inc*, unpublished opinion per curiam of the Court of Appeals, issued December 4, 2008 (Docket No. 280620), the plaintiff fell through a second story floor under construction. Only 3 workers faced the danger of falling through the floor. The Court found this insufficient to meet the third element.

> The primary issue in this appeal concerns element three, i.e., whether plaintiff presented evidence showing that enough workers were exposed to a high risk of harm so as to be "significant." We hold that he did not.
>
> In his deposition testimony, plaintiff stated only that he observed two plumbers on the second floor of the store at the time he fell through the floor. Although plaintiff claims there were no warning signs to stay off the floor, he does not allege, and has not presented proof, that any workers other than the two plumbers accessed the floor and, therefore, were exposed to the dangerous condition. [*Id.* at slip op pp 2-3.]

6. A COMMON WORK AREA

To be a common work area, two or more subcontractors must work in the same location as the plaintiff. The other subcontractors do not need to be in the location at the exact same time, but they must be in the same location at some point. "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 6.[4] Arguably, the common area requirement could be broken down further into two parts. Courts have held that, not only must the other subcontractors be in the same area, but they also must face the same risk.

a. Same area

To meet this requirement, it is not enough that the employees of other subcontractors were working in the general vicinity of the hazard alleged by the plaintiff. Instead, they must face the

[4] There are two distinct concepts that should not be confused. First, employees of multiple contractors must face the danger in question. Second, the presented danger must be the same for all involved. The danger is judged at the time of the plaintiff's accident. But all of the workers do not have to be present at the exact same time. *See Shepard v M&B Constr LLC*, unpublished opinion per curiam of the Court of Appeals, issued September 19, 2006 (Docket No. 261484).

exact same risk. *Hughes* provides one of the clearest examples of this point. In *Hughes*, the plaintiff was working on installing shingles on a roof. He stepped out onto a porch overhang that was not yet supported. The overhang collapsed, and he fell 20 feet. *Hughes*, 227 Mich App at 3. The Court rejected the argument that the area around or underneath the overhang constituted the work area. The actual work area was the top of the roof. It was not a common work area because no other subcontractors worked there. *Id.* at 6-7.

> Plaintiff characterizes the alleged danger at issue in this case as "the danger of collapse of the porch overhang." Since other contractors performed work on the exterior of the house in the vicinity of the overhang, plaintiff argues that these workers were exposed to the same risk and that the overhang constituted a "common work area." . . . However, there is no evidence in the record that the employees of any other trade would work on top of the porch overhang. In all probability, after the carpenters built the overhang and attached it to the house, the only workers who would need to gain access to that limited area were the roofers. Thus, giving plaintiff the benefit of any reasonable inferences, we cannot say that other workers would be subject to the same hazard. [*Id.*]

Several other cases have reached the same conclusion. In *LaPrad v Woodland Hts Models*, unpublished opinion per curiam of the Court of Appeals, issued February 18, 1997 (Docket No. 189076), the plaintiff was doing carpentry in a kitchen. It was undisputed that other subcontractors were also working in the area around him. But the Court of Appeals found that this was insufficient to constitute a common work area. Instead, because the plaintiff was injured when he fell from a platform he created to do his work, the platform and not the kitchen constituted the work area. *Id.* at slip op p 1. "While plaintiff alleged that other workers would share the kitchen area, there was no allegation that the platform set up by plaintiff would be used by any other worker. The trial court did not err in granting summary disposition in this case." *Id.* at slip op p 2.

In *Sine v East Jordan Iron Works*, unpublished opinion per curiam of the Court of Appeals, issued March 21, 1997 (Docket No. 188668), the plaintiff was working on a catwalk

above a foundry floor. He put his hand on a nearby cart conveyor and it was run over. Plaintiff argued that a common work area existed because two electrical contractors were working on the project. The Court of Appeals rejected this stating that "there is no evidence in the record to indicate that employees of the other subcontractors worked anywhere near plaintiff's work area on the catwalk". *Id.* at 3.

In *Pinkowski v Adena Corp*, unpublished memorandum opinion of the United States District Court for the Eastern District of Michigan, issued November 7, 2000 (No. 99-73247) the plaintiff was working with wiring in the ceiling of a new Wal-Mart. The Court stated that the "danger to which [the plaintiff] was exposed was that the electric line he was working on was live." *Id.* at slip op p 3. The Court found no common work area because other subcontractors merely worked in the pharmacy area and not in the ceiling of the pharmacy area. Therefore, they were not exposed to the same danger because they were not working in the ceiling near the live wire. *Id.* at slip op p 4.

In *Petway v Ellis Don Michigan Inc*, unpublished memorandum opinion of the Court of Appeal, issued February 2, 2001 (Docket No. 219058), the plaintiff was injured while constructing scaffolding. He argued that a common work area should exist because other workers were in the area. The Court rejected this. "There was no evidence that workers of any other contractor used the scaffold. The fact that other workers passed by the scaffold is insufficient to establish that the scaffold was a common work area that contained a readily observable and avoidable risk to a significant number of workers." *Id.* at slip op p 2.

In *Klienebreil v Prezzato*, unpublished opinion per curiam of the Court of Appeals, issued December 11, 2003 (Docket No. 242740), the plaintiff was injured while working in the trench. He speculated that several other trades and inspectors would be in the area of the trench. The

Court rejected this and found no common work area because no one else would be actually in the trench. "Kleinebreil's assertion only names individuals that might find themselves near the trench; it does not indicate that any employee of another subcontractor will actually work in the trench area. This is a prerequisite to a finding of a common work area." *Id.* at slip op p 4.

In *Brown v Oliver/Hatcher Constr & Dev Co*, unpublished opinion per curiam of the Court of Appeals, issued February 10, 2004 (Docket No. 244740), the decedent fell while working on a roof. He attempted to argue that the common work area was the area in which he fell. The Court of Appeals rejected this. "Here, plaintiffs do not allege that decedent worked in the area where he fell, and therefore, the trial court's holding was proper." *Id.* at slip op p 3. The Court also noted that the safety measures that the plaintiffs claimed were missing (fall protection) would not have been used on the ground. *Id.*

In *Faulman v American Heartland Homebuilders, LLC*, unpublished opinion per curiam of the Court of Appeals, issued January 4, 2007 (Docket No. 269287) the plaintiff was working with over a dozen other employees of his subcontractor in lifting a wall when he suffered injury. *Id.* at slip op p 1. The Court found no common work area because the plaintiff could not point to ***other*** contractors in the specific area where the accident occurred.

> Moreover, there is no indication that any other subcontractors were ever present in the specific area where the accident occurred. Thus, this case clearly presents a "'situation where employees of a subcontractor were working on a unique project in isolation from other workers,' "rather than a "'situation where employees of a number of subcontractors were all subject to the same risk or hazard.'" *Ormsby, supra* at 57 n 9, quoting *Hughes, supra* at 8. [*Faulman*, slip op p 4.]

In *Faurot v Miller*, unpublished opinion per curiam of the Court of Appeals, issued May 15, 2007 (Docket No. 265476), the plaintiff was injured while cutting down a tree. The Court of Appeals found no common work area because all of the people in the area of the danger presented by the falling tree were under the control of one subcontractor. *Id.* at slip op pp 6-7.

> In this case, the accident occurred in an isolated area during the performance of a unique project overseen by one subcontractor. Although JD Sawmill hired Roc's Logging to fell trees on Cook's property, defendants and their employees were not directly involved in this activity. In particular, Miller noted that the only work that JD Sawmill employees performed on Cook's property was loading timber on trucks for transport to the sawmill. The employees collected this timber at a landing site. However, Heiss and his workers cut the trees and hauled the timber to the landing site, which was 150 to 200 feet from the area where Heiss, Hunter, and plaintiff were felling trees. [*Id.* at slip op p 6.]

b. Same risk

In *Latham*, the Supreme Court indicated that the focus should be on the specific danger and the specific number of workers facing this danger. In that case, the plaintiff was a carpenter employed by a subcontractor on a new school project. On the day of the accident, the plaintiff and his coworkers were using a scissor lift to reach the mezzanine level of the project. They had removed the wire barrier from the mezzanine to gain access. And the plaintiff was not wearing fall protection as required by jobsite rules. *Latham*, 480 Mich at 108. The plaintiff argued that numerous other workers used the lift to reach the mezzanine and that this established a common work area. *Id.* at 109. The Supreme Court rejected this argument. It reasoned that the actual danger presented to the plaintiff was not working at heights. Instead, the proper focus was that he worked at heights without proper fall protection. *Id.* at 113.

> The fundamental question presented in this case, in which the general contractor was in control of the worksite, is: What was the danger creating a high degree of risk that is the focus of the general contractor's responsibility? *Funk* itself provides assistance in answering this question. There, this Court analyzed a similar common-work-area fall. In *Funk,* as here, the plaintiff would not have been injured had he worn a fall-protection device or had netting been provided. This Court agreed with the *Funk* plaintiff that the defendants had
>
> > exposed him to avoidable injury by allowing subcontractors to order the men to work at dangerous heights without any protection from falls in a job environment in which laborers were expected to complete their assigned tasks without regard to the absence of safety equipment guarding against injury in the event of a mishap.
>
> The Court in *Funk* was clear that the danger at issue was not the height itself, but the fact that the men were required to work "at dangerous heights *without any*

> *protection from falls.*" To hold that the unavoidable height *itself* was a danger sufficient to give rise to a duty would essentially impose on a general contractor strict liability for any injury resulting from a fall from an elevated common work area. This has never been the law. Moreover, because working at heights is generally an *unavoidable* condition of construction work, it cannot, by itself, be the avoidable danger *Funk* described. Hazards, including dangerous heights, are commonplace in construction worksites. In some situations, a general contractor may be able to remove a particular hazard, but general contractors simply cannot remove all potential hazards from a construction workplace. If a hazard cannot be removed, the general contractor can take reasonable steps to require workers to use safety equipment and procedures, thereby largely reducing or eliminating the risk of harm in many situations.
>
> Accordingly, in this case, as in *Funk,* 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. [*Id.* at 113-114 (emphasis original.)]

The Supreme Court then reversed the denial of summary disposition to the defendant, noting 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." *Id.* at 115.

In *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, unpublished opinion per curiam of the Court of Appeals, issued October 1, 1999 (Docket No. 210112), rev'd in part on other grounds, 466 Mich 11 (2002),[5] the plaintiff worked for a painting subcontractor. He slipped and fell on some snow or ice while nailing two-by-fours onto the roof. *Id.* at slip op pp 1-2. The roof was regularly accessed by numerous other trades, but the Court still found that the common work area doctrine did not apply.

> However, the evidence presented is insufficient to show that a genuine issue of material fact exists as to whether the danger in the work area involved a high degree of risk to a significant number of workers where the roof of the residential home was only twenty feet from the ground, it was icy/frosty based on the weather conditions that morning, and the number of workers is not significant. [*Id.* at slip op p 3.]

In *Johnson v GGG Industries Ltd Liability Co*, unpublished opinion per curiam of the

[5] The Supreme Court reversed on a portion of the case dealing with premises liability and the open and obvious doctrine. The common work area issue was not appealed.

Court of Appeals issued February 11, 2003 (Docket No. 235145), the plaintiff was tearing down a shed on a roof when he stepped back through an unguarded skylight. *Id.* at slip op pp 1-2. Despite other workers on the roof, the Court found no common work area because the plaintiff was the only worker immediately near the skylight. "[T]he evidence shows that plaintiff was working on the unique project of dismantling a shed-like structure in the immediate vicinity of the skylight, in a location remote from other workers, and thus experienced a unique exposure to the alleged danger of stepping on the skylight." *Id.* at slip op p 4.

In *Gilmore v Sorensen Gross Constr Co, Inc*, unpublished opinion per curiam of the Court of Appeals, issued March 23, 2006 (Docket No. 258033), the plaintiff fell while working for a steel erection subcontractor. The plaintiff fell when a joist he was walking on twisted. *Id.* at slip op p 1. The Court found that the danger was falling due to the shifting joist and that the plaintiff failed to show that this danger was presented to a sufficient number of workers.

> Further, there is no evidence that a significant number of workers ***were at risk of falling due to shifting joists***. Defendant presented evidence that only plaintiff and his steel erection coworkers were on site at the time of the accident. Although plaintiff argues that defendant had supervisory authority over twenty-one subcontractors, there is no evidence regarding how many of those subcontractors would have workers at risk of falling. Accordingly, plaintiff also fails to satisfy the fourth element required for the common work area doctrine. [*Id.* at slip op p 3 (emphasis added).]

In *Wallington v City of Mason*, unpublished opinion per curiam of the Court of Appeals, issued December 28, 2006 (Docket Nos. 267919, 269884), the plaintiff and one other individual worked in a trench that collapsed. The plaintiff attempted to argue that other individuals faced the hazard of the trench because they worked in the general area around the trench. The Court of Appeals rejected this argument because the other workers did not face the risk the plaintiff faced. *Id.* at slip op pp 3-4.

> [O]ther individuals surrounding the trench or at other areas on the project were not exposed to the same risk, i.e., burial from a trench-wall collapse, as were

> plaintiff and the other trench worker. Were these remaining workers to be considered in aggregating the number of individuals exposed to the risk at issue, it would eviscerate the requirement that such workers have been exposed to "a high degree of risk." [*Id.* at slip op p 4.]

In *Veness v Town Ctr Dev LLC*, unpublished opinion per curiam of the Court of Appeals, issued July 31, 2007 (Docket No. 273298), the plaintiff was working on a work platform that had unguarded ends. The plaintiff was wearing a safety harness, but he unhooked it when he was done working on the adjacent roof. He fell as he went down a ladder when his safety lanyard became tangled in cords on the work platform. *Id.* at slip op p 1. The Court found no common work area despite several other trades using the same work platform. The Court concluded that the other workers would not face the same risk because others using the platform would wear safety gear and would not use a ladder to gain access to the area.

> Moreover, plaintiff fails to demonstrate that the open edge of the second-floor balcony represented a high degree of risk to a significant number of workers who used the balconies. Unlike the plaintiff in *Funk,* plaintiff's subcontractor had provided him with a fall-arrest system, which substantially decreased the degree of risk posed by the unguarded edge of the balcony. The record also reflects that other workers would use an internal staircase, rather than an external ladder, to access the balconies, thus keeping them safely away from the outermost, unguarded edge. [*Id* at slip op p 2.]

In essentially the same vein, the Michigan Court of Appeals has also addressed cases in which the danger was only presented for a limited amount of time. In *Rosbury v Jasinski*, unpublished opinion per curiam of the Court of Appeals, issued November 21, 2000 (Docket No. 218857), the plaintiff was injured when installing a stairway. The Court found no common work area because the stairwell opening would be eliminated before others were on the jobsite.

> Here, plaintiff failed to show that the stairway opening created "a high risk to a significant number of workers." *Hughes, supra* at 6, 8-9. Rather, the undisputed facts show that only the employees of plaintiff's employer, Crane Construction, were exposed to the danger of the open stairwell, inasmuch as they were the only workers required to be on the work site at the time of the accident. The hazard created by the stairway opening was eliminated before the presence of other contractors was necessary. [*Rosbury*, slip op p 2.]

In *Berry v Barton-Mallow Co*, unpublished opinion per curiam of the Court of Appeals, issued July 22, 2003 (Docket No. 235475), the plaintiff was pulling a cable near a power panel. This required the use of a guide tape with a metal eye on the end. The power panel was operative, no cardboard guard was in place, and the plaintiff was using a metal ladder. Plaintiff was injured when the metal eye came in contact with the power panel. *Id.* at slip op p 2. The Court found no common work area noting that there was no evidence that other workers would have been subject to the same danger. *Id.* at slip op p 5.

In *Darcangelo v Walbridge Aldinger Co, Inc*, unpublished opinion per curiam of the court of Appeals, issued September 28, 2004 (Docket No. 247631), the plaintiff was hit in the head by a flange that fell off a truck he was standing next to. The plaintiff attempted to argue that the danger presented in the case was the failure to wear hardhats. The Court rejected this and stated that the actual danger was the part falling off the truck onto the plaintiffs head. The Court concluded that there was no readily observable danger and no evidence that it was presented to a significant number of workers.

> However, there was no evidence indicating that there was a readily observable danger regarding the metal flange that fell off of the truck, injuring plaintiff. Plaintiff stated that there was no indication that the clamp holding the metal flange was going to break. . . . There was no evidence that workers of any other contractor used the truck or worked within close range of the truck. The fact that other workers passed by the truck that the metal flange broke off of is insufficient to establish that the truck was a common work area that contained a readily observable and avoidable risk to a significant number of workers. [*Id.* at slip op pp 5-6.]

In *Hamm v Phoenix Ctrs Inc*, unpublished opinion per curiam of the Court of Appeals, issued June 5, 2008 (Docket No. 278040) the Court not only focused on the specific risk but also on the number of workers that faced that risk at the specific time of the injury. In that case, the plaintiff was hit by a large piece of plywood that was picked up by a gust of wind. It was undisputed that the plywood was in a heavy traffic area, and numerous workers from various

trades walked over it. But the Court still found that the danger was not presented to a sufficient number of workers. The Court looked to the number of workers that faced the risk at the time of the accident.

> Although plaintiff supplied evidence that multiple workers used the plywood path throughout the construction project, this fact only serves to demonstrate that the path was, generally speaking, a common work area. It must also be shown that the danger was posed to a significant number of workers. The danger to a significant number of workers is generally calculated at the time the plaintiff was injured. *Ormsby, supra* at 59-60 n 12, 684 NW2d 320. Plaintiff failed to demonstrate that the plywood represented a high degree of risk to a significant number of workers at the time the injury was sustained. Notably, at the time of the accident there were only three other individuals present at the renovation site. [*Hamm*, slip op p 3.]

c.Negative precedent regarding the meaning of a common work area

Earlier precedent exists that arguably took a broader view of the same are/same risk common work area analysis. In *Plummer v Bechtel Constr Co*, 440 Mich 646; 489 NW2d 66 (1992), the plaintiff fell from an unguarded platform that was next to a catwalk system. Much of the catwalk system was guarded. While there was clear evidence that numerous subcontractors used the catwalks, the evidence was not as clear that others had used the specific platform. The Supreme Court lead opinion rejected the defendant's attempt to characterize the work area as the specific platform. Instead, it concluded that the common work area was the entire catwalk system

> The common work area formulation did not contemplate a quilt work of common and noncommon work areas-this fifty or hundred square feet suspended in the air being a common work area and an adjoining fifty or one hundred square feet not being a common work area.
>
> The Edison and Bechtel inspectors did not view their responsibility as being dependent on whether employees of two or more subcontractors had trod the same girder or this platform. It would not have occurred to Western or Suenkel that this was not an area of their responsibility.
>
> The common work area formulation sought to distinguish between a case where it was appropriate to impose overall safety responsibility on the general contractor and one where it would not be appropriate. It does not depend on a

> matter of five, ten or fifteen feet, or who erected this platform, or whether an employee of another subcontractor was on this platform before Plummer. Indeed, workers were probably on the platform when it was first erected, with guardrails.
>
> We conclude that there was sufficient evidence to justify the jury's verdict that the catwalk/platform system from which Plummer fell constituted a common work area. [*Id.* at 667-668 (Levin, J.)]

Pummel is nonbinding precedent as it is only a plurality opinion. *Ormsby*, 471 Mich at 57 n8. Further, it can be explained by the fact that: 1) other workers had to be on the same platform at other times because guardrails were installed then removed and because it was not installed for plaintiff's work; 2) the platform was an integrated part of the catwalk system as the catwalk was the only way to reach it; and 3) other parts of the catwalk were also at least partially unguarded, which presented the same risks.

In *Erickson v Pure Oil*, 72 Mich App 330; 249 NW2d 411 (1976) overruled in part on other grounds by *Ormsby*, 471 Mich at 45, the plaintiff fell from the roof of a steel-frame building under construction. The plaintiff was installing metal roof sheeting which was covered in oil to avoid corrosion. *Erickson*, 72 Mich App at 332-333. The trial court granted summary disposition because no other trades were in the area that day. The Court of Appeals noted that the test was broader than that. It concluded that it did not matter when other subcontractors would face the same risk; it only matters that they would face the same risk eventually.

> Giving plaintiffs the benefit of any reasonable inferences we cannot say that these subcontractors will not work on the steel frame structure, will not arrive at the site at a later time and be subject to the ***same hazard from the lightly oiled beams***. Therefore, in light of the present record, the trial court reversibly erred in granting defendant Antler's motion for summary judgment. [*Id.* at 337-338 (emphasis added).]

Erickson falls directly in line with *Latham* and the other "same risk" cases. The only difference is that the defendant in *Erickson* failed to do its job of determining whether or not other trades would need to access the oiled metal. Given that *Erickson* rather narrowly defines the presented

risk, it is actually fairly strong precedent.

In *Johnson v Turner Constr*, 198 Mich App 478; 499 NW2d 27 (1993) overruled in part on other grounds by *Ormsby*, 471 Mich at 45, the trial court relied only on the fact that other subcontractors were not on site at the specific time of the injury. The Court of Appeals recognized the clear error in the trial court's decision. In fact, the trial court even stated that "maybe at some subsequent date, it would be a common work area to other subs". *Id.* at 481. Given this statement, the trial court misunderstood the common work area doctrine. *Johnson* offers no details of the accident in question. Therefore, its only contribution is that it follows the well accepted rule that all of the subcontractors need not face the same danger at the same time.

In *Phillips v Mazda Motor Mfg*, 204 Mich App 401; 516 NW2d 502 (1994), overruled in part on other grounds by *Ormsby*, 471 Mich at 45,[6] the plaintiff was working on structural steel when a column fell. This caused the plaintiff to fall from the truss he was walking. He was crushed by a falling truss. *Id.* at 404-405. The opinion is not well written and it never actually clarifies what the presented danger was. But it appears that the Court recognized the danger to simply be being crushed by falling steel. The Court found a common work area.

> Testimony at trial established that the employees of several subcontractors worked in the same area as Steelcon but were kept clear of Steelcon's work area while the steel framework was being erected. Other tradesmen were working close by at the time of the collapse, and a truck made a delivery to Steelcon's work area while the framework was being constructed that day. Several tradesmen were working in the area both before and after Steelcon's work. Under *Johnson, supra,* this was sufficient to support a finding that a common work area existed. [*Id.* at 408.]

The Court of Appeals analysis is less than clear. It appears to state two contradictory points. First, it states that the other works were kept clear but then it states that several were in the area.

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[6] *Ormsby* overturns *Erickson, Philips*, and *Johnson*'s decision that the common work area doctrine and the concept of retained control are separate doctrines. In fact, retained control is merely a subset of the common work area applicable to land owners.

Given the lack of clear analysis, *Phillips* is not strong precedent. But it does arguably take a broader view of the common work area than other cases discussed above.

In *Schmaltz v Michigan Tractor & Machinery Co*, unpublished opinion per curiam of the Court of Appeals, issued May 22, 2003 (Docket Nos. 237991, 237992), the plaintiff fell when the manlift he was working on tipped over. The plaintiff claimed that this was caused by uneven ground at the worksite. The Court of Appeals took a very broad view of the common work area in finding that one existed in that case.

> First, the evidence indicated that defendant had supervisory and coordinating authority over the job site and scheduled and coordinated the various trades. Second, the area in which plaintiffs were working was a common work area in that there were other contractors working on a section of the same wall, communication workers were digging a trench less then thirty-five yards from the manlift when it fell, and the daily construction report showed five subcontractors present on the site the day of the accident. In addition, ironworkers, carpenters, and masons all worked on the wall in the same area of the accident during the project. Third, a readily observable and avoidable danger existed in that common work area in that the ground was uneven and muddy and defendant's supervisor ordered another subcontractor to level the ground and lay gravel. Further, the construction supervisor acknowledged that uneven ground would pose a preventable danger to the subcontractors using equipment in the area and both plaintiffs testified that they had previously complained about the condition of the ground in the area. Finally, the condition of the ground created a high degree of risk to a significant number of workers because many of the subcontractors on the site used manlifts or other equipment that required a firm level surface to work safely and many workers could be harmed if a lift fell. Therefore, plaintiffs established that an issue of fact existed with regard to whether plaintiffs were injured in a common work area; accordingly, defendant's motions were properly denied. [*Id.* at slip op p 3.]

The Court really did not focus on one particular danger. It seems to have combined the danger of both falling from elevated work platforms and having the platforms fall on you. The Supreme Court remanded in light of *Ormsby*. *Schmaltz v Michigan Tractor & Machinery Co*, 471 Mich 925 (2004). But the Court of Appeals reached the same decision on remand.

> Third, we conclude that plaintiff established a question of fact as to whether the ground surface conditions created a high degree of risk to a significant number of workmen. See *Ormbsy, supra* at 57. The evidence included

> that several subcontractors were working at the site, in the immediate vicinity of plaintiffs, and most were engaged in work that required the use of machinery, including mechanical manlifts or other equipment that required a firm level surface. The users of the equipment were not the only workers subjected to the risks associated with the poor surface conditions, but workers in close proximity to the equipment were also at serious risk of injury from falling equipment, materials, debris, and workers if the equipment failed or became unstable because of the ground surface conditions. [*Schmaltz v Michigan Tractor & Machinery Co (On Remand)*, unpublished opinion per curiam of the Court of Appeals, issued January 4, 2005 (Docket Nos. 237991, 237992), slip op p 3.]

This decision seems contrary to other decisions of the appellate courts. But the Supreme Court did deny leave. *Schmaltz v Michigan Tractor & Machinery Co*, 474 Mich 870 (2005).

In *Shepard v M&B Constr LLC*, unpublished opinion per curiam of the Court of Appeals, issued September 19, 2006 (Docket No. 261484), the Court of Appeals reiterated the point that, while various subcontractors have to face the same risk, they do not have to do it at the same time. The case does not go beyond this point.

7. THE COMMON WORK AREA DOCTRINE APPLIES TO DIRECT AND VICARIOUS LIABILITY

In *Ophoff v Home Depot*, unpublished opinion of the Court of Appeals, issued September 26, 2006 (Docket No. 267921), the plaintiff attempted to argue that the common work area doctrine applied only to vicarious liability. The Court of Appeals rejected this contention.

> Contrary to plaintiff's arguments, while the "immediate cause of the accident" in the cases cited above [including *Funk*, *Ormsby*, and *Ghaffari*] may have been an act committed by a subcontractor or its employees, or even by the injured party, each case involved a claim that the property owner or general contractor was *directly negligent* in failing to provide a safe worksite, reasonable safety measures, or appropriate safety equipment. Plaintiff does not cite any cases holding otherwise. We find no principled distinction between these cases and the instant case in which plaintiff similarly asserts direct negligence claims against defendants based on their alleged failure to provide a safe workplace and appropriate safety equipment. Therefore, the trial court properly rejected plaintiff's argument that the common work area doctrine does not apply. [*Ophoff*, slip op p 3 (emphasis original).]

The Supreme Court subsequently denied leave to appeal in *Ophoff*. 477 Mich 1005

(2007).

D. Retained Control Doctrine

Formerly, the retained control doctrine was viewed as a separate and distinct exception to the general rule of non-liability. Courts would apply the common work area doctrine to general contractors and separately apply the retained control doctrine to property owners to separately impose liability on the property owner. *Ormsby*, 471 Mich at 48. The Michigan Supreme Court has clarified that these are not two separate exceptions to the general rule of nonliability. Instead, the retained control doctrine is merely a subset of the common work area doctrine that applies only to property owners.

> Accordingly, we conclude that, on the basis of this Court's analysis in *Funk,* the "common work area doctrine" and the "retained control doctrine" are not two distinct and separate exceptions. Rather, the former doctrine is an exception to the general rule of nonliability of property owners and general contractors for injuries resulting from the negligent conduct of independent subcontractors or their employees. Thus, only when the *Funk* four-part "common work area" test is satisfied may a general contractor be held liable for alleged negligence of the employees of independent subcontractors regarding job safety. The "retained control" doctrine is merely a *subordinate* doctrine, applied by the *Funk* Court to the owner defendant, that has no application to general contractors. [*Ormsby*, 471 Mich at 55-56 (emphasis original).]

Thus, the Supreme Court has made it absolutely clear that the retained control doctrine is not applicable to general contractors. Instead, it applies to property owners who step into the shoes of the general contractor.

> [W]e noted in *Ormsby* that a premises owner may still be liable for injuries to workers under limited circumstances. Where the premises owner retains sufficient control over the construction project, the owner "steps into the shoes of the general contractor and is held to the same degree of care as the general contractor."
>
> * * *
>
> *Ormsby* made clear that the owner's liability in such a situation would stem not from the owner's status as the premises *possessor,* but from his or her status as the de facto *general contractor.* [*Ghaffari*, 473 Mich at 24-25 (emphasis original), quoting *Ormsby*, 471 Mich at 49.]

The retained control doctrine applies when the property owner acts as a general contractor rather than passing the duties on to an actual general contractor. All of the requirements of the common work area doctrine would have to apply to establish liability.

E. Inherently Dangerous Activities

The inherently dangerous activity doctrine is exception to the general rule that a landowner is not responsible for the actions of an independent contractor.

> "Where the work is dangerous of itself, or as often termed, 'inherently' or 'intrinsically' dangerous, unless proper precautions are taken, liability cannot be evaded by employment of an independent contractor. Stated in another way, where injuries to third persons must be expected to arise, unless means are adopted by which such consequences may be prevented, the contractee is bound to see to the doing of that which is necessary to prevent the mischief. The injury need not be a necessary result of the work, but the work must be such as will probably, and not which merely may, cause injury if proper precautions are not taken." [*Ingles v Millersburg Driving Ass'n*, 169 Mich 311, 319-320; 136 NW 443 (1912), quoting 26 Cyc. pp. 1559, 1560.]

Formerly, the inherently dangerous activity doctrine was an issue that was raised in nearly every case against both the general contractor and the property owner in attempts to impose liability. Such broad application of the rule has now been rejected. The Michigan Supreme Court more recently explained that this is a limited doctrine that extends only to third parties to the alleged inherently dangerous activity.

> When a landowner hires an independent contractor to perform work that poses a peculiar danger or risk of harm, it is reasonable to hold the landowner liable for harm *to third parties* that results from the activity. If an employee of the contractor, however, negligently injures himself or is injured by the negligence of a fellow employee, it is not reasonable to hold the landowner liable merely because the activity involved is inherently dangerous. As Justice BRENNAN[7] recognized, the inherently dangerous activity doctrine was designed to protect third parties, not those actively involved in the dangerous activity. [*DeShambo v Neilson*, 471 Mich 27, 38; 684 NW2d 332 (2004) (emphasis original).]

The Court concluded that an employee of an independent contractor could not fall under

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[7] The Supreme Court was referring to Justice Brennan's dissent in *McDonough v General Motors Corp*, 388 Mich 430; 201 NW2d 609 (1972).

the inherently dangerous activity doctrine because he was involved in the work. "As our longstanding precedent, before *McDonough,* and the Restatement make clear, the inherently dangerous activity exception is limited to third parties." *Id.* at 40.

In *Farout v Miller*, unpublished opinion per curiam of the Court of Appeals, issued May 15, 2007 (Docket No. 265476), the plaintiff attempted to distinguish *DeShambo* on the grounds that he was a separate independent contractor or a direct employee of the landowner separate from the subcontractor charged with performing the inherently dangerous activity. The Court of Appeal, found this to be a distinction without a difference. The Court concluded that all that mattered was that the plaintiff was actively involved in the activity at the time of the accident.

> On the basis of the information provided in the trial court record, it is undisputed that plaintiff was not an "innocent third party" at the time of the accident, but was actively involved in felling a tree when he was injured. Despite plaintiff's disputed status as an employee or an independent subcontractor of Heiss at the time of the accident, plaintiff was actively involved in the dangerous activity that caused his injury. Accordingly, defendants are not liable for his injuries under the inherently dangerous activity doctrine. [*Id.* at slip op pp 4-5.]