STATE OF MICHIGAN

COURT OF APPEALS

AARON BATCHELDER,

Plaintiff-Appellant,

v

ECHELON HOMES, ELKOW HOMES, ELKOW HOMES CCV, JOHN DOE CARPENTER COMPANY, JOHN ROE, FABIEAN CURRENT CONSTRUCTION, JOHN POE, PLYMOUTH PLUMBING, WOLVERINE ENERGY SERVICE, JOHN BOE, JWF FAMILY, INC., JOHN COE, MICHIGAN SHELF DISTRIBUTORS, and JOHN GOE,

Defendants,

and

CINDAV CONSTRUCTION, INC.,

Defendant-Appellee.

UNPUBLISHED
November 18, 2021

No. 353265
Oakland Circuit Court
LC No. 2017-160326-NO

Before: STEPHENS, P.J., and SAWYER and SERVITTO, JJ.

PER CURIAM.

Plaintiff, Aaron Batchelder, appeals by right a judgment of no cause of action, entered following a jury trial, in favor of defendant Cindav Construction, Inc. ("CCI").[1] We affirm.

I. FACTUAL BACKGROUND

[1] With the exception of CCI, all of the named defendants were dismissed from this action before trial.

This case arises out of injuries plaintiff allegedly sustained in July 2015 when he slipped and fell while descending a stairway after performing plumbing work at a new-construction home. On the date of the accident, plaintiff was employed by a plumbing subcontractor, which had been hired to perform work at the new-construction house owned by general contractor Elkow Homes. Other subcontractors worked at the property, including CCI, who was responsible for the finished carpentry work. Plaintiff tripped and fell on carpentry debris while descending the basement staircase, which, at the time, had no handrail. Plaintiff injured his shoulder and required several surgical procedures to repair it.

Plaintiff subsequently initiated this action, alleging several claims against CCI, which he captioned as claims for premises liability, respondeat superior, negligent supervision and training, and vicarious liability. After CCI filed a motion for summary disposition, which the trial court denied, it sought leave to appeal in this Court on an interlocutory basis. This Court denied CCI's application "for failure to persuade the Court of the need for immediate appellate review." *Batchelder v Echelon Homes*, unpublished order of the Court of Appeals, entered October 24, 2019 (Docket No. 350664) (*Batchelder I*).

Before this case proceeded to trial, the parties filed a joint pretrial order, which summarized both the disputed and undisputed points of fact and law. The parties informed the trial court that they would file supplemental briefs before trial concerning the disputed legal issues, including, as relevant here, (1) whether plaintiff's claims regarding CCI's failure to install a handrail on the property's basement staircase sounded exclusively in premises liability, not also in ordinary negligence; (2) whether CCI could, as a subcontractor, be held liable under the "common work area" doctrine; (3) whether CCI owed plaintiff a statutory legal duty, for purposes of negligence, under MIOSHA;[2] and (4) if so, whether evidence of MIOSHA violations would be admissible at trial and whether the jury would be instructed with M Civ JI 12.05 ("Violation by Defendant of Rules or Regulations Promulgated Pursuant to Statutory Authority"). After the briefs were filed, the trial court ruled that: plaintiff's claims against CCI sounded exclusively in premises liability; CCI could not be held liable under the "common work area" doctrine, and; while neither OSHA[3] nor MIOSHA regulations impose legal duties on defendants for purposes of negligence, evidence of alleged OSHA or MIOSHA violations would be admissible at trial and that plaintiff was entitled to M Civ JI 12.05. However, the trial court also invited CCI's trial counsel to submit further briefing on the OSHA/MIOSHA issue if he could identify any binding caselaw contrary to the trial court's ruling. CCI subsequently did so, filing a motion for reconsideration under MCR 2.119(F)(3), which the trial court granted.

Thereafter, this case proceeded to a jury trial. Due to the court's pre-trial rulings, the jury received only a special-verdict form, which focused on CCI's potential liability under a premises-liability theory and CCI's various defenses, including contributory negligence and nonparty fault. The jury found that CCI was not "the possessor" of the subject property on the date of plaintiff's

[2] The Michigan Occupational Safety and Health Act, MCL 408.1001 *et seq*.

[3] The Occupational Safety and Health Act, 29 USC 651 *et seq*.

accident. Consistent with that verdict, the trial court subsequently entered the no-cause judgment that plaintiff appeals here.

II. ANALYSIS

A. NATURE OF PLAINTIFF'S CLAIMS

Plaintiff first argues on appeal that the trial court erred by holding that his claims regarding CCI's failure to install a handrail on the property's basement staircase sounded exclusively in premises liability, not also in ordinary negligence. We disagree.

"Whether one party owes a duty to another is a question of law reviewed de novo," *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007), as is the question of whether a claim sounds in ordinary negligence, *Estate of Swanzy v Kryshak*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 351649); slip op at 3, lv pending. The "traditional elements of a negligence action" are "(1) duty, (2) breach, (3) causation, and (4) damages[.]" *Hannay v Dep't of Transp*, 497 Mich 45, 63; 860 NW2d 67 (2014) (quotation marks and citation omitted). To prevail on a claim in the context of premises liability, a plaintiff must satisfy those same essential elements. See, e.g., *Mouzon v Achievable Visions*, 308 Mich App 415, 418; 864 NW2d 606 (2014). In the absence of any material factual disputes, it is a question of law for the court to decide whether a legal duty exists. *Braun v York Props, Inc*, 230 Mich App 138, 141; 583 NW2d 503 (1998) ("Generally, the existence of a duty is a question of law for the court to decide, but where certain factual circumstances give rise to a duty, and there are disputed facts, a jury must determine whether those factual circumstances exist.").

In support of his instant argument, plaintiff relies heavily on *Johnson v A & M Custom Built Homes of West Bloomfield, LPC*, 261 Mich App 719, 722-723; 683 NW2d 229 (2004). In *Johnson*, 261 Mich App at 720, the plaintiff employee of a subcontractor "was permanently incapacitated after falling from a roof on a construction job" when "a toe board installed by another subcontractor, Olewnick, dislodged and failed to stop" the plaintiff. Recognizing that the plaintiff's claim against Olewnick regarded alleged negligence in *installing* the toe board—not negligence in *failing* to install one—this Court held that the plaintiff's claim sounded in "active" negligence. *Id*. at 722-723. Thus, this Court held that the claim was actionable under an ordinary negligence theory, reasoning as follows:

> Even if [Olewnick] had no direct duty to take proactive measures to make an otherwise unsafe work place safe, and therefore no duty to install toe boards to prevent [the plaintiff] from falling, [Olewnick's] common-law duty remained intact: "[a]s between two independent contractors who work on the same premises, either at the same time or one following the other, each owes to the employees of the other the same duty of exercising ordinary care as they owe to the public generally." 65A CJS § 534 p. 291. Thus, where a subcontractor actually performs an act, it has the duty to perform the act in a nonnegligent manner. [*Johnson*, 261 Mich App at 723 (footnote omitted; first three alterations added).]

In contrast, plaintiff's instant argument regards CCI's alleged *failure* to install a handrail. In other words, it involves "passive" negligence which legally distinguishable from the "active" negligence addressed in *Johnson*.

This state's jurisprudence recognizes a distinction between "passive" and "active" forms of negligence. See *Chelik v Capitol Transp, LLC*, 313 Mich App 83, 91; 880 NW2d 350 (2015). The passive form, "nonfeasance, . . . is passive inaction or the failure to actively protect others from harm," while the active form, "misfeasance, . . . is active misconduct causing personal injury." *Id*. "The common law has been slow in recognizing liability for nonfeasance because the courts are reluctant to force persons to help one another and because such conduct does not create a new risk of harm to a potential plaintiff." *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 498; 418 NW2d 381 (1988). "Thus, as a general rule, there is no duty that obligates one person to aid or protect another." *Id*. at 498-499.

An exception to that general rule is recognized when a "special relationship" between the parties justifies imposing a duty on the defendant to act. *Id*. at 499. "The rationale behind imposing a duty to protect in these special relationships is based on control. In each situation one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself." *Id*. "The duty to protect is imposed upon the person in control because he is best able to provide a place of safety." *Id*. Because claims sounding in premises liability regard nonfeasance—i.e., the *failure* of a premises possessor to take the necessary steps "to keep the premises within [its] control reasonably safe," *Bailey v Schaaf*, 494 Mich 595, 604-605; 835 NW2d 413 (2013)—such claims rely on the "special relationship" between premises possessors and those present on their land, see, e.g., *id*.; *Williams*, 429 Mich at 499-500.[4]

Given that plaintiff's claim against CCI concerned nonfeasance with regard to dangerous conditions on the land, we cannot conclude that the trial court erred by holding that the claim sounded exclusively in premises liability. "Courts are not bound by the labels that parties attach to their claims. Indeed, it is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 691-692; 822 NW2d 254 (2012) (quotation marks, citations, and brackets omitted). "Michigan law distinguishes between claims arising from ordinary negligence and claims premised on a condition of the land. In the latter case, liability arises solely from the defendant's duty as an owner, possessor, or occupier of land." *Id*. at 692 (citations omitted; emphasis added). "If the plaintiff's injury arose from an allegedly dangerous condition on the land, the action sounds in premises liability rather than ordinary negligence[.]" *Id*.

[4] The duty owed by the premises possessor depends on whether the injured party was a "(1) trespasser, (2) licensee, or (3) invitee." *James v Alberts*, 464 Mich 12, 19; 626 NW2d 158 (2001) (quotation marks and citation omitted).

In this instance, plaintiff alleged that he was injured as a result of several dangerous conditions: the lack of a handrail, inadequate lighting, and a piece of wood trim left on the stairs.[5] Because each is a dangerous condition that was present on the land (i.e., within the subject property), this action sounds in premises liability, not ordinary negligence. See, e.g., *Kachudas v Invaders Self Auto Wash, Inc*, 486 Mich 913, 914; 781 NW2d 806 (2010) ("the plaintiff in this case is alleging injury by a condition of the land, and as such, his claim sounds exclusively in premises liability"); *Pugno v Blue Harvest Farms, LLC*, 326 Mich App 1, 14; 930 NW2d 393 (2018) (holding that the plaintiff's claim, which was captioned as a claim for ordinary negligence, actually sounded in "premises liability only" because all of the allegations of negligence regarded a dangerous condition on the land—a "stack of pallets"—that had allegedly caused the plaintiff's injuries); *Buhalis*, 296 Mich App at 691-692. Thus, the trial court did not err by holding, as a matter of law, that this action sounded exclusively in premises liability, not also in ordinary negligence.

B. "COMMON WORK AREA" DOCTRINE

Plaintiff next argues that the trial court erred by holding that CCI could not be held liable to plaintiff under the "common work area" doctrine. We disagree.

The "common work area" doctrine is a common-law doctrine, see *Ormsby v Capital Welding, Inc*, 471 Mich 45, 48; 684 NW2d 320 (2004), and "[t]he applicability of a legal doctrine is a question of law" that this Court reviews de novo, *James v Alberts*, 464 Mich 12, 14; 626 NW2d 158 (2001). "At common law, property owners and general contractors generally could not be held liable for the negligence of independent subcontractors and their employees." *Ormsby*, 471 Mich at 48. However, in *Funk v Gen Motors Corp*, 392 Mich 91; 220 NW2d 641 (1974), overruled in part on other grounds by *Hardy v Monsanto Enviro-Chem Sys, Inc*, 414 Mich 29 (1982), our Supreme Court "set forth a new exception to this general rule of nonliability, holding that, under certain circumstances, a *general contractor* could be held liable under the 'common work area doctrine' and, further, that *a property owner* could be held equally liable under the 'retained control doctrine.' " *Ormsby*, 471 Mich at 48 (emphasis added). There are four essential elements for a claim under the "common work area" doctrine: "(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 v Barton Malow Co*, 480 Mich 105, 109; 746 NW2d 868 (2008).

Although plaintiff candidly admits that CCI was a subcontractor—not the general contractor or the owner of the subject property—plaintiff nevertheless argues that the trial court erred by concluding that CCI could not be held liable to plaintiff under the "common work area"

[5] Notably, in plaintiff's briefs on appeal, he does not argue that the act of placing the wood trim on the stairs constituted a form of *active* negligence that might support a claim for ordinary negligence under the rule announced in *Johnson*. On the contrary, plaintiff repeatedly concedes that this action *does* sound in premises liability to the extent that it regards the wood trim on the stairs.

doctrine, at least under the facts presented here. We reject that argument as contrary to several binding[6] decisions of both this Court and our Supreme Court. See *Ghaffari v Turner Constr Co*, 473 Mich 16, 31 n 7; 699 NW2d 687 (2005) (*Ghaffari II*) ("the common work area doctrine is *only* applicable to a general contractor or to a property owner who retains sufficient control of the work so as to act in a superintending capacity (under the 'retained control' doctrine)") (emphasis added); *Ormsby*, 471 Mich at 58 & n 10 ("*Funk* is simply inapplicable to Capital in this case because Capital was neither the property owner nor the general contractor."); *Funk*, 392 Mich at 104 n 6 (holding that the "common work area" doctrine is not applicable "where the employee of a subcontractor seeks to recover from another subcontractor"); *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 12; 574 NW2d 691 (1997) ("The 'common work area' exception . . . does not apply where the employee of one subcontractor seeks to recover from another subcontractor."). In light of such authority, the trial court correctly held that CCI's status as a subcontractor rendered the "common work area" doctrine inapplicable to it.

C. OSHA AND MIOSHA

Plaintiff lastly argues that the trial court erred by concluding that CCI did not owe a duty to plaintiff under either MIOSHA or OSHA. Plaintiff further argues that the trial court's purported error in that regard led it to abuse its discretion by excluding any evidence at trial concerning OSHA and MIOSHA and by refusing to instruct the jury with M Civ JI 12.05. We perceive no error in those respects.

A trial court's legal conclusion whether a duty is owed for purposes of a negligence claim is reviewed de novo. *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 26; 761 NW2d 151 (2008). Likewise, in the instant context, "[w]e review claims of instructional error de novo." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). On the other hand, "[a] trial court's decision whether to admit evidence is reviewed for an abuse of discretion, but preliminary legal determinations of admissibility are reviewed de novo[.]" *Albro v Drayer*, 303 Mich App 758, 760; 846 NW2d 70 (2014). "An abuse of discretion occurs when the court's decision results in an outcome that falls outside the range of principled outcomes," *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 528; 872 NW2d 412 (2015), or is founded upon legal error, *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 552; 886 NW2d 113 (2016).

As this Court explained in *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 721; 737 NW2d 179 (2007):

> In Michigan, the violation of a statute creates a rebuttable presumption of negligence, and the violation of an administrative regulation constitutes evidence

[6] See MCR 7.215(J)(1) ("A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule."); *In re AGD*, 327 Mich App 332, 339-340; 933 NW2d 751 (2019) (noting that, under the doctrine of vertical stare decisis, only our Supreme Court has authority to overrule one its prior decisions, and such decisions remain binding on this Court unless and until our Supreme Court does so).

> of negligence. However, MIOSHA and the regulations enacted under MIOSHA apply only to the relationship between employers and employees and therefore do not create duties that run in favor of third parties. Accordingly, MIOSHA does not impose a statutory duty in favor of third parties in the negligence context. Nor do administrative regulations enacted under MIOSHA impose duties in favor of third parties in the negligence context. [Quotation marks and citations omitted.]

In addition, "MIOSHA does not provide an independent tort remedy." *Id*. at 721 n 2. Hence, a plaintiff in a premises-liability action "may not rely on MIOSHA and the MIOSHA regulations to escape application of the open and obvious danger doctrine[.]" *Id*. at 721; accord *Hottmann v Hottmann*, 226 Mich App 171, 177-178; 572 NW2d 259 (1997) (noting that, although "MIOSHA does not create new common-law or statutory rights, duties, or liabilities of employers and employees," evidence of MIOSHA violations may be considered as "evidence of comparative negligence"), citing MCL 408.1002(2) ("Nothing in this act [i.e., MIOSHA] shall be construed . . . to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.").

Similarly, in pertinent part, 29 USC 653(b)(4) provides:

> Nothing in this chapter [i.e., OSHA] shall be construed . . . to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

Thus, OSHA regulations do not create any *new* legal duty on behalf of either employees or employers for purposes of a negligence claim, though evidence of OSHA violations may be introduced "as evidence of comparative negligence" on behalf of a plaintiff employee. *Zalut v Andersen & Associates, Inc.*, 186 Mich App 229, 235-236; 463 NW2d 236 (1990).[7] Accord *Ghaffari v Turner Constr Co*, 259 Mich App 608, 613; 676 NW2d 259 (2003) (*Ghaffari I*) ("plaintiff's contention that either MIOSHA or OSHA imposed a statutory duty in a negligence context . . . is plainly without merit"), rev'd and remanded on other grounds 473 Mich 16 (2005).

In light of such authority, we cannot conclude that the trial court erred by holding, as a matter of law, that CCI did not owe any statutory duty to plaintiff under OSHA or MIOSHA that would support a negligence-related claim, including a claim sounding in premises liability. Moreover, although evidence of OSHA or MIOSHA violations might have been admissible as evidence of comparative negligence committed by *plaintiff*, see *Hottmann*, 226 Mich App at 177-178, and *Zalu*t, 186 Mich App at 235-236, the trial court did not abuse its discretion by excluding any evidence of such violations as proof of *CCI's* purported negligence, see *Hottmann*, 226 Mich App at 180 ("[T]he trial court did not abuse its discretion in ruling that the MIOSHA regulations are inadmissible . . . . The issue for the trier of fact is whether defendant violated the standard of

[7] Because *Zalut* was decided on November 19, 1990, and has not since been reversed or modified, it represents binding precedent. See MCR 7.215(J)(1).

conduct of a reasonable person, not whether defendant failed to comply with the MIOSHA regulations.") (citation omitted).[8]

Consequently, we also cannot conclude that the trial court erred by holding that plaintiff was unentitled to have the jury instructed with M Civ JI 12.05. Because the trial court properly excluded any evidence of the purported OSHA and MIOSHA violations, it necessarily follows that no admissible evidence could have supported providing M Civ JI 12.05 at trial. See *Estate of Goodwin v Northwest Mich Fair Ass'n*, 325 Mich App 129, 163-166; 923 NW2d 894 (2018) (holding that a trial court did not err by refusing to provide M Civ JI 12.05 when there was "no evidence" to support a finding that the disputed regulation had actually been violated or that its alleged violation was the proximate cause of the decedent's injuries).

Affirmed.

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Deborah A. Servitto

[8] Moreover, with respect to a premises liability claim, the jury determined that CCI was not liable for this claim because it was not a possessor of the land, and thus it did not reach the issue whether CCI was negligent. Plaintiff does not argue that evidence of OSHA or MIOSHA violations was relevant to the issue whether CCI was a possessor of land for purposes of premises liability. Given the jury's resolution of the premises liability claim, any error in excluding evidence of the purported OSHA and MIOSHA violations for its relevance to the issue of negligence would be harmless. MCR 2.613(A) ("An error in the . . . exclusion of evidence . . . is not a ground for granting a new trial . . . unless refusal to take this action appears to the court inconsistent with substantial justice.").