

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ELIZABETH BANASZAK,

Plaintiff-Appellant,

v

NORTHWEST AIRLINES, INC.,

Defendant-Appellee,

and

COUNTY OF WAYNE and HUNT  
CONSTRUCTION GROUP, INC.,

Defendants.

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UNPUBLISHED  
November 15, 2012

No. 301368  
Wayne Circuit Court  
LC No. 02-200211-NO

Before: MURPHY, C.J., and O'CONNELL and WHITBECK, JJ.

PER CURIAM.

Following a jury trial, plaintiff appeals by right the judgment of no cause of action in favor of defendant, Northwest Airlines, Inc. ("Northwest"). We affirm.

**I. FACTS AND PROCEEDINGS**

Plaintiff, an apprentice electrician employed by State Group, was injured in 2001 when she fell through a plywood-covered wellway at the McNamara Terminal construction site at Detroit Metropolitan Airport. Plaintiff brought this action against Northwest, as representative of the owner of the airport, Wayne County. Hunt Construction Group, Inc. ("Hunt"), was a contractor on the project. Plaintiff's employer, State Group, subcontracted with Hunt to perform electrical work. Otis Elevator Company ("Otis") contracted directly with Northwest to install elevators, escalators, and moving walkways in the terminal.

This case was the subject of a prior appeal in *Banaszak v Northwest Airlines, Inc.*, unpublished opinion per curiam of the Court of Appeals, issued July 21, 2009 (Docket No 263305), rev'd in part 485 Mich 1038, 776 NW2d 910 (2010), which contains the following summary of relevant background facts:

This case arises out of plaintiff's fall at the McNamara Terminal construction site. [Northwest] occupied the premises and contracted with Otis to install moving walkways in the floor of the terminal. The moving walkways have holes at each end called wellways, where the motors and machinery are stored. When empty, the wellways are approximately 48 inches deep. Otis generally covered the wellways with one-inch thick aluminum plates. However, during construction, some of these plates were stolen or removed. Hunt repeatedly alerted [Northwest] regarding the hazards presented by these uncovered wellways. Following [Northwest's] urging to address the matter, Otis endeavored to cover the wellways with plywood. Thereafter, plaintiff, an apprentice electrician for a subcontractor, State Group, crossed a plywood-covered wellway, her left leg broke through the plywood, and she fell on machinery that was housed in the wellway.

Plaintiff subsequently claimed that she suffered back pain and discomfort in her left leg. Among other claims against Otis, Hunt, and the county of Wayne,<sup>1</sup> plaintiff alleged that [Northwest] was liable for her damages under a premises liability theory. The trial court concluded that a genuine issue of material fact existed regarding this claim, denying [Northwest's] motion for summary disposition, and this Court denied [Northwest's] application for leave to appeal that decision. *Banaszak v Hunt Constr Group, Inc*, unpublished order of the Court of Appeals, entered October 1, 2003 (Docket No. 249455).

The trial court also permitted plaintiff to amend her complaint to include a contractor liability claim against [Northwest], and it later concluded that a genuine issue of material fact existed regarding [Northwest's] retained control of the premises. Following our Supreme Court's opinion in *Ormsby v Capital Welding, Inc*, 471 Mich 45; 684 NW2d 320 (2004), [Northwest] filed a renewed motion for summary disposition of the contractor liability claim because plaintiff did not previously establish that genuine issues of material fact existed regarding both [Northwest's] retained control of the premises and the common work area doctrine. The trial court granted [Northwest's] renewed motion, concluding that there was no high degree of risk to a significant number of workmen under the common work area doctrine. The trial court also dismissed plaintiff's remaining premises liability claim, blending in contractor liability concepts. [*Banaszak*, unpub opn (Docket No. 263305), slip op at 2.]

In the prior appeal, this Court reversed the trial court's order granting Northwest's motion for summary disposition and remanded the case for further proceedings. *Id.*, slip op at 7. However, our Supreme Court subsequently reversed this Court's decision in part, holding that this Court erred in reinstating plaintiff's premises liability claim. Our Supreme Court further

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<sup>1</sup> The claims against Hunt, Otis, and Wayne County were resolved in prior proceedings and are not at issue in this appeal.

held that plaintiff's common work area claim could proceed. *Banaszak v Northwest Airlines, Inc*, 485 Mich 1038; 776 NW2d 910 (2010).

On remand, the case proceeded to trial on plaintiff's common work area claim. Before trial, Northwest filed a motion in limine to exclude eight documents, which consisted of correspondence between Hunt and Northwest, and Northwest and Otis, recounting communications about safety concerns presented by open holes throughout the moving walkways and escalators. The trial court granted Northwest's motion to exclude the documents, primarily because the documents addressed a different hazard, i.e., open wellway holes, than the hazard that caused plaintiff's injury, i.e., an improperly covered wellway hole.

During trial, the trial court allowed plaintiff to introduce, over Northwest's objections, evidence of the minutes of weekly meetings between Hunt and Northwest representatives. The minutes indicated that Hunt sometimes designated Northwest as the "ball in court" entity to deal with Otis. Northwest's project manager, Dennis Farmer, acknowledged that Hunt looked to Northwest to address the problems with Otis because Otis had contracted directly with Northwest and not with Hunt.

A jury returned a special verdict in which it determined that Northwest was not negligent. The trial court thereafter entered a judgment of no cause of action in favor of Northwest.

## II. ANALYSIS

Plaintiff argues on appeal that the trial court erred in granting Northwest's motion in limine to exclude the eight documents in question. We review a trial court's evidentiary rulings for abuse of discretion. *Taylor v Kent Radiology, PC*, 286 Mich App 490, 519; 780 NW2d 900 (2009). "Error requiring reversal may not be predicated on an evidentiary ruling unless a substantial right of the party was affected." *KBD & Assoc, Inc v Great Lakes Foam Technologies, Inc*, 295 Mich App 666, 678; 816 NW2d 464 (2012).

Northwest objected to the admission of the excluded documents on the grounds that they were not relevant and that, even if minimally relevant, exclusion was warranted under MRE 403. "Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; *Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651, 668; 819 NW2d 28 (2011). Generally, relevant evidence is admissible, unless otherwise provided by another legal authority. MRE 402. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403; *Shaw v City of Ecorse*, 283 Mich App 1, 27; 770 NW2d 31 (2009).

Plaintiff contends that the documents were relevant to establishing Northwest's liability for her injuries under the common work area doctrine. The elements of a claim under the common-work-area doctrine are: "(1) the defendant contractor failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and

avoidable dangers (3) that created a high degree of risk to a significant number of workers (4) in a common work area.” *Latham v Barton Malow Co*, 480 Mich 105, 109; 746 NW2d 868 (2008).

A substantial issue at trial involved the factual question whether Northwest, as an owner’s representative, was in a position to coordinate work. Plaintiff maintained that although Hunt was a general contractor, Hunt had no authority to address problems with Otis, which was not Hunt’s subcontractor. According to plaintiff, Hunt relied on Northwest to require and ensure that Otis take reasonable steps to rectify safety concerns. The documents at issue were relevant to the general question of whether Northwest had supervisory authority to avoid a risk of harm from safety concerns, including unprotected or improperly protected holes.

However, the documents do not address the particular safety hazard that led to plaintiff’s injuries, namely, an inadequately covered wellway. The trial court was properly concerned that the jury would be confused by the documents. The trial court did not abuse its discretion in excluding the documents because of the potential for unfair prejudice and confusion of the issues, particularly where plaintiff was able to present other relevant evidence on the same issue. MRE 403.

Even if the trial court erred in excluding the documents, however, plaintiff is not entitled to reversal because exclusion of the documents did not affect plaintiff’s substantial rights. *KBD & Assoc, Inc*, 295 Mich App at 678. Plaintiff extensively cross-examined Farmer, as well as Otis’s project superintendent, Doug Tripp, and defendant’s workplace safety expert, with reference to another set of documents, namely, the minutes of meetings between Farmer or other Northwest representatives and Hunt’s representatives. Plaintiff elicited these witnesses’ testimonies that these documents showed that Hunt sometimes designated Northwest as the “ball-in-court” entity responsible for dealing with Otis’s safety issues, and that Northwest did not object to this designation.

In addition, plaintiff’s safety expert referred to the minutes by explaining that the term “ball in court” had a commonly accepted meaning in the construction industry, and that Northwest was clearly the ball-in-court entity in reference to Otis’s safety issues. In the context of the trial and the examination of witnesses, these documents addressed whether Northwest had authority to coordinate and supervise the relationships among the entities. Moreover, plaintiff examined witnesses about the contractual relationships in the construction project and the contractors’ means of resolving safety concerns. In view of this evidence, the eight excluded documents would have been cumulative of the substantial evidence presented on the question of Northwest’s supervising and coordinating authority.

Plaintiff also argues that the trial court erred in denying her request to use the documents to impeach Tripp when he denied having repeated contact with Otis about wellways. Plaintiff cites Tripp’s deposition testimony as proof of a prior inconsistent statement, but does not explain why she did not attempt to use the deposition testimony for impeachment. See MRE 801(d)(1) and MRE 806. Even if the trial court erred in disallowing the use of the documents for impeachment, however, the error was harmless because plaintiff was allowed the opportunity to impeach Tripp with the minutes of the meetings showing Northwest’s communications with Otis regarding safety. See *KBD & Assoc, Inc*, 295 Mich App at 678.

Finally, plaintiff argues that the trial court's exclusion of the eight documents violated the law of the case as established by this Court's prior decision in *Banaszak*, unpub opn (Docket No. 263305). We disagree. The law of the case doctrine "holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue." *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). The doctrine requires a lower court to follow an appellate court ruling on a particular issue where the facts remain materially the same. *Kidder v Ptacin*, 284 Mich App 166, 170; 771 NW2d 806 (2009). The doctrine applies "only to issues actually decided, either implicitly or explicitly, in the prior appeal." *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000).

Plaintiff relies on the following excerpt from this Court's prior decision in opinion in *Banaszak*, unpub opn (Docket No. 263305), slip op at 2:

When empty, the wellways are approximately 48 inches deep. Otis generally covered the wellways with one-inch thick aluminum plates. However, during construction, some of these plates were stolen or removed. Hunt repeatedly alerted NWA regarding the hazards presented by these uncovered wellways. Following NWA's urging to address the matter, Otis endeavored to cover the wellways with plywood. Thereafter, plaintiff, an apprentice electrician for a subcontractor, State Group, crossed a plywood-covered wellway, her left leg broke through the plywood, and she fell on machinery that was housed in the wellway.

This excerpt does not specifically address the admissibility of the documents, nor did this Court's analysis depend on any facts that were exclusive to the documents. Because the admissibility of the documents was not implicitly or explicitly decided in this Court's prior opinion, the law of the case doctrine does not apply.

Affirmed.

/s/ William B. Murphy  
/s/ Peter D. O'Connell  
/s/ William C. Whitbeck