STATE OF MICHIGAN

COURT OF APPEALS

DAVID TREMONTI,

Plaintiff-Appellee,

and

JACOB DAUDLIN,

Plaintiff,

v

BEAUMONT HOSPITAL,

Defendant-Appellant,

and

FERNDALE ELECTRIC COMPANY, INC.,

Defendant.

UNPUBLISHED
September 23, 2021

No. 353169
Oakland Circuit Court
LC No. 2018-169224-NO

DAVID TREMONTI,

Plaintiff,

and

JACOB DAUDLIN,

Plaintiff-Appellee,

v

BEAUMONT HOSPITAL,

No. 353170
Oakland Circuit Court
LC No. 2018-169224-NO

Defendant-Appellant,

and

FERNDALE ELECTRIC COMPANY, INC.,

Defendant.

Before: RICK, P.J., and RONAYNE KRAUSE and LETICA, JJ.

PER CURIAM.

Plaintiffs David Tremonti and Jacob Daudlin both sustained electrocution injuries while replacing concrete sidewalks on defendant Beaumont Hospital's ("Beaumont") premises. Plaintiffs sued both Beaumont and the company investigating the matter for Beaumont, defendant Ferndale Electric Company, Inc. ("Ferndale Electric"). Ferndale Electric settled with plaintiffs and the case proceeded to trial against Beaumont on plaintiffs' premises liability claims. A jury found that Beaumont was negligent and awarded damages to both plaintiffs. The trial court entered judgment in favor of both plaintiffs consistent with the jury verdicts. Beaumont appeals each judgment as of right. We affirm.

I. BACKGROUND

Plaintiffs were construction workers employed by Holsbeke Construction, Inc. ("Holsbeke"), which was retained by Beaumont to replace sidewalks at the hospital's Royal Oak campus. On August 15, 2017, another Holsbeke employee, Matthew Fleming, was removing a portion of the old sidewalk when he struck a conduit that had been shallowly buried under the sidewalk. The conduit contained electrical wires. It is undisputed that the conduit was not buried at a proper depth: conduit containing electrical wires should have been buried at least a foot deeper. Fleming notified Beaumont's exterior services manager, Nicholas Aseltine, and Fleming made sure that the area was barricaded with barrels and cautionary tape. At Aseltine's request, a Beaumont electrician investigated the exposed conduit, but the electrician recommended that an outside electrical contractor handle the matter. Ferndale Electric was asked to investigate the problem, but it was not able to begin its work until the next day. Aseltine told Fleming to wait until the electricians cleared the area before resuming work on the excavated area.

The next morning, plaintiffs began working in the excavated area where the conduit was located to prepare it for the new concrete to be poured. It had rained the night before, causing water to accumulate in the excavated area. Holsbeke's foreman for the project, Timothy Orosz, knew about the exposed conduit and saw it when he arrived on the jobsite. He was told by Holsbeke's office supervisor not to work in that area until the problem was resolved. Aseltine also told Orosz to stay out of that area until Beaumont could figure out what needed to be done. Aseltine asked Orosz to meet with the electricians from Ferndale Electric at the site. No one from Beaumont was present at that time. According to Orosz, the electricians informed him that the wires in the conduit were dead and there was nothing to worry about. Even though the electricians continued to work in the area, Orosz told his crew that they could work in the area where the

conduit was located. According to Orosz, plaintiffs did not enter the restricted area until the electricians told Orosz that it was safe, which he interpreted as giving his crew permission to work.

Plaintiffs noted that it was common for areas where they worked to be barricaded or taped off. Because it had rained the night before plaintiffs started working in the area, and the conduit was therefore covered with water, plaintiffs did not initially notice the conduit. They only discovered the conduit after removing some of the water and mud. Plaintiffs were also aware of the electricians who were investigating the area, but no one told them not to work in the excavated area because of any hazard from the exposed conduit. Daudlin recalled overhearing something about a wire "being old and dead." While setting up concrete forms in the excavated area, Daudlin received a shock, which he described as "the most horrific thing I still have felt to this day." Tremonti admitted seeing the conduit before he was injured, but explained that he did not think it was hazardous because he knew that conduit that contains electrical wires is required to be buried at a greater depth, usually 18 to 24 inches below concrete. As Tremonti was removing water from the area, he too was shocked. Both plaintiffs were taken to the Beaumont Emergency Room. For purposes of this appeal, it is undisputed that they both sustained lasting injuries.

Electricians for both Beaumont and Ferndale Electric denied telling anyone that the crew could safely work in the excavated area before plaintiffs were shocked. The electricians initially tested the wire and did not receive a signal that it was electrified, but they later discovered that there was still power to the line and the hazard was not abated until a circuit was shut off, which occurred after plaintiffs were injured. It was later determined that the conduit had originally run to a booth that had been removed, and it was powered by a circuit breaker in a nearby machine room.

Plaintiffs filed this action against Beaumont and Ferndale Electric. They alleged claims for premises liability against Beaumont, negligence against Ferndale Electric, and a joint common-work-area negligence claim against both Beaumont and Ferndale Electric. Beaumont moved for summary disposition under MCR 2.116(C)(10). The trial court dismissed the common-work-area claim, but denied summary disposition with respect to the premises liability claim. Plaintiffs settled with Ferndale Electric and proceeded to trial on the premises liability claim against Beaumont. The jury returned verdicts in favor of plaintiffs, and the trial court later entered judgments for plaintiffs consistent with the jury's verdicts.

II. SUMMARY DISPOSITION

Beaumont argues that the trial court erred by denying its motion for summary disposition with respect to plaintiffs' claims for premises liability. Beaumont argues that the allegedly hazardous condition was open and obvious and, in any event, Beaumont met its duty to plaintiffs, regardless of whether plaintiffs are classified as invitees or trespassers. We disagree.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact.

Id. at 120. A court may not assess credibility or determine disputed facts when reviewing a motion for summary disposition. *Zamler v Smith*, 375 Mich 675, 678-681; 135 NW2d 349 (1965).

A. TRESPASSERS OR INVITEES

In their complaint, plaintiffs alleged that they were invitees at the time they were injured. In *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012), our Supreme Court explained:

> The starting point for any discussion of the rules governing premises liability law is establishing what duty a premises possessor owes to those who come onto his land. With regard to invitees, a landowner owes a duty to use reasonable care to protect invitees from unreasonable risks of harm posed by dangerous conditions on the owner's land. Michigan law provides liability for a breach of this duty of ordinary care when the premises possessor knows or should know of a dangerous condition on the premises of which the invitee is unaware and fails to fix the defect, guard against the defect, or warn the invitee of the defect. [Footnotes omitted.]

However, as explained in *Pippin v Atallah*, 245 Mich App 136, 145; 626 NW2d 911 (2001):

> In Michigan, the general rule with regard to trespassers is that "[t]he landowner owes no duty to the trespasser except to refrain from injuring him by 'wilful and wanton' misconduct." This general rule has long been subject to the interpretation that, "after the owner of premises is aware of the presence of a trespasser or licensee, or if in the exercise of ordinary care he should know of their presence, he is bound to use ordinary care to prevent injury to them arising from active negligence." *Schmidt v Michigan Coal & Mining Co*, 159 Mich 308, 311-312; 123 NW 1122 (1909). "Active negligence," in this context, involves action or conduct. See *Preston v Austin*, 206 Mich 194, 201; 172 NW 377 (1919) ("before the principle of active negligence can apply, some duty must rest upon the defendant which is violated by his conduct or act"). Because the duty to refrain from active negligence only arises after the premises owner becomes aware, or should be aware, of the trespasser's presence, it follows that it does not encompass conduct that occurred before the trespasser arrived. [Citation omitted.]

"A 'trespasser' is a person who enters upon another's land, without the landowner's consent." *Sitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). A business invitee can become a trespasser by venturing into a non-public area without permission. See *Constantineau v DCI Food Equipment, Inc*, 195 Mich App 511, 514-516; 491 NW2d 262 (1992). However, that consent, permission, or invitation may be express or implicit. See *Blakeley v White Star Line*, 154 Mich 635, 637; 118 NW 482 (1908). "As a general rule, if there is evidence from which invitee status might be inferred, it is a question for the jury." *Sitt*, 462 Mich at 595.

Beaumont relies on the evidence that it barricaded the restricted area with barrels and cautionary tape, and instructed the workers to stay out of the area until an "all clear" signal was given. Beaumont argues that plaintiffs were trespassers because they ignored the barriers and entered the restricted area before an "all clear" signal was given. However, the evidence

established that barricades were not unusual under the circumstances and would not have communicated that the area was off-limits to construction workers like plaintiffs. Furthermore, there was conflicting evidence whether Holsbeke's workers were given an "all clear" signal to resume work in the restricted area. According to plaintiffs' foreman, Orosz, he was aware of the exposed conduit and knew that workers were to stay out of that area until it was investigated and determined to be safe, but Orosz testified that the electricians investigating the hazard told him that the wires in the conduit were dead. Therefore, a jury could find that those representing or hired by Beaumont to investigate the situation had communicated that it was "all clear" to proceed with working in the area. Indeed, the evidence indicated that the electricians were present while plaintiffs were working in the excavated area where the conduit was located and no one told them to stop before they were injured. The evidence was sufficient to create a question of fact whether an "all clear" signal of some type was given by someone representing Beaumont's interests in investigating the situation.

In any event, plaintiffs' presence was known by Beaumont because their company had been hired to replace the sidewalks. Accordingly, plaintiffs would at most be known trespassers and Beaumont would have had a duty of care to refrain from active negligence. There was evidence to show that Beaumont was actively negligent when its agents assured plaintiffs that it was safe to continue working in the excavated area. There was, as a consequence, evidence from which the jury could have reasonably concluded that plaintiffs were invitees, not trespassers. The trial court did not err in denying summary disposition based on the argument that plaintiffs were trespassers. *Sitt*, 462 Mich at 595.

B. OPEN AND OBVIOUS

Beaumont also argues that the conduit was open and obvious. Dangers that are known to an invitee or are sufficiently obvious that an invitee should be expected to discover them are generally outside the scope of an invitor's duty to protect or warn. *Estate of Livings v Sage's Investment Group, LLC*, ___ Mich ___, ___; ___ NW2d ___ (2021) (Docket No. 159692); slip op at 6. "When the evidence creates a question of fact regarding this issue, the issue is for the fact-finder to decide." *Id*. Nevertheless, "if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001). Thus, exceptions to the open and obvious doctrine can apply where the hazard is "unreasonably dangerous" or the hazard is "effectively unavoidable." *Hoffner*, 492 Mich at 472-473.

The evidence indicated that the conduit was not initially visible to plaintiffs at all, because it was covered with water and mud. When it became visible, the conduit *itself* was clearly open and obvious. However, open and obvious doctrine requires perception of more than just the condition itself, but also the dangerousness of the condition. See *Corey v Davenport College of Business*, 251 Mich App 1, 5; 649 NW2d 392 (2002). Put another way, "the open and obvious doctrine will cut off liability if the invitee should have discovered the condition *and realized its danger*." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995) (emphasis added). The evidence established that conduit containing live electrical wires should have been buried much deeper, and numerous people speculated that the conduit was either some kind of low-voltage system or perhaps part of an irrigation system. Furthermore, it is inherently reasonable for

a person to rely on the knowledge of an expert. See *Eaton v Winnie*, 20 Mich 156, 165-166 (1870). There was evidence that plaintiffs were led to believe by electricians that the conduit was dead—as, given its shallow depth, it should have been from the outset. Thus, notwithstanding plaintiffs' knowledge of the conduit, this evidence supported a finding that plaintiffs would not have had reason to know that the condition was dangerous. The trial court properly left that question to the jury.

III. JURY INSTRUCTIONS

Beaumont next argues that the trial court erred by declining to give its requested instructions defining what constitutes a trespasser and stating the duty owed by landowners to trespassers, and by giving plaintiffs' requested instruction that landowners' responsibilities may not be delegated. We disagree.

"Claims of instructional error are reviewed de novo." *Goodwin v Northwest Mich Fair Ass'n*, 325 Mich App 129, 156; 923 NW2d 894 (2018). However, "[w]e review for abuse of discretion the trial court's determination whether a standard jury instruction is applicable and accurate." *Lewis v LeGrow*, 258 Mich App 175, 211; 670 NW2d 675 (2003). A standard jury instruction must be given if it is applicable, accurately states the applicable law, and is requested by a party. MCR 2.512(D)(2). "Instructional error warrants reversal if the error resulted in such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be inconsistent with substantial justice." *Goodwin*, 325 Mich at 157 (quotation omitted). "If, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury, no error requiring reversal occurs." *Lewis*, 258 Mich App at 211.

A. FAILURE TO GIVE REQUESTED INSTRUCTIONS

Beaumont requested that the trial court give M Civ JI 19.01 to the jury, which provides, in relevant part, the following definition of a trespasser:

> *(A trespasser is a person who goes upon the [land / premises / place of business] of another without an express or implied invitation, for his or her own purposes, and not in the performance of any duty to the owner. It is not necessary that in making such an entry the trespasser have an unlawful intent.)

The use notes for M Civ JI 19.01 state that the instruction should be given only when there is a factual dispute regarding a plaintiff's legal status, and instructions need be given only for those categories in dispute. Beaumont also requested that the trial court give M Civ JI 19.07, which sets forth the limited circumstances under which landowners owed a duty to trespassers.

We note that M Civ JI 19.01 would clearly not be helpful to Beaumont, because it expressly requires trespassers to be on the land "for his or her own purposes, and not in the performance of any duty to the owner." The word "and" must be construed as a true conjunctive unless doing so would clearly render a clause incoherent or clearly contradict the intent of the drafter. See *Coalition Protecting Auto No-Fault v Michigan Catastrophic Claims Ass'n*, 317 Mich App 1, 14; 894 NW2d 758 (2016). Plaintiffs were obviously not on the site for any reason other than to perform their duties to Beaumont of installing sidewalk. Additionally, the trial court did instruct the jury that the landowner had a duty to protect invitees from risks of harm, and Beaumont was

permitted to argue to the jury that plaintiffs were trespassers at the time they were injured. By necessary implication, the instructions would have indicated to the jury that if it believed plaintiffs to be trespassers, Beaumont owed *no* duty to them. We are therefore not persuaded that Beaumont was actually prejudiced by the trial court's decision not to give M Civ JI 19.01 and M Civ JI 19.07 to the jury. Rather, omitting those instructions gave Beaumont more leeway to argue that plaintiffs were trespassers to whom Beaumont owed no duty.

B. INSTRUCTIONS REGARDING NONDELEGABLE DUTY

Beaumont also argues that the trial court erred by instructing the jury that it owed a nondelegable duty to plaintiffs as the possessor of the premises. We disagree.

Beaumont argues that the trial court erred by giving M Civ JI 19.10, which provides:

> A possessor or occupier of [land / premises / a place of business] who owes a duty to [*name of plaintiff*] may not delegate that responsibility to another and thus avoid liability.
>
> *Note on Use*
>
> This instruction should be given if an issue is raised at the trial that the occupier or possessor of property has attempted to delegate the duty regarding the premises by either a lease arrangement, a contract, or the employment of an independent contractor.

Plaintiffs requested this instruction because Beaumont had argued that either Holsbeke or Ferndale Electric were at fault for plaintiffs' injuries. Beaumont argued that the instruction did not apply because this case did not involve a common work area. It further argued that the facts did not show that it was attempting to delegate any duty.

We agree that the trial court did not err by instructing the jury consistent with M Civ JI 19.10. Plaintiffs' claims were based on premises liability, which involves Beaumont's liability as the possessor of the property involved. *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 702-705; 644 NW2d 779 (2002). The instruction did not define the duty owed, but merely informed the jury that any duty owed by Beaumont as a possessor of land could not be delegated to another to avoid liability. Because Beaumont had attempted to show that others were at fault, including Ferndale Electric and Holsbeke, and neither of those entities were in possession or control of the premises, the instruction was appropriate.[1] Accordingly, the trial court did not err by giving this instruction.

[1] We note that the jury was separately instructed to allocate comparative fault, but it found that neither Holsbeke nor Ferndale Electric were at fault.

IV. CAUSATION

Beaumont next argues that the trial court erred by denying its motion for a directed verdict on the issue of causation. We disagree.

This Court reviews de novo a trial court's ruling on a motion for a directed verdict. "A party is entitled to a directed verdict if the evidence, when viewed in the light most favorable to the nonmoving party, fails to establish a claim as a matter of law." *Aroma Wines & Equip, Inc v Columbian Distribution Servs, Inc*, 497 Mich 337, 345; 871 NW2d 136 (2015). "If reasonable persons, after reviewing the evidence in the light most favorable to the nonmoving party, could honestly reach different conclusions about whether the nonmoving party established his or her claim, then the question is for the jury." *Nahshal v Fremont Ins Co*, 324 Mich App 696, 719; 922 NW2d 662 (2018) (quotation omitted). "While causation is generally a matter for the trier of fact, if there is no issue of material fact, then the issue is one of law for the court." *Holton v A+ Ins Assoc, Inc*, 255 Mich App 318, 326; 661 NW2d 248 (2003).

Beaumont argues that the evidence showed that Holsbeke or Ferndale Electric were solely responsible for causing plaintiffs' injuries, thereby relieving it of any liability. We disagree.

First, Beaumont argues that Holsbeke was the cause of plaintiffs' injuries because its employee, Fleming, struck the conduit and damaged it, exposing the wires. However, this position ignores that Beaumont hired Holsbeke to remove the sidewalk, and it ignores the evidence that the conduit was buried too shallowly beneath the surface, just underneath the concrete that Fleming was required to remove. Testimony indicated that because the conduit held electrical wires, it should have been buried at a greater depth, which would have prevented it from being struck when the sidewalk was replaced. Furthermore, the wires should have been deenergized, but were still powered by a circuit breaker in Beaumont's machine room. This evidence established a question of fact whether Beaumont was negligent by burying the conduit too shallowly and by failing to properly decommission the wires when the booth they powered was removed. If the conduit had been properly buried or the wires had been properly deenergized, plaintiff's injuries would not have occurred.

Beaumont also argues that, once the conduit was discovered, it appropriately directed that the area be barricaded with barrels and cautionary tape. However, it was common for Fleming to barricade an area where concrete had been removed in this manner, to keep members of the public out of the area. Both plaintiffs testified that it was not unusual for areas where they were working to be barricaded in this manner. Thus, a trier of fact could have found that this manner of barricading was not sufficient to warn or protect other workers of the danger of the exposed conduit.

Beaumont further claims that it instructed Holsbeke not to have its employees enter the excavated area until Aseltine gave an "all clear" signal. However, conflicting evidence was presented regarding whether Orosz was told to wait until Aseltine gave that signal, or whether Orosz was merely required to wait until he received notice that the area was safe. Conflicting evidence was also presented whether Orosz was advised by electricians that the area was safe because the wires were old and dead. The electricians had a different recall of the events, but plaintiffs' witnesses supported their theory that they resumed working in the area because

electricians had checked out the conduit and said it was safe to return to work. In addition, evidence was presented that after plaintiffs were injured, Beaumont was able to quickly investigate the source of the electricity and shut it off by turning a power switch. This evidence raised a question of fact whether Beaumont was negligent by not taking this action earlier.

Because of these disputed factual issues, there was a question of fact whether Beaumont was a cause of plaintiff's injuries. Therefore, the trial court did not err by denying Beaumont's motion for a directed verdict.

V. COLLATERAL-SOURCE RULE AND COMMON-LAW SETOFFS

Beaumont next argues that the trial court erred by refusing to reduce the amounts of plaintiffs' judgments under the statutory collateral-source rule, MCL 600.6303, or the common-law setoff rule. Specifically, Beaumont argues that because both plaintiffs received worker's compensation benefits for their lost wages and medical expenses, the trial court was required to reduce plaintiffs' judgments for these amounts under MCL 600.6303. In addition, Beaumont argues that both plaintiffs had settled their claims against Ferndale Electric, so it was entitled to a setoff for the settlement amounts under the common-law setoff rule. We disagree.

"A trial court's interpretation and application of MCL 600.6303 is a legal issue, reviewed de novo." *Shivers v Schmeige*, 285 Mich App 636, 653; 776 NW2d 669 (2009). Issues regarding the common-law setoff rule are also reviewed de novo. See *Markley v Oak Health Care Investors of Coldwater, Inc*, 255 Mich App 245, 249-250; 660 NW2d 334 (2003). Under the common-law setoff rule, a plaintiff is only permitted a single recovery from joint tortfeasors, so where there are multiple defendants, the amount a plaintiff recovers from one defendant is set off against amounts subsequently recovered from another defendant. *Id*. at 250-251. The common-law rule applies only to other tortfeasors. *Heinz v Chicago Road Investment Co*, 216 Mich App 289, 294; 549 NW2d 47 (1996). Under the statute, worker's compensation benefits are a collateral source against which a plaintiff's recovery must be set off, unless the payor holds a valid lien against the plaintiff's recovery. *Id*. at 296-297. Furthermore, the statute permits a setoff only as to the same types of damages; i.e., benefits paid for lost wages may only be set off against a recovery for lost wages. *Shivers*, 285 Mich App at 654.

The jury awarded both plaintiffs damages for lost wages, medical expenses, and noneconomic damages. There is no dispute that benefits for lost wages and medical expenses can be subject to the statutory collateral-source rule. However, at the time the trial court ruled on Beaumont's motion, the parties agreed that plaintiffs' worker's compensation insurer was seeking repayment of the benefits paid to plaintiffs for lost wages and medical expenses. Plaintiffs presented evidence that the worker's compensation insurer was asserting liens for those amounts, which plaintiffs would be required to repay pursuant to MCL 418.827(5). Beaumont did not demonstrate that the liens were invalid. Therefore, the trial court did not err by failing to apply the collateral-source rule to reduce plaintiffs' judgments by the amount of workers' compensation benefits received.

Beaumont also argues that it is entitled to a setoff for the amounts of plaintiffs' settlements with Ferndale Electric under the common-law setoff rule. We disagree. The common-law setoff rule only applies in cases of joint *and* several liability. See *Velez v Tuma*, 492 Mich 1, 11-15; 821

NW2d 432 (2012). Here, plaintiffs pursued distinct claims against Beaumont and Ferndale Electric. Plaintiffs alleged premises liability against Beaumont,[2] negligence against Ferndale Electric, and common-work-area against both Beaumont and Ferndale Electric. Only the common-work-area claim could be joint *and* several, and that claim was dismissed by the trial court. Otherwise, the claims against Beaumont and Ferndale Electric were several only. The jury verdicts were solely against Beaumont and the jury expressly found that Ferndale Electric (and others) were not at fault for plaintiffs' injuries. Accordingly, there is no basis for concluding that the amounts awarded to plaintiffs should be considered a duplicate recovery for the same injury or harm. Indeed, MCL 600.6304(4) would appear to bar any setoff in this case after the jury found that Ferndale Electric was not at fault. Accordingly, the trial court did not err by refusing to apply the common-law setoff rule to reduce plaintiffs' judgments by the amounts plaintiffs received under their settlement with Ferndale Electric.

Affirmed.

/s/ Michelle M. Rick
/s/ Amy Ronayne Krause
/s/ Anica Letica

[2] Although plaintiffs entitled their claim against Beaumont "premises liability/negligence," those are in fact totally distinct causes of action. See *Jahnke v Allen*, 308 Mich App 472, 474-476; 865 NW2d 49 (2014). Nevertheless, the title given to a claim by a party is not dispositive. *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 582; 808 NW2d 578 (2011). It is clear that, substantively, plaintiffs' claim against Beaumont sounded in premises liability, and the parties argued that claim as such.