STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH MOORE and CINDY MOORE,

Plaintiffs-Appellants,

V

DETROIT NEWSPAPER AGENCY,

Defendant-Appellee.

UNPUBLISHED
November 27, 2001

No. 221599
Wayne Circuit Court
LC No. 98-822599-NI

Before: Neff, P.J., and Wilder and Cooper, JJ.

PER CURIAM.

Plaintiff[1] was employed by defendant. During a strike he was picketing in front of defendant's Lincoln Park Distribution Center, when he allegedly was hit[2] by an automobile driven by Ernest Hale. Plaintiff's negligence claim against Hale was resolved in mediation. Defendant was not a party to the suit against Hale.

Sometime after the parties accepted the mediation award settling the claim against Hale, plaintiff filed suit against defendant, alleging four claims: automobile negligence, premises liability, negligent hire and supervision, and loss of consortium for Cindy Moore. Summary disposition in favor of defendant was granted on both the automobile negligence and premises liability claims. The negligent hire and supervision claim was tried before a jury, which determined that Hale was an independent contractor and not defendant's employee and that defendant had not negligently supervised Hale. Judgment was entered in favor of defendant. Plaintiff now appeals as of right. We affirm.

I

Plaintiff argues that summary disposition pursuant to MCR 2.116(C)(7) was improper on the automobile negligence claim. We disagree.

[1] The term "plaintiff" will be used throughout this opinion to refer only to Joseph Moore. Cindy Moore's claims are derivative of Joseph Moore's claims.

[2] There was a dispute whether defendant was actually struck by Hale's automobile, but no question that plaintiff was badly injured when he fell to the pavement.

MCR 2.116(C)(7) provides that summary disposition may be granted if

> [t]he claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.

In *Felsner v McDonald Rent-A-Car, Inc*, 193 Mich App 565, 566-567; 484 NW2d 408 (1992), the plaintiff was riding a motorcycle and was struck by a van driven by Gregory Ferrebee, an employee of Spinners Performing Arts, Inc. The plaintiff sued Ferrebee and others, including McDonald Rent-A-Car, seeking damages. *Id.* at 567. The plaintiff later added defendant Spinners as a party on a theory of respondeat superior for the negligence of Ferrebee. *Id.* The complaint did not allege any acts of independent negligence against defendant Spinners. *Id.* The plaintiff, Ferrebee and McDonald Rent-A-Car accepted the mediation evaluations. *Id.* After a satisfaction of judgment was executed in favor of Ferrebee and McDonald Rent-A-Car, defendant Spinners moved for summary disposition on the ground that the plaintiff had released Ferrebee and thus, had discharged defendant Spinners. *Id.* The trial court disagreed. *Id.*

This Court reversed, holding that a "principal sued solely on the theory of vicarious liability for the negligence of its agent under the doctrine of respondeat superior" is not a joint tortfeasor. *Id.* at 568, citing *Theophelis v Lansing General Hosp*, 430 Mich 473, 483; 424 NW2d 478 (1988). Second, this Court noted that the release of an agent from liability necessarily discharges the principal from vicarious liability. *Felsner, supra* at 568-569, citing *Theophelis, supra* at 491. Third, the Court ruled that a mediation judgment can operate as a release:

> Plaintiff also contends that the judgment entered pursuant to the mediation evaluation does not constitute a release, but is, instead, a covenant not to sue. This Court has held that acceptance of a mediation award is the equivalent of a consent judgment, and that a consent judgment operates as a release. The judgment entered pursuant to the mediation award in this case therefore constitutes a release. [*Felsner, supra* at 569-570 (citations omitted).]

In this case, plaintiff's argument that defendant was a joint tortfeasor is meritless. Defendant, the principal, was sued solely on a theory of vicarious liability with respect to the automobile negligence claim. Because defendant was not a joint tortfeasor, and the alleged agent, Hale, was released from liability through the mediation judgment, summary disposition was proper for defendant, pursuant to MCR 2.116(C)(7), on the automobile negligence claim.

On appeal, plaintiff argues that *Felsner* does not apply if Hale is an independent contractor. This argument is not preserved and is not properly supported. More importantly, plaintiff only alleged vicarious liability under one theory: that Hale was an employee and/or agent. Plaintiff made no allegations to support a claim that defendant could be liable if Hale was an independent contractor. The trial court properly failed to consider such a claim where it was never alleged and never argued before the trial court. Further, plaintiff never moved to amend his complaint to allege, in the alternative, such a claim or theory.

Finally, plaintiff argues that discovery was open at the time summary disposition was granted and, therefore, summary disposition was premature. Plaintiff fails to articulate how

further discovery would have benefited his case and also fails to offer how further discovery might have led to factual support for his positions. Therefore, his argument has no merit. *Village of Dimondale v Grable,* 240 Mich App 553, 566-567; 618 NW2d 23 (2000).

II

Plaintiff next argues that summary disposition pursuant to MCR 2.116(C)(8) on the premises liability claim was improper. The trial court ruled that plaintiff failed to state a premises liability claim because there were no allegations to support that he was an invitee on the premises and there were no allegations from which invitee status could reasonably be inferred. Further, the trial court determined that no factual development could justify recovery on a premises liability theory. In doing so, the trial court considered whether plaintiff could prevail if he was a licensee or trespasser. Plaintiff does not challenge that his premises liability claim fails if he is a licensee or trespasser. He only challenges the trial court ruling with regard to his invitee status.

> An "invitee" is "a person who enters upon the land of another upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make [it] safe for [the invitee's] reception." The landowner has a duty of care, not only to warn the invitee of any known dangers, but the additional obligation to also make the premises safe, which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards. Thus, an invitee is entitled to the highest level of protection under premises liability law. [*James v Alberts,* 464 Mich 12, 19-20; 626 NW2d 158 (2001) (citation omitted).]

Plaintiff's first amended complaint alleges that plaintiff was an invitee engaged in lawful picketing, and that he was a pedestrian engaged in lawful picketing. The facts alleged are insufficient to support the conclusion, or an inference, that plaintiff was an invitee. This Court was not required to accept as true plaintiff's conclusion that he was an invitee. A legal conclusion is not a well-pleaded fact. See *Landry v City of Detroit,* 143 Mich App 16, 21; 371 NW2d 466 (1985), rev'd in part on other grounds in *Hadfield v Oakland Co Drain Comm'n,* 430 Mich 139, 195-200; 422 NW2d 205 (1988). Because there was no well-pleaded factual allegation that plaintiff was an invitee, the premises liability claim, based on invitee status, was properly disposed of on summary disposition.

III

Plaintiff also argues that the trial court improperly instructed the jury with regard to the burden of proof. The trial court instructed the jury that plaintiff had the burden to prove, as part of his claim, that Hale was defendant's employee. Plaintiff concedes that this instruction was proper. Plaintiff argues, however, that it was improper for the trial court to rule that plaintiff had the burden of proof with respect to Hale's status as an independent contractor. This argument finds no support in the record. The trial court never made such a ruling and it never instructed the jury that plaintiff had the burden of proof with respect to Hale's independent contractor status.

We further disagree that the trial court should have instructed the jury that defendant had to prove that Hale was an independent contractor. While it is true that a defendant must prove its affirmative defenses, the defense that Hale was an independent contractor is not an affirmative defense that defendant needed to prove.

> An affirmative defense is a defense that does not controvert the establishment of the plaintiff's prima facie case, but otherwise denies relief to the plaintiff. "[A]n affirmative defense includes any defense that seeks to foreclose a plaintiff from continuing a civil action for reasons unrelated to the plaintiff's prima facie case." [*Harris v Vernier*, 242 Mich App 306, 329; 617 NW2d 764 (2000) (citations omitted).]

In any event, the jury found that Hale was an independent contractor and, in a separate finding, that defendant was not negligent in its supervision. Given the latter finding, we fail to see how the claimed instructional error could have been anything but harmless.

IV

Plaintiff next argues that the trial court made a prejudicial comment to the jury, stating that his counsel acted in an unprofessional manner. We review the trial court's conduct to determine if it denied plaintiff a fair and impartial hearing. *Lamson v Martin*, 216 Mich App 452, 457-458; 549 NW2d 878 (1996). We have reviewed the record and are convinced that the trial court's comment to the jury was justified based on plaintiff's failure to follow the trial court's rules and the fact that plaintiff's counsel intimated, in front of the jury, that defendant had withheld information from plaintiff. In any event, this very brief admonition in the course of a four-day trial was unlikely to have influenced the jury. Plaintiff was not denied a fair trial.

V

Plaintiff also argues that the jury's finding that Hale was an independent contractor is against the great weight of the evidence.

> When a party claims that a jury's verdict was against the great weight of the evidence, we may overturn that verdict "only when it was manifestly against the clear weight of the evidence." This Court will give substantial deference to a trial court's determination that the verdict is not against the great weight of the evidence. The trial court cannot substitute its judgment for that of the factfinder, and the jury's verdict should not be set aside if there is competent evidence to support it. This Court gives deference to the trial court's unique ability to judge the weight and credibility of the testimony and should not substitute its judgment for that of the jury unless the record reveals a miscarriage of justice. [*Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999) (citations omitted.]

In *Janice v Hondzinski*, 176 Mich App 49; 439 NW2d 276 (1989), a newspaper carrier was involved in an automobile accident with another driver. The plaintiff driver sued both the carrier and the newspaper. The defendant filed a motion for summary disposition, arguing that

the plaintiffs failed to establish a genuine issue of material fact about whether there was an employee-employer relationship. *Id.* at 52. The trial court agreed and this Court affirmed. *Id.* In doing so, the panel discussed several factors that preponderate in favor of finding independent contractor status as opposed to employee status. *Id.* at 53-55. Many of those factors existed in this case. Specifically, it was undisputed that Hale did not have to follow specific rules for delivering the papers. As long as he delivered a dry, readable paper on time, the means and manner of doing so were up to him.

It was also undisputed that, although defendant offered suggestions and provided envelopes that could be used to collect payment, there were no requirements that carriers like Hale comply with specific billing procedures, credit policies or booking methods. Carriers like Hale purchased the newspapers from defendant and resold them to their customers. While defendant owned the newspaper route and the customer lists, there was ample evidence to support the conclusion that it did not control the actions of the carrier with regard to delivery of the paper.

There was also evidence, which the jury could have found credible, that carriers like Hale had the right to deliver other publications at the same time they were delivering defendant's paper so long as the other items were not attached. There was no question that Hale was not included in defendant's benefit plans and did not get paid vacations. Hale and other carriers signed contracts that specified they were independent contractors. There was also some testimony that carriers could terminate delivery to customers without permission from defendant. The jury's verdict that Hale was an independent contractor was not manifestly against the clear weight of the evidence. *Ellsworth, supra*.

VI

Plaintiff also argues that the trial court erred in refusing to admit evidence of defendant's retroactive termination after the incident at issue. Plaintiff argued that it was relevant to the issue of bias or interest. It is clear from a review of the record that, while the trial court generally excluded the evidence of plaintiff's termination, it left open the possibility that the issue could be revisited at any time during trial if it became relevant with regard to a testifying witness. The issue was never revisited by plaintiff.

In *Powell v St John Hosp*, 241 Mich App 64, 72; 614 NW2d 666 (2000), this Court recognized that evidence showing bias or interest is admissible on the cross-examination of a witness, whose bias is being tested by the adverse party. The trial court in this case similarly recognized that evidence, which may be relevant to the particular bias of a witness, is not generally admissible at trial, but is admissible on a witness-specific basis for cross-examination purposes. The ruling in this regard was correct and since plaintiff never sought to introduce this evidence to show the bias of any particular witness, no error occurred.

VII

Plaintiff also argues that the trial court erred in denying his motion for a new trial based on the reasons set forth on appeal. Because we conclude that none of the issues raised on appeal warrants a new trial, it cannot be said that the trial court abused its discretion in denying plaintiff's motion for a new trial.

Affirmed.

/s/ Janet T. Neff
/s/ Kurtis T. Wilder
/s/ Jessica R. Cooper