

STATE OF MICHIGAN
COURT OF APPEALS

RUTH BURKE,

Plaintiff-Appellant,

v

AGEWELL HOMECARE, L.L.C., and
AGEMARK CORPORATION,

Defendants-Appellees.

UNPUBLISHED
February 15, 2005

No. 250998
St. Clair Circuit Court
LC No. 02-000817-CL

Before: Fort Hood, P.J., and Griffin and Donofrio, JJ.

PER CURIAM.

Following a jury trial, plaintiff was awarded judgment of \$75,000 on her claim against defendant Agewell Homecare, L.L.C. (Agewell), under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*, but the trial court directed a verdict of no cause of action in favor of defendant Agemark Corporation (Agemark). Plaintiff appeals as of right, challenging the directed verdict in favor of Agemark. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

We review *de novo* a trial court's grant of a directed verdict. *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 701; 644 NW2d 779 (2002). The evidence is viewed in a light most favorable to the nonmoving party, granting that party every reasonable inference and resolving any conflicts in the evidence in that party's favor. *Id.* at 702. "A directed verdict is appropriate only when no factual question exists on which reasonable jurors could differ."

The trial court directed a verdict in favor of Agemark based on its determination that Agemark was not plaintiff's employer for purposes of the WPA. In considering this issue, we decline to consider plaintiff's argument regarding defendants' answers to interrogatories. Our review is limited to the trial evidence. *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990). We also decline to consider plaintiff's claim that the trial court erroneously excluded Agemark's employee handbook. Plaintiff abandoned this evidentiary issue because it is not set forth in the statement of questions presented. MCR 7.212(C)(5); *Meagher v McNeely & Lincoln, Inc*, 212 Mich App 154, 156; 536 NW2d 851 (1995). Further, plaintiff has not identified the factual basis for her argument in the record, nor supported her argument with citations to supporting authority. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999); *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). Hence, our review is

limited to the trial court's grant of Agemark's directed verdict motion on the basis of the evidence admitted at trial.

The WPA provides that an "employer shall not discharge, threaten, or otherwise discriminate against an employee . . . because the employee . . . reports or is about to report, verbally or in writing, a violation or a suspected violation of a law. . . ." MCL 15.362. Although the trial court applied the economic reality test to determine whether Agemark was plaintiff's employer, we note that the WPA contains its own definitions of "employer" and "employee." "Employer" is defined as "a person who has 1 or more employees. Employer includes an agent of an employer and the state or a political subdivision of the state." MCL 15.361(b). "Employee" is defined as "a person who performs a service for wages or other remuneration under a contract of hire, written or oral, express or implied." MCL 15.361(a).

The parties do not address the statutory definitions, but instead focus on the economic reality test that was applied by the trial court in order to determine whether Agemark may be characterized as plaintiff's employer. For purposes of our review, therefore, we will assume that the Legislature intended that the economic reality test may be used to determine whether a person or entity is an employer for purposes of a WPA action. But see *Chilingirian v City of Fraser (On Remand)*, 200 Mich App 198, 199; 504 NW2d 1 (1993) ("*Chilingirian II*"). The economic reality test looks to the totality of the circumstances. Relevant factors are "(1) control of a worker's duties; (2) payment of wages; (3) right to hire, fire, and discipline, and (4) performance of the duties as an integral part of the employer's business toward the accomplishment of a common goal." *Chilingirian v City of Fraser*, 194 Mich App 65, 69; 486 NW2d 347 (1992), remanded 442 Mich 874 (1993) ("*Chilingirian I*").

Viewed most favorably to plaintiff, the evidence indicates that plaintiff's nursing duties at the Harrington Inn, an assisted living facility owned by Agemark, were subject to the control of Agewell's director of nursing, Carla Caughel, throughout her employment. Caughel hired, disciplined, and ultimately fired plaintiff. Plaintiff presented little evidence regarding Agewell's business practices, but documentary evidence indicated that one of plaintiff's paychecks was drawn on an Agewell account and that the related earnings statement identified Agewell as plaintiff's employer.

Although Marty Hug, the chief operating officer for Agemark, signed the paycheck and hired Caughel, Hug's mere relationship with both entities does not establish that Agemark controlled plaintiff's employment or paid plaintiff's wages. A person can be an agent for more than one principal. See *Vargo v Sauer*, 457 Mich 49, 68-69; 576 NW2d 656 (1998). Also, speculation and conjecture, i.e., "an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference," do not create a factual issue. *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993).

Finally, while the evidence showed some overlap between Agewell's and Agemark's goals, neither entity's operations depended solely on the other. Agewell provided nursing services both to residential clients at the Harrington Inn and to clients outside of that assisted living facility in the capacity of a home care agency. Similarly, Agemark owned the Harrington Inn, but did not require that its residents use Agewell's nursing services.

We find no evidentiary support for plaintiff's claim that Agewell was acting in the capacity of a labor broker when it had her provide nursing services to residents at the Harrington Inn. A labor broker provides personnel for temporary employment to its customers. *Farrell v Dearborn Mfg Co*, 416 Mich 267, 277; 330 NW2d 397 (1982). The labor broker and its customer have essentially a horizontal business relationship. See *Clark v United Technologies Automotive, Inc*, 459 Mich 681, 689-690; 594 NW2d 447 (1999).

The trial testimony of the various Agewell employees regarding Agemark's ownership of Agewell indicated what was essentially a vertical relationship between these business entities. Under this scenario, the economic reality test is applied to determine if the two entities should be treated as one entity. *Id.* at 691. The test provides, in effect, for equity to reverse-pierce the parent's corporate veil. *Id.* at 690-691. The fiction of distinct corporate entities is respected, unless doing so subverts the ends of justice. *Wells v Firestone Tire & Rubber Co*, 421 Mich 641, 650; 364 NW2d 670 (1984).

Viewing the evidence most favorably to plaintiff, we hold that plaintiff did not establish such integration in Agemark's and Agewell's operations that they should be treated as one entity for purposes of her WPA action. After reviewing the relevant factors as a whole, we conclude that plaintiff did not present evidence from which reasonable jurors could find that Agemark was plaintiff's employer under the economic reality test. *Chilingirian I, supra* at 69-70. Hence, the trial court correctly granted Agemark's motion for a directed verdict.

In passing, we note that we would reach the same result under the statutory definition of "employee" in MCL 15.361(a) because the only reasonable inference from the trial evidence is that plaintiff was under a contract of hire with Agewell. *Chilingirian II, supra* at 200; cf. *Hoste v Shanty Creek Management, Inc*, 459 Mich 561, 576; 592 NW2d 360 (1999). We decline to consider this issue further, however, because it is not briefed by plaintiff and, accordingly, may be deemed abandoned. *Prince, supra* at 197.

Affirmed.

/s/ Karen Fort Hood
/s/ Richard Allen Griffin
/s/ Pat M. Donofrio