STATE OF MICHIGAN

COURT OF APPEALS

HUGH W. HENDERSON and DARLENE HENDERSON,

Plaintiffs-Appellants,

v

ST. JOHN HOSPITAL CORPORATION, ST. JOHN HOSPITAL MEDICAL CENTER, ST. JOHN AMBULATORY CARE and FRANCIS M. WILSON, M.D.,

Defendants-Appellees.

UNPUBLISHED
April 1, 1997

No. 186166
Wayne Circuit Court
LC No. 92-232723-NO

Before: Sawyer, P.J., and Marilyn Kelly and D.A. Burress,* JJ.

PER CURIAM.

In this age discrimination in employment action, plaintiff[1] appeals as of right from an order granting defendants' motions for judgment notwithstanding the verdict and for a new trial. Plaintiff, a cardiologist with staff privileges at St. John Hospital, was dismissed from the EKG reading program conducted by defendants, and brought suit against defendants under the Elliott-Larsen Civil Rights Act. MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*. He alleged that defendants discriminated against him because of his age. After plaintiff obtained a favorable jury verdict, defendants moved for judgment notwithstanding the verdict and for a new trial. The trial court granted both motions. We affirm.

I

Plaintiff first argues that the trial court erred in granting judgment to defendants notwithstanding the verdict on the basis that plaintiff had failed to produce evidence from which the jury could conclude that he was an employee of defendants, not an independent contractor. We disagree. When reviewing the grant or denial of a judgment notwithstanding the verdict, this Court views all evidence in a light most favorable to the nonmoving party. We will uphold the jury's verdict if reasonable jurors could honestly have reached differing conclusions. *Severn v Sperry Corporation*, 212 Mich App 406, 412; 538

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* Circuit judge, sitting on the Court of Appeals by assignment.

NW2d 50 (1995). The question whether plaintiff was an employee or an independent contractor was separately submitted to the jury, which concluded that plaintiff was an employee of defendants.

This Court has ruled that the provision of the Elliott-Larsen Civil Rights Act which prohibits discrimination by employers on the basis of age applies to employees but not to independent contractors. MCL 37.2202; MSA 3.548(202), *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 553; 487 NW2d 499 (1992). See, also, *Falls v Sporting News Publishing Co*, 834 F2d 611, 613 (CA 6, 1987). In order to prevail, plaintiff was thus required to present evidence from which reasonable jurors could conclude that he was an employee of defendants.

The test for determining whether an individual is an employee is the economic reality test, in which courts look to the totality of the circumstances surrounding the work performed. *McCarthy v State Farm Ins Co*, 170 Mich App 451, 455; 428 NW2d 692 (1988). Factors to consider include: control of the worker's duties, payment of wages, authority to hire and fire, and responsibility for the maintenance of discipline. *Id.*

Based upon the evidence presented at trial in this case, we believe reasonable jurors could have reached only one conclusion--that plaintiff was an independent contractor. The evidence showed that plaintiff had an active, private medical practice, that he did not consider himself defendants' employee when he admitted patients to the hospital, that he also read EKGs at another hospital, that his income from the program was reported on Form 1099s, not W-2s, and that defendants withheld no Medicare or Social Security. The evidence also showed that plaintiff was not paid wages for reading the EKGs, devoted only twenty eight hours every ninth week to reading EKGs, and that at most his income from reading EKGs was approximately one-third of his total income. Viewed in the light most favorable to plaintiff, the evidence showed that plaintiff was an independent contractor, not an employee of defendants. The trial court properly granted judgment notwithstanding the verdict to defendants. Because we conclude that it was proper, we need not consider whether the trial court abused its discretion in granting defendants' motion for new trial.

II

Plaintiff also contends that he is entitled to a new trial, if judgment notwithstanding the verdict is upheld. He alleges that the trial court abused its discretion in refusing to permit him to amend his complaint and in refusing to give a special jury instruction he requested. We disagree. The additional theory which plaintiff sought to add to his complaint and present at trial is set forth in *Sibley Memorial Hosp v Wilson*, 160 US App DC 14; 488 F2d 1338, 1341 (1973). There, the Court ruled that an employer may not discriminate against a person under Title VII, the federal civil rights laws, by interfering with the person's employment opportunities with another employer. *Id.* Limiting or controlling an individual's access to the job market on the basis of his age or other similar category is prohibited. *Id.*

Although no Michigan cases have decided whether this theory applies to claims brought under Elliott-Larsen, we will so assume for purposes of this opinion. We conclude that the trial court did not abuse its discretion in denying the amendment and the corresponding instruction. A trial court may deny

leave to amend when the amendment would be futile. *Noyd v Claxton, Morgan, Flockhart & VanLiere*, 186 Mich App 333, 340; 463 NW2d 268 (1990).

Plaintiff never alleged, nor presented evidence that defendants discriminated against him in a manner which prevented him from obtaining work elsewhere. Indeed, plaintiff continued to actively conduct his private medical practice after he was terminated from the EKG reading program, and continued to read EKGs at another hospital at the time of trial. Thus, amending his complaint to add this theory would have been futile, and the trial court did not abuse its discretion in denying plaintiff leave to amend. Similarly, the trial court did not err by refusing to instruct the jury on this theory, since giving a jury instruction on an issue not supported by the evidence or pleadings is erroneous. *Murdock v Higgins*, 208 Mich App 210, 218; 527 NW2d 1 (1994), aff'd ___ Mich App ___ issued 3/7/97.

Affirmed. Defendants being the prevailing party, they may tax costs pursuant to MCR 7.219.

/s/ David H. Sawyer
/s/ Marilyn Kelly
/s/ Daniel A. Burress

[1]Because plaintiff Darlene Henderson's claim is solely a derivative one for loss of consortium, we will use "plaintiff" in the singular to refer to Hugh W. Henderson.