STATE OF MICHIGAN

COURT OF APPEALS

ERIC DON REBANT,

Plaintiff-Appellant,

v

MICHIGAN RUBBER PRODUCTS, INC., DESMA WERKE, KLOCKNER FERROMATIK DESMA, ABC CORPORATION, and DEF CORPORATION,

Defendants-Appellees.

UNPUBLISHED
October 27, 1998

No. 201635
Wexford Circuit Court
LC No. 94-011061 NP

Before: Talbot, P.J., and McDonald and Neff, JJ.

PER CURIAM.

In this products liability action, plaintiff appeals as of right from a judgment of no cause of action based on a jury's finding that defendants, Desma Werke and Klockner Ferromatik Desma ("Desma"), were not negligent. Plaintiff also challenges a partial grant of summary disposition in favor of defendant Michigan Rubber Products, Inc. ("Michigan Rubber"), based on the exclusive remedy provision of the Worker's Disability Compensation Act ("WDCA"), MCL 418.131(1); MSA 17.237(131)(1). We affirm.

I

Plaintiff was assigned to work at a Michigan Rubber facility by a labor broker, Western Temporary Services, and was thereafter injured while operating a rubber injection molding machine manufactured by Desma. Plaintiff's sole claim on appeal with regard to Michigan Rubber is that the trial court erred in granting Michigan Rubber's motion for summary disposition.

Although Michigan Rubber's motion was based on MCR 2.116(C)(8) and (10), we will treat the motion as having been brought under the proper rule, MCR 2.116(C)(4) (lack of subject matter jurisdiction), because there is no indication that either party was prejudiced by the labeling of the motion. Applying a de novo standard of review, we must determine, from an examination of the pleadings and the proofs submitted to the trial court, whether Michigan Rubber was entitled to judgment as a matter of law. See *Faulkner v Flowers*, 206 Mich App 562, 564; 522 NW2d 700 (1994).

The test of whether plaintiff was an employee of Michigan Rubber for purposes of the exclusive remedy provision of the WCDA, where plaintiff was also an employee of a labor broker, turns on the economic reality test and, ultimately, the totality of the employment circumstances. *Kidder v Miller-Davis Co*, 455 Mich 25, 42-46; 564 NW2d 872 (1997). In applying these legal tests to the facts of this case, the trial court concluded that only one reasonable inference could be drawn; plaintiff was an employee of both the labor broker and Michigan Rubber. We agree.

Although no one factor is controlling, the economic reality of the situation supporting the finding that Michigan Rubber was plaintiff's employer is clear from the record. For example, Michigan Rubber had control over the work assigned to plaintiff at its facility, control over whether to end plaintiff's assignment at Michigan Rubber in the event of misconduct, and supervised plaintiff's work at its facility. With regard to the payment of wages, although actual payment to plaintiff was made by the labor broker, the funds were provided by Michigan Rubber. There was also evidence of shared duties between the labor broker and Michigan Rubber with regard to the right to hire, fire and discipline plaintiff. Further, the labor-broker customer relationship presumed a common objective, thus indicating a dual employer situation. See *id.* at 45.

Plaintiff relies on Michigan Rubber's admission that it did not have a policy of insurance to cover payment of medical or wage loss benefits to plaintiff in connection with this accident. However, who wrote the checks for worker's compensation insurance premiums is not dispositive of the employer-employee relationship. *Id.*, *Farrell v Dearborn Mfg Co*, 416 Mich 267; 330 NW2d 397 (1982); *Renfroe v Higgins Rack Coating & Mfg Co, Inc*, 17 Mich App 259; 169 NW2d 326 (1969). We conclude, as did the trial court, that plaintiff's products liability claim was barred by MCL 418.131(1); MSA 17.237(131)(1), and that Michigan Rubber was entitled to judgment as a matter of law.

II

Plaintiff next raises several issues concerning the judgment of no cause of action entered by the trial court based on the jury's finding that Desma was not negligent. Relying on MRE 702, plaintiff first argues that the trial court erred when it excluded certain deposition testimony of a Desma employee, Harold Boese, who was also called to testify at trial by the plaintiff. However, the question whether a witness is qualified to give expert testimony pursuant to MRE 702 is separate and distinct from the issue whether, pursuant to MRE 801(d)(2)(D), a witness' prior out-of-court statement may be introduced as a party admission.

The record indicates that plaintiff's attorney proffered the deposition testimony as a party admission, but that the trial court excluded the evidence because the deposition testimony did not satisfy the requirement in MRE 801(d)(2)(D) that the statement be "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment . . . ." Because plaintiff has not addressed the basis for the trial court's evidentiary ruling, a matter which necessarily must be reached, we conclude that this issue affords plaintiff no basis for relief. *Roberts & Son Contracting, Inc v North Oakland Development Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987).

III

Plaintiff next contends that the trial court erred in refusing to charge the jury in accordance with SJI2d 6.01 where Desma failed to introduce evidence of a foam model of the machine prepared by Desma's expert witness. We conclude that this issue is not properly before this Court because it is insufficiently briefed. *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984). Regardless, we note that the model would not have constituted independent evidence of negligence, although such evidence may be admissible as a testimonial aid. See *Finch v W R Roach Co*, 295 Mich 589, 595-596; 295 NW 324 (1940). See also *People v Castillo*, 230 Mich App 442 ; ___ NW2d ___ (1998) (demonstrative evidence may be admissible to aid factfinder but, like all evidence, must satisfy relevancy requirements under MRE 401 to 403).

Furthermore, the record reflects that the foam model was located outside of the courtroom during the expert's testimony. Plaintiff's attorney's response to the trial court's inquiry on whether "[e]ventually you're going to want that model brought out here," was that, "I'd like to see that done, but it's their model, if they don't want to do it, that's fine." Notwithstanding this response, plaintiff's attorney later sought an instruction permitting an adverse inference under SJI2d 6.01 for Desma's failure to have the foam model brought into the courtroom. Given this record and the arguments presented to the trial court, we do not find that the trial court abused its discretion in refusing to give the adverse inference instruction, which requires, among other things, that "the evidence would have been material, not merely cumulative, and not equally available to the opposite party." See use note to SJI2d 6.01.

IV

Plaintiff next contends that the trial court erred when it refused to charge the jury in accordance with SJI2d 6.01 as a result of Desma's failure to call a designer or designers of the machine as witnesses at trial. The trial court refused to give the instruction on the ground that plaintiff had the right to subpoena the designers. We are not persuaded that plaintiff has demonstrated that the trial court's ruling was an abuse of discretion. See *Urban v Public Bank*, 365 Mich 279, 287; 112 NW2d 444 (1961).

V

Plaintiff next contends that the trial court erred in granting a directed verdict on his assumption of duty theory of negligence and, in particular, on his claim that Desma assumed a duty to warn Michigan Rubber about safety-related issues after the delivery of the machine in question. We disagree.

Both the scope of an undertaking and the nature of the relationship are relevant factors in determining if there is a duty. *Callesen v Grand Trunk W R Co*, 175 Mich App 252, 267; 437 NW2d 372 (1989). Having considered this issue de novo, *Allen v Owens-Corning Fiberglass Corp*, 225 Mich App 397, 406; 571 NW2d 530 (1997), we hold that reasonable minds could not find that Desma agreed or intended to perform safety inspection services for Michigan Rubber's benefit so as to impose upon Desma a legally recognized duty to identify and warn Michigan Rubber about the hazards of its own modifications, such as the placement of steps by the

machine). *Gregory v Cincinnati, Inc*, 450 Mich 1, 25-28; 538 NW2d 325 (1995); *Smith v Allendale Mutual Ins Co*, 410 Mich 685; 303 NW2d 702 (1981). Accordingly, the trial court did not err in granting a directed verdict on this negligence theory.

VI

Plaintiff next contends that the trial court erred in determining whether the verdict was against the great weight of the evidence when denying his motion for new trial. We note that plaintiff presented two design theories of negligence for the jury's consideration, one based on the failure to warn and the other based on the theory that the design chosen rendered the product defective, that is, "not reasonably safe for its foreseeable uses." *Ghrist v Chrysler Corp*, 451 Mich 242, 249; 547 NW2d 272 (1996), *Gregory, supra* at 11-13. Treating plaintiff's argument as one involving the weight of the evidence on the defective product theory, we find that the trial court did not abuse its discretion in denying plaintiff's motion for new trial. MCR 2.611(A)(1)(e); *Severn v Sperry Corp*, 212 Mich App 406, 412; 538 NW2d 50 (1995).

VII

Finally, plaintiff contends that the trial court erred in determining whether there was juror misconduct. We decline to address this issue because it lacks citation to any supporting authority. *Goolsby, supra* at n 1.

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

/s/ Michael J. Talbot
/s/ Gary R. McDonald
/s/ Janet T. Neff