S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

RICKY REED, Plaintiff-Counterdefendant-Appellee,	UNPUBLISHED June 8, 2004
v	No. 236588 Wayne Circuit Court
LINDA SUSAN YACKELL, Defendant/Cross-Defendant,	LC No. 98-839576-NI ON REMAND
and BUDDY LEE HADLEY, GERALD MICHAEL HERSKOVITZ, and MR. FOOD, INC., Defendants/Counterplaintiffs, Cross-Plaintiffs-Appellants.	

Before: Murphy, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

This case returns to us on remand from our Supreme Court after that Court vacated our earlier opinion[1] and remanded the case to the trial court for further findings of fact regarding whether plaintiff was an employee of defendants at the time his injuries were incurred. The trial court issued a lengthy opinion on remand finding, as we did in our original opinion, that plaintiff was not an employee for purposes of the Worker's Disability Compensation Act (hereinafter WDCA), MCL 418.161(1) (l) and (n). The current remand to us from our Supreme Court is for reconsideration of the employment status issue. For the most part, we adopt our earlier opinion and affirm the trial court.

[1] *Reed v Yackell*, unpublished opinion of the Court of Appeals, entered February 14, 2003 (Docket No. 236588).

I

Defendants/counterplaintiffs/cross-plaintiffs, Buddy Lee Hadley, Gerald Michael Herskovitz, and Mr. Food, Inc. (hereinafter defendants), appeal as of right a judgment[2] for plaintiff/counterdefendant Ricky Reed, and against all defendants for damages in the amount of $1,256,320. We affirm.

II

This appeal arises out of an automobile accident. Herskovitz is the owner of Mr. Food, a retail meat market. Hadley was driving Mr. Food's cargo van, delivering meat products in the course and scope of his employment as an employee of Mr. Food. Plaintiff, a former employee of Mr. Food who had been fired five months earlier, was riding in the passenger seat. Yackell lost control of her vehicle and entered an intersection through a red light. Because Hadley was driving while looking at some bills relating to his deliveries, he did not stop the cargo van in time to avoid a collision with Yackell. Upon impact plaintiff's head struck the cargo van's windshield and he temporarily lost consciousness. Hadley drove plaintiff to the Detroit Receiving Hospital emergency room. Plaintiff was released from the emergency room with bandages on his head and knee, but subsequent visits to several doctors and a rehabilitation clinic revealed that plaintiff had sustained a closed head injury as a result of the accident.

Plaintiff filed a complaint alleging negligence against the drivers, Yackell and Hadley, against Herskovitz pursuant to the owner's liability statute, MCL 257.401, and against Mr. Food under the theory of respondeat superior. At the close of plaintiff's proofs, defendants' motion for directed verdict was denied. The jury returned a unanimous verdict for plaintiff and awarded him $1,256,320, finding Yackell sixty percent at fault, and defendants forty percent at fault. Defendants' motion for judgment notwithstanding the verdict, a new trial, and/or remittitur, was denied. Defendants filed a counterclaim against plaintiff, and a cross-claim against Yackell, which were both dismissed.

III

Defendants first argue that plaintiff was an employee of Mr. Food as a matter of law under the statutory definition of "employee" in the WDCA. Defendants contend that because plaintiff was an employee of Mr. Food at the time of the accident, the WDCA is plaintiff's exclusive remedy, and therefore the court lacked subject matter jurisdiction to hear the case and defendants' motion for directed verdict should have been granted. We disagree.

Both plaintiff and Hadley were deposed before trial as was defendant Herskovitz. However, the issue of plaintiff's claimed status as an employee of Mr. Food was not raised until defendants' motion for directed verdict. At trial, Herskovitz was not questioned at all about the claimed employment status of plaintiff at the time of the accident. The trial examination of

[2] The final order in this case for purposes of appellate jurisdiction actually disposed of defendants' cross-claim against Linda Yackell. This appeal, however, deals only with the earlier judgment on the jury's verdict in plaintiff's favor.

plaintiff[3] and Hadley regarding the claimed employment status of plaintiff was quite brief, as was the argument on this issue during defendants' motion for directed verdict in which the matter was treated in a merely perfunctory manner with minimal discussion of the facts in support of the claim and no citation to authority.

The opinion of the trial court on remand notes that the opposing parties relied on essentially the same trial testimony in support of their divergent positions and that it presided over the trial and observed the demeanor of the witnesses who testified. The trial court went on to recite the pertinent testimony regarding plaintiff's status at the time of the accident, noting that defendants and plaintiff "all agreed, at the time of trial, that plaintiff was not an employee of Mr. Food on the date of the accident." The trial court analyzed the testimony in the context of the WDCA and applicable case law and concluded that plaintiff was not an employee as that term is defined in the WDCA. We agree with the trial court's conclusion, but not all of its reasoning.

A

An appellate court reviews de novo the trial court's grant or denial of a directed verdict. *Hord v ERIM*, 228 Mich App 638, 641; 579 NW2d 133 (1998), rev'd on other grounds 463 Mich 399; 617 NW2d 543 (2000). The interpretation or construction of a statute is a question of law and this Court reviews questions of law de novo. *Christiansen v Gerrish Twp*, 239 Mich App 380, 384; 608 NW2d 83 (2000). The existence of an employment relationship is a question of law for the court to decide if the evidence is reasonably susceptible of only one inference. *Clark v United Technologies Automotive, Inc*, 459 Mich 681, 694; 594 NW2d 447 (1999). If evidence of an employee's status is disputed or if conflicting inferences may reasonably be drawn from the known facts, the issue is one for the trier of fact. *Id.*

B

The issue is whether plaintiff was an independent contractor or an employee. The WDCA defines "employee" in MCL 418.161(1) subsection (l) as:

> Every person in the service of another, under any contract of hire, express or implied . . . .

[3] On cross-examination by defense counsel for defendants, plaintiff replied "No" when asked if he was "employed with Mr. Food" and when counsel went on to ask, "So, you were unemployed at the time of the accident, weren't you?" Plaintiff answered, "Yes. I was unemployed at the time of the accident." Defense counsel did not challenge plaintiff's assertions in this regard. Later, on cross-examination by counsel for defendant Yackell, plaintiff was asked how he was supporting himself between the time he was fired by Mr. Food and the time of the accident, about five months. Plaintiff replied that he was painting houses, mostly for relatives. Plaintiff's testimony went unrebutted.

Under subsection (n) "employee" is defined as:

> Every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury, if the person in relation to this service does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer subject to this act.

Under subsection (n) a person is not an "employee," (but is an independent contractor) if: (1) he maintains a separate business in relation to the service, (2) he holds himself out to and renders service to the public in relation to the service, or (3) he is an employer subject to the worker's compensation statute in relation to the service. *Luster v Five Star Carpet Installations, Inc*, 239 Mich App 719, 725; 609 NW2d 859 (2000).[4] All three conditions of the subsection must be met to satisfy a finding that an individual is an employee. *Id.*

The determination of whether an individual is an employee or an independent contractor has historically focused on the common-law-derived economic realities test. *Hoste v Shanty Creek Management, Inc*, 459 Mich 561, 571-572; 592 NW2d 360 (1999). This test considers the totality of the circumstances surrounding the performed work, including: (1) control of the worker's duties; (2) the payment of wages; (3) the right to hire, fire and discipline; and (4) the performance of the duties as an integral part of the employer's business toward the accomplishment of a common goal. All these factors are viewed as a whole, and no one factor is controlling. *Clark, supra*, pp 688-689;

To the extent that the economic realities test is inconsistent with this statutory definition of "employee," it is obsolete. *Luster, supra*, pp 726-727. Case law development of the economic realities test factors that are still valid under the statutory definition may be considered in determining whether a person meets the statutory definition. *Id.*, p 726. If a person qualifies as an employee under the WDCA, the right to the recovery of benefits under the act is the employee's exclusive remedy against the employer. *Clark, supra*, p 687; *Hoste, supra*, p 570.

C

First, under subsection (l) defendants correctly contend that at the time of the accident plaintiff was in the service of Mr. Food and its owner Herskovitz, assisting Hadley with his deliveries under an implied or express contract of hire. To the extent that the trial court on remand concluded otherwise, we disagree. An implied contract existed because an implied contract is formed "when services are performed by one who at the time expects compensation from another who expects at the time to pay therefor." *In re McKim Estate*, 238 Mich App 453, 458; 606 NW2d 30 (1999).

[4] This case cites MCL 418.161(1)(b) and (d) as the relevant subsections because it was a pre-1994 case. With the statutory amendments of 1994, the subsections are (l) and (n), respectively.

In the present case, on the day of the accident plaintiff was expecting compensation for his services, and Herskovitz, via the actions of his employee, Hadley, was expecting to pay for plaintiff's services, as he had done three to five times in the past. Thus, an implied contract existed between plaintiff and Herskovitz. Plaintiff did not assist Hadley gratuitously, but rather expected to be paid for his services on the day of the accident. Therefore, plaintiff qualifies under MCL 418.161(l) as a "person in the service of another, under any contract of hire, express or implied."

However, MCL 418.161(l) and (n) must be read together as separate and necessary qualifications in establishing employee status. *Hoste, supra*, p 573.[5] Thus, an individual claiming employee status under subsection (l) must also be examined under subsection (n). An examination of plaintiff's employment status under subsection (n) in conjunction with the relevant economic realities test factors indicates that plaintiff was not an employee for the purpose of the exclusive remedy provision.

In *Luster, supra*, the plaintiff was paid by each yard of carpet he installed, received no fringe benefits, and the defendant did not withhold taxes from the plaintiff's payments. The defendant provided the carpet, padding and edge strips, and the plaintiff rented his supplies from the defendant. The plaintiff was given minimal direction, and had discretion to hire a helper of his choosing, whom he paid directly out of his own pay. *Id*., p 722. The court found that the plaintiff was an independent contractor, and not an employee of the defendant. *Id.*, p 727. The present case is similar to *Luster* in that plaintiff was paid for each individual time he assisted with deliveries, three to five times over a five-month period. He also received no fringe benefits, was paid in cash, and taxes were not withheld from the payments. Defendants provided the delivery van and the meat products and controlled what deliveries were made. Plaintiff assisted Hadley only when he was available to and each time he did so, he made a separate agreement with Hadley, was paid separately, and always retained the option of accepting or rejecting the offer to assist. See also *McKissic v Bodine,* 42 Mich App 203; 201 NW2d 333 (1972).

Plaintiff's assistance on three to five occasions over a five-month period cannot be viewed as "an integral part" of Mr. Food's business. Further, plaintiff only received between $35 and $40 dollars each time he assisted Hadley, and thus he could not have "primarily" depended upon that payment for a living. *Id.* Plaintiff held himself out to the public as one who could perform general labor in exchange for payment, as he had assisted Hadley delivering meat products on a few occasions, and painted houses for his relatives. Thus, under the economic realities criteria, plaintiff was an independent contractor.

Although at the time of the accident plaintiff might have qualified as an employee under MCL 418.161(l)(l) as one who was "in the service of another, under any contract of hire, express or implied," the undisputed evidence is that plaintiff "held himself out to and rendered service to the public" under MCL 418.161(n). Therefore, the trial court properly concluded[6] that plaintiff was not Mr. Food's employee at the time of the accident and that the WDCA is not plaintiff's

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[5] The same citation designations occur in *Hoste* as occurred in *Luster*.

[6] Both in its ruling on the defendants' motion for directed verdict and on remand from our Supreme Court.

exclusive remedy. Defendant's directed verdict motion was correctly denied and the trial court's findings of fact on remand are correct.

IV

Next, defendants argue that plaintiff did not meet the statutory requirement under MCL 500.3135(2)(ii) for demonstrating traumatic brain injury (hereinafter TBI), because two expert witnesses did not qualify as allopathic or osteopathic physicians, and a third expert witness was an allopathic physician, but did not testify that he "regularly diagnoses or treats closed head injuries." We disagree.

Interpretation of a statute is a question of law, and this Court reviews questions of law de novo. *Vugterveen Systems, Inc v Olde Millpond Corp*, 210 Mich App 34, 39; 533 NW2d 320 (1995), vacated in part on other grounds 454 Mich 119; 560 NW2d 43 (1997). When interpreting a statute, courts must presume that the Legislature has intended the meaning it plainly expressed and if the plain and ordinary meaning of the language is clear, judicial construction is neither necessary nor permitted. *Amerisure Ins Companies v Time Auto Transp, Inc*, 196 Mich App 569, 574; 493 NW2d 482 (1992).

MCL 500.3135(2)(a) provides:

> The issues of whether an injured person has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds either of the following:
>
> * * *
>
> (ii) [F]or a closed head injury, a question of fact for the jury is created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries testifies under oath that there may be a serious neurological injury.

Defendants argue that plaintiff's expert witnesses did not meet this threshold requirement because two of plaintiff's expert witnesses at trial, Dr. Sewick and Dr. Blase, do not qualify as allopathic or osteopathic physicians, and although the third expert, Dr. Gunabalan, is an allopathic physician, he did not testify that he "regularly diagnoses or treats closed-head injuries."

It is true that Dr. Sewick and Dr. Blase are not allopathic nor osteopathic physicians. Dr. Gunabalan's credentials, however, do qualify him to testify under the plain language of the statute. Dr. Gunabalan is an allopathic physician, board certified in nuclear medicine and board-eligible in internal medicine. Nuclear medicine involves the use of radioactive materials and specialized instruments to diagnose a variety of disorders, including those of the brain. When he examined plaintiff, Dr. Gunabalan was the director of a clinic called "Preferred Medicine," and supervisor of all the operations in the clinic.

Dr. Gunabalan testified that he has treated "several" closed head injuries since graduating from medical school. He stated that he specializes in patients such as plaintiff, where there is injury to the body as well as the head, and has been doing so for twenty-some years. In diagnosing plaintiff's brain injury, Dr. Gunabalan relied upon the SPECT scan, and concurring neuropsychological evaluations provided by Dr. Sewick and Dr. Blase, and he further testified that in the regular course of his practice, he would rely on the results of a neuropsychological evaluation. Thus he is qualified under MCL 500.3135(2)(a)(ii) for demonstrating TBI because his specialty involves diagnosing a variety of disorders, including those of the brain, he has treated closed head injuries during his practice over twenty-some years, and in the regular course of his practice, he relies on neuropsychological evaluations in diagnosing closed head injuries.

V

Defendants argue next that the trial court abused its discretion in allowing Dr. Blase to testify as a rebuttal witness. We disagree.

A trial court's decision regarding rebuttal witnesses is reviewed for an abuse of discretion. *Taylor v Blue Cross/Blue Shield of Michigan*, 205 Mich App 644, 655; 517 NW2d 864 (1994). The trial court may exercise its discretion to allow a witness to testify at trial whose name does not appear on the offering party's witness list. Unless a clear abuse thereof is shown, the trial court's ruling must stand. *Jamison v Lloyd*, 51 Mich App 570, 574-575; 215 NW2d 763 (1974); *Coles v Galloway*, 7 Mich App 93, 101; 151 NW2d 229 (1967).

A

Defendants first contend that plaintiff made and then withdrew his representation that Dr. Blase was a treating physician. When the trial court asked plaintiff's counsel if Dr. Blase was a treating physician, he replied "absolutely." The trial court found that because Dr. Blase was a treating physician, and defendants' counsel should have addressed this matter before they signed the final joint pretrial order containing Dr. Blase's name as a "may call" witness, the trial court would not preclude him from testifying.

Defendants argue that plaintiff's counsel subsequently stated, "Here's the problem. Dr. Blase has never treated Ricky Reed," seemingly withdrawing the representation he made earlier. However, the rest of the discussion demonstrates that plaintiff's counsel was attempting to explain to the court that Dr. Blase was part of the rehabilitation facility that was originally treating plaintiff. Plaintiff's counsel stated that Dr. Blase did a neuropsychological exam of plaintiff at the request of Dr. Klein at the Rehabilitation Centers of Michigan, and Dr. Klein, as well as the rehabilitation center did "treat" plaintiff.

B

Next, defendants argue that plaintiff failed to timely disclose his intent to call Dr. Blase as an expert witness. The purpose of witness lists is to avoid trial by surprise. *Grubor Enterprises, Inc v Kortidis*, 201 Mich App 625, 628; 506 NW2d 614 (1993).

Defendants assert that their case is analogous to that of *Beach v State Farm Mut Automobile Ins Co*, 216 Mich App 612; 550 NW2d 580 (1996). The plaintiff in *Beach* had listed the expert witness, truthfully answered that there was no report at the time the interrogatories were served, but later failed to supplement the answers to the interrogatories. The trial court allowed plaintiff's medical witness to testify when plaintiff had not provided a copy of the witness's report until one business day before the trial. *Id.*, pp 618-619. First, the Court in *Beach* noted that MCR 2.302(E)(1)(a)(ii) imposes an "affirmative responsibility" on plaintiff to supplement the responses to the interrogatories. *Id.*, p 619. Second, this Court held that the trial court abused its discretion by not imposing sanctions, among them "the exclusion of the expert's testimony at trial," and the case was remanded. *Id.*, pp 619-620.

However, *Beach* differs from the present case because in *Beach*, this Court believed that plaintiff's counsel may have willfully withheld the expert witness evaluation report, as he had evaluated plaintiff several months before the report was issued. *Id.*, p 620. We harbor no such suspicion in this case.

Here, Dr. Blase only saw plaintiff thirteen days before the trial, and his report was prepared only nine days before trial. There is no evidence on the record that plaintiff was willfully withholding his report, as plaintiff's counsel asserted that he too did not have the report on the second day of trial, and he delivered the report to defendants' counsel shortly after it was in his possession.

Furthermore, plaintiff named the following witnesses on his June 11, 1999, witness list: "all treating health professionals and treatment facilities involved in the care, treatment, and rehabilitation of plaintiff, including but not limited to . . . Rehabilitation Centers of Michigan, Inc." Dr Blase clearly fits into this category. In paragraph fifteen of plaintiff's witness list, plaintiff reserved the right to supplement the witness list as new or different information came to light in the course of continuing the investigation of this matter. This is sufficient notice for a witness who falls within the named category. *Van Every v Southeastern Michigan Transp Authority*, 142 Mich App 256, 262; 369 NW2d 875 (1985).

It is true that plaintiff did not supplement his interrogatories with Dr. Blase's name, however, plaintiff specifically listed Dr. Blase as an expert that may testify at trial in the final joint pretrial order prepared more than seven months before trial. It was prepared by plaintiff in March 2000, and advised defendants of Dr Blase's identity as an expert witness who may testify at trial. Defendants' counsel signed and consented to the final joint pretrial order.

C

Defendants also contend that the trial court's advance approval of Dr. Blase as a rebuttal witness was an abuse of discretion because discretion requires weighing various considerations and in this case the considerations from defendants' evidence had not yet been presented. However, either party is entitled to introduce evidence to rebut that of his adversary and any competent evidence counteracting or disproving the other party's proof is proper rebuttal. *Arnold v Ellis*, 5 Mich App 101, 114; 145 NW2d 822 (1966). Plaintiff's exhibit list specifically provides for "Any and all rebuttal and/or contradictory evidence, exhibits, including video, documents and photographs as necessary."

D

Finally, defendants argue that Dr. Blase's rebuttal testimony was not a rebuttal at all, but rather was corroborative testimony. Rebuttal evidence is evidence that explains, contradicts or otherwise refutes a defendant's evidence. Its purpose is to undercut the defendant's case and not merely to confirm that of the plaintiff. *Sullivan Industries, Inc v Double Seal Glass Co*, 192 Mich App 333, 348; 480 NW2d 623 (1991).

Although he offered substantively similar testimony as Dr. Sewick, Dr. Blase's significant testimony was commentary on and criticism of the testimony of Yackell's hired expert, Dr. Liethen. Dr. Blase explained that the computer program used by Dr. Liethen reviewed the test scores and placed a pound sign next to a score that fell within the "impaired" range. Dr. Blase testified that the overall score on Dr. Liethen's test was solidly within the moderate range of impairment and there was no question that Dr. Liethen's results demonstrated that plaintiff had TBI. Therefore, Dr. Blase's testimony was in fact rebuttal testimony.

In short, Dr. Blasé treated plaintiff and he was specifically identified in a pretrial order consented to by defendants seven months before trial, so his disclosure and plaintiff's intent to call him as an expert were timely. Moreover, his testimony rebutted that of defendants' expert, Dr. Liethen. The trial court did not abuse its discretion in allowing Dr. Blasé to testify as a rebuttal witness.

VI

Defendants next assert that the verdict was excessive and remittitur should have been granted because plaintiff's emergency room records should have been considered and the amount awarded to plaintiff, $1,256,320, is itself a basis for remittitur. We disagree.

The question of the excessiveness of a jury verdict is generally one for the trial court in the first instance. An appellate court must accord due deference to the trial court's decision and may only disturb a grant or denial of remittitur if an abuse of discretion is shown. *Palenkas v Beaumont Hosp*, 432 Mich 527, 531; 443 NW2d 354, 355 (1989). Courts are reluctant to disturb a jury verdict for personal injuries on the ground that the amount is excessive. *McKay v Hargis*, 351 Mich 409, 419; 88 NW2d 456 (1958). A trial court's order of remittitur is governed by MCR 2.611(E)(1). In *Palenkas*, our Supreme Court found that the express language of the court rule demonstrates that remittitur is justified if the jury verdict is "excessive," i.e., if the amount awarded is greater than "the highest amount the evidence will support."

Defendants argue that the trial court should have considered the following information in considering remittitur. Plaintiff's emergency room records indicate that plaintiff sustained a bump to his forehead, hit his left arm, and complained of mild left arm pain and a small abrasion to his right knee. The records also indicate that plaintiff was "Oriented to time, place and person. Recent and remote memory intact. Normal judgment, insight, mood and affect." Under the final diagnoses, the record reads "Left arm contusion."

However, the extensive medical evidence offered at trial, and the effects of the injury on plaintiff, support the verdict in this case. Dr. Gunabalan, Dr. Klein, Dr. Silverman, Dr. Sewick, and Dr. Blase all concurred that plaintiff suffered from TBI. The only doctor to testify that plaintiff suffered no brain injury was Dr. Liethen, who was also the only non-board-certified neuropsychologist to testify. Both the SPECT scan and the Halstead-Reitan test battery were consistent with TBI. Dr. Gunabalan stated that the SPECT scan is a very definitive diagnostic test in imaging, and that he relies on the Halstead-Reitan test battery in the regular course of his practice.

After reviewing plaintiff's SPECT scan results, Dr. Gunabalan explained that as a result of the TBI, plaintiff is unable to maintain concentration, may be unable to remember things that happened only an hour earlier, and cannot be given a job or task with any real expectation that he will complete it. Furthermore, he testified that the dizziness, loss of memory capacity and confusion suffered by plaintiff are directly related to the collision, and these areas of brain dysfunction are highly significant and permanent in nature, leaving plaintiff unable to perform tasks or resume activities that he could perform before the accident occurred.

After reviewing the results of plaintiff's Halstead-Reitan neuropsychological test, Dr. Sewick reported that plaintiff had cerebral impairment in areas of smell, attention capacity, complex information processing, novel problem solving, and emotional functions. He also found plaintiff to be depressed, defensive, and suffering from personality changes and chronic fatigue. He testified that TBI patients are unable to direct and guide their behavior, they are less spontaneous, less driven, and less able to follow through on plans. Furthermore, they have difficulty maintaining employment, in solving simple but new problems during work, and maintaining attention. He asserted that they suffer from changes in personality, a reduced efficiency in living, and a diminished capacity to be productive in life. Thus, the evidence of plaintiff's TBI and the effects thereof supports the verdict in this case.

Affirmed.

/s/ William B. Murphy
/s/ Mark J. Cavanagh
/s/ Janet T. Neff