STATE OF MICHIGAN

COURT OF APPEALS

JAMES D. ELDER, JR.,

Plaintiff/Counter-Defendant-Appellant,

V

MIKE DORIAN FORD, INC.,

Defendant/Counter-Plaintiff-Appellee,

and

MICHAEL V. DORIAN, SR. and MICHAEL V. DORIAN, JR.,

Defendants-Appellees.

UNPUBLISHED
November 16, 2004

No. 244530
Oakland Circuit Court
LC No. 01-030534-CK

JAMES D. ELDER, JR.,

Plaintiff/Counter-Defendant-Appellee/Cross-Appellant,

V

MIKE DORIAN FORD, INC.,

Defendant/Counter-Plaintiff-Appellant/Cross-Appellee,

and

MICHAEL DORIAN, SR., and MICHAEL DORIAN, JR.,

Defendants.

No. 244798
Oakland Circuit Court
LC No. 01-030534-CK

Before: Markey, P.J., and Wilder and Meter, JJ.

WILDER, J, *dissenting*.

I respectfully dissent. I would vacate the verdict and remand for trial on the basis that the trial court reversibly erred by failing to permit the jury to determine whether plaintiff's contract with defendants was at will or for just cause.

Defendants contend on appeal that the trial court erred by finding as a matter of law that plaintiff and defendants had entered into a just cause employment contract. In support of this contention, defendants argue that as a matter of law the contract between plaintiff and defendants should be construed as an at-will contract because the term of the contract was indefinite. Alternatively, defendants contend that whether plaintiff's employment contract provided for just-cause termination should have been submitted to the jury for determination and not decided by the trial court as a matter of law.

The majority rejects each of defendants' contentions, in part concluding that defendants failed to preserve its claim that plaintiff was an at-will employee who could be terminated for any nondiscriminatory reason. The majority discounts defendants' assertion that the trial court erroneously decided this issue as a matter of law, stating that "[i]t was simply not clear whether the court had ruled (1) that the issue of at-will employment would be determined by the jury or (2) that plaintiff had established a just-cause employment contract as a matter of law," *ante* at 6 (emphasis in the original). Citing to *Bracco v Michigan Technological University*, 231 Mich App 578, 589; 588 NW2d 467 (1998), the majority further concludes that irrespective of the trial court's findings as to whether plaintiff was employed as an at-will or just-cause employee, reversal is unwarranted because (1) a just-cause contract may be legally enforceable although the term is "indefinite," (2) the evidence warranted the jury finding that there was a just-cause contract, and (3) defendants argued successfully in opposition to plaintiff's motion for summary disposition that the contract was not open-ended regarding performance, but permitted defendants to terminate plaintiff under circumstances constituting just cause. I respectfully disagree with the majority's analysis.

As the majority has correctly noted, under certain circumstances a just-cause contract may be legally enforceable although the term of the contract is "indefinite." *Id.* Here, the contract language stated in part that the agreement of the parties would "continue from year to year and will be automatically renewed", and that the agreement "may be terminated . . . by mutual consent of the parties . . . or when gross profits are less than $150,000.00 . . . [in] any one year of employment." In my judgment, not only is the term of the contract sufficiently unclear as to preclude a directed verdict in defendants' favor, this same contract language is sufficiently ambiguous as to create a genuine issue of material fact on the question whether plaintiff could be terminated only for cause. Thus, irrespective of the arguments made by the parties, the contract language itself presents issues of fact that required resolution by the jury. The trial court clearly failed to present this issue to the jury, and, unlike the majority, I would find that the trial court erred in this respect.

I further disagree with the majority's conclusion that defendants waived this issue. In their motion for directed verdict, defendants sought a determination by the trial court that the contract between the parties was at will. Before the trial court ruled on the directed verdict motion, defendants also submitted a request that the trial court give the jury instruction SJI2d

110.02 (Wrongful Discharge: Employment Relationship Terminable at Will Unless Terms or Conditions to the Contrary). Defendants specifically noted in their jury instruction request that SJI2d 110.02 would not apply if the trial court granted defendants' motion for directed verdict on the employment contract issue.[1] Contrary to the majority's suggestion that it was unclear whether the trial court intended to leave the question of the nature of plaintiff's employment contract to the jury, the record establishes that the trial court expressly stated, in denying defendants' motion for directed verdict, that it had determined that, as a matter of law, plaintiff had a just-cause contract with defendants. Because defendant presented this issue to the trial court and the trial court decided it as a matter of law, I would conclude that the issue is properly preserved for our review. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). Because this Court reviews a trial court's decision on a motion for a directed verdict in a civil case de novo, *Berryman v K mart Corp*, 193 Mich App 88, 91; 483 NW2d 642 (1992), and "a directed verdict is appropriate only when no factual question exists upon which reasonable minds may differ," *Meagher v Wayne State Univ*, 222 Mich App 700, 708; 565 NW2d 401 (1997) (citations omitted), I would also conclude on the basis of the record that the trial court reversibly erred when it failed to find an existing issue of fact for decision by the jury on the nature of the employment contract, and found instead, as a matter of law, a just-cause contract.

Additionally and alternatively, I would conclude that the question of plaintiff's employment status is preserved as an issue for our review because defendant submitted a proposed jury instruction regarding at-will employment to the trial court which the trial court rejected. When requested by a party, a standard jury instruction must be given if it is applicable and accurately states the law. MCR 2.516(D)(2); *Pontiac School Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 622; 563 NW2d 693 (1997). Recognizing that, generally, claims of instructional error are reviewed de novo and we review a trial court's determination that a standard jury instruction was applicable and accurate for an abuse of discretion, *Hill v Sacka*, 256 Mich App 443, 457; 666 NW2d 282 (2003), reversal is nevertheless required where the failure to give a properly requested, applicable, and accurate jury instruction "resulted in such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be '"inconsistent with substantial justice."' MCR 2.613(A); *Johnson v Corbet*, 423 Mich 304, 327; 377 NW2d 713 (1985); *Sacka*, *supra* at 457-458.

Prejudice clearly occurred here because there was a question of fact regarding the nature of plaintiff's employment contract with defendants which the jury was not permitted to resolve. Instead, the trial court's ruling that there was a just-cause contract as a matter of law "effectively relieved plaintiff . . . [of his] burden of proof," *Cox v Bd of Hosp Managers for City of Flint*, 467 Mich 1, 15; 651 NW2d 356 (2002), and deprived the jury of important information it needed to "decide the case intelligently, fairly, and impartially." *Id.*, citing *Johnson*, *supra* at 327.

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[1] Defendants also requested SJI2d 110.06 (Wrongful Discharge: Employment Policies of Terms or Conditions of the Employment Contract) and SJI2d 110.10 (Wrongful Discharge: Good or Just Cause Contract or Policy-Burden Of Proof), and expressly stated in these requests that these instructions also would not apply if the trial court granted defendants' motion for directed verdict on the employment contract issue.

Therefore, I would conclude that the failure to reverse under these circumstances would be inconsistent with substantial justice.

/s/ Kurtis T. Wilder