STATE OF MICHIGAN

COURT OF APPEALS

VIP MEDIA, INC.,

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant-Appellee,

and

GINA GIANNOTTI,

Defendant.

UNPUBLISHED
December 29, 2009

No. 287102
Wayne Circuit Court
LC No. 05-536786-CH

Before: Meter, P.J., and Borrello and Shapiro, JJ.

PER CURIAM.

Plaintiff appeals as of right the judgment of no cause of action in this suit for breach of a settlement agreement. For the reasons set forth in this opinion, we affirm.

In April 2000, plaintiff applied for eight sign permits from the city, which did not grant them. In May 2000, the city passed a new sign ordinance. Plaintiff then sued for permits. The parties reached a settlement whereby plaintiff could submit its applications under the prior ordinance.

In 2004, plaintiff's counsel sent a letter to the city's counsel, stating:

> I have been contacted by VIP in reference to getting the permits pursuant to our agreement. *Mr. Oram indicates that he was told that the arbitration agreement is not sufficient for having his applications processed under the 1993 ordinance. Apparently the Building and Safety Department is requesting an order*.
>
> Enclosed please find a proposed order which I believe fairly encompasses our agreement. . . . [Emphasis added.]

The effort to get an order was not successful. Plaintiff then sued the city for breach of the settlement agreement.

The case was tried to a jury. The parties stipulated that, in the prior litigation, they had agreed to process the eight original sign applications under the expired ordinance.

At trial, plaintiff proffered the letter drafted by plaintiff's counsel as evidence that the city had refused to process, without a court order, the sign permit applications submitted in 2004. The city objected on hearsay grounds to the admission of the letter. The trial court agreed with the city and excluded the letter as inadmissible hearsay that did not satisfy the elements of a hearsay exception.

In its verdict, the jury answered special interrogatories. It found that (1) plaintiff did *not* submit, in 2004, the original applications; and, (2) the parties did *not* enter into a modified agreement to substitute locations.

Plaintiff argues that the trial court erred in excluding the letter because it was not hearsay but a prior consistent statement. Because plaintiff did not make an offer of proof, and did not make this argument below, this issue is unpreserved. MRE 103(a)(2); *Klapp v United Ins Group Agency (On Remand)*, 259 Mich App 467, 475; 674 NW2d 736 (2003). But we may choose to review it for plain error affecting substantial rights. MRE 103(d); *Veltman v Detroit Edison Co*, 261 Mich App 685, 690; 683 NW2d 707 (2004).

Hearsay is inadmissible unless an exception applies. MRE 802. Hearsay is an out-of-court statement, offered in evidence for its truth. MRE 801(c). Where a document or statement contains multiple levels of hearsay, each level must conform to an exception. MRE 805. Otherwise, the combined statements are inadmissible. MRE 805.

A prior consistent statement is not hearsay pursuant to MRE 801(d)(1)(B). The relevant portions of this rule provide:

> **(d) Statements Which Are Not Hearsay**. A statement is not hearsay if –
>
> (1) *Prior Statement of Witness*. The declarant testifies at the trial . . . and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication . . . . [MRE 801(d)(1)(B) (emphases in original).]

There are three levels of hearsay in the proffered letter: (1) the letter itself is hearsay (it is an out-of-court statement); (2) the letter states that Joseph Oram (plaintiff's principal) told Fortner (plaintiff's counsel) certain things; (3) the letter states that an unidentified city employee told Oram certain things.

The letter was offered for its truth.[1] This is the first or top level of hearsay. This level of hearsay was inadmissible. Fortner was a witness at trial, and the letter was consistent with Fortner's testimony. A prior consistent statement is any statement by a witness made out of court before the witness's testimony that reinforces or supports the testimony. Therefore, the letter was a prior statement of a witness. Evidence that a prior consistent statement was made is permitted to be introduced in this case only if plaintiff can demonstrate that the witness's testimony has been attacked as recently fabricated or influenced by a motive to lie. But there was no charge at trial, express or implied, that this part of Fortner's testimony was of recent fabrication. The city never alleged at trial that Fortner had recently fabricated the claim that he contacted Mills to ask for an order (or that he fabricated the claim that he forwarded a proposed order). Therefore, the last element of this hearsay "exception" is not satisfied, and MRE 801(d)(1)(B) does not make the letter admissible.

The city also argues that other levels of hearsay in the letter were also inadmissible. Specifically, the city argues that the unidentified city employee who made the alleged statement to Oram that the settlement was not sufficient and that a court order was needed, did not testify at trial, and therefore, such alleged statement was not a prior statement of a witness. No one testified at trial that she told Oram that the arbitration agreement was insufficient for having the applications processed under the old ordinance, and that a court order was needed. Therefore, under MRE 801(d)(1)(B), the letter was inadmissible.

Finally, the jury found that (1) plaintiff did *not* submit, in 2004, the eight original signed applications; and (2) the parties did *not* enter into a modified agreement to substitute locations. Admission of the letter would not have changed those two findings. The letter does not state or imply that Oram re-submitted the same applications in 2004. Nor does it state or imply that there was a modified agreement to substitute locations. Accordingly, admission of the letter would not have changed the jury's findings, and any error in excluding the letter was harmless.

Plaintiff also argues that the trial court erred in excluding the letter because it was conduct and not hearsay. This argument, not made below, is also unpreserved.

The letter is clearly a set of assertions. For purposes of the hearsay exclusion, a "statement" includes either an oral or written assertion, or nonverbal conduct that is intended by the actor to be an assertion. MRE 801(a). An "assertion" is a positive statement or declaration, or an allegation. *Random House Webster's College Dictionary* (2nd revised & updated edition, 2001), at p 75. It is also defined as a declaration or allegation. *Black's Law Dictionary* (9th edition, 2009), at p 133. Case law holds that letters are hearsay. E.g., *Maiden v Rozwood*, 461 Mich 109, 124-125; 597 NW2d 817 (1999); *Garey v Kelvinator Corp*, 279 Mich 174, 187; 271 NW 723 (1937). Because letters are hearsay, they are assertions. MRE 801(a).

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[1] Plaintiff does not deny that the letter was being offered for its truth. Plaintiff argues on appeal that it was trying to prove that Fortner forwarded a proposed order. Thus, the letter was offered for the truth of the matter asserted.

Plaintiff cites *People v Jones (On Reh After Remand)*, 228 Mich App 191, 214; 579 NW2d 82, modified in part and remanded 458 Mich 862 (1998), but the case does not support plaintiff's argument. It does not hold that a letter is conduct and not an assertion. Rather, it differentiates between two types of conduct: (1) conduct intended to communicate something (expressive conduct, or an implied assertion); and (2) conduct not intended to communicate something. *Id*. Accordingly, we find no support in *Jones*, for plaintiff's argument.

Plaintiff also cites *People v Davis*, 139 Mich App 811, 813; 363 NW2d 35 (1984). This case also fails to support plaintiff's argument that a letter is conduct. Rather, *Davis* makes the same distinction made in *Jones*, between expressive conduct, and conduct not intended to assert something. *Id*. There is nothing in *Davis* suggesting that a letter is conduct. Thus, plaintiff's argument finds no support in *Davis*.

Plaintiff stated that the letter was offered to prove that Oram had gone to the City to get the permits and was told he needed a court order. Plaintiff's assertions necessitate a finding that the letter's assertions were offered for their truth. Therefore, the letter was hearsay pursuant to MRE 801(c). Having found that the letter constituted inadmissible hearsay, it follows that the trial court did not commit plain error by excluding the letter as evidence.

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

/s/ Patrick M. Meter
/s/ Stephen L. Borrello
/s/ Douglas B. Shapiro