

STATE OF MICHIGAN
COURT OF APPEALS

STEVEN TUCKER and MARY LOU TUCKER,

Plaintiffs-Appellants/Cross-
Appellees,

v

TELLER EXCAVATING, INC.,

Defendant-Appellee/Cross-
Appellant.

UNPUBLISHED

June 29, 2001

No. 220794

Macomb Circuit Court

LC No. 93-005892-NO

Before: Sawyer, P.J., and Griffin and O’Connell, JJ.

PER CURIAM.

In this negligence case, plaintiffs appeal as of right, and defendant cross-appeals as of right from the trial court’s judgment effectuating the jury verdict of no cause for action in favor of defendant. We affirm.

On June 3, 1992, plaintiff Steven Tucker,¹ an employee of the village of Romeo department of public works, was injured when a trench dug by defendant’s employee, Robert Emerick, collapsed. Plaintiffs filed suit against defendant in December 1993. Following a five-day trial, the jury returned a verdict of no cause of action in favor of defendant.

On appeal, plaintiffs challenge the trial court’s jury instructions. In *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000), our Supreme Court set forth the applicable standard for reviewing claims of instructional error.

We review claims of instructional error de novo. In doing so, we examine the jury instructions as a whole to determine whether there is error requiring reversal. The instructions should include all of the elements of the plaintiff’s claims and should not omit material issues, defenses, or theories if the evidence supports them. Instructions must not be extracted piecemeal to establish error. Even if somewhat imperfect, instructions do not create error requiring reversal if,

¹ Plaintiff Mary Lou Tucker’s claim against defendant is for loss of consortium only.

on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury. [A reviewing court] will only reverse for instructional error where failure to do so would be inconsistent with substantial justice. [*Id.* (citations omitted).]

Plaintiffs argue that the trial court's jury instructions were deficient with regard to the borrowed servant exception to the doctrine of respondeat superior. Specifically, plaintiffs argue that the trial court was obliged to instruct the jury as a matter of law that Emerick was not a borrowed servant. Further, plaintiffs assert that the jury should have been instructed that defendant could be held liable under a respondeat superior theory even if it retained only partial control of Emerick. Finally, plaintiffs assert that the trial court should have instructed the jury on factors that suggested that Emerick was under defendant's control. Plaintiffs contend that reversal is warranted on the basis of these cumulative errors. We disagree.

As a preliminary matter, we note that plaintiffs' challenge is not properly before this Court. "In order to preserve for appellate review the adequacy of jury instructions in a civil case, a party must make a request for a jury instruction before the instructions are given and must object to the alleged error after the jury has been instructed." *Leavitt v Monaco Coach Corp*, 241 Mich App 288, 300; 616 NW2d 175 (2000), quoting *Zinchook v Turkewycz*, 128 Mich App 513, 520; 340 NW2d 844 (1983).

We recognize that plaintiffs raised an objection to the instructions after the jury began to deliberate. However, rather than asserting the same grounds for objection that are advanced on appeal, plaintiffs argued that the instruction on the issue of defendant's control should not have been submitted to the jury. Thus, plaintiffs failed to properly preserve this issue for review. *Westland v Jon L Okopski*, 208 Mich App 66, 72-73; 527 NW2d 780 (1994) ("[a]n appeal based on one ground is not preserved where the objection at trial was on a different ground."). Further, our review of the record has not yielded any indication that plaintiffs requested the specific jury instructions they refer to on appeal.² Thus, to the extent plaintiffs failed to request the specified instructions or subsequently raise a timely objection to the trial court's instructions, they have waived this issue in the trial court and on appeal. *Leavitt, supra* at 300.

In any event, an examination of the jury instructions as a whole leads us to conclude that they fairly and adequately presented the theories of the parties and the applicable law to the jury. *Case, supra* at 6. At trial plaintiffs argued that defendant was liable for Steven Tucker's injuries under a respondeat superior theory. On the other hand, defendant maintained that because Emerick was a borrowed servant it was not liable for his actions under the theory of respondeat superior. See e.g., *Hoffman v JDM Associates, Inc*, 213 Mich App 466, 468-469; 540 NW2d 689 (1995); *May v Harper Hospital*, 185 Mich App 548, 553; 462 NW2d 754 (1990). In *Hoffman, supra*, this Court, quoting *Janik v Ford Motor Co*, 180 Mich 557, 562; 147 NW2d 510 (1914), articulated the well-settled test for determining whether an individual meets the definition of a borrowed servant.

² Nor do plaintiffs assert in their brief on appeal that they preserved this issue by requesting the specified instructions in the lower court.

The test is whether in the particular service which he is engaged or requested to perform he continues liable to the direction and control of his original master or becomes subject to that of the person to whom he is lent or hired, or who requests his services. It is not so much the actual exercise of control which is regarded, as the right to exercise such control. [*Hoffman, supra* at 468-469.]

In the present case, the trial court properly instructed the jury that plaintiffs bore the burden of proving that Emerick was negligent and that he was under defendant's control at the time of Steven Tucker's injury. Viewed as a whole, we are satisfied that the trial court's instructions sufficiently conveyed to the jury the applicable law and the parties' positions.

In light of our resolution of plaintiffs' issue on appeal, we need not consider the issue raised by defendant on cross-appeal.

Affirmed.

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Peter D. O'Connell