[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-11038

D.C. Docket No. 8:14-cv-01187-EAK-JSS

HOUSTON SPECIALTY INSURANCE COMPANY,

Plaintiff-Appellant,

versus

ENOCH VAUGHN,
individually, and as Parent and Natural
Guardian of M.V., a minor,
ALL FLORIDA WEATHERPROOFING &
CONSTRUCTION, INC.,
RICHARD FULFORD,
ROBERT MENDENHALL,

Defendants-Appellees,

JOSEPH PFLIEGER,

Defendant.

Appeal from the United States District Court
for the Middle District of Florida

(March 30, 2018)

Before ED CARNES, Chief Judge, NEWSOM, and SILER,[*] Circuit Judges.

PER CURIAM:

While applying a protective coating to a mobile home roof for All Florida Weatherproofing & Construction, Inc., Enoch Vaughn fell and was paralyzed. He sued All Florida, along with its president, Richard Fulford, and a sales representative, Robert Mendenhall, asserting state law tort claims. Houston Specialty Insurance Co., the commercial general liability insurance carrier for All Florida, brought this action against Vaughn, All Florida, Fulford, and Mendenhall seeking a declaratory judgment that it did not have to defend or indemnify All Florida, Fulford, or Mendenhall against Vaughn's claims.

After the evidence was in, both sides moved for judgment as a matter of law. The district court deferred ruling on those motions pending the jury's deliberations and findings. The jury later returned a verdict finding that at the time of Vaughn's accident, he was an "independent contractor" and Mendenhall was an "employee" of All Florida. That verdict would obligate Houston Specialty to defend and indemnify All Florida, Fulford, and Mendenhall against Vaughn's claims. The district court denied the parties' motions for judgment as a matter of law and entered declaratory judgment against Houston Specialty. This is Houston Specialty's appeal.

[*] Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit, sitting by designation.

Houston Specialty contends that the district court erred by "fail[ing] to hold that Mendenhall [was] an independent contractor of All Florida as a matter of law." It argues that the "evidence and testimony show[ ] that All Florida did not have the right to control [his] work," and that the record evidence "overwhelmingly supports finding that Mendenhall was an independent contractor as a matter of law." That matters because if Mendenhall was an independent contractor, he would not be an "insured" under the insurance policy, and Houston Specialty would not have to defend or indemnify him against Vaughn's state law tort claims.

We review de novo the denial of a motion for judgment as a matter of law, viewing the evidence in the light most favorable to the nonmoving party. Howard v. Walgreen Co., 605 F.3d 1239, 1242 (11th Cir. 2010). The motion should be granted only if there is not a legally sufficient evidentiary basis for a reasonable jury to find for the nonmoving party on the issue. Fed. R. Civ. P. 50(a)(1); see Howard, 605 F.3d at 1242; Cleveland v. Home Shopping Network, Inc., 369 F.3d 1189, 1192 (11th Cir. 2004).

"Consistent with § 220(1) of the Restatement, many Florida courts have recognized that the extent of control an employer exercises over the details of the job is a significant factor in determining whether the worker is an employee or independent contractor." Carlson v. FedEx Ground Package Sys., Inc., 787 F.3d

1313, 1319 (11th Cir. 2015); see also Restatement (Second) of Agency § 220(1) (1958) ("[An employee] is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control."). As one Florida appellate court has put it, "the determination of one's status as an employee or independent contractor centers around the degree of control which the putative employer exercises over the person, the decisive question being who has the right to direct what shall be done, and how and when it shall be done." Bowdoin v. Anchor Cab, 643 So. 2d 42, 43 (Fla. 1st DCA 1994); see also Restatement (Second) of Agency § 220(2) (listing factors to consider in determining whether one is an employee or independent contractor). "In Florida, it is well-established that the question of an employer/employee relationship is generally a question of fact, and therefore a question for the trier of fact." Carlson, 787 F.3d at 1318 (quotation marks and alterations omitted).

Although there was evidence presented at trial suggesting that Mendenhall was an independent contractor of All Florida, the evidence does not compel that conclusion. And the question before us is only whether the evidence in the record was sufficient for a reasonable jury to find that he was an employee, not an independent contractor, of All Florida. See Howard, 605 F.3d at 1242; Cleveland, 369 F.3d at 1192. It was.

For example, the evidence shows that Mendenhall: did not have his own business entity; did not work for any company but All Florida; received a daily schedule from All Florida which he could not decline; and did not obtain separate liability insurance for himself or a workers' compensation exemption, nor did All Florida require him to do so. All Florida provided him with business cards with its logo and his name on them, as well as with marketing materials for selling roofing products. Mendenhall was not permitted to sell those roofing products for anyone other than All Florida. All Florida paid for marketing events and "set up . . . leads" for him. And even though Mendenhall used his own vehicle, the company required him to put All Florida magnetic signs on it and to wear All Florida shirts while doing work for the company. Considered collectively, the facts show that All Florida had a lot of control over the details of Mendenhall's job, which was sufficient to permit a jury to conclude that he was an employee of All Florida. See Carlson, 787 F.3d at 1319.

The 2009 "Independent Contractor Agreement" between Mendenhall and All Florida did state that he was an independent contractor, but "the legal relationship of [the] parties does not depend upon what they say it was." La Grande v. B & L Servs., Inc., 432 So. 2d 1364, 1367 (Fla. 1st DCA 1983); see also Villazon v. Prudential Health Care Plan, Inc., 843 So. 2d 842, 854 (Fla. 2003) ("While the obvious purpose to be accomplished by [the] document was to evince

an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other.") (quoting Cantor v. Cochran, 184 So. 2d 173, 174 (Fla. 1966)). Based on the circumstances of their dealings and the extent of control that All Florida had over Mendenhall's work, the jury's finding that he was an employee instead of an independent contractor was reasonable. The district court did not err in denying Houston Specialty's motion for judgment as a matter of law. See Hubbard v. BankAtlantic Bancorp, Inc., 688 F.3d 713, 723–24 (11th Cir. 2012) ("[In] review[ing] a district court's ruling on a motion for judgment as a matter of law," we "do not make credibility determinations or weigh the evidence.").[1]

Houston Specialty also challenges some of the district court's jury instructions. Because any errors in the instructions either were not timely raised in the district court or were actually invited there, we will not consider them. See Access Now, Inc. v. Sw. Airlines Co., 385 F.3d 1324, 1331 (11th Cir. 2004) (not timely raised); Ford ex rel. Estate of Ford v. Garcia, 289 F.3d 1283, 1293–94 (11th Cir. 2002) (invited); Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322, 1329 (11th Cir. 1999) (not timely raised); Wood v. President & Trustees of Spring Hill

[1] Houston Specialty also contends that the district court erred in declining to enter judgment as a matter of law that Vaughn and Mendenhall were working on a "construction project," and that Vaughn was working in the "construction industry." But those arguments also fail. Suffice it to say that even though there was evidence supporting its positions on those issues, there was evidence supporting the defendants' positions to the contrary. As a result, judgment as a matter of law was not appropriate. Fed. R. Civ. P. 50(a)(1).

Coll. in Mobile, 978 F.2d 1214, 1223 (11th Cir. 1992) (invited). In addition, it appears that the jury instructions and verdict form accurately reflect Florida law and "were sufficient so that the jurors understood the issues and were not misled." McNely v. Ocala Star-Banner Corp., 99 F.3d 1068, 1072 (11th Cir. 1996) (quotation marks omitted).

AFFIRMED.