COURT OF APPEALS
DECISION
DATED AND FILED

June 19, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1443 **Cir. Ct. No. 2008CV998**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

CHERYL A. SCHMIDT P/K/A CHERYL A. SELLERS-BRURING,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

LEE J. FEHR, BRYAN E. TILLMAN, FEHR LAW OFFICE AND MINNESOTA LAWYERS MUTUAL INSURANCE COMPANY,

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for La Crosse County: TODD W. BJERKE, Judge. *Affirmed in part, reversed in part and cause remanded for further proceedings*.

Before Blanchard, P.J., Lundsten and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. This is a negligence action filed by Cheryl Schmidt p/k/a Cheryl Sellers-Bruring (Schmidt) against her former attorneys,

Brian Tillman and Lee Fehr, the Fehr Law Office, and Minnesota Lawyers Mutual Insurance Company, the attorneys' malpractice liability insurer (collectively, the "defendants"). The attorneys represented Schmidt in connection with the proposed sale of her salon. Schmidt was convicted in a prior criminal action of multiple crimes after she removed and retained property from the salon that belonged to others, allegedly acting on Tillman's advice. A jury trial was held in this action on whether the attorneys were negligent in their representation of Schmidt. The jury found Tillman and Fehr negligent, and Schmidt contributorily negligent, and that each party's negligence was a cause of damages suffered by Schmidt. The jury apportioned negligence among the parties and awarded damages.

¶2 The defendants argue on appeal that they are entitled to judgment notwithstanding the verdict (JNOV) because the facts as found by the jury do not permit recovery as a matter of law. In support, the defendants rely on: (1) the holding in ***Fleming v. Threshermen's Mutual Insurance Co.***, 131 Wis. 2d 123, 130, 388 N.W.2d 908 (1986), that a negligent tortfeasor is entitled to indemnification from an intentional joint tortfeasor; and (2) public policy considerations. We reject these arguments. Schmidt argues on cross-appeal that the circuit court erred in denying her motion for judgment on the verdict, arguing that, under the doctrine of respondeat superior, Fehr should be liable for his own negligence as well as the negligence attributed to Tillman because Tillman was Fehr's employee. We agree. Accordingly, we affirm the appeal, reverse the cross-appeal, and remand for further proceedings consistent with this opinion.

BACKGROUND

¶3 Schmidt retained Attorneys Tillman and Fehr to represent her in connection with the proposed sale of her business, Little Hawaii Salon, LLC, to Tammy Schyvinck. Tillman and Fehr represented Schmidt over the course of several months, including on the scheduled date of closing.

¶4 On the scheduled closing date, a dispute arose between Schmidt and Schyvinck after Tillman requested a second extension of the closing date because Schmidt had not reached an agreement with the IRS to subordinate its lien on the property. At some point, the La Crosse County district attorney was contacted, and he mediated an agreement between Schmidt and Schyvinck to maintain the status quo until the following day. However, later in the day, Judge Ramona Gonzalez, the intake judge on that day, was contacted and told the parties that Schmidt had the legal right to possess the property until midnight when, according to the judge, Schmidt's lease with the landlord of the building would expire.

¶5 Thereafter, Tillman advised Schmidt to remove all business assets from the salon before midnight. Schmidt, and others acting at her direction, removed, among other things, property encumbered by River Bank and property belonging to salon employees. The building was extensively damaged during the process. Schmidt stored the property that had been removed at various locations. The police later executed search warrants and retrieved the property.

¶6 Schmidt was arrested and charged with one count of felony theft, one count of felony theft as a party to the crime, felony criminal damage to property as a party to the crime, and the transfer of encumbered property. One of the counts for felony theft was later reduced to a misdemeanor. A trial was held to the circuit court for La Crosse County. Schmidt's theory of defense was that she

did not intend to commit the charged crimes because she was acting on Tillman's advice when she removed the property from the salon. The court convicted Schmidt on all counts, except the felony theft count. We affirmed the convictions on appeal. ***State v. Sellers-Bruring***, No. 2007AP1061-CR, unpublished slip op. (WI App June 19, 2008).

¶7 Schmidt subsequently filed a negligence cause of action against Tillman, Fehr, the Fehr Law Office, and the attorneys' malpractice liability insurer. A jury trial was held on whether the attorneys were negligent in their representation of Schmidt. Following the presentation of evidence, the jury was asked in a special verdict: (1) was Fehr negligent in providing legal services to Schmidt and, if so, was Fehr's negligence a cause of damages to Schmidt; (2) was Tillman negligent in providing legal services to Schmidt and, if so, was Tillman's negligence a cause of damages; and (3) was Schmidt negligent regarding her own interests and, if so, was her negligence a cause of her damages. The jury answered "yes" to all questions. The jury apportioned negligence among the parties as follows: 50% to Tillman, 40% to Schmidt, and 10% to Fehr.

¶8 Regarding damages, the jury was asked what amount would "fairly and reasonably" compensate Schmidt for her damages. Schmidt argued that her damages included the legal fees she incurred to defend herself against the criminal charges, lost earning capacity, and "general damages," or amounts intended to compensate Schmidt for humiliation, embarrassment, worry, emotional distress and Schmidt's loss of reputation in the community. Schmidt also requested damages for restitution she was ordered to pay to the victims of her crimes, which amounted to almost $50,000. The jury awarded $210,000 in damages. However, because there was a single, general damages question, it is not possible to

determine if any part of this award included restitution that Schmidt was required to pay in the criminal action.

¶9 The defendants moved for JNOV, arguing that they were not liable for the damages the jury awarded to Schmidt based on: (1) the holding in ***Fleming*** that a negligent tortfeasor has a right to indemnity from an intentional joint tortfeasor; and (2) public policy considerations. The circuit court denied the motion. The defendants appeal.

¶10 Schmidt moved for judgment on the verdict, arguing that Fehr should be liable for the negligence apportioned to Fehr as well as the negligence apportioned to Tillman because, under the doctrine of respondeat superior, an employer is liable for the negligence of an employee acting within the scope of employment. The circuit court denied the motion. Schmidt cross-appeals.

DISCUSSION

I. Defendants' Appeal

¶11 The issue on appeal is whether the circuit court erred in denying the defendants' motion for JNOV. A motion for JNOV is granted where "the verdict is proper but, for reasons evident in the record which bear upon matters not included in the verdict, the movant should have judgment." WIS. STAT. § 805.14(5)(b) (2001-12).[1] A motion for JNOV "does not challenge whether there is sufficient evidence to support fact-finding, but whether the facts that have been found, as a matter of law, permit recovery." ***Chevron Chem. Co. v. Deloitte &***

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Touche, 168 Wis. 2d 323, 331, 483 N.W.2d 314 (Ct. App. 1992). Whether the circuit court erred in denying the defendants' motion for JNOV is a question of law subject to de novo review. ***Bicknese v. Sutula***, 2003 WI 31, ¶15, 260 Wis. 2d 713, 660 N.W.2d 289.

¶12 The defendants argue that the circuit court erred in denying the motion for JNOV because ***Fleming*** and public policy considerations preclude liability being imposed on the defendants as a matter of law. We address and reject the defendants' arguments in turn.

A. ***Fleming***

¶13 The defendants contend that they are not liable for damages as a matter of law based on the holding and analysis in ***Fleming*** that a negligent tortfeasor is entitled to indemnification from an intentional joint tortfeasor. ***Fleming***, 131 Wis. 2d at 130. The defendants concede that ***Fleming*** is "meant to apply" in cases where an intentional tortfeasor and a negligent joint tortfeasor cause injury to a third party, and they concede that the injury complained of here was not to a third party but instead to Schmidt, the alleged intentional tortfeasor. However, the defendants point out that the ***Fleming*** court explained that its decision was based on "the policy of deterring conduct which society considers to be substantially more egregious than negligence." ***Id.*** According to the defendants, this policy applies "just as strongly or more so" here. Thus, the defendants contend, Schmidt is an intentional tortfeasor who must bear the responsibility for her crimes because "[a]ny other result" would "nullif[y] the policy" on which ***Fleming*** is based. We reject the defendants' argument.

¶14 The issue in ***Fleming*** was whether an individual who intentionally shot Fleming was required to indemnify a co-actor who negligently made the

shotgun available to the shooter. ***Id.*** at 125-26. Our supreme court held that "a negligent tortfeasor has a right to indemnity from an intentional joint tortfeasor," explaining:

> Were we to allow a negligent tortfeasor only a right to contribution from an intentional joint tortfeasor, the intentional tortfeasor effectively would receive the benefit of contribution from the negligent tortfeasor, in direct conflict with the established law in this state. While this approach allows a defendant who is causally negligent to escape from liability in some circumstances, we believe that shifting the full responsibility for the loss to the intentional tortfeasor serves the policy of deterring conduct which society considers to be substantially more egregious than negligence.

Id. at 130.

¶15 We conclude that the defendants have not demonstrated that they have been required to pay an amount to Schmidt that runs afoul of the policy on which ***Fleming*** was based.[2] As explained in the background section, Schmidt argued at trial that her damages included legal fees to defend against criminal charges, lost earning capacity, restitution, humiliation, embarrassment, worry, emotional distress, and loss of reputation in the community. The only amount that Schmidt was *required* to pay because of her intentional criminal conduct was the restitution she was ordered to pay the victims of her crimes. None of the other

[2] We acknowledge that, in some instances, issue preclusion might operate to bar a client convicted of a crime from bringing a negligence action against his or her former attorney, alleging that the attorney's negligence led to the client's conviction and that the client suffered damages as a result of the conviction. However, the defendants contend in their reply brief that issue preclusion does not apply in this action because Schmidt did not "ask[] the court or the jury to find that she was wrongfully convicted of her crimes." Because the defendants do not argue that issue preclusion operates to bar this action, we need not address the topic.

damages that Schmidt requested were for amounts she was ordered to pay due to her intentional criminal conduct.

¶16 However, we need not decide whether the defendants could be compelled to contribute to a restitution award that Schmidt was required to pay to the victims of her crimes. As the circuit court explained, "we don't know what the jury awarded." The jury was not asked to itemize its damages, and therefore, we cannot ascertain whether the $210,000 awarded by the jury included restitution.

¶17 Thus, given the special verdict questions and the state of the record on appeal, the defendants have not demonstrated that Schmidt is recovering damages for "conduct which society considers to be substantially more egregious than negligence." ***Id***. We therefore conclude that ***Fleming*** does not bar Schmidt from recovering under the specific facts of this case as it was tried to the jury.

B. Public Policy

¶18 The defendants contend that the public policy factors that courts may apply to negligence cases should bar Schmidt from recovering damages on two grounds: (1) criminals must be "fully and solely responsible for their crimes;" and (2) allowing Schmidt to recover damages "would enter a field with no sensible or just stopping point." We address and reject each ground in turn.

¶19 In Wisconsin, a defendant's liability in a negligence action may be limited for public policy reasons. ***Alvarado v. Sersch***, 2003 WI 55, ¶17, 262 Wis. 2d 74, 662 N.W.2d 350. "Denial of recovery on public policy grounds involves a case-by-case application of one or more of six nonexclusive factors." ***Hoida, Inc. v. M&I Midstate Bank***, 2004 WI App 191, ¶18, 276 Wis. 2d 705, 688 N.W.2d 691. They are:

> (1) the injury is too remote from the negligence; (2) the injury is too wholly out of proportion to the tortfeasor's culpability; (3) in retrospect it appears too highly extraordinary that the negligence should have resulted in the harm; (4) allowing recovery would place too unreasonable a burden on the tortfeasor; (5) allowing recovery would be too likely to open the way for fraudulent claims; and (6) allowing recovery would enter a field that has no sensible or just stopping point.

Id., ¶18 n.5. More broadly, public policy precludes imposing liability on the defendants where "it would shock the conscience of society to impose liability." ***Bowen v. Lumbermens Mut. Cas. Co.***, 183 Wis. 2d 627, 656, 517 N.W.2d 432 (1994). Whether public policy precludes liability is a question of law subject to de novo review. ***Gritzner v. Michael R.***, 2000 WI 68, ¶27, 235 Wis. 2d 781, 611 N.W.2d 906.

¶20 Turning to their first argument, the defendants contend that public policy requires criminals to be held "fully and solely responsible for their crimes" and therefore the defendants cannot be held liable for their negligent representation of Schmidt. In support, the defendants quote from ***Evans v. Cameron***, 121 Wis. 2d 421, 360 N.W.2d 25 (1985), where the supreme court held that a client could not recover from a former attorney for damages allegedly suffered as a result of following the attorney's advice to lie while under oath. There, the court stated:

> Although the public interest is served by discouraging attorney misconduct, it would be inappropriate to promote that interest by removing the damage to those who deliberately and willfully lie under oath …. A court should not encourage others to commit illegal acts upon their lawyer's advice by allowing the perpetrators to believe that a suit against the attorney will allow them to obtain relief from any damage they might suffer if caught.

Id. at 428. The defendants contend that the grounds for not imposing liability in ***Evans*** "applies even more strongly in this case" because Tillman and Fehr were merely negligent, and did not engage in misconduct, as the attorney in ***Evans*** did.

¶21 We conclude that ***Evans*** does not preclude imposing liability on the defendants. The ***Evans*** court stated that:

> There may be circumstances in which the advice given by an attorney is so complex that the client would be unaware of the wrongfulness involved in following that advice. In such circumstances, more weight may be given to the influence an attorney will have over the client and the amount of reliance which the client can justifiably place in the attorney. The wrongfulness of lying while under oath, however, is apparent.

Id. "In ***Evans***, the act of perjury was … clearly wrongful." ***Mrozek v. Intra Fin. Corp.***, 2005 WI 73, ¶25, 281 Wis. 2d 448, 699 N.W.2d 54.

¶22 The record and arguments before us contain ambiguity not present in ***Evans***. It is far less clear here that Schmidt fully understood that she was acting wrongfully.[3] For one thing, Schmidt may have been confused as to what course of action to take in light of the differing approaches taken by the district attorney and the intake judge. Moreover, Tillman testified that he advised Schmidt to "take control of th[e] [business] assets," including property belonging to salon employees, and that he did not discuss with Schmidt what consequences she could face if she removed property belonging to others. Moreover, Schmidt's expert, Attorney Drew Ryberg, testified that Tillman did not properly advise Schmidt on

[3] It is true that Schmidt was convicted of multiple crimes that each contains an element of intent. However, this action is distinct from the criminal action and, as we explain in this opinion, it is not apparent from the evidence presented in this action that Schmidt fully understood that she was acting wrongfully.

what actions to take to prevent criminal charges from being brought against her. Additionally, there was no evidence presented in this action that Schmidt personally damaged property. Thus, unlike where an individual lies under oath on the advice of counsel, it was not as clear-cut in this case that Schmidt's actions were so "clearly wrongful" that she should have understood that removing or retaining the property was illegal. *See* ***id.***

¶23 Additionally, the circuit court accurately noted that this lawsuit did not simply involve Tillman and Fehr advising Schmidt on the date that Schmidt engaged in the intentional criminal conduct for which she was later convicted. The circuit court explained that Tillman and Fehr represented Schmidt over a much longer period of time and that other actions and consequences were at issue in the case as it was tried to the jury. Thus, there are other reasons the clarity that was present in ***Evans***, with respect to the lawyer's advice and the client's action, is not present here.

¶24 The defendants next contend that imposing liability on them would violate the policy that criminals must bear responsibility for their crimes because it would allow Schmidt to recover the restitution she was ordered to pay following her convictions. The defendants observe that restitution "serve[s] to strengthen [the offender's] sense of responsibility and teach the offender to consider more carefully the consequences of his or her actions." ***State v. Kennedy***, 190 Wis. 2d 252, 257-58, 528 N.W.2d 9 (Ct. App. 1994). In the defendants' view, if Schmidt were allowed to recover as damages in this action the restitution she was ordered to pay in the criminal case, she would not have a strengthened sense of responsibility or have been taught to carefully consider the consequences of her actions, which would undermine the important policy that criminals must bear

responsibility for their crimes. We reject this argument for the same reason we reject the defendants' reliance on ***Fleming***.

¶25 Although Schmidt asked the jury to award her the restitution she was ordered to pay, which amounted to almost $50,000, we cannot say without speculating that the jury did in fact include restitution in its damages award. The circuit court correctly concluded that whether damages for restitution were included in the award cannot be ascertained.

¶26 Turning to the defendants' second public policy argument, the defendants contend that "[t]here will be no sensible or just stopping point if [Schmidt] and other similarly-situated criminals are allowed to recover from negligent third parties." The defendants contend that "nearly all intentional crimes are the result of a chain of causation that includes negligence of someone other than the criminal." The defendants maintain that, even though a criminal may be able to prove that he or she could not have committed the crime but for another person's negligence, allowing a criminal to recover from a negligent party is not sensible or just.

¶27 The defendants provide two hypotheticals to illustrate their point. In the first hypothetical, an individual murders his or her spouse after hearing an unsupported rumor that the spouse was having an affair and then the murderer brings a negligence action against the individual who spread the rumor for damages resulting from a murder conviction. In the second hypothetical, a woman is raped in a store parking lot that is negligently maintained and thus unsafe and the rapist brings a negligence action against the store owner to recover damages stemming from a rape conviction. According to the defendants, if Schmidt is allowed to recover damages in this case, then the murderer and rapist would also

be allowed to recover damages in their negligence actions. The defendants maintain that there is no meaningful way to distinguish the hypotheticals from the situation here and therefore imposing liability on the defendants would enter a field with no sensible or just stopping point. We disagree.

¶28 The extreme hypotheticals presented by the defendants bear no resemblance to the facts of this case. Needless to say, Schmidt's wrongfulness is orders of magnitude less clear than the wrongfulness of the homicide and rape scenarios offered by the defendants. Allowing Schmidt to recover in this case does not mean that the hypothetical murderer or rapist could recover damages. The question of whether a party is precluded from recovering damages under public policy considerations is a fact-specific inquiry and the result in one case does not necessarily dictate the outcome in another case. ***Tesar v. Anderson***, 2010 WI App 116, ¶35, 329 Wis. 2d 240, 789 N.W.2d 351 ("Public policy is decided on a case-by-case basis and we only decide the issue before us."). Thus, allowing Schmidt to recover damages does not enter a field with no sensible or just stopping point.

¶29 In sum, we conclude that the public policy concerns raised by the defendants are insufficient to defeat liability in light of the particular facts of this case as they were tried to the jury. However, we readily acknowledge that if the facts of the case were different, and the interactions of the lawyers with Schmidt less complicated, we might reach a different result than we do here.

II. Schmidt's Cross-Appeal

¶30 On cross-appeal, Schmidt argues the circuit court erred in denying her motion to hold Fehr vicariously liable for Tillman's negligence under the doctrine of respondeat superior. Schmidt contends the record shows that Tillman

was an employee of Fehr d/b/a the Law Offices of Lee J. Fehr; that Tillman was acting within the scope of his employment when he negligently represented Schmidt, and therefore, Fehr d/b/a the Law Offices of Lee J. Fehr is liable for the negligence attributed to Tillman. As we understand it, Schmidt is arguing, although not directly, that the court's factual finding that Tillman was an independent contractor and not an employee of the law office is clearly erroneous and unsupported by the record.

¶31 In response, the defendants argue that Schmidt had the burden to prove that Tillman was Fehr's employee and that Schmidt failed to carry that burden at trial. The defendants contend that, whether Tillman was Fehr's employee was a question of fact to be determined by a jury, and that, here, the jury was never asked in the special verdict to make that finding. The defendants contend that the circuit court could resolve a question of fact as a matter of law only if no reasonable jury could have found that Tillman was not Fehr's employee. Applying this test, the defendants contend that the court could not determine as a matter of law that Tillman was an employee and therefore correctly determined that Tillman was an independent contractor.

¶32 In her reply brief, Schmidt contends that there are no facts in the record from which a reasonable jury could conclude that Tillman was an independent contractor, and not an employee of Fehr d/b/a Fehr Law Office. We agree.

¶33 At the outset, we acknowledge that the question of whether an employer-employee relationship exists is ordinarily a question of fact for the jury to determine. ***Kettner v. Wausau Ins. Cos.***, 191 Wis. 2d 723, 737, 530 N.W.2d 399 (Ct. App. 1995); *see also* WIS JI—CIVIL 4030. Here, however, during the jury

instruction conference, the circuit court indicated to the parties that it would entertain a post-verdict motion on whether an employer-employee relationship existed between Tillman and Fehr. The defendants did not object to the court taking this approach in determining whether such a relationship existed. As we indicated, the court denied Schmidt's motion to hold Fehr vicariously liable for Tillman's negligence. The court found that Tillman was an independent contractor, and not an employee, reasoning:

> [I]t's clear to the Court that the relationship [between Mr. Tillman and Mr. Fehr] did not seem to rise to the level of respondeat superior…. [Mr. Fehr] basically allows people to come there as an independent contractor to have space. That does not make him their boss in any way. He is an attorney that is somewhat more mature than Mr. Tillman, has more experience than Mr. Tillman. Mr. Tillman obviously based on what I saw from the testimony and what the jury would have concluded would have called Mr. Fehr for advice, but that is not the advice of a respondeat superior by any means …. The relationship of Mr. Tillman to Mr. … Fehr was of an independent contractor.

¶34 We uphold a circuit court's findings of fact unless they are clearly erroneous. ***Phelps v. Physicians Ins. Co. of Wis.***, 2009 WI 74, ¶34, 319 Wis. 2d 1, 768 N.W.2d 615. "[A] finding of fact is clearly erroneous when 'it is against the great weight and clear preponderance of the evidence.'" ***Id.***, ¶39 (quoting another source). "[A] factual finding is not clearly erroneous merely because a different fact-finder could draw difference inferences from the record." ***State v. Wenk***, 2001 WI App 268, ¶8, 248 Wis. 2d 714, 637 N.W.2d 417.

¶35 Moreover, where the facts underlying the relationship between employer and employee are undisputed, it becomes a question of law, subject to de novo review, although we may benefit from the circuit court's legal analysis. ***Reuter v. Murphy***, 2000 WI App 276, ¶17, 240 Wis. 2d 110, 622 N.W.2d 464.

¶36 In general, a person is liable for his or her own torts. ***Lewis v. Physicians Ins. Co. of Wis.***, 2001 WI 60, ¶11, 243 Wis. 2d 648, 627 N.W.2d 484. However, under the doctrine of respondeat superior, an employer may be held vicariously liable for the tortious acts of an employee where the employee's acts arise within the scope of his or her employment. ***Id.***, ¶12; ***Kerl v. Dennis Rasmussen, Inc.***, 2004 WI 86, ¶¶18, 21-23, 273 Wis. 2d 106, 682 N.W.2d 328. The principal test for determining whether an individual is an employee or an independent contractor is whether the employer has control or the right to control the employee's work. ***Kerl***, 273 Wis. 2d 106, ¶4.

¶37 It has been said that "[a] person who contracts to perform services for another but is not a servant is an independent contractor." ***Id.***, ¶24. An independent contractor is defined as "a person who contracts with another to do something for him but who is not controlled by the other or subject to the other's right to control with respect to his physical conduct in the performance of the undertaking." ***Id.*** (quoting RESTATEMENT (SECOND) OF AGENCY, § 2(3)). In applying this test, we are to look "beyond labels to factual indicia of control or right to control." ***Id.***

¶38 We conclude that the circuit court's finding that Tillman was an independent contractor was clearly erroneous. To begin, contrary to what the circuit court stated, we find no evidence in the record from which it can be reasonably inferred that Fehr allowed his law offices to be used by *other* attorneys as independent contractors. For instance, none of the witnesses testified that Fehr leased office space to attorneys who were not employed by Fehr. The record also lacks evidence establishing that any attorney entered into a contractual agreement with Fehr and his law firm to perform legal services on behalf of the firm as an

independent contractor. Accordingly, the court's finding that Fehr allowed independent contractors to use his offices is clearly erroneous.

¶39 Moreover, the great weight of the credible evidence establishes that Fehr had the right to control and did control Tillman's work. Fehr testified that he was the sole proprietor of the firm and that he hired Tillman. Tillman testified that Fehr was his supervisor and that he was an associate of the law firm. As Schmidt observes, the term "associate" would not ordinarily be understood by those within the legal profession to mean an independent contractor. Rather, "associate" as used in this context is generally understood to mean an attorney employed by a law firm as a junior member. *See* BLACK'S LAW DICTIONARY 141 (9th ed. 2009) (defining an associate as "a lawyer in a law firm, usu[ally] with fewer than a certain number of years in practice, who may, upon achieving the requisite seniority, receive an offer to become a partner or shareholder"). There is no reason to conclude from the record evidence that the term "associate" was being used by Tillman in a way that differed from the generally understood meaning of the term; significant evidence points in the other direction.

¶40 This significant evidence supporting Schmidt's contention that Tillman was an employee of the Fehr law firm includes a letter signed by Schmidt showing that Schmidt retained Fehr's law firm, and not Tillman as an individual attorney, to represent her. The law firm's letterhead, which bore Fehr's name at the top, was followed by the names of two other attorneys, including Tillman. Tillman corresponded with others regarding the proposed sale on firm letterhead, and not on his own letterhead. Fehr testified that he met with Schmidt when she first retained the law firm to represent her, and then "turned [the case file] over" to Tillman. Fehr testified that Tillman discussed certain matters with him related to Schmidt.

¶41 The law firm's billing records admitted into evidence also indicate that Tillman was not an independent contractor. Tillman and Fehr submitted a billing statement to Schmidt, containing the hours that both worked on Schmidt's case file. If Tillman was an independent contractor, one would expect that Tillman would have submitted his own billing statement under his own name for time spent representing Schmidt, and not a statement which also includes time Fehr spent performing legal services on behalf of Schmidt.

¶42 Considered together, the only reasonable inference that can be drawn from the evidence is that Tillman was an employee of Fehr's law firm, and there is no dispute that Tillman was acting within the scope of employment when he negligently represented Schmidt.

¶43 We acknowledge that Tillman testified that he was not Fehr's employee:

> Q At the time you were an associate employee of Attorney Lee Fehr?
>
> [Tillman] I wasn't an employee, but I was an associate in that firm.

¶44 The circuit court's finding that Tillman was an independent contractor and not an employee of Fehr's law firm apparently stemmed from this testimony. In any case, this testimony is the only evidence the defendants provide in support of their position that Tillman was not an employee. However, this testimony, at best, is an assertion by Tillman that an associate attorney in his circumstances is not an "employee." The testimony does not supply underlying reasoning why this might be true. In contrast, all of Tillman's other testimony supports the finding that he was an employee.

¶45 In sum, based on the undisputed facts of record, and the only reasonable inferences that can be drawn from those facts, we conclude that Tillman was employed by Fehr's law firm and was acting within the scope of his employment when he negligently represented Schmidt. Therefore, it follows that Fehr is vicariously liable for Tillman's negligent conduct.

¶46 Schmidt contends that, if Fehr is vicariously liable for Tillman's conduct, then we should remand to the circuit court to enter a judgment against the firm and malpractice liability insurer, holding them liable for 60% of the negligence. The defendants do not offer any argument to the contrary. Consequently, we reverse and remand to the circuit court to enter judgment against Fehr, the Fehr Law Office, and the insurer, holding them liable for 60% of the negligence.

CONCLUSION

¶47 For the foregoing reasons, we affirm the circuit court's denial of the defendants' motion for judgment notwithstanding the verdict and reverse the court's denial of Schmidt's motion for judgment on the verdict.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded for further proceedings.

Not recommended for publication in the official reports.