

STATEMENT OF THE CASE

Scott D. Heckendorf (“Scott”) and Becky Heckendorf (collectively, “Heckendorf”) appeal the trial court’s grant of judgment on the evidence for Rush-Air, LLC (“Rush-Air”) in their negligence action against Rush-Air and Michael Karpy.

We affirm.

ISSUES

1. Whether the trial court erred in granting judgment on the evidence to Rush-Air.
2. Whether the trial court abused its discretion when it did not admit into evidence as an exhibit the deposition of Phil Aaron.

FACTS

On March 11, 2004, Heckendorf brought an action against Rush-Air.¹ The complaint alleged that Rush-Air had been negligent as the owner and landlord of premises at 1601 South Barth in Indianapolis by “intentional[ly] terminat[ing]” the electricity to the premises’ elevator, thereby proximately causing the damages Heckendorf suffered when a printing press being moved by Scott and a premises “tenant” via a stairwell fell on Scott. (App. 25). Subsequently, on September 29, 2004, Heckendorf amended the complaint by adding Karpy as a defendant. The amended complaint alleged that Karpy, “a tenant renting space located on the second floor of the premises,” had sought Scott’s assistance in moving a printing press from the building;

¹ The complaint also named Phil Aaron, co-owner of Rush-Air, as a defendant. On May 16, 2005, Heckendorf voluntarily dismissed Aaron, individually, from the litigation.

that as Karpy and Scott descended the stairs with the press, Karpy “was unable to hold the press and it fell into Scott,” and that Karpy

was negligent in his failure to maintain a proper hold on the press, deciding to remove the press down stairs, and . . . advising Scott that he was capable of lifting and moving heavy weight.

(App. 29). On February 1, 2005, Heckendorf moved for default judgment as to Karpy. After a hearing on March 21, 2005, at which Karpy did not appear, the trial court granted Heckendorf a judgment against Karpy.

At the jury trial on August 15-16, 2006, evidence of the following was presented.² Rush-Air owned an industrial building at 1601 S. Barth in Indianapolis. In early 2002, Roger Porter entered into a written five-year lease agreement with Rush-Air’s co-owner Phil Aaron for the second floor of the building. Subsequently, James Wallick reached a verbal agreement with Porter whereby Wallick would sublease from Porter the second floor for operation of Wallick’s printing business. Subsequent to this, Wallick entered into a verbal agreement to sublease part of the second floor to Karpy, who “was in the printing equipment business” and needed the space “to store some equipment.” (Tr. 31).

Wallick made rent payments to Porter. Initially, Karpy paid his rent to Wallick, but “Porter decided that [Karpy] should be actually paying him . . . because he actually

² The statement of facts in the appellant’s brief should “describe the facts relevant to the issues presented” and be “stated in accordance with the standard of review appropriate to the judgment or order being appealed.” Ind. Appellate Rule 46(A)(6). As Heckendorf’s brief correctly states, our standard of review is “the same as the trial court” and entails “analysis of all the direct and circumstantial evidence presented at trial.” Heckendorf’s Br. at 9 (emphasis added). Thus, in an appeal such as this one, the statement of facts in the appellant’s brief should reference facts presented at trial.

was leasing the entire area.” (Tr. 21). Thus, “the arrangement” became for Karpy to pay Porter directly. (Tr. 22).

The lease between Rush-Air and Porter expressly provided that the tenant “shall not assign this lease in whole or in part or sublet the leased premises in whole or in part without the prior written consent of the landlord which consent shall not unreasonably be withheld.” (Tr. 42). Porter had never sought such consent to sublease the premises. Neither Wallick nor Karpy had any agreement with Rush-Air, and Rush-Air was not aware of any subleases of the second floor.

Scott operated a business titled Sheckey’s Repair Service, which moved and repaired printing equipment. Through Sheckey’s, Scott had a business relationship with Karpy, who on occasion “hir[ed] [him] to move” equipment. (Tr. 52). On September 18, 2003, Karpy called Scott “stating that he needed help moving a press downstairs from the second floor.” (Tr. 54-55). Karpy offered Scott \$200 to “assist[] in moving this press.” (Tr. 104). Scott went to the premises and discovered there was no power to the elevator.³ Karpy “asked if there was any way [they] could get this press down, and [Scott] told him [they] could always move it down the stairs.” (Tr. 55). Scott had moved this particular kind of press “many times” before. (Tr. 56). Scott further testified that with the use of a furniture dolly and second person, he had moved this kind of press down stairs “three or four” times in the past. (Tr. 64). When asked whether there were “risks” involved in

³ Scott testified that he “saw the fuse box” and there were no fuses in it “for the elevator.” (Tr. 63).

moving such a printing press on a dolly down stairs, Scott answered that “there’s no risk” and testified that there was “zero” risk so long as he had “a good helper.” (Tr. 97).

Karpy agreed to obtain a furniture dolly, and Scott returned the next morning to help move the press. Scott examined the stairs where the move would take place – nine stairs to a landing, where they would make two 90-degree turns, and then another nine stairs – and verified that the stairs were dry. Scott testified that he asked “Karpy three times: are you sure you can do this; are you sure you can do this; are you sure you can do this?”; and Karpy responded that he “didn’t have a problem with it.” (Tr. 98). When asked whose decision it was to proceed to move the press down the stairs, Scott testified that it “was [his] decision.” (Tr. 102).

The men moved the press, on the dolly, to the top of the stairs. Scott backed down the stairs in front of it, with Karpy holding the back. As Karpy “went over the first run of stairs,” Karpy yelled, “I’m sorry, here it comes,” and “the press just started roaring down on top of [Scott]” and pinned him to the wall of the stairwell. (Tr. 67, 99, 67). Scott suffered significant injuries.

Scott testified that he had moved the same type of printing press down stairs in the past when there was no freight elevator available. He admitted that it was not the lack of a freight elevator that caused this accident. Scott affirmed that the only difference between the previous occasions when he had moved a printing press down stairs with a dolly and this occasion was the person helping – Karpy.

After testimony by Wallick, Aaron, Scott, and Scott's physician, Heckendorf's counsel moved to have the deposition of Aaron admitted into evidence pursuant to Indiana Trial Rule 32(A)(2). The trial court denied the motion.

Heckendorf's counsel concluded presenting evidence and rested. Rush-Air then rested. The trial court took judicial notice of its order of default judgment against Karpy. Rush Air moved for judgment on the evidence, arguing that there was a "total failure of proof of the presence of a dangerous condition." (Tr. 132). The trial court granted the motion "based upon there being a lack of proof . . . as to the dangerousness of the premises." (Tr. 146). The trial court noted the lack of evidence "that the stairwell was dangerous or was not functioning" or "was wet" or "was not well lit." *Id.* It further noted that Scott

"himself" had deemed the stairwell adequate for the move;
was there "at the request of Mr. Karpy, who did not have any rights in the premises";
had been there the previous day and had inspected the premises and the press he was to move;
"was fully aware that the stairwell was his ingress-egress," and that the elevator was "not functioning and made a business decision to move the equipment for a fee"; and
had "testified that on many other occasions he had moved equipment down stairwells where elevators were not available."

Id. The trial court concluded that Heckendorf failed to show that Rush-Air was negligent with regard to Scott or owed Scott a duty to provide a functioning elevator. The trial court then entered judgment for Rush-Air.

DECISION

1. Judgment on the Evidence

When we review the appeal of a trial court's ruling on a motion for a directed verdict, also known as a motion for judgment on the evidence, we use the same standard as the trial court. *Topp v. Leffers*, 838 N.E.2d 1027, 1031 (Ind. Ct. App. 2005), *trans. denied*. We consider only the evidence and reasonable inferences most favorable to the non-moving party. *Id.* The trial court should only withdraw the issues from the jury and enter judgment on the evidence in favor of the defendants when, at the close of the plaintiff's evidence, there is a total absence of evidence or reasonable inferences on at least one essential element of the plaintiff's case. *Id.* (citation omitted). The motion for a directed verdict "should only be granted where there is no substantial evidence supporting an essential element of the claim." *Id.* at 1032.

Heckendorf argues that the trial court erred in granting judgment on the evidence because evidence was presented on each element of negligence: a duty arising from the relationship between the parties, the breach thereof, and injury proximately cause thereby. *See Benton v. City of Oakland City*, 721 N.E.2d 224, 232 (Ind. 1999). According to Heckendorf, Rush-Air owed a duty to Scott, and that duty was breached by the lack of a functioning elevator, which proximately caused injuries to Heckendorf. Specifically, Heckendorf argues that Rush owed Scott a duty because he was a business visitor; as a business visitor, Rush-Air owed him a duty of reasonable care for his safety; because Rush-Air's lease was with Porter, who had operated a printing business on the

premises,⁴ Rush-Air could reasonably foresee that a printing business tenant might need to move a printing press and that the lack of a functioning elevator might result in injuries to a business visitor being on the premises for that purpose; and Heckendorf suffered damages when Scott was injured in the moving of a printing press from the premises. We cannot agree.

The premises were leased by Rush-Air to Porter. The lease specifically forbade subleasing of the premises without prior written consent of Rush-Air. No consent to sublease the premises was either sought or granted. Thus, Rush-Air had no landlord/tenant relationship with either Wallick or Karpy. Further, according to the evidence presented, Rush-Air had no knowledge of Karpy's presence – let alone that he was storing a printing press on the premises, or that he would undertake to move the press from the premises. If Scott was a business visitor, it was not with respect to the tenant – Porter; nor was it with respect to Porter's unauthorized sublessee, Wallick. Scott could only have been the business invitee of an unauthorized sublessee. Heckendorf proffers no authority for establishing his status as a business invitee through serial unauthorized sublessees -- particularly in light of the written lease's express requirement that there be no subleasing without the written approval of the lessor.

Therefore, we cannot find that Scott was an invitee to the premises. Under these circumstances, we do not find Scott to be a trespasser. *See Carroll by Carroll v. Jagoe Homes, Inc.*, 677 N.E.2d 612, 615 (Ind. Ct. App. 1997), *trans. denied* (a trespasser is one

⁴ Wallick testified that after Porter signed the lease with Rush-Air, he and Porter had operated a printing business on the premises; however, they subsequently parted ways, and Wallick continued the business without Porter – operating under a sublease from Porter and paying rent to Porter.

who enters landowner's property without consent, right, or invitation). Hence, Scott was a licensee on the premises owned by Rush-Air. Accordingly, Rush-Air simply owed Scott the duty to refrain from willfully or wantonly injuring him or acting in a manner to increase a peril, as well as a duty to warn him of any latent danger on the premises of which Rush-Air had knowledge. *Burrell v. Meads*, 569 N.E.2d 637, 639 (Ind. 1991). As already discussed, Scott was aware that the elevator was inoperable, he viewed the stairwell, and based upon his knowledge as an experienced mover, he made the decision to move the press via the stairs. Thus, the evidence failed to establish that Rush-Air breached a duty of care to Scott.

Further, Scott was at the premises in the course of his Sheckey's Repair Service business, which engaged in the moving of printing equipment. As such, he was an independent contractor who held himself out as an expert on the necessary method of making such a move. *See Guaranty Nat'l Ins. Co. v. Dallas Moser Trans.* 596 N.E.2d 966, 969 (Ind. Ct. App. 1992) (independent contractor "controls method and details of his own task"). Scott had moved a press similar to Karpy's down stairs before on multiple occasions. Scott inspected the site, including the stairwell, assessed the risk involved, and deemed it adequate -- testifying that he alone made the decision to move the printing press down the stairs.

Heckendorf presses the theory that there is a general duty of a landlord to provide a functioning elevator. However, Scott testified that an elevator was not necessary to move this kind of printing press. Thus, the evidence did not prove that the lack of an elevator caused his injuries.

As the trial court properly concluded, Heckendorf failed to establish that the premises were dangerous or that Rush-Air breached a duty of care to him. Therefore, the trial court did not err in granting judgment on the evidence for Rush-Air.

2. Admission of Evidence

The admission or exclusion of evidence is a determination entrusted to the discretion of the trial court. *Lachenman v. Stice*, 838 N.E.2d 451, 464 (Ind. Ct. App. 2005), *trans. denied*. Further, the trial court's evidentiary rulings are afforded great deference on appeal and are overturned only upon a showing of an abuse of discretion. *Bova v. Gary*, 843 N.E.2d 952, 955 (Ind. Ct. App. 2006). We will not overturn a trial court's decision to admit or exclude evidence "absent a showing of a manifest abuse resulting in the denial of a fair trial." *Id.*

Heckendorf argues that the trial court committed reversible error when it denied the motion to admit Aaron's deposition transcript. Specifically, Heckendorf contends that the language of Indiana Trial Rule 32(A) expressly provides for the admission of the deposition.

The Rule provides, in pertinent part, as follows:

(A) Use of depositions. At the trial . . . , any part or all of a deposition, so far as admissible under the Rules of Evidence applied as though the witness were then present and testifying, may be used against any party who was present . . . at the taking of the deposition, by or against any party who had reasonable notice thereof or by any party in whose favor it was given in accordance with any one (1) of the following provisions:

(2) The deposition of a party may be used by an adverse party for any purpose.

T.R. 32(A). Heckendorf emphasizes the last phrase of subsection 2 – “may be used by an adverse party for any purpose,” and concludes that because Aaron is a co-owner of Rush-Air, the Rule provides a “clear mandate” for admission of his deposition at trial. Heckendorf’s Br. at 23.

Dean Harvey suggests that pursuant to this provision, “use of the adversary’s deposition is permitted even though the party who gave the deposition has taken the stand.” WILLIAM F. HARVEY, RULES OF PROCEDURE ANNOTATED, 2A INDIANA PRACTICE § 32.3 (2000). That the Rule “permit[s]” use of the deposition does not mandate its admission. Moreover, the authority Dean Harvey cites is instructive. In *Merchants Motor Freight, Inc. v. Downing*, 227 F.2d 247 (8th Cir. 1955), portions of a witness’ deposition were held admissible to impeach that witness’ trial testimony. In *Cleary v. Indiana Beach, Inc.*, 275 F.2d 543 (7th Cir. 1960), the opinion summarily holds that it was not erroneous to admit portions of a witness’ deposition after that witness’ testimony at trial. Thus, in neither case was the complete deposition entered into evidence as an exhibit – which is what Heckendorf’s motion apparently asked the trial court to do.

The Rule states that the deposition “may be used for any purpose.” T.R. 32(A). We note that “may” is a word generally indicating a permissive condition. *See Mendenhall v. Skinner and Broadvent Co.*, 728 N.E.2d 140, 142 (Ind. 2000). Further, we find that the phrase “for any purpose” in Rule 32(A)(2) is limited by the preceding phrase in Rule 32(A): “so far as admissible under the Rules of Evidence.” Thus, the use to

which a party may put an adversary's deposition must be one consistent with the Rules of Evidence.

Heckendorf did not offer the deposition to impeach Aaron's testimony at trial. Further, prior to his apparent offer of it as an exhibit, the deposition was not in any way redacted to exclude inadmissible evidence or "unnecessarily repetitious" testimony. *Merchants Motor Freight*, 227 F.2d at 250. Further, the threshold requirement for the admission of evidence is that it be relevant. *See* Indiana Evid. R. 402. Heckendorf's brief articulates a series of what he perceives to be "relevant" facts that were stated in Aaron's deposition. Heckendorf's Br. at 24. However, these facts were not relevant to Heckendorf's claim: that Rush-Air breached a duty to Scott. Therefore, the trial court did not abuse its discretion when it denied Heckendorf's motion to admit the deposition.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.