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IN THE
COURT OF APPEALS OF INDIANA

TRACY LYNN WESTON, as Personal Representative of Estate of CLINTON DALE WESTON, Deceased, Appellant-Plaintiff,	)	
vs.	)	No. 21A05-0807-CV-402
FAYETTE MEMORIAL HOSPITAL, and PREFERRED EMERGENCY SPECIALISTS, INC., Appellees-Plaintiffs.	)	

APPEAL FROM THE FAYETTE SUPERIOR COURT
The Honorable Ronald T. Urdal, Judge
Cause No. 21D01-0701-PL-080

May 15, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Tracy Lynn Weston, as personal representative of the Estate of Clinton Dale Weston ("the Estate"), filed suit in Fayette Superior Court against Fayette Memorial Hospital ("the Hospital") and Preferred Emergency Specialists, Inc. ("Preferred") (collectively "the Defendants") alleging that the Defendants negligently hired and retained Dr. Scott Longevin ("Dr. Longevin"). The Defendants moved for summary judgment, claiming that Dr. Longevin was an independent contractor, not an employee, and thus they could not be liable for negligently hiring or retaining him. The trial court granted summary judgment in favor of the Defendants. The Estate now appeals and claims that the trial court erred in granting summary judgment in favor of the Defendants because there is a genuine issue of material fact with regard to whether Dr. Longevin was an employee of the Defendants.

We reverse and remand.

Facts and Procedural History

On March 9, 2005, Clinton Dale Weston ("Mr. Weston") went to the Hospital's emergency room and was treated by Dr. Longevin. Mr. Weston later died. The Hospital had a contract with Preferred to staff the Hospital's emergency room, and Dr. Longevin worked at the Hospital through Preferred.

On January 25, 2007, Mr. Weston's wife, Tracy, acting as the personal representative of the Estate of her husband, filed suit against the Hospital and Preferred seeking damages under a theory of negligent hiring and retention of Dr. Longevin. The complaint alleged that Dr. Longevin was an employee of the Hospital and Preferred and was acting in the scope of his employment when he treated Mr. Weston at the emergency room. The complaint also alleged that, "[a]s a direct and proximate result of the acts of negligent employment and retention of Dr. Longevin by [the Hospital and Preferred], [Mr. Weston] died." Appellant's App. p. 13.

The Hospital and Preferred answered the complaint, and eventually both Defendants filed separate motions for summary judgment, claiming that Dr. Longevin was not their employee. The Estate filed responses to both motions, and the trial court held a hearing on the matter on March 14, 2008. On June 12, 2008, the trial court issued an order granting summary judgment in favor of the Hospital. The same day, the trial court issued a separate order granting summary judgment in favor of Preferred. The Estate now appeals. Additional facts will be provided as necessary.

Standard of Review

Summary judgment is appropriate only where the designated evidentiary material demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); Jones v. W. Reserve Group/Lightning Rod Mut. Ins. Co., 699 N.E.2d 711, 713 (Ind. Ct. App. 1998), trans. denied. The burden is upon the moving party to establish, *prima facie*, that no genuine issues of material fact exist and that she is entitled to judgment as a matter of

law. Id. If the moving party meets this burden, the burden then falls upon the opponent to respond by setting forth specific facts demonstrating a genuine issue for trial. Id.

On appeal, we must apply the same standard as the trial court and resolve any disputed fact or inference in favor of the non-moving party. Id. We carefully scrutinize an entry of summary judgment in order to ensure that the non-prevailing party is not denied her day in court. Id. In order to prevail, the appealing party must establish the existence of a genuine issue of material fact from those materials designated to the trial court. Id. Genuine issues of material fact exist where facts concerning an issue which would dispose of litigation are in dispute. Id. at 713-14. Even if the trial court believes that the non-moving party will not prevail at trial, summary judgment is not appropriate and may not be entered where conflicting inferences arise from the undisputed facts.[1] Id.

Discussion and Decision

The Estate argues that the trial court erred in granting summary judgment in favor of the Defendants. Specifically, the Estate claims that, even if the Defendants met their initial burden of designating evidence which demonstrated that there were no genuine issues of material fact, the Estate's response to the Defendant's motion for summary

[1] In its order granting summary judgment in favor of the Hospital, the trial court concluded that "[t]he undisputed facts show that there is no evidence that [Dr. Longevin] was unfit to practice medicine at any time prior to the date of injury alleged in the Plaintiff's Complaint." Appellant's App. p. 8. The Estate notes that the Hospital did not move for summary judgment based upon Dr. Longevin's fitness to practice medicine. The Hospital admits that it did not present this issue in its motion. The Estate therefore claims that the trial court erred in granting summary judgment on a basis not argued by the parties. To the extent the trial court's statement regarding Dr. Longevin's fitness constitutes a specific finding and/or conclusion, it is not binding on us. Jones, 699 N.E.2d at 714. Furthermore, because the parties limit their argument regarding the appropriateness of summary judgment to the question of whether Dr. Longevin was an employee of the Defendants, we too limit our discussion to the question of whether Dr. Longevin was an employee.

judgment designated evidence which demonstrates that there remains a genuine issue of material fact as to whether Dr. Longevin was an employee of the Defendants or an independent contractor.

Indiana courts recognize the tort of negligent hiring and retention of an employee. Konkle v. Henson, 672 N.E.2d 450, 454 (Ind. Ct. App. 1996). "Indiana has adopted the Restatement (Second) of Torts § 317 as the standard with regard to this tort." Id. To determine if an employer is liable for the negligent hiring or retention of an employee, the court must determine if the employer exercised reasonable care. Id. at 454-55. Of course, before a party can be held liable for the negligent hiring or retention of an employee, it must be established that the worker at issue was indeed an employee. Here, both Defendants moved for summary judgment claiming that Dr. Longevin was an independent contractor, not an employee.

Whether one acts as an employee or an independent contractor is generally a question for the finder of fact. Moberly v. Day, 757 N.E.2d 1007, 1009 (Ind. 2001) (citing Mortgage Consultants, Inc. v. Mahaney, 655 N.E.2d 493, 496 (Ind. 1995)). However, if the significant underlying facts are undisputed, the court may properly determine a worker's classification as a matter of law. Id. (citing Hale v. Kemp, 579 N.E.2d 63 (Ind. 1991)). To distinguish employees from independent contractors, we apply the following ten-factor analysis:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
> (b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
(d) the skill required in the particular occupation;
(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
(f) the length of time for which the person is employed;
(g) the method of payment, whether by the time or by the job;
(h) whether or not the work is a part of the regular business of the employer;
(i) whether or not the parties believe they are creating the relation of master and servant; and
(j) whether the principal is or is not in business.

Id. (quoting Restatement (Second) of Agency § 220(2) (1958)).

Under this test, all factors must be assessed, and no single factor is dispositive.[2] Id. (citing Mahaney, 655 N.E.2d at 496). This list of factors is not exhaustive. Mahaney, 655 N.E.2d at 496. If enough of the indicia of an employer-employee relationship exists, an employer-employee relationship may be found despite the parties' designation of independent contractor status. Id. We therefore review each factor.

Factor (a)

The parties vigorously argue over the factor of the extent of control which the master may exercise over the details of the work. The Estate notes that Dr. Longevin was bound by contract with Preferred to comply with the Hospital's bylaws, which included

[2] The Estates cites GKN Co. v. Magness, 744 N.E.2d 397, 402 (Ind. 2001) for the proposition that "the right to exercise control over the manner and means by which the work is to be accomplished is the most important consideration." As noted in Moberly, however, the court in Magness adopted a seven-factor test for determining whether a person is an employee of two different employers. Moberly, 757 N.E.2d at 1010 n.3. The Moberly court noted that, although there is a "good deal of similarity between these two lists, . . . [w]e think that each list of factors works slightly better when applied only for the purpose for which it was developed." Id. Therefore, when the issue is whether a worker is an employee or an independent contractor, we should apply the ten-factor approach. Id. Still, the Moberly court did refer to the control factor as "the leading factor." Id. at 1013.

performance of his duties in an efficient, competent, and courteous manner, and to work cooperatively with other members of the Hospital's staff. This, the Estate claims, demonstrates that Preferred controlled Dr. Longevin.

The Estate also claims that the Hospital controlled Dr. Longevin, noting that the contract between the Hospital and Preferred required Dr. Longevin to be a member of the Hopsital's "staff," subject to the rules and bylaws of the Hospital. These bylaws placed numerous requirements on Dr. Longevin, including: meeting an appropriate standard of care, abiding by the staff rules, preparing medical records in a complete and timely fashion, working cooperatively with other staff, refusing to engage in improper inducements for patient referrals, meeting continuing medical education requirements, and not practicing medicine within a twenty-five mile radius of the emergency room. The Hospital also required Dr. Longevin to respond to a "code blue" in any part of Hospital unless there was another code situation in the emergency room.

Despite this, the Defendants claim that they exercised little control over the particulars of how Dr. Longevin practiced or precisely when he worked. See Moberly, 757 N.E.2d at 1011 (evidence that worker was answerable for results only, and not the particulars of how he went about accomplishing the assigned task, supported conclusion that worker was independent contractor). We need not go into a lengthy analysis of the degree of control, because there is designated evidence which could support an inference that the Defendants exercised some degree of control over Dr. Longevin. Moreover, as we explain infra, there are sufficient questions of fact regarding the other factors to warrant a trial. See Mahaney, 655 N.E.2d at 497 (reversing summary judgment where

there were genuine issues of fact with regard to three of the ten Restatement factors). The precise degree of control is a question of fact.

Factor (b)

Regarding the factor of whether the one employed is engaged in a distinct occupation or business, we agree that the practice of medicine is a distinct occupation. This would tend to support a finding of independent contractor status. See Moberly, 757 N.E.2d at 1011.

Factor (c)

The third factor to consider is "the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision." Moberly, 757 N.E.2d at 1009. Although we might optimistically speculate that hospitals generally supervise the physicians that work for them, the designated evidence does not establish this conclusively. Moreover, given that there are issues of fact with regard to other factors, we need not determine the degree of supervision the Defendants exercised over Dr. Longevin.

Factor (d)

The fourth factor listed in Moberly refers to the skill required in the particular occupation. It cannot be denied that being a physician requires a rather high level of skill and education. This would weigh in favor of finding of independent contractor status. See Moberly, 757 N.E.2d at 1011.

Factor (e)

The next factor we address is whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work. The Defendants claim that Dr. Longevin's "tools" were his medical education and skills. However, it cannot be denied that Dr. Longevin would be hard pressed to practice emergency medicine without access to the Hospital's emergency room. However, as observed in Moberly, "a drain repairman must go to the drain, whether he is an employee or independent contractor." Id. at 1012. Thus, this factor could favor either party.

Factor (f)

Looking at the length of time for which the person is employed, the Defendants claim that Dr. Longevin had been working at the Hospital for "only" a year and five months. This is not an insubstantial amount of time. A trier of fact could infer from this that Dr. Longevin was an employee.

Factor (g)

It appears that the Hospital did not pay Dr. Longevin directly, but simply paid Preferred pursuant to their contract and relied upon Preferred to pay Dr. Longevin. There is little in the designated evidence to establish how Preferred paid Dr. Longevin.

Factor (h)

With regard to the factor of whether or not the work is a part of the regular business of the employer, the Hospital claims that it is not in the business of "practicing medicine." We think this views the question too narrowly. Although the Defendants might not be in the business of practicing medicine, they are both in the business of

providing medical services. Cf. Moberly, 757 N.E.2d at 1012 (fact that employer was a farmer and his business was not drainage tile repair, which is what he paid worker to do, weighed slightly in favor of independent contractor status).

Factor (i)

With regard to the ninth factor, the Hospital and Preferred claim that they have always maintained that Dr. Longevin was an independent contractor and not an employee. The Estate notes, however, that Dr. Longevin twice stated while under oath that he was an employee of Preferred. At a February 6, 2006 deposition, Dr. Longevin was asked, "Where are you employed?" He responded, "I . . . work for Preferred Emergency Services [sic]." Appellant's App. p. 246. He also stated, "I work at Fayette Hospital in Connersville through Preferred Emergency Services [sic]." Id. On October 24, 2006, in response to an interrogatory which stated, "Please identify each person who employed you on March 9, 2005," Dr. Longevin answered, "Preferred Emergency Specialists, Inc." Appellant's App. p. 242.

Preferred argues that Dr. Longevin's responses do not "establish a legally binding employer/employee relationship with Preferred," and that "[t]here is no evidence whatsoever to suggest that Dr. Longevin understood that he was being asked to make a legal conclusion regarding his legal status in relation to Preferred." Appellee's Br. p. 8. Be that as it may, the fact remains that Dr. Longevin did state under oath that Preferred was his employer and that he worked at the Hospital "through" Preferred. Although this may not conclusively establish that Dr. Longevin was an employee of Preferred, it is certainly evidence which could support the conclusion that he was an employee.

The Defendants emphasize that Dr. Longevin later amended his interrogatory response to say, "I was not considered an employee of Preferred Emergency Services, Inc., as previously thought. I was an independent contractor under verbal agreement only to provide emergency services to Fayette Memorial Hospital starting in December 2002 to the best of knowledge." Appellant's App. p. 334. The Defendants claim that Dr. Longevin had a right under Indiana Trial Rule 26(E)(2)(a) to amend his discovery response. We do not disagree. But his contradictory statements do raise factual issues with regard to whether Dr. Longevin was truly mistaken, or whether he believed he was an employee and changed his mind only when this question became an issue during litigation. Cf. Meisenhelder v. Zipp Exp., Inc., 788 N.E.2d 924, 930 (Ind. Ct. App. 2003) (party may not create genuine issue of material fact simply by submitting an affidavit which directly contradicts prior, sworn testimony).

Factor (j)

With regard to the tenth factor, it appears to be undisputed that both the Hospital and Preferred are in business. This factor favors employee status for Dr. Longevin. See Moberly, 757 N.E.2d at 1013.

Summary

Considering these factors in light of the designated evidence in this case, we conclude that the Estate designated evidence demonstrating that genuine issues of material fact remain regarding whether Dr. Longevin was an employee of the Defendants,

especially with regard to Dr. Longevin's beliefs regarding his status.[3] Because there are genuine issues of material fact, the trial court should not have granted summary judgment. The judgment of the trial court is reversed and the cause is remanded for proceedings consistent with this opinion.

Reversed and remanded.

BAILEY, J., and BARNES, J., concur.

[3] The Estate also claims that there is a question of whether Dr. Longevin was a "borrowed" employee. Although the Estate cites to case law referring to the concept of a borrowed employee, it does not attempt to apply this law to the facts of the present case. This argument is therefore waived. See Ind. Appellate Rule 46(A)(8)(a). Even if this argument were not waived, we would not need to address it because we have already determined that summary judgment was improperly granted.