IN THE COURT OF APPEALS OF IOWA

FILED
DEC 1 7 1987
CLERK SUPREME COURT

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SARA PERSHING, as Administrator of the Estate of MATTHEW PERSHING, Deceased; **SARA PERSHING,** as Mother and Next Friend of Andrew Pershing, a Minor; **SARA PERSHING,** Individually, and **STEVEN PERSHING,** Individually,

Plaintiffs-Appellants,

vs.

JON M. FUSSELMAN, M.D., and **JOHN J. ALLHISER, M.D.,**

Defendants-Appellees.

Filed December 17, 1987

7-287
86-1532

Appeal from the Iowa District Court for Muscatine County (No. C3755-586), R. K. Stohr, Judge.

The plaintiffs appeal from the trial court decision sustaining the defendants' special appearance on the grounds that the plaintiffs had not complied with the procedural requirements of Chapter 25A in their malpractice action against the defendant physicians. **AFFIRMED.**

Arthur L. Buzzell of Buzzell, Semel & Vesole, Davenport, and Michael J. Warner, Rock Island, Illinois, for plaintiffs-appellants.

Richard M. Tucker and William M. Tucker of Phelan, Tucker, Boyle & Mullen, Iowa City, for defendants-appellees.

Heard by Donielson, P.J., and Schlegel and Hayden, JJ.

DONIELSON, P.J.

The plaintiffs appeal from the trial court decision sustaining the defendants' special appearance on the grounds that the plaintiffs had not complied with the procedural requirements of Chapter 25A in their malpractice action against the defendant physicians. The plaintiffs claim: (1) the defendants are not employees of the State as defined by Iowa Code section 25A.2(3); (2) the defendants were employees and agents of the Muscatine Health Center; (3) the defendants are estopped from asserting that they are state employees within the provisions of the Iowa State Tort Claims Act. We affirm.

The plaintiffs' son, Matthew Pershing, was treated at the Muscatine Health Center (MHC) by the defendant Jon M. Fusselman from January 1983 through May 1984 and by the defendant John J. Allhiser on May 14, 1984. Matthew Pershing died on May 15, 1984. His parents, Sara and Steven Pershing, brought this suit on May 9, 1986, claiming that the defendants negligently cared for their son. The defendants filed a special appearance which alleged that the district court lacked jurisdiction because they were employees of the State of Iowa and the plaintiffs had not complied with the procedural requirements of Chapter 25A, the Iowa State Tort Claims Act. The trial court sustained the special appearance. Plaintiffs appeal from the trial court decision.

Our scope of review is for the correction of errors at law. Iowa R. App. P. 4. Findings of fact are binding on the appellate court, if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

I. The plaintiffs claim the defendants are not employees of the State as defined by Iowa Code section 25A.2(3). According to the plaintiffs, only physicians who render services at a state institution are considered to be state employees.

Iowa Code section 25A.2(3) states the following:

> "Employee of the state" includes any one or more officers, agents, or employees of the state or any state agency, including members of the general assembly, and persons acting on behalf of the state or any state agency in any official capacity, temporarily or permanently in the service of the state of Iowa, whether with or without compensation but does not include a contractor doing business with the state. Professional personnel, including physicians, osteopathic physicians, optometrists and dentists, who render services to patients and inmates of state institutions under the jurisdiction of the department of human services or the Iowa department of corrections are to be considered employees of the state, whether the personnel are employed on a full-time basis or render services on a part-time basis on a fee schedule or other arrangement.

Ordinarily the determination as to the relationship of employer and employee is a question of fact. Rouse v. State, 369 N.W.2d 811, 813 (Iowa 1985). The criteria in making this determination include the right of selection or to employ at will, responsibility for payment of wages by the employer, right to discharge or terminate the relationship, right to control the work, and whether the party sought to be held as the employer is the responsible authority in charge of the work or for whose benefit the work is performed. Gabrielson v. State, 342 N.W.2d 867, 870 (Iowa 1984).

The MHC was a project started by the University of Iowa College of Medicine and local businesses. The defendants, in May 1984, were associate professors with the University. The defendants received their paychecks from the University. The defendants received their insurance through the University. The defendants attended conferences and meetings at the University to discuss the care and treatment of their patients. The income tax returns for defendant Fusselman for 1983 and 1984 reveal the University was his employer. A University listing of those physicians covered by malpractice insurance includes both defendants.

We find there is substantial evidence in the record to support the trial court's finding that defendants were employees of the State of Iowa in accordance with Iowa Code Chapter 25A.

II. The plaintiffs allege the defendants are not employees of the State because, insofar as the defendants' care and treatment of patients at MHC, the defendants were employees and agents of MHC. They maintain that the University helped start the MHC, but it did not own the land or building; and the University paid the physicians, but MHC reimbursed the University. The plaintiffs contend that the University did not control the defendants and so the doctors were not employees of the University. They rely on Bethards v. Shivvers, Inc., 355 N.W.2d 39, 45 (Iowa 1984), which states that a person who is an employee at one entity but who is "borrowed" by another entity, can, under appropriate circumstances, be regarded the employee of the "borrowing" entity.

The right to control is a principal factor to consider in determining the relationship of employer and employee. Bengford v. Carlem Corp., Inc., 156 N.W.2d 855, 863 (Iowa 1968). In addition, payment of services is another test which can be used to determine if such a relationship exists. See, e.g., Uhe v. Central States Theatre Corp., 258 Iowa 580, 581, 139 N.W.2d 538, 539 (1966).

For those reasons cited in Division I of this opinion, specifically, that the defendants received their compensation and malpractice insurance from the University of Iowa, they were hired by the University and the University retained the right to control defendants' work, we find there was substantial evidence to uphold the trial court's finding that defendants were not employees of MHC.

III. The plaintiffs claim that the defendants are estopped from asserting that they are state employees within the provisions of the Iowa State Tort Claims Act. The plaintiffs argue that there was a conscious and deliberate decision to avoid reference to the University with respect to the MHC. They allege there was no readily available way for them to acquire knowledge of the true facts. The plaintiffs claim that because MHC sought to hide its connection

with the University, it should not be able to rely on that connection to the plaintiffs' detriment.

The Iowa Supreme Court labeled four elements of estoppel in Dierking v. Bellas Hess Superstore, 258 N.W.2d 312, 315 (Iowa 1977), as follows:

> A. False representation or concealment of material facts.
>
> B. Lack of knowledge of the true facts on the part of the person to whom misrepresentation or concealment is made.
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> C. Intent of the party making the representation that the party to whom it is made shall rely thereon.
>
> D. Reliance on such fraudulent statement or concealment by the party to whom made resulting in his prejudice.

The burden of proof is on the party seeking to establish the existence of estoppel to establish the elements of clear and convincing evidence. Id.

We find no affirmative factual showing as it relates to those factors set out in Dierking that defendants intentionally concealed the status of their employment or conducted themselves in such a way to intend plaintiffs to rely on an apparent status of defendants of being non-state employees. Defendants' true employee relationship with the University was not hidden or denied; it was open to inquiry by plaintiffs.

We affirm the district court in all respects.

AFFIRMED.