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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

PURITA VINYARD et al., Plaintiffs and Appellants, v. SCRIPPSHEALTH, Defendant and Respondent.	D046427 (Super. Ct. No. GIC744446)

APPEAL from a judgment of the Superior Court of San Diego County, Luis R. Vargas, Judge. Affirmed.

In this wrongful death action, plaintiffs Purita Vinyard and Jeff Vinyard (the Vinyards) appeal a summary judgment for defendant ScrippsHealth (Scripps), entered after the trial court determined Scripps was not the "special employer" of the physician whose negligence allegedly caused the death of the Vinyards' husband and father, Ronald Vinyard, M.D., after he underwent gastric bypass surgery. We find no triable issue of material fact and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On December 3, 1998, Dr. Vinyard underwent gastric bypass surgery at Scripps Mercy Hospital (the Hospital), a Scripps entity. Eugene Rumsey, M.D., of the Pacific Bariatric Surgical Medical Group, Inc. (Medical Group), performed the surgery and Todd Peterson, M.D., assisted him. Dr. Peterson was a member of the United States Navy and was undergoing surgical residency training at the Hospital under an agreement between it and the Naval Medical Center in San Diego.

After surgery, Dr. Peterson saw Dr. Vinyard daily, and he documented his findings in Dr. Vinyard's medical records. Shortly after surgery, Dr. Vinyard developed sensory changes, weakness, pain and numbness in his left lower leg. Dr. Peterson, however, did not order a Doppler ultrasound to check the possibility of deep venous thrombosis, which Dr. Vinyard was at substantial risk of developing because of his obesity and immobility after surgery.

Dr. Vinyard was discharged from the Hospital on December 8, 1998, to be driven to his home in Wasco, California, by family and friends. During the trip, Dr. Vinyard died. The autopsy report lists the cause of death as " 'pulmonary embolism (minutes) due to thromboembolism—pelvic and lower extremities (days).' "

The Vinyards sued Scripps, Dr. Rumsey, the Medical Group and Dr. Peterson for wrongful death. The Vinyards dismissed Dr. Peterson after learning federal law precludes suit against him as a military officer, and the United States may be sued under a respondeat superior theory only in federal court. The Vinyards then brought a federal

action against the United States for the negligence of Dr. Peterson, and they ultimately accepted a $25,000 settlement.

In the superior court action, Scripps moved for summary judgment on the ground the Vinyards' sole claim against it was based on its vicarious liability for Dr. Peterson's negligence as a "special employee" of Scripps. Scripps argued that under federal law, the exclusive remedy for any negligence of Dr. Peterson was the suit against the United States. Alternatively, Scripps argued the undisputed evidence establishes it was not a dual employer of Dr. Peterson when the alleged malpractice occurred, and thus it has no liability on the ground of respondeat superior. The court granted the motion on both grounds and entered judgment for Scripps on April 8, 2005.[1]

DISCUSSION

I

Standard of Review

"A 'party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he [or she] is entitled to judgment as a matter of law.' [Citation.] A defendant satisfies this burden by showing ' "one or more elements of" the "cause of action" in question "cannot be established," or that "there is a complete defense" ' to that cause of action. [Citation.] If the defendant meets his or her initial burden, 'the opposing party is then subjected to a burden of production of his [or her] own to make a prima facie showing of the existence of a triable issue of material fact.'

[Citation.] We review rulings on summary judgment motions independently." (*Gonzalez v. Paradise Valley Hospital* (2003) 111 Cal.App.4th 735, 739.)

II

Dual Employment

A

In California, the "possibility of dual employment is well recognized in the case law. 'Where an employer sends an employee to do work for another person, and both have the right to exercise certain powers of control over the employee, that employee may be held to have two employers—his original or "general" employer and a second, the "special" employer.' " (*Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 174 (*Kowalski*).) "In determining whether a special employment relationship exists, the primary consideration is whether the special employer has ' "[t]he right to control and direct the activities of the alleged employee or the manner and method in which the work is performed, whether exercised or not . . . ." ' " (*Id.* at p. 175.)

When dual employment exists, "the general employer remains concurrently and simultaneously, jointly and severally liable [with the special employer] for the employee's torts." (*Marsh v. Tilley Steel Co.* (1980) 26 Cal.3d 486, 495.) "Evidence that the alleged special employer has the power to discharge a worker 'is strong evidence of the existence of a special employment relationship. [Citations.] The payment of wages is not, however, determinative.' " (*Kowalski, supra,* 23 Cal.3d at p. 177, fn. omitted.)

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1 The court denied the summary judgment motion of Dr. Rumsey and the Medical

"California courts have held that evidence of the following circumstances tends to negate the existence of a special employment: The employee is (1) not paid by and cannot be discharged by the borrower, (2) a skilled worker with substantial control over operational details, (3) not engaged in the borrower's usual business, (4) employed for only a brief period . . . , and (5) using tools and equipment furnished by the lending employer." (*Marsh v. Tilley Steel Co., supra,* 26 Cal.3d at p. 492.)

"The question of whether an employment relationship exists ' "is generally a question reserved for the trier of fact." ' [Citations.] This remains true '[w]here the evidence, though not in conflict, permits conflicting inferences.' [Citation.] However, if neither the evidence nor inferences are in conflict, then the question of whether an employment relationship exists becomes a question of law which may be resolved by summary judgment." (*Riley v. Southwest Marine, Inc.* (1988) 203 Cal.App.3d 1242, 1248.)

B

The Vinyards contend the trial court erred by resolving the dual employment issue as a matter of law. Scripps counters that summary judgment is proper because undisputed evidence shows it did not control the details of Dr. Peterson's work at the Hospital. We agree with Scripps.

It is undisputed that Dr. Peterson worked at the Hospital for only three months, during which time the Navy paid his salary. He was assigned to work with the Medical

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Group, and they are not involved in this appeal.

Group and its physicians, including Dr. Rumsey; he assisted Dr. Rumsey in Dr. Vinyard's surgery and in providing postoperative care to Dr. Vinyard, and he used his skill and training as a physician in treating patients.

Additionally, Scripps presented evidence that the only Hospital staff Dr. Peterson ever reported to was Michael Sise, M.D., for administrative purposes. In deposition, Dr. Peterson was asked whether he understood that anyone with the Hospital supervised him, and he responded, "I knew that if we had any types of problems, we were supposed to contact Dr. Sise." Dr. Peterson denied that any other employee of the Hospital had any supervisory role over him. Further, he testified he was not allowed to "do anything" pertaining to Dr. Rumsey's patients without his authorization. Dr. Rumsey testified in deposition that he or his partners at the Medical Group authorized Dr. Peterson to write orders concerning its patients.

Dr. Sise testified at deposition that his role with respect to the training program was limited to acting as an administrative liaison between the Hospital and the Navy, "[e]xcept in the direct supervision in the care of my own patients on trauma and vascular." Dr. Sise explained, "I make certain that [the Navy physicians], upon their arrival, contact the appropriate . . . supervising attending staff surgeons and physicians and make certain that their evaluations are filled out by the appropriate attending staff and return to Navy hospital San Diego and then [I am] available to coordinate any leave time they need to take."

In their responsive separate statement, the Vinyards did not dispute that Dr. Sise handled only administrative matters insofar as Dr. Peterson was concerned. They

claimed, however, that "it would appear that Dr. Rumsey and other members of [the Medical Group] were staff members at Mercy Hospital." The assertion is immaterial, though, because it is unsupported by any evidence.

The Vinyards also claimed Dr. Rumsey "was the director of the Mercy/Balboa Residency Training Program *at the time of the incident*" (italics added) suggesting that made him a Hospital employee. They recite this assertion several times on appeal. The Vinyards, however, do not accurately represent the evidence. They cite pages 189 to 191 of Dr. Rumsey's deposition transcript, which shows that *when his deposition was taken in September 2002*, his curriculum vitae stated he was "the director of the Mercy/Balboa Residency Training Program." Dr. Rumsey explained the nature of the program, but he was not asked whether he held that position in 1998 when Dr. Peterson's alleged malpractice occurred.

The Vinyards rely principally on the Memorandum of Understanding between Scripps and the San Diego Naval Medical Center (MOU), which refers to the Hospital as Dr. Peterson's "supervising-institution" [*sic*]. The MOU provides that when "trainees of either party are participating under this agreement at the clinical facilities of the supervising-institution [*sic*], the trainees *will be under the supervision of facility officials of the supervising-institution* [*sic*] and will be subject to and be required to abide by, all of the supervising-institution's [*sic*] rules and applicable regulations." (Italics added.) The MOU also provides that "[e]ach party agrees not to seek indemnification from the other party or its trainees for any settlement, verdict or judgment resulting from any claim

or lawsuit arising out of the performance of the trainee's professional duties while acting under the *control* of the supervising-institution [*sic*] and its employees." (Italics added.)

The MOU also provides that Scripps retains the right to refuse any Navy physician's entry into the training program, and the right "to bar any participant involved in a training program . . . when it is determined that further participation would not be in the best interest of either party." Further, under the MOU Scripps agrees to "[a]rrange schedules that will not conflict with other educational programs and the orderly operation of the institution," and "[d]esignate an official to coordinate trainees' clinical learning experience," including "planning with faculty or staff members for the assignment of trainees to specific clinical cases and experiences."

The Vinyards contend the MOU shows Scripps had the right to control the details of Dr. Peterson's work, even if it did not exercise the right. It is established, however, that "[a]lthough the terms of a contract may specify that a special employer retains the right to control the details of an individual's work or purports to establish an employment relationship, 'the terminology used in an agreement is not conclusive . . . even in the absence of fraud or mistake.' [Citations.] 'The contract cannot affect the true relationship of the parties to it. Nor can it place an employee in a different position from that which he actually held.' [Citation.]" (*Kowalski, supra,* 23 Cal.3d at p. 176; *Miller v. Long Beach Oil Dev. Co.* (1959) 167 Cal.App.2d 546, 554.) Because a contract is not conclusive evidence of the right to control issue, courts consider the numerous factors, which we set forth previously, as indicia of control. Again, the " 'paramount consideration appears to be whether the alleged special employer exercises control over

the details of [an employee's] work. Such control strongly supports the inference that a special employment exists.' [Citation.]" (*Kowalski*, at p. 176.)

The MOU is rather vague and does not specifically indicate Scripps intended to control the details of Dr. Peterson's actual treatment of patients of the Medical Group. In any event, despite the MOU language, the undisputed evidence shows Dr. Peterson was solely under Dr. Rumsey's supervision, and there is no showing Dr. Rumsey was on the Hospital's staff when the alleged malpractice occurred. The only direction Dr. Sise offered pertained to administrative matters, and not to Dr. Peterson's exercise of his medical skills. Dr. Peterson's use of the Hospital's facilities and his engagement in its normal business, medicine, are essentially the only factors helpful to the Vinyards, and in light of the other evidence they are insufficient as a matter of law to permit a jury to reasonably find a special employment relationship.

C

The Vinyards criticize the trial court for basing its ruling, in part, on the Navy's payment of Dr. Peterson's salary while he was assigned to Scripps. The Vinyards cite *Kowalski*, *supra*, 23 Cal.3d at page 177, for the proposition that the payment of wages is not determinative of the special employment issue. While the issue is not determinative, the Vinyards are incorrect in asserting the court erred by considering it along with other factors. (*Marsh v. Tilley Steel Co.*, *supra*, 26 Cal.3d at p. 492.)

Additionally, the Vinyards assert the court erred by basing its ruling on Scripps's inability to terminate Dr. Peterson's employment with the Navy. They cite *Martin v. Phillips Petroleum Co.* (1974) 42 Cal.App.3d 916 (*Phillips Petroleum*), in which the

court held "[i]t is the right to terminate the special employment relationship and not the right to discharge the employee outright that is important." (*Id.* at p. 922, citing *Oxford v. Signal Oil & Gas Co.* (1970) 12 Cal.App.3d 403, 410 (*Oxford*).)

In *Kowalski,* however, the court noted that *Oxford* and *Phillips Petroleum* relied on *Sehrt v. Howard* (1960) 187 Cal.App.2d 739, 743 (*Sehrt*), in concluding "it is the power to terminate the special employment relationship and not the power to discharge an employee that is important." (*Kowalski, supra,* 23 Cal.3d at p. 177, fn. 9.) The *Kowalski* court explained "*Sehrt* does not stand for that proposition since the actual exercise of control was found to be the determining factor for establishing the existence of a special employment relationship. 'Clearly, when a master lends his servant to another, the servant goes to the other at the direction of the master. In such a situation the master has residuary control. He can recall the servant at will; he can discharge the servant or give him other orders. But this is not the test of special employment. The test is whether the special employer has the right to control the details of the work for which the employee was loaned.' " (*Kowalski,* at p. 177, fn. 9.)

The *Kowalski* court noted that in *McFarland v. Voorheis-Trindle Co.* (1959) 52 Cal.2d 698, 705-706 (*McFarland*), the court "considered the fact that the alleged employer could have a worker removed, but not discharged, as indicating the nonexistence of special employment." (*Kowalski, supra,* 23 Cal.3d at p. 177, fn. 9.) In *Kowalski,* the court further explained "that an alleged special employer can have an employee removed from the job site does not necessarily indicate the existence of a special employment relationship. Anyone who has the employees of an independent

contractor working on his premises could, if dissatisfied with the employee, have the employee removed. Yet, the ability to do so would not make the employees of the independent contractor the special employees of the party receiving the services." (*Id.* at pp. 178, fn. 9.) The court disapproved of *Oxford* and *Phillips Petroleum* to the extent they conflict with *McFarland* or *Kowalski* (*Kowalski,* at p. 178, fn. 9), in which the court found no special employment relationship based, in part, on the alleged special employer's ability to remove the employee from the site but not terminate his employment with the lending employer. (*Id.* at p. 179.)

Thus, the Vinyards' assignment of error lacks merit. Indeed, the Vinyards improperly relied on law expressly disapproved on the issue in question. Moreover, under the MOU Scripps lacks the power to unilaterally dismiss a Navy physician from its training program. Rather, Scripps may bar a participant "when it is determined [presumably by the Navy and Scripps] that further participation would not be in the best interest of either party."[2]

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2 Given our holding, we are not required to consider the Vinyards' contention the trial court erred by finding Scripps is immune from suit under the Federal Tort Claims Act (28 U.S.C. §§ 1346(b), 2671), the Medical Malpractice Immunity Act (10 U.S.C. § 1089) and the Federal Employers Liability Reform and Tort Compensation Act of 1988 (28 U.S.C. § 2679).

DISPOSITION

The judgment is affirmed. Scripps is entitled to costs on appeal.

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MCCONNELL, P. J.

WE CONCUR:

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NARES, J.

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IRION, J.