NO. COA11-160
NORTH CAROLINA COURT OF APPEALS

Filed: 1 November 2011

MICHAEL I. CINOMAN, M.D. and
MEDICAL MUTUAL INSURANCE COMPANY
OF NORTH CAROLINA,
Plaintiffs,

v. Wake County
No. 09 CVS 3164

THE UNIVERSITY OF NORTH CAROLINA;
THE UNIVERSITY OF NORTH CAROLINA
HEALTHCARE SYSTEM, d/b/a THE
UNIVERSITY OF NORTH CAROLINA
HOSPITALS AT CHAPEL HILL; THE
UNIVERSITY OF NORTH CAROLINA,
d/b/a THE SCHOOL OF MEDICINE OF
THE UNIVERSITY OF NORTH CAROLINA
AT CHAPEL HILL; THE UNIVERSITY OF
NORTH CAROLINA, d/b/a THE
UNIVERSITY OF NORTH CAROLINA
LIABILITY INSURANCE TRUST FUND;
WILLIAM L. ROPER in his capacity
as Dean of the School of Medicine
of the University of North
Carolina at Chapel Hill; BRIAN
GOLDSTEIN in his capacity as
Chairman of the University of
North Carolina Liability Insurance
Trust Fund Council; and THOMAS M.
STERN, as *Guardian Ad Litem* for
Armani Wakefall,
Defendants.

Appeal by Plaintiffs from order entered 15 April 2010 by Judge Kenneth C. Titus in Wake County Superior Court. Heard in the Court of Appeals 17 August 2011.

Manning, Fulton & Skinner, P.A., by Michael T. Medford and J. Whitfield Gibson, for Plaintiffs-appellants.

Parker Poe Adams & Bernstein LLP, by David N. Allen and Lori R. Keeton, for Defendants-appellees.

HUNTER, JR., Robert N., Judge.

I. Factual & Procedural History

In 1998, the University of North Carolina Hospitals ("Defendants") faced a shortage of attending physicians to staff the UNC Pediatric Intensive Care Unit ("PICU"), in part due to the departure of the UNC PICU's director. In response, Dr. Michael A. Simmons, the Interim Director of the UNC PICU, retained area physicians outside of the UNC Hospitals system who specialized in pediatric intensive care to cover attending physician rotations in the UNC PICU on a "temporary full-time" basis. Dr. Michael Cinoman, head of the Pediatric Intensive Care Unit at Wake Medical Center ("WakeMed"), agreed to assist Defendants as long as WakeMed did not object.

Dr. Cinoman covered multiple UNC PICU rotations as an attending physician in 1998 and 1999. In December 1998, Defendants and WakeMed executed an agreement (the "WakeMed Agreement") characterizing Dr. Cinoman's service to the UNC PICU and stating that the period of the contract would be from 1

March 1998 to 28 February 1999. Dr. Cinoman was not a signatory to the WakeMed Agreement and stated in his affidavit that he did not know about the agreement until after this litigation commenced.

In early February 1999, Dr. Cinoman treated Armani Wakefall in the UNC PICU. In 2007, Armani Wakefall's *guardian ad litem* commenced a medical malpractice action (the "Wakefall litigation") in Durham County Superior Court alleging negligence by multiple employees and agents of Defendants, including Dr. Cinoman. The damages demanded exceeded Dr. Cinoman's medical malpractice insurance coverage. Dr. Cinoman was insured through WakeMed by Medical Mutual Insurance Company (MMIC).

The UNC Liability Insurance Trust Fund (the "UNC-LITF") provides medical malpractice insurance to employees and agents of Defendants, and its terms are contained in a Memorandum of Coverage. Individuals with insurance coverage pursuant to the Memorandum of Coverage include:

> [a]ny attending physician employed full-time by the School of Medicine of the University of North Carolina at Chapel Hill . . . as to any . . . [a]cts within the course and scope of health care functions undertaken as an employee of the School of Medicine of the University of North Carolina at Chapel Hill.

On 20 July 2007, Mary F. Kerr, a risk management specialist for the UNC-LITF, wrote Dr. Cinoman to inform him of the

Wakefall litigation. She explained that he and the other defendants were "insureds under the UNC Liability Insurance Trust Fund," and that the UNC-LITF would provide his defense. On 14 September 2007, Ms. Kerr again wrote to Dr. Cinoman, this time informing him that her prior letter was "not factual as it relates to your malpractice coverage while you were a part-time faculty member at UNC Hospitals" and attaching documents regarding Dr. Cinoman's coverage through MMIC. While MMIC provided a defense for the Wakefall litigation, the Wakefall litigation could result in Dr. Cinoman being liable for amounts exceeding his MMIC policy limits.

On 17 February 2009, Dr. Cinoman and MMIC filed suit against Defendants alleging, *inter alia*, breach of duty to defend and indemnify. Plaintiffs filed a motion for summary judgment on 8 February 2010. Defendants filed a motion for summary judgment on 11 February 2010. Plaintiffs filed an amended motion for summary judgment on 15 March 2010. The motions were heard before Judge Kenneth E. Titus in Wake County Superior Court on 23 March 2010. On 15 April 2010, the trial court entered an order granting Defendants' motion for summary judgment and denying Plaintiffs' motion for summary judgment.

On 28 April 2010, Plaintiffs filed a motion for a new

hearing and/or amendment of or relief from judgment pursuant to rules 59 and 60 of the North Carolina Rules of Civil Procedure that was heard before Judge Titus on 21 September 2010. On 12 October 2010, the trial court entered an order denying Plaintiffs' motion. Plaintiffs timely filed notice of appeal on 21 October 2010.

II. Jurisdiction and Standard of Review

Appeal lies as of right to this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2009). This Court reviews orders granting or denying summary judgment *de novo*, "'freely substitute[ing] its own judgment' for that of the lower tribunal." *Craig ex, rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citation omitted).

Summary judgment is appropriate if "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56 (2009). "The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact. Moreover, 'all inferences of fact . . . must be drawn against the movant and in favor of the party

opposing the motion.'" *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citations omitted).

"'The construction and application of insurance policy provisions to undisputed facts is a question of law, properly committed to the province of the trial judge for a summary judgment determination.'" *Sitzman v. Gov't Employees Ins. Co.*, 182 N.C. App. 259, 261-62, 641 S.E.2d 838, 840 (2007) (quoting *Certain Underwriters at Lloyd's London v. Hogan,* 147 N.C. App. 715, 718, 556 S.E.2d 662, 664 (2001)). However, summary judgment is not appropriate where there are genuine issues of material fact, even where both parties have moved for summary judgment. *See, e.g., Carlson v. Old Republic Ins. Co.*, 160 N.C. App. 399, 404, 585 S.E.2d 497, 500 (2003).

III. Analysis

Plaintiffs argue the trial court erred in granting Defendants' motion for summary judgment and in denying Plaintiffs' motion for summary judgment. Taking the evidence in the light most favorable to Plaintiffs, we hold there are two questions of material fact which make summary judgment for either party inappropriate. We therefore reverse and remand.

The UNC-LITF provides coverage for "[a]ny attending physician *employed full-time*" by Defendants. (Emphasis added.)

Defendants' motion for summary judgment alleged that Dr. Cinoman was not a full-time employee of Defendants, as he was an independent contractor and did not work full-time. Defendants also argued that even if Dr. Cinoman were a full-time employee, he would be removed from coverage by an exclusion regarding independent contractors.

Our Supreme Court has laid out several factors to be considered in determining whether a person is an employee or an independent contractor, including whether:

> [t]he person employed (a) is engaged in an independent business, calling, or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time.

Hayes v. Bd. of Tr. of Elon Coll., 224 N.C. 11, 16, 29 S.E.2d 137, 140 (1944). No particular factor is determinative, and an independent contractor relationship can be found without all of the factors. *Johnson v. News & Observer Pub. Co.*, 167 N.C. App. 86, 89-90, 604 S.E.2d 344, 347 (2004) ("The *Hayes* factors are

considered along with the other circumstances of the employment relationship to determine whether the one employed possesses that degree of independence necessary to require his classification as an independent contractor rather than an employee.").

Although the WakeMed Agreement classifies Dr. Cinoman as an independent contractor, this classification alone is not determinative. *See Grouse v. DRB Baseball Mgmt., Inc.*, 121 N.C. App. 376, 381, 465 S.E.2d 568, 572 (1996); *Johnson*, 167 N.C. App. at 89, 604 S.E.2d at 347 (2004). Instead, we turn to the *Hayes* factors and the degree of control actually exerted by Defendants.

In addition to classifying Dr. Cinoman as an independent contractor, the WakeMed Agreement did not limit his ability to practice outside of the UNC PICU. In fact, Dr. Cinoman continued to perform his duties at Wake Med when he was not working at the UNC PICU. This suggests Dr. Cinoman was engaged in an independent occupation, weighing in favor of an independent contractor relationship.

The method of payment, however, suggests Dr. Cinoman was an employee, not an independent contractor. The WakeMed Agreement provided for payment to Wake Med based on the number of days

worked. The fact that the WakeMed Agreement provided for payments per day rather than by patient suggests an employment relationship. *See Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 384, 364 S.E.2d 433, 438 (1988) ("[P]ayment by a unit of time, such as an hour, day, or week, is strong evidence that he is an employee.").

Defendants billed patients and collected for Dr. Cinoman's services without compensating him for those services. This distinguishes this case from two cases cited by Defendant: *Hylton v. Koontz*, 138 N.C. App. 629, 532 S.E.2d 252 (2000) (finding no employment relationship where doctors collected their own fees and the hospital did not receive compensation for the doctors' services); *Hoffman v. Moore Reg'l Hosp., Inc.*, 114 N.C. App. 248, 441 S.E.2d 567 (1994) (finding no employment relationship where the physician's group, not the hospital, billed for the physician's services). In *Rucker v. High Point Memorial Hosp.*, the defendant hospital's collection of fees was one fact among many that favored the physician's status as an employee. 20 N.C. App. 650, 660, 202 S.E.2d 610, 617 (1974).

Dr. Simmons' affidavit indicates Dr. Cinoman was treated as if he were a permanent employee. This included Dr. Simmons "specifying the rotations to be covered by Dr. Cinoman,

mandating how quickly Dr. Cinoman was required to be in the PICU after being called during periods when he was 'on call' . . . and specifying what medical services by Dr. Cinoman as attending physician required him to be personally with the patient." The WakeMed agreement, although it asserts Dr. Cinoman is an independent contractor, states that Dr. Cinoman was "under the direction of the Division Chief of Pediatric Critical Care" and was "both professionally and individually responsible to the University regarding activities performed pursuant to this Agreement."

Dr. Cinoman was not allowed to use the assistance he thought proper, but was required to use Defendants' equipment and follow Defendants' procedures. The lack of freedom to secure assistance (either equipment or labor) indicates an employment relationship. *Youngblood*, 321 N.C. at 385, 364 S.E.2d at 438.

The record is unclear as to whether Defendants set Dr. Cinoman's schedule. The affidavits of Dr. Cinoman and Dr. Simmons indicated that Defendants dictated his schedule, while Dr. Cinoman's deposition suggests that one of his colleagues who was operating under the same WakeMed Agreement arranged the schedule. Regardless of who created the schedule, it is clear

that Dr. Cinoman was required to be on the job at certain times of the day, which suggests he was not an independent contractor. *See id.* at 385, 364 S.E.2d at 438 ("[W]here the worker must conform to a particular schedule and perform his job only during hours when the defendant's employees are available, the relationship is normally one of employment.").

Dr. Cinoman's continued employment with WakeMed does not exclude him from status as an employee of Defendants. "[T]he 'special employment' or 'borrowed servant' doctrine . . . holds that under certain circumstances a person can be an employee of two different employers at the same time." *Brown v. Friday Services, Inc.*, 119 N.C. App. 753, 759, 460 S.E.2d 356, 360 (1995). The doctrine requires that (1) the employee has made a contract with the special employer, either express or implied, (2) the work being done is that of the special employer, and (3) the special employer can control the details of the work. *Id.* In the present case, there was an implied contract between Dr. Cinoman and Defendants, evidenced by the acceptance by Dr. Cinoman of Defendant's offer to work at the UNC PICU. The work being done was that of Defendants, and for the reasons stated above, there is a question of material fact regarding whether Defendants controlled the details of Plaintiff's work.

Whether an employer-employee relationship exists is a question of fact for the jury when there is evidence which tends to prove it. *Smock v. Brantley*, 76 N.C. App. 73, 75, 331 S.E.2d 714, 716 (1985), *disc. review denied*, 315 N.C. 590, 341 S.E.2d 30 (1986). Taking the evidence in the light most favorable to Plaintiffs, we find there is a forecast of evidence from which a jury could find Dr. Cinoman was an employee of Defendants. On this issue, Plaintiffs would have the burden of showing that he comes within the insurance policy terms on the issue of whether Dr. Cinoman is a full time employee of the Defendant UNC Hospital. If the jury finds Dr. Cinoman was not a full-time employee of Defendant, then Plaintiffs could not show under any set of facts that Dr. Cinoman would be included in the policy. Furthermore, a finding by the jury that Dr. Cinoman was an employee would necessarily preclude a finding that he was an independent contractor.

Defendants also argue Dr. Cinoman did not maintain "full-time" status as contemplated by the UNC-LITF Memorandum of Coverage. "In construing an insurance policy, 'nontechnical words, not defined in the policy, are to be given the same meaning they usually receive in ordinary speech, unless the context requires otherwise.'" *Brown v. Lumbermens Mut. Cas.*

Co., 326 N.C. 387, 392, 390 S.E.2d 150, 153 (1990) (quoting *Grant v. Insurance Co.*, 295 N.C. 39, 42, 243 S.E.2d 894, 897 (1978)); *see also Nationwide Mut. Ins. Co. v. Dempsey*, 128 N.C. App. 641, 643, 495 S.E.2d 914, 915 (1998) ("In the absence of . . . express definitions of terms in contracts of insurance, they should be interpreted according to their daily usage."). The UNC-LITF Memorandum of Coverage provides no definition of "full-time."

In the present case, it is undisputed that when on rotation, Dr. Cinoman worked a minimum of forty hours per week in the UNC PICU. Furthermore, Dr. Simmons' affidavit repeatedly states that Dr. Cinoman's position at the UNC PICU was either a "temporary full-time" or "full-time" position. Defendants argue that the WakeMed Agreement states that Dr. Cinoman should not engage in more than "half-time" services and that he could not have been both a full-time employee at WakeMed and a full time employee at the UNC PICU. This is a fact-dependent inquiry, and the issue of whether Dr. Cinoman was engaged in full-time employment is best left to the jury.

Defendants also argue that even if Dr. Cinoman was a full-time employee, he would be excluded from coverage by Article IV, Section D of the Memorandum of Coverage, which states:

> Any *health care practitioner or independent contractor* for whom commercial medical malpractice insurance coverage is required *as a condition of their privileges* at the University of North Carolina at Chapel Hill.

(Emphasis added). Application of this exclusion requires multiple factual findings. First, it requires the determination described above of whether Dr. Cinoman was an independent contractor. The resolution of this first issue is resolved by the answer to the first jury question. Second, it requires a determination of whether Dr. Cinoman was required as a condition of his privileges to have medical malpractice insurance coverage. Here, the evidence taken in the light most favorable to Plaintiffs presents a material issue of fact.

Dr. Cinoman had a previous relationship with Defendants in 1994. He served in the UNC PICU for his own experience and expertise as part of an exchange in which UNC physicians covered his WakeMed rotations. He also supervised Defendants' interns and residents who served at WakeMed for educational and training purposes pursuant to the Area Health Education Cooperative Program.

As a part of that relationship, Dr. Cinoman was granted privileges and designated a Clinical Assistant Professor at the UNC School of Medicine. He was required to submit proof of his

MMIC coverage to Defendants every two years. Dr. Cinoman contends that this relationship terminated prior to 1998 and that he was not required to have medical malpractice coverage for the position he was in at the time of the actions in question.

Dr. Simmons' affidavit states that he believed Dr. Cinoman would be covered by the UNC-LITF and that he discussed with Defendants' administration that Dr. Cinoman would need insurance coverage. He also states that in his experience, the institution provides coverage for doctors in similar situations.

Benjamin Gilbert, the Senior Vice President and General Counsel for Defendants, states in his affidavit that Dr. Cinoman could not have worked at the UNC PICU without proof of medical malpractice insurance. He states that the privileges Dr. Cinoman worked under in 1998 and 1999 were the same as those maintained and renewed from 1994 to 1998. Whether Dr. Cinoman was required to maintain medical malpractice insurance in February 1999 and is thus excluded from UNC-LITF coverage is an issue of fact best left to the jury. *Cf. Lumber Mut. Cas. Ins. Co. of N.Y. v. Wells*, 225 N.C. 547, 548, 35 S.E.2d 631, 632 (1945). Because this clause is contained in an exclusion within the policy, the burden of showing by a preponderance of the

evidence that Dr. Cinoman is excluded from coverage rests with Defendants.

On remand, we direct the trial court to have the jury resolve any questions of fact, including but not limited to (1) "Whether Dr. Cinoman was a full employee of Defendants?" and (2) "If so, whether Dr. Cinoman was required in February 1999 as a condition of his privileges to maintain medical malpractice insurance separate from that afforded him by any insurance provided by Defendants?"

IV. Conclusion

For the reasons stated above, we reverse the trial court's grant of summary judgment to Defendants and remand for a jury trial on the issues as outlined.

Reversed and remanded.

Judges HUNTER, Robert C. and STROUD concur.

Report per Rule 30(e).