DA 18-0602

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 280

SUMMER STRICKER, Personal Representative of the ESTATE OF ALLEN J. LONGSOLDIER JR.,

Plaintiff and Appellee,

v.

BLAINE COUNTY, and STATE OF MONTANA,

Defendants,

HILL COUNTY,

Defendant and Appellant.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade, Cause No. DDV-12-0937
Honorable Matthew J. Cuffe, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Maureen H. Lennon, Gregory L. Bonilla, MACo Defense Services, Helena, Montana

For Appellee:

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For Amicus Montana League of Cities and Towns:

Patricia Klanke, Drake Law Firm PC, Helena, Montana

Submitted on Briefs: September 18, 2019

Decided: December 3, 2019

Filed:

Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Hill County appeals the entry of summary judgment in favor of the Estate of Allen J. Longsoldier, Jr. (Estate), by the Montana Eighth Judicial District Court, Cascade County, declaring that Hill County is vicariously liable for the negligence of the Northern Montana Hospital (NMH, or Hospital) under the non-delegable duty doctrine. We reverse, and address the following issue:

> *Did the District Court err by determining that Hill County was vicariously liable for the medical negligence of Northern Montana Hospital?*

FACTUAL AND PROCEDURAL BACKGROUND

¶2 On November 19, 2009, a Blaine County sheriff's deputy arrested Allen J. Longsoldier, Jr. (Longsoldier) at the request of Longsoldier's probation officer after the probation officer was unable to make contact with Longsoldier. *Blaine Cty. v. Stricker*, 2017 MT 80, ¶ 6, 387 Mont. 202, 394 P.3d 159. The deputy transported Longsoldier to the Hill County Detention Center (Detention Center) to be detained there, pursuant to an agreement between the counties. *Blaine Cty.*, ¶ 6.[1] Longsoldier had been drinking heavily in the days prior to his arrest, but had not been drinking immediately prior to his arrest and showed no signs of intoxication when he was brought to the Detention Center. *Blaine Cty.*, ¶ 7.

[1] The Counties' agreement granted "authority over and responsibility for" Blaine County detainees to the Hill County Sheriff, but Blaine County retained responsibility for transporting detainees for medical care.

¶3 In the evening of November 21, 2009, Hill County notified Blaine County that Longsoldier had not slept for three days, was hallucinating, was involuntarily detoxing, and needed to be transported to NMH for treatment. A Blaine County sheriff's deputy went to the Detention Center and transported Longsoldier to NMH. *Blaine Cty.*, ¶ 8. At that time, a Detention Center policy called for detainees who were ill to be transported to NMH for medical care.

¶4 A doctor at NMH examined Longsoldier and gave him several medications, but failed to diagnose Longsoldier's alcohol withdrawal syndrome. About two hours after his arrival at NMH, the hospital discharged Longsoldier and a Blaine County deputy transported him back to the Detention Center. *Blaine Cty.*, ¶ 8. Shortly after Longsoldier returned to the Detention Center from NMH, his condition worsened. *Blaine Cty.*, ¶ 9.

¶5 At around 2:30 a.m. on November 22, 2009, Hill County again called Blaine County authorities and requested that Longsoldier be returned to NMH for further treatment. In response, a Blaine County dispatcher called NMH, and a nurse at NMH advised that Longsoldier need not be returned to the Hospital because there was nothing physically wrong with him, and that Longsoldier was "playing them" because he did not want to be in jail. Consequently, Blaine County did not transport Longsoldier to the Hospital at that time. *Blaine Cty.*, ¶ 9. Longsoldier's condition continued to deteriorate, and late in the evening of November 22, the Detention Center called an ambulance, which transported Longsoldier to the Hospital. Shortly thereafter, Longsoldier tragically died due to the effects of alcohol withdrawal syndrome. *Blaine Cty.*, ¶ 10.

¶6 In May of 2010, Longsoldier's Estate filed a discrimination complaint against the Counties and NMH with the Montana Human Rights Bureau (HRB), alleging that Longsoldier had been discriminated against based on his race and disability, respectively Native American and alcoholism. NMH settled with the Estate prior to the contested case hearing in September of 2011. Following the hearing, the Hearing Officer determined there was no evidence that Longsoldier's death was a result of discriminatory animus by the Counties toward Longsoldier. *Blaine Cty.*, ¶ 11. On appeal, this Court noted that the case was "not a claim for negligence," but one for discrimination, and affirmed the Hearing Officer's decision as supported by evidence introduced in that proceeding. *Blaine Cty.*, ¶¶ 29-30, 41.

¶7 The Estate subsequently filed this negligence action against the State of Montana, as well as Blaine and Hill Counties. The Estate moved for partial summary judgment against each of the Defendants, arguing they had a non-delegable duty to provide Longsoldier with reasonable medical care and were therefore vicariously liable for the medical negligence committed by NMH. The District Court concluded vicarious liability was not imposed on Hill County under agency theory or under the exceptions to employer-independent contractor liability, but that Hill County was vicariously liable for NMH's actions on the ground that public policy dictated the creation of a non-delegable duty.[2] The District Court therefore granted the Estate's motion for summary judgment.

[2] The District Court's extensive order also addressed the liability of the State of Montana, Blaine County, and NMH (third party and indemnity), but those issues are not before the Court in this matter.

The parties did not argue, and the District Court did not address, Hill County's own duties to Longsoldier or its negligence. The District Court certified its order "holding Hill County . . . vicariously liable for the medical negligence of [NMH]" was final for purposes of appeal, pursuant to M. R. Civ. P. 54(b), and this Court accepted the same.

¶8 Hill County appeals.[3]

STANDARD OF REVIEW

¶9 We review a district court's ruling on summary judgment de novo, applying the same criteria as the district court under M. R. Civ. P. 56. *Beckman v. Butte-Silver Bow Cty.*, 2000 MT 112, ¶ 11, 299 Mont. 389, 1 P.3d 348. Thus, we review the ruling to determine if genuine issues of material fact existed and whether the moving party was entitled to judgment as a matter of law. *Beckman*, ¶ 11.

DISCUSSION

¶10 *Did the District Court err by determining that Hill County was vicariously liable for the medical negligence of Northern Montana Hospital?*

¶11 Hill County argues the District Court erred because it imposed vicarious liability even though the County's actions did not fall within one of the three exceptions this Court determined gave rise to a non-delegable duty in *Beckman*. The Estate, relying primarily on *Paull v. Park Cty.*, 2009 MT 321, 352 Mont. 465, 218 P.3d 1198, counters that Hill

[3] In an Order entered herein on January 15, 2019, we dismissed without prejudice the appeals filed by the Estate and Blaine County as not within the parameters of the District Court's certification order.

County had a duty to provide health care for Longsoldier that could not be delegated under principles of agency law and public policy.

The* Beckman *exceptions

¶12 Generally, an employer is not liable for the tortious acts of its independent contractor. *Dick Irvin, Inc. v. State*, 2013 MT 272, ¶ 49, 372 Mont. 58, 310 P.3d 524 (citing *Beckman*, ¶ 12). Exceptions to this rule, which create vicarious liability for the employer, arise when (1) there is a non-delegable duty based on contract; (2) the activity is inherently or intrinsically dangerous; or (3) the general contractor negligently exercises control reserved over a subcontractor's work. *Beckman*, ¶ 12 (citing *Umbs v. Sherrodd*, 246 Mont. 373, 376, 805 P.2d 519, 520 (1991)).

¶13 Here, the Estate alleges an employer-independent contractor relationship existed between NMH and Hill County with respect to Longsoldier's care. However, no such relationship is established by the record. First, the Detention Center's unilateral policy to take ill detainees to NMH did not create a contractual relationship between Hill County and NMH for provision of inmate medical care. A contract requires identifiable parties capable of contracting, consent, a lawful object, and sufficient consideration. Section 28-2-102, MCA. Under Hill County's policy, it was the only party, and further, there was no consideration or consent by NMH. Second, an oral contract did not arise between Hill County and NMH regarding Longsoldier's care. Longsoldier was Blaine County's inmate, and Hill County communicated only with Blaine County, having no communication with NMH regarding Longsoldier's care. Hill County was not responsible for transporting

Longsoldier to the hospital to receive treatment. Rather, Blaine County took Longsoldier to the hospital, requested that NMH provide treatment to him, and contacted the Hospital upon receiving word from Hill County that Longsoldier's condition had worsened. These facts show no consent, consideration, or lawful object between Hill County and NMH regarding Longsoldier's care. Therefore, under the facts presented here, Hill County did not have an employer-independent contractor relationship with NMH, which is initially necessary to find a non-delegable duty in the relationship under *Beckman*.

¶14 That is not to say that Hill County had no duty of care to Longsoldier under its detention arrangement with Blaine County or otherwise; Hill County's direct duty to Longsoldier and any breach thereof are not at issue in this appeal. Many of the authorities cited by the Estate and the District Court address the contours of the asserted duty Hill County owed to Longsoldier. In contrast, the question here is whether Hill County was responsible for NMH's actions—whether it had a non-delegable duty with regard to the care provided by NMH to Longsoldier.

¶15 Even if Hill County's involvement here, such as its communications and actions leading to its call for an ambulance to transport Longsoldier to NMH shortly before his death, could be construed as a requisite contractual relationship, Hill County is not vicariously liable for medical negligence committed by NMH. Under the first *Beckman* exception, an employer bears a non-delegable duty when the terms of the parties' contract provide for such a duty. *See Kemp v. Bechtel Constr. Co.*, 221 Mont. 519, 524-25, 720 P.2d 270, 274 (1986); *Ulmen v. Schwieger*, 92 Mont. 331, 348, 12 P.2d 856, 860 (1932);

Stepanek v. Kober Constr., 191 Mont. 430, 432-34, 625 P.2d 51, 52-53. As explained above, there is no express contract between the parties to be examined. Additionally, the Estate has presented no evidence that any alleged contract contained a term delegating a duty to Hill County to assume responsibility for the medical care provided by NMH. Under the second exception, an employer is vicariously liable for torts caused by "inherently or intrinsically dangerous" activities that create a "peculiar risk of harm to others unless special precautions are taken." *Beckman*, ¶¶ 15-22 (citing Restatement (Second) of Torts, § 416). The Estate attempts to hold Hill County liable for the medical negligence that occurred by Hill County's actions in seeking medical care for Longsoldier. However, seeking medical care does not present a peculiar risk of harm rendering such an action inherently or intrinsically dangerous. The risk of harm associated with obtaining medical care is assumed by every individual who seeks care, is not unique to detainees like Longsoldier, and is undertaken with the reasonable expectation that the provider will do more good than harm. There is nothing "inherently or intrinsically dangerous" in seeking medical care. As the District Court reasoned, "[t]he risk that an independently licensed medical professional may provide inadequate medical care is a risk common to all, not peculiar to the operation of a detention center." Finally, under the third exception, Hill County must have reserved some level of control over the care provided to Longsoldier by NMH, which Hill County negligently exercised. *Beckman*, ¶¶ 31-33. However, there is no evidence that Hill County reserved any control over the care provided to Longsoldier

by NMH, particularly considering the fact that Hill County never spoke directly or made any arrangements with NMH regarding Longsoldier's care.

Agency

¶16 Vicarious liability may also arise "where an agency relationship exists." *Dick Irvin, Inc.*, ¶ 49 (citing *Paull*, ¶ 38). An agency relationship requires both consent and control. *Dick Irvin, Inc.*, ¶ 49 (quoting *Wolfe v. Schulz Refrigeration*, 188 Mont. 511, 517, 614 P.2d 1015, 1018 (1979)). In *Paull*, the State of Montana revoked defendant Paull's probation due to violation. ¶¶ 6-7. In accordance with State procedure, Park County obtained the State's permission to hire a private transportation company to transport Paull back to Montana for further proceedings. *Paull*, ¶ 8. Throughout the trip from Florida to Montana, the driver of the private prisoner transportation van denied Paull and the other prisoners adequate bathroom breaks, resulting in unsanitary conditions in the prisoner's portion of the van. *Paull*, ¶¶ 10-11. Ultimately, the driver lost control of the vehicle while he was intentionally swerving in an attempt to make the prisoners spill urine on themselves, causing injuries to Paull. *Paull*, ¶ 12. This Court held the State was liable for the van driver's negligence because the transport company was acting as the State's agent when it accepted Paull as a prisoner under the allegations of the State of Montana's warrant. *Paull*, ¶¶ 37-38. In reaching this conclusion, the Court found that the State gave the transport company all of its control to confine Paull as a prisoner because the transport company "had no independent authority to confine Paull and transport him in shackles from Florida to Montana absent authority from the State of Montana to do so." *Paull*, ¶ 32. The Court

explained that the vicarious liability imposed on the State pursuant to the agency relationship "does not mean that the state is strictly liable for any injury that results from prisoner transportation regardless of fault. It does mean, however, that if the State chooses to transport prisoners by allowing other entities to do the work, it may be held liable for the tortious acts or omission of its agents undertaking the transportation." *Paull*, ¶ 38.

¶17 The case at bar does not involve agency of the nature at issue in *Paull*. Hill County did not enter the relationship with NMH that the State entered with the transportation company there. *Paull*, ¶¶ 32-36. In *Paull*, the State could have transported the prisoner itself, but chose not to, delegating the duty to the transportation company. *Paull*, ¶¶ 8-9. Hill County did not grant to NMH its authority over Longsoldier as a detainee. Rather, Hill County first deferred to Blaine County on the medical care to be provided to Longsoldier, as Blaine County's detainee, including the transportation of Longsoldier to NMH, only directly summoning an ambulance for the emergency that developed as a result of Blaine County's instruction after consulting with NMH. As an independent hospital, NMH had its own authority to treat Longsoldier, whereas the transport company in *Paull* could not transport prisoners without the State's authority. *Paull*, ¶ 32 (the transport company "had no independent authority to confine Paull and transport him . . ."). Because agency requires "the elements of consent and control," *Dick Irvin, Inc.*, ¶ 49, an agency relationship of the nature that gave rise to vicarious liability in *Paull* did not exist here. Therefore, Hill County cannot be held liable for the medical negligence of NMH under the theory of agency applied in *Paull*.

Public policy

¶18 Montana courts may determine the existence of a duty of care in the first instance after examining the foreseeability of a risk and weighing the policy considerations for and against the imposition of liability. *Henricksen v. State*, 2004 MT 20, ¶ 21, 319 Mont. 307, 84 P.3d 38 (quoting *Estate of Strever v. Cline*, 278 Mont. 165, 173, 924 P.2d 666, 670 (1996)). However, contrary to the District Court's rationale, this authority does not provide the basis, by itself, for creation of a non-delegable duty, and the Estate's arguments likewise conflate the role of public policy in the first question with the second. *Henricksen* discusses imposition of an original duty, not the question of whether a duty is non-delegable. *Henricksen*, ¶ 21. The tests for determining whether a duty is non-delegable to third parties are found under the analyses enumerated in *Beckman* and *Paull*. *Dick Irvin, Inc.*, ¶ 49. To again clarify, Hill County's own duty of care to Longsoldier is not at issue in this case. However, whether Hill County's duty to Longsoldier is one that cannot be delegated to NMH has been assessed herein under the proper tests, and, because liability does not arise thereunder, Hill County cannot be held vicariously liable for NMH's medical negligence.

¶19 Therefore, we conclude the District Court erred in granting the Estate's motion for summary judgment on this issue. We reverse and remand for entry of summary judgment in favor of Hill County.

/S/ JIM RICE

We concur:

/S/ INGRID GUSTAFSON
/S/ LAURIE McKINNON
/S/ BETH BAKER
/S/ JAMES JEREMIAH SHEA