

STATE OF MICHIGAN
COURT OF APPEALS

GORDON A. PHILIBECK and FAY PHILIBECK,

Plaintiffs-Appellants,

v

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant-Appellee..

UNPUBLISHED

June 25, 1996

No. 184784

LC No. 94-7194-CK

Before: Hood, P.J. and Markman and A. T. Davis, Jr.*, JJ.

PER CURIAM.

Plaintiffs Gordon A. Philibeck and Fay Philibeck¹ appeal as of right from the trial court's grant of summary disposition in favor of defendant. We affirm.

On February 11, 1985, plaintiff was injured in a motor vehicle accident while riding in a vehicle driven by his wife. Pursuant to the terms of his automobile insurance agreement with defendant, plaintiff was paid personal injury protection benefits until July 20, 1993, when a review of the file began. At that time, defendant decided that an independent medical examination was necessary to evaluate plaintiff's physical condition and answer questions defendant had concerning the relationship of the accident to current benefit obligations. Plaintiff contended that the physician, Dr. Lester A. Owens, put him through various range of motion exercises that aggravated his then-existing physical condition. As a result, plaintiff argued, it was necessary that he seek medical treatment from an orthopedic physician and the surgical repair of his hip prosthesis. Plaintiff brought suit against defendant alleging that defendant was liable for the physician's malpractice on either a theory of respondeat superior or negligent selection. Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10), on the ground that it could not be held liable for the negligence of its independent contractor. The trial court agreed with defendant's contention that it was not liable because Dr. Owens was an independent contractor and concluded that plaintiff had failed to offer any evidence to support its claim that defendant negligently

* Circuit judge, sitting on the Court of Appeals by assignment.

selected the doctor. On appeal, plaintiff contends that the trial court improperly granted summary disposition for defendant. We disagree.

We review a trial court's grant of summary disposition de novo. *Borman v State Farm*, 198 Mich App 675, 678; 499 NW2d 419 (1993), aff'd 446 Mich 482; 521 NW2d 266 (1994). Summary disposition of all or part of a claim may be granted under this subrule when, except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. MCR 2.116(C)(10). Under the no-fault act, the appropriate test for determining whether an employment relationship exists is the economic reality test. *Parham v Preferred Risk Ins*, 124 Mich App 618, 624; 355 NW2d 106 (1983). Under that test, a trial court must consider several factors: (1) control of the worker's duties; (2) payment of wages; (3) the right to hire, fire and discipline; and (4) the performance of the duties as an integral part of the employer's business toward the accomplishment of a common goal. *Id.*, 623-624. A review of the record establishes that Dr. Owens was not defendant's employee. Defendant had no right to control him in the performance of his duties with respect to plaintiff's examination. Further, Dr. Owens did not exclusively depend on defendant for his livelihood and only performed one or two independent medical examinations for defendant per year. Moreover, Dr. Owens' examination of plaintiff was not an intricate part of defendant's business because defendant was engaged in the business of insuring persons or businesses, not examining or treating medical patients. Additionally, plaintiff failed to produce any affidavits, depositions, admissions or other documentary evidence to support his contention that defendant negligently selected Dr. Owens. MCR 2.116(G)(3)(b); *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991); *Janice v Hondizinski*, 176 Mich App 49, 56; 439 NW2d 276; lv den 433 Mich 899 (1989). Accordingly, summary disposition was properly granted.

Affirmed.

/s/ Harold Hood

/s/ Stephen J. Markman

/s/ John H. McDonald

¹ Because the only direct injury in this case was to plaintiff, Gordon A. Philibeck, "plaintiff" will be used to refer to Gordon Philibeck.