

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CA 1211

MARIE BURKSTALLER AND CHRISTOPHER
BURKSTALLER, INDIVIDUALLY AND ON BEHALF OF
THEIR MINOR CHILD
CAMERON BURKSTALLER

VERSUS

SURGICAL SYNERGIES, INC., DENYSE ENGLERT &
SURGICAL ANESTHESIA OF BATON ROUGE


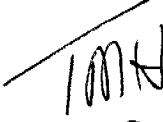

Judgment Rendered: February 10, 2012

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On Appeal from the
19th Judicial District Court,
In and for the Parish of East Baton Rouge,
State of Louisiana
Trial Court No. 590498

Honorable R. Michael Caldwell, Judge Presiding

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BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.

HIGGINBOTHAM, J.

Plaintiffs, Marie and Christopher Burkstaller, individually and on behalf of their minor child, Cameron Burkstaller, appeal the trial court's judgment, which granted summary judgment and dismissed their tort claims against defendants, Perkins Plaza Ambulatory Surgery Center, L.L.C. d/b/a Lake Surgery Center (the Center)¹ and Denyse Englert, based on a finding that the Center is Marie Burkstaller's statutory employer. We affirm.

BACKGROUND

Marie Burkstaller is a certified registered nurse anesthetist who was providing services to the Center according to an agreement for anesthesia services (the Agreement) between the Center and Burkstaller's direct employer, Surgical Anesthesia of Baton Rouge, L.L.C. (SABR). On May 12, 2009, Burkstaller was allegedly injured when she slipped and fell on a wet floor while working at the Center. Burkstaller filed this lawsuit against the Center, Denyse Englert (the Center's employee who had allegedly mopped the floor and failed to post warning signs), and SABR.²

The record establishes that at the time of Burkstaller's employment, the Agreement between the Center and SABR explicitly provided that the Center "shall be the statutory employer" of all SABR's employees performing any work or providing any anesthesia services pursuant to the Agreement. The Agreement also expressly stipulated that all work performed under the Agreement "shall be considered part of the Center's trade, business or occupation and shall be

¹ Although the original petition misidentified this party, the supplemental and amending petition ultimately names the Center as the correct defendant, along with defendants, Englert and Surgical Anesthesia of Baton Rouge, L.L.C.

² Burkstaller and her husband, Christopher Burkstaller, brought the lawsuit individually and on behalf of their minor child, Cameron Burkstaller; however, for our discussion of the facts and law regarding statutory employer, we simply refer to all of the plaintiffs collectively as Burkstaller.

specifically considered an integral part of or essential to the ability of the Center to generate its goods, products or services.”

The Center and Englert filed a motion for summary judgment, averring entitlement to statutory immunity in tort pursuant to La. R.S. 23:1061. After a hearing, the trial court granted the motion and dismissed the Center and Englert from the lawsuit, while reserving Burkstaller’s rights against any other parties. This appeal followed.

DISCUSSION

It is well settled that appellate courts review a trial court’s grant of a motion for summary judgment using the *de novo* standard under the same criteria that govern the trial court’s consideration of whether a summary judgment is appropriate. **Jones v. Estate of Santiago**, 2003-1424 (La. 4/14/04), 870 So.2d 1002, 1006. Louisiana Code of Civil Procedure article 966(B) states that a summary judgment shall be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law.” If the party moving for summary judgment will not bear the burden of proof at trial, it need merely point out that there is an absence of factual support for one or more elements essential to the adverse party’s claim, action, or defense. La. C.C.P. art. 966(C)(2). Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. **Rambo v. Walker**, 97-2371 (La. App. 1st Cir. 11/6/98), 722 So.2d 86, 88, writ denied, 98-3030 (La. 1/29/99), 736 So.2d 840.

The doctrine of “statutory employer” is codified in La. R.S. 23:1061, which provides that a statutory employer relationship “shall not exist ... unless there is a written contract between the principal and a contractor ... which recognizes the

principal as a statutory employer.” La. R.S. 23:1061(A)(3).³ When there is a valid written contractual recognition of the relationship, “there shall be a rebuttable presumption of a statutory employer relationship between the principal [the Center] and the contractor’s [SABR’s] employees,” that may only be overcome by showing the work performed is not an integral part of or essential to the ability of the principal to generate its own goods, products, or services. *Id.*

Thus, an employer seeking to avail itself of tort immunity bears the burden of proving its entitlement to immunity. **Cantu v. Shaw Group, Inc.**, 2009-1774, p.1 (La. App. 1st Cir. 5/3/10) (unpublished), 39 So.3d 847 (table). Once the presumption arises, the burden of rebuttal shifts to the employee. **Everett v. Rubicon, Inc.**, 2004-1988 (La. App. 1st Cir. 6/14/06), 938 So.2d 1032, 1042, writ denied, 2006-1785 (La. 10/13/06), 939 So.2d 369. The ultimate determination of whether a principal is a statutory employer entitled to immunity is a question of law. See Jackson v. St. Paul Ins. Co., 2004-0026 (La. App. 1st Cir. 12/17/04), 897 So.2d 684, 688, writ denied, 2005-0156 (La. 3/24/05), 896 So.2d 1042.

In support of its motion for summary judgment, the Center submitted evidence of the written Agreement expressly recognizing the statutory employer relationship between the Center and SABR. Further, the Center submitted an affidavit of its administrator, showing that the Center contracted with SABR to provide anesthesia to the Center’s surgical patients and that anesthesia services are an integral and essential part of the surgical services that the Center provides to patients.

In opposition, Burkstaller argued that, although the Agreement between the Center and SABR explicitly recognizes the statutory employer relationship, the Center’s “goods, products, or services” merely involve providing a location for doctors to perform their surgical cases. Additionally, Burkstaller relied on the

³ An exception occurs in a two-contract situation, but it is not applicable in this case. See La. R.S. 23:1061(A)(2).

deposition testimony of the Center's administrator, which indicated no expectation that the Center would be responsible for workers' compensation payments to SABR's employees. Because the Agreement did not specifically address how workers' compensation payments would be handled between the two entities, Burkstaller argued that the Agreement conflicts with the codified law on statutory employers in that it seeks to avoid liability to statutory employees. Burkstaller also maintained that anesthesiologists, not the nurse anesthetists, are integral to the Center's business, and therefore, Burkstaller was not a statutory employee of the Center.

Our review of the record reveals that the Agreement between the Center and SABR contains the appropriate statutory language clearly identifying the Center as a statutory employer. We find no provision in the Agreement aimed at immunizing the Center from its duties as a statutory employer, and there is no evidence in the record that the Center actually denied its workers' compensation responsibilities to Burkstaller or any other employee.⁴ Thus, a rebuttable presumption of a statutory employer relationship existed, and Burkstaller failed to provide any evidence to overcome the presumption.

We do not agree with Burkstaller's assessment of the deposition testimony of the Center's administrator as an attempt to avoid liability or to deprive statutory employees of their rights. We further disagree that nurse anesthetists are not integral to the Center's business. The Agreement contains many provisions outlining the qualifications and requirements for nurse anesthetists and physicians, all of whom provide exclusive anesthesia services for the surgeries performed at the Center. The evidence clearly reveals that at the time of Burkstaller's alleged injury, she was part of an anesthesia team supplying anesthesia services that were

⁴ This case does not present the same factual scenario as **Prejean v. Maintenance Enterprises, Inc.**, 2008-0364 (La. App. 4th Cir. 3/25/09), 8 So.3d 766, 774-75, writ denied, 2009-0892 (La. 6/26/09), 11 So.3d 496, where the contract at issue limited payment of workers' compensation benefits to the injured employee only if the employer was unable to pay.

an integral and essential part of the services provided by the Center to its patients. Burkstaller did not provide any evidence to show that her work on the anesthesia team was not an integral part or essential to the Center's ability to provide its surgical services.

CONCLUSION

We conclude that Burkstaller failed to rebut the presumption that the Center is her statutory employer and is entitled to tort immunity. Thus, the trial court correctly granted summary judgment in favor of the Center and Englert, dismissing Burkstaller's claims against them. The trial court's judgment is affirmed. Appeal costs are assessed against plaintiffs-appellants, Marie and Christopher Burkstaller, individually and on behalf of their minor child, Cameron Burkstaller.

AFFIRMED.