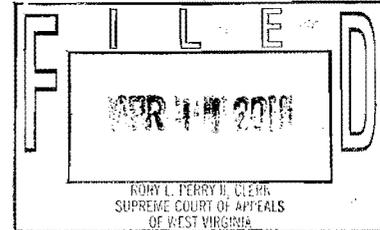


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

No. 11-0074



ALL MED, LLC,

Petitioner,

v.

**RANDOLPH ENGINEERING CO., INC.,
and DONALD R. HAYES,**

Respondents.

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The Circuit Court erred in holding that “the undisputed facts demonstrate that Mr. Hayes was not acting as an agent or employee of Randolph Engineering when he performed the elevation surveys and prepared elevation certificates.” The Court should review this issue because, while the Circuit Court recited virtually all of respondent Randolph’s proposed facts verbatim in its Summary Judgment Order, it ignored many facts and inferences in the record to the contrary.

Assignment of Error No. 2: The Circuit Court erred in holding that the question of Mr. Hayes’ “agency is a question of law for the court.” To the contrary, “[t]he question of whether an agency exists is ordinarily a question of fact[.]” *Goodwin v. Willard*, 185 W. Va. 321, 326, 406 S.E.2d 752, 757 (1991). “Only in those rare cases where the evidence conclusively shows lack of authority and where conflicting inferences cannot be drawn should the Court decide the issue.” *Cremeans v. Maynard*, 162 W. Va. 74, 86, 246 S.E.2d 253, 259 (1978).

Assignment of Error No. 3: The Circuit Court erred in failing to find that the evidence was sufficient for a jury to conclude Mr. Hayes was the “apparent agent” of Randolph, and should be allowed to determine whether Randolph is jointly and severally liable for Hayes’ negligence under that legal theory. All Med presented record evidence showing Mr. Hayes was the apparent agent of Randolph, but the Circuit Court never addressed that theory of liability or All-Med’s apparent agency argument in its Order.

STATEMENT OF THE CASE

Petitioner All Med, LLC (“All Med”), through its principal, Mark Saber, purchased land with five (5) commercial storage buildings in Danville, West Virginia in November of 2006. Prior to the closing on the purchase, Petitioner sought financing from Wesbanco who, for insurance purposes, required Petitioner to secure an “elevation certificate” for this property. At that time, Mr. Saber already had engaged Respondent Randolph Engineering, Inc. (“Randolph”) and its surveyor Donald R. Hayes¹ (“Hayes”) to perform other work on another project in Nitro, West Virginia. Mr. Saber called the offices of Randolph to request an “elevation certificate” for this project, and Mr. Hayes agreed to undertake the job.

Mr. Saber communicated to Mr. Hayes his concern that the Danville property might be in the flood plain, and that his decision to purchase the property would hinge on Mr. Hayes’ survey and elevation findings. (ALLMED-00232) Mr. Hayes (working sometime during ordinary business hours between 9:00 a.m. and 5:00 p.m.), performed the elevation survey work and prepared elevation certificates for the Danville property (ALLMED-0036). In preparing the elevation certificates, surveyor Hayes negligently certified the base flood elevation for the Danville property as 593.00 feet (ALLMED-00003) an elevation that was one-hundred feet off the true elevation. The erroneous elevation certificate provided by Hayes and Randolph then was provided to Hartford Insurance, who relied upon it to provide All Med a quote for annual flood insurance premiums on the Danville property. All Med relied on that flood insurance quote in analyzing the profitability of the property, and determined that the profit margin was acceptable,

¹ Mr. Hayes did not file a Motion for Summary Judgment below, and so the underlying case remains pending against him below. He is not a party to this appeal.

and it therefore completed the purchase of the Danville property.

After All Med closed on the purchase of the Danville property, the Federal Emergency Management Agency ("FEMA") contacted Hayes at the Randolph offices (ALLMED-0045) and advised Hayes there was a problem with the elevation certificate he provided for the Danville property. After consulting with his boss, Roger Randolph (principal owner of Randolph Engineering), Hayes determined he had made a "typo" (ALLMED-0045) and subsequently revised the elevation certificate by changing the base flood elevation from 593.00 feet to 693.00 feet (ALLMED-00010). Because of the change in the elevation certificates provided by Hayes to the federal government, the Hartford then was compelled to give Petitioner a new flood insurance premium based on the true elevation of the Danville property. The difference in elevation caused Petitioner's annual flood insurance premium to skyrocket - from the amount of the initial annual premium quotation of only \$705.00 per year, to over \$30,000.00 per year (ALLMED-00264 - 00265).

For All Med, in practical terms, the dramatically increased premium cost of the flood insurance changed the Danville property from one that would have turned a profit if the premiums had been as quoted based on the erroneous elevation certificate, to a property that could be operated only at a loss with the amount of the premiums based on the actual elevation. As a proximate result of the negligent survey, Petitioner has lost a substantial amount of money on the Danville property, and the property, for All Med, is worthless. (ALLMED-00381).

The fact of Mr. Hayes' negligence in preparing the elevation certificate is undisputed by Randolph. Petitioner and Respondent dispute whether Hayes' work in preparation of the elevation certificate for the Danville property purchase was done within the scope of his

employment for Randolph Engineering and whether Hayes was the apparent agent of Randolph when he performed the work. Because genuine issues of material fact are in dispute concerning whether Hayes was acting as the apparent agent or within the scope of his employment for Randolph when he negligently certified the elevation of the Danville property, Petitioner respectfully requests this Court reverse the circuit court's summary judgment order and a remand this case so that a jury may adjudicate the disputed facts.

Respondent Randolph alleged in its Motion for Summary Judgment that Hayes was not acting as its employee or agent at the time he provided the flood elevation certificate to Petitioner, despite the undisputed facts that Hayes was Randolph's employee at the time he produced the elevation certificate and had worked for Randolph for thirty-two (32) years; that Randolph and Hayes were doing other survey work for Petitioner at the same time in the Nitro location. Petitioner further offered evidence that Randolph paid for Hayes' surveyors license (ALLMED-00143-00144), provided him with an office (ALLMED-0043), told clients calling Randolph for Letter of Map Amendments ("LOMAs"), which require elevation certificates, that Hayes, a project engineer and head of Randolph's surveying department (ALLMED-00027), could do that type of work (ALLMED-00029), and most obviously actually employed Hayes and otherwise held out Hayes as its employee for all work related to surveying, including providing elevation certificates. When All Med's Mark Saber telephoned Randolph Engineering looking for a professional to survey property Petitioner considered buying in Nitro and evaluate a nearby creek area, "they sent down Don Hayes." (ALLMED-00231) Because of the representations of Randolph regarding the specialized skills of Mr. Hayes, Mr. Saber knew to contact him through Randolph when the time came to survey the Danville property and obtain a flood elevation

certificate (ALLMED-00234 - 235).

Despite all of the foregoing record evidence, the Circuit Court granted Respondent Randolph's Motion for Summary Judgment and adopted Randolph's proposed Findings of Fact and Conclusions of Law nearly wholesale. Petitioner's arguments were ignored by the Court in its Order, and Summary Judgment was erroneously granted, given the factual disputes on the issue of Hayes' apparent agency. Petitioner appeals from the Summary Judgment granted below.

SUMMARY OF ARGUMENT

Applying the appropriate *de novo* standard of review, the Circuit Court erred in granting Respondent's Motion for Summary Judgment. Genuine issues of material fact are in dispute, and the evidence of record is more than sufficient for a jury to conclude Donald Hayes was acting as the employee or agent of his employer of thirty-two (32) years, Randolph Engineering. Agency is a question of fact to be determined by the jury, as is whether an agent acted within the scope of his authority. Where an agent has apparent authority, his employer is estopped from denying that authority for the purpose of avoiding liability. Apparent authority exists when a third party reasonably believes that the employee is working for the benefit of the employer, based on appearance and custom. Because questions of fact remain disputed regarding whether Donald Hayes had apparent authority from Randolph Engineering, Inc., Summary Judgment for Randolph Engineering was erroneous; given the apparent agency between Hayes and Randolph, Randolph is liable to Petitioner for the negligent work of Mr. Hayes

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary upon this Appeal pursuant to the criteria of W. Va. R. App. P. 18(a). This case should be set for a Rule 19 argument. The Circuit Court erred, as stated above, in failing to apply settled West Virginia law on apparent agency. The issue is narrow: was Donald Hayes acting as an employee or apparent agent of Randolph Engineering when he negligently performed a faulty elevation survey for Petitioner? The Circuit Court ignored record evidence from which a jury could find for Petitioner and oral argument upon the issue is requested.

ARGUMENT

I STANDARD OF REVIEW

In reviewing a Circuit Court's order granting a Motion for Summary Judgment, this Court applies a *de novo* standard of review. "A circuit court's entry of summary judgment is reviewed *de novo*." *Syllabus* Point 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). A motion for summary judgment "should only be granted when it is clear that there is no genuine issue of material fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." *Syllabus* Point 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. Of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963). "The question to be decided on a motion for summary judgment is whether there is a genuine issue of fact and not how that issue should be determined." *Syllabus* Point 5, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. Of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963). Applying the foregoing summary judgment standard, it is clear the lower court erred in granting Respondent Randolph's Motion for Summary Judgment.

II WHETHER ACTS ARE COMMITTED BY AN EMPLOYEE OR AGENT WITHIN THE SCOPE OF EMPLOYMENT IS A QUESTION OF FACT FOR A JURY AND REMAINS DISPUTED IN THIS CASE

The circuit court below held it was undisputed Mr. Hayes was *not* acting as an employee or agent of Randolph Engineering in performing the elevation survey and negligently preparing and certifying elevation certificates for Petitioner. (ALLMED-00389) To the contrary, however, the evidence of record is in dispute, and is more than sufficient for a jury to conclude Hayes was acting as the employee or agent of his employer of thirty-two (32) years, Randolph Engineering. Not only had Hayes worked for Randolph Engineering for thirty-two (32) years, he was the head

of Randolph's surveying department at the time he negligently certified All Med's elevation survey certificate. (ALLMED-00027) Mr. Hayes' office was located at Randolph Engineering and Randolph paid for his required surveyor's license - something he needed in order to undertake surveying work on an ongoing basis, and more specifically, a license that Hayes used in affixing his surveyor's license "seal" to formally certify the elevation certificates in question. (ALLMED-00143 - 00144) Based on these facts alone, a jury easily could conclude that Hayes performed the elevation survey and produced the negligent elevation certificate for Petitioner while acting within the scope of his employment and/or as an agent of Randolph.

In granting summary judgment on this point, the circuit court misapprehended the law of agency. The law clearly requires the issue whether one is acting and an agent or within the scope of employment ordinarily are questions of fact for a jury, not questions of law for a court:

"Whether an agent is acting within the scope of employment generally is a question of fact for a jury." *Syllabus* Point 4, *Griffith v. George Transfer and Rigging, Inc.*, 157 W. Va. 316, 201 S.E.2d 281 (1973). As shown below, and consistent with *Griffith*, this Court consistently has held the issue of whether acts of an employee or agent are within the scope of employment or agency is a question of fact for a jury to decide.

A WHEN THE EVIDENCE OF AN AGENCY RELATIONSHIP IS IN DISPUTE, OR CONFLICTING INFERENCES CAN BE DRAWN, THE QUESTION OF AGENCY IS A QUESTION OF FACT FOR THE JURY

As stated in *Syllabus* Point 7 of *Courtless v. Jolliffe*, 203 W. Va. 258, 507 S.E.2d 136 (1998):

"When the facts relied upon to establish the existence of an agency are undisputed, and conflicting inferences can not be drawn from such facts,

the question of the existence of the agency is one of law for the court; but *if the facts pertaining to the existence of an agency are conflicting, or conflicting inferences may be drawn from them, the question of the existence of the agency is one of fact for the jury.*”

Syllabus Point 1, *Laslo v. Griffith*, 143 W. Va. 469, 102 S.E.2d 894 (1958) (emphasis added),
Syllabus, *Cremeans v. Maynard*, 162 W. Va. 74, 246 S.E.2d 253 (1978). Similarly, this Court
has explained and reaffirmed that,

“When the evidence is conflicting the questions whether the relation of principal and agent existed and, if so, whether the agent acted within the scope of his authority and in behalf of his principal are questions for the jury.”

Syllabus Point 2, *Laslo, supra*. This Court in *Laslo* stated the general rule that, ordinarily,
agency is a question of fact to be determined by the jury:

“Ordinarily, agency is a question of fact to be determined by the jury. This is true where agency is in issue or dispute, any competent evidence legally tending to prove the existence of the disputed agency has been adduced, and, from the evidence introduced on the question, there may be a fair difference of opinion as to the existence of the agency, such as where the evidence is conflicting or even where it is undisputed, if reasonable men may differ in the inference to be drawn therefrom. On the other hand, agency is a question of law for the court where the material facts from which it is to be inferred are not in dispute and only one reasonable conclusion can be drawn therefrom.”

Laslo, supra, 143 W. Va. at 479, 102 S.E.2d at 900, *quoting* 2 Am. Jur., *Agency* § 454 and 3 C.
J. S., *Agency* § 330b (1) (a) (emphasis added).

Petitioner adduced record evidence more than sufficient for a jury to conclude an agency relationship existed between Mr. Hayes and Randolph Engineering. Indeed, it is difficult to imagine how Mr. Hayes 32-year employee/employer relationship as a surveyor for Randolph could not be deemed sufficient to at least create a genuine issue of material fact as to whether he

was acting as Randolph's agent when he agreed to perform the elevation survey for All Med, especially as All Med contacted him at Randolph's office (ALLMED-0043), Randolph paid for his surveyor's license (ALLMED-00143-00144), and that surveying for a flood elevation certificate was certainly a typical part of overall surveying work performed by Randolph (ALLMED-00029). While Hayes disputes it, the record evidence shows Hayes never told Mr. Saber the elevation survey would be performed outside the scope of Hayes' employment with Randolph Engineering (ALLMED-00271). Typically, of course, it would be undisputed that Hayes would be considered Randolph's employee or actual agent, and there would be no issue that Randolph would be liable for his actions under the doctrine of *respondeat superior*.² Here, however, Hayes and Randolph attempt to dispute the agency/employment relationship, with regard to a particular elevation survey, for the sole purpose of Randolph avoiding liability for the negligence of Hayes.

B SCOPE OF EMPLOYMENT OR AUTHORITY IS DEFINED FLEXIBLY

In *Nees v. Julian Goldman Stores, Inc.*, 106 W. Va. 502, 504, 146 S.E. 61, 62 (1928), this Court explained the elastic nature of what is meant by "scope of employment":

"A master may not limit his liability to such conduct of his servant as is discreet and within the bounds of propriety, and avoid liability

² "The doctrine of *respondeat superior* imposes liability on an employer for the tortious acts of its employees, not because the employer is at fault, but merely as a matter of public policy." Syllabus Point 12, *Dunn v. Rockwell*, 225 W. Va. 43, 689 S.E.2d 255 (2009). Randolph's dispute of agency liability is especially curious given that its liability insurance policy covers Hayes when he is acting in the scope of his employment, but excludes any coverage for acts outside the scope of employment, and Hayes has no independent liability insurance coverage. Randolph knew Hayes was performing elevation surveys out of his office at Randolph and did not require him to obtain separate liability insurance (ALLMED-00134 - 00135). Nor did Randolph take any action to alert clients that Hayes' work might be done outside the scope of Randolph's business.

as to such conduct as is indiscreet and improper. Where a master sends forth an agent he is responsible for the acts of his agent within the apparent scope of his authority, though the agent oversteps the strict line of his duty.”

See also Travis v. Alcon Laboratories, Inc., 202 W.Va. 369, 381, 504 S.E.2d 419, 431 (1998).

Given Mr. Hayes’ position as head of Randolph’s surveying department and his 32 year employment relationship with Randolph, Petitioner, or any reasonable third party for that matter, would be hard pressed to distinguish between Mr. Hayes’ surveying work for the purpose of providing flood elevation certificates and Mr. Hayes’ surveying work for any purpose other than for Randolph Engineering. The accepted definition of “scope of employment” includes a wide range of activities that may differ vastly from the specific tasks of one’s job assigned internally. Respondent made the preposterous suggestion below that the very same work as that done for one’s employer can be distinguished from work the employee says is done independently, for a client already working with the employer on other projects, and the lower Court adopted this suggestion in direct contradiction to established West Virginia law. Hayes’ work for Petitioner, wherever and whenever done, was the same in nature as the work he routinely performed for Randolph Engineering. The record evidence shows Hayes never indicated otherwise, and Mr. Saber rightly believed that the work Hayes did for All Med was on behalf of Randolph Engineering (ALLMED 00271 - 00272). Randolph’s suggestion that Hayes had “gone rogue” in issuing this particular flood elevation certificate is nothing more than an attempt to limit its own liability for acts of its employee clearly done within the scope of his employment, and the Court below erred in accepting this suggestion as determinative of disputed facts.

The Circuit Court further erred in holding that the question of Mr. Hayes' "agency is a question of law for the court." To the contrary, "[t]he question of whether an agency exists is ordinarily a question of fact[.]" *Goodwin v. Willard*, 185 W. Va. 321, 326, 406 S.E.2d 752, 757 (1991). "Only in those rare cases where the evidence conclusively shows lack of authority and where conflicting inferences cannot be drawn should the Court decide the issue." *Cremeans v. Maynard*, 162 W. Va. 74, 86, 246 S.E.2d 253, 259 (1978). Because of the conflicting testimony and inferences therefrom showing Hayes was acting as an employee or agent of Randolph, the Circuit Court should not have usurped the jury's function and decided the question of Mr. Hayes' agency and erroneously granted Respondent's Motion for Summary Judgment.

III. Respondents Are Estopped from Arguing that an Employee with Apparent Authority from His Employer Was Not Acting as an Agent for the Purpose of Liability.

This Court has recognized "apparent agency" liability, and has held that defendants are estopped from arguing that an employee with apparent authority from his employer was not acting as an agent for the purpose of liability: "One who by his acts or conduct has permitted another to act apparently or ostensibly as his agent, to the injury of a third person who has dealt with the apparent or ostensible agent in good faith and in the exercise of reasonable prudence, is estopped to deny the agency relationship." Syllabus Point 1, *General Elec. Credit Corp. v. Fields*, 148 W. Va. 176, 133 S.E.2d 780 (1963). See also, Syllabus Point 8, *Brewer v. Appalachian Constructors, Inc.*, 138 W. Va. 437, 76 S.E.2d 916 (1953).³

³Agency by representation or estoppel, sometimes designated as "apparent agency," involves a case in which there may be no agency in fact, but where the principal or employer holds out or represents a person to be his agent or employee, and a third party or parties rely thereon, in which case the person making the representation is estopped to deny the agency. *Burless v. West Virginia University Hospitals, Inc.*, 215 W. Va. 765, 772, 601 S.E.2d 85, 92 (2004).

The record evidence is sufficient for a jury to conclude Randolph Engineering permitted Mr. Hayes to act apparently or ostensibly as its agent. Again, all other work Mr. Hayes did for All Med was decidedly on behalf of Randolph Engineering; Randolph Engineering incredibly believes it can distinguish the one elevation survey Mr. Hayes performed, which happened to result in an incorrect elevation certificate, from other surveys Mr. Hayes did in the normal course of business and for the benefit of other Randolph Engineering projects. As a long-time employee of Randolph Engineering, performing work related to the general services of Randolph Engineering, Mr. Hayes obviously appeared to be an agent of Randolph Engineering, and the jury is entitled to consider the record evidence showing that neither Mr. Hayes nor Randolph Engineering ever made any representation to the contrary until the initiation of Petitioner's lawsuit.

When a third party reasonably believes an employee has authority to act on behalf of the employer and that belief is traceable to the employer's assent by words or conduct, the employer is liable for the acts of the employee under the doctrine of "apparent agency." Restatement of Law (Third) *Agency* § 2.03 (2005). An employer's manifestation of assent to the authority of an employee to that employee may be different from the manifestation of assent to third parties. *Id.* If the employer places the employee in a position with specific functions and responsibilities, from which third parties will infer that the employer assents to acts by the employee by fulfilling the job's functions or responsibilities, the employer has manifested assent to third parties. *Id.*

The doctrine of "apparent authority" holds an employer accountable for the results of a third party's belief about an employee's authority to act as an agent when the belief is reasonable and is traceable to a manifestation of assent by the employer. Importantly, as to third parties,

apparent authority, when present, trumps restrictions that the employer has privately imposed on the employee. *Id.* at comment c. The doctrine of “apparent authority” applies to any set of circumstances under which it is reasonable for a third party to believe that an employee has authority, so long as the belief is traceable to manifestations of the employer. A third party’s understanding of the employer’s conduct may reflect general business custom as well as usage that is particular to the employer’s industry and prior dealings between the parties. An employer’s manifestation of assent of the employee’s authority to act for it includes such conduct as listing the employer’s name and position in information provided to third parties, or placing its employee in charge of a transaction or situation. *Id.* Generally, an employer may permit its employee to acquire a reputation of authority in an area or endeavor by acquiescing in conduct of the employee under circumstances likely to lead to a reputation.

All Med’s Mr. Saber’s belief that Mr. Hayes had authority to act on behalf of Randolph was completely reasonable, based upon his understanding of Hayes’ employment with Randolph and the other work Hayes already was doing for Mr. Saber on behalf of Randolph (ALLMED-00272). Because Mr. Hayes had been and was actively employed by Randolph Engineering for thirty-two (32) years, Mr. Saber’s belief that he was still working for Randolph Engineering was more than reasonable; the record evidence shows neither Mr. Hayes nor Randolph Engineering explained the alleged difference between Hayes’ survey work for Randolph on Saber’s Nitro project and his work on All Med’s Danville property.

“Apparent authority” is based on a third party’s understanding of signals of all sorts concerning the employee with whom the third party interacts. When the third party knows the actor is an employee, and knows the identity of the employer, the presence of apparent authority

turns on the tie between these signals and the employer in the mind of the reasonable third party. Restatement of Law (Third) *Agency* § 2.03 (2005) at comment d.⁴ The third party observes the employee in a particular context, one that may be defined in part by interactions, dealings, or relationships between the employer and the employee in the past, by an organization, by an industry and by its customs;⁵ by a type of transaction that is conventionally done in a particular way; or, if in a new context, by reasonable expectations based on analogous situations and other relevant circumstances. *Id.*

With regard to Mr. Hayes' work on the Danville property, All Med's Mr. Saber reasonably believed Hayes was the employee of Randolph Engineering, based upon his experience with Hayes and Randolph Engineering at his Nitro property. Mr. Saber recalls Mr. Hayes arriving to meet him in Danville to perform the survey first thing in the morning, during the work week (ALLMED-00238). Therefore, Mr. Saber reasonably understood Mr. Hayes was

⁴ Factually analogous cases from other jurisdictions have interpreted the rules of the Restatement (3d) of Agency and its comments consistently with Petitioner's position. With regard to the perspective of the third party in understanding the apparent agency relationship, *see AgriStor Leasing v. Farrow*, 826 F.2d 732, 738 (8th Cir. 1987) (genuine issue of material fact present as to apparent authority of sales person for equipment dealer to contract on behalf of equipment lessor; lessor gave dealer its forms for lease application, lessor's direct representative accompanied dealer's salesperson to lessee's farm prior to lessor's approval of lease application, lessor's letter to lessee stated dealer would make contact concerning necessary documentation, and dealer's salesperson in fact reappeared with lessor-provided forms to be signed).

⁵The Restatement (3d) of Agency has also been applied in cases where, as here, custom supports the presence of apparent authority when an agent's act is within the limit of authority standard for agents in similar position and endeavors. *See In re Victory Corrugated Container Corp.*, 183 B.R. 373 (Bankr.D.N.J.1995) (auctioneer has apparent authority to sell equipment in sale after auction in which no bids were received even when actual authority was restricted to selling through auction because auctioneers commonly sell items in private sales following auction; person acquainted with business of auctioneering and unaware of any restriction on auctioneer's authority would assume auctioneer had post-auction sale authority).

working his expected hours for his expected employer, doing the type of work Mr. Saber, and any other reasonable person, would believe Mr. Hayes did on behalf of Randolph Engineering; Hayes' actions were within the limit of authority standards as understood by Saber. Randolph Engineering and Hayes assert that this particular survey fell outside the scope of Hayes' employment at Randolph, as privately determined by some unwritten office process though it was no different from survey work typically performed by Hayes on behalf of Randolph. Roger Randolph asserted that he and Hayes had a private understanding between them that Hayes would do elevation certificates "on his own as an individual." (ALLMED-00135)

Simultaneously, Mr. Randolph recalled giving Mr. Hayes "permission" to do elevation certificates (ALLMED-00135) and admitted that Hayes was, at all times, an employee of Randolph Engineering, subject to the employee handbook, which states in pertinent part, "An employee who wishes to engage in outside employment should receive prior approval from his or her supervisor." (ALLMED-00158) Nonetheless, Randolph should be estopped from denying the agency relationship to a third party such as Petitioner because of the privacy of that understanding, and the ostensible, public appearance to the contrary. Restatement (3d) *Agency*, § 2.03, comment d. Randolph Engineering and Hayes convey an outward, ostensible agency between them, and third parties are not privy to any private limitations on that agency discussed between them. Therefore, Randolph may not deny Hayes as its agent for purposes of liability after third parties have already understood the existence of that agency relationship.⁶

⁶ Assuming, *arguendo*, that the private understanding about certain kinds of elevation surveys existed, Randolph did nothing to disabuse clients of the notion that Hayes might not be doing work independently. Indeed a jury could conclude that Randolph declined to inform clients so that they would stay in-house for survey and engineering work.

IV. The Evidence Is Sufficient for a Jury to Conclude Mr. Hayes Was the Apparent Agent of Randolph and Summary Judgment to the Contrary Was Erroneous

The Circuit Court erred in failing to find that the evidence was sufficient for a jury to conclude Mr. Hayes was the apparent agent of Randolph, and should be allowed to determine whether Randolph is jointly and severally liable for Hayes' negligence under that legal theory. All Med presented facts and argument demonstrating Mr. Hayes was the apparent agent of Randolph, but the Circuit Court never even addressed that theory of liability or All Med's apparent agency argument in its Order (ALLMED-00385 - 00391).

CONCLUSION

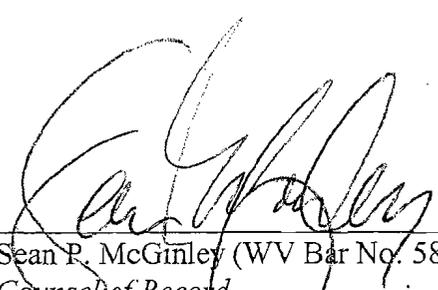
Genuine issues of material fact precluded the lower Court from granting Respondent Randolph's Motion for Summary Judgment. The primary disputed factual issue remains: was Hayes acting within the scope of his employment for Randolph, and/or with apparent authority of Randolph, at the time the elevation certificates were completed and issued? Petitioner's record evidence shows Hayes already was doing related surveying work for Mr. Saber, and that Hayes made no distinction between the initial survey work he performed for All Med on Randolph's behalf and the survey work he did immediately thereafter on the Danville property. It is undisputed Hayes used the elevation survey certificate form obtained from Randolph, that Hayes discussed this matter with his employer. The evidence shows Mr. Saber faxed information concerning the elevation survey work to be performed in Danville to Randolph Engineering. The record evidence is thus sufficient for a jury to conclude Hayes did the elevation survey work during Randolph's regular business hours; and the subject elevation certificates could not have been performed without the use of a surveyor's license, for which Randolph paid.

Because the record evidence is sufficient for a jury to find Hayes was working either within the scope of his employment for Randolph, or with the apparent authority of Randolph at the pertinent times in this case, Randolph's Motion for Summary Judgment should have been denied. For all the foregoing reasons, Petitioner respectfully requests this Court reverse the Order of the Circuit Court of Boone County granting Respondent Randolph Engineering's Motion for Summary Judgment, and to remand this case so that a jury can resolve the disputed facts.

Respectfully submitted,

ALL MED, LLC

By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

No. 11-0074

ALL MED, LLC,

Petitioner,

v.

RANDOLPH ENGINEERING CO., INC.,
and DONALD R. HAYES,

Respondents.

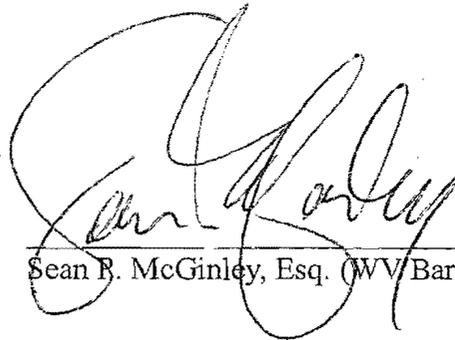
CERTIFICATE OF SERVICE

I, Sean P. McGinley, hereby certify on April 11, 2011 I served the foregoing **PETITIONER'S BRIEF** on counsel for Respondent by hand delivery on the following:

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