

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

No. 11-0074

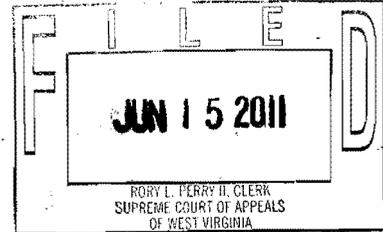
ALL MED, LLC,

Petitioner,

v.

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

Respondents.



**PETITIONER'S BRIEF IN REPLY TO
RESPONDENT'S RESPONSE**

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TABLE OF CONTENTS

Table of Authorities i

Argument

I. Introduction 1

II. The Law of Apparent Authority Is Well Settled by this Court and Applies to the Facts of this Case 1

III. Disputed Facts Are Ripe for Jury Determination 3

IV. Respondent Fails to Appreciate the Distinction Between Actual and Apparent Agency and Apparent Agency's Place in West Virginia Law 6

V. The Court Should Remand this Case for Jury Determination on the Issue of Apparent Agency 9

TABLE OF AUTHORITIES

<i>Burless v. West Virginia University Hospitals, Inc.</i> , 215 W. Va. 765, 772, 601 S.E.2d 85, 92 (2004)	6
<i>Courtless v. Jolliffe</i> , 203 W. Va. 258, 507 S.E.2d 136 (1998)	4
<i>Cremeans v. Maynard</i> , 162 W. Va. 74, 246 S.E.2d 253 (1978)	4
<i>General Electric Credit Corp. v. Fields</i> , 148 W. Va. 176, 133 S.E.2d 780 (1963)	1, 7
<i>Griffith v. George Transfer and Rigging, Inc.</i> , 157 W. Va. 316, 201 S.E.2d 281 (1973)	3, 4
<i>Laslo v. Griffith</i> , 143 W. Va. 469, 102 S.E.2d 894 (1958)	4, 5
<i>Nees v. Julian Goldman Stores, Inc.</i> , 106 W. Va. 502, 504, 146 S.E. 61, 62 (1928)	3
<i>Thompson v. Stuckey</i> , 171 W. Va. 483, 300 S.E.2d 295 (1983)	2
<i>Jones v. Wolfe</i> , 203 W.Va. 613, 616, 509 S.E.2d 894, 897 (1998)	2
<i>Timberline Four Seasons Resort Management Co., Inc. v. Herlan</i> , 223 W. Va. 730, 679 S.E.2d 329 (2009)	6, 7
Restatement of Law (Third) <i>Agency</i> § 2.03 (2005)	6

ARGUMENT

I. INTRODUCTION

In its Response, Respondent does not dispute the fact that Petitioner has presented evidence supporting apparent agency liability. Rather, Respondent seems to ask this Court to ignore the evidence and instead apply Respondent's self-serving idea of "common sense" and "ordinary life experiences."¹ Indeed, Respondent urges this Court to completely ignore the law of apparent agency because Respondent feels that law is "absurd." Response Brief at 15. It should go without saying that when a party urges the Court to ignore completely both the law and the evidence, the reason for such urging is that the party has no valid defense. As shown below, that obviously is true in the case at bar, and the Court should reverse the lower court's summary judgment order and remand the case for jury determination of the disputed facts.

II. THE LAW OF APPARENT AUTHORITY IS WELL-SETTLED BY THIS COURT AND APPLIES TO THE FACTS OF THIS CASE

Apparent authority is precisely the type of agency relationship liability that a trier of fact may find existed between Mr. Hayes and Randolph Engineering under the evidence in this case. As held by this Court,

"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." Syl. pt. 1, *General Electric Credit Corp. v. Fields*, 148

¹Response Brief at 15. Contrary to Respondent's suggestion, the application of "ordinary life experiences" and "common sense" to the facts here likely would lead a jury to conclude that a person in Petitioner's shoes would understand, as Petitioner did, that a "key" employee of an employer (like Mr. Hayes' work for Respondent) would be working for and on behalf of that employer, with the rightful appearance of agency, especially where, as here, the Petitioner already was familiar with that employee's authority and work for that same employer and has requested the same type of work that the employee was authorized by his employer to contract for and perform previously. If this Court or a jury were to apply "common sense" or "ordinary life experiences" instead of evidence and law as urged by Respondent, summary judgment would be equally inappropriate.

W. Va. 176, 133 S.E.2d 780 (1963). Syl. pt. 3, *Thompson v. Stuckey*,
171 W. Va. 483, 300 S.E.2d 295 (1983).

The evidence of record shows that Mr. Saber, the representative of Petitioner, initially contacted Respondent's offices for work on a project in Nitro, West Virginia. Respondent's long-time employee and surveyor, Mr. Hayes, agreed to perform the survey work on the Nitro project. (ALLMED 252) Mr. Hayes is not merely an employee. According to Respondent's owner, Roger Randolph, Mr. Hayes is part of a small number of "key personnel" at Randolph Engineering and is a "project leader" who had authority to contract jobs on behalf of Respondent without additional approval from anyone else at Randolph. (ALLMED 139-140) Indeed Mr. Hayes used that actual authority when he accepted the engagement and performed the work on the Nitro project on Randolph's behalf. He clearly is an agent of Randolph under *Jones v. Wolfe*, 203 W.Va. 613,616, 509 S.E.2d 894, 897 (1998). The evidence shows Respondent's owner, Mr. Randolph, was aware that Mr. Hayes was doing this survey work for Mr. Saber on the Nitro project. (ALLMED 140)

When Petitioner's next project came up that required survey expertise, the evidence of record shows that Mr. Saber again called Respondent's offices, and despite knowing that Mr. Saber already understood Mr. Hayes was the employee and agent of Respondent, neither Respondent nor Hayes made any suggestion that its "key personnel" and "project leader," Mr. Hayes, now would be working outside of his employment. (ALLMED 271-272) Because evidence of record shows Mr. Hayes' clearly had both apparent (and actual) authority to engage in work on Randolph's behalf, and that this authority was not disavowed by Respondent or Mr. Hayes, a jury reasonably could conclude Mr. Saber thus understood Mr. Hayes agreed to this second project on behalf of his employer, and would not, and did not understand that Mr. Hayes would be doing this second survey work outside the scope of his employment and agency for Randolph (unlike the work Mr. Hayes did in Nitro).

Despite Respondent's assertion that liability based on apparent agency is "absurd," the law

in this State long has recognized that an employer is liable for the acts of an employee where such acts are at least within the *apparent* scope of the employee's authority. As held by this Court in *Nees v. Julian Goldman Stores, Inc.*, 106 W. Va. 502, 504, 146 S.E.2d 61, 62 (1928):

“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 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.” (Emphasis added)

As discussed at length in Petitioner's initial brief, the rule stated in *Nees* is consistent with and reiterated by the Restatement of Law (Third) *Agency* § 2.03 (2005).

Moreover, the evidence of record is sufficient for a jury to conclude Respondent had an interest in Mr. Hayes' elevation survey work. Indeed, Respondent specifically gave Mr. Hayes permission to do such work and could have directed him not do the work. (ALLMED 135, 142) A jury easily could find Respondent would not want existing or potential clients to go to other engineering firms, and gave Mr. Hayes permission to do work to protect its client base. Evidence of record, while disputed, is sufficient for a jury to conclude neither Randolph nor Hayes made any effort to tell Petitioner that the Danville work would be outside the scope of Hayes' authority at Randolph. (ALLMED 271-272) The evidence is more than sufficient for a jury to conclude Respondent encouraged this work by Hayes (even though outside work ordinarily was discouraged) in order to keep clients and potential clients “in-house,” and for that reason Respondent made no effort to suggest that Mr. Hayes was acting outside the scope of his employment when he performed elevation surveys.

III. DISPUTED FACTS ARE RIPE FOR JURY DETERMINATION

“Whether an agent is acting within the scope of employment generally is a question of fact for a jury.” Syl. pt. 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.² 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.”

Syl. pt. 1, *Laslo v. Griffith*, 143 W. Va. 469, 102 S.E.2d 894 (1958) (emphasis added), Syl., *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.”

Syl. pt. 2, *Laslo, supra*.

It is noteworthy, and the evidence is undisputed, that Mr. Hayes and Mr. Randolph both

²The disparity between Respondent’s Statement of the Case in its Response and the evidence of record recited in Petitioner’s Statement of the Case in its earlier-filed Appeal Brief illustrate well the number of material factual disputes in the case at bar that are ripe for jury determination. Clearly Respondent is ignoring the evidence of record that does not comport with its self-serving defense. But on summary judgment, the evidence and all of the most favorable inferences therefrom must be viewed in the light most favorable to the non-moving party, here the Petitioner. *Williams v. Precision Coil*, 194 W. Va. 52, 61 n.14, 459 S.E.2d 329, 338 n.14 (1995) (“The nonmoving party is entitled to the most favorable inferences that may reasonably be drawn from the forecast evidence. *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985).”). For example, Mr. Saber’s testimony (ALLMED 272-272) conflicts directly with that of Mr. Hayes regarding conversations they had about the work in Danville and so, for the purposes of summary judgment, the Court must accept Mr. Saber’s testimony as true. Such conflicts are properly resolved by a jury with the opportunity to hear testimony of all relevant witnesses on these and other disputed facts.

testified that Mr. Hayes indeed did work on elevation survey certificates for Respondent, the exact type of work Respondent now claims was outside the scope of Mr. Hayes' employment. (ALLMED 28-29, 120-121). Whether or not an employee has his or her employer's actual authority (or apparent authority) to engage in work on a similar project during the same time period is a genuine issue of material fact for jury determination based on the specific circumstances. *Laslo, supra*.

Evidence of record shows Petitioner retained Respondent for work on the project in Nitro, and Respondent authorized Mr. Hayes, as one of its "key personnel," to contract for and perform the requested work on Respondent's behalf. (ALLMED 231) That Hayes worked on the Nitro project on behalf of Respondent is undisputed. The evidence then shows that Mr. Saber called Randolph Engineering and spoke to Mr. Hayes about the Danville project while Mr. Hayes still was working on behalf of Respondent on the Nitro project. (ALLMED 253, 254). As Mr. Saber testified, at no point was it suggested by Mr. Hayes that this Danville project might fall outside the scope of Mr. Hayes' employment with Respondent. (ALLMED 254-55; 271-72)³ It is at most a genuine issue of material fact whether Petitioner or its representative, Mr. Saber, knew or understood that Mr.

³It is revealing that Respondent is compelled to distort Mr. Saber's testimony. At page 16 of its Response, Respondent misleadingly implies that Mr. Saber's testimony is equivocal about the fact that Mr. Hayes never suggested that the work on the Danville project would be outside of Mr. Hayes' employment for Respondent. Mr. Saber's testimony, in fact, is extremely clear:

Q. Did Mr. Hayes ever tell you that he was performing the elevation survey on his own and not on behalf of Randolph Engineering?

A. No, he did not.

Q. You remember that?

A. He did not say that.

(ALLMED 271-272).

Hayes' work on the Danville project, unlike the work at Nitro, fell within or outside the scope of his employment or agency relationship with Respondent.

IV. RESPONDENT FAILS TO APPRECIATE THE DISTINCTION BETWEEN ACTUAL AND APPARENT AGENCY AND APPARENT AGENCY'S PLACE IN WEST VIRGINIA LAW

In its Response, Respondent conflates one issue in this case - whether or not Mr. Hayes performed work for Petitioner with the apparent agency of Respondent - into an analysis of the different legal standard of whether or not these facts comport with this Court's indicia of actual agency pursuant to *Timberline Four Seasons Resort Management Co., Inc. v. Herlan*, 223 W. Va. 730, 679 S.E.2d 329 (2009). Response Brief at 16-17. Apparent agency, as stated *supra*, and in Petitioner's Appeal Brief, differs from actual agency - such that even where 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, the person holding out the person as an employee or agent 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); Restatement of Law (Third) *Agency* § 2.03, comment c (2005).

In any event, the evidence here is more than sufficient for a jury to conclude Petitioner's Mr. Saber reasonably and in good faith believed that Mr. Hayes was an agent of Respondent, and if the *Timberline* factors are applied, the evidence shows that those factors are all present in this case, including Respondent's ability to control Mr. Hayes' actions, Respondent's ability to benefit from Mr. Hayes' actions,⁴ and certainly the knowledge that Respondent had hired Mr. Hayes and retained

⁴As stated previously, having a "key personnel" such as Mr. Hayes provide elevation certificates to an existing or new client of Respondent certainly benefitted Respondent in that a client or potential client would not seek out a different engineering firm to perform that or other services.

the ability to fire him. Moreover, even in *Timberline*, this Court indicated that no strict proof, such as a contract, is necessary to infer an agency relationship, and reiterated the fact-dependent nature of a determination of agency:

[P]roof of an express contract of agency is not essential to the establishment of the relation. It may be inferred from facts and circumstances, including conduct. *General Elec. Credit Corp. v. Fields*, 148 W. Va. 176, 181, 133 S.E.2d 780, 783 (1963). When we review the circumstances herein and the conduct that occurred between the parties, we can infer that an agency relationship existed.

Timberline, supra, at 736, 335. Such an inference of Mr. Hayes' agency relationship with Respondent, based upon the facts and circumstances of the case at bar, falls well within the rightful province of a jury to weigh the facts in evidence and determine the issue.

How Mr. Hayes was paid for any work he performed for Mr. Saber, Petitioner, or anyone else presents still more questions of fact that a jury must decide. The check to Mr. Hayes is dated November 1, 2006, after the negligent survey was completed, certified, relied upon, and the damage was done. This is consistent with Roger Randolph's undisputed approval of Hayes' survey work and the lack of any requirement by Respondent to inform clients *in advance* that such work would occur outside Mr. Hayes' employment with Respondent. Mr. Randolph testified: "We give Don [Hayes] permission to do elevation surveys on his own." (ALLMED 146). The evidence of record is such that a jury may conclude neither Respondent nor Mr. Randolph personally did anything to inform clients that Mr. Hayes' elevation survey work might be separate from his authority to engage in work on behalf of the company, and indeed it is undisputed that the only information Respondent required Mr. Hayes to give clients was an invoice (provided after the work was complete), as Mr. Randolph testified:

Q. Anything other than the invoice that was required of Mr. Hayes to alert these clients that he was performing the work in his individual capacity?

A. No.

(ALLMED 142)

Thus, even if a jury might conclude that the way the check was made out provided some indicia that Mr. Hayes might not be working for Respondent, the check was not written until well after the negligent work already had been performed and relied upon, and by that date the damage was done. The possibility that Petitioner might have some reason to question Mr. Hayes' capacity *after the fact* hardly is probative of Petitioner's understanding at the time the survey work was requested and the negligence and damage occurred. Moreover, simply making the check out to Mr. Hayes, one of Respondent's "key personnel" who had authority to contract and perform Respondent's work on his own, does not mean Petitioner understood Mr. Hayes' work to be outside the scope of his employment. The evidence of record shows a direct conflict between the understanding Mr. Saber had - that Mr. Hayes was Respondent's agent, performing work that he typically performed for Respondent, no matter the location of the job - and Mr. Hayes' alleged understanding privately with Respondent that this job would be done separately and therefore he should be paid separately for the work, despite Mr. Hayes' other ongoing performance of survey work for Respondent, as stated in the testimony of Mr. Hayes' employer, Roger Randolph.

(ALLMED 121)

Additionally, while Respondent argues it had no power over Mr. Hayes' work (Response Brief at 10-13), the evidence of the power or control Respondent exercised over Mr. Hayes clearly presents still more questions of material fact to be presented to a jury. Evidence of record includes Roger Randolph's testimony that Mr. Hayes asked his employer for, and was given permission by Randolph to perform elevation certificates:

Q. Let me back up to 2006-2007 time frame. Is it your

position that if Mr. Hays [sic] wanted to do outside employment, he still needed to get supervisory approval?

A. When we elected as a company not to do elevation certificates, Don and I discussed him doing them on his own as an individual. **He requested permission to do that. And I gave him permission to do that.**

(ALLMED 135) (Emphasis added).⁵

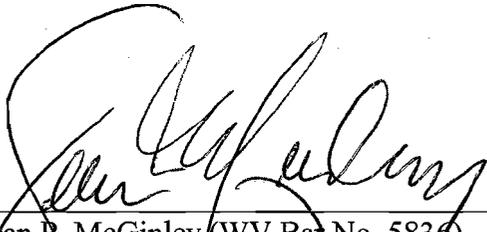
In addition, Mr. Randolph testified that when Mr. Hayes discovered he had made mistakes on the Danville elevation survey for Petitioner, Mr. Hayes immediately discussed the mistake with his employer and also discussed how he was thinking of handling it. (ALLMED 124-126) Surely the foregoing is sufficient for a jury to conclude, “the existence of some degree of control by the principal over the conduct and activities of the agent.” *Timberline, supra*, 233 W.Va. at 735, 679 S.E.2d at 334. Mr. Randolph, on behalf of Respondent, had both the ability and the opportunity to deny Mr. Hayes permission to do elevation certificates on his own (i.e. “some degree of control”) - but Mr. Randolph chose to use his control to allow the work - and a jury easily could conclude he exercised “some degree of control” over the work Mr. Hayes was permitted to do, whether that work was done for the direct benefit of Respondent or the work was allegedly, and unknown to any third party, outside the scope of his employment with Respondent.

⁵Indeed, Respondent’s employee handbook specifically discouraged Mr. Hayes and other employees from doing any outside work (ALLMED 133-34).

V. THE COURT SHOULD REMAND THIS CASE FOR JURY DETERMINATION ON THE ISSUE OF APPARENT AGENCY

For the foregoing reasons as well as those stated in Petitioner's Appeal Brief filed previously with this Court, 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,
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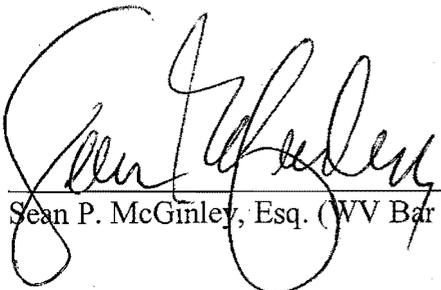
Respondents.

CERTIFICATE OF SERVICE

I, Sean P. McGinley, Esquire, certify that a true and exact copy of the foregoing **PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S RESPONSE** was served upon counsel for defendants on this 15th day of June, 2011, as follows:

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