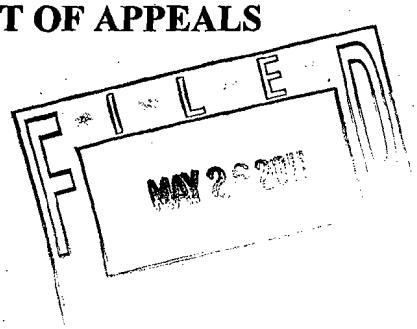
THE WEST VIRGINIA SUPREME COURT OF APPEALS

AT CHARLESTON

No. 11-0074



ALL MED, L.L.C.,

Petitioner,

CIVIL ACTION NO. 08-C-197
Circuit Court of Boone County
Honorable William S. Thompson

v.

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

Respondents.

RANDOLPH ENGINEERING COMPANY'S RESPONSE TO PETITIONER'S BRIEF

May 26, 2011

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I. RESPONSE TO ASSIGNMENTS OF ERROR

Response to Assignment of Error No. 1: The circuit court was perfectly within its authority, and operated according to the law, 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 the elevation certificates [in question]."

Response to Assignment of Error No. 2: This court has said that "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 v. Griffith, 143 W.Va. 469, 479 102 S.E. 2d 894, 900 (1958). For that reason, the circuit court was perfectly within its authority, and operated according to law, in finding that the relevant undisputed facts required it to grant summary judgment to the Respondent in this case.

Response to Assignment of Error No. 3: A third-party who is trying to establish an agent's apparent authority must deal with the alleged apparent agent "in good faith and in the exercise of reasonable prudence." Syl. pt. 1, General Elec. Credit Corp. v. Fields, 148 W.Va. 176, 176, 133 S.E.2d 780, 780 (W.Va. 1963). Beyond that, a third-party seeking to establish an agent's apparent authority based on an employer holding out or representing a person as his agent must actually "rely" on the employer's alleged acts or representations. Syl. pt. 8, Brewer v. Appalachian Constructors, Inc., 138 W.Va. 437, 438, 76 S.E.2d 916, 918 (1953). In this case, the undisputed facts show that All Med, LLC's principal, Mark Saber, could not have believed that Mr. Hayes was working for Randolph Engineering Company, Inc. ("Randolph Engineering") when he did the work in question. He paid Mr. Hayes with a special check made payable only to Mr. Hayes. In sharp contrast, Mr. Saber paid Randolph Engineering for Randolph Engineering's work with checks payable directly to Randolph Engineering. The

circuit court was correct in finding that, as a matter of law, All Med, LLC ("All Med") never thought Mr. Hayes was representing Randolph Engineering when performing the work in question.

II. STATEMENT OF THE CASE

The most important and obvious three pieces of evidence in the entire case -- the checks with which All Med paid for engineering work -- *were never mentioned* throughout the entire nineteen (19) pages of the Petitioner's brief. Moreover, the Petitioner's brief contains a great deal of surplusage that merely attempts to provoke this Court to accept evidentiary conclusions which cannot be sustained in light of all of the evidence in the record. Although Rule 10(d) of the West Virginia Rules of Appellate Procedure allows the Respondent to forgo making a Statement of the Case, these concerns require a response.

Mr. Saber had worked with the Respondent, Randolph Engineering, and Donald Hayes, the other party to this lawsuit, before the subject transaction on a project with Mr. Saber's former father-in-law. (All Med 240) In August of 2006, Mr. Saber wrote a check on his All Med account payable to Randolph Engineering for $285.00 to conclude that project. (All Med 378)

That check was in response to an invoice from Randolph Engineering dated August 7, 2006, for the amount of $285.00. (All Med 378)

Mr. Saber also worked with Randolph Engineering and Mr. Hayes on a project in Nitro, West Virginia, beginning just prior to the time of the Danville project. This Nitro project involved a field survey, a topographic map and a meeting with city officials. (All Med 376) Mr. Saber paid for that work with a check for $1683.00 to Randolph Engineering on May 17, 2007. The check was paid from the account of Blade Creek Development, LLC, another business concern for which Mr. Saber is the general partner. (All Med 377)

That check was in response to an invoice from Randolph Engineering to All Med dated April 3, 2007, for the amount of $1683.00. (All Med 376)

Sandwiched between those two projects was the subject project, which we will call the "Danville project," where Mr. Saber wanted to have an elevation survey done for his proposed purchase of five storage buildings that contained multiple personal storage units. He knew the property was in the floodplain, even if from no other source than from Mr. Hayes, himself. Mr. Hayes told Mr. Saber the property was in the floodplain before Mr. Hayes performed elevation surveys of the property in October 2006. (All Med 287) Mr. Saber hoped to determine his insurance costs, and he knew that the bank would require certification of whether the property was in the floodplain.

It was on this project that Mr. Hayes performed the elevation study and mistakenly reported his findings when completing a government form Elevation Certificate. Instead of correctly transcribing from his notes that the base flood elevation was 693 feet, he mistakenly transcribed that it was 593 feet on the certificate. The certificate was provided to BB&T Carson Insurance, and in turn to Hartford Insurance for government-backed flood insurance coverage.

Different from the payments he made to Randolph Engineering, Mr. Saber paid for the Danville project with a check that was payable to Donald R. Hayes, personally. (All Med 380) The check was written on November 1, 2006 from his All Med account in the amount of $680.00.

Randolph Engineering did not issue an invoice to Mr. Saber or any of his related companies for $680.00. Mr. Saber has no recollection of an invoice that resulted in this check. (All Med 265) Mr. Hayes said that he issued a hand-written invoice to Mr. Saber in this amount, but Mr. Hayes does not have a copy of it. (All Med 84)

Petitioner somehow did not find it worthy of mention in its brief that one of its checks -- the only one for which there was no invoice from Randolph Engineering, and by obvious deduction, the one corresponding to the Danville project -- was payable directly to Donald Hayes, instead of being payable to Randolph Engineering.

Though the cost of the flood insurance became quite high after documents were resubmitted to Hartford, it is also important to note that Mr. Saber bargained for the increased risk when he learned that the property was in a floodplain. While Mr. Saber was negotiating the property's sale price with Paul Gillespie, the prior owner, Mr. Saber became aware that the property was in the floodplain and demanded, and received of Mr. Gillespie, significant considerations in exchange for the risk he was taking in buying the property.

While Mr. Saber said that he did not remember whether Mr. Gillespie told him that the property fell within the floodplain (All Med 237), at sometime between Mr. Hayes' elevation survey and certificate on October 12, 2006, and the closing date of November 17, 2006, Saber began renegotiating with Gillespie. Those renewed negotiations resulted in Mr. Gillespie dropping the asking price and adding another half acre of land to the deal that he had otherwise not wanted to sell. He recalls that these negotiations became necessary "after they had done the elevation level or whatever you call it," "[b]ecause of the floodplain." (All Med 321)

Evidence in the form of testimony by Rita Cuniff, a 40-year employee of BB&T Carson Insurance, and its predecessors, shows that Mr. Saber closed the sale on this property at least one month before any flood insurance policy was actually issued. (All Med 203) Thus it would have to be incorrect to say that All Med depended on the amount of the insurance quote to determine whether to buy the property, as All Med says on Page 2 of its brief. Mr. Saber took an educated

risk in purchasing this property, in addition to the risk of the property being in the floodplain in the first place.

In the circuit court, and here, All Med tried to use a website that never became available to the public until January of 2008 to prove that Mr. Saber relied on certain suppositions back in the fall of 2006. All Med has continued to offer those same pages as part of the record in this brief. They tried to use the 2008 website to prove that Mr. Saber might have relied on Mr. Hayes' high position with Randolph Engineering, and that Randolph Engineering was engaged in regular elevation surveys that were unrelated to other existing work. The circuit court saw how desperate and thin All Med's attempt to establish apparent authority had to be when All Med heavily relied on evidence that never existed at the relevant time.

Mr. Hayes told Mr. Saber that any elevation survey he performed would be performed in a personal capacity, as opposed to as an employee of Randolph Engineering. This is contrary to All Med's argument on page 11 of its brief. Against his personal interest in this lawsuit, Mr. Hayes clearly remembers telling Mr. Saber that he was operating individually. (All Med 37) Mr. Hayes explained how elevation surveys that were not related to other work that Randolph Engineering was doing for clients had become cost prohibitive. Mr. Saber did not remember a conversation on that issue. He said that he merely assumed that Mr. Hayes was working for Randolph. (All Med 271-272)

Mr. Saber did nothing illegal, unethical or even evasive in securing Mr. Hayes' services outside of his employment with Randolph Engineering. He merely took several types of risks in purchasing property that fell within the floodplain that he no longer wants to stand behind.

III. SUMMARY OF ARGUMENT

Petitioner All Med is trying to create an apparent authority in Mr. Hayes to act as an agent based upon facts which do not establish any type of agency. Donald Hayes performed some work on behalf of Randolph Engineering for All Med, but then All Med's principal, Mark Saber, asked Mr. Hayes to do some side work, apart from his employment with Randolph Engineering. Unfortunately for all parties, Mr. Hayes made a mistake while doing this side work, and now Mr. Saber does not want to stand by the risk he took by hiring Mr. Hayes to perform the side work.

Because Donald Hayes was a longtime and trusted employee of Randolph Engineering, All Med now wants to make everything Mr. Hayes does outside of his employment inseparable from Randolph Engineering. Apparent authority is the vehicle by which the law collects those acts of a person who acts as an agent, but meanders past the authority given to him. The vehicle of apparent authority does not tar the employer with every after-hours act of a one who is an employee during work hours.

Donald Hayes did not veer outside of his authority while acting as an agent. In this case, Mr. Hayes' entire encounter with All Med's Danville project was an independent venture outside of any agency or employment with Randolph Engineering. Mr. Saber and All Med knew that. Mr. Saber wrote two checks to Randolph Engineering for projects in which Mr. Hayes was involved, but sandwiched between those two checks another check directly to Donald Hayes is undisputed evidence that proves Mr. Saber's and All Med's knowledge that Mr. Hayes was working on his own, and not as an agent for Randolph Engineering on the Danville project.

While the law must give claimants a chance to be heard when they have facts that create a justiciable controversy, the law need not to indulge nonsensical constructs that are wholly

outside of our reality. It would be nonsensical to require a jury to be impaneled to hear the experienced businessman Mr. Saber say that he wrote two checks to Randolph Engineering within nine months for work that Mr. Hayes did for Randolph Engineering, but wrote another special check in between those two checks to Donald Hayes, personally, without appreciating the difference.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

If the Petitioner presents oral argument to the Court in this case, the Respondent would likewise request oral argument. The Respondent, in reciprocity, requests the opportunity to bring alive for this Court those issues which assisted the circuit court in understanding that the undisputed facts show that there is no genuine issue of material fact remaining for a jury to decide on the issue of whether Donald Hayes was acting as an agent for Randolph Engineering with the apparent authority to conduct an elevation survey for All Med in this instance.

V. ARGUMENT

A. 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. Painter v. Peavy, 192 W. Va. 189, 192, 451 S.E.2d 755, 758 (1994) ("A circuit court's entry of summary judgment is reviewed *de novo*."). "Pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, summary judgment is required when the record shows that there is 'no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Jochum v. Waste Mgmt. of W. Va., Inc., 224 W. Va. 44, 48, 680 S.E.2d 59, 63 (2009). For example, summary judgment is required "when the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Williams v. Precision Coil, Inc., 194 W. Va. 52, 59, 459 S.E.2d 329,

336 (1995). A party cannot successfully oppose a motion for summary judgment "by alleging the *mere existence* of a factual dispute, but must instead point to specific facts demonstrating a genuine issue of material fact worthy of being tried." Reed v. Orme, 221 W. Va. 337, 344, 655 S.E.2d 83, 90 (2007). Further, this Court has said that "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, 143 W. Va. at 479, 102 S.E.2d at 900. Applying this standard, this Court should affirm the circuit court's order granting Randolph Engineering's Motion for Summary Judgment.

B. UNDISPUTED FACTS SHOW THAT DONALD HAYES WAS NOT ACTING AS RANDOLPH ENGINEERING'S AGENT OR EMPLOYEE WHEN HE PERFORMED THE ELEVATION SURVEYS AND PREPARED ELEVATION CERTIFICATES – A JURY FINDING IS UNCESSARY ON THIS ISSUE

The Petitioner wants to urge this court to find that, once an employer hires a person with specialized skills, the employer is tagged with everything the employee ever does when he is using those skills. It is true that Donald Hayes was using skills that come into play during his employment at Randolph Engineering when he worked on the Danville project. The evidence recited in this section shows that no case could be made that he was using them as an agent of Randolph Engineering on that project.

Plaintiff's only theory of liability against Randolph Engineering is an assertion that Mr. Hayes "is an agent of defendant Randolph Engineering Co., Inc." (See, Complaint, generally, and ¶ 4).[1]

[1] When Randolph Engineering asked plaintiff by interrogatory to identify the facts supporting plaintiff's allegation that Mr. Hayes is an agent of Randolph Engineering, plaintiff responded, "Defendant Hayes is employed by Randolph Engineering," and directed Randolph Engineering to its company website *that didn't even exist at the time of any of the work that is discussed in this appeal*, which states that Mr. Hayes has been with Randolph Engineering for over twenty-five years. (See All Med 10)

This Court has stated that "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, 143 W.Va. at 479, 102 S.E.2d at 900. The Court elaborated,

> 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, 143 W.Va. at 469, 102 S.E.2d at 894. "'Where the facts are undisputed, the question of agency arising therefrom should be determined by the court, and not submitted to the jury.'" Laslo, 143 W.Va. at 475, 102 S.E.2d at 900 (quoting Syl. pt. 1, Moore v. Burriss, 54 S.E.2d 23, 132 W.Va. 757 (1949), Syl. pt. 3, Bank of White Sulphur Springs v. Lynch, 93 W.Va. 382, 116 S.E. 685 (1923).

This Court has said that, "[a]n agent is one who, subject to some control of another, acts on behalf of that other as a representative in the conduct of the other's business or contractual relations with third persons." Jones v. Wolfe, 203 W.Va. 613, 616 509 S.E.2d 894, 897 (1998)(per curiam) (citations omitted). The Court has also stated that "an agent is one who, having no personal interest in the subject matter of his agency, acts for another, and does not profit from his activities except as to such compensation as he may receive from his principal, independently of the venture to which his agency relates." Central Trust Co. v. Virginia Trust Co., 120 W.Va. 23, 23, 197 S.E. 12, 19 (1938). This Court has elaborated that:

> In assessing whether an agency relationship exists, we have traditionally held that "[t]here are four general factors which bear upon whether a master-servant relationship exists for the purpose of *respondeat superior*: (1) Selection and engagement of the servant; (2) Payment and compensation; (3) Power of dismissal; and (4) Power of Control. The first three factors are not essential

> to the existence of the relationship; the fourth, the power of control, is determinative.

Timberline Four Seasons Resort Management Co., Inc., v. Herlan, 223 W.Va. 730, 735, 679 S.E.2d 329, 334 (2009)(per curiam)(quoting Syl. pt. 5, Paxton v. Crabtree, 184 W.Va. 237, 400 S.E.2d 245 (1990)). "'One of the essential elements of an agency relationship is the existence of some degree of control by the principal over the conduct and activities of the agent.'" Timberline, 223 W.Va. at 735, 679 S.E.2d at 334 (quoting Teter v. Old Colony, 190 W.Va. 711, 441 S.E.2d 728 (1994)).

"'The law indulges no presumption that an agency exists; on the contrary a person is legally presumed to be acting for himself and not as the agent of another person; and the burden of proving an agency rests upon him who alleges the existence of the agency.'" Syl. pt. 1, John W. Lohr Funeral Home, Inc. v. Hess & Eisenhardt Co., 152 W.Va. 723, 723, 166 S.E.2d 141, 142 (1969)(quoting Syl. pt. 3, Bluefield Supply Co. v. Frankel's Appliances, Inc., 149 W.Va. 622, 142 S.E.2d 898 (1965)); see also, Brand v. Lowther, 168 W.Va. 726, 734, 285 S.E.2d 474, 480 (W.Va. 1981). Therefore, All Med bears the burden of proving that Mr. Hayes acted as an agent of Randolph Engineering when he performed the elevation surveys on the Danville property, and must overcome a presumption that Mr. Hayes was acting for himself and not as the agent of Randolph Engineering.

1. Evidence shows that Mr. Hayes was not acting as an agent or employee of Randolph Engineering on the Danville property because Randolph Engineering had no power to control Mr. Hayes' conduct or activities.

Randolph Engineering never had any power to control Mr. Hayes' work for plaintiff on the Danville project. Randolph Engineering never even knew that Mr. Hayes was doing any of this work until a year and a half after the work was completed. (All Med 73 and 381) It did not select Mr. Hayes for the project nor have the power to dismiss him from it. Randolph

Engineering did not know about this work because Mr. Hayes performed this work as an independent registered surveyor, unconnected to Randolph Engineering.

Although Randolph Engineering discouraged its employees from outside employment, Mr. Hayes would take on independent survey work several times a year, including the performance of elevation surveys for flood insurance purposes—a service Randolph Engineering stopped providing as a stand-alone service sometime in the 1990s as a business decision. In the fall of 2006, Mr. Saber, part-owner of All Med, asked Mr. Hayes for an elevation certificate so that plaintiff could get a quote for flood insurance on the Danville property. Mr. Hayes responded, "I could get it done."

Mr. Hayes did not use Randolph Engineering's survey equipment or company vehicle for his work on the Danville property. The six elevation certificates Mr. Hayes completed for the Danville project evidence that he performed this work independent of Randolph Engineering. On each certificate, he listed his title simply as "Land Surveyor," rather than head of Randolph Engineering Survey Department—his official position at the company. In the space on each certificate for company name, Mr. Hayes left a blank, rather than write in Randolph Engineering. In the space for address, he listed his home address in Hurricane, West Virginia, rather than Randolph Engineering's business address in Scott Depot, West Virginia.

Mr. Saber and Randolph Engineering did not have any correspondence regarding the Danville project. Mr. Saber did not speak to anyone at Randolph Engineering's headquarters about the Danville project, except maybe a secretary in an effort to be transferred to Mr. Hayes' telephone. Randolph Engineering had no records regarding Mr. Hayes' work on the Danville project until after All Med filed this lawsuit.

Likewise, Mr. Saber searched through All Med's financial records and could not find any specific file for Randolph Engineering or any invoice other than an invoice for Randolph Engineering's work on the Nitro property. When Mr. Saber eventually sent a demand letter prior to filing suit, he addressed the letter to Mr. Hayes rather than to the president or one of the principal officers of Randolph Engineering.

Mr. Saber did not see Mr. Hayes perform any of his work on the Danville project and cannot show that Mr. Hayes worked on the Danville project during his normal work hours for Randolph Engineering. Even assuming that Mr. Saber's recollection that he showed the Danville property to Mr. Hayes early in the morning during the week is correct, Randolph Engineering allows its employees a flexible forty-hour work-week -- which could include taking a few personal hours in the morning or taking an entire day off during the week and making up the hours on another day.

Randolph Engineering did not invoice Mr. Saber or All Med for Mr. Hayes' work on the Danville project, or receive payment for it. This stands in sharp contrast to two other Randolph Engineering projects, for which Randolph Engineering issued invoices on company letterhead, which invoices Mr. Saber then paid with checks written to Randolph Engineering.

Mr. Hayes testified that he gave Mr. Saber a handwritten invoice for his work on the Danville project, which had no reference to Randolph Engineering. This is consistent with the understanding between Mr. Hayes and Mr. Randolph that Mr. Hayes would separately invoice his independent survey work. As further discussed below, the only reasonable inference from undisputed facts is that Mr. Saber paid Mr. Hayes for his work on the Danville project with a check payable to "Donald R. Hayes."

All Med cannot overcome the legal presumption that Mr. Hayes acted for himself when he performed the elevation work on the Danville property. The power of control is the "determinative" factor under Timberline. The undisputed material facts demonstrate that Randolph Engineering had no power to control Mr. Hayes' work on the Danville project (the fourth Timberline factor), and further that Randolph Engineering did not select Mr. Hayes for the project (the first Timberline factor) or have the power to dismiss him from it (the third Timberline factor). This Court should affirm the circuit court's finding that Randolph Engineering is entitled to summary judgment, as a matter of law, on All Med's complaint.

All Med cannot even establish facts to show that Mr. Hayes was any sort of an agent of Randolph Engineering when he worked on the Danville project.

2. Undisputed facts show that Mr. Hayes' work on the Danville property was for his own benefit and was entirely unrelated to Randolph Engineering's business.

"[A]n agent is one who, *having no personal interest* in the subject matter of his agency, acts for another, and *does not profit from his activities* except as to such compensation as he may receive from his principal, independently of the venture to which his agency relates." Central Trust, 120 W.Va. at 23, 197 S.E.2d at 19 (emphasis added).

The undisputed facts establish that Mr. Hayes did not act as Randolph Engineering's agent or employee because he had a personal interest in, and directly profited from his work on the Danville project. Further All Med, not Randolph Engineering, compensated Mr. Hayes for this work. Therefore, the second Timberline factor, "payment and compensation" also weighs against All Med.

Mr. Hayes completed the elevation certificates for the Danville project on October 12, 2006. Mr. Hayes testified that he gave Mr. Saber a handwritten invoice for his work on the

Danville property, although Mr. Hayes cannot now locate a copy. Twenty days after Mr. Hayes completed the certificates, Mr. Saber, on November 1, 2006, wrote a check payable to "Donald R. Hayes" for $680.00 on the account of plaintiff All Med. Mr. Hayes thinks this check was payment for his work on the Danville project, but he cannot say with certainty. Mr. Hayes is not sure if the check is for his work on the Danville project or possibly for an elevation certificate he did for plaintiff on the Nitro property that was likewise outside his employment with Randolph Engineering. Regardless, Mr. Hayes endorsed and cashed the $680.00 check on November 11, 2006.

Randolph Engineering did not invoice All Med for Mr. Hayes' work on the Danville property or receive any compensation for it. Further because Randolph Engineering and Mr. Hayes had an understanding that Mr. Hayes would perform all independent work strictly on his own time, Randolph Engineering did not compensate Mr. Hayes for any independent work.

Mr. Saber does not know what the $680.00 check was for, but testified that it was "obviously" for "some work in Nitro or Danville." The $680.00 check cannot represent payment for any of Randolph Engineering's work on the Nitro property because Mr. Saber paid Randolph Engineering in full for its work on the Nitro property by check dated May 17, 2007 payable to "Randolph Engineering Co., Inc." in the amount of $1,683.00. Mr. Saber admits that this May 17, 2007 check is for the work on the Nitro property.

Randolph Engineering had previously issued a corresponding invoice for $1,683.00 for its work on the Nitro property to Mark Saber on April 3, 2007. Given that Mr. Saber paid Randolph Engineering for all its work on the Nitro property with the $1,683.00 check to "Randolph Engineering Co.," the $680.00 check payable to "Donald R. Hayes" was not payment for any of Randolph Engineering's work on the Nitro property. The only reasonable inference

from the undisputed facts is that the $680.00 check payable to "Donald R. Hayes" was payment for the six elevation certificates Mr. Hayes completed for the Danville project, payment for an independent elevation survey Mr. Hayes performed on the Nitro property, or both.

Mr. Saber now says he does not know why he wrote a check to Mr. Hayes instead of Randolph Engineering. Mr. Saber obviously knew how to submit payments to Randolph Engineering because he did so by check both before and after he wrote the $680.00 check to "Donald R. Hayes." On August 7, 2006, Randolph Engineering sent an invoice on company letterhead to Mark Saber's ex-father-in-law, Buck Flynn, for $285.00 for professional engineering services relating to a subdivision. Mr. Saber signed a check, dated October 3, 2006, on the account of plaintiff All Med, payable to "Randolph Engineering Co" in the amount of $285.00. Shortly thereafter, on November 1, 2006, Mr. Saber signed the $680.00 check on the account of plaintiff All Med payable to "Donald R. Hayes." Subsequently, on May 17, 2007, Mr. Saber signed the $1,683.00 check to "Randolph Engineering Co., Inc.," for its work on the Nitro property.

The undisputed facts establish that Mr. Hayes received compensation for his work on the Danville project directly from plaintiff and that Randolph Engineering in no way compensated Mr. Hayes for this work or received payment from plaintiff for Mr. Hayes' work. Mr. Hayes' personal financial interest in his work on the Danville project further demonstrates that he was not acting as Randolph Engineering's agent or employee for this work.

3. Apparent authority is an absurd argument in light of the differing style of payment for the Danville project.

In the context of a *de novo* appeal, an appeals court may employ common sense and ordinary life experience. Imagine the absurdity of the following situations:

- The furnace repair technician from a well known company directs that you make the check payable to him, personally, rather than to the company you called, and whose uniform the technician wears.
- The mail carrier suggests that you make payment for a "collect on delivery" package to her, personally, rather than to the United States Postal Service.
- The pest control technician demands that you make your payment to him, personally, rather than to the company you called to perform the service.

These situations raise curiosity and alarm in the mind of the ordinary person. All Med wants this court to believe that a very similar situation would arouse no curiosity, alarm, or recollection in the mind of its principal, Mr. Saber, even though in this case he wrote checks to Randolph Engineering both before and after he wrote a check to Mr. Hayes personally. He "doesn't remember" having a conversation with Mr. Hayes, where Mr. Hayes told him that he would be performing this project on his own, and apart from Randolph Engineering. Mr. Saber "doesn't remember" why he wrote a check to Mr. Hayes, personally, rather than writing a check to Randolph Engineering, as he did for two other projects both before and after the check he wrote to Mr. Hayes.

All Med urges a standard where a company that employs a person with specialized skills will be required to keep a figurative leash around his neck, whether on duty or off, to govern and monitor everything that employee does with his learned skills -- a standard where not knowing its employees' whereabouts, and not learning about his project until more than a year after the fact is not enough.

Randolph Engineering is not asking this court to substitute itself as the finder of fact, even upon *de novo* review. It is asking the court to recognize that All Med has failed to meet all

four of the determining factors in Timberline for any sort of agency involving the Danville project. Even if All Med could establish some sort of agency, the argument that it was not readily apparent to Mr. Saber that Mr. Hayes was working for himself, and outside of the Randolph Engineering umbrella on this project, is absurd as a matter of law.

VI. CONCLUSION

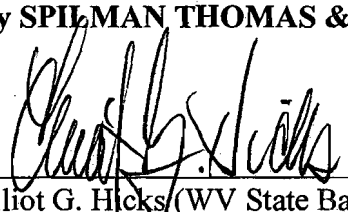
The circuit court considered this decision for quite some time, and clearly viewed the evidence in the light most favorable to All Med, but while the case against Mr. Hayes remains, no angle on the evidence All Med unearthed could be found that allowed All Med to maintain a case worthy of presentation to a jury.

All Med's case has failed all of the determinative tests that would allow any jury to find that Donald Hayes was working as an agent of Randolph Engineering on the Danville project. The thorough work of the circuit court should be upheld, finding that there is no issue of fact to be presented to a jury for determination at trial. Summary judgment should be upheld.

Respectfully submitted,

RANDOLPH ENGINEERING CO., INC.

By SPILMAN THOMAS & BATTLE, PLLC



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CERTIFICATE OF SERVICE

I, Elliot G. Hicks, counsel for Randolph Engineering Co., Inc., do hereby certify that I have served a true copy of the foregoing **"Randolph Engineering Company's Response to Petitioner's Brief"** upon the following, by placing the same in the United States mail, first class, postage prepaid, and addressed as follows on May 26 2011:

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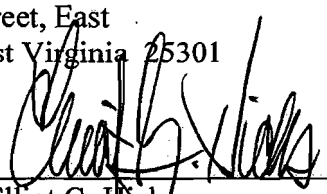

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