

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**January 2012 Term**

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**No. 11-0074**

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**FILED**

**February 24, 2012**

released at 3:00 p.m.

RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**ALL MED, LLC.,  
Plaintiff Below, Petitioner**

**v.**

**RANDOLPH ENGINEERING CO., INC., AND  
DONALD R. HAYES,  
Defendants Below, Respondents**

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**Appeal from the Circuit Court of Boone County  
The Honorable William S. Thompson, Judge  
Civil Action No. 08-C-197**

**AFFIRMED**

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**Submitted: January 25, 2012**

**Filed: February 24, 2012**

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Engineering Co., Inc.**

**The Opinion of the Court was delivered PER CURIAM.**

**JUSTICE WORKMAN dissents and reserves the right to file a dissenting opinion.**

## SYLLABUS BY THE COURT

1. “There are four general factors which bear upon whether a master-servant relationship exists for purposes of the doctrine of *respondeat superior*: (1) Selection and engagement of the servant; (2) Payment of 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.” Syl. pt. 5, *Paxton v. Crabtree*, 184 W. Va. 237, 400 S.E.2d 245 (1990).

2. “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.” Syl. pt. 3, *Teter v. Old Colony Co.*, 190 W. Va. 711, 441 S.E.2d 728 (1994).

3. “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).

4. “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.’ Pt. 3, syllabus, *Bluefield Supply Co. v. Frankel’s Appliances, Inc.*, 149 W. Va. 622.” Syl. pt. 1, *Lohr Funeral Home, Inc. v. Hess & Eisenhardt*, 152 W. Va. 723, 166 S.E.2d 141 (1969).

5. “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, *Gen. Electric Credit Corp. v. Fields*, 148 W. Va. 176, 133 S.E.2d 780 (1963).

**Per Curiam:**

The petitioner herein, All Med, LLC., (hereinafter “All Med”) asks this Court to reverse the December 9, 2010, order of the Circuit Court of Boone County that granted summary judgment on behalf of Respondent Randolph Engineering Co., Inc. (hereinafter “Randolph Engineering”) after finding that defendant below, Donald R. Hayes,<sup>1</sup> did not act as an employee or agent of Randolph Engineering when he conducted an elevation survey and completed an elevation certificate on All Med’s behalf. Before this Court, All Med asserts that the circuit court erred in finding that Mr. Hayes was not an actual agent of Randolph Engineering, in finding that the question of Mr. Hayes’ agency is a question of law for the court, and in finding insufficient evidence that Mr. Hayes was the apparent agent of Randolph Engineering.

Upon this Court’s review of the parties’ arguments, the appendix record, and the pertinent authorities, we affirm the circuit court’s grant of summary judgment on behalf of Randolph Engineering. In summary, we find that the undisputed material facts demonstrate that Mr. Hayes was not working as an actual agent or employee of Randolph Engineering when he performed the elevation survey and completed an elevation certificate on All Med’s behalf. We further find that the circuit court did not err in ruling that the

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<sup>1</sup>Donald R. Hayes is not a party to this appeal.

question of Mr. Hayes' agency is a question of law under the facts of this case. Finally, we find that the evidence below was insufficient for a jury to conclude that Mr. Hayes was the apparent agent of Randolph Engineering.

## **I.**

### **FACTS**

The facts giving rise to the instant proceeding are as follows. Randolph Engineering is a professional consulting engineering firm, and Roger Randolph (hereinafter "Mr. Randolph") is its president. Donald Hayes has worked for Randolph Engineering as a professional land surveyor for many years and was the head of Randolph Engineering's survey department during the events at issue. Randolph Engineering did not conduct elevation surveys at the time Mr. Hayes did the work that is the subject of this case.

In 2006, during the time of the events at issue, Mr. Hayes regularly took on surveying work independent of his employment with Randolph Engineering. Mr. Hayes did this with Mr. Randolph's permission. When Mr. Hayes performed independent surveying work, he used his own equipment. Also, Randolph Engineering did not bill clients for any work that Mr. Hayes performed on his own. Further, Mr. Hayes performed the work that he did independent of his employment with Randolph Engineering outside of the forty hours per

week he worked for Randolph Engineering. Finally, Mr. Hayes' independent work included performing elevation surveys.

Mark Saber is one of the owners of All Med, a company that sells medical equipment for use by the elderly and people with disabilities. Sometime around September 2006, Mr. Saber contacted Randolph Engineering about doing some surveying work on a piece of property All Med had purchased in Nitro, West Virginia. Randolph Engineering sent Mr. Hayes to speak with Mr. Saber about the Nitro property. This was the first time that Mr. Saber met Mr. Hayes.

After Mr. Hayes began the work on the Nitro property, Mr. Saber spoke to Mr. Hayes about performing an elevation survey and completing an elevation certificate on property located in Danville in Boone County. Mr. Hayes made two trips to the Danville property, working a total of approximately ten to fifteen hours on the surveying work. Mr. Hayes used his own personal surveying equipment on the Danville property, and he did not drive a company vehicle. On the elevation certificate that Mr. Hayes completed for the Danville property, he listed his title as "Land Surveyor," and left blank the space for "Company Name." In the space for "Address," Mr. Hayes listed his home address. Mr. Hayes gave Mr. Saber a handwritten invoice for his work at the Danville property. This handwritten invoice listed Mr. Hayes' personal address and had no reference to Randolph

Engineering.

Randolph Engineering did not issue an invoice for any of the work Mr. Hayes performed on the Danville property, and Randolph Engineering was not paid any money for this project. Twenty days after Mr. Hayes completed the elevation certificate for the Danville property, Mr. Saber wrote and signed Check No. 1127, dated November 1, 2006, on the account of All Med Mgmt. Co., LLC payable to Donald R. Hayes in the amount of \$680.00. Mr. Hayes testified below that he thinks this check was in payment for the work he performed on the Danville property, but he cannot confirm this with absolute certainty. Mr. Saber testified that he does not know what this check was in payment for.

Sometime after Mr. Hayes completed work on the Danville property, he realized that he had made a 100-foot error in completing the flood elevation certificate for the Danville property. Specifically, in the space for “Base Flood Elevation” for Buildings 1 through 5, Mr. Hayes recorded “593” feet rather than “693” feet, an error which Mr. Saber alleges caused the elevation certificates to incorrectly reflect that the Danville property was outside the 100-year flood plain.

After Mr. Hayes realized his error, he talked with Mr. Randolph about the issue, in the words of Mr. Hayes, “more as friends than anything else.” This conversation

was the first time Mr. Randolph learned about Mr. Hayes' work for Mr. Saber on the Danville property.

Subsequently, in July 2008, Mr. Saber sent a demand letter addressed to "Mr. Donald R. Hayes, Randolph Engineering, 4414 Teays Valley Road, Scott Depot, WV 25560." In October 2008, the petitioner filed its complaint against Donald R. Hayes and Randolph Engineering, asserting causes of action for negligence and breach of contract based on Mr. Hayes' alleged negligence in completing the elevation certificate. All Med seeks to hold Randolph Engineering liable for Mr. Hayes' alleged negligence under the theory that Mr. Hayes was Randolph Engineering's agent.

By order dated December 9, 2010, the circuit court granted summary judgment on behalf of Randolph Engineering on the basis that Mr. Hayes was not acting as an agent or employee for Randolph Engineering when he performed the elevation survey and prepared the elevation certificate for the Danville property.

## **II.**

### **STANDARD OF REVIEW**

In this case, All Med. challenges the circuit court's grant of summary judgment

on behalf of Randolph Engineering. Our law is clear that “[a] circuit court’s entry of summary judgment is reviewed *de novo*.” Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). Also, this Court has explained:

To meet its burden [of producing additional evidence showing the existence of a genuine issue for trial], the nonmoving party on a motion for summary judgment must offer more than a mere scintilla of evidence and must produce evidence sufficient for a reasonable jury to find in a non-moving party’s favor. The evidence illustrating the factual controversy cannot be conjectural or problematic. The nonmoving party must also present evidence that contradicts the showing of the moving party by pointing to specific facts demonstrating that there is a trial-worthy issue which is not only a genuine issue but also is an issue that involves a material fact. Moreover, the nonmoving party cannot create a genuine issue of material fact through mere speculation or building of one inference upon another. The party opposing a motion for summary judgment may not rest on allegations of his or her unsworn pleadings and must instead come forth with evidence of a genuine factual dispute. Mere allegations are insufficient in response to a motion for summary judgment to show that there is a genuine issue for trial.

*Crum v. Equity Inns, Inc.*, 224 W. Va. 246, 254, 685 S.E.2d 219, 227 (2009) (citing *Powderidge Unit Owners Ass’n v. Highland Props., Ltd.*, 196 W. Va. 692, 698 nn. 10, 11, 474 S.E.2d 872, 878 nn. 10, 11 (1996)) (internal citations omitted). Having set forth the proper standard of review, we now proceed to discuss the issues before us.

### **III.**

### **DISCUSSION**

#### **A.**

In its petition for appeal from the summary judgment order, All Med raises three assignments of error. First, All Med asserts that summary judgment is improper because the evidence in the record is in dispute regarding whether Mr. Hayes was acting as an agent or employee of Randolph Engineering. All Med also avers that there is more than sufficient evidence for a jury to conclude that Mr. Hayes was acting as the agent or employee of Randolph Engineering. Specifically, All Med points to the fact that Mr. Hayes had worked for Randolph Engineering for thirty-two years, Mr. Hayes was the head of Randolph Engineering's surveying department, Mr. Hayes' office was located at Randolph Engineering's headquarters, and Randolph Engineering paid the annual fee on Mr. Hayes' surveyor's license as evidence that Mr. Hayes was acting in the scope of his employment when he conducted the elevation survey and completed the elevation certificate on the Danville property.

This Court finds no merit to All Med's first assignment of error. Under our law,

There are four general factors which bear upon whether a master-servant relationship exists for purposes of the doctrine of *respondeat superior*: (1) Selection and engagement of the servant; (2) Payment of 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.

Syl. pt. 5, *Paxton v. Crabtree*, 184 W. Va. 237, 400 S.E.2d 245 (1990). This Court has further held that "[o]ne 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.” Syl. pt. 3, *Teter v. Old Colony Co.*, 190 W. Va. 711, 441 S.E.2d 728 (1994).

The evidence below indicates that Mr. Hayes performed work for All Med on the Danville property independently of his employment with Randolph Engineering. Mr. Hayes testified below that Roger Randolph, the president of Randolph Engineering, gave him permission to do elevation certificates for clients on his own time independently of his employment with Randolph Engineering. Mr. Hayes further indicated that the work that he performed for All Med on the Danville property was independent of his employment with Randolph Engineering. Likewise, Mr. Randolph testified that Mr. Hayes was acting independently when he performed the work on the Danville property, the Danville property work was not a project of Randolph Engineering, Randolph Engineering was not paid any money for the project, Randolph Engineering did not send Mr. Saber or All Med an invoice for any work performed on the Danville property, and Mr. Randolph did not know that Mr. Hayes performed work for All Med on the Danville property until months later when Mr. Hayes spoke with him about the error Mr. Hayes made on the elevation certificate for the Danville property.

In addition, the record contains a copy of an invoice for \$1,683.00 on Randolph Engineering letterhead to Mark Saber for professional engineering services related to the

Nitro property. The invoice is stamped “PAID” on May 18, 2007, by Check No. 1530. The record also contains a copy of Check No. 1530, signed by Mr. Saber, on the account of “Blade Creek Development LLC” payable to “Randolph Engineering Co., Inc.” in the amount of \$1,683.00. The check is stamped “RECEIVED” on May 18, 2007, by Randolph Engineering. Mr. Saber testified that this check was for the work Randolph Engineering did for him on the Nitro property. Also in the record is a copy of Check No. 1127, dated November 1, 2006, on the account of All Med Mgmt. Co. LLC payable to “Donald R. Hayes” and signed by Mr. Saber for the amount of \$680.00. Finally, there are copies in the record of the elevation certificates that Mr. Hayes prepared for the Danville property. On each certificate, Mr. Hayes listed his title as “Land Surveyor” and left blank the space on the certificate for “Company Name.” In the “Address” portion space on each certificate, Mr. Hayes put his home address.

In the instant case, All Med failed to present evidence to contradict the showing of Randolph Engineering that Mr. Hayes was not acting as its employee or agent when Mr. Hayes performed surveying work on the Danville property by pointing to specific facts which demonstrate that there is a trial-worthy issue that involves a genuine issue of material fact. Also, All Med has failed to produce evidence sufficient for a reasonable jury to find in its favor. The fact that Mr. Hayes has worked for Randolph Engineering for 32 years, is the head of Randolph Engineering’s surveying department, or has an office located at Randolph

Engineering's headquarters is immaterial to the question of whether Mr. Hayes was working as Randolph Engineering's employee or agent when he performed surveying work on the Danville property. Therefore, we conclude that the circuit court did not err in granting summary judgment to Randolph Engineering on the issue of whether Mr. Hayes was Randolph Engineering's employee or actual agent when he performed work for All Med on the Danville property.

## **B.**

The second assignment of error presented by All Med is that the circuit court erred in holding that the question of Mr. Hayes' agency is a question of law for the court. All Med argues that the question of whether an agency exists is ordinarily a question of fact. This Court held in Syllabus point 1 of *Laslo v. Griffith*, 143 W. Va. 469, 102 S.E.2d 894 (1958),

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.

All Med posits that the facts pertaining to the existence of agency in this case are conflicting. All Med again refers to the fact that Mr. Hayes was a thirty-two year employee of Randolph

Engineering, served as the head of Randolph Engineering's surveying department, and Randolph Engineering paid the annual fee for Mr. Hayes' surveyor's license. All Med also cites the fact that the surveying work Mr. Hayes conducted on the Danville property was the same kind of work he typically performed on behalf of Randolph Engineering. Moreover, All Med points to Mr. Saber's testimony that Mr. Hayes never informed him that he was working on the Danville property independently of his employment with Randolph Engineering.<sup>2</sup> Finally, All Med suggests that one should infer that Mr. Hayes' did the work on the Danville property as Randolph Engineering's agent simply because he is an employee of Randolph Engineering.

Again, this Court finds All Med's argument to be meritless. All Med's inference that agency should be presumed under the facts of this case simply because Mr. Hayes is an employee of Randolph Engineering is without basis in our law. This Court has held:

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. Pt. 3, syllabus, *Bluefield Supply Co. v. Frankel's Appliances, Inc.*, 149 W. Va. 622.

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<sup>2</sup>This testimony was disputed by Mr. Hayes. However, this disputed fact is not material to showing the existence of either an actual or apparent agency under the relevant points of law as stated in the body of this decision.

Syl. pt. 1, *Lohr Funeral Home, Inc. v. Hess & Eisenhardt*, 152 W. Va. 723, 166 S.E.2d 141 (1969). Randolph Engineering adduced evidence below that its employee, Mr. Hayes, was working independent of his employment with Randolph Engineering when he performed the elevation survey on the Danville property. All Med failed to meet its burden by bringing forth evidence of material fact that Mr. Hayes was working as an employee and/or agent of Randolph Engineering when he performed the survey. Therefore, the question of Mr. Hayes' agency was properly a question of law for the court.

### C.

In its third and final assignment of error, All Med asserts error in the circuit court's finding of insufficient evidence for a jury to conclude that Mr. Hayes was the apparent agent of Randolph Engineering. All Med avers that it presented evidence showing that Mr. Hayes was the apparent agent of Randolph Engineering, but the circuit court did not address the question of apparent agency in its summary judgment order. All Med further contends that Mr. Saber reasonably believed that Mr. Hayes was doing work on the Danville property as an agent of Randolph Engineering based on Mr. Hayes' previous work as an employee of Randolph Engineering for All Med on the Nitro property. Further, says All Med, the fact that the work performed by Mr. Hayes on the Danville property was the same type of work he performed as an employee of Randolph Engineering also caused Mr. Saber

to reasonably believe that Mr. Hayes worked on the Danville property in the capacity of Randolph Engineering's agent or employee.

With regard to the doctrine of apparent agency, this Court has held that “[o]ne 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<sup>3</sup> in good faith and in the exercise of reasonable prudence, is estopped to deny the agency relationship.” Syl. pt. 1, *Gen. Electric Credit Corp. v. Fields*, 148 W. Va. 176, 133 S.E.2d 780 (1963) (footnote added). We have further explained:

Apparent authority, or ostensible authority, as it is also called, is that which, though not actually granted, the principal knowingly permits the agent to exercise, or which he holds him out as possessing. In effect, therefore, an agent's apparent authority is, as to third persons dealing in good faith with the subject of the agency and entitled to rely upon such appearance, his real authority, and it may apply to a single transaction, or to a series of transactions. . . . Agency 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.

*Gen. Electric Credit Corp. v. Fields*, 148 W. Va. at 182, 133 S.E.2d at 783-784 (quotation

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<sup>3</sup>The concept of apparent agency is also referred to as “ostensible agency” or “agency by estoppel.” These terms are interchangeable. See *Burless v. WV Univ. Hosps., Inc.*, 215 W. Va. 765, 772 n.7, 601 S.E.2d 85, 92 n.7 (2004).

marks and citations omitted).

When we apply our law on apparent agency to the facts of this case, we conclude that All Med failed to present sufficient evidence for a reasonable jury to find that Randolph Engineering by its acts or conduct permitted Mr. Hayes to act apparently or ostensibly as its agent. Stripped to its essence, All Med's argument is that because Mr. Randolph permitted Mr. Hayes to perform survey work on his own time independently of his employment with Randolph Engineering and because Mr. Saber knew that Mr. Hayes performed surveying work as part of his employment duties with Randolph Engineering, Randolph Engineering should now be estopped to deny Mr. Hayes' agency while surveying the Danville property. Such evidence, however, is legally insufficient to support a showing of apparent agency or agency by estoppel. All Med has proffered no evidence to support a showing that Mr. Randolph through words or conduct represented to Mr. Saber that Mr. Hayes was working as Randolph Engineering's agent on the Danville property.

In seeking to show apparent agency, a person also must adduce evidence that he or she believed that the alleged agent was acting on the authority of another and this belief was reasonable under the circumstances. All Med has brought forth no specific facts to show that Mr. Saber believed that Mr. Hayes was acting as Randolph Engineering's employee or agent when he conducted surveying work on the Danville property. To the contrary, there

is evidence in the record that Mr. Saber paid for the surveying work on the Danville property with a check payable to Donald R. Hayes instead of Randolph Engineering, whereas he paid for the work on the Nitro property performed by Randolph Engineering with a check payable to Randolph Engineering. In addition, there is a copy of a demand letter from Mr. Saber addressed to Mr. Hayes and not to the president or principals of Randolph Engineering. These facts support an understanding by Mr. Saber that Mr. Hayes performed the surveying work on the Danville property independent of his employment with Randolph Engineering.

#### **IV.**

#### **CONCLUSION**

For the foregoing reasons, this Court finds that All Med failed to offer evidence below sufficient for a reasonable jury to find in All Med's favor that Mr. Hayes was acting as the employee, actual agent, or apparent agent of Randolph Engineering when he performed the elevation survey and completed the elevation certificate on behalf of All Med on the Danville property. As a result, this Court affirms the summary judgment granted to Randolph Engineering by the Circuit Court of Boone County in its December 9, 2010, order.

Affirmed.