No. 11-0074 – All Med, L.L.C. v. Randolph Engineering Co., Inc. and Donald R. Hayes

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OF WEST VIRGINIA

Workman, Justice, dissenting

This case required the Court to determine if the circuit court erred in granting summary judgment to Respondent Randolph Engineering on the basis that its employee, Donald Hayes, was neither acting as an agent in fact nor with apparent authority in negligently performing an elevation survey for Petitioner All Med, L.L.C. The majority determined that the undisputed material facts demonstrated that Mr. Hayes was not an agent in fact and that there was insufficient evidence for a jury to find that he was acting with apparent authority. For the reasons outlined below, I believe there was sufficient evidence to submit both issues to a jury for resolution. Therefore, I dissent.

In this case, Petitioner All Med, L.L.C., through one of its members, Mark Saber, retained the services of Respondent Randolph Engineering to render professional services with respect to a piece of development property in Nitro, West Virginia. Randolph Engineering dispatched its 32-year employee, Donald Hayes, to oversee these services. At some point thereafter, Mr. Saber again contacted Randolph Engineering to obtain an elevation survey on a piece of investment property in Danville, West Virginia and, again, dealt with Donald Hayes. Mr. Saber commissioned the elevation survey as a necessary

precedent to obtaining a quote for flood insurance on the Danville property, which he was considering for investment. Mr. Hayes admits that he negligently performed the elevation survey. As a result of the inaccurate elevation survey, the flood insurance quote was in a range that demonstrated to Mr. Saber that the property purchase would be profitable. After the error in the elevation survey was revealed, however, the flood insurance premium increased from $705.00 per year to over $30,000.00 per year, making the property wholly unprofitable. Respondent seeks to avoid vicarious liability for Mr. Hayes' admitted negligence by contending that Mr. Hayes was working in an individual capacity outside of the scope of his employment with Randolph Engineering.

Although Petitioner makes two arguments to establish the vicarious liability of Randolph Engineering for the actions of Donald Hayes–agency in fact and apparent agency–I write primarily to address the issue of apparent agency. I am particularly troubled by both the trial court's complete lack of analysis of this issue as well as the majority's dismissive treatment of it. 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 in good faith and in the exercise of reasonable prudence, is estopped to deny the agency relationship." Syl. Pt. 1, *General Elec. Credit Corp. v. Fields,* 148 W. Va. 176, 133 S.E.2d 780 (1963). As we noted in *Burless v. West Virginia University Hospitals, Inc.,* 215 W. Va. 765, 772, 601 S.E.2d 85, 92 (2004),

> 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.

(quoting Syl. Pt. 8, *Brewer v. Appalachian Constructors, Inc.*, 138 W. Va. 437, 76 S.E.2d 916 (1953))(emphasis added). As such, the lower court and majority's preoccupation with the existence of (or lack thereof) agency in fact misses the point entirely. Apparent agency is a principal of estoppel–where there may be no agency in fact, either because the ostensible agent has exceeded his authority or never had it to begin with–the law will estop the principal from denying agency.

As to this issue, the record reveals: (1) that Mr. Saber contacted Randolph Engineering's offices to speak with Mr. Hayes about obtaining an elevation survey on the Danville property; (2) that Randolph Engineering does in fact perform elevation surveys in conjunction with other engineering work;[1] (3) that Mr. Hayes was already performing similar surveying work for Mr. Saber as an employee of Randolph Engineering at the time he commissioned the elevation survey; and, most importantly, (4) that Randolph Engineering expressly granted Mr. Hayes permission to perform this type of "outside" work in addition

[1]Although the majority opinion indicates that "Randolph Engineering did not conduct elevation surveys at the time Mr. Hayes did the work that is the subject of this case," the record clearly reveals that Randolph Engineering did still conduct elevation surveys in conjunction with other engineering work. Randolph Engineering simply did not perform them as "stand alone" projects, as they had become cost prohibitive.

to his regular work duties. Despite the fact that outside work was forbidden by the Randolph Engineering employee handbook, its principal expressly granted permission to Mr. Hayes to perform elevation surveys such as the one at issue outside of his regular duties on an individual basis. Randolph Engineering placed no requirements on Mr. Hayes to disclaim to third parties that any such work was being done on an individual basis and not on Randolph Engineering's behalf, other than separate invoicing, which is discussed more fully *infra.*

Our formulation of a particularized apparent agency rule in *Burless, supra,* is helpful in highlighting the factual issues and inferences which may be drawn from the facts of the case at bar. Although by its language *Burless'* holding is restricted to hospital/physician scenarios, the rule contained therein was derived from *General Electric* and from the general principles set forth in the Restatement (Second) of Agency § 267 and the Restatement (Second) of Torts § 429. In *Burless,* we held that to establish apparent agency between a physician and hospital,

> [A] plaintiff must establish that: (1) the hospital either committed an act that would cause a reasonable person to believe that the physician in question was an agent of the hospital, or by failing to take an action, created a circumstance that would allow a reasonable person to hold such a belief, and (2) the plaintiff relied on the apparent agency relationship.

Syl. Pt. 7, 215 W. Va. 765, 601 S.E.2d 85 (2004). Other than making its holding specific to hospitals and physicians, this syllabus point merely restates the general rule contained in

Syllabus Point 8 of *Brewer* by plainly stating that which is implicit in the general rule–that the "acts or conduct" of the purported principal establishing apparent agency may be proven by either overt actions or failures to act. There is unquestionably sufficient evidence from which a jury could conclude that Randolph Engineering's overt actions or failure to act created the appearance that Donald Hayes was acting as its agent.

As noted above, Mr. Hayes was permitted to perform outside work only with permission of Randolph Engineering. Randolph Engineering required him to separately invoice these customers. It required nothing more of Mr. Hayes to ensure that third parties would be alerted to the fact that Mr. Hayes was not working as an agent of Randolph Engineering for work that was unquestionably of the type Randolph Engineering typically performed. Randolph Engineering certainly had the power to make such requirements and/or disclaimers a condition of Mr. Hayes' outside work, but did not do so. More to the point, given that outside work was prohibited by the employee handbook except with permission, Randolph Engineering had the power to wholly define the conditions and circumstances under which the outside work would be performed. To the extent it expressly permitted Mr. Hayes' outside work without taking steps to disclaim his agency in so doing, knowing he would more than likely obtain this work from its established clients, a jury could reasonably conclude that Randolph Engineering's acts or failure to act created apparent authority in Mr. Hayes.

As to the facts deemed pertinent by the majority, there is no evidence in the record to suggest that Mr. Saber was aware that Randolph Engineering did not perform stand-alone surveys, nor that he was aware of any of the specific arrangements established between Mr. Hayes and Randolph Engineering to accommodate this outside work. In particular, there is no evidence that Mr. Saber was aware that Mr. Hayes had a "flexible" work week permitting him to work on outside projects during normal business hours, nor any evidence that Mr. Saber was aware that Mr. Hayes was using his own equipment, rather than Randolph Engineering's equipment.

Naturally, to establish apparent agency, Petitioner must establish that it believed "in the exercise of reasonable prudence" that Mr. Hayes was acting as an agent of Randolph Engineering. *See,* syl. pt. 1, *General Elec.*, *supra.* Quite obviously then, a key inquiry is whether Mr. Hayes ever told Mr. Saber that he was rendering services in an individual capacity. The majority's misguided handling of this issue is highlighted by its commentary as to this inquiry. Despite conflicting testimony from Mr. Hayes and Mr. Saber as to whether this information was ever conveyed to Mr. Saber, somewhat incredibly, the majority states that this admittedly 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." It is unclear to me how a disputed conversation between the parties about the

central issue in the case–whether Mr. Hayes was working individually or as an employee of Randolph Engineering–can be deemed immaterial for purposes of analyzing apparent agency.

The primary evidence that the majority references to demonstrate that a jury could not reasonably find that Petitioner believed Mr. Hayes was acting as the agent of Randolph Engineering is the fact that Mr. Saber wrote Mr. Hayes, rather than Randolph Engineering, a check for his services *after the negligent acts had occurred*. It does not follow that one can shed themselves of apparent authority after the fact by expressly or implicitly disavowing an agency relationship. The inquiry under our caselaw focuses on the actions of the principal–in permitting one to "hold himself out" as an agent–and the reasonable reliance of an injured third party. The requirement of "reliance" by the third party on the ostensible agency necessarily demands that the focus be on the facts and circumstances as they exist before the creation of the relationship which gives rise to the negligent acts–at a minimum, before the injury itself occurs. Just as Mr. Saber would not be able to *establish* reliance based on acts that occurred after Mr. Hayes performed the elevation survey, Randolph Engineering cannot *defeat* reliance by focusing on these same actions.

In dismissing the apparent agency argument, the majority further references a demand letter which Petitioner sent to Mr. Hayes rather than the principals of Randolph Engineering as demonstrating "an understanding by Mr. Saber that Mr. Hayes performed the

surveying work on the Danville property independent of his employment with Randolph Engineering." As further evidence of the differing inferences which may be drawn from the evidence in this case, the majority overlooks the fact that the demand letter was sent to "Mr. Donald Hayes, Randolph Engineering" at the Randolph Engineering offices rather than to his home address which he placed on the elevation certificate. Respondent, in its brief, made much of the fact that Mr. Hayes had used his home address on the elevation certificate and signed it simply as "Land Surveyor" without reference to Randolph Engineering. Again, not unlike the invoice and payment, this is information which was provided to Mr. Saber after the survey was completed and the elevation certificate was provided to Mr. Saber–after the negligent acts had already occurred. Neither the majority, the lower court, nor the Respondent have identified any information of which Mr. Saber was aware before or at the time that he commissioned the elevation survey to alert him that Mr. Hayes was *not* working as an agent of Randolph Engineering, which was the only context in which Mr. Saber had ever interacted with Mr. Hayes. At best, there is a disputed material fact about whether Mr. Hayes advised Mr. Saber of the scope of his agency when they initially discussed the project.

The significance of the majority's inadequate analysis cannot be understated. Certainly, in the instant case, given the financial interests at stake with respect to the elevation survey, a jury could reasonably find that Petitioner believed Mr. Hayes to be the agent of Randolph Engineering by concluding that an experienced businessman would not

have been interested in contracting with a sole, uninsured proprietor because of precisely what occurred in this case. Under the majority's ruling, Mr. Hayes has committed an admittedly negligent act which has caused Petitioner substantial damages, leaving him with limited or no recourse against an uninsured, individual tortfeasor. This Court has long held that "[t]he 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*." Syl. Pt. 5, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963)(emphasis added). Moreover, "[t]he circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syl. Pt. 3, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). Because I believe that the record more than sufficiently reveals a genuine issue of material fact to be determined by a jury, it appears that both the lower court and majority have usurped the fact-finder's role in this matter.

By no means is it my intention to reinvent the law of actual or apparent agency. Instead, I write to illustrate the clear and unmistakable disputed issues of material fact which predominate this case. "[I]f 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." *Laslo v. Griffith*, 143 W.Va. 469, 479, 102 S.E.2d 894, 900 (1958). While I believe that there are sufficient factual issues to submit even the issue

of agency in fact to a jury,[2] there is no question that the issue of apparent authority demands a jury's consideration.

Therefore, for the reasons stated above, I respectfully dissent.

[2]As to agency in fact, the majority finds that Petitioner has failed to present evidence to establish a master-servant relationship between Mr. Hayes and Randolph Engineering as to the Danville project. Citing the four factors set forth in *Paxton v. Crabtree*, 184 W. Va. 237, 400 S.E.2d 245 (1990), the Court correctly draws attention to the fourth and "determinative" element of "[p]ower of control." It then fails to note that Petitioner has provided evidence from which a jury could reasonably conclude that Randolph Engineering, by its own admission, has demonstrated ultimate control over the actions of Donald Hayes by virtue of the fact that Randolph Engineering has established the parameters of such work. As discussed *infra*, Randolph Engineering's employee handbook forbids employees to perform outside work without permission. Permission was expressly granted to Mr. Hayes and he operated exclusively within that permission. In addition, Randolph Engineering "required" Mr. Hayes to separately invoice any customers for whom he was performing work and subsequent to this lawsuit, it began requiring errors and omissions insurance as a condition to performing any outside work. Without question, a jury could reasonably conclude that inasmuch as Mr. Hayes was working on the Danville project only with the express permission and under the conditions prescribed by Randolph Engineering, it had the power to control any aspect of Mr. Hayes' outside work and therefore was its agent in fact. It is precisely these differing inferences which necessitate submission of these issues to the jury.