Filing # 202724612 E-Filed 07/17/2024 12:13:30 PM

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FIFTH DISTRICT

CASE NO. 5D24-0114
L.T. Case No.: 2020-10637-CIDL

ELIZABETH MOORE, AS PERSONAL REPRESENTATIVE FOR THE ESTATE OF DONNA MARIE REID,

Appellant,

v.

ADVENTIST HEALTH SYSTEM/SUNBELT, INC. d/b/a FLORIDA HOSPITAL NEW SMYRNA BEACH,

Appellee.

ANSWER BRIEF OF APPELLEE

HICKS, PORTER, EBENFELD & STEIN, P.A.
5301 Blue Lagoon Drive
Suite 900
Miami, FL 33126
Tel: 305-374-8171
dstein@mhickslaw.com
lhicks@mhickslaw.com
pgonzalez@mhickslaw.com
Appellate Counsel for Appellee

BEYTIN, MCLAUGHLIN, MCLAUGHLIN, O'HARA & BOCCHINO, P.A.
1063 Maitland Center Commons Boulevard
Maitland, Florida 32751
Tel: 407-622-6725
jwb@law-fla.com
tae@law-fla.com
Counsel for Appellee

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES .... ii-iv

INTRODUCTION.. 1

STATEMENT OF THE CASE AND FACTS..................................... 1

SUMMARY OF THE ARGUMENT... 7

STANDARD OF REVIEW... 8

ARGUMENT.. 8

I. THE TRIAL COURT PROPERLY GRANTED FINAL SUMMARY JUDGMENT IN FAVOR OF THE HOSPITAL............................ 8

A. Summary Judgment Standard.................................... 9

B. Plaintiff failed to establish any issue of material fact on her claim that Dr. Toub was an actual agent of the Hospital.. 12

C. This Court must affirm the trial court's findings on apparent agency and non-delegable duty..................... 24

CONCLUSION... 25

CERTIFICATE OF SERVICE.. 26

CERTIFICATE OF COMPLIANCE... 27

HICKS, PORTER, EBENFELD & STEIN, P.A.
5301 BLUE LAGOON DRIVE, 9TH FLOOR, MIAMI, FL 33126 • TEL. 305/374-8171 • FAX 305/372-8038

TABLE OF AUTHORITIES

Page

Cases

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 10, 11

Applegate v. Barnett Bank of Tallahassee,
377 So. 2d 1150 (Fla. 1979) 24

Bedford v. Doe,
880 F. 3d 993 (8th Cir. 2018) 10

Boggs v. Aetna Cas. & Sur. Co.,
341 So. 2d 1071 (Fla. 1st DCA 1977) 13

Brown v. State,
304 So. 3d 243 (Fla. 2020) 25

Carnes v. Fender,
936 So. 2d 11 (Fla. 4th DCA 2006) 24

Citizens Prop. Ins. Corp. v. Zamanillo,
49 Fla. L. Weekly D192, 2024 WL 172611 (Fla. 3d DCA Jan. 17, 2024) 10

Enic, PLC v. F.F. S. & Co.,
870 So. 2d 888 (Fla. 5th DCA 2004) 19

Foulk v. Perkins,
181 So. 2d 704 (Fla. 2d DCA 1966) 23

Goldschmidt v. Holman,
571 So. 2d 422 (Fla. 1990) 12

Guadagno v. Life Mark Hosp., Ass'n,
972 So. 2d 214 (Fla. 3d DCA 2007) 14

HICKS, PORTER, EBENFELD & STEIN, P.A.
5301 BLUE LAGOON DRIVE, 9TH FLOOR, MIAMI, FL 33126 • TEL. 305/374-8171 • FAX 305/372-8038

Harper v. Toler,
884 So. 2d 1124 (Fla. 2d DCA 2004) 19

Horowitz v. Plantation Gen. Hosp.,
959 So. 2d 176 (Fla. 2007) 14

Hoskins v. State,
75 So. 3d 250 (Fla. 2011) 25

In re Amendments to Fla. R. Civ. P. 1.510,
317 So. 3d 72 (Fla. 2021) 10, 18

Land v. Fla. Dept. of Corrections,
181 So. 3d 1252 (Fla. 1st DCA 2015) 25

Liberatore v. NME Hosps., Inc.,
711 So. 2d 1364 (Fla. 4th DCA 1998) 14

Mane FL Corp. v. Beckman,
355 So. 3d 418 (Fla. 4th DCA 2023) 10

Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
475 U.S. 574 (1986) 11

Olsen v. First Team Ford, Ltd,
359 So. 3d 873 (Fla. 5th DCA 2023) 11

Operations Mgmt. Int'l, Inc. v. Johnson,
294 So. 3d 1005 (Fla. 1st DCA 2020) 16

Prince v. State,
40 So. 3d 11 (Fla. 4th DCA 2010) 25

Sapuppo v. Allstate Floridian Ins. Co.,
739 F.3d 678 (11th Cir. 2014) 13

Scott v. Harris,
550 U.S. 372 (2007) 18

Starkey v. Chew,
241 So. 2d 870 (Fla. 3d DCA 1970) 25

Stoll v. Noel,
694 So. 2d 701 (Fla. 1997) 15, 16, 17

Tabraue v. Doctors Hosp., Inc.,
272 So. 3d 468 (Fla. 3d DCA 2019) 14

Theodore ex rel. Theodore v. Graham,
733 So. 2d 538 (Fla. 4th DCA 1999) 16

Transp. Eng'g, Inc. v. Cruz,
152 So. 3d 37 (Fla. 5th DCA 2014) 13

TropiFlora, LLC v. Fla. Dep't of Health,
346 So. 3d 1271 (Fla. 1st DCA 2022) 13

Two Islands Dev. Corp. v. Clarke,
239 So. 3d 115 (Fla. 3d DCA 2018) 15

Villazon v. Prudential Health Care Plan, Inc.,
843 So. 2d 842 (Fla. 2003) 12, 16

Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.,
760 So. 2d 126 (Fla. 2000) 9

HICKS, PORTER, EBENFELD & STEIN, P.A.
5301 BLUE LAGOON DRIVE, 9TH FLOOR, MIAMI, FL 33126 • TEL. 305/374-8171 • FAX 305/372-8038

INTRODUCTION

This Answer Brief is filed on behalf of Defendant/Appellee Adventist Health Systems/Sunbelt, Inc. d/b/a Florida Hospital New Smyrna Beach ("the Hospital"). The Hospital submits that this Court should affirm the final summary judgment entered in its favor, as there is no record evidence to support Plaintiff/Appellant's vicarious liability claims against the Hospital for the alleged negligence of Defendant Frank W. Toub, M.D.

STATEMENT OF THE CASE AND FACTS

Donna Marie Reid ("Ms. Reid") began seeing Dr. Toub, a general surgeon, in his office practice for treatment of chronic and acute perforated diverticulitis in August of 2012. (R. 321, 328, 354, 393-94, 403, 459-60). This physician-patient relationship continued over the ensuing six years, with Dr. Toub performing several abdominal surgeries on Ms. Reid during this time. (*Id.*). On September 27, 2018, as a continuation of this physician-patient relationship, Dr. Toub performed a hernia repair surgery on Ms. Reid at Florida Hospital New Smyrna Beach, which is part of the Adventist Health Systems. (R. 315, 354).

HICKS, PORTER, EBENFELD & STEIN, P.A.
5301 BLUE LAGOON DRIVE, 9TH FLOOR, MIAMI, FL 33126 • TEL. 305/374-8171 • FAX 305/372-8038

Ms. Reid thereafter filed a medical negligence action against Dr. Toub, Florida Hospital Healthcare Partners, Inc. ("FHHP"), which had contracted with Dr. Toub to provide medical services, and the Hospital, contending that, as a result of Dr. Toub's alleged negligence, Ms. Reid suffered complications following the surgery requiring additional surgery and treatment. (R. 19-23, 38-51, 54-55). Ms. Reid died from unrelated causes in 2020 (R.341), and the personal representative of her estate was substituted as the party plaintiff. (R. 338-49). As to the Hospital (which Plaintiffs refer to as "Adventist Health"), the operative Second Amended Complaint alleged it was vicariously liable for Dr. Toub's alleged medical negligence based on theories of actual agency, apparent agency and non-delegable duty. (R. 343-48).

On July 19, 2023, the Hospital moved for summary judgment on the grounds that there was no record evidence to support Plaintiff's vicarious liability claims against it. (R. 314-37). The motion pointed out that there was no contract between Dr. Toub and the Hospital, and attached the transcript of Dr. Toub's deposition, which was devoid of any suggestion that he was an agent of the Hospital. (R. 320-21). In fact, Plaintiff's counsel did not ask Dr. Toub any

HICKS, PORTER, EBENFELD & STEIN, P.A.
5301 BLUE LAGOON DRIVE, 9TH FLOOR, MIAMI, FL 33126 • TEL. 305/374-8171 • FAX 305/372-8038

questions in his deposition regarding his relationship with the Hospital. (R. 353-93, 413-17). The Hospital also attached the transcript of Ms. Reid's deposition, which, like Dr. Toub's, confirmed that her relationship with Dr. Toub arose before he had contracted with FHHP to perform surgeries at the Hospital. (R. 354-55, 459-61).

The only evidentiary support Plaintiff filed in opposition to the motion for summary judgment consisted of: (1) a 2016 "Employment Agreement" between Dr. Toub and FHHP, with a 2018 amendment; (2) a newspaper article from the Daytona Beach News Journal which appeared *after* the surgery at issue and which showed a photograph of Dr. Toub receiving an award from Florida Hospital New Smyrna; and (3) a social media post purportedly from the Hospital's account announcing the same award to Dr. Toub. (R. 685-732, 879-951).

Dr. Toub's attached contract with FHHP showed that FHHP was a physician staffing company that contracted with Dr. Toub in 2016 to have him provide medical services for patients at Florida Hospital New Smyrna Beach. (R. 929). The contract required Dr. Toub to maintain staff privileges at the Hospital, but stated that "no provision of this Agreement shall guarantee Physician appointment to Medical Staff of Hospital." (R. 929). Dr. Toub's contract with FHHP required

him to comply with the Hospital's codes of conduct and performance standards, but did not contain any provision permitting the Hospital to enforce any of the provisions of the contract. (R. 929-51). The contract also stated that neither FHHP nor the Hospital "shall exercise control over [Dr. Toub] in his/her practice of medicine or treatment of Hospital patients." (R. 933).

The Hospital's summary judgment motion was heard on October 31, 2023, before the Honorable Michael S. Orfinger. (R. Supp. 2193-2268). At the hearing, Plaintiff's counsel conceded that he was not contending that the Hospital and FHHP were one and the same. (R. Supp. 2251, 2254). Rather, Plaintiff contended in large part that the contract between Dr. Toub and FHHP evidenced the Hospital's control over Dr. Toub because there was "plenty of talk about the hospital and [FHHP] policies and procedures that support the Adventist Health mission," and that a "jury can reasonably infer that Florida Hospital Healthcare Partners is not the only entity that is making these controlling decisions." (*Id.*).

The court extensively questioned Plaintiff's counsel regarding the purported evidentiary support for the vicarious liability claims (R. Supp. 2238-57), but noted that the court had not been shown any

evidence regarding the Hospital's or its parent company's corporate structure and how it operated in a manner such that it could exert control over Dr. Toub. (R. Supp. 2254-55). The trial court accordingly granted the Hospital's motion on all three theories pled. (R. 1620-25; R. Supp. 2261-67).

The court expressly held that the record was devoid of any evidence that would support Plaintiff's claims of apparent agency and nondelegable duty, and Plaintiff does not challenge those rulings on appeal. (R. 1622-24). As to actual agency, the court similarly held that "the record is devoid of any evidence of the elements necessary to maintain a cause of action for actual agency." (R. 1621). In addition to noting the absence of a "contract or other employment relationship between Dr. Toub and Florida Hospital New Smyrna Beach," the court held:

> … There is no evidence of an acknowledgement by the Florida Hospital New Smyrna Beach that Dr. Toub would act on its behalf when providing healthcare services to Ms. Reid. There is likewise no evidence of Dr. Toub's acceptance of any such undertaking. Because the Court finds that there was no acknowledgment by the hospital that Dr. Toub would act on its behalf, nor any evidence that Dr. Toub accepted an undertaking to act on the hospital's behalf, the issue of the hospital's control over Dr. Toub *vel non* becomes irrelevant.

> Plaintiff's reliance on the existence of an employment agreement between Dr. Toub and Florida Hospital Healthcare Partners, Inc., is insufficient to support a claim of actual agency between Dr. Toub and Defendant Florida Hospital New Smyrna Beach. While there may be some relationship between those two entities, they are nonetheless separate entities. Stated differently, evidence of the employment agreement between Dr. Toub and Florida Hospital Healthcare Partners, Inc., fails to demonstrate any evidence of an acknowledgment by Florida Hospital New Smyrna Beach that Dr. Toub would act for it, nor does it establish Dr. Toub's acceptance or agreement to act on the hospital's behalf. Likewise, Dr. Toub's employment agreement with a separate entity fails to establish control by Florida Hospital New Smyrna Beach over the actions of Dr. Toub.

(R. 1621-22).

This appeal followed.

HICKS, PORTER, EBENFELD & STEIN, P.A.
5301 BLUE LAGOON DRIVE, 9TH FLOOR, MIAMI, FL 33126 • TEL. 305/374-8171 • FAX 305/372-8038

SUMMARY OF THE ARGUMENT

The trial court's summary judgment in favor of the Hospital should be affirmed on multiple grounds. First, Plaintiff fails to address the trial court's finding below that she failed to present any evidence in support of the first two essential elements of agency: that the principal acknowledged the agent would act for it, and the agent accepted the undertaking. As the trial court's ruling is presumed to be correct, Plaintiff's failure to even address those findings on appeal, let alone show they were improper, warrants affirmance.

Second, Plaintiff has utterly failed to point to any record evidence that the Hospital had any right to exercise control over the actions of Dr. Toub. The sole item of evidence on which Plaintiff relies is a contract between Dr. Toub and FHHP. As the Hospital was not even a party to the contract and the contract does not suggest that the Hospital had a right to control Dr. Toub or enforce any of the contract's provisions, it is totally insufficient to create a jury issue on agency.

Plaintiff's argument that a jury should be permitted to find that the Hospital was actually a signatory to the contract lacks any factual or legal merit. Where, like here, a contract clearly and expressly

identifies the contracting parties, a litigant cannot argue without any supporting evidence that an unnamed party secretly signed the contract as well and then saw to it that any references to it were redacted. Such rank speculation and conjecture are not permitted in Florida courts.

Finally, as Plaintiff has not asserted or argued any error in connection with the trial court's summary judgment on her claims of apparent agency and non-delegable duty, those rulings must be affirmed. The summary judgment should be affirmed in all respects.

HICKS, PORTER, EBENFELD & STEIN, P.A.
5301 BLUE LAGOON DRIVE, 9TH FLOOR, MIAMI, FL 33126 • TEL. 305/374-8171 • FAX 305/372-8038

STANDARD OF REVIEW

Appellee agrees that this Court's standard of review is *de novo*. *See Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000).

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED FINAL SUMMARY JUDGMENT IN FAVOR OF THE HOSPITAL.

The trial court carefully considered the record evidence and correctly determined that Plaintiff failed to put forth any evidence to support her claims of vicarious liability against the Hospital. Plaintiff does not challenge and thus concedes the court's rulings were correct as to apparent agency and non-delegable duty. As to actual agency, Plaintiff fails to point to any part of record the trial court failed to consider or misconstrued. Summary judgment was correctly entered in favor of the Hospital and must be affirmed.

A. Summary Judgment Standard.

On appeal, Plaintiff inexplicably relies on Florida's former summary judgment standard, referencing throughout the brief an alleged "scintilla of evidence" sufficient to avoid the summary judgment on agency. (*E.g.*, IB pp. 5, 6, 7, 8, 9, 11-12, 13, 18, 20, 21).

HICKS, PORTER, EBENFELD & STEIN, P.A.
5301 BLUE LAGOON DRIVE, 9TH FLOOR, MIAMI, FL 33126 • TEL. 305/374-8171 • FAX 305/372-8038

Significantly, the Hospital's motion for summary judgment was governed by the new summary judgment standard that went into effect in 2021 and which adopted the federal summary judgment standard. *See In re Amendments to Fla. R. Civ. P. 1.510*, 317 So. 3d 72, 73-75 (Fla. 2021). Under the current, applicable version of Rule 1.510, "'the mere existence of a scintilla of evidence' in support of the non-movant's position is insufficient to defeat summary judgment." *Mane FL Corp. v. Beckman*, 355 So. 3d 418, 425 (Fla. 4th DCA 2023). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986) (rejecting "scintilla of evidence" standard); *Citizens Prop. Ins. Corp. v. Zamanillo*, 49 Fla. L. Weekly D192, 2024 WL 172611 at *1 (Fla. 3d DCA Jan. 17, 2024) ("We've moved beyond a scintilla of doubt sometimes being sufficient to defeat summary judgment in Florida by adopting the federal summary judgment standard.").

Under Rule 1.510, where, like here, the non-moving party has the burden of proof at trial, the moving party can satisfy its initial burden of production on a motion for summary judgment by "produc[ing] evidence that X is not so or point out that the nonmoving party lacks evidence to prove X'." *In re Amendments*, 317 So. 3d at 75 (quoting *Bedford v. Doe*, 880 F. 3d 993, 996-97 (8th Cir. 2018)).

HICKS, PORTER, EBENFELD & STEIN, P.A.
5301 BLUE LAGOON DRIVE, 9TH FLOOR, MIAMI, FL 33126 • TEL. 305/374-8171 • FAX 305/372-8038

Once the Hospital met this burden, Plaintiff was required to come forward "with '*specific facts showing that there is a genuine issue for trial*'." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (emphasis in original). *See also Anderson*, 477 U.S. at 248 ("[A] party opposing a properly supported motion for summary judgment ... must set forth specific facts showing that there is a genuine issue for trial'.")

The test for determining a genuine issue of material fact is whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50.

Consistent with the new summary judgment standard, this Court has explained that it will no longer be sufficient to maintain that "the existence of any competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stops the inquiry and precludes summary judgment, so long as the 'slightest doubt' is raised." *Olsen v. First Team Ford, Ltd*, 359 So. 3d 873, 877 (Fla. 5th DCA 2023).

HICKS, PORTER, EBENFELD & STEIN, P.A.
5301 BLUE LAGOON DRIVE, 9TH FLOOR, MIAMI, FL 33126 • TEL. 305/374-8171 • FAX 305/372-8038

B. Plaintiff failed to establish any issue of material fact on her claim that Dr. Toub was an actual agent of the Hospital.

Plaintiff's appeal is premised on a fatal misapplication of the test for determining the existence of an agency. Her appellate argument is based on the incorrect contention that "[t]he issue of agency turns on the degree of control exercised by the alleged principal over the alleged agent." (IB p. 13).

Rather, "[e]ssential to the existence of an agency relationship is (1) acknowledgement by the principal that the agent would act for him, (2) the agent's acceptance of the undertaking, and (3) control by the principal over the actions of the agent." *Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842, 853 n. 10 (Fla. 2003), citing *Goldschmidt v. Holman*, 571 So. 2d 422 (Fla. 1990).

Plaintiff's trial court arguments and brief ignore the first two elements – acknowledgment and acceptance. (IB pp. 13-21; R. 880-84). The trial court recognized as much, noting that Plaintiff's failure to point to any evidence of acknowledgment by the Hospital or acceptance by Dr. Toub rendered the issue of control irrelevant. (R. 1621). As Plaintiff does not contend on appeal that the court's finding as to the first two essential elements of agency was incorrect, the

HICKS, PORTER, EBENFELD & STEIN, P.A.
5301 BLUE LAGOON DRIVE, 9TH FLOOR, MIAMI, FL 33126 • TEL. 305/374-8171 • FAX 305/372-8038

Court should affirm on this basis alone. *See Transp. Eng'g, Inc. v. Cruz*, 152 So. 3d 37, 47 (Fla. 5th DCA 2014) ("when an appellant fails to challenge properly on appeal one of the grounds on which the [circuit] court based its judgment, he is deemed to have abandoned any challenge of that ground, and it follows that the judgment is due to be affirmed.") (quoting *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 680 (11th Cir. 2014) (holding that to obtain reversal of a judgment based on multiple, independent grounds, "an appellant must convince us that every stated ground for the judgment against him is incorrect")); *TropiFlora, LLC v. Fla. Dep't of Health*, 346 So. 3d 1271, 1276 (Fla. 1st DCA 2022) (order on appeal would be affirmed because appellant failed to challenge all of the independent, alternative reasons the trial court relied on in granting final judgment); *Boggs v. Aetna Cas. & Sur. Co.*, 341 So. 2d 1071, 1071 (Fla. 1st DCA 1977) ("when an order of the trial court purports to be based upon several alternative grounds it will not be disturbed on appeal if one of the grounds is sufficient for the action taken even though another recited alternative ground is erroneous").

In any event, the trial court's additional finding of an absence of record evidence of control was eminently correct and should be

affirmed as well. (R. 1621-22). A hospital is generally not vicariously liable for the actions of a non-employee private physician to whom staff privileges have been granted. *See Horowitz v. Plantation Gen. Hosp.*, 959 So. 2d 176, 180 (Fla. 2007); *Tabraue v. Doctors Hosp., Inc.*, 272 So. 3d 468, 471 (Fla. 3d DCA 2019); *Guadagno v. Life Mark Hosp., Ass'n*, 972 So. 2d 214, 218 (Fla. 3d DCA 2007); *Liberatore v. NME Hosps., Inc.*, 711 So. 2d 1364, 1366 (Fla. 4th DCA 1998).

Both in the trial court and on appeal, Plaintiff has failed to point to any evidence on which a jury can reasonably rely in order to find that Dr. Toub was anything other than a private physician with staff privileges who was not working for the Hospital.

Notably, in her brief, Plaintiff solely relies on Dr. Toub's contract with FHHP in support of his agency claim. Plaintiff appropriately does not purport to rely on the social media post and newspaper article filed in connection with her opposition to the summary judgment motion, both of which were published after the incident in question, are inadmissible hearsay, and do not evince an agency relationship.

Dr. Toub's contract with FHHP is grievously insufficient to support a claim of agency against the Hospital. The Hospital was not a signatory to the contract, and the contract does not give rise to any

HICKS, PORTER, EBENFELD & STEIN, P.A.
5301 BLUE LAGOON DRIVE, 9TH FLOOR, MIAMI, FL 33126 • TEL. 305/374-8171 • FAX 305/372-8038

inference that the Hospital could have exercised any control over Dr. Toub whatsoever in connection with his contractual agreement with FHHP or his performance of surgeries at the Hospital. To the contrary, the undisputed evidence shows it was FHHP that retained the sole ability to require and enforce Dr. Toub's compliance with the terms of the contract, which did not even guarantee Dr. Toub the right to work at the Hospital. (R. 929).

Plaintiff makes the wholly unsupported argument that "the agreements actually represent employment agreements between three parties, Toub, FHHP <u>and</u> the hospital." (IB p. 13). This statement is contradicted by the plain language of the contracts, which solely identify FHHP and Dr. Toub as the parties to the contracts. (R. 960, 981). The Hospital is not identified as a party, is not a signatory to the contracts, and thus cannot be bound by their terms. (R. 973). *See Two Islands Dev. Corp. v. Clarke*, 239 So. 3d 115, 125 (Fla. 3d DCA 2018) (defendants that were not named as parties to or signatories to a covenant were not bound by its terms).

For this reason, the cases cited by Plaintiff involving the interpretation of a contract between the putative principal and putative agent are inapplicable to this case. *See*, *e.g.*, *Stoll v. Noel*,

HICKS, PORTER, EBENFELD & STEIN, P.A.
5301 BLUE LAGOON DRIVE, 9TH FLOOR, MIAMI, FL 33126 • TEL. 305/374-8171 • FAX 305/372-8038

694 So. 2d 701 (Fla. 1997) (holding that question of agency will often rest on terms of employment agreement <u>between the putative principal and agent</u>); *Villazon*, 843 So. 2d 842 (analyzing whether contract between health maintenance organization and treating physicians rendered treating physicians agents of the HMO); *Operations Mgmt. Int'l, Inc. v. Johnson*, 294 So. 3d 1005 (Fla. 1st DCA 2020) (analyzing contract between corporation and city to determine whether corporation was agent of city); *Theodore ex rel. Theodore v. Graham*, 733 So. 2d 538 (Fla. 4th DCA 1999) (involving contract between alleged negligent doctor and putative principal).

In fact, these cases show the stark differences between this case and those where there was a genuine issue of material fact precluding summary judgment. For instance, the *Villazon* Court held that the trial court should not have confined its analysis to the contracts where there was other evidence such as deposition testimony that supported a finding that the defendant HMO was controlling important aspects of patient care. 843 So. 3d at 854-55. No such evidence exists here. In *Johnson*, in contrast to this case, there were conflicting provisions in the contract. 294 So. 3d at 1007. In *Stoll*,

the hospital and its medical director exercised significant control over patient care rendered by physician consultants. 694 So. 2d at 703.

Not surprisingly, Plaintiff does not cite to a single decision holding that an agency relationship can be founded solely on a contract to which the putative principal is not a party.

Nor do the actual terms of Dr. Toub's contract with FHHP create an issue of fact regarding control. This Court can easily reject Plaintiff's reliance on Section 1.3.4.1 of the contract requiring Dr. Toub to "treat all patients as determined by Hospital." (R. 962; IB p. 14). The contract only gave FHHP, and not the Hospital, the right to enforce that (and every) provision via termination of the contract or legal action. (R. 967-68, 971). As Judge Orfinger correctly observed in relation to a similar clause, "It's not a covenant by the hospital. It's a covenant by [FHHP]." (R. Supp. 2250).

Plaintiff's contention that this clause translates into absolute control by the Hospital over every patient whom Dr. Toub was permitted to treat is not only unsupported by the contractual language, but is blatantly contradicted by the undisputed testimony of Dr. Toub and the decedent herself, both of whom testified that Ms. Reid was a patient of Dr. Toub and would see him at his office long

before he entered into the 2016 contract with FHHP. (R. 354, 393-94, 403, 459-60). Ms. Reid submitted to the 2018 surgery by Dr. Taub due to her longstanding relationship with him and his practice, and not due to her presentation to the Hospital. (R.328). There is no record evidence that Dr. Toub needed the Hospital's permission to perform the 2018 surgery on Ms. Reid, or that the Hospital had any say in determining whether Dr. Toub would perform the surgery.

"When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for the purposes of ruling on a motion for summary judgment'." *In re Amendments to Florida Rule of Civil Procedure 1.510*, 317 So. at 75-76 (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)).

Plaintiff's reliance on section 1.3.4.4. of Dr. Toub's contract regarding compliance with the Hospital's code of conduct and policies must also be rejected. (IB pp. 15-16). At the hearing, Plaintiff's counsel took the nonsensical position that the contract's references to the Hospital's and Adventist Health's code of conduct meant that Dr. Toub "has to religiously observe – personally religiously observe Sabbath from sundown Friday to sundown Saturday." (R. Supp.

HICKS, PORTER, EBENFELD & STEIN, P.A.
5301 BLUE LAGOON DRIVE, 9TH FLOOR, MIAMI, FL 33126 • TEL. 305/374-8171 • FAX 305/372-8038

2246-48). The court was understandably incredulous, noting that such a requirement would likely be unenforceable and also correctly observing that the requirement was being imposed by FHHP and not the Hospital. (R. Supp. 2248).

Plaintiff's argument that a jury could infer from the contract that "the hospital, FHHP and Adventist Health Sunbelt/Systems, Inc. are one and the same entity" (IB pp. 15-16) lacks merit and is also waived. Plaintiff's counsel made it clear during the hearing that Plaintiff was **<u>not</u>** contending that the Hospital and FHHP were "one and the same." (R. Supp. 2251, 2254). *See Harper v. Toler*, 884 So. 2d 1124, 1135 (Fla. 2d DCA 2004) ("[A] party may not ordinarily take one position in proceedings at the trial level and then take an inconsistent position on appeal.").

On appeal, as in the trial court, Plaintiff still fails to cite to any language in the contract that would let a jury infer that FHHP was a "wholly owned subsidiary of Adventist Health." (IB p. 16). There is no such language, and even if there was, a parent-subsidiary relationship is not the equivalent of an agency relationship without the required indicia of control that are absent from the record. *See Enic, PLC v. F.F. S. & Co.*, 870 So. 2d 888 (Fla. 5th DCA 2004).

HICKS, PORTER, EBENFELD & STEIN, P.A.
5301 BLUE LAGOON DRIVE, 9TH FLOOR, MIAMI, FL 33126 • TEL. 305/374-8171 • FAX 305/372-8038

As she did below, in her brief Plaintiff makes a cursory reference to section 1.3.4.8. requiring Dr. Toub to cooperate with FHHP and the Hospital regarding marketing for the Hospital and clinic, without explaining how it supports an argument that Dr. Toub was an agent of the Hospital. (IB p. 17; R. 687). Assuming the argument is even preserved or sufficiently raised in this Court (which is denied), the clause simply does not suggest that the Hospital exercised control over Dr. Toub.

Plaintiff's discussion of Article II of the contract regarding what the Hospital "agrees" to provide to Toub misstates the contract. (IB pp. 18-19). Article II contains no agreement by the Hospital whatsoever, but sets forth "RESPONSIBILITIES OF [FHHP]." (R. 934). Sections 2.1 and 2.2 make clear that it is FHHP that "will ensure" the Hospital would provide access to office space and supplies. (R. 934). Section 2.3 places the sole responsibility for obtaining Dr. Toub's professional liability insurance on FHHP. (*Id.*).

Articles V and X of the contract also do not create a fact issue regarding control. (R.967-68, 971-72). The fact that the Hospital, along with FHHP, had the right to notify patients of the termination or expiration of Dr. Toub's contract with FHHP is antithetical to an

HICKS, PORTER, EBENFELD & STEIN, P.A.
5301 BLUE LAGOON DRIVE, 9TH FLOOR, MIAMI, FL 33126 • TEL. 305/374-8171 • FAX 305/372-8038

agency determination. (IB p. 19). A party's rights upon termination of a contractual relationship by definition cannot be used to establish control sufficient to support an agency.

Plaintiff misstates section 10.2 of the contract, stating that it "makes the hospital a party to the assignment clause agreement" between Dr. Toub and FHHP. (IB p. 19). The clause did no such thing. It merely provided that Dr. Toub would not assign his rights under the contract absent approval from FHHP. (R. 940).

Section 10.7 actually demonstrates that Dr. Toub was not an agent of the Hospital, as it makes clear that Dr. Toub was not permitted to bind the Hospital in any way absent prior approval from the Hospital. (R. 940-41; IB p. 19).

Finally, Plaintiff's argument that a jury can infer, absent a shred of supporting evidence or testimony, that the hospital was in fact a signatory to the contract between Dr. Toub and FHHP is easily rejected. (IB pp. 19-21). The contract by its plain terms was clearly between Dr. Toub and FHHP, and no one else.

Judge Orfinger considered the same unfounded argument below and properly rejected it. At the hearing, when the court asked Plaintiff's counsel for record support for his argument that the

HICKS, PORTER, EBENFELD & STEIN, P.A.
5301 BLUE LAGOON DRIVE, 9TH FLOOR, MIAMI, FL 33126 • TEL. 305/374-8171 • FAX 305/372-8038

Hospital was "like a third party to the contract," Plaintiff's counsel responded that the Hospital's address appeared on a standalone page which followed the signature page of the contract (Bates 00057), and that the page with the Hospital's name and address could actually be a signature page for the Hospital with the Hospital's signature "redacted." (R. Supp. 2243-44; R. 943).

In response, the court correctly pointed out that the Hospital's address on the page following the signatures was an exhibit referenced in section 1.1 of the contract, which was expressly intended to identify the hospital in which Dr. Toub would be working pursuant to his contract with FHHP. (R. Supp. 2244; R. 929). This finding is supported by the plain language of the contract.

In fact, the record demonstrates Plaintiff is not truly contending that the Hospital signed the contract. As defense counsel noted at the hearing, throughout the preceding three years of litigation, aside from requesting FHHP's contract with Dr. Toub, Plaintiff made no attempt in discovery to explore the relationship between Dr. Toub and the Hospital. (R. Supp. 2260). Plaintiff just wants her counsel to be permitted to argue to a jury that it can find the Hospital secretly contracted with Dr. Toub and FHHP.

For this reason, Plaintiff's "privilege log" argument is improper and patently waived. (IB pp. 20-21). Prior to the hearing on the motion for summary judgment, Plaintiff moved to compel, and FHHP voluntarily produced, a less redacted copy of the contract. (R. 853-55, 953). Plaintiff did not file another motion to compel and did not move to continue the hearing to allow her counsel to do additional discovery regarding the signatories to the contract.

When Plaintiff argued at the hearing that there was an inference the Hospital signed the contract and then redacted its signature, defense counsel represented that he had the original contract in his possession and that nothing from that page had been redacted. (R. Supp. 2244). Plaintiff's counsel did not request an inspection, either by the court or counsel, of the original document.

As Plaintiff concedes, she "is not able to prove or disprove that a signatory on behalf of the hospital signed the original or amended employment agreement on behalf of the hospital." (IB p. 20). The jury therefore is not entitled to speculate as to this unsupported fact. *See Foulk v. Perkins*, 181 So. 2d 704, 706 (Fla. 2d DCA 1966) ("[A]n inference recognizable in law cannot be based upon evidence that is so uncertain or speculative as to raise merely a conjecture or

HICKS, PORTER, EBENFELD & STEIN, P.A.
5301 BLUE LAGOON DRIVE, 9TH FLOOR, MIAMI, FL 33126 • TEL. 305/374-8171 • FAX 305/372-8038

possibility.”); *Carnes v. Fender*, 936 So. 2d 11, 14 (Fla. 4th DCA 2006) (“An inference is a permissible deduction from the evidence which the jury may reject or accord such probative value as it desires, and it is descriptive of the factual conclusion that a jury may draw from sufficient circumstantial evidence.”).

As Plaintiff wholly failed to put forth any evidence that would have allowed a reasonable jury to find that Dr. Toub was working as an agent of the Hospital when he performed his 2018 surgery on Ms. Reid, the trial court properly granted summary judgment on the estate’s agency claim.

C. This Court must affirm the trial court’s findings on apparent agency and non-delegable duty.

Plaintiff’s brief solely challenges the trial court’s summary judgment ruling as to Count IV asserting actual agency and does not challenge or attempt to demonstrate error regarding the court’s summary judgment rulings on Plaintiff’s claims of apparent agency and non-delegable duty (Counts V and VI).

As Plaintiff thus concedes the rulings on Counts V and VI were correct, they must be affirmed. *See Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979) (“In appellate

proceedings the decision of a trial court has the presumption of correctness and the burden is on the appellant to demonstrate error."); *Land v. Fla. Dept. of Corrections*, 181 So. 3d 1252, 1254 (Fla. 1st DCA 2015) (it is "well-settled that '[a]n issue not raised in an initial brief is deemed abandoned and may not be raised for the first time in a reply brief'.") (citing *Hoskins v. State*, 75 So. 3d 250, 257 (Fla. 2011)); *Prince v. State*, 40 So. 3d 11, 13 (Fla. 4th DCA 2010) ("An appellant who presents no argument as to why a trial court's ruling is incorrect on an issue has abandoned the issue-essentially conceding that denial was correct."); *Brown v. State*, 304 So. 3d 243, 267 (Fla. 2020) (citations omitted) ("[A]n argument not raised in an initial brief is waived.")); *Starkey v. Chew*, 241 So. 2d 870, 871 (Fla. 3d DCA 1970) ("The brief does not argue this assignment of error; it is therefore abandoned.").

CONCLUSION

WHEREFORE, based on the foregoing, Appellee, ADVENTIST HEALTH SYSTEMS/SUNBELT, INC. d/b/a FLORIDA HOSPITAL NEW SMYRNA BEACH, respectfully submits that the summary judgment in its favor should be affirmed.

HICKS, PORTER, EBENFELD & STEIN, P.A.
5301 BLUE LAGOON DRIVE, 9TH FLOOR, MIAMI, FL 33126 • TEL. 305/374-8171 • FAX 305/372-8038

Respectfully submitted,

BY: */s/ Dinah S. Stein*

DINAH S. STEIN
Florida Bar No. 98272
LINDSEY A. HICKS
Florida Bar No. 124728
HICKS, PORTER, EBENFELD
& STEIN, P.A.
5301 Blue Lagoon Drive, 9th Floor
Miami, FL 33126
Tel: (305) 374-8171
dstein@mhickslaw.com
lhicks@mhickslaw.com
pgonzalez@mhickslaw.com
Appellate Counsel for Appellee

- and-

JOHN W. BOCCHINO
Florida Bar No. 522759
TRAVIS A. EDMANDS
Florida Bar No. 1007944
BEYTIN, MCLAUGHLIN,
MCLAUGHLIN, O'HARA &
BOCCHINO, P.A.
1063 Maitland Center Commons
Boulevard
Maitland, Florida 32751
Tel: 407-622-6725
jwb@law-fla.com
tae@law-fla.com
Counsel for Appellee

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was filed via the Court's E-Portal and served via the E-

Portal this **17th** day of **July**, **2024**, to: Andres Beregovich, Esq., The Beregovich Law Firm, P.A., 210 N. Mills Avenue, Orlando, FL 32801, eservice@beregovichlaw.com, info@beregovichlaw.com, trial@beregovichlaw.com, *Counsel for Appellant.*

BY: */s/ Dinah S. Stein*
DINAH S. STEIN
Florida Bar No.: 98272

CERTIFICATE OF COMPLIANCE

The foregoing complies with the requirements of Rules 9.210 and 9.045, Fla.R.App.P. It is typed in Bookman Old Style 14-point type and does not exceed 13,000 words.

BY: */s/ Dinah S. Stein*
DINAH S. STEIN
Florida Bar No.: 98272