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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000917-MR

BRUCE DIXON, INDIVIDUALLY, AND AS
ADMINISTRATOR OF THE ESTATE OF
PAMELA DIXON, AND AS GUARDIAN OF
MINOR CHILD C.D., AND CORTNEY DIXON

APPELLANTS

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 10-CI-01363

LAKE CUMBERLAND REGIONAL HOSPITAL, LLC
D/B/A LAKE CUMBERLAND REGIONAL HOSPITAL,
LIFEPOINT OF LAKE CUMBERLAND, LLC AND
JOHN HUSTED, M.D.

APPELLEES

OPINION
REVERSING IN PART, AFFIRMING IN PART, AND REMANDING

** ** * ** * ** *

BEFORE: KRAMER, CHIEF JUDGE; JONES AND MAZE, JUDGES.

JONES, JUDGE: Bruce Dixon (in his individual capacity and as the administrator of the estate of his late wife, Pamela Dixon) and his two children (hereinafter collectively referred to as “the Estate”) appeal the Pulaski Circuit Court’s dismissal

of a portion of their claims against Lake Cumberland Regional Hospital, LLC. For the reasons set forth below, we reverse in part, affirm in part, and remand.

I. BACKGROUND

A. Overview

Pamela Dixon (“Pam”) died at her home on January 13, 2010, less than a week after having been discharged from Lake Cumberland Regional Hospital (“the Hospital”) following gastric bypass surgery. Dr. John Husted performed Pam’s initial surgery on December 17, 2009, and an additional surgery on December 20, 2009, after Pam experienced complications.

Following Pam’s death, the Estate filed suit against the Hospital, Dr. Husted, and Dr. Paul Wooldridge, a radiologist who performed and interpreted some of Pam’s CT scans. Prior to trial, the circuit court granted summary judgment to the Hospital on the Estate’s vicarious liability claims after concluding that it would be impossible for the Estate to demonstrate that Dr. Husted acted as either an actual or ostensible agent of the Hospital. The trial court also granted judgment in favor of the Hospital on the Estate’s theory that the Hospital was jointly liable with Dr. Husted because they were involved in a “joint enterprise” with one another. The trial court also dismissed the Estate’s negligent credentialing claim against the Hospital on the basis that Kentucky does not recognize the existence of such a cause of action.

The Hospital remained in the case on other theories of negligence. Those claims, as well as the Estate’s claims against Dr. Husted and Dr.

Wooldridge, were tried before a jury. The jury awarded the Estate \$10,658,265.42 in compensatory damages. It allocated sixty percent (60%) of the fault to the Hospital and forty percent (40%) to Dr. Husted.¹ The Hospital paid its portion of the judgment, \$6,394,959.25. Dr. Husted's medical malpractice insurer paid its maximum coverage obligation, \$825,000, toward Dr. Husted's portion of the judgment. Dr. Husted still owes \$3,438,306.17,² plus accruing interest on his portion of the judgment.

In this appeal, the Estate challenges the trial court's decision to grant the Hospital summary judgement on its vicarious liability claims as well as the trial court's dismissal of the Estate's negligent credentialing claim against the Hospital. The Estate is not seeking a new trial on compensatory damages. It is requesting that we vacate and remand the question of vicarious liability for a jury to determine if Dr. Husted acted as an actual or ostensible agent. If a jury found in the Estate's favor on the vicarious liability issue, the Estate would be able to collect Dr. Husted's portion of the verdict directly from the Hospital. The Estate also requests a trial on the negligent credentialing question so that the jury can determine whether punitive damages are warranted against the Hospital individually.

B. The Hospital & Dr. Husted

Prior to 2008, the Hospital did not have a separate bariatric program in place. Sometime in 2008, the Hospital began taking steps to recruit a bariatric

¹ The jury found in Dr. Wooldridge's favor.

² The Appellant's brief states the amount owed on the judgment is \$3,438,306.21; however, both the Satisfaction of Judgement and the math indicate that the amount is actually \$3,438,306.17.

surgeon to the Somerset area. With the assistance of a professional recruiter, the Hospital located Dr. Husted, a board certified bariatric surgeon with an active practice in California. The Hospital brought Dr. Husted to the area and discussed its plans for a bariatric program with him. Eventually, Dr. Husted reached an agreement with the Hospital for him to relocate to Somerset, Kentucky.

Dr. Husted and a representative for the Hospital entered into a written Recruiting Agreement on April 28, 2008. As part of the Recruiting Agreement, Dr. Husted agreed to engage in the “full-time practice of medicine as a Bariatric/General Surgeon in the Community” on or before August 1, 2008. In return, the Hospital agreed to provide Dr. Husted with: 1) a net collectable revenue guarantee with repayment forgiveness; 2) a net collectable revenue guarantee bonus; 3) a marketing expense reimbursement; 4) relocation expenses; 5) a sign on bonus; and 6) practice management consulting. Section 6 of the Recruiting Agreement provides that nothing about it “shall be deemed to create any type of employment, agency, servant, partnership, or joint venture between the physician and hospital.” This section goes on to explain that the physician shall “employ his/her own means and methods and exercise his/her own independent medical judgment in his/her practice of medicine and in the performance of all professional services for his/her patients, including physician’s selection of hospitals for admission of, or service for, his/her patients.”

In accordance with the terms of the Recruiting Agreement, Dr. Husted set about relocating to Somerset. Ultimately, he leased office space from the

Hospital. Around the time of Dr. Husted's arrival, the Hospital began setting up a comprehensive bariatric center that it named the "Commonwealth Bariatric Center" (hereinafter referred to as the "Bariatric Center").³ In a program overview, the Hospital stated that the Bariatric Center's purpose was to "provide[] long-term comprehensive care for the patient who participates in surgical weight loss." Cathi Roskind, RN,⁴ CBN,⁵ served as the Bariatric Center's program director.

Dr. Husted named his practice the "Cumberland Center for Obesity Surgery." Dr. Husted outfitted his office and hired his own staff. Dr. Husted's office was located in the same building as the Bariatric Center. The two offices shared an outside entryway and vestibule, but had separate interior entrances.

The Bariatric Center extensively advertised itself (as well as Dr. Husted) throughout the community. In several advertisements the Bariatric Center referred to Dr. Husted as "our physician." In others, the Bariatric Center touted the "combined experience" of its staff, including Dr. Husted. Almost all of the advertisements featured Dr. Husted's photograph and credentials. The Bariatric Center's trifold informational brochure stated that the "bariatric surgeon" was "housed within our complex." The advertisements urged prospective patients to call the Bariatric Center to register to attend a free weight loss seminar with Dr.

³ On April 14, 2009, the Hospital filed a certificate of assumed name with the Kentucky Secretary of State indicating that it was operating under the assumed name "Commonwealth Bariatric Center." Both practically and legally, the Bariatric Center is a part of the Hospital; it is not a separate entity.

⁴ Registered Nurse.

⁵ Certified Bariatric Nurse.

Husted. These seminars generally consisted of an educational PowerPoint presentation followed by a question and answer session. The slides informed attendees that the Bariatric Center was a “health care service provided by Lake Cumberland Hospital,” introduced Dr. Husted as the “Medical Director, Bariatric Surgery, Somerset, Kentucky,” and informed attendees that Dr. Husted “was recruited by Lake Cumberland Regional Hospital to build a new bariatric program in Somerset.” The presentation made no mention of the Cumberland Center for Obesity Surgery (the name of Dr. Husted’s practice) or identified Dr. Husted’s office as being separate from the Bariatric Center.

The Bariatric Center gave seminar attendees a patient packet, which they were asked to complete and return to the Bariatric Center along with a copy of their insurance card. The cover-page of the packet featured Dr. Husted’s picture along with the following text:

Thank you for selecting Commonwealth Bariatric Center for your weight loss surgery consideration. You are beginning one of the most important health related decisions of your life; one that should greatly improve your quality of life and well-being. Our center offers a comprehensive bariatric program to include highly trained and knowledgeable surgeons, a certified bariatric nurse for educational support, a bariatric dietician, physical therapy, psychologists for psychological evaluation required by insurance and a caring, well organized office team. We offer Internet support (led by clinical professionals) as well as monthly support meetings as a free service to our patients, as we understand the importance of an on-going support system.

(Emphasis added).

Once the packet was received by the Bariatric Center, its staff would verify the patient's insurance availability. The Bariatric Center staff would then contact the patient to schedule a consultation appointment. During the consultation, the patient would meet with the surgeon, clinical psychologist (who was housed in Dr. Husted's office for at least part of the time), dietician, and bariatric education nurse. After receiving insurance pre-approval, the patient would be scheduled for surgery and a pre-op appointment. At the pre-op appointment, the patient would meet with the surgeon and bariatric education nurse and be pre-registered for surgery. This process included an EKG, lab work, and a chest x-ray.

From the beginning, Dr. Husted and his staff worked closely with Nurse Roskind and other Bariatric Center staff in coordinating their various responsibilities. For example, in a September 2008 memorandum, Nurse Roskind asked Dr. Husted to approve a "schedule of dates" for patient consult days, surgery day, monthly support meetings, vacation time, office holiday closing schedule, and a community information seminar schedule through the end of the year. At the bottom of the memorandum, she indicated that she would need to meet with Dr. Husted again in the near future to discuss several additional matters.

Internal correspondence also revealed that there was confusion regarding the role of the Bariatric Center and Dr. Husted fairly early on. In an email from November of 2008, Nurse Roskind noted that there was "a lack of a defined patient process," which was currently being addressed. This comment

appears to have arisen from concerns regarding who was responsible for calling and scheduling patients. At the end of the email, Nurse Roskind recapped that there had been discussion at the last meeting that Dr. Husted and the Bariatric Center were “not competing against each other. The common goal should be the same, to get the patient through the process and to surgery as efficiently and seamlessly as possible.”

In February of 2009, Nurse Roskind outlined several changes aimed at streamlining the “patient process.” She indicated that going forward Gayla Ellison, a Bariatric Center employee, would schedule all surgeries. Nurse Roskind also instructed that: “all patients enter through [the Bariatric Center], no exceptions.” She explained that if a patient called Dr. Husted’s office directly seeking a consult, his staff should take the patient’s information and give it to Ms. Ellison so that the Bariatric Center could mail the patient a packet. Nurse Roskind further directed that the contact information on Dr. Husted’s individual website was to be changed to reflect the Bariatric Center’s contact information “to decrease duplication of efforts and patient confusion.” Agenda minutes from January of 2009 and May of 2009 refer to Dr. Husted as the Bariatric Center’s “Bariatric Surgery Medical Director.”

C. Pam Dixon

Pam’s husband, Bruce, testified that Pam had struggled with her weight for a number of years. To the best of Bruce’s recollection, Pam had been considering weight loss surgery for approximately a year. Documents produced

during discovery show that Pam completed the Bariatric Center's ten-page patient information packet on April 6, 2009. Pam explained on the form that she was seeking weight loss surgery because: "I am beginning to have a lot of health problems, I have tried for years to lose weight. I faithfully go to a gym which helps me feel better, but I cannot seem to lose weight." Pam indicated that she was referred to the Bariatric Center by Drs. Rachel and Tommy Shelton, whom she described as "my husband's family."

The fifth section of the Bariatric Center's patient information packet reads as follows:

PREFERRED PROCEDURE

PREFERRED SURGEON: JOHN HUSTED, M.D.
 TOMMY SHELTON, M.D.
 RACHEL SHELTON, M.D.

PREFERRED PROCEDURE: _____

Pam checked the boxes for Tommy Shelton, M.D. and Rachel Shelton, M.D. She indicated that she preferred a "lap band" procedure. Page eight of the form asked Pam to include "any additional information your bariatric surgeon should know." Pam wrote "N/A" on this part of the form.

On the same day, April 6, 2009, Pam completed a Bariatric Center "Insurance Review Form." This form indicates that its purpose is to "determine whether or not your insurance policy has benefits for weight loss surgery." Pam listed her health insurance provider as "Humana." Pam stated that bariatric surgery was a "covered benefit" but she was "not sure" if there was a maximum coverage

amount for bariatric surgery. The Bariatric Center's records indicate that it received Pam's patient information packet on April 24, 2009.

On May 13, 2009, Pam signed a "conditions of admission and authorization for medical treatment form." It contains the following patient acknowledgement:

I understand that unless I am specifically otherwise informed in writing, all physicians furnishing services to me, including the pathologist, anesthesiologist, emergency room physician and the like are independent contractors and are not employees or agents of the hospital. I am under the care and supervision of my attending physician and it is the responsibility of the Hospital and it is the responsibility of the Hospital [sic] and its staff including residents and/or students to carry out the instructions of my physician. It is my physician's responsibility to obtain my informed consent, when required for medical or surgical treatment, special diagnostic or therapeutic procedures or hospital services rendered to me under general and special instructions of my physician. I understand that there will be a separate charge for professional services such as physician services. I understand that the Hospital does bill for some professional fees, otherwise the professional fees are not include in the Hospital's bill.

Around this same time, Pam had an office visit with Dr. Tommy Shelton. Dr. Shelton discussed a lap-band procedure with Pam. However, in October of 2009, Humana notified the Bariatric Center that it would only cover surgery by a "board certified" surgeon. Neither Dr. Tommy Shelton nor Dr. Rachel Shelton was board certified. Therefore, Humana would not cover Pam's weight loss surgery if performed by either of them. Dr. Rachel Shelton testified that she discussed the coverage issue with Pam. She told Pam that Dr. Husted was

board certified and that he “was in the community, he was part of the bariatric program and he was brought here for the bariatric procedures.”⁶ A Bariatric Center entry dated October 13, 2009, states simply, “Pt change to Husted due to Dr. T not board certified, needed for ins. Covg. Per Hope.”

Pam’s surgery was scheduled for December 17, 2009. Pam completed pre-surgery authorization and paperwork at the Bariatric Center on December 14, 2009. During this time, Pam completed an informed consent for “Cumberland Center for Obesity.” She also completed a “Pre-Op Education” checklist for the Bariatric Center. The letterhead on the “Pre-Op” form reads: “Commonwealth Bariatric Center and Affiliated Bariatric Surgeon Dr. John Husted.” Around this same time, she also signed another Lake Cumberland Regional Authorization for Medical Treatment form. This form contains the same “legal relationship between hospital and physician” section as the form Pam signed in May of 2009. Finally, Pam had a pre-op visit with Dr. Husted. Dr. Husted wrote out a number of prescriptions for Pam as part of this visit. The prescription pad sheet bore the name “Cumberland Center for Obesity Surgery.”

⁶ In its brief, the Hospital states that Pam’s primary care practitioner, Tammi Emerson-Johnson, also “independently” referred Pam to Dr. Husted. The Hospital asserts that Bruce Dixon confirmed that Emerson-Johnson recommended Dr. Husted. Bruce Dixon actually testified that he did not know who recommended Dr. Husted to Pam. He further testified that he did not recall hearing Dr. Husted’s name until Pam’s surgery. Documents in the record show that while Dr. Husted’s office did correspond with Emerson-Johnson, the correspondence is dated November 13, 2009, which post-dates Pam’s initial consultation with Dr. Husted. Although not certain, it seems most likely that Pam was seen by Dr. Husted first and then consulted with her primary care provider to obtain a letter of necessity for insurance. Neither the dates of the documents nor the totality of the testimony in record supports that Pam was initially made aware of Dr. Husted by Emerson-Johnson.

Pam's surgery took place as planned on December 17, 2009. After the surgery, Pam experienced complications. Dr. Husted ordered diagnostic CT studies, which Dr. Wooldridge performed. On December 20, 2009, Dr. Husted performed an exploratory surgery, during which he found a gastric abscess and a leak at Pam's gastric pouch. Dr. Husted repaired the leak and placed a drain in Pam's abdomen. She was discharged home on January 8, 2010. She passed away on January 13, 2010.

II. Vicarious Liability

Before trial, the Hospital moved the trial court to grant it summary judgment on the Estate's theories that the Hospital was jointly liable with Dr. Husted on its theories of actual agency, ostensible agency, and joint enterprise. Following briefing and oral argument, the trial court granted the Hospital's motion. On appeal, the Estate argues that it produced sufficient facts to create jury issues regarding the existence of an actual or ostensible agency relationship and of a joint enterprise between Dr. Husted and the Hospital.

“Summary judgment is not a substitute for trial.” *Allstate Ins. Co. v. Smith*, 487 S.W.3d 857, 860 (Ky. 2016). It is only appropriate to grant summary judgment if 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.” CR⁷ 56.03. In reviewing the record, the trial court must be careful not to decide issues of fact. The trial court's role in reviewing the record is limited to the “simple

⁷ Kentucky Rules of Civil Procedure.

determination of whether a fact question exists.” *Allstate Ins. Co.*, 487 S.W.3d at 860. In performing this review, the trial court must view the evidence “through a lens colored in favor of the party opposing summary judgment.” *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 604 (Ky. 2014).

Summary judgment “is proper where the movant shows that the adverse party cannot prevail under any circumstances.” *Pearson ex rel. Trent v. Nat'l Feeding Sys., Inc.*, 90 S.W.3d 46, 49 (Ky. 2002); *see also Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985). Stated another way, “the movant should not succeed unless his right to judgment is shown with such clarity that there is no room left for controversy.” *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 482 (Ky. 1991).

We review the trial court's issuance of summary judgment in favor of the Hospital *de novo*. *See The Bd. of Regents of N. Kentucky Univ. v. Weickgenannt*, 485 S.W.3d 299, 307 (Ky. 2016). On appeal, “[t]he standard of review . . . of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law.” *Pearson ex rel. Trent*, 90 S.W.3d at 49.

A. Actual Agency

“Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.” *McAlister v. Whitford*, 365 S.W.2d 317, 319 (Ky. 1962). “Under the common law doctrine of *respondeat*

superior, ‘a principal is vicariously liable for damages caused by torts of . . . an agent or subagent, *other than an independent contractor*, acting on behalf of and pursuant to the authority of the principal.’” *Saint Joseph Healthcare, Inc. v. Thomas*, 487 S.W.3d 864, 876 (Ky. 2016) (quoting *Taylor v. Jewish Hosp. & St. Mary's Healthcare, Inc.*, 26 F. Supp. 3d 642, 648 (W.D. Ky. 2014)). The burden of proving agency is on the party alleging its existence. *Wright v. Sullivan Payne Co.*, 839 S.W.2d 250, 253 (Ky. 1992).

Determining whether an individual was acting as an independent contractor or an agent requires a “careful case-by-case consideration of the facts.” *Steilberg v. C2 Facility Sols., LLC*, 275 S.W.3d 732, 736 (Ky. App. 2008). This consideration should take into account the factors from the Restatement (Second) of Agency § 220(2) (1958). *See Kentucky Unemployment Ins. Comm'n v. Landmark Cmty. Newspapers of Kentucky, Inc.*, 91 S.W.3d 575, 580 (Ky. 2002).

They are:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;

- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.

Restatement (Second) of Agency § 220(2).

Before delving into the substance of Dr. Husted's relationship with the Hospital, we must address the trial court's concern that a determination in favor of the Estate on the issue of agency would upend the law by converting every physician granted privileges at a hospital into an employee. It is undisputed that the Hospital granted Dr. Husted privileges. In no way, however, does this fact standing alone convert Dr. Husted into an agent. This does not mean that a physician with staff privileges can never be considered an agent of the hospital. It means simply that a plaintiff cannot rely *solely* on the existence of staff privileges to establish agency. *See Stacy v. Williams*, 69 S.W.2d 697, 707 (Ky. 1934). Likewise, use of recruiting agreements by hospitals are commonplace in the medical field. The mere existence of such contractual arrangements is also insufficient to establish agency.

This is why it is important to consider the agency question in light of all the factors set out in *Landmark*. *See Landmark*, 91 S.W.3d at 580. “[N]ot one of the aforementioned factors is determinative, and every case, where it must be determined whether an individual is an employee or an independent contractor . . . needs to be resolved on its own facts.” *Id.*

To overcome summary judgment, a plaintiff must show that the hospital was involved in some way in controlling the physician's day-to-day work. In other words, the plaintiff must produce evidence that "the hospital undertook to direct [the physician] in the method of treatment or the procedure of the services he rendered [his patients]." *Stacy*, 69 S.W.2d at 707. The trial court believed the evidence in this case was so one-sided that it supported only one conclusion: Dr. Husted was not an employee of the Hospital.

Having carefully reviewed the record, we cannot agree that no disputed issues of material fact exist in this case with respect to the relationship between Dr. Husted and the Hospital. It is clear to us that the Hospital interjected itself into Dr. Husted's practice. Additionally, it is unclear from the record whether Dr. Husted had an official title within the Bariatric Center. Some, but not all, of the documents the Estate relied on refer to Dr. Husted as the Bariatric Center's "Bariatric Surgery Medical Director." While the Recruiting Agreement relied on by the trial court disclaimed any role by the Hospital in Dr. Husted's treatment decisions, the emails documenting the Bariatric Center's staff meetings, which included Dr. Husted, when viewed in a light most favorable to the Estate, paint a different picture. Those emails include goals for the number and timing of surgeries as well as strict instructions that Dr. Husted was not to perform bariatric surgery on any patient at the Hospital unless that patient was part of the Bariatric Center's program.

Aside from treatment specific decisions, the emails also indicate that the Hospital was heavily involved in the patient relationship from the outset. In fact, at one point, it appears that the Hospital directed the telephone number on Dr. Husted's website to be changed to the Bariatric Center's telephone number to avoid patient confusion and duplication. Dr. Husted's staff was directed to refer all first-time patient calls to the Bariatric Center for intake. It also appears from the emails that the Hospital set the rates Dr. Husted could charge for surgeries and played some decision-making role in how fees were billed to and collected from Dr. Husted's patients. The emails also suggest that Bariatric Center staff screened patients for insurance coverage, sent them Dr. Husted's inform consent forms, and scheduled them for surgery.

To be clear, we are not saying that this evidence is conclusive. It does not compel a decision in the Estate's favor any more than the evidence cited by the trial court compels a decision in favor of the Hospital. Given the factual discrepancies, it was error for the trial court to grant summary judgment in favor of the Hospital. *See Nazar v. Branham*, 291 S.W.3d 599, 606 ("Where the facts are in dispute and the evidence is contradictory or conflicting, the question of agency, like other questions of fact, is to be determined by a jury." (quoting *Wolford v. Scott Nickels Bus Co.*, 257 S.W.2d 594, 595 (Ky, 1953))).

B. Ostensible Agency

The trial court also granted summary judgment in favor of the Hospital on the Estate's alternative theory that the Hospital held Dr. Husted out as

its ostensible agent. In so doing, the trial court relied heavily on the patient acknowledgment forms Pam signed prior to her surgery. In those forms, Pam acknowledged that: “I understand that *unless I am specifically otherwise informed in writing*, all physicians furnishing services to me . . . are independent contractors and are not employees or agents of the hospital.” (Emphasis added). While the forms are certainly relevant, we do not believe they are dispositive in this instance. As detailed below, Pam was given other written documents throughout her course of treatment that indicated Dr. Husted was a Bariatric Center staff member. Additionally, a jury could determine from the facts that Pam relied on the Hospital to provide her with a bariatric surgeon (especially after her insurance indicated that it would not provide coverage if the Drs. Shelton performed the surgery).

The seminal ostensible agency case in Kentucky is *Paintsville*, 683 S.W.2d at 257. In *Paintsville*, a deceased patient’s estate brought a medical malpractice action against the hospital where the deceased patient was treated prior to his death. The patient, a sixteen-year-old boy, was found unconscious on the street in Paintsville, Kentucky. He was taken by ambulance to the Paintsville Hospital where he was treated by Dr. K.J. Ikramuddin, who failed to diagnose his condition. The circuit court granted summary judgment to the hospital. On appeal the issue was whether the hospital could be held liable “on principles of ostensible agency or apparent authority for the negligence of a physician who was not employed by the hospital but who furnished treatment in the emergency room which was provided by the hospital and open to the public.” *Id.* at 255. The court

determined that it is important to ask whether the plaintiff was looking to the hospital for treatment of his physical ailments or merely viewed the hospital as the situs where his physician would treat him for his problems. *Id.* Also important is whether the hospital informed the plaintiff of the nature of its relationship with the treating physicians. *Id.* Ultimately, the Court held that apparent authority/ostensible agency could be used to hold a hospital liable for the negligence of its emergency room personnel where the hospital did not inform the patient of the true relationship between it and the physicians who practiced in its emergency room. *Id.* Absent notice to the contrary, a patient has the right to assume that the treatment received is being rendered through hospital employees and that any negligence associated with that treatment will render the hospital responsible. *Id.*

In 2009, Pam was twice presented with a medical authorization form which she signed. The form noted that, “unless otherwise informed in writing,” Pam was to assume that the doctors who treated her were independent contractors and were not employees or agents of the Hospital. The trial court believed the existence of these forms barred the Estate from relying on ostensible agency as a matter of law. Such forms can be a sufficient basis upon which to grant summary judgment so long as there is “no representation or other action to induce appellant to believe that the physicians were [Hospital] employees or agents” *See Floyd v. Humana of Virginia, Inc.*, 787 S.W.2d 267, 270 (Ky. App. 1989). Here, the trial court failed to recognize that the Estate alleged and introduced sufficient

proof to create an issue of whether the Hospital made representations and took actions sufficient to induce Pam to believe that Dr. Husted was an employee of the Hospital.

The relationship between Pam, Dr. Husted, and the Hospital spanned a period of several months. While the authorization forms Pam signed in 2009 prior to her surgery disclaimed any employment relationship, other documents Pam received from the Hospital during the course of her treatment could be viewed as the Hospital expressly (or at very least implicitly) claiming Dr. Husted as its employee. As previously noted, most of the Bariatric Center's marketing material referred to Dr. Husted as its physician and touted his experience and expertise. Additionally, the Bariatric Center forms Pam filled out listed Dr. Husted as one of the Hospital's surgeons. Pam was simply asked to check which surgeon she "preferred." When viewed most favorably to Pam, this could be seen as Pam's looking to the Hospital to provide her with comprehensive medical care, including physician selection. Additionally, the Bariatric Center scheduled Pam's surgery and presumably, as was its regular course, mailed Dr. Husted's informed consent packets to Pam.

The circuit court found it significant that Pam was referred to Dr. Husted by her primary care practitioner.⁸ The source of the referral is relevant. However, how Pam came to see Dr. Husted is certainly not conclusively

⁸ The circuit court indicated that Mr. Dixon testified to this fact in his deposition. He did not.

Q: But however Pamela heard about Dr. Husted and the clinic, you don't have any information about that?

A: No, I'm not sure.

established by the record. Dr. Rachel Shelton testified in her deposition that she told Pam that Dr. Husted was board certified and was part of the Bariatric Center's program after Pam's insurance refused to cover surgery by Dr. Tommy Shelton. Pam's husband, Bruce, testified that he did not know how Pam came to be treated by Dr. Husted. Pam's primary care nurse practitioner corresponded with Dr. Husted, but this correspondence post-dates Pam's being seen by him. And, notes from the Bariatric Center suggest its personnel scheduled Pam with Dr. Husted after receiving notification from Humana that it would only cover surgery by a board certified bariatric surgeon. If one accepts that Pam came to see Dr. Husted through the Bariatric Center, she could be seen as relying on the Hospital to supply her care as opposed to seeking it out independently.

A number of relevant facts necessary to resolve the issue of apparent authority are in dispute. Given the complex relationship between the Bariatric Center, Pam, and Dr. Husted, and the various written materials the Hospital provided to Pam throughout the course of her treatment, we cannot agree with the trial court's conclusion that the consent form Pam signed prior to surgery is dispositive in this case. Due to the factual disputes that remain, it was error for the trial court to resolve the apparent authority issue on summary judgment.

C. Joint Enterprise

The Estate also claims that trial court erred in rejecting its theory that the Hospital was jointly liable with Dr. Husted because they were engaged in a "joint enterprise" together. "A joint enterprise is an informal partnership, existing

for a limited purpose and duration.” *Abbott v. Chesley*, 413 S.W.3d 589, 604 (Ky. 2013). A plaintiff must be able to establish four elements to predicate liability based on the existence of a joint enterprise:

(1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose, among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.

Huff v. Rosenberg, 496 S.W.2d 352, 355 (Ky. 1973).

While Dr. Husted and the Bariatric Center no doubt shared common goals and may have agreed on certain matters necessary to bring those goals to fruition, the record does not support that element number 3, “a community of pecuniary interest,” can be satisfied in this case. “As to element number 3, it is necessary to the relationship that there be a sharing of the profits and losses; though in the absence of an express agreement, the sharing of losses may sometimes be implied from an express agreement to share profits.” *Roethke v. Sanger*, 68 S.W.3d 352, 364 (Ky. 2001).

The Estate asserts that there is enough evidence in the record of Dr. Husted’s and the Bariatric Center’s “intertwined finances” to create a jury issue on this element. We disagree. While there is evidence that the Bariatric Center controlled various aspects of how Dr. Husted’s fees were to be collected and charged, there is no evidence that Dr. Husted was liable in any way for the Bariatric Center’s overall financial condition. He was not a party to its lease; he

was not responsible for paying any of its operating costs; and there is no evidence he participated in compensating its staff or shared profits (or losses) generated by its other physicians. Likewise, there is no evidence that Dr. Husted made any contribution or investment in the Bariatric Center. In sum, while Dr. Husted was certainly interested in the financial well-being of the Bariatric Center, nothing supports that he was on-the-hook for any out-of-pocket expenses if the Bariatric Center lost money. Therefore, we agree with the trial court's conclusion that the Hospital was entitled to summary judgment on the Estate's joint enterprise theory.

III. Negligent Credentialing

Lastly, the Estate asserts that the trial court erred when it granted judgment on the pleadings in favor of the Hospital on the Estate's claim of negligent credentialing. The Estate alleged that the Hospital failed to follow its own policies and procedures for physician credentialing when it granted surgical privileges to Dr. Husted. To support its claim, the Estate relied on the expert opinion of Dr. Richard K. Bachman. Dr. Bachman reviewed the record and provided the following expert opinion:

From the beginning, the LCRH bariatric program put patients at risk for death and injury when it improperly granted Dr. Husted unrestricted bariatric privileges, even though LCRH sought no proof of his competency and the surgeries planned were new to LCRH, and at least one surgery was experimental. LCRH failed to meet the standard of care in recruiting, financially supporting, vetting and privileging Dr. Husted. LCRH failed to restrict Dr. Husted's bariatric surgery privileges or restrict the scope of his bariatric practice despite adverse outcomes with multiple patients and an unacceptable

complication rate, which LCRH knew or should have known about several months before Pam Dixon's December 19, 2009 surgery. LCRH failed to collect or analyze outcomes data on its new bariatric program for several months.

This opinion, in combination with other evidence in the record, would appear to create an issue of fact as to whether the Hospital acted appropriately in allowing Dr. Husted to use its facilities to perform surgery. Nevertheless, the trial court granted the Hospital's motion for judgment on the pleadings on the Estate's negligent credentialing claims. The trial court concluded that the claim failed as a matter of law because "negligent credentialing is not a recognized cause of action in Kentucky."

In *Spalding v. Spring View Hosp., LLC*, No. 2013-CA-000842-MR, 2016 WL 929507 (Ky. App. Mar. 11, 2016), a divided panel of this Court held that negligent credentialing was a viable cause of action in Kentucky. The Kentucky Supreme Court granted discretionary review on October 13, 2016. A decision by the Supreme Court has not yet issued.

The negligent credentialing question is a weighty one. As our prior opinion demonstrates, there is not uniformity among the members of this Court with respect to the existence or scope of the tort. Given that *Spalding* is not final, we are technically not bound by it. See *Kohler v. Commonwealth, Transp. Cabinet*, 944 S.W.2d 146, 147 (Ky. App. 1997) ("[A]ny reliance on a non-final

opinion of an appellate court is misplaced.”). A majority of this panel could reach any number of different outcomes.

Our substantive review of the negligent credentialing issue, however, is halted by the Hospital’s assertion that the Estate waived its right to appeal the issue of negligent credentialing. After the jury rendered its verdict, the Estate entered into a “satisfaction of judgment” with the Hospital. It provides:

WHEREAS, a Judgment was entered in this action on April 28, 2014 in favor of Plaintiffs, Bruce Dixon, individually, and as Administrator of the Estate of Pamela Dixon, and as Guardian of his Minor Child Caleb Dixon, and Cortney Dixon (“Plaintiffs”), and against Defendants, Lake Cumberland Regional Hospital, LLC and John Husted, M.D., and

WHEREAS, Lake Cumberland Regional Hospital, LLC has now paid the full sum of \$6,394,959.25 for which said Judgment established that it was liable, together with all post-judgment interest, and there are no outstanding executions or liens,

WHEREAS Lake Cumberland Regional Hospital, LLC will not pursue an appeal of the Judgment entered on the verdicts against it,

WHEREAS, Lake Cumberland Regional Hospital, LLC will not contend that Plaintiffs have waived any appeal that Plaintiffs may take against Lake Cumberland Regional, LLC or any other party in this action on any grounds that may allow a finding that Lake Cumberland Regional Hospital, LLC (and/or others) are or may be liable for the portion of the Judgment, together with post-judgment interest, for which Defendant Dr. John Husted was found to be liable (\$4,263,306.17),

NOW THEREFORE, Plaintiffs acknowledge full and complete satisfaction by Lake Cumberland Regional Hospital, LLC of its portion of the April 28, 2014

Judgment and the Clerk of Court is authorized and directed to make an entry to this effect on the face of the Judgment or otherwise in the court record.

“The long-established rule, in the absence of a statute, is that a party who voluntarily accepts the benefits of a judgment cannot prosecute an appeal to reverse it.” *Complete Auto Transit v. Louisville & N. R. Co.*, 273 S.W.2d 385, 386 (Ky. 1954). The jury returned a verdict in favor of the Estate on its negligence claims against the Hospital. The jury then assessed damages. The Hospital’s individual portion of the damages was determined to be \$6,394,959.25. The Estate had the option of accepting payment of the judgment or appealing it. Likewise, the Hospital had the option to appeal and post a bond to stay the judgment. In the end, the parties agreed that the Estate would accept the \$6,394,959.25 in full satisfaction for its independent claims against the Hospital; this would necessarily include the negligent credentialing claim that the trial court had previously dismissed. That claim, like the Estate’s other negligence claims against the Hospital, is a theory of liability predicated on the Hospital’s separate actions. In accepting the Hospital’s payment, the Estate agreed that it had been fully compensated for the Hospital’s negligence.

Furthermore, a clear reading of the satisfaction evinces that the parties intended for payment to be in exchange for the Estate’s waiver of all its appeal rights except “on any grounds that may allow a finding that [the Hospital] . . . may be liable for the portion of the Judgment . . . for which Dr. John Husted was found

to be liable (\$4,263,306.17).” The negligent credentialing claim was entirely against the Hospital, not Dr. Husted. Therefore, appeal of that claim would not have anything to do with the Hospital’s liability for Dr. Husted’s portion of the judgment. As such, we will not consider the substantive merits of the negligent credentialing claim as part of this appeal.

IV. Conclusion

For the reasons set forth above, we affirm in part, reverse in part and remand this matter to the Pulaski Circuit Court for further proceedings.

ALL CONCUR.

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