

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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TAVY PASIEKA and THOMAS PASIEKA,

Plaintiff-Appellants,

v

CESAR MARIO COLOYAN CHAVES, M.D.,

Defendant,

and

MEMORIAL HOSPITAL d/b/a MEMORIAL  
HEALTHCARE,

Defendant-Appellee.

UNPUBLISHED  
October 23, 2012

No. 304190  
Shiawassee Circuit Court  
LC No. 10-000115-NH

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Before: SHAPIRO, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

PER CURIAM.

In this medical malpractice case we consider whether defendant Memorial Healthcare may be held vicariously liable for allegedly negligent treatment rendered to plaintiff Tavy Pasioka (Pasioka) by defendant Cesar Mario Coloyan Chaves, M.D.<sup>1</sup> Plaintiffs assert that when he treated Pasioka, Chavez functioned as Memorial's agent or employee. Memorial argues that it lacked any ability to control Chavez's medical decision-making and therefore bears no responsibility for his potential negligence. The circuit court granted summary disposition to Memorial after finding that Chaves was neither its employee nor its agent.<sup>2</sup>

Although a hospital usually cannot control a physician's treatment of a patient, it may nevertheless qualify as the physician's principal. Memorial oversimplifies the issue by resting it

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<sup>1</sup> Pasioka's husband's claims are wholly derivative.

<sup>2</sup> Plaintiffs' claims against Chavez individually were not dismissed and apparently remain pending in the circuit court.

on an ability to control Chavez's practice of medicine. Taken to its logical conclusion, Memorial's argument forecloses any possibility that a physician could ever serve as a hospital's agent. However, the facts presented in this case establish that Chavez was, in fact, an independent contractor rather than the hospital's agent or employee. Accordingly, we affirm the circuit court.

## I. UNDERLYING FACTS AND PROCEEDINGS

In 2007, Tavy Pasieka sought treatment for an abnormal pap smear at the Shiawassee County Health Department. The Health Department referred her to Chavez, who performed surgery to remove Pasieka's uterus. Pasieka then received radiation therapy prescribed by a gynecologic oncologist. Subsequently, Pasieka developed complications attributable to radiation. Plaintiffs contend that Chavez violated the standard of care by failing to perform a cone biopsy rather than a hysterectomy, and that a cone biopsy would have eliminated any need for radiation treatment. The complaint names as defendants both Chavez and Memorial, and avers that Chavez served as Memorial's actual or ostensible agent, or its employee.

Memorial moved for summary disposition under MCR 2.116(C)(10), asserting that Chavez was a self-employed independent contractor and that it bore no liability for his negligence. Plaintiffs responded that Chavez was not an independent contractor, but an actual agent or employee of Memorial.<sup>3</sup> Plaintiffs supported their claim with a 2005 contract signed by Chavez and Memorial titled "Physician Recruiting Agreement."

The recruiting agreement set forth Chavez's pledge to relocate to Owosso, Michigan "and to establish a private practice in Owosso and surrounding areas within the Hospital's primary services area[.]" The agreement's stated purposes included Memorial's determination that "there is a demonstrated need in the Community for a physician who specializes in Obstetrics and Gynecology," and that Memorial's "best interests" would be served by assisting Chavez "to establish his practice" in the Owosso area. As encouragement, Memorial guaranteed Chavez a "twelve month net practice income" of \$260,000 advanced on a monthly basis "to make up any short fall" in the net income flowing from Chavez's private practice. The agreement allowed Memorial to "inspect and audit" Chavez's books and financial records at any time, and Chavez consented to provide Memorial with a monthly accounting. Chavez also agreed to reimburse the guarantee payments if his net practice income exceeded the income guarantee amount, or if either party to the agreement terminated it under certain specified conditions.

The contract contemplated that Memorial would conduct three-month "periodic review[s]" "to determine if OB/GYN services are at a sufficient level to fulfill the expectations of this agreement." Chavez consented to obtain a Michigan medical license, execute a participation agreement with Medicare and Medicaid, gain active medical staff privileges at Memorial, maintain a full-time practice in the Owosso area, participate in Memorial's on-call schedule for emergencies, and offer his services to the health maintenance organizations and other insurance-related programs "in which Hospital participates." Chavez also agreed to

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<sup>3</sup> Plaintiffs specifically withdrew any claim based on ostensible agency.

“provide a reasonable amount of care for indigent residents of the community both in his office and in the hospital” and to sustain a certain stated level of malpractice insurance coverage. Memorial covenanted to “forgive and cancel” a small percentage of the debt Chavez owed to Memorial for each month that Chavez’ maintained an active office practice, participation in on-call responsibilities, and that he “continues to see a reasonable number of indigent patients in his practice.”

In paragraph nine, the agreement addressed as follows Chavez’s employment status:

9. Independent Contractor. In performing his responsibilities under this Agreement, Physician shall at all times be deemed and regarded as an independent contractor of the Hospital and the Hospital shall neither have nor exercise any control or direction over the practice of medicine by Physician. Physician shall not be considered for any purpose whatsoever to be an employee of the Hospital and shall not be covered by or entitled to any of the Hospital’s workers compensation insurance, unemployment compensation, retirement benefits, disability benefits, vacation pay or sick leave, or other fringe benefits offered by the Hospital to its employees. The Hospital will not be responsible for withholding income or Social Security tax on behalf of Physician.

In response to Memorial’s summary disposition motion, Plaintiffs argued that the physician recruiting agreement established Memorial’s ability to control Chavez’s practice, or that a question of fact existed in this regard. Plaintiffs further contended that the “economic realities” of the relationship between Chavez and Memorial should guide the outcome rather than whether Memorial could control Chavez’s treatment decisions. The circuit court determined that none of the contract provisions “would lead the Court to conclude that the hospital exercises the type of control that then brings us under the terms or under the guise of actual agency,” and granted summary disposition to Memorial.

## II. ANALYSIS

On appeal, plaintiffs renew the arguments they advanced in the circuit court. “We review de novo a circuit court’s summary disposition ruling.” *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). “Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). “In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial.” *Walsh*, 263 Mich App at 621. “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *West*, 469 Mich at 183.

Plaintiffs contend that the physician recruitment agreement “is more akin to an employment contract than anything else,” and that Memorial “exercises considerable control” over Chavez’s practice “by placing significant obligations and restrictions from which [Memorial] hopes to benefit.” We reject plaintiffs’ argument that the duties placed on Chavez by

the recruiting agreement created either an employer-employee or a principal-agent relationship. We reach this conclusion by applying the control test, which remains the appropriate yardstick for analyzing whether a master should be held vicariously liable for a servant's torts. However, in using the control test we have afforded very little weight to the fact that Memorial lacks the ability to direct Chavez's professional judgment. That a physician makes independent, skilled decisions while rendering patient care hardly negates the possibility that he or she may serve as a hospital's agent or employee. Nevertheless, we find no support in the record that Memorial controlled or had the ability to control any relevant aspect of Chavez's medical practice.

#### A. General Principles

"A master is responsible for the negligence of [its] employee." *Hekman Biscuit Co v Commerical Credit Co*, 291 Mich 156, 160; 289 NW 113 (1939). "Under the doctrine of respondeat superior, the negligence of an employee, arising out of acts done within the scope of his employment is imputed to his employer." *Id.* Similarly, a principal may be held vicariously liable for torts committed by its agent, as the law creates a "practical identity" between the two. *Potter v McLeary*, 484 Mich 397, 424; 774 NW2d 1 (2009). "Vicarious liability is indirect responsibility imposed by operation of law." *Theophelis v Lansing Gen Hosp*, 430 Mich 473, 483; 424 NW2d 478 (1988). A hospital may be held vicariously liable for the negligence of its agents, which may include physicians. *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 11; 651 NW2d 356 (2002).

On the other hand, "a hospital is not vicariously liable for the negligence of a physician who is an independent contractor and merely uses the hospital's facilities to render treatment to his patients." *Grewe v Mt Clemens Gen Hosp*, 404 Mich 240, 250; 273 NW2d 429 (1978). An independent contractor is "one who, carrying on an independent business, contracts to do work without being subject to the right of control by the employer as to the method of work but only as to the result to be accomplished." *Candelaria v BC Gen Contractors, Inc*, 236 Mich App 67, 73; 600 NW2d 348 (1999) (quotation marks and citation omitted).

Generally the circumstances which go to show one to be an independent contractor, while separately they may not be conclusive, are the independent nature of his business, the existence of a contract for the performance of a specified piece of work, the agreement to pay a fixed price for the work, the employment of assistants by the employee who are under his control, the furnishing by him of the necessary materials, and his right to control the work while it is in progress except as to results. [*Zoltowski v Ternes Coal & Lumber Co*, 214 Mich 231, 233; 183 NW 11 (1921).]

An employer is not liable for torts committed by an independent contractor unless "the employer has assumed control over" the worker. *Powell v Employment Sec Comm*, 345 Mich 455, 471; 75 NW2d 874 (1956) (SMITH, J., dissenting).<sup>4</sup> "The rationale for this rule is that an

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<sup>4</sup> Justice Smith's dissent was adopted by our Supreme Court in *Tata v Muskovitz*, 354 Mich 695; 94 NW2d 71 (1959).

independent contractor is not subject to the control of the employer, and therefore the employer should not be held vicariously liable for actions outside its control.” *Janice v Hondzinski*, 176 Mich App 49, 53; 439 NW2d 276 (1989).

## B. The Control Test Vs. The Economic Reality Test

Whether a master-servant relationship exists has relevance in a wide variety of cases, including those involving workers compensation, unemployment benefits, employment discrimination, and tort. “Consequently, depending on the circumstances our governmental agencies and courts have developed different tests to ascertain the true nature of an employment relationship.” *Mantei v Mich Pub Schs Employee Retirement Sys*, 256 Mich App 64, 76; 663 NW2d 486 (2003). In tort cases, the common law developed the “control test” as an aid to determining whether to apply the doctrine of respondeat superior. *Nichol v Billot*, 406 Mich 284, 297; 279 NW2d 761 (1979). Quoting *Janik v Ford Motor Co*, 180 Mich 557, 562; 147 NW 510 (1914), this Court has described the control test as follows:

The test is whether in the particular service which he is engaged or requested to perform he continues liable to the direction and control of his original master or becomes subject to that of the person to whom he is lent or hired, or who requests his services. It is not so much the actual exercise of control which is regarded, as the right to exercise such control. To escape liability the original master must resign full control of the servant for the time being, it not being sufficient that the servant is partially under control of a third person. Subject to these rules the original master is not liable for injuries resulting from acts of the servant while under the control of a third person. [*Hoffman v JDM Assocs, Inc*, 213 Mich App 466, 468-469; 540 NW2d 689 (1995).]

In benefit-related cases, a different analysis gradually evolved. The “economic reality test” first set forth by Justice Talbot Smith’s dissenting opinion in *Powell* now governs employment status determinations in cases that do not involve the imposition of liability under the respondeat superior doctrine. In his dissent, Justice Smith argued that, as a “tort concept,” the control test lacked applicability “to the administration of social legislation[.]” *Powell*, 345 Mich at 471. He proposed that in cases arising from remedial legislation, the Court “turn to the act itself to discover its purposes, the mischiefs it was designed to cure.” *Id.* at 476. The legislation at issue in *Powell* governed unemployment compensation. Justice Smith reasoned that because “the act concerns itself with the correction of economic evils through remedies which were unknown at the common law,” the control test was too narrow. *Id.* at 478-479 (quotation marks and citation omitted). The test Justice Smith advanced “is one of economic reality,” concentrating on

the workmen, to see whether or not their work can be characterized ‘as a part of the integrated unit of production,’ . . . and whether ‘the work done, in its essence, follows the usual path of an employee’ . . . . In applying such test, control is only one of many factors to be considered. The ultimate question is whether or not the relationship is of the type to be protected. This is a matter of fact, not terminology. [*Id.* (citation omitted)]

The issue presented in this tort case is whether one party should be held legally liable for the conduct of another. This question has nothing to do with “the administration of social legislation” intended to protect workers against the consequences of injury or unemployment. See *Kidder v Miller-Davis Co*, 455 Mich 25, 32-33; 564 NW2d 872 (1997). Accordingly, we detect no legal basis to apply an economic benefit analysis.

Moreover, we highlight that the control test and the economic reality test seek the answers to entirely different questions. The former identifies the party that should bear responsibility for an injury, while the latter asks whether an individual qualifies as an employee. “[T]he control test is not intended to be a definition of independent contractor status in the first place.” *Nichol*, 406 Mich at 297. Rather, it pertains to cases such as this, where an injured plaintiff seeks to hold a third party responsible for the tort of another.

### C. The Control Test Applied

We turn to our application of the control test, focusing on whether Memorial possessed a right to control relevant aspects of Chavez’s professional activities. We begin by acknowledging that in determining whether an agency relationship exists, “the manner in which the parties designate the relationship is not controlling, and if an act done by one person in behalf of another is in its essential nature one of agency, the one is the agent of such other notwithstanding he is not so called.” *Van Pelt v Paull*, 6 Mich App 618, 624; 150 NW2d 185 (1967), quoting 3 Am Jur 2d, Agency, § 21, p 430. We find the agreement informative, but not dispositive.

Nor are we persuaded that Memorial’s inability to control the mechanics of Chavez’s medical or surgical treatment of patients eliminates an agency relationship. Physicians must exercise independent professional judgments. The detailed, highly individualized nature of professional practice is simply inconsistent with control by a principal. We find analogous the work-place examples cited by Justice Smith in his *Powell* dissent:

[T]he control test reaches its lowest level of futility when it is employed in those cases in which no control is possible from the very nature of the work. . . . Thus laborers are employed to empty a carload of coal. The employer insists that he does not control them, that he did not hire their ‘services’ but only contracted for the ‘result’ of the empty car. The means of unloading, he says, are their own, *i.e.*, they can shovel right-handed or left-handed, start at one end of the car or the other. . . . Or a typist is employed to type mailing stickers from a list of customers. Again the employer argues that he has no control over the way the work is done, meaning, presumably, that the typist can type the letters of the words she must copy in any order she chooses. [*Powell*, 345 Mich at 472 (citations omitted).]

Justice Smith persuasively argued that an employer’s inability to control a worker’s every move hardly negates an employment relationship, and the same reasoning supports that Memorial’s inability to control Chavez’s exercise of medical or surgical discretion does not eliminate its potential liability under the respondeat superior doctrine.

Instead, we look to more meaningful indicia of control. No evidence supports that Memorial maintained any ability to control the pertinent aspects of Chavez's business or profession that it reasonably could have controlled. For example, Memorial imposed no limits on Chavez's ability to set his own practice hours or to practice at hospitals or locations other than Owosso. Chavez selected his own patients, and billed them according to his own dictates. Memorial paid the overhead for his office, equipment, staff and malpractice insurance. Aside from committing to treat a "reasonable" number of indigent patients, Chavez bore no obligation to treat patients referred to him by Memorial. The physician recruiting agreement contemplated that Chavez would run his medical practice autonomously, in the manner he saw fit.

Although Chavez agreed to repay at least some of any debt incurred, including for his overhead, through Memorial's salary advancement, this debtor-creditor arrangement has nothing to do with control. Nor do the other requirements of the agreement, likely also imposed on other physicians practicing at Memorial, establish a master/servant or principal/agent relationship. That Chavez must acquire and maintain hospital privileges and undertake on-call responsibilities in Memorial's emergency room simply does not equate with an ability to control his professional activities. The physician recruiting agreement controls neither Chavez's general professional performance nor his professional practice opportunities. Because the undisputed facts negate any evidence of Memorial's ability to control the relevant aspects of Chavez's medical practice, the circuit court correctly granted summary disposition to Memorial.

Affirmed.

/s/ Douglas B. Shapiro  
/s/ Elizabeth L. Gleicher  
/s/ Amy Ronayne Krause