RENDERED: August 29, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001637-MR

SHAWN SHOFNER and STEPHANIE SHOFNER,
Individually, and as the Administratrix
of the ESTATE OF JOEL SHOFNER — APPELLANTS

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE PAUL W. ROSENBLUM, JUDGE
ACTION NO. 96-CI-00044

BAPTIST HEALTHCARE AFFILIATES, INC.
d/b/a/ TRI-COUNTY BAPTIST HOSPITAL — APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART AND REMANDING

** ** ** ** **

BEFORE: BARBER, COMBS, and KNOPF, Judges.

COMBS, JUDGE. Shawn Shofner and his wife, Stephanie Shofner (in her individual capacity and as the administratrix of the estate of Joel Shofner), appeal from the summary judgment of the Oldham Circuit Court dismissing their negligence claim against the appellee, Baptist Healthcare Affiliates, d/b/a Tri-County Baptist Hospital (the hospital). The Shofners alleged that an emergency room doctor at the hospital, Dr. Richard Lawrence, was

negligent in diagnosing their son's condition and that the negligence resulted in his death. In granting summary judgment, the circuit court concluded as a matter of law that the doctor was an independent contractor and that, therefore, the hospital could not be liable under the doctrine of *respondeat superior*. After reviewing the record in a light most favorable to the Shofners as we must, we conclude that the trial court erred with respect to Dr. Lawrence's employment relationship with the hospital. We vacate and remand accordingly.

The litigation preceding this appeal consisted of a trial, a directed verdict, a previous appeal, a remand, and an entry of summary judgment. The facts involved a tragedy. On February 11, 1995, the Shofners took their six-week-old son, Joel, to the hospital. A nurse contacted Joel's primary care physician, Dr. Plavakeerthi Kemparajurs, and advised him that the child was crying continuously and was experiencing stiffening and rigidity. Dr. Kemparajurs, who had seen the child in his office the day before, refused to authorize payment of insurance for treatment of Joel by emergency room personnel. Nevertheless, Dr. Lawrence, who was on duty in the emergency room, examined Joel and diagnosed the child's problem as colic. Joel was not admitted to the hospital and was sent home. He died two days later from a seizure disorder.

The Shofners filed a wrongful death action against the hospital and Dr. Kemparajurs. Their claim against the hospital was predicated on the alleged negligence of both Dr. Lawrence and the triage nurse, Lavon Martin. Neither Ms. Martin nor Dr. Lawrence was named as a defendant in the lawsuit. Prior to trial, the hospital moved for partial summary judgment and argued that it was not vicariously liable for any alleged negligence of Dr. Lawrence. In support of its motion, it submitted a copy of its contract with Oldham Emergency Group, P.S.C., of which Dr. Lawrence was a member. The contract designated the group's doctors as independent contractors. However, the trial court found that the record did not contain sufficient evidence with respect to the doctor's relationship to the hospital to entitle the hospital to summary judgment at this juncture.

The matter was tried before a jury in September 1999. At the conclusion of the plaintiffs' case, the defendants moved for a directed verdict. The hospital's motion was based, in part, on its renewed assertion that Dr. Lawrence was not its agent. The Oldham Circuit Court directed a verdict for both the hospital and Dr. Kamparajurs, concluding that there was insufficient evidence of causation to submit the case to the jury but not addressing the issue of the doctor's status with respect to the principal/agency issue.

The Shofners appealed the dismissal of their complaint. On May 11, 2001, this Court affirmed the directed verdict in favor of Dr. Kemparajurs. It also affirmed the verdict in favor of the hospital on the issue of its liability for the actions of Ms. Martin.[1] However, this Court concluded that a jury question as to causation was presented because of Dr. Lawrence's failure either to conduct a thorough neurological evaluation of Joel or to address the cause of the child's seizure disorder. Thus, this Court reversed the judgment that had dismissed the Shofners' complaint against the hospital and remanded the case to the Oldham Circuit Court for a new trial. Because the trial court had not addressed the agency issue, this Court observed as follows:

> We express no opinion as to whether Baptist Hospital may be held liable in the event that a jury should find that Dr. Lawrence was negligent and that his negligence caused Joel's death. The issue of whether Dr. Lawrence was an independent contractor must first be addressed at the circuit court level on remand.

After this stage in the appellate process was completed, the hospital again moved for summary judgment, arguing as it had earlier that Dr. Lawrence was an independent contractor. Additionally, the hospital concluded that it could

[1] See, Shofner v. Kemparajurs, No. 1999-CA-002531-MR. Discretionary Review was denied by the Kentucky Supreme Court on February 13, 2002, No. 2001-SC-631-D and 2001-SC-642-D.

not be liable under a theory of apparent or ostensible agency because Stephanie Shofner had signed a form containing the following disclaimer:

> II. INDEPENDENT STATUS OF PHYSICIANS: The medical treatment rendered to the patient during his hospitalization will be provided by independent practitioners. They are not employees or agents of the Hospital. These independent practitioners may include, but are not limited to: anesthesiologist(s), cardiologist(s), pathologist(s), neurologist(s), emergency room physician(s) and other professionals. You will be billed separately for the services of these physicians or the bill you receive will include separate charges for their services. These charges are established by the physician.

In response, the Shofners contended that the contract's designation of the physician as an independent contractor was not dispositive. They cited several provisions in the contract giving the hospital control over Dr. Lawrence and asked the lower court to consider the totality and reality of the circumstances surrounding the relationship -- not merely the contractual recitals of the independent contractor status of the doctor. They also contended that the form required to be signed by Stephanie in order to obtain treatment for Joel should not bar them from relying on principles of apparent agency in seeking to hold the hospital liable for his death.

In the judgment from which the Shofners have appealed, the trial court relied on several provisions of the contract in concluding as a matter of law that Dr. Lawrence was acting as an independent contractor when he treated Joel. It specifically cited ¶7.1, which states the parties' intent that the members of the Oldham Emergency Group have independent contractor status. The court also cited several other provisions of the contract supporting the hospital's position:

> Under the Agreement, Tri-County was not authorized to control the medical judgment of the physicians. *See* Emergency Services Agreement, ¶7.3. The Oldham Emergency Group was responsible for patient billing and collections. *See* Emergency Services Agreement, ¶ 6.1. The Oldham Emergency Group was responsible for setting its fees for professional services provided by the physicians. *See* Emergency Services Agreements, ¶ 6.2. Under the Agreement, the Oldham Emergency Group was obligated to provide its own professional liability insurance. *See* ¶3.1. The Agreement terminated after one year. *See* Emergency Services Agreement, ¶6.2. The Agreement defined terms for early termination by the parties. *See* ¶¶ 5.2, 5.3, 5.4.
>
> The terms of the Agreement did not give Tri-County the right to control Dr. Lawrence. Any control over Dr. Lawrence was retained by the Oldham Emergency Group. It is clear from the terms of the Emergency Services Agreement between the Oldham Emergency Group and Tri-County that Dr. Lawrence, as well as any other physician provided by the Oldham Emergency Group was an independent contractor, not an agent of the hospital.

With respect to the Shofners' claim of apparent agency, the trial court concluded as follows:

> Under Kentucky law the fact that a patient reads and signs an admission form containing an Independent Contractor clause regarding medical personnel is determinative on the issue of ostensible agency. Floyd v. Humana of Virginia, Inc., Ky.App., 787 S.W.2d 267, 270 (1989). Even if a patient is unconscious at the time of admission, if the hospital has taken action to notify the public about the status of physicians, an apparent or ostensible agency is not created. Roberts v. Galen of Virginia, Inc., 111 F.3d 405, 413 (6th Cir. 1997) (*reversed on other grounds* by Roberts v. Galen of Virginia, Inc., 525 U.S.249 (1000). The test is not whether the patient read and signed the form containing the disclaimer, the test is whether the hospital took steps to notify the public about the status of the physicians.

On July 10, 2002, the trial court entered its final order dismissing the Shofners' complaint. This appeal followed.

In reviewing a summary judgment, our function is to determine whether the trial court was correct in ruling that there was no genuine issue of material fact and that the moving party was entitled to summary judgment as a matter of law. CR[2] 56.03; Scifries v. Kraft, Ky.App., 916 S.W.2d 799 (1996). Because the issue is one of law, we may not defer to the decision of the trial court. Goldsmith v. Allied Building Components, Ky., 833 S.W.2d 378, 381 (1992).

[2] Kentucky Rules of Civil Procedure.

The sole issue in this appeal concerns the agency issue: (1) whether the trial court correctly concluded that there was no genuine issue of material fact with respect to Dr. Lawrence's relationship to the hospital and (2) whether the hospital established his relationship as an independent contractor "with such clarity that there is no room left for controversy." Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 482 (1991).

The Kentucky Supreme Court recently re-stated the many factors (indeed, matters of fact) to be considered in determining whether an individual is an employee or an independent contractor. Kentucky Unemployment Insurance Commission v. Landmark Community Newspapers of Kentucky, Inc., Ky., 91 S.W.3d 575 (2002).

> In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among other, are considered:
>
> (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. (Emphasis added.)

Id. at 579. In applying these factors, the Court emphasized that no single factor is determinative and that every case "needs to be resolved on its own facts." Id. at 580.

The trial court's opinion recounts evidence relevant to several of the factors in the employee *versus* independent contractor debate. However, the record also contains other evidence that supports the Shofners' argument that the hospital retained enough control over Dr. Lawrence to raise a question of fact as to his possible status as an agent or servant. Although the trial court believed that the agreement did not give the hospital any control over Dr. Lawrence, a close examination of the agreement reveals the contrary: that in fact the hospital

exerted significant control over Dr. Lawrence. Examples include a lengthy list:

(1) the PSC was required to obtain the hospital's written approval before assigning Dr. Lawrence to work in the emergency department in the first instance (¶1.2);

(2) the hospital determined the number of hours Dr. Lawrence might work in any given day (¶1.2);

(3) the hospital provided all the supplies, equipment, and technical and other non-professional assistance to the doctor (¶4.1);

(4) the hospital had final approval over the amount of fees charged by Dr. Lawrence (¶6.2);

(5) the hospital maintained control over all medical records generated by Dr. Lawrence (¶10.1);

(6) the hospital had the ultimate authority to terminate Dr. Lawrence's relationship with the hospital (¶1.3);

(7) the hospital had the right to demand Dr. Lawrence's participation in non-patient care events designed "to promote community education, support or involvement" (¶1.4).

While the trial court correctly determined that some of the terms of the agreement revealed an intent to create a independent contractor relationship between the parties, the factors upon which it relied were not dispositive under

Landmark, at 581. In addition to the provisions of the agreement cited by the court, others underscored by the appellants indicate an attempt by the hospital to circumvent the doctrine of *respondeat superior* while actually enjoying the benefits of an employer/employee relationship. Particularly significant is the fact that the hospital -- not the Oldham Emergency Group -- had the ultimate control over Dr. Lawrence's ability to practice medicine at the hospital.

A careful review of the evidence reveals facts that could arguably support an ambivalent finding that Dr. Lawrence could have been acting either as an independent contractor or as a servant of the hospital when he treated Joel. We conclude that the hospital exerted sufficient control over the methods and materials used by the doctor to raise a question about his status. Therefore, the court erred in entering a summary judgment in favor of the hospital on this disputed issue of an agency or employment relationship.

The Shofners also contest the court's ruling that they were barred as a matter of law from asserting a claim based on the apparent agency as announced in Paintsville Hospital Company v. Rose, Ky., 683 S.w.2d 255 (1985). We disagree and conclude that the trial court properly resolved the issue. Kentucky law consistently holds that an attempt by a hospital to disclaim an agency relationship and to notify the public (by means of the

very kind of form signed by Stephanie Shofner) suffices to defeat apparent or ostensible agency. This Court summarized the current state of the law on this point in Floyd v. Humana of Virginia, Inc., Ky.App., 787 S.W.2d 267, 270 (1989):

> [W]e find the testimony of the appellant admitting that she had read and signed each of the admission forms to Humana of Virginia Hospital, Inc. d/b/a Humana Hospital University, which indicates her knowledge that the doctors were independent contractors and not agents of the hospital, to be determinative in this case. (Emphasis added).

Next, the Shofners argue that the hospital has a non-delegable duty to provide emergency care at its facility -- one that may not be satisfied by hiring independent contractors. The hospital correctly argues that this issue was not raised in the trial court. As it has not been properly preserved for our review, we may not address it. Regional Jail Authority v. Tackett, Ky., 770 S.W.2d 255 (1989).

Finally, the appellants contend that the hospital waived the right to assert the status of Dr. Lawrence as a defense to its negligence claims. They note that the hospital did not file a protective cross-appeal from the earlier judgment in which a directed verdict had been entered it its favor. Appellants contend that the law-of-the-case doctrine barred relitigating the agency issue on remand. We disagree. The law

of this case is contained in this Court's previous opinion, which directed the trial court to address this very agency issue on remand.

In summary, we hold that there is a question of fact as to whether Dr. Lawrence was acting as the actual agent of the hospital with respect to the Shofners' claims of medical negligence. The judgment is vacated on this issue alone and is remanded for further proceedings consistent with this opinion.

BARBER, JUDGE, CONCURS.

KNOPF, JUDGE, DISSENTS.

KNOPF, JUDGE, DISSENTING OPINION: Respectfully, I dissent. I agree with the trial court that Shofner has failed to establish a genuine issue of fact as to whether Dr. Lawrence was an employee of the hospital as opposed to an independent contractor. Summary judgment for the hospital was therefore proper. The contract between the hospital and Oldham Emergency Group, P.S.C. leaves no doubt that the parties' intended to create an independent-contractor relationship. In my judgment, furthermore, the mere fact that under the contract the hospital retains administrative control of its emergency room does not permit a finding that, contrary to the parties' intentions and contrary to the general independence of physicians, the hospital

exerted an employer's control over Dr. Lawrence's practice of medicine.

Whether a hospital should be deemed vicariously liable for negligent emergency-room services regardless of its employment relationship with the negligent doctor is an interesting question.[3] But, as the majority notes, that question is not presently before us. Our inability to reach that question, however, does not justify a departure from well established principles of agency law. Because I believe the majority's result to be such a departure, I must respectfully dissent.

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ORAL ARGUMENT FOR APPELLANTS:

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ORAL ARGUMENT FOR APPELLEE:

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[3] Schiavone v. Victory Memorial Hospital, 738 N.Y.S.2d 87 (2002); Simmons v. Tuomey Regional Medical Center, 341 S.C. 32, 533 S.E.2d 312 (2000).