IN THE COURT OF APPEALS
FOR THE STATE OF GEORGIA

No. A25A0867

KELLY SCHRIVER, Individually and as Surviving Spouse and Next Friend of BRIAN SCHRIVER, Deceased,

Plaintiff/Appellant

v.

NORTH FULTON EMERGENCY PHYSICIANS, LLC,

Defendant/Appellee

BRIEF OF APPELLANT

STEPHEN G. LOWRY
Georgia Bar No. 460289
CAITLYN B. CLARK
Georgia Bar No. 293413
HARRIS LOWRY MANTON LLP
410 E. Broughton Street
Savannah, Georgia 31401
Telephone: (912) 651-9967
Facsimile: (912) 651-1276

Counsel for Plaintiff/Appellant

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves the tragic and avoidable death of Brian Schriver, a 43-year-old husband and father of three, who presented at WellStar Emergency Department on June 3, 2018, with persistent chest pain. At the Emergency Department, Brian was seen by Dr. Magdeline Holliger who ignored the clear signs of a major cardiovascular event and discharged Brian home after just two hours. Less than 24 hours after Dr. Holliger discharged him from the hospital, Brian Schriver collapsed at home and died of atherosclerotic coronary artery disease.

Kelly Schriver, the surviving spouse of Brian Schriver, filed this action for damages with claims for professional negligence arising from Dr. Holliger's care and treatment of her husband on June 3, 2018, and his subsequent death. Appellant also brought this action against North Fulton Emergency Physicians, LLC (hereinafter referred to as "NFEP") as Defendant Holliger was acting as an employee or agent of NFEP at the time of her care and treatment of Brian Schriver. NFEP controlled her time, manner, and method of performing her services as an Emergency Department Physician on June 3, 2018. Therefore, NFEP is liable for Dr. Holliger's negligence under a theory of *respondeat superior*. Subsequently, NFEP filed a Motion for Summary Judgment denying any vicarious liability for the negligence of Dr. Holliger. Thereafter, the trial court erroneously granted NFEP's Motion.

In granting summary judgment, the trial court improperly weighed the evidence, ignored material facts, and made finding of facts. Further, the trial court relied on an inapplicable legal presumption and granted summary judgment in reliance on such legal presumption. As such, this Court must reverse the Trial Court's order.

STATEMENT OF FACTS AND COURSE OF PROCEEDINGS

Defendant Dr. Holliger committed medical negligence during the care and treatment of Brian Schriver in the WellStar North Fulton Emergency department on June 3, 2018. Dr. Holliger ignored the signs of an incoming major cardiovascular event and negligently discharged Brain Schriver home without the proper testing and observation necessary based on his presentation. As a result of her negligence, Brian collapsed and died less than 24 hours later of atherosclerotic coronary artery disease.

During her care and treatment of Brian Schriver, Defendant Holliger was acting as an employee or agent of Defendant NFEP and, therefore, NFEP is liable for Dr. Holliger's negligence under a theory of *respondeat superior*. In their Motion for Summary Judgment, NFEP denied any vicarious liability for the alleged negligence of Dr. Holliger claiming that she was an independent contractor and not an employee or agent. (V5 - 2351). However, there are numerous factual disputes as

to whether Dr. Holliger was an independent contractor or employee which create a question of fact to be properly determined by the jury.

A. Dr. Holliger's Relationship with NFEP:

NFEP is a physician practice group and is subsidiary of ApolloMD Business Services, Inc. (V7 – 3184-3185).[1] In 2016, ApolloMD Business Services, through its subsidiary Complete Health Services, LLC, contracted with WellStar Health System, Inc. to exclusively provide physicians from NFEP to staff Wellstar's emergency room. (V6 – 2460-2461). In essence, every emergency room physician practicing at WellStar Hospital, was hired by NFEP to do so.

In 2017, NFEP contracted Dr. Holliger to provide emergency medicine services at WellStar Hospital. (V6 - 2495). However, Dr. Holliger and NFEP's relationship goes beyond even employment. Dr. Holliger became a part owner in Apollo MD and, therefore, NFEP as a part of ApolloMD. (V7 – 3151). Specifically, ApolloMD's corporate representative, Stephen Ryan, testified that ApolloMD, provides physicians, and specifically Dr. Holliger, the opportunity to invest in the business and become stakeholders "so they would feel they had some skin in the game to do a good job and do it efficiently." (V7 - 3148). Through her employment with

[1] ApolloMD maintains a large business structure representing an "integrated health function." (V7 – 3145-3146). ApolloMD Business Services, LLC is the parent company of multiple intertwined businesses including NFEP which is owned by Atlanta Telemed, LLC, another subsidiary of ApolloMD Business Services Inc. (V7 – 3152-3153). Additionally, ApolloMD Partners, Inc. (formerly known as, and now merged with, ApolloMD Physician Partners, inc.) exists through the ApolloMD structure to provide physicians an opportunity to invest in their practice groups. (V7 – 3149-3150).

ApolloMD and its subsidiary, NFEP, Dr. Holliger became an investor and owner in this business from 2014-2021. (V7 - 3151). Specifically, through her employment with NFEP, Dr. Holliger became a stakeholder in ApolloMD Partners, Inc. and, as such, a stakeholder in the success of its subsidiary NFEP. (V7 - 3148). Through Dr. Holliger's investment she became a part owner of this business structure and subsequently a part owner in NFEP from 2014-2021. (V7 - 3151).

Notably, all four entities – ApolloMD Business Services, Inc., Atlanta Telemed, LLC, NFEP, and ApolloMD Physician Partners, Inc. – are registered with the secretary of state as having the same principal place of business. (V6 – 2504-2510). This is because each entity is so closely intertwined that they effectively operate as the same company. Accordingly, Dr. Holliger held part ownership in NFEP.

Furthermore, according to Dr. Holliger, her employer in 2018 was NFEP. During her deposition Dr. Holliger testified as follows:

> Q: In June of 2018, who was your employer?
> A: ApolloMD
> Q: Is that also known as North Fulton Emergency Physicians, LLC?
> A: Yes, it is.

(V7 - 2870).

Dr. Holliger did not say she was self-employed, an independent contractor, or worked for any other entities. In fact, she stated she worked exclusively for NFEP or ApolloMD from 1999 until December of 2019. (V7 - 2914).

B. Dr. Holliger's Contractual Agreement with NFEP:

Dr. Holliger signed a contract with NFEP to work at WellStar in July of 2017. (V6 – 2495). Although the title of such contract is "Physician Independent Contractor Agreement", the terms of their agreement do not support such an assertion. (*Id.*). For instance, the contract requires that Dr. Holliger abide by the hospital bylaws, rules, and regulations for membership on the medical staff. (V7 – 2496). It requires she observe standards including those set by the hospital and included in the contract between the practice group and the hospital. (*Id.*). She was required to work six to eight shifts a month or two weekends. (V7 – 2873) Dr. Holliger was required to see whichever patient the hospital assigned to her. (V6 – 2495). Further, her contract required her to perform physician services as opposed to tasks. (*Id.*). Her contract lays out the details of her employment with NFEP.

C. NFEP's Inspection of Dr. Holliger's Medical Care:

Under her contract, NFEP retained the right to inspect Dr. Holliger's medical care. (V6- 2496). Dr. Holliger was required to consent to quality measures including Physician Quality Reporting System, a merit-based incentive payment system, and similar government-based programs. (*Id.*). Further Dr. Holliger was required to participate in reviews of her work in order to control costs and ensure quality of her work:

> The Physician agrees and intends to provide physician services as part of a qualified clinically-integrated joint arrangement. As part of this

> arrangement, the Physician will participate in active and ongoing programs to evaluate and modify practice patterns of, and create a high degree of interdependence and cooperation among, the Physicians who participate in the arrangement, in order to control costs and ensure the quality of service provided through the arrangement. The Physician expressly warrants that any agreement concerning reimbursement or other terms and conditions entered into or within via this arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement.
> (V6 - 2500).

NFEP's control over Dr. Holliger's work was not only required by the contract but enforced through adjustments to her pay. (V7 - 3154). Specifically, under this "performance-based emergency medicine compensation structure," Dr. Holliger's performance was reviewed by the medical director who was employed by NFEP, Dr. Malcom. (V7 – 3198). The medical director retained the right to oversee Dr. Holliger's patient experience problems including patient satisfaction and outcomes; her politeness and cooperation with team members; peer reviews of her patient care and treatment; and how long her patients were there and how long they waited on imaging. (V7 – 3157). Based on this review, the medical director made recommendations to NFEP and ApolloMD to adjust Dr. Holliger's pay accordingly. (V7 – 3198). Dr. Holliger was required to adjust her treatment of patients or take a deduction in pay if she did not perform to the satisfaction of the medical director.

Dr. Holliger's pay was then based on an hourly wage and accounting of CPT codes in addition to these quality criteria. (V7 - 3155). As such, NFEP handles all

billing and collections for Dr. Holliger's care of her patients and all compensation belonged to the practice group, not Dr. Holliger. (V7 – 3169-3171).

D. NFEP Supplied Medical Equipment to Dr. Holliger:

The medical equipment used by Dr. Holliger was supplied by WellStar and NFEP. NFEP contracted with WellStar to provide NFEP's physicians with equipment at the hospital. (V6 – 2467). The agreement states that WellStar will furnish the supplies, utilities, telephone for work at the hospital. (*Id*.). In addition, NFEP is to be involved in all decisions regarding "major equipment acquisitions." (*Id*.). NFEP also contracted to have the right to provide input into what supplies will be provided, what supplies will be kept at the hospital, whether or not there should be new equipment, etc. (*Id*.). Dr. Holliger did not bring any medical equipment with herself to work. She performed her services with equipment bought and paid for by another entity including NFEP.

E. Scheduling:

In their summary judgment motion, NFEP, claims that Dr. Holliger chose when she worked. However, this is inaccurate. Physicians were allowed to request dates which they preferred to work, but throughout this five-year litigation there has been no evidence to suggest that NFEP was required to adhere to such requests or that such requests were always granted. (V7 – 3184-3185). While she was allowed to request dates, all shifts were at set times, and the final schedule was compiled and

set by NFEP based on others' requests and necessity to fill the schedule. (V7 – 2920-2921). Physicians were not allowed to change the schedules and were required to comply once set. (V6 – 2495). Dr. Holliger was required to work six to eight shifts a month or two weekends, and NFEP would put her on the schedule accordingly. (V7 – 2873). Under her contract, Dr. Holliger agreed to make herself available to work an additional two extra shifts per month at the request of NFEP. (V6 – 2495). Essentially, Dr. Holliger was allowed to request dates she would prefer to work, however, this was mere preference as she had no control over the final scheduling which was set by NFEP.

Dr. Holliger practiced medicine exclusively at WellStar and was employed exclusively by NFEP. She testified at her deposition that NFEP was her only employer from 1999 until December of 2019. (V7 – 2914).

F. Billing:

Pursuant to her contract with NFEP, all of Dr. Holliger's invoices, billing records and medical records are the property of NFEP. (V6 – 2496-2497). Additionally, NFEP, through Apollo MD Business Services, handled all collections and payment of the providers. (V7 – 3166-3169). From those collections, the group paid any additional expenses of the business and carrying out of the contract with WellStar Hospital. (V7 – 3169-3170).

G. Expenses and Liability Insurance:

The contract further provided that NFEP would, at all times, pay for and provide Dr. Holliger's professional liability insurance covering her work through her employment with the practice group. (V6 - 2499).

H. Procedural History:

This case was filed April 2, 2020, and named as defendants, WellStar North Fulton Hospital, Inc., Dr. Magdalen Holliger, and North Fulton Emergency Physicians, LLC. (V2 – 7). Defendants Dr. Holliger and WellStar North Fulton Hospital, Inc. have been dismissed from this action and the one remaining defendant is NFEP. (V6 – 2538).

Appellant/Plaintiff alleged in her Complaint that Dr. Holliger was an employee of NFEP and, therefore, defendant NFEP is vicariously liable for Dr. Holliger's medical negligence under a theory of *respondent superior*. (V2 – 7). Defendant NFEP filed a Motion for Summary Judgment claiming that Dr. Holliger was an independent contractor and NFEP could not be found liable for her negligence. (V5 – 2347). A hearing was held by the trial court on April 18, 2024. (V9 - 1). On May 20, 2024, the trial court improperly and erroneously granted summary judgment to NFEP while relying on its own findings of fact. (V6 – 2734).

Dr. Holliger's personal ownership in NFEP, the terms of her contract, and her testimony create issues of fact as to whether Dr. Holliger was an agent/employee of

NFEP that must be decided by a jury. Specifically issues of material fact remain as to whether NFEP retained control over Dr. Holliger's work. Therefore, summary judgment is inappropriate, and this case should be remanded.

ENUMERATION OF ERRORS

I. The trial court erred in relying on an inapplicable presumption established by O.C.G.A. § 51-2-5.1 which applies only to doctors employed by hospitals.

II. The trial court erred in granting summary judgment, where the parties have agreed that genuine issues of material fact are in dispute and the court made important errors of law.

III. The trial court erred in making findings of fact and assigning weight to such facts at the summary judgment phase.

STATEMENT OF JURISDICTION

Jurisdiction exists over this direct appeal because the trial court granted summary judgment as to all claims against Appellee North Fulton Emergency Physicians, LLC, O.C.G.A. § 9-11-56(h), and because the issues raised are not matters within the exclusive jurisdiction of the Georgia Supreme Court, Ga. Const. Art. VI. §5, ¶ 3 & Art. VI, § 6, ¶ 2.

STANDARD OF REVIEW

On appeal of a grant of summary judgment, this Court reviews the evidence *de novo*. *Rubin v. Cello Corp.*, 235 Ga. App. 250, 250-51 (1998). Conclusions of law also are reviewed *de novo.*

In order to prevail on a motion for summary judgment under O.C.G.A. § 9-11-56, the moving party must show that there exists no genuine issue of material fact, and that the undisputed facts, viewed in the light most favorable to the nonmoving party, demand judgment as a matter of law." *Benton v. Benton*, 280 Ga. 468, 470 (2006). "The movant has this burden even as to issues upon which the opposing party would have the trial burden." *Williams v. Chick-fil-A, Inc.*, 274 Ga. App. 169, 169 (2005). The moving party "must demonstrate by reference to evidence in the record that there is an absence of evidence to support at least one essential element of the non-moving party's case." *BBB Serv. Co., Inc. v. Glass,* 228 Ga. App. 423, 436 (1997).

In considering a motion for summary judgment, "a court must give the opposing party the benefit of all reasonable doubt, and the evidence and all inferences and conclusions therefrom must be construed most favorably toward the party opposing the motion." *Mason v. Chateau Cmtys., Inc.*, 280 Ga. App. 106, 106-107 (2006). "In other words, summary judgment is appropriate when the court, viewing all the facts and reasonable inferences from those facts ***in a light most***

favorable to the non-moving party, concludes that the evidence does not create a triable issue as to each essential element of the case." *Id*. (emphasis added).

ARGUMENT AND CITATION OF AUTHORITIES

I. There is no applicable legal presumption created by Dr. Holliger's employment contract with NFEP as O.C.G.A. § 51-2-5.1(g) applies only to hospitals, not practice groups.

As an initial matter, the trial court grossly misinterpreted *Miller v. Polk* when relying on a legal presumption that Dr. Holliger was an Independent Contractor based on language in her contract with NFEP. 363 Ga. App. 171 (2022). The trial court quoted *Miller* holding, "[w]here, as here, the contract of employment clearly denominates the other party as an independent contractor, the relationship is presumed to be true unless the evidence shows that the employer assumed the right to control the time, manner and method of executing the work." 363 Ga. App. at 775-776; *citing Lopez v. El Palmar Taxi*, 297 Ga. App. 121, 123 (2009). (V6 – 2737). This language cited in *Miller,* and subsequently cited by the trial court, tracks the language in O.C.G.A § 51-2-5.1(f). However, the trial court and all parties have correctly agreed O.C.G.A. 51-2-5.1(f) does not apply to this case because the defendant is not a hospital. (V6 – 2737; V6 – 2540). Specifically, the trial court held that, "[b]ecause NFEP is not a hospital, O.C.G.A 51-2-5.1(f), enacted in 2005, is not applicable." (V6 – 2737). As stated by both parties and trial court, this case does not

involve a hospital. Therefore, the legal presumption created by O.C.G.A. 51-2-5.1(f) and applied in *Miller* does not apply to the present case.

Instead, Georgia law is clear that merely labeling an individual an independent contractor in an agreement does not determine the employment status of such person and other factors may negate the contract label. *See Doctors Hospital of Augusta v. Bonner*, 195 Ga. App. 152, 163 (1990) ("Such labeling [as an independent contractor] in a contract is not determinative of the status of any such person and other factors may negate the label"); *See also Lee v. Satilla Health Servs., 220 Ga. App. 885 (1996)* ("the concern is with essence, not nomenclature"). Because there is no legal presumption based on the contract, the trial court was required to look exclusively at the terms of the contract to determine the kind of employment relationship implied. Unfortunately, the trial court instead relied on an inapplicable legal presumption. (V6 – 2743). Such oversight by the trial court must be corrected and summary judgment reversed**.**

II. The Trial Court Erred in Granting Summary Judgment to NFEP Under the Factors Established by This Court in *Lee* and *Cooper.*

Questions regarding whether an individual is acting as an employee or agent, thus subjecting her employer to vicarious liability, is a question of fact to be determined by a jury. *See Hooters of Augusta v. Nicholson*, 245 Ga. App. 363, 367 (2000). Under Georgia law, an employer is liable for the negligent acts of its employees when that negligence occurs within the course and scope of the

employment. *Piedmont Hosp., Inc. v. Palladino*, 276 Ga. 612, 613 (2003). For a master to be held vicariously liable for the actions of its servant under O.C.G.A. § 51-2-2, the master must retain the right to control the time, manner, and method of the servant's work. *Bonner,* 195 Ga. App. at 162.

The appropriate question for the trial court is whether an issue of fact exists as to whether NFEP had the right to control the time, manner, and method of Dr. Holliger's work. *See Lee v. Satilla Health Servs*., 220 Ga. App. 885, 886-887 (1996); *Cooper v. Binion*, 266 Ga. App. 709, 710-711 (2004). In *Lee* and *Cooper*, this Court outlined several factors that indicate control of physicians by another entity. *Lee*, 220 Ga. App. at 886-887; *Cooper*, 266 Ga. App. at 710-711. These factors include: (1) whether the contract is to perform a service rather than accomplish a task; (2) the right of the practice group to inspect the physician's work; (3) the right of the practice group to direct the physician's work step by step; (4) the supplier of the equipment; (5) the nature or skill of the physician's work; (6) the practice group's right to control the physician's time; (7) the method in which the physician is paid; (8) the right to choose which patients to treat; (9) whether the physician spends all working hours at the hospital; (10) the method of billing the patients; and (11) payments for medical malpractice insurance. *Id.* While *Lee and Cooper* were superseded by O.C.G.A. § 51-2-5.1 (f-g) as to hospitals, these factors still apply to the present case as the claims

involve a practice group, not a hospital as addressed in the statute. *Barney v. Peters*, No. CV420-173, 2022 WL 18673310, at n. 4 (S.D. Ga. Dec. 15, 2022).[2]

Instead of considering the factors which this Court has mandated, the trial court made its own findings of fact in favor of NFEP and concluded that Dr. Holliger was an independent contractor. (V6 – 2743). Such a determination properly lies within the purview of the jury. *Nicholson*, 245 Ga. App. at 367. The trial court's inappropriate weighing of evidence and reliance on its own findings of fact at the summary judgment stage was error and must be reversed.

A. Genuine Dispute of Material Fact Exists Regarding Whether NFEP Controlled the Time, Manner, and Method of Dr. Holliger's work.

The trial court improperly concluded that the "record evidence does not show that NFEP assumed the right to control the time, manner and method of executing the work performed by Holliger and instead establishes that Holliger was an independent contractor for NFEP." (V6 – 2743). However, the trial court overlooked material facts; failed to view the evidence in the light most favorable to Ms. Schriver; and weighed the evidence rather than simply looking for the absence of evidence as required at the summary judgment determination. *BBB Serv. Co., Inc. v. Glass,* 228 Ga. App. 423, 436 (1997).

[2] While this is a District Court case, it is still persuasive as the exact issue addressed in the present case was decided by the Southern District of Georgia.

The question of whether an individual is acting as an employee or agent and within the scope of such employment, thus subjecting her employer to vicarious liability, is a question of fact which is to be determined by a jury. See *Hooters of Augusta v. Nicholson*, 245 Ga. App. 363, 367 (2000) ("questions of fact regarding whether an individual is an independent contractor presents a jury question"). In order to grant a summary judgment motion, the evidence *must* "conclusively establish" whether the doctor was an independent contractor or employee. See *Lee v. Satilla Health Servs*., 220 Ga. App. 885, 887 (1996).

It cannot be understated that the facts of the present case do not conclusively establish whether Dr. Holliger was an independent contractor or employee. This is particularly so when viewing the evidence in the light most favorable to Plaintiff. This fact alone should preclude summary judgment. *Lee*, 220 Ga. App. at 887. This Court held in *Lee* that summary judgment was inappropriate when four factors conclusively weighed in favor of independent contractor, two weighed in favor of employee, and one presented with a genuine dispute of material fact. *See generally, Id.* Here, out of the eleven factors which must be considered, there is sufficient evidence to find that at least nine of the factors weigh in favor of Dr. Holliger being an employee or agent of NFEP. In fact, as discussed below, NFEP has even agreed that at least three have factual findings which weigh in favor of Dr. Holliger being an employee. (V9 – 11:21-25; 12:16-21; 13:3-4).

1) NFEP contracted Dr. Holliger to perform a service rather than accomplish a task:

This Court has previously held that contracts to perform a service are more indicative of an employee-employer relationship while contracts to perform tasks are more indicative of an independent contractor relationship. *Cooper v. Binion*, 266 Ga. App. 709, 711 (2004). Dr. Holliger's contract with NFEP provides that NFEP will provide emergency medicine services to hospitals and Dr. Holliger "desires to provide such services." (V6 - 2495). Not only does the contract at issue expressly state this, but during the underlying hearing counsel for NFEP admitted that there is a genuine dispute about this factor, and that this factor "***cuts both ways***" (V9 - 11:24-25). Dr. Holliger was contracted by NFEP to provide emergency medicine services on behalf of NFEP at WellStar hospital.

While the trial court also acknowledged that Dr. Holliger's contract with NFEP was for services, it instead made its own factual finding that Dr. Holliger performed services for WellStar instead of NFEP stating: "this factor would weigh toward finding that Holliger was an employee of WellStar." (V6 - 2843). This analysis grossly ignores the burden of the evidence at the summary judgment phase. The trial court went so far as to ignore evidence which supports Appellant's position and, moreover, a concession from defense counsel that there is a dispute on these material facts.

Furthermore, the trial court misinterpreted Dr. Holliger's contract. The trial court held "Holliger was not contracted by NFEP to provide services on behalf of NFEP but to provide services on behalf of WellStar." (V6 – 2843). This is incorrect. The contract expressly states, "Contractor shall provide professional services in the specialties of emergency medicine, anesthesia medicine and or hospital medicine to those hospital departments specific on service schedule." (V6 – 2495-2496). Dr. Holliger was contracted to perform services at WellStar on behalf of NFEP. NFEP was the entity which benefited from Dr. Holliger's work. Likewise, NFEP was the entity who billed the patients that received services from Dr. Holliger and NFEP paid her based on the services she provided, not WellStar. (V6 – 2495; V7 - 3166-3169). The mere fact that the services were performed at a WellStar campus cannot completely negate the benefit conferred on NFEP by Dr. Holliger's contract for services.

Even so, the trial court points to the fact that Dr. Holliger's pay was in part dependent on billing codes for certain services performed at the hospital. (V6 – 2843). The mere fact that she got paid based on codes for specific services provided has very little bearing because emergency medicine is by nature practiced in an evolving way. Presumably, Dr. Holliger would not practice medicine in a certain way so as to only meet these codes. Dr. Holliger was hired to perform a service of seeing all patients who arrived and were assigned to her in the WellStar Emergency

Department who paid NFEP to staff them. For this reason, WellStar contracted with and paid Dr. Holliger's employer, NFEP, to staff their Emergency Department

Overall, Dr. Holliger's contract clearly stated that she was to perform professional ***services* for NFEP**. (V6 – 2495-2496). NFEP was the beneficiary of such services. Most decidedly, both parties agree there is a dispute regarding this factor. (V9 - 11:24-25). Therefore, this factor weighs in favor of and employer-employee relationship. However, any dispute is undoubtedly a question for the jury.

2) The right of NFEP to inspect Dr. Holliger's work:

The trial court agrees that NFEP maintained the right to inspect Dr. Holliger's work. (V6 - 2843). This fact weighs in favor of an employee relationship, yet the trial court still granted summary judgment finding that she was conclusively an Independent Contractor. (V6 – 2847). Dr. Holliger's contract with NFEP contained a quality control provision in which NFEP held, and exercised, the right to reduce Dr. Holliger's pay based on the way she performed her job. (V6 – 2500). NFEP would inspect her work on a multitude of factors such as patient satisfaction outcomes, Dr. Holliger's politeness and cooperation with team members, peer reviews of her patient care, how long her patients were at the hospital, how they weighed in on imaging, and the overall the quality of her care. (V7 – 3157). Based on their oversight of her work, NFEP held the right to reduce Dr. Hollinger's pay based on her performance. (V6 – 2500). Here, the trial court held that "a mere right

to review work already performed does not equate to a right to control the time, manner and method and means of performing the work." (V6 – 2843). However, the trial court left out an important fact in such an analysis – the fact that NFEP will reduce her pay based on their inspections. (V6 – 2500). This ability incentivized Dr. Holliger to maintain a standard created by NFEP for how she practiced medicine in anticipation of their review and possible punishment through withheld pay. Thereby, NFEP controlled her practice, and her services provided. NFEP created a standard for which they want their physicians to practice, and they forced their physicians, including Dr. Holliger, to modify their practice to adhere to NFEP's standards by deducting their pay. A policy in which a company may inspect work of a physician then deduct pay if the physician is not performing the way the company instructs them to is strong evidence of control.

Additionally, NFEP created a policy that incentivizes employees to get patients in and out of the hospital as quickly as possible so that the physician will get better pay and NFEP can bill for more patient services. This policy created by NFEP likely even contributed to the medical negligence giving rise to this case. Specifically, Brian Schriver was rushed out of the hospital in the face of his presenting signs of a major cardiovascular event. He was discharged in under two hours without running necessary tests such as serial blood work, including troponin and creatine kinase sets, and serial EKGs. This is a true example of why companies

are subject to vicarious liability, and why a jury should be afforded the opportunity to decide whether NFEP is vicariously liable where it maintained such control over Dr. Holliger's medical services rendered to Brian Schriver on June 3, 2018.

3) The right of the NFEP to direct Dr. Holliger's work step by step:

NFEP required Dr. Holliger to follow all WellStar rules and regulations based on NFEP's own contract and agreements with WellStar. (V6 – 2462, 2496). NFEP required that Dr. Holliger abide by hospital bylaws and rules and regulations for membership on the medical staff. (V6 – 2495-2496). NFEP required that she observe standards including those set by the hospital and which had been included in the contract between the practice group and the hospital. (*Id.*). Under this contract, Dr. Holliger was not only required to comply with the bylaws and rules and regulations of the hospital, but the policies and procedures set by the hospital. (V6 – 2462). As such, this factor, at the very least, has material facts in dispute as to whether Dr. Holliger was an employee of NFEP.

4) NFEP supplied equipment to Dr. Holliger:

When the hospital supplies the equipment instead of the physician, this will point in favor of an employer-employee relationship. *Lee* 220 Ga. App. at 885. Here, NFEP took it upon themselves to contract with WellStar in order to supply equipment. (V6 – 2467). Dr. Holliger did not bring her own equipment in order to complete her work. (V7 – 2922). The supplies, utilities, and telephone were furnished to Dr. Holliger for her work at the hospital. In addition, NFEP retained the

right to be involved in all decisions regarding the purchase of major equipment which were to be supplied to the physicians. (V6 – 2467). NFEP also retained the right to have input into what supplies would be provided, what supplies would be kept at the hospital, and whether or not there should be new equipment, etc. (*Id*.). Notably, Dr. Holliger did not have such a right or input. NFEP contracted for supplies to be present at WellStar for their employed physicians, including Dr. Holliger, to use. (*Id*.).

Under this factor, the trial court improperly held that this factor is unhelpful in its analysis because in modern medicine, the hospital must provide equipment. (V6 – 2843). As an initial matter, this is not always true. Even so, the trial court fails to recognize what this contracting agreement for supplies displays about the nature of the relationship between the parties. We agree in modern medicine it is unrealistic for an emergency room doctor to bring their own EKG machine, however, contracting for machinery their doctors would need, is providing equipment in an Emergency Room setting. This simply shows that NFEP contracted for its employees to have the tools needed to complete the service they had been hired to do. Thus, indicating an employer-employee relationship again.

5) <u>The nature or skill of Dr. Holliger's work:</u>

Under the *Cooper* analysis, "the more skilled an employee, the more likely he is an independent contractor." *Cooper*, 266 Ga. App. at 711. Dr. Holliger is a

physician, as such, Appellant concedes that this factor weighs in favor of an independent contractor relationship.

6) NFEP's had the right to control Dr. Holliger's time and exercised such right:

When a practice group has the right to control the physician's time, such right is evidence of control and thus the physician being an employee. "Where the defendant requires the physician to work certain hours or arranges the physician's schedule, this factor shows that the physician is an employee and may along preclude summary judgment." *Cooper,* 266 Ga. App. at 711-12.

NFEP built Dr. Holliger's schedule every single month, and she was required to show up to those set shifts. (V7 – 2920; V6 – 2495). Dr. Holliger testified that she was required to work six to eight shifts per month. (V7 – 2873). NFEP required that she work two weekend shifts as well. (V6 – 2495). All of her scheduled shifts were at set times, and she did not have a right to change the times of the shifts. (V7 – 2922). While the contract says Dr. Holliger could put in requests for certain days, no evidence exists that NFEP was ever required to honor such requests or that they ever did. (V7 – 2920). In fact, NFEP's corporate representative testified that if there were unfilled shifts, NFEP's medical director was expected to push the physicians to fill those slots. (V7 – 3214).

Instead, the trial court focused on the exception to the rule, which is only applicable when the physician has the right to designate what hours they are willing

to work, and the practice group **must** respect that designation. *Cooper*, 266 Ga. App. at 711; (V6 – 2834). Such exception is inapplicable to the present case. The emphasis is the cases which applied this exception was on the fact that the practice group did not have the right to schedule the physician outside of times which they had agreed to. There is no evidence to suggest that NFEP was required to honor Dr. Holliger's requested dates. (V7 – 3184). For the exception to apply, the practice group must be required to abide by requested dates no matter what. Even if the practice group simply retains the right to control the physician's hours, without ever exercising that right, such is sufficient to show control over the physician's time. *Cooper*, 266 Ga. App. at 711-712; *Hodges v. Drs. Hosp*., 141 Ga. App. 649 (1977) (if the hospital simply retains the right to control the physician's hours but never actually exercises that right – the mere fact that they had control will be sufficient). Overall, NFEP set the emergency physicians', including Dr. Holliger's, schedule. While the physicians could make a request, NFEP did not have to honor that request. Once the schedule was set, the physicians were required to show up for their shifts.

This distinction is evidenced in the decision *Williamson v. Coastal Physician Servs. Of the SE*, 251 Ga. App. 667 (2001). In that case, summary judgment was appropriate because the hospital was forbidden from scheduling the physician from the set times he designated. The present case is distinguishable because NFEP retained the right to schedule Dr. Holliger outside of her requested hours and for

additional shifts when needed. (V7 – 2920-2921; V6 - 2495). In fact, Dr. Holliger was instructed to remain "flexible" with the scheduling and keep in mind the need to staff the emergency department in her contract with NFEP. (*Id*.) Georgia law emphasizes that the important consideration is not whether the employer exercised control over the time and manner of executing the work but whether the employer actually retained the right to do so. *Old Republic Ins. Co. v. Pruitt*, 95 Ga. App. 235, 236 (1957). NFEP retained the right to exercise control over Dr. Holliger's schedule and, therefore, at a minimum, there is a question of fact on this issue.

The trial court also relied on *Brown v. Coastal Servs*., in which the court found the hospital did not control a physician's time because they were not allowed to schedule him outside of designated hours and he was not required to work minimum hours per month. 181 Ga. App. 893 (1987); (V6 – 2834). The present case is again distinguishable because Dr. Holliger was required to work a minimum number of hours per month through a shift requirement **set by NFEP**. Dr. Holliger **was not** free to work whatever days she wanted per month, and as few days as she wanted per month. Instead, she was required by her contract to work a certain number of shifts and required to work weekends. (V6 – 2495; V7 – 2873). This fact alone shows NFEP's control over her hours. Dr. Holliger was required to make herself available at least two weekends per month. (V6 – 2495).

Summary judgment was improper because there is a genuine issue of material fact as to whether NFEP maintained a right to control Dr. Holliger's hours regardless of if they ever exercised it or not. NFEP at the motion hearing conceded that there was a dispute on this fact, "as to the second major prong, control of time, I think there is a bit of a dispute" (V9 - 4:19-20). The fact that there is inconclusive evidence on such an important factor that alone precludes summary judgment, and means that there is a dispute over material facts that should go to the jury. Summary judgment is inappropriate when the evidence does not "conclusively establish" whether an individual was an employee or contractor, and it can hardly be said that the facts under this factor conclusively establish NFEP did not retain the right to control Dr. Holliger's schedule.

7) Dr. Holliger is paid by the hour:

If an employee is paid by the hour, that exemplifies an employee-employer relationship. *Cooper*, 266 Ga. App. at 713; *Stewart v. Midani*, 525 F. Supp. 843 (N.D. Ga. 1981). This Court has held in *Lee v. Satilla Health Servs.*, that the basis of pay is more important in a court's analysis of control "more important in a court's analysis of control than the employers right to choose the scalpel to be used or the location of the incision." *Lee*, 220 Ga. App. at 887; *citing Midani*, 525 F. Supp at 849.

Here, Dr. Holliger was paid hourly. NFEP's corporate representative admitted this fact. (V7 – 3155). Even NFEP at the motion hearing conceded that this factor "cuts both ways" and cited to the fact that Dr. Holliger was paid hourly in addition to receiving some pay based on CPT codes. (V9 - 13:3-4). Thus, both parties agree that there is a dispute of material fact over this factor, yet the trial court made its own factual finding ignoring such disputed facts.

The trial court improperly relied on its own findings of fact which are not supported by case law. (V6 – 2862). This Court's precedent instructs that if a physician is employed hourly, it indicates an employee relationship and, likewise, payment by task indicates independent contractor. *Cooper*, 266 Ga. App. at 713. Instead, the trial court again relied on its own considerations and made findings of fact based on Dr. Holliger's taxes and benefits. (V6 – 2862).

NFEP admits Dr. Holliger was paid hourly and acknowledges there is a genuine dispute over this issue. (V9 - 13:3-4). Because Dr. Holliger was paid hourly, precedent requires that this factor be considered in favor of an employee-employer relationship. Thus, summary judgment is inappropriate, and this is a question for the jury.

8) <u>Dr. Holliger had no right to choose which patients she treated:</u>

This Court has previously held that an emergency room physician who is required to treat all patients at the hospital is more likely an employee. *See Doctors*

Hospital of Augusta v. Bonner, 195 Ga. App. 152, 163 (1990). Instead, the trial court found that this is merely a description of the task to be accomplished in any hospital emergency room and does not weigh in favor of an employee-employer relationship. 266 Ga. App. 709, 710-711 (2004) (V6 – 2862). However, this factor undoubtedly sheds light on the relationship between NFEP and Dr. Holliger. Dr. Holliger exclusively saw patients at WellStar. (V7 – 2914). Dr. Holliger was tasked with seeing every patient assigned to her, no matter her choice. (V6 – 2419). In addition, each patient that was assigned to and received services from Dr. Holliger, was billed by NFEP who collected those proceeds. (V7 – 3169 – 3171).

The fact that a physician is seeing every patient, as Dr. Holliger was, is more indicative of an employee relationship because it shows the physician is treating patients generally, not that they were contracted to do a specific job within medicine. *Bonner*, 195 Ga. App. at 163. Therefore, this factor also weighs in favor of Dr. Holliger's employee relationship with NFEP as well.

9) Dr. Holliger spent all working hours at the hospital:

This Court has previously held that a physician that spends all of their working hours at the hospital/practice group and maintains no private practice or hospital privileges elsewhere is more likely to be an employee and not an independent contractor. *Cooper*, 266 Ga. App. at 173.

Here, there is no dispute that Dr. Holliger spent all of her working hours at the WellStar Emergency Department performing services on behalf of NFEP. Dr. Holliger herself testified that she worked exclusively for NFEP from 1999-2019. (V7 - 2914). She maintained no other practices, nor did she treat patients at any other hospitals. (*Id*.) Yet again, the trial court ignored such evidence and failed to view the evidence in the light most favorable to the Appellant/Plaintiff holding, "The court has found no indication in the record whether Holliger maintained any other medical practice during the time she worked for NFEP. Regardless of whether Holliger worked only at WellStar, such fact does little to elucidate the nature of her relationship with NFEP." (V6 – 2862). Not only does this ignore the evidence presented, but it also ignores this Court's prior holding and set precedent in *Cooper*. 266 Ga. App. 709, 710-711 (2004). Unfortunately, the trial court's analysis is wrong. The fact that Dr. Holliger ***only*** worked for NFEP clearly reveals the nature of their relationship. Dr. Holliger did not contract out her work to any other entity as an Independent Contractor likely would. Instead, she was employed exclusively with NFEP. (V7 – 2914). Again, this factor weighs in favor of an employer-employee relationship.

10) <u>NFEP handled all patient billing associated with Dr. Holliger's work:</u>

Where a practice group handles and collects all patient billing through its own system and its name instead of the physician, and if the hospital/practice group has

power to approve physician rates charged, this implies an employer-employee relationship. *Cooper*, 266 Ga. App. at 713.

Again, both parties agree to the factual basis of this factor. Dr. Holliger never handled any patient billing. (V9 – 13:12-13) All patient billing was maintained and completed by NFEP. (V7 – 3169-3171). In viewing this evidence in the light most favorable to the non-moving party, this evidence strongly establishes an employer-employee relationship. Nevertheless, the trial court again blatantly ignored the evidence instead stating, "the court finds that this factor is of little weight in light of modern medical practice." (V6 – 2862). The court offered no explanation whatsoever as to why it made such a factual finding on its own which was directly in opposition to the evidence offered by both parties. (*Id*.).

Ignoring such clear evidence at the summary judgment phase was error, and the trial court's conclusion was unsupported by law. Undoubtedly, there is sufficient evidence to support a finding of an employer-employee relationship under this factor.

11) <u>NFEP chose and paid for Dr. Holliger's medical malpractice insurance:</u>

NFEP paid for Dr. Holliger's medical malpractice insurance. (V6 – 2499). Once again, there is no dispute about this factor and all parties agree this factor weighs in favor of an employer-employee relationship. (V9 – 13:12-13). NFEP

conceded this factor in the hearing: "Now the billing and insurance factors, we agree, that favors employment here." (*Id*.).

This Court has previously held that for summary judgment to be appropriate, the evidence must "conclusively establish" whether the doctor was an independent contractor or employee. See *Lee v. Satilla Health Servs*., 220 Ga. App. 885, 887 (1996). It cannot be understated that the facts of the present case do not conclusively establish whether Dr. Holliger was an independent contractor or employee, particularly so when viewing the evidence in the light most favorable to Plaintiff. See *Lee v. Satilla Health Servs*., 220 Ga. App. 885, 887 (1996) (Summary judgment was inappropriate when just 2 factors weighed in favor of employee relationship and 1 was in dispute). As such, there remains a genuine dispute of material facts as to the control NFEP retained over Dr. Holliger that must be determined by the jury.

B. Dr. Holliger was a part owner of NFEP:

Likely the most telling evidence raised by Appellant is the fact that Dr. Holliger was a part owner of NFEP with a personal financial stake in the business at the time of her alleged negligence. (V7 – 3157). Thus, her ownership status within the corporation is evidence that she was an agent of NFEP and not an independent contractor. Although, there is no prior case law to advise on this subject in the context of physician practice groups, common sense suggests that someone who is part

owner of a very small closely held private company would be an agent of said company.

III. The Trial Court Made Improper Findings of Fact at the Summary Judgment Phase.

As previously laid out above, the trial court's order is riddled with improper findings of fact which should have been preserved for the jury. Most revealing, the trial court includes the words "the court finds" **five times** in its 10-page order. (V6 – 2854-2864). Under Georga law, the trial court may only make necessary findings of fact "if practicable." *Kuruvila v. Mulchy*, 264 Ga. App. 626 (2003). This Court has held that Summary judgment is erroneous when the trial court fails to consider all competent evidence in the record before it. See *State Farm Fire, etc., Co. v. Martin*, 174 Ga. App. 308, 329 (1985) (holding summary judgment improper when trial court judge weighed the evidence); *Greene v. Fulton-DeKalb Hosp. Auth.*, 177 Ga. App. 499 (1986) (holding summary judgment improper when the trial court failed to consider all competent evidence). A judge must not serve as a fact finder on motions for summary judgement. *Fountain v. World Finance Corp*., 144 Ga. App. 10 (1997). The judge must only determine whether an issue exists. *Id.*

Instead of determining whether an issue exists as required at this stage, the trial court improperly weighed the evidence and made findings of fact. (V6 – 2854-2864). As one example, when discussing the factor regarding who provided the equipment the trial court stated, "this court finds this factor unhelpful in light of

modern hospital practice." (V6 – 2859). In doing so, the trial court directly ignored the case law requiring this factor to be considered. It ignored the evidence which clearly weighed in Appellant/Plaintiff's favor. (*Id*.). Similarly, under the factor of whether the physician treats all patients, the trial court again ignored this Court's precedent and stated it, "finds this factor unhelpful." (V6 – 2862).

Again, under the factor of billing, where there is no dispute that Dr. Holliger was paid hourly, and thus the factor weighs in favor of an employer-employee relationship, the trial court again made a finding of fact such to give the factor "little weight." (*Id*.). This determination is clearly within the purview of the jury, not the trial court at the summary judgment stage. Yet again, the trial court made its own findings. The trial court cannot weigh the evidence or determine credibility. *State Farm Fire, etc., Co. v. Martin*, 174 Ga. App. 308, 329 (1985). Each of these instances are improper and require that summary judgment be reversed.

Possibly the most troubling of examples of the trial court evading case law and relying on its own findings of weight and fact comes from the discussion of the insurance factor laid out by this Court in previous cases. Under that factor, if the company provides the physicians of medical malpractice insurance, that suggests the doctor is an employee. *Cooper*, 266 Ga. App. At 713. There is no dispute from any of the parties that NFEP paid Dr. Holliger's medical malpractice insurance. (V6 – 2499). Yet still, the court disregards the case law and arrived at its own findings of

fact, complete with its own argument: "while providing malpractice insurance could indicate an employment relationship, it does not under the current set of facts before the court." (V6 – 2863). The only reasoning the trial court provided to support this determination of fact was that NFEP was fulfilling contractual obligations between itself and the hospital. (*Id*.). Nothing in the case law suggests that the trial court's argument of such fact matters at all in the determination for summary judgment. The trial court failed to view the evidence in the light most favorable to the Plaintiff, and instead weighed the evidence's credibility itself. This was wholly improper and requires that summary judgment be reversed.

CONCLUSION

For the foregoing reasons, Appellant respectfully asks this Court to vacate the May 20, 2024, order granting NFEP's Motion for Summary Judgment and allow this issue to be decided on the merits.

This submission does not exceed the word count limit imposed by Rule 24.

Respectfully submitted this 27th day of January, 2025.

HARRIS LOWRY MANTON, LLP

/s/ Stephen G. Lowry
STEPHEN G. LOWRY
Georgia State Bar No. 460289
CAITLYN B. CLARK
Georgia State Bar No. 293413

410 E. Broughton Street
Savannah, Georgia 31401
P: 912-651-9967
steve@hlmlawfirm.com
cclark@hlmlawfirm.com

Attorneys for Appellant/Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I have this day served counsel for all Parties in the foregoing matter with a copy of the **Appellant Brief** via electronic service as previously consented to by the parties as follows:

Paul E. Weathington, Esq. (pweathington@weathington.com)
Jesse K. Broocker, Esq. (jbroocker@weathington.com)
WEATHINGTON FIRM
1800 Peachtree Street, N.E.
Suite 370
Atlanta, Georgia 30309
Attorneys for Appellee/Defendant North Fulton Emergency Physicians, LLC

Respectfully submitted this 27th day of January, 2025.

HARRIS LOWRY MANTON, LLP

/s/ Stephen G. Lowry
STEPHEN G. LOWRY
Georgia State Bar No. 460289

410 E. Broughton Street
Savannah, Georgia 31401
P: 912-651-9967
steve@hlmlawfirm.com