IN THE COURT OF APPEALS
STATE OF GEORGIA

Civil Action No. A25A0867

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

Appellant,

v.

NORTH FULTON EMERGENCY PHYSICIANS, LLC,

Appellees.

BRIEF OF APPELLEE NORTH FULTON EMERGENCY PHYSCICIANS, LLC

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INTRODUCTION

Appellant asks this Court to adopt strict adherence to the common law framework for analyzing employee-contractor status – that any "disagreement" on any of the eleven (11) factors means the issue becomes a jury question. Beyond the policy implications of this position – which overtly moots any dispositive inquiry altogether – this is simply not the law.

The framework is a guideline, not a mandate. This Court has repeatedly found independent contractor relationships can exist as a matter of law under the framework despite some "factor disagreement." In this case, Judge Tailor applied the undisputed facts to each factor in granting summary judgment, astutely noting certain factors were incongruous in the context of the modern practice of medicine. Beyond just making good sense, this is well within his discretion and adherent to precedent.

North Fulton Emergency Physicians' ("NFEP") contract with Dr. Holliger clearly states "[t]he Company does not control the Physician's time, method and/or manner of his/her treatment of patients. Physician is an independent contractor … not an employee …" This establishes a presumption of independent contractor status. The burden then shifts to Appellant to establish that, in truth, NFEP "retained the right to direct or control the time, manner, and means of work" as distinguished from simply the "right to insist upon the results."

Put another way, the fundamental inquiry at issue is whether NFEP retained authority to effectively control the work of Dr. Holliger prophylactically – substantively removing subjective decision-making from the "work process" in favor of employer-mandated directive – versus simply setting parameters for expectations of results. As shown below, the undisputed facts demonstrate the latter.

In analyzing an employer's degree of control over a contractor Georgia has a decades-old common law analytic framework. The most critical factors for analysis – the right to control time and the right to direct work – remain resolute in dispositive impact. Precedent has only reinforced these two factors must be satisfied to warrant summary judgment. Once the two key factors are met, this Court built into the analysis consideration of the relevance of each other factor in the context of the industry or profession at issue.

For instance, this Court has recognized one factor – who supplies the equipment – does little to inform the question of "control" for emergency room physicians who do not "carry [their] instruments in a black satchel" like the doctors of yore. **None of them supply their equipment**. As such, the factor does not help one differentiate between employed and contracted providers.

In his Order, Judge Tailor noted the key factors of control over time/manner/method favored contractor status under Williamson. The trial court then made clear to state how other factors elucidated the nature of the relationship

between Dr. Holliger and NFEP. The Judge astutely recognized some factors do not provide useful indicia of reliability of "control" in the modern practice of medicine.

This is expressly *not* the purview of a jury as Appellant argues. This is a completely appropriate legal judgment as to what is relevant and/or sufficient to create an issue of fact as a matter of law. Accordingly, affirmation is warranted here.

STATEMENT OF THE CASE[1]

Appellant's Complaint for medical malpractice was filed on April 2, 2020. (V2-7). As of February 12, 2024, NFEP was the only remaining Defendant, as Dr. Holliger and WellStar North Fulton Hospital, Inc., were dismissed. (V6-92). The only claim left to Appellant was her vicarious liability claim against NFEP for the alleged negligence of Dr. Holliger. (V2-7; V6-92).

On December 21, 2023, NFEP filed a dispositive Motion for Summary Judgment on Appellant's claim that NFEP was vicariously liable for Dr. Holliger, given that she was an independent contractor. (V5-519). Following extensive briefing by the parties, and oral argument, the trial court granted NFEP's Motion for Summary Judgment in its Order dated May 20, 2024. (V6-288—298). Appellant

[1] Appellant's Brief makes repeated, and frankly irrelevant, appeals to the facts of the case and purported "clear" negligence of Dr. Holliger. As Judge Tailor has recognized over the course of this matter, Appellant counsel's insistent focus on narrative advocacy belies the weakness of their legal position. Nevertheless, to the extent this Court is interested, five (5) different medical experts unequivocally support Dr. Holliger's care, and the defense has every intent on defending this matter on the medicine, at trial, if need be.

filed her Notice of Appeal on May 28, 2024. (Notice of Appeal). The appeal was docketed in this Court on December 19, 2024.

A. The Physician Independent Contractor Agreement

Dr. Holliger entered into an agreement with NFEP, a physician staffing company, on July 13, 2017. (V5-536; V7-283). This agreement was for Dr. Holliger to perform medical services at WellStar North Fulton Hospital. (V5-536). The agreement is titled "Physician Independent Contractor Agreement." (V5-536—542). A material clause to this agreement is titled "Independent Contractor Status," and reads as follows:

> This Agreement constitutes an independent contract relationship between the Company and the Physician. The Company does not control the Physician's time, method and/or manner of his/her treatment of patients. Physician is an independent contractor with the Company. Physician is not an employee of Company.

(V5-539). While this agreement sets forth additional terms of the relationship, addressed *infra*, nothing in this agreement contradicts this material clause or otherwise conveys the right to control Dr. Holliger's time, manner, or methods of patient care. (V5-536—542).

B. Dr. Holliger's Clinical Judgment

The contract generally stated NFEP's expectation that Dr. Holliger would comply with professional standards, including the bylaws, rules, and regulations of

the Hospital. (V5-536—537). But the express terms of the agreement make clear NFEP had no right to inform/dictate/recommend Dr. Holliger's clinical judgment:

> It is further understood that the Company shall neither have, nor exercise any control or direction over, the methods by which the Physician agrees to perform the Physician's said work and professional functions. The Company shall neither have, nor set standards for the duration or time under which the Physician performs the Physician's work and professional functions.

(V5-539).

Dr. Holliger's work was subject to a post-hoc review under her Physician Independent Contract Agreement related to the quality of her care and government-based program reporting. (V5-537; V7-291—292). However, regarding any inspection of Dr. Holliger's work, "under no circumstances do they [NFEP] ever claim the right or exercise a right to control the physician's independent medical judgment about how a particular patient is treated." (V7-293—294). Moreover, NFEP did not maintain any policies or procedures for physicians regarding how they are to treat patients. (V7-372).

C. Dr. Holliger Controlled Her Schedule

Under her Physician Independent Contractor Agreement, Dr. Holliger agreed to work six to eight physician shifts a month at WellStar North Fulton. (V7-9). To schedule, Dr. Holliger would submit her availability over a month in advance. (V7-56). NFEP's corporate representative described the scheduling process as follows:

> [T]he doctors could create the schedule by submitting their available dates or their blackout dates when they're not available. . . . Some software, fill the schedule, and if they have unfilled shifts it's his [the medical director's] responsibility to try to encourage the physicians to work it out amongst themselves, which often is what happens. And if there's still an unfilled shift, he's got to work it or else they have to hire ... a locum tenens physician.

(V7-350).

The plain terms of the agreement, and the testimonial evidence, establishes, only, that Dr. Holliger "may be requested" – not required – to work two additional shifts per month beyond what she requested. (V5-536). Moreover, there is absolutely no evidence in this case that Dr. Holliger ever had to work a shift that she did not give availability for or did not have the right to refuse.

D. Dr. Holliger's Compensation

Dr. Holliger was paid via a volume-based compensation structure. (V7-291). As part of this structure, Dr. Holliger received payment based the "CPT codes" – billing codes based on care/diagnoses made in the ED. (V7-291). Additionally, "to account for a slow shift where there are very few patients but the physician is still there for however many hours," Dr. Holliger also received an hourly rate. (V7-291). This was described by the NFEP corporate representative as an "hourly add-on." (V7-291). NFEP did not provide Dr. Holliger with any traditional employee benefits, such as vacation pay, sick leave, social security contributions, tax

withholding, or a retirement plan. (V7-306). At year's end, also consistent with Dr. Holliger's contract, she would receive a 1099, not a W2. (V7-319).

E. Equipment, Billing, and Insurance

The medical equipment and supplies that Dr. Holliger used in treating patients were supplied solely by WellStar North Fulton Hospital, not NFEP. (V7-58). The NFEP contract with WellStar North Fulton expressly states that the hospital will maintain and furnish equipment and supplies at the "Hospital's sole cost and expense." (V5-564).

NFEP did agree to pay for Dr. Holliger's medical malpractice insurance under the Physician Independent Contractor Agreement. (V5-540). NFEP's corporate representative provided that the entity did so as it was the easiest way to ensure compliance with the WellStar North Fulton Hospital agreement. (V7-306—307).

Dr. Holliger's Physician Independent Contractor Agreement further provides that all billing and invoices belonged to NFEP. (V5-537—538). As such, NFEP handled billing and collections. (V7-305). NFEP used collections from billing to meet its contractual obligations – i.e., paying its costs and expense, including paying Dr. Holliger pursuant to her independent contractor agreement. (V7-306).

SUMMARY OF ARGUMENT

This case is controlled by this Court's decision in Williamson, which provides direct support regarding the primary two factors in the employee-contractor analysis.

Paired with the appropriately applied common law presumption afforded to the Physician Independent Contractor Agreement, the trial court appropriately found an independent contractor relationship between Dr. Holliger and NFEP. Nonetheless, the trial court appropriately applied the common law framework – considering evidence as to all eleven (11) factors – and found this exemplified the independent contractor relationship. The trial court used appropriate discretion, given the context of modern medical practice, to consider these factors with the undisputed evidence, and its carefully ascribed decision should be affirmed.

ARGUMENT AND CITATION TO AUTHORITY

I. The standard of review is *de novo*.

An appellate court reviews a grant or denial of summary judgment *de novo*. Cooper v. Binion, 266 Ga. App. 709 (2004) (superseded on other grounds).

Pursuant to O.C.G.A. § 9-11-56, summary judgment is appropriate where a party can demonstrate there is no genuine issue of material fact and that it is entitled to judgment in its favor as a matter of law. Although a movant on a motion for summary judgment bears the burden of showing that no genuine issue of material fact exists, they need not entirely negate a plaintiff's claim. Lau's Corp. v. Haskins, 261 Ga. 491 (1991). Rather, a defendant moving for summary judgment may discharge its burden by pointing out by reference to the affidavits, depositions, and other documents in the record that there is no sufficient evidence to create a jury

issue in at least one essential element of a non-moving party's case. Lau's Corp., 261 Ga. at 491.

If the moving party discharges this burden, the non-moving party cannot rest on their pleadings; rather, the non-moving party must point to specific evidence giving rise to a triable issue. Id. As the Supreme Court stated in Lau's, "if there is no evidence sufficient to create a genuine issue as to any essential element of plaintiff's claim, that claim tumbles like a house of cards." Id.; see also Braddy v. Collins Plumbing & Const., Inc., 204 Ga. App. 862 (1992); Garmon v. Warehouse Groceries Food Center, 207 Ga. App. 89, 91 (1993).

II. The trial court appropriately applied the common law legal presumption that Dr. Holliger was an independent contractor.

Appellant grossly misstates the applicable legal standards herein. First, Appellant argues there is no longer a rebuttable common law presumption that when a contract clearly demarcates someone as a contractor, they are unless the evidence proves otherwise. Under Georgia law, where a contract clearly denominates a party as an independent contractor, "that relationship is presumed to be true unless the evidence shows that the employer assumed such control." Loudermilk Enters. v. Hurtig, 214 Ga. App. 746, 748 (1994). This presumption of an independent contractor relationship has long existed as part of Georgia's common law. Id.; see

also Miller v. Polk, 363 Ga. App. 771 (2022).[2] Accordingly, the trial court appropriately considered and applied the common law presumption that Dr. Holliger was an independent contractor. (V6-297).

Appellee does recognize the presumption is not outcome determinative, and "other factors may negate the label." Doctors Hospital of Augusta v. Bonner, 195 Ga. App. 152, 163 (1990). However, to negate the label (i.e., independent contractor), the label must first exist, and the label exists by means of the presumption. The trial court correctly recognized this, applied the presumption, and found it could not be negated by the evidence.

III. The trial court correctly considered, applied, and found that analysis under the common law framework establishes Dr. Holliger being an independent contractor.

Georgia's ultimate test for determining whether a person is employed as an employee or independent contractor is straightforward: does the employer maintain "the right to direct the time, the manner, the methods, and the means of the execution of the work." Glenn v. Gibbs, 323 Ga. App. 18, 20 (2013); see also O.C.G.A. § 51-2-5(5). This is distinguished from the right of an employer to merely insist upon the production of results according to the contract. Glenn, 323 Ga. App. at 18; accord

[2] In Miller, decided 17 years after O.C.G.A. § 51-2-5.1 was enacted, this Court upheld the long-standing common law independent contractor presumption. Miller, 363 Ga. App. at 771. The Miller court did not consider O.C.G.A. § 51-2-5.1, and neither did the trial court here.

Brown v. Coastal Emergency Servs., 181 Ga. App. 893, 894-95 (1987). In discussing this right to control a contractor, this Court has found:

> It is not enough that [the employer] has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right does not mean that the contractor is controlled as to his methods of work. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

Dalton v. 933 Peachtree, L.P., 291 Ga. App. 123, 127 (2008).

While factors or indicia have sprung up through the years to elucidate upon this test, the primary concerns of the analysis have endured. All these factors and different concerns continue to boil down to a single question: **does the employer maintain the right to control the contractor's time, manner, and method of work**. See Augusta Chronicle v. Woodall, 360 Ga. App. 576, 577 (2021). The answer to that question in the present case is a resounding **No**, as reflected in section 8 of Dr. Holliger's Physician Independent Contractor Agreement. (V5-539).

A. *Williamson* Controls.

Williamson v. Coastal Physician Servs. of the Southeast, 251 Ga. App. 667 (2001), provides a non-distinguishable case that is on all fours with the present matter. In Williamson, a physician entered into an "independent contractor agreement" with a staffing company to have the physician staff a hospital's emergency room. Id. at 669. As part of this agreement, the physician in Williamson

provided the entity with his availability to work and allowed the entity to schedule him based on his given availability. Williamson, 251 Ga. App. at 669. Additionally, the contract stated that entity "shall have no control over the manner or method by which he performs his professional medical practice," and the Court found there was no contradictory evidence that the entity controlled the physician's emergency room diagnosis and treatment of the plaintiff. Id. at 669-70. The physician was, however, required to follow hospital policies and procedures, and the entity even helped in developing these policies and procedures. Id. at 670.

In upholding the grant of summary judgment based on the independent contractor relationship, the Williamson Court held that the evidence showed that the staffing company did not control the physician's time, manner, and method of work. Id. Specifically, the Court found that it was "illogical" to leap from the fact that the company coordinated the physician's schedules to a conclusion of control of time. Williamson, 251 Ga. App. at 669-70. As to control of manner and means, the Court held that an emergency room physician being required to comply with hospital rules and regulations, or the staffing company's assistance with creating policies and procedures, did not equate to the control over manner or means. Id. at 670.

The present case is the same factual scenario as Williamson. Appellant's singular attempt to distinguish Williamson, because NFEP "retained the right to schedule Dr. Holliger" regardless of her requests, is a gross misrepresentation to this

Court. (Appellant's Br. at 25-26). No evidence exists to support this statement. Dr. Holliger's agreement simply provides that Dr. Holliger "***may be requested***" to work two additional shifts more than she requests. (V5-536) (emphasis added). Nowhere in this agreement (or any of the testimony) does NFEP "retain the right" to mandate Dr. Holliger work additional shifts. In fact, if anything, this language supports the fact that Dr. Holliger controlled her schedule – and she retained the right to refuse any requests. Additionally, NFEP's testimony on the matter is that if there was an unfilled opening on the schedule, and it could not get a physician to agree to fill it, then it would be required to hire an additional physician – not mandate a current physician, such as Dr. Holliger, fill the schedule. (V7-350). Thus, Appellant's lone attempt to distinguish Williamson is woefully flawed. Accordingly, Williamson demands the finding that Dr. Holliger was an independent contractor.

B. Applying the common law framework to modern medicine.

Beyond the clear application of Williamson, standard application of the contractor framework also mandates affirmation of the trial court. The development of caselaw, and related statutory law, on this issue is instructive to understanding how the framework is meant to guide – not dictate – our courts in decision-making.

The Lee and Cooper cases relied upon by Appellant, and argued in the trial court, were fashioned "to **assist** a court in determining whether the hospital has the right to control the time, manner, and method of an emergency room physician's

work." Cooper, 266 Ga. App. at 710 (emphasis added). These cases reviewed Georgia progeny on the issue and compiled a list of factors that our courts traditionally looked to ***aid*** the question of control over a contractor. Again, the framework provides a list of topics or indicia that ***may*** be instructive, but from the outset our courts have always built into the framework the discretion to recognize certain factors ***may not*** be instructive in a given context. E.g., MCG Health, Inc. v. Nelson, 270 Ga. App. 409, 413- 14 (2004) (summary judgment affirmed even though hiring entity handled billing for actor); Neese v. Britt Home Furnishings, 222 Ga. App. 292, 293 (1997) (summary judgment affirmed based on "pivotal" lack of control even though no 1099 form submitted); Kimble v. BHM Construction Co., Inc., 193 Ga. App. 441, 443 (1989) (summary judgment affirmed even though hiring entity provided liability insurance for actor).

Indeed, less than a year after Cooper, the General Assembly enacted O.C.G.A. § 51-2-5.1 and provided that, in the hospital-physician context, some of the factors set forth in Cooper "shall not be considered as evidence a hospital exercises a right of control over the time, manner, or method of the health care professional's services," including any obligation to treat all patients, payment on an hourly basis, provision of facilities or equipment, physician's maintenance of other practices outside of hospital, payments of medical malpractice insurance, and billing handled

by the hospital. See O.C.G.A. § 51-2-5.1(g)(2). Altogether, the Georgia Legislature rejected six (6) out of the eleven (11) factors set forth in Cooper as irrelevant.

To be clear, O.C.G.A. § 51-2-5.1 does not directly apply here as NFEP is a staffing agency, not a hospital. To be clear, and contra to Appellant's assertions, the trial court did not rely on and/or apply this statute at all in its ruling. However, the statute – both by its plain text and the timing of its enactment – is persuasive to highlight our Legislature's express recognition of the practical incongruities of analyzing modern clinical independent contractor relationships through the lens of the entire framework. See e.g., Blackmon v. Tenet Healthsystem Spalding, Inc., 288 Ga. App. 137, 141 (2007) (applying Cooper as O.C.G.A. § 51-2-5.1 was not retroactive, and "recogniz[ing] (as did the legislature) that [some factors are] **increasingly unrealistic in today's world of emergency medicin**e") (emphasis added); see also Dutton v. United States, 621 Fed. Appx. 962, 965-66 (11th Cir. 2015) (citing Tsosie v. United States, 452 F.3d 1161, 1164 (10th Cir. 2006)) ("When a physician shows up to work in today's world—either as an independent contractor or a full-fledged employee—he no longer is likely to carry all relevant medical instruments in a black satchel.").

Reading these statutory and caselaw developments in harmony, the directive is clear and eminently reasonable – the framework is a guideline to provide indicia of reliability and inform the answer to the ultimate question of control. But, strict

application of every factor, without qualification or contextualization, simply does **not provide reliable guidance**. The trial court astutely recognized this here, as is not only allowable, but advisable under the law. This Court should not overturn that decision. Indeed, this Court should use this opportunity to further cement this developing trend of the caselaw (and statutory law).

C. *Lee* and *Cooper* applied.

Under the Lee and Cooper framework, Georgia's Courts have put forth eleven (11) factors which may bear upon a determination of an independent contractor designation. Lee v. Satilla Health Servs., 220 Ga. App. 885 (1996); Cooper, 266 Ga. App. 709. These factors are measured by analyzing the totality of the circumstances. See Id.; see also Pendley v. S. Reg'l Health Sys., 307 Ga. App. 82, 85-87 (2010). Two of the factors – the right to control time and the right to direct work – weigh most heavily in the analysis. See Barney v. Peters, 2022 U.S. Dist. LEXIS 238161, *8.

The trial court properly considered all eleven factors in its Order, looked at the relevancy of each factor in the context of modern medicine, and found that, in totality, Dr. Holliger was an independent contractor. (V6-288—298). Appellant now seeks to repudiate the trial court's carefully ascribed analysis, now arguing that ***ten*** (10) out of the eleven (11) factors are either a jury question or favor

employment.[3] However, Appellant's transparent attempts to muddy the trial court's Order are without merit, and this Court should affirm.

1. *Right to direct physician's work step-by-step*

The first of two required factors, the right to direct a physician's work step-by-step, weighs in favor of an independent contractor finding, as the trial court duly noted: "'Thus the undisputed evidence on this factor would indicate that Dr. [Holliger] was an independent contractor.'" (V6-292) (citing Cooper, 266 Ga. App. at 711). As to Appellant's contention that a fact dispute exists here. Appellee does not dispute Appellant's contention that Dr. Holliger had to abide by WellStar's bylaws, rules and regulations, and policies and procedures. This fact is simply irrelevant as a matter of law.

The Williamson Court found it "flawed" to suggest that, because the physician also had to comply with similar amorphous contract provisions wherein the physician had to abide by the hospital's "policies and procedures" and credentialing procedures, this somehow equated to control over the physician's emergency room work. Williamson, 251 Ga. App. at 670. To follow Appellant's contention, it would be impossible for any independent contractors to provide care in a hospital, because

[3] Appellant only argued six (6) out of the eleven (11) factors favored employment in the trial court. (V6-8—9).

all medical providers are required to abide by hospital regulations as part of the credentialing and privileging process.

In this case, not only does the contract state that Dr. Holliger is solely responsible for her means and methods (e.g., using her clinical judgment) when treating patients, but there is no evidence of NFEP ever telling Dr. Holliger how to practice medicine, contrary to Appellant's contention. C.f. Barney, 2022 U.S. District LEXIS 238161, *9 (finding the fact that the entity gave the radiologist a document titled "Rads-Tips, Dos and Don'ts" precluded summary judgment when paired with other factors). Moreover, express testimony exists that NFEP had no right to control how Dr. Holliger exercised her independent medical judgment. (V7-293—294). Accordingly, the trial court appropriately considered this factor and found it favors the finding of an independent contractor relationship.

2. *Right to control the physician's time*

Regarding this factor, this Court has found the shift scheduling practices, clearly defined by the contract here, are not indicative of an employee relationship. See Williamson, 251 Ga. App. at 669-70 (holding this factor favors independent contractor where a staffing company coordinates physicians' schedules after the physicians provide availability and does not schedule them outside of these times); see also Brown, 181 Ga. App. at 894, 896 (finding no control over time where physicians notified staffing company of days and hours they are available for work,

and there they were not required to work without prior manifestation of willingness to work).

The scheduling practices discussed in Williamson and Brown are just like those seen in the present matter. Dr. Holliger manifested her willingness to work on certain days, over a month in advance, by providing her availability and blackout dates, which allowed NFEP to coordinate scheduling. (V7-56; V7-350).

Appellant contends – based on nothing more than her own self-serving misinterpretation – that NFEP could override, or not honor, Dr. Holliger's submitted availability and schedule Dr. Holliger whenever it wished. Indeed, Appellant meekly attempts to shift the burden to NFEP, arguing "there has been no evidence to suggest that NFEP was required to adhere to [Dr. Holliger's requested schedule]." The fact there is no evidence to suggest the contract worked contra to the clear terms regarding voluntary scheduling only further belies contractor status here.

In any event, Appellant's speculation as to how the contract could be interpreted as to control over scheduling is misplaced. See Pendley, 307 Ga. App. at 86 (finding, where no evidence exists as to how physician was scheduled or who dictated the period of work, plaintiff could not meet her burden of identifying triable issue because "speculation which raises merely a conjecture or possibility is not sufficient to create even an inference of fact for consideration on summary judgment."). Indeed, the trial court specifically asked Appellant if there was any

evidence that NFEP scheduled Dr. Holliger outside of her provided availability, and Appellant could not provide any such evidence. (V9-31—32).

In any event, Appellant misrepresents the Physician Independent Contractor Agreement, wherein Dr. Holliger only agreed that she "may be requested" to work two additional shifts. (V5-536). That a contractor "may" be "requested" to work additional shifts – even under the loosest interpretation Appellant seeks to apply – still requires Dr. Holliger manifest a ***willingness*** to work these shifts. This suggests NFEP has the opposite of "control" over scheduling – that the contract states it may only ask Dr. Holliger to work outside of her requested schedule. Further, NFEP provided that if an unfilled shift occurred, all it could do is ask – not require – the physician to cover it; elsewise, NFEP would have to have the medical director cover the shift or hire an additional physician. (V7-350).

Accordingly, the evidence elicited in this case establishes that Dr. Holliger had to manifest a prior willingness to work before she was scheduled to work. This accords directly with the terms of the Physician Independent Contractor Agreement. (V5-539) ("The Company does not control the Physicians time …"). Thus, the trial court properly considered this factor and, in light of Williamson and Brown, found this heavily weighted factor proves an independent contractor relationship.

3. *Performance of a service rather than accomplishing a task*

In considering this factor in the hospital-physician context, courts have considered that where "[c]ontracts to perform a service rather than accomplish a task. 'The latter are indicative of an independent contractor relationship, the former of an employee-employer relationship.'" Lee, 220 Ga. App. at 886. As to this factor, again **no factual dispute exists**. Appellant just dislikes how the trial court considered the factor with the facts.

NFEP does not dispute that Dr. Holliger contracted, through NFEP, to provide emergency room care and services for **WellStar** patients. (V5-536). But to the extent Dr. Holliger was paid for said services by NFEP, those payments were for specific and actual "tasks" performed for each patient.[4] Bizarrely, Appellant expressly notes the "service" vs. "task" payment distinction is esoteric given "emergency medicine is practiced in an evolving way," but still advocates for analysis that effectively ignores this obvious fact in favor of blind application.

In any event, the trial court aptly noted that to the extent Dr. Holliger's contracted performance was for services, not tasks, those services were for **WellStar** – the hospital. This is a distinction of great importance for the analysis. Indeed, Lee

[4] Appellant again seems to be grasping at semantical straws here, arguing the undersigned "admitted" there was a fact dispute. There is no dispute – Dr. Holliger was performing tasks and services. The services were mandated by the Hospital (or else no contractor would be allowed to work there). The "tasks" were the service of recompense subject to the contractor relationship at issue here.

and Cooper found that where a physician is "obligated to provide 24-hour a day coverage in the emergency room, 'i.e., to provide that service,' the factor indicates he was the **hospital's** employee." Lee, 220 Ga. App. at 886 (emphasis added).[5]

It is WellStar's patients that Dr. Holliger treats, and then she receives compensation from NFEP dependent on the ***tasks*** she completes with regard to these patients. (V7-291). Here, the trial court, considering and weighing all evidence, appropriately determined that in staffing company-physician context, this factor does not favor an employment relationship, at least not with the staffing agency.

4. *Right to inspect physician's work.*

"A mere right to review work already performed does not equate to a right to control the time, manner, method, or means of performing work." (V6-293) (citing Dalton, 291 Ga. App. at 127). In Dalton, a construction contractor provision provided that the owner's representative had the right to visit the site, ensure the work that was performed complied with contractual specifications, and stop work on the project. Dalton, 291 Ga. App. at 127. Upholding a grant of summary judgment, the Court found "such a general right [to inspect work, make suggestions,

[5] It should be noted this factor was expressly repudiated for consideration by O.C.G.A. § 51-2-5.1(g)(2), where "**any health care professional or group is obligated to staff a hospital department continuously or from time to time**" (emphasis added). The reasoning for abrogation is simple. All physicians who work in a hospital seeing patients – whether as contractors or employees – are performing both tasks and services in a continuous block of time, as mandated by State and Federal law. This factor does nothing to shed light on the question of control.

or prescribe alterations or deviations] does not mean that the contractor is controlled as to his methods of work." Dalton, 291 Ga. App. at 127 (citations omitted)

Just as in Dalton, NFEP had a general right to inspect Dr. Holliger's work **after the fact** to ensure the quality of care and provide government program-based reporting – nothing more. (V5-537; V7-291—292). NFEP did not maintain the right to review Dr. Holliger's work **as it was being performed**; in fact, the testimony on this factor proved this: "under no circumstances do they [NFEP] ever claim the right or exercise a right to control the physician's independent medical judgment about how a particular patient is treated." (V7-293—294). Thus, NFEP's ability to do post-treatment review of Dr. Holliger's work for quality monitoring does not equate to employment. See Barney, 2022 U.S. Dist. LEXIS 238161, *14 ("a physician's quality review mechanism was insufficient to establish 'control'"); see also Charter Peachford Behavioral Health Sys. v. Kohout, 233 Ga. App. 452, 462 (1998) (holding mere exercise of monitoring for quality of medical care provided is not inconsistent with independent contractor relationship).

Appellant attempts to make a mountain out of a mole hill regarding NFEP's ability to reduce Dr. Holliger's pay based on its quality review of her past performance. **While there is absolutely no evidence of this ever occurring, or that it is meant to coerce a physician's clinical judgment**, this fact actually further supports an independent contractor relationship. Judge Tailor suitably recognized

this discrete point during oral argument in the trial court – employees expect the salary or payment contracted for – quality of performance ***never*** impacts baseline payment. (V9-35—37).

Just as the contract in Dalton allowed prescription of deviations or alterations to the work to be performed, NFEP could suggest deviations or alterations to Dr. Holliger to assist with patient experience, politeness, or team cooperation, but Dr. Holliger retained the right to either accept or decline these suggested recommendations (even if it cost her money). However, NFEP never had the right to exercise control over, or interfere with, Dr. Holliger's clinical judgment – that, at all times, remained solely at the discretion of Dr. Holliger. (V7-293—294). Thus, the trial court correctly, considering all relevant evidence, found that this factor favors an independent contractor relationship.

5. *Supplier of equipment*

Appellant even attempts to convince the Court this factor is disputable. It is undisputed that WellStar North Fulton Hospital ***solely*** supplied Dr. Holliger with the equipment and supplies to perform her job. (V7-58). This equipment and supplies were provided at the "sole cost and expense" of the Hospital, although NFEP could provide suggestions on these supplies. (V5-564). Just as Appellant self-servingly interprets "may be requested" to mean NFEP controlled shift scheduling, here Appellant argues "could provide suggestions" means NFEP dictated medical

equipment in the ED. This interpretation not only does not comport with how the contract actually functions, but also further establishes the lack of control NFEP actually exerted.

First, in the years since Cooper, this Court has "recognize[d] (as did the legislature) that this factor is increasingly unrealistic in today's world of emergency medicine, in which the hospital as a practical matter must provide the equipment and supplies for emergency room physicians." Blackmon, 288 Ga. App. at 141. Moreover, as the Eleventh Circuit has noted in an analysis of this factor: "[w]hen a physician shows up to work in today's world—either as an independent contractor or a full-fledged employee—he no longer is likely to carry all relevant medical instruments in a black satchel." Dutton, 621 Fed. Appx. at 965-66 (citing Tsosie, 452 F.3d at 1164).

Second, as the term "may request" scheduling suggests lack of employer-control on scheduling, "could suggest" certain instruments be available in the ED indicates a **lack** of control over equipment.

In light of Blackmon, as well as the persuasive authority of Dutton and Tsosie, the trial court appropriately found this factor of minimal concern to the present analysis between a physician and staffing company. Moreover, to the extent this factor has any great bearing on this case, WellStar, at its "sole cost and expense," supplied Dr. Holliger with supplies to perform her job, not NFEP. (V7-58).

6. *Nature or skill involved in work*

This factor undisputedly favors independent contractor status as Dr. Holliger was a highly skilled emergency room physician. See Cooper, 266 Ga. App. at 711.

7. *Method of compensation*

"If an employee is paid for the entire task performed, this evidences an independent contractor relationship. If, however, the employee is paid by the hour, that exemplifies an employee-employer relationship." Cooper, 266 Ga. App. at 713. Dr. Holliger was compensated via a volume-based compensation structure, which included being paid by the tasks completed through the CPT codes and an "hourly add-on." (V7-291). Appellant, however, grossly ignores the fact that the "hourly-add on" was to "account for a slow shift where there are very few patients but the physician is still there for however many hours." (V7-291). Accordingly, while NFEP does not dispute Dr. Holliger received an hourly "add-on," it was not the primary method of compensation, as she mainly was paid via tasks performed. See Barney, 2022 U.S. Dist. LEXIS 238161, *6 (factor favors independent contractor because physician paid per task).

Moreover, Dr. Holliger did not receive any traditional employee benefits, such as vacation pay, sick leave, social security contributions, tax withholding, or a retirement plan, which would be indicative of employment. (V7-306). The General Assembly has found that these hallmarks of employment, such as tax withholding,

are more important than an hourly wage analysis. See O.C.G.A. § 51-2-5.1(g)(1-2) (evidence of tax withholding may be considered a relevant factor, whereas evidence of compensation on an hourly basis is not a factor to be considered).

The trial court appropriately evaluated these facts, and after careful consideration of the weight prescribed, found that this factor favors Dr. Holliger as an independent contractor. (V6-295—296).

8. *Right to choose which patients to treat*

This Court has found that Bonner, the case relied upon by Appellant, "**could be read** to indicate that an emergency room physician who is required to treat all patients at the hospital is more likely an employee," but other "direct holding[s]" conclude this is "merely a description of the task to be accomplished" and "it does not weigh in favor of an employee-employer relationship." Cooper, 266 Ga. App. at 713 (citing Overstreet v. Doctors Hosp., 142 Ga. App. 895, 896 (1977), and Pogue v. Hosp. Auth. of DeKalb County, 120 Ga. App. 230 (1969)) (emphasis added).

Bonner considered this factor in relation to anesthesiologists, with other distinguishing facts, including the hospital having a closed anesthesiologist panel and no other anesthesiologists were allowed to practice at the hospital. Bonner, 195 Ga. App. 152, 163. Conversely, Overstreet and Pogue were both emergency room physician cases, where the physicians were required to treat anyone referred to by the hospital. Overstreet, 142 Ga. App. at 896-97. Thus, the trial court, following

the direct application of this factor by Cooper, simply noted this factor was unhelpful in the light of modern medical practice and weighed it accordingly. And again, to the extent it favors a finding of employment, that would go more to the hospital and Dr. Holliger than NFEP – who certainly does not dictate what patients Dr. Holliger sees under her agreement.

9. *Physician spends all working hours at hospital*

This Court has "recognize[d] (as did the legislature) the practical problems such a factor creates in today's world of emergency medicine, in which emergency room physicians routinely spend all their working hours at the hospital." Blackmon, 288 Ga. App. 137, 142 (2007). This factor arose in the analysis of a hospital-physician relationship, and it was relevant to show the physician working at the hospital-employer's facility. In this case, Dr. Holliger worked solely at WellStar North Fulton Hospital, not on any NFEP premises. (V7-7—8).

In the instant matter, the trial court did not ignore this factor, but it simply recognized, similar to this Court in Blackmon, it "does little to elucidate the nature of [Dr. Holliger's] relationship with NFEP." (V6-296). As such, the trial court correctly did not weigh this factor to overcome the presumption of contractor status. See Blackmon, 288 Ga. App. at 142 (holding this factor alone, or in conjunction with other tertiary factors, will not preclude summary judgment).

10. *Method of billing patients*

As the trial court rightfully pointed out, "this factor is of little weight in the light of modern medical practice." (V6-296). The trial court did not ignore the factor or make a finding that it favored contractor status. The trial court simply recognized, based on context, modern medicine does not support this factor having a great bearing upon analysis, and it deemed this factor insufficient to overcome the contractual presumption.

In the well over 20 years since Lee and Cooper, the practice of medicine has exploded into a medical and pharmaceutical industrial complex. Dr. Holliger is a physician, not a billing specialist or accounts receivable expert, nor expected to navigate the ever-growing complexity of health insurance, CMS, or accounting. In today's world, the billing and accounting for medical patients requires a team of specialists; to require Dr. Hollinger to do this by herself would prevent her from doing her actual job – treating patients. Accordingly, the trial court appropriately considered this factor, like this Court and the General Assembly have done, and espoused this tertiary factor of *de minimis* concern; certainly not enough to overcome the presumption of independent contractor status, paired the findings on the crucial factors of step-by-step control of work and control of time.

Again – **this just makes good sense**. The legal framework expressly allows for our judges to exercise this "common sense" in its decision-making. Judge Tailor

took an inclusive and broad framework that allows for rational, contextualized application, applied each factor to the facts and context of modern medical practice, and issued a thought out, comprehensive Order on the same. The way the process played out here should be celebrated and affirmed as providing continued clarity of a well-functioning legal framework that can be adapted to the time and context.

11. *Payment for medical malpractice insurance*

Like the factor on billing, traditional application of this tertiary factor makes little sense here. NFEP providing insurance was the easiest way to ensure its compliance with the WellStar North Fulton Hospital agreement, requiring physicians to have insurance. (V7-306—307). Again, considering the ever-growing practice of medicine, and the complexities surrounding multifaceted insurance plans, requiring Dr. Holliger to handle her own insurance would be a daunting proposition.

The trial court judiciously recognized this proposition and set of facts, and similar to this Court and the General Assembly before it, pronounced this factor insufficient to overcome the presumption, with the totality of the circumstances favoring independent contractor status for Dr. Holliger.

D. Dr. Holliger's investment and general statement of employment are irrelevant considerations.

Appellant provides no authority for her proposition that Dr. Holliger's investment in NFEP has any bearing upon an independent contractor analysis. (Appellant's Br. at 32-33). This is an utterly irrelevant consideration, and the trial

court correctly saw through this extraneous argument. (V6-297). The trial court pointed out the spurious nature of this argument, discussing, for example, if an independent contractor works for a Coca-Cola and then invests in Coca-Cola stock, this would automatically make this person an employee. (V9-23). Such a proposition has no bearing on the present analysis, and it only continues to highlight the flimsy nature of Appellant's position and the desperation to survive dispositive inquiry so as to effectively moot the existence of the contractual relationship in the first place. (If it is always a jury question, the protection of the status is effectively mooted in practice).

Further, Appellant erroneously posits that because Dr. Holliger testified "I was working for ApolloMD," this somehow bears upon the analysis. (V7-6—7). This semantical argument is irrelevant and only worthy of mention here in that it belies Appellant's transparent attempt to simply muddy the issues on appeal to encourage "punting" to a jury question. Independent contractors, by their nature, "work" for an entity or person. This does not mean they are employees. Even if Dr. Holliger gave this testimony expressly in the context of being asked about her legal employment status, her lay opinion bears absolutely no weight to analysis here. See Bexley v. Southwire Co., 168 Ga. App. 431 (1983) (finding an independent contractor relationship existed, even when the physician claimed and admitted that he was an employee of the company).

But that is expressly not the context in which this testimony was elicited. This came as part of the standard deposition fare of walking through work history. It was the equivalent of cocktail conversation – "what do you do for work?" That Appellant has made this a substantive – if not primary – argument throughout this process once again only highlights the precarious nature of their espoused position.

IV. The trial court setting forth the material facts and findings of law in its Order does not create error.

In granting a motion for summary judgment the trial court is not required to make findings of fact and conclusions of law. "It is not grounds for reversal that the trial court elected not to issue findings of fact and conclusions of law in support of the court's grant of summary judgment." Hopkins v. Hudgins & Co., 218 Ga. App. 508, 462 S.E.2d 393 (1995).

This case was fully adjudicated on the motion. C.f. O.C.G.A. § 9-11-54(d). Judgment was rendered upon the whole case when the trial court granted Defendant's motion for summary judgment. Nothing more was required. The trial court's Order, however, is not only instructive to the parties in the action, but also to this Court reviewing it. Judge Tailor rightly understood the grant of summary judgment in this case would likely be appealed. Accordingly, and not in error, the trial court provided a thorough discussion of how it reached its ruling. To claim that the trial court erred in providing ***more*** than was required in rendering its judgment is counterintuitive.

Furthermore, "[m]ere entry of findings of fact and conclusions of law in ruling on a motion for summary judgment does not constitute error *per se*. In certain cases when the trial court makes findings of fact and conclusions of law in ruling on motions for summary judgment, it can be helpful to the appellate courts and instructive to the parties." Harrell v. Louis Smith Mem. Hosp., 197 Ga. App. 189, 397 S.E.2d 746 (1990); see also Lewis v. Rickenbaker, 174 Ga. App. 371 (1985). The Georgia Supreme Court has also appreciated that, not only is there no error when a trial court elects to make findings of facts and conclusions of law in ruling on a motion for summary judgment, but also it has no impact on the appellate court's *de novo* review of the trials court's ruling. Atlanta v. N. by Northwest Civic Ass'n, 262 Ga. 531, 536 (1992) ("Moreover, the fact that the trial court made findings of fact and conclusions of law does not change the standard of review on appeal of summary judgments.").

The trial court's inclusion of how it weighed and viewed the factors in reaching its conclusions on the issues of law is not erroneous. **It is the law and how analysis is supposed to be conducted!** Any "findings" of the court are purely legal determinations within the purview of the court. The trial court did not "find facts" in the same way a jury does; the trial court merely "found" – by answering a question of law – there was not a material issue of fact in dispute for the jury to weigh in on.

CONCLUSION

For the foregoing reasons, Appellee North Fulton Emergency Physicians, LLC, respectfully requests that this Court affirm the trial court's grant of summary judgment in its favor.

I certify that this submission does not exceed the word count limit imposed by Rule 24.

This 17th day of February, 2025.

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CERTIFICATE OF SERVICE

Under Rule 6, I hereby certify that I have this day served a true and exact copy of the above and foregoing **BRIEF OF APPELLEE NORTH FULTON EMERGENCY PHYSICIANS, LLC**, upon:

Stephen G. Lowry, Esq.
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by depositing the same in the United States Postal Service with adequate first-class postage affixed thereon to assure delivery.

This 17th day of February, 2025.

WEATHINGTON, LLC

/s/ Paul E. Weathington
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