IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

RICHARD THOMAS CALANNI, et al.	)	CASE NOs. CV-13-804148
	)	CV-14-822838
Plaintiffs	)	
	)	JUDGE PAMELA A. BARKER
v.	)	
	)	**OPINION AND JOURNAL ENTRY ON**
CLEVELAND CLINIC FOUNDATION, et al.	)	**DEFENDANTS' MOTIONS FOR**
	)	**SUMMARY JUDGMENT**
Defendants	)	
	)	

This matter is before the Court on the Motion for Summary Judgment of Defendant Emergency Professional Services, Inc. (hereinafter "EPS") filed on May 30, 2014, the Motion for Summary Judgment of Defendant TeamHealth, Inc. (hereinafter "TeamHealth") filed on May 30, 2014, and the Motion for Summary Judgment of Defendant Emergency Professionals of Ohio, Inc. (hereinafter "EPO") filed on January 12, 2015.

Plaintiffs Richard Thomas Calanni and Lorie Lee Calanni (hereinafter "Plaintiffs") filed Briefs in Opposition to the above referenced Motions. EPS, TeamHealth and EPO filed Reply Briefs.

FACTUAL BACKGROUND AND SUMMARY:

This matter involves medical malpractice and wrongful death claims asserted by Plaintiffs Richard Thomas Calanni and Lorie Lee Calanni[1] on behalf of their deceased daughter, Jacqueline Christine Calanni. On April 3, 2013 Plaintiffs filed a Complaint asserting medical negligence and wrongful death claims against several Defendants, including EPS, TeamHealth

[1] Plaintiffs serve as the co-administrators of the Estate of Jacqueline Christine Calanni.

and three emergency room physicians, Mary S. Dearmin, M.D., Cary C. Scott, M.D., and Mary M. Wong, M.D. (hereinafter "the Defendant Physicians") who treated the decedent in the month leading up to her death (CV-13-804148). On March 3, 2014, Plaintiffs filed a second Complaint against Defendant EPO asserting claims for medical malpractice and wrongful death (CV-14-822838).[2] Plaintiffs allege that Defendants EPS, TeamHealth and EPO are vicariously liable to them for the care provided to their decedent by the Defendant Physicians under the theory of agency by estoppel.

In their respective Motions for Summary Judgment Defendants EPS, TeamHealth and EPO argue that they cannot be held vicariously liable to Plaintiffs under the theory of agency by estoppel because the Defendant Physicians are not their agents or employees, but "independent contractors" pursuant to a contractual agreement with Defendant EPO.

Stated succinctly, Plaintiffs argue in their opposition briefs that there are genuine issues of material fact as to whether Defendants EPS, TeamHealth and EPO retained a "right to control" the Defendant Physicians so as to make them agents/employees of the EPS, TeamHealth and EPO, as opposed to independent contractors, requiring the denial of their summary judgment motions.

TEAMHEALTH'S **MOTION FOR SUMMARY JUDGMENT**:

In its Motion for Summary Judgment, TeamHealth argues that since it did not provide or oversee the medical care and treatment rendered by the Defendant Physicians to the decedent,

---

[2]Case CV-14-822838 was initially assigned to Judge Steven Gall, but was consolidated with CV-13-804148 when this Court granted the Motion to Consolidate on June 9. 2014. Defendant EPO's Motion to Dismiss was granted in part by this Court on July 21, 2014, with the Court dismissing the medical negligence claim against Defendant EPO on the basis that it was time-barred. Plaintiffs' remaining claim against EPO is based on the theory of agency by estoppel – that EPO should be held vicariously liable for the care provided by the Defendant Physicians.

and it has no contractual relationship with any of the Defendant Physicians, it cannot be held liable on a theory of agency by estoppel and summary judgment must be rendered in its favor.[3]

Attached to its Motion is an affidavit of Assistant General Counsel Thomas Pobgee for TeamHealth,[4] wherein Mr. Pobgee avers that TeamHealth is the parent company of EPS, it does not hold itself out to the public as a medical provider and that, as a Tennessee corporation, it does not have employees in Ohio.[5] TeamHealth argues that to hold a corporation liable for a subsidiary, it must appear that the subsidiary was operated as a mere instrumentality of the parent corporation.[6] TeamHealth asserts that under Ohio law Plaintiffs must show that: the control by the parent company was so complete that the subsidiary had no separate existence or will of its own; the parent company's control over the subsidiary was exercised in such a manner as to commit fraud or an illegal act; and this behavior resulted in injury or loss.[7] TeamHealth argues that its only connection to this lawsuit is as the parent company to EPS, and that as a parent company, it does not exercise control over EPS.

TeamHealth further asserts that to maintain a claim of medical negligence against a parent company, the Plaintiffs must demonstrate: the existence of a duty; a breach of that duty; and proximate cause between the breach of that duty and the injury or death.[8] TeamHealth argues that because it did not provide or oversee care to the decedent and it did

---

[3] Defendant TeamHealth, Inc.'s Motion for Summary Judgment, pp. 1, 6-9.
[4] *Id.*, Exhibit A, Affidavit of Thomas Pobgee.
[5] *Id.*, ¶¶5-6.
[6] *Nemeth v. J. C. Baxter Co., Inc.,* 1982 Ohio App. LEXIS 11633, *14-15 (6th Dist. 1982).
[7] *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc.* (1993), 67 Ohio St.3d 274, 289.
[8] *Littleton v. Good Samaritan Hosp. & Health Ctr* (1988), 39 Ohio St.3d 86, 92.

not have a physician/patient relationship with her, it owed no duty of care to the decedent. Therefore, according to TeamHealth, it cannot be held liable for medical negligence.[9]

TeamHealth cites to Plaintiff Lorie Lee Calanni's deposition testimony that before this lawsuit she had not specifically heard of TeamHealth or EPS to support its position that it did not hold itself out as a medical provider, and therefore, it cannot be held liable under the theory of agency by estoppel.[10]

In their Brief in Opposition to TeamHealth's Motion filed on June 30, 2014, the Plaintiffs argue that the totality of the facts and circumstances demonstrate that Defendant TeamHealth retained a degree of control over the Defendant Physicians sufficient to make them agents or employees of TeamHealth and therefore, under the theory of agency by estoppel, TeamHealth is vicariously liable to them for the Defendant Physicians' negligence or malpractice.[11] The facts and circumstances that Plaintiffs point to are that TeamHealth billed for the Defendant Physicians,[12] established a code of conduct for them,[13] hired staff for the hospital,[14] provided medical training to them,[15] and retained the right to control the work of the Defendant Physicians.[16]

In its Reply Brief filed on July 17, 2014, TeamHealth argues that the Plaintiffs' filing of their Complaint against EPO (consolidated Case number CV-14-822838) constitutes an

---

[9] Defendant TeamHealth, Inc.'s Motion for Summary Judgment, p. 6.
[10] *Id.*, pp. 8-9; and Exhibit B, Deposition of Lorie Lee Calanni, pp. 184-186.
[11] Plaintiffs' Brief in Opposition to TeamHealth's Motion for Summary Judgment, pp. 4-6, 8-16.
[12] *Id.*, pp. 10-11
[13] *Id.*, p. 11.
[14] *Id.*, pp. 11-12.
[15] *Id.*, pp. 4-6
[16] *Id.*, p. 15. *Silver v. Statz* (2006), 166 Ohio App.3d 148, ¶14: "contract language does not determine the relationship of the parties, rather the objective nature of the relationship is determined upon analysis of the totality of the facts and circumstances of each case."

acknowledgment that the Defendant Physicians are actually independent contractors of EPO.[17] TeamHealth also argues that Plaintiffs failed to use proper evidence pursuant to Civ.R. 56 to rebut the Motion for Summary Judgment.[18] TeamHealth also argues that the cases cited and relied upon by Plaintiffs are distinguishable from this matter. Specifically, TeamHealth argues that the holding in in *Kraemer v. Bates Motor Transport Lines* (1937), 56 Ohio App. 427,[19] did not include any reference to "sub-agency" and it distinguishes this matter from the holding in *Silver v. Statz* (2006), 166 Ohio App.3d 148,[20] by arguing that the *Silver* court did not rely merely on billing to show an employment relationship, but looked to eight other factors.

EPS' MOTION FOR SUMMARY JUDGMENT:

In its Motion for Summary Judgment, EPS presents arguments that are similar to those of TeamHealth, specifically that because EPS did not provide or oversee the care and treatment of the decedent and it had no contractual relationship with the Defendant Physicians, it cannot be held liable under the theory of agency by estoppel.[21]

EPS argues that it did not employ or contract with the Defendant Physicians, but is a "proactive management entity" that provides professional staffing services to the hospitals. EPS argues that the Defendant Physicians were independent contractors of Defendant EPO and that it was EPO that provided physicians to EPS as part of a staffing agreement. EPS points to the "independent contractor agreement" between EPO and the Defendant Physicians. EPS also

---

[17] TeamHealth Reply Brief, pp. 2-3.
[18] *Id.*, pp. 2-4
[19] *Id.*, pp. 6-7
[20] *Id.*, p.8
[21] EPS' Motion for Summary Judgment, pp. 1, 4-6, 8-11.

offers an argument similar to that of TeamHealth, specifically that since EPS did not oversee the decedent's care, it cannot be held liable to Plaintiffs for medical negligence.[22]

To support its argument that the Defendant Physicians were independent contractors of Defendant EPO, EPS relies upon the affidavit of Stephen J. Murtaugh, the Vice President and Chief Financial Officer of EPS.[23] In his affidavit, Mr. Murtaugh avers that: EPS is an Ohio Corporation that is owned by TeamHealth (a Tennessee corporation);[24] EPS is a separate entity from TeamHealth; the physicians contract with EPO as an independent contractor; EPO provides the staffing to EPS;[25] EPS did not have any control over the manner in which the physicians practiced medicine or exercised medical judgment; EPS did not provide tools or equipment to the doctors; EPS did not employ the staff; EPS did not provide employee benefits; and EPS did not provide transportation or medical training for the physicians.[26]

EPS also relies upon the deposition testimony of Plaintiff Lorie Lee Calanni that she had never heard of Defendant EPS[27] to argue that Plaintiffs did not look to EPS to provide medical care for decedent and that EPS does not hold itself out to the public as a medical provider.[28]

In their Opposition Brief filed June 30, 2014, Plaintiffs argue that genuine issues of material fact exist with respect to whether Defendant EPS retained a "right to control" over the Defendant Physicians sufficient to make EPS vicariously liable for their negligence or

---

[22] EPS' Motion for Summary Judgment, p. 8; citing *Littleton v. Good Samaritan Hosp. & Health Ctr.* (1988), 39 Ohio St.3d 86, 92.
[23] EPS' Motion for Summary Judgment, Exhibit A.
[24] *Id.*, ¶¶4, 5, and 6.
[25] *Id.*, Exhibit A, ¶¶9, 10, and 11.
[26] *Id.* ¶¶15-21.
[27] *Id.*, Exhibit G, Deposition of Lorie Lee Calanni, pp. 184-186.
[28] All Defendants rely upon the holding in *Clark v. Southview Hosp. & Family Health Ctr.* (1994), 68 Ohio St.3d 435, 444-445, to wit: the elements for agency by estoppel are that the hospital held itself out to the public as a care provider of medical services and in the absence of knowledge otherwise, the patient looked to the hospital, and not the individual doctor, to provide competent medical care.

malpractice. According to Plaintiffs, the "right to control" retained and exercised by EPS is demonstrated by the following facts. EPS required the Defendant Physicians to comply with its policies and procedures, treat all patients presenting to the emergency room, complete medical records within a specified period of time, and maintain licensure and credentialing within a specific timeframe.[29] Also, EPS supplied and supervised the nurse practitioners and physician assistants who assisted the Defendant Physicians in their work; retained the right to control their work schedules, had the right to discipline them, contracted for the services of the Defendant Physicians for over eight years; and acted as the billing and collection agent for all professional fees.[30] Finally, the success of EPS was dependent upon the Defendant Physicians providing quality care, and through its parent company, TeamHealth, EPS provided professional liability insurance to the physicians.[31]

On July 17, 2014, EPS filed its Reply Brief and, like TeamHealth, argued that the Plaintiffs' lawsuit against defendant EPO, CV-14-822838, supports its position by demonstrating that the Defendant Physicians executed independent contractor agreements with Defendant EPO only, and never engaged in any contract directly with Defendant EPS.[32] In summary, EPS argues that the Plaintiffs have presented no basis upon which to hold EPS liable since: they cannot show the doctors are agents or employees of EPS;[33] their argument that EPS asserted a

---

[29] Plaintiffs' Brief in Opposition to EPS' Motion for Summary Judgment, pp. 1-7, 12-15.
[30] *Id.*, pp. 1-7, 15-19.
[31] *Id.*, pp. 1-7, 14, 15 and 17.
[32] EPS' Reply Brief in Support of their Motion for Summary Judgment, pp. 2-3.
[33] *Id.*, pp. 5-7.

right-to-control the Defendant Physicians fails;[34] and a non-compete clause in the agreement between EPO and the doctors does not demonstrate any sort of "control" by EPS.[35]

EPO's MOTION FOR SUMMARY JUDGMENT:

On January 12, 2015, Defendant EPO filed its Motion for Summary Judgment. EPO argues that Plaintiffs' only claim against it is based upon the theory of agency by estoppel.[36] In its Motion, EPO explains that: Defendant EPS contracts with the hospitals directly to provide staffing for the emergency departments; EPO contracts with the physicians (as "independent contractors"); EPS then contracts with EPO to provide physicians;[37] and EPS uses these physicians from EPO to staff the emergency departments.[38]

In its Motion, EPO emphasizes that it specifically executed an "Independent Contractor Agreement" with the Defendant Physicians, and therefore, they are not its agents or employees.[39] Specifically, EPO argues that the Defendant Physicians all exercise "Independent Medical Judgment"[40] and points to the fact that the Defendant Physicians provide EPO with their preferred times and hours to work, and are free to also work at other locations, as examples of their autonomy.[41]

---

[34] *Id.*, pp. 7-11.
[35] *Id.*, pp. 12; *See Hamilton Ins. Serv., Inc. v Nationwide Ins. Cos. (1999),* 86 Ohio St.3d 270 (holding that non-competition clauses are enforceable against independent contractors); *See also Carl Ralston Ins. Agency, Inc. v Nationwide Mut. Ins. Co* (2007), 2007-Ohio-507 (holding that enforceability of a non-compete clause does not depend on a person's status as an employee or independent contractor).
[36] EPO's Motion for Summary Judgment, p. 3.
[37] *Id.*, Exhibit E: "Provider Leasing Agreement" between EPO and EPS. This agreement essentially provided EPS with Defendant Doctors Dearmin, Scott and Wong for staffing at the Cleveland Clinic's Sagamore Hills Medical Center and Hillcrest Hospital.
[38] *Id.*, p. 3.
[39] *Id.*, p. 4.
[40] *Id.*, Exhibits F, G, and H ¶6: "Physician shall exercise physician's independent professional medical judgment while providing services hereunder".
[41] *Id.*, p. 5.

EPO also attaches excerpts from the Defendant Physicians' depositions to support its argument of their role as EPO's Independent Contractors. EPO argues that Dr. Mary Dearmin was not an agent or employee of EPO when she saw the deceased, Jacqueline Calanni on March 2, 2012 at Hillcrest Hospital. [42] EPO asserts that Defendant physician Dr. Cary Scott was also an Independent Contractor at the Sagamore Hills location when he saw the decedent Jacqueline Calanni on January 23, 2012 and March 2, 2012.[43] Finally, EPO indicates that Dr. Mary Wong was also an Independent Contractor when she saw Jacqueline Calanni at the Hillcrest Pediatric ER on March 2, 2012.[44]

In further support of its argument that the Defendant Physicians are "independent contractors", EPO relies upon the decision in *Jaeger v. Matrix Essentials* (2002), 236 F.Supp.2d 815, which sets forth the factors to consider when determining if a party is considered an "employee"[45] and an affidavit from an expert consultant, attorney Scott P. Sandrock, who opines that Defendant physicians "were acting as Independent contractors and not agents or employees of EPO".[46]

Plaintiffs filed their Brief in Opposition on March 5, 2015. Plaintiffs argue that there are genuine issues of material fact as to whether the Defendant physicians are employees or agents

---

[42] *Id.*, Exhibit I, Deposition of Mary Dearmin, MD, p. 180: EPO did not pay Dr. Dearmin's taxes, or provide vacation or sick leave; p. 181: EPO did not determine Dr. Dearmin's hours or her treatment of patients and did not interfere with her medical judgment; and p. 182: EPO did not provide Dr. Dearmin's benefits and did not control her day-to day activities.

[43] *Id.*, Exhibit J, Deposition of Cary Scott, MD, p. 134: EPO did not give Dr. Scott a paycheck (he received a voucher without EPO's name on it), p. 135: EPO did not enforce any educational requirements; and p. 135, EPO did not impose personnel policies.

[44] *Id.*, Exhibit L.

[45] *Id.*, pp. 10-11.

[46] *Id.*, Exhibit M, Affidavit of Expert Consultant, Scott P. Sandrock, ¶6.

of Defendant EPO.[47] Plaintiffs point to the "crucial role" that EPO plays in the "complex corporate structure used by Co-Defendants TeamHealth, EPS and EPO.[48] Plaintiffs assert that EPO imposes obligations on the doctors and retains rights of control over them as well, and that under Ohio law, the retention of these rights creates a genuine issue of material fact rendering the granting of summary judgment improper.[49]

Plaintiffs attach the "Physician Contracts"[50] to demonstrate the control that EPO maintains over the Defendant Physicians. EPO contracts with the doctors with the knowledge that these doctors will be "leased" to EPS to staff the emergency rooms. Plaintiffs argue that the contracts grant EPO the right to discipline, fire, set and decrease compensation, determine when, where and how the doctors work, set doctors' qualifications, and legally bind them in other contracts on their behalf. Plaintiffs also point out that the physicians have the understanding that they will be providing professional services on behalf of EPS.[51]

The "Leasing Agreement" between EPO and EPS was also attached to Plaintiffs' Opposition Brief.[52] Plaintiffs point to this agreement to show that EPO provides the physicians to EPS, and then EPS staffs the hospitals and bills or collects for those very services.[53] Plaintiffs reference the "Outsourcing Agreement" between EPS and Co-Defendant the Cleveland Clinic

---

[47] "EPO is not entitled to Summary judgment because there exists genuine issues of material fact as to whether EPO exercised, or retained the right to exercise, sufficient control over Mary Wong, M.D., Mary S. Dearmin, M.D., and Cary Scott, M.D." , Plaintiffs' Brief In Opposition to EPO's Motion for Summary Judgment, p. 1.
[48] *Id.*, p.4, ¶2: "EPO holds the contracts for physicians who staff the hospitals ("Physician Contracts")".
[49] *Id.*, p.4.
[50] *Id.*, p. 6; Exhibit A, Physician Contracts signed by physicians and Dr. James Rybak on behalf of EPO on May 1, 2006.
[51] *Id.*, p. 6; Exhibit A, specifically ¶¶3(c), 3(b), 4(b), 4(g), 4(h), 7(b), 10, 12, 14,15, ad 16(m).
[52] *Id.*, Exhibit B, "Leasing Agreement" (Provider leasing agreement between EPO and EPS, effective January 1, 2005).
[53] *Id.*, p. 7 and Exhibit B, at "Recitals".

Foundation (hereinafter "CCF")[54] and the business operations between EPO, EPS and TeamHealth,[55] in an effort to show that operations between these Defendants are so "interwoven" that a genuine issue of material fact exists as to what entity has control over the Defendant physicians.

Plaintiffs rebut EPO's arguments with respect to the depositions of the Defendant physicians. Plaintiffs point out that in Doctor Mary Dearmin's deposition, she disclosed the following: EPS paid her wages[56]; she corrected her medical charts at EPS' request[57]; EPS provides her with paperwork to sign from time to time, including a "Code of Conduct"- which was created by TeamHealth[58]; and that she would update her Medical Director on various events, with the understanding that this person kept EPS updated as she was "obligated to do"[59]. In the Deposition of Dr. Cary Scott, he explained that Sagamore Hills physicians used the TeamHealth web applications to make scheduling requests, clock in and out and check notifications regarding policy changes.[60] Doctor Scott also discussed the mandatory testing and educational requirements imposed by TeamHealth, EPS or EPO.[61] Finally, Plaintiffs note that Dr. Scott testified that his direct deposit vouchers were signed by TeamHealth, that TeamHealth issued him his 1099 and that they employed his supervisor.[62]

---

[54] *Id.*, pp. 7-8.
[55] *Id.*, pp. 8-12.
[56] *Id.*, Exhibit F, p. 34.
[57] *Id.*, Exhibit F, p. 32.
[58] *Id.*, Exhibit F, p. 79.
[59] Id., Exhibit F, pp. 171-174.
[60] *Id.*, Exhibit G, pp. 25-29.
[61] *Id.*, Exhibit G, pp. 35-40.
[62] *Id.*, Exhibit G, pp. 27-34.

The third Doctor, Mary Wong MD, did not seem to know what entity controlled her work.[63] Plaintiffs point out that all three Defendant doctors were confused when identifying their relationships with EPS, EPO and TeamHealth. In sum, based on the complex relationships detailed by Plaintiffs and the genuine issues of material fact raised, they argue that Summary Judgment is not appropriate.

On March 20, 2015, EPO filed its Reply Brief. This Reply presents EPO's ongoing argument that the Defendant Doctors Scott, Wong and Dearmin are all independent contractors and not agents or employees of EPO. EPO asserts that the Plaintiffs Opposition Brief creates "confusion" and that Plaintiffs are purposefully trying to "create 'issues of fact'".[64] EPO urges the Court to review and rely on the "plain language" of the contract between EPO and the Defendant physicians.[65] EPO argues that it does not have the "right to control the manner and means of doing the work" (meaning the Defendant physicians' provision of medical treatment) and that the physicians are only responsible to EPO for a "final product" (providing medical services based upon their professional medical judgment).[66] Finally, EPO argues that Plaintiffs have taken their examples (from the Opposition Brief-showing EPO's control on the physicians) "out of context" from the contract.[67]

STANDARD FOR SUMMARY JUDGMENT:

Civ. R. 56(C) provides in relevant part as follows:

---

[63] *Id.*, p. 15; Exhibit H, p. 19.
[64] EPO's Reply Brief in Opposition in Support of Motion, p. 2.
[65] *Id.*
[66] *Id.*, p. 7, relying on holding in *Koch v. Lind* (1997), 121 Ohio App.3d 43 and *Conway v. Dispatch Consumer Services, Inc.* (1997), 1997 Ohio App. LEXIS 1672.
[67] *Id.*, pp. 12-16.

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

"In order to properly grant a summary judgment motion pursuant to Civ. R. 56(C), a trial court must review the pleadings, deposition testimony, and other evidentiary materials and determine that: '*** (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O.3d 466, 472, 364 N.E.2d 267, 274; ***.'" *Johnson v. Great American Ins. Co.* (1988), 44 Ohio App.3d 71, 72-73.

The burden of showing that no genuine issue exists as to any material fact falls upon the moving party in requesting a summary judgment. *Harless v. Willis Day Warehousing Company, et al.* (1978), 54 Ohio St.2d 64, 66, 8 O.O.3d 73, 375 N.E.2d 46, 47. Civ. R. 56(E) requires that the adverse or non-moving party set forth specific facts showing that there is a genuine issue

for trial and the non-moving party must so perform if he is to avoid summary judgment. *Id.*, 54 Ohio St.2d at 65.

"Although a party seeking summary judgment must inform the trial court of the basis for its motion, the movant need not necessarily support its motion with evidentiary materials which directly negate its opponent's claim. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 323. Rather, the movant may sometimes meet its burden by pointing out to the trial judge 'that there is an absence of evidence to support the nonmoving party's case.' *Id.* at 325. See, also, *Hodgkinson v. Dunlop Tire & Rubber Corp.* (1987), 38 Ohio App.3d 101, 526 N.E.2d 89." *Johnson v. Great American Ins. Co.* (1988), 44 Ohio App.3d 71, 72-73.

TOTALITY OF THE CIRCUMSTANCES & GENUINE ISSUES OF MATERIAL FACT:

When the Court views the evidence in a light most favorable to the non-moving party, the Plaintiffs, this Court finds that a genuine issue of material fact exists as to whether EPO, EPS and TeamHealth exercised any control over the Defendant Physicians so as impose vicarious liability on these Defendants under the theory of agency by estoppel. Relevant considerations by the Court are the connections between the Defendant Physicians and EPO, EPS and TeamHealth. The Court agrees with Plaintiffs' argument that these Defendants share a complex and interrelated corporate structure.

EPO and the Contract with the Defendant Physicians:

After review of the briefs and evidence submitted by the parties, it is undisputed that there is a direct connection between Defendant EPO and the Defendant Physicians. The

Defendant Physicians executed a contract with EPO.[68] EPO contracts with these physicians knowing that they will be leased to EPS, under the leasing agreement between EPO and EPS.

EPO's primary defense is to rely upon the language in its contract with the Defendant Physicians, which defines the physicians as "independent contractors". [69] However, the Court agrees with the Plaintiffs' argument that the mere fact the contract classifies someone as an "independent contractor" is not, in and of itself, definitive of this issue. *See Walker v. Lahoski*, 1999 Ohio App. LEXIS 3435, 7-8 (Ohio Ct. App., Summit County July 28, 1999) (holding that "such a contract provision is not necessarily controlling. The trial court must look to the substance of the relationship, not merely to a label attached to the relationship").

Importantly, through these contracts,[70] and as highlighted by the Plaintiffs in their Brief in Opposition, EPO is granted the "right" to discipline and fire the doctors, set and decrease their compensation, determine when, where and how the physicians work, set the qualifications for the position, enter into other legally binding contracts on behalf of the physicians, and require compliance with any policies or procedures that EPO imposes upon the contracting physicians.[71]

As Plaintiffs note, even the Defendant Physicians themselves expressed confusion over their relationship with EPO and EPS.[72] Dr. Scott directly stated that he was "confused between

---

[68] See Plaintiffs' Brief in Opposition to Defendant EPO's Motion for Summary Judgment, Exhibit A.

[69] See EPO's Reply to Plaintiffs'' Brief in Opposition to Defendant's Motion for Summary Judgment, p. 3, Exhibit A, at ¶ 1: "The legal relationship of Physician and EPO shall be that of independent contractors".

[70] Specifically the contract between EPO and the Defendant Physicians, and the contract between EPO and EPS is to provide coverage at the emergency rooms to fulfill EPS' agreement with Cleveland Clinic Foundation ("CCF").

[71] See Plaintiffs' Brief in Opposition to Defendant EPO's Motion for Summary Judgment, Exhibit A, ¶¶ 3(b), 3(c), 4(b), 4(g), 4(h), 7(b), 10, 14, 15, 16(m).

[72] *Id.*, p. 16.

EPO and EPS"[73] and Dr. Wong was "totally confused" over "the EPO, EPS thing"[74] and testified that she did not even know what her own relationship was to either entity.[75]

Given the above analysis, the Court agrees with Plaintiffs' argument that Summary Judgment should be denied as to Defendant EPO, as a genuine issue of material fact exists as to whether EPO retained a degree of control or a right of control over the Defendant Physicians.[76] While EPO submitted an affidavit from its expert, Scott P. Sandrock, on the issue of whether or not the Defendant physicians were independent contractors,[77] the Court finds that this is a factual determination that is not dispositive through this expert opining. Reasonable minds could conclude that Defendant Physicians were employees of EPO after consideration of all of the facts and factors presented by the Plaintiffs in rebuttal.[78]

Leasing Agreement" Between EPO and EPS:

EPO and EPS have a contract whereby EPO "leases" physicians to EPS for professional services at the emergency rooms at issue in this matter. EPS has an "Outsourcing Agreement" with the Cleveland Clinic Foundation to staff and manage specified emergency departments.[79]

Plaintiffs also point to the shared role of Trudy Lane to demonstrate the interconnected relationship of EPO, EPS and TeamHealth. Lane is the sole representative of EPO at its office[80]

---

[73] Deposition of Dr. Cary Scott, p. 18.
[74] Deposition of Dr. Mary Wong, p. 45.
[75] *Id.*, p. 86.
[76] *See Albain v. Flowers Hosp.,* 50 Ohio St.3d 251, 255 (1990), holding that an independent contractor is distinguished from an agent or employee by the degree of control or the right to control retained by the employer/principal.
[77] EPO's Motion for Summary Judgment, Exhibit M, Affidavit of Expert Consultant, Scott P. Sandrock, ¶6.
[78] *See Hartlings v. National Mut. Ins. Co.,* 2014-Ohio-1794, ¶63, holding that resolving the issue of whether or not one is an employee or agent is a fact intensive inquiry that requires the consideration of a number of factors.
[79] Deposition of Trudy Lane, Exhibit D, Plaintiffs' Opposition to EPO's Motion for Summary Judgment.
[80] EPO shares an office with EPS at 7123 Pearl Road, Middleburg Heights, Ohio.

and serves as the Vice President of EPO.[81] Importantly, Plaintiffs note that EPO's Vice President Lane also serves, and receives her compensation as, the Senior Vice President of EPS.[82] Lane has been employed by EPS since 2010, when her contract with TeamHealth was assigned (without her knowledge) to EPS.[83]

As discussed in the parties' briefs, it is well settled law in Ohio that employers or agents can be held responsible for the negligence of their agents or employees,[84] and the classification between an employee or "independent contractor" can be determined from the degree of control or right of control held by the principal.[85] Further, as the *Bostic* court noted, "the determination of who has the right to control must be made by examining the individual facts of each case".[86]

As outlined above, Defendants TeamHealth and EPS rely on the excerpt of the Deposition of Plaintiff Lorie Lee Calanni, where she indicates she had not heard of TeamHealth or EPS before this suit.[87] Defendants argue that this fact is further evidence that they did not hold themselves out as medical providers for the decedent and, as such, they are not liable. The Court does not, however, find that that is the only analysis to apply in evaluating this issue. For purposes of determining whether the theory of agency by estoppel would apply, the Court looks to the fact that there are genuine issues of material fact as to the right of control or level of control asserted over the physicians by TeamHealth and EPS.

---

[81] Lane is not considered an employee of EPO and she is not compensated for her role with EPO. Exhibit D, Deposition of Trudy Lane, p. 43.
[82] Exhibit D, Deposition of Trudy Lane, p. 17.
[83] *Id.*
[84] *Clark v. Southview Hosp. & Family Med. Ctr.*, 68 Ohio St.3d 435 (1994).
[85] *Albain v. Flower Hosp.*, 50 Ohio St.3d 251, 255 (1990).
[86] *Bostic v. Connor*, 37 Ohio St. 3d 144, 146 (1988).
[87] Defendant TeamHealth, Inc.'s Motion for Summary Judgment, pp. 8-9; and Exhibit B, Deposition of Lorie Lee Calanni, pp. 184-186.

As previously summarized, in Opposition to Defendant EPS' Motion for Summary Judgment, Plaintiffs lists numerous ways EPS has the right to control or exercises control over the Defendant physicians. While EPS and EPO cite to case law to support the fact that such provisions, like a non-compete clause, are not sufficient to show control over the physicians, this Court notes that it is looking to the **totality** of the factors outlined by the Plaintiffs.

The Court finds the following relevant: the fact that EPS retains the right to control the manner or means of the doctors' work; EPS retained the exclusive right to bill and collect for the doctors' services; EPS maintained the malpractice insurance for the doctors; EPS controls the medical personnel provided to the doctors; the work of the physicians is integral to the business operations of EPS; the doctor's contracts provided the manner and means to which they provided patient care on behalf of EPS; and EPS indirectly controlled the doctors through its close relationship with EPO.[88]

Given the interrelated and overlapping responsibilities and requirements of EPS and EPO, and given the various ways EPS is involved in the daily activities of the Defendant Physicians (who themselves are confused by the differences between EPS and EPO), the Court further finds that Summary Judgment should be denied as to Defendant EPS, as a genuine issue of material fact exists as to whether the EPS retained any degree of control or a right of control over the Defendant physicians.

TeamHealth and its wholly owned subsidiary EPS

As summarized within this opinion, the thrust of Defendant TeamHealth's Motion for Summary Judgment centers on its argument that, as the parent company of EPS, it cannot be

[88] See Plaintiffs' Brief in Opposition to Defendant EPS' Motion for Summary Judgment, pp. 12-18.

held liable for the actions of the Defendant physicians. TeamHealth reiterates that the doctors have a contract with EPO (as independent contractors) and, as such, are far removed from the parent entity TeamHealth.

The Court however, applies a similar analysis to this Defendant's Motion as above and finds that TeamHealth is part of a complex and interwoven relationship with Co-Defendants EPO and EPS. In their brief in Opposition to TeamHealth's Motion for Summary Judgment, Plaintiffs rely on the holding in *State ex rel. Nese v. State Teachers Ret. Bd. Of Ohio*, 136 Ohio St.3d 103 (2013),[89] to support their argument that a genuine issue of material fact exists as to the degree of control asserted by TeamHealth over the Defendant physicians.

Although the Defendant physicians are not directly under contract with TeamHealth, there is still a question of whether the doctors are subject to some level of control by it. The Court notes a genuine issue of material fact exists as to the right of control TeamHealth retains over the Defendant physicians as it: imposes a "Code of Conduct" the physicians must follow; mandates training for physicians; has some ability to discipline the physicians; bills and collects compensation for the services provided by the Defendant physicians; and provides the malpractice insurance for the physicians.[90]

Given the above, this Court finds that Summary Judgment should be denied as to Defendant TeamHealth, as a genuine issue of material fact exists as to whether it retained any degree of control or a right of control over the Defendant physicians.

---

[89] Several factors to consider when determining whether a principal agent relationship exists based upon the degree of control, including: "who controls the details and quality of the work; who controls the hours worked; who selects the materials, tools and personnel used; who selects the routes travelled; the length of employment; the type of business; the method of payment; and any pertinent agreements or contracts".

[90] See Plaintiffs' Brief in Opposition to TeamHealth's Motion for Summary Judgment, pp. 10-15, and all exhibits and citations attached thereto.

Rosado v. Al-Haddad, M.D., Case No. CV 13- 814447 and further comment on the relationship between EPS, EPO and TeamHealth:[91]

On October 24, 2014, the Plaintiffs filed a Notice of Supplemental Authority in further support of their arguments.[92] This notice centered on a decision in the case of *Rosado v. Al-Haddad*, M.D. (Case No. CV 13- 814447) from another Court in the Cuyahoga County Court of Common pleas. In *Rosado*, Judge Michael Jackson issued a decision that analyzed and commented upon the "extremely close interrelationship" shared by EPO, EPS and TeamHealth.[93] It is important to note that this decision from Judge Jackson was responsive to separate Motions to Dismiss from Defendants TeamHealth and EPO.[94] In relevant part, the Rosado Court held as follows:

> First this Court finds that EPO is not "an additional party" after considering the facts of this case. EPO is so interconnected with EPS and THI, as illustrated in the six examples stated above, that these entities are one and the same for the purposes of applying this rule. Accordingly, EPO does not constitute an "additional party" based on these facts.
>
> ...The interrelationship of these three entities is so significant and so intertwined that collectively they constitute one entity for the purposes of interpreting this rule. ... THI, EPS, and EPO...have chosen to develop an intertwined and complex

---

[91] Although the opinion issued by the *Rosado* Court is not binding upon this Court, it lends support to Plaintiffs' assertion and this Court's acknowledgment of the interchangeable relationship between these Defendants.

[92] Plaintiffs' Notice of Filing Supplemental Authority in Support of Brief in Opposition to Defendants TeamHealth and EPS: "Plaintiffs assert that although Defendant Team Health, Inc. did not specifically contract with the emergency room physicians involved in their decedent's care, the nature of THI's relationship with the contracting entity, Co-Defendant Emergency Professionals of Ohio, Inc. (EPO), and its' subsidiary company, Co-Defendant Emergency Professional Services, Inc., warrants a finding of vicarious liability against all three entities".

[93] Plaintiffs' Notice of Filing Supplemental Authority in Support of Brief in Opposition to Defendants TeamHealth and EPS, p. 1.

[94] Rosado is also a medical malpractice case. In that matter Plaintiff only served an 180-day notice on Defendants EPS and TeamHealth East (a registered trade name for EPS), and failed to notice or name Defendant EPO. After the statute of limitations had expired, EPS advised the proper party was EPO and that TeamHealth East is a non-entity. The Plaintiff then moved to Amended Complaint to substitute TeamHealth for TeamHealth East and add EPO as a new party. Plaintiff argued that the new defendant would "relate back" to the original filing and argued that EPS, EPO and TeamHealth are intertwined. Defendants EPO and TeamHealth filed Motions to dismiss, which resulted in the opinion from Judge Jackson that was brought to this Court's attention.

corporate structure to perform the straightforward task of providing medical services to emergency room departments in hospitals.[95]

CONCLUSION:

For the reasons more fully set forth above, the Motions for Summary Judgment of Defendants EPS, EPO and TeamHealth are **DENIED.**

Pamela A. Barker 5-12-15
Judge Pamela A. Barker

IT IS SO ORDERED.

[95] *Margarita Rosado v. Ali G. Al-Haddad, M.D., et al.*, Case No. CV 13- 814447, Journal Entry and Opinion Regarding Defendants' Team Health Inc. and Emergency Professionals of Ohio, Inc.'s Motions to Dismiss, October 24, 2014, p. 7, ¶¶ 1 and 2.