IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT, STATE OF FLORIDA

CASE NO. 5D21-0793

TIMOTHY FIFIELD, as personal representative of the estate of MARGARET FIFIELD,

Appellant,

vs. L.T. Case No. 2017-CA-001340

JSA HEALTHCARE CORPORATION d/b/a JSA MEDICAL GROUP,

Appellee.

_____/

ON APPEAL FROM THE FIFTH JUDICIAL CIRCUIT COURT, IN AND FOR HERNANDO COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

This is a wrongful-death case. The decedent, Margaret Fifield, died due to the negligent care of Dr. Sisto Serafini. The decedent's husband and personal representative of her estate—Plaintiff, Timothy Fifield—sued Dr. Serafini for negligence. Plaintiff also sued Dr. Serafini's employer, Osteopathic Heritage Corporation, and Osteopathic Heritage's joint venturer, JSA Healthcare Corporation, for vicarious liability.

Plaintiff later settled with Dr. Serafini and Osteopathic Heritage. Litigation continued against JSA, but JSA moved for summary judgment on the ground that it was not vicariously liable for Dr. Serafini's negligence. The trial court granted JSA's motion, concluding in relevant part that JSA was not liable under a joint-venture theory. The court then entered final judgment for JSA, from which Plaintiff appeals.

STATEMENT OF THE CASE AND FACTS

A. Dr. Serafini's negligent care of Mrs. Fifield.

Margaret Fifield had a history of rheumatoid arthritis. (R. 138.) For some time, Mrs. Fifield had coverage for medical care through her husband's employer-sponsored insurance. (*See* R. 369.) But that coverage ended when her husband was laid off in 2013. (R. 326, 369.) Mrs. Fifield then obtained health insurance from Humana. (R. 960.)

Mrs. Fifield's new insurance plan required her to select a primary care practice affiliated with Humana. (*See* R. 891, 905.) One such practice was Immediate Medcare & Family Doctor of Northcliffe—a medical clinic run by Osteopathic Heritage. (R. 235–36.) On November 20, 2013, Ms. Fifield established herself as a patient at the Northcliffe clinic. (R. 237.)

At the time, Mrs. Fifield was already taking methotrexate—a drug with potentially life-threatening complications that is used to treat rheumatoid arthritis. (R. 115–16.) She was prescribed methotrexate by a rheumatologist who was no longer covered by her new insurance. (R. 118–19, 122–23.) A rheumatologist is a physician who specializes in the treatment of autoimmune disorders such as rheumatoid arthritis. (R. 116, 123.)

In April 2014, Dr. Sisto Serafini began working for Osteopathic Heritage and took over as Mrs. Fifield's primary care physician. (R. 226–27; *see also* R. 120.) Dr. Serafini had worked in private practice for less than two years. (R. 106.) He had no specialized training in rheumatology or the treatment of rheumatoid arthritis. (R. 106–07.)

Dr. Serafini recommended that Mrs. Fifield consider increasing her dosage of methotrexate the very first time he saw her. (*See* R. 125–28.) A few months later, Mrs. Fifield asked that Dr. Serafini refer her to a rheumatologist. (*See* R. 130–31.) Mrs. Fifield needed Dr. Serafini's referral to see any specialist; in other words, he served as her "gatekeeper." (R. 109–10.) However, Dr. Serafini rejected Mrs. Fifield's request, concluding that he could "manage her rheumatologic condition." (R. 131.)

On June 1, 2015, Mrs. Fifield asked again that Dr. Serafini refer her to a rheumatologist. (R. 166.) She also complained of trouble breathing and increased pain from her arthritis. (R. 166–67.) Yet, once more, Dr. Serafini did not refer Mrs. Fifield to a rheumatologist. (R. 169.) He instead told her to increase her dosage of methotrexate and come to the clinic for testing. (R. 167, 169.)

Dr. Serafini did so even though he knew that breathing problems were a sign of methotrexate toxicity. (*See* R. 152, 168.)

On June 10, 2015, Dr. Serafini finally referred Mrs. Fifield to a rheumatologist. (R. 170, 174–75, 181.) Mrs. Fifield died seven weeks later at the age of 52. (*See* R. 419; *see also* R. 45, 967.) Her death certificate listed her causes of death as pneumonia, sepsis, and methotrexate toxicity. (R. 193.)

Plaintiff's expert physician Dr. Benny Gavi opined that it was below the standard of care for Dr. Serafini not to refer Mrs. Fifield to a rheumatologist sooner. (R. 993.) Dr. Gavi explained that "[m]ethotrexate should only be prescribed by physicians with significant knowledge and experience with th[e] drug." (R. 992.) Dr. Gavi said it was "clear" that Dr. Serafini did not have the required "knowledge base or experience" to treat Mrs. Fifield. (R. 993.)

Not only did Dr. Gavi conclude that Dr. Serafini's actions fell below the standard of care, Dr. Gavi also opined that Dr. Serafini's "[fa]ilure to make the requested referrals in light of [Mrs. Fifield's] overall condition . . . represent[ed] gross negligence and conscious indifference to [her] safety." (R. 994.) Specifically, Dr. Serafini's "numerous deviations from the acceptable standard of care . . .

represent[ed] gross negligence." (R. 994.) Dr. Gavi opined that the "[m]ethotraxate toxicity and Dr. Serafini's gross negligence was a direct cause of [Mrs. Fifield's] death." (R. 994–95.)

B. Osteopathic Heritage's relationship with JSA.

Osteopathic Heritage's owner and corporate representative, Dr. Jeffrey Grove, testified that about 95–100% of Osteopathic Heritage's patients are insured by Humana. (R. 891.) The same held true when Mrs. Fifield was still a patient there. (R. 891.) As Dr. Grove explained: "That's what we do, is Humana." (R. 891.)

Dr. Grove also testified that Humana did not contract with small independent clinics, so Osteopathic Heritage had to get access to Humana patients through other means. (R. 890.) Osteopathic Heritage did so by signing a "Joint Provider/Management Agreement" with JSA Healthcare Corporation, which in turn had a contract with Humana to care for its insureds. (R. 268–69, 284–85, 299, 890; *see also* R. 920–933.) In other words, as Dr. Grove put it, JSA acted as a "conduit" for Osteopathic Heritage to treat Humana patients. (R. 893.) JSA's corporate representative, Garrett Watkins, also noted that JSA maintained its own clinics for treating Humana patients. (*See* R. 269–70, 278, 291.)

Unlike traditional forms of healthcare, Osteopathic Heritage's agreement with JSA did not operate on a "fee-for-service system." (*See* R. 906.) Rather, as Dr. Grove explained, payment was on a "capitated" basis. (R. 891–92.) This meant that Osteopathic Heritage was paid a set amount per patient assigned to it regardless of the services it provided to that patient (if any). (R. 891–92.) Expenses incurred by Osteopathic Heritage—for example, costs of care and medicine for patients—would be reduced from the set amount. (R. 891–92.) If the expenses in a given month exceeded the set amount, Osteopathic Heritage would be left with nothing. (R. 892.)

Notably, Dr. Grove testified that referrals to outside specialists like rheumatologists were considered expenses, so the more patients that were referred the less money Osteopathic Heritage made. (R. 892, 896.) What's more, JSA could terminate the agreement if Osteopathic Heritage ran a deficit for three consecutive months. (R. 896, 922.) Dr. Grove confirmed that Osteopathic Heritage would thereby lose access to 95–100% its patients. (*See* R. 896.)

Mr. Watkins testified that JSA profited from the arrangement by keeping a percentage of the capitated amount, which originated from Humana. (*See* R. 276, 286–88, 290–91, 293–94.) Plaintiff's expert Dr.

Fred Hyde reviewed Osteopathic Heritage's agreement with JSA and testified that JSA and individual physicians working for Osteopathic Heritage would also profit from "bonus pools." (R. 623–27; *see also* R. 920–21, 961–62.) Dr. Hyde explained that pools were "filled when the expense of referring patients to specialists [was] lower—the fewer referrals, the more money in the pool." (R. 962.)

Dr. Hyde further explained that "[i]f costs exceeded revenues, [Osteopathic Heritage], its affiliated physicians, as well as JSA, would share in the losses." (R. 963.) Dr. Serafini, Osteopathic Heritage, and JSA therefore "all had an economic motive to keep from referring [Mrs. Fifield] to a specialist, such as a rheumatologist." (R. 960.) In other words, as Dr. Hyde put it, they "all ha[d] financial incentives to have care provided by the less expensive primary care physician, even when that physician is inadequately trained to provide such care." (R. 961.)

As Dr. Hyde explained, "[i]nadequate access to specialty referrals was a common problem for [JSA], and is a well-known challenge to health maintenance organizations . . . generally." (R. 960.) Moreover, capitation payment systems were "controversial" since they first came in use. (R. 961.) Although studies described

possible efforts to protect against the problems with capitation—and "[c]ontractual provisions which might avoid the impact of such incentives were also well known"—"none of these safeguards" were included in Osteopathic Heritage's contract with JSA. (R. 961.)

Dr. Hyde opined that, "[s]ince this issue (financial incentives working against clinically necessary referrals) was well known to Humana and JSA, it should have been addressed in their contractual provisions with physician practice management companies (such as [Osteopathic Heritage])." (R. 961.) Indeed, "[s]pecific contractual 'guard rails' would have operated as a 'counterweight' to the financial incentive to refuse referrals to specialists." (R. 961–62.) According to Dr. Hyde, "[f]ailure to include such protective provisions by corporations as sophisticated as Humana and JSA . . . indicate a conscious indifference by them to patient welfare." (R. 962.)

C. Procedural history.

Plaintiff filed a wrongful-death action as the surviving spouse and personal representative of Mrs. Fifield's estate. (R. 47.) He alleged that Dr. Serafini was negligent in caring for Mrs. Fifield, and that Osteopathic Heritage and JSA were vicariously liable for Dr. Serafini's

negligence. (R. 43–60.) JSA's vicarious liability was premised on several theories, including joint venture.[1] (R. 53–60.)

Plaintiff later settled with Dr. Serafini and Osteopathic Heritage and dismissed his claims against them. (R. 79–80, 904.) JSA then moved for summary judgment, arguing that it was not vicariously liable for Dr. Serafini's negligence. (R. 757–66.) Plaintiff filed a response in opposition. (R. 867–969.)

At the hearing on JSA's motion for summary judgment, Plaintiff maintained that there were genuine issues of material fact as to JSA's vicarious liability under a joint-venture theory. (R. 1153–57.) The trial court nonetheless granted JSA's motion for summary judgment. (R. 1020–26.) In relevant part, the court concluded that Plaintiff failed to meet the elements of a joint venture. (R. 1025–26.)

On March 5, 2021, the trial court entered final judgment for JSA. (R. 1141–42.) Plaintiff timely appealed. (R. 1207–31.)

[1] Plaintiff's other theories were employment, actual agency, and apparent agency. (R. 53–56.) Plaintiff abandons those theories on appeal and relies solely on joint venture.

SUMMARY OF ARGUMENT

The trial court erred in granting summary judgment for JSA. Because the old summary judgment standard applies to this case, summary judgment was improper "if the record raises the possibility of any genuine issue of material fact or even the slightest doubt that an issue might exist." *Ramsey v. Dewitt Excavating, Inc.*, 248 So. 3d 1270, 1272 (Fla. 5th DCA 2018) (citation omitted). Here, there are genuine issues of material fact as to JSA's vicarious liability under a joint-venture theory. At the very least, the record certainly raises the *possibility* of genuine issues of material fact.

Indeed, there are genuine issues of material fact as to each element for a joint venture. The record demonstrates that JSA and Osteopathic heritage had a community of interest in the performance of a common purpose, joint control or right of control, a joint proprietary interest in the subject matter, right to share in the profits, and a duty to share in any losses which may be sustained. In concluding otherwise, the trial court failed to view the evidence and draw all inferences in the light most favorable to Plaintiff.

STANDARD OF REVIEW

"A final order entering a summary judgment is reviewed de novo." *Id.*

ARGUMENT

I. This case is governed by the old summary judgment standard that was in effect before May 1, 2021.

The old summary judgment standard governs this case because the new standard did not take effect until May 1, 2021—*after* the trial court entered final judgment. *See In re Amends. to Fla. Rule of Civ. Proc. 1.510*, 317 So. 3d 72, 77–78 (Fla. 2021); *see also, e.g.*, *United Auto. Ins. Co. v. Progressive Rehab.*, No. 3D21-0108, 2021 WL 3072936, at *2 n.4 (Fla. 3d DCA July 21, 2021) ("[W]here a motion has already been decided under the pre-amendment rule, review is under the pre-amendment rule.").

Under the old standard, the moving party must "conclusively . . . disprove the nonmovant's theory of the case in order to eliminate any issue of fact." *In re Amends. to Fla. Rule of Civ. Proc. 1.510*, 309 So. 3d 192, 193 (Fla. 2020). Further, the old standard involves "an expansive understanding of what constitutes a genuine (i.e., triable) issue of material fact." *Id.* Indeed, "[t]he existence of *any* competent

evidence creating an issue of fact, however credible or incredible, substantial or trivial, stops the inquiry and precludes summary judgment, so long as the 'slightest doubt' is raised." *See id.* (citation omitted).

II. The trial court erred in granting summary judgment for JSA because there are genuine issues of material fact as to JSA's vicarious liability under a joint-venture theory.

Plaintiff claimed that JSA was vicariously liable for Dr. Serafini's negligence because JSA participated in a joint venture with Dr. Serafini's employer, Osteopathic Heritage. (R. 1008–11). Courts have long recognized vicarious liability under these circumstances. *E.g.*, *Fla. Tomato Packers, Inc. v. Wilson*, 296 So. 2d 536, 539 (Fla. 3d DCA 1974) ("Participants in a joint venture are each liable for the torts of the other or of the servants of the joint undertaking committed within the course and scope of the undertaking, without regard to which of the joint venturers actually employed the servant.").

The elements for a joint venture are: (A) a community of interest in the performance of a common purpose, (B) joint control or right of control, (C) a joint proprietary interest in the subject matter, (D) a right to share in the profits, and (E) a duty to share in any losses which may be sustained. *Jackson-Shaw Co. v. Jacksonville Aviation*

Auth., 8 So. 3d 1076, 1089 (Fla. 2008). "The existence of a joint venture is commonly a fact question to be determined by the trier of fact." *Knepper v. Genstar Corp.*, 537 So. 2d 619, 622 (Fla. 3d DCA 1988). Here, there are genuine issues of material fact—or, at the very least, the possibility of genuine issues of material fact—for each element. Summary judgment was therefore improper. *Ramsey*, 248 So. 3d at 1272.

A. A community of interest in the performance of a common purpose.

JSA and Osteopathic Heritage clearly engaged in a business transaction for a common purpose: providing medical care to Humana patients for a profit. Indeed, JSA had an agreement with Humana to provide care for Humana patients, and JSA contracted with Osteopathic Heritage to delegate that duty. (*See* R. 284–85; *see also* R. 678, 706.) Courts have recognized a common purpose in the related context of hospitals and physicians providing medical care. *E.g.*, *Arango v. Reyka*, 507 So. 2d 1211, 1213 (Fla. 4th DCA 1987); *King v. Baptist Hosp. of Miami, Inc.*, 87 So. 3d 39, 43 (Fla. 3d DCA 2012); *see also Kislak v. Kreedian*, 95 So. 2d 510, 515 (Fla. 1957) ("It is an elemental principle that the relationship of joint adventurers

is created when two or more persons combine their property or time or a combination thereof in conducting some particular line of trade or for some particular business deal.").

The parties' business model served as evidence of their common purpose. As Plaintiff's expert Dr. Hyde explained, JSA and Osteopathic Heritage could have included "safeguards" in the contract to avoid the problem of disincentivizing outside referrals, but no such safeguards were included. (R. 961–62.) Instead, "[t]he economic motive to prevent appropriate referral was a feature contained within—not an exception to—the contract[] between JSA and [Osteopathic Heritage]." (R. 962.)

B. Joint control or right of control.

To establish a joint venture, the participants must have a joint right of control over "the *subject* of the alleged venture." *Chase Manhattan Mortg. Corp. v. Scott, Royce, Harris, Bryan, Barra & Jorgensen, P.A.*, 694 So. 2d 827, 832 (Fla. 4th DCA 1997) (emphasis added). This is different from the analysis for actual agency, which examines whether the principal has control over the *agent*. *E.g.*, *Roman v. Bogle*, 113 So. 3d 1011, 1016 (Fla. 5th DCA 2013) (listing elements for actual agency).

For instance, when considering whether a school board participated in a joint venture with a city to provide lunches to children, the First District did not focus on the school board's control over any particular person. *Austin v. Duval Cty. School Bd.*, 657 So. 2d 945, 948 (Fla. 1st DCA 1995). Instead, the court looked to which party "decided eligibility, number of lunches to be prepared, menus, number and location of work sites, and retained the right to approve any subcontract." *Id.* Likewise, when considering whether a company participated in a joint venture with games concessionaires, the Fourth District did not focus on the company's control over any individual. *Conklin Shows, Inc. v. Dep't of Revenue*, 684 So. 2d 328, 332 (Fla. 4th DCA 1996). Rather, the court considered whether the company had control "over actual running of the games, hiring of personnel, maintenance, and collection of money." *Id.*

Significantly, courts have also recognized that participants in a joint venture "can divide control authority by mutual agreement." *Progress Rail Servs. Corp. v. Hillsborough Reg'l Transit Auth.*, No. 8:04CV200, 2005 WL 1051932, at *4 (M.D. Fla. Apr. 12, 2005) (applying Florida law); *accord Kilgore Seed Co. v. Lewin*, 141 So. 2d 809, 811 (Fla. 2d DCA 1962) (concluding that a "division of work or

authority" satisfied the control element); *Julian Consol., Inc. v. Conrad*, 553 So. 2d 784, 784 (Fla. 1st DCA 1989) (concluding that a joint venture existed even though "neither party had exclusive control over th[e] undertaking.").

For example, in *Arango* the plaintiff alleged that a hospital was engaged in a joint venture with an anesthesiology association. 507 So. 2d at 1212 "The hospital did not have the right to control the professional decisions of the doctors with respect to the use of medications, procedures or equipment; however it conducted the billing and scheduling of patients, and controlled the credit and collection policies." *Id.* at 1213. The Fourth District thus concluded that the control element was met—"there was evidence of shared control, which was split or divided by mutual agreement between the defendants." *Id.* That is, "[e]ach [party] had control over some aspect of providing anesthesiology services; neither had exclusive control." *Id.*

Here, too, JSA and Osteopathic Heritage shared control over the subject of the venture by splitting their responsibilities. Specifically, JSA was responsible for providing "administrative services," including but not limited to negotiating with Humana, distributing

service funds, providing cost and utilization reports, and contesting services. (R. 921.) Meanwhile, Osteopathic Heritage was responsible for providing "primary care physician services" to Humana patients. (R. 920.)

The trial court granted summary judgment for JSA because the court concluded that the "Joint Provider/Management Agreement does not provide for a joint right of control." (R. 1025–26.) In doing so, however, the court failed to view the evidence and draw all inferences in the light most favorable to Plaintiff. *E.g.*, *Martins v. PNC Bank, Nat'l Ass'n*, 170 So. 3d 932, 935 (Fla. 5th DCA 2015) (noting that, on summary judgment, "all evidence before the court plus favorable inferences reasonably justified thereby are to be liberally construed in favor of the non-moving party" (citation and quotation marks omitted)).

Indeed, the trial court placed great weight on the labels used in the agreement. Specifically, the court noted that the agreement refers to Osteopathic Heritage as an "independent contractor" and states that all medical decision-making remains with Osteopathic Heritage. (R. 1025.) The court also said that the affidavits of JSA's and Osteopathic Heritage's corporate representatives "are further

evidence neither JSA or Osteopathic Heritage intended to enter a joint venture." (R. 1026.)

Although the evidence cited by the trial court may support JSA's position, that is not enough to grant summary judgment. Rather, as the party moving for summary judgment, JSA had to "show *conclusively* that no material issues remain for trial." *Visingardi v. Tirone*, 193 So. 2d 601, 604 (Fla. 1966). Put differently, "[t]he burden of the movant for summary judgment is not simply to show that the facts support its own theory of the case, but rather to demonstrate that the facts show that the party moved against cannot prevail." *Fla. E. Coast Ry. Co v. Metropolitan Dade County*, 438 So. 2d 978, 980 (Fla. 3d DCA 1983).

Here, the evidence cited by the trial court was certainly not conclusive. A jury reasonably could reject the testimony cited by the trial court and find Dr. Hyde's testimony credible instead. *E.g.*, *Pena v. Vectour of Fla., Inc.*, 30 So .3d 691, 692 (Fla. 1st DCA 2010) ("Where there is conflicting evidence, the weight to be given that evidence is within the province of the jury." (citation omitted)). As courts have held in the context of agency, a "jury is entitled to infer the existence of an agency on the part of an alleged principal and agent even where

both deny the existence of such an agency." *McCabe v. Howard*, 281 So. 2d 362, 363 (Fla. 2d DCA 1973); *see also Watkins v. Sims*, 88 So. 764, 765 (Fla. 1921) ("[N]otwithstanding the alleged principal and agent are the only witnesses called, and they both categorically deny the existence of the relation, the jury have the right to weigh and consider the whole of the evidence and the fair and reasonable inferences that might be drawn therefrom . . . ." (citation omitted)).

Moreover, the agreement between Osteopathic Heritage and JSA was "not dispositive." *Shands Teaching Hosp. & Clinics, Inc. v. Pendley*, 577 So. 2d 632, 634 (Fla. 1st DCA 1991). "[T]he nature of the parties' relationship is not determined by the descriptive labels employed by the parties themselves." *Font v. Stanley Steemer Int'l, Inc.*, 849 So. 2d 1214, 1216 (Fla. 5th DCA 2003); *accord Transit Mgmt. of Se. La., Inc. v. Grp. Ins. Admin., Inc.*, 226 F.3d 376, 383 (5th Cir. 2000) ("[T]he legal relationship of parties will not be conclusively controlled by the terms which the parties use to designate their relationship, especially with regard to third parties. Courts look to the totality of evidence and not just to the written agreement between the parties to determine whether a joint venture was entered into." (citation omitted)). Nor was it dispositive that Osteopathic Heritage's

physicians retained independent medical judgment. The Fourth District rejected that very argument in *Arango*. 507 So. 2d at 1214.

Arango, like this case, was a wrongful-death action. *Id.* at 1212. The plaintiffs alleged that a hospital was vicariously liable for negligence because the hospital participated in a joint venture with an anesthesiology association. *Id.* The jury agreed and rendered a verdict for the plaintiffs. *See id.*

On appeal, the hospital argued that "as a matter of law, it was not a joint venturer." *Id.* at 1213. The hospital "did not have the right to control the professional decisions of the doctors with respect to the use of medications, procedures or equipment." *Id.* Moreover, the contract between the hospital and the anesthesiology association described the hospital as a "billing and collection agency." *Id.*

The Fourth District soundly rejected the hospital's argument. As the court explained, the fact that doctors "have an obligation to maintain control of their medical judgment does not prevent them from entering into a joint venture contract which recognizes their professional and ethical obligations to their patients, any more than it would prevent [them] from becoming a hospital employee." *Id.* at 1214. After all, "[t]he fact that the hospital cannot 'control' the

exercise of that professional judgment is no different" from the inability of a lay person to control any other type of "professional or licensed expert, (whether that expert be a lawyer, electrical contractor, or an atomic power producer)." *Id.*; *accord Franza v. Royal Caribbean Cruises, Ltd.*, 772 F.3d 1225, 1240 (11th Cir. 2014) ("[N]o principled distinction separates medical skill from other categories of expertise or requires universal immunization from oversight.").

For the same reason, the trial court erred in granting summary judgment for JSA. Under the trial court's logic, "virtually every professional who is expected to exercise independent judgment . . . would have to be deemed an independent contractor." *Franza*, 772 F.3d at 1240 (citation omitted). "Such wholesale immunity has never been the rule." *Id.* Rather, courts recognize that modern healthcare professionals often participate in diverse relationships. *See id.*

Even if Plaintiff were required to show that JSA controlled the individual physicians' actions—the test for actual agency (not joint venture), *see supra*, § II.B, at 14–15—the trial court still erred in granting summary judgment. Like the other elements for a joint venture, the control element need not be expressly stated in a contract; rather, it may be implied under the totality of the

circumstances. *See Russell v. Thielen*, 82 So. 2d 143, 145 (Fla. 1955) ("A joint venture is founded entirely on contract which may be either express or implied in whole or in part from the acts and conduct of the parties or the construction which the parties give to the contract between them."); *Marriott Int'l, Inc. v. Am. Bridge Bah., Ltd.*, 193 So. 3d 902, 906 (Fla. 3d DCA 2015) (noting that the elements may be "express or implied"). Here, the control element was met by implication because of the payment model JSA and Osteopathic Heritage used. As Plaintiff's expert Dr. Fred Hyde explained, the capitation "form of compensation to the primary care physician makes it almost mandatory that expensive referrals to specialist physicians are not made." (R. 962.)

The Florida Supreme Court's decision in *Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842 (Fla. 2003) presents a helpful analogy. There, like here, the plaintiff's wife died due to medical negligence. *Id.* at 843. The plaintiff then sued his wife's primary care physician as well as her health maintenance organization, PruCare. *Id.* He alleged that PruCare was vicariously liable for the physician's negligence under multiple theories, including actual agency. *Id.* at 845, 851–52.

PruCare moved for summary judgment, which the trial court granted. *Id.* at 845. The Third District affirmed on appeal. *Id.* It "reasoned that the medical providers were independent contractors because . . . PruCare entered into contracts with physicians who had their own independent practices and who agreed to provide covered services for a contracted rate." *Id.* The Third District thus concluded that summary judgment was appropriate "because the contractual provisions designated the physicians as independent contractors and . . . there was no evidence that PruCare exercised actual control over the medical judgments and decisions made in the care and treatment of [the plaintiff's] wife." *Id.* at 853.

On review, the Florida Supreme Court quashed the Third District's decision. *Id.* at 856. The court explained that "[t]he physician's contractual independent contractor status does not alone preclude a finding of agency." *Id.* at 854. Instead, the test is whether, under the "totality of the circumstances," the alleged principal has "the right to control, rather than actual control." *See id.* at 853.

As far as what shows a right to control, the court said "[t]he facts peculiar to each case must govern the ultimate disposition." *Id.* at 854. "While physicians of the past in the traditional pattern of

American life may have constituted distinct independent entities," the court acknowledged that "[t]he thought of visiting a private and independent office of a totally independent physician may now be one more of history and cultural conditioning than current reality." *Id.* The court therefore held that "issues of control" must consider how "economic structures" impact the parties' relationships. *See id.* Given "the totality of the circumstances operating within the current reality of the interaction within the decision-making process," genuine issues of fact remained for the jury. *Id.* at 855.

Here, too, there are genuine issues of material fact. A reasonable jury could conclude that, based on the "economic structures," JSA effectively had a right to control whether physicians at Osteopathic Heritage referred patients to specialists. At the very least, this certainly presents the "possibility" of a genuine issue of material fact. Summary judgment was therefore improper. *Ramsey*, 248 So. 3d at 1272.

C. Joint proprietary interest in the subject matter.

To satisfy the joint-proprietary-interest element, Plaintiff did not need to show that JSA and Osteopathic Heritage "jointly owned any resources or assets." *Terry v. Carnival Corp.*, 275 F. Supp. 3d 1323,

1328 (S.D. Fla. 2017) (applying Florida law); *see also A.B. Hirschfeld Press, Inc. v. Weston Grp., Inc.*, 824 P.2d 44, 46 (Colo. App. 1991) ("[T]here is no requirement that title to all property interests be conveyed to the joint venture.").

Instead, it is sufficient that both parties contributed to the venture—for instance, by providing services and resources. *See Terry*, 275 F. Supp. 3d at 1328; *Fla. Tomato*, 296 So. 2d at 538–39 (joint venture existed even though one party only farmed tomatoes); *Arango*, 507 So. 2d at 1213–14 (joint venture existed even though one party only provided medical services); *Kilgore*, 141 So. 2d 809–11 (joint venture existed where one party provided the funding and the other party provided the machinery, equipment, and time needed to grow crops).

Here, both JSA and Osteopathic Heritage contributed to the venture by providing their services and resources. Specifically, Osteopathic Heritage provided the physicians and facilities to care for patients. (R. 236, 267–68, 893, 920.) Meanwhile, JSA provided administrative and managerial services related to that care as well as access to Humana patients through its contract with Humana.

(R. 276–77, 299, 893 921.) JSA and Osteopathic Heritage thus had a joint proprietary interest in the subject matter.

D. A right to share in the profits.

JSA and Osteopathic Heritage had a right to share in the profits from their joint venture. Specifically, both JSA and Osteopathic Heritage could profit from the set payments received from Humana. (*See* R. 276, 286–88, 290–91, 293–94, 628.) This was sufficient to satisfy the shared-profits element. *E.g.*, *Arango*, 507 So. 2d at 1213–14 (concluding that the shared-profits element was met where a hospital retained 12.5% of all collections related to care provided by an anesthesiology association); *see also generally* 46 Am. Jur. 2d *Joint Ventures* § 16 (2021) ("[W]here parties share in the same revenue stream, the shared-profits element required to establish the existence of a joint venture may be established.").

E. A duty to share in any losses which may be sustained.

JSA and Osteopathic Heritage had a duty to share any losses resulting from their joint venture. Specifically, if the expenses in a given month exceeded the set amount paid per patient, Osteopathic Heritage and JSA would have to suffer the net losses. (R. 892, 963.)

The trial court concluded that the Joint Provider/Management agreement "does not provide a duty to share in losses." (R. 1025–26.) But the court did not specify why or cite to a particular provision. (R. 1025–26.) And the fact that the agreement "does not *expressly* provide for the sharing of losses is not fatal." *Fla. Trading & Inv. Co. v. River Constr. Servs., Inc.*, 537 So. 2d 600, 602 (Fla. 2d DCA 1988) (emphasis added); *accord* The Florida Bar, *Business Litigation in Florida* § 18.2(A)(2) (10th ed. 2019).

In any event, as Plaintiff's expert Dr. Hyde explained: "If costs exceeded revenues, [Osteopathic Heritage], its affiliated physicians, *as well as JSA*, would share in the losses." (R. 963 (emphasis added).) Simply put, "the sharing in the profit and loss was there." (R. 624; *see also* R. 589, 622, 705.)

Further, this is not a case where "the parties' profits did not come from a common source" and "losses suffered thus depended on entirely different factors." *Chase*, 694 So. 2d at 832. Rather, the parties' profits came from the same source: Humana. (R. 290–91, 293–94, 590–92.) And losses depended on the same factors: whether costs exceeded revenues. (R. 963.)

Not only would JSA and Osteopathic Heritage share losses when costs exceeded revenues, but they also shared losses in the form of the labor, skill, and experience they invested in vain. The Florida Supreme Court has explicitly recognized that such losses qualify for purposes of establishing a joint venture. *E.g.*, *Russell*, 82 So. 2d at 146 ("Losses under such circumstances would be shared, for in the event of a loss the party supplying the 'know how' would have exercised his skill in vain . . . ."); *accord Uhrig v. Redding*, 8 So. 2d 4, 6 (Fla. 1942).

Other courts have reached the same conclusion. *Sutton v. Smith*, 603 So. 2d 693, 698 (Fla. 1st DCA 1992) ("[B]oth parties would share the losses: ARS & Associates would suffer a loss of the capital invested in the venture, and Sutton would have exercised his skills in vain."); *Arango*, 507 So. 2d at 1214 (noting that losses included "the cost of services"); *In re Carpenter*, 205 F.3d 1249, 1252 (10th Cir. 2010) ("Sharing 'loss' in a joint venture . . . does not necessarily mean only monetary loss. Numerous courts have held that the 'loss' requirement is satisfied where an agreement calls for one party to expend time and out-of-pocket expense on the venture such that a

failure to obtain a profit would render that party's efforts for naught.").

In fact, as the Third District explained, a duty to share in losses "actually and impliedly exists as a matter of law" where one party supplies labor, experience and skill:

> In Florida a duty to share in losses actually and impliedly exists as a matter of law in a situation where one party supplies the labor, experience and skill, and the other the necessary capital since in the event of a loss, the party supplying the knowhow would have exercised his skill in vain and the party supplying the capital investment would have suffered a diminishment thereof.

Fla. Tomato, 296 So. 2d at 539; *accord Fla. Trading*, 537 So. 2d at 602*; Williams v. Obstfeld*, 314 F.3d 1270, 1276 (11th Cir. 2002); *Terry*, 275 F. Supp. 3d at 1330. Here, too, a duty to share in losses actually and implied exists as a matter of law because JSA and Osteopathic Heritage both supplied labor, experience, and skill.

F. JSA and Osteopathic Heritage's actual intent is irrelevant.

Intent is not one of the five elements to establish a joint venture. *E.g.*, *Jackson-Shaw*, 8 So. 3d at 1089. Nevertheless, the trial court stated that "[t]he Joint Provider/Management Agreement clearly

states the intent of the parties was to not create a joint venture." (R. 1025.)

As the Florida Supreme Court explained, "as to third persons the legal, and not the actual, intention controls." *Bryce v. Bull*, 143 So. 409, 411 (Fla. 1932) (citation omitted); *accord* 46 Am. Jur. 2d *Joint Ventures* § 13 (2021). In other words, "[i]f the intent to do those things which constitute a joint adventure exists, the parties will be joint adventurers, notwithstanding they also intended to avoid personal liability that attaches to joint adventurers." *Bryce*, 143 So. at 411 (citation omitted). Accordingly, because the elements for a joint venture were met, summary judgment was improper regardless of JSA and Osteopathic Heritage's actual intent. *See id.* ("It is the substance, and not the name, of the arrangement or contract between them which determines their legal relation toward each other." (citation omitted)); *Marriott*, 193 So. 3d at 907 (holding that the parties' actual intent was "irrelevant"); *see also Fulcher's Point Pride Seafood, Inc. v. M/V Theodora Maria*, 935 F.2d 208, 213 (11th Cir. 1991) ("[W]hatever the true intent of the parties, their conduct (and the intent thereby evidenced) created a joint venture.").

G. The lack of third-party beneficiaries is irrelevant.

The trial court stated that "the Joint Provider/Management Agreement does not allow JSA and Osteopathic Heritage to bind each as there are no third-party beneficiaries to the [agreement]." (R. 1026.) The trial court's observation is inapposite. The presence of third-party beneficiaries is not one of the listed elements for a joint venture, and courts routinely conclude that joint ventures exist without any mention of third-party beneficiaries. *E.g.*, *Arango*, 507 So. 2d at 1212–14; *Fla. Tomato*, 296 So. 2d at 538–39.

To be sure, a person is generally not entitled to enforce a contract unless he is a party or a third-party beneficiary. *See, e.g.*, *Gallagher v. Dupont*, 918 So. 2d 342, 347 (Fla. 5th DCA 2005). But Plaintiff did not sue to enforce JSA's contract with Osteopathic Heritage. Instead, Plaintiff claimed that JSA was vicariously liable for negligence committed by Osteopathic Heritage's employee because JSA participated in a joint venture with Osteopathic Heritage. (R. 1008–11). Courts have long recognized vicarious liability under these circumstances. *E.g.*, *Fla. Tomato*, 296 So. 2d at 539 ("Participants in a joint venture are each liable for the torts of the other or of the servants of the joint undertaking committed within

the course and scope of the undertaking, without regard to which of the joint venturers actually employed the servant."); *accord Discover Prop. & Cas. Ins. Co. v. Lexington Ins. Co.*, 664 F. Supp. 2d 1296, 1301 (S.D. Fla. 2009) ("Florida law provides that each joint venturer is vicariously liable for the acts of a servant working on behalf of the joint venture, no matter which joint venturer actually employed the servant . . . ."); *see also generally* 46 Am. Jur. 2d *Joint Ventures* § 37 (2021) (collecting cases and explaining that "[t]he participants in a joint venture may each be liable for the torts of the employees of the joint undertaking").

CONCLUSION

This Court should reverse the final judgment and remand to the trial court for further proceedings.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing document complies with the word count limitation of Rule 9.210, Florida Rules of Appellate Procedure, in that it contains 6,269 words (including words in headings, footnotes, and quotations), according to the word-processing system used to prepare this document. This document also complies with the line spacing, type size, and typeface requirements of Rule 9.045, Florida Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed via the Florida Courts E-Filing Portal on September 1, 2021, and an electronic copy has been furnished to the following counsel of record:

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