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After our de novo review of the record, and giving weight to the district court's observation of the conflicting testimony, we conclude that the district court's decision to dismiss the protection order petition was not in error.

## CONCLUSION

Because of our conclusion that the time requirement specified in § 28-311.09(7) is directory, the district court did not err in holding a show cause hearing despite Daniel's untimely filing. Additionally, the district court did not err in dismissing Glantz' protection order petition and the ex parte order.

AFFIRMED.

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# MICHAEL L. JACOBSON, SPECIAL ADMINISTRATOR OF THE ESTATE OF VIRGINIA A. JACOBSON, DECEASED, AND MYRON J. JACOBSON, APPELLANTS, V. SHERRY K. SHRESTA, M.D., AND GASTON CORNU-LABAT, M.D., APPELLEES.

838 N.W.2d 19

Filed August 13, 2013. No. A-11-438.

1. **Appeal and Error.** In a bench trial of an action at law, the factual findings by the trial court have the effect of a jury verdict and will not be set aside unless they are clearly wrong.
2. **Judgments: Evidence: Appeal and Error.** An appellate court reviews the sufficiency of the evidence to sustain a judgment by resolving every controverted fact in favor of the successful party and giving such party the benefit of every inference that can reasonably be deduced from the evidence.
3. **Trial: Judges.** A trial judge has broad discretion over the conduct of a trial, and absent abuse, that discretion should be respected.
4. **Trial: Parties.** Bifurcation of a trial may be appropriate where separate proceedings will do justice, avoid prejudice, and further the convenience of the parties and the court.
5. **Trial.** Bifurcation is particularly proper where a potentially dispositive issue may be decided in such a way as to eliminate the need to try other issues.
6. **Records: Appeal and Error.** It is incumbent upon the appellant to present a record supporting the errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors.
7. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.
8. **Political Subdivisions Tort Claims Act: Jurisdiction.** While not a jurisdictional prerequisite, the filing or presentment of a claim to the appropriate

political subdivision is a condition precedent to commencement of a suit under the Political Subdivisions Tort Claims Act.

9. **Independent Contractor: Words and Phrases.** An independent contractor is one who, in the course of an independent occupation or employment, undertakes work subject to the will or control of the person for whom the work is done only as to the result of the work and not as to the methods or means used.
10. **Employer and Employee: Independent Contractor: Master and Servant.** Ordinarily, when a court is presented with a dispute regarding a party's status as an employee or an independent contractor, the party's status is a question of fact which must be determined after consideration of all the evidence in the case. However, where the inference is clear that there is, or is not, a master and servant relationship, the matter is a question of law.
11. **Employment Contracts: Master and Servant: Words and Phrases.** The phrase "where the inference is clear," in the context of whether a master and servant relationship exists, means that there can be no dispute as to pertinent facts pertaining to the contract between and the relationship of the parties involved and that only one reasonable inference can be drawn therefrom.
12. **Employer and Employee: Independent Contractor.** There is no single test for determining whether one performs services for another as an employee or as an independent contractor, and the following factors must be considered: (1) the extent of control which, by the agreement, the employer may exercise over the details of the work; (2) whether the one employed is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the one employed is engaged; (7) the method of payment, whether by the time or by the job; (8) whether the work is part of the regular business of the employer; (9) whether the parties believe they are creating an agency relationship; and (10) whether the employer is or is not in business.
13. **Contracts.** A writing which merely denominates a relationship may not be used to conceal the true arrangement.
14. **Employer and Employee: Independent Contractor.** The right of control is the chief factor distinguishing an employment relationship from that of an independent contractor.
15. ____: ____. The less skill required by a job, the greater the indication that the worker is an employee and not an independent contractor.
16. **Physicians and Surgeons.** The occupation of a physician is a skilled profession.
17. **Employer and Employee.** An ongoing relationship not limited to a specific duration or task is suggestive of an employment relationship.
18. **Employer and Employee: Wages.** The payment of wages, specifically limited wages, argues for an employment relationship.
19. **Employer and Employee: Taxes: Social Security.** The deduction of Social Security taxes and the withholding of income tax tend to indicate an employer-employee relationship, while the failure to do so is a contrary indication.

20. **Health Care Providers: Physicians and Surgeons.** The provision of medical services by physicians on staff at a hospital has been found to be part of the regular business of the hospital.
21. **Employer and Employee: Claims: Political Subdivisions Tort Claims Act.** Where an employee is not acting within the scope of his or her employment when the employee causes an injury, the injured party may pursue a claim against the employee individually without complying with the requisites of the Political Subdivisions Tort Claims Act.
22. **Negligence: Health Care Providers: Limitations of Actions.** Neb. Rev. Stat. § 44-2828 (Reissue 2010) provides for the filing of claims against health care providers within 2 years from the date of the negligent treatment.
23. **Health Care Providers: Claims: Political Subdivisions Tort Claims Act.** The operation of the Nebraska Hospital-Medical Liability Act does not excuse a plaintiff from compliance with the requirement under the Political Subdivisions Tort Claims Act that the claim be presented to the political subdivision prior to filing suit.
24. **Health Care Providers: Political Subdivisions Tort Claims Act.** The Political Subdivisions Tort Claims Act provides for interaction between the Political Subdivisions Tort Claims Act and the Nebraska Hospital-Medical Liability Act.

Appeal from the District Court for Sheridan County: RANDALL L. LIPPSTREU, Judge. Affirmed.

Christopher P. Welsh and James R. Welsh, of Welsh & Welsh, P.C., L.L.O., for appellants.

Mark A. Christensen, Tracy A. Oldemeyer, Cristin McGarry Berkhausen, and Elizabeth A. Tiarks, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellees.

SIEVERS, PIRTLE, and RIEDMANN, Judges.

PIRTLE, Judge.

## INTRODUCTION

Michael L. Jacobson, special administrator of the estate of Virginia A. Jacobson, and Myron J. Jacobson, Virginia's husband, filed a wrongful death action, predicated upon medical malpractice, in the district court for Sheridan County, Nebraska, against Sherry K. Shresta, M.D., and Gaston Cornu-Labat, M.D. (collectively the defendants). The district court entered judgment in favor of the defendants, determining that they were employees of Gordon Memorial Hospital (the Hospital), a political subdivision, and that they were acting within the scope of their employment at the time of the alleged

negligence. The court dismissed the Jacobsons' claims, determining that they failed to comply with the 1-year presentment requirement of the Political Subdivisions Tort Claims Act (Tort Claims Act). Finding no merit to the Jacobsons' assignments of error, we affirm.

## BACKGROUND

On March 28, 2005, the Jacobsons filed a wrongful death lawsuit against the defendants in the district court for Sheridan County. The Jacobsons alleged that on March 29, 2003, Shresta admitted Virginia to the Hospital after Virginia began coughing while eating roast beef. After Virginia's admission, Cornu-Labat performed an esophagogastroscopy on Virginia. Postoperatively, Virginia "coded." A piece of meat was found at the level of her vocal cords and suctioned out. A subsequent x ray showed aspiration pneumonia. Virginia remained under the medical care of the defendants until March 31, when she died due to complications.

The Jacobsons alleged that the defendants were "negligent and/or committed malpractice in failing to exercise within the skill and care ordinarily required of medical care providers in Gordon, Sheridan County, Nebraska or similar communities" and set forth specific allegations of negligence against each of the defendants. The Jacobsons also asserted in their complaint that at all relevant times, the defendants were qualified under the Nebraska Hospital-Medical Liability Act (NHMLA), Neb. Rev. Stat. §§ 44-2801 to 44-2855 (Reissue 2010), and that the Jacobsons, pursuant to § 44-2840, waived their right to a panel review and elected to proceed with their complaint in the district court.

On July 22, 2005, the defendants filed a joint answer denying that either party was negligent. They also alleged that the defendants were employees of the Hospital, a political subdivision, and that because the Jacobsons failed to comply with the notice requirement set forth in the Tort Claims Act, see Neb. Rev. Stat. §§ 13-901 to 13-928 (Reissue 2012), their action was barred.

The defendants subsequently filed a motion for summary judgment, requesting dismissal of the case because the

Jacobsons allegedly failed to comply with the requirements of the Tort Claims Act. On September 20, 2005, the trial court granted summary judgment in favor of the defendants. The Jacobsons appealed, and in a June 18, 2007, memorandum opinion in case No. A-05-1292, this court reversed the trial court's decision on the ground that there was a genuine issue of material fact as to whether the defendants were employees or independent contractors. The matter was remanded for further proceedings.

On November 13, 2007, the defendants filed a motion asking the court to bifurcate the issue of whether they were employees of the Hospital, a political subdivision, from other issues in the medical malpractice case and to hold a bench trial on that issue. The motion alleged that a verdict based on a finding that the defendants were employees of a political subdivision acting within the scope of their employment at the time of the alleged negligence would result in the complaint's being dismissed in its entirety due to the Jacobsons' failure to comply with the 1-year presentment requirement of the Tort Claims Act set forth at § 13-920(1). The record before us does not contain any objection by the Jacobsons at the time the motion was filed or at the hearing on the motion.

The trial court sustained the motion to bifurcate. The Jacobsons subsequently filed a motion asking the court to reconsider its decision to sustain the defendants' motion to bifurcate. The trial court affirmed its decision to bifurcate the issue of the defendants' employment status.

A bench trial was held on February 26, 2009, on the sole issue of whether the defendants were employees of the Hospital. Prior to the beginning of trial, the Jacobsons "renewed" their objection to the bench trial, stating that Neb. Rev. Stat. § 25-221 (Reissue 2008) entitled them to a jury trial on the bifurcated issue. The trial court overruled the objection.

At the start of trial, the parties stipulated that the Hospital is a political subdivision subject to the Tort Claims Act. The parties also stipulated that the Jacobsons did not serve notice of the claim pursuant to the Tort Claims Act at any time prior to the date the lawsuit was filed.

Two witnesses testified at trial, Cornu-Labat and Mehdi Merred, the former chief executive officer and administrator of the Hospital. Shresta did not testify. Other evidence included the defendants' employment agreements with the Hospital.

Shresta was hired by the Hospital pursuant to a "Physician Employment Agreement" executed on May 6, 2002. The agreement provided that it would go into effect on June 28 and was for a term of 1 year. The agreement provided that the Hospital would establish, maintain, and manage medical clinics in Gordon, Nebraska, and its "surrounding service area." The agreement stated that the Hospital would provide at the clinics "all equipment, services, facilities and supplies necessary for the range of medical services customarily provided by private medical practitioners in the field of family practice." The Hospital also agreed to provide all "nursing, technical, and office staff" as needed.

The agreement required Shresta to relocate to and maintain her personal residence within 10 miles of the Hospital. The agreement also required Shresta to provide "the full range of medical services customarily provided by private practitioners specializing in family practice within the region and consistent with the physician's training and privileges" at the clinics maintained by the Hospital and in "area hospitals." It further required Shresta to maintain office hours at the clinics that were customary for physicians in similar communities and as reasonably established by the Hospital and required her to be "on-call" pursuant to a reasonable schedule created by the Hospital. Shresta was obligated under the agreement to comply with all reasonable personnel and administrative policies of the Hospital.

The agreement did not require Shresta to make referrals to or admit patients to any facility controlled by the Hospital. It specified that it was the intent of the parties that Shresta "shall make referral and admission decisions solely in the best medical interests of patients." The parties agreed that the Hospital "shall neither have nor exercise any control over the professional medical judgment or methods used by [Shresta] in the performance of services" under the terms of the agreement. However, Shresta agreed to "perform the duties and functions"

under those terms "in conformance with currently approved practices in the field of family practice and in a competent and professional manner."

The agreement provided that all nonphysician personnel at the clinics would be under the administrative and executive control of the Hospital and under the technical and medical supervision of Shresta when providing services under Shresta's supervision and direction. The agreement granted Shresta the right to approve any physician assistant whom she was asked to supervise. Shresta agreed to provide professional medical supervision and training to employees at the clinics, assist the medical director in the preparation of an annual budget, and give input on types of supplies and equipment to be used. The Hospital was to maintain all patient records, charts, x-ray films, and files, which were the property of the Hospital.

The Hospital, after consulting with Shresta, was to have the "sole right to establish reasonable billing rates" for professional medical services provided by Shresta while she worked in the clinics, hospitals, or nursing homes. The Hospital was also authorized to "bill for and receive any and all professional fees for [Shresta's] professional medical services." Shresta agreed that all fees and other compensation for her medical services would belong to the Hospital. Shresta was not permitted to moonlight at other facilities without the Hospital's approval. All outside activities engaged in by Shresta were not to interfere with her primary position.

The agreement provided that Shresta would receive a salary payable in accordance with the Hospital's regular payroll periods and payroll practices. The agreement provided that the Hospital, as the "employer of [Shresta]," would withhold from Shresta's salary deductions for income taxes, employment taxes, and any other withholdings required by law. The agreement provided that Shresta would be entitled to participate in employee benefit programs. The Hospital agreed to carry and pay for malpractice insurance with respect to services performed by Shresta on behalf of the Hospital.

Cornu-Labat entered into a "Physician Employment Agreement" with the Hospital on April 9, 2002. The agreement

was to take effect no later than July 1 and was for a 3-year term. The terms and conditions set forth in Cornu-Labat's agreement with the Hospital were very similar to those set forth in Shresta's agreement. Cornu-Labat's agreement with the Hospital stated that the Hospital would provide "appropriate office space and staff to conduct normal business functions of a surgical practice." The agreement stated that the Hospital would furnish and pay for all facilities, equipment, supplies, and services reasonably needed by Cornu-Labat. The agreement required Cornu-Labat to relocate to and maintain his personal residence within 10 miles of the Hospital. The agreement required Cornu-Labat to work for the Hospital on a full-time basis, a minimum of 40 hours per week; to provide in the area clinics and hospitals "the full range of medical services customarily provided by private practitioners specializing in general surgery within the region and consistent with [Cornu-Labat's] training and privileges"; and to establish clinic hours to examine patients. Cornu-Labat was also obligated under the agreement to be "on-call" pursuant to a schedule established by the Hospital. The agreement required Cornu-Labat to comply with all reasonable personnel and administrative policies of the Hospital.

The agreement did not require Cornu-Labat to make referrals to or admit patients to any facility controlled by the Hospital. Instead, the agreement stated that Cornu-Labat should make referral and admission decisions "solely in the best medical interests of patients." It also stated, "[The Hospital] shall neither have nor exercise any control over the professional medical judgment or methods used by [Cornu-Labat] in the performance of services hereunder." Cornu-Labat agreed to "perform the duties and functions" under the terms of the agreement "in conformance with currently approved practices in the field of general surgery and in a competent and professional manner."

The Hospital, after consulting with Cornu-Labat, was to have the sole right to "establish reasonable billing rates for all professional medical services provided by [Cornu-Labat] while [he worked] at the hospital or during clinic visits, and to bill for and receive any and all professional fees for

[Cornu-Labat's] professional medical services." Cornu-Labat agreed that all fees and other compensation for his services at the Hospital and clinic belonged to the Hospital. The agreement also provided that all patient records, charts, and x-ray films were the property of the Hospital.

The agreement provided that Cornu-Labat was to receive a salary, payable in accordance with the Hospital's regular payroll periods and practices, subject to deductions for taxes withheld by the Hospital as the "employer of [Cornu-Labat], pursuant to applicable law." The agreement also provided that Cornu-Labat would be entitled to a monthly bonus of "gross professional billings in excess of $30,000 per month." The agreement provided that Cornu-Labat would be entitled to participate in employee benefit programs. The Hospital agreed to carry and pay for malpractice insurance with respect to services performed by Cornu-Labat on behalf of the Hospital.

Merred testified in regard to many of the provisions in the agreements set forth above. His testimony showed that the parties were bound by and abided by the provisions. For example, he testified that the Hospital did the billing for the defendants' services and that the Hospital received the revenue from those services. He testified that each of the defendants was paid a salary by the Hospital and that the Hospital deducted state and federal income taxes and other withholdings required by law from their salaries. Merred testified that the Hospital provided each of the defendants with an office and with equipment and supplies. It also paid for the defendants' medical malpractice insurance. Merred testified that the Hospital set the benefits and vacation time available to Shresta.

Merred testified that the defendants were employees of the Hospital and that both were providing services for the Hospital at the time of the alleged negligence. He also testified that their medical services were an integral part of the Hospital's business of providing medical care to patients.

Cornu-Labat testified that at the time he signed the employment agreement, he was working in the United States on a work "Visa." He testified that his immigration status required him to be employed by an entity that would "sponsor" him as

a surgeon. He testified that based on the requirement that he be employed, he believed he was an employee of the Hospital when he signed the agreement with the Hospital. He testified that his immigration status also precluded him from having other business relationships outside of his sponsored employment and precluded him from having his own business.

Cornu-Labat testified that while there was no one supervising him while he was performing surgery, he had to get permission from the chief of the Hospital's medical staff before performing any procedure. He testified that there was at least one occasion when the chief of the Hospital's medical staff denied his request for a certain procedure.

Following trial, the trial court found that the employment agreements described an employer-employee relationship; that based on the terms of the agreements, the Hospital had the right to control the manner and means of the work and the details of the defendants' performance of duties; that the parties to the agreements intended to create an employer-employee relationship; that the Hospital exercised actual control over the means and methods of the work and details of the defendants' performance of duties; and that the defendants were acting within the scope of their employment when they treated Virginia. The trial court concluded that the defendants were employees of the Hospital and that therefore, the Jacobsons' claim against the defendants was barred for failure to comply with the Tort Claims Act as set forth at § 13-920(1). The court entered judgment in favor of the defendants.

## ASSIGNMENTS OF ERROR

The Jacobsons assign, restated, that the trial court erred in (1) granting the defendants' motion to bifurcate the issue of whether the defendants were employees of the Hospital, thereby denying the Jacobsons a jury trial on that issue; (2) finding that the employment agreements describe an employer-employee relationship; (3) finding that the employment agreements give the Hospital the right to control the manner and means of the defendants' work and the details of the performance of their duties; (4) finding that the parties believed they were creating an employer-employee relationship, i.e., an

agency relationship, when they negotiated the agreements; (5) failing to consider and weigh 10 recognized factors used to determine the defendants' employment status; (6) finding that Shresta was acting within the scope of her employment when treating Virginia; and (7) failing to find that the defendants, by electing coverage under the NHMLA, are barred from asserting the 1-year notice provision of the Tort Claims Act based on the doctrines of waiver and equitable estoppel.

## STANDARD OF REVIEW

[1,2] In a bench trial of an action at law, the factual findings by the trial court have the effect of a jury verdict and will not be set aside unless they are clearly wrong. *Strategic Staff Mgmt. v. Roseland*, 260 Neb. 682, 619 N.W.2d 230 (2000). An appellate court reviews the sufficiency of the evidence to sustain a judgment by resolving every controverted fact in favor of the successful party and giving such party the benefit of every inference that can reasonably be deduced from the evidence. See *Baldwin v. City of Omaha*, 259 Neb. 1, 607 N.W.2d 841 (2000).

## ANALYSIS

*Motion to Bifurcate.*

The Jacobsons first assign that the trial court erred in granting the defendants' motion to bifurcate the issue of whether the defendants were employees of the Hospital. The Jacobsons do not contest the bifurcation itself, but, rather, they argue that the court erred in granting the defendants' request that the employment issue be decided by the court, thereby denying the Jacobsons a jury trial on that issue.

[3-5] A trial judge has broad discretion over the conduct of a trial, and absent abuse, that discretion should be respected. *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009). Bifurcation of a trial may be appropriate where separate proceedings will do justice, avoid prejudice, and further the convenience of the parties and the court. *Id.* Bifurcation is particularly proper where a potentially dispositive issue may be decided in such a way as to eliminate the need to try other issues. *Id.*

[6] Based on the record before us, we find no objection by the Jacobsons to the defendants' motion to bifurcate before the trial court ruled on it. The defendants filed their motion to bifurcate, and a hearing was subsequently held on the motion. The record does not contain any objection by the Jacobsons until after the motion was sustained and the Jacobsons filed a motion to reconsider. Although the Jacobsons state in their brief that they objected to the motion, there is nothing in the record before us to support that contention. We recognize that the Jacobsons "renewed" their objection to the bench trial before trial began, but there is no original objection in the record. Therefore, we are unable to determine whether an original objection was made at all, whether it was timely made, and on what grounds it was made. It is incumbent upon the appellant to present a record supporting the errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors. *Gengenbach v. Hawkins Mfg.*, 18 Neb. App. 488, 785 N.W.2d 853 (2010).

[7] The defendants' motion to bifurcate the employment issue specifically stated that they were requesting a bench trial on the issue. If the Jacobsons believed they were entitled to a jury trial on that issue, they had an opportunity to object and, based on the record before us, did not. Generally, failure to make a timely objection waives the right to assert prejudicial error on appeal. *Wilson v. Neth*, 18 Neb. App. 41, 773 N.W.2d 183 (2009). By failing to object to the motion to bifurcate, the Jacobsons cannot now challenge the court's ruling.

*Employment Status.*

The Jacobsons' next four assignments of error relate to the same issue—whether the trial court erred in determining that the defendants were employees of the Hospital, rather than independent contractors.

Section 13-902 provides:

> [N]o political subdivision of the State of Nebraska shall be liable for the torts of its officers, agents, or employees, and . . . no suit shall be maintained against such political

> subdivision or its officers, agents, or employees on any tort claim except to the extent, and only to the extent, provided by the . . . Tort Claims Act.

Section 13-920(1) states:

> No suit shall be commenced against any employee of a political subdivision for money on account of . . . personal injury to or the death of any person caused by any negligent or wrongful act or omission of the employee while acting in the scope of his or her office or employment . . . unless a claim has been submitted in writing to the governing body of the political subdivision within one year after such claim accrued . . . .

[8] It is undisputed that the Hospital is a political subdivision. While not a jurisdictional prerequisite, the filing or presentment of a claim to the appropriate political subdivision is a condition precedent to commencement of a suit under the Tort Claims Act. *Keller v. Tavarone*, 262 Neb. 2, 628 N.W.2d 222 (2001). The parties in the instant case stipulated that the Jacobsons failed to submit a claim as required by the Tort Claims Act. However, they are bound by the requirements of the Tort Claims Act only if the defendants were "officers, agents, or employees" of the Hospital. See § 13-902.

[9] "Employee shall not be construed to include any contractor with a political subdivision." § 13-903(3). An independent contractor is one who, in the course of an independent occupation or employment, undertakes work subject to the will or control of the person for whom the work is done only as to the result of the work and not as to the methods or means used. *Hemmerling v. Happy Cab Co.*, 247 Neb. 919, 530 N.W.2d 916 (1995).

[10,11] Ordinarily, when a court is presented with a dispute regarding a party's status as an employee or an independent contractor, the party's status is a question of fact which must be determined after consideration of all the evidence in the case. *Id.* However, where the inference is clear that there is, or is not, a master and servant relationship, the matter is a question of law. *Id.* The phrase "where the inference is clear" means that there can be no dispute as to pertinent facts pertaining to the contract between and the relationship of the

parties involved and that only one reasonable inference can be drawn therefrom. See *Kime v. Hobbs*, 252 Neb. 407, 562 N.W.2d 705 (1997).

[12] There is no single test for determining whether one performs services for another as an employee or as an independent contractor, and the following factors must be considered: (1) the extent of control which, by the agreement, the employer may exercise over the details of the work; (2) whether the one employed is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the one employed is engaged; (7) the method of payment, whether by the time or by the job; (8) whether the work is part of the regular business of the employer; (9) whether the parties believe they are creating an agency relationship; and (10) whether the employer is or is not in business. *Keller v. Tavarone, supra*.

In regard to the defendants' employment status, the Jacobsons first argue that the trial court erred in finding that the employment agreements described an employer-employee relationship. The Jacobsons argue that the agreements contain no language specifically stating that the defendants are considered employees, rather than independent contractors. Contrary to their argument, the agreements contain several references to the defendants' being employees. For instance, the agreements contain a provision allowing the defendants to participate in employee benefit programs "in the same manner as other physician employees of [the Hospital]." The agreements also provided that the defendants "shall cooperate fully with [the Hospital] in applying for, obtaining, and maintaining eligibility for [medical malpractice] insurance coverage." The agreements further state that the defendants must use all space, facilities, supplies, equipment, services, and personnel furnished by the Hospital exclusively for the discharge of duties "as . . . employee[s]" under the agreements.

[13] However, labels alone do not resolve the issue of whether the defendants were employees or independent contractors. A writing which merely denominates the relationship may not be used to conceal the true arrangement. *Hemmerling v. Happy Cab Co.*, 247 Neb. 919, 530 N.W.2d 916 (1995). Accordingly, we must consider the provisions of the agreements to discern what control the Hospital had over the defendants' work. This leads us to the Jacobsons' next assignment of error.

[14] The Jacobsons argue that the provisions in the employment agreements do not give the Hospital the right to control the manner and means of the defendants' work and the details of the performance of their duties, as the trial court found. As set forth above, the extent of control which, by the agreement, the employer may exercise over the details of the work is one of the factors used to determine whether an employer-employee relationship exists. In fact, the right of control is the chief factor distinguishing an employment relationship from that of an independent contractor. *Hemmerling v. Happy Cab Co., supra*.

The Jacobsons contend that the employment agreements contain provisions that give the defendants control over certain aspects of their jobs. For instance, the agreements did not require the defendants to make referrals to or admit patients to any facility controlled by the Hospital. Rather, the defendants were allowed to make referral and admission decisions solely in the best medical interests of patients. The defendants also agreed, pursuant to the agreements, that the Hospital would not have any control over the professional medical judgment or methods used by the defendants in their performance of services. The provision that allowed the defendants to make referral and admission decisions solely in the best medical interests of patients is a provision that must be included to prevent the agreements from running afoul of the federal "Stark" law. See 42 U.S.C. § 1395nn (2006 & Supp. V 2011). The Stark law regulates a physician's referral of patients to entities in which the physician has a financial interest, even through a structured compensation agreement.

Despite the existence of provisions that give the defendants control over some aspects of their jobs, there are numerous provisions in the agreements that give the Hospital control over the performance of the defendants' duties. Pursuant to the agreements, the Hospital maintained and owned all medical records and patient files. The Hospital took care of billing patients for the defendants' services and had the sole right to establish billing rates for the services they provided. The Hospital received all revenue from the defendants' medical services.

The agreements require the defendants to comply with all personnel and administrative policies, including those contained in the Hospital's personnel manual. The defendants, pursuant to the agreements, were also required to abide by the medical staff bylaws, rules, and regulations and the administrative policies of the Hospital. As previously stated, the agreements provided that all space, facilities, supplies, equipment, services, and personnel furnished by the Hospital must be used exclusively for the discharge of duties "as an employee" under the agreements.

The agreements provided that the defendants would receive a salary payable in accordance with the Hospital's regular payroll periods and payroll practices. The agreements stated that the Hospital would withhold from the defendants' salaries deductions for income taxes, employment taxes, and any other withholdings required by law. The agreements provided that the defendants could participate in employee benefit programs. The Hospital agreed to carry and pay for malpractice insurance with respect to services performed by the defendants on behalf of the Hospital. The agreements required the defendants to maintain a personal residence within 10 miles of the Hospital.

Shresta's agreement with the Hospital specified that the Hospital was responsible for its own management, and maintained executive and administrative control over all nonphysician personnel. Shresta was required to maintain office hours at the clinics established by the Hospital, and she was required to be "on-call" based on a schedule created by the Hospital.

Finally, the Hospital limited Shresta's outside activities, specifying that "[a]ny moonlighting at another facility will need the approval of the [Hospital]."

Cornu-Labat's agreement required him to work for the hospital on a full-time basis and obligated him to be "on-call" pursuant to a schedule established by the Hospital.

While the agreements did not require the defendants to make referrals to or admit patients to any facility controlled by the Hospital—which would have been contrary to federal law—and gave the defendants authority to use their professional medical judgment, the agreements contain many provisions showing that the defendants were under the control and supervision of the Hospital in most aspects of their employment. The testimony of Merred and Cornu-Labat confirmed that the Hospital exercised its right to control the means and methods of the defendants' services as set forth in the agreements. Both testified as to how various provisions were carried out. Accordingly, we cannot conclude that the district court erred in finding that the agreements described an employer-employee relationship under which the Hospital had the right to control the manner and means of the defendants' work.

The Jacobsons next assign that the trial court erred in finding that the parties believed they were creating an employer-employee relationship or, in other words, an agency relationship when they entered into the agreements. Whether the parties believe they are creating an agency relationship is one of the factors to consider in determining one's employment status. See *Keller v. Tavarone*, 262 Neb. 2, 628 N.W.2d 222 (2001).

We determine that based on the terms of the agreements themselves, it is reasonable to conclude that the parties believed they were creating an agency relationship. In addition to the language in the agreements, Cornu-Labat testified that when he entered into the agreement with the Hospital, he believed he was entering into an employment relationship with the Hospital. Merred testified that although he did not know what the intent of the parties to the agreements was at the time they were signed, based on the provisions of the agreements, the defendants were employees of the Hospital. We cannot say that

the trial court erred in finding that the parties believed they were creating an agency relationship.

The Jacobsons also argue that the trial court erred in failing to consider and weigh all 10 factors used to determine whether one performs services as an employee or as an independent contractor, as previously set forth. The trial court made findings in regard to two of the above factors—the first factor involving the extent of control by the employer and the ninth factor involving an agency relationship—but did not mention others. Although the court did not specifically mention all of the factors in its order, it does not follow that the court failed to consider the factors not mentioned. While it would be helpful and more complete if the trial court had discussed all 10 factors used to determine the defendants' employment status, there is no reversible error on the part of the trial court in failing to do so.

In considering the factors not discussed by the trial court, we conclude that the trial court's finding that the defendants were employees of the Hospital is supported by the other factors. We will discuss in turn each factor that the trial court did not mention, starting with the second factor.

The second factor to consider is whether the defendants were engaged in distinct occupations. Cornu-Labat testified that he did not engage in the practice of medicine for any facilities not run by the Hospital. Shresta was authorized to practice at an outside facility only if she first received approval from the Hospital. There is no evidence that she ever asked for or obtained approval to offer services to other entities. Because the evidence indicates that the defendants did not offer their services to entities outside the Hospital, this factor weighs in favor of a finding that the defendants were employees.

The third factor is whether the defendants worked under the direction of the Hospital or were specialists without supervision. The employment agreements do not indicate that either of the defendants was under the direct supervision of the Hospital's officials. However, Merred testified that the defendants were supervised by Merred and the chief of the Hospital's medical staff. Cornu-Labat testified that he had to get approval

from the chief of the Hospital's medical staff before performing any procedure, but that there was no one supervising him while he was performing procedures. Given that there is some evidence that the defendants were supervised by the Hospital, the extent of their supervision is not clear. This factor does not support a conclusion that the defendants were either employees or independent contractors.

[15,16] The fourth factor concerns the skill required by the defendants' occupations. The less skill required by a job, the greater the indication that the worker is an employee and not an independent contractor. *Pettit v. State*, 249 Neb. 666, 544 N.W.2d 855 (1996). The occupation of a physician is a skilled profession. *Keller v. Tavarone*, 262 Neb. 2, 628 N.W.2d 222 (2001). This factor weighs in favor of a finding that the defendants were independent contractors.

The fifth factor considers who supplied the instrumentalities, tools, and place of work. The employment agreements show that the Hospital provided all of the facilities and supplies, which weighs in favor of a finding that the defendants were employees of the Hospital.

[17] The sixth factor concerns the length of time each of the defendants was employed by the Hospital. An ongoing relationship not limited to a specific duration or task is suggestive of an employment relationship. *Reeder v. State*, 11 Neb. App. 215, 649 N.W.2d 504 (2002). There is nothing in the record to indicate that either of the defendants was hired to complete a specific task, but both were hired for specific durations. That factor, therefore, does not weigh in favor of a finding that the defendants were employees or independent contractors.

[18,19] The seventh factor deals with the method of payment used to compensate the defendants. The payment of wages, specifically limited wages, argues for an employment relationship. *Id.* Also, the deduction of Social Security taxes and the withholding of income tax tend to indicate an employer-employee relationship, while the failure to do so is a contrary indication. *Omaha World-Herald v. Dernier*, 253 Neb. 215, 570 N.W.2d 508 (1997). The defendants contracted to receive fixed salaries, with the possibility of Cornu-Labat's earning a bonus, and the agreements provided that taxes

would be withheld from their salaries, suggesting that they were employees.

[20] The eighth factor is whether the work was part of the regular business of the employer. Both agreements provide that the Hospital was in need of the services of physicians to provide professional medical services at the Hospital's clinics. This indicates that the work which the defendants were hired to do was part of the regular business conducted by the Hospital. Also, based on the agreements, the defendants were on staff at the Hospital. The provision of medical services by physicians on staff at a hospital has been found to be part of the regular business of the hospital. *Reeder v. State, supra*. Merred also testified that the services the defendants provided were integral to the business of the Hospital. This factor weighs in favor of a finding that the defendants were employees.

The final factor is whether the Hospital was or was not in business. The record shows that the Hospital was in the business of providing medical services at its facilities. This factor weighs in favor of a finding that the defendants were employees.

In summary, there are a few factors that weigh in favor of an independent contractor status or that are neutral factors, but there is also substantial evidence of the Hospital's control over the defendants in performing medical services and multiple factors that support the trial court's finding that the defendants were employees of the Hospital. Given the reasonable inferences that can be drawn from the record, this was a question of fact for the trial court to determine. See *Keller v. Tavarone*, 262 Neb. 2, 628 N.W.2d 222 (2001). The trial court's determination that the defendants were employees was not clearly wrong.

*Scope of Employment.*

[21] The Jacobsons assign that the trial court erred in finding that Shresta was acting within the scope of her employment when she treated Virginia. Section 13-920(1) specifies that no claim may be made against an employee of a political subdivision "acting in the scope of his or her office or employment" unless a claim has been submitted to the governing

body of the political subdivision within 1 year of the claim's accrual. Where an employee is not acting within the scope of his or her employment when the employee causes an injury, the injured party may pursue a claim against the employee individually without complying with the requisites of the Tort Claims Act. *Bohl v. Buffalo Cty.*, 251 Neb. 492, 557 N.W.2d 668 (1997).

The Jacobsons contend that based on Shresta's employment agreement, she was hired to provide medical services to patients at the Hospital's clinics, not at the Hospital itself, where Virginia was treated. Shresta's employment agreement stated that the Hospital needed to procure the services of a physician to provide medical services at its medical clinics. The agreement further states that the Hospital "shall establish and maintain medical clinics in Gordon . . . and its surrounding service area" and that Shresta shall provide medical services "to the Clinic[s'] patients, both at the Clinics and in area hospitals." The Jacobsons argue that Shresta was not acting within the scope of her employment when she treated Virginia, because Virginia was treated at the Hospital and was not a patient of a clinic.

Although Shresta was hired to provide services at the Hospital's medical clinics, Shresta's employment agreement was with the Hospital, and the clinics were established and maintained by the Hospital. Shresta's agreement stated that she was required to provide services to patients at the Hospital's clinics and area hospitals and to be on call to provide emergency services. She was also a member of the Hospital's medical staff.

Further, Merred testified that at the time of the alleged malpractice, Shresta was acting within the scope of her employment and performing services for the Hospital.

The evidence indicates that Shresta was acting within the scope of her employment when she treated Virginia. This assignment is without merit.

*NHMLA.*

The Jacobsons next assign that the trial court erred in failing to find that the defendants, by electing coverage under the

NHMLA, are barred from asserting the 1-year notice provision of the Tort Claims Act based on the doctrines of waiver and equitable estoppel. The Jacobsons contend that the NHMLA provides that it is the exclusive remedy against physicians who elect to come under the system. Section 44-2821(2) provides in relevant part:

> If a health care provider shall qualify under the [NHMLA], the patient's exclusive remedy against the health care provider or his or her partner, limited liability company member, employer, or employees for alleged malpractice, professional negligence, failure to provide care, breach of contract relating to providing medical care, or other claim based upon failure to obtain informed consent for an operation or treatment shall be as provided by the [NHMLA] unless the patient shall have elected not to come under the provisions of the [NHMLA].

[22] Section 44-2828 provides for the filing of claims against health care providers within 2 years from the date of the negligent treatment. The Jacobsons argue that the defendants' act of electing coverage under the NHMLA constitutes a waiver of the provisions of the Tort Claims Act or, in the alternative, that the defendants should be equitably estopped from relying on the notice provision of the Tort Claims Act.

[23,24] The Nebraska Supreme Court addressed this issue in *Keller v. Tavarone*, 262 Neb. 2, 628 N.W.2d 222 (2001). The court found that the operation of the NHMLA does not excuse a plaintiff from compliance with the requirement under the Tort Claims Act that the claim be presented to the political subdivision prior to filing suit. The court pointed out that the Tort Claims Act provides for interaction between the Tort Claims Act and the NHMLA. Section 13-919(4) provides:

> If a claim is brought under the [NHMLA], the filing of a request for review under section 44-2840 shall extend the time to begin suit under the . . . Tort Claims Act an additional ninety days following the issuance of the opinion by the medical review panel if the time to begin suit under the . . . Tort Claims Act would otherwise expire before the end of such ninety-day period.

The court found that this section clearly contemplates that litigants would be required to comply with both the NHMLA and the Tort Claims Act. "Section 13-919(4) evinces the Legislature's intent to harmonize the operation of the two acts in question and, thus, contradicts [the plaintiff's] claim that the acts operate exclusive[ly] of one another." *Keller v. Tavarone*, 262 Neb. at 13, 628 N.W.2d at 231.

The court found that if the plaintiff's argument about the exclusivity of the NHMLA was correct, then § 13-919(4) would have been unnecessary. Section 13-919(4) extends the time for filing suit under the Tort Claims Act after the completion of a panel review under the NHMLA. If a suit pursuant to the NHMLA excused a litigant from the requirements of the Tort Claims Act, then the extension provided by § 13-919(4) would not have been needed. Instead, the Legislature amended the statute to harmonize the NHMLA and the Tort Claims Act, signaling its intent that both the NHMLA and the Tort Claims Act were to apply to medical malpractice claims against qualifying political subdivisions. See *Keller v. Tavarone, supra*.

In the instant case, the operation of the NHMLA did not excuse the Jacobsons from compliance with the Tort Claims Act, and the defendants did not waive and are not equitably estopped from asserting the Jacobsons' failure to comply with the 1-year notice provision of the Tort Claims Act. Because the Jacobsons admit that no claim was filed with the Hospital prior to their filing suit, this assignment of error is without merit.

## CONCLUSION

We conclude that the trial court did not err in finding that the defendants were employees of the Hospital, a political subdivision, and were acting within the scope of their employment at the time of the alleged negligence. Accordingly, the district court did not err in dismissing the Jacobsons' claims for failure to comply with the 1-year presentment requirement of the Tort Claims Act. The judgment of the district court is affirmed.

AFFIRMED.