SUPREME COURT OF FLORIDA
Tallahassee, Florida

Case No. 86,685

AMOS W. STOLL, ETC., ET AL.,

Petitioners,

vs.

MINOUCHE NOEL, ETC., ET AL.,

Respondents.
_____/

BRIEF OF THE STATE OF FLORIDA, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, CHILDREN'S MEDICAL SERVICES, AMICUS CURIAE IN SUPPORT OF PETITIONERS

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SUMMARY OF ARGUMENT

Chapter 391, the Children's Medical Services Act, charges the Department of Health and Rehabilitative Services with the responsibility of providing long term care and treatment to chronically ill children of indigent families. In compliance with the Act, HRS established a network of 20 clinics. Each clinic is run by a Medical Director with full time staff. The direct patient care is provided by consultants, local physicians hired by HRS who work under the supervision and direction of the CMS Medical Director.

The CMS program cannot function without the services of physician consultants. Because of the risk of liability and the State's limited resources, the State must provide an incentive to attract qualified physicians of all specialties to work at CMS clinics. The sovereign immunity provided by Section 768.28(9)(a) provides this incentive. Without this immunity, CMS cannot retain a sufficient number of qualified physicians to provide the mandated medical services.

Whether the physicians are paid is irrelevant to their status as agents of the State. The physicians work for the State, which supervises their actions and informs all CMS patients that they will be cared for by "agents of the State." (Fla. Stat. §768.28(9)(a); R 2282 at 8, 10). Interpreting Section 768.28(9)(a)

as including CMS physician consultants within the definition of agency comports with the intent of the sovereign immunity statute and the realities of practicing medicine, as recognized in tort reform and other legislation immunizing health care providers.

The State remains a defendant in the litigation from which these appeals arise and is fully responsible, under the law, for any assessed liability of these physicians. This Court should answer the certified question in the affirmative and reverse the holding of the Fourth District Court of Appeal with directions to reinstate the summary judgments for the individual defendants.

ARGUMENT

ISSUE

WHETHER PHYSICIAN CONSULTANTS WHO CONTRACT WITH THE FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, CHILDREN'S MEDICAL SERVICES, ARE IMMUNE UNDER SECTION 768.28, FLORIDA STATUTES.

Title V of the Federal Social Security Act requires each State to designate an agency for receipt of federal funds for the long-term care and treatment of chronically ill children of indigent families. In response to this federal mandate, the Florida Legislature enacted Chapter 391, entitled the "Children's Medical Services Act". The purpose of the Act is:

> To provide medical services for needy children, particularly those with chronic, crippling or potentially crippling or physically handicapping diseases and conditions, and to provide leadership and direction in promoting, planning, and coordinating children's medical care programs so that the full development of each child's potential may be realized.

Fla. Stat. §391.016. The Department of Health and Rehabilitative Services (HRS) administers the program "to eligible individuals," for whom it is authorized "to provide or contract for the provision of medical services ... ." Fla. Stat. §§391.021(2), 391.026(1). Section 154.011, Florida Statutes authorizes HRS to "[contract] with individual or group practitioners for all or part of the service; ...".

In compliance with the Act, HRS established a network of 20 clinics to serve children throughout the State. Each clinic is run by a medical director with full time staff. The direct patient care in each clinic is provided by local physicians hired by HRS who work under the supervision and direction of the Children's Medical Services' (CMS) Medical Director. For administrative purposes, some of these physicians are classified as "consultants", while others are classified as "Other Personal Services" providers. There is no <u>functional</u> distinction between these groups.

The CMS physicians are compensated, but at a rate well below the rates received by physicians in private practice. These low rates are, in the view of many physicians, too low to compensate for the risk of liability associated with caring for CMS patients who, by definition, are high risk, special needs children. Because the State does not have the financial resources to adequately compensate physicians for the risk of liability associated with caring for these children, it attracts qualified physicians by providing the additional incentive of immunity. The CMS program cannot function without the services of physician consultants. In fact, since the Fourth District's opinion below, doctors have resigned from the CMS program because of the threat of liability. (See 7/26/95 letter from CMS Medical Director Dr. Leterman, attached hereto.) As a matter of policy, CMS consultants must be immunized from suit.

Section 768.28(9)(a) immunizes government agents and employees from suit and personal liability in tort for any injury or damage caused by simple negligence occurring within the scope of their employment. The State has reviewed the facts and the record in this case and admitted that the physicians here were agents of the State. These physicians worked for the State, which supervised their actions. The State informed the adult plaintiffs that the minor plaintiff would be cared for by "agents of the state." (Fla. Stat. §768.28(9)(a); R 2282 at 8, 10).

Even without the State's concession, Section 768.28 immunized these physicians as well as other "consultants," who provide services to CMS pursuant to Chapter 391, from suit. All physicians under contract with CMS are, by virtue of the authority retained by CMS in its regulations and Manual, "agents" of the State. The CMS Medical Director is responsible for supervising all physicians providing services at CMS (Manual §3-1-e, f). Specifically, his duties include:

> b. Directing the proper care and treatment, within budgetary constraints, of all patients who are financially and medically eligible for services, including review of all patient care activities and priority of patients for services.
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> * * *
>
> e. Providing direct line supervisory authority over all personnel who are assigned to the CMS program within the designated service area.
>
> f. Providing medical supervision of all clinics in direct as well as contractual services, including selection of physicians and providers from the panel of CMS consultants in the community. (Emphasis added) (Manual §3-1-b, e, f; Fla. Admin. Code R. 10J-1.006).

CMS staff in the local office sponsoring the CMS services must pre-authorize all "provider services for medically necessary treatment." Fla. Admin. Code R. 10J-3.006(1).

Florida Administrative Code Rule 10J-5.007(1) contains stringent requirements to qualify as a CMS "physician consultant." The Manual and Rule provide detailed procedures that physicians must follow to comply with the CMS program. Fla. Admin. Code R. 10J-5.007(1); Manual §4-6. The "conditions" and requirements delineated in Florida Administrative Code Rule 10J-5.007(1) and the HRS Manual include certification by a specialty board, certification by a sub-specialty board when applicable, membership in good standing of the county medical society, staff privileges in a licensed and accredited hospital, approval by the Department of CMS Patient Care Services, compliance with post-graduate education requirements established by the continuing medical education committee of the Florida Medical Association, recertification board requirements in specialty areas, and a demonstrated interest in and commitment to children.

Direct intervention and interference with the professional judgment of the physicians is not necessary to establish an agency relationship and ignores the realities of the practice of medicine. As the legislature acknowledged in Section 766.102(5), Florida Statutes, the reality of health care makes the type of supervision the plaintiffs contend is a prerequisite, an impossibility:

> The Legislature is cognizant of the changing trends and techniques for the delivery of health care in this state and the <u>discretion that is inherent in the diagnosis,</u>

> care and treatment of patients by different health care providers. (Emphasis added).

As provided in the Manual, however, CMS has retained the authority to supervise and often exercises day to day supervision and direction over its physicians, thereby limiting their discretion. CMS physicians must abide by protocols and procedures outlined in the Manual. HRS decides who is eligible for CMS' services (Manual §5-4), requires that all treatment be pre-approved (Fla. Admin. Code R. 10J-3.006(1)), schedules patient care at its clinics (Manual §4-2), requires that physicians orders be written on prescribed forms (Manual §5-9(g)), maintains absolute authority over payment for services (Manual §5-6), and retains absolute authority to fire consultants at will.

Like the defendant doctor in Bates By and Through Bates v. Sahasranaman, 522 So. 2d 545 (Fla. 4th DCA 1988), who was a salaried staff employee to a public hospital, the physician consultants to the CMS program are agents of the State to whom sovereign immunity protection extends. As the Fourth District stated in Bates By and Through Bates v. Sahasranaman, on page 546 of the opinion:

> There is no reason to interpret the provisions, which insure that the protection of the act extends to volunteer firefighters, public defenders and outside prison health care providers, as limiting the all inclusive

> language of the statute. Nor is there any reason to consider physicians apart from other professional state employees. The language of the statute is clear and unambiguous. There are other public policy concerns which the legislature has resolved by the broad, non-exclusive language in the statute, protecting all state employees from personal liability for simple negligence occurring in the scope of their public employment. See State Department of Transportation v. Knowles, 402 So. 2d 1155 (Fla. 1981). (Emphasis added)

See also Jaar v. University of Miami, 474 So. 2d 239 (Fla. 3d DCA 1985), rev. denied, 484 So. 2d 10 (Fla. 1986).

The State recently adopted two statutes that underscore (1) its commitment to providing care to the indigent, (2) the extent to which it recognizes that personal immunity for physicians is necessary to achieve that goal, and (3) the fact that physicians over whom the State retains some supervisory authority are "agents" of the State for purposes of Section 768.28. Section 766.1115 extended immunity under Section 768.28 to physicians who provide uncompensated care to indigent patients. Section 381.0302 extended immunity to physicians who, in return for educational support, provide uncompensated care to "medically indigent patients" in "underserved locations." In adopting these statutes, the legislature recognized, as it implicitly recognized in enacting Section 768.28 and Chapter 391, that "a significant portion of the residents of this state who are [indigent] are unable to access

needed health care because health care providers fear the risk of medical malpractice liability." Fla. Stat. §766.1115(2); see also Fla. Stat. §381.0302(1), (8).

Neither Section 766.1115 nor Section 381.0302 requires "hands on" control over the doctors to create or maintain agency status. The criteria the legislature adopted to define "agency" status under these statutes describe the relationship between CMS and the physicians it retains to provide services to its patients. Under Section 766.1115(4) and (5), as in the CMS situation, the State retains the absolute right of "dismissal" or "termination," the State has access to all patient records and maintains these records, all adverse incidents are reported to the State, the providers are required to see all patients referred to them, and all patients are notified of the "agency" status of the physicians providing care to them. Under Section 381.0302(7), similar to the CMS situation, a physician must, to qualify as an agent, work "subject to the supervision of the department for the purpose of practice guidelines, continuing education, and other matters pertaining to professional conduct." Significantly, Section 766.1115(11) provides that "[n]othing in this section in any way reduces or limits the rights of the state or any of its agencies or sub-divisions to any benefit [including the benefit of hiring immunized physicians] currently provided under s. 768.28."

Agency status does not depend upon whether the agent is paid. AGO 89-70 addressed whether psychological examiners designated by the Board of Psychological Examiners to supervise or treat applicants for licensure or discipline licensees placed on probation were agents of the Board and, therefore, protected by Section 768.28. The Board selects a psychologist to provide the treatment or supervision and monitors it. The psychologist is compensated for the service by the applicant or licensee. The Attorney General concluded that the psychologist was immune from personal liability under Section 768.28 as an agent of the Board. Since the agency relationship is created by consent of the parties to the agreement, neither consideration nor compensation to the agent is essential. It is the right of control, not actual control or interference with the work, which is significant and distinguishing between an independent contractor and a servant.

AGO 76-188 addressed whether independently insured private health institutions which volunteered their services to HRS to administer the swine flue vaccine were agents of the Department, and therefore, protected by Section 768.28. Like here, the Department selected the private institution and had the authority to terminate the relationship. The Department promulgated guidelines for "program participants" to follow and monitored and controlled their performance to insure that they complied with federal and state guidelines. The Attorney General concluded that

the private health institutions were agents of the Department and therefore, entitled to the protections of Section 768.28(9), even if they were paid:

> Thus, both the Department of Health and Rehabilitative Services and any volunteer private health agency participating in the swine flu immunization program are "program participants" if either agency provides inoculation without charge and in compliance with certain consent form procedures. I might note at this point that the words "without charge" would seem to refer to the administration of vaccine to citizens "without charge" to the citizen. I understand that, after you wrote your letter to me, you have been asked whether a private health agency may be reimbursed for its expenses and still qualify as a "program participant."
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> * * *
>
> The Department of Health and Rehabilitative Services is a State Agency and therefore partakes of the state's sovereign immunity from liability for torts committed by its officers and employees in the scope of their employment and in the course of providing health services on a statewide basis to Florida citizens. Loucks v. Adair, 312 So. 2d 531 (1 D.C.A. Fla. 1975), cert. den., 327 So. 2d 33 (Fla. 1976). Immunity of the Department of Health and Rehabilitative Services as a state agency would appear to exist regardless of any distinction between "proprietary" and "governmental" functions premised upon whether the patient or citizen pays for the services rendered. (Emphasis added).
>
> * * *

AGO 60-95 addressed whether the Florida Crippled Children's Commission Program, the precursor to the Children's Medical Services Act, was liable for "medico-legal action" if a patient under its care was operated on without a permit signed by the parents authorizing the procedure. The Attorney General concluded that the Commission, as a State agency, was not liable in tort, and "[t]he same rule would apply to the director, and all other employees of the Crippled Children's Commission." (Emphasis added).

As the amicus brief of the Florida Medical Association points out, there are growing impediments to Florida's efforts to recruit the highest quality physicians to CMS clinics. The greatest of these is the risk of personal malpractice liability. Because of the risk of liability and the State's limited resources, the State must provide an incentive to attract qualified physicians of all specialties to work at CMS clinics. Section 768.28(9)(a) provides this additional incentive by insulating CMS physicians from the risk of liability associated with caring for CMS patients. Without this insulation, CMS cannot retain a sufficient number of qualified physicians to provide the mandated medical services. Interpreting Section 768.28(9)(a) as including CMS physician consultants, working directly for and under a State agency, within the definition of agency comports with the intent of the sovereign immunity statute and the realities of practicing medicine, as

recognized in tort reform and other legislation immunizing health care providers.

CONCLUSION

Private physicians providing services under contract to HRS under the Children's Medical Services Act, including the four physicians in this case, are agents of the state and, therefore, immune from suit. Under Section 768.28, the State itself, a defendant in the underlying litigation, bears financial responsibility, if any is ultimately assessed, for the actions of such physicians. This Court should answer the certified question in the affirmative and reverse the opinion of the Fourth District Court of Appeal with directions to reinstate the summary judgments for the doctors.

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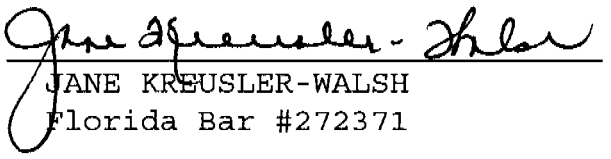
By: 
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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished, by mail, this 4th day of December, 1995, to:

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STATE OF FLORIDA
DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES

July 26, 1995

Dr. Leslie M. Beitsch
Acting Asst. Secretary for CMS
1317 Winewood Blvd.
Tallahassee, Florida 32399

Dear Dr. Beitsch:

Enclosed please find copies of 2 letters of resignation from both Dr. McKenzie and Dr. Stoll. Both of these doctors are leaving as a result of the uncertainty of immunity for liability. As anticipated, neurosurgical coverage for District 10 Children's Medical Services clients will become, at best, extremely difficult after August 1, 1995. I strongly suspect the clinic will be left without coverage. Historically, our neurosurgical coverage has come from Memorial Hospital Neurosurgical Group in Hollywood (the south end of the county) and Dr's McKenzie and Stoll in the north end of the county. Recently, Dr. Molleston (with the Memorial Neurosurgial Group) has resigned due to his relocation to Texas. His former partners at Memorial are unwilling to provide clinic coverage for us due to their already overcrowded patient load. Thus, as you can see, we have to immediately seek new options for our patients.

I have already taken the initiative of exploring new possibilities with other providers locally, but I am not terribly optimistic at this time. If services are unable to be obtained locally we will have to consider sending these children to the University of Miami or Miami Children's Hospital. Such an option will greatly inconvenience families that are already under a great deal of strain and will also further fragment the child's medical care.

Please advise me how I should proceed. Your suggestions are greatly needed.

Sincerely,

Joni Leterman, MD
Medical Director

JL/pg

DISTRICT TEN
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LAWTON CHILES, GOVERNOR