IN THE SUPREME COURT OF FLORIDA
Tallahassee, Florida

Case No.86,685

AMOS W. STOLL, M.D., ALLEN S. WATSON, M.D., SONIA HODGE, M.D., RONALD C. SIROIS, M.D., et al.

Petitioners,

vs.

MINOUCHE NOEL, a minor, by and through her parents and natural guardians, JEAN NOEL and FLORA NOEL, individually,

Respondents.

4th DCA Case No. 93-01731

Broward L.T. Case No. 90-31966 13

BRIEF OF THE FLORIDA MEDICAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Amicus Florida Medical Association ("FMA") is a statewide organization of medical professionals comprised of approximately 17,000 physicians. The certified question -- whether physicians who contract with Children's Medical Services ("CMS") are "agents" of the State and therefore immune from suit under Florida Statutes § 768.28 -- is of great importance to many FMA members who, like the four petitioner physicians in this case, serve as "Consultants" at CMS clinics. As a result of the decision below, physicians who, as even the court below was constrained to concede, perform a "great service for the community" by participating in the CMS program, may now be subject to personal liability for damages based upon acts performed on behalf of the State of Florida.

Because the potential for such liability will deter qualified physicians from serving as Consultants to CMS, and because Consultants are an indispensable part of the State's system for delivering health care to indigent and chronically disabled children, the FMA respectfully submits this brief as amicus curiae to assist the Court in the proper resolution of this case. Amicus addresses two issues which are not addressed at great length by the petitioners: (1) the policy reasons why Consultants to CMS must be entitled to immunity, and (2) the fact that the State has retained about as much authority as it can over Consultants, consistent with their ethical obligations to exercise their professional judgment. These contextual considerations are vital to a proper determination of their status. See Keith v. News & Sun Sentinel Co., 20 Fla. L. Weekly S454, S456 (Sept. 7, 1995).

ISSUE PRESENTED

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?

SUMMARY OF ARGUMENT

I. CMS Consultants must be immunized from suit in order for CMS to carry out its mission. The Legislature has immunized all state agents from suit to create an incentive for qualified individuals to work for the State. That incentive is particularly important in the case of CMS, because caring for CMS's patients carries with it a substantial risk of malpractice liability, which creates a disincentive for physicians to care for those patients. Unless physicians who contract with CMS are able efficiently, uniformly and with absolute certainty to claim the protection of § 768.28, as the Legislature intended, CMS will be unable to attract and retain a sufficient number of physicians, to the detriment of its patients.

Allowing physicians to invoke the protection of § 768.28 will not remove their incentive to adhere to the standard of care. Numerous mechanisms other than tort liability, including exclusion from CMS and licensure revocation, are available to sanction physicians who do not adhere to that standard.

II. As a matter of law, CMS Consultants are professional agents. Professionals, including physicians, are ethically obligated to exercise their professional judgment. Nonetheless, the courts of this State have long recognized that physicians can be state agents, entitled to immunity, if the State retains some general authority to control their actions.

In the CMS context, the State has retained about as much authority as it can over Consultants consistent with their ethical obligations. The State has established a case management system for CMS patients in which Consultants play an important role, but in which the State, through the medical and nursing directors at each clinic, retains the ultimate authority to determine when, where, how, and by what means patients will be cared for.

ARGUMENT

The issue in this case is not whether Minouche Noel and other CMS program beneficiaries should be compensated for injuries caused by negligent treatment by CMS Consultants. In the course of immunizing its agents and employees from suits for negligence, the State of Florida has waived its own sovereign immunity as to such claims. Accordingly, the resources of the State remain available to provide compensation to Minouche and others like her for injuries caused by the negligence of State agents and employees.

Thus, the only question in this case is whether Consultants, including the four petitioners, who took time out of their private medical practices to provide medical care to Minouche at the State-operated and controlled CMS clinic in Ft. Lauderdale, can be subjected to suit and to personal liability for the services they provided on behalf of the State. The answer, clearly, is that they cannot, and any other result would severely impair the State's efforts to provide medical care for indigent, chronically disabled children.

I. 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?

A. CMS CONSULTANTS MUST BE IMMUNIZED FROM SUIT FOR CMS TO CARRY OUT ITS LEGISLATIVE MANDATE.

1. Florida Has Substituted Its Amenability To Suit For That Of Its Employees And Agents As A Means Of Attracting Qualified Individuals To Public Service.

Florida has broadly immunized all state employees and agents from tort suits based upon alleged acts of negligence committed within the scope of their service. See § 768.28, Fla. Stat. (1995). In its original form, § 768.28 provided state employees and agents with a right to indemnification, but not immunity from suit. In 1980, however, the Legislature clarified that public employees and agents were to enjoy absolute freedom from suit, not just protection from ultimate liability, by amending § 768.28 to provide that no employee or agent could be held personally liable in tort "or named as a party defendant." § 768.28(9)(a), Fla. Stat. (1995). According to this Court, "[s]trong policy reasons support the state's desire to immunize its employees from personal liability . . . . Unwillingness of citizens to serve in government without immunity, for example, may be one of those reasons." State v. Knowles, 402 So. 2d 1155, 1158 n.13 (Fla. 1981).

Although it has protected state employees and agents from suit, the Legislature has also preserved the right of victims to compensation. As this Court stated in Knowles, the State in the 1980 amendment "substitute[d] its liability to injured persons for the liability of public employees [or agents] who are merely negligent," id. at 1157, and thereby protected the rights of victims to seek compensation. Thus, § 768.28 strikes a careful balance between

encouraging citizens to dedicate themselves to public service and providing compensation to those parties injured through the negligence of State agents or employees.[1]

2. For CMS To Attract Qualified Physicians, They Must Be Immunized From Suit.

The Court of Appeal's ruling that CMS physicians are not necessarily agents or employees of the State fundamentally disrupts the careful balance struck by the Legislature and thwarts the underlying purpose of § 768.28. As applied in the health care context, that statute embodies the Legislature's view that if the State is to be able to care for patients who participate in State-sponsored health programs, it -- not individual physicians who work for the State -- must bear the financial risk of negligent treatment. This is particularly true in the CMS context. CMS cannot carry out its statutory mission unless the physicians who contract to provide care subject to its policies and rules are, with certainty, immune from suit.

a. The Liability Risks Associated With Caring For CMS Patients Threaten HRS's Ability To Fulfill Its Statutory Obligations.

Florida is required by both federal and state law to provide medical care to indigent, chronically disabled children. See Title V, Federal Social Security Act; CMS Act, 29 Fla. Stat. ch. 391. The Legislature has endeavored to fulfill this statutory obligation by authorizing the Department of Health and Rehabilitative Services ("HRS") to establish CMS clinics across the State. Approximately 20 clinics have been set up, each sponsoring a number of specialty clinics like the one that Minouche Noel attended. Each CMS clinic is

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[1] In striking this careful balance, the Legislature imposed a ceiling on recovery against governmental entities in the judicial forum, but did not prohibit plaintiffs from securing judgments in excess of that cap, or from securing compensation in any amount from the State by means of a claims bill. Michigan Millers Mut. Ins. Co. v. Bourke, 607 So. 2d 418, 421-22 (Fla. 1992).

administered by a Medical Director and a Nursing Director. Importantly, however, there are no full-time treating physicians in any CMS clinics; those clinics are able to provide medical treatment only by contracting with physicians from the community.

The medical community in Florida has historically provided extraordinary support for the CMS program. Since its inception, many physicians have agreed to take time out of their busy and more remunerative private practices in order to treat CMS patients, and it is only through this support that the State has been able to staff clinics.[2] The risk of medical malpractice liability, however, poses a substantial impediment to Florida's ongoing efforts to recruit and retain the highest-quality physicians to treat CMS patients.

The general risk of malpractice liability has, for many years, been quite high in Florida,[3] and common sense suggests that the risk of liability is at least as high -- if not higher -- in the CMS context than in the general population. CMS patients are chronically ill, and they are poor. Due to their indigency, many of these patients have received poor --

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[2] Although the State reimburses physicians for the time they commit to the CMS clinics, it does so at a rate far below average earnings in the private sector. There is no question that the State of Florida cannot -- and does not attempt to -- provide CMS physicians compensation even approaching an amount reflecting the market-value of their services and the risk of malpractice liability. Thus, by any measure, the doctors who agree to treat CMS patients, in the words of the Court of Appeal, provide a "great service for the community." Opinion (Sept. 27, 1995) at 7.

[3] This has led to both extremely high malpractice premiums and the functional unavailability of insurance for some physicians. A 1986 General Accounting Office study, for example, demonstrated that, of the six states studied (including New York and California), Florida physicians had the highest malpractice premiums. United States General Accounting Office, MEDICAL MALPRACTICE: SIX STATE CASE STUDIES SHOW CLAIMS AND INSURANCE COSTS STILL RISE DESPITE REFORMS FRAMEWORK FOR ACTION 16 (1986). Indeed, while the average physician in the United States had a 1 in 12 chance of being sued in 1993, the average Florida physician had 1 chance in 6. Robert E. White, Physicians Protective Trust Fund, Loss Prevention for the 90's, at 1. And, from 1980 to 1992, the total indemnity paid to claimants increased by an astronomical 611 percent. Id. at 2.

and in some cases, no -- primary or preventive care. As a result, many of them have multiple and severe medical problems, and, in some cases, their conditions are likely to deteriorate over time, even with the best of medical care. Moreover, to the extent their conditions do in fact worsen, the degree of deterioration in their health may be greater, on average, than would be observed in a healthy population.

It is well known that liability risk creates a strong disincentive for physicians to care for patients. Indeed, as the Florida legislature has recognized, "a significant proportion of the residents of this state who are uninsured or Medicaid recipients are unable to access needed health care because health care providers fear the increased risk of medical malpractice liability." § 766.1115(2), Fla. Stat. (1995) (emphasis added).[4]

b. Section 768.28 Is Designed To Eliminate Liability Risks Faced By CMS Consultants And The Recruitment Problems Faced By HRS.

The Legislature has recognized that the problem of access to care created by the risk of liability can be solved by immunizing caregivers from suit under § 768.28. Indeed, it has made clear that "it is the intent of the Legislature to ensure that health care professionals

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[4] The State has repeatedly attempted to respond to the adverse effect of malpractice claims on the delivery of medical services in a number of ways. Almost 20 years ago, for example, the Legislature enacted the Medical Malpractice Reform Act of 1975, based on the finding that "without some legislative relief, doctors will be forced to curtail their practices, retire, or practice defensive medicine at increasing cost to the citizens of Florida." Ch. 75-9, Laws of Fla. The Legislature enacted additional tort reform in 1988 following the recommendations made by the Academic Task Force for Review of the Insurance and Tort Systems. At that time, it again acknowledged the "financial crisis in the medical liability insurance industry," noting that the "average cost of defending a medical malpractice claim has escalated in the past decade to the point where it has become imperative to control such cost in the interests of the public need for quality medical services." § 766.201, Fla. Stat. (1992). Based on these legislative findings, this Court itself has recently characterized the medical malpractice insurance crisis as an "overpowering public necessity." University of Miami v. Echarte, 618 So. 2d 189, 196 (Fla.) (upholding statutory monetary cap on non-economic damages in medical malpractice claims where a party requests arbitration), cert. denied, 114 S. Ct. 304 (1993).

who contract to provide [medical] services as agents of the state are provided sovereign immunity." § 766.1115(2), Fla. Stat. (1995).[5]

Such immunity is particularly critical in the CMS context. The State, by its own admission, simply cannot compensate Consultants at a rate sufficient to offset the risks associated with caring for CMS patients. And, because Consultants are barred from independently charging CMS patients (who are, in any event, indigent), no other source of funding exists to meet the rising cost of private insurance premiums. Thus, if the State is to continue to recruit sufficient numbers of physicians to devote their time and talents to the clinics, the only option -- and the option for which the State opted in enacting § 768.28 in its present form -- is to provide meaningful relief from burdensome malpractice litigation and potentially crushing malpractice liability for CMS doctors, no less than other State agents.[6]

If CMS Consultants are not entitled to immunity, the State's ability to provide quality medical care for chronically ill and indigent children will be grievously undermined. Without competitive pay or protection from personal liability, the CMS program will be unlikely to attract or retain a sufficient number of the State's most competent and experienced physicians. The likely result will be a marked qualitative and quantitative decline, in both the short term and over time, in the level of care provided to CMS patients.

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[5] Although § 766.1115 itself only explicitly provides immunity to doctors serving the State outside of the CMS program, the declaration of legislative intent quoted in the text is not limited to non-CMS physicians. Rather, the Legislature stated its intent to confer immunity upon all "health care professionals who contract to provide [medical] services" on behalf of the State. § 766.1115(2) Fla. Stat. (1995).

[6] According to the State, "[b]ecause the State does not have the financial resources to adequately compensate physicians for the risk of liability associated with caring for [CMS] children, it attracts qualified physicians by providing the additional incentive of immunity." Brief of State of Florida, Department of Health & Rehabilitative Services, Amicus Curiae In Support of Appellees (before the Fourth District Court of Appeal) at 4.

If that occurs, the State's impoverished and chronically disabled children will be the real losers.

3. Personal Liability Is Not Necessary To Ensure That CMS Physicians Provide Competent Medical Treatment.

A ruling that CMS physicians enjoy immunity under § 768.28 will not remove the incentive for CMS physicians to adhere to the applicable professional standard of care. The CMS clinics maintain an active quality assurance system in which HRS and CMS representatives conduct a periodic review of CMS treatments.[7] In addition, the Medical Director of each CMS facility retains the absolute authority to dismiss, and to report to state licensing authorities, any physician who provides substandard care.[8] State licensing authorities, of course, have the power to impose a range of disciplinary measures, including license revocation for doctors who render substandard care. These mechanisms -- which directly enforce compliance with the standard of care without the undesirable effect that money damages have of deterring qualified physicians from participating in the CMS program -- are sufficient to ensure that the quality of care provided by CMS physicians will be monitored and evaluated and that appropriate corrective measures can and will be taken where necessary.

B. CMS CONSULTANTS ARE PROFESSIONAL AGENTS ACTING UNDER THE CONTROL OF THE DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES.

In framing the certified question, the Court of Appeal asked whether physician Consultants who contract with the State should be "granted" immunity. That phraseology is

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[7] See Memorandum Of Law Of The State Of Florida In Support Of The Motions For Summary Judgment Of Defendants Hodge, McKenzie, Stoll And Watson, at 13, R. 5113.

[8] Id.

somewhat misleading. The issue before this Court is not whether it should "grant" immunity to Consultants; rather, it is whether the Legislature, by granting immunity to all "agents" of the State, has already conferred immunity upon Consultants.

In adopting § 768.28, the Legislature elected not to identify every specific type of state worker entitled to immunity or to adopt by reference the State's administrative personnel classification. Instead, it broadly immunized all state "employees" and "agents" from suit. There is no doubt that CMS Consultants, such as petitioners, at a minimum, satisfy the definition of "agents."

An "agent" is a person who works on behalf of another, and who is subject to the "control" of the other person (called the "principal") as to the means by which he or she performs the assigned task. Goldschmidt v. Holman, 571 So. 2d 422, 424 n.5 (Fla. 1990).[9] CMS Consultants satisfy this definition. They work on behalf of the State and, according to the HRS Manual and the supporting testimony, subject to the State's extraordinary authority to "control" the means by which they care for CMS patients. See Brief of Petitioners at Parts II, III.

Respondents argued below, however, and the Court of Appeal apparently accepted, that the Manual, and testimony consistent with the Manual, are not dispositive, because some witnesses testified that Consultants, in some respects, are permitted to exercise their medical

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[9] An "employee," by contrast, is defined as a person (1) who is subject to the "control" of another person (employer) with respect to the means by which the employee performs an assigned task; and (2) who also satisfies a combination of the factors set forth in § 220 of the Restatement. Cantor v. Cochran, 184 So. 2d 173, 174-75 (Fla. 1966). An "independent contractor" is one who works for another but who is not subject to the other's control with respect to his or her physical conduct. Nazworth v. Swire Florida, Inc., 486 So. 2d 637, 638 (Fla. 1st DCA 1986); Restatement (Second) of Agency § 14N (1958). An "independent contractor" may be an "agent" if he works "on behalf of another and subject to the other's control except with respect to his physical conduct." Id. (emphasis added).

judgment on a day-to-day basis. See, e.g., Brief of Appellants (before the Fourth District Court of Appeal) at 10 (arguing that Consultants are not agents because HRS does not "tell[] the doctors how to practice medicine"). Such testimony does not create a material question of fact for the legal and factual reasons set forth by petitioners. Respondents' argument, however, also is flawed because it ignores the well-established concept of professional agents.

1. Professionals, Including Physicians, Can Be Agents Despite Their Ethical Obligation To Exercise Their Professional Judgment.

Under respondents' definition, professionals -- such as physicians, attorneys, or accountants -- can never be agents. That is so because physicians and other professionals are "required by [their] code of ethics to exercise professional judgment." Broussard v. United States, 989 F.2d 171, 175 (5th Cir. 1993) (per curiam) (emphasis added). In fact, the Hippocratic Oath, which is widely used as an ethical guide for the medical profession, expressly obligates physicians to "prescribe regimens for the good of [their] patients according to [their] own ability and [their] judgment." The American Medical Association Encyclopedia of Medicine 539 (1989).

The requirement that doctors and other professionals exercise their independent judgment is not merely hortatory. Rather, that requirement can provide the basis for sanctioning the professional. See e.g., Johns v. Jarrard, 927 F.2d 551, (11th Cir. 1991) (stating that "it would almost certainly be violative of a physician's professional ethics for him to abandon his professional judgment in matters relating to the diagnosis and treatment of patients") (internal quotations omitted). Moreover, the degree of control respondents demand in order for doctors to be treated as agents -- that doctors be told precisely how to practice medicine -- is impossible as a practical matter. The practice of medicine "is not an

exact science," and so doctors necessarily "are allowed a wide range in the exercise of their judgment and discretion." Bourgeois v. Dade County, 99 So. 2d 575, 577 (Fla. 1956). Thus, professionals and especially doctors must, by definition, exercise a significant degree of independent judgment and discretion. As a result, if, as respondents argue, the existence of some independent judgment on the part of a professional ipso facto negates a finding of control, then professionals can never be agents or employees.

This Court and other Florida courts, however, have rejected that absolutist position and have long recognized that physicians and other professionals can be State employees or agents. See e.g., Public Health Trust v. Valcin, 507 So. 2d 596, 601 (Fla. 1987); Atwater v. Broward, 556 So. 2d 1161 (Fla. 4th DCA 1990), review denied, 564 So. 2d 486 (Fla. 1990); Bates v. Sahasranaman, 522 So. 2d 545 (Fla. 4th DCA 1988); DeRosa v. Shands Teaching Hosp. & Clinics, Inc., 504 So. 2d 1313, 1315 (Fla. 1st DCA 1987); Jaar v. University of Miami, 474 So. 2d 239 (Fla. 2d DCA 1985), review denied, 484 So. 2d 10 (Fla. 1986); Bryant v. Duval County Hosp. Auth., 459 So. 2d 1154 (Fla. 1st DCA 1984); White v. Hillsborough County Hosp. Auth., 448 So. 2d 2, 3 (Fla. 2d DCA), cause dismissed by 443 So. 2d 981 (Fla. 1983).

The courts of this State are not alone in recognizing that the existence of professional discretion does not preclude a professional from being an agent or an employee. See, e.g., Rivera v. Hosp. Universitario, 762 F. Supp. 15, 19 (D.P.R. 1991) (holding that although "independent judgment is inherent to the practice of medicine . . . not every medical doctor is an independent contractor merely because of the freedom from direct supervision which their profession entails"). As one court of appeals has explained: "[C]ourts have found an employer-employee relationship even when physicians retain their

independent medical judgment. '[T]he control or right to control needed . . . may be very attenuated.'" Keller v. Missouri Baptist Hosp., 800 S.W.2d 35, 38 (Mo. Ct. App. 1990) (quoting Restatement (Second) of Agency § 220, at 60 cmt. d (1958).[10] In fact, the U.S. Supreme Court has unanimously held that a physician under contract with the State to treat persons in State custody exercises governmental power on behalf of the State -- and thus is subject to constitutional limitations on governmental action -- even though "[doctors] are professionals acting in accordance with professional discretion and judgment." West v. Atkins, 487 U.S. 42, 52 (1988). As the West court explained, "[i]nstitutional physicians assume an obligation to the mission that the State, through the institution, attempts to achieve." Id. at 54 (internal quotations omitted).

These cases from Florida and other jurisdictions recognize, expressly or implicitly, that establishment of a principal/agent relationship depends not upon the actual exercise of day-to-day control over even the most trivial aspects of professional practice, but rather upon the principal's retention of the ultimate right to control the time, place and manner in which the assigned task is performed. More specifically, "control" over a physician simply means that where the State and the physician disagree on when, where or how to evaluate or treat a patient, the State retains the authority to make the final decision. In essence, as long as the State retains the final word where there is disagreement, there is a sufficient degree of control to find that the physician is an "agent" of the State.[11]

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[10] See also Collins v. Federated Mut. Implement & Hardware Ins. Co., 247 So. 2d 461, 463 (Fla. 4th DCA 1971) (an agency relationship may exist even where control retained by principal is attenuated).

[11] The Tenth Circuit Court of Appeals has gone even further, suggesting that control over the non-medical aspects of physicians' practice is dispositive. See Lilly v. Fieldstone, 876

(continued...)

2. CMS Controls Consultants To The Maximum Extent Consistent With Professional Ethics.

Applying these principles to the CMS framework, it is clear that CMS has retained as much authority as it can over its Consultants consistent with their ethical obligations, and that Consultants therefore are "agents" of the State when they treat CMS patients. CMS has established a "case management" system for each patient, in which CMS nurses, not Consultants or nurses retained by Consultants, are responsible for "supervising" and "monitoring" each patient's progress. CMS, not the Consultants, determines who the Consultants can treat, and these patients consent to being treated by "Children's Medical Services and its agents." CMS, not the Consultants, determines where and when Consultants can treat these patients. CMS, not the Consultants, determines who assists Consultants in caring for CMS's patients. CMS, not the Consultants, supplies equipment at the clinic. CMS, not the Consultants, is responsible for maintaining patients' records. CMS retains the right to fire Consultants at will. And perhaps most important, CMS, in its Manual, is obligated to "supervise" and "direct" the "medical" care provided by Consultants. R. 2789,

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[11] (...continued)
F.2d 857, 859 (10th Cir. 1989) ("[T]he 'control' test is subject to a doctor's medical and ethical obligations," and "in the case of professionals" the dispositive issue is whether the professional is "subject to other forms of control which are permissible [under professional ethical standards]"); see also Shands Teaching Hosp. & Clinics, Inc. v. Pendley, 577 So. 2d 632, 634 (Fla. 1st DCA 1991) (finding physician was an agent under the control of the clinic "to the extent control was appropriate in view of his professional status"), review denied, 587 So.2d 1329 (Fla. 1991); Wendland v. Akers, 356 So. 2d 368, 370 n.6 (Fla. 4th DCA 1978) ("'[i]t is the general rule that a physician or surgeon, being a professional man, is entirely free to exercise his skill and his soundest judgment in rendering medical or surgical services without any interference from one who employs him and is not a servant or agent in the usual sense of those terms'") (emphasis added) (citation omitted), cert. denied, 378 So. 2d 342 (Fla. 1979).

HRS Manual § 3-1, at 3-1; § 5-1 - § 5-9, at 5-1 - 5-26; Brief of Petitioners at Statement of Facts and Part III.[12]

Beyond all this, as the Court of Appeal recognized, CMS retains the authority, in the HRS Manual and Consultant's Guide, to refuse to pay for tests or treatments ordered by a Consultant. This power is, technically, separate from, and in addition to, CMS's direct authority to determine how CMS patients are treated. It is, however, equally important. CMS patients are, by definition, unable to pay for their own care. Thus, while Consultants may be able to provide CMS patients with some de minimis palliative care for free, unless CMS authorizes payment, they cannot provide any of even the most basic modern medical care such as laboratory tests, x-rays, surgery, radiation therapy, or medication. It is not relevant whether CMS Consultants could, outside the CMS context, treat these patients differently; the issue in this case is whether Consultants are "agents" of the State while acting for CMS.[13]

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[12] Of note, the Legislature has recently established a program that complements the CMS program, and which provides immunity under § 768.28 to physicians who, like CMS physicians, provide care to certain indigent patients and work subject to the authority of the State. See supra n.6. The indicia of "agency" status adopted by the Legislature with respect to that program are all satisfied in this case. Specifically, to be an "agent" for purposes of that statute, the State must retain the right of dismissal, the State must have access to patient records, the physician must report any adverse incident to the State, and the State must retain sole authority to determine selection of patients. § 766.1115(4), Fla. Stat. (1993).

[13] Tellingly, respondents made no attempt in the courts below to dispute that the HRS Manual itself reserves sufficient control over Consultants to render them agents. Indeed, respondents took the opposite task, dismissing the Manual and CMS guidelines as mere "platitudes," Appellants' Reply Br. (before the Fourth District Court of Appeal) at 10, and HRS's regulatory reservation of control as mere "boilerplate." Id. at 12 n.6. Clearly, however, the HRS Manual and the CMS Consultant's guidelines are neither. Rather, they represent the authoritative definition of the relationship between the State and its Consultants, especially since all Consultants by applying to participate in the CMS program expressly "agree to abide by" CMS policies and guidelines. See Brief of Petitioners at Statement of Facts.

In sum, it cannot be disputed that CMS Consultants -- including petitioners -- provide care to CMS patients under as much State "control" as the State can legitimately retain, consistent with the professional ethics of the Consultants. Consultants are, accordingly, "agents" of the State, within the meaning of Section 768.28. They are entitled not to be named as "party defendants" in cases such as this one.

Indeed, this litigation demonstrates the disparity between the unambiguous mandate of Section 768.28 and the reality that CMS physicians are in fact exposed to the tremendous costs of being named as party defendants in malpractice actions. As long as the legal standards are not clear -- i.e., unless Consultants can uniformly and with certainty claim immunity -- physicians will have little incentive to offer their services to CMS, services without which the State cannot care for indigent children. This Court can avoid such a harsh and inequitable result by holding, in agreement with the trial court, that CMS Consultants are entitled to the full scope of protection that Section 768.28 was self-evidently intended to provide -- immunity from liability and immunity from suit.

CONCLUSION

The judgment of the Court of Appeal should be reversed, and the case remanded with instructions to dismiss the complaint as to the petitioners.

Respectfully submitted,

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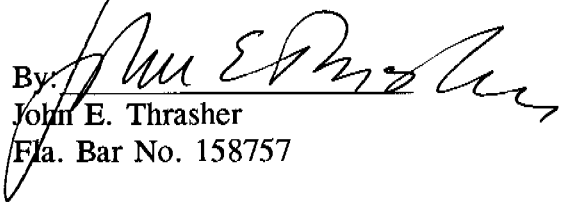
By: 
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December 11, 1995

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