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SUPREME COURT OF FLORIDA

AMOS STOLL, M.D., ALLEN S. WATSON, M.D., SONIA HODGE, et al.,

Petitioners,

vs. CASE NO. 86,685

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

Respondents.

_____/

ANSWER BRIEF OF ACADEMY OF FLORIDA TRIAL LAWYERS as AMICUS CURIAE

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STATEMENT OF THE CASE AND FACTS

The Academy of Florida Trial Lawyers (AFTL) adopts the Statement of the Case and Facts of contained in Respondents' Brief on the Merits.

SUMMARY OF ARGUMENT

This appeal from a summary judgment rests upon the interpretation of the words "agent" or "employee" as used in Florida Statute §768.28(9)(a). The legislature is presumed to know the existing law and the ordinary meanings of words that it uses. Whether an individual is an agent or employee is normally a question for the trier of fact to decide. Substantial questions of fact remain for the trier of fact to determine in this case.

This Court cannot substitute its judgment for the legislature's to create public policy. Section 768.28(9)(a) is the creation of the legislature and not of the courts. Nothing in either Florida Statute §768.28(9)(a) or Part I of Chapter 391 supports a policy extending sovereign immunity to the Defendant physicians in this case. There is no basis for shifting the risk of malpractice from the consultants and their insurers to Florida's taxpayers.

Florida Statute sections 766.1115 and 381.0302 do not support a legislative "policy" of extending sovereign immunity to the consultant physicians simply because they provide services at allegedly below market rates. These other statutes illustrate the legislature knows how to expressly immunize the physicians providing services under the Children's Medical Services (CMS) Act,

and the requirements it would impose in exchange for sovereign immunity. There is nothing to keep CMS physicians from taking advantage of the provisions of these other acts to obtain immunity.

ISSUE

WHETHER THE DISTRICT COURT OF APPEAL ERRED IN REVERSING THE SUMMARY FINAL JUDGMENT FOR THE FOUR INDIVIDUAL DEFENDANT DOCTORS WHERE THERE WAS CONFLICTING EVIDENCE ON THE ISSUES OF EMPLOYMENT AND AGENCY AND THERE IS NO POLICY BASIS FOR THE EXTENSION OF SOVEREIGN IMMUNITY.

The Florida Medical Association (FMA) and Department of Health and Rehabilitative Services (HRS) seek the creation of a judicial "policy" that physician consultants are immune from suit under Florida Statute §768.28(9)(a). The fact FMA and HRS depend upon the creation of a "policy" for the extension of sovereign immunity to these defendants tacitly admits that the defendants are not State agents or employees. There is ample record testimony that the CMS consultants are not State employees or agents.[1] The legislature has clearly and unambiguously extended immunity from individual liability only to an "...employee or agent of the state or any of its subdivisions...." *See*, Fla. Stat. §768.28(9)(a) (1993).

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[1] Although HRS claims to have "admitted" that the consultants are agents or employees of HRS, the HRS employees who were directly involved in the CMS provided testimony to the contrary. *See, generally, Noel's Statement of the Case and Facts.* Descriptive labels used by the parties to a transaction are not determinative of their actual legal relationship. One can be both an independent contractor and an agent, as is the case with attorneys and brokers. *Nazworth v. Swire Florida, Inc.*, 486 So. 2d 637, 638 (Fla. 1st DCA 1986). Professionals who exercise their independent professional judgment, as did the doctors here, may simply be agents who are independent contractors.

Words of common usage used in a statute are to be interpreted in accordance with their plain and ordinary sense. *See, e.g., Rinker Materials Corp. v. City of North Miami*, 286 So. 2d 552, 553 (Fla. 1973); *and Freedman v. State Board of Accountancy*, 370 So. 2d 1168, 1169 (Fla. 4th DCA 1979). The legislature is also presumed to know existing law. *Collins Investment Co. v. Metropolitan Dade County*, 164 So. 2d 806, 809 (Fla. 1964). Thus, we must presume the legislature knew the plain and ordinary meaning of the words "employee" and "agent" when it enacted §768.28(9)(a) as well as the many decisions which have construed these terms.

Whether someone is an agent or employee is normally a question for the trier of fact to decide. *See, e.g., Orlando Executive Park, Inc. v. Robbins*, 433 So.2d 491 (Fla. 1983), *and Goldschmidt v. Holman*, 571 So.2d 422, 424 (Fla. 1990) It is not a proper subject for summary judgment unless the uncontradicted facts support but one conclusion, which is not the case here. *See, Noel's Statement of the Case and Facts, and Noel v. North Broward Hospital District*, 20 FLW D2205, 2206 (4th DCA September 27, 1995).

The claim that qualified physicians will not agree to see CMS patients at the rate of $100.00 per hour for the first hour and $50.00 for each half hour thereafter without the "incentive" of sovereign immunity is contradicted by the record. As part of their CMS agreement, the consultants had to maintain their own liability insurance. *See, numerous record citations at page 12 of Respondents' Brief on the Merits.* The defendant doctors cannot convincingly say they believed they were immune from malpractice

suits when they were required to maintain liability insurance. FMA and HRS urge this Court to shift the financial burden for the malpractice of the consultants from them and their insurers to the taxpayers of Florida. The taxpayers already pay the fees of the doctors, and will also pay the sovereign immunity liability limits and any claims bills.

The judicial branch of government must declare the law as it is found without shading or modifying it out of policy considerations. *Fruh v. State, Dept. of Health & Rehab. Serv.*, 430 So.2d 581, 583 (Fla. 5th DCA 1983). The courts interpret and enforce the law and do not legislate. 13 Fla. Jur. 2d, Courts and Judges, §122, and 10 Fla. Jur. 2d, Constitutional Law, §170. It is not the Court's prerogative to modify or shade clearly expressed legislative intent to uphold a policy the Court favors. *Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984).

Neither the Florida Health Services Corps legislation nor the Access to Health Care Act help the policy argument of HRS and FMA. *See*, Fla. Stat. §§381.0302(1993) and 766.1115(Supp. 1994). What these statutes demonstrate is that the legislature did not intend to treat the CMS consultants as state agents or employees, and that immunity does not exist for these paid non-civil-service consultants. They show the legislature knows how to expressly grant immunity to the CMS consultants if it wishes to do so, and what requirements it would impose in exchange. The CMS consultants could use either of these programs to obtain immunity just as they could have obtained the appropriate OPS designation.

The Health Services Corps and the Access to Health Care Act contain numerous requirements and safeguards missing from the CMS Act. Under §381.0302, "Corps" members "...shall be supervised by the State Health Officer, or his physician designee, for the purpose of practice guidelines, continuing education, and other matters pertaining to professional conduct". Fla. Stat. §381.0302(4)(1993).(Emphasis supplied) This degree of control is absent from CMS, and is akin to the control of an employer over an employee. It demonstrates a legislative willingness and ability to exercise control over the actual practice of the physicians, which is assiduously avoided and subject to disdain in the CMS program.

Corps members must accept assignment in a "public health program" or in a "medically underserved area". Fla. Stat. §381.0302(5)(a)(1995). The participant so assigned must treat Medicaid and low income patients. *Id*. "Public health program" means, among other things, a "children's medical services program", which again shows there is no immunity for CMS doctors who choose not to join the Corps. Fla. Stat. §381.0302(2)(e)(1993).

Licensed physicians may become Corps members if they provide "uncompensated care" and submit to "...the supervision of the department for the purpose of practice guidelines, continuing education, and other matters pertaining to professional conduct." Fla. Stat. §381.0302(8)(1993)(Emphasis supplied). There is that nasty supervision requirement again, which is so like control over an employee or agent and so unlike the *laissez faire* approach toward the medical practices, decisions, and conduct of the paid

CMS consultants. The Corps doctors must accept Medicaid and all patients referred by the department. Fla. Stat. §381.0302(10)(1993). They do not get $100.00 per hour or $50.00 per half hour.[2] The Corps doctors are state agents and immune from suit "...while providing uncompensated services to medically indigent persons..." Fla. Stat. §381.0302(11)(1993).

The legislature has also extended sovereign immunity "...to health care providers[3] who offer free quality medical services to underserved populations of the state..." in the Access to Health Care Act. Fla. Stat. §766.1115(2)(Supp. 1994)(Emphasis supplied). But the immunity again comes with government supervision and regulation. The health care provider must execute a contract to deliver health care services with a governmental contractor. The health care provider becomes an agent of the state "...while acting within the scope of duties pursuant to the contract....", but only if the contract meets specific requirements. Fla. Stat. §766.1115(4)(Supp. 1994). It must contain a right of dismissal or termination; allow access to patient records; require the annual submission of a report of adverse patient treatment incidents and outcomes; permit the government contractor alone to select and refer patients which the provider must accept; require approval of

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[2] CMS consultants have no overhead or administrative duties at CMS clinics. The necessity of covering overhead and unpaid administrative time is normally covered in a physicians "market rate" in his own office, but CMS consultants do not have this overhead with CMS patients.

[3] "Health care provider" means physicians as well as nurses, midwifes, and others. Fla. Stat. §766.1115(3)(d)4.(Supp. 1994).

follow-up or hospital care; and provide that the health care provider is subject to "...supervision and regular inspection by the governmental contractor."[4] Fla. Stat. §766.1115(4)(a)-(e) (Supp. 1994)(Emphasis supplied).

The governmental contractor must provide written notice of the agency relationship to patients, and must establish a quality assurance program to "...monitor services delivered under any contract ... pursuant to this section." Fla. Stat. §§766.1115(5) and (6)(Supp. 1994). The legislature also requires the Division of Risk Management of the Department of Insurance to annually report statistics regarding claims pending and paid and the associated costs. Fla. Stat. §766.1115(7)(Supp. 1994). This allows the legislature to monitor the malpractice burden the taxpayers have assumed. Even with these supervisory requirements and safeguards, the legislature refused to foot the bill for the costs and attorney fees for malpractice litigation involving the governmental contractors. Fla. Stat. §766.1115(9)(Supp. 1994).

The FMA argues that the exercise of professional medical judgment is no basis for finding the consultants are not immune agents or employees. Yet in those existing cases of an express legislative grant of sovereign immunity to doctors who aid the poor, the legislature has exercised its control over "practice

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[4] The governmental contractor is required by law to report incidents involving licensees who may be subject to disciplinary action to the Department of Professional and Business Regulations (DPBR). Fla. Stat. §766.1115(4)(c)(Supp. 1994). Although HRS and the FMA offer the specter of DPBR action as a method of controlling the quality of CMS consultant care, there is no corresponding duty under the CMS statute.

guidelines" and "professional conduct" or has required "supervision and regular inspection". Any doctor who wishes to provide services to the poor without individual malpractice liability may join the Corps or may provide free services under the "Access to Health Care Act". Corps membership expressly allows the provision of services through CMS, and nothing in the "Access to Health Care Act" prevents it. The legislature has already provided the "incentive" of sovereign immunity in these two programs, but at the price of free or uncompensated services and the loss of some independence. None of these offsetting considerations, safeguards, or supervisory requirements are in the CMS Act. The CMS program lacks the "careful balance" of control versus sovereign immunity the legislature has established in the other programs. There is no need for this Court to create another "policy" of immunity as an "incentive".

This Court may descend a slippery slope if it finds a "policy" of sovereign immunity for professionals providing services to the indigent at "low" hourly rates. Doctors are not the only professionals who provide valuable services to the poor at "below market" hourly rates. Many lawyers, including the undersigned, accept Court appointments to help the indigent at rates well below their usual hourly rate. *See, e.g., Board of County Commissioners of Hillsborough County v. Scruggs*, 545 So. 2d 910, 913 (Fla. 2d DCA 1989). These lawyers often work for free as encouraged by, and voluntarily reported to, this Court. Should they also be extended sovereign immunity as a matter of "policy" to create an "incentive" for them to continue their laudable efforts?

CONCLUSION

Questions of fact remain for the trier of fact to determine. There is no legislative policy discernible from Florida Statute §768.28(9)(a) or Part I of Chapter 391 to support the proposition that the legislature intended a "policy" of extending sovereign immunity to CMS consultants as state employees or agents. Sections 766.1115 and 381.0302 demonstrate that no such policy exists absent its creation by the legislature in exchange for free or uncompensated services and control. CMS doctors desirous of sovereign immunity may join the health services corps or become contractors under the Access to Health Care Act. A judicial policy of sovereign immunity as an "incentive" to professionals who provide services to the indigent for "below market" compensation would open Pandora's box. The appellate reversal of the summary judgment should be upheld and this case remanded for trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of the Academy of Florida Trial Lawyers as *Amicus Curiae* has been furnished by regular U.S. Mail to all counsel of record on the attached service list this 26th day of January, 1996.

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