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IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,685

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AMOS W. STOLL, M.D., AMOS W. STOLL, M.D., P.A., ALLEN S. WATSON, M.D., ALLEN S. WATSON, M.D., P.A., SONIA HODGE, M.D., and RONALD C. SIROIS, M.D.,

Petitioners,

vs.

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.
_____/

CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE FROM THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT

RESPONDENTS' BRIEF ON THE MERITS

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I
STATEMENT OF THE CASE AND FACTS

A. Introduction. As the district court recognized, applying the established case-by-case criteria for determining whether a defendant is an "officer, employee, or agent of the state" under § 768.28(9)(a), Fla. Stat. (1995), the plaintiffs provided "numerous references to the record to support [their] position, thereby creating an issue of material fact" (opinion at 6). Notwithstanding their obligation as the moving parties in the trial court, and the petitioners in this Court, to state the evidence in the light most favorable to the plaintiffs' position,[1/] the petitioners have chosen not to inform the Court of the "numerous references to the record" which indisputably create an issue of fact on the agency question. Instead, after twice chastizing the district court for not providing record references in an appellate opinion,[2/] the petitioners and their amicae have chosen instead to address this Court as if it were a legislative body, empowered to confer immunity by fiat, in order to achieve the important policy objective of encouraging private doctors to volunteer their time at the Children's Medical Services ("CMS") clinics administered statewide by the Florida Department of Health and Rehabilitative Services ("HRS").[3/] In an attempt to divert this Court from the fact-specific inquiry which has characterized all of its prior decisions under § 768.28(9)(a)--indeed, in an overt challenge to the

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[1/] *See Thompson v. State,* 588 So. 2d 687 (Fla. 1st DCA 1991); *Kolosky v. Winn-Dixie Stores, Inc.,* 472 So. 2d 891 (Fla. 4th DCA 1985), *review denied,* 482 So. 2d 350 (Fla. 1986); *Marks v. Delcastillo,* 386 So. 2d 1259 (Fla. 3d DCA 1980), *review denied,* 397 So. 2d 778 (Fla. 1981).

[2/] *See* petitioners' brief at 3 ("The court did not identify the specific record evidence on which it relied in reaching its conclusion"); 29 "[T]he court of appeal did not specify the portions of the record on which it relied in concluding that a factual dispute existed").

[3/] *See* petitioners' brief at 11, 13, 24, 32; Florida Medical Association (FMA) amicus brief at 1, 2-3, 5-8; HRS/CMS amicus brief at 1, 4, 12.

case-by-case analysis necessitated by the language of § 768.28(9)(a)[4]--the petitioners and the amicae, repeatedly invoking the undeniable social importance of the CMS program, have entreated this Court to ignore the separation of powers by ordaining protection which the legislature has declined to provide, on the ground that "without that protection, the State's efforts to care for indigent children will be gravely threatened" (petitioners' brief at 11). (They offer no analogous solicitude for the indigent child who was brutalized by their incompetence in her treatment).

This Court repeatedly has recognized that Article X, § 13 of the Florida Constitution authorizes the waiver of sovereign immunity only through "general law," and that the courts' function is to "determine[] . . . as best we could . . . the legislature's original plan"--to "search[] long and hard to recreate the legislature's will . . . ." *State Department of Transportation v. Knowles,* 402 So. 2d 1155, 1157 (Fla. 1981). The courts' "sole function . . . is to enforce the statute according to its terms." *Caminetti v. United States,* 242 U.S. 470, 485, 37 S. Ct. 192, 61 L. Ed. 442 (1917), *quoted in King v. St. Vincent's Hospital,* 502 U.S. _____, 113 S. Ct. 2187, 2191, 124 L. Ed. 2d 424, 433 (1993). That admonition is particularly appropriate in this case, because the legislature has so actively attempted to regulate physicians' exposure to medical-malpractice judgments in general, and the exposure of doctors performing public or quasi-public functions in particular. As the Florida Medical Association (FMA) has pointed out (amicus brief at 6-7 & n.4), various "reform" statutes increasingly have limited doctors' exposure to tort liability; and two recent statutory amendments explicitly confer governmental immunity upon doctors performing specified public services for no compensation

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[4] *See, e.g.,* petitioners' brief at 10 ("[T]he whole enterprise of taking testimony . . . will inevitably lead to inconsistent determinations of status . . ."), 31-32 ("[I]t is entirely inconsistent with the Legislature's intent . . . to rely on the testimony of individual officers . . . . It makes absolutely no sense to allow juries to determine which of these similarly situated physicians is entitled to immunity").

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(*see* FMA amicus brief at 7-8; HRS/CMS amicus brief at 8-9). Section 381.0302(11), Fla. Stat., says that a "Florida Health Services Corps member is an agent of the state under s. 768.28(9) while providing uncompensated services to medically indigent persons" in "medically underserved areas" (§ 381.0302(2)(c)). And § 766.1115(2) expresses the "intent of the Legislature that access to medical care for indigent residents be improved by providing governmental protection to health care providers who offer free quality medical services to underserved populations of the state," and that "health care professionals who contract to provide such services as agents of the state are provided sovereign immunity." Moreover, § 768.28(10)(c), Fla. Stat. (1995) indicates that only a part of CMS's duties are deemed worthy of immunity by the legislature, in providing that "regional poison control centers created in accordance with s. 395.1027 and coordinated and supervised under the Children's Medical Services Program . . . or any of their employees or agents, shall be considered agents of the State of Florida . . . ."

In any of these provisions of the Florida Statutes, the legislature could have explicitly extended immunity to private practitioners who provide medical services to the CMS program for a small fee. It did not do so, and thus the only legislative framework applicable to our inquiry, as the circuit court and the district court both recognized, is the case-by-case analysis which is necessitated by the declaration of § 768.28(9)(a) that sovereign-immunity protection extends to an "officer, employee, or agent"--but not to what the petitioners call a "pure" independent contractor (brief at 16). Although the legislature certainly could have excused CMS consultants from the necessity of such a factual inquiry, as it did recently in two other contexts, it has not done so. The petitioners therefore have entreated this Court to undertake that legislative function.

The petitioners also have neglected to inform the Court, notwithstanding their obligation to state all of the evidence in the light most favorable to the plaintiffs, that the legislature ***has***

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created an employment category for which CMS consultant doctors are eligible, called the 1300 OPS (Other Personal Services) classification, which attempts to create an agency relationship sufficient to confer immunity under § 768.28(9)(a). None of the four defendant physicians in the instant case even applied for the OPS 1300 designation, which is outlined in detail *infra* pp. 8-11. The 1300 OPS doctors are paid a salary; the state withholds their federal income taxes and social security taxes; the doctors have their own offices; they share a number of attributes of permanent civil-service employees; and most important, they provide "routine service for the department in a situation where we supervise them, we provide them office space, you know, they come to work, do something and leave just like everybody else" (Williams Dep., 10-21-92, *see* R. 3767, at 31). The OPS 1300 classification attempts to accommodate the legislature's insistence that government doctors immune from liability be accountable to the agencies for which they work, in order to protect the health and safety of patients who have been deprived of their access to Florida's courts. The defendant doctors had the option to obtain immunity by submitting to such supervision. They chose instead to remain private practitioners, but nevertheless to seek immunity from the judicial branch of government.

The function of the court is not to confer immunity by fiat, but to apply the statute to the facts of each particular case. In order to do that, the court must have the facts of each particular case. At this point in this litigation, the relevant facts have not been provided by the moving parties. That omission alone should be sufficient to warrant approval of the district court's decision.[5/] We will outline the facts in the light most favorable to the plaintiffs below.

B. The Facts. All four defendant doctors were "consultants" to the CMS clinic in

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[5/] *See Lynn v. City of Ft. Lauderdale,* 81 So. 2d 511, 513 (Fla. 1955); *American Motor Inns of Florida, Inc. v. Bell Electric Co.,* 260 So. 2d 276, 277-78 (Fla. 4th DCA 1972); *Raybon v. Burnette,* 135 So. 2d 228, 230 (Fla. 2d DCA 1962). *See generally Avitia v. Metropolitan Club of Chicago, Inc.,* 49 F. 3d 1219 (7th Cir. 1995); *Tesseyman v. Fisher,* 248 P. 2d 471 (Cal. Ct. App. 1952).

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Ft. Lauderdale at the time of their alleged negligence; and Dr. Sirois also had an OPS 1200 designation, *see infra* pp. 12-16. The question prescribed by § 768.28(9)(a) is whether a CMS consultant is an agent or employee of the clinic, or instead an independent contractor. The answer to that question requires knowledge of Florida's civil-service system in general, and of the CMS structure in particular.

1. The Legislative Mandate and Bureaucratic Structure of CMS. 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 whose families are unable to afford such care (Kenyon Dep., 10-21-92, *see* R. 3767, at 60; Parker Dep., 7-9-92, R. 3170 at 63). Florida has recognized the same obligation, codified in Chapter 391 of the Florida Statutes, entitled the "Children's Medical Services Act," which prescribes the selection and designation of "hospitals, clinics, convalescent homes, specialized treatment centers, or other patient care centers for the provision of medical services" to children. *See* § 391.031, Fla. Stat. (1995); Parker Dep., 7-9-92, R. 3170 at 63. Section 391.021 provides that the state program will be managed by HRS, which is charged in § 20.19, Fla. Stat. (1995), to create an Assistant Secretary for Children's Medical Services (§ 20.19(5)(b)(1)), who answers to the Deputy Secretary for Human Services; and to create a Child Support Enforcement Program Office to administer the federal program (§ 20.19(5)(b)(2)(a)) (*see* Kenyon Dep., 10-21-92, *see* R. 3767, at 60; Cupoli Dep., 10-21-92, R. 3657 at 72).

As the responsible state officials, including HRS Secretary Robert Williams, explained, the Secretary bears ultimate responsibility for the CMS program; that responsibility has been delegated to Deputy Secretary for Human Services Varnum Kenyon; and Mr. Kenyon in turn supervises the Assistant Secretary for Children's Medical Services, Dr. Michael Cupoli. With a staff of 34 in Tallahassee, Mr. Cupoli's deputy, Robert Furlough, administers the statewide program, including 22 clinics divided into 11 service districts, some satellite clinics in Florida's

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medical schools, and a few regional centers (a total of 540 nurses, social workers and clerks), with the assistance of Jane Parker, the Chief of Clinics and Regional Programs for CMS (*see* Williams Dep., 10-21-92, *see* R. 3767, at 4, 6-7, 10; Cupoli Dep., 10-21-92, R. 3657 at 7-10, 91; Kenyon Dep., 10-21-92, *see* R. 3767, at 4; Furlough Dep., 7-9-92, R. 3086 at 6-7; Parker Dep., 7-9-92, R. 3170 at 6-7, 64). The mission of every CMS clinic is to provide quality long-term medical care to children of financial need, who suffer chronic long-term debilitating conditions which affect their development (Sheer Dep., 10-26-92, R. 3767 at 52; Sheer Dep., 11-19-91, R. 3011 at 12; Cupoli Dep., 10-21-92, R. 3657 at 8; Fanizzi Dep., 11-19-91, R. 3245 at 91; Swartzbaugh Dep., 11-26-91, *see* R. 3586, at 7). *See generally* R. 2789, or Exhibit B of the petitioners' appendix (HRS Manual, *Children's Medical Services,* April 1, 1987).

2. *Based Upon the Descriptions Provided by All of the Relevant State Officials, CMS Consultants are Independent Contractors.* All of the officials in the state hierarchy testified by deposition. These witnesses explained that there are three service classifications of relevance to our inquiry.

a. Career Civil Servants. First is the career civil-service category, which is applicable to the CMS directors (Dr. Michael Cupoli and Robert Furlough) and staff in Tallahassee, and to the CMS nurses, social workers and clerks statewide. Such full-time civil-service employees receive all the benefits of government employment, such as paid annual leave, paid sick leave, paid holidays, insurance coverage, retirement benefits, and the withholding of federal income and social security taxes (Kenyon Dep., 10-21-92, *see* R. 3767, at 13; Williams Dep., 10-21-92, *see* R. 3767, at 12; Cupoli Dep., 10-21-92, R. 3657 at 22-23; Parker Dep. 7-9-92, R. 3170 at 17, 20). Dr. Cupoli is the only doctor who is a full-time civil-service employee of CMS (Cupoli Dep., 10-21-92, R. 3657 at 9-10). As the CMS Chief of Clinics and Regional Programs explained, the Florida Legislature has created only a very limited number of such career positions, and there are ***no*** full-time civil-service positions available for any doctors to

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staff any of the state's 22 CMS clinics (Parker Dep., 7-9-92, R. 3170 at 29).[6/]

Thus, although the petitioners and the amicae repeatedly have emphasized that the HRS manual authorizes the CMS medical director to supervise, moniter and pre-approve the care ("within budgetary constraints," *see* Manual, R. 2789 or petitioners' appendix B, § 3-1(b), at p. 3-1) (*see* petitioners' brief at 3-4, 6, 20-21; HRS/CMS amicus brief at 2; FMA amicus brief at 5-6), they have neglected to explain how one person in Tallahassee could perform that function in 22 statewide clinics. As we note in discussing *infra* the practical administration of the program, neither medical director Capoli nor the nominal director of the Broward clinic even attempts to do so.

Like many state program which needs additional staff support, CMS must create temporary ad hoc arrangements in order properly to staff its program (Parker Dep., 7-9-92, R. 3170 at 26). As HRS Secretary Robert Williams explained, for a specialized agency like CMS, the only option is to seek the assistance of physicians in the private sector:

> In Children's Medical Services, once again, one because of its technical nature and, secondly, because historically that program has been fundamentally a public/private partnership that depends almost exclusively on private sector physicians for services, we do employ nurses and clerks and social workers to support them, there has been what I would describe as a relatively loose organizational relationship there that allows for a lot of interaction between the local CMS medical director and the CMS assistant secretary in Tallahassee because [the program] is a professional physician to physician kind of relationship.
>
> * * * *

[6/] As HRS Secretary Robert Williams explained, there are doctors who work elsewhere for the state as career employees. They have a special civil-service status called ongoing select exempt service, which entitles them to all the benefits of civil service. However, there are no select exempt service physicians working in the CMS program (Williams Dep., 10-21-92, *see* R. 3767, at 13-14; *see* Kenyon Dep., 10-21-92, *see* R. 3767, at 13). As we also have explained, *supra* pp. 3-4, *see infra* pp. 8-11, the OPS 1300 designation is available to doctors working for CMS clinics, but none of the petitioners sought that status.

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> [W]e don't employ physicians as ongoing full time members of the department with the exception of the assistant secretary. We actually contract for his services and I don't think there are any other exceptions to that, so we use private sector physicians for the local directors and practitioners.
>
> * * * *
>
> As I indicated earlier, the whole model for how Children's Medical Services operated historically has been a partnership between the private medical community and the public sector and the advantage of that is that we are able to basically access very very high quality, very specialized physician services that we typically would not be able to if we employed them full time on our own payroll, but that's a long-standing tradition.

Williams Dep., 10-21-92, *see* R. 3767, at 11, 12, 15. Or as Assistant Secretary Dr. Michael Cupoli put it: "I am the only full time physician in CMS. Everybody else provides service as a private practitioner that we contract with to do the work of CMS" (Cupoli Dep., 10-21-91, R. 3657 at 9). These are "physicians from the community as opposed to public health physicians" (*id.* at 22).

b. The Intermediate OPS 1300 Designation. Until the last half of the 1980's, the only non-civil-service option available to programs like CMS was temporary, part-time arrangements with consultant physicians (we will discuss the status of consultants in a moment). During the last half of the 1980's, in light of consulting physicians' fears of exposure to medical-malpractice actions (*see* Furlough Dep., 7-9-92, R. 3086 at 20; Cupoli Dep., 10-21-92, R. 3657 at 17), the state legislature created a middle category called OPS--meaning Other Personal Services--which was intended (in one but not all of its sub-categories, *see infra*) to permit some non-civil service workers to be considered employees of the state (*see* Parker Dep., 7-9-92, R. 3170 at 26, 32; Furlough Dep., 7-9-92, R. 3086 at 9, 14-15; Kenyon Dep., 10-21-92, *see* R. 3767, at 11; Williams Dep., 10-21-92, *see* R. 3767, at 17; Swartzbaugh Dep., 11-26-91, *see* R. 3586, at 26, 38; Sheer Dep., 11-19-91, R. 3011 at 42). As HRS Secretary Robert Williams

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explained, there are two OPS classifications--the 1300 and the 1200 (Williams Dep., 10-21-92, *see* R. 3767, at 31). The 1300 category "applies to individuals who are performing daily service" or "routine service for the department in a situation where we supervise them, we provide them office space, you know, they come to work, do something and leave just like anybody else" (*id.*). None of the defendant doctors in the instant case had a 1300 OPS classification.

Dr. Ronald Sirois did have the 1200 OPS classification (*see* Swartzbaugh Dep., 11-26-91, *see* R. 3586, at 4-5, 11; Furlough Dep., 7-9-92, R. 3086 at 28-29). As HRS Secretary Williams explained, the 1200 classification is for spot projects for "some period of time specified by contract and in those cases that individual is considered an independent contractor" (Williams Dep., 10-21-92, *see* R. 3767, at 32). We will discuss the differences between 1200 OPS workers and consultants in a moment. To establish the context for that discussion, we need first to review the 1300 classification, which was intended to create an employment relationship.

The 1300 OPS position is not a civil-service position, but it does share some of the attributes of civil-service employment. On the one hand, the 1300 OPS workers receive no fringe benefits, no paid vacations, no holidays, no sick leave, and no annual leave (Parker Dep., 7-9-92, R. 3170 at 21, 26-27; Furlough Dep., 7-9-92, R. 3086 at 22; Fanizzi Dep., 11-19-91, R. 3245 at 66; Williams Dep., 10-21-92, *see* R. 3767 at 28-31; Swartzbaugh Dep., 11-26-91, *see* R. 3586, at 23). On the other hand, as the Deputy Assistant Secretary for Children's Medical Services (Robert Furlough) explained, the 1300 OPS position is similar to civil-service employment in some respects (unlike the defendants' consultant status, which we will discuss next):

> OPS employees, on the other hand, have another process in addition to [the consultant application] to go through. They--we make a conscious decision to employ certain physicians as OPS employees of the Department. [All OPS workers, 1300 and 1200]

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are required to fill out the necessary personnel papers and be fingerprinted, and, in essence, they get paid with a salary warrant, whereas all other consultants get paid with a state check, but it is not salary warrant. The salary warrant, the Department is required to take Social Security benefits and taxes out of the check, and so on. The others [the consultants] are not, we are not required to do so.

* * * *

At the time that the statute was changed [to create the 1300 OPS position], in order to be an OPS employee, it was temporary, time-limited and they would be paid by the hour. The Legislature understood and recognized the need for different kinds of services. They also recognized the need for a payment system and a payment structure that might differ from paying by the hour, particularly for professionals, and therefore they amended the statute to allow us to have [1300] OPS employees that could be--could serve more than just temporarily, that is, more than the 2,080 hours that the statute had provided, and furthermore, it would allow us to pay them in a different manner than just on an hourly basis.

* * * *

Q Is this a contractual arrangement, to your understanding?

A Yes, in that they [1300 workers] have the same kind of contractual relationship as a Career Service employee has. They do an application. They have--as I indicated, they have to go through the process. They have to be fingerprinted, and--there are certain exemptions or differences in OPS than regular Career Service, but it could be construed to be a contract, employment type contract.

* * * *

The [OPS] form says that, "Other Personal Services," in parenthesis, "(OPS) is an employer-employee relationship for the accomplishment of short-term tasks," and then it goes on to explain, "employee shall be assigned to one of the OPS employment categories," and then it tells what the employees are

not eligible for in terms of benefits.

Furlough Dep., 7-9-92, R. 3086 at 11-12, 14-16. *See* Cupoli Dep., 10-21-92, R. 3657 at 16; Swartzbaugh Dep., 11-26-91, *see* R. 3586, at 20.

In light of the character of the 1300 OPS position--the elaborate screening process for applicants (*see also* Parker Dep., 7-9-92, R. 3170 at 24); the requirement that OPS workers keep time sheets, and are paid a salary (*see also* Kenyon Dep., 10-21-92, *see* R. 3767, at 13; Parker Dep., 7-9-92, R. 3170 at 21); the requirement that the state withhold federal income and social security taxes for OPS employees (Furlough Dep., 7-9-92, R. 3086 at 21); the fact that they are given their own offices (Williams Dep., 10-21-92, *see* R. 3767, at 31), and are permitted up to 2400 hours of work (Parker Dep., 7-9-92, R. 3170 at 26; Swartzbaugh Dep., 11-26-91, *see* R. 3586, at 25); and because the 1300 OPS position was created to afford protection from individual liability--all but one of the government officials who were deposed expressed the view that the 1300 OPS category is an employment category, and thus that 1300 OPS workers are entitled to sovereign-immunity protection (Parker Dep., 7-9-92, R. 3170 at 13, 31; Furlough Dep., 7-9-92, R. 3086 at 12; Kenyon Dep., 10-21-92, *see* R. 3767, at 54).[7/]

We need not debate that question in the instant case, because none of the four individual defendants is a 1300 OPS employee, and only Dr. Sirois had attained 1200 OPS status at the time the lawsuit was filed (*see* Furlough Dep., 7-9-92, R. 3086 at 28-29; Swartzbaugh Dep., 11-26-91, *see* R. 3586, at 4-5; Sheer Dep., 11-19-91, R. 3011 at 34; Fanizzi Dep., 11-19-91, R. 3245 at 7-8, 111). Dr. Sirois had no contract like the 1300 workers, and no office, and he was paid only for the blocks of time which he spent at the CMS clinic (no more than once or

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[7/] Only HRS Secretary Robert Williams was equivocal on this point. While he expressed the personal opinion that a 1300 OPS worker is an employee of the state (Williams Dep., 10-21-92, *see* R. 3767, at 31), he also acknowledged that it would be up to the courts to decide whether 1300 OPS workers are employees or independent contractors for purposes of sovereign immunity (*id.* at 18-20).

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twice a month), as were the consultants (Sirois Dep., 7-19-91, R. 1271 at 10; Fanizzi Dep., 11-19-91, R. 3245 at 12; Swartzbaugh Dep., 11-26-91, *see* R. 3586, at 14). Thus OPS 1200 status meant only that Dr. Sirois was fingerprinted before he was hired, was permitted to work up to 2400 hours a year, and was paid by salary warrant from which taxes were deducted (Swartzbaugh Dep., 11-26-91, *see* R. 3586, at 20-25). In all other respects--and in particular the key question of control, as the defendants acknowledged below (2-25-93 Tr. at 8)--1200 OPS workers and consultants are identical (Swartzbaugh Dep., 11-26-91, *see* R. 3586, at 42). Thus, we turn to the consultant category.[8/]

c. Consultants. Although all of the doctors who work for the CMS clinics must first be accepted as consultants, only a small percentage of the consultants choose to go through the additional application process of becoming OPS physicians (Swartzbaugh Dep., 11-26-91, *see* R. 3586, at 16; Furlough Dep., 7-9-92, R. 3086 at 11; Parker Dep., 7-9-92, R. 3170 at 21-22). The consultant designation is not a position but a "status"--a status created and filled by CMS--not by the State of Florida (Parker Dep., 7-9-92, R. 3170 at 17, 21, 23, 57). Unlike the 1300 OPS doctors, whom the State believes to be covered by its Risk Management System (*id.* at 23), the 5000-plus CMS consultants are required to carry their own insurance (*id.* at 55; Cupoli Dep., 10-21-92, R. 3657 at 25; Kenyon Dep., 10-21-92, *see* R. 3767, at 55). *See* HRS Manual, *Children's Medical Services,* April 1, 1987, at 4-4 (R. 2789 or petitioners' appendix B).

The consultants spend very little time at the CMS clinic--most less than one day a week (Cupoli Dep., 10-21-92, R. 3657 at 16)--and maintain their own private practices (Kenyon Dep., 10-21-92, *see* R. 3767 at 10-11). Often they see CMS patients for follow-up visits at their own

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[8/] In its amicus brief (p. 3), HRS/CMS asserts, with no cite to the record, that "[t]here is no functional distinction between [the OPS and consultant] groups." That may be true of the OPS 1200 designation, but it certainly is not true of the OPS 1300 designation, as the citations provided above overwhelmingly demonstrate.

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offices (Cupoli Dep., 10-21-92, R. 3657 at 25, 72). The clinics block out various times per month for the children to be examined in different medical specialities, and doctors like the four petitioners are needed only when their various specialities have been scheduled (Scheer Dep., 11-19-91, R. 3011 at 15; Scheer Dep., 10-26-92, *see* R. 3767, at 54). For example, defendant Sonia Hodge was working at the clinic half a day a week as a general pediatrician, screening patients, at the time she treated Minouche Noel (Hodge Dep., 5-10-91, R. 2925 at 50; Hodge Dep., 10-30-92, *see* R. 3767, at 13-45, 50). Defendant Allen S. Watson worked at the orthopedic clinic once a month for 3-4 hours, and at the myelomeningocele clinic once every three months (Watson Dep., 4-9-91, *see* R. 3586, at 11).[9/] The consultant doctors are paid about $100.00 for the first hour of each session, and about $50 for each additional half hour (Stoll Dep., 5-7-91, R. 3586 at 34; Sheer Dep., 11-19-91, R. 3011 at 10). No federal income or social security taxes are taken from this money; the consultant doctors take no loyalty oath to the state; they receive no sick leave, no vacation time, no retirement benefits, no insurance, and no job security (*see* Williams Dep., 10-21-92, *see* R. 3767, at 28-31; Cupoli Dep., 10-21-92, R. 3657 at 20-21; Hodge Dep., 5-10-91, R. 2925 at 15, 60-61).

There is nothing in writing--in the HRS Manual (R. 2789, or petitioners' appendix B) or anywhere else--which tells the CMS consultants how to practice medicine (Furlough Dep., 7-9-92, R. 3086 at 25; Cupoli Dep., 10-21-92, R. 3657 at 12, 30, 39-41, 69; Scheer Dep., 10-26-92, *see* R. 3767, at 116). Moreover, all of the responsible state officials testified that none of the doctors who work at CMS clinics--whether they have attained OPS status or not--are subject to any control or guidelines in their practice of medicine. These officials did not, as the petitioners assert (brief at 10, 29), offer only conclusory legal opinions concerning the consultants' independent-contractor status. They also offered detailed factual descriptions of the

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[9/] As we have noted, defendant Ronald Sirois--an OPS 1200--worked at the urology clinic once or twice a month (Fanizzi Dep., 11-19-91, R. 3245 at 12).

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consultants' functions. The Assistant Secretary for Children's Medical Services described the basic setup: "[T]he physician will come in and do the physical and history and physical and evaluation and then give a proposed list of treatments . . . . [T]he physician directs the management and the nurses see it through" (Cupoli Dep., 10-21-92, R. 3657 at 53). The Deputy HRS Secretary for Human Services testified that "the physicians [are] free to practice medicine adhering to their standard of care for their particular discipline while they practice medicine in the clinic"; and that "the consultant [is] left to his or her own education, training, experience in performing that engagement" (Kenyon Dep., 10-21-92, *see* R. 3767, at 40, 43; *see id.* at 49-50).

The Deputy Assistant Secretary for Children's Medical Services testified that the "role of HRS is to try to bring to bear the cadre of physicians and services that are necessary to meet the needs of the children"; that "[i]n terms of the actual practice of medicine," "once the physicians are obtained . . . it is again up to the individual physicians to practice medicine with their patients based on their education, training and expertise"; and that "the practice of medicine is left to the physicians on a daily basis with their patients" (Furlough Dep., 7-9-92, R. 3086 at 30-33). Indeed, Mr. Furlough went so far as to testify that no one in the CMS hierarchy has the power to veto the medical decision of a consultant doctor--that the most anyone could do would be to "tell the provider that CMS would not pay for it, would not authorize it and therefore would not pay for it"--but that not even the medical director of a clinic has "the authority to tell the consultant physician or the OPS provider that they could not perform the diagnostic workup or the procedure" in question (*id.* at 41-42).[10/]

[10/] The petitioners can cite passages from various depositions in which other witnesses said that the medical director of a clinic can veto a procedure or treatment proposed by a consulting doctor, if the medical director became aware of the contemplated course of action before the fact. In light of the testimony cited above, and other testimony which we will cite in a moment, any such contradictory evidence is irrelevant for purposes of summary judgment.

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The CMS Chief of Clinics and Regional Programs, Jane Parker, said the same thing. She agreed that "[w]e don't tell them how to practice"; that, "by virtue of the fact that they are licensed and have the ability to do the medicine," the doctors have "authority to make decisions about what types of evaluations, what type of evaluation might be appropriate for a patient or a test order, whether or not to hospitalize a patient [and] how to treat the patient . . ." (Parker Dep., 7-9-92, R. 3086 at 34, 44). Parker also agreed that "under ordinary circumstances" there is no "action that a physician, a consultant at CMS can't take without prior approval"; that if a CMS physician wanted to take some action which Medicaid would not reimburse, then "CMS would reimburse"; and that the medical director of a clinic "would have the authority to say CMS will not pay for it, and he would have the authority to maybe recommend that this is not an appropriate consultant to do CMS services," but "I don't think that as a doctor to a doctor he can say, you cannot do that" (*id.* at 46-48). And although Ms. Parker agreed that CMS might have the authority to create standardized forms, checklists or protocols for the doctors to follow, she said that "Dr. Ausbon, our previous Assistant Secretary, was very firm that we do not tell physicians how to practice medicine; that they are credentialed, they are consultants, the local medical director has screened them, and he did not wish to standardize procedures for physicians" (*id.* at 51-52). Thus, as Assistant Secretary Cupoli testified, it is the consultant doctors who create their own forms for use at the clinics--not the CMS bureaucracy (Cupoli Dep., 10-21-92, R. 3657 at 78-79).

In light of this evidence, and in light of the perceived distinction between the 1300 OMS doctors on the one hand, and the consultants on the other, it is not surprising that every one of the responsible state officials testified that the consultants are not employees of the state, but instead are independent contractors. Deputy Secretary Kenyon said flatly that OPS consultants "are independent contractors with the department" who "do not enjoy an employee/employer relationship with the department," and that if the consulting doctors "are OPS [1300] my

understanding is they enjoy sovereign immunity and if they are consultants they do not" (Kenyon Dep., 10-21-92, *see* R. 3767, at 14, 27, 70; *see id.* at 54-55).[11/]

Deputy Assistant Secretary Furlough said flatly that the four defendant doctors "were CMS consultants providing services to us, but not as employees of the Department"; that "OPS consultants are employees of the Department of HRS, and the consultants are not"; that "[t]he consultant, who is not an OPS, is not an employee of the state"; and that consultants are not entitled to the state's sovereign immunity, because "[c]onsultants, as far as we are concerned, are independent. They are in private practice. They are not employees of the Department, and therefore, in every sense of the word, they are independent" (Furlough Dep., 7-9-92, R. 3086 at 10, 46, 47, 54, 56). Jane Parker, the Chief of Clinics and Regional Programs for CMS, said the same thing: "An OPS [1300] physician is an employee of the state, as I understand it. If the other physician you are talking about is the consultant physician, they are not employees of the state, to my knowledge" (Parker Dep., 7-9-92, R. 3170 at 13).[12/]

3. Descriptions of the Defendants' Functions by the Operational-Level State Employees, and Even by Some of the Defendants, Confirmed the State Officials' Testimony. The state officials' descriptions of the CMS consultants was confirmed by those who run the clinics at the operational level, and even by some of the defendants themselves. William Fanizzi, who is Chief of Pediatrics for the Broward County Public Health Unit, and thus is nominal director of the Broward CMS office (Fanizzi Dep., 11-19-91, R. 3245 at 3, 6), agreed that "OPS employees get sovereign immunity protection, but non-OPS [consultants] don't" (*id.* at 16). Dr.

[11/] As we have noted, defendant Sirois was a 1200 OPS consultant--a status virtually identical, in all relevant respects--to that of the three other defendant consultants.

[12/] In light of this testimony, it is difficult to understand the basis for the petitioners' representation (brief at 26) that "[o]nly the Respondents, non-parties to HRS's arrangement with Petitioners, challenge the terms of that relationship." Every HRS official connected with this program agrees with the respondents' position.

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Fanizzi himself has almost no day-to-day involvement with the consultants' care and treatment of CMS children (Scheer Dep., 10-26-92, *see* R. 3767, at 9, 11-12). He only goes to the clinic one morning per week (Fanizzi Dep., 11-19-91, R. 3245 at 79), and although Dr. Fanizzi is charged to determine the eligibility of children for treatment at the clinic, and can both retain and dismiss the doctors who serve as consultants (*id.* at 6, 43, 89-90), Dr. Fanizzi testified flatly that he does not "get involved hands-on with patients" (*id.* at 111), and is not there "overlooking" the doctors (*id.* at 35). To the contrary, when asked whether he was "supervising" the treatment of patients, he answered that "I'm supervising it from a distance away from the actual examination of the children and the running of the clinic" (*id.* at 82); and when asked whether he controlled or supervised a doctor's activities on a day-to-day basis, he answered: "Day-to-day basis, no" (Fanizzi Dep., 12-24-92, *see* R. 4708, at 44).

When asked: "Did anyone at CMS tell Dr. Sirois how to practice medicine while he was at the clinic," Dr. Fanizzi answered: "Not that I know of" (Fanizzi Dep., 11-19-91, R. 3245 at 37). Dr. Fanizzi agreed that he could not tell a consultant doctor how to examine a patient (*id.* at 38-39); he agreed that no one on the clinic's staff could do so (*id.* at 50); and he explained that "[w]e employ doctors at CMS clinic because we have faith in their ability to do a job" (*id.* at 39). When asked whether there was anyone "in the State of Florida [who] could come to that clinic on any given day and tell [the doctor] what to do with a patient," Dr. Fanizzi answered: "There is nobody that would come down and tell him what to do with a specific patient" (*id.* at 40). To the contrary, the doctor's job is "to go forth on a daily basis to the best of his ability as a doctor of medicine in taking care of his patients" (*id.* at 48); and when asked whether Dr. Fanizzi would tell a consultant doctor how to practice, he answered: "I wouldn't tell him that. I wouldn't tell him he has to listen to what I say" (*id.* at 74). As one of the defendants, Dr. Sonia Hodge, put it at her deposition, Dr. Fanizzi's "duties are only administrative work. He really doesn't get involved with the actual clinical care" (Hodge Dep.,

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5-10-91, R. 2925 at 16). Dr. Fanizzi "was not someone that you would deal with on a day-to-day basis regarding your patients" (*id.* at 17).[13/]

Because Dr. Fanizzi visited the clinic only one morning a week, it is not surprising that the ultimate day-to-day managerial responsibilities fell to June Scheer, R.N., the Broward Clinic's nursing director--its highest full-time on site employee (Fanizzi Dep., 11-19-91, R. 3245 at 6-7, 111; Scheer Dep., 11-19-91, R. 3011 at 5-7; Parker Dep., 7-9-92, R. 3170 at 68). As Nurse Scheer and others described her duties, she is in charge of virtually everything at the clinic *except* the consultant doctors' performance of their responsibilities. Along with Dr. Fanizzi, she helps to review admissions against the criteria for treatment at the clinic (Scheer Dep., 11-19-91, R. 3011 at 14, 26, 35; Scheer Dep., 10-26-92, *see* R. 3767, at 8). She supervises the other nurses (Scheer Dep., 10-26-92, *see* R. 3767, at 95). Along with the other nurses, she orders any tests which the consultants desire for a patient, and monitors the results (Scheer Dep., 11-19-91, R. 3011 at 18, 37).

But Nurse Scheer repeatedly acknowledged that neither she, nor any other nurses, nor

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[13/] We acknowledge that at times in his deposition, Dr. Fanizzi was more equivocal about the extent of his ultimate authority, in extraordinary circumstances, to veto a consultant's decisionmaking. While repeatedly acknowledging that he would never really be in a position to do so, because he had no involvement with patient care, Dr. Fanizzi nevertheless qualified some of his answers--for example by suggesting that no one would interfere with the consultants, as long as they did a good job (Fanizzi Dep., 11-19-91, R. 3245 at 40); that if a consultant did something out of the ordinary, Dr. Fanizzi would discuss the matter with him (*id.* at 41); that Dr. Fanizzi would not tell a consultant what to do unless he was not performing properly (*id.* at 49); that a doctor did not require prior approval in writing progress notes unless the doctor was ordering something exotic (*id.* at 70); and that if Dr. Fanizzi had a real disagreement with a consultant doctor, he would look to the program office in Tallahassee to resolve the disagreement, and the Tallahassee office would have the final say (*id.* at 102-04). As we have noted in text, Dr. Fanizzi also said other things at other times, and thus the testimony collected in this footnote is irrelevant for purposes of summary judgment. As we also have noted, even Dr. Fanizzi's limited assertion of such authority was contradicted by other witnesses, who said that his responsibilities are entirely administrative, and that the most CMS could do about a doctor's decision is decline to pay for it.

any of the other full-time technicians or employees at the CMS clinic, have any authority to override the directions of the consultant physicians, or to tell them what to do. Indeed, when asked directly: "Can the office manager direct a doctor on what he or she does on a daily basis like she could the medical records custodian," Nurse Scheer answered: "No" (Scheer Dep., 11-19-91, R. 3011 at 60-61). She said that although she does advise the doctors about standard practices at the clinic, she neither supervises their activities nor instructs them; that CMS cannot dictate how an exam is done, or how to make notes, or how to gather information, or what tests to order, or what referrals to make to other doctors, or what prescriptions to write (Scheer Dep., 11-19-91, R. 3011 at 43-44, 46, 49, 57; Scheer Dep., 10-26-92, *see* R. 3767, at 18, 36-37, 42-43, 48, 56). In a nutshell, as Nurse Scheer put it, "I would not tell the physician how to practice medicine, no, I would not" (Scheer Dep., 10-26-92, *see* R. 3767, at 14).[14/]

In addition to their descriptions of what the consultant doctors do at the clinics--examining and treating patients at their own discretion, subject to no supervision--Director Fanizzi and Nurse Scheer both made a telling point about what the doctors do *not* do. In a typical private practice, as Dr. Fanizzi readily admitted, a doctor is in charge of the office in which he works; he keeps the records, he hires, supervises and fires the staff; he makes decisions about the purchase and maintenance of office equipment (Fanizzi Dep., 11-19-91, R. 3245 at 96-97, 99-100). In contrast, both Dr. Fanizzi and Nurse Scheer made very clear that Nurse Scheer, as the highest ranking full-time employee at the clinic, is in exclusive charge of

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[14/] Nurse Scheer did volunteer at her depositions that although none of the clinic's employees has any authority to control the consultant physicians' activities, director William Fanizzi, and above him the officials in Tallahassee, do have the ultimate authority to veto a consultant's decision if it calls for some unusual or experimental treatment, if it costs too much, or merely because of a disagreement about proper treatment (*see* Scheer Dep., 11-19-91, R. 3011 at 25-27, 52; Scheer Dep., 10-26-92, *see* R. 3767, at 38, 42, 59, 61, 98, 117-19). Even Nurse Scheer admitted, however, that such a veto had never occurred (Scheer Dep., 10-26-92, *see* R. 3767, at 61). And more important, as we have noted, Nurse Scheer's testimony on this point was contradicted by other witnesses.

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all of these matters (perhaps in consultation with her superiors), and that the consultant doctors themselves have no say whatsoever in the administrative decisions made in the course of running the clinic (*see* Fanizzi Dep., 11-19-91, R. 3245 at 94-96, 98-99; Scheer Dep., 11-19-91, R. 3011 at 19-21, 31; *see also* Furlough Dep., 7-9-92, R. 3086 at 37-38). As Assistant Secretary Cupoli put it, every child at the clinic is a "CMS patient. CMS sees the patient, CMS keeps the records, CMS through the nurses assures that whatever the physician writes is done" (Cupoli Dep., 10-21-92, R. 3657 at 43).

Although this testimony was developed by the defendants, in the apparent belief that the consultant doctors' lack of administrative or supervisory authority suggested that they were employees of the clinic along with everyone else, we will leave it to the Court to decide whether their isolation from everything in the clinic except for the treatment of patients is more consistent with their characterization as independent contractors than as agents. We agree with the defendants that any doctor in a private practice necessarily has authority over his nurses, his administrative personnel, and the physical plant of his office. In contrast, the defendant doctors, who worked at the clinic at most a few days a month, are affirmatively excluded from the management of that clinic. Like the plumber or the electrician who comes to work at your house, they are expressly limited to the specific function--and only that function--for which they have been retained.

Finally, we should note that several of the individual defendant doctors themselves confirmed the autonomy which they enjoy as consultants to CMS. For example, defendant Dr. Sonia Hodge, while confirming that the clinic scheduled her consult hours and the patients whom she saw during those hours (Hodge Dep., 5-10-91, R. 2925 at 61), answered "[t]hat's correct," when asked whether, "as far as what you did with each individual patients [sic], I take it that was your responsibility" (*id.* at 16). Dr. Hodge verified that there are no specific criteria which told her how to conduct an examination, and that she performed her functions based on her

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"education, training and experience" (Hodge Dep., 10-30-92, *see* R. 3767, at 20).[15/]

Similarly, defendant Dr. Allen Watson described his function in language which mirrors the plaintiffs' position (Watson Dep., 5-22-92, *see* R. 3586, at 22-23):

> Q. In other words, you're not employed by Children's Medical Services, right?
>
> A. Am I employed? No, I am a consultant.
>
> * * * *
>
> Q. (continuing) What's the nature of your relationship to your understanding?
>
> A. I am on a--have been selected by them to be on a board of consulting physicians in which they have consulting physicians and surgeons that deal in multiple specialties, of course, that deal with their indigent children.
>
> Q. Um-hum.
>
> A. And this panel consists, of course, [of] pediatricians and neurosurgeons, neurologists, urologists, ENT men, whatever to deal with the impairments of indigent children. And these children are cared for through their clinics and we see them through their program. They are not seen in our offices and they are not--but they organize and arrange these clinics for the children to attend and consultants are advised when the clinics are being held and we come down there and see whoever they have there and pass through the patients that are there at the time.[16/]

[15/] Dr. Hodge also thought that her decisions could be overridden by the nurse functioning as case manager (*id.*); as we have noted, other witnesses testified to the contrary.

[16/] In light of the evidence of the consultants' independence summarized in the previous 16 pages, we cannot protest too strongly the assertion of HRS/CMS (amicus brief at 7)--made with no citation to the record--that CMS "often exercises day to day supervision and direction over its physicians, thereby limiting their discretion." Given the evidence summarized above, this assertion would be irrelevant for purposes of summary judgment even if it were true. In addition, there is no record evidence to support it.

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II
ISSUES ON APPEAL

A. WHETHER THE DISTRICT COURT ERRED IN REVERSING THE SUMMARY FINAL JUDGMENT FOR THE FOUR INDIVIDUAL PHYSICIANS, ON THE GROUND THAT THE UNCONTRADICTED EVIDENCE, TAKING ALL REASONABLE INFERENCES IN THE PLAINTIFFS' FAVOR, DOES NOT CONCLUSIVELY DEMONSTRATE THAT THE FOUR DOCTORS ARE EMPLOYEES OR AGENTS OF CMS.

B. WHETHER THE DISTRICT COURT ERRED IN REVERSING THE SUMMARY FINAL JUDGMENT FOR TWO PROFESSIONAL ASSOCIATIONS, BECAUSE OF EVIDENCE THAT THE INDIVIDUAL DOCTORS IN QUESTION WERE ACTING ON BEHALF OF THEIR PROFESSIONAL ASSOCIATIONS AT THE TIME OF THEIR ALLEGED MALPRACTICE.

III
SUMMARY OF THE ARGUMENT

There is no Florida Statute which specifically confers immunity upon private-sector physicians who volunteer their services, for a nominal fee, at the various CMS facilities in Florida. While § 381.0302(11) explicitly confers such immunity upon uncompensated Florida Health Services Corps physicians; and § 766.1115(2) prescribes such immunity for health-care providers who offer free medical services to underserved populations in Florida; and § 768.28(10)(c) confers immunity on workers at CMS regional poison control centers, the only statute governing the defendant physicians' claim of immunity is § 768.28(9)(a), which mandates a case-by-case analysis by extending immunity not to everyone who performs a public or a quasi-public service, but only to an "officer, employee, or agent" of the state. As this Court and all of the district courts uniformly have recognized, the statutory language requires a case-by-case analysis of the attributes of the employment relationship in question; the decisions uniformly declare that each case depends upon its own particular facts; and they hold more often

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than not that the facts are in sufficient conflict to preclude a summary judgment for either side.

We believe that the statute reflects a salutary legislative judgment--what the FMA calls a "careful balance" (amicus brief at 4) between the need to encourage government service on the one hand, and the need to assure accountability in the performance of that service--and thus to protect our citizens--on the other. The legislature has wisely concluded that immunity is appropriate for government agents and employees who are accountable to their superiors, but not for independent contractors who are not.

But whether we are right or wrong in that evaluation is not for the courts of Florida to decide. The petitioners apparently believe that the legislature has struck the wrong balance--that the case-by-case approach both deters and undermines government service. They favor a bright-line rule in which anyone performing such service is entitled to immunity, whether subject to supervision or not. We will not accept the petitioners' invitation to debate these public-policy questions. They have been raised in the wrong forum. The Court's only function is to apply the existing standard, according to the well-established criteria for its application.

And to establish that point is to determine the outcome of this proceeding. From the foregoing statement of facts alone, it should be abundantly clear that the evidence of record can admit of no single conclusion on the question of agency, in light of the overwhelming evidence, in a variety of contexts, that the four individual physicians were acting as independent contractors when they served as consultants to CMS.

As the Court is well aware, the primary criterion is the extent of the purported principal's control over the day-to-day activities of the purported agent--and in particular the agent's performance of the specific function which assertedly caused the plaintiff's injury. As this Court and others have made clear, that controlling criterion is more important than the putative employer's authority on other subjects--for example the hours which the putative agent works, or the functions to which he is assigned. We will examine a number of decisions in which the

evidence of an employment relationship was far stronger than it is here, and yet a jury question was presented.

The defendant doctors maintained their own private practices virtually all the time, working at CMS anywhere from half-a-day a week to once or twice a month. They were required by contract to carry their own malpractice insurance; they were paid on an hourly basis; they took no loyalty oath to the state; they received no sick leave, no vacation time, no retirement benefits, no insurance, and no job security. They were subject to no control whatsoever in the performance of their sole function--providing medical care to indigent children. The HRS manual told them nothing about how to perform that function, nor did (or could) any of the nurses or employees who were regularly at the clinic in which they worked. The one physician who nominally headed that clinic for administrative purposes went there only one morning a week. And this is only a small part of the overwhelming evidence of the independence exercised by these doctors in the performance of their functions. Unquestionably the evidence creates an issue of fact; unquestionably the district court ruled correctly that summary judgment for the defendants was not appropriate.

The trial court also erred in entering summary judgment for two Professional Associations. There is competent evidence of record indicating that the two doctors in question were operating through their Professional Associations at the time they worked as consultants for CMS.

IV
ARGUMENT

A. THE DISTRICT COURT DID NOT ERR IN REVERSING THE SUMMARY FINAL JUDGMENT FOR THE FOUR INDIVIDUAL PHYSICIANS, BECAUSE THE UNCONTRADICTED EVIDENCE, TAKING ALL REASONABLE INFERENCES IN THE PLAINTIFFS' FAVOR, DOES NOT CONCLUSIVELY DEMONSTRATE THAT THE FOUR DOCTORS ARE EMPLOYEES OR AGENTS OF CMS.

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1. General Principles of Florida's Law of Agency. Section 768.28(9)(a) extends immunity only to an "officer, employee, or agent" of the State; and this Court has adopted § 220 of the *Restatement (Second) of Agency* (1957),[17] which identifies ten fact-specific criteria for defining an agent: 1) the "extent of control which, by the agreement, the master may exercise over the details of the work"; 2) whether the purported agent is engaged in "a distinct occupation or business"; 3) whether the work in that occupation "is usually done under the direction of the employer or by a specialist without supervision"; 4) the extent of "skill required in the particular occupation"; 5) whether the employer provides the instrumentalities and tools which are used in the work; 6) the length of time for which the purported agent is employed; 7) the "method of payment, whether by time or by the job"; 8) whether the job is part of the employer's regular business; 9) whether the parties themselves believe that they are creating the relation of master and servant; and 10) whether the principal is or is not in the business in question. *See Cantor v. Cochran,* 184 So. 2d 173, 174-75 (Fla. 1966). At the argument below, the defendants acknowledged and relied upon the ten-factor test (2-25-93 Tr. at 12). The ten criteria must be applied to the individual facts of each case, *id.* at 174, and the burden rests upon the party claiming an agency relationship to prove it. *Bernstein v. Dwork,* 320 So. 2d 472, 474 (Fla. 3d DCA 1975), *cert. denied,* 336 So. 2d 599 (Fla. 1976).[18]

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[17] *See Cantor v. Cochran,* 184 So. 2d 173, 174 (Fla. 1966); *Robinson v. Faine,* 525 So. 2d 903, 905 (Fla. 3d DCA 1987); *Singer v. Star,* 510 So. 2d 637, 640 (Fla. 4th DCA 1987).

[18] The language of § 768.28(9)(a), and the 10-part case-by-case test prescribed by the *Restatement*, alone forestall the petitioners' contention (brief at 1, 12, 17-18, 27-28, 31-32) that a case-by-case analysis is inconsistent with the very concept of immunity from suit (as opposed to immunity from liability), and that the mere performance of a public function should alone be sufficient to confer such immunity. The short answer is that the legislature has necessitated a case-by-case approach in providing that not all of those who perform a public function are entitled to immunity, but only officers, employees or agents. Not surprisingly, therefore, the cases cited by the petitioners for a blanket rule are not cases decided under Florida law. In *Skobolow v. Ameri-Manage, Inc.,* 483 So. 2d 809, 811-12 (Fla. 3d DCA 1986) (petitioners' brief at 27), the court was interpreting 42 U.S.C. § 1983 in holding that a state hospital is a

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In attempting to fulfill that burden, as the defendants acknowledged both below (2-25-93 Tr. at 6, 13) and on appeal (petitioners' brief at 9, 15 & n.19; *see* FMA amicus brief at 10), the moving party's primary task is to establish the "extent of control which . . . the master may exercise over the details of the work" (*Restatement* § 220). The Florida cases repeatedly emphasize that control by the principal is the "fundamental test" of agency law. *Farmers & Merchants Bank v. Vocelle,* 106 So. 2d 92, 95 (Fla. 1st DCA 1958).[19/] And "control" in this context has a specialized meaning. It focuses not upon the general relationship between the principal and agent, but rather upon the agent's performance of the specific function which

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state agency for purposes of that statute. The rationale was explained in *West v. Atkins,* 487 U.S. 42, 49-52, 55-56, 108 S. Ct. 2250, 101 L. Ed. 2d 40, 50-51, 54 (1988) (petitioners' brief at 28), noting that § 1983 defines state action to include the performance of a governmental function whether the actor is an independent contractor or not. The Supreme Court held that independent professionals can be state actors in this context, 487 U.S. at 51-52, 108 S. Ct. 2250, 101 L. Ed. 2d at 51; and emphasized that "[i]t is the physicians' function within the state system, not the precise terms of employment, that determines whether his actions can fairly be attributed to the State." 487 U.S. at 55-56, 108 S. Ct. 2250, 101 L. Ed. 2d at 54. In contrast under § 768.28(9)(a), as Florida's courts repeatedly have emphasized, the "precise terms of employment" are critical.

The only other decision relied upon by the petitioners on this point (brief at 32 n.37) is *Harlow v. Fitzgerald,* 457 U.S. 800, 813-19, 102 S. Ct. 2727, 73 L. Ed. 2d 396, 407-11 (1982), which sought to accommodate the interests of executive officials asserting qualified immunity in "insubstantial suits," by adopting an objective standard of their good faith based upon the extant state of the law at the time of their conduct. Qualified immunity of course is a defense created by the common law, which is amenable to adjustment by the common law. The instant case concerns the interpretation of a statute.

[19/] *Accord, Keith v. News & Sun Sentinel Co.,* 659 So. 2d 1074, 1080-81 (Fla. 1995); *Dorse v. Armstrong World Industries, Inc.,* 513 So. 2d 1265, 1268 (Fla. 1987); *Miami Herald Publishing Co. v. Kendall,* 88 So. 2d 276, 277 (Fla. 1956); *Robinson v. Faine,* 525 So. 2d 903, 906 (Fla. 3d DCA 1987); *Wiseman v. Miami Rug Co.,* 524 So. 2d 726, 729 (Fla. 4th DCA 1988); *Goldberg v. Casanave,* 513 So. 2d 751, 752 (Fla. 4th DCA 1987); *Singer v. Star,* 510 So. 2d 637, 640 (Fla. 4th DCA 1987); *Nazworth v. Swire Florida, Inc.,* 486 So. 2d 637, 639 (Fla. 1st DCA 1986); *Folwell v. Bernard,* 477 So. 2d 1060, 1063 (Fla. 2d DCA 1985), *review denied,* 486 So. 2d 595 (Fla. 1986); *Ortega v. General Motors Co.,* 392 So. 2d 40, 42-43 (Fla. 4th DCA 1980); *Wendland v. Akers,* 356 So. 2d 368, 370-71 (Fla. 4th DCA 1978), *cert. denied,* 378 So. 2d 342 (Fla. 1979).

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caused the injury. Thus the familiar distinction between ends and means: "Generally, a contractor is not a true agent where the principal controls only the outcome of the relationship, not the means used to achieve that outcome." *Dorse v. Armstrong World Industries, Inc.*, 513 So. 2d 1265, 1268 n.4 (Fla. 1987). As the court noted in *Collins v. Federated Mutual Implement and Hardware Ins. Co.*, 247 So. 2d 461, 463-64 (Fla. 4th DCA), *cert. denied*, 249 So. 2d 689 (Fla. 1971) (emphasis in original):

> The status of an independent contractor as distinguished from that of an employee consists of a contractual relationship by one with another to perform something for him, but the one so engaged is not controlled or subjected to control of the other in the performance of the engagement, *but only as to the result.* Conversely, a principal in an employee-employer relationship retains the right to control the conduct of the employee in regard to the engagement entrusted to him. It may be said that the recognized distinction between an employee and an independent contractor is determined by whether the person is subject to or whether he is free from control with regard to the details of the engagement. Florida Industrial Commission v. State, 1945, 155 Fla. 772, 21 So. 2d 599; 2 Am. Jur., Agency § 8.
>
> Generally the test of what constitutes independent service lies in the control exercised, the decisive question being who has the right to direct what shall be done, and when and how it shall be done. *The right of control as to the mode of doing the work contracted for* is the principal consideration in determining whether one is employed as an independent contractor or as a servant. The relationship of employer and employee requires control and direction by the employer over the actual conduct of the employee. This exercise of control over the person as well as the performance of the work to the extent of prescribing the manner in which the work shall be executed and to the method and details by which the desired result is to be accomplished, is the feature that distinguishes an independent contractor from a servant.

Accord, Miami Herald Publishing Co. v. Kendall, 88 So. 2d 276, 277 (Fla. 1956); *Aetna Casualty & Surety Co. v. Protective National Ins. Co. of Omaha,* _____ So. 2d _____ (Fla. 3d DCA 1993); *Folwell v. Bernard,* 477 So. 2d 1060, 1063 (Fla. 2d DCA 1985), *review denied,*

486 So. 2d 595 (Fla. 1986); *Ortega v. General Motors Co.,* 392 So. 2d 40, 42 (Fla. 4th DCA 1980); *Farmers & Merchants Bank v. Vocelle,* 106 So. 2d 92, 95 (Fla. 1st DCA 1958) (right to fire employee not enough; dispositive test is principal's control "over the means to be employed by the party serving in performing the service").

It follows from the foregoing that even if the principal has some day-to-day authority over the agent, the court must examine the parties' relationship in the performance of the very task which resulted in the plaintiff's injury. As this Court put it in *District School Board v. Talmadge,* 381 So. 2d 698, 702-03 (Fla. 1980), a defendant can share in the state's immunity only if the putative employee was acting within the "true agency relationship" at the time of his alleged negligence. The Court cited *Talmadge* in *Dorse v. Armstrong World Industries, Inc.,* 513 So. 2d 1265, 1268 & n.4 (Fla. 1987), for the proposition that "a contractor is not a true agent where the principal controls only the outcome of the relationship, not the means used to achieve that outcome," and suggested that the argument for independent status "is especially compelling when injuries are caused by means the contractor himself freely chooses to employ or not to employ, such as a failure to provide adequate warnings or safety equipment where the contract itself is silent on these issues." *Accord, Farmers & Merchants Bank v. Vocelle,* 106 So. 2d 92, 95 (Fla. 1st DCA 1958) ("[A]t no time is it shown that any control or supervision was exercised or attempted. The time of performance was such that no such control was contemplated"). In the light of these principles, it is not surprising that the overwhelming majority of appellate decisions hold that the question of agency is properly reserved for the jury's consideration.[20/]

[20/] *See, e.g., Orlando Executive Park, Inc. v. Robbins,* 433 So. 2d 491, 494 (Fla. 1983); *Blue Cross/Blue Shield of Florida, Inc. v. Weiner,* 543 So. 2d 794, 797 (Fla. 4th DCA), *review denied,* 553 So. 2d 1164 (Fla. 1989), *cert. denied,* 494 U.S. 1028, 110 S. Ct. 1475, 108 L. Ed. 2d 612 (1990); *Wiseman v. Miami Rug Co.,* 524 So. 2d 726, 729 (Fla. 4th DCA 1988); *Nazworth v. Swire Florida, Inc.,* 486 So. 2d 637, 639 (Fla. 1st DCA 1986); *Folwell v. Bernard,*

2. *Agency in Medical-Malpractice Cases.* The petitioners complain that the application of these principles to professionals like doctors and lawyers is inappropriate, because such professionals are ethically required to exercise independent judgment. *See* the petitioners' brief at 18-19; FMA's amicus brief at 11 ("Under respondents' definition, professionals--such as physicians, attorneys, or accountants--can never be agents"). Of course our position is not that extreme; we will be citing and discussing cases in which professionals indeed were found to be agents for purposes of sovereign immunity. But the essential point is correct. It is, and it should be, much tougher to establish that a professional is an agent for purposes of sovereign immunity under the language of § 768.28(9)(a), because that statute recognizes the key question of control or accountability in distinguishing between agents and independent contractors, and independent contractors by definition are free of such accountability. It may be a fact of life that professionals are less often found to be agents, but that hardly calls for a different analysis. The statutory language is the same, and the test should be the same.

Not surprisingly, therefore, in medical-malpractice cases, the appellate decisions mirror the criteria outlined above. In *Goldschmidt v. Holman,* 571 So. 2d 422, 424 n.5 (Fla. 1990), the Court relied upon § 1 of the *Restatement (Second) of Agency* (1957), in holding that "[e]ssential to the existence of an actual agency relationship is (1) acknowledgement by the principal that the agent will act for him, (2) the agent's acceptance of the undertaking, and (3) control by the principal over the actions of the agent." In this area, no less than any other, as the defendants acknowledged below (2-25-93 Tr. at 6, 13), the controlling criterion is the extent of the putative principal's control over the agent: "As is usually the case, the question of agency

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477 So. 2d 1060, 1062 (Fla. 2d DCA 1985), *review denied,* 486 So. 2d 595 (Fla. 1986); *Bernstein v. Dwork,* 320 So. 2d 472, 474 (Fla. 3d DCA 1975), *cert. denied,* 336 So. 2d 599 (Fla. 1976).

turns upon the degree of control exercised by the hospital over the doctor."[21/] And here too, the concept of control has a specialized meaning, focusing not upon the general relationship between the doctor and the hospital, but rather upon the extent of the hospital's supervision of the very acts alleged to be negligent:

> There are times when hospital employees may be temporarily under the exclusive control of the treating physician. At such times the hospital will not be liable for their employee's negligence.
>
> "The important question is not whether or not he remains the servant of the general employer as to matters generally, but whether or not, as to the act in question, he is acting in the business of and under the direction of one or the other."
>
> * * * *
>
> The hospital has not met its burden of showing that at the time of the alleged negligent acts Dr. Cantor was not, as a matter of law, its agent. While we have previously noted that there are times when an employee of a hospital may be under the direction and control of a treating physician, the question of when his responsibility begins and the hospital's ends is usually a question for the jury.

Parmerter v. Osteopathic General Hospital, 196 So. 2d 505, 507 (Fla. 3d DCA 1967), *quoting Restatement (Second) of the Law of Agency* § 227a (1958).

Thus, contrary to the defendants' suggestion below, it is not sufficient, as a matter of law, that the hospital may have determined the hours to be worked by a doctor, or the patients

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[21/] *Baldwin v. Dellerson,* 541 So. 2d 779, 780 (Fla. 4th DCA 1989). *Accord, DeRosa v. Shands Teaching Hospital & Clinics, Inc.,* 504 So.2d 1313, 1315 (Fla. 1st DCA 1987); *Bryant v. Duval County Hospital Authority,* 459 So. 2d 1154, 1155 (Fla. 1st DCA 1984). *See also Aetna Casualty & Surety Co. v. Protective National Ins. Co. of Omaha,* _____ So. 2d _____ (Fla. 3d DCA 1993) (control over the details of the work is the key question in determining whether an attorney is an independent contractor or an agent); *Wendland v. Akers,* 356 So. 2d 368, 370 & n.6 (Fla. 4th DCA 1978), *cert. denied,* 378 So. 2d 342 (Fla. 1979) (same re: veterinarian).

to be seen. As the court put it in *Baldwin v. Dellerson,* 541 So. 2d 779, 780 (Fla. 4th DCA 1989): "The fact that, as a [hospital] staff member, [the defendant] was required to be 'on call' on this particular evening and [to] care for whosoever appeared at the hospital in need does not *ipso facto* make [the doctor] the hospital's agent." Indeed, there is no single factor or set of factors which dominate in these cases. They are inherently fact-specific, and the Florida courts overwhelmingly have held that the question of control in particular, and of agency in general, is a question for the jury. *See, e.g., Goldschmidt v. Holman,* 571 So. 2d 422, 424 (Fla. 1990) (question taken from jury only in extreme cases; in *Goldschmidt,* no agency in one doctor's covering patients of another); *Public Health Trust of Dade County v. Valcin,* 507 So. 2d 596, 601 (Fla. 1987) (question generally for jury; affirms dismissal of doctor without discussing facts); *Pinellos v. Cedars of Lebanon Hospital Corp.,* 403 So. 2d 365, 368-69 (Fla. 1981) (question for jury); *Martin v. Drylie,* 560 So. 2d 1285, 1288 (Fla. 1st DCA 1990) (reversing summary judgment on agency question); *Baldwin v. Dellerson,* 541 So. 2d 779 (Fla. 4th DCA 1989) (reversing summary judgment); *Arango v. Reyka,* 507 So. 2d 1211, 1213 (Fla. 4th DCA 1987) (question for jury); *Jaar v. University of Miami,* 474 So. 2d 239, 242 (Fla. 3d DCA 1985) (en banc), *review denied,* 484 So. 2d 10 (Fla. 1986) (generally question of fact); *Irving v. Doctors Hospital of Lake Worth, Inc.,* 415 So. 2d 55, 56 (Fla. 4th DCA), *review denied,* 422 So. 2d 842 (Fla. 1982) (question for jury); *Sanders v. Putnam Community Hospital,* 395 So. 2d 571, 572 (Fla. 5th DCA 1981); *Hunt v. Palm Springs General Hospital, Inc.,* 352 So. 2d 582, 584 (Fla. 3d DCA 1977).[22/]

Indeed, the only cases which we can find in which the doctor was entitled to judgment

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[22/] Because the question is entirely fact-specific, we need not address the petitioners' or the amicae's invocation of decisions or opinions regarding teachers, correction officers, building inspectors, policemen, psychiatric examiners, or swine-flu volunteers (*see* petitioners' brief at 16, 34 n.40; FMA amicus brief at 10-11).

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as a matter of law, are cases involving facts far more extreme, and far less balanced, than the evidence here. For example, in *Bates v. Sahasranaman,* 522 So. 2d 545 (Fla. 4th DCA 1988) (*see* petitioners' brief at 19 n.24; FMA amicus brief at 11), the doctor was a full-time, "salaried staff employee" of a state prison, who was granted explicit immunity under § 768.28(10), Fla. Stat. (1987). In *Jaar v. University of Miami,* 474 So. 2d 239, 242-45 (Fla. 3d DCA 1985) (en banc), *review denied,* 484 So. 2d 10 (Fla. 1986) (petitioners' brief at 19 n.24; FMA amicus brief at 12), the resident doctors in question were employees of both the hospital and the university at the time of their alleged negligence; the Trust which owned the hospital "admitted that the doctors were its employees or agents and that their negligent treatment of [the plaintiff] was performed within the scope of their employment" (an admission which the plaintiffs did not challenge on appeal); and at the same time the doctor who headed the department was a full-time employee of the university, charged by contract to supervise the residents employed by the hospital, and thus was vicariously liable (along with the university) for their negligence. *Jaar* is precisely the kind of case in which a summary judgment may be appropriate--the case of residents who in fact are subject to the supervision of another doctor. *Accord, DeRosa v. Shands Teaching Hospital & Clinics, Inc.,* 504 So. 2d 1313, 1314-15 (Fla. 1st DCA 1987) (petitioners' brief at 19 n.24, 37; FMA amicus brief at 11) (resident doctors working at private hospital entitled to sovereign immunity, because state university's "faculty members directly control and supervise patient care services provided by the university's physicians in training at [the hospital]," the university selected the residents assigned to the hospital, the hospital kept no work records on the residents, and the "university alone has power to dismiss physicians in training").[23/]

[23/] As petitioner Stoll described *DeRosa* in his district-court brief (p. 19), "the University directly controlled and supervised residents providing patient care . . . ." The petitionenrs' suggestion (brief at 37)--that the facts of the instant case "are at least as strong as, if not

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Similarly, in *Bryant v. Duval County Hospital Authority,* 459 So. 2d 1154, 1155 (Fla. 1st DCA 1984) (petitioners' brief at 19 n.24; FMA amicus brief at 12), the court affirmed a summary judgment for the doctor, who was full-time chairman of the hospital's neurosurgery department, paid his base salary (a salary unrelated to the number of patients whom he treated) by the hospital, notwithstanding that the doctor served the hospital under a contract which it had made with a university's fund, which billed for the doctor's services and collected his fees. The key to the decision, as the court stated explicitly, was that the hospital--not the fund--controlled the doctor's activities. *Id.* at 1155.[24/]

In contrast to these cases, in which the facts were relatively straightforward, we have encountered several in which the evidence of an agency relationship was far stronger than it is in the instant case, and yet the reviewing court found that a question of fact had been presented. In *Irving v. Doctors Hospital of Lake Worth, Inc.,* 415 So. 2d 55 (Fla. 4th DCA), *review denied,* 422 So. 2d 842 (Fla. 1982), the defendant doctor worked only in the hospital's emergency room 48-50 hours a week; saw no patients of his own; kept no records of his own; issued no bills of his own; engaged in no follow-up care of the patients; was required to see all

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substantially stronger than, the facts in [*DeRosa*]"--can only be described as wishful thinking. The *DeRosa* doctors were fulltime residents subject to constant supervision. The doctors here worked a few hours every few weeks, subject to no supervision.

[24/] As petitioner Stoll described *Bryant* in his district-court brief (p. 19), the hospital "had the right to control Dr. Bremmer's conduct . . . ." Three other decisions cited by the petitioners or the amicae offer no support for their position. In *Public Health Trust of Dade County v. Valcin,* 507 So. 2d 596, 601 (Fla. 1987) (petitioners' brief at 19 n.24; FMA amicus brief at 11), this Court affirmed dismissal of a doctor without discussing the facts. In *Atwater v. Broward,* 556 So. 2d 1161, 1162 (Fla. 4th DCA), *review denied,* 564 So. 2d 486 (Fla. 1990) (FMA amicus brief at 12), the court held that the doctor did not waive immunity by purchasing liability insurance; there is no discussion of the agency issue. Likewise no discussion of agency in *White v. Hillsborough County Hospital Authority,* 448 So. 2d 2, 3 (Fla. 2d DCA), *review dismissed,* 443 So. 2d 981 (Fla. 1983) (petition at 19 n.24; FMA amicus brief at 12), in which the sole issue is the constitutionality of § 768.28.

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of the hospital's patients; utilized exclusively the hospital's facilities, medicines and personnel; and was subject to the hospital's "policy and procedure manual" and "by-laws [which] contained detailed instructions on the manner in which emergency room care was to be administered, including mandatory procedures to be followed in specific situations." *Id.* at 56. And yet, despite all of these facts--facts overwhelmingly stronger than those at issue in this case--the court found no error in the trial court's refusal to direct a verdict for the plaintiff (who sought to establish the agency relationship), "because a jury question was presented." *Id.* If the doctors' status as employees was not established, as a matter of law, in *Irving,* then the trial court here necessarily erred in entering summary judgment for the defendants.

Two additional cases--perhaps less striking than *Irving*, but no less persuasive--make the same point. In *Garcia v. Tarrio,* 380 So. 2d 1068, 1069 (Fla. 3d DCA 1980), notwithstanding that the hospital assigned its patients to the doctor, that the doctor worked nowhere else, and that the doctor exclusively utilized the hospital's equipment and services, the court found that a jury question was presented. And in *Shands Teaching Hospital and Clinics, Inc. v. Pendley,* 577 So. 2d 632, 633-34 (Fla. 1st DCA), *review denied,* 587 So. 2d 1329 (Fla. 1991), the facts presented a jury question notwithstanding the hospital's contractual right both to discipline and control the residents in question.

In comparison to the above-cited cases, the instant case presents overwhelming issues of fact. The defendant doctors maintained their own private practices virtually all the time. They worked at CMS as consultants--a "status" created by CMS, not by the State of Florida--anywhere from half a day a week to once or twice a month. They were required by contract to carry their own malpractice insurance; they were paid on an hourly basis; they took no loyalty oath to the state; and they received no sick leave, no vacation time, no retirement benefits, no insurance, and no job security. They were subject to no control whatsoever in the performance of their sole function--providing medical care to indigent children. The HRS manual told them

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nothing about how to perform that function, nor did (or could) any of the nurses or employees at the clinic in which they worked. We will not repeat here the overwhelming testimony--both from state officials and from operational-level doctors and nurses--attesting to the virtually-unbridled discretion enjoyed by the four defendant doctors in providing care and treatment in their specialties. We ask the Court to simply re-read our statement of facts, *supra* pp. 12-21, as compared to the case law summarized above.[25/]

Based upon the standard case-by-case critiera for defining agency, this appeal is not remotely close. If anyone was entitled to a summary judgment on the question of agency, it was the plaintiffs--not the defendant doctors. The evidence of record would overwhelmingly support a jury's finding that these physicians are independent contractors, as the district court properly held.

3. The Defendants' Rebuttal: The Ultimate Right of Control. The defendants and the amicae have not denied that control is the key criterion; but they have pointed out that an agency relationship may be defined not only by the control actually exercised by the principal, but also by the extent to which the principal has retained the ultimate right to control the details

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[25/] As we have noted, the Florida Legislature obviously agrees with the respondents' position. Effective April 17, 1992, the legislature enacted § 766.1115, Fla. Stat. (1992 Supp.), which provides that all doctors who execute contracts with the State to "deliver health care services to low-income recipients" which are "volunteer, uncompensated services" (§ 766.1115(3)(a))--if such contracts contain certain specified terms (§ 766.1115(4)), and if the doctor's status is revealed in writing to the patient (§ 766.1115(5))--are considered to be "an agent for purposes of s. 768.28(9)." Section 381.0302(11) confers immunity upon those "providing uncompensated services to medically indigent persons" in the Florida Health Services Corps. And § 768.28(10)(c) confers immunity on employees of "regional poison control centers" supervised by CMS, but no other CMS workers. The statutes clearly indicate the legislature's belief that non-civil-service doctors like the defendants, who are paid for indigent services by the state, are not automatically entitled to the status of state employees. HRS/CMS may be correct (amicus brief at 1, 10) that a doctor may potentially qualify for immunity even if he is paid by the state; but he is not automatically immunized like the specified non-paid doctors in §§ 766.1115 and 381.0302(11). Instead he must satisfy the fact-based case-by-case test of § 768.28(9)(a).

of the work in question (*see* petitioners' brief at 17, 29, 35; FMA amicus brief at 14). We do not disagree. The dispositive question is "whether the person is subject to or whether he is free from control with regard to the details of the engagement," "the decisive question being who has the right to direct what shall be done, and when and how it shall be done."[26/] We acknowledge that in proper cases, an agency relationship can inhere in the putative principal's right to control the details of the putative agent's work, whether or not the principal actually exercises that right.

We also acknowledge that the HRS manual purports to give the CMS medical director in Tallahassee supervisory authority over the care and treatment of patients ("within budgetary constraints," § 3-1(b), at 3-1); prescribes prior authorization by the medical director of tests, services and hospitalization (§ 5-6, at 5-20); authorizes the refusal to pay for services; and contains alot of other language reserving to the agency's director the purported right of both prior and ultimate approval of the consultants' treatment of CMS patients. These provisions are outlined in great detail in the petitioners' brief (pp. 3-9, 17, 19-23, 29, 35-36; *see also* HRS/CMS amicus brief at 2, 5, FMA amicus brief at 5-6, 14-15).

What the petitioners have failed to recognize, however, is that the right of control must be ***meaningful***--not illusory; it must be accompanied by a ***capacity*** to direct the agent's work, as opposed to the hollow assertion of such a right. The right of control is defined by practicalities--not formalities. This Court made that crystal clear only a few months ago in a workers'-compensation case--*Keith v. News & Sun Sentinel Co.,* 659 So. 2d 1074, 1079 (Fla. 1995):

[26/] *Collins v. Federated Mutual Implement and Hardware Ins. Co.,* 247 So. 2d 461, 463 (Fla. 4th DCA), *cert. denied,* 249 So. 2d 689 (Fla. 1971). *Accord, Farmers & Merchants Bank v. Vocelle,* 106 So. 2d 92, 95 (Fla. 1st DCA 1958) (question is whether the agent is "subject to the control or direction of the owner as to the result to be obtained," or whether he is "subject to the control of the person being served as to the means to be employed").

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> [C]ourts should initially look to the agreement between the parties, if there is one, and honor that agreement, unless other provisions of the agreement, or the parties' actual practice, demonstrate that it is not a valid indication of status. . . . [W]here other provisions of an agreement, or the actual practice of the parties, belie the creation of the status agreed to by the parties, the actual practice and relationship of the parties should control.

Accord, Cantor v. Cochran, 184 So. 2d 173, 174 (Fla. 1966) ("While the obvious purpose to be accomplished by this document was to evince an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other").

The message could not be more clear. The formal reservation of control is only one factor in the overall determination. Thus, for example, in *National Surety Corp. v. Windham,* 74 So. 2d 549, 550 (Fla. 1954), *receded from on other grounds, Griffin v. Speidel,* 179 So. 2d 569 (Fla. 1965), notwithstanding the principal's theoretical right of control, and notwithstanding that the right had been sporadically exercised, there was no agency at the particular time in question, because at that time the principal was incapable (by virtue of drunkenness) of exercising his right of control. And in *Farmers' Merchants Bank v. Vocelle,* 106 So. 2d 92, 95 (Fla. 1st DCA 1958), although the bank could have structured its relationship with its janitorial staff in a manner which involved direct supervision of its activities--that is, although the bank had a theoretical right of control--the dispositive question was whether the bank in fact had retained such a right; and the court had little trouble holding that it had not:

> At the outset is the circumstance that at no time is it shown that any control or supervision was exercised or attempted. The time of performance was such [janitorial services after hours, when bank employees were not present] that no such control was contemplated. The bank did furnish the tools and supplies, but only what Berthena herself selected and requested. Furthermore Berthena had a regular job which more or less controlled when she performed the work for the bank. The inference is much stronger that one of the conditions of her accepting the work was that she

> have independence in its performance and that she be responsive only for the results. She had the liberty of getting others to do the work; she had no instructions other than to do a good cleaning job; she was free to do the same work for others which on some occasions she did; and she had complete freedom to do the work in whatever way she saw fit.

Notwithstanding the bank's theoretical powers, the court found no agency because there was "no positive evidence that the bank retained the right of control over the means of performance, and no such right can be inferred from the circumstances except the menial nature of the job."

The same reasoning is found in *F.L. Enterprises, Inc. v. Unemployment Appeals Commission,* 515 So. 2d 1340, 1342 (Fla. 5th DCA 1987):

> Of all the factors, the right of control as to the mode of doing the work is the principal consideration. . . . The evidence here clearly shows that F.L. Enterprises exercised no control over the *details* of the work and left Jouben to solicit prospects entirely as she wished. There was simply no requirement that the work be done in a particular manner, and there is no evidence that Jouben's presentations were monitored or reviewed. While Jouben was expected to work particular times and locations, she notified F.L. Enterprises what periods she would be available for work. Furthermore, merely expecting that a worker be present at a particular location during a particular time does not, without more, transform the worker from an independent contractor to an employee.

Here too, the court was concerned not with theoretical possibilities but with practical realities--that the company in fact "exercised no control over the *details* of the work," and that there was "no requirement that the work be done in a particular manner" and "no evidence that Jouben's presentations were monitored or reviewed." *See also Aetna Casualty & Surety Co. v. Protective National Ins. Co. of Omaha,* _____ So. 2d _____ (Fla. 3d DCA 1993) (insurance company has no authority to control attorney which it has hired, in the actual conduct of litigation); *T&T Communications, Inc. v. State Department of Labor and Employment Security,* 460 So. 2d 996, 998 (Fla. 2d DCA 1984) (purported agents were "skilled tradesmen" who were "normally

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unsupervised").

The petitioners have not even attempted to demonstrate a meaningful right of control in this case. They are content to rely upon the agency's formalistic reservation of ultimate responsibility for the care and treatment of CMS patients, which in the real-world context of this particular operation is a practical impossibility. It is a fact of record--because the evidence is uncontradicted--that the consultant system was structured so as to make any such supervision inherently impossible. The evidence for this point is overwhelming and uncontradicted. It is relevant here not to vary the terms of the written framework, thus implicating the parol-evidence rule (*see* petitioners' brief at 30), but to show that the unambiguous written framework is meaningless in practice.

As we have emphasized, there are no instructions--orally or in writing, in the HRS manual or anywhere else--which purport to tell the doctors how to practice medicine (*see* Furlough Dep., 7-9-92, R. 3086 at 25; Cupoli Dep., 10-21-92, R. 3657 at 12, 30, 39-41, 69; Scheer Dep., 10-26-92, *see* R. 3767, at 116). As we noted, the only physician involved with the Broward clinic in an administrative capacity is its director, William Fanizzi, who visits the clinic only one morning per week (Fanizzi Dep., 11-19-91, R. 3245 at 79), and has almost no day-to-day involvement with the consultants' care and treatment of CMS children (Scheer Dep., 10-26-92, *see* R. 3767, at 9, 11-12). Dr. Fanizzi's "duties are only administrative work. He really doesn't get involved with the actual clinical care" (Hodge Dep., 5-10-91, R. 2925 at 16). Even if Dr. Fanizzi theoretically had the authority to supervise the consultants, the fact is that he is not present at the clinic on a day-to-day basis, and thus is physically incapable of such supervision. As the Assistant Secretary for Children's Medical Services put it: "[T]he physician will come in and do the physical and history and physical and evaluation and then give a proposed list of treatments . . . . [T]he physician directs the management and the nurses see it through" (Cupoli Dep., 10-21-92, R. 3657 at 53). Or as the Deputy HRS Secretary for Human

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Services testified, "the physicians [are] free to practice medicine adhering to their standard of care for their particular discipline while they practice medicine in the clinic"; and "the consultant [is] left to his or her own education, training, experience in performing that engagement" (Kenyon Dep., 10-21-92, *see* R. 3767, at 40, 43; *see id.* at 49-50). Thus, the Deputy Assistant Secretary for Children's Medical Services concluded, "the practice of medicine is left to the physicians on a daily basis with their patients" (Furlough Dep., 7-9-92, R. 3086 at 30-33); and no one in the CMS hierarchy, including the clinic's medical director, has "the authority to tell the consultant physician or the OPS provider that they could not perform the diagnostic workup or the procedure" in question (*id.* at 41-42). The Court will find a number of additional citations to the same effect at pages 12-21, *supra*.

In practical terms, the reservation of such an ultimate right is meaningless. Not only are the consultants' services not subject to prior approval or authorization; the CMS is inherently incapable of providing such prior authorization, because it has no doctor on site to do so. Under the authorities cited above, not only was there no control in fact; there was no retention of a meaningful right of control either. We conclude that the evidence of record embraces a classic factual conflict on the key question of agency. By reference to the central criterion under Florida law--the exericse or retention of control--if anyone was entitled to a summary judgment on this point, it was the plaintiffs--not the defendants.

4. The Other Miscellaneous Factors Relevant to the Agency Question; at Best a Conflict of Fact. The petitioners and the amicae have pointed to several additional miscellaneous factors which assertedly support their position. We do not deny the relevance of these factors, but none of them is dispositive; and there are several which point the other way.

1) Factors Invoked by the Petitioners. First, the petitioners emphasize the state's "concession" that CMS consultants are its agents (petition at 2, 18, 24-26). Of course, that "concession" is significantly undermined by the unanimous contrary testimony of every public

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official involved with this program. In any event, it makes no sense to suggest that a state's "admission" should be dispositive of the issue; that would make the state the sole arbiter of sovereign immunity in Florida, abrogating the language of the legislature and the role of the courts. Not surprisingly, therefore, it is well established that a party's "admission" of an agency relationship is only one factor for the court to consider. *See Cantor v. Cochran,* 184 So. 2d 173, 174 (Fla. 1966); *Lee v. American Family Life Assurance Co. of Columbus,* 431 So. 2d 249, 250 (Fla. 1st DCA 1983).

Second, the petitioners point out that the agency hires the CMS consultants, and can fire them (petition at 8, 34, 37; *see* HRS/CMS amicus brief at 10). The power to hire and fire is relevant, but it is not dispositive. As the court put it in *Farmers' & Merchants Bank v. Vocelle,* 106 So. 2d 92, 95 (Fla. 1st DCA 1958): "[T]he mere fact that the one being served can, at will, terminate the relationship without incurring liability is not a conclusive circumstance of an employment, although such may be a highly indicative factor. . . . A patient may 'fire' his physician, and a client his attorney, without incurring liabilities . . . ." *Accord, Lee v. American Family Life Assurance Co. of Columbus,* 431 So. 2d 249, 251 (Fla. 1st DCA 1983).

Third, the petitioners have emphasized the state's ownership and control of all aspects of the clinic itself--including the nurses and other employees, the physical plant and medical instruments, the admission of patients, and even the consultants' specialty assignments and work schedules (*see* petitioners' brief at 7, 34, 36; FMA amicus brief at 14). We acknowledge that control of the facility is a relevant factor, but it certainly is not dispositive. As the court put it in *Ft. Myers Airways, Inc. v. American States Ins. Co.,* 411 So. 2d 883, 886 (Fla. 2d DCA), *review denied,* 418 So. 2d 1278 (Fla. 1982): "It is the control of the relationship and not of the instrument which determines the relationship between the parties." *See Florida Industrial Comm'n v. State,* 155 Fla. 772, 21 So. 2d 599, 604 (1945) (ownership of the facility is not enough). The putative principal may dictate hours and patients to be seen, without necessarily

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controlling the relationship: "The fact that, as a [hospital] staff member, [the defendant] was required to be 'on call' on this particular evening and [to] care for whosoever appeared at the hospital in need does not *ipso facto* make [the doctor] the hospital's agent." *Baldwin v. Dellerson,* 541 So. 2d 779, 780 (Fla. 4th DCA 1989).[27/] These factors all are relevant, but they are not dispositive.

Indeed, as we have suggested, *supra* pp. 19-20, it may be argued in the unique circumstances of this case that CMS' control over the plant, the facility, the equipment and the staff--with the consultant doctors entirely out of that loop--is a powerful indication of the consultants' independent-contractor status. There can be little question that if the doctors were bona fide agents or employees, they would certainly have line authority over every aspect of the clinic, and over all subordinate personnel. Instead, like any independent contractors, the doctors are restricted to the specific jobs to which they are assigned, and have no responsibility or authority outside the parameters of those jobs. This point alone is sufficient to create an issue of fact on the question of independent-contractor status.

Fourth (brief at 7, 27), the petitioners argue that their status is recorded in the release form executed by CMS patients, which says that treatment will be provided by "agents" of CMS and the State of Florida (*see* R. 3082, 3389). However, the release form does not identify the "agents" whose employment the patient assertedly acknowledges; it thus carries virtually no weight in determining whether the CMS consultants are agents or instead independent contractors. At most it is one small factor, of marginal relevance.

[27/] *Accord, F.L. Enterprises, Inc. v. Unemployment Appeals Comm'n,* 515 So. 2d 1340, 1342 (Fla. 5th DCA 1987) (control of time and place insufficient); *Kane Furniture Corp. v. Miranda,* 506 So. 2d 1061, 1064-65 (Fla. 2d DCA), *review denied,* 515 So. 2d 230 (Fla. 1987) (control of plans and specifications insufficient, without control of implementation); *T&T Communications v. State Department of Labor and Employment Security,* 460 So. 2d 996, 998 (Fla. 2d DCA 1984) (same); *Lee v. American Family Life Assurance Co. of Columbus,* 431 So. 2d 249, 251 (Fla. 1st DCA 1983) (control of promotional materials insufficient).

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2) *Factors Which Support the Plaintiffs' Position.* Moreover, in addition to the miscellaneous factors invoked by the petitioners, there are a number of miscellaneous factors which point the other way. First is the fact that the doctors are not salaried, and are not subject to any withholding requirements, but are paid on an hourly basis. Although they are not paid per patient (*see* the petitioners' brief at 37), they nevertheless are not salaried, and that is one factor which suggests independent-contractor status.[28/]

Second, it is significant that the CMS consultants take no loyalty oath to the state, and receive no sick leave, no vacation time, no retirement benefits, no insurance, and no job security. Those are all indices of an agency relationship, and all of them are missing here. *See F.L. Enterprises, Inc. v. Unemployment Appeals Comm'n,* 515 So. 2d at 1342; *Strickland v. Progressive American Ins. Co.,* 468 So. 2d at 526.

Third, it is significant that the consultants do not work at the CMS clinics full time. The four defendants worked no more than a few times a month, and devoted the rest of their time to their private practices. *See Strickland v. Progressive American Ins. Co.,* 468 So. 2d at 526, *citing Aldridge v. Yellow Cab of Gainesville, Inc.,* 448 So. 2d 1129 (Fla. 1st DCA), *review denied,* 456 So. 2d 1183 (Fla. 1984).[29/]

Fourth, as we have noted, although the 1300 OPS doctors are covered by the state's Risk Management System, the CMS consultants are required to carry their own insurance (Parker

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[28/] *See Eighty Four Lumber v. Bethel,* 544 So. 2d 1094, 1096 (Fla. 1st DCA 1989) (no withholding); *F.L. Enterprises, Inc. v. Unemployment Appeals Comm'n,* 515 So. 2d 1340, 1342 (Fla. 5th DCA 1987) (no withholding); *Kane Furniture Corp. v. Miranda,* 506 So. 2d 1061, 1065-66 (Fla. 2d DCA 1987), *review denied,* 515 So. 2d 230 (Fla. 1987) (payment per yard of material--no withholding); *Strickland v. Progressive American Ins. Co.,* 468 So. 2d 525, 526 (Fla. 1st DCA 1985) (method of payment is a relevant factor; no withholding).

[29/] Defendant Hodge had given up her private practice in anticipation of moving out of Florida (*see* Hodge district court brief at 3 & n.3); but she still worked at the clinic only one-half day a week (Hodge Dep. 5-10-91, R. 292 at 50; Hodge Dep. 10-30-92, *see* R. 3767, at 45, 50).

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Dep., 7-9-92, R. 3170 at 55; Cupoli Dep., 10-21-92, R. 3657 at 25; Kenyon Dep., 10-21-92, *see* R. 3767, at 55). Given the petitioners' emphasis upon the state's position before this Court, the state's actions in requiring CMS consultants to carry their own insurance may speak louder than its words.

Fifth, the OPS consultant designation is not a civil service position but a "status"--created not by the state but by CMS itself (Parker Dep., 7-9-92, R. 3170 at 17, 21, 23, 57).

At bottom, the most we can say about the evidence of record--on issues other than the key issue of control--is that the evidence points both ways. It certainly cannot be said that the evidence on these issues is so overwhelming in favor of the adverse parties' position that it could save the orders of summary judgment from reversal. On the key issue of control, and on all the other issues, there are significant material disputes of fact, which necessarily precluded summary judgment.

B. THE DISTRICT COURT DID NOT ERR IN REVERSING THE SUMMARY JUDGMENT FOR TWO PROFESSIONAL ASSOCIATIONS, BECAUSE OF EVIDENCE THAT THE INDIVIDUAL DOCTORS IN QUESTION WERE ACTING ON BEHALF OF THEIR PROFESSIONAL ASSOCIATIONS AT THE TIME OF THEIR ALLEGED MALPRACTICE.

As to Dr. Stoll's P.A., there is simply no evidence of record one way or the other on the point. Dr. Stoll testified on deposition that he has his own professional association, that he did at the time he treated Minouche Noel, and that he has no other partners in that professional association (Stoll Dep., 5-7-91, R. 3586 at 6). That is the only evidence of record which we can find on the point, and it hardly sustains Dr. Stoll's obligation, as the moving party on summary judgment, to demonstrate that his service at CMS was outside the scope of his relationship with his professional association.

As to Dr. Watson, there is affirmative evidence that his work at the clinic was indeed performed within the scope of his relationship with his professional association. Dr. Watson

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acknowledged that he was employed by his professional association at the time he treated Minouche Noel; and he testified that the check which CMS wrote for that service, although made out to him personally, was deposited into the bank account of his professional association (Watson Dep., 4-9-91, *see* R. 3586, at 13-14). That evidence, admitting that the professional association was the recipient of the fee paid to Dr. Watson for his service at the clinic, unquestionably creates an issue of fact concerning the professional association's liability.

V
CONCLUSION

It is respectfully submitted that the certified question should be answered in the negative, and that the decision of the district court should be approved.

VI
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 23rd day of January, 1996, to all counsel of record on the attached service list.

Respectfully submitted,

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