FLORIDA SUPREME COURT
Tallahassee, FL

Case No.86,685

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,

v.

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.
_____/

4DCA CASE NO. 93-10731

BROWARD
L.T. CASE NO. 90-31966 13

Certified Question Of Great Public Importance From The District Court of Appeal, Fourth District

PETITIONERS' BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES

OTHER AUTHORITIES

PETITIONERS'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

The issue presented by this appeal is whether physicians who contract with the Florida Department of Health and Rehabilitative Services ("HRS") to work on behalf of the Children's Medical Services ("CMS") program are entitled to the protection of Florida Statutes Section 768.28, which not only immunizes "agents" of the State from liability, but also prohibits them from being "named as [] party defendant[s] in any action." § 768.28(9)(a), Fla. Stat. (1995). This issue was certified to this Court by the Fourth District Court of Appeal as one of great public importance after that Court reversed a summary judgment in favor of Petitioners Amos W. Stoll, M.D., Allen S. Watson, M.D., Sonia Hodge, M.D. and Ronald C. Sirois, M.D.[1] The trial court granted summary judgment to Petitioners, all of whom contracted with HRS to work on behalf of CMS, on the ground that they were entitled to the protection of Section 768.28.

The action underlying this appeal was originally filed in 1990 by the parents of Minouche Noel, both individually and on behalf of their daughter. They alleged that Petitioners, a neurosurgeon, an orthopedic surgeon, a pediatrician and a urologist who cared for Minouche as part of a multi-disciplinary team, failed adequately to diagnose and treat a cyst which complicated Minouche's spina bifida. All of Respondents' allegations arise out of medical care Petitioners provided to Minouche at the CMS clinic

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[1] Two of the four physicians, Dr. Amos Stoll and Dr. Allen Watson, formed professional associations which technically also are petitioners in this action. See infra at 38-39.

in Fort Lauderdale, which is operated by HRS pursuant to Florida Statutes Ch. 391 and § 20.19, and/or subsequent surgery at the Broward General Medical Center ("BGMC"), a state facility. Respondents also named HRS and BGMC as defendants in this suit, claiming that they were vicariously liable for the actions of the Petitioners.

All of the Petitioners affirmatively pled that they were employees or agents of CMS/HRS and entitled to immunity under to Section 768.28, and all ultimately moved for summary judgment on that ground. In connection with those motions, the State formally admitted that the Petitioners were acting as employees and agents of the State, see, e.g., R. 4631-32, 4655-57, and, rather than disputing its vicarious liability for Petitioners' alleged negligence, the State acknowledged that it was the only proper defendant in this case.[2] On May 5, 1993, the circuit court entered final summary judgment in favor of Petitioners, finding that they were both "employees" and "agents" of the State. As a result of that ruling, two state entities -- HRS and BGMC -- remain as defendants in this case, and remain available to compensate the Respondents should they ultimately prevail on the merits of their claim. The trial against those entities has been stayed pending the outcome of this appeal.

On appeal, the Fourth District Court of Appeal, in an opinion authored by the Honorable Juan Ramirez, Jr., sitting by

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[2] R. 5113-5127, Memorandum of Law of the State of Florida in Support of the Motions for Summary Judgment of Defendants Hodge, Sirois, Stoll and Watson at 14 (Feb. 23, 1993).

designation, acknowledged that the Petitioners were "consultants" to the CMS program, Opinion (September 27, 1995) at 3;[3] that the CMS Act "designates HRS as the manager and the entity ultimately responsible for the CMS Program," id.; that the Medical Director of CMS has the authority to refuse to pay for any proposed therapy, id. at 5; and that both "agents" and "employees" of the State are immune from suit under Section 768.28. The Court also acknowledged that "appellees are providing a great service for the community." Id. at 6.

Nonetheless, the Court of Appeal reversed the judgment of the circuit court. It stated that the authority to refuse to pay for a treatment "is not equivalent to actually directing the type or course of treatment," id. at 5, and that "appellant [Respondents] points out that no one in the CMS hierarchy has the power to veto the medical decision of a consultant doctor. At the very least, appellant has made numerous references to the record to support its position, thereby creating an issue of material fact." Id. The court did not identify the specific record evidence on which it relied in reaching its conclusion, nor did it attempt to square its conclusion with the language of the HRS Manual, discussed below, which vests in HRS the responsibility to "supervis[e]" and "direct[]" the "proper care and treatment . . . of all patients." In response to Petitioners' Joint Motion for

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[3] The Fourth District issued an initial opinion on March 29, 1995. Petitioners timely filed a Joint Motion for Certification and in response, the Fourth District issued a second opinion on September 27, 1995, vacating the original opinion and certifying the question presented. The latter opinion is attached as Appendix A.

Certification, however, the court, recognizing that whether CMS Consultants such as Petitioners are entitled to immunity controlled the outcome of this case, certified the question presented to this Court. Petitioners now bring this matter before this Court to address that certified question.

STATEMENT OF THE FACTS

The CMS clinic in Fort Lauderdale is one of 16 clinics across the State operated by HRS. § 391.091, Fla. Stat. (1995). The network of CMS clinics was established in the mid 1960s "to provide medical services for needy children, particularly those with chronic, crippling or potentially crippling . . . diseases or conditions." § 391.016, Fla. Stat. (1995). This network was established to satisfy the requirement of Title V of the federal Social Security Act that each state designate an agency for receipt of federal funds for the care of indigent, chronically ill children.

Each of the CMS clinics is administered by a medical and nursing director, and each is staffed by a full-time nursing and administrative staff. Record ("R.") 2789-2921, HRS Manual, § 4 (attached as Appendix B)[4]. Other than the Medical Director,

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[4] Record citations refer, where possible, to actual pages in the Record. In some instances, however, that is not possible, because certain documents, particularly depositions, were not fully integrated into the Record when it was created; instead, the Notices of Filing of those documents were numbered, but the documents themselves were not. Where we cite to such documents, or where the index to the Record is unclear, we cite to the page(s) in the Record where the document is indexed, provide the name of the document, and then cite to the specific page(s) in the document to which we are referring. We understand that

(continued...)

however, there are no full-time physicians practicing at CMS. Rather, CMS relies entirely on community physicians with whom it contracts on a part-time basis to treat its patients.[5] CMS contracts with these individuals -- designated "Consultants" -- pursuant to its statutory "powers, duties and responsibilities . . . to provide or contract for the provision of medical services to eligible individuals." § 391.026, Fla. Stat. (1995).

Under the authority delegated to it under Chapter 391 and Section 20.19, CMS published the policies and rules governing its relationship with the Consultants in two documents -- a manual entitled "HRS Manual: Children's Medical Services" (the "HRS Manual") and the "CMS Consultant's Guide," which is provided to all Consultants. CMS requires each Consultant to agree to abide by the terms of these documents. Specifically, each Consultant, as a condition of participating in the CMS program, is required to sign a form stating that "I request that my name be added to the panel of Consultants rendering specialty or special services to Children's Medical Services, by whose policies I agree to abide." R. 925, CMS Consultant's Guide (Ex. to Deposition of Dr. Sonia Hodge, 5/10/95) (emphasis added).

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[4] (...continued)
subsequent to the creation of the Record, all depositions were filed with the Court of Appeal.

[5] See, e.g., Record ("R.") 3657-3764, Deposition of Dr. Michael Cupoli ("Cupoli Depo"), 10/21/92, at 9-10, 43; R. 3767-68, Deposition of Varnum S. Kenyon ("Kenyon Depo"), 10/21/92, at 9-10; R. 3767-68, Deposition of Robert Williams ("Williams Depo"), 10/21/92, at 11-15, 21-22; R. 3086-3152, Deposition of Dr. Robert Furlough ("Furlough Depo"), 7/9/92, at 20, 30-31, 50-55; R. 3245-3365, Deposition of William Fanizzi ("Fanizzi Depo"), 11/19/91, at 19.

The HRS Manual establishes, inter alia:

- The Authority of the Medical Director -- The Medical Director of each clinic, not the Consultants, is ultimately "responsible for . . . [s]upervising and directing the proper care and treatment, within budgetary constraints, of all patients who are financially and medically eligible for [CMS'] services, including review of all patient care activities and priorities of patients for services." R. 2789-2921, § 3-1(b), HRS Manual, at 3-1 (emphasis added).

- The Qualifications of "Consultants" -- To qualify as a Consultant, a physician must, inter alia, be board certified, a member in good standing in the local county medical society, have staff privileges at a licensed and accredited hospital, and be in compliance with certain post-graduate education requirements. Id. § 4-6, at 4-2.

- Eligibility Criteria for Patients -- To be eligible for the CMS program, a child must satisfy certain specific financial and medical eligibility criteria. Id. § 5-4, at 5-4.

- A "Case Management" System -- "Case management is the process of planning and assuring comprehensive health care services for CMS patients." Id. § 5-1, at 5-1. Under this system, medical care is provided by the Consultants (acting under the supervision of the Medical Director, see infra Part II), but a CMS nurse who is designated as the case manager for each patient is explicitly made responsible for "supervis[ing] the implementation [of], and monitor[ing] the progress of the patient's treatment plan." Id. §§ 1-5, 5-4(c), at 1-2, 5-5.

- Rules Governing the Provision of Clinic Services -- Among other rules, the Manual states that "[a]ll services provided to CMS patients must be prior authorized," id. § 5-6(d), at 5-20; that "[c]linics are held in accordance with schedules approved by the local CMS Medical Director," id. § 4-2, at 4-1, and that consultants must accept their compensation from the clinic as payment in full for their services, id. § 5-6, at 5-20.

The "Consultant's Guide," in a section entitled "Rights and Responsibilities of Consultants," amplifies the language of the Manual concerning the Medical Director's broad supervisory authority. It states, in pertinent part, that "[a]ll services provided to CMS patients must be prior authorized. This means the

service has been approved through the medical director or CMS case management nurse prior to service delivery." R. 3767-68, Consultant's Guide, at 5 (emphasis in original).

Additional details about the relationship between CMS and its Consultants were provided by various witnesses in this case. The testimony below demonstrated that:

- CMS' Medical Director determines each physician's qualifications and each patient's eligibility for treatment[6];
- Upon being accepted for treatment by CMS, patients, including Respondents, execute a release form in which they acknowledge that care and treatment will be provided by "agents" of CMS and the state[7];
- CMS provides all equipment, supplies, and support services and maintains control and custody of all CMS patient records[8];
- All CMS physicians must adhere to CMS' operating procedures at the clinic[9];
- CMS physicians are required to see and treat all eligible CMS patients[10];

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[6] R. 3086-3152, Furlough Depo, at 20-21, 32-35; R. 3011-3081, Deposition of June Scheer ("Scheer Depo"), 11/19/91,, at 7-9, 12-14, 35-36; R. 3245-3365, Fanizzi Depo, at 6; R. 3657-3764, R. 3767-68, Cupoli Depo, at 13-15, 43.

[7] R. 3082, CMS Release Form; R. 3389, CMS Release Form; R. 3011-3081, Scheer Depo, at 32; R. 3086-3152, Furlough Depo, at 48.

[8] R. 3011-3081, Scheer Depo, at 16-24; R. 3086-3152, Furlough Depo, at 37, 56-57, 62; R. 3245-3365, Fanizzi Depo, at 99, 109-110; R. 3657-3764, Cupoli Depo, at 85-87.

[9] R. 3011-3081, Scheer Depo, at 15; R. 3086-3152, Furlough Depo, at 21.

[10] R. 3011-3081, Scheer Depo, at 14; R. 3086-3152, Furlough Depo, at 36; R. 3170-3241, Deposition of Jayne Parker, R.N. ("Parker Depo"), 7/9/92, at 41, 54; R. 3245-3365, Fanizzi Depo, at 92, 113; and R. 3657-3764, Cupoli Depo, at 81.

- CMS consultant physicians undergo CMS peer review or quality assurance review and pay review[11];
- CMS has the authority to terminate a physician's relationship with CMS for any reason and at any time[12];
- CMS controls the hours worked by the physicians and determines the time and place where the physicians render care and treatment to CMS patients[13]; and
- CMS has final authority over all care and treatment provided to CMS patients, and it can refuse to allow a Consultant's recommended course of treatment of any CMS patient for either medical or budgetary reasons.[14]

The State has not disputed any of these facts. To the contrary, despite its potential liability in this case, it has acknowledged that they create an agency relationship. R. 4631-32, 4655-57.

ISSUE PRESENTED FOR REVIEW

WHETHER IMMUNITY PURSUANT TO FLORIDA STATUTE 768.28 SHOULD BE GRANTED TO PHYSICIAN CONSULTANTS WHO CONTRACT WITH THE FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, CHILDREN'S MEDICAL SERVICES?

SUMMARY OF ARGUMENT

I. In Section 768.28, the Legislature immunized both "employees" and "agents" of the State not just from liability, but also from suit. In so doing, it substituted its liability to injured persons for the liability of public employees and agents.

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[11] R. 3011-3081, Scheer Depo, at 62, 64, 110; R. 3086-3152, Furlough Depo, at 59-60; R. 3657-3764, Cupoli Depo, at 76-77.

[12] See infra at 37.

[13] See infra at 36.

[14] See infra at 35-36.

It did so, in large measure, to attract qualified individuals to work for the State.

An "agent" is a person who works on behalf of another individual, subject to that individual's authority to direct the means by which he or she performs an assigned task. The category of "agents" is far broader than the category of "employees," and in fact includes many workers -- such as doctors, in many instances -- who are technically "independent contractors." Whether or not a principal actually exercises any authority over the agent does not affect the agent's status.

II. CMS Consultants, including Petitioners, are "agents" of HRS, and entitled to immunity, because they perform a state function and because HRS retains the authority to control the means by which they perform their tasks. The principal evidence of HRS's authority over its Consultants is the plain language of the HRS Manual. That language demonstrates that HRS has not just the right, but in fact the "responsibility," to "supervise" and "direct" the "medical" care of all CMS patients, and has "supervisory authority" over all "personnel." The Manual also grants to the Medical Director absolute authority over payment for treatments proposed by Consultants. That power is independent of the power directly to control medical care, but in the CMS context, just as important. In this context, where all patients are indigent, the authority to decline to pay for treatment is, in fact, the power to determine what care patients will receive. HRS, which authored the Manual, agrees that it establishes CMS's

authority to control the care provided by Consultants, and its view would be entitled to deference even if the Manual were ambiguous.

III. The court of appeal erred by disregarding the plain language of the Manual and the position of the State and by looking instead to the testimony of various officers of HRS which it claimed "create[d]" a material question of fact precluding summary judgment. Such testimony is legally irrelevant as a matter of administrative law because the testimony of an agency official cannot overcome a written agency policy. Such testimony also is irrelevant under basic principles of contract interpretation, which preclude parol evidence where, as here, an employment contract such as the Manual is unambiguous. Moreover, the whole enterprise of taking testimony on the issue of the State's authority, which is established by the Manual, is antithetical to the concept of immunity <u>from suit</u>, which must be readily determinable, and this enterprise will inevitably lead to inconsistent determinations of status, with some Consultants being found immune from suit, while others are required to stand trial.

Finally, Petitioners in this case should prevail even under the most rigorous summary judgment analysis because, contrary to the Court of Appeal's holding, the testimony in this case -- even that which addresses the issue of the State's authority -- does not "create" a material question of fact. The testimony conclusively and without equivocation shows that Consultants are hired by CMS to help it implement its statutorily mandated function of treating chronically ill indigent children. The testimony also demonstrates that CMS determines Consultants' eligibility to join

CMS as well as patients' eligibility for treatment; controls the time, place and manner under which Consultants provide care to CMS patients; and, most importantly, retains the power to veto any course of treatment proposed by Consultants for medical or budgetary reasons. That authority is more than sufficient to establish agency status.

IV. The court of appeal also erred in reversing summary judgment in favor of the two professional association petitioners. There is no evidence that they worked for CMS, and if they had, they, like other Consultants, would be entitled to immunity.

ARGUMENT

The issue presented is plainly one of great public importance. HRS, pursuant to obligations imposed on it by both federal and state law, provides care to approximately 50-60,000 children across the state through the CMS program. It provides that care by contracting with thousands of community physicians, such as Petitioners. The immunity from suit afforded by Section 768.28 is a critical incentive for such physicians to work for this program, and without that protection, the State's efforts to care for indigent children will be gravely threatened. The issue presented also is of particular importance to the four physician Petitioners, all of whom agreed to work for HRS subject to HRS's authority to "supervise," "direct," and "prior approve" their actions. Ironically, these physicians have spent more than five years seeking to prove that they should not even have been named as "party defendants" in this action. For the reasons set forth

below, this Court should confirm that they are entitled to immunity.

I. SECTION 768.28 IMMUNIZES FROM SUIT ALL AGENTS OF THE STATE.

A. The Legislature Has Immunized "Agents" As Well As "Employees" Of The State From Suit In Order To Attract Qualified Individuals To Work For The State.

Prior to 1973, state workers could be held liable for tortious acts arising out of their employment, but the State itself was shielded from tort liability by the doctrine of sovereign immunity. District Sch. Bd. v. Talmadge, 381 So. 2d 698, 700 (Fla. 1980). In 1973, the Legislature altered that arrangement by waiving, in large measure, the States' immunity and providing, in Florida Statutes Section 768.28, that "[n]o officer, employee, or agent of the state . . . shall be held personally liable in tort for any injuries or damages suffered as a result of" any negligent act or omission occurring within the scope of that employment. Id. (emphasis omitted). In 1980, this Court narrowly construed that provision, holding that it did not prevent state workers from being named as defendants in tort actions, but simply required the State to pay any judgment entered against such a worker. Id. at 702-03.

In response to that decision, the Legislature amended Section 768.28 specifically to shield state workers not just from liability, but also from suit. Section 768.28, as amended in 1980, now provides, in pertinent part, that:

> [n]o officer, employee, or agent of the state . . . shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in

> the scope of his employment or function. . . . The exclusive remedy for injury or damage suffered as a result of an act, event, or omission of an officer, employee, or agent of the state . . . shall be by action against the governmental entity . . . .

§ 768.28(9)(a), Fla. Stat. (1995) (emphasis added). As this Court has recognized, "the 1980 statute can only be what it purports to be -- a declaration of public policy by the legislature that the state will henceforth substitute its liability to injured persons for the liability of public employees who are merely negligent." State v. Knowles, 402 So. 2d 1155, 1157 (Fla. 1981).

"Strong policy reasons support the state's desire to immunize its employees from personal liability for on-the-job negligence. Unwillingness of citizens to serve in government without immunity, for example, may be one of those reasons." Id. at 1158 n.13. This concern is particularly strong in the context posed by this case. The risk of being named as a defendant in a medical malpractice action is extremely high in Florida, and without the promise of immunity from suit, many physicians will be unwilling to work for CMS.[15]

B. Agents Are Individuals Who Work On Behalf Of Another Person, And Subject To The Other Person's General Authority To Control The Means By Which They Perform Their Assigned Task.

Respondents will likely attempt to limit this Court's focus, as they did below, to an analysis of whether Consultants are "employees" of CMS or "independent contractors." This limited

[15] See Brief of State of Florida as Amicus Curiae; Brief of Florida Medical Association as Amicus Curiae.

framing of the issue, however, ignores the plain language of the statute and the reality that one who is an "agent" of the State, but who does not reach the legal status of an "employee," is nonetheless entitled to the immunity protection of Section 768.28. Indeed, who is an "agent" of the State within the meaning of Section 768.28 if not someone other than an "employee," and why would the Legislature have included the phrase "or agent" unless it intended immunity to extend to those who may not meet the legal definition of a State employee?"[16]

An "employee" is an individual who works for another, "and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." Restatement (Second) of Agency § 220(1) (1958) ("Restatement") (emphasis added); also Cantor v. Cochran, 184 So. 2d 173, 174-75 (Fla. 1966). An "independent contractor," by contrast, is one who works for another but who is not subject to the other's control with respect to his or her physical conduct. Restatement § 14N. Thus, the categories of "employee" and "independent contractor" are mutually exclusive.

"Agency" status is something of a hybrid, and much simpler than "employee" status. In an agency relationship, a principal delegates to an agent "management of some business to be

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[16] See, e.g., Myers v. Hawkins, 362 So. 2d 926, 929 (Fla. 1978) ("We presume that the language differentiation was intentional"); 2A Sutherland Statutory Construction § 46.06, at 119 (5th ed. 1992) ("'It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute'") (citation omitted).

transacted in his name or on his account"[17] as well as "discretionary authority" to carry out that business.[18] More formally, this Court, in Goldschmidt v. Holman, 571 So. 2d 422, 424 n.5 (Fla. 1990), held that "[e]ssential to the existence of an actual agency relationship is (1) acknowledgment 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."[19]

All "employees" are "agents," because they work subject to the control of their employers. More importantly, for purposes of this case, many "independent contractors" also are agents. As the First District Court of Appeal has recognized, "'independent contractor' is a term which is antithetical to the word 'servant' [employee], although not to the word 'agent.'" Nazworth v. Swire Florida, Inc., 486 So. 2d 637, 638 (Fla. 1st DCA 1986) (quoting Restatement §14N cmt. a). Indeed, "one who contracts to act on behalf of another and subject to the other's control except with respect to his physical conduct is an agent and also an independent

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[17] King v. Young, 107 So. 2d 751, 753 (Fla. 2d DCA 1958).

[18] Economic Research Analysts, Inc. v. Brennan, 232 So. 2d 219, 221 (Fla. 4th DCA 1970).

[19] See also The Florida Bar Re: Standard Jury Instructions -- Civil (Professional Malpractice), 459 So. 2d 1023, 1025 (Fla. 1984) ("An agent is a person who is employed to act for another, and whose actions are controlled by his employer or are subject to his employer's right of control"); Restatement § 1(1) ("Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act").

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing were served by U.S. mail on December 4, 1995, on:

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contractor." Id. (quoting Restatement § 14N) (emphasis added). Thus, according to the Restatement:

> most of the persons known as agents . . . are independent contractors . . . but, although employed to perform services, are not subject to the control or right to control of the principal with respect to their physical conduct in the performance of the services. However, they fall within the category of agent.

Restatement § 14N, cmt. a (emphasis added).[20] Only those individuals who perform a task for another person but who are not subject to any control by that person with respect to the means by which they perform that task are "independent contractors" but not "agents."[21]

In short, the term "agent" is much more inclusive than the term "employee," and many individuals who are not "employees" are nonetheless "agents." Indeed, the only workers who are not agents -- i.e., the only workers who are pure "independent contractors" -- are those who work on behalf of another, but who are not subject to any control with respect to the means by which

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[20] Similarly, according to the Attorney General, volunteers working for county tourist development councils and psychological examiners designated by the Board of Psychological Examiners to supervise and treat applicants for licensure, though plainly not "employees" of the State, are nonetheless the State's "agents." Attorney General Opinion No. 90-83, 1990 Fla. AG LEXIS 83, at *7 (Oct. 4, 1990); Attorney General Opinion No. 89-70, 1989 Fla. AG LEXIS 79, at *6-*7 (Oct. 6, 1989).

[21] See Dorse v. Armstrong, 513 So. 2d 1265, 1268 n.4 (Fla. 1987) ("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"); De Luxe Laundry & Dry Cleaners v. Frady, 40 So. 2d 779, 779 (Fla. 1949) (en banc) (same).

they perform their task. That is the only class of workers which is not explicitly protected by Section 768.28.

The word "control" as used in the definitions of "employee," "independent contractor," and "agent" has a very specific meaning. This Court, consistent with the teaching of the Restatement, has held that the critical issue with respect to "control" is not whether the employer/principal actually exercises any control over the individual, but rather whether the employer/principal retains the authority to control significant aspects of the individual's work. Specifically, "the decisive question [is] . . . who has the right to direct what shall be done, and when and how it shall be done." Magarian v. Southern Fruit Distribs., 1 So. 2d 858, 860-61 (Fla. 1941)(emphasis added); also National Sur. Corp. v. Windham, 74 So. 2d 549, 550 (Fla. 1954) (en banc) ("It is the right of control, not actual control or actual interference with the work, which is significant") (emphasis in original).[22]

For State "agents" to be immunized from suit, as the Legislature decreed, such individuals must be readily identifiable. If they are not, Consultants, like the Petitioners, will be forced to litigate over their status, contrary to the obvious intent of the Legislature. Moreover, without clarity, some Consultants will

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[22] See also Peterson v. Highland Crate Co-op, 23 So. 2d 716, 717 (Fla. 1945); 2 Fla. Jur. 2d § 108, at 271-72 ("It is the right of control, not actual control or actual interference with the work, which is significant . . ."") (emphasis added); Restatement § 14, at 60 ("The control of the principal does not, however, include control at every moment; its exercise may be very attenuated and, as where the principal is physically absent, may be ineffective").

be found to be entitled to immunity, while others who are similarly situated will be forced to stand trial. Here, unlike many situations where there is no written description of the worker's status, the necessary clarity is provided by the HRS Manual and the Consultant's Guide, which establish that the State retained the authority to control the CMS Consultants. It follows a fortiori that CMS Consultants are agents of the State, and entitled to immunity.

II. CMS "CONSULTANTS" SUCH AS PETITIONERS ARE ENTITLED TO IMMUNITY BECAUSE THEY ARE AGENTS OF THE STATE.

The State openly acknowledges that Consultants work on its behalf and are the essential means by which CMS performs its mandated function.[23] Moreover, Consultants plainly accept that they will be working for the State when they join CMS; they explicitly agree, as a condition of their employment, to "abide" by the policies of CMS. See supra at 5. Thus, there is no dispute that Consultants satisfy the first two prongs of the Goldschmidt definition of "agency."

The third Goldschmidt factor also is satisfied because the State retains the authority to control the means by which Consultants treat CMS's patients. As numerous courts have recognized, "control" in this context has a somewhat unique meaning. Physicians must, as a matter of professional ethics, exercise their professional "'skill and . . . soundest judgment in

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[23] See, e.g., R. 3657-3764, Cupoli Depo, at 72, 73; R. 3086-3152, Furlough Depo, at 53-54, 65-66; R. 3170-3241, Parker Depo, at 59-60, 64; Record Supplement ("R. Supp."), Williams Depo, at 35-38.

rendering medical or surgical services without any interference from [the] one who employs [them].'" Wendland v. Akers, 356 So. 2d 368, 370 n.6 (Fla. 4th DCA 1978). Thus, they cannot be "servant[s] or agent[s] in the usual sense of those terms." Id. (citation omitted)(emphasis added). Despite this, the Florida courts have long recognized that physicians can nonetheless be agents of the State within the meaning of Section 768.28 when the State retains some general authority over their practices.[24]

The starting point in determining whether the State retains sufficient authority over the Consultants is the HRS Manual, which contains the agreement between HRS and the Consultants -- or, more precisely, the rules under which Consultants agree to work.[25] This document, which contains the only written description of the relationship between HRS and the Consultants (including Petitioners), demonstrates that HRS retains about as much authority to control the actions of its Consultants as it can, consistent with their professional ethics. Moreover, HRS has interpreted the Manual to contain such authority, and thus

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[24] See, e.g., Public Health Trust v. Valcin, 507 So. 2d 596, 601 (Fla. 1987); Bates v. Sahasranaman, 522 So. 2d 545 (Fla. 4th DCA 1988); DeRosa v. Shands Teaching Hosp. & Clinics, Inc., 504 So. 2d 1313, 1315 (Fla. 1st DCA 1987); Jaar v. University of Miami, 474 So. 2d 239 (Fla. 2d DCA 1985), review denied, 484 So. 2d 10 (Fla. 1986); Bryant v. Duval County Hosp. Auth., 459 So. 2d 1154 (Fla. 1st DCA 1984); White v. Hillsborough County Hosp. Auth., 448 So. 2d 2, 3 (Fla. 2d DCA), cause dismissed by 443 So. 2d 981 (Fla. 1983).

[25] See Keith v. News & Sun Sentinel Co., 20 Fla. L. Weekly S454, S455 (Sept. 7, 1995) (the starting point in determining legal status is any agreement between the parties).

even if the Manual were ambiguous, that interpretation would be entitled to deference by this Court.

A. The HRS Manual Unambiguously Demonstrates That The State Retains The Authority To Control Consultants, Thus They Are State Agents.

Section 3-1 of the HRS Manual provides that the CMS Medical Director is responsible, inter alia, for the following:

> b. Supervising and directing the proper care and treatment, within budgetary constraints, of all patients who are financially and medically eligible for services, including review of all patient care activities and priority of patients for services.
>
> c. Assuring fiscal integrity of the CMS budget at the local level. . . .
>
> e. Providing direct line supervisory authority over all personnel who are assigned to the CMS program . . ., [and]
>
> f. Providing medical supervision of all clinics . . .

R. 2789-2921, HRS Manual § 3-1, at 3-1 (emphases added).

The plain language of subsection 3-1(b), standing alone, makes clear that HRS retained plenary authority over the Consultants. The term "supervise" is defined by Webster's Dictionary to mean "[t]o direct and watch over the performance of." The term "direct" is defined to mean "[t]o regulate or conduct the affairs of: manage," "[t]o take authoritative charge of: control," or "[t]o order or command." Webster's II New Riverside University Dictionary 381 (1984) (emphases added). And the term "proper care and treatment" in this context can only refer to the medical care

provided by the Consultants. Thus, this subsection establishes that the Medical Director not only has the authority, but indeed has the affirmative legal "responsibility," to control the Consultants, who provide the front-line medical "care and treatment" to CMS's patients.[26]

The other subsections of this provision underscore this reading. Subsection (e), for example, which grants the Medical Director "supervisory authority over all [clinic] personnel," makes clear that Medical Director has authority over the people who provide care directly to the clinic's patients -- i.e., the Consultants. Likewise, subsection (f), which requires the Medical Director to provide "medical" not just fiscal, supervision "of all clinics," makes clear that the Director's authority is not limited, as the court below suggested, to controlling payment for care, but extends to the actual treatment of patients.

Numerous other provisions of the Manual drive home the extent of HRS's authority over the practice of the Consultants at CMS. Section 5-4, for example, which vests in HRS the authority to determine who is eligible for CMS's services, makes clear that HRS determines which patients the Consultants can care for. Section 4-2, which provides that "[c]linics are held in accordance with schedules approved by the local CMS Medical Director, HRS Manual, at 4-1 (emphasis added), makes clear that the Medical Director, not the Consultants, has the authority to schedule patient care, and

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[26] Cf. Economic Research Analysts, Inc. v. Brennan, 232 So. 2d 219, 221 (Fla. 4th DCA 1970) (agency relationship exists where principal obligated by law to supervise worker).

Section 4-6(d), which provides that Consultants may be excluded from CMS for refusal to participate in clinics, id. at 4-4, puts bite into that authority.

Finally, Section 5-6 establishes that the Medical Director has absolute authority over payment for services. That section stipulates that "[e]xpenditures on CMS patients must be prioritized by the local CMS Medical Director," subject to a cap of $25,000 per patient per year, which the Medical Director may "elect to exceed . . . after reviewing the individual case, if funding is available." Id. § 5-6(b), at 5-19 . That section further provides that "[a]ll services provided to CMS patients must be prior authorized." Id. at 5-20 (emphasis added). As the Consultant's Guide explains, "[t]his means the service has been approved through the Medical Director or CMS case management nurse prior to the service delivery." R. 2925, Consultant's Guide, at 5 (emphasis in original).

The Medical Director's authority to control payment for services is essential to his capacity to operate the clinic within budget. It simply is not possible to "assur[e] the fiscal integrity of the CMS budget at the local level," as he is required to do, see R. 2789-2921, HRS Manual § 3-1(c), at 3-1, without the capacity to control which services are provided to individual patients -- i.e., to determine how those patients are treated by the Consultants. The Medical Director must have the authority, for example, to determine whether a patient should be hospitalized or receive lab tests if he is to maintain control over how his limited resources are spent.

The court below, in reversing the judgment of the circuit court, downplayed HRS's authority to refuse to pay for treatment, holding that this authority "is not equivalent to actually directing the type or course of treatment." Opinion at 6. Whether or not that authority is "equivalent" to the authority actually to direct treatment, however, is irrelevant. The authority to supervise and direct -- i.e., control, or even veto -- treatment is directly set forth in provisions of the Manual other than those dealing with the Medical Director's fiscal authority.

More fundamentally, however, the court of appeal's analysis is entirely inconsistent with the structure of the CMS program. CMS's patients are, by definition, incapable of paying for their own care. Thus, the authority to decline to pay for treatment, which the court below readily conceded the Medical Director possessed, is equivalent to the authority to control how patients are treated. For the most part, there simply is no way for CMS's patients to receive, or for the Consultants to provide, care which CMS will not pay for. That is the reason why the CMS program was created in the first place.

In sum, the plain language of the only written descriptions of the relationship between HRS and its Consultants, and the context in which that relationship was established, demonstrate that HRS retains the authority to control the actions of its Consultants. That evidence alone establishes that Consultants are "agents" of the State.

B. HRS Has Interpreted The HRS Manual To Provide It With The Authority To Control Physicians, And That Interpretation Is Entitled To Deference.

HRS, interpreting its own Manual, has determined that it retains the authority to control the care provided by its Consultants. That interpretation is entitled to deference by this Court. Thus, even if the Manual were ambiguous, this Court should conclude as a matter of law that Consultants work subject to HRS's authority and hence they are agents of the State.

Since the issue first arose, HRS has consistently interpreted the rules and policies set forth in the Manual to provide it with the authority to control the care and treatment provided by Consultants to CMS patients. Before the circuit court, HRS admitted that each of the Petitioners was an "agent" of the State, and argued, in an amicus brief, that the Manual demonstrated that it "retained the right to determine what the individual physicians could do, and how they could perform their assigned tasks."[27] HRS also argued, as a matter of policy, that "unless physicians such as the [Petitioners] are afforded immunity, the State will find it difficult -- perhaps impossible -- to recruit a sufficient number of qualified physicians to provide health care services to the population of children that it is obligated to serve in . . . Florida."[28] Accordingly, HRS acknowledged that "[t]he State alone should bear full financial responsibility, if

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[27] R. 5113-5127, Memorandum of Law of the State of Florida in Support of the Motions for Summary Judgment of Defendants Hodge, Sirois, Stoll and Watson at 4 (Feb. 23, 1993).

[28] Id. at 14.

any, for their actions."[29] The State reiterated these positions in its amicus brief in support of Petitioners in the Fourth District,[30] and continues to do so here. See Brief of State of Florida as Amicus Curiae.

HRS's interpretation of its Manual is entitled to deference. See generally Raffield v. State, 565 So. 2d 704, 706 (Fla. 1990) ("The interpretations of administrative officers who are charged to administer a law, are entitled to judicial deference and will be given great weight in the courts of Florida"); Pan American World Airways, Inc. v. Florida Public Servs. Comm'n, 427 So. 2d 716, 719 (Fla. 1983) (deference must be accorded to agency rules).[31] Here, HRS designed and structured the CMS program. Thus, it plainly is in the best position to interpret its own Manual. It also is legally responsible for providing care to indigent children, and therefore it is in the best position to know, as a practical matter, how the Manual should be interpreted in order to maintain the fiscal and programmatic integrity of the

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[29] Id.

[30] Brief Of State Of Florida, Department Of Health And Rehabilitative Services, Children's Medical Services, Amicus Curiae In Support Of Appellees at 6, 12, 13.

[31] See also Griswold v. United States, 59 F.3d 1571, 1576 n.8 (11th Cir. 1995) (IRS manual provisions "do constitute persuasive authority as to the IRS's interpretation of the statute and the regulations"); Department of Health & Rehabilitative Servs. v. A.S., 648 So. 2d 128, 132 (Fla. 1995) ("the administrative construction of a statute by the agency charged with its administration should not be disregarded or overturned . . . except for the most cogent reasons or unless clearly erroneous").

CMS program. The fact that HRS has articulated its position in amicus briefs does not detract from the weight of its position.[32]

Beyond this, the fact that HRS and its Consultants share a common understanding of their relationship makes this a relatively unique -- and uniquely easy -- case. This is not a case where, for example, the employer is seeking to distance itself from its putative employee or agent in order to avoid liability. To the contrary, the State has not only acknowledged that it retains the authority to control Petitioners, but also has made plain its willingness to live with the financial consequences of that acknowledgment. Only the Respondents, non-parties to HRS's arrangement with Petitioners, challenge the terms of that relationship.

The Respondents, however, have no basis on which to challenge the mutual understandings of HRS/CMS and its Consultants. There is no evidence here that the parties secretly colluded to hide from the Respondents the nature of their relationship. To the contrary, it is undisputed that Minouche Noel sought care from the

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[32] As the United States Supreme Court stated 50 years ago, the views of an agency administrator expressed in an amicus brief are entitled to substantial deference because "the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case. . . ." Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944). See also Quiller v. Barclays American/Credit, Inc., 727 F.2d 1067, 1071 (11th Cir. 1984) ("In an amicus brief filed by the [Federal Home Loan Bank] Board in this case, the agency has embraced the conclusion of its general counsel. Since the agency's view of its own regulations and the statute it oversees is not 'demonstrably irrational,' we should give great weight to its interpretation").

CMS clinic, not any individual doctor[33]; that both of her parents signed a "release form" authorizing "Children's Medical Services and its agents to examine and treat" their child[34]; and that Minouche continued to seek care from the clinic long after at least one of the Petitioners left the clinic.

C. Consultants Also Are State Agents Because They Perform A State Function.

Finally, independent of the extent to which the State "controls" their activities, Consultants also are agents because they perform a state function when treating CMS patients. In Skoblow v. Ameri-Manage, Inc., 483 So. 2d 809 (Fla. 3d DCA 1986), the Third District Court of Appeal held that a company with which the State contracted to provide management services for South Florida State Hospital was entitled to immunity as an agency of the State. The court held that, although the company had been delegated various discretionary, decision-making powers, it was a state agency, and entitled to immunity, because, at the relevant time, it was a "'corporation[] primarily acting as [an] instrumentalit[y] or agenc[y] of the state'" -- i.e., performing a state function. Id. at 812 (citation omitted). The United States

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[33] When Minouche Noel's medical condition was initially suspected, she was referred to the CMS clinic itself, not to any individual physician. R. 3245-3365, Fanizzi Depo, at 105-07; R. 3011-3081, Scheer Depo, at 27, 36. Moreover, as a general matter, patients made appointments with the clinic not with individual physicians, and CMS felt entirely free to substitute one physician for another without providing its patients with any notice of the change. R. 3011-3081, Scheer Depo, at 28.

[34] R. 2282, CMS Release Form, at 8, 10 (as Exhibit B in Appellee's Brief) (emphasis added); R. 3011-3081, Scheer Depo, at 32-33.

Supreme Court, applying precisely the same reasoning, held that a physician providing prison medical services on behalf of the State of North Carolina was a state actor, despite his professional obligation to employ his professional judgment. That Court reasoned that "[i]t is the physician's function within the state system, not the precise terms of his employment, that determines whether his actions can fairly be attributed to the State." West v. Atkins, 487 U.S. 42, 55-56 (1988).

The reasoning of those cases applies here. Consultants are specifically retained to provided medical and surgical care to CMS's patients; in treating those patients, they serve CMS's purpose and fulfill a mandated state function; and they treat patients at times and in settings dictated by CMS. In short, Consultants act primarily as "instrumentalit[ies]" of the state while working for CMS. As such, they are entitled to immunity under Section 768.28.

III. THE COURT OF APPEAL ERRED BOTH LEGALLY AND FACTUALLY IN HOLDING THAT DEPOSITION TESTIMONY IN THIS CASE CREATED A MATERIAL QUESTION OF FACT ABOUT THE LEGAL STATUS OF CONSULTANT PHYSICIANS.

The court below held that, despite the plain language of the Manual and the position of the State, Respondents had "point[ed] out" sufficient evidence to "create" a material question of fact over whether the four physician Petitioners were state agents. That court did not find that Petitioners did not work on behalf of the State, nor did it find that Petitioners had failed to accept the undertaking assigned to them. Rather, it held only that Respondents had adduced evidence which called into question the

State's authority to control the medical care provided by the Petitioners. The court, however, misread the record; in fact, no witness contradicted the Manual, and indeed every witness who addressed the issue testified that the State did have the power to "veto" the medical decisions of the Petitioners as well as the power to control their practices at CMS in numerous other ways. But even more fundamentally, the testimony on which that court relied is legally irrelevant to the issue of whether Consultants are entitled to immunity.

A. Deposition Testimony Concerning The State's Authority Is Legally Irrelevant Because The Manual Itself Establishes That Authority.

The court of appeal did not specify the portions of the record on which it relied in concluding that a factual dispute existed over the extent to which HRS retained the authority to supervise and direct -- i.e., "control" or "veto" -- the care provided by Consultants. Based on the briefs and record before it, however, that court could only have been referring to the testimony of certain officers of HRS which, as demonstrated below, is entirely consistent with the Manual. But even if that testimony did contravene the plain language of the Manual and the position of HRS, such testimony would legally irrelevant.

First, testimony of agency officials which contradicts the policy of an agency, particularly where that policy is in writing, is irrelevant under standard principles of administrative law. Here, the HRS Manual itself establishes the rules and policies governing the relationship between CMS and its

Consultants. Thus, the personal opinions of various officers about the nature of CMS's relationship with its Consultants -- if they conflicted with the Manual -- would simply have no legal significance. See, e.g., National Sur. Corp. v. Windham, 74 So. 2d 549, 550 (Fla. 1954)(en banc)(that party "understood" that he worked subject to principal's authority "has no significance. The latter's right to control depends upon the terms of the contract").[35]

The logic of this argument is consistent with, and underscored by, basic contract principles. The Manual is a contract, because in joining HRS, the Consultants expressly "agree[d] to abide" by the "policies" of CMS. See supra at 5. Under standard contract principles, testimony concerning an agreement between two parties -- i.e., parol evidence -- is relevant only if the writing memorializing the agreement is ambiguous. See, e.g., State v. Sarasota County, 549 So. 2d 659, 660 (Fla. 1989); Friedman v. Virginia Metal Prods. Corp., 56 So. 2d 515, 516 (Fla. 1952). Here, the Manual is not ambiguous, and any testimony contradicting it therefore would not be relevant.

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[35] See also Public Employees Relations Comm'n v. Dade County Police Benevolent Ass'n, 467 So. 2d 987, 989 (Fla. 1985) ("[H]ow the law of agency should be applied is an interpretation of law and policy and not a determination of fact," and the authority to make that determination "resides with the Commission and not a hearing officer. . . . [T]he Commission has the authority to overrule a statutory interpretation made by one of its hearing officers"); Agency for Health Care Admin. v. Orlando Regional Healthcare Sys., Inc., 617 So. 2d 385, 388 (Fla. 1st DCA 1993) (affirming hearing officer's conclusion that policy set forth in HRS Manual superseded understanding of that policy expressed by agency head).

Second, the testimony of individual officers about HRS's authority also is legally irrelevant because the very process of taking such testimony -- and allowing a jury to resolve any issues "created" by such testimony -- is inherently inconsistent with the concept of immunity from suit, which the Legislature has granted state agents. Such immunity "'is effectively lost if a case is erroneously permitted to go to trial'" because a state worker simply cannot be "'reimmunized' if erroneously required to stand trial or face the other burdens of litigation." Tucker v. Resha, 648 So. 2d 1187, 1189 (Fla. 1994) (citation omitted). Nor can the "social costs" associated with such litigation ever be recouped if a state worker is erroneously required to stand trial. Id. at 1190.

Thus, the context in which this suit arises requires that entitlement to immunity be decided according to standards which are so clear that an eligible state worker can, if "named as a party defendant," move immediately for dismissal.[36] To make that possible, this Court need not refashion the definition of "agent"; that definition already is sufficiently clear. But in determining who qualifies as a State "agent," it is entirely inconsistent with the Legislature's intent to immunize such individuals from suit to rely on the testimony of individual officers rather than the objective standards of the Manual. Indeed, to hold, as the court of appeal did, that the testimony of individual officers in an

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[36] See Keith v. News & Sun Sentinel Co., 20 Fla. L. Weekly S454, S456 (Sept. 7, 1995) (it is "always proper and permissible to consider the context within which the issue of status arises").

action such as this can "create" a material question of fact about the legal status of Consultants, reads out of Section 768.28 the prohibition against naming state agents as defendants, and returns that provision -- by judicial fiat -- to its pre-1980 form.[37]

Moreover, reliance on the testimony of individual officers rather than the objective standards of the Manual creates a risk of inconsistent determinations. All Consultants are governed by precisely the same rules and policies. It makes absolutely no sense to allow juries to determine which of these similarly situated physicians is entitled to immunity. See Keith, 20 Fla. L. Weekly at S456 ("structure" must be given to process of determining employment status to avoid "inviting inconsistent results"). That approach also is entirely unfair, and would destroy the incentive to work for the State which immunity from suit provides.

In sum, the structure and logic of Section 768.28 itself require that where, as here, an across-the-board determination of status can be made, individualized testimony on that issue should not be considered.

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[37] In a very closely analogous situation, the United States Supreme Court, to protect government workers from the burdens of litigation, entirely redefined the standard for qualified immunity under federal law so that the availability of that immunity did not turn on questions of fact of the type which might preclude summary judgment. See Harlow v. Fitzgerald, 457 U.S. 800, 815-19 (1982).

B. The Deposition Testimony In This Case Is Fully Consistent With The HRS Manual And Makes Clear That HRS Retained Great Authority Over The Care Provided By Consultants.

While it is entirely unnecessary for this Court to analyze any evidence other than the writings which establish the CMS-Consultant relationship, the remainder of the record in this case, even the testimony which covers the same territory as the Manual and Consultant's Guide, uniformly and overwhelmingly supports Petitioners' -- and the State's -- position. Thus the circuit court, which carefully reviewed all of the depositions,[38] properly granted summary judgment. See, e.g., Magarian v. Southern Fruit Distribs., 1 So. 2d 858, 860 (Fla. 1941) (summary judgment appropriate where "the inference is clear" that the worker is or is not an "employee" or "agent"); Cantor v. Cochran, 184 So. 2d 173, 174 (Fla. 1966) (employment status not a question for the jury where, as here, there is no dispute of material fact, just a dispute over the "legal relationship that certain undisputed facts engender[]").[39]

In determining whether the principal retains the requisite "control" over a worker for the worker to qualify as an "agent," this Court, of course, has relied principally on direct evidence of the principal's authority to direct the worker's actions. In addition, this Court has traditionally looked to

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[38] R. Supp., Hearing on Motions for Summary Judgment, 2/25/93, at 53.

[39] See also Keith v. News & Sun Sentinel Co., 20 Fla. L. Weekly S454, 456 (Fla. Sept. 7, 1995) ("We do not agree . . . that the Restatement analysis may routinely be used to support any resolution of the issue by the factfinder simply because each side of the dispute has some factors in its favor").

whether the principal sets the worker's hours; determines the clients or customers with whom the agent deals; pays the worker by the hour (which is highly probative of an employee or agency relationship) or by the job; and retains the right to fire the agent at will. See, e.g., Cantor, 184 So. 2d at 174-75. With respect to this final criterion, this Court has held that

> "[t]he power to fire is the power to control. The absolute right to terminate the relationship without liability is not consistent with the concept of independent contractor, under which the contractor should have the legal right to complete the project contracted for and to treat any attempt to prevent completion as a breach of contract."

Id. at 174 (citation omitted)(emphasis added).[40]

The deposition testimony demonstrates that all of these criteria were satisfied. Contrary to the court below's reading of the record, each witness who addressed the issue testified that the

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[40] See also Justice v. Belford Trucking Co., 272 So. 2d 131, 136 (Fla. 1972) (relying on fact that truck driver was subject to termination at discretion of employer in finding that trucker was employee). The notion that these factors, rather than the exercise of control over minute details of the individual's actions, are the key indicators of the right to control, squares fully with the holdings by all courts to address the issue that professionals such as police officers and teachers -- who, like physicians, are generally obliged to use their best professional judgment in the details of their work -- may nonetheless be "employees" or "agents" of the State. See, e.g., Gulf County Sch. Bd. v. Washington, 567 So. 2d 420, 422-23 (Fla. 1990) (teachers are State employees); Reddish v. Smith, 468 So. 2d 929 (Fla. 1985) (corrections officers using discretion on security issues are employees or agents of state); Trianon Park Condo. Ass'n v. City of Hialeah, 468 So. 2d 912 (Fla. 1985) (city building inspectors using discretion, skill and judgment in carrying out government function nevertheless employees of the state); Sequine v. City of Miami, 627 So. 2d 14 (Fla. 3d DCA 1993) (police officers immune as employees of city despite use of discretionary judgment in making law enforcement decisions).

State -- through the Medical Director -- retains the authority to "veto" treatment -- i.e., to determine, in advance of treatment, how a CMS patient will be treated if it disagrees, for either medical or budgetary reasons, with a course of treatment proposed by a Consultant.[41] The uncontradicted testimony also demonstrates that HRS:

- Retains the authority, "for either medical or budgetary reasons," to determine what diagnostic tests Consultants can perform on CMS patients[42]
- Retains the authority to determine where diagnostic tests can be performed[43];

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[41] R. 3657-3764, Cupoli Depo, at 55 (Medical Director has authority to intervene long before standard of care is breached), 83-85 (Medical Director has discretion to determine whether a procedure is appropriate and can withhold authorization based on that determination), 95-99 (Medical Director has "final say" if he disagrees with consultant over how a patient should be treated); R. 3245-3365, Fanizzi Depo, at 101-04, 110-115 (CMS has final choice over course of treatment); R. 3086-3152, Furlough Depo, at 38-44, 59 (where Medical Director disagreed with consultant over proposed course of treatment, he would have authority to refuse to pay for treatment and to revoke CMS' permission for consultant to care for patient); R. 3170-3241, Parker Depo, at 47-51 (Medical Director has authority to tell physician not to pursue a particular course of action), 51 (Medical Director would have authority to overrule proposed course of treatment), 62-63; R. 3011-3081, Scheer Depo, at 25 (CMS has authority to veto course of treatment proposed by consultant), 26-27 (CMS can veto proposed course of treatment for budgetary reasons).

[42] R. 3657-3764, Cupoli Depo, at 95-97 ("on a regular basis" Medical Director decides not to authorize tests for either medical or budgetary reasons); R. 3245-3365, Fanizzi Depo, at 115; R. 3086-3152, Furlough Depo, at 38-39; R. 3170-3241, Parker Depo, at 47-49.

[43] R. 3657-3764, Cupoli Depo, at 97; R. 3011-3081, Scheer Depo, at 37.

- Retains the authority to determine whether or not a CMS patient should be hospitalized,[44] and, except in cases of emergency, the authority to determine where a patient can be hospitalized[45];

- Purchases and maintains all of the medical equipment that Consultants use at the clinics[46]; and

- Controls all nurses and administrative personnel who assist the Consultants in performing their functions at the clinics.[47]

In addition, the witnesses testified, without contradiction, that the State:

- Controls who Consultants can treat and requires them to see all patients assigned to them[48];

- Controls when and where Consultants can treat CMS' patients by setting the times of the clinics and providing them with clinic space[49];

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[44] R. 3657-3764, Cupoli Depo, at 98; R. 3086-3152, Furlough Depo, at 39-40.

[45] R. 3657-3764, Cupoli Depo, at 98; R. 3011-3081, Scheer Depo, at 26.

[46] R. 3245-3365, Fanizzi Depo, at 98-99; R. 3011-3081, Scheer Depo, at 23-24.

[47] R. 3657-3764, Cupoli Depo, at 85; R. 3245-3365, Fanizzi Depo, at 94-95; R. 3086-3152, Furlough Depo, at 37; R. 3011-3081, Scheer Depo, at 19-22. These individuals in turn controlled the manner in which the medical records of all CMS patients were maintained, R. 3245-3365, Fanizzi Depo, at 97-98; R. 3011-3081, Scheer Depo, at 22; the manner in which CMS' patients and their charts were prepared for each clinic visit; and the manner in which follow-up care of these patients was conducted, R. 2789-2921, HRS Manual § 5-5(a)(2), at 5-11; R. 3011-3081, Scheer Depo, at 17-18.

[48] R. 3245-3365, Fanizzi Depo, at 91-92; R. 3086-3152, Furlough Depo, at 35-36; R. 3170-3241, Parker Depo, at 40-41; R. 3011-3081, Scheer Depo, at 12, 35.

[49] R. 3245-3365, Fanizzi Depo, at 56, 93; R. 3011-3081, Scheer Depo, at 15; R. 3086-3152, Furlough Depo, at 21.

- Pays Consultants for their services by the hour not by the patient,[50] and prohibits them from charging independently for any services that they provide to a CMS patient[51]; and

- Retains the right to fire Consultants at will -- at any time and without any reason[52] -- and that Consultants have no legal right to continue to treat any CMS patient, and no right to assert breach of contract as a basis for allowing them to continue to treat any CMS patient.[53]

This testimony leaves no room for a jury to find that the Petitioners were not "agents" of the State. Indeed, the facts of this case are at least as strong as, if not substantially stronger than, the facts in two cases in which the lower courts have affirmed summary judgment and found physicians entitled to summary judgment as a matter of law. In DeRosa v. Shands Teaching Hospital & Clinics, Inc., 504 So. 2d 1313 (Fla. 1st DCA 1987), for example, the First District Court of Appeal held that residents working under the general supervision of state university faculty members were entitled to immunity under Section 768.28. Likewise, that court held in Bryant v. Duval County Hospital Authority, 459 So. 2d 1154 (Fla. 1st DCA. 1984), that a physician was an agent of a public hospital -- and entitled to immunity under Section 768.28 -- because the hospital selected him, retained the power to dismiss

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[50] R. 3245-3365, Fanizzi Depo, at 88; R. 3011-3081, Scheer Depo, at 10-11.

[51] R. 3245-3365, Fanizzi Depo, at 88-89; R. 3170-3241, Parker Depo, at 39; R. 3011-3081, Scheer Depo, at 10-11.

[52] R. 3657-3764, Cupoli Depo, at 77-79; R. 3245-3365, Fanizzi Depo, at 43, 89-90; R. 3086-3152, Furlough Depo, at 21, 34, 36, 43-44; R. 3011-3081, Scheer Depo, at 11-12; and R. 3767-68, Kenyon Depo, at 67-68.

[53] R. 3657-3764, Cupoli Depo, at 100.

him, and generally retained the authority to control the care he provided.

IV. THE COURT OF APPEAL ALSO ERRED IN REVERSING SUMMARY JUDGMENT IN FAVOR OF DR. WATSON'S AND DR. STOLL'S PROFESSIONAL ASSOCIATIONS.

Finally, the court of appeal's judgment with respect to the two corporate entities, Amos W. Stoll, M.D., P.A., and Allen S. Watson, M.D., P.A., which also are petitioners, must also be reversed. First, there is nothing in the record which demonstrates that the two professional associations were involved in any way with the care of Minouche Noel. To the contrary, the evidence shows that Drs. Watson and Stoll were retained personally and individually as CMS Consultants, and were paid personally rather than through their professional associations.[54] Moreover, neither Dr. Watson nor Dr. Stoll ever treated Minouche at their private offices.[55]

Furthermore, CMS personnel who were deposed on this issue testified that CMS hires individual physicians only and not their professional associations. If either doctor was unavailable to see Minouche, or if CMS otherwise needed to arrange coverage for their doctors in treating CMS patients, CMS would have the patient seen by another CMS Consultant rather than by someone affiliated with

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[54] R. 3657-3764, Cupoli Depo, at 101; R. 3937-3938, Scheer Depo, 10/26/92, at 101; R. 3586-3587A, Deposition of Allen S, Watson, M.D. ("Watson Depo"),4/9/91, at 14.

[55] R. 3586-3587A, Deposition of Sonia Hodge, M.D., 5/10/91, at 25,32; R. 3586-3587A, Watson Depo, at 10, 25, 37.

either physician's professional association.[56] In any event, even if the two professional associations had been retained as CMS Consultants, they, like all other Consultants, would be entitled to immunity.

* * * *

The Legislature's edict that "agents" of the State not even be "named as party defendants" has, for the Petitioners, proven, thus far, to be a wholly illusory protection. By answering the certified question in the affirmative, this Court can not only make clear that the Petitioners are entitled to immunity, but also relieve others who are similarly situated from the very substantial burdens of litigating this issue in the future, with potentially conflicting results in different cases. HRS intended to, and did, retain authority over all of its Consultants. Consultants such as Petitioners therefore are agents of the State and entitled to immunity. The State, which remains a defendant below, is, by its own admission, the only proper defendant in this action.

CONCLUSION

This Court should accept jurisdiction; answer the certified question in the affirmative; and reverse the judgement of the Court of Appeal.

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[56] R. 3657-3764, Cupoli Depo, at 101-102; R. 3937-3938, Scheer Depo, at 101.

Respectfully submitted,

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