Od 7

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

FILED
SID J. WHITE
FEB [illegible] 1996
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

PETITIONERS' REPLY BRIEF

George Bunnell, Esq. and Gary Farmer, Jr.
Bunnell, Woulfe, Keller, & Gillespie
888 E. Las Olas Blvd.
Fort Lauderdale, FL 33301

Robert Collier, Esq.
Timothy J. Payne, P.A.
P.O. Box 14666
Fort Lauderdale, FL 33302

Bartley C. Miller, Esq.
Panza, Maurer, Maynard & Neel, P.A.
3600 N. Federal Highway
Fort Lauderdale, FL 33308

Carter G. Phillips, Esq.
Paul E. Kalb, Esq.
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006

Counsel for Petitioners

February 19, 1996

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND OTHER AUTHORITIES

PETITIONERS' REPLY BRIEF

In their Answer Brief, Respondents acknowledge that the HRS Manual, the only written description of the relationship between CMS and its Consultants, is "unambiguous." Respondents' Brief ("Resp. Br.") at 39. Moreover, they do not dispute that the Manual explicitly obligates the CMS Medical Director not only to "supervis[e]," "direct" and "prior authorize" the "proper care and treatment, within budgetary constraints, of all [CMS] patients," but also to "provid[e] direct line supervisory authority over all personnel who are assigned to the CMS program." And they do not dispute that Consultants, as a condition of working for CMS, agree to abide by these rules. See Petitioners' Brief ("Pet. Br.") at 5.

Instead, in an effort to avoid the obvious import of these undisputed facts -- that when Consultants leave their private practices to work for CMS, they work subject to CMS's authority to control the means by which they care for CMS's patients -- Respondents largely ignore the Manual, and focus instead on certain broad policy and statutory arguments and on various facts which they claim preclude summary judgment. In making these arguments, however, Respondents fundamentally misconstrue both Florida Statutes § 768.28 and the common law of agency. In particular, without any basis, they claim that something more than the "formal" authority established in the Manual -- i.e., the "meaningful" "capacity" to exercise that authority -- is required to establish an agency relationship. As a result of this and other misreadings of the law, Respondents mistakenly rely on facts which, even if

viewed in the light most favorable to their cause, simply are not material to the issue before this Court. Indeed, Respondents do not mention the concept of materiality anywhere in their brief.

If § 768.28(9)(a) immunized only state "employees" but not state "agents"; if that provision only immunized state "employees" and "agents" from liability, but not from suit; and if this Court's decisions concerning "control" required evidence of a "meaningful" ongoing capacity to exercise authority; then Respondents' legal and policy arguments might be pertinent, and the facts on which they rely might be material. But that is not the law. Accordingly, the certified question should be answered in the affirmative.

1. Policy Considerations As an initial matter, Respondents' contention that this Court cannot hold that Consultants are entitled to immunity without impermissibly encroaching on the Legislature's domain is completely misguided. Resp. Br. at 1-2. The Legislature has already unambiguously conferred immunity on all "agents" of the State. § 768.28(9)(a), Fla. Stat. (1995). Thus, the only issue before this Court is whether Consultants are state "agents." That is quintessentially a judicial question, which properly can be answered by this Court.

Moreover, in answering that question, this Court need not, as Respondents contend, create new public policy. This Court is obliged, however, to "ascertain the intention of the Legislature and effectuate it." Ervin v. Peninsular Tel. Co., 53 So. 2d 647, 652 (Fla. 1951). As this Court has recognized, the Legislature's intent in immunizing state employees and agents from all the rigors

of litigation, including discovery, was to create an incentive for individuals to work for the State. State v. Knowles, 402 So. 2d 1155, 1158 n.13 (Fla. 1981). And, as the State has made clear, the incentive which that statute provides to physicians is critical to the future of the CMS program.[1]

2. Subsequent Legislation Respondents (and amicus) are equally misguided in contending that Consultants as a class are not entitled to immunity because the Legislature did not specifically confer immunity upon them in the manner it conferred immunity upon certain physicians in the Florida Health Services Corps Act and the Access to Health Care Act. Resp. Br. at 2-3, 22. Those statutes were adopted several years after the events underlying this case and thus, regardless of their breadth, could not be interpreted retroactively to withdraw the immunity which existed during the relevant period, which covered all state employees and agents, including physicians. Walker & LaBerge, Inc. v. Halligan, 344 So. 2d 239, 243 (Fla. 1977). In any event, those statutes did not preempt the general provisions of § 768.28, but merely clarified the conditions under which physicians working under those two particular statutory schemes, who do not necessarily work in state facilities and who are not governed by any guidelines comparable to the Manual, should be considered "agents" of the State and hence entitled to immunity under the provisions of § 768.28(9)(a). Thus, regardless of those statutes, the issue in this case remains the same -- are CMS's physicians "agents" within the meaning of

---

[1] See Brief of State of Florida As Amicus Curiae at 1, 12; also Brief of Florida Medical Association As Amicus Curiae at 7-9.

§ 768.28? Because the HRS Manual unequivocally demonstrates that they are, they are entitled to immunity.[2]

These two statutes, however, are far from irrelevant to the question presented by this case. In adopting them, the Legislature explicitly found that many indigent state residents are unable to obtain access to needed health care "because health care providers fear the increased risk of medical malpractice liability," § 766.1115(2), Fla. Stat. (1995), and recognized that immunizing physicians from suit was a powerful and appropriate means of alleviating this problem. This Court should effectuate that policy determination in answering the certified question. City of Boca Raton v. Gidman, 440 So. 2d 1277, 1282 (Fla. 1983) ("A law should be construed together with any other law relating to the same purpose such that they are in harmony").[3]

3. Case-By-Case Analysis Respondents' related, and oft-repeated, contention that § 768.28 requires, in all instances, a "case-by-case" analysis of "employee" or "agency" status, e.g., Resp. Br. at 2, 3, 22, 23, 25 n.18, 35, is equally wide of the mark. Concededly, basic principles of statutory interpretation require that the words "employee" and "agent" be given their common

---

[2] Respondents' arguments concerning § 768.28(10)(c) also are irrelevant. Section 768.28(9)(b)(2) expressly provides that the statutory term "[o]fficer[s], employee[s] or agent[s]" "includes, but is not limited to" various categories of state workers identified in the statute. (Emphasis added).

[3] Moreover, in specifying a set of criteria for determining entitlement to immunity under those statutory schemes, the Legislature adopted criteria that plainly are satisfied by CMS Consultants. See Brief of State of Florida as Amicus Curiae at 7-8.

law meaning. 2B Sutherland Statutory Construction § 50.03 (5th ed. 1992). But it does not follow from this that a jury must decide, in every case, whether the defendant is an employee or agent. At common law, a defendant's status was not a jury question in cases where the "inference [was] clear" concerning the individual's status as an "employee" or "agent."[4]

More to the point, this Court has recently made clear that the "context" in which employee or agency status arises is critical. Keith v. News & Sun Sentinel Co., 20 Fla. L. Weekly S454, 456 (Sept. 7, 1995). In the context of § 768.28, which prohibits state employees and agents from being "named as party defendant[s]," the case-by case approach advocated by Respondents, which would require state workers such as Consultants, in every instance, to endure both pre-trial discovery and trial to have their status determined, makes a mockery of the statute's protections. Tucker v. Resha, 648 So. 2d 1187, 1189 (Fla. 1994). To effectuate the plain language of that provision, status in cases under § 768.28 must be determined, where at all possible, prior to trial.

4. Civil Service Structure Respondents' reliance on evidence concerning the civil service structure, Resp. Br. at 6-12, also is misplaced. At most, such evidence relates to the issue of employee status. But neither the answer to the certified question,

---

[4] Magarian v. Southern Fruit Distribs., 1 So. 2d 858, 860 (Fla. 1941) (quoting Restatement (Second) of Agency ("Restatement") § 220 cmt. c); also Keith v. News & Sun Sentinel Co., 20 Fla. L. Weekly S454, 456 (Fla. Sept. 7, 1995); Cantor v. Cochran, 184 So. 2d 173, 174 (Fla. 1966).

nor Petitioners' entitlement to summary judgment, turns on whether Consultants are state "employees," because both "employees" and "agents" of the State are immunized under § 768.28(9)(a). Accordingly, this evidence is not material to the certified question.[5]

Similarly, Respondents' reliance on the opinion testimony of certain state officials that Consultants are not "employees" entitled to immunity, Resp. Br. at 11, 15-16, is misplaced. That testimony ignores the question of agency. Beyond that, entitlement to immunity is not an issue on which individual state officers, particularly non-lawyers, have any particular insight or definitive say, and thus those statements are completely immaterial.

5. Definitions of "Employee," "Agent," and "Independent Contractor" When they turn to their legal analysis, Respondents again ignore the distinction between "employees" and "agents" and conflate the two categories by distorting their well-settled and precise definitions. Contrary to Respondents' contention, Resp. Br. at 25, the 10 factors set forth in § 220 of the Restatement define employee status, not agency status.[6] The test for agency status is much simpler: An agent is a person "whose actions are

---

[5] Indeed, if this evidence is relevant, it is relevant only to the extent that Respondents concede that individuals with OPS 1300 status are entitled to immunity, because there is undisputed testimony that there is no functional difference between such individuals and Consultants. See, e.g., R. 3657-3764, Deposition of Dr. Michael Cupoli ("Cupoli Depo"), 10/21/92, at 73; R. 3011-3081, Deposition of June Scheer, 11/19/91, at 29-33.

[6] See Restatement § 220, § 2 & § 2 cmt. d (1958) (defining "servant"; distinguishing "servant" from "agent"; and defining "employee" to be synonymous with term "servant").

controlled by his employer or are subject to the employer's right of control." The Florida Bar Re: Standard Jury Instructions -- Civil (Professional Malpractice), 459 So. 2d 1023, 1025 (Fla. 1984); see also Pet. Br. at 13-15.

This distinction cannot be overlooked, because many facts which may be relevant to the test of "employee" status are not material to the question of "agency." In particular, many of the factors which Respondents claim are critically important in this case -- e.g., payment by salary warrant, the provision of fringe benefits and office space, withholding of taxes, and loyalty oaths -- while possibly relevant to "employee" status, self-evidently are not material to the question of agency, which turns solely on the question of "control." Likewise, CMS's requirement that Consultants maintain private liability insurance -- which actually does not cover several of the Petitioners -- is not material to the issue of CMS's authority to control the Consultants.[7]

Respondents similarly distort the term "independent contractor" and repeatedly use it colloquially -- and improperly -- to mean "non-agent." E.g., Resp. Br. at 5, 6, 9, 23, 35, 42. In fact, however, many independent contractors are agents. Pet. Br.

---

[7] Cf. Atwater v. Broward County, 556 So. 2d 1161 (Fla. 4th DCA) (physician employed by county was "employee" or "agent" of State despite having private insurance coverage), review denied, 564 So.2d 486 (Fla. 1990). As Dr. Cupoli explained, the State adopted this requirement as a precautionary measure to protect patients in the event that a court should determine that a particular consultant -- if he should see a patient in his private office -- is not an "employee" or "agent" of the State, and hence that State funds are not available to satisfy any judgment. R. 3657, Cupoli Depo, at 25 ("It's our expectation that [for] the patients seen in our clinic, they would have sovereign immunity but that's not been tested").

at 15-17. Indeed, 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." Pet. Br. at 15-16.

The fact that "independent contractors" can be "agents" is important. For one thing, it renders meaningless casual references to plumbers and electricians. See, e.g., Resp. Br. at 20. While such workers may often be independent contractors, they also may be agents of the companies for which they work, depending on the terms of their agreements with those companies. More importantly, Respondents' suggestion that Consultants are not entitled to immunity if they are "independent contractors" is simply wrong. Section 768.28(9)(a) affirmatively immunizes all state "agents" regardless of whether they also are "independent contractors"; it does not affirmatively exclude -- or even mention -- "independent contractors."

6. Authority to Control When Respondents finally do address the core issue of "control," they acknowledge -- as they must -- that agency status turns not on the actual exercise of control, but rather on the ultimate "right to direct what shall be done, and when and how it shall be done." Resp. Br. at 36 (emphasis added). They also acknowledge -- as they must -- that the Manual is "unambiguous," id. at 39, and, formally, at least, gives the CMS Medical Director extensive supervisory authority over Consultants, including the "purported right of both prior and ultimate approval of the" care they provide to CMS patients, id. at 36.

The importance of all this cannot be overstated. In acknowledging that agency status does not turn on the actual exercise of control, Respondents effectively acknowledge the immateriality of the testimony on which they rely to the effect that no one actually told the doctors how to practice medicine, or that CMS generally left the Consultants free to care for patients according to their education, training and experience. E.g., id. at 14, 15, 17, 39-40. And, in acknowledging that CMS in the Manual "unambiguous[ly]" retained formal authority to control the Consultants, they effectively, although perhaps unwittingly, also acknowledge that any oral testimony by state officers to the effect that CMS did not retain such authority -- which is precisely the type of evidence on which the court of appeal erroneously purported to rely -- would, if it actually existed, be immaterial.[8] Such testimony is immaterial under the general rule that parol evidence cannot defeat summary judgment on unambiguous contract language,[9] and under the rule that the opinions of agency officers cannot supersede written agency policies and procedures. Pet. Br. at 29-30.

---

[8] Without belaboring the point, when read carefully, as the trial court did, the testimony does not in any way contradict the Manual. In fact, every witness who suggested on initial questioning that the State did not have authority to direct the care provided by Consultants ultimately explained that the State did in fact have the authority, in the event of a disagreement, to "control" or "veto" decisions made by Consultants. See Pet. at Br. 33-38.

[9] Cf. McCarty v. Dade Co. Div. of Am. Hosp. Supply, 360 So. 2d 436, 438 (Fla. 3d DCA 1978) ("on a motion for summary judgment, the trial court cannot consider evidence which is inadmissible under the parol evidence rule").

Squeezed between the rule that exercise of authority is immaterial and the unambiguous language of the Manual authorizing the Medical Director to "supervise," "direct," and "prior authorize" the care Consultants provide, Respondents try to carve out an exception to cover their situation, arguing that something more than "formal" authority is required to establish an agency relationship -- namely, the "meaningful" "capacity" to exercise that authority. Resp. Br. at 37. And, relying on testimony that the Fort Lauderdale Medical Director was not always on site, e.g., id. at 39, they argue that CMS lacked such "meaningful" "capacity." Indeed, they go so far as to suggest that the consultant system was structured to make supervision "inherently" impossible, and that the Manual's written description of the relationship was "meaningless in practice." Id. at 39.

Respondents' approach finds no support in the decisions of this Court, which have never injected a "meaningful" "capacity" requirement into the definition of "control." To the contrary, this Court long ago held that "the [principal's] right to control depends upon the terms of the contract of employment." National Sur. Corp. v. Windham, 74 So. 2d 549, 550 (Fla. 1954) (en banc) (emphasis added). That is, agency status is determined by reference to the initial agreement of the parties and, except in rare instances, is determined exclusively by reference to that agreement.[10]

---

[10] As Respondents point out, it may be appropriate in some circumstances to look beyond that agreement. This Court has found it appropriate to do so in cases in which the agreement described (continued...)

Starting from that premise, this Court held -- in the sole decision of this Court on which Respondents rely -- that no employment relationship was created in a case in which the principal was intoxicated at the time of the agreement and thus incapable, as a matter of law, of providing "rational direction" (and, perhaps more basically, of entering into a contract). Id.[11] This Court, however, has never held that where, as here, a principal clearly has the legal capacity at the beginning of the relationship to "control" the worker, and where, as here, it unequivocally manifests its intention to retain the authority to control, that additional evidence of some "meaningful" continuous mechanism for exercising control is necessary to establish an agency relationship. The Restatement likewise has explicitly rejected that idea, stating that "[t]he control of the principal . . . may be very attenuated and, as where the principal is

---

[10] (...continued)
the relationship in legal terms that did not resolve the issue in dispute -- for example, where the agreement stated that it created an "independent contractor" relationship. See, e.g., Justice v. Belford Trucking Co., 272 So. 2d 131, 133, 135 (Fla. 1972); Cantor v. Cochran, 184 So. 2d 173, 174 (Fla. 1966). Presumably, it would also be appropriate to look beyond the agreement in cases in which it was patently ambiguous. This Court, however, has not held that parol or extrinsic evidence is appropriate in cases such as this one, where the agreement, rather than labeling the relationship, specifically sets forth the substantive terms of the relationship, and those terms admit of only one conclusion.

[11] Likewise, in Farmers & Merchants Bank v. Vocelle, 106 So. 2d 92, 95 (Fla. 1st DCA 1958), on which Respondents also rely, the First District held only that no employment relationship was created where the principal could have retained the authority to control, but manifested no "positive" intent to do so.

physically absent, may be ineffective." Restatement § 14 cmt. a (emphasis added).

Moreover, Respondents' proposed expansion of the definition of "control" makes no sense. First, it gives those in positions of authority the perverse incentive not to exercise their authority over their workers, and indeed to leave them completely unsupervised. Second, it is grossly unfair to agents, because it makes their status (and, in the case of state agents, their immunity) turn not on the terms of their agreements with their principals, but rather on actions of their principals over which they have no control. Finally, it would throw into doubt the immunity from suit of every state employee and agent, because it would make their entitlement to immunity turn on whether their immediate supervisors were in a position effectively to exercise their authority.

7. "Meaningful" "Capacity" to Control In any event, Consultants surely qualify as "agents" of the State even under Respondents' proposed definition of "control." The State plainly has the legal capacity to provide physicians with "rational direction"; otherwise, the immunity of all physicians who work for the State (even those which Respondents acknowledge are entitled to immunity) is threatened. Moreover, as Respondents acknowledge, regardless of the day-to-day activities of the CMS Medical Director in Fort Lauderdale, the State had, and continues to have, in place an entire administrative structure (the CMS Program Office) which oversees the CMS program and the physicians who provide direct

patient care. Resp. Br. at 5.[12] Finally, as the court of appeal recognized, CMS has in place a mechanism to "refuse to pay for any . . . therapy" proposed by a Consultant. Opinion at 5. In the CMS context, where the patients are, by definition, incapable of paying for their own care, such a mechanism is dispositive evidence of CMS's "meaningful" "capacity" to exercise its authority over the means by which Consultants care for CMS patients.

* * *

The policy considerations vigorously advanced by the State in support of Petitioners can and legitimately should inform this Court's judgment about whether Consultants are immune from suit. But this Court need not rely on those policy concerns. Consultants are "agents" of the State, and hence entitled to immunity, because the unambiguous language of the HRS Manual establishes that the State retains the authority to control the means by which they care for patients while working for CMS. Evidence to the effect that the State did not always exercise that authority, that the State did not have in place a "meaningful" mechanism to monitor Consultants, and even oral testimony that the State did not have ultimate authority to control Consultants (if it existed) is not material.

Beyond this, the other prerequisites of § 768.28 also are satisfied here. Respondents do not allege that Petitioners cared for Minouche Noel anywhere except at the CMS clinic in Fort

---

[12] See also R. 3086-3152, Deposition of Dr. Robert Furlough, 7/9/92, at 58-59 (describing role of Program Office).

Lauderdale or the Broward General Medical Center, which are both state facilities. Pet. Br. at 1-2. Thus there is no dispute -- as there potentially might be if a Consultant cared for a CMS patient at his or her private office -- that Petitioners acted at all relevant times within the scope of their agency relationship.[13] Moreover, although Respondents hyperbolically, and inappropriately, suggest that Petitioners "brutalized" Minouche, their Complaint in fact alleges only simple negligence, involving highly technical questions of medical practice and procedure. For all of these reasons, this Court should determine that CMS Consultants, including Petitioners, are entitled to immunity from suit, that the State, as it has admitted, is the only proper defendant in this case, and that the case should proceed to trial strictly on that basis.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Petitioners' Brief On The Merits, this Court should accept jurisdiction; answer the certified question in the affirmative; and reverse the judgment of the Court of Appeal.

---

[13] Indeed, the State has formally admitted that Petitioners were working, at all relevant times, within the scope of their agency. R. 4631-32, 4655-57.

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing were served by U.S. mail on February 16th, 1996, on:

Sheldon J. Schlesinger, Esq.
Sheldon J. Schlesinger, P.A.
1212 S.E. 3rd Avenue
Ft. Lauderdale, FL 33316

Joel Perwin, Esq.
Podhurst, Orseck, Josefsburg, Eaton,
Meadow, Olin & Perwin, P.A.
25 West Flagler St., Suite 800
Miami, FL 33130

Jane Kreusler-Walsh, Esq.
Jane Kreusler-Walsh, P.A.
501 South Flagler Dr.
Suite 503 -- Flagler Center
West Palm Beach, FL 33401

John E. Thrasher, Esq.
Christopher L. Nuland, Esq.
Florida Medical Association
P.O. Box 2411
Jacksonville, FL 32203

Harry T. Hackney, Esq.
Cummins, Mueller & Judson, P.A.
P.O. Box 491656
Leesburg, FL 34749-1656

Panza, Maurer, Maynard &
Neel, P.A.
3600 N. Federal Highway
Fort Lauderdale, FL 33308

By: _____
Bartley C. Miller, Esq.
Florida Bar No. 788650

Respectfully submitted,

George Bunnell, Esq. #010175
Bunnell, Woulfe, Keller,
& Gillespie
888 E. Las Olas Blvd.
Fort Lauderdale, FL 33301
(305) 761-8600

Robert Collier, Esq. #854440
Timothy J. Payne, P.A.
P.O. Box 14666
Fort Lauderdale, FL 33302
(305) 524-7300

Bartley C. Miller, Esq. #788650
Panza, Maurer, Maynard &
Neel, P.A.
3600 N. Federal Highway
Fort Lauderdale, FL 33308
(305) 390-0100

Carter G. Phillips, Esq.
Paul E. Kalb, Esq.
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioners