IN THE SUPREME COURT OF THE STATE OF FLORIDA

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VALERIE PAGAN and JAMI PAGAN

Appellant.

v.

SARASOTA COUNTY PUBLIC HOSPITAL BOARD, et al.

Appellees,

____

ON APPEAL FROM THE DISTRICT COURT OF THE SECOND DISTRICT COURT OF APPEALS (APPEAL CASE NO. 2D02-5672)

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JURISDICTIONAL BRIEF FOR APPELLANTS

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STATEMENT OF THE CASE AND FACTS

The Pagans as well as other named defendants filed medical malpractice suits against SMH PHYSICIAN SERVICES, INC.[1] and certain doctors working for it. The Hospital Board, First Physicians Group, and the Doctors filed the instant action seeking a declaration from the court that First Physicians Group and the Doctors were immune from tort liability under the doctrine of sovereign immunity. The Complaint cites Florida Statute §768.29(9)(a), indicating that the Hospital Board is immune under its provisions and that this immunity extends to First Physicians Group. (R. V. I, p. 11-14).

In the interest of brevity, the Appellant will not discuss the numerous facts that are part of the record before the Second District, as the facts asserted by the AppellantS were, in large part, adopted by the Second District in its Opinion. In summary, the Hospital Board takes no part whatsoever in the day-to-day operations of First Physicians Group, however, there are necessarily shared directors on the respective boards of directors as between the Hospital Board and First Physicians Group.

The Board maintained that First Physicians Group is a "subsidiary" of the Board that was created pursuant to the enabling act of the Board itself. (R. V. 12, p. 2288-2364;

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[1] SMH Physician Services, Inc. does business as "First Physicians Group" and is referred to as such in the Opinion of the Second District. For ease of reference, this label will be used throughout this brief

hearing transcript at p. 6-8). The Board argued that the members of the Board of Directors of First Physicians Group served at the pleasure of the Board and that, as such, the Board had "control" over First Physicians Group and the Doctors. (R. V. 12, p. 2288-2364, hearing transcript at p. 26-32). The trial court noted the following at the hearing:

> It seems to me that what the hospital is doing is spreading around their sovereign immunity because of what is perceived to be the malpractice crisis. However, in following the law, I mean, I'm not here for public purpose -- public policy purpose, you know, that's really not what I'm here for today, because I think it stinks. I think it's wrong. I think it's uncompetitive and I think the hospital -- I think they ought to fix it by doing away with the independent corporation and just have these people as employees of the hospital. There would be no question, you know, but anyway, I can't tell them how to do their business. In following the law, it appears that they followed what they have to do to create this subsidiary or affiliate, whatever you want to call it, and I'm going to grant summary judgment. I find that they're entitled to sovereign immunity, as much as I think it's bad public policy, and I hope that an appellate court would consider all of those arguments. Okay. (R. V. 12, p. 2288-2364; hearing transcript at p. 65-66).

The court found that "SMH PHYSICIAN SERVICES, INC., and each of its employee physicians are entitled to sovereign immunity under Florida Statutes §768.28." (R. V. 13, p. 2365-2368).

The Pagans appealed and the Second District concluded that the Hospital Board's initial creation of, and ability to dissolve, the First Physicians Group was tantamount to the day to day control necessary to extend sovereign immunity.

SUMMARY OF ARGUMENT

The decision of the Second District Court of Appeal directly and expressly conflicts with prior decisions in the State of

Florida on several issues. Initially, the Second Districts conclusion that "structural control" was sufficient to justify the extension of sovereign immunity is contrary to the decisions in Bryant v. Duval County Hospital Authority, 459 So.2d 1154 (Fla. 1st DCA 1984),Robinson v. Linzer, 758 So.2d 1163 (Fla. 4th DCA 2000, Theodore ex. rel. Theodore v. Graham, 733 So.2d 538 (Fla. 4th DCA 1999). Further, the Second District's conclusion that control can be exercised solely through shared directors is in conflict with well established corporate law as codified in §607.0830, Florida Statutes. Finally, the Second District's holding is in conflict with the decisions in Jaar v. University of Miami, 474 So.2d 239 (Fla. 3rd DCA 1985), and Baldwin v. Dellerson, M.D., 541 So.2d 779 (Fla. 4th DCA 1989), which hold that questions of agency in this context are factual in nature and are improper for resolution on summary judgment.

ARGUMENT

I. THE SECOND DISTRICT COURT OF APPEAL DETERMINED THAT THE EXTENSION OF SOVEREIGN IMMUNITY WAS A FUNCTION OF THE HOSPITAL'S "STRUCTURAL CONTROL," REGARDLESS OF WHETHER ANY DAY-TO-DAY CONTROL WAS POSSIBLE OR DID, IN FACT, TAKE PLACE, AND THIS HOLDING IS DIRECTLY AND EXPRESSLY IN CONFLICT WITH PRIOR HOLDINGS WHICH FOCUS THE AGENCY QUESTION ON THE EXERCISE OF DAY-TO-DAY CONTROL.

The Second District described the functioning of First Physicians Group a follows:

> Although First Physicians Group is a nonprofit corporation, this is not a group of doctors that is serving primarily or only the poor. These doctors appear to accept patients and receive payments from their patients and insurance companies just like any private clinic or professional association of physicians. The Hospital Board does not appear to control these doctors' fees or the selection of

> their patients. The doctors in this group are only required to perform eighteen hours of community service each year. The corporation is a nonprofit corporation, but the physicians within the group earn large salaries established by complex production formulas similar to those used in private sector medical groups...The doctors in this group are not required to admit their patients to Sarasota Memorial Hospital. Their patients may be admitted to other hospitals in the community.... As to the specific issue argued at summary judgment, which revolved around whether the Hospital Board controlled First Physicians Group, the undisputed facts before the trial court showed that First Physicians Group was created by the Hospital Board, initially funded by the Hospital Board, and remains partially funded by it. The Hospital Board has the power to dissolve First Physicians Group and to claim any remaining assets upon dissolution. The nine members of First Physicians Group's board of directors are elected by the Hospital Board and serve at the pleasure of the Hospital Board. Under the Bylaws and articles of incorporation of First Physicians Group, a majority of its board of directors must be composed of sitting Hospital Board members. The chief executive officer of the Sarasota Memorial Health Care System is required to also be president of First Physicians Group. (Opinion at p. 5, 12).

The Second District determined that what it described as "structural control" was sufficient to extend sovereign immunity. This finding is in contrast to a number of prior holdings which properly focus the inquiry on actual day-to-day control of the alleged agent by the immune entity.

The court in Bryant v. Duval County Hospital Authority, 459 So.2d 1154 (Fla. 1st DCA 1984), made similar observations in reaching a contrary result. In Bryant, the defendant doctor was the chairman of neurosurgery at the Duval County Hospital Authority (d/b/a University Hospital) and was a full-time staff physician employed by the hospital. Id. at 1155. His salary was paid by the hospital, but was supplemented by the University

Hospital Academic Fund, which provided billing and collections services. Id. The medical malpractice claimant argued that the doctor was working within the course and scope of his duties for the Fund, an entity that was not immune. Id. The court observed as follows:

> Common law considerations in determining the existence of an employer and employee relationship were the selection and engagement of the servant, the payment of wages, the power of dismissal, and the right of control over the servant's conduct. The essential element was the right of control; the least determinative was the payment of wages. 2 Fla.Jur.2d 297, Agency and Employment §121. While Dr. Bremer received supplemental salary and other benefits from the Fund, no allegation or evidence shows that the Fund was involved in selecting and hiring him, that the Fund has the power to dismiss him, or, most importantly, that the Fund has a right of control over Dr. Bremer's conduct. Id. at 1155.

The focus of the inquiry was which entity, the Hospital or the Fund, controlled the doctor. The record in that case showed no control by the Fund whatsoever and established that the doctor was a full-time staff physician employed by the hospital. In the instant case, the Hospital Board is, at best, analogous to the Fund as it takes no part whatsoever in the day-to-day control of First Physicians Group.

In keeping with this analysis, the court in Robinson v. Linzer, 758 So.2d 1163 (Fla. 4th DCA 2000) denied a motion for summary judgment similar to that filed by the Hospital Board in the instant case. In Robinson, the trial court addressed a medical malpractice action filed by a patient against an emergency room physician and his employer. Id. at 1163. The trial court entered summary judgment in favor of the doctor and

his employer (Coastal), finding that they were agents of the Broward Hospital District. The court concluded as follows:

> It appears that the Hospital District and Coastal were, by their contract, attempting to create an agency status. The actual relationship, however, not the label, determines whether there is an agency. Id. at 1164.

The court observed that, despite the label, the actual operations contemplated by the contract left the "day-to-day management and supervision of the emergency room physicians" to the employer, not the hospital. Id. at 1163. The Fourth District reversed the trial court's order on this basis. The Second District's holding in the instant case, finding that "systemic control" is sufficient to extend sovereign immunity, flies in the face of Robinson.

The court in Theodore ex. rel. Theodore v. Graham, 733 So.2d 538 (Fla. 4th DCA 1999), held that no agency existed between the hospital and the doctor who was the defendant in a malpractice suit. There, the physician had autonomy and full discretion in her exercise of professional judgment when treating patients. The court noted that the hospital had never attempted to impose policies or procedures regarding the doctor's diagnosis or handling of patients. The court went as far as to conclude that governmental control over the administrative aspects of the doctor's practice is not tantamount to control over the physician's procedures. Thus, the amount of control retained by the hospital over the individual doctors' practices was of paramount concern to the Theodore court. Here again, this is

directly contrary to the Second District's holding in the instant case.

II. THE SECOND DISTRICT COURT OF APPEAL DETERMINED THAT THE SHARING OF BOARD MEMBERS BETWEEN THE HOSPITAL BOARD AND FIRST PHYSICIANS GROUP EQUATED TO "STRUCTURAL CONTROL" OF FIRST PHYSICIANS GROUP, AND THIS HOLDING IS DIRECTLY AND EXPRESSLY IN CONFLICT WITH A WEALTH OF CASE-LAW IN THE CORPORATE SETTING WHICH REQUIRE DIRECTORS OF FIRST PHYSICIANS GROUP TO ACT IN THE BEST INTERESTS OF FIRST PHYSICIANS GROUP, REGARDLESS OF THE DESIRES OF THE HOSPITAL BOARD.

The Second District's concept of "structural control" of First Physicians Group by the Hospital Board stands in conflict with the maxims of corporate law, which require a director to function for and on behalf of the corporation in which he or she serves. Once again, the Appellants would note that the Second District voiced its conclusions as to the independent <u>functioning</u> of the First Physicians Group and its doctors. This was clearly established in the record. The ties that do exist between First Physicians Group and the Hospital Board were described as a function of the sharing of directors between the Hospital Board and First Physicians Group. This sharing of directors cannot be equated to "control" without usurping a long-standing maxim of corporate law which imposes a fiduciary duty on a director to act for and on behalf of the entity that he is a director of. In essence, the Second District ignored the independent corporate status of First Physicians Group, relying on the notion that, as a practical matter, the directors of First Physicians Group would direct First Physicians Group into oblivion if it benefitted the Hospital Board. Section

§607.0830, Florida Statutes provides that "[a] director shall discharge his or her duties...in a manner he or she reasonably believes to be in the best interest of the corporation." Florida courts have held in keeping with this, concluding that "[c]orporate directors owe a fiduciary obligation to the corporation and to the stockholders and must act in good faith and in the best interest of the corporation. Tillis v. United Parts, Inc., 395 So.2d 618 (Fla. 5th DCA 1981).

The fact that the President of First Physicians Group (Dr. Findley) also works for the Board does not in any way diminish his fiduciary obligation to First Physicians Group and he has acknowledged as much. When asked whether he was aware of any document that would require him to follow the directions of the Board with regard to First Physicians Group, he testified that he wasn't aware of any. (R. V. 11-12, p. 2082-2263; Findley transcript at p. 109).

The undersigned was able to locate an Eleventh Circuit decision which addresses the issue of agency as it relates to shared directors. In S & Davis International, Inc. v. The Republic of Yemen, 218 F.3d 1292 (11th Cir. 2000), the court addressed a suit by S & Davis seeking to enforce an arbitration award against the General Corporation for Foreign Trade and Grains of Yemen ("General Corporation"). Id. at 1295-1297. The Ministry of Supply & Trade (the "Ministry") and The Republic of Yemen were also named as defendants. Id. The Ministry filed a motion to dismiss, claiming sovereign immunity under the

Foreign Sovereign Immunities Act of 1976. Id. One of the issues on appeal was whether the General Corporation was, in fact, an instrumentality of the Ministry such that the General Corporation could avail itself of sovereign immunity. Id. at 1298. The court observed as follows:

> In applying the agency exception to the rule of sovereign immunity, how much control the sovereign exercised over the instrumentality is reviewed...At a minimum, however, we can confidently state that the relationship of principal and agent does not obtain unless the parent has manifested its desire for the subsidiary to act upon the parent's behalf, the subsidiary has consented so to act, the parent has the right to exercise control over the subsidiary with respect to matters entrusted to the subsidiary, **and the parent exercises its control in a manner more direct than by voting the majority of the stock in the subsidiary or making appointments to the subsidiary's Board of Directors.** Id. at 1299; citing, Transamerica Leasing, Inc. v. La Republica de Venezuela, 200 F.3d 843 (D.C. Cir. 2000)(emphasis added).

The S & Davis holding is in keeping with the statute and cases cited above, which confirm that the sharing of board members cannot be the equivalent of "control." See also, Pulte Home Corp., Inc. v. Ply Gem Industries, Inc., 804 So.2d 1471 (M.D. Fla. 1992)(holding that under Michigan law, "common officers and directors in a parent and subsidiary does not destroy the separate identity of either corporation.") What the Second District called "structural control" is nothing short of a conflict of interest.

III. THE SECOND DISTRICT COURT OF APPEAL DETERMINED THAT NO MATERIAL QUESTIONS OF FACT REMAINED ON THE QUESTION OF AGENCY, AND THIS HOLDING IS DIRECTLY AND EXPRESSLY IN CONFLICT WITH PRIOR HOLDINGS WHICH ESTABLISH THAT QUESTIONS OF AGENCY ARE UNIQUELY FACTUAL IN NATURE AND SHOULD NOT BE RESOLVED BY WAY OF A SUMMARY JUDGMENT.

Both the Appellant and the Appellee moved for summary judgment before the trial court. In order to show that sovereign immunity does not attach to First Physicians Group or the Doctors, the Pagans needed only show that there is a break in the "control" alleged by the Board. The converse is not true. In order for the Board to have been entitled to summary judgment, it bore the immense burden of showing that no factual issues remain at all with regard to the relationship between the Board, First Physicians Group, and the individual Doctors themselves. Based on the evidence in the record, the Board did not meet this high burden.

The court in Jaar v. University of Miami, 474 So.2d 239 (Fla. 3rd DCA 1985) held, with regard to a doctor employed both by the University of Miami and by the Public Health Trust of Dade County, that "that the existence and scope of an agency relationship are generally questions of fact to be resolved by the factfinder." Id. at 242. Similarly, the court in Baldwin v. Dellerson, M.D., 541 So.2d 779, 780 (Fla. 4th DCA 1989) held, with regard to the issue of sovereign immunity, that

> there are genuine issues of material fact relative to Dr. Tomback's relationship to the hospital, i.e., as agent or independent contractor. The fact that, as a staff member, he was required to be 'on call' on this particular evening and care for whosoever appeared at the hospital in need does not ipso facto make Tomback the hospital's agent. As is usually the case, the question of agency turns upon the degree of control exercised by the hospital over the doctor.

Beyond the factual issues presented with regard to whether there exists any agency relationship between the individual doctors

and the Sarasota County Public Hospital Board, additional factual issues are presented with regard to whether the individual doctors' actions were outside the course and scope of their authority in the event an agency relationship is established. The Second Districts' decision is in contrast to the cases finding that agency questions such as those presented in the instant case should not be resolved through summary judgment.

CONCLUSION

The decision of the Second District Court of Appeal directly and expressly conflicts with prior decisions in the State of Florida on several material issues, including the nature and extent of control required for immunity to extend from an immune entity to a subsidiary, whether control can exercised solely through shared directors, and whether summary judgment was appropriate to affirmatively answer the agency question. For the reasons described above, review should be granted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy hereof has been furnished by U.S. Mail to David A. Wallace, Esq., Williams, Parker, Harrison, Dietz & Getzen, 200 South Orange Ave., Sarasota, FL 34236, Stephen E. Day, Esq., and Rhonda B. Boggess, Esq., Taylor, Day & Currie, 50 North Laura St., Ste. 3500, Jacksonville, FL 32202, and Joel S. Perwin, Esq., Podhurse, Orseck, P.A., 25 West Flagler St., Ste. 800, Miami, FL 33130, this 15th day of September, 2004.

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I certify that this Brief satisfies the requirements of Rules 9.100(1) and 9.210(a)(2) in that this computer generated brief is formatted in Courier New 12 point font.

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