

**IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
THIRD DISTRICT**

Case Number: 3D2023-796

Lt. Court Case No: 18-36746 CA 01

STEPHEN GRANT LARKIN,
M.D., and DUVAL EMERGENCY
GROUP, LLC,

Appellants,

vs.

FRITZ DICTAN, individually and
as Personal Representative of
THE ESTATE OF MARILAINE
DICTAN LEVI, and as Guardian
of NELCIE DICTAN and
SANDERLIEN DICTAN, the
Surviving Minor Children of
MARILAINE DICTAN LEVI, and
THE PUBLIC HEALTH TRUST
d/b/a JACKSON HEALTH
SYSTEM a/k/a JACKSON
NORTH MEDICAL CENTER

Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

**REPLY BRIEF OF APPELLANTS
STEPHEN GRANT LARKIN, M.D., and DUVAL EMERGENCY GROUP,
LLC**

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ARGUMENT

I. Rebuttal of Arguments Set Forth By Dictan-Levi and The Trust

A. Section 766.1115 Notice Requirements and Section 768.28(9)(b) Definitions

Dictan-Levi expends considerable time and effort in his Answer Brief to advance arguments against a position that Appellants do not assert in their Initial Brief and to ignore words in the plain reading of a statutory provision. Dictan-Levi asserts that sovereign immunity is not available to Appellants as they failed to provide notice pursuant to Florida Statute § 766.1115. Dictan-Levi errs in assuming that Dr. Larkin and Duval seek sovereign immunity specifically under that statutory section. Dr. Larkin and Duval do not seek to apply sovereign immunity specifically under section 766.1115 and, therefore, notice under that section is completely immaterial. Rather, immunity is sought generally under section 768.28 and subsection (9).

Dictan-Levi further asserts that Florida Statutes § 768.28 (9)(b)(2) is the exhaustive list of possible “officers, employees, or agents” of the sovereign. Dictan-Levi tortures this statute by very plainly ignoring the words “includes, but is not limited to”. This phrase makes clear that subsection (9)(b)(2) is not an exhaustive list of possible agents. Therefore,

it is clear that Dr. Larkin and Duval do not need to be a “health care provider when providing services pursuant to s. 766.1115” nor are they required to be a university or an employee of one, a public defender, an investigator, a firefighter, or a member of the Child Protection Team. Notably, prison contractors are not included in the list of categories but, nonetheless, the Second District in *G4S*, the Fourth District in *Lovelace*, and the Middle District of Florida in *Horn* found entitlement to sovereign immunity for the contractors due to the control retained by the State.

This point is further supported by reference to *Stoll*. There, the Florida Supreme Court simply held and acknowledged that the physicians were “agents” of the sovereign due to the extensive control contained within the relevant contracts. There was no discussion regarding any of the categories contained in section 768.28(9)(b)(2). It is clear that those categories were just examples and were not meant to be an exhaustive list as Dictan-Levi so strenuously argues.

B. Case Law Cited Regarding Control Is Distinguishable

Dictan-Levi cites to *Theodore v. Graham*, 733 So. 2d 538 (Fla. 4th DCA 1999), as support in his Answer Brief. The *Theodore* case is factually distinguishable from this instant case. In *Theodore*, Dr. Graham was an

obstetrician who acted as the obstetrical director of the Regional Perinatal Intensive Care Center (RPICC). The RPICC program was created by statute and governed by rules promulgated by HRS. Pursuant to a Fla. Admin Code section, 64C-6, Dr. Graham, in her capacity as the program director, had authority to make the final decision for admission of a patient to the program. *Id.* at 540. Further, there was no provision at all in any contract which gave the government the right to control Dr. Graham's decisions regarding patient treatment. *Id.* at 540-541. These facts, together with Dr. Graham's own testimony that HRS placed no restrictions upon her own independent exercise of professional judgment in treating patients, was the focus of the court in determining that it was a question of fact over whether HRS controlled Dr. Graham's involvement in the treatment of patients. *Id.*

Here, there is no such independent control given to Dr. Larkin over which patients may be seen by him or within the confines of the emergency department. He must take and see everyone that presents for his treatment within the confines of the Jackson North emergency department. Further, Dr. Larkin never testified that The Trust exercised no control over his actions. The relevant contracts in this matter, the PSA, state that Duval and Dr. Larkin shall provide care to patients under the direction and control of

the The Trust's Chief Medical Officer, which is exactly the opposite situation as was presented in *Theodore*. Therefore, the major factors weighing against Dr. Graham are inapplicable to Dr. Larkin here and the decision to reverse Dr. Graham's summary judgment is entirely distinguishable.

Dictan-Levi also cites to *M.S. v. Nova Southeastern Univ., Inc.*, 881 So. 2d 614 (Fla. 4th DCA 2004). *M.S.* is also factually distinguishable from this case. In *M.S.*, Nova contracted with The School Board of Broward County, Florida, in order to operate a school program for children with disabilities. After analyzing the relevant contracts, the Fourth DCA stated that Nova was not an agent of The School Board as the contracts granted Nova full control over the operation of the school. The Court cited factors pointing away from an agency status as Nova retained rights to provide an educational program, interviewed and hired employees, supervised and evaluated employees, maintained the physical environment of the school, and resolved complaints and grievances.

When analyzing the PSA here, none of those factors are present. The Trust retained the rights to control the educational program given to physicians including training, standards, and in operation of the electronic record system, retained the rights to control the exact provision of medical

care given by those physicians given that all care was performed under the direction and control of The Trust's Chief Medical Officer, retained the rights to approve all physicians, retained the rights to remove any physician, retain the rights to control the physical environment of the hospital, its staffing, its equipment, etc., and retained control over the Medical Director who was tasked with handling patient complaints.

Dictan-Levi also cites to *Robinson v. Linzer*, 758 So. 2d 1163 (Fla. 4th DCA 2000), which is likewise distinguishable. First, *Robinson* was decided under the old summary judgment standard which required the movant seeking summary judgment to conclusively disprove the non-movant's theory of the case to prevail. Now, the standard is only whether or not a reasonable jury could return a verdict for the non-moving party. Under the former standard, any record evidence weighing against a finding that the physician was an agent of the sovereign hospital defeated summary judgment. Second, the Fourth District stated that the contract between the facility and physician group stated that an individual hired and employed by the group was responsible for the day-to-day management of the emergency room physicians. Here, The Public Health Trust retained full authority to approve or disapprove of the medical director, monitored the medical director's performance, and paid for the medical director's services

via a stipend payment. Attachment B to the PSA specifically states that the Medical Director “must be approved by the Trust” and that Duval “shall remove the Medical Director . . . should the Trust advise [Duval] that the Medical Director does not meet Trust’s performance standards or other Trust requirements.” Further, The Trust imposed no fewer than 37 duties upon the Medical Director and imposed monitoring of the Medical Director’s performance standards. Finally, The Trust acknowledged payment for the services of the Medical Director. “Medical Directorship . . . payments are included in the calculation of the Subsidy Payment payable to [Duval].”

The Trust cites to *Gradia v. Baptist Hospital, Inc.*, 345 So. 3d 385 (Fla. 1st DCA 2022) as support for the notion that agency is a jury issue. In *Gradia*, the First District cited only two facts in support of the notion that the contract “cut both ways”. First, is that the agreement stated that the physicians were not employees of Baptist Hospital. Here, the PSA contains a similar statement. Second, is that the physician group PEP was responsible for the acts of its agents. Here, and as cited in the Initial Brief, The Trust contemplated sovereign immunity for the physicians of Duval in section VII regarding the liability of Duval for actions performed under the PSA. Labels in a contract, including the self-serving statement by The Trust that Duval and physicians are not employees, are not dispositive. There is

only one view of the PSA here due its overwhelming indicia of control over Duval and Dr. Larkin.

Essentially the only elements that Dictan-Levi and The Trust point towards that are The Trust did not retain rights for billing of Dr. Larkin's service, did not pay wages to Dr. Larkin, did not physically set Dr. Larkin's schedule but did mandate provisions regarding staffing, and pointing towards a self-serving label that the contract did not make an employment relationship. These factors do not "cut both ways" and are in no way dispositive as to whether The Trust actually retained control over the manners in which Dr. Larkin could practice medicine, which is the real issue present here. See Theodore v. Graham, 733 So. 2d 538 (Fla. 4th DCA 1999) ("there exists a question of fact whether [Dr. Graham] was controlled or subject to the control of HRS *in that aspect of the performance of the engagement which involved the treatment of patients.*") (emphasis added).

The Trust also points towards the notion that bylaws, rules, and regulations are mandated by both state and federal laws and thus are not indicia of control over Duval and Dr. Larkin. The Trust ignores jurisprudence on this issue that medical staff bylaws do indeed create a contract with the physician and are not simply matters of state or federal

compliance. See *Naples Cmty. Hosp. Inc., v. Hussey*, 918 So. 2d 323 (Fla. 2d DCA 2006) (“Florida has adopted the majority view that hospital bylaws become a binding and enforceable contract between a hospital and its medical staff when adopted by a hospital’s governing board”). Therefore, Duval and Dr. Larkin being forced to adhere to the same is indeed a relevant point of contention, as was also discussed in the various case law cited in the Initial Brief, such as *Stoll*.

C. The Trust’s Interpretation of Contractual Terms Does Not Control

Dictan-Levi asserts that The Trust’s own interpretation of the terms of its contract with Duval controls and cites as support the *Stoll* matter, which itself relies on the cases of *Raffield v. State*, 565 So. 2d 704 (Fla. 1990) and *Pan American World Airways, Inc. v. Florida Public Service Com.*, 427 So. 2d 716 (Fla. 1983). However, these cases have to do with a governmental entity interpreting a statute that it either created or enforced and do not pertain to interpreting the definition of a word in a contract. The Trust’s own definition is not entitled to great weight in this scenario.

The *Raffield* case involved an analysis of the statute located at Fla. Stats. section 370.08(3) and which prohibited the possession, sale, or shipment of any food fish caught with a purse seine. The case also

involved the interpretation of the Magnuson Fishery Conservation and Management Act. Raffield had been charged with possession of red drum fish within Florida caught by a purse seine in violation of both laws listed above. The sole statement that may be applicable to this matter was as follows: “Here, Florida’s jurisdiction over Raffield and the red drum he caught in federal waters off Louisiana is plainly authorized by the federal officer charged with administering the Magnuson Act. The interpretation of administrative officers with special expertise, who are charged to administer a law, are entitled to judicial deference and will be given great weight in the court of Florida.” *Raffield*, 565 So. 2d at 706. The *Raffield* court cited to *United States Gypsum Co. v. Green*, 110 So. 2d 409, 414 (Fla. 1959), which held “the contemporaneous construction of a statute by those charged with its enforcement and interpretation is entitled to great weight . . .”

The *Pan-Am* case involved the application of a tariff or deposit by Florida Power and Light Company to initiate service for Pan-Am following a merger with another airline. The dispute was submitted to the Florida Public Service Commission which found in favor of FPL and ordered that the deposit for services be paid. Pan-Am argued that a Florida Administrative Code section, Rule 25-6.33, mandated a finding in their favor. The Florida

Public Service Commission, interpreting its own rule on customer deposits, Rule 25-6.97, disagreed with Pan-Am. The Florida Supreme Court stated “[w]e have long recognized that the administrative construction of a statute by an agency or body responsible for the statute’s administration is entitled to great weight and should not be overturned unless clearly erroneous.” *Pan-Am*, 427 So. 2d at 719.

In *Stoll*, the medical care was provided at CMS clinics managed by Florida HRS and specifically created by Chapter 391 of the Florida Statutes. It follows then logically that the Florida Supreme Court cited to case law supporting the notion that an entity charged with administering a statutory law is given great weight when interpreting that statutory law.

This instant matter does not involve a Miami-Dade County government official interpreting a statutory law nor does it involve an agency interpreting its own promulgated statutes or regulations. Rather, this case involves a governmental entity entering into a contract for services and later arguing that plain English words do not mean what they purport to mean. The application of The Trust’s interpretation of contractual terms is completely distinguishable from the Magnuson Act officer interpreting the Magnuson Act or the Florida Public Service Commission interpreting its own promulgated regulations. Dictan-Levi and The Trust did

not cite to any Florida case law purporting to support that a governmental entity may alter the terms of a contractual relationship because the governmental entity later interpreted the term or phrase differently.

D. Definition of “Indigent”

The Trust urges this Court that the term “indigent” must be ambiguous as Appellants provided multiple dictionary definitions and exemplars as utilized by the Florida Legislature to define the term. The Trust’s argument falls short as a review of case law shows that courts routinely reference numerous dictionaries to define contractual terms. See, e.g., *Beans v. Chohonis*, 740 So. 2d 65 (Fla. 3d DCA 1999) (referencing Webster’s and The American Heritage Dictionaries); *Specialty Restaurants Corp. v. City of Miami*, 501 So. 2d 101, 102 (Fla. 3d DCA 1987) (referencing American Heritage, Black’s, Oxford, and Random House Dictionaries); *BKD Twenty-One Mgmt. Co. v. Delsordo*, 127 So.3d 527 (Fla. 4th DCA 2012) (referencing Black’s and Merriam-Webster’s Dictionaries). The mere fact that Appellants provided references to numerous dictionaries to define a term does not suggest that the term itself is per se ambiguous. All of the definitions suggest the term to mean an impoverished individual, and in the context of this matter, specifically one

who cannot pay for medical care. Medicaid recipients meet that definition under Florida law and are indigent in this context.

The mere possibility of different definitions does not make a contractual term ambiguous. Rather, the differing definitions must both be able to be reasonably inferred from the terms of the contract. See *Commer. Capital Res., LLC v. Giovannetti*, 955 So. 2d 1151 (Fla. 3d DCA 2007). Nowhere in the PSA does the The Trust point this Court towards support for their narrow definition to be reasonably inferred from the terms of the contract.

The Trust further urges this Court that the PSA was specifically designed to facilitate patient care for patients who are unable to pay for medical care, and so somehow their definition of indigent would be inferred, but offers no support for that statement. A plain reading of the PSA indicates that the contract was designed to facilitate the provision of emergency medical care to all patients of the community who present to the Jackson North emergency department. A properly operated emergency department compliant with all federal and state statutes and regulations, such as EMTALA, may not refuse to treat an individual due to their insurance status and thus the concept of treating solely uninsured patients was not at the heart of this contract. Rather, The Trust included within the

provisos of the PSA the bestowal of agency status upon Duval and Dr. Larkin for the treatment of indigent patients without any further definition of the term and certainly nothing to reasonably infer that this statement referred only to uninsured patients.

CONCLUSION

The trial court below denied Dr. Larkin's and Duval's Motion for Summary Judgment as to Sovereign Immunity, according to the Order, as "the parties directed the Court to differing positions of the same contract, which creates issues of fact on the issue of agency." The trial court committed reversible error as there are no genuine issues of material fact regarding the degree of control retained by The Trust nor is the PSA ambiguous. All of the issues contained in this instant Appeal are ripe for determination as a matter of law by this Court. Dr. Larkin and Duval are both entitled to sovereign immunity as a matter of law.

The PSA contains numerous and expansive elements of control over Duval and Dr. Larkin that are strikingly similar, if not identical, in nature, extent, and quantity, as compared to cases where the courts of this State have held that the contracting entity is a sovereign agent. This Court is empowered to interpret contracts and come to conclusions of law regarding their terms. There is no genuine issue of material fact to be submitted to a jury as the PSA does not "cut both ways" regarding control or agency.

The PSA is unambiguous and the plain language of its provisions control. The PSA very plainly bestows a sovereign agency status when

treating “indigent” patients. Dictan-Levi meets the dictionary definitions of “indigent” as it is utilized in this context. The Trust’s narrow definition of the term is not able to be reasonably inferred from the PSA.

Accordingly, under the plain terms of the PSA, Duval and Dr. Larkin were sovereign agents of The Trust when providing Designated Services to Dictan-Levi. The trial court should be reversed and this cause remanded with instructions for the trial court to enter summary judgment in favor of Dr. Larkin and Duval for the foregoing reasons.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of September, 2023, I electronically filed the foregoing using the Third District Court of Appeal's eDCA Portal which will send a notice of electronic filing to the attorney participant filers and served a copy by email to: Daniel Harwin, Esquire, Freedland Harwin Valori, PL, 110 SE 6th Street, Ste 2300, Fort Lauderdale, FL 33301; Daniel@fhvlegal.com; Melissa@fhvlegal.com; Ellen@fhvlegal.com; Rodrigo L. Saavedra, Jr., Esquire, Rodrigo L. Saavedra, Jr., P.A., 3000 N. Federal Highway, Building 2, Ste 200, Fort Lauderdale, FL 33306, rsaavedra@rsaavedralaw.com; nancy@rsaavedralaw.com; Korissa Lepore, Assistant County Attorney, Miami-Dade County Attorney, Stephen P. Clark Center, Ste 2810 111 Northwest First Street, Miami, FL 33128-1993; lepore@miamidade.gov; maggief@miamidade.gov; Joseph M. Goldstein, Esquire, Shutts & Bowen, LLP, 200 E. Broward Blvd., Suite 2100, Ft. Lauderdale, FL 33301, JGoldstein@shutts.com; Jgoodwin@shutts.com; DBitran@shutts.com; CTamburry@shutts.com; Phillip Rakhunov, Esquire, Pollack, Solmon, Duffy, LLP, 101 Hunting Avenue, Suite 530, Boston, MA 02199, prakhunov@psdfirm.com

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fla. R. App. P. 9.210.