

IN THE DISTRICT COURT OF APPEAL OF FLORIDA  
FOR THE FIRST DISTRICT  
STATE OF FLORIDA

JULIE A. ZEMAITIS DECESARE, M.D.,  
and OB HOSPITALIST GROUP, LLC,

Appellants,

Case No.: 1D2024-2427  
L.T. Case No.: 2022-CA-72

v.

SHAKERA MARION and  
COREY BROOKS, as parents and  
natural guardians of S.B.,

Appellees.

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**INITIAL BRIEF OF APPELLANTS, JULIE A. ZEMAITIS DECESARE,  
M.D. AND OB HOSPITALIST GROUP, LLC**

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& FONTELA, P.A.**

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## PRELIMINARY STATEMENT

In this initial brief, the Appellants and defendants in the circuit court, Julie A. Zemaitis DeCesare, M.D. and OB Hospitalist Group, LLC, will be referred to as Dr. DeCesare and OBHG, respectively. Appellees and plaintiffs in the circuit court, Shakera Marion and Corey Brooks, as parents and natural guardians of S.B., will be referred to as Ms. Marion, Mr. Brooks.

Citations to the Appendix will be by use of an “*App.*”, followed by the corresponding appendix letter e.g., *App. A*. If pages to a deposition are cited, these citations will include the use of an “*App.*”, followed by the corresponding appendix letter and the deposition page numbers, e.g., *App. J, at p. 1, li. 2*.

## STANDARD OF REVIEW

This appeal is before the Court pursuant to Rule 9.130(a)(3)(F)(iii), Florida Rules of Appellate Procedure. *See also* Art. V, § 4, Fla. Const.; *Fla. Highway Patrol v. Jackson*, 288 So.3d 1179 (Fla. 2020); *In re Amendments to Fla. R. App. P. 9.130*, 289 So.3d 866, 867 (Fla. 2020). Dr. DeCesare and OBHG appeal a nonfinal order denying Appellants’ Motion for Summary Judgment as to the Affirmative Defense of Sovereign Immunity (hereinafter “Appellants’ motion for summary judgment”). Appellants’ motion for summary judgment asserted statutory immunity pursuant to § 768.28, Fla. Stat. A trial court’s denial of summary judgment is reviewed *de novo*.

*Emerald Coast Utilities Authority v. Thomas Home Corp.*, 359 So.3d 1239 (Fla. 1st DCA 2023).

### STATEMENT OF THE CASE

Appellees filed their original Complaint on January 12, 2022, against Dr. DeCesare and OBHG, alleging that Dr. DeCesare was negligent in her care and treatment during the delivery of S.B. on July 4, 2019. *App. A.* OBHG was alleged to be vicariously liable for the actions of Dr. DeCesare in the Complaint. *Id.* Appellants filed their motion for summary judgment on June 25, 2024, alleging that Dr. DeCesare and OBHG are entitled to sovereign immunity under § 768.28(9)(a), as Dr. DeCesare was acting as an agent of the State of Florida at all times material to the Complaint. *App. B.* Appellees filed their Response to Appellant’s Motion for Summary Judgment on August 6, 2024. *App. C.*

A hearing was held on Appellant’s Motion for Summary Judgment on August 27, 2024. Thereafter, on September 10, 2024, the circuit court issued a written order denying the motion. *App. D.* In its Order, the circuit court found that there were “issues of fact that Dr. DeCesare was an agent of the State of Florida and acting within the scope of employment or function for the state at the time of the alleged medical negligence.” *Id.* The circuit court did not expand on what the issues of material fact were and denied the Motion based on the foregoing statement and “for the reasons argued by Plaintiffs at the hearing and in their Response Opposing

Defendants' Motion for Summary Judgment, filed August 6, 2024." *Id.* This appeal follows.

### **STATEMENT OF THE FACTS**

In December 2015, Dr. DeCesare began her employment as an Associate Professor and Program Director of the Obstetrics and Gynecology Residency Program for the University of Florida College of Medicine ("UF COM") located at Sacred Heart Health System, Inc. d/b/a Sacred Heart Hospital of Pensacola ("SHH") *App. E.* According to Dr. DeCesare's UF Faculty Appointment, her responsibilities included "patient care and teaching responsibilities," including providing "close supervision and teaching of the OB/GYN residents rotating on your service," and providing "professional obstetric and gynecological surgery services for patients admitted to Sacred Heart Hospital and inpatient treatment services rendered while [she was] on call." *Id.*

Dr. DeCesare resigned from her employment with UF COM as both an Associate Professor and as Program Director of the Obstetrics and Gynecology Residency Program for UF COM, effective September 30, 2018. However, following her resignation as a UF COM employee, Dr. DeCesare continued performing the duties and responsibilities as outlined in her UF Faculty Appointment when she became an employee of OBHG in August 2018. Under a Professional Services Agreement ("PSA") between OBHG and SHH, SHH required that all

physicians employed by OBHG maintain courtesy faculty appointments with the applicable College of Medicine operating the OB residency program, e.g., UF COM.<sup>1</sup> *App. H.* Specifically, physicians employed by OBHG were required to provide “coverage, medical training, and support for the Residency Program.” *Id.*

At all times material to the underlying Complaint, Sacred Heart was a teaching institution affiliated with UF COM. Therefore, the health care provided at Sacred Heart included care provided by resident physicians, student nurses, and other healthcare profession students, as outlined in the Consent for Service and Treatment (“consent”) provided to and signed by Ms. Marion prior to receiving any treatment from Dr. DeCesare. *App. I.*

According to the consent, Ms. Marion acknowledged that some or all of her treatment would be provided by resident physicians. *Id.* Additionally, all patients who were admitted to Sacred Heart through the OB Emergency Department, who had not received prenatal care from a private OB/GYN practice, would be admitted under the Residency Program. *App. H.* The Residency Program bills for the admission and all services performed during the hospitalization. *Id.*

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<sup>1</sup> The original Professional Services Agreement was in effect beginning August 29, 2014. *App. F.* This PSA was later amended to add the requirements discussed herein regarding OBHG physicians obtaining and maintaining courtesy faculty appointments. *App. H.* The residency program at the time of this first amendment was operated by Florida State University College of Medicine, but was later changed to the University of Florida College of Medicine. *App. G.*

Ms. Marion's prenatal care was provided by the Sacred Heart Residency Program in Pensacola, Florida. That care was provided by UF COM residents. Upon her admission to Sacred Heart Hospital on July 3, 2019, Ms. Marion's care and treatment was primarily provided by two UF Resident Physicians, Shannon McCloskey, and Samantha Johnson. Dr. DeCesare treated Ms. Marion as a Sacred Heart Hospital patient under the UF COM Residency Program. According to Dr. McCloskey, the role of the attending OB hospitalist was to provide supervision and help if any assistance was needed. *App. J, at p. 32, li. 12-22.* Further, Dr. DeCesare, with regard to her role as an OB hospitalist, testified as follows at her deposition:

Q. Did you ever tell Shakera or Corey, the parents of this little girl, that the quote scope unquote of your work with them was limited?

A. So, what I would do as an OB hospitalist – so to answer your question, yes. As an OB hospitalist, I would come on and get check out. I would make walk rounds and meet the laboring patients. I would typically go in the room and introduce myself, explain my role. I'm Dr. DeCesare. I'm working as the OB hospitalist today. I will be present in the delivery room with the resident physicians when you have your baby if you deliver on my shift [. . .] part of my role was to cover University of Florida deliveries when the UF attending wasn't there. On this day, the UF attending was not there. [. . .]

*App. K, at p. 40, li. 11 – p. 41, li. 16.*

At all times material to the underlying Complaint, Dr. DeCesare was covering for the UF COM Attending Physician. During the delivery of S.B., the physicians

present were UF COM OB residents, Drs. Johnson and McCloskey, and Dr. DeCesare. *App. J, at p. 43, li. 6-11.* Dr. McCloskey was the initial delivering resident physician. *App. K, at p. 112, li. 20 – p. 113, li. 21.* Dr. McCloskey called a shoulder dystocia, and she performed a McRoberts maneuver while the nurses applied suprapubic pressure under Dr. DeCesare’s guidance and assistance. *Id.* After McRoberts and suprapubic pressure were unsuccessful, Dr. Johnson, senior OB resident, stepped in under Dr. DeCesare’s guidance and assistance to attempt a woodscrew maneuver. *Id.* After a failed woodscrew maneuver, Dr. DeCesare stepped in and performed a fourth-degree episiotomy and Rubins maneuver, which successfully extracted the posterior arm, resolving the dystocia and completing the delivery. *Id.; see also App. L.*

### **SUMMARY OF ARGUMENT**

The circuit court erred when it denied Appellants’ Motion for Summary Judgment. Based on the totality of the evidence contained in the record, Dr. DeCesare and, therefore, OBHG are immune from liability based on the doctrine of sovereign immunity under section 768.28(9), Florida Statutes.

Dr. DeCesare was an agent of the State of Florida when she provided care and treatment to Ms. Marion. However, the circuit court’s order does not articulate the basis for determining why Dr. DeCesare was not acting within the scope of her function as an agent of the State at the time of the alleged medical negligence. The

record evidence clearly establishes Dr. DeCesare was acting within the course and scope of her courtesy faculty appointment with the UF COM Residency Program at all times material. She supervised and assisted UF OB Residents during the care and treatment of Ms. Marion. Thus, she was acting in the same capacity as the UF OB physician for whom she was covering, who undoubtedly would have had sovereign immunity simply based on his/her employment status.

The undisputed record evidence establishes that Dr. DeCesare was acting solely in her capacity as an agent of the State pursuant to her courtesy faculty appointment with UF COM Residency Program, and is therefore immune from liability pursuant to section 768.28(9). This Court should reverse the circuit court's order denying summary judgment and hold that Dr. DeCesare is entitled to immunity pursuant to the provisions of § 768.28(9), and that such immunity is imputed to OBHG due to the sole allegations of vicarious liability.

## **ARGUMENT**

- 1. The Circuit Court Erred in Denying Dr. DeCesare and OBHG's Motion for Summary Judgment on the Affirmative Defense of Sovereign Immunity where Dr. DeCesare was acting within the course and scope of her faculty appointment with the University of Florida College of Medicine.**

The circuit court erred when it denied Dr. DeCesare and OBHG's motion for summary judgment. Dr. DeCesare is entitled to immunity from suit under the provisions of section 768.28(9) because she was acting within the course and scope

of her courtesy faculty appointment with the UF College of Medicine Residency Program, and was therefore acting as an agent of the State of Florida. OBHG is entitled to sovereign immunity because it is only alleged to be vicariously liable for Dr. DeCesare's alleged negligence.

The affirmative defense of sovereign immunity under section 768.28(9)(a), Florida Statutes, provides in pertinent part:

No officer, employee, or *agent* of the state or of any of its subdivisions 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 her or his employment or function.

(Emphasis added).

When an employee or agent of a state university medical school provides allegedly negligent treatment to a patient at a private facility, the issue that determines whether sovereign immunity applies is whether the doctor was acting within the scope of her employment or function as a member of the faculty of the university's medical school, or as a staff physician of a private hospital treating a hospital patient. *See Martin v. Drylie*, 560 So.2d 1285, 1288 (Fla. 1st DCA 1990).

The elements of actual agency are (1) acknowledgement by the principal that the agent will act for it, (2) the agent's acceptance of the undertaking, and (3) control by the principal over the actions of the agent. *See Goldschmidt v. Holman*, 571 So. 2d 422, 424 (Fla. 1990)(elements of actual agency). Dr. DeCesare was an agent of

the State of Florida when she provided care and treatment to Ms. Marion.

Here, UF COM acknowledged that Dr. DeCesare would act for UF COM by extending a courtesy faculty appointment to her and permitting her to cover for the UF COM Attending Physician, thereby taking on their duties. Dr. DeCesare accepted this undertaking by actually filling in for the UF COM Attending Physician and teaching, supervising, and guiding the UF COM OB Residents. UF COM had control over Dr. DeCesare because only UF COM had the ability to grant, deny, or withdraw courtesy faculty appointments.

UF COM retains the ability to reappoint, withdraw appointments, or terminate appointments to faculty positions. As such, the selection and engagement of Dr. DeCesare and the power to terminate her supports the conclusion that she was an agent of the UF COM Residency Program, and therefore of the State of Florida.

The instant matter is analogous to *DeRosa v. Shands Teaching Hosp. & Clinics, Inc.*, 504 So.2d 1313, 1315 (Fla. 1st DCA 1987). In *DeRosa*, a patient suffered serious injury when he underwent a cardiac catheterization procedure at Shands Hospital, Inc. *Id.* at 1314. Plaintiff filed suit against two fellows from the University of Florida's College of Medicine, who assisted during the operation as physicians in training. These fellows were under the supervision of a physician who was a faculty member of the UF COM and a staff member at Shands. *Id.* The fellows filed a motion for summary judgment, arguing they were entitled to sovereign

immunity under section 768.28(9)(a). *Id.* at 1315. The court agreed that the fellows were acting within their roles as employees of the State when they provided treatment to the patient, therefore summary judgment was granted. *Id.* Later, summary judgment was granted and affirmed in favor of the supervising physician based on his status as a university faculty member. *Id.*

Similar to the physician in *DeRosa*, Dr. DeCesare was acting within the scope of her courtesy faculty appointment with UF when rendering treatment to Ms. Marion while accompanied by UF OB Resident Physicians. She acted within her role as an educator, trainer, and supervisor, aiding OB residents in the completion of their education and training requirements when she rendered care to Ms. Marion.

It would be illogical not to afford faculty members of state universities, even those with courtesy appointments, who are training and supervising residents the same immunity from suit that is provided to the very residents they are training who are working under a Residency Program through that same university. Further, it is undisputed that Dr. DeCesare was accompanied and assisted by an OB resident physician at all times while rendering treatment to Ms. Marion, and therefore she was unquestionably performing teaching, supervising, and training responsibilities.

As discussed *supra*, the PSA between Sacred Heart Hospital and OBHG requires employees of OBHG, such as Dr. DeCesare, to maintain courtesy faculty appointments with UF COM. *App. H.* The Agreement also “contemplates Physicians

will provide coverage, medical training, and support for Ob residents assigned to Labor & Delivery rotations at the Hospital (“the Residency Program”). *Id.*

Appellees asserted in their Response to Appellant’s motion for summary judgment and at the subsequent hearing that this PSA had expired when they knew for a fact that this statement was false. Appellees had been provided through discovery, well before Appellants’ motion for summary judgment was filed, with all iterations and amendments to the PSA, demonstrating it was in effect until 2020. So, while the record may not hold the continuous amendments to the PSA, Plaintiffs attempted to argue that it was expired when they knew that it was not. Regardless, Dr. DeCesare still maintained a courtesy faculty appointment with UF COM whether or not the PSA was active or had expired, because she otherwise would not have been permitted to fill in for the UF COM Attending Physician when Ms. Marion presented to SHH on July 3, 2019. The argument for sovereign immunity does not, therefore, hinge on the existence of this PSA.

Appellees also argued below that the holding in *Martin v. Drylie, supra*, demonstrates that Dr. DeCesare is not entitled to sovereign immunity. Quite frankly, the reason the physician in *Martin* was not entitled to sovereign immunity is because factual issues existed as to whether the physician was acting within his capacity as a state university medical school professor or whether he was acting as a staff member at a private hospital. *Id.* at 1289. Here, Dr. DeCesare was not acting as a staff member

at a private hospital nor was she acting as a staff member of an independent hospitalist group. She was undoubtedly acting as an instructor of UF OB residents at all times material.

Appellees also attempted to suggest that because Dr. DeCesare was bound by the policies and procedures of Sacred Heart Hospital, this somehow lessens or negates her status as an agent of the State. As discussed within Appellants' motion, the fact that Dr. DeCesare was providing services in a third party's facility, Sacred Heart Hospital and, therefore, could have been under some control by SHH is of no consequence in determining her status as an agent of the State of Florida entitled to sovereign immunity. In *Andrew v. Shands at Lake Shore, Inc.*, 970 So.2d 887, 888 (Fla. 1st DCA 2007), a patient alleged that Shands at Lake Shore, Inc. was liable for a radiologist's negligence, although the radiologist, who was a UF COM faculty member, was not named as a defendant. Despite the fact that Shands at Lake Shore, Inc. retained control over the medical services provided at the hospital, including those provided by the radiologist, this Court acknowledged that the radiologist would be immune from liability under section 768.28(9)(a) because he was a UF COM employee. *Id.* at 889.

Similarly, even though Dr. DeCesare may have been under some control of SHH at times, because UF engaged her as a courtesy faculty member, retained the right to terminate such an appointment, and therefore, exercised control over her

conduct, Dr. DeCesare was an agent of UF when she rendered care to Ms. Marion.

**2. OBHG is also entitled to summary judgment because its employee, Dr. DeCesare, is entitled to summary judgment and the claim against OBHG is solely for vicarious liability.**

An employer is entitled to summary judgment if its employee is entitled to summary judgment and the claim against the employer is for vicarious liability only. *See Bankers Multiple Line Ins. Co. v. Farish*, 464 So.2d 530, 532 (Fla. 1985) (“It is generally recognized that, when a principal’s liability rests solely on the doctrine of respondeat superior, a principal cannot be held liable if the agent is exonerated.”) Here, because OBHG’s alleged liability is solely based on its vicarious liability for the alleged negligence of Dr. DeCesare, an entry of summary judgment in her favor as to the affirmative defense of sovereign immunity entitles OBHG to an entry of summary judgment on that issue as well.

Below, Appellees attempted to distinguish *Farish*, claiming an exception to a vicariously liable employer’s entitlement to summary judgment when its employee is entitled to summary judgment, citing *University of Miami v. Ruiz ex rel. Ruiz*, 164 So.3d 758 (Fla. 3d DCA 2015). In *Ruiz*, the reason the practice was not immune from suit for the vicarious liability of its doctors under the Florida Birth-Related Neurological Injury Compensation Association (“NICA”), was because the doctors had waived immunity under NICA by failing to give required notice of participation in the NICA plan to the plaintiffs. *Ruiz*, 164 So.3d at 767-78.

Dr. DeCesare has not waived immunity from suit and OBHG is claimed to be solely vicariously responsible for her alleged negligence. Thus, OBHG is entitled to summary judgment as to the affirmative defense of sovereign immunity.

### **CONCLUSION**

The undisputed record evidence shows that Dr. DeCesare was an agent of the UF College of Medicine at all times material and only provided care and treatment to Shakera Marion within the scope of her courtesy faculty appointment. Given that she was acting within the scope of this appointment, she, and OBHG as the entity alleged to be vicariously liable for her alleged negligence, must be afforded sovereign immunity as granted to agents of the state under Section 768.28(9)(a), Florida Statutes.

Based on the foregoing reasons and for all of the arguments made below to the circuit court, Appellants respectfully request this Honorable Court to reverse the circuit court's Order denying Appellants' motion for summary judgment and determine that Dr. DeCesare and OBHG are entitled to summary judgment and are immune from liability pursuant to sovereign immunity and the provisions of section 768.28(9), Florida Statutes.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

The undersigned counsel certifies pursuant to Fla. R. App. P. 9.100(1) that this  
Petition complies with the font requirements of Rule 9.100(1).

s/ Jessica E. Keeler  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the above has been furnished via the Florida Court’s E-portal and electronic mail this 25<sup>th</sup> day of October, 2024, to:

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