IN THE SUPREME COURT OF FLORIDA

Case No.: SC10-2306
Lower Tribunal No.: 1D10-6
Trial Court No.: 16-2006-8519

ANDREAS KECK,

Petitioner,

v.

ASHLEIGH K. EMINISOR,

Respondent.

PETITIONER'S REPLY BRIEF

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INTRODUCTION

The record on appeal, along with established precedent, clearly shows that: (1) the First District Court of Appeal ("First DCA") had common law certiorari jurisdiction to review the trial court's order denying Keck's motion for summary judgment on the basis of immunity from suit; and (2) as an employee of a state agency or subdivision, Keck has immunity from suit, pursuant to §768.28(9)(a), Fla. Stat. Since Respondent concedes that the First DCA had jurisdiction for certiorari review (Answer Br. 1), Keck relies on his Initial Brief on this point. Keck respectfully requests that this Court render a written opinion answering the certified question and clarifying that review of a denial of a motion for summary judgment based on a claim of individual immunity under §768.28(9)(a) need not await entry of a final judgment, because of the existence of irreparable harm. Such an opinion would serve as valuable guidance to courts, litigants, employees of governmental entities, and anyone considering such employment.

The remainder of this Reply Brief will address Respondent's arguments on the second issue before this Court – the trial court's departure from the essential requirements of law when it found that Keck was not entitled to summary judgment based on immunity under §768.28(9)(a). The plain language of §768.28, together with existing case law, shows that JTM was a corporation primarily acting as an instrumentality of the state (JTA). Pursuant to §768.28(9)(a), as an employee

of JTM, a status that has never been disputed, Keck is entitled to immunity from the present lawsuit. Alternatively, Keck is entitled to immunity as an agent of the state, pursuant to §768.29(9)(a).

I. JTM IS A CORPORATION PRIMARILY ACTING AS AN INSTRUMENTALITY OR AGENCY OF THE STATE; THEREFORE, KECK IS ENTITLED TO IMMUNITY.

Respondent argues that JTM is not a "state agency" under §768.28(2) because (1) JTA is an independent establishment of the state, and (2) corporations acting as instrumentalities or agencies of independent establishments of the state are not included in the statute's definition of the term. This argument is contrary to the plain language of the statute and precedent.

Respondent incorrectly reads §768.28(2) as having only two parts. (Answer Br. 6). The statute actually contains three distinct clauses, separated by semicolons, conferring the status of state agency or subdivision on three categories of entities, including JTM. The first clause lists those entities that are considered "the state:" the executive departments, the Legislature, the judicial branch, and the independent establishments of the state. The second clause provides that counties and municipalities are considered "state agencies or subdivisions." Lastly, the third clause includes corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities in the definition. The fact that the independent establishments of the state are included in the first clause clearly shows the

legislative intent that these establishments be considered "the state" for purposes of the statute. The independent establishments are not listed separately from the three branches of the state, as Respondent suggests in her Answer Brief.

Respondent erroneously argues that, although independent establishments are included in the first clause as state agencies or subdivisions, the term "state," as used in the clause concerning corporations acting as instrumentalities of the state, refers only to the three branches of state government. This claim is based on Respondent's faulty rationale that the executive departments, the legislature, and the judiciary "are the state, while independent agencies . . . are not." (Answer Br. 8). Respondent provides no legal authority for this position. To the contrary, the plain language of the statute shows that the independent establishments of the state, along with the executive departments, the Legislature, and the judiciary are "the state." Case law shows that corporations acting as instrumentalities of executive departments are considered state agencies or subdivisions pursuant to §768.28, which Respondent does not deny. *See Prison Rehabilitative Indus. v. Betterson (PRIDE)*, 648 So. 2d 778 (Fla. 1st DCA 1994). Since there is no logical or legal basis for treating independent establishments differently from executive departments under §768.28(2), corporations acting as instrumentalities of

independent establishments are "state agencies or subdivisions." [1]

In an attempt to distinguish independent establishments of the state, Respondent argues that JTA has great independence and broad powers, and a private corporation (i.e. JTM) acting as an instrumentality of such an independent agency "is about as remotely connected with state government as any entity could be." (Answer Br. 7). As before, Respondent provides no legal basis for this argument. Section 768.28(2) does not distinguish between private and other types of corporations, nor between state agencies and independent establishments of the state. On those occasions when the Legislature intended to treat some entities differently under §768.28, it did so explicitly. *See e.g.* §768.28(3)(all agencies or subdivisions, except a municipality and the Florida Space Authority, may request the assistance of the Department of Financial Services in consideration, adjustment, and settlement of claims under the statute); §768.28(6)(a)(before any action can be instituted on a claim against the state or one of its agencies or subdivisions, except a municipality or the Florida Space Authority, written notice of the claim must be presented to the Department of Financial Services); §768.28(1)(specifies locations where suit can be brought against a state university

[1] JTA was created by general law, §349.03(1), Fla. Stat, just like the executive departments of the State. *See, e.g.*, §20.15 (Dep't of Education), §20.155 (Bd. of Governors of the State Univ. Sys.), and §20.23 (Dep't of Transp.), Fla. Stat. There is no logical distinction, and the Legislature made no statutory distinction, between the executive departments and the independent establishments of the state for purposes of §768.28(2) – all are considered "the state."

board of trustees, which are different from those locations where suit can be brought against any other state agency or subdivision). Thus, although §768.28 contains provisions that exclude state university boards of trustees, municipalities, and the Florida Space Authority from certain provisions that are applicable to all other state agencies and subdivisions, the fact that those three entities are specifically included in the §768.28(2) definition of "state agency or subdivision" demonstrates the legislative intent that no agency or subdivision be excluded. There is no legal or logical explanation for Respondent's statutory interpretation, which arbitrarily excludes corporations primarily acting as instrumentalities of independent establishments of the state from the definition of "state agencies," where the Legislature clearly did not make or intend such an exclusion.

Respondent's argument that corporations acting as instrumentalities of independent agencies of the state are not entitled to sovereign immunity is also contrary to case law and opinions of Florida's Attorney General. *See Pagan v. Sarasota County Pub. Hosp. Bd.*, 884 So. 2d 257 (Fla. 2d DCA 2004); Op. Att'y Gen. Fla. 05-24 (2005)(Volusia Hospital District, an independent tax district of the state, exercises significant control over a non-profit corporation, thus corporation is subject to the provisions of §768.28); Op. Att'y Gen. Fla. 06-36 (2006)(Citrus County Hospital Board, an independent establishment of the state, created a non-profit corporation which acts primarily as an instrumentality of the Hospital Board,

and is thus considered a "state agency" for purposes of §768.28).

Lastly, applying the trial court's and Respondent's flawed interpretation of §768.28(2) would mean that corporations directly controlled by the state's water management districts, fire control districts, transportation authorities, or the many other independent establishments of the state, would not fall within the definition of "the state" for the purposes of §768.28, and thus, their employees would not be shielded from liability. Such a conclusion is not only contrary to legislative intent, as demonstrated by the plain meaning of this statute, but would have a detrimental financial effect on the state's numerous independent establishments.

II. RESPONDENT APPLIES ERRONEOUS PRINCIPLES OF STATUTORY CONSTRUCTION.

As a general rule, statutory interpretation begins with the plain meaning of the statue. *Fla. Birth-Related Neurological Injury Compensation Assn. v. Dep't. of Admin. Hrgs.*, 29 So. 3d 992, 997 (Fla. 2010)("when the language of a statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.") Since the language of §768.28(2) is clear and unambiguous, there is no need to resort to rules of statutory interpretation and construction. Respondent nevertheless seeks to have the Court look beyond the clear and unambiguous language in §768.28(2).

Even assuming, *arguendo*, that §768.28(2) is ambiguous, Respondent wrongly intertwines two separate provisions of the statute. It is true that §768.28(9)(a), conferring immunity to government employees, officers, and agents, did not exist at common law, and would be subject to strict construction. However, this is irrelevant because the issue before the Court is the status of Keck's employer (JTM) under §768.28(2), a subsection addressing the waiver of immunity by government entities, as opposed to the granting of immunity to individuals. *See Pagan*, 884 So. 2d at 267-68 (in a similar inquiry, the dispositive question was whether the individual's employer, a corporation acting as an instrumentality of an independent establishment of the state, qualified as a state agency). Judge Wetherell, dissenting from the First DCA's denial of certiorari jurisdiction in this case, addressed the merits of Keck's petition, and correctly stated that §768.28(2) should be construed in favor of immunity of the state, because immunity is the rule. *Keck v. Eminisor*, 46 So. 3d 1065, 1075 (Fla. 1st DCA 2010). If JTM acts primarily as an agency or instrumentality of the state, it is an agency or subdivision of the state, and Keck has immunity from this suit.

III. THE REASONS BEHIND THE CREATION OF JTM ARE IRRELEVANT TO ITS STATUS AS A STATE AGENCY.

Respondent argues that JTM cannot be a private employer and act as an instrumentality or agency of the state at the same time. (Answer Br. 11-14). This argument is erroneous and inconsistent with the plain meaning of §768.28(2).

Section 768.28(2) simply states that corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities are state agencies or subdivisions. Respondent offered no legal authority for concluding that the "corporations" described in the third clause of §768.28(2) cannot be private entities.

Respondent also argues that JTM cannot be a private employer for labor-relations purposes and a state agency for immunity purposes. However, the plain language of the statute allows precisely such a scenario. A corporation primarily acting as an instrumentality of the state may have any labor-relations arrangements it desires. Respondent has not identified any legal authority holding that the labor-relations arrangements of the corporation will determine whether it is a state agency or subdivision for purposes of §768.28(2).[2]

The test to determine whether a corporation is a state agency, for purposes of §768.28(2), is the degree of control the government entity has over the day-to-day operations of the corporation. *PRIDE, supra.; Shands Teaching Hosp. v. Lee*, 478 So. 2d 77, 79 (Fla. 1st DCA 1985). The law does not impose any requirements or

[2] In considering the merits of Keck's petition before the First DCA, Judge Wetherell noted that there was no inherent contradiction between giving a JTM employee immunity from suit while also allowing him the right to strike. As he pointed out: "The criteria for determining whether an entity is a public employer for labor relations purposes are different than those used to determine whether a private entity is primarily acting on behalf of a public agency for purposes of sovereign immunity." *Keck*, 46 So. 3d at 1076.

restrictions on the benefits and collective-bargaining rights the corporation gives its employees. By definition, employees of a non-governmental corporation have the right to strike (§447.13), and cannot participate in the state's retirement system (§121.051). To accept Respondent's argument – that JTM is not entitled to sovereign immunity because its employees have the right to strike and participate in a private pension plan – would mean that employees of a corporation could never be entitled to §768.28(9)(a) immunity, regardless of the governmental entity's control over the corporation's daily operations. Such a conclusion would not only be contrary to §768.28(2) and the case law, but would render meaningless the Legislature's inclusion of corporations acting primarily as instrumentalities of the state in the definition of state agency.

Respondent's reliance on *Gulfstream Land & Dev. v. Wilkerson*, 420 So. 2d 587 (Fla. 1982) is misplaced. *Gulfstream* considered whether, for purposes of workers' compensation immunity, a parent company could claim to be the employer of an individual who was actually employed by a subsidiary. The Court held that, since there was no "absolute integration" of the parent and subsidiary, the parent company could not be an employer for purposes of workers' compensation immunity. *Gulfstream* addressed an entity's employer status for purposes of workers' compensation immunity, not for purposes of sovereign immunity. The method for determining "employer" status in *Gulfstream* is

irrelevant. In addition, to the extent to which JTA and JTM could be seen as parent and subsidiary, JTA does not claim to be Keck's employer. No one disputes that JTM is the employer. Assuming, *arguendo*, that JTA claimed employer status, the reasoning in *Gulfstream* would support such a claim; the undisputed record shows that there is "absolute integration" of JTA and JTM, leading to the conclusion that JTA is Keck's employer.

IV. ***PRIDE*, *SHANDS*, AND *PAGAN* CONFIRM JTM'S STATUS AS A STATE AGENCY OR SUBDIVISION.**

Respondent attempts to distinguish the applicability of *PRIDE*, *Shands*, and *Pagan*, from the instant case by wrongly arguing that the §768.28(2) definition of "state agency" includes only corporations created (1) pursuant to enabling legislation; and (2) for a public purpose. These requirements are neither explicit, nor implied, by §768.28(2). Had the Legislature intended its definition of "state agencies" to include only corporations created pursuant to state statute, it would have said so in §768.28(2). Further, although the term "public purpose" is vague and ambiguous, there is no mention of any such requirement in §768.28(2).[3]

In *PRIDE*, the court discussed a statute that dictated the terms of the

[3] Respondent suggests that the purpose behind the creation of JTM, to enable its employees to maintain non-public employment benefits, should disqualify JTM from the §768.28(2) definition of "state agency," because such purpose is not a "public purpose." Assuming *arguendo* that public purpose is required, certainly JTA's desire to continue its operations and provide regional transportation services to the public with JTM's trained and knowledgeable workforce is a public purpose.

Department of Corrections' control over PRIDE; however, the court made clear that the test it was applying to determine whether PRIDE was a corporation acting as an instrumentality of the state, and thus entitled to sovereign immunity, was the state's degree of control, not whether or not it was created by statute. *PRIDE*, 648 So.2d at 780. The source of the state's control was never discussed as a factor in this determination, and is not mentioned in §768.28(2). There is no legal authority to support Respondent's argument that, absent any legislative mandate that the governmental entity control the day-to-day operations of the corporation, it isn't entitled to sovereign immunity.

In furtherance of her attempt to distinguish *PRIDE* from the instant case, Respondent argues that JTA's authority to create JTM was "at best questionable." (Answer Br. 15). Contrary to Respondent's claim, JTA had statutory authority to "do all acts and things necessary or convenient for the conduct of its business and the general welfare of the authority," §349.04(2)(l), Fla.Stat. This statutory provision gave the JTA the authority to create the JTM. (*See* Initial Br. 36-40).[4]

[4] Even assuming, *arguendo*, that JTM was created without lawful authority, Keck would still be entitled to immunity. If the Court were to consider JTM to not be a corporation, then JTM should logically be considered a division or department of JTA, based on the undisputed material facts, and Keck would be entitled to summary judgment based on §768.28(9)(a).

Further, the trial court's disregard of JTM's corporate status in denying Keck's motion for summary judgment was erroneous. A court should not look behind a corporate entity in determining liability, absent fraud or creation of the corporation

Respondent's argument that the amendment of §349.04 in 2009 changed the powers of JTA and authorized it to form corporations for the first time is based on a misreading of the staff analysis accompanying that amendment. (Answer Br. 15-16). The staff analysis simply states that the amendment was intended "to make JTA's enabling language consistent with its current activities and mission." Fla. Staff Analysis, H.B. 1213 (April 17, 2009); *see also* Initial Br. 38. There is no indication that the Legislature considered the establishment of JTM in any way unlawful or invalid, and Respondent has not provided any legal support for her conclusion that JTA's authority to create JTM would affect JTM's status as state agency under §768.28(2).[5]

Respondent mistakenly relies on *Shands, supra.*, in an attempt to argue that legislative creation of a corporation is controlling on the issue of whether the corporation is considered a state agency under §768.28(2). The court's use of legislation in *Shands* was for the purpose of determining the degree of state control over the corporation. The legislation evaluated by the court was merely evidence of the state's lack of control in that case. Here, JTA's uncontested complete control over JTM is demonstrated by the terms of the employment contract and

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for an improper purpose. *See Gershuny v. Martin McFall Messenger Anesthesia Professional Assn.*, 539 So.2d 1131, 1133 (Fla. 1989).

[5] Judge Wetherell also noted that the amendment was intended to clarify JTA's existing authority to form JTM. *Keck*, 46 So. 3d at 1076.

deposition testimony rather than by legislation; nevertheless, the degree of JTA's control meets the test, and JTM is a "state agency" as defined in §768.28(2).

Similarly, Respondent argues that *Pagan*, *supra*, is distinguishable from this case by pointing out that there, the corporation found to be entitled to sovereign immunity was created pursuant to legislation that specifically enabled the Hospital Board to "establish, operate, or support subsidiaries and affiliates . . . to assist the hospital board in fulfilling its declared purpose of provision for the health care needs of the people of the hospital district." (Answer Br. 17). However, the existence of the enabling legislation is mentioned in *Pagan* merely as background in the opinion. In affirming the corporation's entitlement to sovereign immunity as an instrumentality of an independent establishment of the state, the *Pagan* court stressed the *PRIDE* and *Shands* decisions, without stating any reliance on enabling legislation or on the purpose of the corporation's creation.[6] *Pagan*, 884 So.2d at 264. Respondent's argument that a corporation must be created pursuant to a specific statute and for a "public purpose" (as determined by her) to be considered a "state agency" as defined by §768.28(2), is simply not the law.

[6] The court in *Pagan* also commented that the purpose of the corporation there was to allow "doctors to obtain immunity from malpractice suits without sacrificing the income of private practice." 884 So. 2d at 260. Nevertheless, the physician employees of the corporation acting as an instrumentality of the independent establishment of the state were entitled to immunity from suit.

V. KECK IS ENTITLED TO IMMUNITY AS AN AGENT OF JTA.

Respondent advances another incorrect argument in the last section of her Answer Brief, stating that because Keck is not a government employee, he is not entitled to immunity as an agent of the state pursuant to §768.28(9)(a). (Answer Br. 18-19). Respondent claims that Keck cannot be JTA's agent, because JTA created an employer other than itself for the bus drivers. Based on this statement, it appears that Respondent incorrectly equates "agent" with "employee."

Respondent's argument is contrary to Florida law. Section 768.28(9)(a) gives immunity from suit to officers, employees, and agents. Had the Legislature meant to immunize state employees only, it would not have included officers and agents in subsection (9)(a). Respondent has not cited any authority that would support striking the word "agent" from §768.28(9)(a). She has also failed to provide any authority for the claim that only government employees can be agents for purposes of §768.28. Case law clearly refutes such an assertion, as was addressed at length in Keck's Initial Brief. This Court has held that §768.28(9)(a) immunity extends to private parties who are involved in contractual relationships with the State, provided that such parties are agents of the State. *See Stoll v. Noel*, 694 So. 2d 701 (Fla. 1997); *Agner v. APAC-Fla., Inc.*, 821 So. 2d 336, 339 (Fla. 1st DCA 2002); *DeRosa v. Shands*, 504 So. 2d 1313 (Fla. 1st DCA 1987). Whether such parties "are agents of the state turns on the degree of control retained

or exercised by [the state agency]." *Stoll*, 694 So. 2d at 703. In the instant case, the high level of day-to-day control JTA possessed and exercised over JTM and JTM employees, including Keck, is uncontested, and Keck is clearly an agent of JTA.

Respondent further erroneously argues that the statute cannot be extended to employees whose work is controlled by someone other than their employer. (Answer Br. 19). This claim ignores this Court's holding in *Stoll, supra.*, and the plain language of §768.28(9)(a), which recognizes three groups of individuals who have immunity from suit: officers, employees, and agents of the state. Clearly, employees and agents are separate categories of individuals, and there is no requirement that agents be government employees. Based on the plain language of §768.28(9)(a), and existing case law, the record shows that Keck was employed by JTM and his work was fully controlled by JTA. Respondent fails to explain why, under the law, these facts would not render Keck an agent of JTA.

Even assuming, *arguendo*, that JTM is not a state agency under §768.28(2), the undisputed facts of this case show that Keck is an agent of JTA, acting in the course and scope of JTM's contract with JTA, and therefore, entitled to immunity from this suit pursuant to §768.28(9)(a).

In conclusion, because Keck is (1) an employee of a corporation acting primarily as an instrumentality of the state, and/or (2) an agent of the state, he is immune from suit, and his Petition for Certiorari should be granted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this motion has been furnished by U.S. Mail this ___ day of May, 2011, to counsel for the Respondent: Thomas F. Slater, Esq., Stephen J. Pajcic, III, Esq., and Benjamin E. Richard, Esq., One Independent Dr., Ste. 1900, Jacksonville, FL 32202; William Bald, Esq., 200 West Forsyth Street, Ste. 1100, Jacksonville, Florida 32202.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the present Reply Brief complies with the font requirements of Fla. R. App. P. 9.100.

Respectfully submitted,

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