Filing # 17975035 Electronically Filed 09/08/2014 04:15:54 PM

RECEIVED, 9/8/2014 16:18:53, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

Case Nos.: SC13-1872 and SC13-1874
(Consolidated)

ENOCK PLANCHER, as Personal Representative of the Estate of ERECK MICHAEL PLANCHER, II,

Petitioner,

vs.

UCF ATHLETICS ASSOCIATION, INC., and GREAT AMERICAN ASSURANCE COMPANY,

Respondents.

ON REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL
DAYTONA BEACH, FLORIDA

INITIAL BRIEF OF PETITIONER ENOCK PLANCHER

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INTRODUCTION

The decision on review eviscerates a Florida jury verdict, reducing it by 98%. The Fifth District Court of Appeal discounted the verdict, not because the jury erred, but rather because it decided that a private corporation and its out-of-state insurance company are entitled to the State of Florida's sovereign immunity. To justify its decision, the appellate court was compelled to apply a novel and unacceptable approach for determining when a private corporation is an agency or instrumentality of the State, entitled to use the State's sovereign immunity as a shield against its wrongful conduct. If the appellate court had applied the long-standing Florida law of sovereign immunity, it would have had no choice but to affirm the jury's verdict.

If left undisturbed, the decision will effect a fundamental change in the law as we know it. The decision articulates a new test that excludes both the Legislature and the judiciary from the sovereign immunity equation. Under this test, the State's sovereign immunity will be granted in corporate boardrooms by private corporations and their lawyers. Sovereign immunity will no longer be the subject of legislative enactment or judicial scrutiny. A private corporation will be entitled to sovereign immunity based solely on its corporate structure without regard to the absence of any provision for State control over those day-to-day operations. The Legislature's authority to grant sovereign immunity will be

suborned by private corporations with *carte blanche* to avail themselves of sovereign immunity.

The Fifth District's decision extends the State's sovereign immunity based on nothing more than the authority inherent in every relationship between related corporations. Contrary to Florida and federal law, the decision wrongly concludes that the State need not exercise, or even provide for, *any* control over the day-to-day operations of private corporations that claim to operate as agencies or instrumentalities of the State. The undisputed facts in this case established that the University of Central Florida ("UCF") did not control the day-to-day operations of UCF Athletics Association, Inc. ("UCFAA"), nor did it make any provision to do so. The Fifth District held that UCF's inherent authority over UCFAA, based on nothing more than its enabling statute and organizational documents (which do not provide for UCF's control over UCFAA's day-to-day operations), is sufficient to grant sovereign immunity to UCFAA. The decision provides a blueprint for private corporations on how to use the State's sovereign immunity to avoid accountability for their actions without the bother of any State control.

No other court has adopted this test -- and for good reason. Government control over a corporation's day-to-day operations has always been the *sine qua non* underlying the extension of sovereign immunity to private corporations acting as agencies or instrumentalities of the State. The concept of sovereign immunity

strikes a tenuous balance between the financial interests of the sovereign and the fundamental due process rights of its citizens. Courts have long provided the checks and balances necessary to protect against the unfettered abuse of the State's sovereign immunity. The decision before the Court eliminates those checks and balances. If this new approach is implemented, the judiciary will be limited to a cursory review of the structure and formation of private corporations. The courts will be precluded from reviewing the critical issue of whether a private corporation's day-to-day operations are subject to sovereign control. That result is contrary to the law and policy of this State.

To compound its error, the Fifth District, also for the first time, extended sovereign immunity to an out-of-state insurance company that sold general liability coverage to UCFAA. The decision will award insurance companies the restitution intended for injured citizens of Florida. The untenable result is to shift the risk of loss from the insurer that charged substantial premiums for providing insurance coverage onto injured citizens like the Planchers. UCFAA purchased liability coverage for the very purpose of insuring the consequences of its negligence. Florida's sovereign immunity is not intended to secure a windfall for a private insurer that charges premiums for insurance coverage it will never provide. The decision effectively precludes the State from purchasing insurance coverage because insurers will simply refuse to pay based on the sovereign immunity of the

insured. The Court rejected this result in *Michigan Millers Mut. Ins. Co. v. Bourke*, 607 So. 2d 418 (Fla. 1992), and should do the same here.

STATEMENT OF THE CASE AND FACTS

Ereck Plancher was born in Naples, Florida to Haitian immigrant parents. A gifted student and athlete, he was a real-life example of the American dream. Plancher was a stand-out high school football player who agreed to play football at UCF. He arrived at UCF three weeks after he turned 18. (R. 647, 6388). He died 14 months later during conditioning drills conducted by UCFAA. (R. 721, Ex. 15).

UCFAA adopted a policy to ensure the safety of student-athletes with sickle cell trait.[1] (Tr. Ex. 31). The policy imposes mandatory testing for African-Americans, and requires the athlete, physicians, trainers, coaches, and staff be informed of a positive test result. (*Id.*). UCFAA tested Plancher for sickle cell trait in January 2007; the test result was positive. (R. 721). No one from UCFAA advised Plancher of the test result. (T. 1798). In fact, the test result was missing from his file. (R. 6401). UCFAA re-tested Plancher in June 2007, and the result was again positive. (R. 722). There was no evidence UCFAA informed Plancher of his test result, counseled him on sickle cell trait, or advised him of symptoms he

[1] Sickle cell trait is a hereditary, generally benign, condition that can become dangerous during extreme physical exertion. Exertion causes an affected athlete's red blood cells to "sickle," which restricts the delivery of oxygen though the blood, causing muscles to break down and release toxins. (T. 3318-19).

might suffer or precautions to follow.[2] (T. 2105, 2145). Head Coach George O'Leary knew of Plancher's positive test result. (T. 3000). Most of the other coaches, trainers, and team physicians, including Plancher's position coach, the offensive coordinator, and Robert Jackson, the only trainer on the field the day Plancher died, were never advised he had sickle cell trait. (T. 2668, 2809, 3243-44). UCFAA team physicians never saw his test results. (T. 2105, 2145). UCFAA did not educate Jackson or the coaches on sickle cell trait. (T. 2796, 3162).

Ereck Plancher's Death

On March 18, 2008, Plancher collapsed and died during a conditioning session. (R. 721, Ex. 15). Following weightlifting, the team performed high-intensity conditioning drills in a facility the players called "the Oven." (T. 1360-65). Witnesses testified the fans were turned off and the doors were closed. (T. 1364, 3494). Jackson was the only certified trainer present. (T. 3251). At the end of the drills, O'Leary ordered an obstacle course to be spread down the 100-yard field. The players ran the length of the field, flipped onto a mat in the far end zone, and sprinted back. (T. 1367-68). The drill was extremely taxing and caused numerous players to vomit. (T. 1400-01). Coaches were screaming at players to

[2] The NCAA has concluded that sickle cell trait does not preclude athletes from safely participating in intercollegiate athletics. Before Plancher's death, the NCAA and the National Athletic Trainers' Association adopted the following precautions for athletes with sickle cell trait: gradual conditioning, additional time for rest, withdrawal from a workout if an athlete suffers undue fatigue or breathlessness, and the provision of supplemental oxygen. (R. 721, Exs. 11, 13).

get on their feet. (T. 1399-400). During the second run through the obstacle course, Plancher was in obvious distress. Other players held him up, assisted him through the obstacles, flipped him onto the mat in the end zone, and supported him during the return sprint. (T. 1862-63). All of the coaches watched, but no coach or trainer came to Plancher's aid. (T. 1869). O'Leary then ordered the team to run sprints across the width of the field. (T. 1409). Plancher collapsed and appeared to be exhausted. (T. 1872-73). When teammates moved to help him, O'Leary told them to "back the f__ up." (*Id.*). The coaches yelled at Plancher to get up and continue. (T. 1873-74). He finally got up and finished in slow motion, visibly exhausted and in distress. (T. 1413-14, 3509). Trainers and coaches did not remove Plancher from the drills, but instead commanded that he continue. (T. 1873-74).

In the huddle after the sprints, O'Leary criticized Plancher's performance, berating him and using profanities. (T. 1882). When the players were dismissed to do jumping jacks, Plancher was dazed and lost. (T. 3514-15). He was unable to do the jumping jacks; his body was "like jello." (T. 1888-89). Plancher collapsed a second time. (T. 1890-91, 3516-17). Still, no trainer approached him. (*Id*). As his teammates began carrying him off the field, a coach yelled at the players to "put his ass down and make him walk." (T. 1422-23, 3741). His teammates put him on the ground, where he lay motionless. (T. 1423).

Jackson finally approached and told the players to place Plancher on a

bench. (T. 1423). This was the first time a trainer or coach came to his aid. No one called 911. (T. 1424, 3266, 3829). Plancher was moaning and could not speak. (R. 6510; T. 3265). According to Jackson, he did not believe it was an emergency situation. (T. 3265). He did not administer oxygen. (T. 3270). Instead, he summoned the Head Football Trainer from an adjacent building and asked her to bring a cart and take Plancher to the training room. (T. 2803-04). She arrived and called 911. (R. 721, Ex. 6). As she began the call, Plancher's pulse stopped. (*Id.*). Dispatch records reveal the caller was shouting Plancher's name as the call came through. (Tr. Ex. 34). Before the 911 call ended, Plancher stopped breathing and had no pulse. (R. 721, Ex. 6). He could not be revived. The Medical Examiner concluded that Plancher died as the result of "dysrhythmia, due to acute exertional rhabdomyolosis with sickle cell trait." (R. 721, Ex. 15).

After Plancher's death, O'Leary reported that the conditioning session had not been taxing. (R. 7325). UCFAA Athletics Director Keith Tribble also stated that the workout had been light. (T. 1048-49). UCFAA was later forced to recant its inaccurate statements. (R. 7260). UCFAA also issued a press release claiming all of the coaches knew Plancher had sickle cell trait. (T. 2809). According to the offensive coordinator Salem, "I remember reading the release that UCF had that all the coaches knew, you know, that Ereck Plancher had sickle cell. I was like, shit, I didn't know." (*Id.*). Salem testified that some players were "very, very concerned"

about the lack of candor in UCFAA's statements. (T. 2811). Soon thereafter, O'Leary called a team meeting, allowing only coaches and players in the room. (T. 1426-27, 3748-49). O'Leary explained that the coaches and players were in the "circle of trust" and instructed the players not to speak to anyone outside the circle of trust about Plancher's death -- including their own parents. (T. 1427, 3749-50).

UCFAA's Relationship with UCF

UCFAA was formed in 2003 as a private, not-for-profit corporation pursuant to Section 1004.28, Florida Statutes, to operate the athletics program at UCF. UCFAA's Director of Athletics explained that privatizing the program allowed UCFAA to hire coaches "without having it, you know, be public." (R. 7540-41). He was unaware of any UCF rules or regulations UCFAA must follow. (R. 7548).

Section 1004.28(1), Florida Statutes, defines a "university direct support organization" ("DSO") as a private, not-for-profit corporation incorporated under Chapter 617. A university DSO must be organized and operated ***exclusively*** to receive, hold, invest, and administer property and to make expenditures for the benefit of a State university. § 1004.28(1)(a)(2), Fla. Stat. The university board of trustees must certify that a DSO is consistent with the goals of the university and the best interests of the State. § 1004.28(1)(a)(3), Fla. Stat. The chair of the university board of trustees may appoint a member of the DSO board of directors and executive committee. § 1004.28(3), Fla. Stat. The university president, or a

designee, must serve on the DSO board and executive committee. *Id.*

UCFAA's Articles of Incorporation state that its purpose is to promote the health and physical welfare of UCF students through intercollegiate athletics. (R. 2877). UCFAA's Bylaws, however, provide that the day-to-day activities of UCFAA are to be managed by its Executive Vice President (the UCFAA Athletic Director). (R. 2773). The Bylaws authorize the UCFAA Executive Vice President to sign contracts necessary for the routine activities of UCFAA without review or approval by UCF. (R. 2777). The Bylaws also require the UCF Board of Trustees to review and approve UCFAA's budget; however, UCFAA never submitted its budget for review until 2010, after the filing of this lawsuit. (R. 7491, 2775). As chair of the UCFAA board, the UCF President received only an overview of the budget and never made any revisions. (R. 7489-91, 7501). UCFAA's Bylaws also provide its employees are not State employees. (R. 2777). The Bylaws require UCFAA, not UCF, to indemnify UCFAA's officers, directors, and employees. (*Id.*). Finally, UCFAA's Articles of Incorporation provide that if UCFAA is dissolved, its assets are distributed to UCF Foundation, Inc., not to UCF. (R. 173).

The Bylaws provide for a board of at least seven directors. (R. 2770-71). In addition to the UCF President, UCFAA's directors include the President of UCF's Alumni Association; President of UCF's Golden Knights Club; and faculty, students, and members of the public appointed by the President. (R. 2770). The

Bylaws also expressly grant voting power to directors who are not appointed by the UCF President. (*Id.*). The Bylaws do not impose any reporting requirement on UCFAA. Before Plancher's death, a UCF Trustee complained that the DSO structure failed to keep the UCF Trustees informed about the DSOs' activities. (R. 2874, Ex. 18). An Internal Control Review of UCFAA's Business Office similarly concluded "UCFAA financial dealings were micromanaged, with little to no information provided to University. Attitude appears to have been 'us vs. them' and not centered on University as a whole." (*Id.*, Ex. 20).

UCF and UCFAA entered into an Intercollegiate Athletics Services Agreement ("Agreement") in which UCFAA agreed to operate the athletics program in exchange for a fee paid by UCF. (R. 166-67). UCFAA does not receive State appropriations. (R. 7259). The Agreement does not provide for any restriction or guidance over UCFAA's operations by UCF. The Agreement vests total operational control in UCFAA, and retains in UCF no right to control any aspect of those operations. The Agreement provides that UCFAA employs coaches and staff members, recruits athletes, and "coordinate[s] and oversee[s] all functions of team functions [sic]...." (R. 167). UCF retained no control over the operation of the football program, the strength and training program, or the sports medicine program. Likewise, UCF retained no right to control the policies adopted by UCFAA. Further, under the Agreement, UCFAA, and not UCF, assumed the risk

of UCFAA's negligence, and the negligence of those engaged by it, in the performance of its obligations under the Agreement. (R. 168). Finally, the Agreement expressly states that it does not create a joint venture, partnership, or any other similar relationship between UCFAA and UCF. (*Id.*).

The Agreement also provides UCF with no right to control the fees paid to UCFAA for its services. In its 2005 Operational Audit, the State of Florida Auditor General concluded that UCF "did not have procedures to monitor and control the specific uses of the student athletic fees ...." (R. 2936, Ex. 22, pp. 3-4). The Auditor General rejected as insufficient the fact that the UCF President and Vice-President of Administration and Finance are UCFAA directors and received quarterly budget reports, stating UCF "did not retain control over such moneys." (*Id.*, p. 4). By the 2008 audit, UCF had transferred approximately $49,000,000 in fees to UCFAA. (R. 3026, Ex. 25, p. 8). The Auditor General again concluded UCF retained no control over UCFAA's operations. (*Id.*).

UCFAA adopted and implemented its own policies and procedures without any input from UCF. UCFAA's Executive Associate Athletics Director, a UCFAA employee who does not report to UCF, is responsible for establishing and implementing UCFAA's policies and procedures. (R. 2780, 7238; 7242). UCFAA developed its own Policy Manual, Employee Handbook, Sports Medicine Policies, and UCFAA Athletic Business Office Policy and Procedures without UCF's

supervision or approval.[3] (R. 3105, 7242, 7360, 7526, 2805, Exs. 9-11). The UCFAA Policy Manual provides that the UCFAA Senior Management Team, not UCF or even the UCFAA board, is responsible for both strategic planning and day-to-day operations. (R. 2805, Ex. 9). The Senior Management Team includes the Director of Athletics, and the Assistant and Associate Directors of Athletics -- all UCFAA employees. (*Id.*). The Policy Manual also provides for the day-to-day operation of UCFAA by UCFAA employees. (*Id.*). UCFAA is headed by the Director of Athletics, a UCFAA employee, who controls UCFAA's day-to-day activities. (*Id.*; R. 7242, 7537, 7539). UCFAA's Director of Athletics is at the top of the UCFAA leadership team included in the student-athlete handbook. (R. 3075). There are no UCF employees who direct and control the operations of UCFAA. UCFAA employs coaches and staff, recruits student athletes, and coordinates all team functions. (R. 7246). UCFAA has its own staff of approximately 140 people. (R. 7539). UCFAA's employees are not State of Florida employees. (R. 7244, 2777). UCFAA hires and fires its employees, and pays their salaries. (R. 7295, 7314-15, 10001-2). UCFAA is not bound by State procedures regarding the hiring and firing of employees, or limits on their salaries. UCFAA's employees do not receive State retirement, health insurance, workers'

[3] A 2005 NCAA Self-Study confirmed that UCFAA conducts its day-to-day operations free from any control by UCF. The Self-Study also reflected that UCFAA, not UCF, is responsible for developing and implementing policies to ensure the health and safety of athletes. (R. 2767).

compensation, or disability benefits. (R. 855, 7244, 7432, 7475, 7538). UCFAA has its own human resources and risk management departments, which do not receive direction from UCF. (R. 7435-36, 10003).

UCFAA's Executive Associate Athletics Director approves its day-to-day purchases, which are routed to the UCFAA business office for payment. (R. 2805, Ex. 11; 7244-45). UCF does not review or approve UCFAA's purchases, expense reimbursements, or travel. (*Id.*). UCFAA is not bound by the UCF procurement rules; it approves its own contracts in connection with its day-to-day operations without UCF supervision. (R. 7244-45). UCFAA's Senior Associate Athletic Director, Internal Operations, assists with day-to-day operations and supervises the sports medicine program, strength and conditioning program, and human resources and risk management departments. (R. 2783, 7284, 7297).

O'Leary, the Head Football Coach, is an employee of UCFAA. (R. 10002). He controls every aspect of the day-to-day operations of the football program: he recruits student-athletes, hires and fires assistant coaches, and supervises football practices and the conditioning program. (R. 7252, 7314-15). UCF's President has no involvement in the football program. (R. 7315). The Head Football Trainer and Head Athletic Trainer, both UCFAA employees, control the day-to-day activities of the sports medicine department. (R. 7297).

The athletics program generates annual revenues in excess of $30,000,000.

(T. 1129-30). UCFAA has its own Chief Financial Officer, who manages the day-to-day financial operations of UCFAA, including its business office. (R. 7526). UCF does not supervise the CFO; he reports only to UCFAA's Director of Athletics. (*Id.*). UCFAA adopted the "UCFAA Athletic Business Office Policy and Procedures," which does not provide for review, oversight, or control by any UCF representative of the day-to-day business operations of UCFAA. (R. 2805, Ex. 11). UCFAA staff prepares the UCFAA budget. (R. 7489-91). The UCFAA board is given only an overview of the budget. (*Id.*). As chair of UCFAA's board, the UCF President never revised or vetoed any budget item. (R. 7501). UCF's Board of Trustees never approved UCFAA's budget until after the filing of this lawsuit, even though UCFAA's Bylaws require it to do so. (R. 7491, 2775). UCFAA maintains its own accounting records, has its own bank accounts, and files its own tax returns. (R. 10001, 10004). UCFAA also purchases its own liability insurance with policy limits of $21 million. (R. 7478, 2805, Ex. 12). The annual insurance premium was approximately $150,000. (R. 7478). UCF is not involved in claims made against UCFAA. (R. 7300-01). UCFAA is not covered through the State's Risk Management Trust Fund. (R. 7303, 7305).

The Lawsuit

Enock Plancher, Ereck Plancher's father and the personal representative of his estate, sued UCFAA and the UCF Board of Trustees for negligence. (R. 1).

UCFAA answered the complaint and moved for summary judgment on its affirmative defense of sovereign immunity. (R. 17, 23, 36). The trial court denied UCFAA's motion for partial summary judgment, its renewed motion, and its motion for clarification on its sovereign immunity defense. (R. 1397, 3231, 4414). After spending approximately 100 hours considering evidence presented at a half-day hearing, the trial court concluded UCFAA "has not been substantially controlled by UCF in either the day-to-day decisions or major programmatic decisions." (*Id.*). The court also noted that the Florida Legislature could have granted sovereign immunity to university DSOs like UCFAA, but it did not. (R. 3225). The trial court contrasted specific grants of sovereign immunity to other DSOs. (*Id.*). The trial court concluded that the Legislature's decision not to grant sovereign immunity to all university DSOs was explained by the legislative purpose of DSOs to promote private fund-raising in support of public universities. (*Id.*). Noting that UCFAA has been expanded, in some respects, beyond the limits allowed by statute, the trial court concluded it was unlikely the Legislature intended to authorize a DSO with a scope as broad as UCFAA's. (*Id.*).

On August 19, 2010, Mr. Plancher served UCFAA with a proposal for settlement pursuant to Section 768.79, Florida Statutes, and Rule 1.442, Florida Rules of Civil Procedure. (R. 5664, Ex. A). Mr. Plancher proposed to settle all claims against UCFAA for $4,750,000, but UCFAA refused. (*Id.*).

The case was tried to a jury for three weeks.[4] The jury returned a verdict against UCFAA finding that UCFAA's negligence caused Ereck Plancher's death. (R. 5645). The jury awarded his parents $5,000,000 each. (R. 5645-46). The trial court denied UCFAA's post-trial motions. Prior to entry of final judgment, Mr. Plancher filed a motion to join UCFAA's liability insurer, Great American Assurance Company ("Great American"), in the judgment pursuant to Section 627.4136, Florida Statutes. (R. 5727). UCFAA purchased private liability insurance from Great American with policy limits of $11 million, and an additional $10 million policy (for a total of $21 million) from a different insurer. (R. 7478, 2805, Ex. 12). Great American did not object to the joinder motion or to the imposition of joint and several liability, nor did it request the inclusion of any limiting language in the judgment. Great American did not assert any coverage denial or reservation of rights. The trial court granted the motion and entered Final Judgment against UCFAA and Great American, imposing joint and several liability for the damages. (R. 5825, 5827).

Because the damages award was more than double his settlement proposal, Mr. Plancher also filed a motion for attorneys' fees and costs pursuant to the proposal for settlement. (R. 5664). The trial court granted the motion, awarded $1,897,720 in attorneys' fees, and entered judgment for the fees against UCFAA.

[4] Mr. Plancher dismissed the UCF Board of Trustees before trial. (T. 35).

((R. 5840; Cons. Supp. R. 252). The trial court also awarded $524,931.22 in costs and entered judgment against UCFAA and Great American. (5D11-4253 R. 40).

UCFAA and Great American appealed the judgments to the Fifth District Court of Appeal. They contended that the trial court erred by denying UCFAA's motion for summary judgment on its sovereign immunity defense. UCFAA and Great American did not contest the trial court's decision that UCF failed to control UCFAA's day-to-day operations and major programmatic decisions, but argued instead that UCF was not required to do so. The Fifth District agreed, concluding that Section 1004.28 and UCFAA's corporate documents give UCF the inherent power to control UCFAA as much or as little as it chooses. The Fifth District reversed, in part, holding UCFAA is entitled to sovereign immunity, and remanding with directions that the Final Judgment be reduced to $200,000. *UCFAA, Inc. v. Plancher*, 121 So. 3d 1097 (Fla. 5th DCA 2013) ("*UCFAA I*"). The Fifth District also extended sovereign immunity to Great American. *UCFAA, Inc. v. Plancher*, 121 So. 3d 616, 619 n. 3 (Fla. 5th DCA 2013) ("*UCFAA II*").

SUMMARY OF THE ARGUMENT

UCFAA is not entitled to sovereign immunity. The Florida Legislature has not granted sovereign immunity to UCFAA or to university DSOs in general. Legislative enactments extending sovereign immunity to some DSOs, but not others, confirm that the Legislature never intended the statutory scheme governing

university DSOs to convey sovereign immunity on those corporations. UCFAA is also not entitled to sovereign immunity as an agency or instrumentality of UCF. UCF does not control any aspect of UCFAA's day-to-day operations, nor has it provided for the right to do so. To avoid the lack of State control over UCFAA, the Fifth District adopted a new test, holding that UCFAA is an agency or instrumentality of UCF merely because UCF possesses ultimate power over it. No other court has extended sovereign immunity to a private corporation absent some provision for State control over its day-to-day operations. The decision also erroneously extends sovereign immunity to UCFAA's liability insurer. Florida law prohibits an insurer from asserting a sovereign immunity defense under Section 768.28. The Court should reverse and reinstate the trial court's judgments.

ARGUMENT

UCFAA asks this Court to bestow on it the best of all worlds -- and to do so at the expense of students it harms like Ereck Plancher. UCFAA admits UCF "privatized" its athletics program to avoid the restrictions it faced as part of UCF. Privatizing the program allowed UCFAA to hire coaches "without having it, you know, be public." (R. 7540-41). UCF and UCFAA deliberately and purposefully removed UCFAA's operations from any State control. Indeed, that was the whole point of the exercise. UCFAA nonetheless seeks the protection of the State's sovereign immunity. UCFAA wants to enjoy the benefits of operating as a private

corporation, free from any State control, while at the same time shielding itself from liability as if it were a State agency. UCFAA cannot have it both ways. The government control UCFAA was formed to avoid is a condition of sovereign immunity. UCFAA chose to operate free from the burdens of State control. By doing so, it surrendered the corresponding protection of sovereign immunity.

The State's sovereign immunity is intended to protect the public treasury. It is not intended to subsidize multi-million dollar private corporations that reap very significant revenues because they neither comply with State rules nor cover the foreseeable economic costs of their operations. Similarly, sovereign immunity is not intended to create a windfall for insurers that sell liability coverage to the State. UCFAA purchased $21,000,000 of general liability insurance -- more than 100 times the sovereign immunity cap on damages. Great American charged UCFAA substantial premiums in exchange for its agreement to pay claims made under its policy. Great American collected those premiums for coverage it now says it need never provide. The Court should reject Great American's specious argument.

I. UCFAA Is Not Entitled to Sovereign Immunity.

Section 768.28(5), Florida Statutes, provides that the State and its agencies and subdivisions are liable for tort claims in the same manner and to the same extent as a private individual, except that such liability shall not include punitive damages or prejudgment interest. Notwithstanding that liability, neither the State

nor its agencies or subdivisions are required to pay a claim or a judgment by any one person that exceeds the sum of $200,000. *Id.*

The Legislature Has Not Expressly Granted Sovereign Immunity to UCFAA.

The analysis of whether a private corporation is entitled to the protection of the State's sovereign immunity necessarily begins with an examination of whether the Florida Legislature has expressly granted sovereign immunity to the corporation. The Legislature is authorized to establish and regulate the use of State powers, including sovereign immunity, within the State university system. § 1001.705(1)(c)7, Fla. Stat. University DSOs operate separate and apart from State universities and are not subject to the laws and regulations governing those universities. (R. 2495, pp. 3-5, 18). The Legislature has not expressly granted sovereign immunity to university DSOs in general, or to UCFAA in particular. The Legislature relieved university DSOs of the burdens imposed upon State universities, and, at the same time, refused to extend to them the concomitant protections of the State's sovereign immunity.

UCFAA Is Not a State Agency or Instrumentality.

Because there is no express grant of sovereign immunity to UCFAA, or to university DSOs in general, UCFAA must establish that it is a "state agency or subdivision" as that term is used in Section 768.28(5). Section 768.28(2) defines "state agencies or subdivisions" to include "corporations primarily acting as

instrumentalities or agencies of the state." § 768.28(2), Fla. Stat. UCFAA contends that it is a corporation acting as an agency or instrumentality of UCF.[5]

Florida law has long held that a private corporation acts as an agency or instrumentality of the State only if the State has "direct control" over the corporation's "detailed physical performance" and its "day to day operations." *Shands Teaching Hosp. and Clinics, Inc. v. Lee*, 478 So. 2d 77, 79 (Fla. 1st DCA 1985); *Prison Rehab. Ind. and Diversified Ent., Inc. v. Betterson*, 648 So. 2d 778, 780 (Fla. 1st DCA 1994). The Florida test is derived from federal authority analyzing the government's waiver of sovereign immunity under the Federal Tort Claims Act ("FTCA"). *See Shands*, 478 So. 2d at 79; *Hollis v. Sch. Bd. of Leon Cnty.*, 384 So. 2d 661, 663 (Fla. 1st DCA 1980) (Florida act is modeled on FTCA); *see also Comm. Carrier Corp. v. Indian River Cnty.*, 371 So. 2d 1010, 1016-17 (Fla. 1979); *Schick v. Florida Dep't of Agric.*, 504 So. 2d 1318, 1322 (Fla. 1st DCA 1987), *rev. denied*, 513 So. 2d 1060 (Fla. 1987). The FTCA is a limited waiver of sovereign immunity by the United States for torts committed by employees of federal agencies. *See Lewis v. U.S.*, 680 F.2d 1239, 1240 (9th Cir. 1982). Like Section 768.28(2), the FTCA defines federal agency to include corporations primarily acting as instrumentalities or agencies of the United States,

[5] In *Keck v. Eminsor*, 104 So. 3d 359 (Fla. 2012), this Court held that a private corporation may act as an agency or instrumentality of another agency or instrumentality of the State.

but specifically excludes contractors with the United States. 28 U.S.C. § 2671. The United States Supreme Court has held that whether a private corporation is a governmental agency or instrumentality turns on the government's control over the corporation's detailed physical performance. *U.S. v. Orleans*, 425 U.S. 807, 814 (1976). The government must supervise the corporation's day-to-day operations. *Id.* at 815; *see also Schwab v. U.S.*, 649 F. Supp. 1319, 1352 (M.D. Fla. 1986). In determining whether a private corporation is an agency or instrumentality of the United States, the federal courts look to common law agency principles for the necessary degree of government control. *See Orleans*, 425 U.S. at 813-14; *Lewis*, 680 F.2d at 1243; *Kuntz v. Lamar Corp.*, 385 F.3d 1177, 1185 (9th Cir. 2004); *Leone v. U.S.*, 910 F.2d 46, 49 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991).

Shands adopted the federal standard *verbatim*. 478 So. 2d at 79. Quoting the United States Supreme Court, the court in *Shands* explained that "the *critical factor* is the existence of federal government *control* over the 'detailed physical performance' and 'day to day operation' of that entity." *Id.* (emphasis in original). *Shands* relied on this federal authority, not to define the parameters of the State's waiver of sovereign immunity, but rather to define the limits of the State's extension of its sovereign immunity to private corporations.

In *Shands*, the First District considered whether Shands Teaching Hospital and Clinics, Inc., ("Shands, Inc.") was an agency or instrumentality of the State.

Despite the Florida Legislature's reservation to the State of extensive ultimate power over Shands, Inc., the First District found that the State did not provide for control over its day-to-day operations. Shands, Inc. was a private, non-profit corporation organized solely for the purpose of leasing (from the State Board of Education) and operating Shands Teaching Hospital. In Section 240.513, Florida Statutes, the Legislature reserved in the State extensive power over Shands, Inc., including the following: i) the State Board of Regents approved its articles of incorporation; ii) the President of the University of Florida appointed its entire board of directors; iii) the Vice President for Health Affairs of the University of Florida served as chair of the board; iv) the hospital employees were transitioned from State employees to employees of the private corporation; v) the hospital facilities and personnel were used to promote the teaching and research programs of the University health center; vi) the University health center reimbursed Shands, Inc. for the costs of those teaching and research programs, as well as for the costs of serving indigent patients, state-mandated programs, and underfunded state programs; vii) the reimbursements were funded through State appropriations to the University health center; and viii) the State Board of Regents' self-insurance trust fund provided general liability insurance coverage to Shands, Inc.

Like Shands, Inc., UCFAA is a private, non-profit corporation. The President of the University of Florida had the power of complete board

appointment in *Shands*. Here, the UCF President may appoint some, but not all, of UCFAA's directors. The Vice President for Health Affairs of the University of Florida served as chair of Shands, Inc.'s board; the UCF president serves as the Chair of UCFAA's board. Like the hospital employees in *Shands*, the UCFAA employees are not State employees. Just as UCFAA is to promote the health and physical welfare of UCF students through intercollegiate athletics, Shands, Inc. was to promote the teaching and research programs of the University health center. UCFAA and Shands, Inc. are both paid for providing services to the State. UCFAA's fees are funded through student athletic fees, while Shands, Inc.'s fees were funded indirectly through State appropriations. Finally, unlike Shands, Inc., UCFAA has not been covered through the State's Risk Management Trust Fund.

The First District in *Shands* rejected as insufficient the very same facts the Fifth District approved in this case. The First District concluded those facts did not establish the necessary direct state control over the detailed physical performance and day-to-day operations of Shands, Inc. In short, the *Shands* court rejected the conclusion reached by the Fifth District, requiring instead direct State control over the corporation's "detailed physical performance" and its "day-to-day operations."

Nearly a decade later, the First District again considered whether a private corporation was an instrumentality of the State in *Prison Rehabilitative Industries*

v. Betterson, 648 So. 2d 778 (Fla. 1st DCA 1994).[6] The First District found that the corporation in *Betterson* was subject to numerous legislative constraints establishing extensive government control over its day-to-day operations. The corporation needed the Governor's approval before selling manufactured goods, and was required to provide the Legislature with in-depth status reports on its operations. The Department of Corrections approved the policies and procedures relating to the use of inmates. The corporation received State funds directly from a trust fund administered by the Governor. The corporation was subject to performance and financial audits by the State Auditor General, and the State had a reversionary interest in its property. The corporation was also entitled to coverage by the State's Department of Risk Management. § 946.510, Fla. Stat. The First District concluded these constraints evidenced sufficient control over the corporation's day-to-day operations to render it a State agency under *Shands*.

The Fifth District recognized that, in *Betterson*, the corporation's "essential operations remained subject to a number of legislatively mandated constraints over its day-to-day operations." *UCFAA I*, 121 So. 3d at 1107. UCFAA is not subject to any similar constraints. UCFAA does not need UCF's approval of any aspect of

[6] The governing statute in *Betterson* was amended to state that the corporation "is deemed to be a corporation primarily acting as an instrumentality of the state" and the "provisions of s. 768.28 shall be applicable" to it. *Betterson*, 648 So. 2d at 779. The First District cited the rule of statutory construction permitting it to "consider subsequent enactments of a statute as an aid to interpreting the original legislation." *Id.* There is no similar language in Section 1004.28.

its provision of services, does not provide in-depth status reports to UCF on its operations, nor does it require UCF's approval of any of its policies and procedures. It receives a fee for the services it provides. Although UCFAA is subject to financial audits by the State, the Auditor General concluded that UCF has no control over UCFAA's financial operations. UCFAA's property does not revert to UCF and the State Department of Risk Management has not extended coverage to UCFAA. The control factors in *Betterson* do not exist in this case.

Finally, in *Keck v. Eminsor*, 104 So. 3d 359 (Fla. 2012), this Court examined the degree of control sufficient to establish that a private corporation is an agency or instrumentality of the State. The issue before the Court was whether an employee of a private corporation, Jax Transit Management Corporation ("JTM"), was entitled to sovereign immunity under Section 768.28(9)(a), Florida Statutes. The employee's immunity necessarily derived from the status of JTM as a private corporation acting primarily as an agency or instrumentality of the Jacksonville Transit Authority ("JTA") under Section 768.28(2). The Court concluded that, "although JTM is a private corporation, it is wholly controlled by and intertwined with JTA." *Keck*, 104 So. 3d at 361. The Court then described in detail the facts establishing JTA's control over the day-to-day operations of JTM. JTM was formed for the sole purpose of providing bus drivers and maintenance workers for JTA. JTA employees directly supervised the JTM bus drivers. JTA determined

the bus routes and provided all of the buses. JTA also provided all of the facilities used by JTM, and paid all of JTM's operational costs. JTM owned no assets of its own and maintained a zero-balance payroll. Each week, JTA deposited into JTM's account the amount of money needed to meet JTM's payroll. The bus drivers wore JTA uniforms and carried JTA identification cards. JTA was the sole shareholder of JTM and its board was composed primarily of JTA managerial employees. The executive director of JTA was chair of the JTM board. The Court concluded that JTM's employee worked for, was supervised by, and was paid by JTA.

Critical facts like those establishing JTA's control over JTM's day-to-day operations are entirely absent from this case. Although UCFAA, like JTM, was formed for the purpose of operating the UCF athletics program, UCF, unlike JTA, does not exercise any control over UCFAA's day-to-day operations. UCFAA's employees do not work for UCF, are not supervised by UCF employees, and are not paid by UCF. UCF has no involvement in developing or implementing UCFAA's policies or programs, nor is it involved in any aspect of UCFAA's delivery of services. UCF does not pay UCFAA's payroll, or any of UCFAA's operational costs. In fact, UCFAA's sports operations, business operations, and human resources operations are all entirely independent of UCF and subject to no supervision or control by UCF. UCFAA owns property and assets. (R. 7475-76). To the extent UCFAA uses property of UCF, it pays a fee to do so. (R. 7483-84).

The only common facts between this case and *Keck* are i) the UCF President chairs the UCFAA board and makes some board appointments, and ii) the student-athletes wear "UCF Knights" uniforms. Of course, in *Shands* the First District concluded that the State's authority to appoint the ***entire*** board of directors was insufficient to establish the private corporation as an agency or instrumentality of the State. Similarly, the fact that student-athletes wear uniforms bearing the "UCF Knights" logo does nothing to establish UCF's control over the day-to-day operations of UCFAA. Use of the "UCF Knights" logo is a matter of intellectual property licensing, not operational control. Certainly, no one would suggest vendors that manufacture or sell T-shirts or other memorabilia bearing the "UCF Knights" logo, or video games featuring players in UCF uniforms, are agencies or instrumentalities of the State because their goods bear the UCF name or trademark.

According to the Fifth District, Section 1004.28, UCFAA's Bylaws, and the Agreement give UCF the discretion to control UCFAA as much or as little as it sees fit. To the contrary, neither the statute, the corporate documents, nor the Agreement provide for any UCF control over UCFAA's day-to-day operations. For example, the decision explains that Section 1004.28(6) restricts UCFAA's right to enter into contracts absent UCF approval. In fact, that section actually ***authorizes*** UCFAA to enter into agreements to finance, design and construct, lease, purchase, or operate facilities to serve the needs of the university, subject

only to UCF's approval of the issuance of revenue bonds or debt to fund capital outlay projects – activities well beyond UCFAA's day-to-day operations. Nothing in Section 1004.28(6) provides for any control by UCF over UCFAA's day-to-day authority to enter into contracts. Instead, the Bylaws authorize UCFAA's Executive Vice President to sign contracts for UCFAA without UCF's approval, and the evidence established that UCFAA, in fact, entered into contracts in its day-to-day operations without UCF approval. (R. 7244-45).

The Fifth District also notes that Section 1004.28 requires UCF to certify that UCFAA operates consistent with the goals of UCF and the best interests of the State. UCFAA's Articles of Incorporation similarly state that its purpose is to promote the health and welfare of UCF students through athletics. Nothing in those mission statements subjects UCFAA's day-to-day operations to UCF control. The court in *Shands* rejected virtually identical factors as insufficient to convert a private corporation into a State agency or instrumentality.

The Fifth District also relies on the UCF President's authority to appoint members of the UCFAA board, his role as chair of the UCFAA board, and the requirement that amendments to UCFAA's Bylaws be approved by UCF. Again, *Shands* rejected these same factors as insufficient to demonstrate control over day-to-day operations. *See also U.S. v. Bestfoods*, 524 U.S. 51, 69 (1998) (overlapping officers and directors do not create agency or instrumentality); *Yellow Pages*

Photos, Inc. v. Ziplocal, LP, 2012 WL 5830590, *5 (M.D. Fla. 2012).

The decision also points out that UCFAA receives the majority of its funds from UCF student athletic fees. The cases are legion that government funding does not convert a private corporation into a government agency or instrumentality, nor does it establish the government's right to control its day-to-day operations. *See Orleans*, 425 U.S. at 816 ("The Federal Government in no sense controls 'the detailed physical performance' of all the programs and projects it finances by gifts, grants, contracts, or loans"); *Kuntz*, 385 F.3d at 1184 ("Neither federal regulation nor federal funding, even extensive or exclusive federal funding, is sufficient to make an entity a federal agency"); *Perez v. United States*, 594 F.2d 280, 285 (1st Cir. 1979). That is particularly true here where UCFAA receives no State appropriations, and the Auditor General concluded that UCFAA's use of student athletic fees was not controlled by UCF and violated Section 1004.28. UCFAA contended that the violations resulted from a 2007 amendment to Section 1004.28(1)(c) prohibiting the use of student fees by DSOs. To the contrary, the Auditor General concluded as early as 2005 that UCF "did not have procedures to monitor and control the specific uses of the student athletic fees" paid to UCFAA. (R. 2936, Ex. 22, pp. 3-4). The Auditor General rejected as insufficient the fact that the UCF President and Vice-President of Administration and Finance are UCFAA board members who received quarterly budget reports, stating UCF "did

not retain control over such moneys." (*Id.*, p. 4). Moreover, UCFAA continued to violate the statute into 2008.[7] (R. 7481). Equally telling, although the Bylaws require UCF's Board of Trustees to review and approve UCFAA's budget, UCFAA never submitted its budget to UCF prior to this lawsuit. (R. 7491, 2775).

Finally, the decision identifies the Agreement as a source of UCF control, but fails to point to even one provision vesting operational control in UCF. In fact, the Agreement provides UCF with no right to control any aspect of UCFAA's day-to-day operations. In the Agreement, UCF and UCFAA agree to be responsible for their own negligence and that of their employees. The Agreement also states that it does not create a joint venture, partnership, or other similar relationship between UCFAA and UCF, indicating that the parties did not intend to create an agency relationship. *See M.S. v. Nova Southeastern Univ., Inc.*, 881 So. 2d 614, 620 (Fla. 4th DCA 2004), *rev. denied*, 900 So. 2d 554 (Fla. 2005).

Given the complete lack of any provision for UCF's control over UCFAA's day-to-day operations, the Fifth District should have affirmed the final judgments.

The Fifth District Articulates a New Test.

To avoid that result, the Fifth District rejected long-standing Florida and federal law and adopted a new test. The Fifth District acknowledged that "the key factor in determining whether a private corporation is an instrumentality of the

[7] Even after 2008, UCF and UCFAA continued to circumvent the statute by using student athletic fees to pay expenses incurred by UCFAA. (R. 2390-98).

state for sovereign immunity purposes is the level of governmental control over the performance and day-to-day operations of the corporation." *UCFAA*, 121 So. 3d at 1106. The court, however, then departed from Florida and federal authority by holding that the State need not exercise or provide for ***any*** control over a private corporation's day-to-day operations to entitle the corporation to sovereign immunity. *UCFAA*, 121 So. 3d at 1109. The court concluded, "...we reject the Planchers' assertion that for UCFAA to have sovereign immunity, UCF had to actually control UCFAA's day-to-day operations. Instead, we determine that ***the power to control is sufficient*** ... [UCF may] oversee [UCFAA's] day-to-day operations as much or as little as it sees fit." *Id.*

The Fifth District cites no authority for this new test – and with good reason. The only articulation of the test appears in a concurring opinion in *Pagan v. Sarasota County Public Hospital Board* which was not adopted by the majority. 884 So. 2d 257 (Fla. 2d DCA 2004) (Canady, J., concurring), *rev. denied*, 894 So. 2d 971 (Fla. 2005). Florida and federal cases all require the exercise of actual control or supervision by the State over the day-to-day operations of a private corporation, or some provision evidencing the State's intent to exercise control at the operational level. *See Shands*, 478 So. 2d at 79; *Betterson*, 648 So. 2d at 780 and n. 3. No other case has concluded that the complete absence of any actual control over a corporation's day-to-day operations, or even evidence establishing

the intent to exercise operational control, justifies an extension of the State's sovereign immunity.

The Fifth District's Decision Contravenes the Legislature's Intent.

The first problem with the decision is that it extends sovereign immunity to all university DSOs based solely on their statutorily mandated structure -- a result the Florida Legislature has repeatedly rejected. The Florida Legislature has never accepted the notion that the statutory scheme creating university DSOs entitles those DSOs to sovereign immunity. For example, the H. Lee Moffitt Cancer Center and Research Institute ("Moffitt"), a University of South Florida DSO, unsuccessfully pursued an express legislative grant of sovereign immunity for years.[8] (R. 2495, pp. 30-33). In the same year the Legislature enacted Section 1004.28, it also enacted Section 1004.43, in which it declared that Moffitt is a corporation acting as an instrumentality of the State for purposes of sovereign immunity. The Legislature did not include similar language in Section 1004.28 with respect to university DSOs in general. The Legislature's express declaration in the Moffitt statute confirms its intent that the statutory scheme applicable to university DSOs does not reserve in the State sufficient control to extend its sovereign immunity. If Section 1004.28 and the corporate structure it mandates were sufficient to make university DSOs agencies or instrumentalities of the State,

[8] Recognizing that it did not enjoy sovereign immunity, Moffitt, like UCFAA, purchased liability insurance. (R. 2495, p. 33).

then there would have been no basis for the Legislature's refusal to extend sovereign immunity to Moffitt, and no need for its subsequent specific grant.

The Legislature has enacted similar statutes expressly declaring other DSOs to be agencies or instrumentalities of the State for purposes of sovereign immunity. *See* § 1004.447, Fla. Stat. (Florida Institute for Human and Machine Cognition, Inc.); § 1004.41, Fla. Stat. (Shands Teaching Hospital and Clinics, Inc.); § 288.9625 (Institute for the Commercialization of Public Research). The Legislature has not enacted similar legislation for UCFAA, nor has it amended Section 1004.28 to extend sovereign immunity to all university DSOs. Under the black-letter rules of statutory construction, the Legislature's enactment of statutes declaring some, but not all, DSOs to be agencies or instrumentalities of the State confirms its intent that Section 1004.28, and the corporate structure it mandates, are insufficient to establish UCFAA as an agency or instrumentality of the State. *See, e.g., McFadden v. State*, 737 So. 2d 1073, 1075 (Fla. 1999); *Mingo v. ARA Health Servs., Inc.*, 638 So. 2d 85, 86 (Fla. 2d DCA 1994).

Sovereign Control Over Day-to-Day Operations
Is the *Sine Qua Non* of Sovereign Immunity.

The second problem with the decision is that government control over the day-to-day operations of a private corporation has always been a condition of extending the State's sovereign immunity to a private corporation. The control test ensures that sovereign immunity is extended to a private corporation only if its

day-to-day operations are subject to direct government control and supervision. The requirement of government control ensures that immunity does not protect private conduct that is not subject to the crucible of government supervision and approval. The State's failure to provide for control or supervision of the day-to-day operations of a private corporation does nothing to ensure that those operations are conducted under the imprimatur of the sovereign – and thereby entitled to sovereign immunity. The Fifth District's new test is entirely backward – it authorizes the extension of sovereign immunity to a private corporation in the complete absence of any provision for State control over the corporation's day-to-day operations. The immunity afforded an agency or instrumentality of the State under Section 768.28(2) flows directly from the sovereign. *Sierra v. Associated Marine Inst., Inc.*, 850 So. 2d 582, 590 (Fla. 2d DCA 2003), *rev. denied*, 869 So. 2d 538 (Fla. 2004). Thus, it is incumbent upon the State to provide for control or supervision of the day-to-day operations of private corporations that seek to share in its immunity. By eliminating the requirement of any provision for State control over a corporation's day-to-day operations, the decision dispenses with the *sine qua non* underlying the extension of sovereign immunity to private corporations.

The Fifth District cites the *Pagan*[9] concurrence for the proposition that

[9] *Pagan* was decided on cross-motions for summary judgment, with the parties conceding a decision could be made without consideration of other facts. *See Pagan*, 884 So. 2d at 262-63. The appellate court suggested the result may have

"when analyzing the issue of control in cases outside the sovereign immunity context where a principal-agent relationship exists, the focus is on the right to control, instead of actual control." That citation is misplaced because the decision does not require UCF to retain the right to control UCFAA's day-to-day operations. To the contrary, the Fifth District concludes that UCF need not even provide for the right to control UCFAA's day-to-day operations, so long as it has the ultimate power to do so. Accordingly, the court held that UCFAA is an agency or instrumentality of UCF merely because UCF possesses ultimate power over UCFAA. Under that reasoning, UCF's inherent power to do anything justifies the fact it did nothing. The Fifth District's new test is no test at all. UCF did not actually control UCFAA, nor did it provide for the right to do so. No case has extended sovereign immunity to a private corporation under those facts.

Florida cases analyzing when a subsidiary corporation operates as an agency or instrumentality of its parent demonstrate the error in the decision below. A parent corporation and its wholly owned subsidiary are separate corporate entities, and the parent is not liable for the torts of the subsidiary unless the subsidiary operates as an agency of the parent. *See GalenCare, Inc. v. Mosley*, 59 So. 3d 138, 143 (Fla. 2d DCA 2011); *Reynolds Am., Inc. v. Gero*, 56 So. 3d 117, 120 (Fla. 3d

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been different had it been presented with facts about the actual operation of the physicians' practice. *Id.* In light of the paucity of record facts, the court limited its holding and refused to approve a structural control test. *Id.* at 258.

DCA 2011); *Pappalardo v. Richfield Hospitality Serv., Inc.*, 790 So. 2d 1226, 1228 (Fla. 4th DCA 2001). For an agency relationship to exist between parent and subsidiary corporations, the parent must exert a "high and very significant" level of control over the subsidiary's operations. *See Reynolds*, 56 So. 3d at 120; *Enic, PLC v. F.F. South & Co., Inc.*, 870 So. 2d 888, 891 (Fla. 5th DCA 2004); *State v. Am. Tobacco Co.*, 707 So. 2d 851, 855 (Fla. 4th DCA 1998). The existence of overlapping officers and directors is insufficient to establish the control necessary to make a subsidiary an agency or instrumentality of its parent. *See Bestfoods*, 524 U.S. at 69; *Yellow Pages*, 2012 WL 5830590.

In contrast, under the Fifth District's new test, a parent corporation need not exert ***any*** control over the day-to-day operations of its subsidiary, nor even retain the right to do so. The decision would make every subsidiary an agency or instrumentality of its parent merely by virtue of the inherent power the parent possesses over the subsidiary. For example, every parent corporation forms its subsidiary and has the power to dissolve it. Similarly, every parent corporation has the power to appoint directors to the subsidiary's board and approve its organizational documents. Indeed, a parent corporation has the ultimate power to impose restrictions over any and all aspects of a subsidiary's operations. Absent actual control of the day-to-day operations of the subsidiary, or the parent's express retention of the right to do so, the parent's inherent power over its

subsidiary is insufficient to render the subsidiary an agent of the parent. The Fifth District's decision will render every subsidiary an agency or instrumentality of its parent, and make every parent vicariously liable for the torts of its subsidiaries. That has never been the law in Florida, nor should it be.

Federal cases construing the FTCA, from which the Florida test is derived, similarly require the government to exercise actual control over the day-to-day operations of a private a corporation acting as an agency or instrumentality of the government, or at a minimum expressly provide for the right to do so. *See Orleans*, 425 U.S. at 816; *Lewis*, 680 F.2d at 1240-42; *Autery v. U.S.*, 424 F.3d 944, 957 (9th Cir. 2005) (contractual provisions addressing detailed performance insufficient because government did not actually direct performance); *Williams v. U.S.*, 50 F.3d 299, 306-07 (4th Cir. 1995) (government must actually supervise day-to-day operations); *Leone*, 910 F.2d at 50 (detailed regulations and evaluations insufficient basis for control); *Merklin v. U.S.*, 788 F.2d 172, 175 n. 3 (3d Cir. 1986) ("broad, supervisory control, or even the potential to exercise detailed control" insufficient); *Lipka v. U.S.*, 369 F.2d 288, 289 (2d Cir. 1966) ("United States did not exercise 'actual control over the details of performance'" despite reservation of broad supervisory powers), *cert. denied*, 387 U.S. 935 (1967); *Vallier v. Jet Propulsion Lab*, 120 F. Supp. 2d 887, 895 (C.D. Cal. 2000) (test in Ninth Circuit is whether government actually exercised control over detailed

physical performance of corporation's services, not whether government had unexercised right to control), *aff'd* 23 F. App'x 803 (9th Cir. 2001); *Heinrich v. Sweet*, 83 F. Supp. 2d 214, 221 (D. Mass. 2000) (government in no sense controlled day-to-day operations of contractor because "although the Commission may arguably have been empowered to exercise such supervision, it chose not to do so"), *aff'd* 308 F.3d 48 (1st Cir. 2002), *cert. denied*, 539 U.S. 914 (2003); *Diaz v. U.S.*, 372 F. Supp. 2d 676, 681 (D. P.R. 2005).

UCFAA may cite cases for the black-letter proposition that a principal's right to control the day-to-day operations of its agent is sufficient to establish a principal-agent relationship. Even in "right to control" cases, however, the courts require something more than the government's inherent power to enter into the relationship. The government must actually exercise that power to provide for its right to control the day-to-day operations of the private corporation. *See Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842, 854-55 (Fla. 2003); *Nova*, 881 So. 2d at 618-20; *Robinson v. Linzer*, 758 So. 2d 1163, 1164 (Fla. 4th DCA 2000), *rev. denied*, 780 So. 2d 912 (Fla. 2001); *Agner v. APAC-Florida, Inc.*, 821 So. 2d 336, 340 (Fla. 1st DCA 2002) (even where contract purports to create agency relationship, court must nonetheless look carefully to degree of control exercised by State), *rev. denied*, 842 So. 2d 842 (Fla. 2003); *Theodore v. Graham*, 733 So. 2d 538, 540-41 (Fla. 4th DCA 1999), *rev. dismissed*, 737 So. 2d 551 (Fla.

1999); *see also Vallier*, 23 F. App'x at 84 (rejecting right to control because no regulation, contract provision, or actual practice provided for government's control over day-to-day activities); *Letnes v. U.S.*, 820 F.2d 1517, 1518-19 (9th Cir. 1987) (despite restrictive effect, contractual provisions mandated by regulation and designed to secure federal objectives insufficient to establish government control over day-to-day operations). Because an agent is not necessarily an agency or instrumentality of the State, UCFAA was required to establish even greater control over its day-to-day operations to qualify as an agency or instrumentality of UCF. *See Sierra*, 850 So. 2d at 592. It failed to do so.

In *Lewis*, the United States Court of Appeals for the Ninth Circuit rejected a test similar to that adopted here. The court considered whether federal reserve banks are instrumentalities of the federal government under the FTCA. The court concluded that federal reserve banks are not federal instrumentalities because they conduct their activities without day-to-day direction from the federal government. A House of Representatives Report explained Congress's intent as follows:

> ...the Government shall retain sufficient power over the reserve banks to enable it to exercise a direct authority when necessary to do so, but that it shall in no way attempt to carry on ... the routine operations and banking ... the reserve-bank plan retains to the Government power over the exercise of the broader banking functions, while it leaves to individuals and privately owned institutions the actual direction of routine.

Lewis, 680 F.2d at 1241 (citing H.R. Report No. 69, 63 Cong. 1st Sess. 18-19

(1913)). The court concluded this reservation of power to exercise authority "when necessary" did not satisfy the requirement of direct government control over the day-to-day operations of the private corporations.

The Fifth District's new test is particularly problematic when applied in the sovereign immunity context. In the context of vicarious liability, the principal assumes the risk of its failure to control its agent. A principal's decision to forego control or supervision of its agent works only to the detriment of the principal. The principal becomes vicariously liable for conduct of the agent it could or should have controlled. The consequence of the State's failure to provide for control over a corporation claiming sovereign immunity is very different. The State's failure to provide for control over the day-to-day operations of private corporations like UCFAA results not in the State's vicarious liability, but rather in the extension of its immunity to corporations operating free from any State control or supervision. The victim of UCF's lack of control is not UCF (as it would be in the traditional principal-agent context), but rather innocent victims of UCFAA's negligence.

The Fifth District's Decision Dramatically Expands Sovereign Immunity.

If the decision stands, private corporations, themselves agencies or instrumentalities of the State, may form other corporations and confer on them the State's sovereign immunity without the requirement of any State control over the day-to-day operations of those corporations. The holding removes the checks and

balances that guard against the unfettered expansion of sovereign immunity to private corporations many tiers removed from the State.[10] The decision effects a judicial expansion of sovereign immunity far beyond that granted by the Legislature, or previously approved by any court.

In 1897, Oliver Wendell Holmes observed, "[i]t is revolting to have no better reason for a rule of law than that it was so laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since and the rule simply persists from blind imitation of the past."[11] Former United States Supreme Court Justice John Paul Stevens echoed those sentiments this year, noting "the simple interest in establishing justice provides a sufficient but compelling justification for putting an end to a doctrine that never should have been adopted in a democracy."[12] This Court has likewise recognized that sovereign immunity's prohibition against recovery for governmental negligence is harsh and results in considerable injustice.[13] *See Michigan Millers*, 607 So. 2d at 421.

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[10] As the trial court recognized, this model is already being used to seek sovereign immunity for DSOs operating far beyond their legislative purpose. (R. 3225).

[11] Oliver Wendell Holmes, *The Path of the Law*, 110 Harv. L. Rev. 991, 1001 (1997) (an address delivered by Mr. Justice Holmes on January 8, 1897).

[12] John Paul Stevens, Six Amendments How and Why We Should Change the Constitution, p. 81 (2014).

[13] The Court expressed a similar concern in *McCall v. U.S.*, 134 So. 3d 894 (Fla. 2014), explaining that the cap on noneconomic damages in Section 766.118, Florida Statutes, "has the effect of saving a modest amount for many by imposing devastating costs on a few – those who are most grievously injured, [and] those who sustain the greatest damage and loss...." 134 So. 3d at 903.

Finally, Judge Altenbernd, author of the *Pagan* majority, has expressed concern about the expansion of sovereign immunity to subsidize profitable commercial enterprises by shielding them from the foreseeable costs of their economic activities. *See Univ. of Florida Bd. of Trustees v. Morris*, 975 So. 2d 493, 498 (Fla. 2d DCA 2007) (Altenbernd, J., concurring), *rev. denied*, 974 So. 2d 388 (Fla. 2008). That concern is particularly compelling here where UCFAA seeks to share in the State's sovereign immunity to protect its operation of a commercial sports enterprise that generates more than $30 million in annual revenues and pays its football coach over $1 million. (T. 1129-30; R. 7313-14). College sports programs may no longer earn staggering revenues at the expense of student-athletes who receive no compensation and no share in the profits generated from their efforts. *See O'Bannon v. NCAA*, 2010 WL 445190 (N.D. Ca. 2010) (enjoining NCAA prohibition on athletes sharing in revenues generated from use of their names and likenesses); *Northwestern Univ. v. College Athletes Players Ass'n (CAPA)*, Case No. 13-RC-121359 (NLRB, Reg. 13, March 26, 2014) (college football scholarship players are employees entitled to vote on collective bargaining representative). To borrow from Justice Holmes, it is "revolting" that UCFAA, a flourishing commercial enterprise that has for years operated free of the burdens of State control, now seeks to invoke the shield of the State's sovereign immunity to avoid the consequences of causing Ereck Plancher's death.

The test applied by the Florida courts prevents such an unjust result. It strikes a sensible balance among the countervailing interests that shape the State's sovereign immunity. It ensures sovereign immunity is extended only to those private corporations that are subject to State control or supervision. Application of the long-standing Florida law will not deny sovereign immunity to all university DSOs, but will simply ensure that those who do enjoy sovereign immunity are subject to the requisite State control – just as the Legislature intended.

II. Great American Is Not Entitled to Sovereign Immunity.

The Fifth District also erroneously extended the State's sovereign immunity to Great American, UCFAA's private insurance company. There is no authority in Florida authorizing the extension of sovereign immunity to a private insurer. To the contrary, Section 768.28(5), Florida Statutes, specifically contemplates that the State may purchase insurance to cover claims in excess of the statutory limit on recoverable damages. The Fifth District's decision renders that statutory provision a nullity and, therefore, must be reversed. Even if this Court were to approve the extension of sovereign immunity to UCFAA, Great American is not entitled to share in that sovereign immunity.

UCFAA purchased $11 million in general liability insurance coverage from Great American. Great American did not limit coverage under its policy to $200,000 or to any amounts recovered on a claims bill. Great American charged

UCFAA substantial premiums for this coverage. Without objection by Great American, the trial court joined Great American as a defendant on the damages and costs judgments.[14] Consistent with the joinder statute, the trial court imposed joint and several liability on Great American. Great American now contends that it is entitled to the benefit of any sovereign immunity extended to UCFAA.[15]

In *Michigan Millers*, this Court held that an insurer may not assert sovereign immunity under Section 768.28. The Court explained that the plain language of the sovereign immunity statute defeats any contention that an insurer is entitled to share in the sovereign immunity of its insured. Under Section 768.28(5), a claim may be settled or a judgment paid in an amount that exceeds the statutory payment cap but falls within the amount of available liability insurance. If an insurer were entitled to the sovereign immunity of its insured, the insurer's coverage obligation would likewise be capped at the statutory maximum, and the insurer could never be required to pay the excess settlement or judgment specifically authorized by the statute. The insurer's payment obligation could never exceed that of the sovereign

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[14] Unlike the insurer in *Pagan*, Great American never asserted that its policy limits its coverage if UCFAA has sovereign immunity. *See Pagan*, 884 So. 2d at 261.

[15] The Fifth District agreed with Great American explaining that "sovereign immunity attached to the judgment before Great American was added to the merits and costs judgment." *UCFAA II*, 121 So. 3d at 619 n. 3. That explanation makes no sense. There was no judgment in place prior to Great American's joinder. Thus, there was no judgment to which sovereign immunity could attach prior to the joinder. Further, sovereign immunity does not "attach" to a judgment. Parties, not judgments, are entitled to assert sovereign immunity.

insured and Section 768.28(5) would be rendered a nullity.

Michigan Millers involved an automobile accident caused by a school board bus driver. Although the statute in place at the time capped the school board's payment obligation at $100,000 per person and $200,000 per accident, the school board maintained liability insurance of $200,000 per person and $325,000 per accident. The school board's insurer paid its policy limit of $325,000.[16] Michigan Millers provided liability insurance, including uninsured motorist coverage, to the owners of the other vehicle in the accident. The owners claimed uninsured motorist benefits for the amount of their damages in excess of the $325,000 paid by the school board's insurer. Michigan Millers denied the claim, asserting it was entitled to rely on the school board's sovereign immunity defense. This Court rejected Michigan Millers's argument, explaining that Section 768.28 authorizes a judgment in excess of the statutory payment cap. The Court noted that, although the purchase of liability insurance does not operate as a waiver of sovereign immunity as to the sovereign, "the limits of the sovereign immunity statute may be exceeded when insurance coverage is available." *Id.* at 422. Thus, the Court concluded that an insurer may not raise a sovereign immunity defense under Section 768.28.

The Court's conclusion makes perfect sense. The plain language of the sovereign immunity statute defeats any contention that an insurer is entitled to

[16] Unlike Great American, the school board's insurer did not seek to reduce its coverage obligation in reliance on the school board's sovereign immunity.

share in the sovereign immunity of its insured. Section 768.28(5) specifically contemplates that a claim may be settled or a judgment paid in an amount that exceeds the statutory payment cap, but falls within the amount of available liability insurance. If an insurer were entitled to the sovereign immunity of its insured, an insurer could never be required to pay the excess settlement or judgment specifically authorized by the statute. The argument that Great American is entitled to rely on UCFAA's sovereign immunity (if any) is defeated by the plain language of Section 768.28(5).

The Court's decision in *Michigan Millers* is likewise consistent with the joinder statute's imposition of joint and several liability against an insurer for the judgment. "'[J]oint and several liability' means that 'each liable party is individually responsible for the entire obligation.'" *Mondello v. Torres*, 47 So. 3d 389, 395 (Fla. 4th DCA 2010) (quoting Black's Law Dictionary 926 (17th ed. 1999)). By imposing joint and several liability, the joinder statute recognizes that the insurer remains liable on the judgment without regard to the collectibility of the judgment against the insured. The cap on damages does not reduce the State's liability for the torts it causes. Indeed, Section 768.28(5) provides that the State is liable for tort claims in the same manner and to the same extent as a private individual. The statutory cap simply limits the amount of damages that may be recovered from the State. The imposition of joint and several liability under the joinder statute

obligates Great American to satisfy UCFAA's liability even if Mr. Plancher cannot collect the full amount of the judgments from UCFAA.

Finally, a decision permitting Great American to share in UCFAA's sovereign immunity, if any, would defeat the very purpose underlying sovereign immunity -- to protect the State's treasury. *See Spangler v. Fla. State Turnpike Auth.,* 106 So. 2d 421, 424 (Fla.1958). UCFAA paid substantial premiums to Great American for liability insurance coverage of $11 million. If UCFAA were to prevail on its sovereign immunity argument, and Great American were permitted to share in that immunity, then Great American would receive an extraordinary windfall. Great American will have charged premiums for insurance coverage it need never provide. UCFAA will have paid annual premiums of $150,000 for $200,000 in coverage -- a nonsensical result. *See Beach v. City of Springfield*, 177 N.E. 2d 436, 439 (Ill. App. Ct. 1961) ("It is ludicrous to contend that anyone can enter into an indemnifying contract and then refuse to fulfill the contract against the injured party, contending in substance that there ... was no risk to be insured."); *Basner v. Andrews*, 339 N.Y.S.2d 67, 69-70 (N.Y. Civ. Ct. 1972) ("[t]o hold that an insurance carrier can ... assert its non-liability under its policy would be a travesty on our laws and public policy"); *DeKalb Cnty. School Dist. v. Bowden*, 339 S.E. 2d 356, 356 (Ga. Ct. App. 1985) ("when a public body has purchased liability insurance, there is no necessity for the protection which

sovereign immunity provides *to the public*. Conversely, the insurer, as a private, for-profit entity, should not be accorded the protection of sovereign immunity, which exists for the benefit of the *public*.") (quoting *Toombs County v. O'Neal*, 330 S.E. 2d 95 (Ga. Ct. App. 1985) (Weltner, J., concurring) (emphasis in original). The decision before the Court does not protect Florida taxpayers, but rather undermines the fundamental purpose of sovereign immunity to the advantage of insurance companies and the detriment of injured Florida citizens.

III. The Fifth District Erred in Ordering the Final Judgment Reduced.

Finally, the Fifth District erred by ordering the $10 million judgment against UCFAA and Great American reduced to $200,000, the amount of the statutory damages cap. The court instructs the judgment "shall be reduced to $200,000 in accordance with section 768.28(5), Florida Statues." *UCFAA I*, 121 So. 3d at 1109 n.17. Florida courts, however, uniformly hold that a plaintiff is entitled to rendition of a judgment in excess of the amount the State can be required to pay under Section 768.28. *See, e.g., Michigan Millers*, 607 So. 2d at 421; *Gerard v. Dep't of Trans.*, 472 So. 2d 1170, 1172-73 (Fla. 1985); *Berek v. Metro. Dade Cnty.*, 422 So. 2d 838, 840-41 (Fla. 1982); *Paushter v. S. Broward Hosp. Dist.*, 664 So. 2d 1032, 1033 (Fla. 4th DCA 1995) (J. Pariente); *S. Broward Topeekeegeeyugnee Park Dist. v. Martin*, 564 So. 2d 1265, 1267 (Fla. 4th DCA 1990), *rev. denied*, 576 So. 2d 291 (Fla. 1991); *Dep't of Envir. Prot. v. Garcia*, 99 So. 3d 539, 545 (Fla. 3d

DCA 2011). As the court explained in *Martin*, "...the mere fact the legislative act places a cap upon the amount of damages recoverable against the governmental entity does not affect the plaintiff's right to a judgment for his full damages." 564 So. 2d at 1267. The decision should be reversed to the extent it orders the Final Judgment reduced to $200,000.

CONCLUSION

For the foregoing reasons, Enock Plancher respectfully requests that this Court reverse the Fifth District's decision and reinstate the trial court's judgments.

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