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IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

v.

UCF ATHLETICS ASSOCIATION, INC., et al.

Respondents,
_____/

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

L.T. Case No. 5D11-2710

ANSWER BRIEF OF RESPONDENTS UCF ATHLETICS ASSOCIATION, INC. AND GREAT AMERICAN ASSURANCE COMPANY

On Review From The Fifth District Court Of Appeal

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STATEMENT OF THE CASE AND FACTS

In a decision that broke no new ground and expressly followed all three Florida decisions that previously analyzed the same issue, the Fifth District held that UCF Athletics Association, Inc. ("UCFAA") acts primarily as an instrumentality of the state and therefore is entitled to limited sovereign immunity under section 768.28(2), Florida Statutes. Petitioner Enock Plancher, the personal representative of the Estate of Ereck Plancher ("Plaintiff"), sought review based on purported conflict. This Court granted review but without oral argument.

Respondents, UCFAA and Great American Assurance Company ("Great American"), will demonstrate that no conflict exists and that jurisdiction should be discharged. Should the Court reach the merits, however, the Fifth District's decision is correct and should be approved.

Plaintiff conceded below that when the University of Central Florida ("UCF") directly operated its athletics department, it had sovereign immunity. UCF's decision to use a statutorily authorized direct-support organization to operate the athletics department did not deprive it of the immunity Plaintiff admits it had. Rather, as the Fifth District held, UCFAA administers UCF's athletics program wholly subject to the university's governance, including its financial and operational control. UCFAA therefore primarily acts as an instrumentality of UCF and is entitled to limited sovereign immunity.

A. The Incident And The Parties' Trial Theories

As the Fifth District correctly observed, the analysis of the sovereign immunity issue does not implicate the facts surrounding Ereck Plancher's death. Nonetheless, Plaintiff's Initial Brief presents pages of facts, many that UCFAA disputes. And, of course, Plaintiff fails to acknowledge UCFAA's defense on the merits or even the jury's finding that punitive damages were not warranted. Accordingly, UCFAA will briefly discuss its defenses.

UCFAA emphatically challenged the cause of Ereck's death and presented evidence, including test results, showing that he died from a congenital heart condition. T. 33:4337-44, 4423-27, 4431-43; 39:5097. UCFAA also showed that there is no scientific evidence that exertion can cause blood cells to sickle and result in death in individuals who have the sickle cell trait ("SCT"). T. 12:1739-40, 1785; *see also* T. 19:2597-98; 34:4536-40, 4543-53, 4573-74, 4583. Ereck had SCT, a genetic condition found in 1 in 12 African-Americans. T. 11:1606; 24:3175. SCT is different from sickle cell disease, which is a severe blood disorder that affects 1 in 300 African-Americans. T. 34:4530-34.

UCFAA also disputed Plaintiff's claims about the workout, presenting evidence that, at the time of Ereck's death, neither the National Collegiate Athletic Association ("NCAA") nor any sports medicine body placed exercise restrictions on SCT-positive athletes. T. 12:1709-10. The workout was appropriate for

Division I football training and consistent with practices Ereck had participated in for more than a year. T. 12:1656, 1681-82; 23:3085; 31:4185; 33:4408; 34:4491. UCFAA also presented evidence that no one ordered water or trainers removed, and that players had access to both during the workout. T. 30:4020, 4070, 4075; 31:4117-18, 4212; 33:4317; 35:4687; 38:4980.

The jury found UCFAA negligent in causing Ereck's death. R. 30:5645. The jury rejected Plaintiff's claim that he proved facts warranting punitive damages. R. 30:5646. The jury assessed damages at $10 million. *Id.*

B. UCFAA Primarily Acts As An Instrumentality Of UCF

Prior to 2003, UCF, a state university, administered its own athletics department. R. 14A:2444. When it did so, Plaintiff concedes that the department had sovereign immunity. R. 18:3342-43, 3345-46. In 2003, UCF decided to operate the department through a statutorily authorized direct-support organization, pursuant to sections 1000.21(6), 1001.72(2)(l), and 1004.28 Florida Statutes, and UCF accordingly created UCFAA. R. 14A:2443; A. 4 ¶¶6-7. UCFAA's offices are located on UCF's campus, in buildings UCF owns. R. 14A:2384-85, 2399.

1. UCFAA's creation, purpose, and corporate structure

Section 1004.28 authorizes a state university to use a direct-support organization under the following conditions:

- It must be a non-profit organization under chapter 617;

- It must be approved by the Department of State;
- It must be organized and operated exclusively for the university's benefit;
- The university's president or a designee must serve on its board of directors; and
- The university's board of trustees must certify that the organization operates consistently with the university's goals and the state's best interests.

§ 1004.28(1)(a)1-3, Fla. Stat. Consistent with section 1004.28, UCFAA is organized as a chapter 617 nonprofit corporation, and UCF's Board of Trustees certified it as a university direct-support organization. R. 14A:2444-46; A. 4 ¶7.

Since its inception, UCFAA has been organized and operated exclusively for the benefit of UCF and its Board of Trustees. R. 14A:2444-46; A. 4 ¶17. UCF's Board of Trustees has the exclusive and unfettered power to decertify UCFAA as a direct-support organization and dissolve the corporation. R. 14A:2448; A. 4 ¶23. UCFAA's articles of incorporation provide that, upon dissolution, the corporation's assets shall be distributed to the University of Central Florida Foundation, Inc., or, under certain conditions, as directed by UCF's President. R. 13:2213; A. 1 at 3.

UCFAA's corporate structure makes it wholly subject to UCF's governance and control. Its articles of incorporation provide that UCFAA's purpose is to promote the health and physical welfare of UCF students through intercollegiate

athletics. R. 13:2211; A. 1 at 1. Consistent with Florida's Sunshine Law, section 286.011, and an opinion of the Attorney General, UCFAA gives public notice for all of its board of directors meetings. R. 14A:2445; A. 4 ¶11; Op. Att'y Gen. Fla. 2005-27 (2005). All such meetings are open to the public. R. 14A:2445; A. 4 ¶11.

Under UCFAA's articles of incorporation, the corporation is managed by a board of directors and, under UCFAA's bylaws, UCF's President automatically serves as chair of UCFAA's board. R. 13:2212, 2217; A. 1 at 1; A. 2 at 2. The board consists of at least six members, four of whom are controlled by UCF: UCF's President, the chair of UCF's Board of Trustees or a designee, and the presidents of the UCF Alumni Association and the Golden Knights Club or their designees. R. 13:2216-17; A. 2 at 1-2. In addition, UCF's President is authorized by the bylaws to appoint to UCFAA's board an unlimited number of additional voting members from UCF's administration, faculty, or student body. R. 13:2216; A. 2 at 1. As a result, UCF completely controls UCFAA's board.

Dr. John Hitt is UCF's President and, thus, he automatically serves as chair of UCFAA's board. R. 14A:2445; A. 4 ¶8. Under UCFAA's bylaws, which may not be amended without the approval of UCF's Board of Trustees, UCF's President appoints UCFAA's officers, including UCFAA's Executive Vice President, who automatically serves as the university's Director of Athletics and manages the corporation's day-to-day activities. R. 13:2218-19, 2224; A. 2 at 3-4, 9.

Plaintiff asserts that UCF retained no control over UCFAA's policies and operations (IB at 10-12), but Plaintiff overlooks the undisputed facts. Dr. Hitt hired Keith Tribble as the Director of Athletics. R. 14A:2446; A. 4 ¶13. At all material times, Tribble served at Dr. Hitt's pleasure and direction and reported to Dr. Hitt, who remained responsible for the athletics department. *Id*.; R. 13:2320-23, 2330. On a day-to-day basis, Tribble and his staff supervised UCFAA's 140 employees, who carried UCF identification cards. R. 13:2320-21, 14A:2410.

Dr. Hitt set UCFAA's vision and goals, he communicated them to the Athletics Director, and the Athletics Director communicated them throughout the department, which was responsible for carrying out and achieving his goals and objectives. R. 13:2324, 2363, 14A:2446; A. 4 ¶13. Dr. Hitt held the ultimate authority to hire and fire, and all such decisions involving head coaches were made in consultation with him. R. 14A:2369-70, 2384.

Furthermore, contrary to Plaintiff's implications (IB at 13), UCFAA did not simply approve its own contracts. With minor exceptions such as standard game contracts, UCF's General Counsel's office reviewed all proposed contracts, and if the General Counsel's office did not approve a contract, UCFAA did not execute it. R. 14A:2372-79.

Section 1004.28(2)(b) permits a university to prescribe rules for a direct-support organization's use of the university's property, facilities, and personal

services, which rules must provide for budget and audit review and oversight by the university's board of trustees. UCF prescribed such rules. Fla. Admin. Code R. 6C7-4.034 (2003) (repealed June 8, 2009 and readopted as UCF Reg. 4.034).

UCFAA's bylaws expressly grant UCF's President "the authority to monitor ***and control*** the use of [UCFAA's] resources." R. 13:2218; A. 2 at 3 (emphasis added). The bylaws also authorize UCF's President to "review and approve quarterly expenditure plans," and they grant UCF's President the broadest possible line-item authority over UCFAA's budget:

> The Chairman of the Board shall possess line-item authority over the budget of the Corporation. This authority includes the establishment of additional line items and reduction or elimination of existing budgetary items.

R. 13:2218; A. 2 at 3. Thus, UCF's President can add to, or subtract from, UCFAA's budget at will as well as control the use of all of UCFAA's resources. UCFAA's bylaws further grant UCF's President the authority to establish an unlimited number of special committees to accomplish any objectives affecting various interests and the welfare of UCFAA and UCF. R. 13:2223; A. 2 at 8.

UCFAA's bylaws provide that, upon approval by the board of directors, the budget shall be submitted to UCF's President for approval, and UCF's President shall submit the budget for review and approval to UCF's Board of Trustees. R. 13:2221-22; A. 2 at 6-7. Plaintiff attempts to make much of the fact that, prior to 2010, UCF's Board of Trustees did not formally approve UCFAA's budget (IB

at 9, 14), but Plaintiff ignores the unrebutted testimony below that UCF's chief financial officer chaired UCFAA's finance committee and demanded that he be involved, and was involved, with the preparation of UCFAA's budget every year as it was being developed. R. 14A:2382, 2386-87.

Because UCFAA operates for the sole and exclusive benefit and convenience of UCF, government accounting standards consider UCFAA a component unit of UCF. R. 14A:2446; A. 4 ¶15. As a result, UCFAA's financial results are included within UCF's financial statements. R. 14A:2446; A. 4 ¶15.

In accordance with Florida law, UCFAA receives a comprehensive annual financial audit from an independent accountant. R. 14A:2447; A. 4 ¶20. The audit report is submitted to UCF's Board of Trustees and Florida's Auditor General. *Id.*

In 2008, based on an audit of UCF (not UCFAA), the Auditor General informed UCF (not UCFAA) that it was not complying with a 2007 change to section 1004.28(1)(c) that prohibited university direct-support organizations from receiving student athletic fees. R. 14A:2392; 15:2742; 16:3026. Since 2003, UCFAA had received student athletic fees directly from UCF. R. 14A:2391-92; 15:2743. After the audit, UCF changed its practices to comply with the new law. Now, UCF holds student athletic fees in an account, UCFAA submits third-party invoices to UCF, and UCF pays those invoices for UCFAA from that account. R. 14A:2391-94. Such invoices paid by UCF include UCFAA's payroll and game

contract payments. R. 14A:2393-98.

Unlike any ordinary independent corporation, all university direct-support organizations, including UCFAA, are statutorily prohibited from incurring debt or issuing bonds without the approval of the state university system's Board of Governors. § 1010.62(3)(a). The same constraint applies to UCF and all state universities. *Id.*

UCF, not UCFAA, is a "member institution" of the NCAA, which organizes and regulates the athletics programs of member institutions throughout the United States. R. 14A:2447. After UCF created UCFAA, the school's 16 male and female intercollegiate sports teams did not become the UCFAA Knights. R14A:2430, 2439, 2471. Rather, they remained the UCF Knights. *Id.*

2. The Services Agreement between UCF and UCFAA

In 2005, UCF and UCFAA executed an agreement entitled the Intercollegiate Athletics Services Agreement. R. 13:2206; A. 3. It states that, since its formation, and at UCF's request, UCFAA has administered UCF's athletics program for the benefit of the university and its students. *Id.* The agreement obligates UCFAA to continue to do so. R. 13:2206-07; A. 3 at 1-2.

The agreement requires UCF to pay UCFAA an annual amount equal to the amount UCF receives in student athletic fees. R. 13:2207; A. 3 at 2. This amount,

plus loans from UCF, provides the majority of UCFAA's funding. R. 13:2134; 14A:2446; A. 4 ¶16.

The agreement provides that it shall not be construed to create a joint venture, partnership, or other like relationship between the parties. R. 13:2208; A. 3 at 3. It further provides that nothing in it shall be construed or interpreted as a waiver of sovereign immunity of the state beyond the waiver provided in section 768.28, Florida Statutes. *Id.*

C. UCFAA's Claim Of Sovereign Immunity And Plaintiff's Challenges

UCFAA claimed limited sovereign immunity under section 768.28(2) and (5) as a corporation acting primarily as an instrumentality or agency of UCF. R. 12:2120; 18:3280, 3433. Ignoring that UCFAA sought limited sovereign immunity, not the complete immunity available to agents or employees of the state under section 768.28(9), Plaintiff argued that UCFAA could not qualify as an "agent" of UCF because UCFAA's bylaws provide that its employees are not state employees and because UCF and UCFAA do not share a common law "agency" relationship under principal-agent principles. R. 15:2726-39. Plaintiff also argued that UCFAA could have sovereign immunity only if UCF was actually controlling UCFAA's day-to-day operations with respect to the football program. R. 15:2692-703, 2726-39; 18:3369-70. Plaintiff argued that the Legislature has expressly granted immunity to some direct-support organizations but not UCFAA.

R. 15:2723-26. Finally, Plaintiff argued that it was improper for UCF to transfer its athletics department to a direct-support organization to avoid various public records, employment, and bidding requirements. R. 15:2703-04, 2751-53.

D. The Trial Court's Ruling

The court ruled that UCFAA did not have sovereign immunity, stating that UCF had not controlled UCFAA's "day-to-day decisions or major programmatic decisions." R. 17:3226. The court also observed that, unlike with certain other organizations, the Legislature had not expressly granted UCFAA sovereign immunity. *Id.* Finally, in comments reflecting a misunderstanding of the statutory change that prompted the Auditor General's criticism of UCF's direct provision of athletic fees to UCFAA, the trial court commented that UCFAA had been "expanded in some cases beyond the limits allowable by the state, as evidenced by the Florida Auditor General's reversal of the policy of transferring student athletic fees to the UCF Athletics Association." *Id.*

E. The Judgments

Following trial, Plaintiff relied upon section 627.4136, which permits liability insurers to be joined for purposes of entering final judgment, to join UCFAA's insurer, Great American. R. 30:5727, 31:5825. The trial court entered judgment against UCFAA and Great American for $10 million. R. 31:5827-28. The trial court later entered a separate judgment against UCFAA and Great

American for costs in the amount of $524,931.22, and a separate judgment against UCFAA (but not Great American) for attorney's fees in the amount of $1,897,720. S.R. 1:252; R. 1(5D11-4253):40.

F. The Appeals To The Fifth District

UCFAA and Great American separately appealed the merits judgment (Case No. 5D11-2710) and the costs judgment. (Case No. 5D11-4253). UCFAA also appealed the fees judgment. (Case No. 5D12-454). The fees and costs appeals were briefed together, but separately from the merits appeal. The Fifth District issued two separate opinions.

In the appeal from the merits judgment, the Fifth District agreed with UCFAA that UCFAA primarily acted as an instrumentality of UCF, focusing on UCF's right and ability to control every aspect of UCFAA's operation and finances. *UCF Athletics Ass'n, Inc. v. Plancher*, 121 So. 3d 1097, 1106-09 (Fla. 5th DCA 2013). It rejected Plaintiff's argument that the right to control UCFAA was insufficient and that UCFAA could have sovereign immunity only if UCF was actually controlling UCFAA's day-to-day operations. Plaintiff did not raise any issue regarding the liability of UCFAA's insurer in the merits appeal briefing.

In the appeals from the fees and costs judgments, UCFAA asserted that those judgments should be reversed if the Fifth District reversed the merits judgment in the related appeal. In response, Plaintiff argued two new points

regarding Great American. In a footnote, he argued that Great American should not obtain a reversal of the costs judgment based on UCFAA's sovereign immunity because Great American did not expressly preserve any sovereign immunity argument when it was added to the case below. Plaintiff also argued that liability insurers should be required to pay more than their insureds owe when their insureds' liability is limited by sovereign immunity.

In its decision, also in a footnote, the Fifth District rejected Plaintiff's argument that Great American had to raise sovereign immunity after it was added to the case. *UCF Athletics Ass'n, Inc. v. Plancher*, 121 So. 3d 616, 619 n.3 (Fla. 5th DCA 2013). The Fifth District did not address Plaintiff's argument that liability insurers should be required to pay more than their insureds owe, which was not raised in the appeal on the merits of sovereign immunity.

Plaintiff has now sought review in this Court.

SUMMARY OF ARGUMENT

Point I. Plaintiff sought jurisdiction based on three areas of supposed conflict or misapplication, but the briefing now confirms that none exists. The Fifth District directed that the judgment be reduced in accordance with section 768.28(5). Plaintiff never challenged that directive, which does not conflict with or misapply any decision. Plaintiff's asserted conflict as to sovereign immunity rested on his claim that "longstanding" Florida case law requires the actual exercise of control. In fact, the Fifth District followed every decision on point and none of them used Plaintiff's test. Finally, the Fifth District never addressed Plaintiff's untimely insurance argument, and, contrary to Plaintiff's assertions, this Court has never held that a liability insurer's coverage extends beyond the liability of the insurer's sovereignly immune insured. The Court should discharge jurisdiction.

Point II. The First, Second, and now Fifth Districts have addressed the circumstances under which a corporation acts primarily as an instrumentality of the state under section 768.28(2). All of them focused on the state's ability to control the corporation's performance and day-to-day operations, but none of them required that the state actually be running the corporation's day-to-day activities for sovereign immunity to exist. When the correct standard is applied, it is manifest that UCFAA acts primarily as an instrumentality of UCF. UCF created

UCFAA for the sole purpose of administering UCF's athletics program, whose teams remain the UCF Knights, not the UCFAA Knights. As an approved direct-support organization, and based on UCFAA's corporate structure, UCF completely controls every aspect of UCFAA's operations, finances, and even its existence. UCFAA unquestionably acts primarily, if not exclusively, as an instrumentality of UCF and therefore has limited sovereign immunity under section 768.28.

Point III. Plaintiff argues that UCFAA's liability insurer, Great American, cannot "benefit" from UCFAA's sovereign immunity and thus the judgment against the insurer should stand. Plaintiff never raised this argument in defending the merits judgment below, raising it only later in the separate costs appeal. It is therefore waived. Even if considered on the merits, Great American is a liability insurer, and its insured's sovereign immunity likewise limits the insurer's liability. No case has ever held, nor should any case ever hold, that a liability insurer can be liable to a third party beyond the liability of its insured.

Point IV. The district court directed that the judgment be reduced to $200,000 "in accordance with section 768.28(5)." Plaintiff raised no challenge below to that directive, which is fully consistent with case law making clear that, while judgment should be rendered in the full amount of the plaintiff's damages, the judgment is not executable beyond the statutory cap.

ARGUMENT

I. THIS COURT SHOULD DISCHARGE JURISDICTION BECAUSE NO CONFLICT OR MISAPPLICATION EXISTS

Plaintiff sought review by asserting three purported conflicts or misapplications. Yet, now that Plaintiff has filed his Initial Brief, it is clear that neither conflict nor misapplication exists. This Court should, accordingly, discharge its jurisdiction.

For his first jurisdictional point, which has become the last point in the Initial Brief, Plaintiff asserted that, in ordering the judgment to be "reduced to $200,000 in accordance with section 768.28(5)," the decision below conflicted with a host of cases holding 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, Florida Statutes." Pet. Jur. Br. at 6. There is no conflict and no misapplication of this Court's case law.

Section 768.28 provides that a judgment against a defendant with sovereign immunity should be rendered in the amount of the plaintiff's damages. The cases Plaintiff cites as the basis for conflict or misapplication jurisdiction simply repeat the statute's language. Other cases, however, further explain that the judgment must indicate that it is not executable beyond the $200,000 statutory cap. *E.g.*, *Pinellas County By & Through Bd. of County Commr's v. Bettis*, 659 So. 2d 1365, 1367-68 (Fla. 2d DCA 1995); *Dade County Sch. Bd. v. Radio Station WQBA*, 699

So. 2d 701, 702-03 (Fla. 3d DCA 1997), *aff'd in part and rev'd in part on other grounds*, 731 So. 2d 638 (Fla. 1999). By instructing the trial court that the judgment "shall be reduced to $200,000 ***in accordance with section 768.28(5)***" (emphasis added), the Fifth District simply required the trial court to enter a judgment that does not permit execution beyond $200,000—precisely as then-Judge Quince directed in *Bettis*. No conflict or misapplication exists.

Plaintiff's second asserted basis for jurisdiction was that the Fifth District adopted a "new, unacceptable test" for determining when a corporation acts primarily as an instrumentality of the state. Pet. Jur. Br. at 7. According to Plaintiff's jurisdictional brief, the court "reject[ed] long-standing Florida law requiring UCF ***to exercise actual control*** over the detailed physical performance and day-to-day operations of UCFAA . . . ." and, instead, required only the "power to control." *Id.* (emphasis added). Plaintiff claimed that this holding expressly and directly conflicted with the First District's decisions in *Shands Teaching Hospital and Clinics, Inc. v. Lee*, 478 So. 2d 77, 79 (Fla. 1st DCA 1985), and *Prison Rehabilitation Industries and Diversified Enterprises, Inc. v. Betterson*, 648 So. 2d 778, 780 (Fla. 1st DCA 1994), which, according to Plaintiff, required the actual exercise of control by the state, not merely the power to control. Pet. Jur. Br. at 7.

It is true that the Fifth District rejected Plaintiff's actual exercise of control argument, but that holding is entirely consistent with *Shands*, *Betterson*, and *Pagan*

v. Sarasota County Public Hospital Board, 884 So. 2d 257 (Fla. 2d DCA 2004)—the only cases to address this issue. None of them required the ***actual exercise*** of control over day-to-day operations. Rather, each focused on the ***ability (or power)*** to control the corporation's performance and day-to-day operations.

Perhaps recognizing that its jurisdictional argument cannot withstand scrutiny, Plaintiff adds a new argument in his Initial Brief. He argues that the decision below did not require even the ability to control. *See, e.g.*, IB at 36-37 ("[U]nder 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***.") (emphasis altered). Of course, the Fifth District said exactly the opposite:

> [W]e 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 the power to control is sufficient.***

121 So. 3d at 1109 (emphasis added). *See also id.* at 1108 ("[W]hen 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."). Indeed, that holding was consistent with *Betterson*, *Shands*, and *Pagan*, all of which focused on the ability to control. Thus, Plaintiff's misreading of the Fifth District's opinion is not a basis for conflict jurisdiction.

Plaintiff's third asserted basis for jurisdiction was conflict with, or

misapplication of, *Michigan Millers Mutual Insurance Co. v. Bourke*, 607 So. 2d 418 (Fla. 1992), on whether "sovereign immunity is available to a liability insurer." Pet. Jur. Br. at 9. Plaintiff never raised this argument in the appeal from the merits judgment. Plaintiff raised it belatedly in the appeal from the costs judgment, and thus the Fifth District never discussed it in either decision. It is axiomatic that there cannot be conflict where the opinion does not address an issue.

Even if the issue could be considered, there is, in fact, no conflict with or misapplication of *Michigan Millers*. There, an insurer faced with its insureds' first-party claim for underinsured motorist benefits sought to assert the tortfeasor's (not the insureds') sovereign immunity. This Court held that the insurer could not do so. That has nothing to do with this case, a third-party action where the insured's liability is limited by sovereign immunity and the insurer is liable only to the same extent. Neither *Michigan Millers* nor any other case has ever suggested, let alone held, that a liability insurer can be liable to a third party for an amount greater than that for which its insured is liable to the third party. There is no conflict.

In sum, when the Court reviews the Initial Brief, it should become clear that none of the asserted jurisdictional bases exists. Accordingly, this Court should discharge its jurisdiction.

II. THE DISTRICT COURT CORRECTLY HELD THAT UCFAA PRIMARILY ACTS AS AN INSTRUMENTALITY OF UCF AND IS THEREFORE ENTITLED TO LIMITED SOVEREIGN IMMUNITY UNDER SECTION 768.28(2) AND (5)

Section 768.28, Florida Statutes, grants limited sovereign immunity to "the state and its agencies and subdivisions." § 768.28(5). The statute defines "state agencies or subdivisions" to include "corporations primarily acting as instrumentalities or agencies of the state . . . ." § 768.28(2). In *Keck v. Eminsor*, 104 So. 3d 359 (Fla. 2012), this Court held that "the state" includes "the independent establishments of the state, including state university boards of trustees." *Id.* at 367-68. There is no dispute that UCF is part of "the state" for purposes of sovereign immunity. Accordingly, under *Keck*, UCFAA is entitled to limited sovereign immunity if it qualifies as a corporation primarily acting as an instrumentality or agency of UCF. This issue raises a pure question of law that this Court reviews de novo. *Pino v. Bank of N.Y.*, 121 So. 3d 23, 31 (Fla. 2013).

The Fifth District discussed and followed ***all*** of the decisions examining this issue and concluded that UCFAA primarily acts as an instrumentality of its creator, UCF. UCFAA is thus entitled to limited sovereign immunity. In so holding, the Fifth District correctly rejected Plaintiff's unsupportable position that, for UCFAA to have sovereign immunity, UCF must have been actually controlling UCFAA's day-to-day operations. The court correctly concluded that "the power to control is sufficient." 121 So. 3d at 1109.

Perhaps now recognizing that his "actual control" argument cannot withstand scrutiny, Plaintiff argues here that actual control ***or*** the right to control is necessary, and claims that the Fifth District required neither. IB at 32-36. Contrary to the clear language of the Fifth District, Plaintiff claims that "the decision ***does not require UCF to retain the right to control*** UCFAA's day-to-day operations" and that, "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***." IB at 36-37 (emphasis altered); *see also id.* at 32 (arguing that, under the Fifth District's decision, "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." (emphasis altered)).

When the case law is objectively examined, and when the facts of this case are fairly applied, it is clear that UCF sufficiently controls, and, more importantly, maintains the right to control, UCFAA such that UCFAA acts primarily, if not exclusively, as an instrumentality of UCF. As the Fifth District held, "no amount of spin negates the fact that it is UCF that benefits from UCFAA's work." 121 So. 3d at 1109.

A. The Key Factor Is The State's *Ability To Control* The Corporation's Performance And Day-To-Day Operations

The First, Second, and now the Fifth Districts have all examined whether a corporation primarily acts as an instrumentality of the state under section

768.28(2). Their decisions all focused on the same factor: the state's ability to control the corporation's performance and day-to-day operations. Plaintiff's contrary arguments have no support whatsoever.

1. Every Florida court uses the ability to control standard

Prior to the decision below, three district court decisions examined whether a corporation acts primarily as an instrumentality of the state. In all three cases, the courts focused on the facts of the relationship and the state's ability to control the corporation's performance and day-to-day operations.

In *Prison Rehabilitative Industries and Diversified Enterprises, Inc. v. Betterson*, 648 So. 2d 778 (Fla. 1st DCA 1994), the plaintiff's vehicle collided with a cow owned by PRIDE, a private corporation operating a prison work program. The First District held that "statutory constraints" governing PRIDE "cumulatively constitute *sufficient governmental control over PRIDE's daily operations* to require the conclusion *as a matter of law* that PRIDE has, from its inception, acted primarily as an instrumentality of the state." *Id.* at 780-81 (emphasis added).

In reaching its conclusion, the court in *Betterson* acknowledged that, "while PRIDE was accorded substantial independence in the running of the work programs, its essential operations nevertheless remained subject to a number of legislatively mandated constraints over its day-to-day operations." *Id.* at 780. The *Betterson* court then enumerated the specific constraints that supported its

conclusion: (1) PRIDE was organized solely to operate a work release program; (2) it could sell goods to private entities only with the Governor's approval; (3) it was required to provide the Governor and the Legislature with an independent audit; (4) it was subjected to financial and performance audits by the Auditor General; (5) the Department of Corrections was required to make inmates available and to approve PRIDE's policies and procedures regarding inmates; (6) PRIDE was restricted to nonprofit status; (7) the Governor had to approve PRIDE's articles of incorporation and administered a trust fund with funds PRIDE used; and (8) the state had a reversionary interest in PRIDE's property. *Id.* at 780.

As these constraints make clear, *Betterson* did not require the Department of Corrections to have been actually controlling PRIDE's day-to-day operations, such as how the loose cow that caused the accident was penned. It required the state to possess "sufficient governmental control" over PRIDE to support sovereign immunity, and the controls identified by the court as sufficient were high-level operational and fiscal controls, not daily basic oversight.

Similarly, the Second District in *Pagan v. Sarasota County Public Hospital Board*, 884 So. 2d 257 (Fla. 2d DCA 2004), affirmed a summary judgment for First Physicians, a nonprofit corporation created by a county hospital board, holding that the corporation had limited sovereign immunity under section 768.28(2) and (5). The parties agreed that the determinative issue was whether the

board had "sufficient control" over First Physicians for it to act as a state instrumentality. *Id.* at 263. The trial court held that sufficient control existed because: (1) the hospital board created and funded First Physicians; (2) the hospital board had the power to dissolve First Physicians and claim its assets; (3) the First Physicians board was elected by the hospital board and served at the latter's pleasure; (4) the First Physicians articles of incorporation and bylaws provided that a majority of the corporation's directors must be sitting hospital board members; and (5) the hospital district's chief executive officer automatically served as president of First Physicians. *Id.*

Citing *Betterson*, the Second District affirmed. As in *Betterson*, *Pagan* did not require proof the hospital board actually controlled the medical services that First Physicians provided on a day-to-day basis and which formed the basis for the malpractice claim in the case. Rather, *Pagan* focused on financial oversight and governance controls, including the overarching authority to control the policies under which day-to-day operations were conducted.

In a concurrence, then-Judge Canady explained that the appellants in *Pagan* argued that "day-to-day operational control over a corporation [wa]s necessary to establish that the corporate entity [wa]s an instrumentality or agency under section 768.28(2)." *Id.* at 266 (Canady, J., concurring). The Second District rejected that position, and Judge Canady further discussed that result. He explained that

whether a corporation is a governmental instrumentality or agency generally "centers on the issue of control," which must be more than the control exercised by the government in its regulatory capacity but cannot be so complete as to be inconsistent with the entity's separate corporate existence. *Id.* at 267, 270. He pointed out that First Physicians was a state instrumentality because it began and carried out its operations as "a creature of the Hospital Board," which indisputably had limited sovereign immunity, and the hospital board managed First Physicians through its board of directors and chief executive officer. *Id.* at 271.

Pagan and *Betterson* are thus fully consistent in their holdings that sovereign immunity existed for a private corporation based upon operational and fiscal control established through governance and corporate structure. Neither *Pagan* nor *Betterson* required that the state actually direct day-to-day activities for sovereign immunity to exist. In fact, *Pagan* rejected that very notion.

Whereas the *Betterson* and *Pagan* courts determined that the corporations there were primarily acting as state instrumentalities, the court in *Shands Teaching Hospital and Clinics, Inc. v. Lee*, 478 So. 2d 77 (Fla. 1st DCA 1985), reached the opposite conclusion, though on materially different facts. In *Shands*, the First District considered the status of a teaching hospital created by statute. A state law directed the hospital "to study and develop a plan to become more self-sufficient and fiscally independent," and, based on that law and legislative reports, the First

District concluded that "the intent of the legislature was to treat Shands as an autonomous and self-sufficient entity, one not *primarily* acting as an instrumentality on behalf of the state." *Id.* at 79 (emphasis in original).

Shands further observed, "[b]y analogy," that under federal law, "[t]here are no sharp criteria for determining whether an entity is a federal agency within the meaning of the [Federal Tort Claims] Act, but the *critical factor* is the existence of federal government *control* over the 'detailed physical performance' and 'day to day operation' of that entity." *Id.* (quoting *Lewis v. United States*, 680 F.2d 1239, 1240 (9th Cir. 1982) (emphasis in original)). *Shands* did not, however, hold that the state must actually be running the corporation's day-to-day operations, and, to the extent Plaintiff relies on Federal Tort Claims Act case law, that misplaced reliance is discussed below. Instead, having determined that the Legislature intended the hospital to be an "autonomous and self-sufficient entity," the First District in *Shands* determined that "[t]he plain meaning of section 240.513 reflects that Shands' day-to-day operations are not under direct state control" and that, as a result, "Shands is not a corporation *primarily* acting as an instrumentality of the state, as required by section 768.28(2)." *Id.* (emphasis in original).

Pagan, Betterson, and Shands are all consistent. In *Betterson* and *Pagan*, the corporations were largely independent from the state, but the state nonetheless maintained sufficient government controls over performance and day-to-day

operations. Both corporations acted primarily as instrumentalities of the state, and so had limited sovereign immunity under section 768.28. In *Shands*, by comparison, an "autonomous and self-sufficient" corporation without significant government control over its day-to-day operations was not primarily acting as an instrumentality of the state, and so lacked sovereign immunity.

2. The Fifth District followed this established law

The Fifth District's decision below expressly followed *Betterson*, *Pagan*, and *Shands*. 121 So. 3d at 1106-08. The court held that "[t]he key factor in determining whether a private corporation is an instrumentality of the state for sovereign immunity purposes is the level of governmental control over the performance and day-to-day operations of the corporation." *Id.* at 1106 (citing *Betterson* and *Shands*).

Examining the contours of the requisite control, the Fifth District determined that "[t]he agency must be subject to something more than the sort of control that is exercised by the government in its regulatory capacity." *Id.* (citing *Pagan*). The court also expressly adopted Judge Canady's reasoning that "control of the governmental entity over the corporation necessary to establish an instrumentality relationship under section 768.28(2) does not require that the corporation be subsumed in the governmental entity." *Id.* at 1109 (quoting *Pagan*, 884 So. 2d at 270 (Canady, J., concurring)). The Fifth District held:

> We adopt that reasoning here. In doing so, 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 the power to control is sufficient.

Id. at 1109.

Citing this passage, Plaintiff boldly, but erroneously, declares that the Fifth District did not mean what it said when it held that the power to control is sufficient. IB at 36 ("That citation [to Judge Canady's concurrence] is misplaced because the [Fifth District's] decision does not require UCF to retain the right to control UCFAA's day-to-day operations."). Plaintiff's effort to recharacterize the decision below as rejecting a requirement of right of control and adopting some "new standard" necessarily fails. The Fifth District discussed, examined, and followed the decisions in *Betterson*, *Pagan*, and *Shands*. Its decision is fully consistent with those cases, and it should be approved.

3. Plaintiff's arguments advocating a different standard are incorrect

Plaintiff continues to advocate a different standard. This position is unsupported and unsupportable.

First, Plaintiff continues to suggest that UCFAA cannot be an instrumentality of the state in the absence of the sort of express statutory declaration given to other corporations. IB at 20, 34; *cf., e.g.*, § 1004.43, Fla. Stat. (H. Lee Moffitt Cancer Center); § 1004.447, Fla. Stat. (Florida Institute for Human

and Machine Cognition, Inc.). But, in *Keck*, this Court rejected an argument that the lack of direct statutory authority precluded a state agency from creating a corporation that primarily acts as its instrumentality. 104 So. 3d at 368-69. Furthermore, Florida law has long recognized that a corporation may be an instrumentality of the state, even in the absence of a statutory declaration, "*under the facts and circumstances of a particular relationship*." *Mingo v. ARA Health Servs., Inc.*, 638 So. 2d 85, 86 (Fla. 2d DCA 1994) (emphasis added). To the extent Plaintiff argues otherwise, he is incorrect, as the Fifth District held. 121 So. 3d at 1103 n.6.

Next, to support his "actual control" argument, Plaintiff relies on facts described in *Keck*. That reliance is misplaced because, as the Court in *Keck* stated, the plaintiff in that case conceded that the defendant corporation, JTM, was an instrumentality of the independent establishment of the state, JTA, that created JTM. 104 So. 3d at 368 ("[T]he legal circumstances attending the formation of JTM by JTA do not alter the fact—which is conceded by Eminisor—that JTM is an instrumentality of JTA."). *Keck* never determined the level of control that must be present for a corporation to be an instrumentality of the state.

Plaintiff also places considerable emphasis on case law under the Federal Tort Claims Act, arguing that "the federal courts look to common law agency principles for the necessary degree of government control." IB at 22. However,

the federal government's waiver of sovereign immunity under the Federal Tort Claims Act is materially different from Florida's waiver under section 768.28, and Plaintiff's reliance on federal law in this context is wholly misplaced. Even the trial court, which accepted Plaintiff's actual control argument, stated that it found the Federal Tort Claims Act case law unhelpful. R. 17:3226.

The Federal Tort Claims Act extends immunity to, and accepts responsibility for, the acts of any "federal agency" and, under certain circumstances, "employees" of the United States. 28 U.S.C. §§ 2671, 2679. The federal act defines "federal agency" to include corporations primarily acting as instrumentalities or agencies of the United States. 28 U.S.C. § 2671. However, the "federal agency" definition expressly ***excludes*** "any contractor with the United States." *Id.* The United States Supreme Court has emphasized that "due regard must be given to the exceptions, including the independent contractor exception . . . ." *U.S. v. Orleans*, 425 U.S. 807, 814 (1976). The independent contractor exception precludes any independent corporation from being an instrumentality or agency of the United States, and a private corporation can constitute a "federal agency" within the law only if its day-to-day operations are directly supervised by the federal government under common law principal-agent principles. *See id.* at 814-15; *see also, e.g., U.S. ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140, 1146 (9th Cir. 2004) ("The courts use

common law agency principles in tort to determine the scope of the 'independent contractor exception' to the federal government's partial statutory waiver of sovereign immunity.").

Florida law takes a completely different approach. Section 768.28 distinguishes between (1) state agencies or subdivisions, which include corporations acting as instrumentalities and agencies of the state, and (2) agents and employees of the state. Under section 768.28(2) and (5), state agencies or subdivisions—which include corporations acting as instrumentalities or agencies of the state—receive ***limited*** sovereign immunity, which permits certain claims to proceed, subject to limitations on damages. Under section 768.28(9), agents and employees of the state receive qualified, but ***complete***, immunity, precluding all claims against such persons subject to limited exceptions, such as acts committed in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

As a result, Plaintiff's "actual control" argument proves too much. Common law agents of the state are covered under section 768.28(9), not section 768.28(2) and (5). If UCF were actually controlling UCFAA's day-to-day activities such that UCFAA constituted UCF's common law agent, then UCFAA would not have ***limited*** sovereign immunity under section 768.28(2) and (5)—it would have qualified, but ***complete***, immunity under section 768.28(9), and Plaintiff could not

recover a judgment against UCFAA in any amount. UCFAA has never argued that it is an agent of UCF, entitled to complete immunity under section 768.28(9).

Simply put, Plaintiff's reliance on federal case law in support of his "actual control" argument is entirely misplaced. As the Fifth District correctly recognized, section 768.28(2) permits private corporations that do not qualify for complete immunity as agents of the state under section 768.28(9) to qualify as a state agency or subdivision when they primarily act as an instrumentality or agency of the state. *See* 121 So. 2d at 1108 ("Judge Canady explained that 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." (emphasis added)).

B. UCF Sufficiently Controls UCFAA Such That UCFAA Primarily Acts As An Instrumentality Of UCF

Applying the correct standard, it is clear that the Fifth District's decision should be approved. Plaintiff conceded below that, prior to 2003, UCF's athletics department had limited sovereign immunity. That did not change when UCF decided to operate the department through a direct-support organization and created UCFAA for this purpose. It is manifest that, under the analysis established by *Betterson*, *Shands*, and *Pagan*, UCF sufficiently controls UCFAA for UCFAA to be primarily acting as an instrumentality of UCF.

In connection with creating UCFAA as a direct-support organization, UCF

has certified that UCFAA operates consistently with the university's goals and the state's best interests. UCFAA is statutorily obligated to act for UCF's exclusive benefit. § 1004.28(1)(a). UCFAA is also contractually obligated under the services agreement to administer UCF's athletics program for the benefit of the university and its students.

Section 1004.28(2)(b) permits a university to prescribe rules for a direct-support organization's use of the university's property, facilities, and personal services, which rules *must* provide for *budget and audit review and oversight by the university's board of trustees*. UCF prescribed such rules. Fla. Admin. Code R. 6C7-4.034 (2003) (repealed June 8, 2009, and readopted as UCF Regulation 4.034). Plaintiff argues that UCFAA did not always obtain UCF's formal approval for its budgets, but Plaintiff ignores that UCF's chief financial officer chaired UCFAA's finance committee and was part of the process by which UCFAA's budgets were developed, giving the university a direct role in the development process, and ensuring that the budget was prepared in accordance with UCF's intentions.

Furthermore, section 1010.62 severely restricts how university direct-support organizations may acquire or issue debt and, among other things, requires that they, like universities, first obtain approval of the Board of Governors. § 1010.62(3)(a). No autonomous corporation faces such reviews and mandated

government approvals before it may obtain loans and otherwise incur debt.

Also, section 1012.97(2) authorizes university police officers to take action with respect to facilities "under the guidance, supervision, regulation, or control" not only of the university but also of a university's direct-support organization as well as "*any other organization controlled by the state university*." (emphasis added). By giving university police jurisdiction over all direct-support organization property and by use of the phrase "any other organization controlled by the state university," the Legislature again recognized that *the state* controls direct-support organization property. No autonomous corporation is subject to such specific law enforcement jurisdiction over its property.

Beyond the statutory scheme, the corporate structure UCF set in place gives UCF far more control over UCFAA than the Legislature mandated for all university direct-support organizations through section 1004.28. UCF's President, Dr. Hitt, is not just a member of UCFAA's board of directors, he is required to be the board chair, and can appoint ***unlimited*** additional voting directors from the school's administration, faculty, or student body. As such, Dr. Hitt and UCF can expand the board to whatever size is necessary to obtain a result and so have ***complete control*** over UCFAA's board, which manages the corporation.

Also, as chair of UCFAA's board of directors, UCF's President is expressly authorized to monitor ***and control*** all of UCFAA's resources. UCF's President can

also exercise a line-item veto over UCFAA's budget and unilaterally insert lines into the budget. These powers together give UCF ***complete control*** over UCFAA's finances and operations.

The Director of Athletics serves at Dr. Hitt's pleasure. Thus, through the Director of Athletics, Dr. Hitt has the ability to control all of UCFAA's hiring, from coaches to other personnel. Dr. Hitt also has the authority to create an unlimited number of special board committees to accomplish any objectives affecting the interests and welfare of UCFAA and UCF.

The unlimited authority given to Dr. Hitt, as UCF's President, over UCFAA's finances and operations is actual, direct authority ***to control*** the corporation in all respects. It is not theoretical, inchoate authority merely resting in UCF. UCF's President is, in fact, in charge of UCFAA.

UCFAA also depends on UCF for financial support. While UCF no longer provides UCFAA with funds directly from student athletic fees, UCF holds student athletic fees in an account. UCFAA submits third-party invoices to UCF—including UCFAA's payroll and game contract payments—and UCF pays them from that account. This process not only ensures accountability, it demonstrates UCFAA's financial interrelatedness with, and dependence on, UCF.

UCF also has the exclusive power to dissolve UCFAA and transfer its assets to the UCF Foundation, Inc., or, under certain conditions, wherever UCF directs.

Thus, if UCFAA does not perform in the manner UCF desires, UCF can dissolve the corporation and transfer its assets.

Simply put, ***UCF has complete authority to control*** UCFAA. UCF controls UCFAA's operations, its finances, and even its existence. UCFAA is a captive and entirely subservient entity, created by UCF and existing for the sole purpose of serving UCF by administering its athletics department.

Throughout his Initial Brief, Plaintiff isolates various facts and argues that, standing alone, each is insufficient to establish the requisite level of control. *See* IB at 29-30 (UCF President's position as chair of UCFAA's board, authority to appoint additional board members, bylaws approval restriction), 30 (UCF funding), 33-34 (direct-support organization status), 36-38 ("parent" corporation status). Plaintiff's characterizations of the facts aside, no fact can be examined merely in isolation. To determine whether UCF sufficiently controls UCFAA, the facts must be taken together. When that is done, it is clear that UCFAA primarily acts as an instrumentality of UCF.

Plaintiff relies heavily on *Shands*, but the First District in that case determined that the Legislature intended the hospital to be autonomous and self-sufficient, and the court considered that factor dispositive. That analysis is fully consistent with the analysis in *Betterson* and *Pagan*, where no similar autonomy, self-sufficiency, or legislative intent existed. That analysis is also fully consistent

with the Fifth District's decision here. UCF did not create UCFAA to be an autonomous, self-sufficient organization. UCF created UCFAA to administer the university's athletics program.

Indeed, UCF's control over UCFAA far exceeds that seen in *Betterson* and *Pagan*, both of which held that the corporations in those cases were entitled to sovereign immunity as a matter of law. If, as the *Betterson* court held, the state possessed "sufficient governmental control" over PRIDE to support sovereign immunity for an accident involving a cow on a highway, then, here, UCF certainly possesses "sufficient governmental control" over UCFAA to support sovereign immunity for an accident involving football practice. The same is true with *Pagan*.

Accepting Plaintiff's arguments would require this Court to rewrite section 768.28, to disapprove both *Betterson* and *Pagan*, and to cast aside the legal framework on which state actors and corporations created by state actors have relied for decades in structuring their affairs. Plaintiff apparently recognizes this, and so his Initial Brief includes pages of dramatic rhetoric about not following the rule of law simply because it was laid down in the past. IB at 42-43. He incorrectly claims that the decision below allows private corporations to confer sovereign immunity on each other, and he erroneously attacks UCF for supposedly sharing its sovereign immunity with "a commercial sports enterprise" that operates "free from any State control or supervision." IB at 41-43. Plaintiff implicitly, if

not explicitly, invites this Court to abandon what he calls the "considerable injustice" of sovereign immunity. IB at 42.

Such arguments are entirely misplaced. The Legislature has determined that corporations primarily acting as instrumentalities of the state have limited sovereign immunity under section 768.28(2) and (5), and the separation of powers doctrine precludes this Court from evaluating the wisdom of that determination. If UCFAA does not primarily, if not exclusively, act as an instrumentality of UCF in administering the university's athletics department, then what does it do? That is *all* it does and, as a result, it is statutorily entitled to limited sovereign immunity.

Plaintiff also improperly attacks the features of university direct-support organizations, but those features are also the Legislature's creation. Section 1004.2(5) provides that all records of a university direct-support organization, with limited exceptions, are confidential and exempt from the public records provisions of section 119.07(1), Florida Statutes. Such public records exemptions and other exemptions from laws generally governing state agencies are a long recognized feature of direct-support organizations.

Indeed, a 1987 Florida Senate staff report titled, "A Review of Direct-Support Organizations, Their Function, and Accountability to the State," explained that state agencies are motivated to create direct support-organizations to authorize the solicitation of private funds to support public programs and to allow revenue

expenditures on state programs outside of the state budgeting and purchasing systems. R. 14B:2495 at 73. The report t2outed the ability of direct-support organizations to operate without many of the constraints limiting state agencies. *Id.* at 4-5, 9, 50, 53, 74, 76. The report also identified the functions of direct-support organizations as "many and varied," and specifically referenced their role with "university athletic programs." *Id.* at 5.

Apart from the decision below, the only decision to address a university direct-support organization in this context is *Elend v. Sun Dome, Inc.*, 2005 U.S. Dist. Lexis 35264 (M.D. Fla. Dec. 22, 2005), R14A:2481. *Elend* held that Sun Dome was a Florida agency entitled to Eleventh Amendment immunity from suits in federal court. *Id.* at **8-24. The court focused on (1) the University of South Florida's control over the corporation; (2) how section 1004.28 defines a university direct-support organization; (3) how USF funded Sun Dome and oversaw its finances; and (4) how Florida's Division of Risk Management was responsible for any judgment against Sun Dome. *Id.* at **10-28.

These factors are exactly the same in this case, except that whether the Division may ultimately pay any judgment against UCFAA cannot be resolved at this time because the Division has declined to take a position during this litigation. R. 18:3436-37. Plaintiff's statements in his Initial Brief to the effect that the Division has not "extended coverage" (IB at 26; *see also* IB at 14, 24) are

misleading. The Division awaits the conclusion of this litigation. R. 18:3436-37.

While *Elend* addressed Eleventh Amendment immunity, not sovereign immunity under section 768.28, both issues involve whether a defendant is a state agency for immunity purposes. *Elend* cited section 768.28's "state agency" definition in discussing whether USF's board of trustees was a state agency entitled to Eleventh Amendment immunity. The decision supports the Fifth District's decision below, as the Fifth District recognized. 121 So. 3d at 1109 (citing *Elend*).

UCFAA does nothing but administer UCF's athletics department, just as UCF created it to do. The teams are known as the UCF Knights, not the UCFAA Knights. UCF, not UCFAA, is a member institution of the NCAA. When the law is correctly applied to the facts in this case, it is manifest that UCFAA primarily acts as an instrumentality of UCF, just as the Fifth District concluded. The decision below should be approved.

III. PLAINTIFF'S EFFORTS TO AVOID SOVEREIGN IMMUNITY BY ATTACKING UCFAA'S INSURER ARE WAIVED, WITHOUT SUPPORT, AND FUNDAMENTALLY IN CONFLICT WITH BASIC INSURANCE LIABILITY PRINCIPLES

Next, in a last-minute effort to avoid UCFAA's sovereign immunity, Plaintiff argues that the Fifth District erred when it "extended the State's sovereign immunity" to UCFAA's liability insurer. IB at 44. This argument is waived, incorrect, and fundamentally in conflict with basic liability insurance principles.

In the appeal from the merits judgment entered against UCFAA (and Great American, as UCFAA's liability insurer), UCFAA and Great American raised sovereign immunity as a basis to reverse the judgment, but Plaintiff raised no argument concerning Great American. He did not argue that Great American should be liable for the entire $10 million award even if UCFAA has sovereign immunity.

It was only when Plaintiff later filed his answer brief in the separate fees and costs appeals that, for the first time, he raised two arguments concerning Great American's purported separate liability: (1) Great American should not benefit from UCFAA's sovereign immunity because Great American did not preserve that position by objecting when judgment was entered against it; and (2) Great American should not benefit from UCFAA's sovereign immunity based on *Michigan Millers Mutual Insurance Co. v. Bourke*, 607 So. 2d 418 (Fla. 1992). In their reply in the fees and costs appeals, UCFAA and Great American responded that the *Michigan Millers* argument was untimely because it was never raised in the merits appeal and that, in all events, Plaintiff was legally incorrect with respect to both issues.

The Fifth District rejected Plaintiff's preservation argument in a footnote of the fees and costs decision. 121 So. 3d at 619 n.3. In this Court, Plaintiff does not challenge that holding.

The Fifth District never addressed the *Michigan Millers* argument that Plaintiff attempts to reassert here. That argument was waived when Plaintiff failed to raise it in defense of the $10 million merits judgment, and it is not preserved for review in this Court. *See, e.g.*, *Shands Teaching Hosp. & Clinics, Inc. v. Mercury Ins. Co. of Fla.*, 97 So. 3d 204, 210 (Fla. 2012) ("Shands did not properly present this argument to the First District. We therefore do not address it."); *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985) ("In order to be preserved for further review by a higher court, an issue must be presented to the lower court . . . .").

Moreover, Plaintiff's argument is without merit. Plaintiff contends that, under *Michigan Millers*, sovereign immunity may not be "extended" to an insurer under section 768.28. IB at 44. Plaintiff further contends that section 768.28 permits the State to purchase insurance beyond the statutory limit on damages and that "[t]he Fifth District's decision renders that statutory provision a nullity, and, therefore must be reversed." *Id.* Plaintiff is incorrect. He misunderstands basic insurance concepts.

Michigan Millers involved a first-party claim by insureds against their own insurer for uninsured motorist coverage. This Court held that the insurer could not escape its first-party coverage obligation to its insureds merely based on the third-party tortfeasor's sovereign immunity. Here, however, Great American is not defending a claim ***by*** its insured, and Great American is not trying to escape a

coverage obligation based on a third party's sovereign immunity. To the contrary, Great American—as UCFAA's ***liability insurer***—seeks to fulfill its contractual obligation by providing liability coverage to the extent that UCFAA owes Plaintiff, and no more. *Michigan Millers* is thus completely inapposite.

Plaintiff's argument reflects a fundamental misunderstanding regarding liability insurance coverage. Florida law prohibited Great American from being joined in the action below prior to its conclusion. *See* § 627.4136(1), Fla. Stat. (prohibiting joinder of liability insurer in a third party's action until a settlement or verdict is reached against the insured). Only after Plaintiff prevailed below was Great American—UCFAA's ***liability insurer***—added to the merits and costs judgments based on section 627.4136(4). That provision permitted Plaintiff to add "a liability insurer . . . as a party defendant *for the purpose[] of entering final judgment* . . . ." § 627.4136(4) (emphasis added). The statute does not authorize the joinder of an insurer for any other purpose.

A liability insurer's obligations are derived from, and limited by, its insured's liability. This Court long ago confirmed that a third party's ability to proceed directly against an insurer does not permit the third party to recover more from the insurer than the third party can recover from the insured. As this Court held in *Stuyvesant Insurance Co. v. Bournazian*, 342 So. 2d 471 (Fla. 1976), "The fact that an injured person may proceed directly against the insurer as a third party

beneficiary of the insurance contract . . . in no way elevates the carrier's responsibility to pay amounts for which the insured himself would not have been liable." *Id.* at 472 n.3 (citation omitted). *See also State Farm Fire & Cas. Co. v. Robinson*, 529 So. 2d 1210, 1211 (Fla. 5th DCA 1988) ("[t]he liability insurer's liability is entirely derivative"). Based on sovereign immunity, UCFAA is liable to pay $200,000, and UCFAA's liability insurer is obligated to indemnify UCFAA for no more than that amount.

Thus, Plaintiff has it exactly backwards when he argues that "[t]he cap on damages does not reduce the State's liability for the torts it causes." IB at 47. By definition, the cap on damages limits the insured's liability, which, in turn, limits the liability of the insured's liability insurer. As this Court explained in *Berek v. Metropolitan Dade County*, 422 So. 2d 838 (Fla. 1982), in distinguishing between the judgment's reflection of the total amount of the plaintiff's damages and the judgment's limitation on the sovereignly immune defendant's ***liability***:

> [S]ection 768.28(5) authorizes the rendition of judgment in excess of the maximum amount which the state can be required to pay. The purpose of this provision is so that the excess can be reported to the legislature and then paid in whole or in part by further act of the legislature. These provisions recognize that the judgment and post-judgment assessments to be entered of record should upon motion of the plaintiff be the full amount of actual damages suffered, costs, and post-judgment interest and ***not the amount of the defendant's liability***.

Id. at 840-41 (emphasis added). Likewise, in *City of Lake Worth v. Nicolas*, 434

So. 2d 315 (Fla. 1983), this Court held that, once the defendant pays the plaintiff the statutory limit on damages, the plaintiff "shall be required to give a satisfaction of judgment, his recourse for the excess being only to the legislature." *Id.* at 316.

Plaintiff essentially asks this Court to turn the entire body of law on ***liability coverage*** on its head and hold a liability insurer liable for an amount of damages for which its insured is not liable. No case has done so.

Finally, to the extent Plaintiff contends that UCFAA or other entities with sovereign immunity are not receiving the benefit of their bargain when they purchase liability coverage in excess of the sovereign immunity damages limits, Plaintiff is mistaken. First, Plaintiff ignores that liability insurers generally provide insureds with a defense in litigation—a benefit that sometimes far exceeds the amount in controversy. Second, section 768.28(5) expressly authorizes settlements in excess of the statutory limits on damages where the settlement is paid by insurance proceeds, which gives insurers the ability, but not the obligation, to settle above the statutory caps. That ability to settle does not require liability insurers to pay beyond their insureds' obligation to pay. Third, liability coverage beyond the statutory caps may be extremely beneficial if, for whatever reason, sovereign immunity is not applicable in a particular case.

In sum, UCFAA's sovereign immunity limits its liability to Plaintiff. As UCFAA's ***liability*** insurer joined under section 627.4136 at the time of entering

judgment merely for the purpose of entering that judgment, Great American can have no greater liability on the judgment.

IV. THE DISTRICT COURT DID NOT ERR IN ORDERING THE JUDGMENT REDUCED

In an effort to twist the district court's words to manufacture jurisdiction in this Court, Plaintiff argues that the district court erred when it held, in a footnote, that "[t]he judgment entered against UCFAA shall be reduced to $200,000 in accordance with section 768.28(5), Florida Statutes." IB at 49 (quoting 121 So. 3d at 1109 n.17). In essence, Plaintiff argues that the district court contravened the plain language of section 768.28(5) when it ordered the judgment to be reduced to $200,000 "***in accordance with section 768.28(5).***" (emphasis added). Plaintiff misreads this language and the controlling case law, and his point is unpreserved.

Where a defendant has limited sovereign immunity under section 768.28(5), neither the statute nor the case law calls for entry of an ordinary money judgment. Rather, while the statute and the cases Plaintiff cites provide that a judgment should be "rendered" in excess of the damages caps, cases that Plaintiff does not cite require the judgment to ***limit*** the defendant's liability based on sovereign immunity and its damages caps. *See, e.g.*, *Pinellas County By & Through Bd. of County Commr's v. Bettis*, 659 So. 2d 1365, 1367-68 (Fla. 2d DCA 1995) ("To the extent the trial court's order awarding attorney's fees requires the County to make payment beyond the limits of its liability, that was error."); *Dade County Sch. Bd.*

v. Radio Station WQBA, 699 So. 2d 701, 702-03 (Fla. 3d DCA 1997) (reversing entry of judgment above cap that provided "for which sum let execution issue"), *aff'd in part and rev'd in part on other grounds*, 731 So. 2d 638 (Fla. 1999); *see also Polk County v. Sofka*, 730 So. 2d 389, 390 (Fla. 2d DCA 1999) ("This verdict would normally have resulted in a judgment totaling $5,005,000, with a restriction preventing execution on an amount in excess of [the cap] without legislative authorization.").

The district court and the parties all understood the form the judgment should take to comply with the aforementioned case law—a form consistent with then-Judge Quince's opinion in *Bettis* that the judgment reflect the full amount of Plaintiff's damages, but not permit execution beyond the $200,000 statutory cap. Had there been any confusion, Plaintiff would surely have raised this issue with the district court, but he did not. *See Shands*, 97 So. 3d at 210 ("Shands did not properly present this argument to the First District. We therefore do not address it."). Thus, Plaintiff's argument is unpreserved, it cannot support conflict jurisdiction, and it fails to demonstrate error. It should be rejected.

CONCLUSION

For all of the reasons demonstrated above in Point I, no conflict or misapplication exists, and the Court should discharge its jurisdiction. Alternatively, for all of the reasons demonstrated above in Points II, III, and IV, the Court should reject Plaintiff's arguments and approve the decisions below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 29, 2014, a true and correct copy of the foregoing was served by e-mail through the e-portal on: Stacy D. Blank, Esq. (stacy.blank@hklaw.com; joann.loyola@hklaw.com), Holland & Knight, LLP, 100 North Tampa Street, Suite 4100, Tampa, Florida 33602; Christopher V. Carlyle, Esq. (served@appellatelawfirm.com), The Carlyle Building, 1950 Laurel Manor Drive, Suite 130, The Villages, FL 32162; and C. Steven Yerrid, Esq. (syerrid@yerridlaw.com; csullivan@yerridlaw.com), The Yerrid Law Firm, P.A., 101 East Kennedy Blvd., Suite 3910, Tampa, FL 33602.

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CERTIFICATE OF COMPLIANCE

I further certify that this Answer Brief complies with the formatting requirements of Florida Rule of Appellate Procedure 9.210.

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