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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

REPLY BRIEF OF PETITIONER ENOCK PLANCHER

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The Answer Brief filed by UCFAA and Great American offers no support for the Fifth District's decision. The Answer Brief is rife with inaccurate statements of the law and the facts.[1] The result is a feeble and disjointed attempt to defend the indefensible decision in this case. One thing remains clear: UCFAA cannot operate a $30 million commercial enterprise free of State control, yet hide behind the shield of the State's sovereign immunity to avoid the consequences of causing Ereck Plancher's death. A reversal of the Fifth District's decision, and application of long-standing Florida law, will ensure sovereign immunity protects only those corporations whose day-to-day operations are subject to State control.

I. UCFAA Is Not Entitled to Sovereign Immunity.

UCFAA concedes Mr. Plancher's principal argument on appeal. UCFAA argues that a private corporation is an agency or instrumentality of the State if the corporation is subject to "high-level operational and fiscal controls" by the State. To the contrary, the "high-level" control test advocated by UCFAA has never been the test in Florida. Instead, the Florida courts hold that a private corporation is an

[1] For example, although they contend the facts surrounding Plancher's death are immaterial, UCFAA and Great American nonetheless inaccurately assert that neither the NCAA nor any sports medicine body had placed exercise restrictions on athletes with sickle cell trait. In fact, both the NCAA and the National Athletic Trainers' Association had adopted precautions for athletes with sickle cell trait. (R. 721 at Exs. 11, 13). UCFAA had also imposed mandatory testing of African-American student-athletes and adopted its own sickle cell policy. (Tr. Ex. 31).

agency or instrumentality of the State only if the State has direct control over the corporation's day-to-day operations. UCFAA misstates both Florida law and the Fifth District's holding in its effort to reconcile the Fifth District's decision with prior Florida decisions. According to UCFAA, the courts in *Prison Rehabilitative Industries and Diversified Enterprises, Inc. v. Betterson*, 648 So. 2d 778 (Fla. 1st DCA 1994), and *Pagan v. Sarasota County Public Hospital Board*, 884 So. 2d 257 (Fla. 2d DCA 2004), concluded that "high-level operational and fiscal controls" by the State over a private corporation are sufficient to establish that the corporation is an agency or instrumentality of the State entitled to share in its sovereign immunity. (AB 23, 25). To the contrary, prior Florida decisions hold 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); *Betterson*, 648 So. 2d at 780.

Moreover, the Fifth District did not adopt the "high-level" control test described by UCFAA. Instead, the Fifth District held that UCFAA is an agency or instrumentality of UCF merely because UCF possesses ultimate power over UCFAA. The Fifth District's decision did not turn on "high-level operational and fiscal controls" by UCF over UCFAA. To the contrary, the Fifth District held that UCFAA was entitled to sovereign immunity notwithstanding the absence of any

provision for control by UCF over UCFAA.[2] No Florida case has ever applied the test adopted by the Fifth District – and with good reason. The Fifth District's rationale would render every subsidiary an agency or instrumentality of its parent, and make every parent vicariously liable for the torts of its subsidiaries. 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 Am., Inc. v. Gero*, 56 So. 3d 117, 120 (Fla. 3d DCA 2011); *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).

Moreover, even a cursory look at the facts of the prior Florida cases reveals that the State control must exist at the level of the corporation's day-to-day operations. The First District in *Betterson* found that the private corporation was subject to numerous statutory constraints over its day-to-day operations. UCFAA concedes there are no similar constraints over its day-to-day operations – hence the attempt to characterize the control factors in *Betterson* as "high-level operational and fiscal constraints." More important, the Fifth District dispensed with any consideration of factors like those in *Betterson*, concluding that UCF need not

[2] UCFAA also misstates the conflict identified by Mr. Plancher. The conflict is not whether Florida courts require the actual exercise of control as opposed to some manifestation of the State's right or intent to exercise control. Instead, the conflict arises from the Fifth District's decision to dispense with any requirement of control – whether actual or intended.

impose any constraints over UCFAA's day-to-day operations. UCFAA attempts to distinguish *Shands* by arguing that it involved materially different facts. To the contrary, the facts in *Shands* are remarkably similar to the facts in this case. *See* IB, 22-24. 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. UCFAA suggests *Shands* turned on the Legislature's intent to treat Shands as an autonomous and self-sufficient entity. The Legislature, however, manifested its intent by including in the Shands enabling statute provisions very much like those in this case. *See* § 240.513, Fla. Stat. If UCFAA is correct, then the Legislature also presumably intends those factors to ensure that university DSOs will likewise be treated as autonomous and self-sufficient entities.

UCFAA also summarily dismisses this Court's decision in *Keck v. Eminsor*, 104 So. 3d 359 (Fla. 2012), because the plaintiff there conceded the defendant was an instrumentality of the State. Notwithstanding that concession, this Court described in detail the facts establishing State control over the corporation's day-to-day operations, concluding "although JTM is a private corporation, it is wholly controlled by and intertwined with JTA." *Id.* at 361. UCFAA predictably ignores those factors because they are absent from this case.

The *Pagan* and *Elend* decisions do nothing to support UCFAA's arguments. The parties in *Pagan* conceded that a decision could be made without

consideration of other facts. The Second District expressed concern about the limited record and, in light of the paucity of facts, limited its holding and refused to approve a "structural" control test. The facts missing in *Pagan* were presented by Mr. Plancher in this case and, as the Second District predicted, the trial court correctly reached a different result. UCFAA describes the result, but not the facts, in *Elend v. Sun Dome, Inc.*, 2005 U.S. Dist. LEXIS 35264 (M.D. Fla. 2005), an unpublished Eleventh Amendment immunity case. The University of South Florida ("USF") formed a DSO to operate an arena on its campus. The plaintiffs in *Elend* conceded the DSO was an arm of the State because USF exerted significant control over the DSO's day-to-day operations. For example, USF's President reviewed and approved its expenditures. USF could require a change in its personnel without explanation. In fact, USF's control over the day-to-day operations of the DSO was so detailed USF had to approve the particular vending machines and video games it placed in the arena. Finally, the DSO was covered through the Florida Risk Management Trust Fund. Thus, any judgment entered against the DSO would put the State treasury at risk. Not one of those facts is present in this case.

UCFAA makes no attempt to distinguish the instructive federal authority decided under the Federal Tort Claims Act ("FTCA"). Instead, it contends that federal authority has no place in an analysis of the Florida test given the distinctions between Sections 768.28(2) and (5) and Section 768.28(9). The

problem for UCFAA is that the Florida courts have expressly relied on the FTCA as the model for the test under Sections 768.28(2) and (5). *See Shands*, 478 So. 2d at 79; *Hollis v. Sch. Bd. of Leon Cnty.*, 384 So. 2d 661, 663 (Fla. 1st DCA 1980); *see also A Review of Direct-Support Organizations, Their Function, and Accountability to the State*, Florida Senate Committee on Governmental Operations, pg. 78 (1987). UCFAA cites no case in support of its argument.[3]

UCFAA also mischaracterizes Mr. Plancher's argument on legislative intent. Mr. Plancher does not contend that an express statutory enactment is necessary for UCFAA to be an agency or instrumentality of the State. The material point is that the Legislature has repeatedly refused to accept the argument, advanced by UCFAA and amici, that all university DSOs are State agencies or instrumentalities based solely on their statutorily mandated structure. If UCFAA and amici were correct, then there would have been no need for the Legislature's specific grant of sovereign immunity to some DSOs, but not others. *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).

UCFAA also re-argues the facts regarding UCF's purported control over UCFAA's day-to-day operations, but fails to identify even one factor providing UCF with control over the day-to-day operations of UCFAA. UCFAA relies first

[3] The *Pagan* concurrence likewise cites federal authority decided under the FTCA, as well as common law agency principles.

on UCF's certification that UCFAA operates consistent with the goals of UCF and the best interests of the State, and UCFAA's contractual agreement to administer the athletics program for the benefit of UCF. Nothing in those provisions subjects UCFAA's day-to-day operations to UCF control.[4] In fact, the court in *Shands* rejected virtually identical factors as insufficient.

UCFAA also points to UCF's adoption of administrative rules providing for budget and audit review and oversight by the UCF Board of Trustees. Those rules do not provide for UCF control of UCFAA at any level, much less at the day-to-day operational level. The testimony established that UCFAA's budget was prepared and administered by UCFAA. (R. 7484, 7531). Moreover, UCFAA ignored those rules and never once submitted its budget to the UCF Board of Trustees for review prior to this lawsuit. (R. 7491, 2775).

Similarly, UCFAA relies on Section 1010.62, Florida Statutes, which requires the Florida Board of Governors to approve the acquisition or issuance of debt by a DSO to fund capital outlay projects. The acquisition or issuance of debt to fund a capital outlay project is not a part of day-to-day operations. To the extent UCFAA contends Section 1010.62 applies to all of its loans, the Auditor General concluded that only two of UCFAA's loans were approved by UCF's President

[4] UCFAA also notes that UCF has the ultimate power to dissolve UCFAA. Even the *Pagan* concurrence recognizes that the State's power to create and dissolve a corporation does not make that corporation an agency or instrumentality of the State. *Pagan*, 884 So. 2d at 268.

and none was approved by the UCF Board of Trustees, much less by the Florida Board of Governors. (R. 3026 at Ex. 25). UCFAA also contends UCF controls its day-to-day operations because Section 1012.97(2) authorizes university police to enter facilities controlled by DSOs. Law enforcement jurisdiction does not equate to State control over day-to-day operations. Law enforcement officers may enter onto property owned by private corporations throughout Florida to keep the peace. That does not give the State control over the day-to-day operations of those corporations, nor does it entitle them to sovereign immunity.[5]

UCFAA has little to say about Section 1004.2(5), which exempts university DSOs from the Florida public records law. The public records exemption "and other exemptions from laws generally governing state agencies" cut directly against the argument that the Florida statutes are sufficient to establish DSOs as agencies or instrumentalities of the State.[6]

UCFAA next argues that its structure provides UCF with control over its

[5] UCFAA states its offices are in buildings owned by UCF, but fails to disclose UCF charges it a fee for occupying the facilities, and also charges for maintenance, repairs, and utilities. (R. 7483, 7493, 7501).

[6] The public records exemption makes sense given the purpose of DSOs to promote private fund-raising for public universities. The exemption was adopted to protect the confidentiality of charitable donors. *See Palm Beach Comm. College Found., Inc. v. WFTV, Inc.*, 611 So. 2d 588, 589-90 (Fla. 4th DCA 1993). The trial court recognized UCFAA has been expanded beyond the limits allowed by statute and noted it is unlikely the Legislature intended to authorize a DSO with a scope as broad as UCFAA's. (R. 3225). The Senate Report also concludes DSOs have been used to run programs outside State regulations. (R. 2495, pgs. 3-5, 18).

day-to-day operations. UCFAA relies on the UCF President's dual role as chair of the UCFAA board, and his authority to appoint UCFAA board members. *Shands* rejected these very same factors as insufficient to demonstrate the requisite State control.[7] UCFAA also ignores the principle that dual directors owe independent fiduciary duties to the parent and subsidiary they represent. *See U.S. v. Bestfoods*, 524 U.S. 51, 69 (1998); *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710-11 (Del. 1983). UCFAA cannot establish UCF control through dual directors because the directors owe fiduciary duties to each entity. UCFAA argues that UCF's President can appoint unlimited voting directors to UCFAA's board, and thereby "expand the board to whatever size is necessary to obtain a result…." (AB, 34). UCFAA cannot mean the consequences of its argument. UCF's President cannot intentionally dilute the voting rights of other UCFAA directors (several of whom are not appointed by the UCF President) to secure a result desired by UCF. To do so would violate his fiduciary duty to UCFAA. *See Transeo S.A.R.L. v. Bessemer Venture Partners VI L.P.*, 936 F. Supp. 2d 376, 400-01 (S.D.N.Y. 2013).

UCFAA also argues that the UCF President monitors and controls UCFAA's resources through line-item budget vetoes. This argument rings hollow given that he never once did so. (R. 7501). UCFAA side-steps that defect by arguing UCF's CFO, in his role as a UCFAA board member, chairs UCFAA's finance committee.

[7] Before Plancher's death, a UCF Trustee complained that the DSO structure failed even to keep UCF Trustees informed about the DSOs' activities. (R. 2874, Ex. 18).

Significantly, the Auditor General rejected as insufficient the fact that UCF's President and CFO are UCFAA board members who receive budget reports. (R. 2936, Ex. 22, p. 4). The Auditor General concluded UCF "did not have procedures to monitor and control the specific uses of the student athletic fees" paid to UCFAA. (*Id.*, pp. 3-4). 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).

UCFAA also relies on the fact that it receives financial support from UCF. Government funding, however, does not convert a private corporation into a government agency or instrumentality, nor does it establish the government's right to control the corporation's day-to-day operations. *See U.S. v. Orleans*, 425 U.S. 807, 816 (1976); *Kuntz v. Lamar Corp.*, 385 F.3d 1177, 1184 (9th Cir. 2004); *Perez v. U. S.*, 594 F.2d 280, 285 (1st Cir. 1979). That is particularly true here where UCFAA receives no State appropriations.

UCFAA also contends that, because UCF's President serves as UCFAA's board chair, and because the board chair hires UCFAA's Athletics Director, UCF *per force* controls UCFAA's day-to-day operations. This syllogism fails for obvious reasons. First, UCFAA admits that its board chair sets only its vision and goals (AB, 6); he does not control its day-to-day operations. Second, UCFAA's

Policy Manual provides that UCFAA's Senior Management Team, not UCF or the UCFAA board chair, is responsible for both strategic planning and day-to-day operations. (R. 2805, Ex. 9). It is telling that UCFAA's Athletics Director was unaware of any UCF rules or regulations UCFAA was required to follow. (R. 7548). Moreover, neither UCF's President, nor any other witness, testified about UCF's purported control over UCFAA's day-to-day operations.

UCFAA next contends it is an instrumentality of the State because UCF is the NCAA member institution. This fact has no bearing on whether UCF controls UCFAA's day-to-day operations. In fact, UCFAA ***pays*** UCF for tuition, housing, and meals provided to scholarship athletes. (R. 7501). A 2005 NCAA Self-Study confirmed UCFAA conducts its day-to-day operations free from UCF control. (R. 2767). Even the NCAA compliance officers are UCFAA employees. (R. 7473).

UCFAA and amici also cite the 1987 Senate Report, which is premised on an understanding that "the state assumes a degree of liability for the employees and activities of DSOs." (AmB, 7-8). Neither is true in this case. Under the Agreement and Bylaws, UCF has no liability for UCFAA's employees or its conduct. (R. 2777, 2874 at Ex. 17). The Senate Report points out that DSOs operate separate from State universities and are not subject to the laws and regulations governing them. (R. 2495, pp, 3-5, 18). The Senate Report concludes the enabling statutes do not entitle all DSOs to sovereign immunity; instead, the determination is made on a

case-by-case basis with the primary factor being "the degree of state control over the actions of the organization and its employees." (R. 2495, pg. 77-78). Here, UCF exercised no control over UCFAA's actions or its employees.

Finally, UCFAA accuses Mr. Plancher of asking this Court to rewrite Section 768.28, disapprove *Betterson* and *Pagan,* and cast aside the legal framework that has prevailed in Florida for decades. The Fifth District's decision has already done just that. The Fifth District's new test extends sovereign immunity to private corporations in the absence of any provision for State control over their day-to-day operations. Mr. Plancher asks the Court to reject the Fifth District's unprecedented judicial expansion of sovereign immunity.

II. Great American Is Not Entitled to Sovereign Immunity.

Great American contends that Mr. Plancher waived his right to challenge the Fifth District's extension of sovereign immunity to Great American because he failed to raise the issue in the appeal of the merits judgment. There was a very good reason for Mr. Plancher's silence: Great American never asserted its entitlement to sovereign immunity in the merits appeal. Mr. Plancher had no indication that Great American claimed sovereign immunity until it raised the issue in its appeal of the attorneys' fees award.

Great American bases its claim to sovereign immunity on the notion that an insurer's liability can never exceed that of its insured. According to Great

American, "the cap on damages limits the insured's liability, which, in turn, limits the liability of the insured's liability insurer." (AB, 44). That statement is not accurate. Section 768.28(5) provides that the State and its agencies are ***liable*** for tort claims to the same extent as a private individual. Thus, the statutory cap on damages does not reduce the State's ***liability*** for the torts it causes. The statute simply caps the amount of damages that may be collected from the State. Great American will be exposed to no greater liability than its insured because the statutory cap does not reduce UCFAA's liability; it only limits the amount of the judgment that can be collected from UCFAA.

Section 768.28(5) specifically contemplates that the amount of a judgment against the State in excess of the statutory cap may be collected from an insurer up to the policy limits. The statute provides that a claim may be settled or a judgment paid in an amount that exceeds the statutory cap but falls within available liability insurance. If an insurer were entitled to the sovereign immunity of its insured, the insurer could never be required to pay the excess settlement or judgment authorized by the statute, and Section 768.28(5) would be a nullity. The Court's decision in *Michigan Millers* could not be clearer: "the limits of the sovereign immunity statute may be exceeded when insurance coverage is available." *Michigan Millers Mut. Ins. Co. v. Bourke*, 607 So. 2d 418, 422 (Fla. 1992).

Great American also mistakenly relies on the joinder statute in support of its

argument. By imposing joint and several liability against an insurer for the judgment, the joinder statute recognizes that an insurer is obligated to pay the full amount of the judgment despite obstacles to collection against the insured. If Great American were correct, there could never be a basis for several liability. The joinder statute and Section 768.28(5) do not impose on an insurer any greater liability than that imposed on its insured. They simply do not afford an insurer the benefit of the insured's statutory limit on collectability.

Finally, Great American attempts to justify the windfall it has received by arguing that insurers "generally provide insureds with a defense in litigation." (AB, 45). Apparently, Great American suggests it sold UCFAA $10 million of insurance to cover the costs of its litigation defense. Great American also contends UCFAA received the benefit of the premiums it paid because Great American had the ability, but not the obligation, to settle the case in an amount above the statutory cap. UCFAA did not purchase insurance against legal fees, or a settlement option from Great American. UCFAA purchased liability coverage to insure the consequences of its negligence. If this Court accepts Great American's argument, the State will no longer be able to purchase liability insurance because insurers will simply refuse to pay based on the sovereign immunity of the insured. No public interest is served by extending Florida's sovereign immunity to an insurer that charges premiums for insurance coverage it will never provide.

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

To avoid the Fifth District's obvious error in reducing the amount of the judgment to the statutory cap, UCFAA and Great American ask this Court to ignore what the Fifth District said and consider only what they believe it meant. The Fifth District stated "[t]he judgment against UCFAA shall be reduced to $200,000 in accordance with section 768.28(5)…." 121 So. 3d 1097, 1109 n.17 (Fla. 5th DCA 2013). Florida courts hold that a plaintiff is entitled to rendition of a judgment in the full amount of its damages even if the amount exceeds the statutory cap. *See* IB, 49-50. UCFAA and Great American assert the Fifth District meant to amend the judgment to limit execution against UCFAA to $200,000.[8] That is not what the Fifth District ordered. The decision should be reversed.

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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[8] UCFAA and Great American erroneously contend Mr. Plancher failed to preserve this error in the Fifth District. He made this precise argument on pages 11-12 of his Answer Brief in Case Nos. 5D11-4253 and 5D12-454.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of November, 2014, I electronically filed the foregoing Reply Brief with the clerk of the Court by using the Florida Courts E-Portal system, which will transmit the foregoing document by email. I have also served a copy of the foregoing via email to:

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