

SOVEREIGN IMMUNITY

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- I. **What is Sovereign Immunity and What is its Purpose?** (Wetherington article)
Sovereign Immunity prohibits/restricts tort suits against the government; the government cannot be sued without its consent. Reasons for sovereign immunity:
- A. Separation of powers
 - 1. Government affairs must be protected from interference by courts and plaintiffs
 - 2. Separation of powers concerns prohibits the judicial branch from interfering with the discretionary functions of the legislative or executive branch absent a violation or constitutional or statutory right.
 - B. Protects the discretion of governmental authorities in decision-making
 - 1. Government administration would be disrupted if the state could be sued at the instance of every citizen
 - 2. governmental decision-making requires flexibility and discretion
 - C. Regulates the fiscal impact of tort damage awards on the public treasury
“Public treasure must be protected from excessive encroachments”
- II. **Article X, Section 13 of Florida Constitution.**
- A. “Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.”
 - B. Only the legislature can waive sovereign immunity for state and political subdivisions through a general law, which it did on a limited basis through 768.28 of Florida Statutes. See for a general overview of the history, American Home Assurance v. National Railroad Passenger Corp., 2005 WL 1580639 (Fla. 2005).
- III. **Limited Waiver of Sovereign Immunity in Tort (Section 768.28, F.S.)**
- A. ***What can the state or subdivision be sued for? (768.28(1))***
 - 1. ...The state, for itself, and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act.
 - 2. Recover damage in tort for money damages. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions
 - 3. For injury or loss of property, personal injury or death;
 - 4. Caused by the negligent or wrongful act or omission of any employee of the agency or subdivision
 - 5. while acting in the scope of the employee’s office or employment

under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state,

6. may be prosecuted subject to the limitations specified in this act.
7. Not a waiver of the Eleventh Amendment protections. Not waiving immunity of state to be sued in federal court.

B. *What is a “state agency or subdivision?” (768.28(2))*

1. “...counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties or municipalities...”
2. Court has found the Public Health Trust to fall within the definition of 768.28(2). Jaar v. University of Miami. However, the University of Miami is not covered by sovereign immunity even though its employee-doctors are agents of the Trust.
3. Corporation managing state hospital considered an agency of the state for purposes of sovereign immunity from civil rights actions. **Skoblow v. Ameri-Management**, 483 So. 2d 809 (3rd DCA 1986); however, corporation providing medical care to inmates at County jail not an agency of the County due to the clear wording of the contract, **Mingo v. ARA Health Services, Inc.** 638 So. 2d 85 (2nd DCA 1994) (corporation not agency based on clear language of the contract)
4. **Analysis on what is an agency and instrumentality.** **Pagan v. Sarasota County Public Hospital Board**, 884 So. 2d 257 (2nd DCA 2004). Not for profit is agency and instrumentality of Hospital District Board because Board had undeniable right to control the operations of the not for profit. Hospital Board created the not for profit, can dissolve it (and assets revert to the Hospital Board), elects its members (which include a majority of Hospital Board members), has the hospital district CEO serve as the president of the not for profit, used funds to create and operate the not for profit. **See also Shanding Teaching Hospital v. Lee**, 478 So. 2d 77; **PRIDE v. Betterson**, 648 So. 2d 778.
Analysis from concurring opinion. Generally, the analysis of whether a corporation is a gov’t instrumentality or agency centers on the issue of control.
 - a. The corporation must be subject to something more than the sort of control that is exercised by the gov’t in its regulatory capacity. U.S. v. Orleans, 425 US 807 (1976).
 - b. Control that flows from a simple contractual arrangement between a gov’t and a corp. ordinarily will not be sufficient to establish that the contracting corp. is an instrumentality or agency of the state. Mingo v. ARA Health Services, 638 So. 2d 85 (2nd DCA 1994).

- c. Mere fact that corp. created by the gov't will not necessarily establish that corp is a gov't agency or instrumentality. Doe v. Am. Red Cross, 727 F. Supp 186 (E.D. 1989).
- d. A corp. can act primarily as an agency or instrumentality of a sovereignly immune entity w/o that entity exercising actual control over the day to day operations of the corp. There is a recognition that those corps will carry out their operations in a manner that is separate and distinct from the operations of the gov't entity to which they are related.

C. *How much can a county or the Trust be liable for? (768.28(5))*

- 1. Shall not be liable for punitive damages or interest for the period of time before judgment.
- 2. Shall not be liable to pay a claim or judgment by any one person that exceeds \$100,000 or totaling other claims arising from the same incident exceed \$200,000
- 3. Anything beyond that must be paid for by the Legislature through a special claims bill. Special act of the legislature.

IV. Governmental Employee or Agent (768.28(9), F.S. and Case Law)

A. *When is an employee or agent protected and when can he/she be sued? (768.28(9))*

“Gov’t employees enjoy immunity from liability for negligence when committed within the scope and course of their gov’t employment” Gardner v. Holifield, 639 So. 2d 652, 656 (1st DCA 1994)

- 1. “No officer, employee or agent of the state or any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event or omission of action in the scope of her or his employment or function,
- 2. Unless such officer, employee or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety or property.
- 3. The exclusive remedy for injury or damage suffered as a result of an act, event or omission of any officer, employee, or agent of the state or any of its subdivisions... shall be by action against the governmental entity, ...unless such act or omission was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety or property.
- 4. The state or its subdivisions shall not be liable in tort for the acts or omissions of an officer, employee or agent committed while acting outside the course and scope of her or his employment or committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety or property.”

B. *Who is an employee or agent? (Statutory designation).*

1. “Officer, employee or agent’ includes but is not limited to, any health care provider when providing services pursuant to s. 766.1115, any member of the Florida Health Services Corps, as defined in s. 381.0302, who provides uncompensated care to medically indigent persons referred by the Department of Health....” 768.28(9)(b)(2)
2. State Department of Corrections. Health care providers that contractually agree to be agents of the Department of Corrections to provide health care services to inmates of the state correctional system shall be considered agents of the State...while acting within the scope of and pursuant to the guidelines established in the contract or by rule. The contract shall provide for the indemnification of the state by the agent for any liabilities incurred up to the limits set out in this chapter. Id. at 10(a).
3. Regional Poison Control Centers, including their employees or agents, which are coordinated and supervised by Department of Health, shall be considered agents of the Department of Health. The contract shall provide for the indemnification of the state by the agent for any liabilities incurred up to the limits set out in this chapter. Id. at 10(c).
4. Medical Care to University sports programs. Health Care practitioner as defined in 456.001(4), who has contractually agreed to act as an agent of a state university to provide medical services to a student athlete for participation in athletics, shall be considered an agent of the university, while acting within the scope of and pursuant to guidelines established in the contract. The contract shall provide for the indemnification of the state by the agent for any liabilities incurred up to the limits set out in this chapter. Id. at 12(a).

C. *Who is an employee or agent? (Case Law)*

1. **Employee**. The primary test for determining whether an individual is an employee is whether the government controls or has the right to control that person’s work. Wetherington article.
 - a. **Jaar v University of Miami, 474 So. 2d 239, 242 (3d DCA 1985)**. “The Trust admitted that the doctors were its employees or agents and that their negligent treatment of Jaar was performed within the scope of their employment. As employees or agents of the Trust, Dr Ward and the residents are entitled to sovereign immunity.” Id. at 243. However, the evaluation of employment contracts and employment status is a question of law to be resolved by the trial court. Sosa v. Knight-Ridder Newspapers, 435 So. 2d 821 (Fla. 1983).
 - b. **DeRosa v. Shands Teaching Hospital & Clinics, 504 So. 2d 1313 (1st DCA 1987)**. Shands is a not for profit hospital that provides a hospital setting to the University of Florida College of Medicine for the training of residents under the supervision of UF faculty doctors. Shands is not a state agency and cannot claim

sovereign immunity. The residents and the doctor, however, are employee-agents of UF and therefore are entitled to sovereign immunity. “Under the terms of the agreement, all university faculty and resident physicians providing services at Shands may claim sovereign immunity under Section 768.28(9), Florida Statutes, as employees of the state.” Id. at 1215.

- i. Test to determine if employee: Does entity control or have the right to control the person’s work?
 - ii. Factors to consider: selection and engagement of employee; payment of wages; power of dismissal; and right of control over conduct.
- c. **Bryant v. Duval County Hospital Authority**, 459 So. 1154 (1st DCA 1984) Doctor who worked at public hospital but had joint funding sources for his salary is government employee immune from ordinary liability. Test to determine if employee same as *Shands*: “Essential element was the right of control; the least determinative was the payment of wages.”
- d. **White v. Hillsborough County Hospital**, 448 So. 2d 2 (2nd DCA 1983). Section 768.28(9) which protects government employees from liability for negligence that occurs during the course of their employment, and instead substitutes the governmental agency as the liable party, does not violate the constitution. See also **State Department of Transportation v. Knowles**, 402 So. 2d 1155 (Fla 1981); **Bates v. Sahasranaman**, 522 So. 2d 5454 (4th DCA 1988) (doctor employed by public hospital is immune from simple negligence under 768.28(9)).
- e. **Public Health Trust v. Valcin**, 507 So. 2d 596 (Fla. 1987). Generally surgeons are only independent contractors granted the privilege of practicing in hospitals rather than employees. Vicarious liability does not necessarily attach to the hospital for the doctors’ acts or omissions. Relationship between doctor and hospital is usually a question of fact for the jury. However, doctor in question was employee/agent and immune from liability under 768.28(9), F.S.
- e. **Gardner v. Holifield**, 639 So. 2d 652 (1st DCA 1994) . Issue of material fact as to whether doctor was acting as FAMU medical director or private doctor when treated heart condition of a student-athlete.

2. **Agent.**

The existence and scope of an agency relationship are generally questions of fact to be resolved by the factfinder. **Dade County Police Benevolent Association v. City of Homestead**, 444 So. 2d 465, 471 (3d DCA 1984), **Orlando Executive Park, Inc. v. Robbins**, 433 So. 2d 491 (Fla. 1983), **Goldschmidt v. Holman**, 571 So. 2d 424 (Fla. 1990),

Noel v. North Broward Hospital District, 664 So. 2d 989 (4th DCA 1995). If evidence is susceptible of only one interpretation, then the issue of fact need not go to the jury. Amerven Inc. v. Abbadie, 238 So. 2d 321 3d DCA 1970). See Eberhardy v. General Motors, 4040 F. Supp. 826 (M.D. 1975). Jaar v University of Miami, 474 So. 2d 239, 242 (3d DCA 1985); Sierra v. Associated Marine Institutes, 850 So. 2d 582 (2nd DCA 2003) (sovereign immunity is an affirmative defense that may justify a motion to dismiss only when the complaint itself conclusively establishes its applicability).

- a. Baldwin v. Dellerson, 541 So. 2d 779 (4th DCA 1989), (“As is usually the case, the question of agency turns upon the degree of control exercised by the hospital over the doctor”; issue of fact as to whether doctor who was staff member of public hospital was an agent or independent contractor).
- b. Metropolitan Dade County v. Glaser, 1999 WL 89427 (3d DCA 1999) (The existence of a true agency relationship depends on the degree of control exercised by the principal. The County provided OTAC’s operating funds and oversaw OTAC’s expenditures. The County had no control or input into any of OTAC’s operations or actions, and did not control the outcome of OTAC’s goals. Although the existence of an agency relationship is usually a question for the trier of fact, the evidence presented was not sufficient to create a jury question.)
- c. Jaar v University of Miami, 474 So. 2d 239, 242 (3d DCA 1985). Plaintiff sued 3 residents, attending physician (UM faculty physician), PHT and UM. Residents and attending physician found to be agents of PHT and immune from liability under 768.28(9). PHT found liable for actions of its agents/employees up to the statutory cap. UM found liable for negligent actions of its employee, the UM faculty physician.

Conclusion: Principal of an agent not protected by sovereign immunity.

- d. Stoll v. Noel, 694 So. 2d 701 (Fla. 1997).
 - i. Issue: Should sovereign immunity be granted to physician consultants who contract with the State’s Children’s Medical Services?
 - ii. Analysis: Whether the physician consultants are agents of the state turns on the degree of control retained or exercised by the State. The right to control depends on the terms of the employment contract.
 - iii. Facts: The consultant must agree to abide by the terms published in the HRS manual and CMS Consultant’s Guide which contain CMS policies and rules governing its relationship with consultants and states: all services provided to patients must be authorized in advance by the clinic medical director; CMS has the responsibility to

supervise and direct the medical care of all patients; CMS has supervisory authority over all personnel; CMS medical director has absolute authority over payment for treatments proposed by consultants. The Manual and Guide demonstrate that CMS has final authority over all patient care and treatment, and it can refuse to allow a recommended course of treatment for medical or budgetary reasons.

- iv. Conclusion: physician consultants are agents of the state, entitled to immunity from tort actions.
- e. **Theodore v. Graham**, 733 So. 2d 538 (4th DCA 1999).
 - i. Analysis of Stoll. To reach its result in Stoll, the SC analyzed the consultant's employment contract in terms of the 'degree of control retained or exercised by CMS.' The result in Stoll turns on the extensive control retained by the government over the patients' treatment; the CMS director had 'final authority over all care and treatment provided to CMS patients.'
 - ii. Graham had final authority on patient admission and treatment. "In a lawsuit which concerns a purported dereliction in the treatment of a patient, one view of the record is that there was not such a reservation of governmental control over Graham's actual doctoring of patients to render her an agent of the state protected by sovereign immunity. The case does not involve damage caused by an administrative snafu or deviation from administrative guidelines, which would fall under those areas subject to government control in the contracts at issue."
 - iii. Issue of fact as to whether the doctor was an agent of the state, for purposes of immunity. Therefore, summary judgment was inappropriate.
- f. **Robinson v. Linzer**, 758 So. 2d 1163 (4th DCA 2000). Contract with Coastal Emergency Services drafted to state that ER doctor would be an agent of the hospital (South Broward Hospital District) and thus entitled to sovereign immunity protection. However, ER medical director, who was supplied by Coastal Emergency Services, had day to day management and supervision of ER physicians. Whether there was an agency relationship was an issue of fact precluding summary judgment. "It appears that Hospital District and Coastal were, by their contract attempting to create an agency status. The actual relationship, however, not the label, determines whether there is an agency."
- g. **M.S. v Nova Southeastern University**, 881 So. 2d 614 (4th DCA 1004). Nova ran a pre-school for children with disabilities under a contract with the School Board. Sued for negligent hiring,

supervision etc because a volunteer molested several children. Nova claimed to be an agent of the School Board. Sufficient issues of fact to preclude entry of summary judgment.

- h. **Dorse v. Armstrong**, 513 So. 2d 1265, 1268, n.4 (Fla. 1987).
“An entity or business acting as an independent contractor of the government, and not as a true agent, logically cannot share in the full panorama of the government’s immunity.”
“A person or entity may share in governmental immunity only when performing activities within the scope of a true agency relationship with a sovereign. The existence of a true agency relationship depends on the degree of control exercised by the principal. Generally a contractor is not a true agent where the principal controls only the outcome of the relationship, not the means used to achieve that outcome.”
- i. **Goldschmidt v. Holman**, 571 So. 2d 422 (Fla. 1990). Essential to the existence of an actual agency relationship is (1) acknowledgement by the principal that the agent will act for him; (2) the agent’s acceptance of the undertaking; and (3) control of the principal over the actions of the agent. Restatement (Second) of Agency.
- j. **Agner v. APAC-Florida**, 821 So. 2d 336 (1st DCA 2002).