SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/CS/SB 1138

SPONSOR: Appropriations Subcommittee on General Government and Governmental Oversight and Productivity Committee and Senator Clary

SUBJECT: Professional Service Providers

DATE: April 15, 2003 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Imhof	RI	Fav/1 amendment
2.	White	Wilson	GO	Fav/CS
3.	DeLoach	Hayes	AGG	Fav/CS
4.			AP	
5.			RC	
6.				

I. Summary:

The bill amends s. 768.28(10), F.S., to provide that the following entities or persons are agents of the Department of Transportation (DOT) for purposes of the waiver of sovereign immunity contained in s. 768.28, F.S.: (1) professional firms that provide monitoring and inspection services of the work required for state roadway, bridge, or other transportation facility construction projects; or (2) firm employees who perform such services.

Pursuant to s. 768.28(9), F.S, it is the DOT, rather than the agent, that will be held liable for firm or employee tortious action to the extent that the action is within the scope of the agent's function and is not in bad faith, malicious, or willful and wanton. The bill specifies that these agents must indemnify the state for agent liability up to the $100,000/$200,000 limits specified in s. 768.28(5), F.S.; however, the DOT will be liable to pay any claim bills for damages in excess of these limits that are based on agent liability.

The bill takes effect upon becoming a law.

The bill substantially amends s. 768.28(10) of the Florida Statutes.

II. Present Situation:

I. Sovereign Immunity/Waiver: The common law doctrine of sovereign immunity prohibits lawsuits in state court against a state government and its agencies and subdivisions without the government's consent.[1] Article X, s. 13, of the State Constitution, authorizes the Florida

[1] *Cauley v. City of Jacksonville,* 403 So.2d 379 (Fla. 1981).

Legislature to waive sovereign immunity by stating that, "Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating."

Pursuant to this constitutional authority, the Legislature enacted s. 768.15, F.S., its first general waiver of sovereign immunity, in 1969.[2] This section waived the immunity of the state, its agencies, and subdivisions in tort, and did not specify a maximum dollar cap for damages. The section was repealed in 1970. In 1973, the Legislature enacted s. 768.28, F.S., which waived the sovereign immunity of the state, and its agencies and subdivisions in tort, and specified a $50,000 cap for damages paid to one person and a $100,000 cap for total damages arising out of the same incident/occurrence.[3] Today, this waiver remains codified at s. 768.28, F.S.; however, the maximum statutory dollar caps for damages were increased to $100,000 and $200,000, respectively, in 1981.[4] [5]

Judgments in excess of these caps may be entered; however, payment of excess judgments is not required unless a claim bill requiring payment is enacted by the Legislature. A claim bill may be filed based either upon an excess judgment or upon equitable considerations when there is no underlying excess judgment. Over the past three years, 39 percent of filed claim bills have been enacted into law.[6]

a. Entities subject to the waiver of sovereign immunity: The statutory waiver of sovereign immunity applies to the state and its agencies or subdivisions. Section 768.28(2), F.S., defines "state agencies or subdivisions" as including, "the executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state, including state university boards of trustees; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities, including the Florida Space Authority." Accordingly, these entities may be liable in tort up to statutory limits.

b. Officers, employees, and agents of the government: In the event that an officer, employee, or agent of a "state agency or subdivision" commits a tortious act, s. 768.28(9), F.S., provides that the person is not personally liable in tort; instead, the exclusive remedy for a tortious injury lies against the government employer or entity that acts as the agent's principal. The only exception to this transfer of liability is that the government employer or principal is not liable when the officer, employee, or agent acts outside the scope of his or her employment or function, or in bad faith, with malicious purpose, or in wanton and willful disregard of human rights, safety, or property.

Conduct is considered to be within the scope of employment when: (1) it is the type of conduct which the employee is hired to perform; (2) it occurs substantially within the time and space

[2] 1969 Fla. Laws ch. 357 s. 1.
[3] Chapter 73-313, L.O.F.
[4] Chapter 81-317, L.O.F.
[5] The maximum statutory dollar caps are now codified at s. 768.28(5), F.S., which states that governmental damages are limited to $100,000 per person or a total of $200,000 per single incident.
[6] In 2002, 40 claim bills were filed and 24 bills, i.e., 60 percent, were enacted into law. In 2001, 43 claim bills were filed and 2 bills, i.e., 4.7 percent, were enacted into law. In 2000, 19 claim bills were filed and 10 bills, i.e., 52.6 percent, were enacted into law.

limits authorized or required by the work to be performed; and (3) the conduct is activated at least in part by a purpose to serve the employer.[7]

A governmental entity is liable for both the intentional and negligent torts of its officers, employees, and agents. The fact that the tort may be intentional does not automatically give rise to a finding of "wanton and willful disregard"; rather, the courts have stated such disregard connotes conduct much more reprehensible and unacceptable than mere intentional conduct.[8]

c. Agency relationship: As discussed above, agents of "state agencies or subdivisions" may not be held personally liable in tort. The factors required to establish an agency relationship are: (1) acknowledgment by the principal that the agent will act for him; (2) the agent's acceptance of the undertaking; and (3) control by the principal over the actions of the agent.[9]

When evaluating the existence of these factors, the courts have held that the following principles should be followed: (1) party labels, e.g., contractual provisions or other evidence evincing the parties' intent to create an agency relationship, may be considered, but are not dispositive of the issue of agency;[10] (2) a principal must control the means used to achieve the outcome, not merely the outcome of the relationship;[11] and (3) the principal's right to control the agent, not whether the principal actually exercises that right, is the relevant consideration.[12]

The existence of an agency relationship is generally a question of fact to be resolved by the fact-finder based on the facts and circumstances of a particular case.[13] In the event, however, that the evidence of agency is susceptible of only one interpretation the court may decide the issue as a matter of law.[14]

Recent case law provides further guidance concerning the precise degree of control that the government entity must retain over the private contractor in order to establish an agency relationship. The leading Florida Supreme Court case is *Stoll v. Noel*,[15] wherein physicians under contract with Children's Medical Services (CMS) within the Department of Health and Rehabilitative Services (HRS) to provide medical care to disabled children were sued by a patient for malpractice. The trial court found that the physicians were immune from liability as CMS agents, and entered summary judgment in the physicians' favor.

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[7] *Craft v. John Sirounis and Sons, Inc.,* 575 So.2d 795, 796 (Fla. 4th DCA 1991).
[8] *Richardson v. City of Pompano Beach*, 511 So.2d 1121 (Fla. 4th DCA 1987)
[9] *Goldschmidt v. Holman,* 571 So.2d 422 (Fla. 1990).
[10] *Cantor v. Cochran*, 184 So.2d 173, 174 (Fla.1966); *Shands Teaching Hospital and Clinics, Inc. v. Pendley*, 577 So.2d 632, 634 (Fla. 1st DCA 1991).
[11] *Dorse v. Armstrong World Industries, Inc.*, 513 So.2d 1265, 1268; *See also U.S. v. Tianello*, 860 F. Supp. 1521, 1524 (M.D. Fla. 1994)(holding that a principal need not control the physical conduct of the agent, but only need control the manner in which the undertaking that is the subject of the relationship is to be performed.
[12] *Id.*; *Nazworth v. Swire Florida, Inc.,* 486 So.2d 637, 638 (Fla. 1st DCA 1986).
[13] *Borg-Warner Leasing v. Doyle Electric Co.,* 733 F.2d 833, 836 (11th Cir. 1984), *cert. denied*, 475 U.S. 1140, 106 S.Ct. 1790, 90 L.Ed.2d 336 (1986).
[14] *Campbell v. Osmond*, 917 F. Supp. 1574, 1583 (M.D. Fla. 1996).
[15] *Stoll v. Noel*, 694 So.2d 701 (Fla. 1997).

On appeal, the Florida Supreme Court affirmed the trial court and held that the physicians were both independent contractors and CMS agents.[16] The Court stated that whether the physicians were agents turned on the degree of control retained or exercised by CMS as set forth in their contract. The Court found that the following factors evidenced an agency relationship between the physicians and CMS: (1) CMS required the physicians to abide by policies and rules in the HRS and CMS manuals; (2) all physician services rendered and paid for by CMS had to first be authorized by the CMS medical director; and (3) HRS policy made CMS responsible for supervising all personnel and medical care for CMS patients. Further, the Court noted HRS's acknowledgement that its manual created an agency relationship, and of its financial responsibility for the physicians' actions.[17]

Since *Stoll*, Florida's Fourth District Court of Appeals has considered the degree of control necessary to establish agency status for private contractors in two cases, *Theodore v. Graham* and *Robinson v. Linzer.*[18]

In *Theodore*, the director of the Regional Perinatal Intensive Care Center (RPICC), an entity designated by HRS and housed within St. Mary's Hospital, was sued for malpractice. HRS rules governing RPICC providers stated that the director was to make final decisions regarding RPICC patient admissions and terminations. On appeal from the trial court's finding that the director was a HRS agent, the court reversed, holding that, unlike *Stoll*, HRS's provisions gave the director, not HRS, great control over the program and patient treatment. Further, the court noted that the director's contract specified that she would be liable for negligent acts. On these facts, the court found that it was a factual question as to whether she was "controlled or subject to the control" of HRS with regard to patient treatment, and remanded the case for a determination of agency by the fact-finder.

Similarly in *Robinson,* an emergency room (ER) physician employed by Coastal Emergency Services, Inc., in the South Broward Hospital District, was sued for malpractice. The contract between Coastal and the hospital specified that the: (a) physician was an agent of the hospital; (b) hospital had exclusive control over the method and manner of physician services; and (c) physician was immune from suit under s. 768.28, F.S. The contract also specified, however, that Coastal was to hire and pay the ER physicians and that the ER director, a Coastal employee, was responsible for day-to-day physician supervision. On appeal from the trial court's finding that the physician was a hospital agent, the court reversed, holding that the amount of control exercised by the hospital over the ER physician was significantly less than that exercised by HRS over the physician in *Stoll*, and instead was more analogous to the control exercised by the hospital in *Theodore.*[19]

The holdings in *Theodore* and *Robinson* illustrate that Florida courts will not accept contractual labels of agency or conflicting clauses appearing to reserve exclusive governmental control as

[16] In some cases, the terms "agent" and "independent contractor" are used mutually exclusively; however, in *Stoll,* the Court adopted the position of the *Restatement (Second) of Agency*, s. 14N (1957), which provides that, "One who contracts to act on behalf of another and subject to the other's control except with respect to his physical conduct is an agent and also an independent contractor." *Id.* at 703.
[17] *Id.* (stating that HRS's interpretation of its manual is entitled to judicial deference and great weight).
[18] *Theodore v. Graham*, 733 So.2d 538 (4th DCA 1999); *Robinson v. Linzer*, 758 So.2d 1163 (Fla. 4th DCA 2000).
[19] *Robinson*, 758 So.2d at 1163-1164.

being sufficiently dispositive of agency as a matter of law. Rather, as in *Stoll*, the entirety of the evidence must demonstrate the government's right to control the private agent.

The standard of review utilized in *Stoll, Theodore,* and *Robinson* was de novo. In order to have approved the trial courts' findings of agency as a matter of law, the appellate courts had to have found that reasonable persons could have only concluded that the evidence established an agency relationship between the private and governmental entities.[20] However, where different interpretations are possible, the issue of agency is factual and must be decided by a fact-finder. The standard of review for a fact-finder's decision is whether competent substantial evidence supports the decision.[21] Given this less rigorous standard, a fact-finder's determination of agency based on the evidence presented to the trial courts in *Theodore* and *Robinson* might withstand future appellate review.

d. Statutory designations of agency: Statute confers agent status to certain private entities under contract with the government. The Legislature has stated that the following entities are government agents for purposes of s. 768.28(9), F.S., immunity: (1) members of the Florida Health Services Corps; (2) persons under contract with the Departments of Health and Business and Professional Regulation to provide services regarding complaints or applications; (3) physicians retained by the Florida State Boxing Commission; (4) health care providers under contract to provide care to indigent state residents; (5) public defenders and their employees and agents; (6) health care providers under contract with the Department of Corrections to provide inmate care; (7) regional poison control centers and their employees and agents; (8) providers of security and maintenance for rail services in the South Florida Rail Corridor, or their employees or agents, under contract with the Tri-County Commuter Rail Authority or Department of Transportation; and (9) providers or vendors, or their employees or agents, under contract with the Department of Juvenile Justice to provide juvenile and family services.[22]

No Florida case appears to have resolved a challenge to the status of a statutorily designated agent. As a result, it is unknown whether the courts would accept a legislative determination of agency solely as a matter of law, or if the courts would analyze the actual relationship between the private and governmental entities to determine if the elements of agency are satisfied.

If a statutory designation of agent status was found invalid due to a lack of evidence establishing an agency relationship between the designated entity and the government, the likely constitutional challenge would be that the extension of sovereign immunity limitations to the agent violates the right of access to courts. In *Kluger v. White*,[23] the Court held that the Legislature may not abolish certain rights to redress for injury, unless the Legislature provides a reasonable alternative of redress, or shows an overpowering public necessity for the abolishment of such right and that no alternative method for meeting the necessity exists.

[20] *Campbell v. Osmond*, 917 F. Supp. 1574, 1583 (M.D. Fla. 1996.
[21] *See* Phillip J. Padavano, *Florida Appellate Practice*, s. 9.6 (2003)(stating that it is difficult demonstrate an absence of competent substantial evidence).
[22] Sections 381.0302(11), 455.221(3), 456.009(3), 548.046, 766.115(4), 768.28(9)(b)2., 768.28(10), and 768.28(11), F.S.
[23] *Kluger v. White*, 281 So.2d 1 (Fla 1973).

II. Workers' compensation: Chapter 440, F.S., sets forth Florida's "Workers' Compensation Law," which provides employer paid compensation and disability and medical benefits to an injured worker.

Section 440.09(6), F.S., provides:

> Except as provided in this chapter, a construction design professional who is retained to perform professional services on a construction project, or an employee of a construction design professional in the performance of professional services on the site of the construction project, is not liable for any injuries resulting from the employer's failure to comply with safety standards on the construction project for which compensation is recoverable under this chapter, unless responsibility for safety practices is specifically assumed by contracts. The immunity provided by this subsection to a construction design professional does not apply to the negligent preparation of design plans or specifications.

III. Professional firms providing monitoring and inspection services: The DOT contracts with professional firms to oversee state roadway, bridge, and other transportation facility construction projects. These firms provide construction engineering and inspection services, referred to as "CEI." Specifically, the firms observe and report to the DOT on the general contractor's activities during construction, and monitor for the DOT the contractor's compliance with DOT plans, specifications, and contract provisions. The firm maintains a daily record of the construction project.

The contractor has control of the construction site, site personnel, and traffic management. Under DOT standard practice, the firm providing CEI services has no control over the design engineer, the contractor, or the general contractor's means or methods of construction or traffic maintenance. It is the duty of the CEI engineer to observe and report on the contractor's activities and to report to the DOT the extent of the contractor's compliance or non-compliance with all contractual requirements.

Firms providing CEI services have been named as defendants in tort suits related to construction projects. One example is a circuit court case entitled *Jimmy R. Jones Construction Co. v. Reynolds, Smith, & Hills, Inc.,*[24] wherein a CEI firm under contract with the DOT was sued. The Circuit Court dismissed the claim against the CEI firm on summary judgment finding that the firm was an agent of the DOT based upon the facts that: (1) the DOT had the right to review the CEI firm's work and to fire the CEI firm without liability for anything other than completed work, (2) the CEI firm was required to follow DOT standards and procedures; and (3) the CEI firm acted on behalf of the DOT performing functions that would have ordinarily been performed by the DOT.[25]

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[24] *Jimmy R. Jones Construction Co. v. Reynolds, Smith, & Hills, Inc*., Case No. 92-2449, Leon County Circuit Court, August 5, 1992.

[25] *See also Duszlak v. Wands, White Construction, Co,Inc., AIM Engineering & Surveying,Inc., & DOT*, Case No. 2000 CA 1601, Alachua County Circuit Court (July 19, 2001); *Gay and FCI, Insurance Co. v. GC-GW, Inc., Florida Power, Corp., and AIM Engineering and Surveying, Inc.*, Case No. 99-384, Leon County Circuit Court, (September 19, 2000); and *Pitts v.*

According to the representatives of CEI firms, tort claims related to state construction projects have resulted in higher insurance premiums for CEI firms under contract with the DOT.

III. Effect of Proposed Changes:

The bill amends s. 768.28(10), F.S., to create a new paragraph (e), which provides that the following entities or persons are agents of the DOT for purposes of the waiver of sovereign immunity contained in s. 768.28, F.S.: (1) professional firms that provide monitoring and inspection services of the work required for state roadway, bridge, or other transportation facility construction projects; or (2) firm employees who perform such services.

In order for agent status to apply, the agents must be acting within the scope of the firm's contract with the DOT to ensure that the construction project is constructed in conformity with the project's plans, specifications, and contract provisions. Further, the contract between the professional firm and the state must provide, to the extent permitted by law, for indemnification of the state by the agents for any liabilities up to the $100,000/$200,000 limits specified in s. 768.28(5), F.S.

The bill also provides that the paragraph shall not be construed as designating persons who provide monitoring and inspection services as employees or agents of the state for purposes of Chapter 440, F.S.

Finally, the bill specifies that the paragraph is inapplicable: (a) if the agents are involved in an accident while operating a motor vehicle; and (b) to a firm engaged by the DOT to provide design or construction of a state roadway, bridge, or other transportation facility.

The bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

GC-GW, Inc., Florida Power, Corp., and AIM Engineering and Surveying, Inc., Case No. 99-385, Leon County Circuit Court (September 19, 2000) (holding that the CEI firms were agents of the DOT for purposes of sovereign immunity).

D. Other Constitutional Issues:

Statutorily according sovereign immunity in the absence of a true agency relationship may raise a constitutional challenge on the basis of the access to courts provision in Article I, s. 21 of the State Constitution, which provides that the "courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay." In *Kluger v. White*,[26] the Court held that the Legislature may not abolish certain rights to redress for injury, unless the Legislature provides a reasonable alternative of redress, or shows an overpowering public necessity for the abolishment of such right and that no alternative method for meeting the necessity exists.

If the DOT continues its standard practices wherein it retains control over professional firms that provide monitoring and inspection services, it is unlikely that an argument claiming that there is no true agency relationship between the DOT and the firm would be successful. As discussed in the "Present Situation" section of this analysis, the DOT's standard practice is to: (1) retain the right to review the CEI firm's work and to fire the CEI firm's personnel at will; and (2) require the CEI firm to follow DOT standards and procedures. Based on these facts, several circuit courts have held that such professional firms are agents of the DOT for purposes of sovereign immunity.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The professional firms accorded agent status by this bill will not be responsible for tort liability damages in excess of the $100,000/$200,000 maximums specified in s. 768.28(5), F.S. It is anticipated that the firms' professional liability insurance premiums will be lowered as a result of this bill.

C. Government Sector Impact:

The bill requires the statutorily designated agents to indemnify the DOT up to the $100,000/$200,000 limits specified in s. 768.28(5), F.S. If a lawsuit arises by the DOT due to negligence by the designated agents, the department may recover attorney fees. However, costs associated with agent liability damages required to be paid by the enactment of a claim bill, and for any costs that may result from actions against an agent to collect indemnification may be incurred.

Costs to the DOT for procurement of these professional firm services may decrease if there is a decrease in professional firm liability insurance.

[26] *Kluger v. White*, 281 So.2d 1 (Fla 1973).

VI. Technical Deficiencies:

None.

VII. Related Issues:

Statutorily according agent status to private entities contracting with the state is beneficial in that it clarifies precisely which entities the Legislature intends to be subject to the state's sovereign immunity. Such clarification may result in decreased litigation over the issue of which private entities have agent status and in agents being able to purchase less expensive liability insurance. Lowered litigation and insurance costs might result in the submission of lower bids in the state procurement process.

Statutory agent status also has several potential downsides:

- The state agency that acts as the private entity's principal is liable for agent torts. Although agents, as provided in this bill, may be statutorily required to indemnify the state agency for liabilities incurred up to the limits of the chapter, the state agency will ultimately be responsible for paying sums due above the chapter limits in the event a claim bill based on agent negligence is enacted.

- If a greater number of private entities are accorded statutory agent status: (1) the Legislature may be required to consider a larger number of claim bills; (2) more injured victims may not be made whole given that not all claim bills are enacted into law; and (3) less agent accountability will be required for negligence, given that the state, not the agent, is liable for damages in excess of the chapter limits.

- Lawsuits may be filed, which argue that no true agency relationship exists between a statutory agent and the state.

Given the nature of the contractual relationship between the DOT and the professional firms accorded agent status in this bill, the aforementioned downsides appear to pose less concern than they might in situations involving more attenuated relationships between the state and a private entity statutorily accorded agent status. As discussed in the "Other Constitutional Issues" section of this analysis, DOT's current standard practices appear to establish an agent/principal relationship between the DOT and professional firms providing monitoring and inspection services. Thus, under current law, the DOT might, notwithstanding this bill, be held liable for the agent professional firm's negligence. The effect of this bill should be to statutorily clarify the firm's agent status, and, in turn, to decrease litigation over whether the firm is an agent of the DOT for sovereign immunity purposes and decrease professional liability insurance costs.

VIII. Amendments:

None.