

FINAL BILL ANALYSIS

BILL #: CS/CS/HB 395

FINAL HOUSE FLOOR ACTION:

102 Y's 7 N's

SPONSOR: Rep. O'Toole

GOVERNOR'S ACTION: Approved

COMPANION BILLS: SB 626

SUMMARY ANALYSIS

CS/CS/HB 395 passed the House on April 15, 2011, and subsequently passed the Senate on April 28, 2011. The bill was approved by the Governor on June 2, 2011, chapter 2011-114, Laws of Florida, and becomes effective July 1, 2011. The bill provides that Shands Teaching Hospital and Clinics, Inc.; Shands Medical Center, Inc.; and Shands Jacksonville HealthCare, Inc.; and any not-for-profit subsidiary which directly delivers health care services "shall be conclusively deemed corporations primarily acting as instrumentalities of the state" and are expressly granted sovereign immunity.

An entity is considered acting as an instrumentality of the state when the state exercises significant control over the entity. The bill establishes such control by authorizing the University of Florida (UF) Board of Trustees, acting through the President of the University or his or her designee, to control Shands Jacksonville Medical Center, Inc.; Shands Jacksonville HealthCare, Inc.; Shands Teaching Hospital and Clinics, Inc.; and those not-for-profit subsidiaries that qualify sovereign immunity. Furthermore, these entities are required to audit their financial statements and provide the audit and financial statements to the University of Florida Board of Trustees (UFBOT). In addition, the UFBOT is required to approve the articles of incorporation and appoint board members to Shands Jacksonville Medical Center, Inc., and Shands Jacksonville HealthCare, Inc.

The bill also identifies the not-for-profit corporations that operate the teaching hospitals at Gainesville and Jacksonville: Shands Teaching Hospital and Clinics, Inc.; Shands Jacksonville Medical Center, Inc.; and Shands Jacksonville HealthCare, Inc., and establishes that the primary purpose of these entities is to support the University of Florida Board of Trustees' health affairs mission. The UFBOT is authorized to provide general and professional liability insurance to affiliates of Shands Teaching Hospital and Clinics, Inc.; any successor corporation that acts in support of the UFBOT; Shands Jacksonville Medical Center, Inc.; and to any of the not-for-profit subsidiaries and affiliates of Shands Jacksonville Medical Center, Inc.

Shands UF and Shands Jacksonville Medical Center, Inc., are the established University of Florida teaching hospitals and are affiliated with the University's colleges in the J. Hillis Miller Health Science Center. Shands Jacksonville HealthCare, Inc., is the not-for-profit parent corporation of Shands Jacksonville Medical Center, Inc. The UFBOT is authorized to lease the hospital facilities of the health center known as the Shands Teaching Hospital and Clinics on the campus of the University of Florida to a private not-for-profit corporation.

I. SUBSTANTIVE INFORMATION

EFFECT OF CHANGES:

Current Situation

History of Shands Teaching Hospital and Clinics

Shands Teaching Hospital was opened in 1958 in Gainesville to serve the needs of the University of Florida's School of Medicine. Over the next 21 years, the hospital operated as part of the university.¹

In 1978, a study was conducted to determine how to make Shands Teaching Hospital more self-sufficient and fiscally independent. The study recommended that by leasing Shands Teaching Hospital to a not-for-profit corporation Shands Teaching Hospital would receive "local autonomy, and flexibility in responding to dynamic changes in the health care industry."²

In 1979, the Legislature expressly required the State Board of Education³ to lease Shands Teaching Hospital and ancillary health care facilities, which are known as Shands Teaching Hospital and Clinics, to a private not-for-profit corporation organized solely for the purpose of operating the hospital and ancillary health care facilities and other health care facilities and programs determined to be necessary by the board of the not-for-profit.⁴ The agreement between the University of Florida Board of Trustees (UFBOT) and the not-for-profit corporation was to provide for:

- Approval of the articles of incorporation by the UFBOT.
- Governance of the not-for-profit corporation by a board of directors appointed and chaired by the President of UFBOT and vice chaired by the Vice President for Health Affairs of the University of Florida.
- Use of the hospital and facilities and personnel.
- Continued recognition of the collective bargaining units and agreements.
- Use of hospital facilities and personnel in connection with research programs.
- Reimbursement to the hospital for care of indigent patients and implementation of state-mandated programs and "underfunded state programs" subject to appropriations by the Legislature.⁵

Shands Teaching Hospital and Clinics, Inc., was created in 1980 as the not-for-profit corporation responsible for operating, maintaining, and insuring Shands Teaching Hospital and Clinics. Shands Teaching Hospital and Clinics, Inc., entered into an agreement with the UFBOT. The agreement transferred all assets and liabilities of the hospital facilities to Shands Teaching Hospital and Clinics, Inc.; provided reversion of the net assets at termination of the contractual agreement; provided that the legal title to all buildings and improvements remained with the State of Florida; and provided that the

¹ History of Shands HealthCare, available at, <http://www.shands.org/about/history.asp> (last visited March 17, 2011).

² *Shands Teaching Hospital & Clinics, Inc. v. Lee*, 478 So. 2d 77, 79 (Fla. 1st DCA 1985), citing *Recommendations of a Feasibility Study for a Change of Governance of Shands Teaching Hospital*, A Report to the Florida Legislature, 12 (Jan. 1979).

³ Chapter 79-248, s. 1, L.O.F. The University of Florida Board of Trustees is the successor in interest to the State Board of Education. Chapter 2002-387, s. 186, L.O.F., codified at s. 1004.41, F.S. (2002).

⁴ Chapter 79-248, s. 1, L.O.F.

⁵ Section 1004.41(4)(b)5., F.S.

State Board of Education could only terminate the agreement if Shands Teaching Hospital and Clinics, Inc., declared bankruptcy.⁶

Recent Litigation

In 1985, a medical malpractice action was brought against the Board of Regents⁷ and Shands Teaching Hospital and Clinics, Inc.⁸ Based on the legislative history discussed above, the court found 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.”⁹ The court also noted that “[t]he plain meaning of section [1004.41] reflects that Shands’ day-to-day operations are not under direct state control.”¹⁰

In 1987, a newspaper alleged that Shands Teaching Hospital and Clinics, Inc., was in violation of the sunshine law and the public records law.¹¹ The court, in *Campus Communications, Inc. v. Shands Teaching Hospital and Clinics, Inc.*,¹² stated that the Sunshine Law only applies to a “state agency or authority”¹³ and that the public records law only applies to a “unit of government” or private entity “acting on behalf of any public agency.”¹⁴ The court concluded, based on the rationale in *Shands Teaching Hospital & Clinics, Inc. v. Lee*,¹⁵ that “Shands is not a state agency or authority for purposes of the Sunshine Law and that Shands is not a unit of government or private entity acting on behalf of any public agency for purposes of the Public Records Law.”¹⁶

Sovereign Immunity

The term “sovereign immunity” originally referred to the English common law concept that the government may not be sued because “the King can do no wrong.” Sovereign immunity bars lawsuits against the government or its political subdivisions for the torts¹⁷ of officers or agents of such governments unless such immunity is expressly waived. “The legislative purpose in enacting sovereign immunity statutes is to protect the public from ‘profligate encroachments on the public treasury.’”¹⁸ However, one of the concerns regarding sovereign immunity is that it allows the governmental entity to avoid accountability for its actions.

Article X, s. 13 of the Florida Constitution recognizes the concept of sovereign immunity and gives the Legislature the right to waive the state’s immunity in part or in full by general law. The Legislature did in

⁶ Section 1004.41(4)(e), F.S.

⁷ The Board of Regents was created in 1965, as the governing body of the State University System. Chapters 63-204 and 65-138, L.O.F. The Board of Regents was abolished in 2001. Section 229.003(5)(a), F.S. (2001).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Campus Communications, Inc. v. Shands Teaching Hospital and Clinics, Inc.*, 512 So.2d 999 (Fla. 1st DCA 1987).

¹² *Id.*

¹³ Section 286.011(1), F.S.

¹⁴ Section 119.011(2), F.S.

¹⁵ *See Lee*, 478 So.2d at 79.

¹⁶ *Campus Communications*, 512 So.2d at 1000.

¹⁷ “A ‘tort’ is a civil wrong for which a remedy may be obtained, usually in the form of damages, the commission or omission of an act by one, without right, whereby another receives some injury, directly or indirectly, to his or her person, property, or reputation. A tort is a wrong that the law redresses, and not a mere infraction of good morals.” 55 Fla. Jur 2d Torts § 1.

¹⁸ *Jaar v. University of Miami*, 474 So.2d 239, 246 (Fla. 3rd DCA 1985)(holding that because the University of Miami is a private educational institution any liability it incurs for the negligence of its agents has no effect on the public treasury).

fact establish a limited waiver of sovereign immunity for liability for tort. More particularly, the law provides:

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 for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within 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, may be prosecuted subject to the limitations specified in this act.¹⁹

The waiver of sovereign immunity limits the recovery in a tort action against the state to \$100,000 for any one person for one incident and limits all recovery related to one incident to a total of \$200,000.²⁰ When the state's sovereign immunity applies, the officers, employees, and agents of the state that were involved in the commission of the tort are not personally liable to an injured party.²¹

The term "state" means "state agencies or subdivisions" which includes the executive departments, the Legislature, the judicial branch, 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.²²

Instrumentalities of the State

The Legislature has created corporations and authorized subsidiary corporations.²³ Whether those corporations enjoy sovereign immunity is based upon whether those corporations are considered "instrumentalities of the state." Determining whether such corporations are instrumentalities of the state is dependent upon the degree of control the state has over the corporation. When the corporation is significantly controlled by the state, it is considered an instrumentality of the state,²⁴ but when the corporation acts with significant autonomy, it is not.²⁵

In *Prison Rehabilitative Industries & Diversified Enterprises v. Betterson*,²⁶ the court examined whether Prison Rehabilitative Industries and Diversified Enterprises, Inc., (PRIDE) was an instrumentality of the state. The court noted, that while "the actual extent of control is ordinarily a question of fact to be proved by the evidence, here the proof of control rests entirely on statutory provisions, which leaves the issue to be decided as a matter of law."²⁷ Even though "PRIDE was accorded substantial

¹⁹ Section 768.28(1), F.S.

²⁰ Section 768.28(5), F.S. Effective October 1, 2011, the limits change from \$100,000 to \$200,000 and \$200,000 to \$300,000.

²¹ Section 768.28(9), F.S.

²² Section 768.28(2), F.S.

²³ See e.g., s. 1004.43, F.S., creating the H. Lee Moffitt Center and Research Institute and establishing sovereign immunity; s. 1004.447, F.S., creating the Florida Institute for Human and Machine Cognition, Inc., and establishing sovereign immunity.

²⁴ *Pagan v. Sarasota County Hospital Board*, 884 So.2d 257 (Fla. 2nd DCA 2004); *Prison Rehabilitative Industries & Diversified Enterprises v. Betterson*, 648 So.2d 778 (Fla. 1st DCA 1994).

²⁵ See *Lee*, 478 So.2d at 79, (holding that the nonprofit corporation to which the State Board of Education leased the Shands Teaching Hospital was not entitled to the benefit of sovereign immunity because the corporate entity was determined to be "an autonomous and self-sufficient entity, one not primarily acting as an instrumentality on behalf of the state").

²⁶ 648 So.2d 778, 781 (Fla. 1st DCA 1995).

²⁷ *Id.* at 781 n. 3.

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.”²⁸ For example, PRIDE is only permitted to sell its goods to private entities upon approval of the Governor, required to annually provide the Governor and the Legislature with an independently audited financial statement and an in-depth status report concerning the operation of the correctional work programs, subjected to both financial and performance audits by the Auditor General, restricted to nonprofit status, and required to have the articles of incorporation approved by the Governor. “These statutory constraints 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.”²⁹

Moffitt Cancer Center

The Legislature created the H. Lee Moffitt Cancer Center and Research Institute (Moffitt), and expressly provided that Moffitt and its not-for-profit subsidiaries are “conclusively deemed instrumentalities of the state” for purposes of sovereign immunity. To support its designation as an instrumentality of the state the Legislature enacted provisions to demonstrate sufficient governmental control over Moffitt and its not-for-profit subsidiaries by identifying the composition of the board of the not-for-profit corporation;³⁰ requiring the agreement between Moffitt and the Board of Governors³¹ to provide for an annual financial audit;³² authorizing the Board of Governors, the Auditor General, and the Office of Program Policy Analysis and Government Accountability to require and receive any detail or supplemental data relative to the operation of Moffitt;³³ clarifying that Moffitt is not an “agency” within the executive branch;³⁴ clearly stating that the records of Moffitt and its subsidiaries are public records unless made confidential or exempt by law;³⁵ identifying the documents that are exempted from public disclosure law;³⁶ and providing that meetings of Moffitt and its subsidiaries at which the expenditure of appropriated dollars are discussed remain open to the public unless made confidential or exempt by law.³⁷

Florida Institute for Human and Machine Cognition, Inc.

The Legislature created the Florida Institute for Human and Machine Cognition, Inc., (Institute), a not-for-profit corporation established at the University of West Florida, and designated the Institute as an instrumentality of the state for purposes of sovereign immunity. To support the Institute’s designation as an instrumentality of the state, the Legislature enacted provisions to demonstrate state control over the Institute and approved subsidiaries by making the officers, directors, and employees of the Institute and any not-for-profit corporate subsidiary subject to the code of ethics for public officers and employees;³⁸ clearly stating that the Institute and any authorized and approved subsidiary are subject to the public records and meetings requirement;³⁹ and requiring that the Institute’s articles of incorporation be approved by the Board of Governors; and providing that the members of the board of

²⁸ *Id.*

²⁹ *Betterson*, 648 So.2d at 780.

³⁰ Section 1004.43(1), F.S.

³¹ The “Board of Governors” is the Board of Governors of the State University System.

³² Section 1004.43(2)(d), F.S.

³³ *Id.*

³⁴ Section 1004.43(7), F.S., citing s. 20.03(11), F.S., defining “agency.”

³⁵ Section 1004.43(8)(a), F.S.

³⁶ Section 1004.43(8)(b), F.S.

³⁷ Section 1004.43(9), F.S.

³⁸ Section 1004.447(3), F.S.

³⁹ Section 1004.447(4)(b), F.S.

directors of the Institute are responsible for the prudent use of all public and private funds and that they will ensure that the use of the funds is in accordance with all applicable law, bylaws, and contractual requirements.⁴⁰

Effect of Proposed Changes

The bill provides that Shands Teaching Hospital and Clinics, Inc.; Shands Jacksonville Medical Center, Inc.; Shands Jacksonville HealthCare, Inc.; and any not-for-profit subsidiary which directly delivers health care services, “shall be conclusively deemed corporations primarily acting as instrumentalities of the state” for purposes of sovereign immunity.

The bill amends current law to identify the not-for-profit corporations that operate the teaching hospitals at Gainesville and Jacksonville: Shands Teaching Hospital and Clinics, Inc.; Shands Jacksonville Medical Center, Inc.; and Shands Jacksonville HealthCare, Inc. The bill also recognizes that the primary role of Shands Teaching Hospital and Clinics, Inc., is to support the UFBOT health affairs mission and authorizes the corporation to operate the hospital and ancillary health care facilities as deemed necessary by the board of the corporation.

The bill also states that Shands Jacksonville Medical Center, Inc., and its parent Shands Jacksonville HealthCare, Inc., are private not-for-profit corporations organized primarily to support the health affairs and mission of the UFBOT. In addition to the oversight provided by current law,⁴¹ the bill provides that the UFBOT acting through the President of the University of Florida or his or her designee has the right to control Shands Jacksonville Medical Center, Inc.; Shands Jacksonville HealthCare, Inc.; Shands Teaching Hospital and Clinics, Inc.; and those not-for-profit subsidiaries that qualify for sovereign immunity. These entities are also required to audit their financial statements and provide those financial statements to the UFBOT which then submits those statements to the Auditor General. Shands Jacksonville Medical Center, Inc., and Shands Jacksonville HealthCare, Inc., must comply with the same provisions that apply to Shands Teaching Hospital and Clinics, Inc., such as approval of the articles of incorporation and the appointment of board members.

Proponents of the bill contend that without sovereign immunity it costs UF, Shands Teaching Hospitals and Clinics, Inc., and Shands Jacksonville HealthCare, Inc., approximately \$12 million each year for liability insurance. It is undisputed that “[i]t is [] more economic to run any business or profession if one has limited liability. It is easier to compete with other businesses or professionals if one can avoid the costs and liabilities that the competitor cannot avoid.”⁴²

Reducing liability insurance costs may help defray the cost of care provided to indigent and Medicaid patients. For example, in fiscal year 2010, eight percent of the patients discharged by Shands at the University of Florida and 14 percent of the patients discharged by Shands Jacksonville Medical Center, Inc., were uninsured patients. That year, Shands at the University of Florida wrote off \$49.5 million and Shands Jacksonville Medical Center, Inc., wrote off \$57.1 million. In addition, 27 percent of the patients discharged by Shands at the University of Florida and 35 percent of the patients discharged by Shands

⁴⁰ Section 1004.447(4)(c), F.S.

⁴¹ See *supra* text accompanying note 4. *But see Lee*, 478 So.2d at 79 (holding that “[t]he plain meaning of section [1004.41] reflects that Shands’ day-to-day operations are not under direct state control.”).

⁴² *University of Florida Board of Trustees v. Morris*, 975 So.2d 493, (Fla. 2d DCA 2007)(Altenbernd, J., concurring)(stating that “the idea that government can now enter into favorable leases and contracts based at least in part on the government’s ability to expand its umbrella of sovereign immunity to favor some private enterprises over others is an idea that warrants very close scrutiny.”).

Jacksonville Medical Center, Inc., were Medicaid patients.⁴³ However, the bill authorizes the UFBOT to provide general and professional liability insurance from a self-insurance program to affiliates of Shands Teaching Hospital and Clinics, Inc.; any successor corporation that acts in support of the UFBOT; and to Shands Jacksonville Medical Center, Inc., and to any of its not-for-profit subsidiaries and affiliates. It is unclear what effect this may have on any potential costs savings.

Sunshine Law and Public Records Law

As stated above, *Campus Communications* held that Shands Teaching Hospital and Clinics, Inc., was not a “state agency or authority” or a private entity “acting on behalf of any public agency” within the meaning of the Public Records Law or Sunshine Law, because of an earlier determination that Shands was not a state agency or corporation primarily acting as an instrumentality or agency of the state.⁴⁴

The bill, by designating certain not-for-profit corporations and subsidiaries as instrumentalities of the state,⁴⁵ will subject those entities to the Public Records Law and the Sunshine Law. Proponents of the bill suggest that the affected corporations are already covered by an existing public records and meetings exemption created in s. 395.3036, F.S. It is unclear whether the not-for-profit corporations and subsidiaries will qualify for these exemptions.⁴⁶

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

⁴³ Correspondence with representatives of Shands Teaching Hospitals and Clinics, Inc., on file with staff of the House Education Committee.

⁴⁴ *Campus Communications*, 512 So.2d at 1000.

⁴⁵ Shands Teaching Hospital and Clinics, Inc., Shands Jacksonville Medical Center, Inc., and Shands Jacksonville HealthCare, Inc., as well as any not-for-profit subsidiaries of Shands Teaching Hospital and Clinics, Inc., and Shands Jacksonville Medical Center, Inc.

⁴⁶ Section 395.3036, F.S., creates a public records and public meetings exemption for all records and all meetings of a private corporation that leases a public hospital or other public health care facility. The private lessee must meet specified criteria, including the finance an accountability provisions of s. 155.40(5), F.S., which provides that if a hospital operator [which would include a private lessee] receives more than \$100,000 annually from the county, district, or municipality that owns the hospital, then the revenues must either be made subject to annual appropriations or, if there is a contract which provides for revenues longer than 12 months, the public owner must be able to modify the contract upon 12 months notice.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

A recovery in a tort action by an injured plaintiff against any of the entities granted sovereign immunity by this bill will be limited to \$100,000 for any one person for one incident and all recovery related to one incident is limited to a total of \$200,000. (Effective October 1, 2011, the limits change from \$100,000 to \$200,000 and \$200,000 to \$300,000.) Section 768.28(5), F.S.; see also note 1 to s. 768.28, F.S.

D. FISCAL COMMENTS:

Currently, if an entity has sovereign immunity and a plaintiff succeeds in adjudicating the matter in court, and the court determines that the damages exceed \$200,000, then the plaintiff may ask members of the Legislature to file a “claim bill” on the plaintiff’s behalf. The Speaker of the House of Representatives may appoint a Special Master to review a claim bill or conduct a hearing, if necessary.⁴⁷ If a (non-local) claim bill is passed, then the funds used to pay the claim will either come from that entity’s budget or additional General Revenue Funds may be appropriated to that entity to cover some or all of the claim.

⁴⁷ Rule 5.6 – Claim Bills, The Rules, Florida House of Representatives, 2010-2012. Most recently an \$18.2 million claim bill was signed into law; the defendant was the Florida Department of Children and Family Services, *available at*, http://www.southfloridainjurylawyerblog.com/2008/05/florida_claims_bill_grants_9ye.html.