



The Florida Senate

Interim Project Report 2003-131

December 2002

Committee on Governmental Oversight and Productivity

Senator James E. "Jim" King, Jr., President

REVIEW OF SOVEREIGN IMMUNITY IN FLORIDA

SUMMARY

The common law doctrine of sovereign immunity prohibits lawsuits against a state government and its agencies and subdivisions in state court. This report provides an overview of the doctrine's historical underpinnings and its current operation in Florida. Further, this report addresses the impact of sovereign immunity on public contracting. Issues specifically discussed are the application of sovereign immunity to breach of contract suits against governmental entities and the nexus that must exist between a governmental entity and a private contractor in order for sovereign immunity to be derivatively extended to the private contractor. This latter issue has taken on increasing importance in recent years given the national trend toward privatization of public functions.

- Preserves governmental discretion by enabling officials to engage in flexible decision-making without risking liability.
- Enhances the separation of powers by prohibiting the judiciary from interfering with the discretionary functions of the legislative and executive branches, except where a constitutional or statutory right is violated.
- Eliminates a chilling effect on law enforcement officials who might be less willing to investigate, pursue, and arrest criminals if errors could result in liability.³

Opponents of sovereign immunity have stated that it:

- Fails to discourage wrongdoing, as governmental accountability is not required.
- Is unjust because it leaves injured parties with no viable remedy.
- Lessens public oversight of governmental improprieties by prohibiting the court from hearing an injured's grievances.⁴

BACKGROUND

The doctrine of sovereign immunity prohibits lawsuits in state court against a state government, and its agencies and subdivisions without the government's consent.¹ At common law the doctrine's foundation was premised on the maxim, "The king can do no wrong." As sovereign, the king was considered to be beyond the jurisdiction of any court.² In modern times, sovereign immunity is justified by public policy providing that it:

- Protects the public treasury from excessive encroachments.
- Protects the orderly administration of government from disruption by suit.

Taking into account these criticisms, the majority of states have enacted legislation that waives sovereign immunity and permits suits for relief from governmental wrongs. Article X, s. 13, of the State Constitution, authorized the Florida Legislature in 1868 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

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

² RESTATEMENT (SECOND) OF TORTS Ch. 45A (1979).

³ *Sovereign Immunity, A Survey of Florida Law*, Florida House of Representatives, Committee on Claims, 1999-2000.

⁴ *Id.* at 1-2.; Whetherington and Pollock, *Tort Suits Against Governmental Entities in Florida*, 44 Fla.L.Rev. 1, 28-29 (1992).

sovereign immunity, in 1969.⁵ 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.⁶ 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 1981.⁷

A concept related to, but distinct from, sovereign immunity is the immunity from suit accorded by the Eleventh Amendment of the United States Constitution.⁸ This provision divests the federal courts of the power to entertain a suit brought by a private party against a state unless the state consents or Congress authorizes the action.⁹ Section 768.28(17), F.S., provides that only an explicit statutory statement of Eleventh Amendment waiver is sufficient to waive that immunity. No such statutory waiver has been enacted in Florida.

METHODOLOGY

Staff reviewed Florida statutes, legislative histories, federal and state case law, and law review articles, and discussed the subject matter with experts on sovereign immunity, legislative staff, and state agency attorneys.

FINDINGS

Since its enactment, Florida's waiver of sovereign immunity in s. 768.28, F.S., has been amended numerous times and has been the subject of voluminous judicial interpretation. Part One of the

following discussion provides an overview of the current operation of sovereign immunity in Florida and Part Two specifically addresses the impact of sovereign immunity on public contracting.

I. Current operation of sovereign immunity in Florida -- Section 768.28, F.S., provides that sovereign immunity for tort liability is waived for the state, and its agencies and subdivisions.

a. Entities subject to the waiver of sovereign immunity – The waiver 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.”

The determination of entities falling within the definition of “state agencies or subdivisions” is relatively clear with the exception of determining the entities that may be classified as an “independent establishment of the state” or “corporations acting primarily as instrumentalities or agencies.” Neither classification is statutorily defined; however, statutes, other than s. 768.28, F.S., Attorney General Opinions, and case law provide some guidance in determining which entities fall within these classifications.

Statute expressly designates the following entities as “corporations acting primarily as instrumentalities or agencies” of the government: (1) Community Improvement Authorities; (2) persons or organizations providing shelter space for compensation during an emergency; (3) the Florida Space Authority; (4) health care entities under contract with the Department of Health to provide services as part of a school nurse services public-private partnership; (5) the Florida Housing Finance Corporation; (6) businesses contracted with by the Department of Business and Professional Regulation under the “Management Privatization Act”; (7) the Florida Engineers Management Corporation; (8) Prison Rehabilitative Industries and Diversified Enterprises (PRIDE); (9) the University Boards of Trustees; and (10) the not for-profit corporation governing the H. Lee Moffitt

⁵ 1969 Fla. Laws ch. 357 s. 1.

⁶ Chapter 73-313, L.O.F.

⁷ Chapter 81-317, L.O.F.

⁸ The Eleventh Amendment of the United States Constitution states that, “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” The Eleventh Amendment does not apply to counties and municipalities. *Tuveson v. Florida Governor’s Council on Indian Affairs, Inc.*, 734 F.2d 730 (11th Cir. 1984).

⁹ *Port Authority Trans- Hudson Corp. v. Feeney*, 495 U.S. 299, 304, 110 S.Ct. 1868, 1872, 109 L.Ed.2d 264 (1990).

Cancer Center and Research Institute and its not-for-profit subsidiaries.¹⁰

Attorney General Opinions have found that certain entities fall within the definition of “state agencies or subdivisions” in s. 768.28, F.S. These entities include: (1) port authorities; (2) district school boards; (3) fire control districts; (4) district mental health boards established as nonprofit corporations; (5) municipal housing authorities; (6) water control districts; and (7) mosquito control districts.¹¹

Florida courts have held that special taxing districts¹² and the Florida National Guard¹³ are “independent establishments of the state,” and that a firm under contract to operate a state hospital¹⁴ and electric utilities¹⁵ were “corporations acting primarily as instrumentalities or agencies” of the government.

b. Monetary limits – Section 768.28(5), F.S., limits governmental damages to \$100,000 per person or a total of \$200,000 per single incident. 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.¹⁶

c. Exceptions to the waiver of sovereign immunity –The courts have created an exception to the waiver of sovereign immunity contained in s. 768.28, F.S., which provides that immunity for discretionary government functions has not been waived. This exception is

¹⁰ Sections 189.433, 189.443, 252.21, 331.328, 768.28(2), 381.0056(10), 420.504(8), 455.32(4), 471.038(3), 946.5026, 1001.72(5), and 1004.43, F.S.

¹¹ Florida Attorney General Opinions Nos. 78-316; 75-248; 87-38; 78-106; 78-33; 78-113; and 78-145.

¹² *Eldred v. North Broward Hospital District*, 498 So.2d 911 (Fla. 1986).

¹³ *Crawford v. Department of Military Affairs*, 412 So.2d 449, 451 (Fla. 5th DCA 1982).

¹⁴ *Skoblow v. Ameri-Manage, Inc.*, 483 So.2d 809 (Fla. 3rd DCA 1986).

¹⁵ *Jetton v. Jacksonville Electric Authority*, 399 So.2d 396 (Fla. 1st DCA 1981).

¹⁶ 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.

recognized in order to comply with the constitutional separation of powers doctrine. By maintaining immunity for discretionary functions, the courts avoid intervening by way of tort law in fundamental legislative and executive branch questions of policy and planning.¹⁷

To determine whether a function is discretionary, the courts use this four-part test: (1) Does the challenged activity involve a basic governmental policy, program, or objective? (2) Is the activity essential to accomplishing that policy, program, or objective? (3) Does the activity require the exercise of basic policy evaluation, judgment, and expertise? (4) Does the government agency involved possess the legal authority and duty to do the activity? If these questions can be answered affirmatively, the government activity is discretionary; however, if any of the questions can be answered in the negative, the government activity is likely operational and not subject to immunity.¹⁸

A second exception to the waiver of sovereign immunity is referred to as the “public duty doctrine,” which provides that the government may not be liable unless there is a statutory or common law duty of care in existence that would have been applicable to an individual under similar circumstances.¹⁹ The Florida Supreme Court has identified the following four categories of governmental functions to be considered when determining the application of sovereign immunity: (1) legislative, permitting, licensing, and executive officer functions; (2) enforcement of laws and the protection of public safety; (3) capital improvements and property control operations; and (4) providing professional educational and general services for the health and welfare of the citizens. The court has stated that there is no common law duty for the functions in categories one and two; however, regarding categories three and four, there are common law duties of care for how property is maintained and operated and how professional and general services are performed. Thus, these latter functions are to be analyzed to determine if they are discretionary or operational.²⁰

d. Officers, employees, and agents of the government – Section 768.28(9), F.S., provides that

¹⁷ *Department of Health and Rehabilitative Services v. Yamuni*, 529 So.2d 258, 260 (Fla. 1998).

¹⁸ *Id.*

¹⁹ *Trianon Park Condominium Association, Inc. v. City of Hialeah*, 468 So.2d 912, 917 (Fla. 1985).

²⁰ *Id.* at 921.

officers, employees, and agents of the state or its subdivisions are not personally liable in tort; instead, the exclusive remedy for tortious injury by officers, employees, or agents 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 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.²¹

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.²²

II. Sovereign immunity's impact on public contracting -- Since the mid-1970s, the State of Florida has shifted much of its governmental service delivery to private contractors. Forty percent of the \$50 billion FY 2003 General Appropriations Act is composed of payments to public and private sector contract vendors. Given this scale, it is important to understand sovereign immunity's impact on both the state and its contract vendors.

The first issue for consideration is the extent to which a defense of sovereign immunity may be asserted against a lawsuit alleging a governmental breach of contract. For most of the twentieth century, Florida courts held that sovereign immunity protected the state against suit for breach of contract when the state contracted with private entities.²³ The rationale for this holding was that the Legislature had not expressly authorized such suits. In 1984, however, the Florida Supreme Court in *Pan-*

Am Tobacco Corp.,²⁴ receded from this holding, stating that, "Where the Legislature has, by general law, authorized entities of the state to enter into contract or to undertake those activities which, as a matter of practicality, require entering into contract, the legislature has clearly intended that such contracts be valid and binding on both parties. As a matter of law, the state must be obligated to the private citizen or the legislative authorization for such action is void and meaningless." The Court further stated that its holding was limited to suits on express, written contracts.²⁵

Since the *Pan Am Tobacco Corp.* case, Florida courts have held that not only may the state be held liable for a breach of an express contractual obligation, but also for breach of an implied contractual obligation.²⁶ Examples of implied contractual obligations include requirements that a contractual party not hinder performance by the other party, not knowingly and unreasonably delay the performance of contractual duties, and not furnish misleading information to prospective bidders.²⁷

Express or implied contractual obligations against which a defense of sovereign immunity may not be asserted, however, may only arise from the written contract. When an alleged contractual obligation stems from non-written evidence, sovereign immunity is a viable defense. For example in *Miorelli Engineering, Inc.*, a private contractor argued that the county was required to reimburse it for costs of work performed outside of the scope of the written contract.²⁸ According to the contractor, the county directed it to perform this work without executing a written contract amendment. The Florida Supreme Court held that sovereign immunity barred this claim. The Court explained that an express written contract is required before sovereign immunity is waived, as to hold otherwise could result in subjecting a sovereign to unlimited liability whenever an unscrupulous government employee alters the terms of a written contract either orally or by conduct.²⁹

²⁴ *Pan-Am Tobacco Corp. v. State Department of Corrections*, 471 So.2d 4, 5 (Fla. 1984).

²⁵ *Id.* at 6.

²⁶ *Champagne-Webber, Inc. v. City of Ft. Lauderdale*, 519 So.2d 696, 698 (Fla. 4th DCA 1989), approved in *County of Brevard v. Miorelli Engineering, Inc.*, 703 So.2d 1049, 1051 (Fla. 1997).

²⁷ *Champagne-Webber, Inc.*, 519 So.2d at 697-698.

²⁸ *Miorelli Engineering, Inc.*, 703 So.2d at 1051.

²⁹ The *Miorelli* court also held that the doctrines of waiver and equitable estoppel may not be used against the state to defeat written contract terms. *Id.*

²¹ *Craft v. John Sirounis and Sons, Inc.*, 575 So.2d 795, 796 (Fla. 4th DCA 1991).

²² *Richardson v. City of Pompano Beach*, 511 So.2d 1121 (Fla. 4th DCA 1987).

²³ See e.g., *Gay v. Southern Builders, Inc.*, 66 So.2d 499 (Fla. 1953).

Unlike Florida, not all states prohibit a defense of sovereign immunity when the state is alleged to have breached a written contract. In Texas, for example, governmental entities retain sovereign immunity, unless legislatively waived, for breach of contract suits. Plaintiffs who allege a breach of contract claim against such an entity must utilize an administrative dispute resolution process. Texas governmental entities are required to pay damage awards less than \$250,000. If the award exceeds \$250,000, the Legislature must approve payment of the award.³⁰

A second issue for consideration is the extent to which a private entity under contract with the government may assert sovereign immunity. Under current law, a private entity must either be a corporation primarily acting as an instrumentality or agency of the government, or a government agent in order for sovereign immunity to be derivatively extended.

Pursuant to s. 768.28(2), F.S., “a corporation acting primarily as an instrumentality or agency of the state, a county or a municipality” is included within the definition of “state agencies or subdivisions,” which are subject to the limited waiver of sovereign immunity provided in s. 768.28(1), F.S. Accordingly, such corporations may assert the defense of sovereign immunity to limit damages payable in tort. Numerous entities have been statutorily classified as corporations acting primarily as instrumentalities or agencies of the government. There is, however, no statutory definition for this classification, and relatively few Florida cases interpret its meaning. The critical factor considered by courts is the degree of government control over the entity’s physical performance and daily operations.³¹

For example in *Shands Teaching Hospital v. Lee*, the court held that the hospital was not a corporation primarily acting as an instrumentality or agency of the state. The court found that the following evidence demonstrated that Shands’ day-to-day operations were not under direct state control: (1) legislation authorized the State Board of Education to lease Shands Teaching Hospital to a private, non-profit corporation organized to operate the hospital; and (2) legislative history

indicated that the purpose of the lease was to permit Shands to be autonomous and self-sufficient.^{32 33} Similarly, in *Mingo v. ARA Health Services, Inc.*,³⁴ the court held that ARA Health Services, a company under contract with a Sheriff to provide inmate medical services, was not a corporation primarily acting as an instrumentality or agency. The court found that the following factors disavowed such status: (1) the Legislature had granted agency status to Department of Corrections’ health care providers, and could have done likewise for county jail providers, but did not; and (2) the contract stated that ARA was an independent contractor and was not an agent, employee, or partner of the Sheriff.

Finally, in *Skoblow v. Ameri-Manage, Inc.*,³⁵ the court ruled that Ameri-Manage, Inc., a private entity under contract with a state hospital to provide management services, was a corporation primarily acting as an agency of the state. According to the court, the factors demonstrating this status included that the contract required the hospital administrator, an employee of Ameri-Manage, to: (1) appoint grievance committee members and render final decisions on employee grievances; (2) effect personnel and disciplinary actions as specified by HRS rules; (3) submit personnel actions directly to the State Personnel Director as specified in HRS rules; and (4) assign to established classes new positions created by the Legislature and Administrative Commission and reclassify positions to existing Career Service Classes.³⁶

Under these cases, it appears that the court will closely review the contract between the private entity and government, and will not find instrumentality or agency status, unless the provisions establish that the entity is subject to the government’s rules and control.

The second form of sovereign immunity potentially available to private entities under contract with the government is set forth in s. 768.28(9), F.S., which, as discussed in Part I, states that agents of the state or its subdivisions are not personally liable in tort; instead, the government entity is held liable for its agent’s torts.

³² *Shands*, 478 So.2d at 78-79.

³³ *Compare Prison Rehabilitative Industries v. Betterson*, 648 So.2d 778 (Fla. 1st DCA 1994)(holding that PRIDE was a state instrumentality based on extensive government control over its daily operations).

³⁴ *Mingo v. ARA Health Services, Inc.*, 639 So.2d 85 (Fla. 2nd DCA 1994).

³⁵ *Skoblow v. Ameri-Manage, Inc.*, 483 So.2d 809 (Fla. 3rd DCA 1986).

³⁶ *Id.* at 811-812.

³⁰ Chapter 2260 of the Texas Government Code.

³¹ *Shands Teaching Hospital v. Lee*, 498 So.2d 77, 79 (Fla. 1st DCA 1985); *See also* Judge Thomas D. Sawaya, *Florida Personal Injury and Wrongful Death Actions*, p. 462 (2003).

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.³⁷ 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;³⁸ (2) a principal must control the means used to achieve the outcome, not merely the outcome of the relationship;³⁹ and (3) the principal's right to control the agent, not whether the principal actually exercises that right, is the relevant consideration.⁴⁰

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.⁴¹ 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.⁴²

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*,⁴³ 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.

³⁷ *Goldschmidt v. Holman*, 571 So.2d 422 (Fla. 1990).

³⁸ *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).

³⁹ *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).

⁴⁰ *Id.*; *Nazworth v. Swire Florida, Inc.*, 486 So.2d 637, 638 (Fla. 1st DCA 1986).

⁴¹ *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).

⁴² *Campbell v. Osmond*, 917 F. Supp. 1574, 1583 (M.D. Fla. 1996).

⁴³ *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.⁴⁴ 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.⁴⁵

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*.⁴⁶

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,

⁴⁴ 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.

⁴⁵ *Id.* (stating that HRS's interpretation of its manual is entitled to judicial deference and great weight).

⁴⁶ *Theodore v. Graham*, 733 So.2d 538 (4th DCA 1999); *Robinson v. Linzer*, 758 So.2d 1163 (Fla. 4th DCA 2000).

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*.⁴⁷

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 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.⁴⁸ 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.⁴⁹ 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.

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.⁵⁰

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.

Although the term "agent" is not statutorily defined, the presumption is that the Legislature uses a term of legal significance according to the term's traditional legal meaning.⁵¹ The traditional legal meaning of the term "agent" is that which derives from the common law of agency, as explained *supra*.⁵² Further, given *Stoll's* holding that HRS's interpretation that its manual created an agency relationship with the physicians was entitled to great weight and deference, it stands to reason that a Legislative determination of agency would demand even greater weight and deference.⁵³ Accordingly, it appears likely that a court would find a legislative designation of agent to have been enacted in accordance with its traditional legal meaning and

⁴⁷ *Robinson*, 758 So.2d at 1163-1164.

⁴⁸ *Campbell v. Osmond*, 917 F. Supp. 1574, 1583 (M.D. Fla. 1996).

⁴⁹ See Phillip J. Padavano, *Florida Appellate Practice*, s. 9.6 (2003)(stating that it is difficult demonstrate an absence of competent substantial evidence).

⁵⁰ 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.

⁵¹ *City of Tampa v. Thatcher Glass Corp.*, 445 So.2d 578, 580, n. 2 (Fla.1984).

⁵² *Goldsmith v. City of Atmore*, 996 F.2d 1155, 1162 (11th Cir.1993).

⁵³ *Stoll*, 694 So.2d at 703; See analogously *University of Miami v. Echarte*, 618 So.2d 189, 196 (Fla.1993) (stating that legislative determinations of public purpose and facts are presumed correct and entitled to great weight and deference, unless clearly erroneous).

would accept the designation as establishing agency as a matter of law.

In summary, under current Florida law, the nexus required between a private contractor and the government to derivatively cloak the contractor with sovereign immunity is that the contractor must either be a “corporation acting primarily as an instrumentality or agency” or a government agent. Whether some lesser nexus would be upheld to justify extension of sovereign immunity to private entities is an issue that has not been expressly addressed in Florida case law. However, related Florida and United States (U.S.) Supreme Court authority provide some assistance in attempting to resolve this issue.

In *Dorse v. Armstrong World Industries, Inc.*,⁵⁴ the Florida Supreme Court considered whether the “Government Contractor Defense” should be recognized in Florida. Recognized in a number of other jurisdictions, this defense provides a private manufacturer with product liability immunity for injuries caused by design defects in military equipment even where the manufacturer may not necessarily be an agent of the government. Regarding the defense, the Court stated, “We do not find, as some courts have suggested, that this defense arises from the doctrine of sovereign immunity. To the contrary, 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. * * * Rather, we agree with the Eleventh Circuit that the theoretical basis of this defense is the federal warmaking and defense power, which the constitution has entrusted exclusively to the president and Congress.”⁵⁵ The Court, finding that the defense would prevent the inhibition of discretionary military decisions by judicial act, held that the defense should be recognized in Florida.

Subsequently in *Boyle v. United Technologies*, the U.S. Supreme Court approved this defense.⁵⁶ The Court ruled that the defense may be asserted when: (1) the U.S. approved reasonably precise specifications; (2) the equipment conformed to the specifications; and (3) the supplier warned the U.S. of known dangers in the use of the goods. Further, the Court held that this defense would preempt state law when it concerns an area of

uniquely federal interest and where state law conflicts with an identifiable federal policy.^{57 58}

Although the precise issue in front of the *Dorse* Court was not whether a nexus less than agency could suffice to extend sovereign immunity to a private contractor, the Court did state that it would be illogical to permit such extension to a private contractor who was not a true agent.⁵⁹ Consequently, it would appear that in Florida it is necessary that private contractor be either a “corporation acting primarily as an instrumentality or agency” or an agent of the government before sovereign immunity may be derivatively extended.

If immunity from liability is legislatively accorded to a private entity not entitled to share in the state’s sovereign immunity, the likely constitutional challenge would be that the law violates the right of access to courts. In *Kluger v. White*,⁶⁰ 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.

RECOMMENDATIONS

Based upon the findings in this report, it is recommended that consideration be given to the status of private entities contracted with by the state and to the status of legislatively created entities, whose status as a public or private entity may not be easily determined. If the Legislature wishes for an entity to be subject to sovereign immunity, the Legislature may enact legislation specifically designating the entity as a corporation primarily acting as an instrumentality or agency of the state or as a state agent, assuming the nature of the relationship between the state and the entity would support such a designation. As discussed in this report, it would appear that legislative

⁵⁴ *Dorse*, 513 So.2d at 1266-1270.

⁵⁵ *Id.* at 1268.

⁵⁶ *Boyle v. United Technologies*, 487 U.S. 500, 108 S.Ct. 2510, 2515-2519 (1988).

⁵⁷ *Id.*; See also *Dorse v. Eagle-Picher Industries, Inc.*, 898 F.2d 1487, 1489-1490 (11th Cir. 1990).

⁵⁸ Recently, the U.S. Supreme Court refused to extend qualified immunity to private prison guards in *Richardson v. McKnight*, 117 S.Ct. 2100 (1997). This holding was based on a lack of historical tradition for according qualified immunity to private parties, and on a lack of public policy reasons in support of such an extension.

⁵⁹ This statement by the Florida Supreme Court has been quoted in two Florida District Court cases. *Agner v. APAC-Florida, Inc.*, 821 So.2d 336, 340 (Fla. 1st DCA 2002); *Theodore*, 733 So.2d at 539.

⁶⁰ *Kluger v. White*, 281 So.2d 1 (Fla 1973).

designations would be accorded great weight and deference if challenged in court.

Greater legislative specificity could result in clarifying precisely which entities are subject to the state's sovereign immunity, and in turn, may result in decreased litigation and lower state purchasing costs. The savings that stem from lower private contractor liability costs should be passed onto the state in the form of lower bids. The potential downside, however, is that more injured victims may not be made whole, less accountability will be required for negligent acts, and the Legislature may have to consider a larger number of claim bills.