

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Higher Education Committee

BILL: SB 626

INTRODUCER: Senators Thrasher, Lynn, and Dean

SUBJECT: Shands Teaching Hospital and Clinics, Inc.

DATE: March 18, 2011 REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|------------------|
| 1. | Brown | Stovall | HR | Favorable |
| 2. | Brown | Matthews | HE | Favorable |
| 3. | | | BC | |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

I. Summary:

The bill clarifies statutory provisions relating to the corporations known as Shands Teaching Hospital and Clinics, Inc. (Shands UF), Shands Jacksonville Medical Center, Inc. (Shands Jax), and Shands Jacksonville Healthcare, Inc. (Shands Health), and provisions regarding the purpose of the corporations. The bill authorizes the corporations to create subsidiaries and affiliates, and provide liability insurance to them.

The University of Florida President is granted removal authority of members of the Shands UF Board of Directors.

The bill provides the UF's Board of Trustees the right to control Shands UF and Shands Jax.

Application of sovereign immunity is extended to Shands UF, Shands Jax, Shands Health, and any not-for-profit subsidiaries.

This bill substantially amends section 1004.41 of the Florida Statutes.

II. Present Situation:

The Relationship Between Shands and the University of Florida (UF)

Shands Teaching Hospital opened in 1958 in Gainesville for the purpose of serving the needs of the UF's School of Medicine. Over the next 21 years, the hospital operated as a part of the UF. In the late 1970s, however, a legislative task force concluded that a not-for-profit corporation should be formed to provide the hospital with local governance while retaining the role as a UF

teaching hospital. Shands Teaching Hospital and Clinics, Inc. (Shands UF) was created for that purpose in 1980 pursuant to state law enacted in 1979.¹

Shands UF and Shands Jacksonville Medical Center, Inc. (Shands Jax) are the established UF teaching hospitals and are affiliated with the University's colleges in the J. Hillis Miller Health Science Center (UF HSC). Shands Jacksonville HealthCare, Inc. (Shands Health) was created as the not-for-profit parent of Shands Jax.

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 state or its political subdivisions for the torts of officers, employees, or agents of such governments unless the immunity is expressly waived.

Article X, s. 13, of the Florida Constitution recognizes sovereign immunity and gives the Legislature the right to waive immunity. Section 768.28, F.S., contains the limited waiver of sovereign immunity applicable to the state. Accordingly, officers, employees, and agents of the state are generally exempt from tort liability for damages unless certain high-level intent can be shown. However, these provisions are considered to represent a limited waiver as they allow for some recovery, currently capped at \$100,000 per person or \$200,000 per incident.² Limits may be exceeded through the claims process, initiated through the filing of a legislative claims bill. Still, the review and award of a claim is entirely at the prerogative of the Legislature.

State agencies and subdivisions, for purposes of sovereign immunity, are defined to include:

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....³

The State Risk Management Trust Fund

The Department of Financial Services (DFS) administers a program of risk management for the state in conjunction with a state self-insurance fund, designated as the State Risk Management Trust Fund (the Fund), which provides insurance for various types of proceedings against the state.⁴ The Fund covers, unless specifically excluded by the DFS, all departments of the state of Florida and their employees, agents, and volunteers, under conditions and parameters set in statute.⁵ The Bureau of Claims Administration within the DFS Division of Risk Management investigates and makes appropriate dispositions on all general liability, automobile liability, federal civil rights, employment, and court-awarded attorney fee claims for damages filed against the state of Florida due to the alleged negligent acts of state employees.

¹ See ch. 79-248, L.O.F.

² s. 768.28(5), F.S.; ch. 2010-26, L.O.F., effective October 1, 2011, increases the caps to \$200,000 per person and \$300,000 per incident, to apply to claims arising on or after that effective date.

³ s. 768.28(2), F.S.

⁴ See s. 284.30, F.S.

⁵ See s. 284.31, F.S.

Florida Case Law

Shands Teaching Hospital and Clinics, Inc. v. Lee⁶

The First District Court of Appeal specifically denied recognition of Shands UF as a corporation primarily acting as an instrumentality of the state. The court based its conclusion on a legislative provision which directed Shands UF, in concert with the Board of Regents, to study and develop a plan to become more self-sufficient and fiscally independent. This, the court determined, indicated legislative intent to imbue Shands UF with local autonomy and flexibility, outside of the auspice of direct state control and state treatment.

Prison Rehabilitative Industries v. Betterson⁷

The First District Court of Appeal concluded that since statutory authority provided for extensive government control over the day-to-day operations of the Prison Rehabilitative Industries and Diversified Enterprises (PRIDE), PRIDE was properly a corporation primarily acting as an instrumentality of the state, and therefore subject to the benefits of sovereign immunity.

Stoll v. Noel⁸

The Florida Supreme Court upheld the classification of physicians hired as part-time consultants at a health care facility run by the state Department of Health and Rehabilitative Services as agents of the state due to the degree of control retained or exerted by the state concerning final authority over care and treatment and thus entitlement to statutory immunity.

Pagan v. Sarasota County Public Hospital Board⁹

The Second District Court of Appeal asserted that structure dictates control in finding that a hospital board's structural control of a physicians' group made the group a corporation primarily acting as an instrumentality or agency of the state. In so doing, the court deemed noteworthy that the board created the nonprofit group through government funding, elected its entire board, and retained the power to dissolve it.¹⁰

Governance and Control of Shands Entities

The relationship between the University of Florida and the Shands entities has evolved since Shands Teaching Hospital and Clinics, Inc., was created in 1980 and since the First District Court of Appeal issued its 1985 ruling in *Shands Teaching Hospital and Clinics, Inc. v. Lee*. The University has established a significant degree of practical governance and operational control over Shands entities, as indicated by the following:

- The Shands UF, Shands Jax, and Shands Health governing boards are under the common control of the president of the University of Florida or the president's designee, the senior vice president for health affairs (VPHA).
- The VPHA, the University Board of Trustees, and university officers, faculty, and employees have the authority to maintain a controlling majority of each Shands entity's board of directors and have continually exercised this authority.
- The University president or the VPHA:

⁶ 478 So.2d 77, 79 (Fla. 1st DCA 1985)

⁷ 648 So.2d 778, 780 (Fla. 1st DCA 1995)

⁸ 694 So.2d 701, 703 (Fla. 1997)

⁹ 884 So.2d 257 (Fla. 2nd DCA 2004)

¹⁰ *Id.* at 259.

- Serves as board chairman and has board appointment and removal authority;
 - Serves as president of Shands UF;
 - Actively oversees administration by the chief executive officer of each Shands entity; and
 - Has officer appointment and removal authority except for the chief executive officers. (The chief executive officers are appointed or removed by the board of each entity, under the common control of the president of the University or the president's designee.)
- Any changes to the charter of Shands UF must be approved by the university board of trustees, and any changes to the Shands Jax charter or bylaws must be approved by the University-controlled board of Shands Health.
 - Shands UF operates a university teaching hospital on property leased by the university.

The University of Florida J. Hillis Miller Health Center Self-Insurance Program

The Florida Board of Governors¹¹ has created the University of Florida J. Hillis Miller Health Center Self-Insurance Program (UF SIP) to provide comprehensive general and professional liability protection for the University of Florida's Board of Trustees in support of the colleges of the UF HSC at the Gainesville and Jacksonville campuses and their employees, agents, and students.¹²

The UF SIP also provides professional liability protection to Shands UF and Shands Jax, their not-for-profit health care affiliates, and their employees and agents. Professional liability protection is provided to Shands hospitals and to their professional health care employees in the amount of \$2 million per claim, with no annual aggregate.

III. Effect of Proposed Changes:

The UF College of Health Professions is renamed the College of Public Health and Health Professions. This appears to be a ministerial change as public health is already offered as a degree program.

Provisions relating to Shands Jacksonville (Shands Jax), Shands Health, and the Jacksonville campus of the University of Florida (UF) are statutorily separated from provisions relating to the Gainesville campus of the UF and Shands Teaching Hospital and Clinics (currently referred to in statute as a private, not-for-profit corporation).

Regarding Shands UF:

- Its mission is expanded from the operation of Shands UF and ancillary facilities to supporting the university board of trustees' (UBOT) mission of community service and patient care, education and training and clinical research.
- Board of Directors removal authority is added to the existing appointment authority granted to the university president or the president's designee.

¹¹ See s. 7(d), Article IX, State Constitution.

¹² See s. 1004.24, F.S.

- The use of hospital facilities and personnel for community service and patient care is added to other allowable uses, as detailed in UBOT agreements.
- Comprehensive general liability insurance currently authorized for Shands affiliates by the UBOT is permitted for subsidiaries.
- Shands UF, with approval of the UBOT, is authorized to create for-profit and not-for-profit corporate subsidiaries and affiliates.
- The UBOT is afforded control of Shands UF, and Shands UF and any not-for-profit subsidiaries of Shands UF are granted sovereign immunity.

Regarding Shands Jacksonville (Shands Jax) and Shands Health:

- They exist as private not-for-profit corporations organized to support the UBOT mission of community service and patient care, education and training, and clinical research.
- Shands Jax is a teaching hospital affiliated with the UBOT, located on the UF Jacksonville campus.
- Shands Jax and Shands Health, with approval of the UBOT, are authorized to create for-profit and not-for-profit corporate subsidiaries and affiliates.
- The UBOT is afforded control of Shands Jax and Shands Health. Shands Jax, Shands Health, and any not-for-profit subsidiary of Shands Jax is granted sovereign immunity.

This bill alternately grants these entities sovereign immunity, while, at the same time, endowing the UBOT with increased authority over Shands and its associated entities. However, the UBOT is a state agency, part of the executive branch of state government.¹³ Therefore, it could be argued that Shands UF, Shands JAX, and Shands Health are eligible for sovereign immunity through their relationship with the UBOT.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

By designating certain not-for-profit corporations and subsidiaries as instrumentalities of the state, the bill could render those entities subject to the provisions of Article I, Section 24, of the Florida Constitution relating to access to public records and meetings. It is unclear whether those corporations and subsidiaries would qualify for the exemptions provided under s. 395.3036, F.S. In 1987, a newspaper alleged that Shands Teaching Hospital and Clinics, Inc., was in violation of the sunshine law and the public records law.¹⁴ The court opined that because Shands Teaching Hospital and Clinics, Inc.,

¹³ s. 1001.705(1)(d), F.S.

¹⁴ *Campus Communications, Inc., v. Shands Teaching Hospital and Clinics, Inc.*, 512 So.2d 999 (Fla. 1st DCA 1987).

is not a unit of government or private entity acting on behalf of a public agency, it was not subject to the public records law.¹⁵

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

By deeming Shands UF, Shands Jacksonville, Shands Health, and any not-for-profit subsidiaries of Shands UF or Shands Jacksonville as instrumentalities of the state for the purposes of sovereign immunity, the bill could reduce claim payouts by the UF SIP.

The extension of sovereign immunity to Shands UF, Shands Jax, Shands Health, and any not-for-profit subsidiaries would give these entities a competitive advantage in the marketplace by reducing the cost of insurance. There is precedence for extending sovereign immunity in these situations. The 2010 Legislature explicitly recognized the sovereign immunity of any not-for-profit subsidiaries of the H. Lee Moffitt Cancer Center and Research Institute.¹⁶

C. Government Sector Impact:

The DFS advises that there is no fiscal impact to the State Risk Management Trust Fund because the Fund does not provide liability coverage to the University of Florida or any Shands entity.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

¹⁵ *Id.*

¹⁶ ch. 2010-85, L.O.F.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
