

**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.)

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Prepared By: The Professional Staff of the Health Regulation Committee

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BILL: SB 626

INTRODUCER: Senator Thrasher, Senator Lynn, and Senator Dean

SUBJECT: Shands Teaching Hospital and Clinics, Inc.

DATE: March 11, 2011

REVISED: \_\_\_\_\_

|    | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION             |
|----|---------|----------------|-----------|--------------------|
| 1. | Brown   | Stovall        | HR        | <b>Pre-meeting</b> |
| 2. | _____   | _____          | HE        | _____              |
| 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 Jacksonville Medical Center, Inc., and Shands Jacksonville Healthcare, Inc., and provisions regarding the purpose of the corporations. The bill authorizes the corporations to create corporate subsidiaries and affiliates. The bill provides the University of Florida’s Board of Trustees the right to control Shands Teaching Hospital and Clinics, Inc., Shands Jacksonville Medical Center, Inc., and Shands Jacksonville Healthcare, Inc. The bill provides that Shands Teaching Hospital and Clinics, Inc., Shands Jacksonville Medical Center, Inc., Shands Jacksonville Healthcare, Inc., and any not-for-profit subsidiaries of Shands Teaching Hospital and Clinics, Inc. or Shands Jacksonville Medical Center, Inc. are instrumentalities of the state for purposes of sovereign immunity.

This bill substantially amends the following sections of the Florida Statutes: 1004.41.

**II. Present Situation:**

***The Relationship Between Shands and the University of Florida***

Shands Teaching Hospital was opened in 1958 in Gainesville for the purpose of serving the needs of the University of Florida’s School of Medicine. Over the next 21 years, the hospital operated as a part of the University. 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 University of Florida teaching hospital. Shands Teaching Hospital

and Clinics, Inc. (Shands UF) was created for that purpose in 1980 pursuant to state law enacted in 1979.<sup>1</sup>

Shands UF and Shands Jacksonville Medical Center, Inc. (Shands Jacksonville) are the established University of Florida 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 Jacksonville.

### ***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 the concept of sovereign immunity and gives the Legislature the right to waive such immunity in part or in full by general law. Section 768.28, F.S., contains the limited waiver of sovereign immunity applicable to the state.

Under this statute, officers, employees, and agents of the state will not be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

Instead, the state steps in as the party litigant and defends against the claim. Subsection (5) limits the recovery of any one person to \$100,000 for one incidence and limits all recovery related to one incidence to a total of \$200,000.<sup>2</sup> For purposes of this analysis, when the term sovereign immunity is used, it means the application of sovereign immunity and the limited waiver of sovereign immunity as provided in s. 768.28, F.S.

### ***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.<sup>3</sup> 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.<sup>4</sup> 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 alleged negligent acts of state employees.

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<sup>1</sup> See ch. 79-248, Laws of Florida.

<sup>2</sup> Section 1, ch. 2010-26, Laws of Florida, amended s. 768.28(5), F.S., effective October 1, 2011, to increase the limits to \$200,000 for one person for one incidence and \$300,000 for all recovery related to one incidence, to apply to claims arising on or after that effective date.

<sup>3</sup> See s. 284.30, F.S.

<sup>4</sup> See s. 284.31, F.S.

### ***Florida Case Law***

The relationships between the state and various entities regarding sovereign immunity has been the subject of numerous appellate court cases in Florida, including:

- *Shands Teaching Hospital and Clinics, Inc. v. Lee*<sup>5</sup>  
The First District Court of Appeal examined the waiver of sovereign immunity under s. 768.28, F.S., and opined that to come within the purview of the waiver, entities must be state agencies or “corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities.” The court found that the intent of the Legislature was to treat Shands as an autonomous and self-sufficient entity, not “primarily acting as an instrumentality on behalf of the state” because the day-to-day operations were not under direct state control and because the teaching hospital did not qualify as a state agency or corporation primarily acting as an instrumentality or agency of the state within the meaning of s. 768.28, F.S.
- *Prison Rehabilitative Industries v. Betterson*<sup>6</sup>  
The First District Court of Appeal opined that since ch. 946, F.S., provided extensive government control over the day-to-day operations of the Prison Rehabilitative Industries and Diversified Enterprises (PRIDE) and provided that PRIDE was a corporation primarily acting as an instrumentality of the state, the provisions of s. 946.5026, F.S., regarding sovereign immunity in tort actions merely clarified PRIDE’s previously existing status under s. 768.28, F.S.
- *Stoll v. Noel*<sup>7</sup>  
The Florida Supreme Court opined that the physicians hired as part-time consultants at a health care facility run by the state Department of Health and Rehabilitative Services were agents of the state due to the degree of control retained or exerted by the state concerning the “final authority over all care and treatment” and thus were entitled to statutory immunity.
- *Pagan v. Sarasota County Public Hospital Board*<sup>8</sup>  
The Second District Court of Appeal opined that “the structure dictates the control” and that, in this instance, the hospital board’s structural control of First Physicians Group made First Physicians Group a corporation primarily acting as an instrumentality or agency of the state.

### ***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:

<sup>5</sup> 478 So.2d 77 (Fla. 1<sup>st</sup> DCA 1985)

<sup>6</sup> 648 So.2d 778 (Fla 1<sup>st</sup> DCA 1995)

<sup>7</sup> 694 So.2d 701 (Fla. 1997)

<sup>8</sup> 884 So.2d 257 (Fla. 2<sup>nd</sup> DCA 2004)

- The Shands UF, Shands Jacksonville, 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:
  - 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 Jacksonville 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 Governors<sup>9</sup> 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 both the Gainesville and Jacksonville campuses and their employees, agents, and students.<sup>10</sup>

The UF SIP also provides professional liability protection to Shands UF and Shands Jacksonville, 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:**

**Section 1** amends s. 1004.41, F.S., as follows:

- The University of Florida's College of Health Professions is changed to the College of Public Health and Health Professions.
- Provisions relating to Shands Jacksonville, Shands Health, and the Jacksonville campus of the University of Florida are separated from provisions relating to the Gainesville

<sup>9</sup> See s. 7(d), Article IX, Constitution of the State of Florida

<sup>10</sup> See s. 1004.24, F.S.

- campus of the University of Florida and Shands UF by being placed into a new subsection.
- The bill provides that Shands UF is a private not-for-profit corporation organized for the primary purpose of supporting the University of Florida Board of Trustees' health affairs mission of community service and patient care, education and training of health professionals, and clinical research. Current law indicates that Shands UF is organized solely for the purpose of operating Shands Teaching Hospital and ancillary health care facilities.
  - The bill provides that the University president or the president's designee has authority to appoint and remove members of the Shands UF Board of Directors.
  - The bill allows for the use of hospital facilities and personnel in support of community service and patient care, in addition to allowable uses in current law.
  - The bill allows the University Board of Trustees to provide to Shands UF affiliates comprehensive general liability insurance as is already allowed for Shands UF subsidiaries under current law.
  - The bill allows Shands UF, with the prior approval of the University Board of Trustees, to create for-profit and not-for-profit corporate subsidiaries and affiliates.
  - The bill provides the University Board of Trustees the right to control Shands UF, and it provides that Shands UF and any not-for-profit subsidiaries are conclusively deemed corporations primarily acting as instrumentalities of the state, pursuant to s. 768.28(2), F.S., for the purposes of sovereign immunity.
  - The bill provides that Shands Jacksonville and Shands Health are private not-for-profit corporations organized for the primary purpose of supporting the University of Florida Board of Trustees' health affairs mission of community service and patient care, education and training of health professionals, and clinical research.
  - The bill provides that Shands Jacksonville is a teaching hospital affiliated with the University Board of Trustees, located on the University's Jacksonville campus.
  - The bill allows Shands Jacksonville and Shands Health, with the prior approval of the University Board of Trustees, to create for-profit and not-for-profit corporate subsidiaries and affiliates.
  - The bill provides the University Board of Trustees the right to control Shands Jacksonville and Shands Health, and it provides that Shands Jacksonville, Shands Health, and any not-for-profit subsidiary of Shands Jacksonville are conclusively deemed corporations primarily acting as instrumentalities of the state, pursuant to s. 768.28(2), F.S., for the purposes of sovereign immunity.

**Section 2** provides an effective date for the bill of July 1, 2011.

**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18, of the Florida Constitution.

**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.

**C. Trust Funds Restrictions:**

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f), of the Florida Constitution.

**D. Other Constitutional Issues:**

If immunity from liability is legislatively accorded to a private entity, a potential constitutional challenge would be that the law violates the right of access to the courts. Article I, s. 21, of the Florida Constitution provides that the courts shall be open to all for redress for an injury. To impose a barrier or limitation on litigant's right to file certain actions, an extension of immunity from liability would have to meet the test announced by the Florida Supreme Court in *Kluger v. White*.<sup>11</sup> Under the test, the Legislature would have to provide a reasonable alternative remedy or commensurate benefit, or make a legislative showing of overpowering public necessity for the abolishment of the right and no alternative method of meeting such public necessity.

However, a substitute remedy does not need to be supplied by legislation that reduces but does not destroy a cause of action. When the Legislature extends sovereign immunity to a private entity, the cause of action is not constitutionally suspect as a violation of the access to courts provision of the State Constitution because the cause of action is not completely destroyed, although recovery for negligence may be more difficult.<sup>12</sup>

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

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<sup>11</sup> 281 So.2d 1 (Fla. 1973)

<sup>12</sup> *Id.* at 4.

**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.

**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.

**B. Amendments:**

None.