

SOVEREIGN IMMUNITY

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BRIEF HISTORY

- Sovereign immunity is an ancient English common law principle based on the understanding that king, or sovereign, ruled by divine right and therefore could do no wrong.



General Concept

- Sovereign Immunity is a doctrine which precludes a litigant from asserting an otherwise meritorious cause of action against a sovereign unless the sovereign consents to suit. -- Black's Law Dictionary (5th Ed)
- Sovereign immunity is not an insurance policy; it is a prohibition on suing the government.

Modern Day Reasons for Sovereign Immunity

- Separation of powers
 - Government affairs must be protected from interference by courts and plaintiffs
- Protects the discretion of governmental authorities in decision-making
 - Government administration would be disrupted if the state could be sued at the instance of every citizen
- Regulates the fiscal impact of tort damage awards on the public treasury
 - “Public treasure must be protected from excessive encroachments”

-- Wetherington, “Tort Suits Against Governmental Entities in Florida (Florida Law Review 1992)



Florida Sovereign Immunity

Article X, Section 13 of Florida Constitution:

“Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.”



Florida Sovereign Immunity

- ❑ Only the legislature can waive sovereign immunity for state and political subdivisions through a general law.
- ❑ Section 768.28 of Florida Statutes



Limited Waiver -- 768.28, F.S.

- What is the limited waiver?
 - It allows a litigant to:
 - Recover damages in tort for money damages
 - For injury or loss of property, personal injury or death;
 - Caused by the negligent or wrongful act or omission of any employee
 - While acting in the scope of the employee's office or employment.
 - Does not include punitive damages or accrued interest prior to judgment




Limited Waiver -- s. 768.28, F.S.

- For How Much?
 - \$100,000 for a claim/judgment by one person (increases to \$200,000 on October 1, 2011);
 - \$200,000 totaling all claims arising from same incident (increases to \$200,000 on October 1, 2011)
 - Special Claims Bill must be approved by Legislature for any amount beyond these caps



Limited Waiver -- s. 768.28, F.S

- Only Governmental Entity Can be Sued
- Officers, employees or agents cannot be held personally liable (and cannot be named individually in any action) for any injury or damage caused by any act, event or omission in the scope of employment or function.
- Exception: if the officer, employee or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard for human rights, safety or property.



How do you know if the limited waiver of sovereign immunity applies?

- It is a fact determination decided by a judge or jury
- What to consider?
 - Is an state agency or subdivision involved?
 - Is the individual involved an officer, employee or agent?
 - Did a negligent or wrongful act or omission occur?
 - Did it occur within the scope of employment?
 - Did the individual act in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard for human rights, safety or property?



State agency or subdivision

- ❑ Executive department; the Legislature; judicial branch including public defenders;
- ❑ Independent establishments of the state including state university board of trustees
- ❑ Counties and municipalities
- ❑ Corporations primarily acting as instrumentalities or agencies of the state, counties or municipalities



State agency or subdivision

- Public Health Trust is a state agency or subdivision – it agency and instrumentality of a political subdivision
- University of Miami is not
 - Jaar v. University of Miami,
474 So. 2d 239 (3rd DCA 1985)



Corporations acting as instrumentalities or agencies

- ❑ Pagan v. Sarasota County Public Hospital Board, 884 So. 2d 257 (2nd DCA 2004)
- ❑ Not for profit physician group created by the Sarasota County Public Hospital Board
- ❑ Limited waiver of sovereign immunity (s. 768.28, F.S.) applied to Hospital Board and its employees
- ❑ What about the not-for-profit?



Corporations acting as instrumentalities or agencies

Pagan v. Sarasota Public County Hospital Board

- Yes.
- Not for profit group considered an agency and instrumentality of the Public Hospital Board for purposes of 768.28, F.S.
- Why? Because Board had undeniable right to control the operations of the not for profit



Corporations acting as instrumentalities or agencies

Pagan v. Sarasota County Public Hospital,

- Criteria considered by Court:
 - Not for profit created by Hospital Board
 - Hospital Board can dissolve not for profit and assets revert to Board
 - Hospital Board elects members of not for profit board, which includes a majority of hospital board members
 - Hospital Board CEO serves as not for profit's president
 - Hospital Board funds used to create and operate not-for-profit



Corporations acting as instrumentalities or agencies

□ General Parameters

- Must be more than regulatory control
- Must be more than control that flows from a simple contractual relationship
- Mere fact that corporation created by government insufficient
- Government not involved in day to day operations of the corporation



Who is an Employee

- Primary test: does the entity control or have the right to control that person's work?
- Factors to consider:
 - Selection and engagement of employee
 - Payment of wages
 - Power of dismissal
 - Right to control conduct



Who is an Employee

- Legislature has determined that the following meet the definition of “officer, employee or agent” for purposes of 768.28
 - Member of Florida Health Care Services Corp
 - Contractual health care providers for Department of Corrections
 - Regional Poison Control Centers employees or agents
 - Contractual health care providers for University athletic programs



Who is an Agent

- Factual question for judge or jury
- Factors to consider:
 - Has the principal acknowledged that the agent will act for him/her?
 - Did the agent accept the undertaking?
 - What level of control does the principal have over the actions of the agent?



Who is an Agent

- ❑ Stoll v. Noel, 694 So. 2d 701 (Fla. 1997)
- ❑ Physicians under contract with State to provide medical care to children under the Children's Medical Services Program.
- ❑ Are the physicians serving as agents of State for purposes of 768.28, F.S.?



Who is an Agent

Stoll v. Noel

- Yes.
- State retained and exercised sufficient control over physicians
 - Must abide by state manual and other CMS policies and procedures
 - All services must be authorized in advance by CMS' medical director
 - CMS medical director had authority over payment for treatments proposed by physicians
 - CMS retained responsibility to supervise and direct all medical care of the patients
 - CMS retained supervisory authority over all personnel



Agency Models Used by PHT

- University of Miami Basic Affiliation Agreement & Annual Operating Agreement
- Parties acknowledge UM medical faculty as agents of the PHT for purposes of:
 - Provision of care to Hospital Patients (medically indigent, recipients of Medicaid and other gov't programs)
 - Training and Supervising PHT medical residents
 - Engaging in certain administrative functions



Agency Models Used by PHT

- Florida International University Basic Affiliation Agreement and Annual Operating Agreement
- The parties recognize that FIU medical faculty agents for the PHT for purposes of providing care to patients at Jackson North Medical Center



Agency Models Used by PHT

- MICC Group
- Contract with physician group to provide services exclusively on behalf of PHT
- PHT controls physician group through final patient decisionmaking, billing for services rendered, allocation of resources, imposition of policies and procedures, supervision and oversight



OTHER TYPES OF IMMUNITY

- ❑ Hazardous Spills; persons who assist in containing or treating spills (768.128, F.S)
- ❑ Good Samaritan Act (768.13, F.S.) - physician rendering emergency care
- ❑ Good Samaritan Volunteer Firefighters Assistance Act
- ❑ Cardiac Arrest Survival Act (768.1325, F.S)
- ❑ Emergency Medical Dispatch Act (768.1335, F.S.)
- ❑ Professional Malpractice; Immunity (768.1345, F.S.) – rendering medical care during declared emergency
- ❑ Florida Volunteer Protection Act (768.1355, F.S)
- ❑ Liability for canned or perishable food distributed for free (768.136)
- ❑ Limitation of civil liability for certain farmers (768.137)



Bill (SB 1676, HB 1393, SB 1272)

- Physicians providing care in Teaching Hospitals
 - Amendment to definition of “officer, employee or agent” in 768.28, F.S. to include:
“Any nonprofit independent college or university located and chartered in this state which owns or operates an accredited medical school, and its employees or agents, when providing patient services pursuant to paragraph (10)(f).”



Bill (SB 1676, HB 1393, SB 1272)

- Physicians providing care in Teaching Hospitals, cont'd
- Patient Services to include:
 - Care provided to patients in a teaching hospital
 - Training and supervising residents in a teaching hospital
 - Medical Research Protocols
 - Training and supervision of medical students in a teaching hospital



Bill (SB 1676, HB 1393, SB 1272)

- Teaching Hospital is defined as a “teaching hospital owned or operated by the state, a county or municipality, a public health trust, a special taxing district, a governmental entity having health care responsibilities, or a not-for-profit entity that operates such facilities as an agent of the state or a political subdivision of the state under a lease or other contract.”



Bill (SB 1972)

- Medicaid Provider Bill (SB 1972)
 - Amendment to Medical Malpractice Statute (Chapter 766)
 - Limits liability of a health care provider for an action arising from the rendering of care to a Medicaid or Low Income Pool recipient
 - Liability Cap of \$200,000/\$300,000
 - Judgment exceeding cap must be presented to legislature for approval



CONCLUSION

- Sovereign Immunity is NOT:
 - Insurance coverage
 - Magic Pixie Dust
 - Something that can be “given”



Conclusion

- Sovereign Immunity is:
 - A restriction on suing the government and its employees or agents
- Who and/or what is considered government or an instrumentality or agency of government is a factual determination that depends on:
 - Types of entities or people involved
 - The relationships
 - Level of control
 - Intent of parties
- Ultimately an after-the-fact determination by a trier-of-fact (judge or jury)



Other Resources on HGT Website

- Section 768.28, F.S.
- Outline of Cases related to Sovereign Immunity