IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CASE NO. 1D06-4995

CONNIE ANDREW and
WILLIAM ANDREW, Individually,
and CONNIE ANDREW as Personal
Representative of the Estate of Dustin
Andrew, deceased,

Appellants,

v. L.T. No. 04-352-CA

SHANDS AT LAKE SHORE, INC., a
Florida corporation, and UNIVERSITY
OF FLORIDA BOARD OF TRUSTEES,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT,
THIRD JUDICIAL CIRCUIT, IN AND FOR
COLUMBIA COUNTY, FLORIDA

AMENDED INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE AND OF THE FACTS

This is an appeal of the partial final judgment dismissing with prejudice all claims against Defendant/Appellee, Shands at Lake Shore, Inc. ("Shands"). (R-5-869.) The trial court ruled that the limited waiver of sovereign immunity available under section 768.28(9)(a), Florida Statutes, allows the plaintiffs to sue only the University of Florida Board of Trustees for the alleged negligence of the on-call radiologists. (R-5-869; *see also* R-4-671, ¶¶ 8-10 (allegations of Third Amended Complaint).)

Statement of the Facts

Plaintiffs/Appellants, Connie Andrew and William Andrew, individually, and Connie Andrew, as Personal Representative of the Estate of Dustin Andrew, deceased (referred to individually as "Mrs. Andrew" or "Mr. Andrew," and collectively as the "Parents"), lived in Welborn, Florida, with William's 15-year-old son, Dustin Andrew (the "Child"). (R-4-670, ¶ 5.) On or about August 21, 2002, the Child visited the emergency room of Shands at Lake Shore, Inc. ("Shands"), complaining of abdominal pain and blood in his urine. (*Id.* at 671, ¶ 8.) A CT scan of his abdomen was performed and read by radiologists, including Ghulam Dastgir, M.D., and possibly other radiologists on call for interpreting diagnostic radiological exams performed at Shands. (*Id.*) The radiologists interpreted the CT scan and reported the results of their interpretation to the

healthcare providers who were attempting to diagnose and treat the Child's medical condition. (*Id.* at 671, ¶ 8.)

The radiologists failed to identify a mass or tumor located in or adjacent to the Child's bladder, which was subsequently diagnosed as a malignant tumor. (*Id.* at 671, ¶ 9.) Further, the radiologists failed to diagnose the mass, which was apparent on the CT scan, and did not take or recommend appropriate steps to rule out a tumor. (*Id.*) The malignant tumor continued to grow, eventually metastasized, and caused the Child's death. (*Id.*)

Mrs. Andrew was appointed the personal representative of the Child's estate. (R-4-670, ¶ 5.) She and Mr. Andrew, as the surviving parent, brought an action for medical and hospital negligence against Shands and the University of Florida Board of Trustees (the "Board"), under Chapter 766, Florida Statutes. The Parents sought damages for the Child's wrongful death. (*Id.* at 669, ¶¶ 2, 3; *id.* at 672, ¶ 12.)

Shands is a Florida corporation licensed to conduct business in the State of Florida, with its office and agents in Columbia County, Florida. (R-4-670, ¶ 6.)

The Board is a governmental entity organized and existing under the laws of Florida for the purpose of operating state educational facilities. (*Id.* at 670, ¶ 7.) The Board controls the University of Florida, which includes a College of Medicine. (*Id.*; *see also id.* at 677, ¶ 30(a).) The College of Medicine provides

residents for Shands' use in furnishing medical care. (*Id.* at 677, ¶ 30(a).) The Board owns the hospital building, which Shands leases. (*Id.* at 677, ¶ 30(b).) Facilities encompassed within the hospital include in-patient and support facilities for patient care, such as anesthesiology and surgery departments, laboratories, and radiology. (*Id.* at ¶ 30(c).)

Statement of the Case

The Parents initially filed the complaint against Shands and the Board on or about July 26, 2004. (R-1-1-7.) Shands moved to dismiss or, in the alternative, to strike certain portions of the complaint (R-1-13-15; R-1-22-25), and the Board moved for more definite statement (R-1-20-21). On January 21, 2005, the Parents filed an Amended Complaint and, on February 7, 2005, a Second Amended Complaint. (R-1-64-73; R-1-153-62.)

On May 3, 2006, the Parents filed a Third Amended Complaint. (R-4-669-81.) In the Third Amended Complaint, the Parents demanded judgment against Shands and the Board for all damages recoverable by the Child's estate and survivors under section 768.21, Florida Statutes. (*Id.* at 671, ¶ 10.) The Parents alleged that Dr. Dastgir, and possibly other radiologists, negligently failed to identify the mass located in or adjacent to the Child's bladder and to diagnose the mass as a tumor. (*Id.*)

In the Third Amended Complaint, the Parents relied on various theories of vicarious liability to allege claims against Shands for the negligence of Dr. Dastgir, and possibly other radiologists, who failed to properly identify and diagnose the malignant tumor near the Child's bladder. Specifically, the Parents alleged that:

(1) Shands is vicariously liable for the negligence of the radiologists who negligently interpreted the Child's CT scan, who were subject to Shands' control and who were acting within the course and scope of the master-servant relationship (Count I). (R-4-672, ¶ 14.)

(2) Shands is vicariously liable for the negligence of the radiologists under a theory of apparent agency (Count II). (R-4-673, ¶¶ 15-17.) The Parents specifically alleged in Count II that they

> came to Shands because of SHANDS' name and reputation as a hospital and allowed Dustin to undergo radiological examination and interpretation . . . in the reasonable belief that the radiology services were being rendered by SHANDS or its employees or servants.

According to the Parents, Shands represented that the radiologists were its employees or servants "[t]hrough its advertising and through the appearances created by the relationship of the radiologists and the hospital," and caused the Parents to justifiably rely on the radiologists' care and skill. (*Id.* at ¶ 17.)

(3) Shands is vicariously liable for the negligence of the radiologists through a non-delegable duty imposed by an implied contract, pursuant to which

Shands undertook to provide hospital and medical care to the Child, including diagnostic radiology examination and interpretation (Count III). (R-4-673, ¶¶ 18-19.) The Parents alleged in Count III that Shands "held itself out as providing non-negligent radiological services," and that they "were not offered the opportunity to select a radiologist other than the radiologists provided by Shands." (*Id.* at 674, ¶ 19.) According to the allegations of Count III:

> SHANDS had the duty and the ability to ensure that the radiologists providing services to its patients followed the prevailing standard of care in providing radiological examination and interpretation. Having undertaken a duty to provide diagnostic radiology interpretation, SHANDS cannot escape its liability to [the Parents] by delegating performance under a contract to an independent contractor.

(*Id.*) The Parents relied on the non-delegable duty doctrine to allege that Shands is liable for the negligence of the radiologists. (*Id.*)

(4) Shands is vicariously liable for the negligence of the radiologists because of the non-delegable duty imposed by federal regulations; specifically, the regulations governing the federal Medicare program, which require participating hospitals to maintain or have available diagnostic radiologic services and to ensure that services are performed in a safe and effective manner (Count IV). (R-4-674-75, ¶¶ 20-26.)

(5) Shands is vicariously liable for the negligence of the radiologists through the non-delegable duty imposed by state regulations, which require

Shands, as a hospital licensed by the State of Florida, to provide diagnostic radiology interpretation for its patients (Count V). (R-4-676, ¶¶ 27-28.)

In addition to the master-servant, apparent agency, and non-delegable duty claims, the Parents alleged, in Count VI of the Third Amended Complaint, that Shands and the Board engaged in a joint venture to provide medical care. (R-4-676, ¶¶ 29-31.) According to the allegations of Count VI, Shands and the Board shared: a community of interest in the performance of medical care and services to patients; control and the right of control over such medical care and services; a joint interest in the financial benefits and profits generated by the contribution of their resources and services; and financial benefits, profits and losses resulting from the joint venture. (*Id.* at 677, ¶ 30.) Count VI included details related to the joint venture; for example, only radiologists employed by the Board may practice at Shands, and the College of Medicine physicians are the only physicians who admit patients. (*Id.* at 677, ¶ 30(d); *id.* at 678, ¶ 30(g); *see generally id.* at ¶ 30(a)-(n).) The Parents sought judgment against Shands because the radiologists who provided the Child's medical care "were, at all material times, acting within the course and scope of their employment by the joint venture." (*Id.* at 679, ¶ 31.)

Finally, the Parents stated an alternative claim against only the Board in Count VII of the Third Amended Complaint. (R-4-679-80, ¶¶ 31-32.) "In addition to or in the alternative to the allegations above," the Parents alleged that the

radiologists who negligently interpreted the Child's CT scan on or about August 21, 2002 "were the employees of UFBOT and were acting within the course and scope of their employment." (*Id.* at 679-80, ¶ 32.)

Shands moved to dismiss the Third Amended Complaint and to transfer venue. (R-4-691-730; R-5-761-801.) In its Amended Motion to Dismiss Third Amended Complaint and Incorporated Motion to Change Venue and Incorporated Answer to Count VII (the "Amended Motion to Dismiss"), Shands argued that the limited waiver of sovereign immunity provided by section 768.28(9), Florida Statutes, precluded any cause of action against Shands for the alleged negligence of the physicians, who were employed by the Board. (R-5-762-73 & n.1.) According to Shands:

> By operation of this statute, no entity other than the University of Florida Board of Trustees may be sued for the alleged negligence of the physicians described in the Third Amended Complaint.

(R-5-763.)

Moreover, Shands moved to dismiss each individual count of the Third Amended Complaint (Counts I-VI). (*See* R-5-763-772.) Shands argued that the Parents failed to allege certain elements necessary to state causes of action for vicarious liability arising from a master-servant relationship (Count I), apparent agency (Count II), and non-delegable duty (Counts III, IV, and V). (*See* R-5-763-70.) Shands also sought to dismiss the Parents' cause of action for vicarious

liability arising under the doctrine of joint venture (Count VI). (*Id.* at 770-71.) The Parents opposed Shands' Amended Motion to Dismiss. (R-5-739-50.)

The trial court heard argument on the Amended Motion to Dismiss on July 31, 2006. (Supp. R-1-1-15.) While defense counsel claimed that Shands "is not claiming sovereign immunity per se" (*id.* at 5), he relied on the waiver of sovereign immunity statute (section 768.28(9)(a) of the Florida Statutes) to argue that the Parents' claims against Shands must be dismissed. (*Id.* at 6-7.) According to Shands, because "the complaint itself alleges that Dr. Datsgir is an employee and . . . all the other potential radiologists were employees or agents of the University of Florida," the Parents' "exclusive remedy, as provided in the statute, is against the University of Florida." (*Id.*)

Following the argument of counsel, the trial court stated:

> Okay. Mr. Gibbs [Shands' trial counsel], you can prepare the order. I grant your motion, and it's sanitized by opposing counsel.

(Supp. R-1-15.)

On August 25, 2006, the trial court entered the Partial Final Judgment Dismissing All Claims Against Defendant Shands at Lake Shore, Inc., as proposed by the Parents' counsel. (R-5-854; R-5-855-56.) The trial court ordered that

> SHANDS' Amended Motion to Dismiss is GRANTED and all claims against SHANDS AT LAKE SHORE, INC. are dismissed with prejudice.

(R-5-855.) The Parents timely filed the Notice of Appeal of Final Order on September 22, 2006. (R-5-872-76.)

Meanwhile, on or about August 25, 2006, Shands submitted another form of proposed partial final judgment to the trial court. (R-5-868.) On September 5, 2006, the trial court signed another Partial Final Judgment Dismissing All Claims Against Defendant Shands at Lake Shore, Inc. (the "Partial Final Judgment"), as proposed by Shands. (R-5-869.) The Partial Final Judgment, which was rendered by filing with the clerk on September 22, 2006, stated that

> all claims against SHANDS AT LAKE SHORE, INC. are dismissed with prejudice as Plaintiff's exclusive remedy lies against the UNIVERSITY OF FLORIDA BOARD OF TRUSTEES. *Fla. Stat. §768.28(9)(a).*

(R-5-869.)

On January 25, 2007, the Parents timely served the Initial Brief of Appellants, which addressed each of the grounds raised by Shands in its Amended Motion to Dismiss. Shands moved to strike the Initial Brief, arguing that the Parents raised issues on appeal that had not been addressed by the trial court. Shands asked that the Court direct the Parents to file an amended initial brief

addressing only the trial court's ruling that the Parents' "exclusive remedy" under section 768.28(9)(a), Florida Statutes, is an action against the Board.[1]

The Court first denied Shands' Motion to Strike the Initial Brief (*see* Order, entered March 7, 2007), but subsequently revisited the question of jurisdiction after Shands filed a motion to relinquish jurisdiction. The Court then ruled, in its Order entered April 18, 2007, that the trial court's Partial Final Judgment, rendered by filing with the clerk on September 22, 2006, is "the order to be reviewed on appeal." (Order, entered April 18, 2007.) Accordingly, the Court denied the motion to relinquish jurisdiction, granted Shands' motion to strike the Initial Brief, and directed the Parents to file an amended initial brief that was "limited to the basis of the trial court's ruling." (*Id.*) The Parents respectfully submit this Amended Initial Brief of Appellants, which addresses only whether the trial court erred in ruling that section 768.28(9)(a), Florida Statutes, prohibits an action against Shands for the radiologists' alleged negligence. (R-5-869.)

[1] For the same reasons, Shands opposed the Florida Justice Association's Motion for Leave to File an Amicus Curiae Brief on Behalf of Appellants, which addressed only the law related to non-delegable duty. The Court refused to permit the Florida Justice Association to file its Amicus Curiae Brief. (*See* Order, entered February 28, 2007, denying leave to file amicus curiae brief.)

SUMMARY OF ARGUMENT

The trial court erred as a matter of law when it dismissed with prejudice all of the Parents' claims against Shands. The well-pled allegations of the Third Amended Complaint, when accepted as true, adequately state claims against Shands for the negligent failure of the radiologists to identify and diagnose the Child's malignant tumor, whether those claims arise pursuant to the master-servant relationship between Shands and the radiologists (Count I), or under theories of apparent agency (Count II), non-delegable duty (Counts III, IV, and V), and joint venture (Count VI).

Shands cannot rely on the statutory immunity granted to physicians employed by the state to shield itself from liability for the radiologists' negligence. Section 768.28(9), Florida Statutes, upon which Shands relies, must be strictly construed to protect only individual state officers, agents, or employees. The limited waiver of immunity within the statute – which allows an injured plaintiff to sue the governmental entity (here, the Board) for its employee's negligence – does not require dismissal of the Parents' claims against Shands. Aside from Shands' inability as a matter of law to rely on the physicians' immunity to shield itself from liability, Shands is an independent entity – not a state agency. The extension of sovereign immunity to Shands contradicts the plain language of the statute and its legislative purpose.

Therefore, the Parents ask that this Court reverse the Partial Final Judgment dismissing with prejudice all claims against Shands, and remand to allow the Parents to plead and prove Shands' liability for the negligent failure of the radiologists to identify and diagnose the Child's malignant tumor.

ARGUMENT

Standard of Review

Whether the trial court properly dismissed the Third Amended Complaint against Shands is a question of law. *City of Gainesville v. Dept. of Transp.*, 778 So. 2d 519, 522 (Fla. 1st DCA 2001). "On appeal of a judgment granting a motion to dismiss, the standard of review is de novo." *Id.* In ruling on Shands' Amended Motion to Dismiss, the trial court "was obliged to treat as true all of the amended complaint's well-pleaded allegations, . . . and to look no further than the amended complaint . . . ." *Id.*; *accord Agner v. APAC-Fla., Inc.*, 821 So. 336, 338 (Fla. 1st DCA 2002). This the trial court failed to do.

Instead, the trial court dismissed with prejudice each of the Parents' claims against Shands, ruling that the Parents' exclusive remedy for the radiologists' negligence lies against the Board under section 768.28(9)(a), Florida Statutes. (R-5-869.) "The standard of appellate review on issues involving the interpretation of statutes is de novo." *B.Y. v. Dep't of Children & Families*, 887 So. 2d 1253, 1255 (Fla. 2004); *accord Fla. Birth-Related Neurological Injury Comp. Ass'n v. Fla.*

Div. of Admin. Hrgs., 948 So. 2d 705, 709-10 (Fla. 2007). Because the trial court's interpretation of section 768.28(9)(a) contradicts the plain language of the statute, the Partial Final Judgment dismissing all of the Parents' claims against Shands must be reversed.

I. THE TRIAL COURT ERRED IN RULING THAT THE PARENTS' "EXCLUSIVE REMEDY" FOR THE RADIOLOGISTS' ALLEGED NEGLIGENCE IS AN ACTION AGAINST THE BOARD. SHANDS CANNOT SHIELD ITSELF FROM LIABILITY UNDER THE STATUTORY IMMUNITY GRANTED TO THE BOARD'S PHYSICIANS.

The trial court relied on the sovereign immunity granted to the Board's physicians to dismiss with prejudice each of the Parents' claims against Shands. (R-5-869.) This was error. Shands argued in its Amended Motion to Dismiss that the limited waiver of sovereign immunity available under section 768.28(9)(a), Florida Statutes, only permits claims for medical negligence against the Board itself. (R-5-763.) According to Shands:

> By operation of this statute, no entity other than the University of Florida Board of Trustees may be sued for the alleged negligence of the physicians described in the Third Amended Complaint.

(*Id.*) Shands' interpretation contradicts established law.

Section 768.28(9)(a), Florida Statutes, states, in pertinent part, as follows:

> (9)(a) No officer, employee, or agent of the state or any of its subdivisions shall 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. However, such officer, employee, or agent shall be considered an adverse witness in a tort 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. The exclusive remedy for injury or damage suffered as a result of an act, event, or omission of any officer, employee, or agent of the state or any of its subdivisions or constitutional officers shall be by action against the governmental entity, or the head of such entity in her or his official capacity, or the constitutional officer of which the officer, employee, or agent is an employee, unless such act or omission was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

§ 768.28(9)(a), Fla. Stat. (2002).

In construing statutory provisions, courts should consider the history, the legislative intent, the evil to be corrected, the subject regulated, and the object to be obtained. *State Bd. of Accountancy v. Webb*, 51 So. 2d 296, 299 (Fla. 1951). The polestar for statutory interpretation is the legislature's intent, and that intent is determined primarily from the language used. *St. Petersburg Bank & Trust Co. v. Hamm*, 414 So. 2d 1071, 1073 (Fla. 1982). Clear and unambiguous language of a statute should be given effect; unambiguous statutes should not be subject to construction or interpretation. *Robinson v. Sterling Door & Window Co.*, 698 So.

2d 570, 571 (Fla. 1st DCA 1997). In the absence of ambiguity, the plain meaning of a statute controls. *State v. Dugan*, 685 So. 2d 1210, 1212 (Fla. 1996).

Courts should also give meaning to the words used in light of their effect on the purpose of a statute. *Cason v. Fla. Dep't of Mgmt. Servs.*, 2006 Fla. LEXIS 2686, *18 (Fla. Nov. 16, 2006). Consequently, when interpreting a statute, the courts should look to the entire statutory scheme to determine the legislature's intent. *State v. J.M.*, 824 So. 2d 105, 110-11 (Fla. 2002).

Here, section 768.28(9)(a), Florida Statutes, is encompassed within section 768.28, which waives the sovereign immunity for the state, its agencies, and subdivisions "only to the extent specified in this act." § 768.28(1)(a), Fla. Stat. The statute must be strictly construed. *Levine v. Dade County Sch. Bd.*, 442 So. 2d 210, 211 (Fla. 1983); *accord City of Gainesville v. Dep't of Transp.*, 920 So. 2d 53, 54 (Fla. 1st DCA 2005), *review denied*, 935 So. 2d 1219 (Fla. 2006).

The language of section 768.28(9)(a), Florida Statutes, is clear and unambiguous. Subsection (9)(a) only precludes an "officer, employee, or agent of the state" from being held *personally* liable in tort or named as a party defendant. § 768.28(9)(a), Fla. Stat.; *see also Smith v. Rankin*, 32 Fla. L. Weekly D750C, Case No. 2D06-3144 (Fla. 2d DCA March 21, 2007) (interpreting section 768.28(9)(a) to find that the statute "shields a State employee from liability for conduct that injures or damages another") (LaRose, J., concurring). The statute

provides that the exclusive remedy for any injury or damage caused by the act or omission of the individual officer, employee, or agent is an action against the governmental entity that employs the individual. § 768.28(9)(a), Fla. Stat. Nowhere within its plain language does the statute prohibit an injured plaintiff from suing an independent entity that may also be held liable. *See Jaar v. Univ. of Miami*, 474 So. 2d 239, 245 (Fla. 3d DCA), *aff'd on reh'g en banc*, 474 So. 2d 239 (Fla. 3d DCA 1985).

The Third District's decision in *Jaar* is directly on point. In *Jaar* the Third District considered whether the doctrine of sovereign immunity applied to limit the liability of a private, non-profit educational institution (the University of Miami) for the negligent acts of its employee. The University's employee, a member of the medical school's faculty, was an attending physician at Jackson Memorial Hospital, a county hospital operated by the Public Health Trust of Dade County (the "Trust"). 474 So. 2d at 240, 245.[2] The Trust admitted that the attending physician and three medical residents acted as its employees or agents in the negligent treatment of a hospital patient. *Id.* at 244. Accordingly, the *Jaar* Court found that the physicians were entitled to immunity from liability under section 768.28(9)(a), Florida Statutes. *Id.*

[2] The Trust operated the county hospital; the University of Miami contracted with the county hospital to provide patient care and to teach residents there. *Id.* at 240-41, 242, nn. 3 & 4.

The Third District, however, rejected any notion that the University could rely on the physicians' statutory immunity to shield itself from liability. *Id.* at 245. The Third District reasoned that although the county hospital's immunity extends to the acts of its agents, this immunity does not revert to the agents' principal. *Id.* "The University receives no sovereign immunity protection from the doctors' relationship to the [county hospital]." *Id.*

Indeed, the University would be immune, according to the *Jaar* Court, "only if it were an agent of the Trust." *Id.* Yet because the clear and unambiguous language of the contracts between the Trust and the University demonstrated the absence of any agency relationship – and showed instead that the two were independent entities "joined for the purpose of providing health and medical services to the public" – the Third District declined to extend immunity to the University itself. *Id.*

The Third District also found that any extension of the doctrine would not fulfill the legislative purpose of the statute. As the Third District reasoned:

> The legislative purpose in enacting sovereign immunity statutes is to protect the public from "profligate encroachments on the public treasury." . . . . The University is a private non-profit educational institution. Any liability it incurs for the negligence of its employees has no effect on the public treasury.

474 So. 2d at 245. The *Jaar* Court concluded, then, that "the University is not entitled to benefit from sovereign immunity protections." *Id.*

Like the University in *Jaar*, Shands is not entitled to benefit from the sovereign immunity protection afforded to individual physicians under section 768.28(9)(a), Florida Statutes. *See id.* While section 768.28(9)(a) plainly entitles the individual radiologists to sovereign immunity, the statute does not extend immunity to Shands. As a matter of law, Shands cannot rely on the physicians' immunity to shield itself from liability. *See id.*

Nor is Shands itself entitled to sovereign immunity. *See Shands Teaching Hosp. & Clinics, Inc. v. Lee*, 478 So. 2d 77, 78-79 (Fla. 1st DCA 1985) (interpreting section 768.28(2), Fla. Stat.). Despite defense counsel's claim that Shands "is not claiming sovereign immunity per se" (Supp. R-1-5), the trial court essentially finds – in ruling that the Parents' exclusive remedy lies against the Board – that Shands cannot be sued for the negligence of its on-call radiologists. (R-5-869; *see also* Supp. R-1-6-7; R-5-762-73 (arguments by Shands' counsel).)

Yet Shands is an independent entity – not a state agency or corporation acting primarily as an instrumentality or agency of the state. *See Shands Teaching Hosp. & Clinics, Inc. v. Pendley*, 577 So. 2d 632, 633 (Fla. 1st DCA 1991); *Lee*, 478 So. 2d at 78-79; *see also* § 768.28(2), Fla. Stat. (defining "state agencies or subdivisions"). For this reason alone, Shands does not fit within the confines of section 768.28, Florida Statutes. Shands is not entitled to any protection that the statute affords. *See Lee*, 478 So. 2d at 78 (ruling that Shands was not entitled to

the benefit of section 768.28(8), Florida Statutes, which limits attorneys' fees against the state or any of its agencies or subdivisions to twenty-five percent of the judgment or settlement). And because Shands is an independent entity, any liability that Shands may incur for the radiologists' negligence "has no effect on the public treasury." *Jaar*, 474 So. 2d at 245. The trial court's extension of sovereign immunity to Shands contradicts not only the plain language of the statute, but also the statute's legislative purpose. *See id.*

In any event, the trial court's dismissal of the Parents' claims with prejudice contradicts Florida law, which requires the trial court to accept as true all of the Third Amended Complaint's well-pled allegations. *See, e.g., Agner v. APAC-Fla., Inc.*, 821 So. 2d 336, 338 (Fla. 1st DCA 2002). "Only a 'true agent' of the government may 'share in the full panorama of the government's immunity.'" *Id.* (citations omitted); *see also Pagan v. Sarasota County Pub. Hosp. Bd.*, 884 So. 2d 257, 263 (Fla. 2d DCA 2004) (finding that a non-profit corporation created, funded, and controlled by the governing board of a county hospital district was entitled to sovereign immunity under section 768.28), *review denied*, 894 So. 2d 971 (Fla. 2005). Nowhere within the Third Amended Complaint, however, did the Parents allege that Shands acted as the Board's agent or was otherwise subject to the Board's control. *See Agner*, 821 So. 2d at 338.

Indeed, the Parents specifically alleged in Count VI that Shands and the Board engaged in a joint venture to provide medical care to Shands' patients. (R-4-676, ¶ 30.) Although the Parents also pled that the negligent radiologists were employed by the Board (R-4-679-80, ¶ 32), this alternative allegation does not create even a question of fact as to the degree of control exercised by the Board. *See Agner*, 821 So. 2d at 340. Even assuming that Shands could rely on section 768.28 as a matter of law (which, of course, it cannot), there is no evidence to suggest that Shands is entitled to sovereign immunity. *See Ragoonanan v. Assoc. in Obstetrics & Gynecology*, 619 So. 2d 482, 484 (Fla. 2d DCA 1993) (finding that the trial court prematurely dismissed the plaintiffs' claims under section 768.28(9)(a), for "there is insufficient evidence in the record at this stage of the proceedings to determine the issue of sovereign immunity") (citing *Testa v. Pfaff*, 464 So. 2d 220 (Fla. 1st DCA 1985)); *see also Ragoonanan v. Assoc. in Obstetrics & Gynecology*, 640 So. 2d 1178, 1179 (Fla. 2d DCA 1994) (again reversing improper dismissal of complaint with prejudice under section 768.28(9)(a), Florida Statutes).

For all these reasons, Shands is not entitled to benefit from the sovereign immunity protections of section 768.28(9)(a), Florida Statutes. *See Jaar*, 474 So. 2d at 245. The trial court erred as a matter of law in dismissing the Parents' claims against Shands with prejudice. (R-5-869.)

CONCLUSION

For all the foregoing reasons, Appellants, Connie Andrew and William Andrew, individually, and Connie Andrew, as Personal Representative of the Estate of Dustin Andrew, deceased, respectfully request that this Court reverse the Partial Final Judgment Dismissing All Claims Against Defendant Shands at Lake Shore, Inc. in its entirety, and remand to allow the Appellants to plead and prove each of the claims stated in the Third Amended Complaint.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Susan L. Kelsey, Anchors Smith Grimsley, The Perkins House, 118 N. Gadsden St., Tallahassee, Florida 32301 (Appellate Counsel for Appellees); and Eric P. Gibbs, Hannah, Estes & Ingram, P.A. (Counsel for Defendants/Appellees), P.O. Box 4874, Orlando, Florida 32802-4974; by U.S. Mail, this 3rd day of May, 2007.

Rebecca Bowen Creed
Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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