APPENDIX

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-11082
Non-Argument Calendar

D.C. Docket No. 3:14-cv-01454-TJC-MCR

[Filed November 5, 2018]

FLUID DYNAMICS HOLDINGS, LLC,
a Delaware Limited Liability Company,

Plaintiff - Appellant,

versus

CITY OF JACKSONVILLE,
a Florida municipality,
JACKSONVILLE ELECTRIC AUTHORITY,
a body politic and corporate created by the
Charter of the City of Jacksonville, Florida,

Defendants - Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(November 5, 2018)

Before MARCUS, MARTIN, and ROSENBAUM, Circuit Judges.

PER CURIAM:

Fluid Dynamics Holdings, LLC, appeals the entry of summary judgment in favor of the Jacksonville Electric Authority ("the JEA"), an agency of the City of Jacksonville, Florida. The district court ruled on the basis of sovereign immunity. After review, we affirm.

I.

Fluid Dynamics sued the City of Jacksonville ("the City") and the JEA under Florida law for tortious interference and defamation. The complaint alleged the City and the JEA interfered with an agreement Fluid Dynamics had to install "Precision Flow Systems" on water pipes at private apartment complexes in Jacksonville. Concerned these devices might cause fire safety issues, the City and the JEA required Fluid Dynamics to remove some of them. The City and the JEA also voiced concerns about the devices in a news article published in First Coast News.

In response to the suit brought by Fluid Dynamics, the City and the JEA both raised sovereign immunity as an affirmative defense. Fluid Dynamics later dismissed the City with prejudice.

The JEA moved for partial summary judgment, asserting it is entitled to sovereign immunity except to the extent waived by the Florida legislature in Florida Statute § 768.28. Fluid Dynamics countered that whether the JEA is entitled to sovereign immunity turns on the level of control the City exerts over the

JEA, which it contended is a question of fact. As support, Fluid Dynamics cited Plancher v. UCF Athletics Association, Inc., 175 So. 3d 724 (Fla. 2015), in which the Florida Supreme Court held a private, nonprofit corporation was entitled to sovereign immunity because of the control a state university exerted over it.

The district court held the JEA is a governmental unit entitled to sovereign immunity as a matter of law and thus granted the JEA's motion. The district court considered itself bound by the Florida First District Court of Appeal's decision in Jetton v. Jacksonville Electric Authority, 399 So. 2d 396 (Fla. 1st DCA 1981), which held that the JEA has sovereign immunity. Id. at 396.

The JEA then moved for summary judgment, asserting Fluid Dynamics did not provide pre-suit notice required by § 768.28, such that the JEA retained its sovereign immunity. Fluid Dynamics admitted it did not provide the required notice. The district court entered final judgment in the JEA's favor. This appeal followed.

II.

Florida municipalities and municipal agencies enjoy sovereign immunity.[1] See Cauley v. City of Jacksonville, 403 So. 2d 379, 384 (Fla. 1981); Jetton, 399 So. 2d at 398. However, the Florida legislature has waived sovereign immunity from tort suits to the extent set out in § 768.28. The waiver extends to any state "agencies or subdivisions," defined to include "counties and municipalities" and "corporations primarily acting as instrumentalities or agencies of . . . municipalities." Id. § 768.28(1), (2). We agree with the district court's ruling that the JEA has sovereign immunity subject to the § 768.28 waiver.

As the district court explained, the Jacksonville Charter defines the JEA as an "independent agenc[y]" of the City. Jacksonville, Fla., Charter § 18.07. The Florida legislature "created and established" the JEA by statute as a "body politic and corporate" to exercise "all powers with respect to electric, water, sewer, natural gas and such other utilities which are now, in future could be, or could have been but for this article, exercised by the City of Jacksonville." Id. § 21.01 (citing statutes creating the JEA). As the Charter makes plain, the JEA is a governmental entity created by the Florida legislature, and it primarily acts as the City's agent in providing utility services.

What's more, Florida courts have already determined the JEA is entitled to sovereign immunity

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[1] We apply Florida substantive law, including Florida sovereign immunity law, in this diversity case. Carlson v. FedEx Ground Package Sys., Inc., 787 F.3d 1313, 1318 (11th Cir. 2015).

and subject to the provisions of § 768.28. See Jetton, 399 So. 2d at 398.[2] In Jetton, a man sued the JEA over injuries he sustained when building materials he was carrying touched a JEA electrical transmission line. Id. at 396. The JEA asserted that its liability was limited by § 768.28(5), which at the time limited recovery from a municipal agency to $50,000. Id. at 397. The First District Court of Appeal concluded the JEA "is a governmental unit, an electric utility operated by the City of Jacksonville." Id. at 398. It held the damages cap "clearly extends to units that, like JEA, are 'primarily acting as instrumentalities or agencies of . . . municipalities.'" Id. (quoting Fla. Stat. § 768.28(2)) Florida courts continue to follow Jetton's sovereign immunity holding. See Fluid Dynamics Holdings LLC v. City of Jacksonville, Case No. 3:14-cv-1454-J-32MCR, 2017 WL 3723367, at *3 n.5 (M.D. Fla. Aug. 29, 2017) (collecting cases). And the Second District Court of Appeal cited Jetton in Sebring Utilities Commission v. Sicher, 509 So. 2d 968, 970 (Fla. 2d DCA 1987), in concluding another Florida municipal agency has sovereign immunity.

Fluid Dynamics says the Florida Supreme Court's decision in Plancher called Jetton into question. 175 So. 3d at 724. Not so. In Plancher, the Florida Supreme Court held the University of Central Florida Athletics Association, a private non-profit corporation, is entitled

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[2] We are "bound to adhere to decisions of the state's intermediate appellate courts absent some persuasive indication that the state's highest court would decide the issue otherwise." Winn-Dixie Stores, Inc. v. Dolgencorp, LLC, 746 F.3d 1008, 1021 (11th Cir. 2014) (quotation marks omitted).

to sovereign immunity because of the degree of control the University of Central Florida exercises over it. Id. at 729. Plancher looked to the athletic association's bylaws and to Florida statutes to determine the university exercised sufficient control over the athletic association to entitle the athletic association to sovereign immunity. If we accept that Plancher's control test applies to governmental entities as well as private corporations controlled by state agencies, the test is met here. The City exercises control over the JEA. The mayor appoints, and the municipal council confirms, members of the JEA's board. Jacksonville, Fla., Charter § 21.03; cf. Plancher, 175 So. 3d at 728 (discussing UCF's control over the athletic association board). The mayor and the municipal council approve the JEA's budget and have unique powers over the JEA's revenues. Jacksonville, Fla., Charter § 21.07; cf. Plancher, 175 So. 3d at 728-29 (discussing UCF's power over the athletic association budget). And the municipal council has the power to amend the article of the charter that delineates the JEA's powers. Jacksonville, Fla., Charter § 21.11. The Florida Supreme Court found a similar level of control sufficient to make the University of Central Florida Athletic Association an instrumentality of the University of Central Florida. See Plancher, 175 So. 3d at 728–729. So too the City's control over the JEA makes it an instrumentality or agency of the municipality.

The bottom line is the JEA is entitled to sovereign immunity. The Florida legislature waived the JEA's immunity from tort liability in § 768.28. However, Fluid Dynamics has conceded that it did not satisfy the

pre-suit notice requirements set out in § 768.28(6). Failure to provide the required notice is "fatal" to a tort suit against an entity with sovereign immunity. Menendez v. N. Broward Hosp. Dist., 537 So. 2d 89, 91 (Fla. 1988). Judgment in the JEA's favor was proper for that reason.

We therefore AFFIRM the district court's judgment. We DENY AS MOOT Fluid Dynamics' motion to certify a question to the Florida Supreme Court.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Case No. 3:14-cv-1454-J-32MCR

[Filed February 20, 2018]

FLUID DYNAMICS HOLDINGS, LLC, a Delaware Limited Liability Company,	)
Plaintiff,	)
v.	)
CITY OF JACKSONVILLE, a Florida municipality and JACKSONVILLE ELECTRIC AUTHORITY, a body politic and corporate created by the Charter of the City of Jacksonville, Florida,	)
Defendants.	)

ORDER AND FINAL JUDGMENT

This case is before the Court on Defendant Jacksonville Electric Authority's ("JEA") Motion for Summary Final Judgment. (Doc. 68). Plaintiff Fluid Dynamics Holdings, LLC filed a response. (Doc. 69).

On August 29, 2017, the Court found as a matter of law that JEA is entitled to sovereign immunity in this action because it is a "governmental unit acting as an instrumentality of the City of Jacksonville." (Doc. 63 at 14). Under Florida law, a plaintiff must provide pre-suit notice to the Florida Department of Financial Services in addition to presenting pre-suit notice to the relevant agency. Fla. Stat. § 768.28(6)(a). Fluid Dynamics concedes that it did not provide pre-suit notice to the Department of Financial Services. (Doc. 69 at 5). However, if, contrary to the Court's Order, JEA is not entitled to sovereign immunity, Fluid Dynamics was not required to provide pre-suit notice to the Department of Financial Services.

JEA now requests that the Court enter summary judgment in its favor on all counts due to Fluid Dynamics's failure to provide pre-suit notice. (Doc. 68 at 6). Fluid Dynamics also requests that the Court enter a final judgment in JEA's favor so it may appeal the Order finding that JEA is entitled to sovereign immunity. (Doc. 69 at 5).

Accordingly, it is **ORDERED AND ADJUDGED** that:

1. Defendant Jacksonville Electric Authority's Motion for Summary Final Judgment (Doc. 68) is **GRANTED**.

2. Judgment is entered in favor of Defendant Jacksonville Electric Authority and against Plaintiff Fluid Dynamics Holdings, LLC.

3. The stay imposed on December 11, 2017 is lifted.

4. All deadlines and motions are terminated, and the Clerk should close the file.

DONE AND ORDERED in Jacksonville, Florida the 20th day of February, 2018.

s/_____
TIMOTHY J. CORRIGAN
United States District Judge

sj
Copies:

Counsel of record

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Case No. 3:14-cv-1454-J-32MCR

[Filed August 29, 2017]

FLUID DYNAMICS HOLDINGS LLC, A Delaware Limited Liability Company,	)
Plaintiff,	)
v.	)
CITY OF JACKSONVILLE, et. al.,	)
Defendants.	)

ORDER

Is JEA, the City of Jacksonville's independent electric authority, entitled to sovereign immunity such that Florida Statute § 768.28, which governs tort claims against governmental entities, applies to tort actions against JEA? The answer is yes.

This case is before the Court on Defendant JEA's Motion for Partial Summary Judgment on the Affirmative Defense of Sovereign Immunity (Doc. 53), to which Plaintiff Fluid Dynamics Holdings LLC has responded (Doc. 56). With the Court's permission, JEA

filed a reply (Doc. 59), and Fluid Dynamics filed a sur-reply (Doc. 60). On January 3, 2017, the Court held a hearing on this issue, (See Docs. 46, 47, 54), the record of which is incorporated by reference.

I. BACKGROUND

According to its Complaint, Fluid Dynamics manufactured the "Precision Flow System," a product engineered to "[conserve] water and substantially [reduce] water bills." (Doc. 1 ¶ 13). Mid-America Apartment Communities, Inc. ("MAA") entered into an agreement with Fluid Dynamics to place Precision Flow System valves on some of MAA's properties. (Id. ¶¶ 16-17). Under this agreement, Fluid Dynamics installed Precision Flow System valves on eight MAA properties in Jacksonville, Florida. (Id. ¶ 17). Both the City of Jacksonville and JEA knew that Fluid Dynamics installed these valves at MAA properties. (Id. ¶ 18).

In November 2012, JEA discovered that Fluid Dynamics installed two Precision Flow Systems on fire lines at MAA properties. (Id. ¶ 21). On December 3, 2012, representatives of JEA, Fluid Dynamics, and MAA met to discuss what to do about the Precision Flow System valves installed on fire lines, and Fluid Dynamics "agreed to remove its installations from the two fire lines." (Id. ¶¶ 22-25).

The next day, First Coast News, a Jacksonville news outlet, published a negative story about MAA, Fluid Dynamics, and the Precision Flow System. (Id. ¶ 26). The story was titled "Apartment Company's Efforts to Trim Water Bills could be Putting

Jacksonville Tenants in Danger." (Id.). In the story, JEA accused Fluid Dynamics of "meter tampering" and stated that the Precision Flow System "can be a safety issue in the case of a fire." (Id. ¶¶ 28-29).

The news story damaged Fluid Dynamics' business relationship with MAA. (Id. ¶¶ 37-41). After it aired, MAA terminated its contract with Fluid Dynamics and removed all previously installed Precision Flow System valves from MAA's properties in Jacksonville. (Id. ¶ 37). Shortly thereafter, the City of Jacksonville provided a multimillion dollar incentive and subsidy package to MAA. (Id. ¶¶ 39-40).

Fluid Dynamics also alleges that JEA interfered with Fluid Dynamics' business relationship with Saint John's County, Florida. (See id. ¶¶ 87-94). In January 2013, Fluid Dynamics agreed to sell the Precision Flow System to St. John's County. (Id. ¶¶ 87-94). Fluid Dynamics alleges that when JEA learned of this relationship, JEA "threatened to remove municipal and utility cooperation and assistance from St. John's County if St. John's County continued its business relationship with" Fluid Dynamics. (Id. ¶ 61)

Fluid Dynamics alleges that JEA made defamatory statements about Fluid Dynamics and the Precision Flow System (Count I); that JEA tortiously interfered with Fluid Dynamics' contractual relationship with MAA (Count II); and that JEA intentionally interfered with Fluid Dynamics' business relationship with St. John's County (Count III). (Id.). On January 2, 2017, after the Court set a hearing on JEA's Motion for

Protective Order (Doc. 46),[1] JEA moved for partial summary judgment on the affirmative defense of sovereign immunity. (Doc. 53). JEA seeks a dispositive ruling to determine whether it "is immune from tort liability except to the extent that it is waived in Fla. Stat. § 768.28." (Id. at 2).

II. ANALYSIS

A. Sovereign Immunity and Florida Law

Sovereign immunity is a common law doctrine that developed in medieval England. Cauley v. City of Jacksonville, 403 So. 2d 379, 381 (Fla. 1981). The doctrine comes "from the concept that one could not sue the king in his own courts; hence the phrase 'the king can do no wrong.'" Id. In the United States, both the states and the federal government "fully embraced the sovereign immunity theory." Id. (citing Restatement (Second) of Torts § 895B, comment a at 400 (1979)). Thus, at common law, "state governments, their agencies, and their subdivisions could not be sued in state courts without state consent."[2] Id.

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[1] In that motion, JEA sought to prevent Fluid Dynamics from taking a deposition of JEA's CEO. That motion remains under advisement pending the outcome of JEA's Motion for Partial Summary Judgment.

[2] This federal court sitting in diversity is applying Florida law, including state sovereign immunity law. See, e.g., Cook ex rel. Estate of Tessier v. Sheriff of Monroe Cty., Fla., 402 F.3d 1092, 1117–19 (11th Cir. 2005) (concluding under supplemental jurisdiction that a state law claim for negligent training and supervision was barred by Florida state law sovereign immunity).

In 1973, the Florida legislature enacted section 768.28, Florida Statutes, waiving "sovereign immunity for liability for torts." Fla. Stat. § 768.28(1). The statute's waiver specifically applies to "the state or any of its agencies or subdivisions." Id. The statute provides that "state agencies or subdivisions include . . . independent establishments of the state, including . . . counties and municipalities; and corporations acting primarily as instrumentalities or agencies of the state, counties, or municipalities." Id. § 768.28(2).[3]

However, Florida's waiver of sovereign immunity is limited. See id. § 768.28(5). Tort liability for the state, its agencies, or its subdivisions "shall not include punitive damages or interest for the period before judgment." Id. Neither will the state, its agencies, nor its subdivisions "be liable to pay a claim or a judgment by any one person which exceeds the sum of $200,000." Id.[4] Therefore, a plaintiff who pursues a tort claim

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[3] Because the statute uses the language "including," section 768.28's list of "independent establishments of the state" is not exhaustive. See United States v. Hastie, 854 F.3d 1298, 1304 (11th Cir. 2017) ("[T]he word 'including' in a statute signifies enlargement not limitation." (citations omitted)). Thus, an entity need not be explicitly described in section 768.28 for the statute to apply.

[4] In pertinent part, section 768.28(5) provides:

> Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of $200,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of $300,000. However, a

against Florida or one of Florida's agencies or subdivisions cannot recover more than $200,000 (absent a claims bill passed by the Legislature and signed by the Governor into law).

JEA argues that section 768.28 limits the amount Fluid Dynamics can recover. However, Fluid Dynamics argues that section 768.28 is inapplicable to JEA. Thus, it is necessary to analyze whether sovereign immunity, as applied through section 768.28, applies to JEA.

B. JEA's Status Under Section 768.28

JEA, formerly known as the Jacksonville Electric Authority, is listed in the city charter as an "independent agency" of the City of Jacksonville. Charter of the City of Jacksonville § 18.07(d); see also Ch. 78-538, § 1, Laws of Fla. (same); Ch. 80-515, § 1, Laws of Fla. (same); Ch. 92-341, § 1, Laws of Fla. (same). The Florida legislature established JEA in 1967 as a "body politic and corporate" and provided JEA with "all powers with respect to electric, water, sewer, natural gas and such other utilities which are now, in the future could be, or could have been . . . exercised by the City of Jacksonville." Charter of the City of Jacksonville § 21.01. Because JEA is a statutorily

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judgment or judgments may be claimed and rendered in excess of these amounts and may be settled and paid pursuant to this act up to $200,000 or $300,000, as the case may be; and that portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature.

created entity, it is not incorporated with the Florida Secretary of State.

In 1981, the Florida First District Court of Appeal decided that JEA has sovereign immunity under section 768.28. See Jetton v. Jacksonville Elec. Auth., 399 So. 2d 396, 398 (Fla. Dist. Ct. App. 1981) ("The waiver of sovereign immunity under the statute clearly extends to units that, like JEA, are primarily acting as instrumentalities or agents of . . . municipalities." (alteration in original) (internal quotations marks omitted)). Jetton determined that JEA was "a governmental unit, an electric utility operated by the City of Jacksonville." Id. (citing Ven-Fuel v. Jacksonville Elec. Auth., 332 So. 2d 81 (Fla. Dist. Ct. App. 1975); Amerson v. Jacksonville Elec. Auth., 362 So. 2d 433 (Fla. Dist. Ct. App. 1978)). As a governmental unit, JEA is entitled to section 768.28(5)'s liability limits. Id. Florida circuit courts and federal district courts have continuously cited Jetton and ruled that section 768.28 applies to JEA.[5]

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[5] Duval County circuit courts have consistently applied Jetton and held that section 768.28 applies to JEA. See, e.g., Order on Defendants' Motion to Dismiss, or Alternatively, Motion to Stay, Bartram Park Ltd. v. City of Jacksonville, No. 16-2008-CA-14100-XXXX-MA (Fla. Cir. Ct. Jan. 28, 2010) (citing Jetton for the proposition that JEA is a municipal agency but finding that sovereign immunity does not bar claim for breach of implied contract); Hill v. Altec Indus., Inc., No. 02-04265-CA (Fla. Cir. Ct. Apr. 19, 2005) (granting summary judgment in favor of JEA because plaintiff failed to meet the notice requirements under section 768.28); Order Dismissing Count III of the Second Amended Complaint, Liberty Mut. Ins. Co. v. Fortress Homes & Cmtys. of Fla., LLC, No. 2003-CA-00856 (Fla. Cir. Ct. Oct. 12, 2004) ("JEA is a governmental unit which primarily acts as an

While Jetton remains the seminal case regarding section 768.28 and JEA, other Florida courts have come to a similar conclusion concerning the sovereign immunity of other municipal utilities in the state. For example, in Sebring Utilities Commission v. Sicher, the Second District Court of Appeal had to determine whether to apply section 768.28's liability limitations to a municipal utility. 509 So. 2d 968 (Fla. Dist. Ct. App. 1987). The Second District agreed with Jetton and held that section 768.28 applied to a "utility acting as a municipality." Id. at 970.

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instrumentality or an agency of a municipality." (citing Jetton, 399 So. 2d at 396)); Order on Plaintiff's Motion to Strike, Williams v. Jacksonville Elec. Auth., No. 1997-CA-4539, Div. CV-B (Fla. Cir. Ct. Oct. 23, 1997) (applying section 768.28 to claims against JEA); see also Bombgartner v. Jacksonville Elec. Auth., 1 Fla. Jury Verdict Rev. & Analysis (Jury Verdicts Review Publications, Inc.) 4:C8 (Fla. Cir. Ct. 1990) (plaintiffs' award was limited to $200,000 under Florida's sovereign immunity law, with plaintiffs accepting the limit).

Another judge of this Court has also applied section 768.28 to JEA. See Sipho v. Jacksonville Elec. Auth., No. 3:02-cv-138-HES (M.D. Fla. Jan. 9, 2004) (noting that "Florida has waived sovereign immunity for tort liability against the state . . ." pursuant to § 768.28(1) and (6)(a) and granting summary judgment for JEA on state tort claims because plaintiff failed to satisfy § 768.28); cf., Jacksonville Port Auth. v. Thompson Eng'g, Inc., No. 3:12-cv-1227-J-20JRK (M.D. Fla. Mar. 4, 2015) (citing Jetton for the proposition that JEA is entitled to sovereign immunity under Florida Law and noting that "[t]he First District Court of Appeals [sic] found JEA to be subject to sovereign immunity . . . ."; declining to dismiss JEA's claims based on sovereign immunity grounds but later allowing JEA to raise sovereign immunity defenses again in responding to amended complaint).

In the same vein, the Fifth District Court of Appeal determined that section 768.28 applied to the Orlando Utilities Commission ("OUC"), a municipal utility that is structurally similar to JEA;[6] in Lederer v. Orlando Utilities Commission, the Fifth District held that the notice requirement of section 768.28(6) applied to the OUC. 981 So. 2d at 525-26. The Fifth District explained that the Florida Legislature "established the OUC as a 'part of the government of the City of Orlando,' but provided that the OUC would have substantial autonomy to operate independent of the City government." Id. at 523-24. As a legislatively created entity, the OUC could not be sued in tort without proper section 768.28(6) notice.[7] Id.

Following Lederer, a federal district court sitting in diversity further explained why section 768.28 applies to the OUC. See Hodge v. Orlando Utils. Comm'n, No. 6:09-cv-1059-Orl-19DAB, 2009 WL 4042930 (M.D. Fla. Nov. 23, 2009). Applying the language of section 768.28 to the Lederer decision, the Hodge court explained, "[i]f

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[6] The Florida legislature created the OUC by a special act passed by the Legislature. Lederer v. Orlando Util. Comm'n, 981 So. 2d 521, 523-24 (Fla. Dist. Ct. App. 2008). Like JEA, the Orlando city council "selects OUC's board members" but "the OUC acts independently and beyond the control of the City with respect to the powers it has under the special act." Id. at 524. "Thus, while the OUC may be a public utility designated as part of [Orlando's] government, it remains a distinct legal entity that operates mostly independently of the city." Id. at 525.

[7] In so holding, the Lederer court explained that its conclusion that the OUC is not a municipality or municipal department resolved the notice issue before the court, rendering it unnecessary to "determine precisely what the OUC is." Id. at 526.

OUC is not a municipality . . . and if plaintiffs suing OUC are subject to the presuit notice requirement imposed by Section 768.28(6), then OUC must fall within the definition of 'state agency or subdivision' in Section 768.28(2)." Id. at *10. Thus, the court explained, "OUC is exempt from punitive damages pursuant to Section 768.28(5)[.]" Id.

Thus, Florida law establishes that JEA has sovereign immunity from tort liability exceeding $200,000 under section 768.28(5). Jetton directly addressed whether section 768.28 applies to JEA and determined that it does; entities like JEA that act as instrumentalities of municipalities have sovereign immunity. Contrary to Fluid Dynamics' suggestion, Jetton is not "inapplicable today" (Doc. 56 at 8); state and federal courts regularly cite Jetton as authority in tort suits against JEA. Moreover, Sebring, Lederer, and Hodge strengthen Jetton's rationale.

C. The control test does not apply to JEA.

Seeking to avoid the force of this precedent, Fluid Dynamics asserts that existing case law does not definitively identify JEA as having sovereign immunity under section 768.28; instead, JEA's entitlement to sovereign immunity is a question of fact under "the control test." (Doc. 56 at 1). Fluid Dynamics argues that because JEA is able to operate independently of the City of Jacksonville, it is a corporation "primarily acting as [an instrumentality or agency] of the state." Fla. Stat. § 768.28(2).

To decide whether a corporation is entitled to limited sovereign immunity under section 768.28,

Florida courts are required to apply a control test. See Plancher v. UCF Athletics Ass'n, Inc., 175 So. 3d 724 (Fla. 2015).[8] In approving the Fifth District's holding that UCF Athletics Association, Inc. ("UCFAA") was entitled to limited sovereign immunity under section 768.28, the Florida Supreme Court noted that the lower court analyzed Florida case law and identified that the key factor in determining whether a corporation is an instrumentality of the state and therefore entitled to section 768.28 immunity "is the level of governmental control over the performance and day-to-day operations of the corporation." Id. at 725 (quotation marks omitted). However, section 768.28 does not provide a definition for the word "corporation." Thus, whether an entity is a corporation subject to the control test needs to be determined in the first instance.

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[8] See also Shands Teaching Hosp. and Clinics, Inc. v. Lee, 478 So. 2d 77, 79 (Fla. Dist. Ct. App. 1985) (holding that Shands was not entitled to sovereign immunity because "Shands' day-to-day operations are not under direct [governmental] control"); Prison Rehabilitative Indus. and Diversified Enterprises, Inc. v. Betterson, 648 So. 2d 778, 780-81 (Fla. Dist. Ct. App. 1994) (noting that legislative constraints created "sufficient governmental control over PRIDE's daily operations to require the conclusion as a matter of law that PRIDE has, from its inception, acted primarily as an instrumentality of the state."); Pagan v. Sarasota Cnty. Pub. Hosp. Bd., 884 So. 2d 257, 267 (Fla. Dist. Ct. App. 2004) ("[T]he analysis of whether a corporation is a governmental instrumentality or agency centers on the issue of control.") (Canady, J., concurring specially); G4S Secure Sols. (USA), Inc. v. Morrow, 210 So. 3d 92, 93 (Fla. Dist. Ct. App. 2016) ("The determinative factor [in deciding whether a corporation has sovereign immunity] is the degree of control retained or exercised by the state agency.").

The Florida legislature provides the definition of corporation elsewhere in the Florida Statutes. See Fla. Stat. § 607.01401(5) (defining "corporation" as a "corporation for profit, which is not a foreign corporation, incorporated under or subject to the provisions of [the Florida Business Corporation Act]"); Id. §§ 617.01401(4) (defining "corporation" as a "corporation not for profit, subject to the provisions of [Chapter 617], except a foreign corporation"), (5) (defining "corporation not for profit" as "a corporation no part of the income or profit of which is distributable to its members, directors, or officers, except as otherwise provided under [Chapter 617]"). A corporation does not exist until it files articles of incorporation with the Department of State. Id. § 607.0203; id. § 617.0203.

Case law suggests that the definitions in Chapters 607 and 617 inform whether an entity is a corporation subject to the control test. Florida courts have only applied the control test to Chapter 607 or Chapter 617 corporations that have articles of incorporation filed with the Department of State. See Plancher, 175 So. 3d at 726[9]; G4S, 210 So. 3d at 93; Pagan, 884 So. 2d at

[9] Fluid Dynamics suggests that "[n]othing in Plancher limits this analysis [control test] to private corporations" and maintains that "the 'control' test is to be applied to every entity other than the state, county or municipality itself." (Doc. 56 at 5). However, Fluid Dynamics cites no cases in support of this argument. While it is true that Plancher does not explicitly limit its holding to corporations, the Court's opinion strongly suggests as much. For instance, the Plancher court cited the Fifth District Court of Appeal's observation that the "key factor in determining whether a private corporation is an instrumentality of the state for sovereign immunity purposes is

259; Betterson, 648 So. 2d at 780; Shands, 478 So. 2d at 78. In Plancher, the Florida Supreme Court applied the control test to UCFAA, a not for profit corporation with articles of incorporation filed with the Department of State.[10] Shands, Betterson, Pagan, and G4S also

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the level of governmental control . . . ." Plancher, 175 So. 3d at 725 (emphasis added). In citing section 768.28(2), the court italicized the entity under discussion: "*corporations primarily acting as instrumentalities or agencies of the state*." Id. at 726 (emphasis in original). The court even describes the plaintiffs' argument as one about "actual state control over a corporation's day-to-day operations." Id. at 728 (emphasis added). Importantly, UCFAA, the entity at issue in Plancher, is a not-for-profit Florida corporation. Id. at 726; see G4S, 210 So. 3d at 94 (citing Plancher for the proposition that limited sovereign immunity is available for private parties involved in contractual relationships with the state if those parties are determined to be acting as agents of the state).

As these examples demonstrate, Plancher confined its analysis to corporations and did not address the applicability of its decision to independent public utilities like JEA. Fluid Dynamics has provided no authority suggesting that the Florida Supreme Court intended to abrogate the First District Court of Appeal's decision in Jetton, and this Court, sitting in diversity, declines at this time to unilaterally extend Plancher without a showing that the Florida Supreme Court would do so. See Starling v. R.J. Reynolds Tobacco Co., 845 F. Supp. 2d 1215, 1236 (M.D. Fla. 2011) ("Where the highest court—in this case, the Florida Supreme Court—has spoken on the topic, [this Court follows] its rule. Where that court has not spoken, however, [this Court] must predict how the highest court would decide this case."), adhered to on denial of reconsideration (Dec. 22, 2011) (citing Molinos Valle Del Cibao, C. por A. v. Lama, 633 F.3d 1330, 1348 (11th Cir. 2011)).

[10] See the Florida Department of State Division of Corporations' website, www.sunbiz.org, which features records of Florida corporations. Individual corporations' records can be found by completing a search of the entity name.

applied the control test to entities that have articles of incorporation filed with the Department of State. Fluid Dynamics did not cite any cases that apply the control test to entities not incorporated under Chapters 607 or 617.

JEA is not such a corporation because articles of incorporation did not establish JEA's existence. Instead, the Florida Legislature created JEA as part of the City of Jacksonville Charter. Thus, the control test is irrelevant in determining whether JEA has limited sovereign immunity under section 768.28. Rather, under Jetton, Sebring, Lederer, and Hodge, JEA is a governmental unit acting as an instrumentality of the City of Jacksonville or a state agency or subdivision. Either way, section 768.28 applies to JEA. Thus, section 768.28(5) limits the amount of damages Fluid Dynamics can recover from JEA in this action, and partial summary judgment for JEA is proper.[11]

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[11] The Court notes that section 768.28 contains the following provision:

> No provision of this section, or of any other section of the Florida Statutes, whether read separately or in conjunction with any other provision, shall be construed to waive the immunity of the state or any of its agencies from suit in federal court, as such immunity is guaranteed by the Eleventh Amendment to the Constitution of the United States, unless such waiver is explicitly and definitely stated to be a waiver of the immunity of the state and its agencies from suit in federal court. This subsection shall not be construed to mean that the state has at any time previously waived, by implication, its immunity, or that of any of its agencies, from suit in federal court through any statute in existence prior to June 24, 1984.

Accordingly, it is hereby

ORDERED:

1. Defendant JEA's Motion for Partial Summary Judgment (Doc. 53) is **GRANTED**. The Court finds as a matter of law that the City and JEA's affirmative defense of sovereign immunity applies to this action, limiting the damages Plaintiff Fluid Dynamics Holdings LLC can recover.

2. Based on this ruling, JEA's Motion for Protective Order (Doc. 46) is also **GRANTED**.

3. The Court vacated the case schedule pending the outcome of these motions. No later than **September 22, 2017**, the parties shall file a proposed schedule to return this case to the active docket.

DONE AND ORDERED in Jacksonville, Florida the 29th day of August, 2017.

s/_____
TIMOTHY J. CORRIGAN
United States District Judge

bh
Copies:

Counsel of record

Fla. Stat. § 768.28(18). Neither party has discussed whether this provision has any applicability in the case, so the Court does not consider it.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-11082-JJ

[Filed December 13, 2018]

FLUID DYNAMICS HOLDINGS, LLC, a Delaware Limited Liability Company,	)
Plaintiff - Appellant,	)
versus	)
CITY OF JACKSONVILLE, a Florida municipality, JACKSONVILLE ELECTRIC AUTHORITY, a body politic and corporate created by the Charter of the City of Jacksonville, Florida,	)
Defendants - Appellees.	)

Appeal from the United States District Court
for the Middle District of Florida

BEFORE: MARCUS, MARTIN, and ROSENBAUM, Circuit Judges.

PER CURIAM:

The petition(s) for panel rehearing filed by Fluid Dynamics Holdings LLC. is DENIED.

ENTERED FOR THE COURT:

/s/_____
UNITED STATES CIRCUIT JUDGE

APPENDIX E

Florida Statutes §768.28

768.28 Waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusions; indemnification; risk management programs.—

(1) In accordance with s. 13, Art. X of the State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee's office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act. Any such action may be brought in the county where the property in litigation is located or, if the affected agency or subdivision has an office in such county for the transaction of its customary business, where the cause of action accrued. However, any such action against a state university board of trustees shall be brought in the county in which that university's

main campus is located or in the county in which the cause of action accrued if the university maintains therein a substantial presence for the transaction of its customary business.

(2) As used in this act, "state agencies or subdivisions" include 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.

(3) Except for a municipality and the Florida Space Authority, the affected agency or subdivision may, at its discretion, request the assistance of the Department of Financial Services in the consideration, adjustment, and settlement of any claim under this act.

(4) Subject to the provisions of this section, any state agency or subdivision shall have the right to appeal any award, compromise, settlement, or determination to the court of appropriate jurisdiction.

(5) The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, but liability shall not include punitive damages or interest for the period before judgment. Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of $200,000 or any claim or judgment, or portions thereof, which, when totaled

with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of $300,000. However, a judgment or judgments may be claimed and rendered in excess of these amounts and may be settled and paid pursuant to this act up to $200,000 or $300,000, as the case may be; and that portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature. Notwithstanding the limited waiver of sovereign immunity provided herein, the state or an agency or subdivision thereof may agree, within the limits of insurance coverage provided, to settle a claim made or a judgment rendered against it without further action by the Legislature, but the state or agency or subdivision thereof shall not be deemed to have waived any defense of sovereign immunity or to have increased the limits of its liability as a result of its obtaining insurance coverage for tortious acts in excess of the $200,000 or $300,000 waiver provided above. The limitations of liability set forth in this subsection shall apply to the state and its agencies and subdivisions whether or not the state or its agencies or subdivisions possessed sovereign immunity before July 1, 1974.

(6)(a) An action may not be instituted on a claim against the state or one of its agencies or subdivisions unless the claimant presents the claim in writing to the appropriate agency, and also, except as to any claim against a municipality, county, or the Florida Space Authority, presents such claim in writing to the Department of Financial Services, within 3 years after such claim accrues and the Department of Financial

Services or the appropriate agency denies the claim in writing; except that, if:

1. Such claim is for contribution pursuant to s. 768.31, it must be so presented within 6 months after the judgment against the tortfeasor seeking contribution has become final by lapse of time for appeal or after appellate review or, if there is no such judgment, within 6 months after the tortfeasor seeking contribution has either discharged the common liability by payment or agreed, while the action is pending against her or him, to discharge the common liability; or

2. Such action is for wrongful death, the claimant must present the claim in writing to the Department of Financial Services within 2 years after the claim accrues.

(b) For purposes of this section, the requirements of notice to the agency and denial of the claim pursuant to paragraph (a) are conditions precedent to maintaining an action but shall not be deemed to be elements of the cause of action and shall not affect the date on which the cause of action accrues.

(c) The claimant shall also provide to the agency the claimant's date and place of birth and social security number if the claimant is an individual, or a federal identification number if the claimant is not an individual. The claimant shall also state the case style, tribunal, the nature and amount of all adjudicated penalties, fines, fees, victim restitution fund, and other judgments in excess of $200, whether imposed by a civil, criminal, or administrative tribunal, owed by the

claimant to the state, its agency, officer or subdivision. If there exists no prior adjudicated unpaid claim in excess of $200, the claimant shall so state.

(d) For purposes of this section, complete, accurate, and timely compliance with the requirements of paragraph (c) shall occur prior to settlement payment, close of discovery or commencement of trial, whichever is sooner; provided the ability to plead setoff is not precluded by the delay. This setoff shall apply only against that part of the settlement or judgment payable to the claimant, minus claimant's reasonable attorney's fees and costs. Incomplete or inaccurate disclosure of unpaid adjudicated claims due the state, its agency, officer, or subdivision, may be excused by the court upon a showing by the preponderance of the evidence of the claimant's lack of knowledge of an adjudicated claim and reasonable inquiry by, or on behalf of, the claimant to obtain the information from public records. Unless the appropriate agency had actual notice of the information required to be disclosed by paragraph (c) in time to assert a setoff, an unexcused failure to disclose shall, upon hearing and order of court, cause the claimant to be liable for double the original undisclosed judgment and, upon further motion, the court shall enter judgment for the agency in that amount. Except as provided otherwise in this subsection, the failure of the Department of Financial Services or the appropriate agency to make final disposition of a claim within 6 months after it is filed shall be deemed a final denial of the claim for purposes of this section. For purposes of this subsection, in medical malpractice actions and in wrongful death actions, the failure of the Department of Financial Services or the appropriate

agency to make final disposition of a claim within 90 days after it is filed shall be deemed a final denial of the claim. The statute of limitations for medical malpractice actions and wrongful death actions is tolled for the period of time taken by the Department of Financial Services or the appropriate agency to deny the claim. The provisions of this subsection do not apply to such claims as may be asserted by counterclaim pursuant to s. 768.14.

(7) In actions brought pursuant to this section, process shall be served upon the head of the agency concerned and also, except as to a defendant municipality, county, or the Florida Space Authority, upon the Department of Financial Services; and the department or the agency concerned shall have 30 days within which to plead thereto.

(8) No attorney may charge, demand, receive, or collect, for services rendered, fees in excess of 25 percent of any judgment or settlement.

(9)(a) No officer, employee, or agent of the state or of 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 an 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. The state or its subdivisions shall not be liable in tort for the acts or omissions of an officer, employee, or agent committed while acting outside the course and scope of her or his employment or committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

(b) As used in this subsection, the term:

1. "Employee" includes any volunteer firefighter.

2. "Officer, employee, or agent" includes, but is not limited to, any health care provider when providing services pursuant to s. 766.1115; 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); and any public defender or her or his employee or agent, including, among others, an assistant public defender and an investigator.

(c) For purposes of the waiver of sovereign immunity only, a member of the Florida National Guard is not acting within the scope of state employment when performing duty under the provisions of Title 10 or Title 32 of the United States Code or other applicable federal law; and neither the state nor any individual may be named in any action under this chapter arising from the performance of such federal duty.

(d) The employing agency of a law enforcement officer as defined in s. 943.10 is not liable for injury, death, or property damage effected or caused by a person fleeing from a law enforcement officer in a motor vehicle if:

1. The pursuit is conducted in a manner that does not involve conduct by the officer which is so reckless or wanting in care as to constitute disregard of human life, human rights, safety, or the property of another;

2. At the time the law enforcement officer initiates the pursuit, the officer reasonably believes that the person fleeing has committed a forcible felony as defined in s. 776.08; and

3. The pursuit is conducted by the officer pursuant to a written policy governing high-speed pursuit adopted by the employing agency. The policy must contain specific procedures concerning the proper method to initiate and terminate high-speed pursuit. The law enforcement officer must have received instructional training from the employing agency on the written policy governing high-speed pursuit.

(10)(a) Health care providers or vendors, or any of their employees or agents, that have contractually agreed to act as agents of the Department of Corrections to provide health care services to inmates of the state correctional system shall be considered agents of the State of Florida, Department of Corrections, for the purposes of this section, while acting within the scope of and pursuant to guidelines established in said contract or by rule. The contracts shall provide for the indemnification of the state by the agent for any liabilities incurred up to the limits set out in this chapter.

(b) This subsection shall not be construed as designating persons providing contracted health care services to inmates as employees or agents of the state for the purposes of chapter 440.

(c) For purposes of this section, regional poison control centers created in accordance with s. 395.1027 and coordinated and supervised under the Division of Children's Medical Services Prevention and Intervention of the Department of Health, or any of their employees or agents, shall be considered agents of the State of Florida, Department of Health. Any contracts with poison control centers must provide, to the extent permitted by law, for the indemnification of the state by the agency for any liabilities incurred up to the limits set out in this chapter.

(d) For the purposes of this section, operators, dispatchers, and providers of security for rail services and rail facility maintenance providers in the South Florida Rail Corridor, or any of their employees or agents, performing such services under contract with

and on behalf of the South Florida Regional Transportation Authority or the Department of Transportation shall be considered agents of the state while acting within the scope of and pursuant to guidelines established in said contract or by rule.

(e) For purposes of this section, a professional firm that provides monitoring and inspection services of the work required for state roadway, bridge, or other transportation facility construction projects, or any of the firm's employees performing such services, shall be considered agents of the Department of Transportation while acting within the scope of the firm's contract with the Department of Transportation to ensure that the project is constructed in conformity with the project's plans, specifications, and contract provisions. Any contract between the professional firm and the state, to the extent permitted by law, shall provide for the indemnification of the department for any liability, including reasonable attorney's fees, incurred up to the limits set out in this chapter to the extent caused by the negligence of the firm or its employees. This paragraph shall not be construed as designating persons who provide monitoring and inspection services as employees or agents of the state for purposes of chapter 440. This paragraph is not applicable to the professional firm or its employees if involved in an accident while operating a motor vehicle. This paragraph is not applicable to a firm engaged by the Department of Transportation for the design or construction of a state roadway, bridge, or other transportation facility construction project or to its employees, agents, or subcontractors.

(f) For purposes of this section, any nonprofit independent college or university located and chartered in this state which owns or operates an accredited medical school, or any of its employees or agents, and which has agreed in an affiliation agreement or other contract to provide, or permit its employees or agents to provide, patient services as agents of a teaching hospital, is considered an agent of the teaching hospital while acting within the scope of and pursuant to guidelines established in the affiliation agreement or other contract. To the extent allowed by law, the contract must provide for the indemnification of the teaching hospital, up to the limits set out in this chapter, by the agent for any liability incurred which was caused by the negligence of the college or university or its employees or agents. The contract must also provide that those limited portions of the college, university, or medical school which are directly providing services pursuant to the contract and which are considered an agent of the teaching hospital for purposes of this section are deemed to be acting on behalf of a public agency as defined in s. 119.011(2).

1. For purposes of this paragraph, the term:

a. "Employee or agent" means an officer, employee, agent, or servant of a nonprofit independent college or university located and chartered in this state which owns or operates an accredited medical school, including, but not limited to, the faculty of the medical school, any health care practitioner or licensee as defined in s. 456.001 for which the college or university is vicariously liable, and the staff or administrators of the medical school.

b. "Patient services" mean:

(I) Comprehensive health care services as defined in s. 641.19, including any related administrative service, provided to patients in a teaching hospital;

(II) Training and supervision of interns, residents, and fellows providing patient services in a teaching hospital; or

(III) Training and supervision of medical students in a teaching hospital.

c. "Teaching hospital" means a teaching hospital as defined in s. 408.07 which is 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 facility as an agent of the state, or a political subdivision of the state, under a lease or other contract.

2. The teaching hospital or the medical school, or its employees or agents, must provide notice to each patient, or the patient's legal representative, that the college or university that owns or operates the medical school and the employees or agents of that college or university are acting as agents of the teaching hospital and that the exclusive remedy for injury or damage suffered as the result of any act or omission of the teaching hospital, the college or university that owns or operates the medical school, or the employees or agents of the college or university, while acting within the scope of duties pursuant to the affiliation agreement or other contract with a teaching hospital, is by commencement of an action pursuant to the provisions

of this section. This notice requirement may be met by posting the notice in a place conspicuous to all persons.

3. This paragraph does not designate any employee providing contracted patient services in a teaching hospital as an employee or agent of the state for purposes of chapter 440.

(g) For the purposes of this section, the executive director of the Board of Nursing, when serving as the state administrator of the Nurse Licensure Compact pursuant to s. 464.0095, and any administrator, officer, executive director, employee, or representative of the Interstate Commission of Nurse Licensure Compact Administrators, when acting within the scope of their employment, duties, or responsibilities in this state, are considered agents of the state. The commission shall pay any claims or judgments pursuant to this section and may maintain insurance coverage to pay any such claims or judgments.

(11)(a) Providers or vendors, or any of their employees or agents, that have contractually agreed to act on behalf of the state as agents of the Department of Juvenile Justice to provide services to children in need of services, families in need of services, or juvenile offenders are, solely with respect to such services, agents of the state for purposes of this section while acting within the scope of and pursuant to guidelines established in the contract or by rule. A contract must provide for the indemnification of the state by the agent for any liabilities incurred up to the limits set out in this chapter.

(b) This subsection does not designate a person who provides contracted services to juvenile offenders as an employee or agent of the state for purposes of chapter 440.

(12)(a) A health care practitioner, as defined in s. 456.001(4), who has contractually agreed to act as an agent of a state university board of trustees to provide medical services to a student athlete for participation in or as a result of intercollegiate athletics, to include team practices, training, and competitions, shall be considered an agent of the respective state university board of trustees, for the purposes of this section, while acting within the scope of and pursuant to guidelines established in that contract. The contracts shall provide for the indemnification of the state by the agent for any liabilities incurred up to the limits set out in this chapter.

(b) This subsection shall not be construed as designating persons providing contracted health care services to athletes as employees or agents of a state university board of trustees for the purposes of chapter 440.

(13) Laws allowing the state or its agencies or subdivisions to buy insurance are still in force and effect and are not restricted in any way by the terms of this act.

(14) Every claim against the state or one of its agencies or subdivisions for damages for a negligent or wrongful act or omission pursuant to this section shall be forever barred unless the civil action is commenced by filing a complaint in the court of appropriate

jurisdiction within 4 years after such claim accrues; except that an action for contribution must be commenced within the limitations provided in s. 768.31(4), and an action for damages arising from medical malpractice or wrongful death must be commenced within the limitations for such actions in s. 95.11(4).

(15) No action may be brought against the state or any of its agencies or subdivisions by anyone who unlawfully participates in a riot, unlawful assembly, public demonstration, mob violence, or civil disobedience if the claim arises out of such riot, unlawful assembly, public demonstration, mob violence, or civil disobedience. Nothing in this act shall abridge traditional immunities pertaining to statements made in court.

(16)(a) The state and its agencies and subdivisions are authorized to be self-insured, to enter into risk management programs, or to purchase liability insurance for whatever coverage they may choose, or to have any combination thereof, in anticipation of any claim, judgment, and claims bill which they may be liable to pay pursuant to this section. Agencies or subdivisions, and sheriffs, that are subject to homogeneous risks may purchase insurance jointly or may join together as self-insurers to provide other means of protection against tort claims, any charter provisions or laws to the contrary notwithstanding.

(b) Claims files maintained by any risk management program administered by the state, its agencies, and its subdivisions are confidential and exempt from the provisions of s. 119.07(1) and s. 24(a),

Art. I of the State Constitution until termination of all litigation and settlement of all claims arising out of the same incident, although portions of the claims files may remain exempt, as otherwise provided by law. Claims files records may be released to other governmental agencies upon written request and demonstration of need; such records held by the receiving agency remain confidential and exempt as provided for in this paragraph.

(c) Portions of meetings and proceedings conducted pursuant to any risk management program administered by the state, its agencies, or its subdivisions, which relate solely to the evaluation of claims filed with the risk management program or which relate solely to offers of compromise of claims filed with the risk management program are exempt from the provisions of s. 286.011 and s. 24(b), Art. I of the State Constitution. Until termination of all litigation and settlement of all claims arising out of the same incident, persons privy to discussions pertinent to the evaluation of a filed claim shall not be subject to subpoena in any administrative or civil proceeding with regard to the content of those discussions.

(d) Minutes of the meetings and proceedings of any risk management program administered by the state, its agencies, or its subdivisions, which relate solely to the evaluation of claims filed with the risk management program or which relate solely to offers of compromise of claims filed with the risk management program are exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution until

termination of all litigation and settlement of all claims arising out of the same incident.

(17) This section, as amended by chapter 81-317, Laws of Florida, shall apply only to causes of actions which accrue on or after October 1, 1981.

(18) No provision of this section, or of any other section of the Florida Statutes, whether read separately or in conjunction with any other provision, shall be construed to waive the immunity of the state or any of its agencies from suit in federal court, as such immunity is guaranteed by the Eleventh Amendment to the Constitution of the United States, unless such waiver is explicitly and definitely stated to be a waiver of the immunity of the state and its agencies from suit in federal court. This subsection shall not be construed to mean that the state has at any time previously waived, by implication, its immunity, or that of any of its agencies, from suit in federal court through any statute in existence prior to June 24, 1984.

(19) Neither the state nor any agency or subdivision of the state waives any defense of sovereign immunity, or increases the limits of its liability, upon entering into a contractual relationship with another agency or subdivision of the state. Such a contract must not contain any provision that requires one party to indemnify or insure the other party for the other party's negligence or to assume any liability for the other party's negligence. This does not preclude a party from requiring a nongovernmental entity to provide such indemnification or insurance. The restrictions of this subsection do not prevent a regional water supply authority from indemnifying and assuming the

liabilities of its member governments for obligations arising from past acts or omissions at or with property acquired from a member government by the authority and arising from the acts or omissions of the authority in performing activities contemplated by an interlocal agreement. Such indemnification may not be considered to increase or otherwise waive the limits of liability to third-party claimants established by this section.

(20) Every municipality, and any agency thereof, is authorized to undertake to indemnify those employees that are exposed to personal liability pursuant to the Clean Air Act Amendments of 1990, 42 U.S.C.A. ss. 7401 et seq., and all rules and regulations adopted to implement that act, for acts performed within the course and scope of their employment with the municipality or its agency, including but not limited to indemnification pertaining to the holding, transfer, or disposition of allowances allocated to the municipality's or its agency's electric generating units, and the monitoring, submission, certification, and compliance with permits, permit applications, records, compliance plans, and reports for those units, when such acts are performed within the course and scope of their employment with the municipality or its agency. The authority to indemnify under this section covers every act by an employee when such act is performed within the course and scope of her or his employment with the municipality or its agency, but does not cover any act of willful misconduct or any intentional or knowing violation of any law by the employee. The authority to indemnify under this section includes, but is not limited to, the authority to pay any fine and provide legal representation in any action.

Florida Rule of Appellate Procedure 9.150

RULE 9.150. DISCRETIONARY PROCEEDINGS TO REVIEW CERTIFIED QUESTIONS FROM FEDERAL COURTS

(a) Applicability. On either its own motion or that of a party, the Supreme Court of the United States or a United States court of appeals may certify 1 or more questions of law to the Supreme Court of Florida if the answer is determinative of the cause and there is no controlling precedent of the Supreme Court of Florida.

(b) Certificate. The question(s) may be certified in an opinion by the federal court or by a separate certificate, but the federal court should provide the style of the case, a statement of the facts showing the nature of the cause and the circumstances out of which the questions of law arise, and the questions of law to be answered. The certificate shall be certified to the Supreme Court of Florida by the clerk of the federal court.

(c) Record. The Supreme Court of Florida, in its discretion, may require copies of all or any portion of the record before the federal court to be filed if the record may be necessary to the determination of the cause.

(d) Briefs. If the Supreme Court of Florida, in its discretion, requires briefing, it will issue an order establishing the order and schedule of briefs.

(e) Costs. The taxation of costs for these proceedings is a matter for the federal court and is not governed by these rules.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPEAL NUMBER 18-11082
DISTRICT COURT CASE NO.: 3:14-cv-1454-TJC-MCR (S.D. Fla.)

[Filed June 11, 2018]

FLUID DYNAMICS HOLDINGS, LLC,
Appellant,

Versus

JACKSONVILLE ELECTRIC AUTHORITY,
Appellee,

MOTION FOR CERTIFICATION TO THE SUPREME COURT OF FLORIDA

Matthew Petrie
Jake M. Greenberg
Christopher B. Spuches
AGENTIS PLLC
501 Brickell Key Dr., Suite 300
Miami, Florida 33131
Telephone (305) 722-2002
Counsel for Appellant

CERTIFICATE OF INTERESTED PERSONS

The following persons and business entities have an interest in the outcome of this appeal:

2011 Waxman Family Dynasty Trust, member of Plaintiff/Appellant, Fluid Dynamics Holdings, LLC;

2011 Weiner Family Dynasty Trust, member of Plaintiff/Appellant, Fluid Dynamics Holdings, LLC;

Adams, Eric S., District Court counsel to Plaintiff, Fluid Dynamics Holdings, LLC (terminated July 7, 2015);

Agentis PLLC, appellate counsel for Plaintiff/ Appellant, Fluid Dynamics Holdings, LLC;

Antonos, Howard J., trustee to 2011 Weiner Family Dynasty Trust;

Bishop, Thomas E., District Court counsel to Plaintiff, Fluid Dynamics Holdings, LLC;

CFS 7 Funding, LLC, attorney-in-fact to Fluid Dynamics Holdings, LLC;

City of Jacksonville, co-defendant;

Corrigan, The Hon. Timothy J., United States District Court Judge

D'Agata, David J., District Court counsel for co-defendants, City of Jacksonville and Jacksonville Electric Authority;

ECC, P.L., District Court counsel to Plaintiff, Fluid Dynamics Holdings, LLC;

Ehrenstein, Michael D., District Court counsel to Plaintiff, Fluid Dynamics Holdings, LLC;

Falkner, Douglas, trustee to 2011 Waxman Family Dynasty Trust;

Fluid Dynamics Holdings, LLC, Plaintiff/Appellant;

Greenberg, Jake M., District Court and appellate counsel to Plaintiff/Appellant, Fluid Dynamics Holdings, LLC;

Jacksonville Electric Authority, Defendant/ Appellee;

Mairs, Rita M., District Court counsel to co-defendants, City of Jacksonville and Jacksonville Electric Authority;

Office of General Counsel, City of Jacksonville, District Court counsel to co-defendants, City of Jacksonville and Jacksonville Electric Authority;

Petrie, Matthew A., appellate counsel to Appellant, Fluid Dynamics Holdings, LLC;

Phillips, Jon R., District Court counsel to co-defendants, City of Jacksonville and Jacksonville Electric Authority;

Richardson, The Hon. Monte C., United States Magistrate Judge;

Roberson, Helen P., District Court counsel to Plaintiff, Fluid Dynamics Holdings, LLC;

Safi, Tiffiny, District Court counsel to co-defendants City of Jacksonville and Jacksonville Electric Authority;

Shenhav, Ella A., District Court counsel to Plaintiff, Fluid Dynamics Holdings, LLC (terminated July 7, 2015);

Shutts & Bowen, LLP, District Court counsel to Plaintiff, Fluid Dynamics Holdings, LLC (terminated on July 7, 2015);

Spuches, Christopher B., District Court and appellate counsel for Plaintiff/Appellant, Fluid Dynamics Holdings, LLC;

Tanner & Bishop, P.A., District Court counsel to Plaintiff, Fluid Dynamics Holdings, LLC;

Teal, Jason R., District Court counsel to co-defendants, City of Jacksonville and Jacksonville Electric Authority;

Waxman, Adam, beneficiary of 2011 Waxman Family Dynasty Trust;

Waxman, Michael, beneficiary of 2011 Waxman Family Dynasty Trust;

Weiner, Andrew J., beneficiary of 2011 Weiner Family Dynasty Trust;

Weiner, Jessica L., beneficiary of 2011 Weiner Family Dynasty Trust;

Weiner, Michael A., beneficiary of 2011 Weiner Family Dynasty Trust.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 11th Cir. R. 26.1-3, the Appellant certifies that no publicly held corporations either (1) directly or indirectly own 10% or more of any class of the Appellant's equity interests, or (2) otherwise have any interest in the outcome of this appeal.

MOTION FOR CERTIFICATION

Appellant, Fluid Dynamics Holdings, LLC ("Fluid"), through undersigned counsel, respectfully moves this Court to certify the following question to the Supreme Court of Florida:

> Whether the "control" test established in *Plancher v. UCF Athletics Association, Inc.*, 175 So.3d 724 (Fla. 2015), applies to any entity not specifically identified under Florida Statute Ch. 768.28(2) seeking sovereign immunity as a corporation primarily acting as instrumentalities or agencies of the state, counties, or municipalities, or whether its application is limited to only private corporations.

AUTHORITY FOR CERTIFICATION OF THE QUESTION

The Court of Appeals "may certify one or more questions of law to the Supreme Court of Florida if the answer is determinative of the cause and there is no controlling precedent of the Supreme Court of Florida." Fla. R. App. P. 9.150(a). *See also* Art. V, § 3(b)(6), Fla. Const.; Fla. Stat. § 25.031 (2009); *MCI WorldCom Network Servs. v. Mastec, Inc.*, 370 F.3d 1074, 1078 (11th Cir. 2004) (noting that the Court of Appeals "may certify questions of state law to the state's highest court.") "When substantial doubt exists about the answer to a material state law question upon which the case turns, a federal court should certify that question to the state supreme court in order to avoid making unnecessary state law guesses and to offer the state

court the opportunity to explicate state law." *Forgione v. Dennis Pirtle Agency, Inc.*, 93 F.3d 758, 761 (11th Cir. 1996).

The Appellant submits that the issue raised in this appeal regarding the application of the "control test" is purely a question of Florida state law on which there is no controlling precedent from the Supreme Court of Florida. Section 726.28, Florida Statutes provides for a limited waiver of sovereign immunity in tort actions for state "agencies and subdivisions" and expressly identifies entities to whom sovereign immunity applies: (i) the executive departments; (ii) the Legislature; (iii) the judicial branch; (iv) the independent establishments of the ***state***, including state university boards of trustees; (v) counties and municipalities; and (vi) ***corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities***, including the Florida Space Authority. Fla. Stat. § 768.28(1)-(2) (emphasis added). Notably, utility companies (such as the JEA) are not included as enumerated "agencies and subdivisions" entitled to sovereign immunity under the statute. Thus, sovereign immunity will only apply to JEA if it primarily acts as an instrumentality of Jacksonville.

Although the Supreme Court of Florida in *Plancher v. UCF Athletics Association, Inc.* held that "whether an entity is acting primarily as an instrumentality" and therefore entitled to sovereign immunity depends on the level of control the applicable government maintains over the independent entity, 175 So.3d 724 (Fla. 2015), the District Court in this case held that the

"control test" only applies to private corporations that have filed articles of incorporation with the Florida Department of State despite no such limitation in *Plancher*.

Rather, *Plancher* confirmed that the application of the limited waiver of sovereign immunity under section 768.28 of the Florida Statutes depends on whether the governmental entity exercises sufficient control over the day-to-day operations of the corporate "entity" or, alternatively, whether the entity is "autonomous and self-sufficient." 175 So. 3d at 726. Neither the Supreme Court of Florida nor any other Florida court has made any distinction that a different standard applies depending on the type of entity at issue, and the District Court provided no basis for applying a different standard for private corporations. Indeed, the Florida Supreme Court's analysis included no discussion of the scope of the application of the "control test", but rather, consistently speaks in terms of the "entity" that is subject to control. *See id.* at 728 (setting forth the elements of the "control test" with respect to the ***entity*** at issue); *id.* at 726 ("[T]hree Florida district court decisions have addressed whether an ***entity*** was primarily acting as an instrumentality of the state and, therefore, entitled to limited sovereign immunity under section 768.28, and all three decisions focused upon governmental control over the ***entity***." (emphasis added)); *id.* (discussing *Shands Teaching Hospital & Clinics, Inc. v. Lee*, 478 So.2d 77 (Fla. Dist. Ct. App. 1985), and noting that "the intent of the legislature was to treat Shands as an autonomous and self-sufficient ***entity***[.]" (emphasis added)). If the Supreme Court of Florida intended to limit the application of its decision

to only private corporations, it could have expressly done so.

Because the Supreme Court of Florida did not expressly limit application of the "control test" and the applicable statute likewise includes no such limitation, this Court would need to guess as to how the Supreme Court of Florida would interpret and apply its decision in *Plancher*. Because of the lack of precedent from the Supreme Court of Florida and the determinative nature of the question with respect to this appeal, certification of this question to the Florida Supreme Court is appropriate.

CONCLUSION

For these reasons, Fluid respectfully requests that this Court certify the issue to the Supreme Court of Florida:

Respectfully submitted,

June 11, 2018

By: */s/ Matthew A. Petrie*
Matthew A. Petrie
Fla. Bar No. 44770

CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), as it has been prepared in the Times New Roman font, 14-point, on Microsoft Word 2010. I also certify that this motion complies with the length limits of Fed. R. App. P. 27(d)(2), as it was prepared on a computer and contains fewer than 5,200 words.

By: */s/ Matthew A. Petrie*
Matthew A. Petrie
Fla. Bar No. 44770

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 11, 2018, a true and correct copy of the foregoing motion was filed electronically with the Court via the Court's CM/ECF filing system, and that the brief was e-served through the CM/ECF system to the following:

Notice will be electronically mailed to:

Jon Robert Phillips
Jason R. Teal
Tiffiny Douglas Safi
David Jeffrey D'Agata
Jake Matthew Greenberg
Matthew A. Petrie

By: */s/ Matthew A. Petrie*
Matthew A. Petrie
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