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ASSESSING THE SCOPE OF STATE UNIVERSITY SOVEREIGN IMMUNITY: A COMMENTARY ON THE VEXING DISPUTE OVER UCF ATHLETICS ASSOCIATION, INC.

CHAD HINSON*

I. INTRODUCTION

A high profile case, one garnering national media attention, presents a new question of law that will soon be resolved.¹ The issue is narrow, but the implications are so broad every university within the State University System of Florida signed an amicus brief filed on appeal.² The issue is whether the University of Central Florida Athletics Association, Inc. (UCFAA), a direct-support organization (DSO), is primarily acting as an instrumentality of the state so to afford it limited state sovereign immunity.³ An instrumentality is “[a] means or agency through which a function of another entity is accomplished, such as a branch of a governing body.”⁴ Although the issue is specific to UCFAA, because it is a Direct Support Organization (DSO), the resolution of the question ultimately impacts more than eighty similar organizations

* I would like to extend my gratitude to Richard E. Mitchell, Esq. of Gray Robinson, P.A. for his help and analysis. You are a superb litigator and a true gentleman. Many thanks also to Jordan Clark, Esq., Associate General Counsel for the University of Central Florida (UCF). I am very grateful you took time to help me. You are a credit to the legal profession. This Article is dedicated to my three children Cameron, Kiley, and Carter. You are my greatest gifts. The author, Chad Hinson, Esq., is a member of the New York Bar in good standing.

1. *See generally* UCF Athletics Ass’n v. Plancher, 121 So. 3d 1097 (Fla. Dist. Ct. App. 2013) (per curiam). In *Plancher*, the parents of UCF football player filed a negligence claim against UCF and UCFAA after their son collapsed during a football practice and subsequently died. *Id.* at 1099; *see also* Mark Fainaru-Wada, *Plancher’s Parents Sue Central Florida*, ESPN (Mar. 12, 2009), <http://sports.espn.go.com/ncf/news/story?id=3973607> [hereinafter Fainaru-Wada, *Plancher’s Parents*]; Adam Jacobi, *Jury Awards \$10 Million to Ereck Plancher Family*, CBSSPORTS.COM, <http://www.cbsports.com/mcc/blogs/entry/24156338/30364990> (last updated July 1, 2011, 2:19 PM). On the first day of trial, the University of Central Florida was dropped as a defendant by the Planchers. *Plancher*, 121 So. 3d at 1099 n.2.

2. *See* Jurisdictional Brief of Petitioner Enock Plancher at 8, UCF Athletics Ass’n v. Plancher, 121 So. 3d 1097 (2013) (No. SC13-1872).

3. *See Plancher*, 121 So. 3d at 1103.

4. BLACK’S LAW DICTIONARY 870 (9th ed. 2009).

throughout Florida.⁵ Under Florida law, DSOs are authorized, not-for-profit companies “[o]rganized and operated exclusively to receive, hold, invest, and administer property and to make expenditures to or for the benefit of a state university.”⁶ DSOs are commonly implemented throughout the state to effectuate a particular purpose an individual state university deems necessary.⁷ The underlying motive for incorporating in this manner is to allow a university a degree of flexibility in a specific area of its operations. An example of this is in fundraising, where philanthropic donors wishing to make a gift to a university have the choice to remain anonymous, instead of having their names published.⁸

The interesting aspect of this issue centers on the unorthodox nature of the business organization itself. It is a hybrid company in the sense that it operates in both the private and public sphere.⁹ While it is a creation of state government, it is also incorporated privately and operates with a degree of autonomy.¹⁰ The complexity of this issue is compounded by several factors. The statute granting public universities in Florida the authority to create DSOs is silent as to the topic of state sovereign limited immunity. However, another statute’s plain language grants instrumentalities of the state limited sovereign immunity. But that ambiguity then begs the question to what is considered a corporate instrumentally and what is not? More confusing is the body of Florida government tort law, which has been described as “a tangled web of incomprehensible and inconsistent principles, exceptions, and exceptions to the exceptions.”¹¹ Thus, courts tasked with classifying its status as either a public or private entity are presented with the classic Gordian knot scenario.¹²

I argue that UCFAA is an instrumentally of the state of Florida because the nexus between both entities is very strong and the entanglement is so comprehensive. My premise is supported by critiquing the arguments, case law, and other relevant factors of this case. After that, I will explain why the

5. Jurisdictional Brief of Petitioner Enock Plancher, *supra* note 2, at 8–9.

6. FLA. STAT. § 1004.28(1)(a) (2013).

7. *See* Jurisdictional Brief of Petitioner Enock Plancher, *supra* note 2, at 8–9.

8. *See Plancher*, 121 So. 3d at 1109.

9. *See infra* Part II.

10. *Id.*

11. William N. Drake, Jr. & Thomas A. Bustin, *Governmental Tort Liability in Florida: A Tangled Web*, FLA. B. J., Feb. 2003, at 8. *See generally* William N. Drake, Jr. & Thomas A. Bustin, *Judicial Tort Reform: Transforming Florida’s Waiver of Sovereign Immunity Statute*, 32 STETSON L. REV. 469 (2003).

12. A Gordian knot is defined as, “1: an intricate problem; *especially*: a problem insoluble in its own terms—often used in the phrase *cut the Gordian knot*[;] 2: a knot tied by Gordius, king of Phrygia, held to be capable of being untied only by the future ruler of Asia, and cut by Alexander the Great with his sword.” *Gordian Knot*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/gordian%20knot> (last visited Apr. 18, 2014).

plaintiffs' argument falters. At the conclusion of this Article, I will present some basic public policy issues to consider and predict where I believe the law in this area is likely headed in the future.

II. A HORRIBLE TRAGEDY: *UCFAA v. PLANCHER*

In 2003, the University of Central Florida (UCF) incorporated a DSO given the name UCFAA.¹³ According to its Articles of Incorporation, "the purpose of the Corporation shall be to promote education . . . and to encourage, stimulate, and promote the health and physical welfare of the students of [UCF] by encouraging, conducting, and maintaining all kinds of intercollegiate athletics."¹⁴ The specific authority for the creation of UCFAA by the UCF Board of Trustees is derived from both the Florida State Constitution and state statute.¹⁵ This process is ultimately approved by the Florida Department of State.¹⁶

On March 18, 2008, UCF football player Ereck Plancher was participating in off-season conditioning drills inside the Nicholson Fieldhouse.¹⁷ These drills included lifting weights, negotiating an obstacle course, and running wind sprints.¹⁸ It is alleged that during those drills, Ereck began to show signs of fatigue.¹⁹ Although UCF head football coach "[George] O'Leary said he never saw Plancher in distress during the workout, but he did see him getting up after stumbling during a sprint."²⁰ At the conclusion of practice, O'Leary gathered the team together for a final huddle.²¹

"And at that time I said, 'Where's Ereck Plancher?' I said you're better than that, and I expect all our wide receivers and DBs to be able to run."

13. Articles of Incorporation of UCF Athletic Ass'n, Inc. (Feb. 25, 2003) (on file with author).

14. *Id.*

15. FLA. CONST. art IX, § 7; FLA. STAT. § 1004.28(1)(a)(1) (2013).

16. FLA. STAT. § 1004.28(1)(a)(1).

17. Iliana Limón, *UCF Coach George O'Leary Describes Ereck Plancher's Final Workout*, ORLANDO SENTINEL (Aug. 12, 2010), http://articles.orlandosentinel.com/2010-08-12/sports/os-george-oleary-ereck-plancher-20100811_1_plancher-family-attorney-sickle-cell-tract-enock-and-giselle-plancher [hereinafter Limón, *Coach George O'Leary*].

18. See Associated Press, *Report: UCF Player Died After Struggling Through Intense Drill*, USATODAY.COM (Apr. 11, 2008), http://usatoday30.usatoday.com/sports/college/football/cusa/2008-04-11-ucf-death_N.htm.

19. Limón, *Coach George O'Leary*, *supra* note 17.

20. *Id.*

21. Iliana Limón, Kyle Hightower & Tim Stephens, *The Final Workout of Ereck Plancher*, ORLANDO SENTINEL (July 18, 2008), <http://www.orlandosentinel.com/sports/orl-ucfside1808jul18,0,7974689.story> [hereinafter Limón, *The Final Workout*].

O'Leary said he was talking with a staff member after the workout when he noticed players helping carry Plancher over to the athletic trainer.

He asked [athletic trainer] Jackson what was happening, and the athletic trainer responded Plancher was suffering from dehydration and exhaustion.

While players took Plancher outside, O'Leary tried to clear the coaching staff out of the fieldhouse to avoid observing players tossing a football because it would have been an NCAA violation.

When O'Leary stepped outside, he saw Plancher was being propped up by a teammate while Jackson served him water. The player then moved and Plancher was placed flat on the bench.

O'Leary said he grabbed Plancher's hand "just to let him know I was there" and the player squeezed it. He said Plancher's eyes were fluttering and he was awake. Then [head athletic trainer] Vander Heiden arrived to assist Jackson. . . .²² [A] 911 call was made at 10:48 a.m. . . . [A] school official says rescue breathing and CPR were being administered. . . . An automatic external defibrillator was already attached to Plancher.

A UCF trainer performed compressions while Furnas administered rescue breaths. . . . Plancher was placed in an ambulance at 11:06 a.m.

[Sadly, h]e was pronounced dead at 11:51 a.m.²³

In the months that followed, information became available that revealed that prior to his death, Ereck was previously diagnosed with sickle cell trait (SCT) by UCFAA.²⁴ At that time, however, testing for SCT was not mandatory by the

22. Limón, *Coach George O'Leary*, *supra* note 17.

23. Limón, *The Final Workout*, *supra* note 21; *see also* Mark Fainaru-Wada, *Conditioned for Death: Could UCF Have Prevented the Ereck Plancher Tragedy?*, ESPN (Nov. 2, 2008), <http://sports.espn.go.com/espn/otl/news/story?id=3672808>.

24. SCT "is not a disease, but having it means that a person has inherited the sickle cell gene from one of his or her parents." CTR. FOR DISEASE CONTROL, WHAT YOU SHOULD KNOW ABOUT SICKLE CELL TRAIT, *available at* http://www.cdc.gov/ncbddd/sicklecell/documents/SCD%20factsheet_Sickle%20Cell%20Trait.pdf Only if a person inherited the sickle cell gene from both parents will the person have sickle cell disease. *Id.* Sickle cell disease is defined as, a genetic condition that is present at birth. In SCD, the red blood cells become hard and sticky and look like a C-shaped farm tool called a "sickle." The sickle cells die early, which causes a constant shortage of red blood cells. Also, when they travel through small blood vessels, they get stuck and

NCAA.²⁵

UCF coach George O’Leary said during a deposition he knew wide receiver Ereck Plancher had [SCT], but he thought the player was suffering from dehydration on the day he died.

O’Leary said athletic trainer Robert Jackson initially told him Plancher was dehydrated and exhausted following [the] offseason conditioning workout. . . .²⁶

The issue of SCT tragedy is not a new phenomenon in NCAA athletics and neither are the resulting civil actions against universities.²⁷ However, the issue of responsibility for detection by the NCAA is one that is contested.²⁸ Following the tragic death of Rice football player Dale Lloyd II in September 2006, a lawsuit was filed against the NCAA.²⁹ The lawsuit ultimately settled, but as a result the NCAA for the first time announced that “it would recommend all of its student-athletes be tested for SCT.”³⁰ While individuals can opt out if they agree to education and sign liability waivers, mandatory SCT education and confirmation of SCT status of athletes began in 2010 for Division I schools.³¹ In 2012, it also became a requirement for Division II schools and

clog the blood flow. This can cause pain and other serious problems.

Id.

25. *Background on Sickle Cell Trait and the NCAA*, NCAA.ORG (Sept. 9, 2010), <http://ncaastudent.org/wps/wcm/connect/public/ncaa/resources/latest+news/2010+news+stories/september+latest+news/background+on+sickle+cell+trait+and+the+ncaa> (“determin[ing] that mandatory screening is the best way to raise awareness among student-athletes and coaches and prevent potential serious illness or death in student-athletes who may carry the trait”).

26. Limón, *Coach George O’Leary*, *supra* note 17.

27. *E.g.* Barry Pound, *Family Settles Wrongful Death Lawsuit Against Ole Miss, NCAA*, LANIER L. FIRM, http://www.lanierlawfirm.com/law_firm_news/family-settles-wrongful-death-lawsuit-against-ole-miss-ncaa.htm (last visited Apr. 18, 2014).

28. *Compare* Alejandro Bautista, Comment, *College Football’s Serial Murderer: Sickle Cell Trait*, 21 MARQ. SPORTS L. REV. 403 (2010) (discussing the critical issue of SCT among college football players and praising the proactive steps taken by the NCAA in April 2010), with Janis L. Abkowitz, *President’s Column—Sickle Cell Trait and Sports: Is the NCAA a Hematologist?*, AM. SOC’Y HEMATOLOGY (May 1, 2013), www.hematology.org/Publications/Hematologist/2013/10463.aspx (arguing the NCAA policy attributes risk inappropriately), and John A. Kark, David M. Posey, Harold R. Schumacher, & Charles J. Ruehle, *Sickle-Cell Trait as a Risk Factor for Sudden Death in Physical Training*, 317 NEW ENG. J. MED. 781 (1987) (stating that testing sickle cell trait athletes is unwise).

29. Brett Zarda, *Lawsuit Prompts NCAA to Screen Athletes for Sickle Cell*, USATODAY.COM, http://usatoday30.usatoday.com/sports/college/2010-06-30-sickle-cell-ncaa-cover_N.htm (last updated July 2, 2010).

30. Megan Manfull, *Rice Has Lead in NCAA Initiative After Lawsuit*, HOUS. CHRON. (June 30, 2009), <http://www.chron.com/sports/rice/article/Rice-has-lead-in-NCAA-initiative-after-lawsuit-1723629.php>.

31. Scott Hensley, *Blood Doctors Call Foul on NCAA’s Screening for Sickle Cell*, NPR (Jan. 26, 2012, 6:07 PM), <http://www.npr.org/blogs/health/2012/01/26/145923225/blood-doctors-call-foul-on>

extended to Division III in 2013.³² A recent lawsuit filed in Allegheny County Common Pleas Court underscores the continued seriousness of this issue in collegiate athletics.³³

A. *The Legal Battle*

A negligence action was subsequently filed by the estate of Plancher, and the suit named both UCFAA and the UCF Board of Trustees as defendants.³⁴ While clearly sympathetic, UCFAA also disputed the claim and publicly defended its actions.³⁵ At the time, UCF spokesman Grant Heston stated: ““While the lawsuit limits what the university can say, what we know to date about the March 18 workout indicates that coaches and staff acted appropriately. . . . Per university policy, UCF will not discuss specifics about the lawsuit.””³⁶

UCFAA argued from pretrial motions through appeal its functions as an instrumentality of UCF (and therefore on behalf of the state of Florida).³⁷ If the courts affirmed, this would enable UCFAA to cap the amount of damages the plaintiffs could claim to \$200,000 in the event of an adverse jury verdict.³⁸ If the trial court rejected UCFAA’s argument, however, it could potentially be exposed to high liability.³⁹ Aware of this, the plaintiffs countered by insisting UCFAA is a private company.⁴⁰ If true, UCFAA would be considered outside the umbra of Florida’s limited sovereign immunity statute.

Before trial, UCFAA filed a pretrial motion for summary judgment requesting that Judge Robert Evans issue a favorable ruling that as a direct support corporation, UCFAA was entitled to limited sovereign immunity

ncaas -screening-for-sickle-cell.

32. Associated Press, *NCAA, Div. II School Sued over Sickle Cell Death*, USATODAY.COM (Sept. 9, 2013), <http://www.usatoday.com/story/sports/ncaab/2013/09/09/slippery-rock-ncaa-sued-over-sickle-cell-death-of-jack-hill-jr/2787507/>.

33. See Rob Dauster, *NCAA, D-II Slippery Rock Sued over Death of Jack Hill, Jr.*, C.BASKETBALLTALK (Sept. 10, 2013), <http://collegebasketballtalk.nbcsports.com/2013/09/10/ncaa-d-ii-slippery-rock-sued-over-death-of-jack-hill-jr/>.

34. Aisling Swift, *Family of Former Lely Football Star Files Wrongful Death Suit Against UCF*, NAPLES DAILY NEWS, <http://www.naplesnews.com/news/2009/mar/12/former-lely-football-player-plancher-family-sues-/?print=1> (last updated Mar. 12, 2009).

35. See Fainaru-Wada, *Plancher’s Parents*, *supra* note 1.

36. Swift, *supra* note 34.

37. See Brief on Jurisdiction of Respondents UCF Athletics Ass’n, Inc., & Great Am. Assurance Co. at 6–9, *Plancher v. UCF Athletics Ass’n*, 121 So. 3d 1097 (2013) (No. SC13-1872).

38. *Id.* at 4 (citing FLA. STAT. § 768.28(5) (2013)).

39. See generally Jurisdictional Brief of Petitioner Enock Plancher, *supra* note 2.

40. *Id.*

protection.⁴¹ In response, the Planchers stated that under Florida law, UCF did not exert the sufficient control necessary over UCFAA for it to be considered an instrumentality of UCF.⁴² At the hearing on the matter, attorneys representing the Plancher family argued that UCFAA was created so the athletic department could operate without worrying about observing state laws: “[t]hey wanted to grow, . . . [t]hey elected to privatize[,] and they don’t have to deal with any state rules.”⁴³ In reference to UCF’s unilateral ability to dissolve UCFAA, defense counsel Richard Mitchell said “Power to destroy is the ultimate power to control.”⁴⁴

On March 24, 2010, Judge Evans, ruling against UCF, states:

The undisputed evidence in this case demonstrates to this court the UCF Athletic Association has not been substantially controlled by UCF in either day-to-day decisions or major programmatic decisions

. . . .

University direct-support organizations were formed to promote private fund-raising in support of public universities. . . . It is unlikely that the Legislature when authorizing 1004.28 envisioned the present scope of the UCF Athletic Association. In its present form, the UCF Athletic Association has been expanded in some cases beyond the limits allowable by the state as evidenced by the Florida monitor general’s reversal of the policy of transferring student athletic fees to the UCF Athletic Association.⁴⁵

Essentially, his position was that because the statute on DSOs was silent as to the sovereign immunity, the legislature did not intend for it to be granted. UCF and UCFAA strongly disagreed with the ruling, “We respect Judge Evans’

41. See generally Defendant’s Motion for Judgment in Accordance with Motion for Directed Verdict/Motion for Judgment Notwithstanding the Verdict, Motion for New Trial, and Motion for Remittitur, *Plancher*, 121 So. 3d 1097 (No. 2009-CA-007444-0) [hereinafter Defendant’s Motion for Judgment]. This is the first appeal from the trial court decision following Fla. R. Civ. P. 1.530 and 1.480. Under Florida rules of procedure, the party seeking appeal must first do so at the presiding trial court.

42. See Jurisdictional Brief of Petitioner Enock Plancher, *supra* note 2, at 7–9.

43. Iliana Limón, *UCF Ereck Plancher Case Settlement Cap Argument Remains Unsettled*, ORLANDO SENTINEL (Aug. 13, 2010), http://articles.orlandosentinel.com/2010-08-13/sports/os-ucf-ereck-plancher-hearing-20100813_1_plancher-family-settlement-cap-ucfaa.

44. *Id.*

45. Iliana Limón, *Judge Rules Against UCF in Ereck Plancher Lawsuit*, ORLANDO SENTINEL (Sept. 24, 2010), http://articles.orlandosentinel.com/2010-09-24/sports/os-ucf-ereck-plancher-ruling-20100924_1_ucfaa-ucf-campus-march-giselle-plancher.

decision but respectfully disagree The law and state statutes clearly show that the UCF Athletics Association is a state agency and subject to sovereign immunity. We will evaluate all of our options, and an appeal is certainly one of them.”⁴⁶ As a result of the ruling, the jury at trial never heard the argument.

Opening arguments began on June 15, 2011, despite UCFAA’s grave concerns they would not be given a fair trial.⁴⁷ During the course of a very contentious and acrimonious trial, UCFAA strongly contested multiple issues of fact, evidence, and trial procedure. UCFAA presented medical evidence and testimony which supported their claim that Ereck passed away of Fibro Muscular Dysplasia of the sinoatrial nodal artery, and not a “sickling collapse,” as the Planchers theorized.⁴⁸ Moreover, it was UCFAA’s position that no medical evidence was presented by the Planchers’ showing that had UCFAA pulled Ereck out of drills earlier, it would have made a difference in saving his life.⁴⁹ To counter the Planchers’ claim of negligence, UCFAA tried to bring into evidence the fact that two other UCF football players with SCT were present and participated in the same practice/conditioning drill.⁵⁰ However, the trial judge denied it over a dispute regarding discovery. One interesting point of note is the trial judge allowed the Planchers over eight days to present their case, while limiting UCFAA to less than three.⁵¹

On June 30, 2011, the jury returned a favorable verdict for Planchers, finding UCFAA negligent.⁵² While the jury did not find that UCFAA acted with gross negligence in the case, they did award statutory survivors, Enock Plancher and Gisele Plancher, compensatory damages in the amount of \$5 million each, for a total verdict of \$10 million.⁵³ No punitive damages were

46. *Id.*

47. Iliana Limón, *UCF Files Motion to Disqualify Judge in Ereck Plancher Wrongful Death Lawsuit*, ORLANDO SENTINEL (June 6, 2011), http://articles.orlandosentinel.com/2011-06-06/sports/os-ereck-plancher-trial-ucf-0607-20110606_1_plancher-family-attorneys-ucf-attorneys-judge-robert-m-evans; see also Defendant’s Motion for Judgment, *supra* note 41, at 23. UCFAA appealed over 133 errors of law during the course of this trial in its appeal to Judge Robert Evans. See *Id.* While very well written, it leaves no ambiguity regarding UCFAA’s displeasure with the trial.

48. See Defendant’s Motion for Judgment, *supra* note 41, at 3. UCFAA argued it was entitled to a directed verdict after the Planchers’ case, based on the fact they presented expert testimony that conflicted with the plaintiffs’ evidence. As such, the Planchers’ claim was based on impermissibly stacked inferences.

49. See *id.* at 31.

50. *Id.* at 21.

51. *Id.* at 23.

52. *UCF Found Negligent in Plancher’s Death*, UPI.COM (July 1, 2011), http://www.upi.com/Top_News/US/2011/07/01/UCF-found-negligent-in-Planchers-death/UPI-72101309546628/.

53. Jacobi, *supra* note 1.

assessed.⁵⁴

On August 2, 2011, Judge Evans again rejected all UCFAA's arguments and ruled unilaterally in favor of the Planchers.⁵⁵ Still confident in the strength of its legal argument, UCFAA subsequently appealed the trial court decision to Florida's Fifth District Court of Appeal.⁵⁶ The scope of its argument before the court was reduced to three substantive issues. First, UCFAA argued it was denied a fair trial.⁵⁷ Second, "the trial court erred when it denied UCFAA's motion for summary judgment" regarding the medical waiver Ereck Plancher signed prior to commencement playing for UCF.⁵⁸ Third, the trial court erred when it entered judgment against UCFAA on the issue of limited sovereign immunity as an instrumentality.⁵⁹ In response, the Planchers argued that as a condition precedent to claiming sovereign immunity, UCF had to exercise actual control over the "detailed physical performance" and "day-to-day operations" over UCFAA.⁶⁰ Furthermore, because UCF and UCFAA previously signed an Intercollegiate Athletics written services agreement that had a provision disclaiming the relationship as "a joint venture, partnership, or other like relationship," the Planchers argued this severed UCFAA's instrumentality claim.⁶¹

B. Established Law

In finding a logical resolution to this issue, the place to start from a historical perspective is the seminal case on point regarding the issue of instrumentalities of government. In *United States v. Orleans*, the U.S. Supreme Court was tasked with answering whether state community action agencies are an instrumentality of the federal government.⁶² Under the Economic Opportunity Act of 1964,

54. *Id.*

55. Iliana Limón, *Judge Denies UCFAA Motion for New Trial, Declines to Alter Ereck Plancher Verdict*, ORLANDO SENTINEL (Aug. 2, 2011), http://articles.orlandosentinel.com/2011-08-02/sports/os-ereck-plancher-ucf-hearing-0803-20110802_1_plancher-family-ucfaa-attorneys-ucf-athletics-association.

56. Sarah Aslam, *UCFAA Files Plancher Appeal*, CENT. FLA. FUTURE, <http://www.centralfloridafuture.com/news/ucfaa-files-plancher-appeal-1.2741479> (last updated May 23, 2012).

57. *See generally* UCF Athletics Ass'n v. Plancher, 121 So. 3d 1097 (Fla. Dist. Ct. App. 2013) (per curiam). The 5th District Court of Appeal found no merit in UCFAA's argument regarding its position on the fairness of the trial, but this author disagrees with the court. *See id.* at 1099 n.3.

58. *Id.* at 1099.

59. *Id.*

60. Jurisdictional Brief of Petitioner Ereck Plancher, *supra* note 2, at 8 (citing Prison Rehab. Inds. v. Betterson, 648 So. 2d 778, 780 (Fla. Dist. Ct. App. 1995); Shands Teaching Hosp. & Clinics, Inc. v. Lee, 478 So. 2d 77, 79 (Fla. Dist. Ct. App. 1985).

61. *Plancher*, 121 So. 3d at 1107 n.14.

62. *U.S. v. Orleans*, 425 U.S. 807 (1976) (defining instrumentalities of federal government); *see*

federal money was allocated to authorized action agencies with the intent of helping low-income families reach self-sufficiency.⁶³ In return, the agencies were subjected to a degree of federal regulation.⁶⁴ In the case, an approved Ohio action agency, named the Warren-Trumbull Council, planned a recreational outing for kids.⁶⁵ During the trip, a child participating was injured when the car he was in driven by an employee of the agency collided with a parked truck.⁶⁶ The boy's father subsequently sued the United States for negligence under the Federal Tort Claims Act.⁶⁷ The father alleged the state agency itself was an instrumentality of the federal government.⁶⁸

In deciding the case, the Supreme Court determined whether an agency is considered an arm of the federal government by assessing the actual degree of control the legislature intended to have over the agency.⁶⁹ Although the Court found the federal government implemented regulations and guidelines for the agency to follow, they were merely for passive assurance federal money was properly spent.⁷⁰ Moreover, the Court found the federal government specifically intended to delegate the power of control over the Warren-Trumbull Council to the locals.⁷¹ The way they accomplished this was relinquishing the ability to serve on its Board of Directors. The Court stated that when Congress implements programs and projects it finances by gifts, grants, contracts, or loans, the recipients do not automatically become arms of the federal government.⁷² The method the Court used to determine the status of an instrumentality mandates the government intend to have actual control over the "detailed physical performance" and "day to day operations."⁷³ As such, the Court determined the Warren-Trumbull Council was not held to be an instrumentality because the federal government did not meet the control

also *Hines v. Cenla Cmty. Action Comm., Inc.*, 474 F.2d 1052, 1058 (5th Cir. 1973).

63. *Orleans*, 425 U.S. at 809.

64. *Id.* at 816 ("Similarly, by contract, the Government may fix specific and precise conditions to implement federal objectives. Although such regulations are aimed at assuring compliance with goals, the regulations do not convert the acts of entrepreneurs—or of state governmental bodies—into federal governmental acts.").

65. *Id.* at 810.

66. *Id.*

67. 28 U.S.C. § 1346(b) (2012) The Federal Tort Claims Act is a limited waiver of sovereign immunity, making the Federal Government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment. *Id.*

68. *Orleans*, 425 U.S. at 810–11.

69. *Id.* at 816–17.

70. *Id.* at 818.

71. *Id.* at 818–19.

72. *Id.* at 816.

73. *Id.* at 814–15.

requirements over it.⁷⁴

However, the rule must be tempered with the realization that, in this case, the federal government *intentionally delegated complete control over operations* to the local government.⁷⁵ This is a major distinction that must be noted when applying the rule to cases where the issue is government instrumentalities. Thus, while the rule of law is a government must show actual control over the “detailed physical performance” and “day-to-day operations,” it is logical to also consider the actual intent of the government in question when applying the rule to other fact patterns.

With that in mind, the rule in Florida on government instrumentalities is consistent with the holding in *Orleans* regarding control.⁷⁶ However, Florida case law tempers that rule by also recognizing that “actual control” by the government over a private agency or business can be effectuated simply by placing certain constraints in place over it.⁷⁷ In this case, UCF has “actual control” over UCFAA and multiple constraints in place to demonstrate it. For instance, the UCFAA by-laws require that four of the six directors on UCFAA’s board of directors be from UCF.⁷⁸ Moreover, in the Intercollegiate Athletics Services Agreement between UCFAA and UCF, UCF has a right to audit UCFAA’s records.⁷⁹ Through its Articles of Incorporation, UCF has the final authority to dissolve UCFAA.⁸⁰ UCF’s President ultimately remains responsible for the athletic program.⁸¹ Indeed, UCFAA exists and operates solely at the pleasure and discretion of UCF.

A similar type set of facts are seen in *Prison Rehabilitative Industries v. Betterson*.⁸² In that case, the Florida Legislature granted the Florida Department

74. *Id.* at 819.

75. *Id.* at 818 (“Nothing could be plainer than the congressional intent that the local entities here in question have complete control over operations of their own programs with the Federal Government supplying financial aid, advice, and oversight only to assure that federal funds not be diverted to unauthorized purposes.”).

76. See *Pagan v. Sarasota Cnty. Pub. Hosp. Bd.*, 884 So. 2d 257, 267–68 (Fla. Dist. Ct. App. 2004) (Canady, J., concurring) (citing *Orleans*, 425 U.S. at 807) (holding that structural controls in place by the government over an agency meet the threshold to grant the agency limited state sovereign immunity).

77. *Pagan*, 884 So. 2d at 267–69.

78. *UCF Athletics Ass’n v. Plancher*, 121 So. 3d 1097, 1104 (Fla. Dist. Ct. App. 2013) (per curiam).

79. Intercollegiate Athletics Services Agreement between UFC & UFC Athletic Ass’n, Inc. § 13 (July 1, 2005).

80. Articles of Incorporation of UCF Athletic Ass’n, Inc., *supra* note 13; see also *Plancher*, 121 So. 3d at 1108.

81. *Plancher*, 121 So. 3d at 1107.

82. 648 So. 2d 778 (Fla. Dist. Ct. App. 1994).

of Corrections (Department) the ability to lease a prison agricultural program to a private, not-for-profit business named PRIDE.⁸³ The Florida legislature, at the time, concluded doing this would “provide for more effective and efficient management and administration, and contain the cost of the correctional system.”⁸⁴ While PRIDE operated with a degree of autonomy, certain statutory constraints by the legislature were set in place to control it. For instance, “PRIDE [was] subjected to both financial and performance audits by the Auditor General,” its articles of incorporation had to be approved by the legislature, and the Department of Corrections had “to approve policies and procedures established by PRIDE.”⁸⁵

In 1988, a plaintiff brought an action in negligence against PRIDE claiming she was injured by a cow owned by PRIDE after it ran onto the highway that she was driving on.⁸⁶ In return, PRIDE argued it was an instrumentality of the state. Like *Plancher v. UCFAA*, the issue in that case was determining the status of PRIDE. The issue centered on whether the state had “actual control” over this company, because PRIDE had both latitude and discretion in its “day-to-day operations.”⁸⁷ In resolving the issue, the court noted that “while PRIDE was accorded substantial independence in the running of the work programs, its essential operations nevertheless remained subject to a number of legislatively mandated constraints over its day-to-day operations.”⁸⁸ Because proper controls were in place, the court held PRIDE was an instrumentality of Florida. This case bolsters UCFAA’s theory on appeal that the Planchers’ theory mistakenly confuses “actual” control with “actively” controlling when determining the status of UCF’s power over UCFAA.

To cast further doubt on the Planchers’ argument, a recent Florida Supreme Court case also held that a corporation is an instrumentality of the state when the state acts through it.⁸⁹ Moreover, Justice Canaday, a current Florida Supreme Court judge, wrote a concurring opinion on the issue of instrumentalities of government and the topic of control.⁹⁰ Using the analogy of a principal agent relationship to state government and their instrumentalities, Justice Canady wrote:

83. *Id.* at 780.

84. *Id.*

85. *Id.*

86. *Id.* at 779.

87. *Id.* at 780–81 & n.3.

88. *Id.* at 780.

89. *Keck v. Eminisor*, 104 So. 3d 359, 369 (Fla. 2012).

90. *See Pagan v. Sarasota Cnty. Pub. Hosp. Bd.*, 884 So. 2d 257, 270 (Fla. Dist. Ct. App. 2004) (Canady, J., concurring) (stating a state entity had sufficient control over a private corporation and thus the company was entitled to sovereign immunity).

It would be unfaithful to the plain meaning of section 768.28(2) to impose a requirement for control of a type that is inconsistent with the separate corporate existence of the entity acting primarily as an instrumentality or agency. The authorization of immunity for corporations under section 768.28(2) necessarily involves a recognition that those corporations will carry out their operations in a manner that is separate and distinct from the operations of the governmental entity to which they are related. The control of the governmental entity over the corporation necessary to establish an instrumentality relationship under section 768.28(2) does *not* require that the corporation be subsumed in the governmental entity.⁹¹

C. The Outcome

On August 16, 2013, in a per curiam opinion, Florida's Fifth District Court of Appeal reversed the Orange County Circuit Court's final judgment.⁹² While affirming the Circuit Court's findings on UCFAA's claims over the issues of trial fairness and the medical waiver, the court ultimately agreed with UCFAA's instrumentality claim.⁹³ Furthermore, the court held that the disclaimer provision regarding the business relationship between UCF and UCFAA in their service agreement did not sever UCFAA's instrumentality status.⁹⁴ Finally, regarding the level of control so vigorously disputed between the two parties, the court found that UCF ultimately had sufficient amount of control necessary over UCFAA by virtue of the institutional constraints in place at the time of incorporation.⁹⁵ As a result of its finding UCFAA an instrumentality of the state, it also lowered the amount of damages to \$200,000, the statutory sovereign immunity cap. Unhappy with the holding, the Planchers filed a brief requesting the Florida Supreme Court use its discretionary jurisdiction power to hear this case.⁹⁶

91. *Id.*

92. UCF Athletics Ass'n v. Plancher, 121 So. 3d 1097, 1099 (Fla. Dist. Ct. App. 2013) (per curiam).

93. *Id.*

94. *Id.* at 1107 n.14.

95. *Id.* at 1109.

96. Jurisdictional Brief of Petitioner Enock Plancher, *supra* note 2, at 1.

III. CONCLUSION

The intent of UCF to control UCFAA from the outset is also revealed from an internal document UCF created in 2005. Three years before the tragic death of Ereck Plancher, UCF answered an NCAA Institution Self-Study Instrument Report.⁹⁷ In the report, UCF answers the NCAA's question regarding who is responsible for oversight and compliance. In answering, UCF stated:

The UCF Board of Trustees has the ultimate authority for institutional control over the UCFAA and has delegated this authority to the UCF President. The UCF President oversees the institutional control process over the UCFAA Board of Directors, the Director of Athletics, and all UCFAA personnel. UCFAA's oversight includes all other university personnel that interact with the UCFAA in administering and monitoring compliance with all institutional, NCAA, state, and federal rules and regulations.

Specifically, the Director of Athletics is charged with making certain that all members of the UCFAA staff have full knowledge of and abide by the rules and regulations of the university, the NCAA, and the conference. In addition, the Director of Athletics is responsible to the UCF President and receives direction and advice on general policy matters from the Faculty Athletics Representative and the Athletics Committee.

UCF is organized to maintain compliance with NCAA rules by maintaining institutional control over the UCFAA.⁹⁸

This document, along with UCFAA's Articles of Incorporation, by-laws, and corporate hierarchy, are prima facie evidence of state government acting through a company, and thus creating the classic instrumentality.⁹⁹ The Plaintiffs in this case argue the Florida legislature did not expressly extend sovereign immunity to all university DSOs. The legislature did, however, expressly grant limited sovereign immunity to instrumentalities of the state. At bottom, the main weakness with the Planchers' legal argument is it makes little sense. If UCFAA is not an instrumentality, then what is? "As [former United

97. See generally U. CENT. FLA., GOVERNANCE AND COMMITMENT TO RULES COMPLIANCE (2005), available at http://grfx.cstv.com/photos/schools/ucf/genrel/auto_pdf/ncaa-selfstudy-governance.pdf.

98. *Id.* at 27.

99. See BLACK'S LAW DICTIONARY, *supra* note 4, at 870 (defining an instrumentality as "[a] means or agency through which a function of another entity is accomplished, such as a branch of a governing body.").

States] Chief [Justice Burger] was fond of saying, that made no sense. And if it didn't make good sense, how could it make good law?"¹⁰⁰ With that in mind, UCFAA has an overwhelming amount of factors and law that favor its argument. While state sovereign immunity law should not extend past the legislative grant, that is simply not the case here. The DSO is a specific creation of the Florida state legislature.

From a policy standpoint, as well as common sense, there should be a bright line where the grant of sovereign immunity ceases to extend on public university settings. Equally important, however, is protecting legitimate instrumentalities of the state from aggressive litigants motivated by windfall verdicts disguised as the pursuit of justice. In the event UCFAA and other DSOs are ultimately granted limited sovereign immunity, I am skeptical you will see an explosion of these organizations for fiscal reasons. However, in the event DSOs are held to be private organizations, it is likely the death knell of the entity out of liability concerns and costs. Justice Antonin Scalia once said "[t]he value of any . . . rule . . . must be assessed not only on the basis of what is gained, but also on the basis of what is lost."¹⁰¹ While Florida gains a new rule, which hopefully moves the substantive law forward, I am saddened we lost Ereck Plancher along the way.

100. BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 98 (Simon & Shuster, 1st paperback ed. 2005).

101. *Minnick v. Mississippi*, 498 U.S. 146, 161 (1990) (Scalia, J., dissenting).