UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

FLUID DYNAMICS HOLDINGS LLC,
A Delaware Limited Liability Company,

Plaintiff,

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

CITY OF JACKSOVILLE, 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.

[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 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]

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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 judgment or judgments may be claimed and rendered in excess of these amounts and may be settled

Therefore, a plaintiff who pursues a tort claim 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

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> 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.

City of Jacksonville § 21.01. Because JEA is a statutorily 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]

[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 instrumentality or an agency of a municipality."

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.

In the same vein, the Fifth District Court of Appeal determined that section 768.28 applied to the Orlando Utilities Commission ("OUC"), a

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(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).

Federal district courts sitting in diversity (as this Court is) have 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).

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 OUC is not a municipality . . . and if plaintiffs suing

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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 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,

[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.").

whether an entity is a corporation subject to the control test needs to be determined in the first instance.

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 259; Betterson,

[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

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 applied the control test to entities that have

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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 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.

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.

TIMOTHY J. CORRIGAN
United States District Judge

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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.