IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO. 67,022



BRENT R. ELDRED, a minor, by and through his parents and next friends, SUSAN E. ELDRED and RICHARD K. ELDRED, individually,

Petitioners,

vs.

NORTH BROWARD HOSPITAL DISTRICT d/b/a BROWARD GENERAL MEDICAL CENTER,

Respondents.

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# BRIEF OF AMICUS CURIAE, SOUTH BROWARD HOSPITAL DISTRICT, d/b/a MEMORIAL HOSPITAL

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## STATEMENT OF THE CASE AND FACTS

SOUTH BROWARD HOSPITAL DISTRICT, d/b/a Memorial Hospital, appearing as amicus curiae in support of NORTH BROWARD HOSPITAL DISTRICT, is a special tax district created by Ch. 24415, Laws of Florida (1947) to "establish, construct, acquire, operate and maintain such hospital or hospitals or facilities for limited or extended care and treatment, as in [the board's] opinion shall be necessary for the use of the people of said district. . .. "(A.12).[1] The legislature's objectives in creating the District are stated as "preservation of the public health, and for the public good and for the use of the public of said district. . .." (A.12). In accordance with these objectives, the District provides hospital services to all residents of its geographic area; services to indigent residents are provided without charge. It operates through a board of elected commissioners, whose members can be removed only by the governor. Its meetings, records and financial statements are subject to public scrutiny. Due process is observed. The District uses its legislatively-conferred taxing power to raise operating funds. It is empowered to issue bonds and to condemn property through eminent domain proceedings. In short, it is structurally and functionally similar to the North Broward Hospital District, and to the many other special tax districts which exist in Florida. (A.1-37).

In North Broward Hospital District v. Eldred, 466 So.2d 1210 (Fla. 4th DCA 1984), the Fourth District Court of Appeal deter-

[1]As reference is made to South Broward Hospital District's charter, this document is attached as an appendix.

mined that the North Broward Hospital District is a corporation primarily acting as a governmental instrumentality, and thus is an agency subject to the limitation on liability contained in the waiver of sovereign immunity statute, section 768.28(5), Florida Statutes. A similar conclusion was reached in a subsequent case that challenged the South Broward Hospital District's status as a governmental entity for purposes of ascertaining its tort liability. Lee v. South Broward Hospital District, 20 FLW 1435 (Fla. 4th DCA June 12, 1985).

South Broward Hospital District's interest in this case is twofold. Because the Lee court relied on Eldred in determining that South Broward Hospital District is a governmental entity, any decision made in the instant case will directly affect it. Moreover, South Broward Hospital District perceives the question certified to this Court as being of greater public importance than its phrasing suggests. As stated, the Fourth District's question is restricted to the status of the North Broward Hospital District. Resolution of the District's status, however, will necessarily have an impact on the tort liability of the numerous special tax districts operating in the State of Florida. Pursuant to the consent of both parties, South Broward Hospital District adds its voice to the present debate in hopes of impressing on the Court that a substantial public issue is before it, and persuading the court that special tax districts, including hospital districts, are indeed under the aegis of the sovereign immunity waiver provisions of section 768.28, Florida Statutes.

## ARGUMENT

In the instant case the petitioners, Eldreds, seek to convince the Court that the definition of "state agencies and subdivisions" in the sovereign immunity waiver statute (section 768.28(2), Florida Statutes) does not include the North Broward Hospital District. They contend that the sovereign immunity waiver statute did not displace its predecessor method for determining a local governmental entity's liability in tort, namely the governmental-vs.-proprietary analysis of an agency's functions. Specifically, Eldreds argue that North Broward's functions are more proprietary than governmental, and that consequently its tort liability is not subject to the statutory limitation.

In so contending, Eldreds rely on Suwanee County Hospital Corp. v. Golden, 56 So.2d 911 (Fla. 1952), which predates the statutory waiver of sovereign immunity, and overlook recent authority that disapproves their position. The Suwanee court found that a hospital, whose central role the court assumed to be governmental, could be immunized with respect to indigent, non-paying patients, but "proprietary" and therefore not immunized with respect to its paying patients. As recognized in Cauley v. City of Jacksonville, 403 So.2d 379 (Fla. 1981), it was precisely to eliminate such artificial distinctions that the sovereign immunity waiver statute was enacted in 1974. That statute now prescribes conditions under which any injured person may seek redress, and ensures equal application of immunity concepts to all governmental entities. The Cauley court construed section

768.28 as having abrogated the governmental-vs.-proprietary test and made clear that the pre-statutory status of a local governmental entity is not determinative of its present status.

The Fourth District Court of Appeal rejected Eldreds' contentions. It found that the Hospital District is included in the waiver of sovereign immunity statute, by virtue of the category "corporations acting primarily as [governmental] instrumentalities" included in that statute's definition of state agencies or subdivisions. North Broward Hospital District v. Eldred, 466 So.2d at 1211. Moreover, the court decided that all hospital districts are definitionally included in the category of corporations acting primarily as government instrumentalities. It indicated that it was unwilling to undertake a case-by-case examination of the subtle differences which exist from one district to the next. South Broward Hospital District supports the Fourth District's approach, and maintains that it should be adopted by this Court based on legislative intent, a substantial body of favorable case law, and considerations of public policy.

A common-sense construction of section 768.28(2) suggests that, in selecting the word "primarily" to describe corporations subject to the conditional sovereign immunity waiver, the legislature anticipated an analysis of an agency's ownership, not its functions. Any agency that in its constitutive sense is more governmental than private would be subject to the statute. The legislature did not envision a resurrection of the long-discredited analysis of an agency's functions, nor an assessment of its sources of revenue. It intended to uniformly include all entities whose essential characteristics are primarily govern-

mental. Within the class would be all special districts, which are statutorily-created local units of special government. Florida Statutes, section 200.001(8)(c) (1983). The sub-class of hospital districts must be regarded as included in the immunity waiver statute because they possess features inevitably and uniquely associated with governmental entities.[2]

Perhaps the most fundamental characteristic of a governmental entity is the power to tax, which is a power common to hospital districts. As its charter reveals, South Broward Hospital District is invested with a number of other significant governmental attributes, including: the power to condemn property through eminent domain; the power to issue bonds, the obligation to observe due process; and the declared raison d'etre of serving the residents of the District. (A.1-37). Private hospitals do not have these features, and, conversely, South Broward Hospital District lacks the major distinguishing characteristic of a private hospital: it cannot refuse an unwanted patient if the patient is a resident of the District. See West Coast Hospital Association v. Hoare, 64 So.2d 293 (Fla. 1953). By virtue of these features, it is clear that the South

[2]The legislature's definition of "state agencies and subdivisions" also includes the category of "independent establishments of the State." Florida Statutes, section 768.28(2). While the Fourth District's opinion focused on the "corporations primarily acting as instrumentalities" clause, the "independent establishments" clause offers an entirely sufficient alternative basis for concluding that the provisions of the statute extend, categorically, to state-created special districts.

Broward Hospital District and the class of hospital districts who share them are intrinsically and primarily governmental, and only extrinsically and secondarily private. According to any reasonable construction, hospital districts are therefore within the definition of agencies subject to the sovereign immunity waiver statute.

South Broward Hospital District's interpretation of the legislature's intent comports with the one insight which the history of the sovereign immunity waiver statute reveals. On April 12, 1973, the Judiciary Committee of the Florida House of Representatives entertained discussion on then-designated House Bills 315 and 376. While the rest of the session was uneventful insofar as the status of special districts is concerned, it included the following colloquy:[3]

First Speaker — [It would] cost more to handle all these claims on a self insurance basis than if they were to do it by private industry, but I'll let Mr. Rogers finish on that--I know we're going to have to get to this.

Second Speaker — Why don't we go on . . . I think Mr. (unintelligible) that was in reference to the State's property insurance. Had the state been in the insurance business for the school buildings and their contents for the last five years, had they collected the same number of dollar bills the insurance industry

[3]This tape is available from the Florida Department of State, Division of Archives, History and Records Management, Tallahassee, Florida.

did and paid the same claims, it would have cost the taxpayers about two million dollars more to have been in a self-insurance program.

Third Speaker — Just one more question before we take a vote on the amendment--what would be the cost difference between--to the state--between the limits as they now are in the bill--of $100,000/$500,000--or if we lower them to $25,000/$100,000? What would be the difference in cost to the state?

Second Speaker — Probably 10-15%, I would say.

First Speaker — What's that in terms of dollars?

Second Speaker — Uh--I can't give you that answer. You're considering so many entities--you're considering drainage districts, school districts, counties . . .

Third Speaker — Mr. (unintelligible), could you answer the question approximately?

Second Speaker — Just roughly I can answer it for the State of Florida, the executive branch of state government of Florida. It would be approximately $700,000.

* * * * * * *

The excerpted dialogue, with its specific reference to drainage districts, demonstrates that the legislature intended to include special districts in its plan of sovereign immunity waiver.

A series of opinions issued by the state Attorney General are in accord. Among the agencies that he has advised are included in section 768.28 are water control districts, Op. Att'y Gen. 78-113; the Tampa Port Authority, Op. Att'y Gen. 78-127; the

Canal Authority, Op. Att'y Gen. 79-13, and housing authorities, Op. Att'y Gen. 78-33. If traditional governmental-vs.-proprietary analysis were applied, any of these might be found "primarily" private agencies, yet, clearly they exist for the benefit of all citizens. Were the more than 500 special districts operating in Florida suddenly exposed to unlimited tort liability, the results would be catastrophic.

The Attorney General has repeatedly advised that tax-supported public hospitals such as the North and South Broward Hospital Districts are primarily governmental instrumentalities for purposes of section 768.28. Op. Att'y Gen. 84-87; Op. Att'y. Gen. 78-42. An agency's status with respect to its tort liability must be determined not from the percentage of expenses defrayed by fees or some other quantitative talisman, but by reference to its public purpose and governmental authority.

Case law as well as the Attorney General's opinions support the position that hospital districts primarily serve as government instrumentalities. Three recent decisions from the Fifth District Court of Appeal confirm that hospital districts are within the purview of section 768.28 by acknowledging that the four-year statute limitations (provided in section 768.28(11)), rather than the two-year limit of section 95.11, Florida Statutes, governs actions against hospitals. Florida Patient's Compensation Fund v. S.L.R., 458 So.2d 342 (Fla. 5th DCA 1985); Whitney v. Marion County Hospital District, 416 So.2d

500 (Fla. 5th DCA 1982); Whack v. Seminole Memorial Hospital, 456 So.2d 561 (Fla. 5th DCA 1984). Eldreds attempt to distinguish these cases on the grounds that their holding was not on the exact point of law presented here. Do they imply that hospitals should be regarded as governmental for purposes of the longer statute of limitations, but not for purposes of the substantive provisions of that same statute? Such an argument is untenable. Along with obtaining the advantage of the extended statute of limitations, the Whitney plaintiff was required to comply with the statutory notice requirements. That court clearly regarded the hospital as a covered entity under section 768.28.

In related decisions, the Public Health Trust of Dade County was declared a state agency with tort liability limited to $100,000 pursuant to the sovereign immunity waiver statute, and an employee of the Duval County Hospital Authority was found to be the employee of a state agency with limited liability under section 768.28. Jaar v. University of Miami, 10 FLW 427 (Fla. 3d DCA Feb. 12, 1985); Bryant v. Duval County Hospital Authority, 459 So.2d 154 (Fla. 1st DCA 1984). While these latter two hospitals were created by slightly different statutory mechanisms, it would be anomalous to declare that they are entitled to conditional sovereign immunity and hospital districts are not, when all exist for the same purpose. The essentially governmental character of hospital districts as well as their public purpose mandate that they be treated as state entities for tort liability purposes.

Since the advent of the sovereign immunity waiver statute, a considerable amount of authority has amassed which unequivocally supports the proposition that tax-supported hospital districts are regarded as primarily government instrumentalities. Both aspects of the district court's opinion in the instant case are fair and sensible. The North Broward Hospital District is an entity within the coverage of section 768.28, because there is no way to reasonably categorize it other than as a primarily governmental instrumentality. The second part of the court's opinion is also correct: it would be pointless, not to mention impractical, to attempt an ad hoc analysis of each and every special tax district in this state. By its choice of language the legislature definitionally included hospital districts within the scope of section 768.28, and this court's affirmative answer to the certified question should be accompanied by a statement that its answer is dispositive with respect to, at a minimum, all other hospital districts.

## CONCLUSION

Amicus, South Broward Hospital District, urges the court to declare that the North Broward Hospital District, and others similarly situated, are corporations primarily acting as governmental instrumentalities and are therefore covered by the provisions of section 768.28, Florida Statutes.

Respectfully submitted,

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