IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,022



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

Petitioners,

vs.

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

Respondents.

_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

# BRIEF OF PETITIONERS ON MERITS

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## I.
## STATEMENT OF THE CASE AND FACTS

Because only a single, narrow legal issue is presented here, our statement of the case and facts will be brief. The petitioners are Richard and Susan Eldred, on behalf of their minor son, Brent. They were plaintiffs in a medical malpractice action below against the respondent, North Broward Hospital District, d/b/a Broward General Medical Center ("hospital") (R. 1506, 1517). They alleged that the hospital's infection control procedures were negligent, which caused an outbreak of meningitis in one of its newborn nurseries; that their newborn son contracted meningitis shortly after his birth as a result; and that the infection caused him to sustain severe brain damage (R. 1506, 1517). Following a lengthy trial, the jury returned a verdict against the hospital, and awarded Brent damages in the amount of $900,000.00 (R. 1600). Judgment was entered in that amount (R. 1634). The hospital thereafter filed a motion to alter the judgment to limit its liability to $50,000.00, contending that it had been clothed with sovereign immunity in 1975 by the enactment of §768.28, Fla. Stat. (R. 1627). The trial court denied the motion (R. 1636).

The hospital appealed to the District Court of Appeal, Fourth District. The District Court rejected several challenges to the verdict, but held that the hospital's motion to amend the judgment to limit its liability had been erroneously denied. *North Broward Hospital District v. Eldred*, 10 FLW 909 (Fla. 4th DCA April 10, 1985).[1/] Having concluded that the hospital was a "state agency or subdivision" within the definition of that phrase in §768.28, and in accordance with this Court's decision in *City of Lake Worth v. Nicolas*, 434 So.2d 315 (Fla. 1983), it affirmed the judgment but remanded "with direction that upon payment by appellant to appellee's parents and next friends of the statutory maximum of $50,000 provided at the time of the 1977 incident by section 768.28(5),

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[1/] A copy of the District Court's slip opinion is included in the appendix to this brief.

Florida Statutes (1975), said parents and next friends shall be required to execute and deliver a satisfaction of judgment to appellant . . .". The District Court also certified the following question of great public importance to this Court:

> Is North Broward Hospital District, by its operation of the hospitals within said district, a corporation primarily acting as an instrumentality or agency of the state?

The Eldreds thereafter invoked the discretionary review jurisdiction of this Court.

## II.
## ISSUE PRESENTED FOR REVIEW

> IS NORTH BROWARD HOSPITAL DISTRICT, BY ITS OPERATION OF THE HOSPITALS WITHIN SAID DISTRICT, A CORPORATION PRIMARILY ACTING AS AN INSTRUMENTALITY OR AGENCY OF THE STATE--AND THEREBY ENTITLED TO SOVEREIGN IMMUNITY AND THE PROTECTION OF §768.28, FLA. STAT. (1975), AS A RESULT?

## III.
## SUMMARY OF THE ARGUMENT

Because our argument is relatively short, our summary of it will be brief. Our general premise is relatively straightforward. Prior to 1975 at least, neither the North Broward Hospital District nor any other "tax district hospital" was protected from tort liability by the sovereign immunity of the State. *See Suwannee County Hospital Corp. v. Golden*, 56 So.2d 911 (Fla. 1952). In fact, *Golden* holds that the legislature cannot constitutionally immunize tax district hospitals from tort liability. The basis for that holding was this Court's conclusion in *Golden* that tax district hospitals are primarily private hospitals, and only secondarily possess any governmental attributes. That distinction was *maintained* in a number of post-*Golden* decisions (in which the courts of this State held that the secondary governmental attributes of tax district hospitals required their compliance with the due process clause), so those decisions are irrelevant here.

In 1975, the legislature enacted §768.28, which purportedly *waived* the sovereign immunity of those governmental entities which had theretofore enjoyed its protection. The definition of "state agencies or subdivisions" covered by the statute includes "cor-

porations *primarily* acting as instrumentalities or agencies of the state, counties, or municipalities". The hospital contends that it falls within this definition. In our judgment, because this Court held in *Golden* that tax district hospitals are *primarily* private institutions, and only secondarily governmental in nature; and because this Court also declared in *Golden* that the legislature could not constitutionally immunize tax district hospitals from tort liability; and because the word "primarily" cannot be treated as surplusage, but must be afforded a meaning and purpose; and because the legislature was presumptively aware of *Golden* when it inserted the qualifying word "primarily" in the statute--we think the statute plainly and unambiguously *excludes* the hospital from its coverage.

If the statute does not plainly and unambiguously *exclude* the hospital from its coverage, it certainly cannot be said that it plainly and unambiguously *includes* the hospital. In that event, the Court is left with an ambiguity to resolve, and must resort to rules of statutory construction. Because the hospital is contending here that §768.28 *created* sovereign immunity for it, thereby restricting the plaintiffs' long-recognized common law right to sue it for negligence, the appropriate rule of construction is the settled rule that statutes in derogation of the common law must be strictly construed in favor of the common law, and any doubt as to their meaning must be resolved against abrogation of the common law. This Court has twice held in recent years that it would not construe §768.28 to abolish common law rights and create immunity from suit, where the intent to do so was not clearly and unequivocally expressed. The legislature's intent to abolish common law tort liability for tax district hospitals certainly is not clearly and unequivocally expressed in §768.28, and the statute should therefore be construed to *exclude* the hospital from its coverage.

The District Court's opinion is not responsive to the argument we made, because it ignores the fact that the answer to the certified question must depend solely upon the

intent of the legislature, as expressed in the language of §768.28--not upon appearances, the separate statutory language of the Public Records Act, or policy considerations concerning what the legislature should have done. Reduced to its essentials, the answer to the certified question depends solely upon what the legislature intended by its purposeful insertion of the word "primarily" into the statute. If *Golden* is still the law in this Court; and if the word "primarily" is to be given any meaning at all; and if this Court is correct that it will not imply abolition of common law rights by §768.28, absent a clear and unequivocally expressed intent to do so--then tax district hospitals are *excluded* from the coverage of §768.28. The question of whether or not they should have been included within the coverage of the statute is simply an irrelevant question here, which should be debated by the legislature after this Court answers the certified question in the negative.

## IV.
## ARGUMENT

NORTH BROWARD HOSPITAL DISTRICT IS MERELY A "TAX DISTRICT HOSPITAL"; IT IS NOT A CORPORATION *PRIMARILY* ACTING AS AN INSTRUMENTALITY OR AGENCY OF THE STATE OR BROWARD COUNTY; AND IT IS THEREFORE NOT ENTITLED TO SOVEREIGN IMMUNITY AND THE PROTECTION OF §768.28, FLA. STAT. (1975).

### A. Introduction.

Our general premise here is relatively straightforward. Prior to 1975 at least, neither the North Broward Hospital District nor any other "tax district hospital" was protected from tort liability by the sovereign immunity of the State. *See Suwannee County Hospital Corp. v. Golden*, 56 So.2d 911 (Fla. 1952). That proposition is beyond debate here. The hospital successfully contended below, however, that §768.28, Fla. Stat.--in which the legislature partially *waived* the sovereign immunity of those governmental entities which had theretofore enjoyed its protection--actually *created* immunity for it. Whether that contention is correct depends solely upon the intent of the legisla-

ture, as expressed in the language of the statute. In our judgment, the language of the statute expressly *excludes* the hospital from its coverage.

At the very least, the language of the statute is not sufficiently clear for this Court to conclude comfortably that the legislature intended to create sovereign immunity where it had never existed before--especially in the face of a square holding from this Court that any attempt to do so would be unconstitutional. We therefore believe that the District Court's affirmative answer to the certified question was the wrong answer, and we believe this Court should follow its prior decisions on the point, answer the certified question in the negative, and hold that the legislature did not create sovereign immunity for the hospital by enactment of §768.28. Our elaboration upon this relatively simple argument follows.

**B. The main argument.**

**1. §768.28(2) unambiguously *excludes* the hospital.**

Section 768.28(2) defines the "state agencies or subdivisions" included within the coverage of the statute as follows:

> As used in this act, "state agencies or subdivisions" include the executive departments, the Legislature, the judicial branch, and the independent establishments of the state; counties and municipalities; and *corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities.*

Because §768.28 contains its own specific definition of "state agency or subdivision", the arguably broader general definition of "political subdivision" (a phrase, incidentally, which is not found in §768.28) contained in §1.01, Fla. Stat., is simply irrelevant to the issue at bar. *See Ervin v. Capital Weekly Post*, 97 So.2d 464 (Fla. 1957).

Because the hospital derives its existence from Ch. 27438, Laws of Florida (1951), its status depends upon that Special Act. An examination of the Act reveals that the hospital was "created and incorporated" by the legislature with "all the powers of a body corporate, including the power to sue and be sued . . . [etc.]". Sections 1, 4. Because of

its corporate status, the hospital must therefore demonstrate that it is a *corporation primarily acting as an instrumentality of the state or Broward County* before it can claim the benefit of §768.28. The key word is "primarily"--and it is this word which results in the exclusion of the hospital from the coverage of the statute.

An examination of the hospital's statutory charter demonstrates that it functions primarily as a *private* hospital. It is empowered to treat patients both from within and without the district; it is required to charge all patients who are "financially able" for services rendered; and it may treat without charge only those patients who are "indigent". Section 30. Its taxing authority is limited to making up deficits caused by a shortfall of income generated from its services to private-paying patients. It is in short, primarily a proprietary hospital--and it is noteworthy, we think, that in the year in question here, 1977, it generated revenues of $32,000,000.00 from its private bill-paying patients (R. 1284).[2/] The Eldreds were paying patients, not indigents (R. 20).

The hospital contends that it is primarily governmental because it has the power to tax and has certain other "public" attributes. In our judgment, those attributes are incidental and secondary, because they exist only to the extent necessary to make up deficits occurring in the course of the hospital's primary activity as a private proprietary hospital. In theory at least, if no deficits occurred, those attributes would be largely surplusage. We need not debate the point at length, however, because the hospital's position has already been squarely rejected by this Court. The hospital in *Suwannee County Hospital Corp. v. Golden*, 56 So.2d 911 (Fla. 1952), made precisely the same argument, and this Court rejected it--holding that limited taxing power and other "public" attributes did not turn a primarily proprietary tax district hospital into a governmental entity:

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[2/] The record does not contain evidence of the amount of *tax*-generated revenues received in that period. It was the hospital's burden to produce that evidence, of course, and in its absence this Court has no choice but to assume that the bulk of the hospital's budget for 1977 was covered by private paying patients.

By Chapter 23547, Laws of Florida, Special Acts of 1945, a district was created for the purpose of building and maintaining a hospital "* * * for the benefit of the citizens and residents * * *" of Suwannee County, "* * * and the extension, when available, of hospitalization to patients from other and adjoining counties; provided, however, that patients from other counties * * * shall be required to pay the cost of such hospitalization * * *."

The Legislature was at pains to declare in the act that the hospital was to be "public"; also that the corporation was to be non-profit with net earnings placed in a reserve fund to be used for hospital purposes.

The trustees were empowered to prescribe maximum charges and fees, and to determine who should receive hospitalization free because of inability to pay.

The particular provision brought into focus by this controversy is: "the said corporation *may contract and be contracted with, and may sue and be sued, but said corporation shall not be liable for any negligence of any of its officers, agents or employees, including doctors and surgeons and nurses who may be engaged in work on or about said hospital*, and shall not be liable for any tort committed by an officer, agent or employee of said corporation." (Italics ours.)

Counsel for appellants have directed us to decisions of a federal court and of the Supreme Courts of Ohio and Alabama, which seem to support the position that an institution like Suwannee County Hospital should not be held responsible for damages for tort.

. . . .

This authority of considerable respectability seems to bear out appellant's position, but we firmly disagree with it and feel we are obligated to exercise our prerogative of interpreting the Florida Constitution according to our own consciences and understanding.

In the first place, we see no fundamental sameness in a hospital and the school system, and very little in a hospital and a home for disabled veterans.

As important as public health and as indispensable as hospitals are to public health, it seems to us their activities fall more clearly in the category of "proprietary" functions than "governmental" functions, as to those patients who pay for the services they require and who are justified in expecting they will receive free of negligence the expert services for which they pay.

Institutions such as these are not a part of any state-wide system maintained at public expense, so all who become afflicted may, regardless of their individual worth, have the advantages of professional nursing, medical attention, and modern scientific apparatuses without cost to them.

Actually, construction of hospitals is often financed by a public corporation because of the large amount required for the purpose, and operation likewise is supervised and underwritten to keep them going concerns. Deficits between income and outgo are met by some form of taxation because of the definite value of hospitals to the community.

But what conceivable difference is there between the functioning of a non-profit institution, operated by a district, and the activities and services of doctors, nurses, and technicians connected with it, and a hospital owned and operated privately. We can think of none. Yet, from a commercial standpoint, there is quite a difference, for the public one pays no taxes, on the contrary, can draw upon the exchequer for financial aid, and while the privately owned one pays its own way, and actually helps through taxation to pay the other's way also. A distinction from a humanitarian view is that the public corporation can and should more appropriately care for those unfortunate persons who are unable to pay for their treatment.

It is our view that one who enters a hospital of the type of appellant and pays for the professional services he receives is entitled to the same protection, and under our constitution, to the same redress of wrongs, that he would be entitled to had he had the same experience in a privately owned and operated hospital. And it bothers us not at all that the corporation is called "non-profit", the "net earnings" to be "placed in its reserve fund, and used for hospital purposes." True, these "net earnings" do not reach the pocket of any individual, but we can see no impropriety or illogic in making them available for the sick who have been injured by mistreatment as well as those who seek a restoration of health by proper treatment.

At least as to those who are paying patients like appellee, the hospital is operated in a proprietary capacity, and they may not be divested of constitutional rights by the attempted statutory immunization. As to persons of that classification, the hospital is the same as if it were privately maintained, its duty to the patient is the same, and it should be equally responsible for its torts.

An enterprise is not governmental in character simply because the government enters it or the legislature declares it so. Whether it be governmental or proprietary depends on the nature of the business and the determination of the courts.

*Suwannee County Hospital Corp. v. Golden*, 56 So.2d 911, 912-13 (1952).[3/]

The *Golden* decision is not the only authority on point. There are numerous Florida decisions which draw the same distinction drawn in *Golden*, and which hold that a corporation operating an essentially private hospital is not rendered a "governmental" hospital merely because it has some public purpose and is capable of assessing taxes to subsidize itself. *See, e.g., West Coast Hospital Ass'n v. Hoare*, 64 So.2d 293 (Fla. 1953); *Moles v. White*. 336 So.2d 427 (Fla. 2nd DCA 1976) (and decisions cited therein). *Compare Buck v. McLean*, 115 So.2d 764, 766 (Fla. 1st DCA 1959), in which the Court interpreted the *Golden* decision to mean that the tax district hospital at issue there "neither possessed any of the attributes nor discharged any of the functions of sovereignty."

It is also of no moment that the hospital is subject to the provisions of the due process clause. *See North Broward Hospital District v. Mizell*, 148 So.2d 1 (Fla. 1962). The very most that *Mizell* (and other related decisions)[4/] stand for is the proposition that, because the hospital does have some public attributes by virtue of its limited taxing power, its employees and staff are entitled to procedural due process. That is not inconsistent with our position here, since we do not deny that the hospital has *some* attributes

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[3/] It is true, as the hospital will no doubt point out, that a governmental entity acting in a proprietary capacity can now be clothed with sovereign immunity (that is, if the legislature chooses to do so--which it did not in this case, as we shall explain *infra*), and the *Golden* decision is now possibly problematical on the *constitutional* issue contained in it. *See Cauley v. City of Jacksonville*, 403 So.2d 379 (Fla. 1981) (in which this Court held that the same Constitution which prohibited the legislature from creating immunity for quasi-public proprietary hospitals allowed the legislature to create immunity for municipalities acting in a proprietary capacity). *Golden's* discussion of the distinction between essentially governmental hospitals and essentially private hospitals subsidized by public monies remains valid, however, and is therefore directly instructive on the issue presented here.

It is also worth noting that the special act creating the hospital did *not* attempt to confer immunity upon it, as the legislature had previously attempted in the special act at issue in *Golden*. The hospital can therefore claim no immunity from its enabling legislation, and the immunity it claims must derive solely from §768.28.

[4/] *Mizell v. North Broward Hospital District*, 175 So.2d 583 (Fla. 2nd DCA 1965); *Hitt v. North Broward Hospital District*, 387 So.2d 482 (Fla. 4th DCA 1980).

of a public hospital. Our contention is simply that those secondary attributes do not render it *primarily* an instrumentality of the sovereign--which is what §768.28 *requires* before the hospital can be clothed with sovereign immunity. Moreover, in *Mizell* itself, this Court described the North Broward Hospital District as "engaged in . . . *essentially* proprietary activity under governmental auspices . . .". *Mizell, supra* at 3 (emphasis supplied). In view of the fact that the very decision imposing due process requirements on tax district hospitals describes those hospitals as "*essentially proprietary* . . . under governmental auspices", it is clear that the mere requirement to comply with the due process clause does not turn a tax district hospital into an *essentially* (or "primarily") governmental entity--which is what §768.28 requires before such a hospital can claim the benefit of sovereign immunity.

There is no ambiguity in any of these decisions; but even if there were, any ambiguity was laid to rest in 1976 by this Court when it held "that a public corporation whose functions are local rather than state-wide does not share the sovereign immunity of the state". *Circuit Court of Twelfth Judicial Circuit v. Dept. of Natural Resources*, 339 So.2d 1113, 1115 (Fla. 1976). The Court also opined in *Circuit Court* that, in the absence of a constitutional immunity from suit (which the hospital clearly does not have in this case), the *Golden* decision stands for the proposition that the legislature cannot statutorily immunize a local hospital district. In light of *Golden* and *Circuit Court*, the word "primarily" contained in §768.28 should clearly be construed to exclude the hospital; it should not be construed to include the hospital, else it will be subject to serious constitutional challenge under both *Golden* and *Circuit Court*.

This long line of judicial authority (with the exception of *Circuit Court*) preceded the enactment of §768.28, and the legislature was presumptively aware of it. It is also evident that the legislature was aware of the settled distinction between public governmental entities and essentially private entities subsidized by public funds, because it did

not extend the coverage of §768.28 to *all* corporations acting in *any* capacity as an instrumentality of the state or counties; instead, it expressly extended the coverage of §768.28 only to those "corporations *primarily* acting as instrumentalities or agencies of the state, counties [etc.]". The qualifying word "primarily" cannot be treated as surplusage and ignored; it must be afforded a meaning and purpose, since the legislature included it in the statute. And its inclusion can *only* mean that the legislature intended that corporations acting primarily as private entities, and only secondarily possessing attributes of governmental instrumentalities, are *not* afforded governmental immunity.[5/] The hospital in this case is clearly acting primarily as a private hospital, and only secondarily possesses any attributes of a governmental instrumentality. Unless the word "primarily" is to be ignored altogether, the definition of "state agencies or subdivisions" in §768.28(2) expressly *excludes* the defendant in this case.

Faced with the square holdings of *Golden* and like decisions, the hospital sought to finesse them below by contending that they no longer retain any vitality because, according to the hospital, the legislature's waiver of sovereign immunity was an attempt to eliminate artificial distinctions between proprietary and governmental activities as a basis for sovereign immunity. That may be true where the legislature *expressly* eliminated the distinction--as it did by expressly including "municipalities" within the coverage of §768.28. *See Cauley v. City of Jacksonville*, 403 So.2d 379 (Fla. 1981) (by expressly including municipalities within coverage of §768.28, legislature *created* sovereign immunity for municipalities operating in proprietary capacities). But in this case,

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[5/] It is worth noting that the legislature had good reason to exclude essentially private tax-district hospitals from the coverage of the statute. Because such hospitals compete directly with private hospitals, they would be given an undue competitive economic advantage in the marketplace if they were immunized from negligence actions, which might result in economic adversity to private hospitals. The legislature could therefore have reasonably concluded that economic fairness in this vital industry required that essentially private tax-district hospitals be treated the same as private hospitals in this area.

the legislature did not expressly include "tax district hospitals" within the coverage of §768.28, as it did with "municipalities". Instead, it expressly retained the governmental-proprietary distinction where public corporations were concerned, and included within the coverage of §768.28 only those corporations "primarily" acting as instrumentalities of a governmental entity. In view of *Golden*, the hospital does not fit that expressly defined category, and it is therefore expressly *excluded* from coverage of the statute.

The hospital will also point this Court to a number of Opinions of the Attorney General reflecting that the Attorney General shares its reading of the statute, but we need not remind this Court that those opinions are not sought in an adversary posture in which both sides of the question are presented; that they are not the law; or that they are entitled to no more weight than the opinions of opposing counsel in this case. The law is contained in §768.28 and the decisional law, and if the law compels a conclusion contrary to the opinion of the Attorney General, then it is this Court's constitutional function to say so.

The hospital will also point to a decision of the Fifth District which mentions in dicta that tax district hospitals are within the coverage of §768.28: *Whitney v. Marion County Hospital District*, 416 So.2d 500 (Fla. 5th DCA 1982). The District Court's conclusion in *Whitney* that the Marion County Hospital District was a state agency is, of course, not dispositive of the status of the North Broward Hospital District; but more importantly, *Whitney* does not discuss the issue presented here at all. In *Whitney*, the defendant contended that it was a state agency, and the plaintiff apparently agreed with that contention in order to obtain the benefit of the longer four-year statute of limitations provided by §768.28. In view of this agreement, the District Court clearly did not "hold" anything on this issue. In addition, the special act of the legislature creating the Marion County Hospital District purported to confer sovereign immunity upon the hospital district, except to the extent of liability insurance carried by the Board of Trustees

(much like the statute declared unconstitutional in *Golden*). In this case, the special act of the legislature creating the North Broward Hospital District contains no such provision. For both of these reasons, *Whitney* is simply inapposite here--and it is, of course, not controlling in any event upon this Court's determination of the issue presented here.

There are two additional decisions which have mentioned in dicta that tax district hospitals are within the coverage of §768.28: *Whack v. Seminole Memorial Hospital, Inc.*, 456 So.2d 561 (Fla. 5th DCA 1984), and *Florida Patient's Compensation Fund v. S. L. R.*, 458 So.2d 342 (Fla. 5th DCA 1984). These decisions are distinguishable for the same reasons that *Whitney* is distinguishable. In all three of these cases, the plaintiffs apparently *agreed* with the defendant-hospitals that the hospitals were within the coverage of §768.28 for the purpose of obtaining the longer four-year statute of limitations period contained in that statute--and the defendants were not about to forsake the haven provided for them by §768.28 by disagreeing with the plaintiffs. The issue presented in this case was therefore not before the Fifth District in those decisions--and that is perfectly clear from the fact that not one of them mentions *Golden* or comes to grips with the legislature's intention in inserting the word "primarily" into the coverage provision of §768.28. In short, the dicta in those decisions should have no bearing on the question of first impression presented here.

In the final analysis, we think Section 768.28(2) plainly and unambiguously provides immunity only to those public corporations acting *primarily* as instrumentalities of a governmental entity. The *Golden* and *Circuit Court* decisions make it perfectly clear that the hospital in this case is *not* such a corporation, notwithstanding that it may possesss some secondary attributes of a governmental entity, and the hospital is therefore clearly *not* clothed with a new-found immunity by §768.28 as a result. Unless the qualifying word "primarily" is construed out of existence, the hospital's claim of immunity simply cannot be accepted. As long as that qualifying word appears in the definition

section of §768.28, the hospital is provided no protection by the statute, and the plain and unambiguous language of the statute simply must be enforced by this Court. *See State v. Egan*, 287 So.2d 1 (Fla. 1973) (and numerous decisions cited therein).

**2. If ambiguous, §768.28(2) must be construed to *exclude* the hospital.**

If the statute does not plainly and unambiguously *exclude* the hospital from its coverage, it certainly cannot be said that it plainly and unambiguously *includes* the hospital. In that event, the Court is left with an ambiguity to resolve, and must resort to rules of statutory construction. Although it is true, as a general rule, that waivers of sovereign immunity must be strictly construed in favor of immunity, the hospital is not contending that §768.28 *waived* any sovereign immunity it may have had, because it had no immunity prior to enactment of §768.28 on the facts in this case. *See Suwannee County Hospital Corp. v. Golden, supra.* In view of this undeniable fact, the hospital is actually urging that §768.28 *created* sovereign immunity for it, thereby restricting the plaintiffs' long-recognized common law right (which was *not* abrogated by the hospital's enabling legislation) to sue it for negligence. Because no *waiver* of immunity is involved, it would be inappropriate to construe the statute strictly in the hospital's favor. Because the *creation* of immunity at the expense of common law rights is involved, the more appropriate rule of construction is the settled rule that statutes in derogation of the common law must be strictly construed in favor of the common law, and any doubt as to their meaning must be resolved against abrogation of the common law. *See, e. g., Dudley v. Harrison, McCready & Co.*, 127 Fla. 687, 173 So. 820 (1937); *State ex rel. Grady v. Coleman*, 133 Fla. 400, 183 So. 25 (1938); *Southern Attractions, Inc. v. Grau*, 93 So.2d 120 (Fla. 1957).

Although we think that rule of construction requires that any ambiguity in §768.28 be resolved in the plaintiffs' favor, we would suggest as well that a certain amount of clarity should be required in a statute when the legislature intends to create immunity

from tort liability where it never existed before, and where it was constitutionally prohibited at the time. There is no such clarity in §768.28 with respect to tax district hospitals (as there is with respect to municipalities). And the only way that tax district hospitals can be read into the statute is by ignoring both the word "primarily" and this Court's decision in *Golden*. The Court must also ignore the title of the statute--"*waiver* of sovereign immunity"--in order to find that the legislature intended to *create* immunity for the hospital in this case. All things considered, we think the legislature came nowhere close to making it clear that it intended to change the law announced in *Golden*, and it would appear much more likely that, by its purposeful choice of the word "primarily", it actually intended not to change the law announced in *Golden*.

In our judgment, the law announced in *Golden* should remain the law until the legislature announces its intention to overrule it with clear and unequivocal language which leaves no doubt as to its intention. Certainly, the present version of §768.28 contains no such language, and the answer to the certified question should therefore be in the negative until the legislature distinctly says otherwise. *See District School Board of Lake County v. Talmadge*, 381 So.2d 698 (Fla. 1980) (§768.28 did not abolish common law tort liability for government employees, and immunize them from suit, where the intent to do so was not clearly and unequivocally expressed); *Carlile v. Game & Fresh Water Fish Commission*, 354 So.2d 362 (Fla. 1977) (§768.28 did not change common law venue rule by implication, where intent to do so was not clearly and unequivocally expressed); *Trail Builders Supply Co. v. Reagan*, 235 So.2d 482 (Fla. 1970) (common law right of indemnification in tort actions was not abolished by implication in Workers' Compensation Act, where intent to do so was not clearly and unequivocally expressed).

### C. A response to the District Court's opinion.

That was essentially the argument we made to the District Court. The District Court did not respond to it, but passed it up to this Court instead: "We shall not para-

phrase all of the arguments raised by the parties upon this issue as they will be fully presented to this state's highest court". The District Court did give some brief explanation for its answer to the certified question. We will respond briefly to that explanation for our conclusion here.

First, the District Court stated: ". . . We are convinced that if it looks, walks, quacks and swims like a duck, that is what it is". Although we do not think that observation is particularly pertinent here, we will not complain (squawk?) about it because we understand what the District Court meant by it. The problem with the observation is, however, that this Court said in *Golden* that although tax district hospitals have duck-like attributes, they are simply not ducks. Put in terms more pertinent to the issue here, *Golden* says that although tax district hospitals have some secondary governmental attributes, they are primarily private hospitals. And if appearances are to be controlling here, certainly tax district hospitals appear to their private paying patients to be private hospitals--not governmental hospitals (and especially not ducks). The more important point, however, is that the answer to the question presented here must ultimately depend upon the language of the statute, and what the legislature meant by the word "primarily". No matter how duck-like the hospital may appear to be, if its duck-like characteristics are only secondary, and it is primarily not a duck, then it is simply not a duck--which is essentially what this Court said in *Golden*.

Next, the District Court relied upon this Court's recent decision in *Michel v. Douglas*, 464 So.2d 545 (Fla. 1985), in which this Court held that the personnel records of the Marion County Hospital District were "public records" within the meaning of Chapter 119, Fla. Stat. (1979)--and therefore open to public inspection. We have no difficulty squaring *Michel* with our position here, for two reasons--one general and one specific. First, as we have noted previously, this Court has held in the past that, notwithstanding that tax district hospitals are *essentially* proprietary institutions, their secondary gov-

ernmental attributes obligate them to comply with certain laws imposed upon governmental entities--like the due process clause. Obligating tax district hospitals to comply as well with the Public Records Act logically follows from those holdings. The converse is not true, however. It does not logically follow that merely because an entity with secondary governmental attributes must comply with the Public Records Act, it is also *primarily* governmental rather than proprietary and therefore immune from tort liability.

There is also a more important, and considerably more specific, reason why *Michel* is irrelevant to the issue presented here--the language of the two separate statutes involved. Section 119.011, Fla. Stat. (1983), defines "public records" as records held by "any agency"--and it defines "agency" to include "any state, county, *district*, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law . . .". Tax district hospitals are therefore expressly *included* within the coverage of Chapter 119, without distinction between whether they are primarily governmental or only secondarily governmental in nature. In contrast, §768.28 does not go that far. It includes only those "corporations *primarily* acting as instrumentalities or agencies of the state [or] counties . . ."--which, according to *Golden*, *excludes* tax district hospitals. Because, in the final analysis, resolution of the issues presented in both *Michel* and this case depends solely upon the language of the respective statutes involved, *Michel* has no bearing on the quite different question presented here.

Finally, citing Ralph Waldo Emerson on "the hobgoblin of little minds", the District Court justified its holding in the name of "consistency", arguing that all entities with any governmental attributes should be treated alike. With all due respect to the District Court, we think that observation begs the question. The question is not whether, as a matter of policy, the legislature *should have* included all entities with any governmental attributes within the coverage of §768.28; the question is whether the legislature *did*

include all those entities within the coverage of the statute.[6/] In our judgment, it clearly did not. By its purposeful choice of the qualifying word "primarily", it clearly intended to include within the coverage of the statute only those corporations acting "primarily" as governmental instrumentalities, and exclude those corporations with only secondarily governmental attributes. If *Golden* is still the law in this Court; and if the word "primarily" is to be given any meaning at all; and if this Court is correcct that it will not imply abolition of common law rights by §768.28, absent a clear and unequivocally expressed intent to do so--then tax district hospitals are excluded from the coverage of §768.28. The question of whether or not they should have been included within the coverage of the statute is simply an irrelevant question here, which should be debated by the legislature after this Court answers the certified question in the negative.

## V.
## CONCLUSION

It is respectfully submitted that the certified question should be answered in the negative. The District Court's decision should be quashed, and the cause should be remanded to the District Court with directions to affirm the plaintiffs' judgment.

## VI.
## CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 31st day of May, 1985, to: ELLEN MILLS GIBBS, ESQ., Gibbs & Zei, 224 S.E. 9th

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6/ Though the courts' role in the lawmaking process is recognized, and they have a limited power to adjust statutory provisions to fit changing concepts, the courts cannot use the machinery of construction to amend, modify, or repeal valid statutes. And it is well settled that courts are not concerned with the wisdom of an enactment. Their function is only to ascertain the will of the legislature. They must construe the law as given by the legislature and may not substitute judicial cerebration for the law or require the enforcement of what they think the law should be.

49 Fla. Jur.2d, *Statutes*, §110, pp. 146-47 (and numerous decisions cited therein).

Street, Ft. Lauderdale, Fla. 33316, and to FLEMING, O'BRYAN & FLEMING, Attention: William D. Ricker, Jr., Esq., 1415 East Sunrise Blvd., Ft. Lauderdale, Fla. 33304, Attorneys for Appellant; and to BERNARD & MAURO, P.O. Drawer 14126, 707 S.E. Third Avenue, Ft. Lauderdale, Fla. 33302.

Respectfully submitted,

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