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,

Respondent.

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

GIBBS & ZEI
224 S.E. 9th Street
Fort Lauderdale, Florida 33316

-and-

FLEMING, O'BRYAN & FLEMING
1415 East Sunrise Boulevard
Fort Lauderdale, Florida 33304
(305) 764-3000
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(continuation)

TABLE OF AUTHORITIES
(continuation)

OTHER AUTHORITIES

Florida Statutes

Session Laws

OTHER AUTHORITIES
(continued)

PREFACE

This brief is submitted pursuant to Rule 9.120, Florida Rules of Appellate Procedure. This appeal is brought upon the discretionary jurisdiction of this Court from a decision of the Fourth District Court of Appeal which certified the following as a question of great public interest: 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 parties will be referred to in this brief as follows:

NORTH BROWARD HOSPITAL DISTRICT, d/b/a BROWARD GENERAL MEDICAL CENTER	Hospital District, Respondent
BRENT R. ELDRED, SUSAN E. ELDRED and RICHARD K. ELDRED	Eldreds, Petitioners

STATEMENT OF THE CASE AND OF THE FACTS

Respondent accepts the statement of the case and facts contained in Petitioners' brief with two important additions: the date of the alleged malpractice and the correct amended statute to be considered. The alleged medical malpractice in this case occurred on or after December 11, 1977 (R 383, 1217), and, therefore, the appropriate statute is section 768.28(5), as amended effective June 2, 1977, by Chapter 77-86, Laws of Florida. The importance of applying the 1977 amendment to the 1975 statute will be fully discussed in the argument portion of this brief.

SUMMARY OF THE ARGUMENT

Prior to the 1973 legislative enactment of the waiver of sovereign immunity act, section 768.28, Florida Statutes, Florida had a long and tortured history of judicial application of the common law doctrine of sovereign immunity which resulted in inconsistent, inequitable and incongruous results for various Florida local governmental entities. The Legislature thought that it resolved the earlier confusion in the law when it waived sovereign immunity for the state and its subdivisions by creating broad tort liability against governmental entities while preserving their fiscal integrity by limiting the dollar amount of their liability.

Following the 1975 effective date of the 1973 legislation, the Florida Attorney General issued an opinion advising the City of Fort Lauderdale that the Act did not apply to local governmental units. Because the Attorney General's opinion caused great difficulties for local governments in obtaining liability insurance, the Legislature enacted the 1977 amendment to section 768.28. The 1977 legislation left no doubt that local governmental entities were to be provided the same limitations of liability as any other state agency, without regard to their prior status in the common law.

This court has previously approved the constitutionality of the original 1973 legislation and the 1977 amendment as it applies to local governmental units. Since 1977, the Attorney

General has likewise consistently advised all local governmental units that they are included within the limitation of liability provisions of section 768.28. In fact, there have been no judicial decisions or Attorney General opinions since 1977 which have not interpreted the Act, as amended in 1977, to include local governmental units within the limitation of liability provisions of section 768.28.

The North Broward Hospital District is a legislatively created special tax district which provides public hospital services to the northern half of Broward County. It is the only public body in its district which provides such services and its existence is limited to providing hospital services. This Court as well as several district courts of appeal have consistently found the Hospital District to be a local governmental entity subject to all of the laws imposing special obligations upon such bodies.

The Hospital District maintains that it is an independent establishment of the state as defined in section 768.28(2) since it is imbued with the characteristics of the sovereign, including taxing authority independent of other local governmental entities and an independent board of commissioners which answers only to the citizens of the district. Because its enabling legislation "created and incorporated" a special tax district, however, it was apparently construed by the Fourth District Court of Appeal to be a corporation primarily acting as an instrumentality of the state. Whether it is construed as a

corporation or as an independent establishment of the state, it is providing the public services of an independent governmental entity and was intended to be among the local governmental entities provided limitation of liability by section 768.28.

ISSUE PRESENTED FOR REVIEW

WHETHER THE NORTH BROWARD HOSPITAL DISTRICT IS AN INDEPENDENT ESTABLISHMENT OF THE STATE OR ALTERNATIVELY IS A CORPORATION PRIMARILY ACTING AS AN INSTRUMENTALITY OR AGENCY OF THE STATE OR BROWARD COUNTY AND IS ENTITLED TO THE LIMITATION OF LIABILITY PROVIDED BY SECTION 768.28(5) FLORIDA STATUTES (1977)?

ARGUMENT

THE NORTH BROWARD HOSPITAL DISTRICT IS AN INDEPENDENT ESTABLISHMENT OF THE STATE OR ALTERNATIVELY IS A CORPORATION PRIMARILY ACTING AS AN INSTRUMENTALITY OR AGENCY OF THE STATE OR BROWARD COUNTY AND IS ENTITLED TO THE LIMITATION OF LIABILITY PROVIDED BY SECTION 768.28(5), FLORIDA STATUTES (1977).

A. Introduction

Stripped to its basics, the Eldreds' argument that the Hospital District is not to be included within the limitation of liability provision of the waiver of sovereign immunity statute, section 768.28(5), Florida Statutes (1977), is nothing more than an attempt to resurrect the governmental versus proprietary test this Court put to rest in Cauley v. City of Jacksonville, 403 So.2d 379 (Fla. 1981) by grafting on to it the paying patron test rejected by this Court in Circuit Court of Twelfth Judicial Circuit v. Department of Natural Resources, 339 So.2d 1113 (Fla. 1976). The Eldreds' outdated view of the modern law of limited sovereign immunity requires them to narrowly view the Hospital District as nothing more than a revenue generating corporation without a public purpose.

Although they dwell at length on the Legislature's use of the word "primarily" to describe a qualifying relationship between certain governmental entities, the Eldreds cite to no case or statutory definition of "primarily" to support their position. In fact, notwithstanding their lengthy effort to resurrect a case-by-case test for determining the applicability

of section 768.28(5), which effort is based on their perception of the Legislature's intent in using the word "primarily," the Eldreds insist that the statute is unambiguous and needs no interpretation![1]

The issue before this Court is not merely whether the Hospital District is a corporation primarily acting as an instrumentality or agency of the state, county or municipality.[2] It is instead whether the Hospital District is a "state agency or subdivision" provided the limitation of liability of section 768.28(5). To answer that question one must look to the full definition of "state agencies or subdivisions" contained in section 768.28(2). When doing so one will note that the Eldreds completely ignore that portion of the statute which includes "independent establishments of the state" in the definition of state agencies or subdivision. The Eldreds ignore this aspect of the statute; this brief will not.

---

[1]Although the Eldreds go so far as to imply that this Court is not to consider legislative intent in determining whether the Hospital District is to be included in the limitation of liability provisions of section 768.28, decisional law in this state has long held that determining legislative intent is the primary guide to statutory interpretation. Tyson v. Lanier, 156 So.2d 833 (Fla. 1963). In fact, as early as 1938 this Court noted that determining and effectuating legislative intent overrides all other rules of statutory construction. American Bakeries Co. v. Haines City, 131 Fla. 790, 180 So. 524 (1938).

[2]The Hospital District realizes that the certified question inquires as to "corporations primarily acting as an instrumentality or agency of the state." This Court is not limited to the four corners of the question as certified, however. If the District Court merely chose the wrong language for its certified question or too narrowly construed the statute, its holding is still correct and should be affirmed by this Court. Congregation Temple De Hirsch v. Aronson, 128 So.2d 585 (Fla. 1961).

In order to answer the precise question posed by the Fourth District, it is necessary to determine the meaning of "corporations primarily acting as instrumentalities or agencies of the state, counties or municipalities" intended by the Legislature. Legislative intent, however, cannot be fully understood without reviewing the common law history of sovereign immunity. This brief will, therefore, evaluate the common and statutory law concerning the doctrine of sovereign immunity prior to 1977, including a review of judicial application of the doctrine prior to the original 1973 legislation waiving sovereign immunity, section 768.28,[3] the 1976 Attorney General's opinion which adversely construed the 1973 legislation against local governments and the Legislature's uncharacteristically swift 1977 response to correct problems caused by the 1976 Attorney General's opinion. The brief will then examine the judicial interpretations of the waiver of sovereign immunity act as amended in 1977 as they relate to its application to local governments.

---

[3]Section 768.28 was first enacted, effective January 1, 1975, by Chapter 73-313, Laws of Florida. That Act waived sovereign immunity for the state, its agencies and political subdivisions, but limited the recovery for any one person to an amount not in excess of $50,000.00. The section was amended effective June 2, 1977. Ch. 77-86, Laws of Fla. The 1977 session law specifically provided that the amendment was intended to clarify the Legislature's intent to apply the statute to all state agencies and subdivisions. In 1981, the statute was amended to increase the amount of liability for a governmental entity to $100,000.00 for any one person or $200,000.00 for the same incident or occurrence. Ch. 81-317, §2, Laws of Fla. The incident in this case occurred in December, 1977, and therefore, the amendment effective June 2, 1977, is controlling. Collier v. Dade County, 417 So.2d 695 (Fla. 3d DCA 1982).

Following this historical review of the development of the law of sovereign immunity in Florida, this brief will show why the precise question posed by the Fourth District must be answered affirmatively in light of that history. Finally this brief will deal with the more fundamental question of whether the Hospital District is an independent establishment of the state.

B. The Development of Sovereign Immunity Prior to 1977

Prior to 1973 no statute dealt with sovereign immunity. While common law application of the doctrine to the state government did not create major problems, its application to local governmental units was inconsistent and inequitable. The case law concerning municipalities, for instance, led to a tortured history oscillating between immunity and no immunity. See the discussions of the historical development of sovereign immunity for local governmental units in Cauley v. City of Jacksonville, 403 So.2d at 381-386, and Commercial Carrier Corporation v. Indian River County, 371 So.2d 1010, 1015-1017 (Fla. 1979).

To deal with the factual circumstances of individual cases, over the years this Court created various tests to determine whether a specific act or omission by a local governmental unit fell within the common law protection of sovereign immunity. For instance, in Brown v. Town of Eustis, 92 Fla. 931, 110 So. 873 (Fla. 1926), and Ballard v. City of Tampa, 124 Fla. 457, 168 So. 654 (Fla. 1936), a governmental versus proprietary

distinction was created in finding that negligent acts of municipal policemen and street maintenance workers were not protected by sovereign immunity. The Ballard decision held that municipalities would be immune from the results of governmental decisions but not from the effects of carrying out corporate functions. In 1952 this Court appeared to create a separate exception from immunity for a public hospital district where it apparently held that a paying patron, but not a nonpaying patron, could recover damages for medical malpractice. Suwannee County Hospital Corp. v. Golden, 56 So.2d 911 (Fla. 1952).

Because a separate analysis of each factual situation led to inconsistencies in the application of the law, however, this Court tried to clear the air in its decision in Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957). That decision appeared to eliminate any vestiges of municipal immunity when it stated: "... when an individual suffers a direct, personal injury proximately caused by the negligence of a municipal employee while acting within the scope of his employment, the injured individual is entitled to redress for the wrong done ..." 96 So.2d at 133-34.

Within ten years, however, this Court was again moving toward creating case-by-case exceptions for various negligent proprietary acts. For example, in Modlin v. City of Miami Beach, 201 So.2d 70 (Fla. 1957), where the city was sued for a wrongful death allegedly caused by a negligent building inspector, the plaintiff was denied recovery because she could not show

she was owed a special duty different than that owed to the general public.

The confusion continued when the paying patron versus nonpaying patron test apparently created in Suwannee County was reexamined and rejected. Circuit Court v. Dept. of Natural Resources, 339 So.2d 1113 (Fla. 1976). In upholding the sovereign immunity of the Florida Department of Natural Resources for the 1973 wrongful death of a paying patron in a state park, this Court held that Suwannee County did not stand for a paying patron versus nonpaying patron exception to governmental tort immunity, but rather for a statewide services versus local services exception.

At one time or another, therefore, there were at least four different common law tests -- general versus special duty, governmental versus proprietary, paying patron versus nonpaying patron, and local versus statewide services -- to apply to negligent acts of local governmental units to determine whether or not the unit's liability was limited by sovereign immunity. Unfortunately, none of the four tests was absolute; together they lead to confusing, inconsistent and incongrous results. Cauley v. City of Jacksonville, 403 So.2d at 385.

Because of the confusion in the law surrounding the application of sovereign immunity to individual governmental units, in 1973 the Legislature enacted section 768.28 which waived sovereign immunity as to all claimants but limited recovery for any one claimant. Ch. 73-313, Laws of Fla. The

Attorney General returned confusion to the law in 1976, however, when he advised the City of Fort Lauderdale that enactment of section 768.28 did not eliminate the City's tort liability. 1976 Op. Atty. Gen. Fla. 076-41 (Feb. 23, 1976).

The Legislature's reaction was uncharacteristically swift and unequivocal. Removing any doubt as to its original intention in 1973, the Legislature specifically stated that not only did the Attorney General misinterpret its original intent, his advice had created difficulty in the ability of local governments to obtain affordable liability insurance -- if they could obtain it at all. Ch. 77-86, Laws of Fla.[4] The significant addition to section 768.28(5) was quite simple -- but clear:

---

[4]The preamble of Chapter 77-86 states in part:

WHEREAS, Chapters 73-313 and 74-235, Laws of Florida, creating and subsequently amending sections 768.28 and 768.30, Florida Statutes, waived the sovereign immunity of the state and its agencies or subdivisions for liability for torts, and

WHEREAS, in enacting section 768.28, Florida Statutes, the Legislature clearly intended to make the state, the counties, and the municipalities liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, and . . .

WHEREAS, the Attorney General, in his opinion number 076-41, dated February 23, 1976, failed to recognize the basis for the limitation of liability set forth in subsection (5) of section 768.28, Florida Statutes, and

WHEREAS, the Legislature finds that local governments throughout the state, because of the uncertainty caused by the Attorney General's opinion, are experiencing difficulty obtaining liability insurance, and, if the insurance is available, the rates are exorbitant and often beyond the ability of the local taxpayers to afford, and

> The limitations of liability set forth in this subsection shall apply to the state and its agencies and subdivisions whether or not the state or its agencies or subdivisions possessed sovereign immunity prior to July 1, 1974. (emphasis supplied).

C. The 1977 Amendment And Its Progeny

This Court as well as the various district courts of appeal and the Attorney General have revisited the question of the applicability of the waiver of sovereign immunity statute to local governmental units on numerous occasions since the 1977 amendment to section 768.28(5), and without exception have interpreted the legislative enactment to include all local governmental units within its provisions.

The seminal decision establishing the applicability of section 768.28 as amended in 1977 to local governmental units is Cauley v. City of Jacksonville, 403 So.2d 379 (Fla. 1981). In Cauley, this Court acknowledged that the central question before it was whether a local governmental unit enjoyed sovereign immunity for its proprietary functions. In finding that local governmental units were to be included in section 768.28, this Court held that the legislative enactment furthered rather than denied equal protection and eliminated the major inconsistency in prior law where similar actions of a municipality and a county

---

([4] continued)

WHEREAS, this problem requires clarification of the present statute, NOW, THEREFORE,

(emphasis supplied)

often resulted in liability attaching to the municipality but not to the county. In rejecting all tests for determining whether a governmental unit had immunity based on the nature of the negligent act or the type of governmental unit, this Court said that municipalities could no longer be identified as partial citizens compared to other constitutionally authorized local governmental units.[5]

The most thorough analysis of the extent to which immunity was waived by section 768.28 is the decision in Commercial Carrier Corporation v. Indian River County, 371 So.2d 1010 (Fla. 1979). After discussing the various exceptions to municipalities' absolute immunity which have been judicially created over the years, this Court specifically rejected the "governmental vs. proprietary" exception expressed in Gordon v. City of West Palm Beach, 321 So.2d 78 (Fla. 4th DCA 1975), and the "special duty vs. general duty" exception created in Modlin v. City of Miami Beach. Leaving no doubt that there would no longer be artificial tests carving out exceptions to section 768.28, this Court stated:

> ... we conclude that Modlin and its ancestory and progeny have no continuing vitality subsequent to the effective date of section 768.28.

---

[5]Special tax districts like the Hospital District are recognized and authorized by the following Florida constitutional provisions: Article VII, Sections 2, 8, 9 and 12 and Article VIII, Section 6(b).

371 So.2d at 1016. In short, this Court rejected any test designed to subject a local governmental unit to more liability than permitted by section 768.28.[6]

There has been no Supreme Court decision expressly dealing with the applicability of section 768.28(5) to hospital districts, although there have been several decisions applying it to other local governmental units. City of Lake Worth v. Nicolas, 434 So.2d 315 (Fla. 1983); Berek v. Metropolitan Dade County, 422 So.2d 838 (Fla. 1982); and Beard v. Hambrick, 396 So.2d 708 (Fla. 1981), (Hillsborough County Sheriff). There have been a number of district court opinions, however, which have uniformily applied section 768.28(5) to hospital districts as well as a variety of other local governmental units. Whitney v. Marion County Hospital District, 416 So.2d 500 (Fla. 5th DCA 1982); Jetton v. Jacksonville Electric Authority, 399 So.2d 396 (Fla. 1st DCA 1981), pet. denied, 411 So.2d 383 (Fla. 1981); Rumbough v. City of Tampa, 403 So.2d 1139 (Fla. 2d DCA 1981); Bryant v. Duval County Hospital Authority, 459 So.2d 1154 (Fla. 1st DCA 1984); Jaar v. Public Health Trust, 10 F.L.W. 427 (Fla. 3rd DCA Feb. 12, 1985). In addition there has been a plethora of Attorney General opinions advising various independent special

---

[6]The Court did establish an exception to section 768.28 which expanded the protection of the statute by granting absolute immunity for planning functions. 371 So.2d at 1022. That governmental exception is not an issue here, however.

tax districts that they are included within the provisions of section 768.28(5).[7] There have been no appellate decisions or attorney general opinions to the contrary.

An analysis of the state of the common law at the time of the original 1973 enactment of section 768.28 coupled with the clarifying 1977 amendment, necessitated by the 1976 Attorney General's opinion, leaves no doubt that the Legislature intended to insure that the limitation of liability provided by section 768.28 applied to local governmental units. The remaining question to answer, therefore, is whether the Hospital District is a local governmental unit intended to be provided the limitations included in section 768.28(5).

D. The Hospital District is an Agency or Subdivision of the State Pursuant to Section 768.28

The Hospital District is an independent special tax district created by the Legislature in 1951. Ch. 27438, Laws of Fla. (1951). It operates public hospitals which the Legislature

---

[7] See e.g. 1981 Op. Att'y Gen. Fla. 081-96 (December 22, 1981) (Manatee County Housing Authority); 1981 Op. Att'y Gen. Fla. 081-83 (November 3, 1981) (Suwanee River Authority); 1981 Op. Att'y Gen. Fla. 081-57 (August 4, 1981) (Southwestern Palm Beach County Hospital District); 1978 Op. Att'y Gen. Fla. 078-145 (December 21, 1978) (South Walton County Mosquito Control District); 1978 Op. Att'y Gen. Fla. 078-113 (September 7, 1978) (East Beach Water Control District); 1978 Op. Att'y Gen. Fla. 078-106 (August 15, 1978) (District Mental Health Board); 1978 Op. Att'y Gen. Fla. 078-42 (March 9, 1978) (Southeastern Palm Beach County Hospital District); 1978 Op. Att'y Gen. Fla. 078-33 (March 2, 1978) (Tampa Housing Authority). For a compilation of characteristics concerning Florida's independent special districts see Department of Community Affairs, Division of Local Resources Management, Guide to Special Districts in Florida, (May 1983).

found were necessary for the use and benefit of the citizens of the District. Section 6, Ch. 27438. This Court and two district courts of appeal have specifically held on a number of occasions that the Hospital District is a public agency subject to the rights and responsibilities of public agencies. See, e.g., State ex rel Robinson v. North Broward Hospital District, 95 So.2d 434 (Fla. 1957) (subject to bond validation); North Broward Hospital District v. Mizell, 148 So.2d 1 (Fla. 1962) (subject to due process requirements for medical staff); William A. Berbusse, Jr., Inc. v. North Broward Hospital District, 117 So.2d 550 (Fla. 2d DCA 1960) (subject to public bidding requirements); North Broward Hospital District v. Adams, 143 So.2d 355 (Fla. 2d DCA 1962) (slip and fall in public hospital); Mizell v. North Broward Hospital District, 175 So.2d 583 (Fla. 2d DCA 1965) (subject to due process requirements for medical staff); Hitt v. North Broward Hospital District, 387 So.2d 482 (Fla. 4th DCA 1980) (subject to special First Amendment rules for public bodies); Stack v. Saxton, 455 So.2d 1322 (Fla. 4th DCA 1984) (injuries involving involuntary hospitalization).

While none of the decisions dealing with the Hospital District has construed section 768.28, several cases concerning other special districts similar to the Hospital District have specifically held that section 768.28 is applicable to them. For instance, the First District has found the Jacksonville Electric Authority, created by a special act of the Legislature with many of the same rights and duties of the Hospital

District, see Ch. 67-1569, Laws of Fla., is entitled to the limitation of liability of Section 768.28(5). Jetton v. Jacksonville Electric Authority, 399 So.2d 396 (Fla. 1st DCA 1981). The Fifth District has rendered a series of decisions which hold that special hospital tax districts are subject to the four year statute of limitations applicable to public agencies, Section 768.28(6), rather than the two year professional malpractice statute, Section 95.11(4)(b). Florida Patients Compensation Fund v. SLR, 458 So.2d 342 (Fla. 5th DCA 1984); Whack v. Seminole Memorial Hospital, Inc., 456 So.2d 561 (Fla. 5th DCA 1984); Whitney v. Marion County Hospital District, 416 So.2d 500 (Fla. 5th DCA 1982).[8] Relying on the decision under review, the Fourth District recently held that section 768.28 waiver provisions apply to the South Broward Hospital District. Lee v. South Broward Hospital District, 10 F.L.W. 1435 (Fla. 4th DCA June 12, 1985).

In addition to the decisions finding special tax district hospitals subject to the longer statute of limitations for public agencies, a number of appellate decisions have found them subject to other constraints imposed only on public

---

[8]Interestingly, the Eldreds attempt to distinguish these decisions by suggesting that they are irrelevant because the court recognized that the parties stipulated to the obvious fact that the hospital district operated public hospitals. The Eldreds also suggest that the courts can pick and choose among the subdivisions of section 768.28 and apply them to hospital districts apparently on a "feel good" basis without regard to a controlling definition.

agencies. Michael v. Douglas, 464 So.2d 545 (Fla. 1985) (Marion County Hospital District subject to Public Records Act); National Union v. Southeast Volusia Hospital District, 436 So.2d 294 (Fla. 1st DCA 1983) (hospital district subject to Public Employees Relations Act); Southeast Volusia Hospital District v. National Union, 429 So.2d 1232 (Fla. 5th DCA 1983) (hospital district subject to Public Employees Relations Act); News-Press Publishing Co., Inc. v. Carlson, 410 So.2d 546 (Fla. 2d DCA 1982) (Lee Memorial Hospital subject to Government in Sunshine Law). Jess Parrish Memorial Hospital v. Laborer's International Union, 397 So.2d 989 (Fla. 1st DCA 1981) (public hospital subject to Public Employees Relations Act); North Brevard County Hospital District, Inc. v. Florida Public Employees Relations Commission, 392 So.2d 556 (Fla. 1st DCA 1980) (hospital district subject to Public Employees Relations Act); North Broward Hospital District v. Mizell (medical staff privilege for public hospital governed by principles applicable to other public officers); Hitt v. North Broward Hospital District (public hospital could not summarily deprive employee of state created status). The Second District has likewise held a tax supported special water mangement district subject to the Public Employees Relations Act. South Florida Water Management District v. Leyton, 402 So.2d 597 (Fla. 2d DCA 1981).

The Eldreds' suggestion that the Hospital District is not a state agency flies in the face of statutory and common law which has held it and similar special tax districts to the

same obligations as any other state agency. The Eldreds can present no authority to the contrary because there has been none based on enactment of section 768.28 in 1973. Instead the Eldreds rely on the illogical conclusion that a governmental entity which generates revenue from user fees as well as ad valorem taxes cannot be "primarily" acting for a state, county or municipality.[9]

To suggest that the Legislature's purpose in enacting section 768.28 could be defeated because a governmental unit charges a fee for services which might be provided by private sources is too narrow and unrealistic a view of governmental services in Florida in 1985. In today's governmental structure fees are charged for any number of governmental services including water, sewage, trash collection, electricity, parks -- national, state and local -- recreational facilities, transportation, toll roads, ambulance and paramedic services and higher education.[10] To suggest that the Legislature was not

---

[9]Interestingly, Broward General Hospital, which is the hospital where the alleged malpractice occurred, was originally owned by the City of Fort Lauderdale and leased to the North Broward Hospital District. It was purchased from the City through a revenue bond issue validated by this Court in State ex rel Robinson v. North Broward Hospital District, 95 So.2d 434 (Fla. 1957).

[10]The Eldreds' suggestion that West Coast Hospital Association v. Hoare, 64 So.2d 293 (Fla. 1953), and Moles v. White, 336 So.2d 427 (Fla. 2d DCA 1976) stand for the proposition that a legislatively created hospital district is not a "governmental" hospital is a misrepresentation of the facts in those cases. The private hospital in West Coast and Moles was chartered under the

fully aware of the extent that service charges pay for public services, would require this Court to assume an ostrich's view of the world. Most importantly, however, almost ten years ago, this Court rejected a similar argument in Circuit Court v. Dept. of Natural Resources, when it refused to so narrowly define the role of government. The Eldreds, on the other hand, apparently would prefer elimination of governmental user charges with the consequent enormous increases in taxes in order to preserve an outdated concept of modern government.

To understand the Legislature's purpose in using the word "primarily" to help define a governmental agency one must take a broader view of governmental services than do the Eldreds. The purpose of the Hospital District is to insure that there are adequate public health facilities for all persons within the District without regard to their ability to pay. Section 30, Ch. 27438, Laws of Fla. (1951). Private hospitals do not have to insure similar access. The Legislature not only found creation of the Hospital District to be a public purpose it found it "necessary for the preservation of the public health and for the public use and for the welfare ..." of the inhabitants of the District. Section 6, Ch. 27438, (emphasis supplied). The

---

([10] continued)

Florida non-profit corporation statute, Chapter 617, and was not a legislatively created independent tax district like the North Broward Hospital District.

Hospital District was not created primarily for the benefit of the citizens of Broward County, it was created exclusively for their benefit.[11]

The only public hospitals available to the hundreds of thousands of people living in the area encompassing the district are those maintained by the Hospital District. It is difficult to understand how the Hospital District could do more to serve its portion of Broward County as a corporation primarily acting as an instrumentality of the county.

On the other hand, the Hospital District has the characteristics of the sovereign which make it an independent establishment of the state. While research does not reveal a judicial construction of the phrase "independent establishments of the state," section 768.28(2), it is difficult to imagine a governmental unit more qualified to be an "independent establishment of the state" than a legislatively created, self-governing, special tax district charged with providing for the "public health ... and good" of the citizens of the district. Section 6, Chapter 27438.

The Hospital District is governed by seven commissioners appointed by the Governor for four year terms, each

---

[11] Interestingly, the Legislature recognized that non-taxpaying nonresidents of the District had no inherent right to claim the services of the Hospital District when it provided that the Board of Commissioners could adopt rules permitting access by nonresidents provided that residents would have first claim on services. Section 30, Ch. 27438.

commissioner being a resident qualified elector of one of seven subdistricts. Section 1, 2 and 3. Chapter 27438. In order to carry out the public purpose required by the enabling legislation, the Board of Commissioners of the Hospital District is delegated numerous powers of the sovereign. Included is the power of eminent domain and the power of taxation. Sections 8 and 26. In order to assist the Hospital District in exercising its powers, the Broward County Commission must "order and require the county tax assessor ... to assess, and the county tax collector ... to collect the amount of taxes" levied and assessed by the Hospital District. Section 27. A similar duty to assess and levy the Hospital District's taxes on all railroad, telegraph and telephone property located within the District is placed on the Comptroller of the State of Florida under the enabling legislation. Section 27.

In addition to the Hospital District's enabling legislation which gave it governmental obligations as well as rights, the Florida Constitution recognizes the need for special districts like the Hospital District, authorizes their existence as a local government and provides methods for financing their operations. For instance, Article VIII Section 6(b) specifically provides that special districts, like municipalities, are "recognized and shall be continued" as they were prior to the 1968 constitutional revision. Article VIII Section 8 provides that state funds can be appropriated to assist special districts, while Section 9 authorizes special districts to levy ad valorem

taxes. Finally, Article VII Section 12 provides that "counties, school districts, municipalities and special districts and local governmental bodies with taxing powers" can issue bonds payable from ad valorem taxes.

In other words, special taxing districts like the Hospital District were created on a par with other local governmental bodies. Like the muncipality in Cauley v. City of Jacksonville, the Hospital District should not be identified as a partial citizen compared to other constitutionally authorized local governmental units. 403 So.2d at 386. The Hospital District has all of the obligations of an independent establishment of the state and it is similarly entitled to the protections provided other governmental bodies.

Whether this Court construes the Hospital District as a corporation primarily acting for the state or the county or as an independent establishment of the state the purpose of section 768.28(5) is properly served. The only local governmental unit providing public hospitals to half of Broward County will be subject to all of the obligations of a public body -- both included in section 768.28 and in addition to it -- and will receive the only benefit provided by section 768.28 -- limitation of liability.

CONCLUSION

The decision below should be affirmed. The question certified by the Fourth District Court of Appeal should be answered in the affirmative or alternatively, it should be determined that the North Broward Hospital District is an independent establishment of the state. In either event it should be held that the North Broward Hospital District was intended to be and is included within the limitation of liability provisions of section 768.28(5), Florida Statutes.

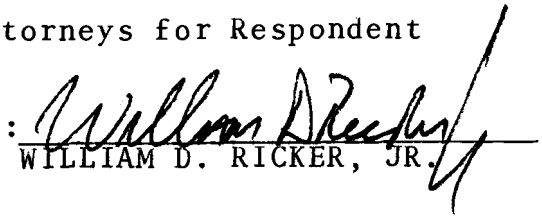
Respectfully submitted,

Ellen Mills Gibbs
GIBBS & ZEI
224 S.E. 9th Street
Fort Lauderdale, Florida 33316

and

William D. Ricker, Jr., Esq.
FLEMING, O'BRYAN & FLEMING
1415 East Sunrise Boulevard
Post Office Drawer 7028
Fort Lauderdale, Florida 33338

Attorneys for Respondent

By: 
WILLIAM D. RICKER, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent has been furnished by U.S. Mail this 25th day of June, 1985, to: JOEL D. EATON, ESQ., Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadow & Olin, P.A., 25 West Flagler Street, Suite 1201, Miami, Florida 33130; ELLEN MILLS GIBBS, ESQ., 224 S.E. 9th Street, Fort Lauderdale, Florida 33316; LEONARD M. BERNARD, JR., ESQ., Bernard & O'Brien, Post Office Box 14126, Fort Lauderdale, Florida 33302; and SHELDON J. SCHLESINGER, ESQ., Post Office Box 21704, Fort Lauderdale, Florida 33335.

FLEMING, O'BRYAN & FLEMING
Attorneys for Respondent
1415 East Sunrise Boulevard
Post Office Drawer 7028
Fort Lauderdale, Florida 33338

By: William D. Ricker
WILLIAM D. RICKER, JR.

jer/3177e