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

REPLY BRIEF OF PETITIONERS ON MERITS

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I.
ARGUMENT

NORTH BROWARD HOSPITAL DISTRICT (AND ITS AMICI) ARE MERELY "TAX DISTRICT HOSPITALS"; THEY ARE NOT CORPORATIONS *PRIMARILY* ACTING AS *INSTRUMENTALITIES OR AGENCIES* OF THE STATE OR THEIR RESPECTIVE COUNTIES; AND THEY ARE THEREFORE NOT ENTITLED TO SOVEREIGN IMMUNITY AND THE PROTECTION OF §768.28.

Our initial brief adequately anticipates the responses of the respondent tax district hospital and its several amici, so we simply refer the Court to our initial brief for the bulk of our reply to the arguments raised by our capable adversaries here. We will, however, reply briefly to some of the points which they have advanced in support of approval of the decision below.[1/]

We note first that the hospital and its amici have spent a considerable amount of space exploring the checkered history of sovereign immunity in this state with respect to "local governmental units". Utilizing this discussion as a springboard, and characterizing themselves throughout as "local governmental units", the hospital and its amici urge that they are entitled to the same treatment now afforded other "local governmental units" where sovereign immunity is concerned. In our judgment, this argument misses the point here in two important respects. First, the question presented here is whether the legisla-

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1/ In actuality, we have only been favored with the amicus brief of one of the respondent's several amici, the South Broward Hospital District. Although Rule 9.370, Fla. R. App. P., required the remaining amici to serve their briefs contemporaneously with the respondent's brief, they did not do so. Neither did they respond to this Court's order of July 9, 1985, to serve their briefs "as soon as possible". We were advised by the secretary of counsel for the remaining amici on Wednesday, July 17, that the brief would probably not be served before the due date of our reply brief. Because our reply brief must be served on or before Monday, July 22, we have no choice but to prepare it and serve it without the benefit of the remaining amici's briefs.

Hopefully, the remaining amici will raise no arguments not already raised by the two briefs to which this reply brief is directed, and the remaining amici's tardiness will cause us no harm. If new arguments *are* raised, we ask the Court to disregard them, not merely because we have been deprived of our right to reply, but also because of the settled rule that an appellate court cannot consider arguments raised by amici which have not been raised by the parties to the appeal. *See Higbee v. Housing Authority of Jacksonville*, 143 Fla. 560, 197 So. 479 (1940).

ture included or excluded tax district hospitals from the sovereign immunity waived (and created) by §768.28. The answer to that question must depend upon the language of the statute, and the language of the statute alone--not upon the checkered history of sovereign immunity with respect to municipalities (which, unlike tax district hospitals, are expressly included by definition within the coverage of §768.28) and other governmental units. And because the answer to the question depends solely upon the language of the statute, the history of sovereign immunity with respect to other governmental units is simply irrelevant here.

Second, our adversaries' description of themselves as "local governmental units" simply assumes the answer to the question presented here, and therefore puts the cart before the horse. In point of fact, tax district hospitals have never been considered to be "local governmental units" in this state, and their several attempts to obtain the benefit of that label over the years have been consistently rejected by this Court in the context presented here, as we noted in our initial brief. *See, e. g., Suwannee County Hospital Corp. v. Golden*, 56 So.2d 911 (Fla. 1952). This Court's most recent decision on the point makes that perfectly clear: ". . . 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).[2/]

In short, if *Golden* and *Circuit Court* are still the law, the hospital and its amici are, as we argued initially, not governmental units at all. They are essentially private hospitals with only secondary governmental attributes. And, unless this Court is willing

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[2/] In fact, this Court declared in *Circuit Court* that, in the absence of a constitutional immunity from suit (which the hospital clearly does not have in this case), this Court's prior decisions stand for the proposition that the legislature cannot statutorily immunize a local hospital district. We are therefore somewhat puzzled by our adversaries' insistence that the history of sovereign immunity in this state compels the conclusion that tax district hospitals are statutorily immunized by §768.28.

to ignore *all* its prior precedent on the point, the hospital and its amici simply cannot be considered as "local governmental units" here. Once that is recognized, the only relevant question presented here is whether the legislature expressly created sovereign immunity for these essentially private hospitals--and, as we demonstrated in our initial brief, if the answer to the question is not unequivocally "yes", then tax district hospitals remain amenable to tort actions, as they always have been.

Curiously, the briefs of the hospital and its amici have managed to avoid that central question altogether. Nowhere do they argue that the language of §768.28(2) expressly includes tax district hospitals, and nowhere do they respond to our contention that the purposefully-chosen word "primarily" excludes them from the coverage of the statute (or, at the very least, creates a sufficient ambiguity to prevent their inclusion within the coverage of the statute). Neither do they demonstrate that they are even an "instrumentality" of a governmental unit, a demonstration which the statute clearly requires. "Instrumentality" is a synonym for "agency", of course, so no such demonstration can be made. In fact, the hospital and its amici have conceded that they are *not* "instrumentalities" (or "agencies") of any governmental unit, by conceding that they are autonomous entities which are *not* controlled by any governmental unit. Before one can be an agent, of course, there must be some principal who controls the manner and means of the agent's undertaking. No such principal exists here.

The hospital and its amici have also simply ignored the two decisions most relevant to the question presently before the Court, each of which holds that §768.28 will not be construed to abolish common law rights and remedies, where the intent to do so was not clearly and unequivocally expressed: *District School Board of Lake County v. Talmadge*, 381 So.2d 698 (Fla. 1980); *Carlile v. Game & Fresh Water Fish Commission*, 354 So.2d 362 (Fla. 1977). Instead of responding to our argument concerning the language of the statute and this Court's prior decisions concerning the clarity required to create immunity,

the hospital and its amici have sought to avoid the import of the statute's language altogether by claiming that the phrase "corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities" is irrelevant here, and that they are included within the coverage of the statute by a different phrase--"the independent establishments of the state". They assert, in addition, a "policy" argument as to why they *should have been* included within the coverage of the statute. In our judgment, the first attempted finesse of the language of the statute is incorrect, and the policy argument is beside the point. We will respond to each argument in turn.

Tax district hospitals are clearly not "independent establishments of the state". If they were, they would long ago have shared the sovereign immunity of the state. They have never shared the sovereign immunity of the state, however, because "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, supra*, 339 So.2d at 1115. In short, this Court has already determined that the hospital and its amici are not "independent establishments of the state", and if the Court is willing to follow its own precedent on that point, it need go no further in rejecting our adversaries' attempt to finesse the real question presented here--whether they are "corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities".

Even if the question had not already been decided, there is a settled principle of statutory construction which would prevent this Court from finding that tax district hospitals were meant to be included within the phrase "independent establishments of the state". That settled principle is the doctrine of *ejusdem generis*, which means essentially this: where general words follow a designation of particular subjects or classes, the meaning of the general words will be presumed to be restricted by the particular subjects or classes preceding them. *See, e. g., Soverino v. State*, 356 So.2d 269 (Fla. 1978); *State ex rel. Soodhalter v. Baker*, 248 So.2d 468 (Fla. 1971); *Delgado-Santos v. State*, 10 FLW

1426 (Fla. 3rd DCA June 11, 1985). *See generally*, 49 Fla. Jur.2d, *Statutes*, §128 (and decisions collected therein).

Section 768.28(2) defines the "state agencies or subdivisions" included within the coverage of the statute in three sections, separated by semi-colons:

> As used in this act, "state agencies or subdivisions" include [1] the executive departments, the Legislature, the judicial branch, and *the independent establishments of the state*; [2] counties and municipalities; and [3] *corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities.*

Application of the settled doctrine of *ejusdem generis* compels the conclusion that the phrase "independent establishments of the state" must be construed to limit its meaning to one similar to that of the more particularized phrases which precede it--executive departments, the Legislature, the judicial branch . . .". Clearly, when the phrase "independent establishments of the state" is construed to be restricted to establishments similar to the three branches of our government, the phrase simply cannot include local tax district hospitals whose governmental attributes, to the extent that they exist at all, exist within the limited sphere of a single county.

In addition, of course, it is a simple matter of common sense that, because tax district hospitals are *corporations*, they fall within the more specific language of the statute relating to *corporations*, rather than the more general, nebulous language relating to the "independent establishments of the state". Construed otherwise, the third portion of the three-part definition contained in §768.28(2) would be meaningless surplusage. We therefore take it to be clear here that the District Court presented the right question to this Court--whether the hospital (and its amici) are "corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities".

Once again, the hospital and its amici have not addressed that particular question. Instead, they have asserted a "policy" argument as to why they should have been given sovereign immunity by the legislature. Although we think the particular language of the

statute is controlling here, rather than the broader question of whether the legislature should have used language sufficiently unequivocal to create sovereign immunity for tax district hospitals, we will respond to the policy argument briefly nevertheless, because we do not believe it supports our adversaries' claim to sovereign immunity. In essence, the hospital and its amici have argued that they should share in the sovereign immunity of the state because all (even arguably) "governmental units" should be treated alike--i. e., that they should be immunized for the sake of "consistency". It was the same argument which obviously motivated the District Court's conclusion below. We think this argument can cut both ways, however, and the way in which it ultimately cuts depends, in our judgment, upon whether tax district hospitals are primarily governmental units or primarily private hospitals assisted in a limited way by the government.

If, as this Court squarely held in *Golden*, tax district hospitals are primarily private hospitals incidentally subsidized by public funds, then, in our judgment, "consistency" requires that they be treated the same as private hospitals are treated--not that they be given an artificial competitive advantage over those hospitals (an advantage which they never had before) by a newly-created immunity from suit. The several decisions cited by the hospital and its amici involving county-owned hospitals and county-run public health trusts do not require a different conclusion, because entities owned and operated by a governmental entity are clearly "primarily" governmental "instrumentalities"--unlike the essentially private, autonomous, corporate tax district hospitals involved here--and they are clearly entitled to sovereign immunity (and always have been) as a result. In fact, we think that is precisely why the legislature purposefully inserted the words "primarily" and "instrumentalities" into the statute. Corporations which are essentially governmental should be treated as governmental entities are treated, for the sake of consistency--and, for the sake of consistency, corporations which are primarily non-governmental should be treated the same as their private counterparts. Our adversaries' "policy" argument

therefore clearly begs the question here. If, as this Court held in *Golden*, tax district hospitals are autonomous and essentially private hospitals with only secondary governmental attributes, then fundamental notions of "consistency" require the conclusion which we have urged upon the Court, not the conclusion which our adversaries have urged.

Our adversaries' final complaint is that it would be easier for everyone if every entity which has any governmental attributes is included within the coverage of §768.28, rather than requiring in every case an *ad hoc* determination of whether any given entity is primarily governmental or primarily something else. That might have been a decent argument to make to the legislative sponsors of §768.28; it should be unavailing here, however, because *ad hoc* determinations simply cannot be avoided in light of the fact that the legislature included the words "primarily" and "instrumentalities" in the statute. As long as those words exist in the statute, courts simply must determine whether a given corporation is primarily governmental or primarily something else before they can determine whether such a corporation is included or excluded from the statute. In short, because the language of the statute *requires ad hoc* determinations, the judiciary is not free to avoid those determinations merely because a bright line rule might have been more desirable--which brings us to our final point in reply.

In our judgment, the definition section of §768.28 does draw a perfectly proper line in precisely the right place. It is apparent (to us, at least) that the legislature's effort to bring some sense to the checkered history of sovereign immunity by enactment of §768.28 is bottomed upon the simple notion that all essentially governmental entities should share in the sovereign immunity of the state, and that those entities which are not primarily governmental should not. That is why immunity was created for municipalities, which are undeniably governmental in nature. But it does not follow that, because municipalities were given immunity, all other corporations not primarily governmental in

nature, but with secondary governmental attributes, should share in that immunity. After all, the business of awarding and enforcing judgments against essentially private tax district hospitals has always belonged to the judiciary of this state, and the legislature may well have decided that it did not wish to arrogate that historical function to itself, at the cost of having to entertain scores of additional claims bills every session. Such a conclusion would have been perfectly reasonable, of course, since the law announced by this Court at the time was that the legislature did not even have the constitutional power to immunize tax district hospitals. The distinction purposefully drawn by the words "primarily" and "instrumentalities" may therefore have been thoughtfully intended by the legislature to prevent precisely the result our adversaries have urged here--the abolition of long-recognized common law rights, and the wholesale transfer of tort remedies long-enforced by the judiciary to the legislative claims bill process.

In conclusion, we note simply that the adoption of our adversaries' position here will require the Court to treat the words "primarily" and "instrumentalities" as surplusage, and ignore them. This Court is not free to do that, however. It is required to presume that the legislature inserted the words in the statute advisedly and for a purpose, and it simply must give them effect. *See Stein v. Biscayne Kennel Club, Inc.*, 145 Fla. 306, 199 So. 364 (Fla. 1941); *Lee v. Gulf Oil Corp.*, 148 Fla. 612, 4 So.2d 868 (1941). If the words "primarily" and "instrumentalities" are given effect, as they must be--and if this Court meant what it said in *Golden*, *Circuit Court*, *Talmadge*, and *Carlile*--then tax district hospitals are still liable in tort, as they always have been, and they have not been granted the windfall of sovereign immunity which they now purport to find in §768.28. At the very least, as we urged in our initial brief, absent an unequivocal expression of intent in the statute to overrule both *Golden* and *Circuit Court*, and destroy the common law rights and remedies of the plaintiffs in this case in the process, the Court should hold that the law has not yet been properly changed by the legislature, and that the policy

arguments made here by our adversaries should be made to the legislature at a future session--unless, of course, this Court is still committed to the proposition that the Constitution (which, incidentally, has not changed in any relevant respect since *Golden*) prevents legislative creation of immunity for tax district hospitals.

II.
CONCLUSION

It is respectfully submitted once again 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.

III.
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 19th day of July, 1985, to: Ellen Mills Gibbs, Esq., Gibbs & Zei, 224 S.E. 9th Street, Ft. Lauderdale, Fla. 33316; William D. Ricker, Jr., Esq., Fleming, O'Bryan & Fleming, 1415 East Sunrise Blvd., Ft. Lauderdale, Fla. 33304; Bernard & Mauro, P.O. Drawer 14126, 707 S.E. Third Avenue, Ft. Lauderdale, Fla. 33302; Rex Conrad, Esq., Conrad, Scherer & James, P.O. Box 14723, Ft. Lauderdale, Fla. 33302; and to Steven Berger, Esquire, Suite B-5, Oak Plaza Professional Center, 8525 S.W. 92nd Street, Miami, Fla. 33156.

Respectfully submitted,

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