IN THE SUPREME COURT OF THE
STATE OF FLORIDA



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| HILLSBOROUGH COUNTY HOSPITAL AND WELFARE BOARD, d/b/a/ TAMPA GENERAL HOSPITAL, | ) | |
| Petitioner | ) | |
| v. | ) | Case No. 73,458 |
| LOTTIE TAYLOR, as guardian of the person and property of IRMA JEAN TAYLOR, incompetent | ) | |
| Respondent. | ) | |

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL
CASE NO. 87-2350

# AMICUS CURIAE BRIEF ON BEHALF OF THE FLORIDA LEAGUE OF CITIES, INC.

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## INTRODUCTION

The Petitioner, Hillsborough County Hospital and Welfare Board, d/b/a/ Tampa General Hospital, was an Appellant before the Second District Court of Appeals and was the Defendant before the Circuit Court of the 13th Judicial Circuit. The Respondent, Lottie Taylor, as guardian of the person and property of Irma Jean Payne, incompetent, was an Appellee in the Second District Court of Appeals and was the Plaintiff before the Circuit Court of the 13th Judicial Circuit. The Florida League of Cities, Inc., pursuant to motion filed with this court, is amicus curiae and represents the interests of its member local governments that self-insure their tort liability in the State of Florida.

## STATEMENT OF CASE AND FACTS

Amicus curiae addresses the legal issues raised by the certified questions and accepts the Statement of Case and Facts adopted by the Petitioner.

## CERTIFIED QUESTIONS

1. WHETHER THE ESTABLISHMENT OF A SELF-INSURANCE TRUST FUND OR ESCROW ACCOUNT BY THE GOVERNMENTAL HOSPITAL IS EQUIVALENT TO THE PURCHASE OF INSURANCE?

2. WHETHER A GOVERNMENTAL HOSPITAL WHICH HAS ESTABLISHED A SELF-INSURANCE TRUST FUND WAIVES SOVEREIGN IMMUNITY AGAINST CLAIMS UP TO THE AMOUNT OF THE TRUST FUND UNDER SECTION 286.28, FLORIDA STATUTES (1979)?

## SUMMARY OF ARGUMENT

An affirmative answer to the questions certified will substantially affect the budgetary process of government and may destroy governmental self-insurance. When coventional liability insurance is unavailable, a government will not budget for tort liability claims for a given fiscal year because to do so will waive its sovereign immunity, and because one claim can deplete a fund budgeted to satisfy all claims arising during the year. The only available alternative will be to consciously fail to budget for tort liability and to essentially decrease services if and when a liability claim matures against the government. This in turn will impair the ability of the government to responsibly budget for services.

A plain reading of the statute evinces a legislative intent not to equate self-insurance with insurance. Self-insurance simply is not insurance. In insurance, you have an agreement (insurance policy) whereby one party (the insurer) who, for a fee (premium), accepts the risk of liability from another party (the insured). None of these characteristics are associated with self-insurance. There is no agreement between two parties. One party does not assume the risk of another party; the exposed party retains the risk. The government does not pay a premium, rather it simply sets aside the amount of money it feels it will lose as a result of tort claims during a given fiscal year.

The majority of state jursidictions faced with the question have held that self-insurance is not insurance. Likewise, the majority of jurisdictions faced with the question have held that a self-insurance certificate is not an insurance policy. Likewise, jurisdictions that have statutes analagous to that in Florida have held that the establishment of a

self-insurance fund does not waive the local government's sovereign immunity.

Section 286.28, Fla. Stat., was passed in the 1950's and the courts are obliged to reflect on the times and conditions under which the statute was passed. During the 1950's state agencies, special districts, and counties could only exercise the power expressly or implicitly delegated to them by the state legislature. County home rule was not to come for some two decades. Likewise, sovereign immunity applied to state agencies, special districts, and counties, and government could not be subjected to tort liability. If government attempted to purchase liability insurance to cover tort liability, the expenditures frankly would not be for a public purpose because government would be expending funds to insure against something for which it could not be subjected to liability. Thus, any obligation to purchase liability insurance was a moral obligation as opposed to a legal obligation and such an expenditure would undoubtedly have to be authorized by the legislature. The purpose of Sec. 286.28(1), Fla. Stat., was to authorize just such an expenditure.

Section 286.28(2), Fla. Stat., provided that when a government purchases liability insurance, it waives its sovereign immunity up to the coverage limits of the policy. They only legitimate reason for Section 286.28(2), Fla. Stat. was that the legislature could not permit government to use taxpayer dollars to purchase liability insurance from a for-profit insurance company, and then permit the company to reap a windfall profit by asserting in a court of law that the government was immune from liability.

This legislative purpose does not apply to governmental self insured funds. Self-insured funds are not for profit and there is no chance that a

for-profit organization will reap a financial windfall by accepting taxpayer dollars and not assuming the corresponding risk.

The Court issued Avallone v. Board of County Commissioners, 493 So.2d 1002 (1986) in 1986. The very next session, 1987, the state legislature repealed Sec. 286.28, Fla. Stat., and amended Sec. 768.28(5), Fla. Stat., thereby indicating its concern with the Court's decision. If a court places an interpretation on a state statute, and the legislature does not change the statute, then it is reasonable to assume that it was the legislative intent that the statute be interpreted as it was by the court. If, on the other hand, the court places an interpretation on a statute, and the statute legislature immediately changes the statute, then it appears reasonable for the court to take cognizance of the fact that the legislature did not concur with the court's application of the statute. This is particularly true in an area such as sovereign immunity where Florida's Constitution expressly provides that it is within the legislative domain to waive government's sovereign immunity. In light of the legislature's reaction to the court's application of the statute to the traditional purchase of liability insurance, it appears particularly unsuitable to extend the Court's decision to self-insured governments.

Florida's constitution vests with the legislature the power to waive government's sovereign immunity. By definition, this includes the power to define the nature and extent to which government will be subjected to tort liability. While Florida's courts have stated that Sec. 768.28, Fla. Stat., evinces a legislative intent to waive sovereign immunity on a broad basis, the courts have nonetheless held that the waiver of sovereign immunity is exclusively vested in the state legislature, and that the waiver of sovereign immunity should be strictly construed and should be

clear and unequivocal. The statute should therefore be strictly construed and strict scrutiny of the statute does not permit one to say that the waiver of sovereign immunity in this instance is unequivocal. The statute does not evince a legislative intent to permit governments to directly or indirectly, consciously or unconsciously, deliberately or undeliberately waive the Section 768.28(5), Fla. Stat. $100,000/$200,000 thresholds simply by setting aside a portion of its budget to satisfy tort claims.

## ARGUMENT

THE ESTABLISHMENT OF A SELF-INSURANCE FUND BY A GOVERNMENT IS NOT EQUIVALENT TO THE PURCHASE OF INSURANCE, AND A GOVERNMENT WHICH ESTABLISHES A SELF-INSURANCE FUND DOES NOT WAIVE ITS SOVEREIGN IMMUNITY AGAINST CLAIMS UP TO THE AMOUNT OF THE FUND UNDER SECTION 286.28, FLORIDA STATUTES (1979).

The questions before the court is whether the establishment of a self-insurance fund by a government to pay liability claims arising against the government is equivalent to the purchase of insurance, and whether a government that establishes such a self-insurance fund waives its sovereign immunity for a claim up to the amount set aside in the fund? An affirmative answer to these questions will place self-insured governments in a dilema. Such governments will be left with two alternatives: to purchase liability from a traditional insurance carrier, regardless of its cost or availability; or to fail to set aside claim reserves and operate as if it will never be subjected to a tort liability claim. The former alternative may be impractical because of the cost of conventional liability insurance and may in fact be impossible because of the unavailability of such insurance. To say the least, the latter skirts the fringes of budgetary irresponsibility.

Stated differently, the question before the court is whether a government that budgets a portion of its tax revenues to offset liability claims (just as it budgets tax revenues to offset law enforcement activities) waives its sovereign immunity up to the amount budgeted or set aside to pay potential claims? Make no mistake, an affirmative answer to this question places a government in an extremely untenable position. An affirmative answer will substantially impair a government's budgetary

process and may destroy the ability of government to self-insure tort liability.

Amicus asserts the court may take judicial notice of the instability and cyclical nature of Florida's liability insurance market and the availability of liability insurance, particularly for governments, ebbs and flows from year to year as liability insurance carriers flee Florida's market, return, and then flee again. If the court answers the certified questions affirmatively, government will be faced with two alternatives when traditional liability insurance becomes unavailable. The government, using acceptable actuarial principles, can estimate the amount it may pay in a given fiscal year for all liability claims that may arise during the year, and set aside or budget that amount for the fiscal year. Under this alternative, the government will be faced with the prospect that any one claim will deplete the amount budgeted to offset all liability claims. In this event, the government will be faced with the prospect of diverting taxpayer dollars budgeted for governmental services (e.g. law enforcement services, fire protection) to satisfy all other claims that subsequently arise during the fiscal year. Alternatively, the government can consciously decide not to budget any taxpayer dollars to offset potential liability claims that arise during the fiscal year and simply divert taxpayer dollars budgeted for governmental services to offset liability claims as they come due.

In sum, amicus asserts Florida's sovereign immunity laws do not permit a government to consciously or unconsciously, directly or indirectly, deliberately or undeliberately waive the Sec. 768.28(5), Fla. Stat., liability thresholds simply by setting aside or budgeting a portion of its taxpayer dollars to offset liability claims that may arise during a given

fiscal year. Amicus asserts that to hold otherwise would drive a stake straight through the heart of government's budgetary capabilities and substantially impair government's ability to efficiently provide governmental services in a responsibly fiscal manner.

Rules of statutory construction are designed to discover the legislative intent of a statute. Tyson v. Lanier, 156 So.2d 833 (Fla. 1963). Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, the plain and obvious provisions of the statute must control, Tropical Coach Line, Inc. v. Carter, 121 So.2d 779 (Fla. 1960). If the language of the statute is clear and admits of only one meaning, the legislature should be held to have intended what it has plainly expressed. State ex rel. Triay v. Burr, 79 Fla. 290, 84 So. 61 (1920), Overman v. State Board of Control, 71 So.2d 262 (Fla, 1954). Courts will routinely avoid an interpretation of a statute that would produce unreasonable or absurd results, Foley v. State, 50 So.2d 179 (Fla. 1951). Likewise, a statute should be construed in its entirety and as a whole. Florida Jai Alai, Inc. v. Lake Howell Water & Reclamation District, 274 So.2d 522 (Fla. 1973).

Sec. 286.28(1), Fla. Stat. (repealed 1987), authorized governments "to secure and provide for" ... "insurance to cover liability for damages on account of bodily or personal injury or death" ... "or to cover liability for damage to ... property" ... ; "and to pay the premiums therefore from any general funds appropriated or made available for the necessary and regular expense of operations of such political subdivisions ...." Sec. 286.28(2), Fla. Stat. (repealed 1987), provided that "in consideration of the premium at which such insurance may be written," ... "the insurer shall

not be entitled to the benefit of the defense of governmental immunity of any such political subdivisions of the state ...."

Amicus contends that a plain reading of the statute, construed in its entirety, evinces a legislative intent that Sec. 286.28, Fla. Stat. (repealed 1987), was intended to apply to a situation in which a government "pays a premium" to purchase "any insurance contract" from an "insurer" and "in consideration of the premium" for such "insurance", "the insurer shall not be entitled to the benefit of the defense of governmental immunity". On the other hand, the lower court would have this court read the above language to mean that any government which elects to self-insure itself against liability is an authorized "insurer", that it has paid "premiums" to itself for liability "insurance", and that "in consideration of the premium" it paid itself for "such insurance", it is all of a sudden an "insurer" and has therefore waived its sovereign immunity up to the amount it has budgeted to pay tort liability claims. Amicus respectfully submits the lower court's interpretation is a strained interpretation of the statute, see Cobbin v. City and County of Denver, 735 P.2d 214 (Col. App. 1987).

Black's Law Dictionary (5th Edition, 1979) defines "insurance" as follows:

> A contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss of a specified subject by specified perils. The party agreeing to make the compensation is usually called the "insurer" or "underwriter"; the other, the "insured" or "assured"; the agreed consideration, the "premium"; the written contract a "policy"; the events insured against, "risks" or "perils"; and the subject, right or interest to be protected, the "insurable interest". A contract where one undertakes to indemnify another against loss, damage, or liability arising from an unknown or contingent event and is applicable only to some contingency or act to occur in the future. An agreement by which one party for a consideration promises to pay money or its equivalent to do an act valuable to other party upon destruction, loss, or injury of something in which other party has an interest.

Black's Law Dictionary (5th Edition, 1979) in part defines "contract" to be:

> An agreement between two or more persons which creates an obligation to do or not to do a particular thing. Its essentials are competent parties, subject matter, a legal consideration, mutuality of agreement, and mutuality of obligation;

and defines "premium" to include:

> The sum paid or agreed to be paid by an insured to the underwriter (insurer) as the consideration for the insurance. The price of insurance protection for a specified period of exposure.

On the other hand, Black's Law Dictionary (5th Edition, 1979), defines "self-insurance" as follows:

> The practice of setting aside a fund to meet losses instead of insuring against such through insurance.

Self-insurance simply does not carry with it the traditional incidences associated with insurance. There is no "contract" in a self-insured setting because there are not two parties to contract. There is no "stipulated consideration" or "premium" paid; the self-insured simply sets aside a portion of its budget to satisfy tort claims. The self-insured does not shift the risk to another party, but retains the risk itself. There are no private investors or nongovernmental participants, thus no danger that private persons will receive an unconscionable profit by accepting premiums while asserting immunities to avoid claims. Amicus implores this court to consider the court's statement in American Nurses Association v. Passaic General Hospital, 471 A.2d 66 (Super. Ct. App. Div), reversed on other grounds 484 A.2d 670 (N.J. 1984):

> We start from the premise that so-called self-insurance is not insurance at all. It is the antithesis of insurance. The essence of an insurance contract is the shifting of the risk of loss from the insured to the insurer. The essence of self-insurance, a term of colloquial currency rather than of precise legal meaning, is the retention of risk of loss by one upon whom it is directly imposed by law or contract.

471 A.2d at 69.

A review of state court decisions reveals that a majority of states confronted with the question of whether "self-insurance" is "insurance", have answered in the negative, see 8 A. J. Appleman, Insurance Law and Practice, Sec. 4912 (rev. ed. 1981); American Family Mutual Insurance Company v. Missouri Power and Light Company, 517 S.W.2d 110 (Mo. 1974); United National Insurance Company v. Philadelphia Gas Works, 289 A.2d 179 (Pa. 1972); Universal Underwriters Insurance Company v. Marriott Homes, Inc., 238 So.2d 730 (Ala. 1970); and Allstate Insurance Company v. Zellars, 452 S.W.2d 539 (Tex. Civ. App.), modified on other grounds, 462 S.W.2d 550 (1970). Likewise, the tendency is for courts to conclude that a self-insurance certificate is not an insurance policy. Mountain States Telephone and Telegraph Company v. Aetna Casualty and Surety, 568 P.2d. 1123 (Ariz. Ct. App. 1977); O'Sullivan v. Salvation Army, 85 Cal.App.3d 58, 147 Cal.Rptr. 729 (1978); Hill v. Catholic Charities, 455 N.E.2d 183 (Ill. 1983); Jordan v. Honea, 407 So.2d 503 (La. App. 1981); Shelton v. American Re-Insurance Company, 173 S.E.2d 820 (Va. 1970); White v. Regional Transportation District, 735 P.2d 218 (Colo. App. 1987). See generally, Annot., 27 A.L.R. 4th 1266 (1984).

In Cobbin v. City and County of Denver, 735 P.2d 214 (Colo. App. 1987), action was brought on behalf of a minor child against the city and county of Denver and its Department of Social Services and against the state and state Department of Social Services to recover for multiple injuries allegedly inflicted by unknown persons while the child was in the custody of the city and county Department of Social Services. Under a Colorado statute analogous to the Florida statute before this court,

Colorado's Court of Appeals held that the city and county did not waive sovereign immunity by electing to self-insure.

In Antiporek v. Village of Hillside, 499 N.E.2d 1307 (Ill. 1986), the plaintiff brought suit seeking damages for injuries sustained by her daughter while sliding on property owned and maintained by the Village. Illinois' Supreme Court, interpreting an Illinois statute analogous to the statute before this court, held that the establishment of a risk-management pool in which municipalities participated was self-insurance, rather than insurance, and did not therefore result in a waiver of immunity from tort liability.

In In re Request for Opinion of the Supreme Court Relative to the Constitutionality of SDCL 21-32-17 and Construction of SDCL 21-32-16, 379 N.W.2d 822 (S.D. 1985), the Governor of South Dakota asked the Supreme Court of South Dakota to construe South Dakota laws authorizing the state to purchase liability insurance and providing that sovereign immunity would be waived to the extent that liability insurance was purchased. Faced with the question of whether the government's establishment of a self-insurance fund would waive sovereign immunity, the Supreme Court answered in the negative.

Amicus respectfully requests this court join the other state courts that have held that the establishment of a self-insurance trust fund is not the equivalent to the purchase of insurance and that the establishment of such a self-insurance trust fund does not waive the sovereign immunity of the government against claims up to the amount in the fund.

Originally enacted as Sec. 455.06., Fla. Stat. (renumbered Sec. 286.28, Fla. Stat., 1979), in 1953, Sec. 286.28, Fla. Stat. (repealed,

1987), was amended in 1957, 1959, 1963, 1967, 1971, and 1979, Ch. 28-220, 57-176, 59-76, 59-342, 63-499, 67-39, 71-230, and 79-361, Laws of Florida, respectively.

Amicus is frankly unable to locate any authoritative judicial guide outlining the purpose of the statute. While legislative intent is the paramount factor in construing statutes, State v. Egan, 287 So.2d 1 (Fla. 1973), and must be determined primarily from the language of the statute, Van Pelt v. Hilliard, 75 Fla. 792, 78 So. 693 (1918), the judiciary's goal in construing statutes is to determine the purpose of the legislature, Tyson v. Lanier, 156 So.2d 833 (Fla. 1963). In determining the purpose of a statute, a court may read the statute in light of the attendant conditions at the time of its enactment, including political, industry and social practices at the time of enactment, State v. Jacksonville, 50 So.2d 532 (Fla. 1951); Radio Telephone Communications, Inc. v. Southeastern Telephone Co., 170 So.2d 577 (Fla. 1964).

When Sec. 286.28, Fla. Stat. (repealed 1987), was enacted and amended in the 1950's, the rule of law in Florida was that state agencies, special districts and counties could possess and exercise only those powers expressly granted by the legislature, or those necessarily or fairly implied in or incident to the powers expressly granted, Paul Smith Construction Co. v. Pitts, 114 So.2d 417 (Fla. 2nd DCA 1959); Colen v. Sunhaven Homes, Inc., 98 So.2d 501 (Fla. 1957). Indeed, if reasonable doubt existed as to whether a statute authorized a government to exercise a certain power, the doubt would, as a matter of law, be resolved against the government, Edgerton v. International Company, 89 So.2d 488 (Fla. 1956); Williams v. Town of Dunnellon, 125 Fla. 114, 169 So. 631 (1936). An amendment to Florida's Constitution and two decades would pass before the

courts recognized a county's home rule authority, see Speer v. Olson, 367 So.2d 207 (Fla. 1978). Likewise, common law sovereign immunity for the state, its agencies, special districts and counties remained in full force and effect until Florida's legislature enacted Sec. 768.28, Fla. Stat., and waived sovereign immunity in 1973; Ch. 73-313, Laws of Florida; see Cauley v. City of Jacksonville, 403 So.2d 379 (Fla. 1981). Thus, when Sec. 286.28, Fla. Stat. (repealed 1987), was enacted, government generally could not be subjected to tort liability for the negligent conduct of its officers and employees nor could a government exercise any power unless authorized by the legislature.

In the 1950's, absent Sec. 286.28(1), Fla. Stat. (repealed 1987), amicus asserts that governments would have had no lawful authority to purchase liability insurance because it had no legal obligation to reimburse those injured by the negligent acts or omissions of its officers or employees. If government attempted to purchase liability insurance, the expenditure frankly would not be for a public purpose because government would be expending tax revenues to insure against something for which it could not be subjected to liability. Amicus therefore asserts the purpose of Sec. 286.28(1), Fla. Stat. (repealed 1987), was to authorize government to purchase liability insurance to satisfy tort claims if the government determined it had a moral obligation to reimburse persons injured as a result of the wrongful actions or omissions of the government's officers or employees.

Taken in the above context, one may further speculate on the purpose of Sec. 286.28(2), Fla. Stat. (repealed 1987), governing the waiver of sovereign immunity up to the coverage limits of any liability policy purchased by the government. Simply put, the purpose of 286.28(2), Fla.

Stat. (repealed 1987), was to ensure that private investors, paid to accept certain risks, could not assert sovereign immunity and shirk the responsibilities they had assumed, thereby receiving an unconscionable profit by accepting premiums while asserting immunities to avoid claims.

In the 1950's, self-insurance was but a speck on the horizon, not unlike facsimiles, video cassette recorders, computers, and video games. Persons wishing to fiscally protect themselves from tort liability purchased liability insurance from traditional for-profit insurance companies. Given the political, industry and social practices at the time Sec. 286.28, Fla. Stat. (repealed 1987), was enacted and amended, amicus respectfully submits that it would be absurd to read into the statute a purpose other than that asserted above.

This court alluded to this purpose in Avallone v. Board of County Commissioners, 493 So.2d 1002, 1004 (Fla. 1986), when it stated:

> Political subdivisions are authorized to spend public money for the purchase of liability insurance. However, when liability insurance is purchased, and within the purview of the statute, the contract shall prohibit the assertion of sovereign immunity to the extent of the coverage, even if it is otherwise a valid defense. To construe the section otherwise would deprive the public of the benefit of the public expenditure. (Emphasis added).

Given the purpose asserted by amicus, it is relatively clear it was not the legislative intent to apply Sec. 286.28(2), Fla. Stat. (repealed 1987), to self-insurance funds because it would not further the stated legislative purpose of the statute. There is no process by which one party, for a profit, assumes the risk of another party; the risk remains with the self-insured. Since there are no private investors or nongovernmental participants, there is no danger that private persons will receive an unconscionable profit by accepting premiums while asserting immunities to avoid claims. Amicus further asserts that the purpose of the

Sec. 768.28(5), Fla. Stat. $100,000/$200,000 damage thresholds is to permit governments to order their fiscal planning and to guard against placing too heavy a financial burden on taxpayers, see Jetton v. Jacksonville Electric Authority, 399 So.2d 396 (Fla. 1st DCA 1981), and that application of the statute to self-insured governments would contravene the stated purpose of the statutory limitations on the collectability of judgments.

In 1986, this court stated in Avallone v. Board of County Commissioners, 493 So.2d 1002, 1004-1005 (Fla. 1986):

> We hold that purchase of tort liability insurance by a government entity, pursuant to sec. 286.28, constitutes a waiver of sovereign immunity up to the limits of insurance ....

During the legislative session immediately following the court's decision, the legislature repealed Sec. 286.28, Fla. Stat., Ch. 87-134, Sec. 4, Laws of Florida, and amended Sec. 768.28(5), Fla. Stat., to state:

> Notwithstanding the limited waiver of sovereign immunity provided herein, the state or any agency or subdivision thereof may agree, within the limits of insurance coverage provided, to settle a claim made or a judgement rendered against it without further action by the Legislature, but the state or agency or subdivision thereof shall not be deemed to have waived any defense of sovereign immunity or to have increased the limits of its liability as a result of its obtaining insurance coverage for tortious acts in excess of the $100,000 or $200,000 waiver provided above. (Emphasis added)

Ch. 87-134, Sec. 3, Laws of Florida.

A plain reading of Ch. 87-134, Laws of Florida, leaves little doubt that the court's holding in Avallone v. Board of County Commissioners, supra, was worrisome to the legislature, and that it was the particular legislative intent of Ch. 87-134, Laws of Florida, to legislatively address the reasons leading to the court's holding.

The legislature is presumed to know the existing law when it enacts a statute and it is presumed that the legislature was acquainted with the judicial construction of former laws when it amends a statute, Collins

Investment Company v. Metropolitan Dade County, 164 So.2d 806 (Fla. 1964). Courts have therefore uniformly held that the failure of the legislature to amend a statute that has been construed in a particular manner may amount to a legislative acceptance or approval of the construction. White v. Johnson, 59 So.2d 532 (Fla. 1952). However, it is also incumbent upon the courts to reevaluate the construction placed on a statute when the statute is amended or repealed and the amendment or repeal evinces a legislative intent or clear expression that is contrary to the court's earlier holding. Deltona Corporation v. Kipnis, 194 So.2d 295 (Fla. 2nd DCA 1966). This is particularly true where Florida's Constitution has vested the authority to waive government's sovereign immunity in the hands of Florida's legislative branch, Art. X, Sec. 13, Fla. Const.

In Avallone v. Board of County Commissioners, supra, the county had purchased liability insurance; it was not self-insured. In light of the 1987 legislation, it appears reasonable for the court to take cognizance of the legislature's apparent reaction to the court's holding in the context of the "purchase of liability insurance", and to refrain from extending the holding to the colloquial quagmire called "self-insurance".

Art. X, Sec. 13, Fla. Const., provides that the sovereign immunity of the state may be waived only by general law. The courts have interpreted this provision to mean that the power to waive the state's sovereign immunity is vested exclusively in the legislature and a local government may not therefore waive sovereign immunity by local law. Kaulakis v. Boyd, 138 So.2d 505 (Fla. 1962); Arnold v. Shumpert, 217 So.2d 116 (Fla. 1968); Donisi v. Trout, 415 So.2d 731 (Fla. 4th DCA 1982). While this court has held that the passage of Sec. 768.28, Fla. Stat., evinces the

intent of the legislature to waive sovereign immunity on a broad basis, Commercial Carrier Corporation v. Indian River County, 371 So.2d 1010 (Fla. 1979), this court has likewise nonetheless uniformly held that a waiver of sovereign immunity must be strictly construed, Berek v. Metropolitan Dade County, 422 So.2d 838 (Fla. 1982) and that such a waiver must be clear and unequivocal. Spangler v. Florida State Turnpike Authority, 106 So.2d 421 (Fla. 1958); Arnold, supra. These cases demonstrate that one who seeks to subject government to liability must predicate his or her claim upon a statute expressly subjecting the government to liability.

Sec. 286.28, Fla. Stat. (repealed 1987), should therefore be strictly construed and strict scrutiny of the statute does not permit one to say the waiver of sovereign immunity in this instance was unequivocal. Amicus respectfully submits that it was not the legislative intent for Sec. 286.28, Fla. Stat. (repealed 1987), to permit a local government to consciously or unconsciously, deliberately or undeliberately, directly or indirectly waive its sovereign immunity simply by setting aside a portion of its taxpayer dollars to satisfy tort claims arising during a given fiscal year.

## CONCLUSION

Based on the cases, authorities and policies cited herein, the Florida League of Cities, Inc., respectfully requests this honorable court to answer the questions certified by the 2nd District Court of Appeals in the negative.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a copy of the foregoing has been furnished by Federal Express or U.S. Mail this 17th day of January, 1989 to the following persons:

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