IN THE SUPREME COURT OF THE
STATE OF FLORIDA

HILLSBOROUGH COUNTY HOSPITAL
AND WELFARE BOARD d/b/a
TAMPA GENERAL HOSPITAL,

Petitioner,

Case No.: 73,458

LOTTIE TAYLOR, as guardian
of the person and property of
IRMA JEAN PAYNE, Incompetent,

Respondent.
_____/

BRIEF OF AMICUS CURIAE
THE FLORIDA BOARD OF REGENTS

Certified Question On Appeal from the
District Court of Appeal,
Second District
(Case No.: 87-2350)

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Preliminary Statement

This Brief of Amicus Curiae the Florida Board of Regents is filed in support of the Petitioner, Hillsborough County Hospital and Welfare Board, d/b/a Tampa General Hospital. Petitioner will be referred to as "TGH." Respondent, Lottie Taylor, as Guardian of the Person and Property of Irma Jean Payne, Incompetent, will be referred to as "Respondent." The Florida Board of Regents will be referred to as "BOR." The appendix to this amicus brief will be designated "A. _____."

All emphasis is supplied unless otherwise noted.

Statement of the Case and Facts

The Board of Regents relies upon the Statement of the Case and the Facts contained in TGH's Initial Brief. In addition, the BOR offers the following explanation regarding its interest in this case.

The BOR, an agency and instrumentality of the State of Florida, is responsible for the University of South Florida College of Medicine which participates in residency programs at various hospitals in the Tampa Bay area, including Tampa General Hospital. The BOR is also responsible for the University of Florida College of Medicine which participates in residency programs at hospitals in other parts of the State. In both instances, faculty members of the Colleges of Medicine carry out teaching functions through those residency programs.

To protect against claims arising out of the alleged medical malpractice of BOR employees, the BOR has established self-insurance trust funds in accordance with statutory provisions governing the BOR. The documents establishing these trust funds expressly limit liability to the extent to which sovereign immunity has been waived as described in Florida Statutes, 768.28(5) -- $100,00 per person and $200,000 per incident. (A. Tab 1). 1/ The BOR did not purchase liability insurance or establish a trust fund

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1/ The prior limitation amounts of §768.28(5) of $50,000 per person and $100,00 per incident apply in this case. However, the statute now provides a waiver of sovereign immunity to the extent of $100,000 per person and $200,000 per incident.

to pay claims beyond the limits of liability described in Section 768.28(5), and it did not intend to waive its sovereign immunity for claims in excess of the limits specified in that statute.

Unlike the BOR's trust fund, the trust fund at issue in this case was created by TGH when it set aside a definitive fund of money in order to allow it to "opt out" of the Florida Patients Compensation Fund ("FPCF"). (R. 592, 622). Had that Fund not been established, TGH would have been required to become a member of the FPCF and the coverage of that Fund would have been available at the time of Irma Payne's injury.

In contrast, no such circumstances were involved with BOR's establishment of its trust fund. There was no requirement that the BOR establish a trust fund as an alternative to membership in the FPCF. Thus, in that critical respect, the BOR's trust fund is very different from TGH's. The BOR simply did what it was authorized to do under Section 768.28(13) and established self-insurance to cover its limited liability under Section 768.28(5).

Although the BOR's trust fund is different from TGH's, the instant case, involving the general question of the impact of a trust fund upon the general sovereign immunity of the sovereign agency creating it, is nevertheless of substantial concern to BOR. The Second District's decision that TGH's trust fund constitutes a waiver of sovereign immunity for all claims, regardless of their amount, may be construed to place some doubt upon the trust fund BOR has established in order to protect itself and its employees with respect to the claims which may be statutorily asserted

against them. That would create a new and expansive theory of waiving sovereign immunity which would do untold mischief to BOR's ability to achieve its mission of medical education in this state.

SUMMARY OF ARGUMENT

The decision of the Second District Court of Appeal that the establishment of TGH's self-insurance trust fund constituted a waiver of sovereign immunity up to the entire limits of the fund is contrary to both the plain intent of the Legislature in authorizing the establishment of such governmental trust funds and to the reasoning of this Court in Avallone, infra.

Further, the Second District's opinion failed to apply the 1987 amendments to the Florida Statutes which specifically preclude any notion that governmental trust funds shall be construed to waive sovereign immunity beyond the specific statutory limits established by the Legislature. By the Legislature's explicit direction, those amendments are binding on all actions in which a judgment had not been rendered on the effective date of June 30, 1987, which is the case here.

The Second District's decision in Taylor, if left intact, would potentially place sovereign agencies which have established self-insurance trust funds in the position of opening themselves up to unlimited malpractice liability. Yet, in attempting to address the rising cost of health care in this state, the Legislature has established a procedural mechanism whereby those state agencies can

provide health care to citizens without being subject to unlimited tort liability. That result was never intended by the Florida Legislature and it should not be sanctioned by this Court.

ARGUMENT

ESTABLISHMENT OF THE TRUST FUND DOES NOT WAIVE SOVEREIGN IMMUNITY FOR CLAIMS IN EXCESS OF THOSE ALLOWED BY STATUTE.

The Second District Court of Appeal held that the Medical Malpractice Self-Insurance Trust Fund established by TGH is the equivalent of commercial liability insurance under Section 286.28, Florida Statutes. It accordingly held that this constituted a waiver of TGH's sovereign immunity as to medical malpractice claims, regardless of their amount.

That decision violates the patent intent of the Florida Legislature in enacting the statutes authorizing such trust fund programs to protect against claims in the amounts for which the Leglislature had authorized recovery against sovereign agencies. It is also contrary to the reasoning of this Court in Avallone v. Board of County Commissioners, 493 So.2d 1002 (Fla. 1986).

In Avallone, the Florida Supreme Court concluded that the purchase of commercial liability insurance by a government agency pursuant to Section 286.28, Florida Statutes (1983) constituted a waiver of sovereign immunity up to the limits of the insurance coverage. This Court reasoned that, where a government entity purchases, in the private marketplace, a commodity such as liability insurance with public funds, which insurance provides coverage above the statutory limits, the public should derive the

full benefit of such an expenditure and be entitled to recoveries up to the stated policy limits. The effect of Avallone was to prohibit a private insurance company from raising sovereign immunity because the public has already paid a premium for an insurance policy.

Unlike Avallone, in this case there was no expenditure of public funds to purchase liability insurance. (TGH's Initial Brief at pp. 13 and 23). The TGH trust fund documents reflect no prior payment by the public of any premium to a private insurance company for insurance. (TGH's Motion for Rehearing at p. 6). Thus, the underlying reason for this Court's decision in Avallone does not exist with respect to governmental trust funds which are not established through public funds and Avallone provides no support for the Second District's decision below.

Moreover, Avallone is inapplicable for an even more fundamental reason. In Avallone, the limits of commercial coverage purchased by the County were in excess of the County's limited liability under Section 768.28(5), whereas the protection provided by TGH's trust fund is specifically limited to the amounts of recovery authorized in Section 768.28(5).2/ (TGH's Initial Brief at p. 23). It is critical in this regard to recognize that Section 768.28(13) specifically allows state agencies to limit such coverage:

2/ The BOR's trust fund is simply limited to the specified statutory amounts. (A. Tab 1).

> The state and its agencies . . . are authorized to be self-insured, to enter into risk management programs, or to purchase liability insurance for whatever coverage they may choose, or to have any combination thereof, in anticipation of any claim, judgment, and claims bill which they may be liable to pay pursuant to this section.

In short, this statute authorizes a state agency to be self-insured "for whatever coverage" it may choose to protect against liability that it may have "pursuant to this section." "This section," of course, is Section 768.28 -- the statute providing for a limited waiver of sovereign immunity up to the specified statutory cap.

Under this statutory scheme, governmental trust funds can be established pursuant to Section 768.28 for the purpose of only paying claims in accordance with the statutory cap on recoveries against sovereign governmental agencies. Since the coverage provided by the trust fund is in fact limited precisely to those amounts for which TGH is liable under Section 768.28(5), there is no waiver of sovereign immunity beyond those limits.

The Second District's opinion completely ignores the fact that TGH's trust fund was not secured through public monies, as was the case in Avallone, nor does it discuss whether the trust fund there was established only for coverage of claims up to the amount of the statutorily authorized recovery. Since that was undeniably the case, just as it is with respect to BOR's trust fund, there is neither logic nor reason for these trust funds to be construed as a waiver of sovereign immunity precluding recovery of amounts in excess of those specified limits.

Finally, the Taylor Court's opinion does not address the 1987 changes in the Florida Statutes, which specifically provide that governmental trust funds shall not be construed to waive their sovereign immunity beyond the specific statutory limits established by the Legislature. These changes took effect on June 30, 1987, and by the Legislature's explicit direction, are binding on "all causes of action then pending or thereafter filed." Since this case was pending at the time of the enactment of that legislation, it is controlling here and the Second District erred in failing to apply it.

Thus, even if there were any doubt before, the statute now clearly precludes any inference of a waiver of sovereign immunity from the purchase of liability insurance or the establishment of trust fund protection against malpractice claims. In particular, the Legislature amended Section 768.28 so as to expressly provide that a state agency may purchase liability insurance in any amount, without waiving its sovereign immunity above the limits of Section 768.28(5). (A. Tab 2). Moreover, the Legislature repealed in its entirety section 286.28, providing that any state agency or subdivision which purchases liability insurance coverage waives the defense of governmental immunity to the extent of the policy limits. Further, the opinion does not discuss the amendment to section 768.28(5), Florida Statutes, which added the following provision:

> Notwithstanding the limited waiver of sovereign immunity provided herein, the state or an agency or subdivision thereof may agree, within the limits of insurance coverage provided, to settle a claim made or a judgment 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.

768.28 Fla. Stat. (Supp. 1988).

These changes in Chapters 768.28(5) and 286.28 demonstrate that, even where a governmental agency has insurance coverage, while it may choose to settle a claim or pay a judgment in excess of $100,000/200,000 statutory limit, the acquisition of such insurance cannot be considered a further waiver of sovereign immunity as to amounts over the specified limits or an increase in the agency's liability.3/ The Second District concluded that TGH's trust fund was tantamount to a commerical insurance policy and that its existence constituted a waiver of sovereign immunity in any given case up to the amount of money in the Fund. Regardless of the correctness of that determination, the 1987 amendments clearly signal the Legislature's intent that no such waiver now exists even by the purchase of the insurance which the Second District has equated with the establishment of trust funds.

3/ The Legislature made another change which applies specifically to BOR. Chapter 240.213, Florida Statutes, specifically applies to the authority of the BOR or the universities in the State University System themselves to secure liability insurance, either through purchasing such insurance or as a self-insurer through the establishment of a trust fund. Prior to 1987, this Chapter provided that the immunity of the BOR was waived to the extent of liability insurance carried "and to the extent of funds available in a particular insurance trust fund." The 1987 Legislature struck this waiver provision in its entirety.

In short, the 1987 statutory amendments confirm that the amount of a plaintiff's recovery against a sovereign agency is strictly limited to the amount stated in the legislative waiver, wholly without regard to insurance considerations. As the legislative history establishes, these 1987 changes all reflect the Legislature's concern that previous statutory language might be interpreted to allow a result that would wipe out a governmental agency's entire insurance trust fund. (A. Tabs 3 & 4) By enacting these clarifying provisions, the Legislature acted to protect existing self-insurance trust funds from oblivion. (A. Tabs 3 & 4).

These amendments do not alter the substantive right of an individual to bring a claim against a sovereign agency. Instead, they merely change the procedure by which an individual can recover an amount above the limits set out in Section 768.28 by requiring that a claims bill be brought to the Legislature for that excess amount. That is clearly a meaningful remedy, as this Court implicitly recognized in Gerard v. Department of Transportation, 472 So.2d 1170 (Fla. 1985), so that plaintiffs have not been deprived of any substantive right to prosecute their claims.

Rather, these amendments are plainly remedial in nature, for "a remedy is the means employed in enforcing a right or in redressing an injury." Grammer v. Roman, 174 So.2d 443, 446 (Fla. 2d DCA 1965). Further, "[i]t is gnerally recognized that no vested

rights exist as to a particular remedy or mode of procedure." Rothermel v. Florida Parole and Probation Commission, 441 So.2d 663, 664 (Fla. 1st DCA 1983).

When a statute is remedial in nature and the Legislature expresses its clear intent for retroactive application, it shall be given effect. Seddon v. Harpster, 369 So.2d 662 (Fla. 2d DCA 1979), aff'd, 403 So.2d 409, 411 (1981). As the Court held in Grammer, 174 So2d. at 446, "[r]emedial statutes do not come within the legal conception of a retrospective law, or the general rule against the retrospective operation of statutes."

Florida law is clear that "statutes which do not alter contractual or vested rights but relate only to remedies or procedure are not within the general rule against retrospective operation and, absent a saving clause, all pending proceedings are affected." Rothermel, 441 So.2d at 664. See also, Fogg v. Southeast Bank, N.A., 473 So.2d 1352 (Fla. 4th DCA 1985); Batch v. State, 405 So.2d 302 (Fla. 4th DCA 1981); Harris v. State, 400 So.2d 819 (Fla. 5th DCA 1981). Accordingly, remedial statutes, such as the ones at issue here, "operate retrospectively in the sense that all pending proceedings, including matters on appeal, are determined under the law in effect at the time of decision rather than that in effect when the cause of action arose or some earlier time." Fogg, 473 So.2d at 1353.

The relevant statute in this case -- Section 768.28(5) -- expressly provides that it "shall take effect upon becoming law" on June 30, 1987 and "shall apply to all causes of action then pending

or thereafter filed, but shall not apply to any cause of action to which a final judgment has been rendered. . . ." Ch. 87-134, §4, Laws of Fla. Plainly, the Legislature intended Section 768.28(5), as amended, to retroactively apply to causes of action occurring before the effective date of June 30, 1987 and to limit the amount of recovery in such cases by plaintiffs against governmental agencies. Under the decisions cited above, the statute can and must be applied as the Legislature directed. See Marion County School Board v. Streetman, 13 F.L.W. 2479 (Fla. 5th DCA Nov. 10, 1988)(court held that Chapter 87-134 was consitutional and was properly applied retroactively to a cause of action that occurred prior to the effective date of the statute).

The Second District erroneously failed to apply that controlling law in this case. That decision could expose BOR's trust fund, as well as the trust funds of others similarly situated, to total liquidation through excessive claims beyond the statutory limits, in direct contravention of the 1987 Legislature's stated intent that the establishment of such trust funds shall not be deemed a waiver of sovereign immunity except to the limited extent provided by Section 768.28. And it was to avoid precisely such a misinterpretation of the statutory scheme that the Legislature enacted legislation in 1987 to make its intent in that regard crystal clear.

Besides the fact that Taylor was wrongly decided under both the prior statutes and the statutes as amended during this case, the broad sweeping language of the Taylor Court's opinion might be

construed to apply to all trust funds and all governmental agencies, whatever their purpose or source of funding. With respect to the Board of Regents, this would create havoc with medical education throughout the state. Medical students gain valuable training through programs allowing them to treat and care for patients in a clinical setting. Certainly, the medical professional's training would suffer if the state universities training them through such residency programs could be held liable for damages in excess of the $100,000/$200,000 statutory limit. The academic medical center's ability to provide this educational tool would be greatly impeded by having to bear such a risk and the medical profession and society would in turn suffer.

CONCLUSION

There would be far-reaching implications to the provision of medical education and to the provision of health care in this state of a holding that an academic college of medicine, operating as a sovereign agency, could be liable for damages in excess of the specified statutory limits simply because it established a trust fund to pay claims up to the amount allowed by statute. Based on the foregoing arguments, as well as the arguments in TGH's Initial Brief, BOR urges this Court to reverse the decision of the Second

District in Taylor or, in the alternative, to clarify that Taylor applies only to judgments rendered prior to June 30, 1987.

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CERTIFICATE OF SERVICE

I hereby certify that an original and seven copies have been Federal Expressed to Sid J. White, Clerk, The Florida Supreme Court Building, Tallahassee, Florida 32399-1925 and a true and correct copy of the foregoing has been furnished by U.S. Mail to Tony Cunningham, Esquire, 708 Jackson Street, Tampa, Florida 33602; Robert L. Blake, Esquire, Public Health Trust Division, Jackson Memorial Hospital, 1611 Northwest 12th Avenue, West Wing 109, Suite C, Miami, Florida 33136; Michael N. Brown, Esquire, Barnett Plaza, Suite 1240, 101, East Kennedy Boulevard, Post Office Box 2111, Tampa, Florida 33601 and Bonita L. Kneeland, Esquire, Post Office Box 1438, Tampa, Florida 33601; and by Federal Express to Joel D. Eaton, Esquire, 800 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130, this 16th day of January, 1989.

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