IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,458

SECOND DISTRICT COURT OF APPEAL

NO. 87-2350

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

Petitioner,

v.

LOTTIE TAYLOR, as Guardian
of the Person and Property
of IRMA JEAN PAYNE,
Incompetent,

Respondent.
_____/

AMICUS CURIAE BRIEF OF THE PUBLIC HEALTH TRUST OF DADE COUNTY, FLORIDA

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I.

INTRODUCTION

Pursuant to the Court's Order of January 9, 1989, the Public Health Trust of Dade County ("Trust") respectfully submits this amicus curiae brief to support the positions taken by the Petitioner in Hillsborough County Hospital and Welfare Board d/b/a Tampa General Hospital v. Lottie Taylor, etc., 13 F.L.W. 1929 (Fla. 2d DCA Aug. 26, 1988) ("Taylor") and to respond to specific holdings of the majority in the Fourth District Court of Appeal ("Fourth District and sometimes "lower court").

The Trust is an agency and instrumentality of Dade County, Florida ("County") which was created by the County pursuant to Section 154.07, et seq., Fla. Stat. (1987), to operate, maintain, and govern Jackson Memorial Hospital ("Jackson") and other designated facilities owned by the County.

Jackson, with a licensed capacity of 1466 beds is a regional referral center, and the primary teaching hospital for the University of Miami School of Medicine, and, thus, serves as the major tertiary health care provider in South Florida.

II.

STATEMENT OF INTEREST

As noted above, Jackson is the County hospital and provides the bulk of medical treatment and care for medically indigent persons in Dade County. A substantial portion of its budget is funded exclusively from ad valorem taxes against taxable property in the County.

Jackson has established a self-insurance program for

professional, automobile, and general liability claims. The self-insurance program established by the Trust is similar to Petitioner's - and not unlike Petitioner - administers such program with the understanding that a self-insurance program does not constitute insurance in the traditional sense.

As an agency of a political subdivision of the State, Jackson, through the Trust has sovereign immunity from such claims, except for the limited waiver of such immunity as provided in Section 768.28, of the Florida Statutes. The Trust has always assumed that its maximum liability exposure was $100,000 per claim and $200,000 per incident in accordance with Section 768.28. Additionally, the Trust operates its self-insurance program under the assumption that it is exempt from the requirements of the Florida Patient's Compensation Fund pursuant to Section 768.54, et seq., Fla. Stat. (1987).

As one of the nation's busiest medical centers, the lower court's ruling if allowed to stand, would have an enormous impact on the way the Trust does business, and would have a direct and substantial effect on future liability claims against the Trust.

III.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae, Public Health Trust of Dade County hereby adopts the statement of the case and facts presented by the Petitioner, Hillsborough County Hospital and Welfare Board d/b/a Tampa General Hospital ("Petitioner" and sometimes "Tampa General"). To the extent that positions taken in this brief differ from the positions taken in Petitioner's brief, the Trust adopts the brief and legal positions of the

Petitioner.

It should be pointed out that the questions certified by the Fourth District appear to depart somewhat from the premise upon which the lower court based its decision. The Fourth District as the chief premise for its ruling stated that Section 768.54, Fla. Stat. (1979) required all hospitals, including governmental hospitals, to contribute to the Florida Patient's Compensation Fund or to establish an alternative form of self-insurance to pay medical malpractice claims. The certified questions propounded to this Court contain no reference to Section 768.54. The Fourth District denied all motions for rehearing without indicating whether it was retreating from its holding that the Florida Patient's Compensation Fund required Tampa General, and presumably all other governmental hospitals, to purchase medical malpractice insurance or to establish self-insurance funds, and the establishment of those mandatory self-insurance funds was equivalent to the purchase of insurance under Section 286.28.

IV.

RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

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

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

V.
SUMMARY OF ARGUMENT

1. A governmental agency is sovereignly immune from tortious claims of third parties, and statutes purporting to

waive sovereign immunity must be clear, emphatic and unequivocal. The mere establishment of a self-insurance program by a governmental agency does not in and of itself waive that immunity.

2. The establishment of a self-insurance program is not equivalent to, nor does it constitute, insurance in the traditional sense or the purchase of insurance. The overwhelming weight of authority has rejected the premise that self-insurance constitutes other insurance. Hence, the creation of a self-insurance fund alone, does not waive the sovereign immunity of that agency.

3. There is no statutory or decisional law which requires a governmental entity to purchase commercial insurance or to self-insure in anticipation of any claim, judgment or clams bill for tortious conduct. Section 768.28 of the Florida Statutes authorizes but does not compel the establishment of an insurance program.

4. The lower court erred when it ruled that all hospitals in Florida, including governmental hospitals, are required to comply with or contribute to the Florida Patient's Compensation Fund. Section 768.54(2)(a), Fla. Stat (1979), expressly exempted agencies of the State from the requirements of the statute. The mere act of setting aside funds to pay liability contingencies (as Section 129.01, Fla. Stat., [and other statutes for other levels of government], requires each county to create and maintain a balanced budget) does not constitute an act of waiver.

5. Section 286.28, Fla. Stat. (1979) (now repealed) when in force and effect, authorized governmental agencies to purchase commercial insurance for specific species of torts

but such statute was inapposite to medical malpractice claims. The statute simply stated that when a governmental entity purchased liability insurance, that entity waived sovereign immunity up to the amount of the coverage. In the case at bar, there was no purchase of commercial insurance and, therefore, there was no waiver of sovereign immunity.

VI.

THE VOLUNTARY ESTABLISHMENT OF A SELF-INSURANCE TRUST FUND OR ESCROW ACCOUNT BY A GOVERNMENTAL HOSPITAL IS NOT EQUIVALENT TO THE PURCHASE OF INSURANCE

a.

THE WAIVER OF SOVEREIGN IMMUNITY IS WITHIN THE EXCLUSIVE PROVINCE OF THE LEGISLATURE AND WAIVER MUST BE CLEAR AND UNEQUIVOCAL

It is axiomatic and well-established that a governmental agency is sovereignly immune from tortious claims except when such immunity is specifically waived by the legislature:

> In accordance with S.13, Art. X, State Constitution, the state for itself and for its agencies and subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act... . Actions at law against the state or any of its agencies or subdivisions in tort for money damages ... may be prosecuted subject to the limitiations specified in this act. Section 768.28(1), Fla. Stat. (1987). 1/

This Court clearly delineated the fundamental principle of waiver with respect to doctrine of sovereign immunity in Spangler v. Florida Turnpike Authority, 106 So. 2d 421, 424:

1/ A state agency or subdivision is powerless to waive immunity on its own initiative. The power to waive immunity is vested exclusively in the Legislature by general law. Arnold v. Shumpert, 217 So. 2d 116 (Fla. 1968); Davis v. Watson, 318 So. 2d 169, 170 (Fla. 4th DCA 1975).

> ...[T]he courts have consistently held that statutes purporting to waive the sovereign immunity must be clear and unequivocal. Waiver will not be reached as a product of inference or implication. The so-called 'waiver of immunity statutes' are to be strictly construed. This is so for the obvious reason that the immunity of the sovereign is a part of the public policy of the state. Accord: Manatee County v. Town of Longboat Key, 365 So. 2d 143 (Fla. 1978).

And notwithstanding this unmistakable enunciation of fundamental governmental law, the lower court waived sovereign immunity of the Petitioner as a product of inference and implication when it ruled that the voluntary establishment of an internal self-insurance program constitutes waiver of sovereign immunity. It is the exclusive province of the Legislature to abrogate or limit the effects of sovereign immunity. There is nothing in any statutory or decisional law which expressly or impliedly waives sovereign immunity when a governmental agency establishes an internal self-insurance program.

b.

IN THE ABSENCE OF LEGISLATIVE ENACTMENT, SELF-INSURANCE CANNOT CONSTITUTE INSURANCE FOR THE PURPOSE OF WAIVER OF SOVEREIGN IMMUNITY

The concept of self-insurance, an imprecise legal term, is the retention of the risk of loss by setting aside assets, either by accounting entries or by establishing a special fund from which a company pays claims. American Nurses Association v. Passaic General Hospital, 471 A. 2d 66, 69 (Super. Ct. App. Div.); Keeton and Widiss, Insurance Law, A Guide to Fundamental Principles, Legal Doctrines and Commercial Practices, Section 81.3(b), Pages 13-14, West Publishing Co. (St. Paul, Minn.) 1988. "[A]lthough an entity that handles the risk of tort claims in this manner is

sometimes referred to as a 'self-insurer,' this approach involves no insurance as that term is ordinarily used in regulatory statutes or in other legal contexts." Keeton and Widiss, supra at page 14.

Without exception, insurance has been judicially defined as shifting a risk of loss from the insured to the insurer. In Epmeir v. United States, 199 F. 2d 508, 509-510 (7th Cir. 1952), the Seventh Circuit Court of Appeals enunciated what has always been judicially accepted as the definition of insurance:

> Insurance of ancient origin, involves a contract, whereby, for an adequate consideration, one party undertakes to indemnify another against loss arising from certain specified contingencies or perils. Fundamentally and shortly, it is contractual security against possible anticipated loss. Risk is essential and, equally so, a shifting of its incidence from one to another. Physicians' Defense Co. v. Cooper, 9 Cir., 199 F. 576; Jordon v. Group Health Ass'n, 71 App.D.C. 38, 107 F.2d 239; Old Colony Trust Company v. Commissioner of Internal Revenue, 1 Cir., 102 F.2d 380; Alliance Ins. Co. v. City Realty Co., D.C., 52 F.2d 271; Meyer v. Building and Realty Co., 209 Ind. 125, 196 N.E. 250, 100 A.L.R. 1442; 44 C.J.S., Insurance, Section 1, p. 471; 29 Am.Jur. 47, Sec. 3; 1 Bouvier's Law Dict. Rawle's Third Revision, p. 1613; Webster's International Dictionary, 2d Ed. 1942, p. 1289.

See e.g., Southeast Title and Insurance Co. v. Collins, 226 So. 2d 247 (Fla. 4th DCA 1969).

As a matter of common understanding, usage and legal definition, an insurance contract denotes a policy issued by an authorized and licensed insurance company whose primary business it is to assume specific risk of loss ... in consideration of the payment of a premium. By analogy, the overwhelming weight of authority has rejected the premise that self-insurance constitutes other insurance within the

context of standard "other collectible insurance" clauses. See, e.g., State Farm Mutual Auto Ins. Co. v. Universal Appleman Co., 406 So. 2d 1184 (Fla. 1st DCA 1981), petition for review denied, 413 So. 2d 877 (1982); Friedfield v. Royal Indemnity Co., 167 So. 2d 586 (Fla. 3d DCA 1964), and Carolina Casualty Ins. Co. v. Insurance Co. of North America, 595 F. 2d 128, 143 n. 53 (3rd Cir. 1979).[2/] The lower court's chief error was equating self-insurance with the purchase of insurance in the absence of a statutory enactment so stating.

c.

HOSPITALS OWNED AND OPERATED BY GOVERNMENTAL AGENCIES ARE EXEMPT FROM THE FLORIDA PATIENT'S COMPENSATION FUND

It is herein conceded that should the legislature compel governmental agencies to self-insure in lieu of purchasing insurance for liability claims, a plaintiff may arguably pursue a portion or all of trust-funds as delineated and allowable in the enactment. In the case at hand, no such enactment exists.

The limited waiver of immunity statute (768.28), supersedes all other statutes regarding governmental

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2/ See also, In re Request for Opinion of the Supreme Court Relative to the Constitutionality of SDCL 21-32-17, 379 N.W. 2d 822 (S.D. 1985); United National Ins. Co. v. Philadelphia Gas Works, etc., 221 Pa. Super. 161, 289 A.2d 179 (1972); Universal Underwriters Ins. Co. v. Marriott Homes, Inc., supra, 286 Ala. at 231, 238 So. 2d at 730; Home Indemnity Company v. Humble Oil & Refining Co., 314 S.W.2d 861 (Tex.Civ.App. 1958), writ of error and reh'g den. 159 Tex 224, 317 S.W.2d 515 (1958); American Family Mut. Ins. Co. v. Missouri P. & L. Co., 517 S.W.2d 110 (Sup.Ct.Mo. 1975). See also Carolina Cas. Ins. Co. v. Insurance Co., etc., 595 S.2d 128, 143 n. 53 (3 Cir. 1979). And see 8A Appleman, Insurance (1981), Section 4912 at 508-511.

immunity. Section One (1) of the statute states that "[T]he state for itself and for its agencies and subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act." The statute goes further to permit (but not compel) a governmental agency to be "self-insured, to enter into risk management programs, or to purchase liability insurance for whatever coverage they may choose ... in anticipation of any claim, judgment and claims bill which they may be liable to pay pursuant to this section." Section 768.28(13), Fla. Stat. (1981).

After correctly stating that 768.28 authorizes the state and its agencies to voluntarily become self-insured or to voluntarily purchase liability insurance, the Fourth District went on to incorrectly interpret Section 768.54 thusly:

> Section 768.54 required all hospitals to contribute to the Florida Patient's Compensation Fund or to establish an alternative form of self-insurance. Rather than contributing to the fund, the Hillsborough County Hospital and Welfare Board established an escrow account known as the Medical Malpractice Self-Insurance Trust Fund in the total amount of $4,250,000. Tampa General Hospital was allotted $2,500,000 of the trust fund. Taylor at 13 F.L.W., 1930.[3] (emphasis supplied)

There is nothing in Section 768.54 requiring governmental hospitals to comply with or contribute to the Florida Patient's Compensation Fund. In fact, Section 768.54(2)(a), Fla. Stat. (1980) specifically exempts governmental agencies from the Florida Patient's Compensation Fund. "Any hospital

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3/ The lower court ruled that the Respondent was entitled to the entire amount of the Trust Fund without regards to whether other funds had been paid from the fund during the Petitioner's fiscal year.

operated by an agency of the state shall be exempt from the provisions of this section and shall not be required to participate in the fund." 3A/

Section 768.54 could not very well require governmental agencies to purchase commercial insurance or to self-insure for their tortious conduct, when the preemptive sovereign immunity statute permits governmental agencies the discretion to purchase commercial insurance, create a voluntary self-insurance program for whatever amount the agency deems appropriate for its purposes, or to be uninsured if it so desired. 4/ "[T]here is no requirement that the governmental entity buy insurance, but once it does so, then the terms of the legislative act authorizing the purchase of such liability insurance, is applicable." Avallone v. Board of County Commissioners Citrus County, 493 So. 2d 1002, 1007 (Fla. 1986) (concurring opinion, Ehrlich, J.).

The mere act of voluntarily taking funds from one internal account and placing those funds into another internal account to pay contingent liability claims cannot

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3A/ Hospitals operated by an agency, subdivision, or instrumentality of the state are exempted from the provisions of Section 768.54 by virtue of Laws 1983, c. 83-206 Section 2, effective 1983.

4/ Authorizing governmental agencies "to purchase liability insurance for whatever coverage they may choose", implicitly authorizes an agency to be uninsured. As developed in this brief, self-insurance is equivalent to no insurance since a claimant can look only to full faith and credit of the entity to satisfy any claim. Arguendo, should the entity set up a self-insurance fund, there is no guarantee that the fund will be sufficient to pay up to $100,000 per claimant as allowed under 768.28(5).

and does not constitute waiver of immunity, particularly when no law of Florida mandates such separation of funds.[5/] In light of the lower court's decision, governmental agencies will be faced with the hard choice of balancing their budgets through self-insurance programs or waiving sovereign immunity.

II.

A GOVERNMENTAL HOSPITAL WHICH HAS ESTABLISHED A SELF-INSURANCE TRUST FUND DOES NOT WAIVE SOVEREIGN IMMUNITY UP TO THE AMOUNT OF THE SELF-INSURANCE FUND UNDER 286.28, FLORIDA STATUTES (1979)

a.

SECTION 286.28 WHEN APPLICABLE DID NOT CONTEMPLATE MEDICAL MALPRACTICE CLAIMS

If it has been sufficiently established that the creation of a self-insurance program by a governmental agency is not the equivalent of the purchase of insurance, then the second question certified to this Court by the Fourth District is academic and of no consequence with respect to the case at bar.

It is herein submitted that Section 286.28 (now repealed) when in force and effect was, and continues to be, inapposite to the facts in the case at hand. Arguably, Section 286.28 was never meant to cover any and all governmental tortious liability such as medical malpractice claims. The statute is specific with regards to the species of tortious conduct

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5/ The legislature has mandated that all budgets of the County be balanced, that is the total of the estimated receipts, including balances brought forward shall equal the total of appropriations and reserves. Fla. Stat. 129.01(2)(b), Fla. Stat. (1987). The sole purpose of an internal self-insurance program is to allow the agency the opportunity to budget and set aside a finite sum of money to pay liability claims based upon past experiences and future projections, so that all funds will not be utilized in day-to-day operations.

which waives immunity and relates specifically to motor vehicles, watercraft, aircraft and personal and real property, or any other such operations.

Moreover, the legislature expressed in the most lucid language that "in those instances, where by general law, provision has been made for the public offices ... to provide such insurance, this section shall not be construed to impair any such previous acts but shall be construed as cumulative thereto." Section 286.28(1), Fla. Stat. (1979).

The statutory scheme providing for the Florida Patient's Compensation Fund sets forth specific standards and guidelines for settlements and judgments for self-insured hospitals. See Section 768.54(2)(b)(4) and Section 627.357. As a corollary principle, if the fund does not provide guidelines for governmental agencies, and Section 286.28 does not cover medical malpractice actions, then the lower court erred in ruling that Section 286.28 is applicable to this case.

b.

THE ESTABLISHMENT OF A SELF-INSURANCE PROGRAM IS NOT EQUIVALENT TO THE PURCHASE OF LIABILITY INSURANCE

It is axiomatic that the Legislature is presumed to know existing law when it enacts a statute and is also presumed to be acquainted with the judicial construction of former laws on the subject concerning which the latter statute is enacted. Williams v. Jones, 326 So. 2d 425, 435 (Fla. 1975); Collins Investment Co. v. Metropolitan Dade County, 164 So.2d 806, 809 (Fla. 1964).

The plain meaning of sub-Section 2 of 286 when in force and effect, was to waive immunity only to the extent that the

state was a party to a traditional insurance contract which idemnified the state for any loss for which it would be liable in the absence of immunity. It specifically contemplated that an agency would pay premiums. A self-insurance program does not pay premiums. It specifically provides for a written insurance contract. A governmental entity cannot contract with itself. It specifically contemplated two separate and distinct contractual parties, an insurer and an insured. There is no insurer and insured in a self-insurance program. Section 624.03 defines insurer as "every person engaged as indemnitor, surety, or contractor in the business of, entering into contracts of insurance or of annuity." See also, Zinke-Smith v. Fla. Ins. Guar. Ass'n, Inc., 304 So. 2d 507 (Fla. 4th DCA 1974). The Petitioner and those similarly situated cannot be construed to be insurers.

The Florida Legislature following the overwhelming weight of authority has defined an insurance policy as a "written contract of or written agreement for or effecting insurance or the clauses, rider, endorsements and papers which are a part thereof." Section 627.402(1), Fla. Stat. (1981). 6/

When the legislature provided in Section 286.28(2) that "the insurer shall not be entitled to the benefit of the defense of governmental immunity," it must have intended the word insurer to have the same meaning as that expressed in Section 624.03.

6/ Section 627.413, specifies what each insurance policy must contain.

It would be superfluous and meaningless for the statute to prohibit a governmental entity which voluntarily purchased commercial insurance in the first place, from raising sovereign immunity when the governmental entity could cancel the policy at anytime and moreover has no liability under the typical liability insurance policy. 7/ Neither the complaint nor any other pleading in this cause alleges facts that would bring the Petitioner within the ambit of the statutory definition of insurer or that the Petitioner had indeed purchased insurance.

For all the foregoing reasons, it is clear that the Legislature never intended the purchase of insurance by governmental entities to conceptually embrace self-insurance programs.

7/ In the next Legislative Session - after this Court's holding in Avallone that the purchase of insurance waived sovereign immunity up to the face value of the policy, the Legislature repealed Section 286.28 and provided that the purchase of insurance did not waive the sovereign's immunity. See Section 768.28 (5) Fla. Stat. (1987). Also, see Williams v. Hartford Accident and Indemnity Company, 382 So. 2d 1216, 1220 (Fla. 1980), wherein this Court stated that ...[T]he timing and circumstances of an enactment may indicate it was formal only and served as a legislative clarification or interpretation of existing law, and thus such an enactment may even suggest that the same rights existed before it.

CONCLUSION

It is herein submitted that the establishment of a self-insurance program does not constitute the purchase of insurance and, therefore, does not constitute a clear and unequivocal waiver of sovereign immunity as contemplated by the holdings of Spangler, supra, and its progeny.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 17th day of January, 1989, to: Michael N. Brown, Esquire, Allen, Dell, Frank & Trinkle, P.A., P.O. Box 2111, Tampa, Florida 33601; Bonnie Kneeland, Esquire, Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., P.O. Box 1438, Tampa, Florida 33601; Tony Cunningham, Esquire, 708 Jackson Street, Tampa, Florida 33602; Sylva H. Walbolt, Esquire, One Harbour Place, P.O. Box 3239, Tampa, Florida 33601; and Joel D. Eaton, Esquire, 1202 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130.

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