IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,458

HILLSBOROUGH COUNTY HOSPITAL AUTHORITY, d/b/a TAMPA GENERAL HOSPITAL,

Petitioner,

vs.

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

Respondent.

SECOND DISTRICT COURT OF APPEAL
Case No. 87-2350

ON PETITION TO INVOKE DISCRETIONARY REVIEW
FROM THE SECOND DISTRICT COURT OF APPEAL

(CERTIFIED QUESTIONS OF GREAT PUBLIC IMPORTANCE)

INITIAL BRIEF ON MERITS OF PETITIONER

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MNB/A-39

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES — Page

TABLE OF CITATIONS
(continued)

OTHER AUTHORITY — Page

STATEMENT OF CASE AND FACTS

Petitioner is the Hillsborough County Hospital Authority, a political subdivision of the State of Florida, and by Special Act is charged with the responsibility of operating the Tampa General Hospital in Tampa, Florida. It will be referred to throughout as the Hospital Authority. The Hospital Authority was the defendant at the trial level below and Respondent Lottie Taylor, as Guardian of the person and property of Irma Jean Payne, was the plaintiff below and will be referred to herein as Taylor.

As background information, the Hospital Authority was created by the State Legislature in 1980 by Chapter 80-510, Laws of Florida. The predecessor to the Hospital Authority was the Hillsborough County Hospital and Welfare Board, originally created in 1963, Chapter 63-1402, Laws of Florida. In addition to having the responsibility of operating Hillsborough County's two public hospitals, also held the responsibility of operating the welfare system for Hillsborough County as well as the ambulance system. In 1980, when the Hospital Authority was created, the Hospital and Welfare Board was abolished by Chapter 80-509, Laws of Florida. The responsibility of operating Tampa General Hospital being transferred to the newly created Hospital Authority and the responsibilities of the Division of Welfare and the Division of Emergency Medical Services were transferred to Hillsborough County.

In 1976, prior to the creation of the Hospital Authority, its predecessor, the Hospital and Welfare Board, established an

escrow fund (referred to as the HWB Malpractice Reserve Fund) (A. 5-17) and designated The First National Bank of Florida as the depository. It is this fund that is the center of the controversy of this action.

In October 1980, Irma Jean Payne (the ward of Taylor) underwent a tubal ligation and during that surgery, or recovery period thereafter, suffered injuries. (R. 1-7) Suit was filed by Taylor alleging that the Hospital Authority was medically negligent in the care and treatment of Irma Jean Payne and that such negligence was the cause of her injuries. (R. 1-7) After a rather prolonged litigation process, the Hospital Authority and Taylor entered into a stipulation to the effect that the Hospital Authority would not contest liability and that the case had a value of $2,500,000.00. However, the Hospital Authority continued to assert, as it had in the past, that its liability for this incident was limited to $50,000.00,[1/] pursuant to §768.28(5), Fla. Stat. (1980 Supplement). Taylor, on the other hand, attempted to avoid that limitation of liability by arguing that the creation of the escrow fund by the Hospital Authority, in essence, amounted to the purchase of an insurance policy. Therefore, the Hospital Authority waived its sovereign immunity to the extent of the entire fund.

[1/] This action accrued prior to the effective date of Chapter 81-317, Laws of Florida, and thus, the prior limitation amounts of §768.28(5), Fla. Stat., of $50,000.00 per claim and $100,000.00 per incident apply here. The statute further provides, however, that judgments in excess of these limits may be reported to the legislature and paid in whole or in part only by further act of legislature.

The trial court entered its Order Regarding Motion for Court Determination of All Pending Legal Questions Including, But Not Limited to, Questions of Constitutionality, Insurance and Other Matters (A. 1-17) on June 2, 1987 (R. 618-634) holding:

1. That the establishment of the Malpractice Reserve Fund by the Hospital Authority created "a fund of, or in the nature of, insurance with the purposeful intent of procuring the same." (R. 618-620)

2. That by establishing such fund, "pursuant to F.S. 768.28(10) and the relevant decisional law, there has been a waiver of sovereign immunity and corresponding statutory limits of liability coextensive with the amount of money in the foregoing fund established by the Defendant Hillsborough County Hospital and Welfare Board d/b/a Tampa General Hospital at the time of the negligence heretofore set forth." (R. 620)

3. That Chapter 80-510, Laws of Florida, which created the Hospital Authority, was unconstitutional (R. 620, 621) because:

a. Tampa General Hospital failed to notify Irma Jean Payne that its liability was limited;

b. Chapter 80-510 was created for the primary purpose of limiting the Hospital Authority's liability; and

c. The Act's title failed to briefly express the subject matter of the law.

4. That judgment would be entered in favor of Taylor and against the Hillsborough County Hospital and Welfare Board a/k/a Hillsborough County Hospital Authority in the amount of $2,500,000.00. (R. 621)

5. That execution would issue against the public body.

The Hospital Authority timely filed its Motion for Rehearing and Clarification (R. 632-652) on June 11, 1987. That motion was denied by the trial court on August 12, 1987. (R. 1003) During the interim, between the signing of the "Order" and the denial of the Hospital Authority's rehearing, Chapter 87-134, Laws of Florida, became effective. That Act provided that the purchase of insurance did not waive sovereign immunity and, by its terms, provided that it applied to all cases where a final judgment had not yet been rendered.

The Hospital Authority then appealed the matter to the Second District Court of Appeal. (R. 1033, 1034) The District Court agreed with the Hospital Authority's contentions that the primary purpose of its enabling act, Chapter 80-510, was to restructure the hospital and welfare functions in Hillsborough County and that, in fact, the Hospital Authority had already acquired sovereign immunity by general act in 1977 under Chapter 77-86, Laws of Florida. The District Court accordingly reversed the trial court as to its ruling that Chapter 80-510, Laws of Florida, was unconstitutional.

However, in a split opinion, the District Court affirmed the trial court's holding that the creation of the escrow fund by the

Hospital Authority was the equivalent of purchasing insurance and that the Hospital Authority had waived its sovereign immunity up to the amount of the fund allotted to Tampa General Hospital, i.e., $2,500,000.00. The District Court then amended the judgment to allow Taylor to execute against the entire Tampa General fund. Judge Parker dissented from the majority opinion and would have found that the creation of the fund by the Hospital Authority was not the equivalent of purchasing insurance. A copy of that opinion is found in the Appendix. (A. 18-29)

The Hospital Authority next moved for rehearing, rehearing en banc and requested certification of the question of whether governmental hospitals who established escrow funds created insurance which waived sovereign immunity on malpractice claims to the aggregate limit of the fund. The District Court denied the motion for rehearing en banc and the motion for rehearing except to the extent that it did certify questions to be of great public importance. (A. 30-31)

The Hospital Authority then filed its Notice to Invoke Discretionary Jurisdiction and that brings us to these proceedings.

QUESTIONS CERTIFIED TO BE OF GREAT PUBLIC IMPORTANCE

The Second District Court of Appeal certified the following questions to be of great public importance:

1. WHETHER THE ESTABLISHMENT OF A SELF-INSURANCE TRUST FUND OR ESCROW ACCOUNT BY THE GOVERNMENTAL HOSPITAL IS THE 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 FUND UNDER SECTION 286.28, FLA. STAT. (1979)?

SUMMARY OF THE ARGUMENTS

The arguments presented by the Petitioner Hospital Authority are relatively simple. As to the first question presented, the answer is quite simply no, the establishment of a self-insurance fund or escrow account is not the equivalent of purchasing insurance. As defined by the courts and the legislature, "insurance" means transferring the risk of a known contingency from one (the insured) to another (the insurer) for a consideration (the premium) and the other agreeing (by the insurance policy) to pay or indemnify the insured should that risk occur. None of these elements are present when an entity, be it public or private, simply decides to place its own money into a fund and retain all of the risk that such a contingency will occur.

The Hospital Authority's answer to the second question is likewise in the negative. The maintenance of an escrow fund or "self-insurance" does not waive sovereign immunity pursuant to §286.28, Fla. Stat. This is true for either of two reasons. First, §286.28 simply does not apply here by its own terms. The statute specificially states that in consideration of premiums paid, the insurer is denied the opportunity to claim sovereign immunity to the extent of the insurance coverage. No insurance policy was purchased here by the Hospital Authority, no premium was paid and no insurance policy was isssued. The policy reasons

announced in Avallone, infra, for waiving sovereign immunity to the extent of commercially purchased insurance coverage are not present here. In fact, public policy would be thwarted by application of the Avallone decision to these facts. Since the statute does not specifically apply to an escrow fund established by a public body, a further waiver of sovereign immunity cannot be inferred. The statute must be strictly construed.

Second, §286.28 was repealed before the trial court order appealed from was rendered. Chapter 87-134, Laws of Florida, repealed §286.28 and provided that the purchase of insurance by a governmental body did not constitute a waiver of sovereign immunity. The Act by its terms applied to all causes of action where a final judgment had not yet been rendered. Since the trial court had not disposed of the Hospital Authority's motion for rehearing until after the effective date of Chapter 87-134, the order was not rendered until after §286.28 was no longer was in existence. There was no waiver.

QUESTION ONE

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

The trial court held that the Hospital Authority had waived its sovereign immunity "pursuant to Florida Statutes, §768.28(10),[2/] and the relevant decisional law" (R. 620) by creating its Malpractice Reserve Fund. In order to understand the purpose of the creation of this fund by the Hospital Authority, it is necessary to review the various legislative enactments of the mid-1970s.

A short time after the Waiver of Sovereign Immunity Act, §768.28, Fla. Stat., took effect, Chapter 75-9, Laws of Florida, was enacted. That Act, among other things, created the Florida Patient's Compensation Fund, §768.54, Fla. Stat. At the time of its enactment, the Act required every licensed hospital to join the fund unless they qualified to be exempted from participation. The permitted exemptions were (§768.54(2)(c), Fla. Stat.):

> 1. Post a bond in an amount equivalent to $10,000.00 per claim for each hospital bed in said hospital, not to exceed a $2,500,000.00 annual aggregate.

[2/] The Hospital Authority believes that the trial court erroneously referred to §768.28(10), Fla. Stat. (1975), in its order. That statute was similar to §286.28 in that it waived sovereign immunity to the extent that insurance may have been purchased by the agency. This section, however, was repealed by Chapter 77-86, Laws of Florida, which was prior to the accrual of this cause of action.

2. Prove financial responsibility in an amount equivalent to $10,000.00 per claim for each hospital bed in said hospital, not to exceed a $2,500,000.00 annual aggregate, to the satisfaction of the board of governors of the fund, through the establishment of an appropriate escrow account.

3. Obtain professional liability coverage in an amount equivalent to $10,000.00 or more per claim for each bed in said hospital from a private insurer, from the Joint Underwriting Association, or through a plan of self-insurance as provided in §627.357. No hospital was required to obtain such coverage in excess of the $2,500,000.00 annual aggregate.[3/]

Factually, the record actually reflects that the escrow fund was established on May 25, 1976, to avoid membership in the Florida Patient's Compensation Fund. (R. 592, 622) In the month preceding Ms. Payne's operation, the Hospital Authority merely authorized its Executive Director to execute and deliver a promissory note to The First National Bank of Florida for a loan to increase the funds in the escrow account. (R. 634)

Legally, it should be noted that the provisions of §768.54, Fla. Stat. (1979), have nothing to do with sovereign immunity. Instead, those provisions deal with the limitation of liability which hospitals and doctors can obtain by becoming members of the

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[3/] In 1980, Chapter 80-328, Laws of Florida, amended the Act so that no longer were governmental hospitals required to participate or meet one of the three exemptions.

Florida Patient's Compensation Fund. There is nothing in this medical malpractice act to suggest that Tampa General Hospital would lose its limitation of liability under the sovereign immunity statutes if it failed to create an account. In fact, §768.54(2)(d)(1), Fla. Stat. (1979), simply provides that the Hospital "shall be subject to liability under law without regard to the provisions of this section" if it failed to comply. Thus, Tampa General Hospital would still have had sovereign immunity under §768.28, Fla. Stat. (1979), if it had ignored the medical malpractice statute.

Is the establishment and maintenance of this escrow account by the Hospital Authority (and its precedessor in interest) the equivalent of purchasing insurance? As pointed out by the amici curiae, Hospital Board of Directors of Lee County and the Florida Hospital Association, in their brief with the District Court, there are significant differences between one purchasing a contract of insurance and one setting aside a sum of one's own money for protection of contingent liabilities. The purchasing of insurance spreads the risk among many policyholders and also results in the expenditure of public funds to purchase an asset, i.e., the contract of insurance. As we shall see later, it may have made sense for the legislature in §768.28(10) and §286.28, Fla. Stat., to allow the public to obtain the benefit of that expenditure waiving sovereign immunity to the extent of the insurance. The same is not true as far as the escrow fund is concerned. Here, the entity, whether it be a governmental agency, such as the Hospital Authority, or an individual, has not

spread the risk at all. The Hospital Authority has simply placed its own funds in an account and retained all of the risk itself.

Insurance is defined as "a contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils" or "as a contract whereby 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." Black's Law Dictionary, Rev. 4th Ed.

In the Florida Insurance Code, "insurance" is defined as "a contract whereby one undertakes to indemnify another or pay or allow a specified amount or a determinable benefit upon determinable contingencies." (§624.02, Fla. Stat.)

Professor Long defines insurance thusly:

> A liability insurance policy is a contract either with fixed monetary limits or a single aggregate amount for all losses, whereby for a specified consideration, called a premium, one party known as the insurer agrees to assume loss or liability imposed by law in respect to certain property, rights, or liability caused by specified risks or hazards. The party to be insured against loss or liability is called the assured or insured; the causes of damage, loss, or liability are risks or hazards; the property rights or liabilities of the insured which may subject the insured to loss or liability, the subject of insurance or the insurable interest.

The Law of Liability Insurance, Long, 1971 Vol. 1, §1.02.

Clearly, here there was no contract between the two parties wherein one paid the other a premium in exchange for the other's

promise to pay or indemnify upon the happening of a certain event. See Appleman, Insurance Law and Practice, Vol. 12, §7001.

Although no Florida case directly on point could be found, the case of Ponder v. Fulton-DeKalb Hospital Authority, 353 S.E. 2d 515 (Ga. 1987), is strikingly similar. There, Nellie Ponder brought suit against the Hospital Authority doing business as Grady Memorial Hospital alleging medical malpractice in her treatment during pregnancy and in the delivery and treatment of her son. The trial court granted partial summary judgment to the hospital finding that it had waived its sovereign immunity to the extent of its self-insurance fund. Georgia law provided that charitable institutions had sovereign immunity from suits except to the extent of insurance coverage. Thus, the question presented to the Georgia Supreme Court was whether the establishment and maintenance of Grady Hospital's self-insurance fund was the equivalent of insurance so as to waive immunity.

The Georgia Supreme Court reasoned,

> The definition of insurance demonstrates the respects in which Grady's plan differs from ordinary insurance. Insurance is a contract whereby one party agrees to assume certain risks for another party in consideration for the payment of premiums and to pay the insured party a specified amount on the happening of a particular contingency. Bankers Health and Life Insurance Co. v. Knott, 41 Ga. App. 639, 154 S.E. 194 (1930), quoting from 32 C.J. 975, sec. 1. A necessary element of insurance is distribution of risk. Under Grady's plan, no premium is paid, no second party assumes the risk and no distribution of risk is accomplished. The Grady plan better fits into the mold of a reserve fund created to protect against contingencies. An important effect of the fund is the protection of the charitable assets.

> The policy considerations behind our holdings of immunity waiver to the extent of liability insurance coverage may be stated thusly: the premium has been paid, the coverage has been extended, so it must have been intended that the benefits be paid. No such policy considerations exist here. The plan states its purpose as the provision of a fund to pay legal claims. We construe a legal claim for the purposes of this case to be a claim which could succeed in the absence of the fund. This claim could not. We therefore find that the hospital's defense of charitable immunity is not waived because of the existence of the self-insurance plan.

Id. at 517.

Insurance is a contract by which a party pays a premium and shifts a specified risk to another party. In this case, Tampa General Hospital created an escrow fund of its own monies (plus a loan from the bank) as a reserve account for malpractice. When the citizens of Hillsborough County pay $25,000.00 as a premium on a $2,500,000.00 insurance policy, it may make sense for the courts or the legislature to enforce a judgment for a particular party up to the amount of $2,500,000.00 against the insurance company, otherwise, there would be a windfall to the insurance company. On the other hand, when the government has fully retained the risk and a $2,500,000.00 judgment for one claimant will cost the government $2,500,000.00, it makes no sense to describe the fund as "insurance." There is no windfall in this case.

The provisions of §768.54(2)(c), Fla. Stat. (1979), required an escrow account "in an amount equivalent to $10,000.00 per claim for each hospital bed in said hospital, not to exceed a $2,500,000.00 annual aggregate. . . ." It should be noted that

the lower court decided to "waive" Tampa General Hospital's liability to the full extent of the fund which was established for a hospital with more than 250 beds and with thousands of patients each year. If there is a "waiver" by virtue of this "insurance," it would be equally logical to make the insurance $10,000.00 for this single claim involving one hospital bed. There is no logic to the lower court's ruling which depletes a fund for the exclusive benefit of a single patient when it was designed to protect thousands of patients. The legislature may have the authority to make such a decision through a claims bill, but this is not a decision which was delegated under the statutes to a judicial forum.

As Judge Parker so aptly points out in his dissent to the opinion of the District Court (A. 28-39), there is no "insurer"; there is no "insurance contract"; and there have been no "insurance premiums" paid. As held in American Nurses Assn. v. Passaic General Hospital, 192 N.J. Super. 486, 471 A.2d 66 (Super. Ct. App. Div.), reversed on other grounds, 98 N.J. 83, 484 A.2d 670 (1984), self-insurance is not insurance.

> 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 by loss by the one upon whom it is directly imposed by law or contract.

192 N.J. Super at ____, 471 A.2d at 69 (A. 28-29).

Obviously then, the establishment of an escrow account is not the equivalent of purchasing insurance. The lower court's decision must be reversed with instructions to enter a judgment in favor of the Hospital Authority pursuant to the limitations in §768.28, Fla. Stat. (1980).

QUESTION TWO

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, FLA. STAT. (1979)?

Prior to its repeal,[4/] §286.28, Fla. Stat. (1979), provided:

> (1) The public officers in charge or governing bodies, as the case may be, of every county, district school board, governmental unit, department, board, or bureau of the state, including tax or other districts, political subdivisions, and public and quasi-public corporations, other than incorporated cities and towns, of the several counties and the state, all hereinafter referred to as political subdivisions, which political subdivisions in the performance of their necessary functions own or lease and operate motor vehicles upon the public highways or streets of the cities and towns of the state or elsewhere, own or lease and operate watercraft or aircraft, or own or lease buildings or properties or perform operations in the state or elsewhere are hereby authorized, in their discretion, to secure and provide for such respective political subdivisions, and their agents and employees while acting within the scope of their employment, insurance to cover liability for damages on account of bodily or

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[4/] As will be shown later, §286.28 was repealed by Chapter 87-134, Laws of Florida, prior to the rendition of the order by the trial court in this action. The Hospital Authority does not believe §286.28 applies to this action.

personal injury or death resulting therefrom to any person, or to cover liability for damage to the property of any person or both, arising from or in connection with the operation of any such motor vehicles, watercraft, or aircraft, from the ownership or operation of any such buildings, property, or livestock, or any other such operations, whether from accident or occurrence; and to pay the premiums therefor from any general funds appropriated or made available for the necessary and regular expense of operations of such respective political subdivisions, without the necessity of specific appropriation or specification of expense with respect thereto. Provided, that in those instances where, by general law, provision has been made for the public officer in charge or governing body of any such political subdivision to provide such insurance, this section shall not be construed as cumulative thereto.

(2) In consideration of the premium at which such insurance may be written, it shall be a part of any insurance contract providing said coverage that the insurer shall not be entitled to the benefit of the defense of governmental immunity of any such political subdivisions of the state in any suit instituted aginst any such political subdivision as herein provided, or in any suit brought against the insurer to enforce collection under such an insurance contract; and that the immunity of said political subdivision against any liability described in subsection (1) as to which such insurance coverage has been provided, and suit in connection therewith, are waived to the extent and only to the extent of such insurance coverage; provided, however, no attempt shall be made in the trial of any action against a political subdivision to suggest the existence of any insurance which covers the whole or in part any judgment or award which may be rendered in favor of the plaintiff, and if a verdict rendered by the jury exceeds the limit of the applicable insurance, the court shall reduce the amount of said judgment or award to a sum equal to the applicable limit set forth in the policy.

In Avallone v. Board of County Commissioners of Citrus County, 493 So.2d 1002 (Fla. 1986), the Supreme Court considered a case brought by a person who had been injured at a swimming facility in a county-owned park. Pursuant to §286.28, Fla. Stat., the County had obtained insurance to protect it from bodily injury claims. In Avallone, the Supreme Court held that the statutory language in §286.28, Fla. Stat., prohibited the insurance carrier from raising sovereign immunity as a defense to the limits of the insurance policy.

It is significant to note that §286.28, Fla. Stat., did not contain a similar waiver of sovereign immunity for governmental entities which created escrow funds or other forms of self-insurance. As the Supreme Court stated:

> The thrust of section 286.28 is relatively simple. Political subdivisions are authorized to spend public money for the purchase of liability insurance. However, if such insurance is purchased and is within the purvue 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 this section otherwise would deprive the public of the benefit of the public expenditure.

493 So.2d 1004. Thus, the Supreme Court clearly recognized the distinction between an insurance policy for which a premium had been paid as a public expenditure and a circumstance under which a governmental entity would be directly liable to pay a judgment. The reasoning of the Avallone case supported this Defendant in the lower court and this Defendant relied upon that case in the lower court.

During the 1987 legislative session, however, steps were taken to legislatively overrule the Avallone decision in order to retain a limitation of liability even in the event of insurance coverage. Chapter 87-134, Laws of Florida, specifically repealed §286.28, Fla. Stat., and added language to §768.28(5) which provides:

> . . . 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 obtaining insurance coverage for tortious acts in excess of the $100,000.00 or $200,000.00 waiver provided above.

Chapter 87-134, §5, Laws of Florida, specifically states that the law shall take effect:

> Upon becoming a law 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 or in which a jury has returned a verdict unless such judgment or verdict has been or shall be reversed.

The act took effect on June 30, 1987. This date was approximately three weeks after the Defendant had filed its motion for rehearing. (R. 732) The lower court did not dispose of the motion for rehearing until August 12, 1987. (R. 1003) Thus, the final judgment was not "rendered" until after the new statutory amendments had become effective. Rule 9.020(g), Fla. R. App. P. Even though the statute was not in existence at the time the motion for rehearing was filed, this Court should apply the

new law in this pending appeal. Florida East Coast Railway Co. v. Rouse, 194 So.2d 260 (Fla. 1967).

Tampa General Hospital still maintains that its escrow fund is not a private insurance policy purchased for purposes of §286.28, Fla. Stat. In fact, it was a fund historically established under §768.54(2)(c) which precluded the need to pay a premium for such insurance. Thus, the lower court erred in treating the escrow fund as if it were some separate insurance company, but Chapter 87-134, Laws of Florida, now clearly specifies that the limitation of liability would still exist even if the escrow fund were regarded as insurance.

In further support of the Hospital Authority's position, we would cite to the Court the decision rendered in Marion County School Board v. Streetman, ___ So.2d ___ (Fla. 5th DCA 1988) [13 F.L.W. 2479, 11/10/88]. There, the court held that Chapter 87-134 was constitutional and was properly applied retroactively to a cause of action that occurred prior to the effective date of the statute. Decisional law in effect at the time of the appeal governs the case even if there has been a change in the law since the time of trial. Lowe v. Price, 437 So.2d 142 (Fla. 1983). Thus, even if the creation of the escrow fund is somehow found to be the equivalent to purchasing an insurance policy, §286.28, Fla. Stat., was effectively repealed before the final judgment in this case was rendered. There could be no further waiver of sovereign immunity more than what is provided for under §768.28(5), Fla. Stat.

It is apparent that the legislature intended the waiver of sovereign immunity provided for in §286.28(2) to apply only in those circumstances where a commercial liability policy was purchased. The initial language of subsection two points out rather vividly the soundness of this contention and bears repeating: "In consideration of the premium at which such insurance may be written. . . ."

Where is the premium paid in this action? Where is the consideration paid? The answer, of course, is that neither are present here. This Court has previously held that in interpreting this statute,[5/] the statutory language "must be clear and unequivocal," that "waiver will not be reached as a product of inference or implication" and that such statutes should be "strictly construed." Arnold v. Shumpert, 217 So.2d 116, 118 (Fla. 1968), quoting Spangler v. Florida State Turnpike Authority, 106 So.2d 421, 424 (Fla. 1958).

As expressed by this Court in Carlile v. Game and Fresh Water Fish Commn., 354 So.2d 362, 364 (Fla. 1977):

> Statutes in derogation of the common law are to be construed strictly, however. They will not be interpreted to displace the common law further than is clearly necessary. Rather, the courts will infer that such a statute was not intended to make any alteration other than was specified and plainly pronounced. A statute, therefore, designed to change the common law rule must speak in clear, unequivocal terms, for the presumption

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[5/] Section 286.28, Fla. Stat., was previously numbered 455.06.

> is that no change in the common law is intended unless the statute is explicit in this regard. 30 Fla. Jur. Statute, Sec. 130.
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> Inference and implication cannot be substituted for clear expression. Dudley v. Harrison, McCready & Co., 127 Fla. 687, 173 So. 820 (1937).

See also, Berek v. Metropolitan Dade County, 396 So.2d 756 (Fla. 3d DCA 1981), approved, 422 So.2d 838; and State ex. rel. Division of Administration v. Oliff, 350 So.2d 484 (Fla. 1st DCA 1977).

The legislature certainly knows the difference between paying premiums to purchase liability insurance and setting aside a sum of one's own money in an escrow account. One need only look to the very statute that led the Hospital Authority to establish its escrow account, §768.54(2)(c)(1), (2) and (3), Fla. Stat. The legislature set forth three separate alternatives to joining the Florida Patient's Compensation Fund, i.e., posting a bond, establishing an escrow account, or purchasing insurance (including creating a self-insurance plan under §627.357, Fla. Stat., which is subject to regulation and investigation by the State).

Section 768.28(13), Fla. Stat., demonstrates that the legislature is able to clearly and unequivocally specify self-insurance as well as the purchase of liability insurance when that is their intent. There is no such similar mention of self-insurance or escrow accounts or funds in §286.28, Fla. Stat. Quite to the contrary, it authorizes political subdivisions to pay premiums to purchase insurance.

As pointed out by the majority of this Court in Avallone, supra, §768.28 and §286.28, Fla. Stat., could be read in harmony and the following could be concluded:

> 1. Political subdivisions are authorized to purchase liability insurance pursuant to the conditions of sections 286.28(1) and 768.28(10).
>
> 2. When liability insurance is purchased, there will be no assertion of sovereign immunity, up to the coverage limits of the policy, regardless of whether such defense would be otherwise valid. § 286.28(2).
>
> 3. Sovereign immunity is waived and political subdivisions are liable for torts in the same manner as a private individual would be, except as noted below, regardless of whether liability insurance is purchased. § 768.28(1) and (5). This waiver is absolute, it is not contingent on the purchase of liability insurance as in section 286.28.
>
> 4. Unlike private tortfeasors, government tortfeasors are not liable for punitive damages or prejudgment interest. Further, statutory caps are placed on the damages which may be assessed against government unless there is insurance coverage in excess of the statutory cap. §§ 286.28(2); 768.28(5) and (10). However, the legislature may by special act direct payment of damages above the statutory cap. § 768.28(5).
>
> In summary, we see no conflict between sections 286.28 and 768.28 or any reason why both should not be given full effect. We hold that purchase of tort liability insurance by a government entity, pursuant to section 286.28, constitutes a waiver of sovereign immunity up to the limits of insurance coverage and that this contingent waiver is independent of the general waiver in section 768.28.

The Court found the intention of the legislature to be clear:

> The thrust of section 286.28 is relatively simple. Political subdivisions are authorized to spend public money for the purchase of liability insurance. However, if such insurance is purchased and is 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.

Id. at 1004.

Again, there was no expenditure of public funds to purchase liability insurance here. The fund proceeds are available to the public for payment of claims up to the limits set forth in §768.28(5), Fla. Stat., and for payment of any claims bill which may be passed by the legislature. The public is not being deprived of the benefit of this fund, nor are they deprived of any benefit of any expenditure of the type seen in Avallone. It is legally impermissible to infer that §286.28 provides for the waiver of sovereign immunity by the creation of an escrow fund or a self-insurance fund, when the statute does not clearly and unequivocally so state.

The order of the trial court and decision of the Second District Court of Appeal have the unwarranted effect of amending §286.28 to provide for a much greater waiver of sovereign immunity than that provided for by general law. The State Constitution (Article X, §13) and its progeny forbid sovereign immunity to be waived by inference. Had the legislature thought it wise to waive immunity for the state and its agencies to the extent that each may have set aside certain funds to demonstrate

financial responsibility, it knew how to do so. It did not. Thus, the establishment of this escrow fund by the Hospital Authority did not waive sovereign immunity further than that provided for by §768.28(5), Fla. Stat., either because §286.28 was effectively repealed prior to the trial court's rendition of its order or because §286.28 simply does not apply to the establishment of an escrow fund by an agency of the state. In either case, the decision below must be reversed with instructions to the trial court to enter judgment in favor of the Plaintiff/Respondent in the sum of $50,000.00.

CONCLUSION

For the reasons stated above, the establishment of an escrow fund is not the equivalent of purchasing insurance. Further, the establishment of a self-insurance fund does not waive sovereign immunity pursuant to §286.28 since that section was repealed prior to the trial court rendering its order. In the alternative, §286.28 by its own terms does not apply.

The order of the trial court must be reversed with directions to enter final judgment in favor of the Plaintiff/Respondent in the sum of $50,000.00.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this _____ day of January, 1989, to: TONY CUNNINGHAM of Wagner, Cunningham, Vaughan & McLaughlin, P.A., 708 Jackson Street, Tampa, Florida 33602; JOEL D. EATON of Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadlow & Olin, P.A., 800 City National Bank Building, 25 West

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