3-14

IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,458

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

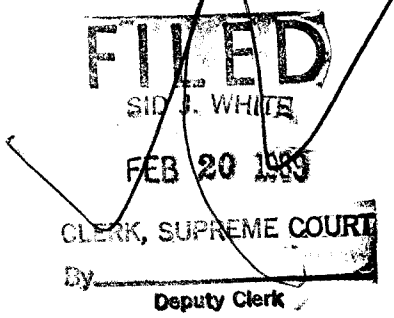
Petitioner,

vs.

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

Respondent.

_____/



ON DISCRETIONARY REVIEW OF CERTIFIED QUESTIONS FROM THE DISTRICT COURT OF APPEAL, SECOND DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

WAGNER, CUNNINGHAM, VAUGHAN & McLAUGHLIN, P.A.
708 Jackson Street
Tampa, Fla. 33602
-and-
PODHURST, ORSECK, JOSEFSBERG, EATON, MEADOW, OLIN & PERWIN, P.A.
800 City National Bank Building
25 West Flagler Street
Miami, Florida 33130
(305) 358-2800

Attorneys for Respondent

BY: JOEL D. EATON

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LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780

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LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
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I.
STATEMENT OF THE CASE AND FACTS

Although we find the various statements of the case and facts submitted by the petitioner-hospital and its amici to be somewhat argumentative and over-inclusive, we will accept the hospital's statement as essentially accurate. For our introductory purposes here, we think a reorganization of the essential facts in chronological order may prove helpful to the Court:

(1) Prior to the incident in suit, §768.54, Fla. Stat. (1979), required the hospital to procure at least $100,000.00 in commercial liability insurance or provide $100,000.00 in "self-insurance" pursuant to §627.357, Fla. Stat. (1979), and join the Florida Patient's Compensation Fund (FPCF) to insure all amounts in excess of that sum; or alternatively, to demonstrate financial responsibility to patients who might be injured by its malpractice by establishing an escrow account in an amount not to exceed $2,500,000.00. For the express purpose of avoiding joinder in the FPCF, the hospital created the "Medical Malpractice Self-Insurance Risk Management Trust Fund" at issue here (which is described in the various documents included in the appendix to the hospital's initial brief at A. 5-17).[1/] The trust fund was expressly "restricted solely to the authorized payment of claims for medical malpractice under the self insurance program of the [hospital]" (A. 12).[2/]

[1/] At the time several of those documents were created, management of the hospital belonged to the Hospital and Welfare Board of Hillsborough County, which was replaced as governing authority of the hospital in 1980 by the Hillsborough County Hospital Authority. Ch. 80-510, Laws of Florida. The latter entity, which is the petitioner here, has acknowledged that it inherited all the rights and obligations of its predecessor, so the Court can disregard the occasional difference in nomenclature which appears in the record.

[2/] At page 5 of the Board of Regents' amicus brief, it is stated that the hospital's "trust fund is specifically limited to the amounts of recovery authorized in Section 768.28(5) . . . (TGH's Initial Brief at p. 23)." The reference to the hospital's brief is a reference to an *argument* made by the hospital as to how §286.28 should be read, not to anything which the documents say. The documents establishing the trust fund provide *no* support for the Board's characterization of them, and the Board's statement is in error.

(2) On February 28, 1980, the hospital's self insurance trust fund was transferred to a fiduciary, the First National Bank of Florida, which was charged with the responsibility of managing the fund, and which was to receive 3% of the fund's income for its services (A. 14-15). Since the fund was placed in trust for medical malpractice victims, the hospital gave up control of the fund by that transfer.

(3) Shortly before the incident in suit, §768.54 was amended, and governmental hospitals were relieved of the *requirement* that they join the FPCF. Section 768.54(2)(a), Fla. Stat. (1980 Supp.).[3/] Nevertheless, the hospital continued to maintain its self-insurance trust fund voluntarily, as separately authorized by, and in compliance with, §627.357(1), Fla. Stat. (1979).

(4) On October 1, 1980, the plaintiff's ward (hereinafter, simply "plaintiff") underwent purely elective surgery (a tubal ligation) in the hospital, and received a severe injury which rendered her totally incompetent (R. 1-7). The hospital has conceded that the plaintiff's injury was caused by its malpractice, and it has stipulated that the plaintiff's damages are $2,500,000.00 (R. 811).

(5) Notwithstanding that the hospital has set aside funds in a self-insurance trust fund which are both sufficient to pay that amount and which are expressly earmarked for and restricted to payment of such claims, the hospital contends that all but $50,000.00 of those funds belongs to it, as a matter of law, unless the legislature orders it to use them for the very purpose for which they are presently set aside.

(6) Both the trial court and a majority of the District Court below rejected the

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[3/] Amicus, Public Health Trust of Dade County, correctly observes that governmental hospitals are not *required* to join the FPCF, and then argues that the District Court therefore committed error in concluding otherwise. The Public Health Trust has misread the District Court's decision. The reference in the decision to §768.54's *requirement* to join the FPCF was to the requirement in existence in 1979 when the hospital's trust fund was created. We do not read the decision as requiring a governmental hospital to join the FPCF after 1980.

hospital's contention. They held that the voluntary creation of the hospital's self-insurance trust fund amounted to a waiver of its sovereign immunity up to the amount of the coverage provided by the self-insurance trust fund, under §286.28, Fla. Stat. (1979), and that judgment for the plaintiff could therefore be entered in the amount of her stipulated damages. (Although the District Court's opinion does not expressly say so, the District Court also rejected the hospital's contention that Ch. 87-134, Laws of Florida--which was enacted after the plaintiff's judgment was entered, but before the hospital's motion for rehearing was denied--retroactively abolished §286.28, Fla. Stat. (1979).) The propriety of that holding (and the additional, unexpressed holding) are the issues before the Court.

II.
ISSUES ON APPEAL

The District Court has certified two questions to the Court. Both questions, in our judgment, ask essentially the same thing and therefore present but a single question to the Court. The hospital and its amici have argued the two questions separately, however, so we will adhere to the format established by the hospital for the convenience of the Court. We restate the two issues argued by the hospital as follows:

> A. WHETHER THE HOSPITAL'S ESTABLISHMENT OF A SELF-INSURANCE TRUST FUND PURSUANT TO §627.357, FLA. STAT. (1979), QUALIFIES AS "INSURANCE TO COVER LIABILITY FOR DAMAGES" WITHIN THE MEANING OF THAT PHRASE IN §286.28, FLA. STAT. (1979).
>
> B. IF SO, WHETHER §286.28, FLA. STAT. (1979), EFFECTS A WAIVER OF THE HOSPITAL'S SOVEREIGN IMMUNITY UP TO THE AMOUNT OF THAT FUND, OR ONLY TO THE LIMITED AMOUNT PROVIDED BY §768.28, FLA. STAT. (1980 SUPP).

Although it has not identified it as a separate issue, the hospital has argued a third question here which was not certified to the Court--contending that the first two questions are academic because Ch. 87-134, Laws of Florida, retroactively repealed the statutory waiver of sovereign immunity upon which the lower courts relied in affirming the plaintiff's judgment. For ease of discussion, and because it will be necessary to

challenge the constitutionality of Ch. 87-134 in response to the hospital's contention, we prefer to state this issue separately as follows:

> C. WHETHER CH. 87-134 RETROACTIVELY PROVIDES SOVEREIGN IMMUNITY TO THE HOSPITAL ON THE FACTS IN THIS CASE; AND IF SO, WHETHER IT MUST BE DECLARED UNCONSTITUTIONAL TO THE EXTENT THAT IT ATTEMPTS TO DEPRIVE THE PLAINTIFF OF A SUBSTANTIVE RIGHT WHICH WAS REDUCED TO JUDGMENT BEFORE ITS ENACTMENT.

III.
SUMMARY OF THE ARGUMENT

A. The bulk of the hospital's argument is devoted to a demonstration that a self-insurance trust fund is not the same thing as a commercial liability insurance policy. This argument simply belabors a truism which is entirely beside the point. The issue presented here is whether a self-insurance trust fund is "insurance to cover liability for damages" within the meaning of that phrase in §286.28, Fla. Stat. (1979). In our judgment, when the various statutes relating to the issue are read *in pari materia*, as they must be, the lower courts' conclusion that the hospital's self-insurance trust fund qualified as "insurance to cover liability for damages" within the meaning of §286.28 was correct.

Section 768.28(13), Fla. Stat. (1980 Supp.), expressly authorized the hospital "to be self-insured" as an alternative to the purchase of commercial liability insurance. Section 627.357(1), Fla. Stat. (1979), authorized the creation of the hospital's self-insurance trust fund, called it "insurance", and placed it under the regulatory authority of the Department of Insurance. Section 286.28, Fla. Stat. (1979), authorized the hospital to "secure and provide . . . insurance to cover liability for damages", and specified thereafter that, when "such insurance coverage has been provided" sovereign immunity is "waived to the extent . . . of such insurance coverage". The only logical conclusion which emerges from reading these statutes *in pari materia* is that the hospital's statutorily-authorized self-insurance is "insurance" within the meaning of §286.28, as the lower

courts held.

B. If the hospital's self-insurance trust fund is "insurance to cover liability for damages" within the meaning of that phrase in §286.28(1), then it follows inexorably that the hospital's immunity was waived up to the amount of that fund because of the plain language of §286.28(2). The hospital's contention that §286.28's waiver of immunity can be no greater than the waiver of immunity expressed in §768.28 was rejected by this Court in *Avallone v. Board of County Commissioners of Citrus County*, 493 So.2d 1002 (Fla. 1986), and it should be rejected in this case for the same reason.

C. Ch. 87-134, Laws of Florida, is not applicable to the instant case. Fairly read, §5 of the act evidences an intent to exclude its application in all pending cases in which liability and damages have been determined as a matter of fact. In the instant case, the hospital conceded its liability and stipulated to the plaintiff's damages long before Ch. 87-134 was even conceived, and those stipulations were reduced to judgment before Ch. 87-134 became effective. And since §5 of the act evidences an intent to exclude its application in cases in which liability and damages have been determined as a matter of fact, it should be construed as inapplicable to the instant case.

In any event, if Ch. 87-134 were intended to apply retroactively to the instant case, it is thoroughly settled that, in cases brought against a governmental entity under §768.28 and its companion statutes, the version of the statutes which controls is the version in existence at the time the plaintiff's cause of action accrues, and that any attempt by the legislature to retroactively abolish a plaintiff's rights under that version of the statutes is constitutionally impermissible. The single decision upon which the hospital relies for a contrary conclusion was, we respectfully submit, wrongly decided. We will explain the error of that decision in the argument which follows.

In conclusion, it is respectfully submitted that the certified questions should be answered in the affirmative, and that the District Court's decision should be approved.

In addition, Ch. 87-134 should be declared inapplicable, or unconstitutional to the extent that it attempts to retroactively abolish the plaintiff's rights, which were reduced to judgment before the act's enactment.

IV.
ARGUMENT

A. THE LOWER COURTS CORRECTLY HELD THAT THE HOSPITAL'S ESTABLISHMENT OF A SELF-INSURANCE TRUST FUND PURSUANT TO §627.357, FLA. STAT. (1979), QUALIFIES AS "INSURANCE TO COVER LIABILITY FOR DAMAGES" WITHIN THE MEANING OF THAT PHRASE IN §286.28, FLA. STAT. (1979).

As a threshold matter, we should observe that the final judgment which is the subject of this appeal is not erroneous, even if the hospital is entirely correct that its liability for payment upon that judgment is limited to a lesser amount without further act of the legislature. This is so because, as every conceivable version of §768.28 which might be applicable here plainly reflects, the plaintiff was entitled to the entry of a judgment against the hospital *in the full amount* of her stipulated damages, notwithstanding that the hospital's liability for *payment* of that judgment may have been limited. *See City of Lake Worth v. Nicholas*, 434 So.2d 315 (Fla. 1983); *Gerard v. Department of Transportation*, 472 So.2d 1170 (Fla. 1985).

As a result, the District Court's decision should be approved to the extent that it affirms the plaintiff's judgment, even if the hospital is correct that its liability for payment is limited. And if the hospital is correct, the very most that it will be entitled to is imposition of a condition upon that approval--the condition that, upon payment of whatever lesser amount is ultimately deemed applicable here, the plaintiff must satisfy the judgment of record and apply to the legislature for the balance. *See North Broward Hospital District v. Eldred*, 466 So.2d 1210 (Fla. 4th DCA 1985), *approved*, 498 So.2d 911 (Fla. 1986). In any event, notwithstanding this technical wrinkle, the question of whether the hospital is required to *pay* the entire judgment at this point is squarely before the

Court, and it should be answered as a result. We therefore turn to the first issue on appeal.

The bulk of the hospital's (and its amici's) argument on this issue is devoted to a demonstration that a self-insurance trust fund is not the same thing as a commercial liability insurance policy. The two types of "insurance" are different by definition, of course, so the argument simply belabors a truism with which no reasonable person could quarrel. It is also entirely beside the point. The issue presented here is not whether a self-insurance trust fund is the same thing as a commercial liability insurance policy; the issue is whether a self-insurance trust fund is "insurance to cover liability for damages" within the meaning of that phrase in §286.28, Fla. Stat. (1979), and whether the creation of such a fund waives sovereign immunity as a result. The answer to that question clearly depends upon the meaning of the various statutes involved--not the obvious truism that self-insurance and commercial liability insurance are different types of insurance. We therefore believe that the bulk of the hospital's argument on this issue can be regarded as irrelevant.

In our judgment, the lower courts' conclusion that the hospital's self-insurance trust fund qualified as "insurance to cover liability for damages" within the meaning of that phrase in §286.28 was correct.[4/] We begin with *Avallone v. Board of County Commissioners of Citrus County*, 493 So.2d 1002, 1004 (Fla. 1986), in which this Court held that the various statutes relating to waivers of sovereign immunity must be read "in pari materia". Neither §768.28, Fla. Stat. (1980 Supp.), nor §286.28, Fla. Stat. (1979), is

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4/ We have no quarrel with the general principle relied upon by the hospital--that waivers of sovereign immunity must be explicit, rather than inferential. Our position will be simply that the hospital's self-insurance trust fund is "insurance to cover liability for damages" within the meaning of that phrase in §286.28. If we are correct about that, then the waiver effected by §286.28 is clearly explicit, rather than inferential. There is therefore no need for us to devote any space in the text to the general principle relied upon by the hospital.

limited to the purchase of a commercial liability insurance policy. In fact, §768.28(13), Fla. Stat. (1980 Supp.), expressly authorizes the state and its agencies "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 . . .".

Neither is §286.28 limited in its terms to the purchase of a commercial insurance policy. Subsection (1) of the statute, which is the "authorization" to insure, makes no mention of commercial liability insurance; it simply authorizes state agencies "to secure and provide . . . insurance to cover liability for damages":

> (1) The public officers in charge or governing bodies, as the case may be . . . are hereby authorized, in their discretion, *to secure and provide* for such respective political subdivisions, . . . , *insurance to cover liability for damages* on account of bodily or personal injury or death resulting therefrom to any person, . . .

(Emphasis supplied).

Subsection (2) of the statute contains two parts. Its first part prohibits commercial liability insurers from asserting the defense of sovereign immunity; its second part, which is addresed to state agencies rather than liability insurers, waives sovereign immunity to the extent of any "insurance" "secured and provided" under the authority of subsection (1):

> (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 subdivision of this state in any suit instituted against 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; . . .*

(Emphasis supplied). As a result, and because §768.28 and §286.28 must both be given effect according to *Avallone*, in order to prevail on this issue the hospital must

necessarily convince this Court that the type of "self-insurance" which it was authorized to provide by §768.28, and which it secured and provided for the plaintiff in this case, is not "insurance to cover liability for damages" within the meaning of §286.28(1).[5/]

In our judgment, "insurance" is "insurance", whether it is self-insurance or commercially-procured insurance. "Malpractice insurance" is defined in the Insurance Code, in a manner which is broad enough to cover both, as follows:

> *Malpractice.*--Insurance against legal liability of the insured, and against loss, damage or expense incidental to a claim of such liability, arising out of the death, injury, or disablement of any person, or arising out of damage to the economic interest of any person, as the result of negligence in rendering expert, fiduciary, or professional service.

Section 624.605(k), Fla. Stat. (1979).

Elsewhere in the Insurance Code, the legislature authorized the creation of the hospital's self-insurance trust fund, called it "insurance", and placed it under the regulatory authority of the Department of Insurance, as follows:

> **Medical Malpractice Insurance; Purchase.--**
>
> (1) A group or association of health care providers as defined in s. 768.54(1)(b) [which includes hospitals, like the petitioner], composed of any number of members, is authorized to self-insure against claims arising out of the rendering of, or failure to render, medical care or services and coverage for bodily injury or property damage, including all patient injuries arising out of the insured's activities, upon obtaining approval from the Department of Insurance and upon complying with the following conditions:
>
> (a) Establishment of a Medical Malpractice Risk Management Trust Fund to provide coverage against professional medical malpractice liability.

[5/] Because this issue depends entirely upon the meaning of an explicit statutory scheme contained in the Florida Statutes, the hospital's reliance upon decisions from other jurisdictions involving analogous issues and different statutory schemes seems to us to be misplaced. Accordingly, we will limit our arguments here to the language of the Florida Statutes.

> (b) Employment of professional consultants for loss prevention and claims management coordination under a risk management program.
>
> Any such group or association shall be subject to regulation and investigation by the department. The group or association shall be subject to such rules as the department adopts, and shall also be subject to Part VII of chapter 626, relating to trade practices and frauds.

Section 627.357(1), Fla. Stat. (1979). In our judgment, this statute clearly puts to rest (in Florida, at least) any notion that "self-insurance" cannot be considered "insurance". *See Gabriel v. Travelers Indemnity Co.*, 515 So.2d 1322 (Fla. 3rd DCA 1987), *review denied*, 525 So.2d 878 (Fla. 1988) (municipality's "self-insurance," as authorized by §768.28(13), Fla. Stat. (1979), is "insurance," preventing uninsured motorist claim against tort victim's insurer).

An examination of the documents included in the hospital's appendix will reveal that the hospital's "Medical Malpractice Self-Insurance Risk Management Trust Fund" (as it is called in the documents) was set up under this statute to insure two hospitals (Tampa General Hospital and Hillsborough County Hospital), and that it complied with the statute in all respects. The documents also reveal that the monies placed into this trust fund were earmarked for a particular purpose, to the exclusion of any other purpose: "Said HWB Malpractice Reserve Fund is and shall be restricted solely for the authorized payment of claims for medical malpractice under the self insurance program of the Board". The documents also reflect that the trust fund was placed in the control of a separate commercial entity, the First National Bank of Florida, which was charged with the responsibility of earning income upon it, and which was entitled to a fee for its services in the amount of 3% of all annual income earned on the funds.[6/] The documents also

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[6/] We mention these facts--that the funds were transferred to a third-party, that they generate income, that the third-party is paid for managing the fund, and that the funds have been placed in trust for, and restricted solely to the payment of claims by, medical malpractice victims--to make it clear that far more is involved here than the mere

reflect that the trust fund was created in lieu of, and as a considered alternative to, another option open to the hospital--participation in the Florida Patient's Compensation Fund.[7/] In form, of course, these documents do not create a typical commercial liability insurance policy; in substance, however, there is very little to distinguish the hospital's self-insurance trust fund from such a commercial arrangement (which is probably why the legislature called it "insurance", and required that it be subject to the regulatory authority of the Department of Insurance).

The hospital's argument is clearly constructed upon matters of form, not substance, and we think it should be just as clear that the hospital's self-insurance trust fund is "insurance" within the meaning of that term. Surely, it ought to be irrelevant whether the hospital chooses to insure itself by utilizing the self-insurance authorization of §627.357, or by joining the FPCF under §768.54, or by purchasing a commercial liability insurance policy, since the result should logically be the same under each alternative form of "insurance". *See Gabriel v. Travelers Indemnity Co.*, 515 So.2d 1322 (Fla. 3rd DCA 1987), *review denied*, 525 So.2d 878 (Fla. 1988).

We need not rely on logic alone, however, since we think the same conclusion can

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"budgeting" of taxpayer dollars to offset liability claims, as The Florida League of Cities claims in its amicus brief. Once it is understood that the trust fund is no longer under the direct control of the hospital but has been placed in trust for medical malpractice victims, and that it can be used for no other purpose, then it should be clear that the League's complaint--that approval of the District Court's decision "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" (League's brief, p. 9)--is rhetorical hyperbole at its most extreme, which adds nothing of substance to the debate here.

[7/] We agree with the hospital that, at least on the date the plaintiff's cause of action accrued, the hospital was not *required* to participate in the FPCF. However, the documents clearly reflect that the hospital would have joined the FPCF had it not created the self-insurance trust fund as an equivalent alternative, and that the trust fund was therefore considered by the hospital as a fully comparable substitute for, and alternative to, participation in the FPCF--and those facts, in our judgment, should at least inform the determination of whether the hospital's self-insurance trust fund should be considered "insurance" within the meaning of §286.28.

be fairly read from the combination of §768.28, §627.357, and §286.28. To briefly recapitulate, §768.28(13) expressly authorizes, in the alternative, self-insurance or commercial insurance. Section 627.357(1) expressly authorizes health care providers to create self-insurance under the regulatory jurisdiction of the Department of Insurance, in the form of a "Trust Fund *to provide coverage against professional medical malpractice liability*" (emphasis supplied). Section 286.28 makes it clear that governmental authorities can "secure and provide . . . *insurance to cover liability for damages*" (emphasis supplied), and that sovereign immunity is waived to the extent of the "insurance" provided. Since the hospital's trust fund is statutorily defined by §627.357(1) as a fund "to provide coverage against professional medical malpractice liability", and since this is precisely the type of "insurance to cover liability for damages" which governmental agencies are authorized to "secure and provide" by §286.28, and since the various statues involved must be read *in pari materia*, according to *Avallone*--the only logical conclusion which emerges from such a reading is that the hospital's statutorily-authorized self-insurance is "insurance" within the meaning of §286.28, as the lower courts held.

One final point needs to be made concerning the hospital's position on this issue. The hospital argues that, since the public's money is involved, there is no logic in allowing its self-insurance trust fund to be treated in the same manner as a commercial liability insurance policy, since the fund was designed to protect thousands of patients and should not be allowed to be substantially exhausted by a single patient.[8/] The simple answer to this contention is, of course, that the hospital does not negligently injure

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8/ One of the hospital's amici has argued that no public money is involved. This contention is clearly in error. The money in issue here clearly belonged to a governmental agency (a tax district hospital) before it was transferred to a third party in trust for the plaintiff. Because of the fund's origin, the money is clearly public money, not private money.

thousands of patients; fortunately (or unfortunately), it negligently injures only a few. The fund in issue here was set up with public monies by a duly-constituted public authority; it has no other purpose than to pay the damages of the handful of patients which it may negligently injure over time; and it therefore ought to be used for that purpose.

In the words of *Avallone*, "[t]o construe the section [§286.28(1)] otherwise would deprive the public of the benefit of the public expenditure". 493 So.2d at 1004. That observation should be just as compelling when the public expenditure is for self-insurance as it is when the public expenditure is in the form of premiums for a commercial insurance policy--since the public expenditure can be used for no other purpose in either event. We therefore respectfully submit that the lower courts did not err in concluding that the hospital's self-insurance trust fund was "insurance to cover liability for damages" within the meaning of that phrase in §286.28.

B. SECTION 286.28, FLA STAT. (1979), EFFECTS A WAIVER OF THE HOSPITAL'S SOVEREIGN IMMUNITY UP TO THE AMOUNT OF ITS SELF-INSURANCE TRUST FUND.

The hospital and its amici next contend that, even if the hospital's self-insurance trust fund is "insurance to cover liability for damages" within the meaning of that phrase in §286.28, the statute effects no waiver of immunity beyond the waiver already effected by §768.28, and that the hospital remains immune from suit for all amounts in excess of $50,000.00. This, of course, was essentially the argument which this Court rejected in *Avallone*, when dealing with the purchase of commercial liability insurance.[9/] And if a self-insurance trust fund is (as commercial liability insurance is) "insurance to cover

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[9/] To be more precise, the argument in *Avallone* was that the purchase of insurance under §286.28 did not waive immunity for "planning level" negligence, because §768.28 did not waive immunity for "planning level" negligence--and this Court rejected that argument. In this case, the argument is that provision for insurance under §286.28 did not waive immunity up to the amount of insurance provided, because §768.28 did not waive immunity above $50,000.00. Although the two arguments address different aspects of §768.28, they clearly amount in substance to the same argument.

liability for damages" within the meaning of that phrase, as we have argued, then it follows inexorably that the argument must be rejected again for the same reason it was rejected in *Avallone*.

Section 286.28 plainly provides that, if "insurance to cover liability for damages" is secured and provided by a political subdivision, then 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 . . . of such insurance coverage; . . .*" (emphasis supplied). A waiver "to the extent of insurance coverage" is clearly a different and far broader waiver than the limited waiver of immunity effected by §768.28, which is effected even where no insurance coverage whatsoever has been provided--and to read §286.28 as the hospital suggests is tantamount to pretending that the statute simply does not exist. Clearly, as the Court has already held in *Avallone*, both §768.28 and 286.28 must be read together as cumulative waivers of immunity, and where "insurance to cover liability for damages" has been secured and provided, then the plain language of §286.28's waiver of immunity to the extent of that coverage must be given effect.

While it should be unnecessary to go beyond *Avallone* and the plain language of §286.28, it is worth reminding the Court that the legislature elsewhere made it explicit (with respect to the Board of Regents, at least) that the funding of a self-insurance trust fund has exactly the same effect as the purchase of commercial insurance--a waiver of immunity up "to the extent of funds available in a particular insurance trust fund for the satisfaction of any claim for which such trust fund was established". Section 240.213, Fla. Stat. (1979). We do not suggest that this statute is controlling on the different governmental defendant in this case. However, we do suggest that, in determining the legislative intent concerning the application of the plain language of §286.28 to the hospital's self-insurance trust fund, the Court can properly assume that the legislature

intended to be consistent, rather than inconsistent.[10/]

In any event, if the hospital's self-insurance trust fund is "insurance to cover liability for damages" within the meaning of that phrase in §286.28, then the plain language of §286.28 requires a conclusion that the hospital's immunity from suit was waived up to the extent of that insurance. Once it is determined that the statute cannot be altogether ignored, it simply cannot be read any other way. *See Avallone, supra.* Of course, the legislature was free to provide that immunity is waived by a self-insurance trust fund only up to a specified amount of the total funds set aside as "insurance to cover liability for damages", but the point is that it did not (until 1987 at least, a point which we will address in a moment). And if §286.28 governs the extent of the hospital's waiver of immunity here, as we have argued it should, then the lower courts were clearly correct in concluding that the hospital's immunity from suit was waived up to the amount of the plaintiff's stipulated damages. If the self-insurance trust fund is exhausted, and assuming that the hospital does not fund it further in voluntary recognition of its moral obligation to do so, so be it; its immunity will thereafter be governed by §768.28. In the meantime, however, the fund ought to be used for the sole purpose for which it was set aside in the first place.

[10/] The Board of Regents has filed a lengthy amicus brief here, contending that the District Court's holding below significantly impacts upon its own self-insurance trust fund. We disagree. The Board of Regents' self-insurance trust fund is explicitly governed by a separate statutory scheme which exists quite independently of §286.28, and it is therefore highly doubtful that the Court's resolution of the issue presented in the instant case will have any effect whatsoever upon that separate statutory scheme. In any event, as noted above, the explicit statutory scheme governing the Board of Regents' self-insurance trust fund is *consistent* with the result reached by the District Court in this case (consistent, that is, for all causes of action arising before the enactment of Ch. 87-134, Laws of Florida, which changed the statute to provide what the Board now contends the prior statute provided). In our judgment, the Board really has no dog in the fight here.

C. CH. 87-134 DOES NOT RETROACTIVELY PROVIDE SOVEREIGN IMMUNITY TO THE HOSPITAL ON THE FACTS IN THIS CASE; AND IF IT DOES, IT MUST BE DECLARED UNCONSTITUTIONAL TO THE EXTENT THAT IT ATTEMPTS TO DEPRIVE THE PLAINTIFF OF A SUBSTANTIVE RIGHT WHICH WAS REDUCED TO JUDGMENT BEFORE ITS ENACTMENT.

Finally, the hospital and its amici contend that Ch. 87-134, Laws of Florida, retroactively abolished whatever rights the plaintiff may have had in the hospital's self-insurance trust fund by removing the waiver of immunity theretofore effected by §286.28. Applicability of that act to the instant case is, according to the hospital, bottomed upon §5 of the act, which reads as follows:

> This act shall take effect upon becoming a law [June 3, 1987] and shall apply to all causes of action then pending or thereafter filed, but shall not apply to any cause of action in which a final judgment has been rendered or in which the jury has returned a verdict unless such judgment or verdict has been or shall be reversed.

As the hospital reads this provision, since "rendition" of the plaintiff's judgment had been postponed by the hospital's motion for rehearing (for appellate purposes, at least; *see* Rule 9.020(g), Fla. R. App. P.), and the act became effective before the motion for rehearing was denied, Ch. 87-134 applies to abolish the plaintiff's prior legal rights in the instant case.[11/]

11/ The abolition of those rights was effected by the *repeal* of §286.28 and by an amendment to §768.28(5) which effectively overruled *Avallone* by adding 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.

That, of course, is one way to read §5 of the act. It is hardly a sensible reading, however, since the very next phrase excludes application of the act to all cases in which liability and damages have been determined by a *verdict*, an event which occurs long before the typical "rendition" of a final judgment. Section 5 is therefore typical legislative gobbledygook which makes no sense at all, and it obviously requires this Court's "construction" to give it a sensible meaning. Read in its entirety, §5 evidences an intent to exclude its application in all pending cases in which liability and damages have been determined as a matter of fact. *See State, Department of Transportation v. Knowles*, 402 So.2d 1155 (Fla. 1981) (at minimum, where liability and damages have been determined as a matter of fact, retroactive legislation which would change the judgment to be entered in the case was unconstitutional). That, of course, is the instant case. In lieu of allowing the instant case to proceed to verdict, the hospital conceded its liability and stipulated to the plaintiff's damages--long before Ch. 87-134 was even conceived--and those stipulations were reduced to judgment well before Ch. 87-134 became effective. This case had therefore proceeded well beyond the "verdict" stage of the proceedings at the time Ch. 87-134 became effective, and it should therefore be excluded from its application.

In any event, even if §5 of Ch. 87-134 were intended to allow the hospital to escape its pre-existing liability under prior law by delaying "rendition" of the plaintiff's judgment until after the effective date of the new statute, the legislature does not have the last word on the question. The last word on the question belongs to the Constitution of the State of Florida. It is thoroughly settled in Florida that a statute cannot operate retroactively without violating the Constitution where it will impair or destroy pre-existing, substantive rights, even though the legislature clearly intended the statute to operate retroactively upon causes of action previously accrued. *See Young v. Altenhaus*, 472 So.2d 1152 (Fla. 1985); *State v. Lavazzoli*, 434 So.2d 321 (Fla. 1983); *Fleeman v.*

Case, 342 So.2d 815 (Fla. 1976); *L. Ross, Inc. v. R. W. Roberts Construction Co.*, 466 So.2d 1096 (Fla. 5th DCA 1985), *approved*, 481 So.2d 484 (Fla. 1986). *Cf. Sunspan Engineering & Construction Co. v. Spring-Lock Scaffolding Co.*, 310 So.2d 4 (Fla. 1975).

Since this proposition is settled, the only relevant question is whether the waiver of sovereign immunity in existence at the time the plaintiff's cause of action accrued in 1980 created a substantive right or merely a remedial right. The answer to that question is also thoroughly settled. The decisional law is replete with cases in which the courts of this State have held that a waiver of sovereign immunity creates a substantive right, which accrues at the time the plaintiff is injured, and that the legislature simply has no authority to impair such a right retroactively. As a result, it is thoroughly settled that, in cases brought against a governmental entity under §768.28, the version of the statute which controls is the version in existence at the time the plaintiff's cause of action accrues, and that any attempt by the legislature to retroactively abolish a plaintiff's rights under that version of the statute is constitutionally impermissible.

Rupp v. Bryant, 417 So.2d 658 (Fla. 1982), is representative:

> The Bryants prior to the 1980 amendments thus had the right to seek recovery from both Rupp and Stasco since neither defendant could assert immunity. The amendments plainly abolished this right retroactively. Based on due process considerations expressed in *Village of El Portal v. City of Miami Shores*, 362 So.2d 275 (Fla. 1978), and *McCord v. Smith*, 43 So.2d 704 (Fla. 1949), which prohibit retroactive abolition of vested rights, we agree with the district court that section 768.28(9), Florida Statutes (Supp. 1980), is unconstitutional insofar as it abolishes the Bryants' right to recover from Rupp and Stasco. Under similar circumstances, we recently held that those same 1980 amendments could not constitutionally affect a non-final jury award, and any reduction of the award was an impermissible, retroactive law. *State, Department of Transportation v. Knowles*, 402 So.2d 1155 (Fla. 1981). Although the Bryants have not proceeded as far in the litigation process, we apply the reasoning in *Knowles* to reach the same conclusion that the 1980 amendments may not be applied retroactively in this case.

417 So.2d at 665-66.

There are numerous additional decisions dealing with legislative attempts to amend §768.28 retroactively, all of which say essentially the same thing. *See State, Department of Transportation v. Knowles*, 402 So.2d 1155 (Fla. 1981) (post-incident amendment which would reduce plaintiff's recovery, fixed by verdict, from $70,000.00 to $50,000.00 was constitutionally impermissible); *Rice v. Lee*, 477 So.2d 1009 (Fla. 1st DCA 1985), *review denied*, 484 So.2d 9 (Fla. 1986); *Arney v. Department of Natural Resources*, 448 So.2d 1041 (Fla. 1st DCA 1984); *Stillwell v. Thigpen*, 426 So.2d 1267 (Fla. 1st DCA 1983); *Kirkland v. State, Department of Health & Rehabilitative Services*, 424 So.2d 925 (Fla. 1st DCA 1983); *Galbreath v. Shortle*, 416 So.2d 37 (Fla. 4th DCA 1982); *Meli v. Admiral Insurance Co.*, 413 So.2d 135 (Fla. 3rd DCA 1982); *Talmadge v. District School Board of Lake County*, 406 So.2d 1127 (Fla. 5th DCA 1981). *Cf. City of North Bay Village v. Braelow*, 498 So.2d 417 (Fla. 1986).

Particularly instructive is *Griffin v. City of Quincy*, 410 So.2d 170 (Fla. 1st DCA 1982), *review denied*, 434 So.2d 887 (Fla. 1983), in which a governmental defendant attempted to avail itself of a more favorable post-incident version of §768.28. That position was rejected as follows:

> . . . We have determined that the trial court was correct in applying the statute that was in effect at the time appellant's cause of action accrued. Retrospective application of the statute would adversely affect appellant's right to recover the policy limits of the City's insurance, which right vested when appellant suffered the injury. Thus, the statute in existence at the time of the incident should be applied. . . .

410 So.2d at 173. Most respectfully, as all of these decisions hold, a waiver of sovereign immunity creates a substantive right which vests at the time the cause of action accrues, and it simply cannot be retroactively abolished by an amendment which purports to create sovereign immunity which did not exist before.[12/]

[12/] One of the hospital's amici has argued that the substantial reworking of the law of sovereign immunity effected by Ch. 87-134 did not *change* the law in response to this

The hospital has simply ignored this long line of authority, and has placed all its eggs in the single basket recently created by the Fifth District in *Marion County School Board v. Streetman*, 13 FLW 2479 (Fla. 5th DCA Nov. 10, 1988). In that case, the district court affirmed a trial court's determination that Ch. 87-134's retroactive repeal of §286.28 was "constitutional and retroactively applied to the date of injury in this case". No explanation for this conclusion was offered, and the sole authority cited for it was *Clausell v. Hobart*, 515 So.2d 1275 (Fla. 1987), *cert. denied*, ____ U.S. ____, 108 S. Ct. 1459, 99 L. Ed.2d 690 (1988). We respectfully submit that *Clausell* is entirely inapposite to the quite different problem created by Ch. 87-134's retroactive repeal of a statutory waiver of sovereign immunity, and that *Streetman* was wrongly decided.

The issue in *Clausell* was the propriety of enforcing an affirmative defense created by a statute of repose enacted long *before* the plaintiff's cause of action accrued, where the statute had been declared unconstitutional before the cause of action accrued but had thereafter been resurrected by a declaration that it was constitutional. This Court held that enforcement of the statute of repose would not impair any vested substantive rights because, when its second decision was rendered, "the statute became valid *ab initio* and was restored to its operative force". 515 So.2d at 1276. In other words, because the statute at issue in *Clausell* had been enacted *before* the plaintiff's cause of action accrued and was valid at all times, including the time at which the plaintiff's cause of action accrued, enforcing the statute would not result in the impermissible abolition of the plaintiff's cause of action by retroactive application of a statute enacted

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Court's construction of it in *Avallone*, but merely "clarified" the law--and that the new statutory scheme can therefore be applied retroactively as a matter of judicial construction without violating the Constitution. This contention deserves no more than a footnote in response. When a statute has to be *repealed* (such as §286.28 was) and a diametrically opposite provision *added* (such as the amendment to §768.28(5)), it is ludicrous to suggest that the law was merely "clarified". *See State, Department of Transportation v. Knowles*, 402 So.2d 1155 (Fla. 1981). Clearly, by repealing §286.28 and amending §768.28(5) to provide exactly the opposite of what §286.28 previously provided, the legislature *changed* the law in Ch. 87-134.

after the plaintiff's cause of action accrued. In the instant case, of course, exactly the opposite circumstance is involved.

There are additional distinguishing features between *Clausell* and the instant case. The Court was careful to note in *Clausell*, for example, that the statute of repose "provided a defense to a cause of action rather than creating a cause of action". 515 So.2d at 1276. In the instant case, however, the waiver of sovereign immunity effected by §286.28 created a cause of action which the legislature attempted to abolish in Ch. 87-134, by reimposing sovereign immunity to all but a limited extent.[13/] In addition, the so-called "retroactivity" complained of by the plaintiff in *Clausell* was not caused by a legislative enactment, but was the result of a judicial decision upholding the constitutionality of the pre-existing statute. And finally, the constitutional provision in issue in *Clausell* was the due process clause of the United States Constitution, not the due process clause of the Florida Constitution, upon which we rely--which may explain the unnecessarily broad language in *Clausell* upon which the *Streetman* court apparently relied.

Although that broad language undeniably exists in *Clausell*, it cannot be squared with any of the numerous decisions previously cited to the Court in this brief--decisions which have squarely held that the legislature cannot permissibly create sovereign immun-

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13/ The fact that the plaintiff may still have a limited right to judgment in the amount of $100,000.00 under Ch. 87-134 (and the right to seek a claims bill for the difference) cannot save it from a declaration of unconstitutionality here. That point has already been decided by this Court in *State, Department of Transportation v. Knowles*, 402 So.2d 1155, 1158 n. 8 (Fla. 1981):

> We discount both the contention that Knowles was given a new right to sue the department, since that right existed before the 1980 statute, and the suggestion that Knowles was given the right to apply to the legislature for the balance of his jury award. That right, like the right to his $50,000 judgment against the department, existed before the 1980 amendment. *See* § 768.28(5), Fla. Stat. (1977).

ity after-the-fact, and retroactively apply it to defeat causes of action which have already accrued under prior versions of the Florida Statutes. There is no indication in *Clausell* that this Court intended to overrule *Rupp v. Bryant, supra*, or *State, Department of Transportation v. Knowles, supra*--and we submit that it did not intend to overrule those decisions on the entirely different type of facts at issue in *Clausell*. In fact, we respectfully submit that, if *Clausell* means what the *Streetman* court apparently thought it means, the due process clause of the Florida Constitution no longer prohibits retroactive legislation of any kind, and the legislature is now free to retroactively abolish any and all preexisting legal rights at its whim. The contrary is far too settled in this Court's constitutional jurisprudence to allow such a thing at this date, however, and we therefore suggest that *Clausell* should be limited to its rather peculiar facts--and that *Streetman* should be declared erroneous.

In any event, even if this Court did mean to overrule its prior jurisprudence concerning the due process clause in favor of a view that a plaintiff acquires no vested substantive rights when his cause of action accrues, we respectfully submit that such a reading of *Clausell* would still not validate the retroactive abolition of the plaintiff's rights effected by Ch. 87-134 in this case. In the instant case, not only did the plaintiff's cause of action accrue in 1980, but the plaintiff's cause of action had been reduced to *judgment* before the effective date of Ch. 87-134. It is settled that a cause of action is merged in a judgment, and that the judgment creates a new cause of action, enforceable in its own right. *See Crane v. Nuta*, 157 Fla. 613, 26 So.2d 670 (Fla. 1946); *Workmen's Co-Operative Bank v. Wallace*, 151 Fla. 329, 9 So.2d 731 (Fla. 1942).

It is also settled that a judgment creates a vested right which cannot validly be impaired by subsequent legislative action. *State ex rel. Warren v. City of Miami*, 153 Fla. 644, 15 So.2d 449 (1943); *Van Loon v. Van Loon*, 132 Fla. 535, 182 So. 205 (1938). *See State, Department of Transportation v. Knowles*, 402 So.2d 1155 (Fla. 1981).

Therefore, quite apart from the date upon which the plaintiff's cause of action accrued, the reduction of that cause of action to judgment clearly ought to have prevented the legislature from retroactively abolishing the rights received in that judgment. And for any or all of these reasons, we respectfully submit that Ch. 87-134 should be declared unconstitutional, to the extent that it attempts to deprive the plaintiff in this case of a substantive right which was reduced to judgment before the act's enactment.

A final question remains: if our challenge to the constitutionality of a retroactive application of Ch. 87-134 is rejected, what should be the amount of the plaintiff's judgment which the hospital will ultimately have to pay? According to the hospital, payment on the judgment should be limited to $50,000.00 by §768.28, Fla. Stat. (1980 Supp.). If Ch. 87-134 is to be applied retroactively, however, payment of the plaintiff's judgment should be limited to $100,000.00--because Ch. 87-134 waives the sovereign immunity of the hospital to *that* amount. Clearly, the hospital cannot have it both ways. It cannot claim that §286.28, Fla. Stat. (1979), does not survive a retroactive application of an inconsistent Ch. 87-134, but that §768.28, Fla. Stat. (1980 Supp.), does survive a retroactive application of an inconsistent Ch. 87-134--and it therefore logically follows that, if Ch. 87-134 is constitutional, payment of the plaintiff's judgment should be limited to $100,000.00, not $50,000.00.

Of course, this conclusion presents the Court with a peculiar conundrum, because it has previously held that a substantive statutory right of immunity from suit cannot permissibly be withdrawn by retroactive amendatory legislation. *Walker & LaBerge, Inc. v. Halligan*, 344 So.2d 239 (Fla. 1977), cited with approval in *State, Department of Transportation v. Knowles*, 402 So.2d 1155, 1159 n. 14 (Fla. 1981). If that decision applies here, then the legislature could not permissibly raise the limit of the hospital's waiver of immunity retroactively from $50,000.00 to $100,000.00--so a retroactive application of Ch. 87-134 in that manner would be unconstitutional. But if the amenda-

tory legislation cannot be applied retroactively against the hospital to raise the limit of its immunity, how can it permissibly be applied retroactively against the plaintiff to lower the limit of the hospital's immunity? If there is any logic at all behind the due process clause, it clearly cannot. We therefore respectfully submit that the only principled choice available to the Court (short of overruling all its prior decisions on the point) is to declare Ch. 87-134 unconstitutional, to the extent that it attempts to deprive the plaintiff in this case of a substantive right which was reduced to judgment before the act's enactment.

V.
CONCLUSION

It is respectfully submitted that the certified questions should be answered in the affirmative, and that the District Court's decision should be approved. In addition, Ch. 87-134 should be declared inapplicable, or unconstitutional to the extent that it attempts to retroactively abolish the plaintiff's rights in this case.

Respectfully submitted,

WAGNER, CUNNINGHAM, VAUGHAN &
McLAUGHLIN, P.A.
708 Jackson Street
Tampa, Fla. 33602
-and-
PODHURST, ORSECK, JOSEFSBERG,
EATON, MEADOW, OLIN & PERWIN, P.A.
800 City National Bank Building
25 West Flagler Street
Miami, Florida 33130
(305) 358-2800

Attorneys for Respondent

BY: Joel D. Eaton
JOEL D. EATON

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 17th day of February, 1989, to: Michael N. Brown, Esq., Allen, Dell, Frank & Trinkle, Post Office Box 2111, Tampa, Fla. 33601; Bonita L. Kneeland, Esquire, Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., Post Office Box 1438, Tampa, Fla. 33601; Sylvia H. Walbolt, Esquire, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., One Harbour Place, Post Office Box 3239, Tampa, Fla. 33601; Harry Morrison, Jr., Esquire, Deputy General Counsel, Florida League of Cities, Inc., 201 West Park Avenue, Post Office Box 1757, Tallahassee, Fla. 32302; and to Robert A. Ginsburg, Dade County Attorney, Jackson Memorial Hospital, Public Health Trust Division, 1611 N.W. 12th Avenue, Executive Suite C, Room 109 W.W., Miami, Fla. 33136.

BY: Joel D. Eaton
JOEL D. EATON