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.

FILED
SID J. WHITE
MAR 20 1989
CLERK, SUPREME COURT
By Deputy Clerk

ON DISCRETIONARY REVIEW
FROM THE SECOND DISTRICT COURT OF APPEAL

(CERTIFIED QUESTIONS OF GREAT PUBLIC IMPORTANCE)

REPLY BRIEF ON MERITS OF PETITIONER

MICHAEL N. BROWN, ESQUIRE
ALLEN, DELL, FRANK & TRINKLE
Suite 1240, Barnett Plaza
101 East Kennedy Boulevard
Post Office Box 2111
Tampa, Florida 33601
Phone: (813) 223-5351

and

BONITA L. KNEELAND, ESQUIRE
FOWLER, WHITE, GILLEN, BOGGS,
VILLAREAL & BANKER, P.A.
Post Office Box 1438
Tampa, Florida 33601
Phone: (813) 228-7411

ATTORNEYS FOR PETITIONER

mnb/taylor.1

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — Page

OTHER AUTHORITY

REPLY STATEMENT OF THE CASE AND FACTS

Only a few additional comments need be made in reply to the Statement of the Case and Facts submitted by Respondent.

The Petitioner Hospital hardly gave up control of its escrow fund after it was deposited with the First National Bank of Florida. The Hospital could still remove all or part of its funds, at its option. Money was paid out of the escrow fund to settle claims, only upon the Hospital's direction.

Secondly, the Hospital's bank account which is the subject of this action was never created or maintained in compliance with §627.357(1), Fla. Stat. (1979), as stated by Respondent. It was initially created to comply with the permitted exemptions of §768.54(2)(a), Fla. Stat., The Florida Patients' Compensation Fund. After the creation of the Hospital's escrow account, the Florida Patients' Compensation Fund Act was amended and exempted governmental hospitals, like Petitioner, from having to comply. Thus, at the time of the incident involved here, neither §627.357(1) nor §768.54(2)(a) applied to the Hospital or its escrow fund.

QUESTIONS CERTIFIED TO BE OF GREAT PUBLIC IMPORTANCE

The Second District Court of Appeal certified two questions to be of great public importance. Respondent has also raised as a separate issue the constitutionality of Chapter 87-134, Laws of Florida, as it is applied to this case. Rather than accepting Respondent's version of this point on appeal, Petitioner would restate it as:

3. WHETHER CHAPTER 87-134 IS PROPERLY APPLIED TO A PENDING CAUSE OF ACTION WHERE JUDGMENT HAS NOT BEEN RENDERED AND RESPONDENT RETAINS HER CAUSE OF ACTION?

DISCUSSION OF REPLY ARGUMENTS

1. THE ESTABLISHMENT OF A SELF-INSURANCE TRUST FUND OR ESCROW ACCOUNT BY THE GOVERNMENT HOSPITAL IS NOT THE EQUIVALENT TO THE PURCHASE OF INSURANCE.

Initially, it must be pointed out that Respondent's premise regarding the establishment of the Hospital's escrow fund is in error. Taylor has argued that the Hospital established its escrow fund for the payment of medical malpractice claims "pursuant to §627.357, Fla. Stat (1979), and that section must be read in conjunction with §768.28 and §286.28 in order to reach their desired interpretation. Taylor's reliance is misplaced, however. Section 627.357 does not apply at all to this fact situation and was not seriously argued to apply, until now.

Section 627.357, Fla. Stat. (1979), provides that a group or association of health care providers, whether it be a group of doctors, a group of podiatrists, a group of osteopaths, or a group of hospitals, could properly join together to establish a Medical Malpractice Risk Management Trust Fund to provide coverage against professional liability. The trust fund so created could then purchase medical malpractice insurance. In those cases, the Department of Insurance had regulatory powers over the trust fund.

That was not the case in the case at bar. There was never a suggestion made below, much less any evidence introduced to

support the notion, that the Hospital's escrow fund was ever subject to any regulations of the Department of Insurance. As the documents contained in the appendix clearly show, the fund in question was created by a single entity, the Hospital & Welfare Board of Hillsborough County, not a group or association of health care providers. Thus, §627.357, Fla. Stat., has no application here and Respondent's references to same are simply irrelevant.

We believe it is in order to return to the real question certified by the Second District Court of Appeal, i.e., whether this escrow account is equivalent to the purchase of insurance. We agree that §768.28, Fla. Stat. (1980 Supp.) and §286.28, Fla. Stat. (1979), should be read in pari materia. However, Respondent limits her reading of §286.28 to subsection 1 of that statute and then attempts to jump from that subsection to her conclusion that establishing an escrow account is the equivalent of purchasing insurance. In the process of doing so, she hurdles subsection 2 of §286.28. It is submitted that subsection 2 is all important, at least in these circumstances. Subsection 1 allows political subdivisions of the state to secure and provide insurance, and to pay premiums therefor.[1]

As further evidence that the legislature did not intend to waive sovereign immunity for those political subdivisions who simply set aside a certain sum of their money, subsection 2 of

---

[1]Although Respondent glosses over this language, it lends support to the argument of what should already be clear, i.e., that the legislature was speaking of the purchase of insurance from a commercial carrier.

§286.28 specifically and unambiguously sets forth when immunity is waived. A reiteration of subsection 2, we believe, is all that is needed:

> In consideration of the premium at which such insurance may be written, it shall be a part of any insurance contract providing 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 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 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.

§286.28(1), Fla. Stat. (emphasis added).

Obviously, there are no references, express or implied, to any waiver of sovereign immunity by establishing an escrow fund. The whole premise upon which the waiver is based is the consideration of the premium paid by the political subdivision to the insurer. There was no such consideration here. Petitioner simply set aside funds from which it could pay claims. It did not purchase insurance.

Respondent also argues that by placing its funds in a bank under a trust agreement, that the Hospital no longer exercises "control" over the fund. A reading of the document transferring the funds into the bank shows otherwise. The agreement entitled "Designation of and Agreement with Fiduciary Under HWB Malpractice Reserve Fund" can be found at page A-14 of the appendix. The bank's duties are to hold and invest the Hospital's funds only as specified by the Hospital. The Hospital had the right to inspect the bank's books and to remove, with or without cause, the funds. Just how these documents purport to be similar to an insurance contract is not explained by Respondent in her brief.

The Hospital deposited a certain amount into the fund beginning October 1976. (A-6). Each year thereafter, additional deposits were made, until an aggregate of $2.5 million was reached in October 1983 (long after the incident date involved here).[2] No third party funds were used to make up this escrow account. These are funds derived solely from the Petitioner Hospital. Significantly, no funds can be disbursed from the Hospital's escrow fund "except after review and recommendation of the Claims Review Committee heretofore established by this Board [Hospital & Welfare Board] and after concurrence of the Board." (A-7). As seen earlier, the Board could withdraw all monies from the fund, with or without cause. With deference to the Respondent, we submit that there is nothing in the documents that

---

[2]Even if Respondent's argument is accepted, the judgment would still be in error. There was only $1.7 million in the escrow account at the time of the incident in question. No one has made the suggestion that this escrow fund was a "claims made" policy. Thus, a judgment of $2.5 million is erroneous.

create the escrow account that resembles an insurance contract in any way, shape or form. It bears repeating that this escrow account was not regulated by the Department of Insurance and is funded only with the Hospital's money.

In answer to Respondent's last argument on this point, that the public would be deprived of the benefit of these funds unless Respondent was able to deplete them, we submit the following: If the Court permits Respondent to deplete the entire escrow fund, there would be none of these funds available to settle or satisfy the claims of other members of the public. Thus, it is the public who would be deprived of the benefit of this fund if the Court affirms this judgment. It took the Hospital eight years to fund this account to the $2.5 million level. Presumably, it would take at least that long to refund the account. During the interim, what happens to those claimants who have the misfortune of presenting their claims during the absence of the fund? Another alternative question presented is if the Court holds that the establishment of an escrow fund is the equivalent of purchasing insurance and a waiver of sovereign immunity, what is the incentive to re-establish the fund at all? The public would certainly lose the benefit of such a fund under those circumstances.

Taylor's argument that the Hospital's escrow fund is tantamount to purchasing insurance because it was set up as an alternative to joining the Florida Patients' Compensation Fund just does not hold water. In reviewing the Florida Patients' Compensation Fund Act, §768.54(2)(c), Fla. Stat. (1979), it

is clear that the Hospital had four options in 1976 when the fund was created. It could:

A. join the Patients' Compensation Fund, or

B. post a bond in an amount equivalent to $10,000 per claim for each bed not to exceed an aggregate of $2,500,000; or

C. establish an escrow fund in the same amounts, or

D. obtain professional liability coverage in an amount equivalent to $10,000 for each bed through a commercial carrier, through the Joint Underwriting Association or through a plan of self-insurance as provided in §627.357.

Taylor argues that the Hospital became exempt by complying with alternative D above. As we have seen previously, §627.357, Fla. Stat., does not apply to the Hospital's creation of its escrow fund. Neither did the Hospital purchase insurance from either a private insurer or the Joint Underwriting Association.[3] Taylor then is confusing the fourth alternative with what the Hospital actually utilized -- alternative C, the establishment of an escrow account.

In any case, since neither §627.357 nor §768.54(2)(c) applied to this escrow account at the time of this incident, this

---

[3]It is interesting to note that the requirements under this exemption alternative was simply to provide liability coverage in an amount equivalent to $10,000 per claim. If it is deemed that the escrow fund does fit into this alternative, clearly the limits of this coverage is what the Act proscribed, i.e., $10,000.

is not a critical point except insofar as it points out the fallacy of Respondent's premise upon which she bases her argument.

2. A GOVERNMENTAL HOSPITAL WHICH HAS ESTABLISHED A SELF-INSURANCE TRUST FUND DOES NOT WAIVE SOVEREIGN IMMUNITY AGAINST CLAIMS UP TO THE AMOUNT OF THE FUND UNDER §286.28, FLA. STAT. (1979).

Respondent simply argues that a plain reading of Avallone v. Board of County Commissioners of Citrus County, 493 So.2d 1002 (Fla. 1986), and §286.28 will provide the answer to this question certified by the Second District Court of Appeal. We agree wholeheartedly. However, Respondent ascribes a much broader reading of both Avallone and §286.28 than was ever intended or warranted. This Court said:

> We hold that purchase of tort liability insurance by a governmental 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.

493 So.2d 1004 (emphasis added).

The opinion in Avallone gives no hint of support to Respondent's argument. Neither does a plain reading of §286.28. This Court, in Avallone, had no difficulty in finding the meaning of the statute. As pointed out in Petitioner's Initial Brief, this Court stated:

> The thrust of §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 this section otherwise would deprive the public of the benefit of the public expenditure.

493 So.2d 1004.

There is no language in §286.28 to suggest that it was ever meant to apply to the setting aside of a governmental body's own funds in an escrow account. To give such a construction to an otherwise clear statute would violate the prohibition against waiving sovereign immunity by innuendo.

According to Taylor, §240.213, Fla. Stat. (1979) (pertaining to the Florida Board of Regents' authority to secure liability insurance), is illustrative of what the legislature intended when it enacted §286.28, Fla. Stat. (1979). We agree! As we have seen, §286.28 waives immunity of political subdivisions "to the extent and only to the extent of such insurance coverage. . . ." In §240.213, however, the legislature went one step further. In that Act, the immunity of the Board of Regents is waived "to the extent of liability insurance carried by the Board of Regents and 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." §240.213(2) (emphasis added). Undeniably, the legislature knew the difference between insurance and escrow funds when it enacted §240.213, and we can presume it knew that difference when it enacted §286.28. In the latter instance, the legislature chose specifically not to include escrow funds in waiving the immunity of political subdivisions.

We also agree with Taylor that §286.28 is plain and unambiguous and needs no constructive interpretation. It means what it says and what it says is, or perhaps more to the point what it does not say, is that immunity will be waived by establishing an escrow fund.

3. CHAPTER 87-134 MAY PROPERLY BE APPLIED IN A PENDING CAUSE PRIOR TO JUDGMENT BEING RENDERED WHERE IT MERELY PROVIDES FOR A DIFFERENT REMEDY AND DOES NOT IMPAIR THE UNDERLYING CAUSE OF ACTION.

Respondent Taylor has chosen to separately identify and argue a point on appeal regarding the applicability and constitutionality of Chapter 87-134, Laws of Florida, to these proceedings.

Taylor's argument is twofold. First, she argues that the Act is nothing but legislative gobbledygook and requires "construction." Second, she argues that it is unconstitutional at least insofar as it may be applied to this case. The Hospital submits she is wrong on both counts.

Taylor's pitch that the Hospital's concession of liability and stipulation to her damages amounted to the rendition of a judgment is off base. One very important issue was left to be resolved and, in fact, took a substantial amount of time for the trial court to enter its order on this issue. That issue, of course, is why we are here before this court, i.e., the amount of damages that the Hospital must pay. With all due respect to Taylor, we believe the legislature knew what the term rendition meant as it was used in Chapter 87-134, Laws of Florida. We also believe that this Court knew what the term rendition meant when

it approved its definition in the Florida Rules of Appellate Procedure (Rule 9.090(g)). We do not consider this either legislative or judicial "gobbledygook."

The language of the Act is simple. It (the repeal of §286.28) applies to all cases pending and does not apply to any case where a final judgment had been rendered. This case was still pending at the time Chapter 87-134 took effect and no final judgment had been rendered. There can be no question but that Chapter 87-134 applied to this case by its own terms. When the language of a statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plan and obvious meaning. Courts are without power to construe an unambiguous statute in a way which would extend, modify or limit its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power. See Holly v. Auld, 450 So.2d 217 (Fla. 1984).

We have no argument with basic black letter law relied upon by Taylor that a statute cannot operate retroactively where it will destroy pre-existing vested rights. We do disagree, however, that Taylor had any vested rights in the measure of damages provided for in §286.28, Fla. Stat (1979).[4]

Taylor's right to sue and her access to the courts were not changed one iota by the repeal of §286.28 by Chapter 87-134, Laws

---

[4]We do not believe the Court will have to reach this point since we do not believe §286.28 applied to this case in the first instance.

of Florida. It was only the measure of damages that was affected, i.e., the sovereign immunity limits provided for by §768.28(5) or the so-called "insurance" limits provided for by the Hospital's escrow fund.

As this Court announced in Walker & LaBerge, Inc. v. Halligan, 344 So.2d 239, 243 (Fla. 1977):

> Appellee's reliance upon Tel Service Co., supra, and Summerlin, supra, is misplaced. In these cases, the nature of the statutes involved was inherently procedural or affected only the measure of damages for vindication of a substantive right. . . . (omitting unrelated portions of quote) Concomitantly, the question in Tel Service Co. involved the measure of damages to be recovered. Alteration of such measure of damages did not work any modification of fundamental substantive rights.

In Tel Service Co. v. General Capital Corp., 227 So.2d 667 (Fla. 1969), a statute which became effective during appeal was applied which restricted the amount of damages recoverable by the plaintiff. This Court held that no vested substantive rights were created in the prior statutes relied upon by the plaintiff in Tel Service Co., which provided for greater damages.

The cases cited by Taylor are distinguishable. Rupp v. Bryant, 417 so.2d 658 (Fla. 1982), held that the legislature could not retrospectively destroy a plaintiff's right to sue two individuals. State, Dept. of Transportation v. Knowles, 402 So.2d 1155 (Fla. 1981), similarly dealt with a statutory attempt to retrospectively provide immunity from suit to state employees and was found impermissible. Rice v. Lee, 477 So.2d 1009 (Fla. 1st DCA 1985), rev. den., 484 So.2d 9 (Fla. 1986), also dealt

with immunity from suit of state employees. Similarly, Arney v. Dept. of Natural Resources, 448 So.2d 1041 (Fla. 1st DCA 1984), held that §768.28(9)(a) could not be retroactively applied to preclude suits against state employees.

As this Court stated in Cauley v. City of Jacksonville, 403 So.2d 379, 384 (Fla. 1981), regarding the limitation of damages one can recover when suing a sovereign:

> The subject legislative act has not abolished or unreasonably restricted an individual's cause of action against a municipality.

In Jetton v. Jacksonville Elec. Authority, 399 So.2d 396 (Fla. 1st DCA 1981), the court found that limiting the amount of damages recoverable under §768.28 was not an unconstitutional abolition of a vested right.

There is yet another reason why Chapter 87-134 should be applied retrospectively. As this Court pointed out in City of Orlando v. Des Jardins, 493 So.2d 1027, 1029 (Fla. 1986):

> While the procedural/substantive analysis often sheds light on the propriety of retroactively applying a statute (citations omitted), the dichotomy does not in every case answer the question. Florida's courts have embraced a third alternative. If a statute is found to be remedial in nature, it can and should be retroactively applied in order to serve its intended purposes.

This Court held that the application of the Uniform Contribution Among Tortfeasors Act to an incident occurring prior to its passage was not an unconstitutional, retrospective application. The Court aligned itself with the courts of other states

which held the act was in essence "a remedial measure which affects only the remedies available in a cause of action which already exists and, thus, the retroactive application of the act does not violate the due process clause." p. 278.

The Hospital respectfully submits that Chapter 87-134 is a remedial measure passed by the legislature to remedy the effects of the Avallone case and only affects the remedies available to Respondent in a cause of action that already exists.[5]

To accept Taylor's argument, this Court would have to rule that all governmental hospitals who chose not to join the Florida Patients' Compensation Fund by complying with one of the permitted exceptions, automatically waived its sovereign immunity to the extent of $2.5 million. The fallacy of such an argument is patent.

In answer to the final question posed by Respondent on page 23 of her brief, the alleged conundrum presented only exists if Respondent's arguments are accepted. We submit that the correct answer is that §286.28 does not apply at all. The establishment of an escrow fund is not the equivalent of purchasing insurance and therefore neither §286.28 nor Chapter 87-134 come into play. The judgment should be limited to $50,000 by virtue of §768.28(5).

---

[5]Respondent still has the right to seek legislative help in the form of a claims bill and the legislature may order Petitioner to satisfy the stipulated damages from its escrow fund. But that is the legislature's prerogative, not the Court's.

CONCLUSIONS

The judgment being appealed is wrong and must be reversed with instructions to the lower court to limit the judgment against the Hospital to the sum of $50,000. The creation of an escrow account by a governmental body is not the equivalent of purchasing insurance. Even if it were, §286.28 does not apply to the creation of such a fund. Beyond that, §286.28 was effectively repealed before the judgment in this case was rendered.

For these reasons, the questions certified by the Second District Court of Appeal should be answered in the negative and the judgment reversed.

Michael N. Brown

MICHAEL N. BROWN, ESQUIRE
ALLEN, DELL, FRANK & TRINKLE
Suite 1240, Barnett Plaza
101 East Kennedy Boulevard
Post Office Box 2111
Tampa, Florida 33601
Phone: (813) 223-5351

and

BONITA L. KNEELAND, ESQUIRE
FOWLER, WHITE, GILLEN, BOGGS,
VILLAREAL & BANKER, P.A.
Post Office Box 1438
Tampa, Florida 33601
Phone: (813) 228-7411
ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail this 17th day of March, 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 Flagler Street, Miami, Florida 33130; ROBERT L. BLAKE and HUGO BENITEZ, Assistant County Attorneys, Dade County Attorney, Public Health Trust Division, Jackson Memorial Hospital, 1611 Northwest 12th Avenue, West Wing 109, Suite C, Miami, Florida 33136; SYLVIA H. WALBOLT, ESQUIRE, One Harbour Place, Post Office Box 3239, Tampa, Florida 33601; and HARRY MORRISON, JR., ESQUIRE, Deputy General Counsel, Florida League of Cities, Inc., 201 West Park Avenue, Post Office Box 1757, Tallahassee, Florida 33202.

Michael N. Brown

MICHAEL N. BROWN, ESQUIRE