IN THE SUPREME COURT OF FLORIDA

FLORIDA DEPT. OF HEALTH
AND REHABILITATIVE SERVICES,

Petitioner,

vs. **CASE NO. SC00-105**
(First DCA 96-2375)

S.A.P.,

Respondent.
_______________________________/

Upon Petition for Review of a Question Certified
to be of Great Public Importance
by the District Court of Appeal, First District

INITIAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE

The essence of this lawsuit is dismissal, with prejudice, of S.A.P.'s second amended complaint against Petitioner, the Florida Department of Health and Rehabilitative Services (HRS). The order of dismissal held the complaint was barred by the seven-year statute of repose in §95.051(1)(h), Florida Statutes (1995), and no recognized grounds for tolling were present. (R 179-82).[1] S.A.P. timely appealed.

The First DCA reversed in an opinion issued September 3, 1997. (Appendix A). HRS moved for rehearing, etc. on September 15. While that motion was pending, this Court issued its original opinion in Fulton County Administrator v. Sullivan, 22 Fla.L.Weekly S578 (Fla. Sept. 25, 1997). Without ruling on HRS' motion for rehearing, the First DCA ordered supplemental briefing and a second oral argument. In March 1998, it abated this case pending disposition of Fulton County Administrator on rehearing.

This Court ultimately withdrew its original opinion in Fulton County Administrator, and decided the case on markedly different grounds. *See* Fulton County Administrator v. Sullivan, 24 Fla.L.Weekly S557 (Fla. Nov. 24, 1999) (importing Georgia's statute of limitation for wrongful death actions, which allowed for tolling based on fraudulent concealment of identity).

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[1]Cites to the record are in the form (R {page no.]).

On December 15, 1999, the First DCA denied HRS' motion for rehearing, and adhered to its original opinion. That order also certified the following question to be of great public importance:

> CAN THE DOCTRINE OF FRAUDULENT CONCEALMENT APPLY TO TOLL THE STATUTE OF LIMITATIONS IN A NEGLIGENCE ACTION?

(*See* Appendix B.). HRS filed its notice to invoke this Court's discretionary jurisdiction on January 13, 2000.

STATEMENT OF THE FACTS

Again, this case arises from dismissal of S.A.P.'s second amended complaint. Consequently, HRS' statement of the facts is taken from the second amended complaint. (R 163-76).

S.A.P. was born in August 1975; her younger sister (not a party to this action) was born a year later. (R 164, ¶4). Reportedly, S.A.P.'s natural father was sentenced to prison in 1977. Her natural mother was reported to law enforcement for child abuse in 1978. (R 167, ¶14).

In December 1978, HRS placed both girls in an emergency shelter. A month later, they were placed in foster care in Jacksonville, with a parent identified as "C.C." (R 164, ¶¶6-7).

On October 20, 1979, Clay County Sheriff officers found the girls in Orange Park--not their proper foster home location. S.A.P. was bruised over her entire body, burned, beaten, etc.

Although 4 years old, she was emaciated and weighed 22 pounds.[2] (R 164, ¶8).

Based on these injuries, S.A.P. claimed HRS negligently failed to monitor her placement with "C.C." in 1979; negligently failed to reasonably supervise her caseworker (a "Ms. Dassie"); and negligently failed to remove her from the home of "C.C.," when HRS should have known the girls were being abused or neglected. S.A.P. also alleged the caseworker falsified records relating to her foster care placement in 1979 with "C.C.". (R 165-66, ¶10).

Notice of intent to sue was given in May 1993. (R 171-6). This suit was filed in January 1995, about 17 months after S.A.P. reached her majority.

The second amended complaint also included allegations which

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[2]S.A.P. remained in foster care until December 1984, when she was placed in an adoptive setting by HRS. Apparently, she remained in that setting until May 1990, when she returned to HRS' custody. She was released from HRS' custody upon her 18th birthday (R 165, ¶9); that is, in August 1993.

S.A.P. relied upon to toll the statute of limitation:

> The department, during the plaintiff's minority, actively concealed the facts concerning the negligence that is the basis of this complaint. Any records concerning the negligence complained of were, by Florida Statute and by the active efforts of the defendant, concealed from the public and those involved in the care of the plaintiff. The defendant department obstructed the law enforcement investigation of the abuse of the plaintiff and her sister in 1979. In the report of the internal investigation conducted by the defendant and released on December 21, 1992, it was first revealed that law enforcement officials alleged that employees of the defendant obstructed the criminal investigation of the 1979 abuse and neglect of the plaintiff. The department's own internal investigation, reported on December 21, 1992, also revealed for the first time that the case worker charged with the duty to supervise the placement of the plaintiff and her sister *falsified* records so that it appeared that the case worker had conducted monthly supervision visits with the plaintiff and her sister. The records reveal that the foster home was frequently visited and that S.A.P. and her sister were doing fine. Had any interested adult examined these records prior to December 21, 1992, they would have been misled into believing that the department had reasonably, appropriately, and lawfully discharged its supervision duties. The negligence of the department was concealed by these falsified records. [e.o.].

(R 166-67, ¶13).

S.A.P. alleged her natural parents could not file the lawsuit, as they did not have custody of her in 1979, and never regained custody or temporary care. She alleged some information was made available to a different foster parent in 1990, but such information contained the falsified records indicating S.A.P. had

been "properly supervised and visited" by HRS in 1979. Not until HRS' own, internal investigation in 1992 was it learned the records had been falsified.

S.A.P. further alleged her adoptive parents had no knowledge, and did not have access to records of the 1979 events. She also alleged her adoptive parents had a conflict of interest, arising from a report the adoptive father sexually abused her. Lastly, because she was 3 to 4 years old at the time, she claimed no actual memory, compounded by the effects of trauma during and after the 1979 events. (R 167-9, ¶¶14-17).

SUMMARY OF THE ARGUMENT

The question as certified does not reflect an essential fact of this case--the defendant, HRS, has sovereign immunity. Its liability is controlled by §768.28, Florida Statutes, not ch. 95.

As a waiver of sovereign immunity, §768.28 must be strictly construed. Nowhere does it mention tolling of the four-year limitation period. Consequently, the statute does not allow tolling under any circumstances, including falsification or fraudulent concealment of records by HRS.

To allow tolling would be tantamount to holding the State liable for fraud, despite language to the contrary in §768.28. The answer to the certified question, re-phrased to reflect HRS' sovereign immunity, is "NO."

Having answered the certified question negatively, this Court must address another issue to fully dispose of this case: whether §768.28 allows for delayed accrual of S.A.P.'s cause of action. By identical logic, the answer also is "NO."

From its enactment in 1973 through the present, §768.28 did and does not provide for delayed accrual. It does not, in direct contrast to §95.031(1), Florida Statutes, provide a "cause of action accrues when the last element ... occurs." Therefore, S.A.P.'s cause accrued in October 1979, not in 1992 when the alleged fraudulent concealment was revealed through an investigation by HRS itself.

S.A.P. sustained the injuries at issue in October 1979. (R 164, ¶8). Her cause of action accrued then. Notice of intent to sue was given in May 1993 (R 171-6); suit was filed in January 1995. Since the statute of limitation was not tolled, S.A.P.'s claims were barred by her failure to give notice of intent to sue within 3 years of accrual of her claim; that is, by October 1982. Alternatively, her claims were barred by her failure to file suit within four years; that is, by October 1983. The First DCA's decision must be reversed, with directions to affirm the trial court's order of dismissal.

ARGUMENT

ISSUE

CAN THE DOCTRINE OF FRAUDULENT CONCEALMENT APPLY TO TOLL THE STATUTE OF LIMITATIONS IN A NEGLIGENCE ACTION?

A. The Certified Question Should Be Re-Phrased

The certified question is set forth above. However, it does not accurately reflect an important fact and is much broader than necessary.

A state agency, HRS has sovereign immunity subject to the waiver in §768.28, Florida Statutes. Regardless of whether fraudulent concealment would toll the limitation period for a negligence action between private parties, such tolling is not permitted under §768.28.

When HRS sought rehearing below, it alternatively moved for certification of two questions, the first of which was: "Does sovereign immunity preclude application of the doctrine of fraudulent concealment to the State?" (*See* Appendix C, p.12). The panel nevertheless certified an imprecise question. To the extent it implicates tolling in a negligence suit against a defendant without sovereign immunity, the question as certified calls for an advisory opinion.

HRS respectfully requests this Court re-phrase the certified question to read:

> Can the doctrine of fraudulent concealment apply to toll the statute of limitations in a negligence action, when the defendant enjoys sovereign immunity? [proposed language underlined].

See Resha v. Tucker, 670 So.2d 56, 57 (Fla. 1996) (restating certified question which did "not delineate that the present action was brought against an individual rather than the state"); Merkle v. Robinson, 737 So.2d 540 (Fla. 1999) (rephrasing certified question to reflect fact a cause of action arising in another state and not time-barred there was time-barred under Florida law).

This case presents the mirror image of Resha: the certified question does not reflect the negligence action was brought against a state agency rather than a private defendant. Based on the logic of Resha, in particular, HRS suggests re-phrasing as stated.

B. Section 768.28 Controls Over Ch. 95, And Must Be Strictly Construed

1. Section 768.28 Controls over Ch. 95

Section 768.28 controls over limitation, accrual and tolling provisions of ch. 95, Florida Statutes, when the defendant enjoys sovereign immunity. As the First DCA has said:

> Our supreme court has held that this 4-year period of limitation was intended to apply to all actions permitted by the limited waiver of immunity, notwithstanding the fact that a different statute of limitations might apply had the action been brought against a private defendant.

Horn v. State, Dept. of Transportation., 665 So.2d 1122, 1125 (Fla. 1st DCA 1996) (in an action under federal maritime law, four year limitation period in 768.28 controlled over three year federal

period). *See* Showell Industries, Inc. v. Holmes County, 409 So.2d 78, 79 (Fla. 1st DCA 1982) (three-year statutory period in §768.28(6), Fla. Stat. (1975), for contribution claims against the State controlled over the one-year statutory period in §768.31(4)(c), Fla. Stat. (1978)). *See also*, Wright v. Polk County Public Health Unit, 601 So.2d 1318, 1391 (Fla. 2d DCA 1992) (reversing dismissal on other grounds, but agreeing with county's argument that the "tolling of the limitations period governing malpractice actions has no effect on the limitations period enunciated in the Sovereign Immunity Act").

Horn followed this Court's decision in Beard v. Hambrick, 396 So.2d 708,(Fla. 1981). In Beard, this Court concluded the four year period in §768.28(12), Florida Statutes (Supp. 1974), controlled over the two year limitation period for wrongful death in §95.11, Florida Statutes. The Court's rationale bears repeating:

> We believe that the legislature intended that there be one limitation period for all actions brought under section 768.28. We base this belief on the prerequisite notice provisions of this section and the need to have a uniform period for actions against governmental entities.

Id. at 712.

Negligence actions, presumably, are far more common than wrongful death actions. The need for a uniform limitation period is correspondingly greater. Allowing delayed accrual of a cause of action, or the period of limitation to be tolled does not promote

uniformity in practice, even though the four year time limit remains nominally unchanged.

A provision in ch. 95 strongly reinforces the conclusion §768.28 controls as to actions against the state. Section 95.011, Florida Statutes--again, in both the 1979 and 1999 versions--sets forth the applicability of ch. 95:

> A civil action or proceeding, ... including one brought by the state, ... or any agency or officer of any of them ... shall be barred unless begun within the time prescribed in this chapter or, if a different time is prescribed elsewhere in these statutes, within the time prescribed elsewhere. [e.s.].

Notably, the Legislature did not include actions "against" the state, when it carefully included actions brought "by" the state; thereby excluding suits against the state from the operation of ch. 95. *See* Thayer v. State, 335 So.2d 815, 817 (Fla. 1976) ("[W]here a statute enumerates the things on which it is to operate, or forbids certain things, it is ordinarily to be construed as excluding from its operation all those not expressly mentioned.").

Also, there is recognition that time periods "elsewhere in these statutes," are controlling. The intent of this passage must be to treat actions against the state differently; that is, to subject actions against the state to the conditions of §768.28.

Section 768.28 is a much narrower statute than ch. 95. The former applies only when an entity with sovereign immunity is sued for certain acts; the latter, to all other suits unless provided

differently in another law. As the far narrower statute, §768.28 controls over ch. 95. *See* McKendry v. State, 641 So.2d 45, 46, (Fla. 1994):

> [A] specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms. ... The more specific statute is considered to be an exception to the general terms of the more comprehensive statute. [internal cites omitted]

Any tolling of the limitation period, or delayed accrual of S.A.P.'s cause, must come from §768.28, not ch. 95. See Sheils v. Jack Eckerd Corp., 560 So.2d 361, 363 (Fla. 2d DCA 1990):

> Therefore, the second applicable rule of statutory construction is that where a general law that applies to numerous classes of cases conflicts with the law that applies only to a particular class, the latter, or more specific law, generally controls even when, in regard to statutes of limitations, the general provision provides for a longer period than the more specific provision. [e.s.].

2. Section 768.28 must be Strictly Construed

Section 768.28(1) (1979) carefully waived sovereign immunity, but "only to the extent specified in this act." The 1999 version does the same. This language and caselaw require strict construction of §768.28. *See* Carlile v. Game and Fresh Water Fish Commission, 354 So.2d 362, 364 (Fla. 1977) ("[t]hat statute is clearly in derogation of the common law principle of sovereign immunity and must, therefore, be strictly construed"); Levine v. Dade County School Bd., 442 So.2d 210, 212 (Fla. 1983) (pre-suit notice requirements, as part of the statutory waiver of sovereign

immunity, must be strictly construed). *See also*, Pirez v. Brescher, 584 So.2d 993, 995 (Fla. 1991) (upholding dismissal of claim against sheriff, when written notice was given to county attorney who did not represent sheriff; since claimant thereby "failed to comply with a condition precedent to the waiver of sovereign immunity").

In effect, the opinion below wrote into the limitation period of §768.28(11) (1979) or §768.28(13) (1999) a tolling mechanism based on fraudulent concealment. This Court has recently rejected such logic:

> As the Fifth District pointed out, section 95.11(2)(b), Florida Statutes (1981), makes no reference to a discovery rule for latent defects. Using the principle of statutory construction *expressio unius est exclusio alterius*, we conclude that the absence of such express language in section 95.11(2)(b), Florida Statutes (1981), is clear evidence that the legislature did not intend to provide a discovery rule in section 95.11(2)(b), Florida Statutes (1981). To conclude otherwise would require us to write into section 95.11(2)(b), Florida Statutes (1981), a discovery rule when the legislature has not. ... Any change in this result is a matter for legislative consideration.

Federal Ins. Co. v. Southwest Florida Retirement Center, Inc., 707 So.2d 1119, 1122 (Fla. 1998).[3]

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[3]Federal Ins. Co. follows the rationale of Fulton County Administrator v. Sullivan, 22 Fla. L. Weekly S578 (Fla. Sept. 25, 1997); which was withdrawn on other grounds. *See* 24 Fla.L. Weekly S557 (Fla. Nov. 24, 1999). Standing alone, however, Federal Ins. Co. is persuasive authority.

By analogy, this Court cannot write a provision into §768.28 which would provide for tolling of the four year limitation period for negligence actions due to fraudulent concealment. *See* Cassoutt v. Cessna Aircraft Co.,1999 WL 790701*2 (Fla.1st DCA 1999) ("Further, the statute, being one of limitation, mandates a strict or conservative construction rather than a liberal construction."). The analogy is particularly compelling, as all of §768.28 must be strictly construed, not just its limitation language.

By similar analogy, this Court cannot write "last element" language into §768.28. Under §95.031(1), a "cause of action accrues when the last element constituting the cause of action occurs." [e.s.]. To the contrary, §768.28(6) & (11) (1979), and §768.28(6)(a) & (13) (1999), do not have any such language, but provide only that notice and a complaint must be given and filed within three or four years, respectively, after "such claim accrues." Had the Legislature so desired, it could have included "last element" language in the appropriate subsection of §768.28, either expressly or by cross-reference to §95.031. That the Legislature did not do so precludes S.A.P. from relying on §95.031(1), to claim her cause of action did not accrue until HRS released the results of its internal investigation in December 1992.[4]

[4]The same reasoning precludes S.A.P. or HRS from relying on §95.051(1)(h) for its minority-tolling or 7 year repose language.

3. S.A.P.'s Claims are Barred

Strict construction has two crucial implications for this case. First, since §768.28 (1979) did not provide for delay in accrual of a cause of action under any circumstances, S.A.P.'s negligence claim accrued not later than October 1979, when she was discovered in an emaciated and injured condition by the Clay County sheriff's office.[5] Second, since §768.28 did not provide for tolling of the four year limitation period under any circumstances, S.A.P.'s cause was barred as of October 1983.[6]

The second amended complaint conceded the open and notorious nature of Appellant's injuries, and the latest date at which those injuries could have occurred:

> On or about October 20, 1979, the Clay County Sheriff's Office responded to reports from neighbors that they heard the cries of young children .... They found S.A.P. ... bruised ... burned, beaten, choked, malnourished .... S.A.P., then age 4, weighed 22 pounds and was "very emaciated" according to medical records.

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[5]Deciding whether §768.28 allows delayed accrual of a cause is necessary to fully dispose of this case, as S.A.P.'s complaint was timely filed if her cause did not accrue until 1992.

[6]Alternatively, as declared in §768.28(1), sovereign immunity is waived only to the "extent specified." Among the specifications for waiver are the 3-year presuit notice requirement and the 4-year limitation period. If these conditions are not met, there is no waiver as a matter of law. Assuming her cause accrued in October 1979, S.A.P.'s failure to give pre-suit notice within 3 years, or file a complaint within 4 years, of her injuries precluded a waiver of sovereign immunity. She had no cause of action; dismissal was proper.

(R 164, ¶8) Since these facts must be taken as true, this Court must infer that the events giving rise to Appellant's cause of action occurred not later than October 20, 1979. *See* Cristiani v. City of Sarasota, 65 So.2d 878, 879 (Fla. 1953) ("The general rule seems to be that actions for personal injury based on the wrongful or negligent act of another accrue at the time of the injury and that the statute of limitations begins to run at the same time."); Doe v. Dorsey, 683 So.2d 614, 617 (Fla. 5th DCA 1996), *rev. den.*, 695 So.2d 699 (Fla. 1997) (same). *See also* Hearndon v. Graham, 710 So.2d 87, 88 (Fla. 1st DCA 1998) ("Generally, the last element in the case of the tort cause of action of battery is complete upon the physical contact which constitutes the battery."); *Id.* at 92, n.4 ("In the instant case, for purposes of negligence the last element was injury or damage to Hearndon, which occurred when the abuse occurred, despite the fact that Hearndon may have repressed any memory of her injuries." [e.s.; internal cite omitted]).

Accrual of a cause of action is twice mentioned in §768.28 (1979). Subsection (6) requires claims against the state to be preceded by written notice. Such notice must be given "within 3 years after such claim accrues." Under subsection (11), all claims against the state are barred unless a civil complaint is filed in the appropriate court "within 4 years after such claim accrues." Neither subsections (6) and (11), nor any other provision of §768.28 (1979) provided for delayed accrual of a cause of action;

corresponding language in the 1999 version of §768.28 has not changed in substance. *See* subsections (6)(a) and (13), respectively, of §768.28 (1999).

S.A.P.'s complained-of injuries occurred in October 1979. (R 164, ¶8). By operation of §768.28, her cause of action accrued at that time, and was not tolled for any reason. Her failure to file notice of her claims until May 1993 barred her cause pursuant to §768.28(6) (1979). Alternatively, her failure to file her complaint until 1995 barred her cause pursuant to §768.28(11) (1979). Today, the same result would be dictated by §768.28(6)(a) & (13).

Backtracking, §768.28(11) (1979) provided:

> Every claim against the state or one of its agencies or subdivisions for damages for a negligent or wrongful act or omission pursuant to this section shall be forever barred unless the civil action is commenced by filing a complaint in the court of appropriate jurisdiction within 4 years after such claim accrues.

Other than two exceptions relating to actions for contribution and medical malpractice, this language has not changed through the present. *See* §768.28(13) (1999).

The statute could not be more clear. It applies to every claim, and places an absolute bar to claim based on an untimely-filed complaint. As a matter of public policy, the legislature wanted suits against the government to be brought "promptly"; that is, within four years, regardless of the facts in an individual

case. Thus, §768.28, then and now, required all suits to be brought within four years, without exception.

Putting these points--particularly the absence of "last element" and tolling provisions in §768.28--together, §768.28(13) functions simultaneously as a four year statute of limitation and a four year statute of repose; absolutely barring S.A.P.'s cause as of October 20, 1983. The fact that neither S.A.P. nor her subsequent foster or adoptive parents knew of a potential cause of action does not defeat treating §768.28(11) (1979) and §768.28(13) (1999) as statutes of repose. *See* Doe v. Shands Teaching Hosp. and Clinics, Inc., 614 So.2d 1170 (Fla. 1st DCA 1993), *rev. den.* 626 So.2d 204 (Fla. 1993) (rejecting access to courts attack upon the medical malpractice statute of repose, as applied to bar an action when the appellants "neither knew nor could have reasonably known of an injury before the expiration of the repose period").

S.A.P. vaguely claims her cause did not accrue until HRS released its internal investigation report in 1992. (complaint, ¶¶13-14). Assuming the "last element" of her cause occurred then does not help her, as the four-year period in §768.28 functions as a statute of repose, legally preventing her cause from accruing. *See* Carr v. Broward County, 505 So.2d 568, 570 (Fla. 4th DCA 1987) ("[A] statute of repose not only bars an accrued cause of action, but will also prevent the accrual of a cause of action where the

final element necessary for its creation occurs beyond the time period established by the statute.

The four year period in §768.28, strictly construed and read in conjunction with the other provisions of 768.28, requires all negligence actions against the state to be brought within four years of the events giving rise to the cause of action. Any other interpretation would lead to the absurd result of no repose period for negligence actions by minors against the State, despite the seven year repose period for negligence actions by minors against defendants without sovereign immunity. *See* §95.051(1)(h), Florida Statutes (1999). Such result would also contravene §768.28(1), which provides sovereign immunity is waived only "if a private person[] would be liable to the claimant."

Finally, the facts of this case reveal the need for strict application of the sovereign immunity waiver. More than 20 years later, HRS would be held liable for the actions of an errant employee acting in bad faith. Liability would attach, despite the fact HRS was performing a duty--involuntary removal of children from unfit homes and placing them in foster care--which no private entity could do.

C. Sovereign Immunity Is Not Waived For Fraudulent Conduct Of Any Kind

S.A.P.'s case is made more complex by her reliance on fraudulent concealment to contend her negligence action did not accrue until release of HRS' internal investigation in December

1992; because, until that time, no one acting on her behalf would have known her caseworker's falsified monthly visitation reports. (R 166-67, ¶13). Construed liberally, S.A.P. thereby alleged two "defenses" to her lawsuit being barred. First, her cause did not accrue until December 1992; or, alternatively, the limitation period was tolled until December 1992.

S.A.P. was injured in October 1979. Assuming her cause was preserved through delayed accrual or tolling until 1992 does not help her. Falsification of records and fraudulent concealment are both examples of bad-faith conduct, for which sovereign immunity has not been waived.[7]

Again, the waiver of sovereign immunity begins by declaring that liability is waived "only to the extent specified in this act [ch. 73-313, Laws of Fla.]." *See* §768.28(1). As it existed in 1979, subsection (9) of §768.28 provided:

> (9) No officer, employee, or agent of the state or its subdivisions shall be held personally liable in tort for a final judgment which has been rendered against him for any injuries or damages suffered as a result of any act, event, or

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[7]S.A.P.'s claim of concealment based on confidentiality of the records must be given short shrift. Records of her placement in foster care, abuse, visitation by a caseworker, etc. would not have been confidential as to her or her guardian, regardless of whether they were confidential as to the general public. *See e.g.*, §39.411(3) & (4), Fla. Stat. (1979) (child and legal guardians, among others, "always have the right" to inspect and copy official records pertaining to the child; which are otherwise confidential); §63.162(5), Fla. Stat. (1979) (information as to the family medical history of the child and the natural parents shall be furnished to the adoptive parents).

> omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. [e.s.].

Thus, the statute always contemplated personal liability for conduct outside the scope of employment. Moreover, the waiver itself was limited to acts or omissions done within the scope of employment. §768.28(1) (1979).

Less than a year after S.A.P.'s injuries, §768.28(9) was amended to read:

> (9) No officer, employee, or agent of the state or its subdivisions shall be held personally liable in tort or named as a party defendant in any action ~~for a final judgment which has been rendered against him~~ for any injury or damages suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. The exclusive remedy for injury or damage suffered as a result of an act, event, or omission of an officer, employee, or agent of the state or any of its subdivisions or constitutional officers shall be by action against the governmental entity, or the head of such entity in her or his official capacity, or the constitutional officer of which the officer, employee, or agent is an employee, unless such act or omission was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. **The state or its subdivisions shall not be liable in tort for the acts or omissions of an officer, employee,** or agent committed while acting outside the course and scope of her or his employment or **committed in bad faith** or with malicious purpose or in a manner exhibiting wanton

> <u>and willful disregard of human rights, safety, or property.</u> [underlined language added in 1980; stricken language deleted; **boldface supplied**].

See §1, ch. 80-271, Laws of Florida (eff. July 1, 1980).

This language has not changed in substance since. To this day, nothing in §768.28 provides for tolling due to fraudulent concealment. Moreover, current §768.28(9)(a) further limits the waiver of sovereign immunity, by re-asserting the state's immunity against liability for acts of "bad faith."

Fraudulent concealment is an act of bad faith. To allow the doctrine of fraudulent concealment to sustain an otherwise-barred suit for negligence is the same as holding HRS liable for an act of bad faith. To apply the doctrine of fraudulent concealment here would directly contravene the express language of §768.28, which includes the applicable limitations statute. S.A.P. cannot rely on that doctrine to toll the four year period in §768.28(13).

Two cases need discussion. The first is <u>Vargas v. Glades General Hospital</u>, 566 So.2d 282 (Fla. 4th DCA 1990). There, the court held the "statute of limitations contained in section 768.28(11), Florida Statutes, may be tolled by fraudulent concealment of the facts necessary to put the injured party on notice of the negligent act or the resulting injury." *Id.* at 285.

A careful reading of <u>Vargas</u> reveals that the decision has more problems than prospects. The legal conclusion that the doctrine of fraudulent concealment could apply to toll the statute of

limitation was the purest dicta, as the Vargas court immediately acknowledged there was, factually, no fraudulent concealment. *Id.* at 285 ("As applied to the facts of this case we conclude that there was no fraudulent concealment ... to toll the statute of limitations ...."). The proper approach would have been to assess the factual premise of the alleged fraudulent concealment; and, finding none, to decline to reach the legal question of whether such concealment could toll the limitation period in §768.28. Since there was no fraudulent concealment as a matter of fact, there was absolutely no need for the court to reach the issue of whether the doctrine applied.[8]

More important to this Court's decision, the Vargas court's logic is self-contradictory. It justified its holding, in part, on the ground sovereign immunity rests on the policy consideration of "the need to administer government in an orderly manner." *Id.*, 566 So.2d at 284. Tolling the limitation period for negligence based on bad-faith conduct by aberrant employees hardly promotes the goal of orderly government. Regardless of the cap on damages, HRS still faces the possibility of trial for employee conduct occurring more

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[8]As dicta, the Vargas holding was not binding on the trial court here. State ex rel. Biscayne Kennel Club v. Board of Business Regulation of Dept. of Business Regulation of State, 276 So.2d 823, 826 (Fla. 1973). It had no precedential value before the First DCA . *See* McDonald's Corp. v. Department of Transp. State of Fla., 535 So.2d 323, 325 (Fla. 2d DCA 1988), and should be disregarded by this Court. Continental Assur. Co. v. Carroll, 485 So.2d 406, 408 (Fla. 1986) ("[Obiter] dicta is at most persuasive and cannot function as ground-breaking precedent.").

than 20 years ago, and expressly outside the statutory waiver of sovereign immunity.

The Vargas court under-valued precedent on strict construction of the sovereign immunity waiver, and did not give due weight to the express, 1980 statutory language, now in §768.28(9)(a), which expressly preserves sovereign immunity when an employee acts in bad faith. Notably, until the instant opinion below--which did not cite Vargas--no other court reached the same result. *See* County of Brevard v. Miorelli Engineering, Inc., 677 So.2d 32, 34 (Fla. 5th DCA 1996) ("fraud in the inducement is a tort independent of breach of contract [for which] ... [s]overeign immunity has not been waived"), *affirmed on different ground*, 703 So.2d 1049 (Fla. 1997).

The Florida Supreme Court's affirmance of Miorelli is instructive. Technically, the Court did not address whether sovereign immunity outright barred a claim for fraudulent inducement. Having concluded the work performed was outside terms of the contract, the Court found the absence of a written change order dispositive. *Id.* at 1051. However, the Court then found waiver and equitable estoppel were not available to excuse the failure to obtain a written change order, saying:

> An unscrupulous or careless government employee could alter or waive the terms of the written agreement, thereby leaving the sovereign with potentially unlimited liability. [e.s.].

Id.

The use of "unscrupulous" is significant. In context, the Court was contemplating a deliberate, wrongful act; as opposed to the "careless" act just mentioned. Such unscrupulous conduct would have to be a bad-faith act for which sovereign immunity is not waived. Just as the possibility of bad faith precluded the application of estoppel or waiver to defeat a county's sovereign immunity in Miorelli, fraudulent concealment cannot be applied to defeat HRS' sovereign immunity here.

In Parker v. State of Florida Bd. of Regents ex rel. Florida State University, 724 So.2d 163 (Fla. 1st DCA 1998), the First DCA itself concluded the state Board of Regents could not be liable, in an action for breach of contract, as to alleged fraudulent acts of a college dean. Sovereign immunity attached under §768.28(9)(a) because "fraudulent misrepresentation per se contains the element of bad faith." *Id.* at 169.

Parker, an FSU professor, sued the Board of Regents (BOR) for fraudulent misrepresentation and breach of contract when his salary was "not raised as allegedly promised." *Id.* at 164. After a jury verdict for Parker on both counts, the trial court granted judgment in favor of BOR as to the fraudulent misrepresentation count based on sovereign immunity. The First DCA agreed, while upholding the verdict on the breach of contract count. *Id.*

While the facts of Parker bear no resemblance to this case, the point of law is the same--fraudulent conduct inherently

includes bad faith acts, for which sovereign immunity is expressly preserved under §768.28(9)(a). Recall, S.A.P. alleges the caseworker visitation reports were falsified so that it "appeared that the case worker had conducted monthly supervision visits" (R 166-67, ¶13), when such visits did not actually occur.

Taken as true, these allegations depict deliberate, misleading conduct by an aberrant employee, and not anything akin negligent misrepresentation. The gravamen of Parker applies with great force:

> The state's entire argument is that for fraud to exist, as a matter of law, bad faith must also exist. We agree. Although our review of the law of fraud in Florida reveals that bad faith has not always been considered a necessary element of fraud, nor always the gist of that cause of action, First Interstate Dev. Corp. v. Ablanedo, 511 So.2d 536, 539 (Fla.1987), established that bad faith must always be considered a necessary element of fraud.

Id. at 168.

To be clear, this Court should, but need not, agree that bad faith is "always" a necessary element of fraud for purposes of sovereign immunity. Here, the alleged fraudulent concealment is based on deliberate falsification of records to conceal the lack of lawfully required visitation of S.A.P.'s foster home. Bad faith is present; its potential absence in other allegedly fraudulent acts is immaterial.

Taking S.A.P.'s factual allegations as true, she is relying on acts of bad faith by her caseworker to delay accrual of her cause

or to toll the limitation period. By agreeing, the decision under review made HRS liable, despite the fact the waiver of sovereign immunity does not apply to acts or omissions "committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety or property." §768.28(9)(a), Fla. Stat. (1999).

S.A.P. cannot have it both ways. If her cause accrued in October 1979, before the 1980 "bad faith" amendment in ch. 80-271, Laws of Florida, then the absence of "last element" and tolling provisions in §768.28 (1979) required dismissal. If her cause did not accrue until the release of HRS' internal investigation in December 1992, then she is subject to the 1980 law expressly preserving sovereign immunity against liability for acts of bad faith by state employees.

The final possibility is a little more complex in its resolution. Assume S.A.P.'s cause accrued in October 1979, but the four-year limitation period was indeed tolled by falsification of the visitation reports. Such tolling was statutorily abrogated as of July 1, 1980, when the amendments to subsection (9) of §768.28 took effect, and specifically re-asserted sovereign immunity for actions done in bad faith.

In effect, the Legislature shortened S.A.P.'s limitation period to four years, with no tolling, from July 1, 1980; the effective date of ch. 80-271. The Legislature can do this, as

S.A.P.'s cause would not have been barred under any circumstances until October 1983. *See* Wiley v. Roof, 641 So.2d 66, 68 (Fla. 1994) ("Before the action is barred by the statute [of limitation], the Legislature has absolute power to amend the statute and alter the period of limitations prescribed therein....").

If the 1980 law eliminated tolling of S.A.P.'s cause, she still had four years to file a complaint; that is, through July 1, 1984. She did not file her complaint until 1995. Her lawsuit was barred.

Alternatively, the amendments enacted in ch. 80-271 were curative--by abrogating a then-recent decision of this Court--and apply retroactively to bar S.A.P.'s cause. A recent explanation of the 1980 amendments by this Court precisely holds as much. After quoting from a contemporaneous legislative staff analysis, this Court said:

> The need for such a clear statement preventing personal liability of public employees for damages or injuries suffered as a result of an act, event or omission of action occasioned within the scope of their employment is evidenced by the Florida Supreme Court's statement that the "absence of an explicit prohibition against suing public employees for their torts suggests that none was intended."
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> Fla. H.R. Comm. on Govtl. Ops., PCB 31 (1980) Staff Analysis 1 (May 2, 1980) (State Archives Collection).
>
> The quotation highlighted in the last sentence comes from our opinion in District School Board v.

> Talmadge, 381 So.2d 698, 702 (Fla.1980), *limited*, Rupp v. Bryant, 417 So.2d 658, 661 (Fla.1982).
>
> * * *
>
> [I]t is obvious that the purpose underlying the 1980 amendments was to abrogate the first and third holdings to the extent an employee's conduct fell within the scope of employment. employment. (FN6). [e.s.].
>
> * * *
>
> We thus conclude that the intent behind the 1980 amendments was to extend the veil of sovereign immunity to the specified governmental employees when they are acting within the scope of employment, with the employing agency alone remaining liable up to the limits provided by statute.
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> [6] We so hold.

McGhee v. Volusia County, 679 So.2d 729, 732-33 (Fla. 1996).

Not necessary to its decision, the McGhee Court did not address the express preservation of sovereign immunity when an employee acted, as here, in bad faith but within the scope of employment. However, the "bad faith" provisions, simultaneously enacted with the abrogative provisions in ch. 80-271, are an essential part of the Legislature's action.[9] In return for immunizing employees from any personal liability for acts done within the scope of employment, the Legislature expressly preserved

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[9]McGhee requires "related statutes [to be read] together so that they illuminate each other and are harmonized." *Id.*, 679 So.2d at 735, n.1.

immunity when such acts were done in bad faith, etc. Done, as the McGhee court notes, shortly after issuance of Talmadge, the amendments in ch. 80-271, Laws of Florida, must be considered curative and thus retroactive.

These amendments bar S.A.P.'s use of bad faith acts (repeated falsification of visitation reports over 9-10 months of 1979) to delay accrual of her negligence cause, or tolling of its limitation period. As indicative of their curative nature, the 1980 Legislature expressly provided ch. 80-271 would: "apply to all actions pending in the trial or appellate courts on the date this act shall take effect and to all actions thereafter initiated." [e.s.]. *See* ch. 80-271 at §4. If it accrued in 1979, S.A.P.'s cause was not filed until 1995; that is, well "thereafter." If it accrued in 1990 or 1992, the 1980 amendments are not being applied retroactively. Again, S.A.P.'s claim was barred.

Fraudulent acts, such as deliberate concealment of visitation reports, cannot toll a limitation period in §768.28. To allow such is to directly contravene the statutory waiver of sovereign immunity, which must be strictly construed. The certified question must be answered in the negative. In answering it, this Court should disapprove dicta in Vargas, while approving Parker, thereby resolving a conflict of law between two district courts of appeal. Of course, this Court must reverse the instant opinion below.

CONCLUSION

The certified question, re-phrased as HRS suggests, must be answered in the negative. The decision under review must be reversed and remanded, with directions to affirm the trial court's order of dismissal.

Respectfully submitted,

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I certify a true copy of the foregoing has been furnished by U.S. Mail to **JAY C. HOWELL**, Anderson & Powell, 2029 North Third Street, Jacksonville Beach, Florida 32250-7429; this ___ day of February, 2000.

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TABLE OF APPENDICES

Appendix	Item	Date
A	Opinion Below	09/03/1997
B	Order Denying Rehearing and Certifying Question	12/15/1999
C	HRS' Motion for Rehearing, etc. [excerpts]	09/15/97