IN THE SUPREME COURT OF FLORIDA

FLORIDA DEPT. OF HEALTH AND REHABILITATIVE SERVICES,

Petitioner,

vs. **CASE NO. SC00-105**

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

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REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

CERTIFICATION OF TYPE SIZE

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TABLE OF CITATIONS

Cases **Pages**

Other Authority

SUMMARY OF THE ARGUMENT

Section 768.28, Florida Statutes, abrogates common law by lifting, under narrow conditions, a centuries-old bar to holding the sovereign liable in tort. Also §768.28(1) declares sovereign immunity is waived only to the "extent specified." Together, these circumstances require strict construction of the larger statute.

Nowhere does §768.28 mention tolling of the four-year limitation period. Therefore, strict construction of the statute does not allow tolling under any circumstances, including falsification or fraudulent concealment of records by HRS. The answer to the certified question, re-phrased to reflect HRS' sovereign immunity, is "NO."

For the first time, S.A.P. urges HRS is equitably estopped to raise the statute of limitation. This Court must not consider an issue raised so belatedly without justification, particularly since this issue is not necessary to fully dispose of the case. Nevertheless, §768.28 is silent as to equitable estoppel. Just as fraudulent concealment is not available to toll the limitation period, equitable estoppel is not available to prevent HRS from asserting this suit is time-barred.

Section 768.28 does not, in contrast to §95.031(1), Florida Statutes, provide a "cause of action accrues when the last element ... occurs." Therefore, no delay in accrual is available to sustain S.A.P.'s cause.

ARGUMENT

ISSUE

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

A. The Statutory Waiver Of Sovereign Immunity Does Not Allow Tolling Or Delayed Accrual Under Any Circumstances

S.A.P.'s argument is belied by her overwhelming reliance on decisions involving private defendants. Whether fraudulent concealment tolls a limitation period in a suit between private parties is not necessarily dispositive. The statutory waiver of sovereign immunity does not mention tolling of the limitation period. Since that waiver must be strictly construed, tolling is not available under any circumstances.

S.A.P. overlooks the obvious: the State always had sovereign immunity; absent the waiver in §768.28, any tort action was barred. Today, her negligence action is viable only under the conditions of §768.28. By omitting any mention of tolling or delayed accrual, the statute leaves them unavailable to anyone suing a sovereign defendant. This Court cannot "read into" §768.28 any grounds for tolling or delayed accrual of a cause of action. "Whatever rights of recovery against the state are given to a claimant must, in our view, affirmatively appear in the waiver of immunity statute and cannot be read into it." Berek v. Metropolitan Dade County, 396 So.2d 756, 758 (Fla. 3d DCA 1981) (holding the $50,000 limit on

recovery was absolute cap on monetary award, including postjudgment interest and costs), *result affirmed* 422 So.2d 838 (Fla. 1982).

S.A.P. relies heavily on dicta in Vargas v. Glades Gen. Hosp., 566 So.2d 282 (Fla. 4th DCA 1990). Her preoccupation with that case leads to two mistakes. First, she never addresses HRS' analogy to two contrary and more recent decisions: County of Brevard v. Miorelli Engineering, Inc., 677 So.2d 32, 34 (Fla. 5th DCA 1996), *affirmed on different ground*, 703 So.2d 1049 (Fla. 1997); and Parker v. State of Florida Bd. of Regents ex rel. Florida State University, 724 So.2d 163 (Fla. 1st DCA 1998). The analogy is simple. Just as HRS cannot be held liable for fraud or other acts of bad faith by its employees, it cannot effectively be held liable by allowing such acts to toll the limitation period for negligence. (*See* HRS' initial brief, p.21-5.)

Second, S.A.P. narrowly focuses (as did Vargas) on the language in §768.28(5), Fla. Stat. (1979), declaring the State liable to the same extent as a private individual under like circumstances.[1] In so doing, she ignores the express statutory directive that sovereign immunity was waived "only to the extent specified in this Act." *See* §768.28(1) (1979) and (1999).

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[1]Vargas addressed the 1979 version of § 768.28. *See id.*, 566 So.2d at 283 (observing appellants sought review of a final summary judgment which held their action barred by §768.28(11), Florida Statutes (1979)). It did not consider whether the changes in ch. 80-271, Laws of Fla. (1980) applied retroactively. *See* HRS' initial brief at p.26-9, and p.5-6 herein.

Nowhere does the act specify that fraudulent concealment will toll the four-year limitation period, or a sovereign defendant can be equitably estopped to assert the limitation period has expired. Since the waiver of sovereign immunity must be strictly construed, any "doctrine" or principle of law which does not appear in the express language of the statutory waiver is not available to a plaintiff suing a sovereign defendant.

B. Sovereign Immunity Is Preserved Against Acts Of Bad Faith

In part B, S.A.P. contends fraudulent or bad faith acts can be attributed to the State for purposes other than liability for damages. Specifically, she relies on such acts for three purposes: to toll the limitation period for an astounding 13 years (from 1979 until 1992); to delay accrual of her cause for the same amount of time; or to assert equitable estoppel against HRS (not the caseworker herself). But for these three possibilities, S.A.P. has no viable cause of action, and HRS cannot be liable. Therefore, S.A.P. is doing exactly what she claims she is not--trying to posit liability where there is none.

To do so, she makes a fine distinction. Her suit is based on HRS' alleged negligence. She relies on HRS' alleged bad faith not for a cause of action *per se*, but to avoid the four-year limitation period which expired in October 1983.

S.A.P. cites only the 1979 version of §768.28(9)(a). (answer brief, p.9). Such reliance is ironic, as it concedes her cause

accrued in 1979. It also fails to account for the express preservation of sovereign immunity against acts of bad faith, enacted in ch. 80-271, Laws of Florida (1980).

Chapter 80-271 amended §768.28(9) in response to a decision by this Court. As discussed in HRS' initial brief (p.26-9), those amendments were curative--effectively saying sovereign immunity was never waived for acts of bad faith, etc. S.A.P. did not say different in her answer.

The State always had sovereign immunity; but for the waiver in §768.28, S.A.P. could not have sued HRS in tort. In contrast, S.A.P.'s reasoning is backwards. She argues as if there always had a right to sue the state in tort subject only to reasonable conditions, such as a limitation period which could be tolled. If such were true, retroactive application of the 1980 law would be troublesome. However, the waiver of sovereign immunity never contemplated state liability for acts of bad faith by employees. Thus, preservation of her negligence action based on such acts also was never contemplated by §768.28. Not until this Court's decision in District School Board v. Talmadge, 381 So.2d 698, 702 (Fla.1980), *limited*, Rupp v. Bryant, 417 So.2d 658, 661 (Fla.1982); was it necessary to say otherwise.[2]

[2]The Legislature reacted very promptly. Talmadge issued in February, 1980; ch. 80-271 was enacted in the 1980 session.

Restated, the textual changes to §768.28(9) [now codified as §768.28(9)(a)] made by §1 of ch. 80-271, Laws of Florida, declared what had been the common law all along. The sovereign, not liable at all for damages in tort until the waiver was enacted, certainly was not liable in tort for acts of bad faith by its employees. Therefore, the 1980 amendment, a statement of what the law was all along, cured this Court's anomalous conclusion in Talmadge. Acts of bad faith could not posit liability in the state, even when S.A.P.'s cause accrued in 1979.[3]

Alternatively, if her cause accrued in 1992, the 1980 amendment to §768.28(9) prospectively applies to her. S.A.P. cannot have it both ways--her cause cannot accrue in 1979 for purposes of arguing the 1980 law was not retroactive, yet simultaneously accrue in 1992 for purposes of complying with the 4-year limitation period.

S.A.P. then relies on a number of cases holding a sovereign entity is subject to award of costs and guardian ad litem fees, etc. (answer brief, p. 9-11). Her error is subtle. In those cases, the sovereign entity was required to pay costs because it was, indeed, already liable in tort. Here, HRS is not otherwise

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[3]HRS does not contend ch. 80-271 should be applied retroactively to relieve any employee of personal liability. *See* Rupp, 417 So.2d at 656-666 ("[Plaintiffs] prior to the 1980 amendments thus had the right to seek recovery from both Rupp and Stasco since neither defendant could assert immunity.").

liable. S.A.P. did not file her lawsuit within four years of her injury. As to her, there has been no waiver of sovereign immunity.

Because it appears as part of statutory waiver, the 4-year deadline in §768.28 is more than a typical limitation period. It is an inherent attribute of the waiver of sovereign immunity. If the deadline is not met, there is no waiver. In contrast, S.A.P. would find the waiver perpetual; always available to an untimely plaintiff if that plaintiff can allege facts tolling the deadline or excusing compliance. Such logic flies in the face of §768.28(11) (1979), which declares a claim is "forever barred" [e.s.; now found in §768.28(13)] unless an action is commenced within four years after accrual.[4] Furthermore, nothing in §768.28 alters the common law principle that a cause of action for personal injury accrues when the injury occurs. (*See* argument and cases cited in HRS' initial brief, p.15). That a prevailing party can obtain costs, etc. against a sovereign entity does not mean an plaintiff can rely on acts of bad faith to save a time-barred cause of action.

For the first time, S.A.P. contends it is not yet clear whether the bad faith acts occurred within or without the scope of employment of various HRS employees. (answer brief, p.12). This

[4]In contrast, §95.011, Fla. Stat., directs only that an untimely action "shall be barred." The use of "forever" in §768.28(11) (1979), cannot be deemed superfluous. Instead, the bar contemplated by §768.28(11) is absolute, and not subject to tolling.

is irrelevant. If the bad faith occurred outside the scope of employment, then HRS cannot be liable regardless of when S.A.P.'s cause accrued. Conversely, if the bad faith occurred within the scope of employment, sovereign immunity is expressly preserved by the 1980 amendment, discussed earlier, which applies to S.A.P. That amendment carefully states:

> The state or its subdivisions shall not be liable in tort for the acts or omissions ... 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 and willful disregard of human rights, safety, or property. [e.s.].

See §1, ch. 80-271, Laws of Florida (amending §768.28(9)).

Even the most cursory reading of this language shows the circumstances under which the state is not liable are in the alternative. The first circumstance is when the acts or omissions are outside the scope of employment. The second, free-standing circumstance is when acts or omissions are committed in bad faith. Bad faith, regardless of whether the acts or omissions occurred within or without the course and scope of employment, cannot posit liability at all. *See* McGhee v. Volusia County, 679 So.2d 729, 734 (Fla. 1996):

> [T]he plain language of the statute reveals that a governmental entity is liable for the actions of its employee unless the employee is either not acting within the scope of employment or is acting in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. ... These two bases should remain distinct, as a finding of

> either one will revoke the waiver of sovereign immunity. The majority does not give clear effect to this latter basis for revocation, which must not be written out of the statute. [e.s.].

(Wells, J., concurring) [internal cite omitted].

S.A.P. never addresses the 1980 amendment in her answer brief. By relying only on the 1979 version of §768.28, she concedes her cause accrued in 1979; and cannot claim accrual was delayed until 1992. Moreover, the 1980 change was curative, and applies retroactively to her 1979 cause. Conversely, if her cause accrued in 1992, the 1980 change prospectively applies to her.

C. A Sovereign Entity Cannot Be Equitably Estopped Based On Acts Of Bad Faith, When Estoppel Results In Liability

This Court should not address S.A.P.'s equitable estoppel argument. Equitable estoppel was not mentioned in her second amended complaint (R 163-76)--and cannot be gleaned through liberal construction--despite HRS' earlier motion to dismiss the first amended complaint based on the statute of limitation. S.A.P. did not respond to HRS' motion to dismiss the second amended complaint (R 177-8), and thus did not raise equitable estoppel at the most appropriate time.

Now, equitable estoppel is being raised as a "defense" to the limitation statute. *See* Consortion Trading Intern., Ltd. v. Lowrance, 682 So.2d 221, 222 (Fla. 3d DCA 1996) (final summary judgment not appropriate when defendants had pled affirmative defenses that "sounded in waiver, estoppel, and bad faith" [e.s.]);

Morsani v. Major League Baseball, 739 So.2d 610, 615 (Fla. 2d DCA 1999), ("The availability of waiver as a defense to the statute of limitations, like equitable estoppel, has long been recognized in Florida."). Thus, S.A.P. is raising a new argument, in the nature of an affirmative defense, for the first time on appeal. She cannot do so. *See* Fla.R.Civ.P. 1.100(a) (when an answer contains an affirmative defense, the opposing party "shall" file a reply containing any avoidance of the defense); Rule 1.110(d) (requiring affirmative defenses, including "estoppel" to be pled); Rule 1.140(h) (all defenses not raised by motion or responsive pleading are waived).

The trial court did not rule on the basis of equitable estoppel, which also was not raised in the briefs to the First DCA. The opinion below addressed the statute of limitation, the availability of a guardian or next friend to bring suit, and the repose language in §95.051(1)(h), Florida Statutes. It did not pass upon equitable estoppel. The issue was not "tried" by express or implied consent of the parties.

Reaching the equitable estoppel issue is not necessary to dispose of this case. If the absence of appropriate language in §768.28 precludes tolling of the limitation period for fraudulent concealment, then the absence of appropriate language also precludes asserting equitable estoppel to avoid the limitation period. It would be absurd to hold the bad faith acts by HRS did

not toll the limitation period, while holding the same acts could support equitable estoppel to preclude assertion of the statute of limitation.[5] Alternatively, if tolling is legally available (subject to later proof), then equitable estoppel is a moot point.

To be sure, courts have held equitable estoppel can apply to governmental entities, but "only in rare instances and under exceptional circumstances." Council Bros., Inc. v. City of Tallahassee, 634 So.2d 264, 266 (Fla. 1st DCA 1994), *quoting* North American Co. v. Green, 120 So.2d 603, 610 (Fla.1959). However, none of those cases addressed the issue of whether equitable estoppel is available, when §768.28 is narrowly construed.

If this Court reaches the issue, it should apply the same rationale earlier urged by HRS. Essentially, §768.28 must be very narrowly construed. It does not expressly mention equitable estoppel. Therefore, someone suing a sovereign entity cannot invoke equitable estoppel under any circumstances.

D. Lack Of A Capable "Guardian" To Sue Does Not Toll A Limitation Period Or Delay Accrual Of A Cause Of Action

S.A.P.'s final point urges the statute of limitations "could not begin to run" until a parent or guardian knew or should have

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[5]A private party's ability to raise equitable estoppel against assertion of a limitation statute is before this Court in Morsani, 739 So.2d 610 at 616 (certifying this question: "Does section 95.051, Florida Statutes (1993), prohibit the application of the doctrine of equitable estoppel to an action filed outside of the applicable statute of limitations?"), *review pending* (case no. 96,004).

known of the facts supporting her cause of action. (answer brief, p.15). She also alludes, tersely, to the possibility her cause of action did not accrue until the emergence of a parent or guardian capable of bringing suit. (answer brief, p.16).

Either way, S.A.P.'s argument must fail. Factually, the absence of a capable guardian was not HRS' fault. For example, her natural mother was reported for child abuse; her natural father, imprisoned. Her first foster parents grossly neglected and abused her; her adoptive father was reported for sexual abuse. (R 167-9, ¶¶14-17). In short, S.A.P. relies on the wrongful, possibly criminal, acts of <u>others</u> to toll the limitation period or delay accrual of her cause against HRS. It would be one thing, if she were suing her foster parents or adoptive father, to claim a defendant in tort should not benefit from her or his own wrongdoing. It is quite another to claim the limitation period should be tolled as to HRS.

S.A.P. is still relying on acts of "bad faith or ... [in] wanton and willful disregard of human ... safety" to preserve her cause of action. Such reliance is particularly troublesome as to her <u>natural</u> parents, who were not even arguably acting as "agents" of HRS by providing foster or adoptive care.

HRS' response is much the same as its argument against tolling of the limitation period through fraudulent concealment. Section 768.28 does not provide for tolling of the limitation period, or

delay in accrual of a cause, for any reason. Therefore, the absence of a capable parent or guardian also cannot work to preserve S.A.P.'s lawsuit, at least when the defendant enjoys sovereign immunity. A different result as to a private defendant is immaterial.

The events of S.A.P.'s early life were indeed tragic. No one would wish them on another child. However, the injuries underlying this suit occurred over 20 years ago. They were inflicted by foster parents subject, at most, to intermittent supervision by an HRS caseworker. The caseworker and other HRS employees allegedly committed bad faith, if not criminal, acts by falsifying visitation reports, etc.

S.A.P. does not allege HRS had any reason to suspect her first foster parents would harm children as they did. Even she does not contend HRS is responsible for the neglect leading to her removal from her natural parents.

Involuntary removal of children from their natural parents is something only the government can do. Removal is a difficult situation; supervising foster parents is equally difficult. Twenty years after the fact, S.A.P. would hold HRS responsible for transgressions of foster parents HRS had no reason to suspect. This scenario well illustrates why the sovereign immunity statute should be strictly construed to bar S.A.P.'s lawsuit.

Lastly, S.A.P. can seek a claims bill from the Legislature, which can grant monetary relief even when the State is not legally obligated to do so. Claims bills are acknowledged by §768.28(5), which provides judgment amounts exceeding the statutory caps "may be paid ... only by further act of the Legislature."

In Gamble v. Wells, 450 So.2d 850 (Fla. 1984), a child in custody of HRS' predecessor agency sustained crippling and disfiguring injuries due to the agency's negligence. The child's attorney "decided that the only possible means available for recovery would be a private relief act." *Id.* at 852. Ultimately, the Legislature enacted ch. 80-448, Laws of Florida, and granted the child $150,000.[6] Describing the award, this Court said:

> This voluntary recognition of its moral obligation by the legislature in this instance was based on its view of justice and fair treatment of one who had suffered at the hands of the state but who was legally remediless to seek damages.

Id. at 853. The child in Gamble did not obtain a judgment first. Holding S.A.P. is without legal remedy does not mean she is without relief based on fairness.

CONCLUSION

The certified question, re-phrased as HRS suggests, must be answered in the negative. S.A.P.'s reliance on equitable estoppel

[6]The legal dispute was whether the child's attorney was entitled to $50,000 in fees pursuant to contract with the child's guardian, or $10,000 as provided in the act. This Court upheld the lower amount as a matter of legislative grace not subject to a private contract. *Id.* at 853.

and delayed accrual to preserve her lawsuit must also be rejected. 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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CERTIFICATE OF SERVICE

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 March, 2000.

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