

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, DEPARTMENT)
OF HEALTH AND REHABILITATIVE)
SERVICES,)
) **Fla. S.Ct. Case No. 00-105**
Petitioner,)
)
v.) **1st DCA Case No. 96-2375**
)
S.A.P.,)
)
Respondent.)
_____)

**BRIEF OF THE SOLICITOR GENERAL
ON BEHALF OF THE STATE OF FLORIDA, *AMICUS CURIAE***

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

THOMAS E. WARNER
Solicitor General

T. KENT WETHERELL, II
Deputy Solicitor General

on behalf of

ROBERT A. BUTTERWORTH, Attorney
General, and the State of Florida

The Capitol – PL-01
Tallahassee, FL 32399
(850) 414-3681
(850) 410-2672 (fax)

TABLE OF CONTENTS

Table of Citations ii

Certificate of Type Size and Style iii

Interest of *Amicus Curiae* 1

Preliminary Statement 2

Summary of the Argument 4

Argument

THE STATE’S SOVEREIGN IMMUNITY IS NOT WAIVED FOR

THE FRAUDULENT ACTS OF STATE EMPLOYEES AND

THEREFORE SUCH ACTS CANNOT BE ATTRIBUTED TO

THE STATE FOR ANY

PURPOSE. 5

Conclusion 11

Certificate of Service

TABLE OF CITATIONS

Cases

<i>Dept. of Health and Rehabilitative Svcs. v. B.J.M.,</i> 656 So.2d 906 (Fla. 1995).	2
<i>Dept. of Health and Rehabilitative Svcs. v. Yamuni,</i> 529 So.2d 258 (Fla. 1988).	2
<i>Gilchrist Timber Company v. ITT Rayonier, Inc.,</i> 696 So.2d 334 (Fla. 1997).	8
<i>Federal Insurance Co. v. Southwest Florida Retirement Center, Inc.,</i> 707 So.2d 1119 (Fla. 1998)	3
<i>First Interstate Development Corp. v. Ablanado,</i> 511 So.2d 536 (Fla. 1987)	7
<i>Fulton County Administrator v. Sullivan,</i> 22 Fla. L. Weekly S578 (Fla. Sept. 25, 1997).	2, 9
<i>Fulton County Administrator v. Sullivan,</i> 24 Fla. L. Weekly S557 (Fla. Nov. 24, 1999).	3
<i>Levine v. Dade County School Board,</i> 442 So.2d 210 (Fla. 1983).	5

Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976) 9

Parker v. State of Florida Board of Regents,

724 So.2d 163 (Fla. 1st DCA 1998) 7, 9

Proctor v. Schomberg, 63 So.2d 68 (Fla. 1953) 9

Rupp v. Bryant, 417 So.2d 658 (Fla. 1982) 6

S.A.P. v. Dept. of Health and Rehabilitative Svcs.,

704 So.2d 583 (Fla. 1st DCA 1997) 8, 9

Statutes

FLA. STAT. § 16.01 1

FLA. STAT. § 768.28 passim

FLA. STAT. § 768.28(1) 5

FLA. STAT. § 768.28(9)(a) passim

Laws of Florida

Chapter 73-313 5

Chapter 74-235 5

Florida Constitution

Article IV, section 4(c) 1

Article X, section 13 5

Other Authorities

BLACK’S LAW DICTIONARY (6th ed. 1990) 7

CERTIFICATE OF TYPE STYLE AND SIZE

In compliance with this Court’s Administrative Order dated July 13, 1998, the undersigned certifies that the type size and style used in this brief is 12-point Courier New.

INTEREST OF *AMICUS CURIAE*

The State's interest in this case arises from the implied holding of the court below that the fraudulent acts of state employees can be attributed to the State for purposes of tolling the statute of limitations on claims against the State. The Attorney General, by and through the Solicitor General, appears in this case as *amicus curiae* on behalf of the State to address this issue and to urge the Court to hold that the fraudulent acts of state employees cannot be attributed to the State or its agencies for any purpose.

The implied holding of the court below implicates an issue of statewide importance, namely the integrity of the limited waiver of sovereign immunity in section 768.28, *Florida Statutes* ("F.S."). The Court's decision in this case has the potential to affect not only the Petitioner Department of Health and Rehabilitative Services (hereinafter "Department") but all "state agencies or subdivisions" subject to section 768.28, *F.S.*

The Attorney General is the "chief state legal officer" and is charged with defending tort claims against the State. FLA. CONST. art. IV, §4(c); FLA. STAT. § 16.01 (1999). In this capacity and on behalf of the State as a whole, the Attorney General has a direct interest in preserving the limited scope of the waiver of

sovereign immunity in section 768.28, *F.S.*

PRELIMINARY STATEMENT

In this brief, the Solicitor General focuses only on the implied holding of the court below that, notwithstanding section 768.28(9)(a), *F.S.*, fraudulent acts allegedly committed by public employees may be attributed to "state agencies or subdivisions" such as the Department.¹ The Solicitor General submits that the First District's holding contravenes the State's limited waiver of sovereign immunity and has the potential to subject the State to liability for the fraudulent acts of its employees. Absent the tolling of the statute of limitations, the claim against the Department in this case was untimely.

The Solicitor General joins the Department's suggestion that the Court rephrase and narrow the question certified by the First District to more accurately characterize the circumstances of this case. The Solicitor General also joins the

¹ This brief does not address whether sovereign immunity bars Respondent's negligence claim against the Department. *But see Dept. of Health and Rehabilitative Svcs. v. B.J.M.*, 656 So.2d 906 (Fla. 1995); *Dept. of Health and Rehabilitative Svcs. v. Yamuni*, 529 So.2d 258 (Fla. 1988). Neither the trial court nor the First District reached the issue. As discussed in this brief, however, the issue of the Department's sovereign immunity is inextricably intertwined with the First District's holding that the applicable statute of limitations was tolled based upon alleged fraudulent acts of the Department's employees.

Department's arguments on the merits and urges the Court to answer the rephrased certified question in the negative. *See Fulton County Administrator v. Sullivan*, 22 Fla. L. Weekly S578 (Fla. Sept. 25, 1997) (hereinafter "*Sullivan I*") (fraudulent concealment does not toll the statute of limitations because it is not one of the grounds specifically set forth in section 95.051), *withdrawn on other grounds*, 24 Fla. L. Weekly S557 (Fla. Nov. 24, 1999); *Federal Insurance Co. v. Southwest Florida Retirement Center, Inc.*, 707 So.2d 1119, 1122 (Fla. 1998) (citing *Sullivan I* for the proposition that the Court will not write exceptions into statutes of limitation where the Legislature has not).

SUMMARY OF THE ARGUMENT

The breadth of the question certified by the First District conceals an important threshold issue which the court below implicitly (and incorrectly) determined, i.e., whether alleged fraudulent acts of Department employees are attributable to the Department itself. The Solicitor General is compelled to address this implied holding due to its potential implications on the sovereign immunity of the State, its agencies and subdivisions.

The First District held that the allegations of “fraudulent concealment” in the Second Amended Complaint tolled the statute of limitations for Petitioner’s claim against the Department. To reach this conclusion, the First District necessarily attributed the alleged fraudulent acts and omissions of the Department’s employees to the Department itself. In so doing, the court impermissibly expanded the limited waiver of sovereign immunity in section 768.28, *F.S.*, and effectively deleted paragraph (9)(a) from the statute.

The opinion of the First District, if not overruled, establishes the dangerous precedent that the State, its agencies and subdivisions may be liable for the fraudulent acts of their employees. The Solicitor General submits that such a result contravenes the language and intent of section 768.28, *F.S.*, as well as this Court’s

precedent, and constitutes bad public policy.

ARGUMENT

THE STATE’S SOVEREIGN IMMUNITY IS NOT WAIVED FOR THE FRAUDULENT ACTS OF STATE EMPLOYEES AND THEREFORE SUCH ACTS CANNOT BE ATTRIBUTED TO THE STATE FOR ANY PURPOSE.

The Florida Constitution preserves the State’s sovereign immunity but authorizes the Legislature to make provision “by general law for bringing suit against the state.” FLA. CONST. art. X, § 13. In 1973, the Legislature enacted section 768.28, *F.S.*, which provides a limited waiver of the State’s sovereign immunity. *See* ch. 73-313, § 1, Laws of Fla; *see also* ch. 74-235, § 3, Laws of Fla. (modifying the effective date of section 768.28, *F.S.*). That waiver is not absolute, *see* FLA. STAT. § 768.28(1) (sovereign immunity is waived for torts, “but only to the extent specified in [section 768.28]”); it is limited and must be strictly construed. *See Levine v. Dade County School Board*, 442 So.2d 210, 212 (Fla. 1983).

The State’s sovereign immunity is specifically not waived for torts committed by public employees outside the scope of their 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.” FLA. STAT. §

768.28(9)(a) (1999). The relative extent of sovereign liability versus individual governmental employee liability is set forth in section 768.28(9)(a), *F.S.*, which provides:

No officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage 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. However, such officer, employee, or agent shall be considered an adverse witness in a tort action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function. 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 and willful disregard of human rights, safety, or property.**

Id. (emphasis supplied); *see also Rupp v. Bryant*, 417 So.2d 658 (Fla. 1982).

The operative terms of section 768.28(9)(a), *F.S.* – “bad faith”, “malicious

purpose, “wanton and willful disregard of human rights” – are not specifically defined in statute. However, the general legal standards of “bad faith” and “fraud” and the equitable doctrine of “fraudulent concealment” are well defined.

“‘Bad faith’ and ‘fraud’ are synonymous.” *See* BLACK’S LAW DICTIONARY at 660 (6th ed. 1990). This Court has held the terms to be legally synonymous. For example, in *First Interstate Development Corp. v. Ablanado*, 511 So.2d 536, 539 (Fla. 1987), this Court held that “intentional misconduct is a necessary element of fraud.” This holding has been interpreted to mean that “for fraud to exist, as a matter of law, bad faith must also exist.” *Parker v. State of Florida Board of Regents*, 724 So.2d 163, 168 (Fla. 1st DCA 1998).

Parker involved a claim by a Florida State University (“FSU”) professor against the Florida Board of Regents (“Board”) for fraudulent misrepresentations made by an FSU dean, who is considered an employee of the Board, to the professor. *Id.* at 164-65. The district court in *Parker* affirmed the trial court’s directed verdict for the Board on the fraudulent misrepresentation claim on the basis of sovereign immunity. *Id.* at 167-69. Applying *Ablanado*, the court expressly held that “bad faith must be deemed to be a necessary element of any action for fraud” and, pursuant to section 768.28(9)(a), *F.S.*, the Board is not liable

for the actions of its employees taken in bad faith. *Id.* at 169.

The legal equivalence of fraud and bad faith is self-evident as both involve intentional acts of deception. While it is not wholly illogical to suggest that one could commit fraud in good faith, *see Gilchrist Timber Company v. ITT Rayonier, Inc.*, 696 So.2d 334, 336-37 (Fla. 1997) (distinguishing negligent misrepresentation from intentional misrepresentation), the Second Amended Complaint in this case clearly alleges intentional fraudulent acts and omissions by employees of the Department as the basis for tolling the statute of limitations. *See* Second Amended Complaint at ¶ 13 (“employees of the [Department] obstructed the criminal investigation ...”; “the case worker ... falsified records”) (emphasis supplied); *see also S.A.P. v. Dept. of Health & Rehabilitative Svcs.*, 704 So.2d 583, 585 (Fla. 1st DCA 1997) (quoting Paragraph 13 in its discussion of the issue of fraudulent concealment).

The gravamen of Respondent’s actual claim against the Department, however, is in Paragraphs 9 through 11 of the Second Amended Complaint (specifically Paragraph 10(a)-(d)) which allege negligence by the Department in connection with the provision of foster care services to the Respondent. In essence, the Respondent is attempting to use the alleged fraudulent acts of

Department employees to toll the statute of limitations by attributing them to the Department, but then couching her ultimate claim against the Department as one of negligence to avoid the effect of section 768.28(9)(a), *F.S.* The First District approved this sleight of hand; this Court must not.

The doctrine of fraudulent concealment is grounded in equity and itself presupposes intentional action or inaction involving bad faith. As this Court stated in *Nardone v. Reynolds*, 333 So.2d 25, 36 (Fla. 1976), tolling of the statute of limitations because of fraudulent concealment is based upon the premise that “courts will not protect defendants who are directly responsible for the delays of filing because of their own **willful** acts.” (emphasis supplied). *Accord Sullivan I*, 22 Fla. L. Weekly at S579 (citing *Proctor v. Schomberg*, 63 So.2d 68 (Fla. 1953)).

Since the fraudulent acts of the Department employees are not attributable to the Department for purposes of liability, *see* FLA. STAT. § 768.28(9)(a) (1999); *Parker*, 724 So.2d at 169, it logically follows that such acts cannot be attributed to the Department under the guise of “fraudulent concealment” for purpose of tolling the statute of limitations to resurrect a claim against the Department. To hold otherwise would impermissibly attribute the employees’ fraudulent or bad faith acts

to the Department. Because the opinion below does precisely that, *see S.A.P.*, 704 So.2d at 585, it should be reversed.

Simply put, the fraudulent acts or omissions of public employees are not attributable to, and cannot be the basis for imposing liability on their governmental employer. Such acts fall outside of the limited waiver of sovereign immunity in section 768.28, *F.S.* The implied holding of the First District that such acts may be attributed to the Department must be reversed to preserve the Department's sovereign immunity and to give full effect to paragraph (9)(a) of section 768.28, *F.S.*

Sound public policy requires governmental liability to be imposed sparingly and only in situations where the alleged tortious act occurred in the good faith conduct of the public business. Where the tortious act allegedly occurred as a result of fraudulent, deceptive, illegal or otherwise bad faith acts of public employees, it is inappropriate to impose liability on their employer, the public entity. In such cases, liability and relief lies where equity, logic and the Legislature dictate – with the employee tortfeasor. *See* FLA. STAT. § 768.28(9)(a) (1999).

CONCLUSION

For the foregoing reasons of law and policy, the Solicitor General respectfully requests this Court to answer the certified question, as rephrased and narrowed, in the negative and to reverse the decision of the First District.

THOMAS E. WARNER (Fla. Bar #176725)
Solicitor General

T. KENT WETHERELL, II (Fla. Bar #060208)
Deputy Solicitor General

on behalf of

ROBERT A. BUTTERWORTH, Attorney
General, and the State of Florida

The Capitol – PL-01
Tallahassee, FL 32399
(850) 414-3681
(850) 410-2672 (fax)

CERTIFICATE OF SERVICE

I certify that on this ____ day of February, 2000, a true and correct copy of this brief was provided by **hand delivery** to Charlie McCoy, Assistant Attorney General, Collins Building, Room 424-F (counsel for Petitioner), and a true and correct copy of this brief was provided by **U.S. Mail** to Jay C. Howell, Anderson & Powell, 2029 North Third Street, Jacksonville Beach, Florida 32250-7429 (counsel for Respondent).

Attorney