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IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,522

FILED
1983
CLERK, SUPREME COURT
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MAURICE SKOBLOW,

Petitioner,

vs.

AMERI-MANAGE, INC., ROBERT A. BURTON, JOHN PITRELLI, ELSA DOMINGUEZ, BARBARA McMURTREY, JACKIE DALE and PAUL UHRIG,

Respondents.

RESPONDENTS' ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

The Respondents accept Petitioners Statement of the Case and Facts. The only party affected by this Court's present review is the Respondent Ameri-Manage, Inc., which the Third District Court of Appeal in Skoblow v. Ameri-Manage, Inc., 483 So.2d 809 (Fla. App. 3 Dist. 1986), determined, as an agency of the state, was immune from suit brought pursuant to 42 U.S.C. s. 1983. The other defendants in the trial court below were sued under a defamation count. Defendant, Robert A. Burton, is not a party to the present appellate proceedings.

SUMMARY OF ARGUMENT

The State of Florida is immune from suit for civil rights violations brought pursuant to 42 U.S.C. s. 1983. This case involves the sovereign immunity of the state and the nature of the relationship of the state to the federal government under our republican form of government.

At the time the Union was created the several then existing states enjoyed a traditional common-law sovereign immunity from suit. Other states, upon attaining statehood, are entitled to immunity as an attribute of their sovereignty. The Eleventh Amendment to the United States Constitution made this sovereign immunity applicable to suits against states brought in federal court. Florida did not abrogate its sovereign immunity upon joining the Union in 1845. Congress has not abrogated the states' sovereign immunity pursuant to any constitutionally authorized power, nor has the State of Florida waived its sovereign immunity for violations of civil rights whether brought in federal or state court.

The state's limited waiver of sovereign immunity for traditional common law torts does not encompass violations of constitutional civil rights. Therefore, there is no basis for finding that the State of Florida is subject to suit for civil rights violations brought pursuant to 42 U.S.C. s. 1983.

ARGUMENT

The several states of the United States possess those powers of sovereignty not granted to the federal government exclusively by the United States Constitution, prohibited by that document to the states, or reserved to the people. See, 2 Antieau, Modern Constitutional Law s. 10:1 (1969). In Parker v. Brown, 317 U.S. 341, 359-360, 87 L.Ed. 315, 63 S.Ct. 307 (1943), the United States Supreme Court stated:

> The governments of the States are sovereign within their territories save only as they are subject to the prohibition of the Constitution as their action in some measure conflicts with powers delegated to the National Government, or with Congressional legislation enacted in the exercise of those powers.

One important aspect of this sovereignty is that the states are generally not subject to suit. In 1793, the United States Supreme Court, relying on the language in Article III, section 2 of the Constitution which provides that the federal judicial power extends, among other things, to controversies "between a State and Citizens of another State," assumed original jurisdiction over a suit brought by a citizen of South Carolina against the State of Georgia. Chisholm v. Georgia, 2 Dall. 419, 1 L.Ed. 440 (1793). This decision caused a cry of consternation and overwhelming opposition which soon resulted in the adoption of the Eleventh Amendment. This Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

While the plain and clear language of the Eleventh Amendment does not apply to suits against a State brought by one of its own citizens, the United States Supreme Court has extended the application of the immunity to such suits. As stated in Pennhurst State School & Hospital v. Holderman, 104 S.Ct. 900, 906 (1984): "The Amendment's language overruled the particular result in Chisholm, but this Court has recognized that its greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III." (e.s.) See also, Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890) (federal jurisdiction over suits against nonconsenting states not contemplated by the Constitution.) The principle of sovereign immunity underlies the Eleventh Amendment and is a constitutional limitation on the federal judicial power:

> That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given; not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification." (e.s.)

Ex parte State of New York No.1, 256 U.S. 490, 497, 41 S.Ct. 588, 589, 65 L.Ed. 1057 (1921).

The emphasized language of the above Supreme Court decisions is important because it illustrates the Court's awareness that

the Eleventh Amendment is but an exemplification of the fundamental principle of sovereign immunity, a Constitutional codification of the principle. This conclusion is compelling when the Court's ruling are analyzed since the clear language of the Eleventh Amendment does not apply to suits brought by a citizen against his own State. Thus, even in the absence of the Eleventh Amendment the conclusion would be the same, and under modern constitutional law the case of Chisholm v. Georgia, supra, would be overruled. A state is not amenable to suit brought by a citizen of that state whether in federal or state court because of the state's sovereign immunity.

Respondent agrees that the Eleventh Amendment does not bar an action brought in state court under 42 U.S.C. s. 1983. See Petitioner's Brief at 4-5. This is not an issue. The Eleventh Amendment is not applicable to a suit based upon a federal statute brought in state court because the Eleventh Amendment is a constitutional limitation on the federal judicial power. Petitioner fails to understand that the issue is not simply one of jurisdiction, but of sovereign immunity. A state is entitled as an attribute of sovereignty to immunity from suit in the absence of abrogation or waiver of that sovereign immunity.

I

A state's sovereign immunity from suit under our form of federal government can be waived in two ways for a civil rights cause of action. A state may waive its immunity and consent to suit against it in federal or state court. See, e.g., Clark v. Barnard, 108 U.S. 436, 2 S.Ct. 878, 27 L.Ed. 780 (1883). A

state's consent to be sued must be unequivocally expressed. See, Edelman v. Jordan, 415 U.S. 651, 673, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); Manatee County v. Town of Longboat Key, 365 So.2d 143, 147 (Fla. 1978); Spangler v. Florida State Turnpike Authority, 106 So.2d 421 (Fla. 1958). Secondly, Congress has the power with respect to the rights protected by the Fourteenth Amendment to abrogate the state's sovereign immunity. See, Fitzpatrick v. Bitzer, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976). If Congress has expressed an intent to abrogate the states' sovereign immunity suit could be brought under a federal statute either in federal court or state court. The question is whether Congress has expressed an intent to abrogate the states' sovereign immunity for suits brought pursuant to 42 U.S.C. s. 1983.

A

The United States Supreme Court in a series of judicial decisions has explored the parameters of the state's sovereign immunity as constitutionally guaranteed by the Eleventh Amendment. Section One of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

> without due process of law; nor deny
> to any person within its jurisdiction
> the equal protection of the laws.

Section Five of the Fourteenth Amendment declares: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." This implementing language vests Congress with the power where unequivocally expressed to "overturn the constitutionally guaranteed immunity of the several States." Quern v. Jordan, 440 U.S. 332, 342, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979)). Pursuant to this grant of authority Congress has enacted a series of Federal Civil Rights Acts. In 1871, Congress enacted an act now codified as 42 U.S.C. s. 1983, which, in pertinent part, provides:

> Every person who, under color of any
> statute, ordinance, regulation, custom,
> or usage, of any State or Territory
> of the District of Columbia, subjects,
> or causes to be subjected, any citizen
> of the United States or other person
> within the jurisdiction thereof to the
> deprivation of any rights, privileges,
> or immunities secured by the Constitution
> and laws, shall be liable to the party
> injured in an action at law, suit in
> equity, or other proper proceeding for
> redress.

This federal statute, giving a right of action against a person who, under color of state law, custom, or usage, subjects another to deprivation of any rights, privileges, or immunities secured by the Federal Constitution, has several purposes: (1) it overrides certain kinds of state laws; (2) it provides a remedy where state law is inadequate; and (3) it provides a federal remedy where a state remedy, though adequate in theory, is not available in practice. Monroe v. Pape, 365 U.S. 167, 5 L.Ed.2d 492, 81 S.Ct. 473 (1961).

The issue of whether the states and other governmental entities are subject to suit under 42 U.S.C. s. 1983 has been addressed by the Supreme Court in a number of decisions. In Monroe v. Pape, supra, at the Court concluded 5 L.Ed.2d 507, that a municipality was not a "person" within the meaning of s. 1983. Subsequently, the Court reversed itself as to the applicability of the act to municipal corporations in Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), concluding that Congress did not intend to exclude municipal corporations from the coverage of the act. The Court did not, however, address the question of the act's applicability to states in Monell. Earlier, however, on the Supreme Court in Edelman v. Jordan, supra, had reaffirmed the rule that had evolved that a suit in federal court by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. The Monell decision appeared to cast some doubt on the Supreme Court's position as to the applicability of 42 U.S.C. s. 1983 to the states.

Any such doubts were laid to rest in Quern v. Jordan, 440 U.S. 332, 39 L.Ed.2d 358, 99 S.Ct. 1139 (1979). The Court held that Congress in 1871, in adopting a provision which is now section 1983, did not intend to subject the states to liability under the act, since such liability would have deprived them of the immunity from suits in federal courts which is guaranteed by the Eleventh Amendment to the United States Constitution. See also, Alabama v. Pugh, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d

1174 (1978); Hutto v. Finney, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978); Milliken v. Bradley, 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977); Fitzpatrick v. Bitzer, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976). In Alabama v. Pugh, the Court held that the State of Alabama could not be joined as a defendant without violating the proscriptions of Eleventh Amendment, even though the complaint was brought pursuant to 42 U.S.C. s. 1983 and the claim was based upon alleged violations of the Eighth and Fourteenth Amendments.

B

Petitioner, however, contends that a state can be sued in state court under 42 U.S.C. s. 1983 because the Eleventh Amendment is not applicable to a suit brought in state court. Presumably the basis for this position is some sort of reliance on the Supremacy Clause. Article VI to the Federal Constitution, in relevant part, provides:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

State courts of general jurisdiction would appear to have concurrent jurisdiction to hear a claim brought pursuant to 42 U.S.C. s. 1983. See, Martinez v. California, 444 U.S. 277, 62 L.Ed.2d 481, 100 S.Ct. 553, 558 N.7. (1980) wherein the Supreme Court noted that California's acceptance of jurisdiction over a federal claim under 42 U.S.C. s. 1983 appeared to be consistent

with the general rule that where

> "an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court." Testa v. Katt, 330 U.S. 386, 391, 67 S.Ct. 810, 813, 91 L.Ed. 967, quoting Claflin v. Houseman, 93 U.S. 130, 137, 23 L.Ed. 833.

Thus, if Congress enacted a law pursuant to its Constitutional powers which included the states within its application, then a claim brought under the act in state court would not be barred against the state by sovereign immunity because Congress had Constitutionally abrogated the states' sovereign immunity and under the Supremacy Clause the state courts would be bound thereby. However, the sine qua non to the viability of a suit against a state brought pursuant to a federal statute is a clear and unequivocal expression of Congress' intent to abrogate the states' sovereign immunity. A claim brought pursuant to 42 U.S.C. s. 1983 would be applicable to a state notwithstanding its sovereign immunity if Congress has clearly and unequivocally expressed an intent to abrogate the states' sovereign immunity and made the state a "person" for purposes of 42 U.S.C. s. 1983. The United States Supreme Court has resolved this issue.

In Quern v. Jordan, supra the Supreme Court determined that Congress had not expressed an intent to override the states' traditional sovereign immunity and that states were not "persons" for purposes of 42 U.S.C. s. 1983. As the Court stated:

> Given the importance of the States' traditional sovereign immunity, if

> in fact the members of the 42d Congress believed that s. 1 of the 1871 Act overrode that immunity, surely these would have been lengthy debate on this point and it would have been paraded out by the opponents of the Act along with the other evils that they thought would result from the Act. (e.s.)

Quern at 343.

The Court here is talking about the States' traditional sovereign immunity not merely the Eleventh Amendment immunity. Justice Brennan, in dissent, stated that the Court concludes, "in what is patently dicta, that a State is not a `person' for purposes of 42 U.S.C. s. 1983, Rev.Stat. s. 1979." Id. 440 U.S. at 350. However, as the majority opinion pointed out in response to Justice Brennan's assertion that the Court's ruling as "patently dicta:"

> Mr. Justice BRENNAN's opinion characterizes this conclusion [that Congress did not by the general language of s. 1983 to override the traditional sovereign immunity of the States] as "gratuitous" and "paten[t] dicta." Post, at 1150. But we cannot think of a more "gratuitous" or useless exercise of this Court's discretionary jurisdiciton than to decide which of two conflicting interpretations of Edelman v. Jordan is correct, if in truth we believed that Edelman itself no longer were valid. The question does not arise out of the blue; it was extensively discussed in our brother BRENNAN's concurrence in Hutto v. Finney last Term. We therefore fail to see how our reaffirmance of Edelman can be characterized as "dicta." (e.s.)

Therefore, Petitioner's assertion that a state is subject to suit in state court under 42 U.S.C. s. 1983 simply because the Eleventh Amendment does not apply is erroneous. The State's sovereign immunity still bars the action since as the Supreme Court has ruled, Congress has not expressed an intent to abrogate

the states' sovereign immunity for an action brought pursuant to 42 U.S.C. s. 1983.

Petitioner's reliance on Maine v. Thiboutot, 448 U.S. 1, 65 L.Ed.2d 555, 100 S.Ct. 2502 (1980) is ill-founded. The issue before the Court in Maine was whether attorney's fees under 42 U.S.C. s. 1988 may be awarded to the prevailing party for a claim based on violations of federal statutory law. The issue of the state's sovereign immunity from actions brought pursuant to 42 U.S.C. s. 1983 was not before the Court. The decision in Maine was consistant with the Court's position that attorney's fees under 42 U.S.C. s. 1988 are awardable against the states. The ratio decidendi for this conclusion was that Congress had clearly and unequivocally expressed an intent to abrogate the states' constitutionally protected sovereign immunity for attorney's fees under 42 U.S.C. s. 1988. See, Hutto v. Finney, 437 U.S. 678, 57 L.Ed.2d 522, 98 S.Ct. 2565 (1978) in which the Court held that in enacting the Civil Rights Act of 1976, 42 U.S.C. s. 1988, Congress intended to override the Eleventh Amendment immunity of the States and authorize fee awards payable by the States when their officials are sued in their official capacities.

Likewise Petitioner's reliance on Fitzpatrick v. Bitzer, 519 F.2d 559 (2d Cir. 1975) is ill-placed since Fitzpatrick involved a constructon of Title VII of the 1964 Act, 42 U.S.C. s. 2000e et seq., and is therefore totally irrelevant to the issue before this Court. See, Petitioner's Brief at 6.

C

The second way by which the state's sovereign immunity may

be waived is when the State Legislature has clearly and unequivocally expressed its intent to waive the state's sovereign immunity to civil rights suits brought pursuant to 42 U.S.C. s. 1983. Manatee County v. Town of Longboat Key, 365 So.2d 143 (Fla. 1978); Spangler v. Florida State Turnpike Authority, 106 So.2d 421 (Fla. 1958).

Petitioner cites no case law nor does he provide any analysis as to how the Legislature has expressed its intent to waive sovereign immunity for civil rights claims. While this issue is one of first impression before this court, the federal courts reviewing Florida law have concluded that Florida has not waived its sovereign immunity. See, Gamble v. Florida Dept. of Health & Rehab. Services, 779 F.2d 1509 (11th Cir. 1986); Ostroff v. Florida Dept. of Health & Rehab. Services, 554 F.Supp. 347 (M.D. Fla. 1983); Shinholster v. Graham, 527 F. Supp. 1318 (N.D. Fla. 1981). Contra, Meeker v. Addison, 586 F. Supp. 216 (S.D. Fla. 1984) (overruled by the 11th Circuit in Gamble). Although the Court of Appeals in Gamble reviewed Florida's statutes from the perspective of the Eleventh Amendment, it is clear from a reading of the decision that the court was looking for state legislative intent to waive the state's sovereign immunity. See, Gamble at 1515 wherein the federal court of appeals stated that from the language of s. 768.28, F.S., "the Florida legislature gave a strong indication that it did not intend to waive its immunity to civil rights actions."

An examination of the Florida Statutes relevant to the waiver issue does not reveal a legislative intent to waive the State's sovereign immunity for civil rights claims. The State of

Florida pursuant to Section 768.28, Florida Statutes, has waived its sovereign immunity for traditional tort actions for prescribed purposes and subject to certain procedural requirements and monetary recovery limitations. This waiver does not include civil rights suits. Section 768.28(1), F.S., provides:

> In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act. Any such action may be brought in the county where the property in litigation is located or, if the affected agency or subdivision has an office in such county for the transaction of its customary business, where the cause of action accrued.

This statute is not a waiver of Florida's sovereign immunity from suits brought pursuant to 42 U.S.C. s. 1983 to recover damages for alleged civil rights violations. Section 768.28, F.S., is a limited abrogation of Florida's immunity; the waiver is limited to traditional torts in circumstances in which the state would be liable if it were a private person. In subsection (5) of s. 768.28, by declaring that "[t]he state and its agencies and subdivisions shall be liable for tort claims in the same manner

and to the same extent as a private individual under like circumstances," the Florida Legislature has clearly stated that it did not intend to waive Florida's immunity to civil rights actions. By analogizing to suits permitted against "private individuals," the Legislature has expressed an intent to create a limited sovereign liability for acts or omissions solely within the scope of traditional tort law.

This Court in construing the provisions of s. 768.28, F.S., has stated:

> [F]or there to be governmental tort liability, there must be either an underlying common law or statutory duty of care with respect to the alleged negligent conduct.

Trianon Park Condominuim v. City of Hialeah, 468 So.2d 912, 917 (Fla. 1985). The Court in Trianon at 917 went on to state:

> [I]t is important to recognize that the enactment of the statute waiving sovereign immunity did not establish any new duty of care for governmental entities. The statute's sole purpose was to waive that immunity which prevented recovery for breaches of existing common law duties of care. Section 768.28 provides that governmental entities "shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances." This effectively means that the identical existing duties for private persons apply to governmental entities. (e.s.)

The statute provides that the state or its agencies may be held liable "in accordance with the general laws of this state . . . subject to the limitations specified in this act." Section 768.28(1). As the United State Court of Appeals, Eleventh Circuit in Gamble v. Florida Dept. of Health & Rehab.

Services, supra, at 1515 stated: "This is an explicit indication that the substantive law governing actions under s. 768.28 is state law, not federal law as is the case of an action brought pursuant to s. 1983." If the State of Florida has waived its sovereign immunity for federal civil rights claims, then none of the limitations and procedures specified in s. 768.28, F.S., would be applicable to such cause of action. The claimant would not have to comply with the notice requirements of the statute; the monetary limitations would not be applicable to such a claim; he would be entitled to punitive damages against the state, even though prohibited by subsection (5) of the statute; nor would any of the state law defenses be applicable to such action. In this regard, see Petitioner's Brief, p. 1, note 1.

Further evidence of the Legislature's intent to waive the state's sovereign immunity only for traditional common-law torts is contained in subsection (9)(a) of the statute, which, in pertinent parts, 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 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.

This provision operates to immunize state officers and employees acting in the scope of their employment or function. If the Legislature had intended to waive the state's sovereign immunity for civil rights claims, it was precluded from immunizing of state officers and employees under applicable

federal provisions of law. See, Martinez v. California, 444 U.S. 277, 100 S.Ct. 553 (1980). Such conclusion would make an effort to harmonize the various provisions of s. 768.28 impossible if the statute is read as a waiver of the state's sovereign immunity for civil rights actions.

In Shinholster v. Graham, 527 F.Supp. 1318, 1331-1332 (N.D. Fla. 1981), the federal district court addressing the issue of whether the State of Florida had waived its immunity for suits brought pursuant to 42 U.S.C. s. 1983 concluded:

> After exhaustive examination of the applicable Florida Statutes and their legislative histories, the undersigned must conclude that the State of Florida has not statutorily waived its Eleventh Amendment immunity for itself, nor for any arms of the state, nor for its officers, employees or agents sued in their official capacities.

Although this conclusion was couched in terms of the Eleventh Amendment because the claim was brought in federal court, the district court made it clear that it was addressing the issue of the state's sovereign immunity:

> [T]he Florida legislature's intent to limit the waiver of sovereign immunity solely to tort claims and to the exclusion of federal civil rights suit is abundantly clear.

Finally, while the federal courts sometimes loosely refer to a federal civil rights action under 42 U.S.C. s. 1983 as a "constitutional tort" it is clear that the two types of action are entirely different. See, e.g., Gamble v. Florida Dept. of Health & Rehab. Services, supra, at 1515, concluding:

> We agree with HRS, therefore, that s. 768.28, F.S., when viewed alone, was intended to render the state and its agencies liable for damages for traditional torts under state law, but to exclude such liability for "constitutional torts."

II

Petitioner, however, does not argue that the State has waived its sovereign immunity. Rather his position is that the state's sovereign immunity simply does not apply to a cause of action brought pursuant to 42 U.S.C. s. 1983 in state court. The proposition that a state can be sued without its consent under a federal statute in the absence of any congressional intent to abrogate the states' sovereign immunity is a novel proposition and unsupportable. Petitioner's unarticulated theory that the State of Florida should be subject to suit under 42 U.S.C. s. 1983 because it is a good thing, would appear to be some sort of plea for equity. See Petitioner's Brief, p. 11. This theory has absolutely no legal basis - constitutional, statutory or judicial - and should be firmly rejected by this Court. Petitioner cannot point to any judicial decision for the proposition that the state's sovereign immunity from suit does not apply to civil rights violations.

Petitioner relies primarily upon State Road Department of Florida v. Tharp, 1 So.2d 868 (1941) and its progeny for his unsupportable self-serving proposition. Such reliance is unfounded. Tharp and related cases involved the concept of property taking and the government's obligation to compensate for such taking whether under eminent domain or pursuant to an inverse condemenation proceeding.

A traditional right or attribute of sovereignty is the power of eminent domain, and American constitutional law has always recognized that the several states possess this power. See,

Antieau, Modern Constitutional Law, s. 10:2 (1969); 26 Am.Jur. 2d Eminent Domain s. 2 (the power to appropriate private property for public use is an attribute of sovereignty and is essential to the existence of government); 21 Fla.Jur.2d Eminent Domain s. 1. As stated by the United States Supreme Court in Cincinnati v. Louisville & N.R. Co., 223 U.S. 390, 56 L.Ed. 481, 483, 32 S.Ct. 267 (1912):

> The right of every state to authorize the appropriation of every description of property for a public use is one of those inherent powers which belong to state governments without which they could not well perform their great functions . . . . This right of appropriating private property to a public use is one of the powers vital to the public welfare of every self-governing community. It is a power which this court has described as an 'incident to sovereignty;' a power which 'belongs to very independent government.'

And see, Daniels v. State Road Dept., 170 So.2d 846 (Fla. 1964) (eminent domain like the police power is inherent attribute of sovereignty to be exercised in case of public exigency for public good); Slavens v. Duval County, 73 So.2d 684 (Fla. 1954) (power of eminant domain is not granted to state, but is reserved as an attribute of sovereignty, and it may be exercised in any manner state sees fit, so long as constitutional restraints are not violated).

The corollary to this power of eminent domain or constitutional restraint on the exercise thereof is that private property shall not be taken without just compensation. This constitutional protection of private property rights what the issue that concerned the Tharp court. In Tharp, the Court determined that actions of the State Road Department in building

a bridge and maintenance of fill damaged the use of a mill to the extent that it amounted to a taking of the mill owner's property for the benefit of the public without just compensation. As pointed out in an excellent analysis of Tharp the First District Court of Appeal in Department of Transportation v. Burnette, 384 So.2d 916 (Fla. 1st D.C.S. 1980) stated: "The inverse condemnation remedy for unconstitutional 'takings' has been broadened over the years by pressures for relief against State-caused damage or impairment of land use." Thus, an inverse condemnation remedy has been judicially constructed to provide the necessary reciprocal ingredient to the relationship between the state and private property owners where the state has not directly sought to condemn private property but whose action in effect constitutes a taking. While an important exception to the general sovereign immunity of the state, the inverse condemnation remedy provides no precedent to the wholesale erosion of the fundamental principle. Petitioner's conclusion that because "[i]t would be unfair to limit Tharp to property takings . . . , the state has no traditional immunity from suit in its own courts for violations of its citizen's [sic] rights" is nothing more than a call for judicial legislation which should be rejected by this Court.

What Petitioner is really asking this Court to do is to declare that the state's sovereign immunity is not applicable to claims alleging violations of an individual's civil rights.

It is clear that under the Constitution of Florida, any waiver of the state's sovereignty must be "made by general law." Article X, Section 13, State Const.

For violations of traditional torts, the State Legislature, by general law, has enacted a limited waiver of the state's sovereign immunity. Section 768.28, F.S., establishes certain procedures (consistent with important considerations of risk management and settlement negotiations) for filing claims and establishes limits for the total amount of liability types of damages. However, the statute makes it clear that "[t]he 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 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." Section 768.28(9)(a). Thus, the Legislature has established a distinction between torts caused by the negligent or wrongful act or omission of any employee while acting within the scope of his office or employment and 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. The state assumes liability for the former, while properly refusing responsibility for the latter.

Citizens of the State are not without recourse for violations of their civil rights committed by state officers and employees. The civil rights statute, 42 U.S.C. s. 1983 permits suits against the individuals in their personal capacity who commit constitutional deprivations. Further, a citizen has the right to prospective injunctive relief to halt any violations of his civil rights caused by state officers or employees. Also he has the right to monetary damages for any past constitutional

deprivations against the individual committing the violation under 42 U.S.C. s. 1983. Additionally, the state is responsible for payment of attorney's fees when an award is made against an officer or employee of the state in his official capacity. Hutto v. Finney, supra.

Why then is Petitioner seeking to have this Court judicially waive the state's sovereign immunity? Petitioner is seeking punitive damages from the state which present state law prohibits. Furthermore, all of the procedural requirements, substantive state law, and monetary limitations established by the State Legislature in s. 768.28, F.S., would not be applicable to such actions. The Florida Legislature has made provision for payment of final judgments rendered against any officer, employee, or agent in a civil rights law suit as a result of any act or omission under color of state law, custom, or usage. Section 111.071, F.S. However, the statute makes it clear that "payments for the full amount of the judgment may be made unless the officer, employee, or agent has been determined in the final judgment to have caused the harm intentionally." This limitation prohibits payment for punitive damages awards where the court has found that the defendant acted willfully or intentionally. See, Lee v. Southern Home Sites Corp., 429 F.2d 290 (5th Cir. 1970) for a discussion of the applicable standard for imposition of punitive damages.

This Court should be fully apprised of the consequences of a decision which determines that the state's sovereign immunity is not applicable to an action brought pursuant to 42 U.S.C.

s. 1983: the procedures specified in s. 768.28, F.S., would not be applicable to such suits; there would be no monetary limitations on the damage awards against the state; punitive damages would be awardable against the state; and substantive principles of state law, such as pertinent state law immunities, would not be applicable to a suit brought pursuant to 42 U.S.C. s. 1983.

CONCLUSION

For the foregoing reasons, Respondents respectfully request this Court to hold that the state and its agencies have sovereign immunity from suit brought pursuant to 42 U.S.C. s. 1983 in state court, and to affirm the decision of the Third District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 2nd day of September, 1986 to: all counsel on the attached list.

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