IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,522

MAURICE SKOBLOW,

Petitioner,

v.

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

Respondents.

PETITIONER'S BRIEF

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STATEMENT OF THE CASE AND FACTS

This is a proceeding to review a decision of the Third District Court of Appeal which construed provisions of the state and federal constitution. The relevant facts are contained in the opinion of the district court. The only issue addressed here is whether the state and its agencies are immune from suit in state court under 42 U.S.C. § 1983, whether through the eleventh amendment to the United States Constitution or through some traditional common law immunity. No other issues will be presented.

SUMMARY OF ARGUMENT

This brief addresses the issue of whether the state is immune from suit in its own courts for claims arising under the federal civil rights act, 42 U.S.C. § 1983. The Third District Court of Appeal held that the state was immune under the eleventh amendment to the United States Constitution and that the state was immune under traditional common law principles. This Court should reject both conclusions.

First, this Court should find that the eleventh amendment does not apply to state court. It is solely a limit on the article III jurisdiction of the federal courts. Both the plain language of the amendment which refers only to the "judicial power of the United States" and the simple statements in the few cases which have discussed the issue compel this conclusion.

Second, the state is not entitled to traditional common law immunity from suit for violations of the constitution. There is a well established exception to immunity in Florida. The state may be sued, without regard to immunity, where it violates the constitutional rights of its citizens. 42 U.S.C. § 1983 provides a remedy for such constitutional violations. A federal civil rights action therefore can be brought in state court.

ARGUMENT

This brief addresses only the federal constitutional and common law immunity issues and concludes that no immunity precludes an action under 42 U.S.C. § 1983 in state court against the state or its agencies. It does not address the Third District's additional holding that the State of Florida has not waived its immunity.[1/]

[1/] This Court should note, however, that if it reaches the waiver issue, that issue contains two aspects. First, has there been a waiver of eleventh amendment immunity? Since that amendment only affects federal jurisdiction, see argument I, infra, and since that issue has already been addressed in federal court, this Court need not answer the question other than to adopt federal law. Gamble v. Dep't of Health and Rehabilitative Serv., 779 F.2d 1509 (11th Cir. 1986)("[T]he Eleventh Amendment is an absolute bar to suit by an individual against a state or its agencies in federal court"; Florida has not waived its immunity from suit in federal court); Terrell v. United States, 783 F.2d 1562, 1564-65 (11th Cir. 1986)("[A]lthough Florida has waived its immunity from tort actions filed in state court, Florida has not waived its immunity from tort suits in federal fora."). The only waiver issue which need be addressed is whether § 768.28 waived state common law immunity for civil rights suits in state court. This Court should find such a waiver. A claim under § 1983 is a tort. It is simply a constitutional tort. Owen v. City of Independence, Missouri, 445 U.S. 622, 635, 100 S.Ct. 1398, 1407 (1980), quoting Imbler v. Pachtman, 424 U.S. 409, 417, 96 S.Ct. 984, 988 (1976)("By its terms, § 1983 'creates a species of tort liability that on its face admits of no immunities'").

In addition, if this Court finds a waiver, it should not apply the limitations of § 768.28 to a federal civil rights claim. A state immunity statute cannot control a claim under § 1983 even though it is filed in state court. Martinez v. California, 444 U.S. 277, 282, 100 S.Ct. 553, 558 & n.8 (1980)("A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced"); Bach v. County of Butte, 147 Cal.App.3d 554, 195 Cal.Rptr. 268, 272 (Ct. App. 1983). See also Overman v. Klein, 654 P.2d 888, 891-92 (Idaho 1982)(notice of claim requirements of state statute inapplicable to § 1983 action filed in state court).

I. THE ELEVENTH AMENDMENT DOES NOT BAR A CIVIL RIGHTS ACTION FILED IN STATE COURT BECAUSE THE AMENDMENT ONLY LIMITS JURISDICTION OF THE FEDERAL COURTS.

Several decisions of district courts of appeal in this state, in addition to the decision under review here, have concluded that the immunity provided by the eleventh amendment to the federal constitution bars suits for damages brought against the state or its agencies in state court pursuant to the federal civil rights act. Dep't of Corrections, State of Florida v. Hill, 11 F.L.W. 1070 (Fla. 3d DCA May 6, 1986), rev. pending case no. 69,016; Spooner v. Dep't of Corrections, 11 F.L.W. 1157 (Fla. 1st DCA May 19, 1986), rev. granted, case no. 68,932; Arney v. Dep't of Nat. Resources, 448 So.2d 1041 (Fla. 1st DCA 1984). This Court should overrule those decisions and reverse the Third District's decision in this case to the extent that it is based on such immunity. The eleventh amendment does not provide such immunity because it is simply a limitation on the article III jurisdiction of the federal courts. Compare Royal Netherlands Steamship Co. v. Garcia, 11 FLW 1167, 1168, n.3 (Fla. 3d DCA, May 20, 1986)(federal courts are courts of limited jurisdiction as delineated in article III; "State courts do not labor under such limitations").

The eleventh amendment prohibits suits for money damages against states in federal court.

> 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.

The amendment is limited to suits brought in federal court. It is inapplicable on its face to suits filed in state court.[2/]

The courts have rarely addressed this precise question of whether the eleventh amendment applies to suits against states in state court. However, the United States Supreme Court has made it clear that a state can be sued in state court under 42 U.S.C. § 1983. Maine v. Thiboutot, 448 U.S. 1, 100 S.Ct. 2502 (1980).[3/] In Maine v. Thiboutot, a plaintiff filed a § 1983 action in state court against the State of Maine. The State of Maine appealed the limited issue of whether it could be responsible for attorney's fees under 42 U.S.C. § 1988, the attorney's fee provision of the civil rights act. The Court held that the state could be liable for such attorney's fees. Then it noted that a state obviously could be sued in state court.

> No Eleventh Amendment question is present, of

2/ There were two primary views of the eleventh amendment at the time it was proposed. Some sponsors of the amendment saw it as simply restoring the limits of article III as originally understood by the framers of the constitution. Others supported the amendment because they were fearful that the states would otherwise be required by the federal courts to pay debts owing to non-citizens. However, each one focused on federal court jurisdiction. Jacobs, The Eleventh Amendment and Sovereign Immunity at 68-69 (1972).

3/ The interpretation of the eleventh amendment, and the determination of any other questions relating to § 1983, are matters of federal law, governed by decisions of the federal courts. State v. Bd. of Control, 93 So.2d 354, 355 (Fla. 1957)(this Court bound by decisions of United States Supreme Court construing acts of Congress and federal constitution).

> course, where an action is brought in a state court since the Amendment, by its terms, restrains only "[t]he Judicial power of the United States."

Id. at 9, n.7, 100 S.Ct. at 2507 n.7. See also Biscoe v. Arlington County, 738 F.2d 1352, 1357, n.2 (D.C.Cir. 1984)("Nevada v. Hall was initially a state court action and therefore did not implicate the Eleventh Amendment, which by its terms applies only to federal courts"); Fitzpatrick v. Bitzer, 519 F.2d 559, 570-71 (2d Cir. 1975)("State courts would have faced no constitutional barrier to granting the retrospective damage relief Congress authorized since they are free from the limitations of the Eleventh Amendment, which restrict only federal judicial power"), mod. on other grounds, 427 U.S. 445, 96 S.Ct. 2666 (1976).

This conclusion is a settled principle. A plaintiff who cannot obtain appropriate relief against a state in federal court can obtain that same relief in state court.

> Because the eleventh amendment is not applicable in state courts, some plaintiffs unable to obtain full relief in federal court have bifurcated their claims and sought retroactive relief in state court. Other plaintiffs have avoided federal courts entirely and have filed all their claims in state courts. Moreover, the use of state courts to raise federal claims is encouraged when parties have viable state law claims that cannot be heard in federal courts.

Steinglass, The Emerging State Court § 1983 Action: A Procedural Review, 38 U.MIA.L.REV. 381, 407 (1984)(footnotes omitted). See also Comment, Avoiding the Eleventh Amendment: A Survey of Es-

cape Devices, 1977 ARIZ.ST.L.J. 625, 629-30, citing Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821)(Marshall, C.J.)(suits begun in state court and later appealed to United States Supreme Court are not within eleventh amendment because amendment only applies to suits "commenced or prosecuted" in federal court). Compare 58 WASH.U.L.Q. 481 (case note on Nevada v. Hall, 440 U.S. 410 (1979), which held that eleventh amendment does not preclude suit against one state in the courts of a sister state; refers to eleventh amendment as "waning doctrine of sovereign immunity").

42 U.S.C. § 1983 permits suits against "persons" who act "under color of law" and deprive citizens of their civil rights. State courts have concurrent jurisdiction over such claims. See Martinez v. California, 444 U.S. 277, 282, n.7, 100 S.Ct. 553, 558, n.7 (1980); Maine v. Thiboutot, supra, 448 U.S. at 3, n.1, 100 S.Ct. at 2503, n.1. Historically, a "person" within the meaning of this statute is a person or entity which Congress intended could be sued. See generally Monell v. Dep't of Social Serv. of the City of New York, 436 U.S. 658, 98 S.Ct. 2018 (1978)(local governments are persons under § 1983). The issue of whether a state is a person under § 1983 has arisen often in federal court where the courts have repeatedly concluded that the state is not a person. E.g., Quern v. Jordan, 440 U.S. 332, 99 S.Ct. 1139 (1979); Cate v. Oldham, 707 F.2d 1176, 1180 (11th Cir. 1983)("[T]he Eleventh Amendment to the United States Constitution prohibits suits in federal court against a state . . ."). However the reason for that conclusion is that the eleventh amend-

ment bars federal court jurisdiction. 440 U.S. at 337, 99 S.Ct. at 1143. See also Arthur v. Florida Dep't of Transp., 587 F.Supp. 974, 975 (S.D.Fla. 1984)(Fla.Stat. § 768.28 was a waiver of immunity for suit "in an 'appropriate forum'", but did not specifically refer to federal court).

These federal decisions rule on federal court jurisdiction and are irrelevant to a determination of whether the eleventh amendment affects state court jurisdiction. However the decision under review here relies on several federal decisions, together with other state court decisions which similarly rely on federal cases. That reliance was misplaced. For example, the Third District here relied in part on the United States Supreme Court decision in Quern v. Jordan, supra.[4/] Quern is clearly limited to federal court jurisdiction. The United States Supreme Court held that a state could not be sued for money damages in federal

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4/ The Third District in fact relied exclusively on federal decisions which interpreted federal court jurisdiction. 483 So.2d at 811-12 & n.1. None of those decisions discussed state court jurisdiction. See e.g., id., citing Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 104 S.Ct. 900 (1984)(sole issue discussed was the eleventh amendment as a bar to federal court jurisdiction). As the court noted in Pennhurst:

> "[b]ecause of the problems of federalism inherent in making one sovereign appear against its will in the courts of the other, a restriction upon the exercise of the federal judicial power has long been considered appropriate in a case such as this."

Id., quoting Employees v. Missouri Pub. Health & Welfare Dep't, 411 U.S. 279, 294, 93 S.Ct. 1614, 1622-23 (1973)(Marshall J., concurring).

court under § 1983. Yet the Quern plaintiffs filed a damage action in state court. They obtained a $522,863.83 judgment there against the state. Peltz v. State, No. 81-CC-1475 (Ill.Ct.Cl. May 12, 1981). See also Steinglass, supra, 38 U.MIA.L.REV. at 407, nn. 117, 118; Ricard v. State, 390 So.2d 882 (La. 1980)(allowing award of compensatory damages under § 1983 against state department of public safety without discussion of immunity issue). Compare Stanton v. Godfrey, 415 N.E.2d 103 (Ind. 1981)(court permitted damage action in state court against Public Welfare Department after separate injunctive action in federal court, reasoning that eleventh amendment barred damages in federal court but not state court).

The federal civil rights act was intended to redress grievances by citizens who had been deprived of their constitutional rights by state action. The action of a department of the state is a classic example of state action. Although the eleventh amendment constitutes a jurisdictional bar to the filing of such a suit in federal court, it has no application to the same suit filed in state court. This Court should conclude that the eleventh amendment does not bar an action filed against the state or its agencies in state court pursuant to 42 U.S.C. § 1983.

II. THE STATE HAS NO TRADITIONAL IMMUNITY FROM SUIT IN ITS OWN COURTS FOR VIOLATIONS OF A CITIZEN'S RIGHTS.

In the alternative to a finding of eleventh amendment immunity, the Third District also found a traditional state common law immunity to bar civil rights cases in state court. That con-

clusion should be rejected. The traditional immunity in this state has never encompassed claims of a constitutional nature such as that presented under § 1983.

Sovereign immunity in Florida has never been absolute. It has always allowed for a small class of damage actions to be brought against the state for compelling public policy reasons. State Road Dep't of Florida v. Tharp, 146 Fla. 745, 1 So.2d 868 (1941). Cf. Pan-Am Tobacco v. State, Dep't of Correction, 425 So.2d 1167, 1170 & n.1 (Fla. 1st DCA 1983)("there are cases in which the doctrine of sovereign immunity may not properly be invoked"); Dep't of Transp. v. Burnette, 384 So.2d 916, 921 (Fla. 1st DCA 1980)(courts historically award damages for state impairment of property use "not to require the State to buy the "taken" land . . . but . . . rather, sovereign immunity notwithstanding, to exact damages . . .").

In Tharp, this Court outlined the circumstances under which sovereign immunity would not relieve the state of responsibility for its improper conduct. Those circumstances include violation of a citizen's constitutional rights.

> Immunity of the State from suit does not afford relief against an unconstitutional statute or against a duty imposed on a State officer by state, nor does it afford a State officer relief for trespassing on the rights of an individual even if he assume to act under legal authority.[5/] It will not relieve the

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5/ It is interesting to compare this language to the language of § 1983 itself:

> State against any illegal act for depriving a citizen of his property; neither will it be permitted as a plea to defeat the record of land or other property wrongfully taken by the State through its officers and held in the name of the State.
>
> Section 22 of Article 3 of the Constitution authorizes provision by general law for bringing suit against the State for all liabilities now or hereafter existing, but it has no application to the case at bar, and if it did, it should be read in connection with Section 4 of the Bill of Rights providing that all courts be open in order that every person may seek redress for injury done to his lands, goods, person, or reputation.

1 So.2d at 869.

A claim under § 1983 for violation of an individual's constitutional rights falls squarely within the immunity exception described in Tharp. It would be unfair to limit Tharp to property takings and at the same time deny relief to persons who suffer the more serious constitutional denials which can be remedied through the award of damages pursuant to § 1983. Therefore, the

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> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction therof 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.

The nature of the conduct addressed in this section and in Tharp is the same: state action (compare "under color of law" with "assume to act under legal authority"). And the nature of the deprivation is substantially the same: an unconstitutional act by that arm of the state which "trespasses" on the rights of an individual.

state has no traditional immunity from suit in its own courts for violations of its citizen's rights.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court to hold that there is no sovereign immunity from suit under 42 U.S.C. § 1983 against the state or its agencies in state court and to reverse 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 6th day of August, 1986 to: all counsel on the attached list.

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