

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.

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PETITIONER'S REPLY BRIEF

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ARGUMENT<sup>1/</sup>

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

Respondent agrees in its brief at 5 that the eleventh amend-  
ment does not bar an action brought in state court under 42  
U.S.C. § 1983.<sup>2/</sup> It then confuses issues and concepts and argues  
that jurisdiction of state or federal court is not the relevant  
issue. The State's arguments are jumbled. It presents an over-  
lapping discussion of unrelated concepts. At most, however, it  
argues only that it is not a "person" under § 1983.<sup>3/</sup> The State

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1/ In addition to the arguments presented here, Petitioner  
adopts and incorporates the arguments presented in the reply  
brief of Petitioner in Spooner v. Dep't of Corrections, case no.  
68,932 consolidated with this case.

2/ The Third District here ruled only on the scope of the immu-  
nity under the eleventh amendment. The Third District held:

Absent an unequivocal expression of intent by  
either the United States Congress to overturn  
a state's eleventh amendment immunity, or a  
state legislature to waive the state's sover-  
eign immunity, a state and its agencies are  
immune from civil rights actions brought  
against them pursuant to section 1983 in both  
federal and state courts.

483 So.2d at 811. The State admits in its brief at 5 that it  
agrees with Petitioner: there is no eleventh amendment immunity  
in state court. Cf. Della Grotta v. State of Rhode Island, 781  
F.2d 343, 346 (1st Cir. 1986) (eleventh amendment waiver must re-  
fer to federal court because amendment is jurisdictional bar  
there). See also Tuveson v. Florida Governor's Council on Indian  
Affairs, 11 F.L.W. 2004, 2006 (Fla. 1st DCA, Sept. 18, 1986).

3/ The Third District said nothing about that issue, an issue of  
statutory interpretation which is entirely distinct from the jur-  
isdictional issue presented by the eleventh amendment. See Della  
(footnote continued)

is incorrect. It is a "person" under 42 U.S.C. § 1983. This Court should reject the State's claim.

In determining whether there is a claim under 42 U.S.C. § 1983, there must be a suit against a "person" who has deprived a citizen of his rights "under color of State law". See Gomez v. Toledo, 446 U.S. 635, 100 S.Ct. 1920 (1980). The issue of whether an entity is a "person" involves an analysis of the legislative history of § 1983. See Monell v. Dep't of Social Serv. of City of New York, 436 U.S. 658, 98 S.Ct. 2018 (1978) (determining that a municipality is a person). The State has always been considered a person under § 1983 whether it is sued in state or federal court. See, e.g., Quern v. Jordan, supra (the underlying assumption of Quern was that injunctive relief might be granted against the state which necessarily was considered a "person" under § 1983); Monell, supra; Della Grotta v. State of Rhode Island, supra, 781 F.2d at 349 and cases cited in n.7. See generally authorities cited in Brief of Amicus Curiae National Emergency Civil Liberties Committee at 11-13.

Portions of Monell discussed the legislative history of § 1 of the Civil Rights Act, § 1983, and those debates make clear that the State was intended to be a person under § 1983. In discussing the intended reach of § 1983, Representative Bingham, author of § 1 of the fourteenth amendment, stated that

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Grotta v. State of Rhode Island, supra, 781 F.2d at 348 & n.6. The reason why the Third District said nothing about the issue which the State now raises here is that no one ever said anything about this issue in the Third District.

the bill's purpose [is] to be "the enforcement . . . of the Constitution on behalf of every individual citizen of the Republic . . . to the extent of the rights guarantied to him by the Constitution."

The States never had the right, though they had the power, to inflict wrongs upon free citizens by a denial of the full protection of the laws . . . [And] the States did deny to citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the State, as I have shown, the citizen had no remedy. . . . They took property without compensation, and he had no remedy.<sup>4/</sup> Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of rights as these are in the States and by States, or combinations of persons?

436 U.S. at 685, n.45, 98 S.Ct. at 2033, n.45.

Any contrary implications proffered in the State's brief are simply incorrect. The State is a person and can be sued under this federal statute. The only issues in this case are "where" and for what kind of relief can the state be sued. The former issue is resolved by the decisions cited in Petitioner's initial brief which demonstrate that the eleventh amendment bar only applies to limit the jurisdiction of the federal courts. The ac-

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<sup>4/</sup> It is interesting to note this remark in the context of a general discussion of constitutional rights and improper takings of property and rights by the State in light of the State's arguments concerning State Road Dep't of Florida v. Tharp, 146 Fla. 745, 1 So.2d 868 (1941), infra. See also Monell, 436 U.S. at 686-87, 98 S.Ct. at 2033-34 (Representative Bingham, who drafted § 1, explained that he had drafted it with a particular case in mind in which a city had taken private property for public use without compensation and there was no redress for the wrong).

tion may be brought in state court.

The final issue then is whether this action can be brought in state court for retrospective relief, i.e., damages.<sup>5/</sup> Since the eleventh amendment does not bar such relief in state court and since there is no other basis offered for barring such relief, this action for damages was properly brought in state court pursuant to 42 U.S.C. § 1983.<sup>6/</sup>

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<sup>5/</sup> This analysis is no novel proposition. The distinctions between the issue of who is a "person", the issue of immunity and the issue of court jurisdiction was alluded to in Quern.

In Edelman we reaffirmed the rule that had evolved in our earlier cases that a suit in federal court by private parties seeking to imposed a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.

Quern, supra id. at 337, 99 S.Ct. at 1143.

As we have noted above, we held in Edelman that in "a [42 U.S.C.] § 1983 action . . . a federal court's remedial power, consistent with the Eleventh Amendment, is necessasrily limited to prospective injunctive relief . . .

Id. at 338, 99 S.C. at 1144.

<sup>6/</sup> The state interjects some discussion of traditional concepts of sovereign immunity, as opposed to eleventh amendment immunity, in a convoluted attempt to argue that some such principle could limit the federal civil rights act. The only manner in which such an immunity concept could be involved in this analysis is in the initial determination of whether Congress intended to apply § 1983 to states in the first place. Since that question is resolved by the abundant law which finds the state to be a "person", any further discussion of "traditional sovereign immunity" is superfluous. To the extent that the State may be arguing that some state principles could override § 1983 and provide immunity to the State which Congress did not otherwise intend, the State's position is incorrect. See Martinez v. California, 444 U.S. 277, (footnote continued)



Much of the State's brief is devoted to a general history of sovereign immunity and the eleventh amendment. Petitioner does not quarrel with most of these general principles or any of this history. However none of this general discussion really addresses the issue of whether the United States Congress, the federal legislative branch, had the authority and intent to apply the civil rights act to the states in state court despite the eleventh amendment limitation on the power of the federal judiciary. The decisions on which the State relies are decisions which interpret the eleventh amendment, a jurisdictional limitation on federal court. Compare Quern v. Jordan, 440 U.S. 332, 339, n.7, 99 S.Ct. 1139, 1144, n.7 (1979) (in distinguishing between the issue of statutory interpretation and the issue of eleventh amendment immunity, the court stated: "[T]his position [that Monell undercut the holding of Edelman] ignores the fact that Edelman rests squarely on the Eleventh Amendment immunity, without advertent in terms to the treatment of the legislative history in Monroe v. Pape . . .").

This Court should conclude that Ameri-Manage, if it is considered a state agency, is a person under 42 U.S.C. § 1983. Ameri-Manage is a corporate entity which provides management services for a state-owned hospital. It performs certain functions which were delegated to it by the Department of Health and Rehabilitative Services, a state corporate body. It should be con-

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282, 100 S.Ct. 553, 558 & n.8 (1980).

sidered a "person" under § 1983 and subject to suit in state court. See Monell, supra, 436 U.S. at 688-89 & n.53, 98 S.Ct. at 2034-35 & n.53.

- b. Fla.Stat. § 768.28 is a waiver of immunity for purposes of suit in state court.

The State says in its brief at 13 that "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". The State has not read all of Petitioner's brief. The argument which the State presents was already presented to this Court in Petitioner's brief at 3, n.1 where Petitioner acceded to the federal law, particularly the decision in Gamble v. Fla. Dep't of Health and Rehabilitative Serv., 779 F.2d 1509 (11th Cir. 1986).

As Petitioner previously stated in that footnote, 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'").

The State argues that § 768.28 only waives sovereign immunity for "traditional" tort actions under limited circumstances and that this does not include civil rights actions. It relies on

circular restatements of subsection (1) of § 768.28, which prove nothing, and on out of context statements from this Court's decisions on completely unrelated subjects. Ameri-Manage's answer brief at 15, citing Trianon Park Condominium v. City of Hialeah, 468 So.2d 912 (Fla. 1985). This Court should reject the State's analysis on this point and find that an action under § 1983 falls within the ambit of § 768.28

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

The State never directly addresses this issue. Rather, it incorporates a discussion of the primary decision on which Petitioner relies in its discussion of § 1983. It claims this theory is incorrect and is not supported by the primary decision on which Petitioner relies. State Road Dep't of Florida v. Tharp, 146 Fla. 745, 1 So.2d 868 (1941). It claims that Tharp is limited to eminent domain proceedings. Tharp contains no such limitation. This Court should apply its principles as they are stated.

The State simply fails to understand the crux of the "inverse condemnation remedy" it discusses in its brief at 20. It speaks of the construction of this remedy by the judiciary "to provide the necessary reciprocal ingredient to the relationship between state and private property owners where the state has not directly sought to condemn private property". The State seems not to understand the substance of its own statements. In simple language, inverse condemnation is judicial recognition that the

State cannot constitutionally take the land of its citizens without paying back in damages. That is simply a basic principle of our state and federal constitutions. Fifth amendment, fourteenth amendment, U.S. Const.; Art. I, §§ 9, 21 Fla.Const.

Unconstitutional takings of property or liberty by the state are not treated differently from takings of land. This is not an issue of eminent domain, i.e., whether the state has the police power to take property in the first place. It is an issue of the constitutionality of the taking. Condemnation of land, without compensation, is an unconstitutional taking of property. As the legislative history of 42 U.S.C. § 1983 demonstrates, this taking by a state is no less a constitutional violation than any other taking. And this taking is intended to be redressed in the same fashion: through 42 U.S.C. § 1983. See argument supra at 3, n.4 and authorities cited there.

The language of Tharp itself, and the language of those recent decisions which rely on it, make this conclusion clear. Tharp began its analysis by stating in plain and distinct language that sovereign immunity protects the state from tort actions, but that protection is not absolute in all other circumstances.

As to tort actions, the rule is universal and unqualified unless relaxed by the State, but in other fields it is not universal in application and cannot be said to cover the field like the "dew covers Dixie".

1 So.2d at 869. The Court then stated that sovereign immunity does not give the State protection against an unconstitutional

statute or a duty imposed on the state or "for trespassing on the rights of an individual". See Petitioner's initial brief at 869. The Court concluded by stating that Art. 3, § 22, Fla.Const. (authorizing provision by general law for bringing suit against the State) has no application to a case for unconstitutional taking of property and, if it did, it must be read in conjunction with § 4 of the Bill of Rights which provides that "all courts be open in order that every person may seek redress for injury done to his lands, goods, person, or reputation".

Tharp is no departure from traditional common law principles. Tharp simply expressed the correct analysis of the limits of sovereign immunity which previously had been set out in the statements of the proponents of § 1983. The sovereign is not free to violate the constitutional rights guaranteed to its citizens and then claim immunity from suit for damages. The citizen whose personal rights are infringed or whose personal property has been taken is entitled to the same relief as the person whose land has been indirectly condemned by the State. This Court should conclude that there is no traditional sovereign immunity in this State which would bar an action in the courts of this State for redress of unconstitutional conduct.

CONCLUSION

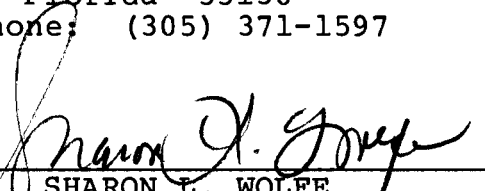
For the foregoing reasons, and the reasons stated in Petitioner's initial brief, Petitioner respectfully requests this Court to hold that there is no sovereign immunity from suit under 42 U.S.C. § 1983 against the state or its agencies in state court and to reverse the decision of the Third District Court of Appeal.

Respectfully submitted,

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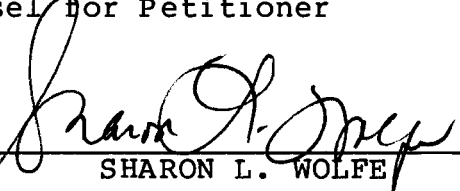
I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 10<sup>th</sup> day of October, 1986 to: all counsel on the attached list.

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