IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 68,932

FLORIDA BAR NUMBER 0102824
FLORIDA BAR NUMBER 0349781

ROBERT EDWARD SPOONER,

Petitioner,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

RESPONDENT'S ANSWER BRIEF

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TABLE OF CONTENTS

CITATIONS OF AUTHORITY

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Respondent, DEPARTMENT OF CORRECTIONS, was the appellee in the district court of appeal and the defendant in the trial court. Respondent will be referred to in this brief as DOC.

Petitioner, ROBERT EDWARD SPOONER, was the appellant in the district court of appeal and the plaintiff in the trial court. Petitioner will be referred to in this brief as SPOONER.

References to SPOONER'S initial brief will be by use of the symbol SB followed by the appropriate page number in parentheses, e.g., (SB,1).

References to the record on appeal will be by the symbol R followed by the appropriate page number in parentheses, e.g., (R,1).

STATEMENT OF THE CASE AND FACTS

DOC accepts SPOONER'S rendition of the statement of the case and facts except as follows:

Count II of the amended complaint alleging a civil rights violation incorporated by reference the allegations of negligence contained in Count I as follows:

> The aforementioned negligent acts and omissions on the part of the Defendants, State of Florida, Department of Corrections and Louis Wainwright, has (sic) in the past and continues (sic) to the present and into the future to deprive the Plaintiff of the rights, privileges and immunities guaranteed to the Plaintiff by the constitution and laws of the United States of America and the laws of the State of Florida. The Plaintiff's constitutional rights pursuant to the IV, V, and XIV amendments of the United States Constitution have been impinged upon and the Plaintiff has been deprived of those rights as protected by the aforementioned constitution and laws and as protected by 42 U.S.C. § 1983. The acts and omissions set forth above were done under color of state law.

(R, 15-18). Thus, the basis of the civil rights allegations against DOC in Count II was grounded upon the alleged negligence of DOC as previously alleged in Count I of the amended complaint.

The trial court dismissed Count II of the amended complaint. The order of dismissal is silent as to whether the § 1983 civil rights claim was dismissed for failure to state a cause of action due to the negligence allegation, which as a matter of law cannot support the claim, or whether it was dismissed on sovereign immunity grounds. SPOONER appealed.

The District Court of Appeals, First District, on rehearing, affirmed the dismissal of the civil rights claim against DOC. In doing so, the District Court, noting the civil rights violation was based on the negligence of DOC, certified a question as one being of great public importance. The District Court's opinion is reported at Spooner v. Department of Corrections, State of Florida, 488 So.2d 897 (Fla. 1st DCA 1986). SPOONER then invoked the discretionary jurisdiction of this Honorable Court.

Also pending before the Court are two cases which present identical questions of law: Hill v. Department of Corrections, Case No. 69,016 and Skoblow v. Ameri-Manage, Inc., Case No. 68,522. See also, Department of Corrections v. Hill, 490 So.2d 118 (Fla. 3d DCA 1986) (same certified question as one at bar) and Skoblow v. Ameri-Manage, Inc., 483 So.2d 809 (Fla. 3d DCA 1986) (same issue as at bar without certified question).

SUMMARY OF ARGUMENT

The issue before the Court is straightforward in contradistinction to SPOONER'S attempt in his initial brief to complicate it by breaking down the First District Court of Appeal's succinct and direct certified question into four points of argument. The First District asks whether pursuant to Section 768.28, Florida Statutes (1983), the State of Florida has waived its Eleventh Amendment and common law immunity and consented to suits against the State and its agencies under 42 U.S.C. Section 1983.

It is DOC's position the question may be answered in one word -- "No".

First, the Eleventh Amendment to the United States Constitution standing alone, by its terms and as interpreted by the United States Supreme Court, is a restriction on the power of the federal courts to entertain suits by a citizen of a state against his own state or another state in federal courts and has no application in the courts of the several states. In fact, the State of Florida has expressly not waived its immunity recognized by the Eleventh Amendment. However, an analysis of federal case law on the subject of Eleventh Amendment immunity will be helpful in a determination of whether the State of Florida has waived its traditional common law sovereign immunity for purposes of a 42 U.S.C. Section 1983 claim in state court.

Second, the Florida Legislature did not intend for Section 768.28, Florida Statutes to be an all encompassing waiver of the State of Florida's sovereign immunity. Rather, the statute is a waiver of sovereign immunity limited to actions at law, against the state or its agencies to recover money damages in tort for negligence. It merely waived the sovereign immunity which previously prevented recovery for existing common law torts negligently committed by the government under circumstances in which a private person would be liable. Indeed, the statute created no new causes of action not already recognized by either an underlying common-law or statutory duty of care with respect to the government's negligent conduct. Moreover, one may not sue, be it in federal court or in state court, pursuant to 42 U.S.C. § 1983 for mere negligent conduct.

Consequently, the State of Florida, its agencies and subdivisions in a 42 U.S.C. Section 1983 action are protected in state court by its traditional sovereign immunity which existed prior to the ratification of the United States Constitution and which has neither been abrogated by the clear intent of the United States Congress nor waived by the Legislature of the State of Florida.

The certified question should be answered in the negative.

ARGUMENT

CERTIFIED QUESTION

HAS THE STATE OF FLORIDA, PURSUANT TO SECTION 768.28, FLORIDA STATUTES (1983), WAIVED ITS ELEVENTH AMENDMENT AND STATE COMMON LAW IMMUNITY AND CONSENTED TO SUITS AGAINST THE STATE AND ITS AGENCIES UNDER 42 U.S.C. SECTION 1983?

A.

ELEVENTH AMENDMENT IMMUNITY

DOC agrees with SPOONER'S assertion that the Eleventh Amendment "is solely applicable to the federal judiciary and does not address or limit the authority of state courts." (SB, 6) However, SPOONER'S argument "the Eleventh Amendment bar to the jurisdiction of federal courts to render damage awards against a state does not apply in state courts", (SB,9) clearly demonstrates a lack of understanding of the relationship between a State's sovereign immunity and the Eleventh Amendment.

The principle of sovereign immunity which insulates the States from any suit in the first instance is at the very roots of the Eleventh Amendment to the United States Constitution and is recognized in the attendant case law. Our United States Supreme Court in recognizing the sovereignty of the several States has consistently stated that the Eleventh Amendment is a limit on federal judicial authority granted by the States and which is contained in Article III, Section 2 of the Constitution. The Eleventh 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.

The Amendment was quickly passed after the Supreme Court, in 1793, assumed original jurisdiction over a suit brought by a citizen of South Carolina against the State of Georgia. That decision, Chisholm v. Georgia, 2 Dall.419, 1 L.Ed 440 (1793), "created such a shock of surprise that the Eleventh Amendment was at once proposed and adopted". Monaco v. Mississippi, 292 U.S. 313, 325 (1934)

The significance of the passage of the Eleventh Amendment is in the recognition of the viability of the sovereign immunity of the several States. In Parker v. Brown, 317 U.S. 341, 359-360 (1943), the Supreme Court noted:

> 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. (e.s.)

The language in Parker clearly indicates the Supreme Court recognized that the sovereign immunity of the States is limited only by the power granted to the federal government by the several States' ratification of the United States Constitution. Indeed, in Ex parte State of New York No. 1, 256 U.S. 490 (1921), the Court said:

> 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 parties against a State without consent given: ... because of the fundamental rule of which the Amendment is but an exemplification. (e.s.)

Id., 497. Thus, it was expressly recognized that Eleventh Amendment immunity is in reality a constitutional limitation on the federal judicial power granted by the States themselves and established in Article III of the Constitution. Cf. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 104 S.Ct. 900 (1984).

Although sovereign immunity serves to shield the States from suit, the shield can be pierced in one of two ways: one, by abrogation by the United States Congress acting in accordance with Section 5 of the Fourteenth Amendment to the United States Constitution; or two, consent of the several States to be amenable to suit. However, absent either an abrogation of immunity by Congress or an express waiver by the State, sovereign immunity prevents suits against a State both in federal court and in state court. Id., 104 S.Ct. at 907 ("A State's constitutional interest in immunity encompasses not merely whether it may be sued, but where it may be sued.") Thus, even if a State waives its sov-

ereign immunity to be sued in its own courts it will not necessarily be considered a waiver of immunity in the federal courts. Id., 907, n.9.

As previously stated, one of the methods of removing a State's shield of immunity is for Congress to abrogate it through the passage of appropriate legislation to enforce the Constitution. Congress' power to abrogate the States' immunity has been manifested by the passage of the various Civil Rights Acts to enforce the Fourteenth Amendment. However, some contexts in which the Fourteenth Amendment is enforced by private suits against States or state officials under those Acts may be constitutionally impermissible in other contexts. In those situations where Congress has utilized its power to enforce the Fourteenth Amendment against the States, there must be an unequivocal and clear expression of intent to override the States' Eleventh Amendment immunity.

For example, in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), the Supreme Court found an express intent on the part of congress to bring States within the purview of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e et seq. Id., 448. And in Hutto v. Finney, 437 U.S. 678 (1978), the Court held that Congress intended that attorney's fees awarded pursuant to 42 U.S.C. Section 1988 be assessed against a State's treasury as part of the costs of bringing a civil rights claim against the

State for prospective injunctive relief. See also Maine v. Thiboutot, 448 U.S. 1 (1980). However, fee liability runs with merits liability the State being required to pay § 1988 attorney's fees from the public treasury only if it is found liable on the merits of a claim for prospective injunctive relief. Kentucky v. Graham, ___ U.S. ___, 105 S.Ct. 3099 (1985). DOC will show that in marked contrast, the United States Supreme Court has expressly held the congressional intent necessary to bring the States within the purview of 42 U.S.C. Section 1983 is lacking.

42 U.S.C. Section 1983 states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or 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.

In Alabama v. Pugh, 438 U.S. 781 (1978), decided only ten days after Hutto, the Supreme Court held that the State of Alabama could not be joined as a defendant in an action based on 42 U.S.C. Section 1983 and the Eighth and Fourteenth Amendments. The Court said to allow suit against the State of Alabama would violate the Eleventh Amendment and the States sovereign immunity

which the Amendment recognizes. Id., 782; Pennhurst, 104 S.Ct. at 918-19.

In Quern v. Jordan, 440 U.S. 332 (1979) the Court said that in order to "overturn the constitutionally guaranteed immunity of the several States", Congress must express an "unequivocal expression" to do so. (e.s.) The Quern Court upheld Alabama v. Pugh's decision that a suit brought against state officials pursuant to 42 U.S.C. Section 1983 could not be maintained in the absence of clear congressional intent to abrogate the State's immunity from suit. Both Alabama v. Pugh and Quern v. Jordan reaffirmed the rule expressed earlier by the Court in Edelman v. Jordan, 416 U.S. 1000 (1974), that the Eleventh Amendment barred suit in federal court by parties seeking to impose liability upon the public treasuries of the States. Cf., Pennhurst 104 S.Ct. at 918.

In Monroe v. Pape, 365 U.S. 167 (1961) the Supreme Court concluded that a municipality was not a "person" for the purposes of § 1983. However, in Monell v. Department of Social Services, 436 U.S. 658 (1978), the Court overruled Monroe to the extent that it held Congress intended to include municipalities within the provisions of § 1983. While not addressing the issue in direct terms, the Court strongly inferred that a State is not a "person" under § 1983. Id., 690, n.54. This notion was confirmed, however, once and for all by the Court in Quern v. Jordan

which drew the following comments from Justice Brennan in his concurring opinion:

> ... the Court goes on to conclude, in what is patently dicta, that a State is not a "person" for purposes of 42 U.S.C. § 1983, Rev. Stat. § 1979[2]... upon re-examination of the legislative history of § 1983, [Monell v. New York City Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)] held that a municipality was indeed a "person" for purposes of that statute.[5] As I stated in my concurrence in Hutto v. Finney, 437 U.S. 678, 703, 98 S.Ct. 2565, 2581, 57 L.Ed.2d 522 (1978), Monell made it "surely at least an open question whether § 1983 properly construed does not make the States liable for relief of all kinds, notwithstanding the Eleventh Amendment." The Court's dicta today would close that open question on the basis of Alabama v. Pugh , 438 U.S. 781, 98S.Ct. 3057, 57 L.Ed.2d 1114 (1978) (footnotes omitted) (e.s.)

Id., 350-351. Justice Rhenquist writing for the Quern majority responded to Justice Brennan's comments by noting:

> In Tenney v. Brandhove, 341 U.S. 367, 71S.Ct. 783, 95 L.Ed. 1019 (1951), the Court rejected a similar attempt to interpret the word "person" in §1983 as a withdrawal of the historic immunity of state legislators ... given the importance of the States' traditional sovereign immunity, if in fact the members of the 42d Congress believed that § 1 of the 1871 Act overrode that immunity, surely there 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. Instead, § 1 passed with only limited debate and not one Member of Congress mentioned the Eleventh Amendment or the direct financial consequences to the States of enacting § 1. We can only conclude that this silence on the matter is itself a significant indication of the legislative intent of § 1. (e.s.)

Id., 342-343.

From the foregoing, there can be no doubt that traditional sovereign immunity is alive and well according to the interpretations made by the United States Supreme Court in actions against the States pursuant to 42 U.S.C. Section 1983. It follows that SPOONER'S assertion "that the Eleventh Amendment bar to the jurisdiction of federal courts to render damage awards against a state does not apply in state courts", (SB,6) is erroneous. Notwithstanding the Eleventh Amendment, the States' traditional sovereign immunity would still preclude an action against them pursuant to 42 U.S.C. Section 1983 be it in federal court or state court. Of course, the preceding sentence is true only if the State has not waived its own sovereign immunity and has not otherwise consented to be sued whether in state or federal court for actions coming within the purview of 42 U.S.C. Section 1983.

Not only may Congress expressly abrogate a State's sovereign immunity but the State itself may consent to be sued in federal court. See e.g. Clark v. Bernard, 108 U.S. 436 (1883) (State voluntarily submitted to jurisdiction of court by making itself

defendant.) However, the State's consent to such a suit in federal court must be unequivocally expressed or overwhelmingly implied in terms which "will leave no room for any other reasonable construction". Edelman, 415 U.S. at 673 citing Murray v. Wilson Distilling Co., 2131 U.S. 151, 171 (1909). So important is the requirement of an unequivocal expression of a waiver of the immunity of the State to be sued in federal court that the United States Supreme Court has consistently held that even when a State consents to suit in its own courts it will not be considered as a waiver of sovereign immunity for purposes of the federal courts. Thus, absent a clear construction of waiver by a State, the Eleventh Amendment's recognition of sovereign immunity will still serve to protect the State from suit in federal court. Pennhurst, 104 S.Ct. at 907, n.9 citing Florida Department of Health v. Florida Nursing Home Association, 450 U.S. 147, 150 (1981). See Gamble v. Florida Department of Health and Rehabilitation Services, 779 So.2d 1509 (11th Cir. 1986) (State of Florida has not waived its Eleventh Amendment immunity).

The United States Supreme Court has determined Congress has not abrogated the States' sovereign immunity in actions brought pursuant to 42 U.S.C Section 1983 and the Eleventh Circuit Court of Appeals has determined the Florida Legislature has not waived the State of Florida's Eleventh Amendment immunity for actions brought in federal court. This Honorable Court need only determine whether the limited waiver of sovereign immunity enacted

pursuant to Section 768.28, Florida Statutes (1983) includes a waiver of sovereign immunity for alleged civil rights violations under 42 U.S.C. Section 1983 brought in state court. DOC submits the Court's finding should be in the negative.

B.

STATE COMMON LAW IMMUNITY

The First District Court of Appeals below relied on the opinion of the United States Court of Appeals, Eleventh Circuit in Gamble v. Florida Dept. of Health and Rehabilitation Services, 779 F.2d 1509 (11th Cir. 1986), and the Northern District of Florida's opinion in Shinholster v. Graham, 527 F.Supp. 1318 (N.D. Fla. 1981), to hold that Florida's waiver of sovereign immunity pursuant to Section 768.28 Florida Statutes (1983) did not contemplate a waiver of sovereign immunity to be sued under 42 U.S.C. Section 1983 in either state or federal court. See also Skoblow v. Ameri-Manage, 483 So.2d 809 (Fla. 3rd DCA 1986); Spooner v. Department of Corrections, State of Florida, 488 So.2d 897, 898 (Fla. 1st DCA 1986). In doing so, the First District adopted as its own the reasoning and analysis of the opinion in Gamble. Id. In Gamble, the Circuit Court of Appeals reviewed the relevant statutory scheme regarding civil rights claims brought against the State of Florida and its employees and agents.

This Honorable Court need not go to the great lengths the Gamble Court utilized to reach its conclusion the State of Florida has not waived its sovereign immunity so as to allow itself to be sued for alleged civil rights violations under 42 U.S.C. Section 1983. The Legislature in enacting Section 768.28(15)[1], Florida Statutes (1984) left no doubt the State at no time has intended to waive its immunity guaranteed by the Eleventh Amendment. It should be noted that the Gamble Court was cognizant of § 768.28(15) but found it unnecessary to consider the effect of the statute on the case before it based on the Court's analysis of the other relevant statutes. Gamble, 779 F.2d at 1515, n.8.

DOC's argument to this point clearly demonstrates the State of Florida's traditional sovereign immunity, as guaranteed by the Eleventh Amendment, shields the State from suit pursuant to 42 U.S.C. Section 1983 under federal law as well as under state law. This is so because the Congress has not abrogated the

[1]Section 768.28(15) Florida Statutes (1984) states:

> (15) No provision of this section, or of any other section of the Florida Statutes, whether read separately or in conjunction with any other provision, shall be construed to waive the immunity of the state or any of its agencies from suit in federal court, as such immunity is guaranteed by the Eleventh Amendment to the Constitution of the United States, unless such waiver is explicitly and definitely stated to be a waiver of the immunity of the state and its agencies from suit in federal court. This subsection shall not be construed to mean that the state has at any time previously waived, by implication, its immunity, or that of any of its agencies, from suit in federal court through any statute in existence prior to June 24, 1984.

State's traditional sovereign immunity, Quern; Edelman; and, the State has not waived it. Gamble; Shinholster; Skoblow. SPOONER'S Supremacy Clause argument is devoid of merit, (SB, 11-18), because the cases decided by the United States Supreme Court regarding 42 U.S.C. Section 1983 make it clear that the States' sovereign immunity is "supreme" in Section 1983 suits against them.

Indeed, the Supremacy Clause confirms that when Congress legislates within the scope of its constitutionally granted powers that legislation may displace state law. However, in Wardair Canada v. Florida Dept. of Revenue, ___ U.S. ___ (Slip op. filed June 18, 1986), the United States Supreme Court noted that the intention of Congress to pre-empt state law must be analyzed. Justice Brennan, writing for the majority noted:

> But we have consistently emphasized that the first and fundamental inquiry in any pre-emption analysis is whether Congress intended to displace state law, and where a congressional statute does not expressly declare that a state law is to be pre-empted, and where there is no actual conflict between what federal law and state law prescribe, we have required that there be evidence of a congressional intent to pre-empt the specific field covered by the state law. Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n, 461 U.S. 190 (1983); Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984)

Slip op. at 4. Since the Supreme Court has held Congress did not intend the States to be held liable for money damages pursuant to 42 U.S.C. Section 1983 one must look to traditional state tort law for a remedy. This concept was recently confirmed by the Court in Daniels v. Williams, ____ U.S. ____, 54 U.S.L.W. 4090 (1986) when the Court wrote:

> Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society. We have previously rejected reasoning that "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States". Paul v. Davis, 424 U.S. 693, 701 (1976), quoted in Parratt v. Taylor, 451 U.S., at 544.

54 U.S.L.W., at 4091-4092. Consequently, SPOONER'S Supremacy Clause argument has no basis in the law.

The only issue remaining is this Court's determination whether the State of Florida has waived its traditional common law sovereign immunity to the extent of making itself liable for money damages for civil rights claims brought pursuant to 42 U.S.C. Section 1983 in State court. DOC contends the Court must answer the State of Florida's limited waiver of immunity pursuant to § 768.28 does not extend to claims made under 42 U.S.C. Section 1983 whether the claim be brought in state or federal court.

In support of DOC's position that the State of Florida has not waived its sovereign immunity for civil rights claims in state court, DOC invites the Court's attention to the cases in which this Court has held that the waiver of sovereign immunity statutes must be strictly construed. In fact, the Court has required, consistent with the decisions of the United States Supreme Court, that to constitute a waiver of sovereign immunity there must be specific, clear, unequivocal and unambiguous language in the statute which purports to waive the immunity. See Spangler v. Florida State Turnpike Authority, 106 So.2d 421, 474 (Fla. 1958) (statutory language "must be clear and unequivocal"; "waiver will not be reached as a product of inference or implication,"; and, statutes should be "strictly construed.") See also Art. X, § 13, Fla. Const.; Rabideau v. State, 409 So.2d 1045 (Fla. 1982); Manatee County v. Town of Longboat Key, 365 So.2d 143 (Fla. 1978).

With the foregoing in mind, the analyses by Chief Judge Stafford in Shinholster, 527 F.Supp at 1332-1338, and by Judge Anderson in Gamble 779 F.2d 1513-1520, while addressing Florida's statutory waiver scheme from Eleventh Amendment perspectives, are nevertheless equally applicable in the context of whether the State has waived its state common law sovereign immunity to suits based on civil rights claims. There is no reason to repeat or expound on the analyses here. DOC contends that the analyses are correct and should be given great weight by this court in ren-

dering its decision in the case at bar.

Section 768.28 is entitled "Waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney's fees; statute of limitations; exclusions" and provides in relevant part:

> (1) 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 states 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.

This statute, which waived sovereign immunity on a limited basis, "created no new causes of action, but merely eliminated immunity which prevented recovery for existing common law torts committed by government." Trianon Park Condominiums v. City of Hialeah, 468 So.2d 913, 914 (Fla. 1985) (e.s.) The sole purpose of the statute was to "waive that immunity which prevented recovery from breaches of existing common law duties of care. Section 768.28

provides that government entities 'shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances.'" Id., 917; § 768.28(1); § 768.28(5). However, for there to be governmental tort liability pursuant to § 768.28 and the laws of this state, there must be either an underlying common law or statutory duty of care with respect to the alleged negligent conduct. Id., 917. Compare Pan-Am Tobacco v. Department of Corrections, 471 So.2d 4 (Fla. 1985) (State liable in equity when legislature, pursuant to general law, authorizes state to enter into express, written contracts and then state breaches the contract.)

Clearly, a claim brought pursuant to § 768.28 in state court based on a 42 U.S.C. § 1983 violation cannot be maintained against the State of Florida. First, § 768.28 contemplates only causes of action for traditional torts brought "in accordance with the general laws of this state." 42 U.S.C. Section 1983 clearly does not come within this provision of the statute. Indeed, under the federal law, the States do not come within the purview of 42 U.S.C. Section 1983 for traditional torts. See Daniels, 54 U.S.L.W., at 4090 ("Due Process Clause [of the United States Constitution] is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty or property")

Second, the State remains immune for conduct of its employees and agents who act outside the scope of employment in bad faith or with a malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. § 768.28(9)(a). Rather, the State can be found liable for traditional torts under 768.28 only for negligent conduct which breaches an underlying duty of care. Trianon. In contrast, one may not maintain an action for a civil rights violation under 42 U.S.C. Section 1983 based only on negligent conduct. Daniels v. Williams; Davidson v. Cannon, ____ U.S. ____, 54 U.S.L.W. 4095 (1986). If the State of Florida in fact waived its sovereign immunity for civil rights claims brought pursuant to 42 U.S.C. Section 1983 by enactment of § 768.28, the question remains then for what purpose were § 284.31, § 284.38, § 111.07 and § 111.071 passed by the Legislature? The answer can be found in Shinholster and Gamble which discuss these statutes and the attendant legislative intent of each in detail. See also § 768.28(15). While DOC certainly recognizes that it is for this Honorable Court to say what is the law in Florida, it submits these cases contain cogent intelligent reasons for finding that the State of Florida has not consented to be sued pursuant to 42 U.S.C. Section 1983 in any court. The cases make it clear that the statutes merely reflect current civil rights jurisprudence. That is, when an official is sued under the statute the State will pay from the state treasury for the costs of prospective

injunctive relief and for attorney's fees but only if the official is found liable in his official capacity. However, the State will not pay for attorney's fees or punitive damages if the official is found liable in his personal capacity. See, e.g. Kentucky v. Graham. Remember, the State may not even be named as a party defendant in federal court in an action for money damages brought pursuant to 42 U.S.C. Section 1983. Alabama v. Pugh; Quern v. Jordan . The State cannot be a party defendant in state court either because § 768.28 applies only to negligent governmental tortious conduct and mere negligence will not support a claim under 42 U.S.C. Section 1983. Daniels; Davidson. Therefore, by the plain language of § 768.28 and the other relevant statutes as well as this Court's interpretation of § 768.28 in Trianon, the State of Florida is immune from suit brought in its own courts pursuant to 42 U.S.C. Section 1983.

Third, § 768.28 makes absolutely no reference to civil rights claims or "constitutional torts". Shinholster; Gamble. Such claims could not have existed against the State at common law. An individual's remedy at common law was by an action directly against the governmental official for his tortious conduct. Rather, § 1983 civil rights claims and "constitutional torts" are creatures emanating from Acts of Congress and directly from the Constitution. Therefore, no duty exists on the part of the State on which to base claims against it for money damages other than for breaches of traditional duties based on the common

law and the laws of the State of Florida. Trianon. This concept too was recently addressed by the Supreme Court of the United States in Daniels v. Williams. In that case, the Court held the Constitution did not supplant traditional tort law and that, in fact, they do not address the same concerns. The Court said:

> That injuries inflicted by governmental negligence are not addressed by the United States Constitution is not to say that they may not raise significant legal concerns and lead to the creation of protectable rights. The enactment of tort claims statutes, for example, reflects the view that injuries caused by such negligence should generally be addressed.[2] It is no reflection on either the breadth of the United States Constitition or the importance of traditional tort law to say that they do not address the same concerns. (footnote omitted)

54 U.S.L.W., at 4092.

Fourth, as has been argued earlier, 42 U.S.C. Section 1983 applies only to "persons" and the States are not "persons" which may be found liable for money damages pursuant to a violation of that statute. Quern v. Jordan. DOC submits this Honorable Court should not only find that § 768.28 does not waive the State's immunity from suit in state court for alleged violations of 42 U.S.C. Section 1983, it should affirmatively follow Quern and find that the State of Florida is not a "person" for purposes of Section 1983 and thus is not amenable to suit in state court in any event. See Hambley v. DNR, 459 So.2d 408 (Fla. 1st DCA 1984); Arney v. DNR, 448 So.2d 1041 (Fla. 1st DCA 1983). Of the

state courts which have reached the issue a vast majority have reached the conclusion that States are not "persons" for purposes of 42 U.S.C. Section 1983. See Lowrey v. Dept. of Corrections, 380 N.W.2d 99 (Mich. App. 1985); Hampton v. Michigan, 377 N.W.2d 920 (Mich. App. 1985); Merritt v. State, 696 P.2d 871 (Idaho 1985); Mezey v. State, 208 Cal Rptr. 40 (1984); Fetterman v. University of Connecticut, 473 A.2d 1176 (Conn. 1984); Shaw v. City of St. Louis, 664 S.W.2d 572 (Mo. App. 1983); Rains v. State of Washington, 674 P.2d 165 (Wash. 1983); Thomas v. New York Temporary State Comm. on Regulation of Lobbying, 442 N.Y.S.2d 632 (1981), affirmed, 436 N.E.2d 1310 (N.Y. 1982); DeVargas v. State, 640 P.2d 1327 (N.M. App. 1981); State v. Green, 633 P.2d 1381 (Alaska 1981); Boldt v. State, 305 N.W. 133 (Wis.), cert. denied. 454 U.S. 973 (1981); Thiboutot v. Maine, 405 A.2d 230 (Me. 1979), aff'd on other grounds, 448 U.S. 1 (1980); Edgar v. State, 595 P.2d 534 (Wash. 1979), cert. denied, 444 U.S. 1077 (1980); Taylor v. Mitzel, 147 Cal. Rptr. 323 (1978). Cf. Ruiz v. Estelle, 679 F.2d 1115 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983). Contra Smith v. Michigan, 333 N.W.2d 50 (Mich. App. 1983); Gumbhir v. Kansas State Board of Pharmacy, 646 P.2d 1078 (1982), cert. denied, 459 U.S. 1103 (1983). Cf. Marrapese v. Rhode Island, 500 F.Supp. 1207 (D.R.I. 1980).

SPOONER relies primarily on two cases for the proposition that while the Legislature expands or limits the State's sovereign immunity pursuant to Art. X, s. 13 of the Florida Consti-

tution this Court has the authority to construe the scope of the sovereign immunity defense. He relies on Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957) citing City of Tallahassee v. Fortune, 3 Fla. 19 (1850); and State Road Department of Florida v. Tharp, 1 So.2d 868 (Fla. 1941). These cases do not help SPOONER.

As SPOONER contends, the Hargrove "Court rejected the contention that sovereign immunity extended to municipalities", (SB, 19), and found that the City could be held liable for the acts of its police officers on the basis of respondeat superior. DOC sees no relevance to the issue at bar. Moreover, municipalities have always been treated differently than States for traditional sovereign immunity purposes. The State of Florida cannot be held liable for money damages for a violation of an individual's civil rights under 42 U.S.C. Section 1983 on the basis of respondeat superior. See Gamble, 779 F.2d at 1515 (...law governing actions under § 768.28 is state law, not federal as in an action brought pursuant to § 1983); McLaughlin v. City of LaGrange, 662 F.2d 1385 (11th Cir. 1981), cert. denied, 102 S.Ct. 2249 (1982) (Respondeat superior generally invalid theory of recovery under § 1983).

SPOONER'S reliance on Tharp is also not compelling. Tharp involved the taking of property and the government's obligation pursuant to the Florida Constitution to compensate property

owners whether pursuant to eminent domain or inverse condemnation proceedings. In Department of Transportation v. Burnette, 384 So.2d 916 (Fla. 1st DCA 1980), the First District noted that the remedy for unconstitutional "takings" had been broadened over the years from those situations where private property was taken directly to include indirect actions which constituted a "taking". This expansion of a property owner's remedy in no way establishes a nexus with the principles which underlie the remedies for claims brought pursuant to 42 U.S.C. § 1983 (SB, 21). In the former situation only the State can be held liable for money damages whereas in the latter (barring a claim for prospective injunctive relief) only the individual who has acted under color of state law can be held liable for money damages. SPOONER'S position is simply untenable.

SPOONER as well as other citizens of this State are not without recourse for violations of their civil rights. They may seek redress for damages against the individuals who committed the violations personally. Damages would include those of a punitive nature. In addition, prospective injunctive relief is available against the State or its officials found liable in their official capacities. Costs in such a situation must be borne by the State from its treasury. Attorneys' fees pursuant to 42 U.S.C. § 1988 are also available in those situations where prospective injunctive relief is granted. It is for these reasons the Legislature provided for payment from the state treasury

when it is determined an individual is entitled to prospective injunctive relief and attorney's fees in an action brought pursuant to 42 U.S.C. Section 1983. See § 284.31; § 284.38; § 111.07 and § 111.071. These statutes, standing alone or in conjunction with § 768.28, clearly are not intended to extend the limited waiver of the State of Florida's sovereign immunity for tort liability. They merely reflect the current status of the civil rights laws. Moreover, SPOONER'S reliance on Avallone v. Board of County Commissioners of Citrus County, 11 F.L.W. 312 (Fla. July 10, 1986) is misguided. That case considered the status of the defense of sovereign immunity when the county had purchased liability insurance pursuant to § 286.28. Section 286.28 is just not relevant and has no application to the case at bar. SPOONER'S attempt to extend Avallone to cover the statutes created for implementation of the Florida Casualty Risk Management Trust fund is frivolous. In any event, Avallone is not controlling inasmuch as of this date the decision is pending on rehearing.

Notwithstanding the foregoing, there is another reason the First District's decision below should be affirmed. It should be remembered that the trial court dismissed SPOONER'S 42 U.S.C. § 1983 claim without stating its rationale for doing so. Nonetheless, the First District specifically noted that the § 1983 claim was based on the negligent conduct of DOC. Spooner, 488 So.2d at 898.

As previously demonstrated, an action brought pursuant to 42 U.S.C. Section 1983 cannot be maintained on the basis of negligence alone. Daniels; Davidson.

Because a trial court's decision, if correct for any reason or on any theory, is correct it must be affirmed if the evidence or alternate theory supports the decision. U.S. Home Corp. v. Suncoast Utilities, 454 So.2d 601 (Fla. 2d DCA 1984) citing Applegate v. Barnett Bank, 377 So.2d 1150 (Fla. 1979). Thus, the trial court's dismissal of the civil rights claim and subsequent affirmance by the First District Court of Appeals in this case demands that this Honorable Court affirm the decision whether it answers the certified question or not.

CONCLUSION

Based on the foregoing argument and citation of authority, the Court should find that the State of Florida is not amenable to suit in its own courts on an action based on 42 U.S.C. Section 1983. While the Eleventh Amendment applies only to the jurisdiction of the federal courts, its enactment specifically recognizes the sovereign immunity of the several States. Indeed, based on the States' sovereign immunity and lack of congressional intent to abrogate it, the States may not be sued pursuant to 42 U.S.C. Section 1983. One of the reasons is found in the notion that the States are not "persons" within the meaning of the statute.

Certainly if the States are not amenable to suit under Section 1983 in federal court based on their sovereign immunity they are not amenable to suit in their own courts absent an express waiver of that immunity. It is abundantly clear the State of Florida has not waived its immunity from suit for civil rights claims in federal court. It is equally clear the State of Florida has not waived its sovereign immunity from suit for civil rights claims brought in state court. Consequently, the Court should answer the certified question in the negative.

In the alternative, the Court should refrain from answering the certified question and find the lower court rulings were correct in this case inasmuch as a § 1983 claim cannot be based solely on negligent conduct.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to **PHILIP M. BURLINGTON**, Edna L. Caruso, P.A., Suite 4B-Barristers Building, 1615 Forum Place, West Palm Beach, Florida 33401; **DAVID P. HEATH**, Post Office Box 1879, Tallahassee, Florida 32302; **JOEL V. LUMER**, 1002 Concord Building, 66 West Flagler Street, Miami, Florida 33130; **SHARON L. WOLFE**, 500 Roberts Building, 28 West Flagler Street, Miami, Florida 33130; **MICHAEL EGAN**, Post Office Box 1836, Tallahassee, Florida 32302 this 4th day of September, 1986.

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