IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,016

JESSE HILL,

Petitioner,

v.

DEPARTMENT OF CORRECTIONS,
STATE OF FLORIDA,

Respondent.

FILED
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PETITIONER'S INITIAL BRIEF

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STATEMENT OF THE CASE

This cause is before this Court pursuant to certification by the Third District Court of Appeal of Florida, of the following 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 suit against the State and its agencies under 42 U.S.C. Section 1983?

This action was initiated by the Plaintiff/Petitioner Hill through the filing of a three-count complaint in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida on November 18, 1984 (R-1-7). The amended complaint, filed April 2, 1984, (R-10-17) sought damages against the Department of Corrections of the State of Florida alleging false imprisonment, negligence and a violation of Hill's civil rights pursuant to 42 U.S.C. 1983. The amended complaint also named certain individual defendants whom Hill voluntarily dismissed prior to trial. (R-38) The action proceeded solely against the State agency.

During trial, the Honorable Joseph Farina dismissed the civil rights action and the case was submitted to the jury on the negligence and false imprisonment claims. Through the special verdict interrogatory form, which was reviewed and agreed to by both parties, the jury found the DOC liable for the false imprisonment claim and, on the negligence claim, found the DOC 75% negligent and the Plaintiff 25% comparatively

negligent. The jury additionally awarded $750,000.00 in damages. (App. 7).

After the agreed verdict form was read by the Court and delivered to the jury, the Respondent, DOC had one and one-half hours while the jury deliberated to review and consider the verdict form. (TR-549-552)(App. 8). When the jury returned its verdict, the DOC accepted same without comment or objection. The jury was polled and each juror acknowledged that the verdict was his or her own. (TR 553-554). On March 25, 1985, (R-257) the trial court entered its final judgment against the DOC for the full amount of the verdict, $750,000.00. Thereafter, the Defendant filed its multiple Rule 1.530, Fla. R. Civ. P. motions for new trial and motions for judgment notwithstanding the verdict (R181-193). None of these Rule 1.530 Fla. R. Civ. P. addressed the verdict form or the reading of same to the jury. These post trial motions were denied by the trial judge by order dated June 3, 1985. (R-206).

On June 4, 1984 (R-207) the DOC filed its motion to amend final judgment asking the Court to reduce the amount of judgment by the 25% that the jury found Hill comparatively negligent. (App. 7). Judge Farina denied this motion by order dated June 20, 1985 "that there was no objection to the form of the verdict at trial; and there is no reduction of a false

imprisonment award by comparative negligence." (R-210) (App. 3).

A timely appeal was filed by the DOC to the Third District Court of Appeal (R-211) and Hill cross-appealed the dismissal of his 42 U.S.C. 1983 civil rights action (R-212).

The Third District Court of Appeal in an opinion filed May 6, 1986 (App. 1) recast the DOC's issue on appeal as whether the trial court erred in giving the jury a misleading instruction and verdict form. In so doing, the Court avoided the appropriate standard of review, overlooked the fact that an agreed verdict form was submitted to the jury and avoided the issue of fundamental error. The Court agreed with the trial judge that comparative negligence was not a defense to an intentional tort but remanded the case to the trial court for a new trial on damages for false imprisonment claiming that the verdict form was misleading. The Court furthermore affirmed the dismissal of the 42 U.S.C. Section 1983 claim on the authority of Scoblow v. Ameri-Manage, Inc., 43 So.2d 809 (Fla. 3d DCA 1986) Review Granted Supreme Court Case No. 68,522, Skoblow v. Ameri-Manage (Fla. July 14, 1986).

By opinion filed June 17, 1986 the Third District, on motion for rehearing and certification, certified the aforementioned question to this Court for its discretionary review.

This Court has jurisdiction of the certified question pursuant to Article V Section 3(b)(4) Fla. Const. and authority to review the entire case pursuant to Lawrence v. Florida East Coast Railway, 346 So.2d 1012 (Fla. 1977).

STATEMENT OF THE FACTS

In March of 1982 Hill was arrested for having a revolver tucked in his pants, during a domestic dispute with his father while he as in the home in which he was living at the time. The police charged Hill with carrying a concealed firearm. The Court accepted Hill's plea of guilty to the charge and on June 11, 1982, placed Hill on twelve months non-reporting probation and withheld adjudication. (Pl. Exhibit 1). Non-reporting was a form of probation imposed by Dade County Circuit Judges approximately 8% of the cases in 1982 (TR-251).

On the day sentence was imposed, June 11, 1982 Hill proceeded to the Department of Corrections Intake Office where he was interviewed by a receptionist. (TR-254-255). The receptionist obtained certain information and, apparently directed Hill to proceed to another office of the Department of Corrections. Hill did not proceed to the office, however, Hill was uncertain when he was to appear. (TR-386).

On January 18, 1983, probation officer in training, Dorothy MacEachern met with her supervisor, Eugenia Huft to

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review pending caseload (TR-222). During a review of Hill's file, Huft noted that MacEachern had not yet obtained a copy of the Court order of probation for Hill. Huft instructed MacEachern to obtain the aforesaid order. She did not. (TR-225-228).

In or about January 28, 1983, MacEachern, still without a copy of the Court's order of probation in her file, falsely swore to an affidavit of probation in front of Eugenia Huft, claiming that Hill had violated conditions 2, 5 and 7 of his order of probation.(TR-154-160) Supervisor Huft likewise failed to note that MacEachern had not yet obtained a copy of Hill's Court order of probation.(TR-227-228) As a result of the false and erroneous affidavit, a warrant was issued for the arrest of Hill.(Pl. Exhibit 3) He was arrested on February 18, 1983, (Pl. Exhibit 5) and remained incarcerated for seven and one-half days. During his incarceration, Hill contacted MacEachern on at least one occasion and requested that she assist in his release. MacEachern advised that the matter was out of her hands. MacEachern never obtained a copy of Hill's order of probation throughout the seven and one-half days of his incarceration. On at lease one occasion, she was in the courtroom with Hill's court file merely a few feet away. (TR-165-168).

At trial, the DOC's employees admitted that Hill's arrest for allegedly violating his "non-reporting" probation was entirely and unequivocally erroneous. MacEachern admitted at trial that she was mistaken as to each and every alleged violation of probation. (TR-155-157). She admitted that she should not have sent a letter to Hill (TR-144) and that he did not have an obligation to respond to any letters. (TR-144-145). She admitted that her failure to have a copy of Hill's order of probation in her file prior to swearing out an affidavit of probation violation, was an error. (TR-154). Finally, when a clerk in trial Judge Moore's criminal courtroom recognized with horror that Hill's probation was non-reporting, MacEachern withdrew her affidavit of probation violation and Hill was released. (TR-164)

The essence of Hill's civil rights action was the existence of a defacto custom or policy within the Department of Corrections which condoned, tolerated or permitted the supervision of probationers without due regard, knowledge, or concern about their status as non-reporting or reporting probationers. The DOC admitted that notwithstanding the fact that Hill was taken into custody on February 18, 1983 as a result of an affidavit of violation of probation filed by MacEachern, the agency was not aware until February 24, 1983 that Hill's probation, imposed in June of 1982, was non-

reporting. (TR-120). It thereby admitted that it was not until after Hill had spent seven and one-half days in jail that it knew the nature of its responsibility in the case. The DOC admitted that notwithstanding the fact that it did not have a copy of the Court order of probation, the file was treated by the DOC as reporting probation "until officially informed otherwise". (TR-123). The evidence further revealed that as a matter of custom or policy, the DOC relied entirely upon information given to it by a probationer in order to determine his status as to reporting or non-reporting. (TR-254-255).

Huft, MacEachern's immediate supervisor testified that the DOC was aware of the problems associated with its supervision of probationers which was manifested by the fact that "we lose so many probationers that never report from the Court to our intake. I don't know the exact percentage but a high percentage of probationers never cross the street and come to our intake office, and, because it was very hard to follow up on it, the procedure was changed." (TR-234).

DOC intake supervisor Oscar Knight testified it was the procedure of the DOC in June of 1982 to proceed to open a file and process a probationer without any written documentation from the Court itself. (TR-250). That in June of 1982, approximately 8% of the probationers were "on non-reporting probation" (TR-251, and that notwithstanding the level of

education or intellect of the probationer, a receptionist had the initial responsibility of obtaining information regarding the individual's probation from that individual orally. (TR-255-254). Knight admitted that the only certain way to determine the conditions and nature of an individual's probation was to obtain a copy of the Clerk's jacket or court order. However, there was no policy or procedure in effect of June of 1982 whereby the intake office would obtain that information. (TR-258).

Finally, in an incredible admission of the DOC's absence of policies when dealing with reporting versus non-reporting probation, Oscar Knight exclaimed "there is no such thing as non-reporting probation" and accordingly, the Department of Corrections never trained its employees in any fashion with respect to how to deal with non-reporting probation. (TR-263). Knight made the statement with the working knowledge that approximately 8% of the defendants sentenced in Dade County, Florida in 1982 were sentenced to non-reporting probation.

The Plaintiff presented the only medical testimony in the case. (TR-247). The uncontroverted evidence established that prior to this incident the Plaintiff has suffered a broken neck between the C-1 and C-2 vertebrae (R-125), that just prior to the incident his condition was asymptomatic but he remained a "walking eggshell" and was much more susceptible to an injury

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to the neck than a normal person. (TR-126). As a result of the deprivation of proper care in the jail and the jostling within the cell, Hill's condition was aggravated and accelerated to the extent of an additional 5% to 7% permanent disability rating to the body as a whole. (TR-128-131). The evidence also established that in Hill's condition, he faced the possibility that if he were jostled or rearended in an auto accident, he could easily be paralyzed from the neck down. (Tr-132).

Hill testified that as a result the DOC's improperly citing him for a violation of probation, he was taken to the Dade County Jail, fingerprinted, photographed and placed in an overcrowded holding cell with fifteen other persons. He was later transferred to a smaller cell with thirteen other persons. (Tr-366-367). He was denied medical care and was unable to sleep for the seven and on-half days he was in jail. (Tr-368). He was also shoved by a guard causing injury. (Tr-369). He suffered from severe neck cramps and at the time of trial still had cramps and tightness in his neck. (TR-374). He was ordered by his doctor to wear a brace after this incident (TR-377), sustained medical bill (TR-375) and could expect further medical care in the future. (R-130). Additionally, due to his medical condition, education and training, his ability to work in the future was limited. (Tr-410).

Plaintiff's life expectancy at the time of trial was 46 years. (TR-429). His lost capacity for enjoyment of life, pain, suffering and injury to reputation in the past, as well as future pain and mental anguish were all considered by the jury in awarding damages.

SUMMARY OF ARGUMENT

The Third District Court of Appeals has certified the question of whether or not the State of Florida pursuant to the passage of 768.28 Florida Statutes waived its Eleventh Amendment and State common law sovereign immunity and thereby consented to suit for actions pursuant to 42 U.S.C. Section 1983. Prior to addressing the certified question, this Court should first consider the premise of the question, i.e. the existence of state common law sovereign immunity and federal Eleventh Amendment constitutional immunity as a bar to federal civil rights actions.

The Eleventh Amendment to the United States Constitution only limits the jurisdiction of federal courts over states and its agencies. It has been interpreted to be a restraint only upon the exercise of the federal judicial power and has no applicability in an action such as the case at bar which was filed in state court. Therefore, that issue is not properly before this Court for its review.

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State courts have concurrent jurisdiction with the federal courts to entertain federal civil rights actions pursuant to 42 U.S.C. Section 1983. However, since this section is a federal statute which proscribes state action, Florida common law sovereign immunity is not applicable.

This Court should answer the certified question by stating that neither the Eleventh Amendment nor common law sovereign immunity is applicable in a 42 U.S.C. 1983 action filed in state court.

In exercising its discretionary review of this case, this Court should consider the entire case. The Third District Court of Appeal erred in remanding the case for a new trial on damages. The language in the verdict form which was characterized by the Third District as a misleading instruction, was not only not objected to by the DOC but also was specifically agreed. Not only did the language not constitute a fundamental error, but it was virtually identical to jury instructions and model verdict forms adopted and approved by this Court.

The relief sought in this Court is a remand of the cause for a new trial on liability under 42 U.S.C. 1983, and reversal of the District Court's order of new trial on damages on the false imprisonment count with instructions to reinstate the judgment.

ISSUE I

ARGUMENT

> Neither the Eleventh Amendment to the United States Constitution nor common law sovereign immunity bar actions in state court pursuant to 42 U.S.C. 1983.

The Eleventh Amendment to the United States Constitution states as follows:

> 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 a foreign state.

While the Amendment has been construed in Hans v. Louisiana, 135 U.S. 1, 10 S.Ct. 504, 33 L.Ed.2d 842 (1890), to encompass suits by a state's own citizens in federal court as opposed to another state, it has never been interpreted to encompass suits brought in state court as opposed to the federal courts.

The United States Supreme Court recently had an opportunity to review a 42 U.S.C. 1983 action which had been filed in state court against the State of Maine and its commissioner of human services. Maine v. Thiboutot, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980). The action alleged a violation of Section 1983 for the deprivation welfare benefits and sought attorneys' fees pursuant to Section 1988 of the Civil Rights Act. After first determining that Section 1983 actions encompassed violations of both the federal constitution

and federal laws the Court considered the issue of attorneys' fees pursuant to 42 U.S.C. Section 1988. The Court held that Section 1988 applied to that action and that the State of Maine was responsible for the plaintiffs' attorneys' fees in that action in state court. The Court additionally noted in footnote 7 that "no Eleventh Amendment question is present, of 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." 448 U.S. 1, 11, 100 S.Ct. 2502, 2507, 65 L.Ed. 555.

It is clear therefore that from a reading of the most recent United States Supreme Court case on point and its own clear language, the Eleventh Amendment to the United States Constitution does not apply to actions maintained in state court. That issue, therefore, should not have been addressed in either Scoblow v. Ameri-Manage, Inc., 483 So.2d 809 (Fla. 3d DCA 1986) review granted Supreme Court Case No. 68,522 Skowblow v. Ameri-Manage (July 14, 1986), Spooner v. Department of Corrections, 11 F.L.W. 1157 (Fla. 1st DCA May 19, 1986) Review Granted Supreme Court Case No. ________. Spooner v. Department of Corrections, or the case at bar.

It is clear that Florida courts have jurisdiction to hear actions pursuant to 42 U.S.C. 1983. In a well reasoned opinion Judge Shivers, speaking for the First District Court of Appeal

in Lloyd v. Page, 474 So.2d 865 (Fla. App. 1st DCA 1985) concluded that Florida state courts had concurrent jurisdictions with the federal courts to consider actions pursuant to 42 U.S.C. 1983. There, the Court noted that although numerous appellate decisions had addressed Section 1983 actions, none had squarely faced the issue of concurrent jurisdiction. The Court held based in part upon Article I, Section 21 of the Florida Constitution that the state courts had concurrent jurisdiction to enforce cases arising under federal law. See also Jesson, Inc. v. Tedder, 481 So.2d 554 (Fla. 4th DCA 1986). It furthermore appears that each of the five District Courts of Appeal has entertained at least one Section 1983 action.

The issue of a state's common law immunity to Section 1983 actions has not been squarely addressed by the United States Supreme Court. This is in large part, the result of the existence of the Eleventh Amendment question in federal court. Actions filed in federal courts against state agencies have uniformly been resolved based upon the existence or non-existence of an Eleventh Amendment immunity waiver. Consequently, the United States Supreme Court has not reached that question on cases which have worked their way through the federal appellate system.

The Supreme Court has, however, addressed the question of a municipality's immunity from liability under Section 1983. In Owen v. City of Independence Missouri, 445 U.S. 622, 100 S.Ct. 1398 663 L.Ed. 2d 673 (1980) the Court squarely addressed the scope of a municipality's immunity from liability under Section 1983 and determined that it was essentially one of federal statutory construction. The Court stated as follows:

> By its terms, Section 1983 "creates a species of tort liability that on its face admits of no immunities." Citing Imbler v. Pachtman, 424 U.S. 409, 417, 96 S.Ct. 984, 988, 47 L.Ed. 2d 128 (1976). Its language is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted. Rather, the act imposes liability upon "every person" who, under color of state law or custom, "subjects or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." And Monell held that these words were intended to encompass municipal corporations as well as natural "persons." 445 U.S. 622, 635, 100 S.Ct. 1398, 1407), 663 L.Ed. 2d 673.

The Court furthermore stated at footnote 30 that,

> Municipal defenses - including an ascertation of sovereign immunity - to a federal right of action are, of course controlled by federal law. See Fitzpatrick v. Biter, 427 U.S. 445, 455-456, 96 S.Ct. 2666, 2671, 49 L.Ed 2d 614 (1976); Hampton v. Chicago, 484 F.2d 602, 607 (CA 7 1973) (Stevens, J.)("conduct by persons acting under color of state law which is wrongful under 42 U.S.C. Section 1983 or Section 1985(3) cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect but transmute a basic guarantee into an illusory promise; and

> the supremacy clause of the constitution insures that proper instruction may be enforced.")

Finally, Justice Brennan stated as follows:

> How "uniquely amiss" it would be, therefore, if the government itself - "the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the sitting of worthy norms and goals for social conduct" - were permitted to disavow liability for the injury it has begotten. (citation omitted). 445 U.S. 622, 652, 100 S.Ct. 1398, 1415, 63 L.Ed. 673.

It appears clear therefore that pursuant to the cases cited above and the supremacy clause, common law immunities are not applicable in a federal civil rights action pursuant to 42 U.S.C. Section 1983. Although the issue has not been specifically addressed by the United States Supreme Court, it is clear that the intent of the Supreme Court to construe the Civil Rights Act in such a manner so as to hold that state common law sovereign immunities are inapplicable.

It is also possible, however, to analyze the issue from a Florida sovereign immunity viewpoint. In Cauley v. City of Jacksonville, 403 So.2d 379 (Fla. 1981), this Court conducted an exhaustive analysis of the history of sovereign immunity in the State of Florida. The Court concluded with its decision that "in this state, sovereign immunity should apply equally to all constitutionally authorized governmental entities and not in a disparate manner." 403 So.2d at 387. If therefore, sovereign immunity is to be equally applied throughout the

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State of Florida for all its agencies, counties and municipal governments, there can be no immunity from actions pursuant to 42 U.S.C. 1983 in Florida courts. It is clear that under Owen and Monell that municipalities and cities in Florida do not have sovereign immunity from civil rights actions in state courts. Therefore, under a uniformed theory of sovereign immunity, neither the state nor its agencies have state common law immunity.

This Court should reject the premise of the certified question and hold that neither the Eleventh Amendment nor common law sovereign immunity are applicable in state court 42 U.S.C. 1983 actions against the state or its agencies and municipalities.

ISSUE TWO

ARGUMENT

> The District Court erred in ordering a new trial on damages where the allegedly misleading verdict form was agreed to by both parties, did not constitute fundamental error and was consistent with the dictates of Florida law and Florida standard jury instructions and model verdict forms.

This Court in Lawrence v. Florida East Coast Railway Company, 346 So.2d 1012 (Fla. 1977) ruled for the first time that special verdict forms would be required in all jury trials involving comparative negligence. In the case at bar, since Plaintiff was proceeding on both an intentional tort claim and

a negligence claim to which the Defendant raised the defense of comparative negligence, a special verdict interrogatory form was prepared, agreed to by both parties, and then read and submitted to the jury.

The verdict form (App. 7) which was prepared contained the following language after questions pertaining to the apportionment of negligence, determination of liability for false imprisonment and the request for total amount of damages of the plaintiff:

> In determining the total amount of damages, do not make any reduction because of negligence, if any, of Plaintiff Jesse Hill. If you have found Jesse Hill negligent in any degree, the Court in entering judgment will reduce Jesse Hill's total amount of damages (100%) by the percentage of negligence which you found is chargeable to Jesse Hill.

This language is virtually identical to that contained in the suggested verdict forms contained in the Model Charges found in the Florida Standard Jury Instructions. See Model Charge 2, 3, 5 and 6. In addition, Florida Standard Jury Instruction 6.1(c) states as follows:

> In determining the total amount of damages, you should not make any reductions because of the negligence, if any, of (claimant). The Court will enter a judgment based on your verdict and, if you find that (claimant) was negligent in any degree, the Court in entering judgment will reduce the total amount of damages by the percentage of negligence which you find is chargeable to (claimant). Fla. St. J. Inst. 6.1(c).

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This precise instruction was prepared by the DOC, submitted by the DOC and read by the trial judge at the request of the DOC. See trial transcript pages 467-468. Similar language is also found in 6.3(c) and 6.5(c) of the Florida Standard Jury Instructions, all of which have been approved by this Court.

This Court recognized in Lawrence v. Florida East Coast Railway Company, supra the need to place the mathematical computations in the hands of a judge rather than a jury and provide a means for appellate review of these computations. The need was even more pervasive in the case at bar. Comparative negligence was not a defense to the intentional tort while it was a defense to the negligence claim. If the jury found for the Plaintiff on both counts, as it did, it was important that the Court know the total amount of damages and be in a position to enter a judgment in accordance with the law and the jury's determination of damages. If the jury had not been so instructed it is conceivable, in fact probable, that the jury would have assumed it was their responsibility to reduce their damage award by the amount of the Plaintiff's comparative negligence. Then, had the jury not found for the Plaintiff on the intentional tort count, there would have been a double reduction as the court in entering judgment reduced the already reduced verdict.

Rule 1.470 Fla. R. Civ. P. specifically provides that,

> No party may assign as error the giving of any charge unless he objects thereto at such time or the failure to give any charge unless he requested the same.

In addition, this Court long ago held that where no objection is made to the form of the verdict, any defect as to form is waived. Higber v. Dorigo, 66 So.2d 684 (Fla. 1953).

After the jury had been charged, including a reading of the verdict form, and immediately prior to the beginning of their deliberations, the following found at page 549 of the transcript took place:

> The Court: Let me ask you this. Off the record we have gone over the verdict form. You both agree to the verdict form?
>
> Mr. Peeples: (Trial counsel for DOC). Yes.

An analogous situation occurred in Rosario v. Melvin, 446 So.2d 1158 (Fla. 2d DCA 1984). There, the Second District stated that the trial court elected not to utilize the Florida Standard Jury Instructions Model Charge which they held follows the suggestion of Lawrence v. Florida East Coast Railway, supra. The court determined that the appellants waived any ambiguities when they failed to object to the form of the verdict. In the case at bar not only is there a failure to object but specific agreement in the form of the verdict by the

DOC's trial counsel and the submission of an identical instruction.

The DOC knew or should have known at trial that comparative negligence was not a defense to the intentional tort action and that therefore a finding on that count would not result in a reduction by the trial judge in entering judgment. It was therefore incumbent upon trial counsel to raise a contemporaneous objection to the verdict form rather than agreeing to it. As pointed out in the statement of the case, the DOC requested a copy of the verdict form prior to deliberations, it then had one and one-half hours to review the verdict form before the jury returned the verdict. However, the DOC remained silent even after the verdict was returned and the jury polled.

As the court stated in Keller Industries v. Morgart, 412 So.2d 950 (Fla. 5th DCA 1982),

> The fault should not be laid upon the trial judge; rather, it must be placed upon the defendant's trial attorney who led the court into error by approving, or failing to object to, the form of the verdict before it was submitted to the jury. Trial counsel also failed to bring the inconsistent verdicts to the attention of the trial court before the jury was discharged thus preventing the timely correction of the problem by the trial judge. For all we know, defendant's trial counsel intentionally, for tactical reasons, chose not to bring the problem to the court's attention.

Indeed, the DOC remained silent on this point for 71 days after the judgment was entered. Its Rule 1.540 motion to amend final judgment was specifically denied by the trial court stating that there was no objection to the form of the verdict (App 5). The standard of review of the denial of a Rule 1.540 motion is abuse of discretion, however, none was shown. Schwab & Co., Inc. v. Breezy Bay, Inc., 360 So.2d 117 (Fla. 3d DCA 1978).

There seems to be no dispute that the verdict form did not constitute "fundamental error." In Sanford v. Rubin, 237 So.2d 134 (Fla. 1970) this Court defined fundamental error as follows:

> "'Fundamental error,' which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action. The Appellate Court should exercise its discretion under the doctrine of fundamental error very guardedly." Sanford supra at 137.

There is no question that after Lawrence v. Florida East Coast Railway, supra juries are to be instructed to apportion negligence, and determine the full amount of the plaintiff's damages without reduction. Since the jury did also find for Hill on the intentional tort claim the trial judge did not reduce the verdict in entering judgment this was not fundamental error.

In dealing with the analogous issue of the erroneous inclusion of an inappropriate measure of damages this Court stated in Bould v. Touchette, 349 So.2d 1181 (Fla. 1977) as follows:

> To hold that the inclusion of this element of damages in the instructions to the jury was fundamental error would mean that every instruction on damages would be subject to attack on appeal without the necessity of making any objection during the trial of the case. We hold that this was not a fundamental error, but was an invited error which could not be raised for the first time upon appellate review. Bould supra at 1181.

The same reasoning is applicable here. The DOC had at its disposal the means by which to call this point to the trial judge's attention. They did not. Perhaps this was because it hoped the Plaintiff did not know the verdict as to the intentional tort would not be reduced. Having elected as a trial tactic to agree to the verdict form it should not now be permitted to assail it.

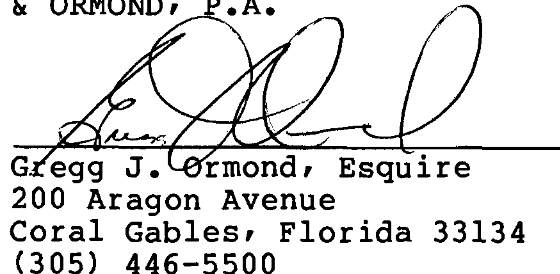
CONCLUSION

Based upon the foregoing authorities, neither Eleventh Amendment nor state common law immunities bar a 42 U.S.C. 1983 action filed in state court against a state agency. The trial court erred in dismissing Count I of the complaint and the Third District Court of Appeal erred in affirming the dismissal.

Additionally, the Third District Court of Appeal was in error when it vacated the judgment and remanded the case for a new trial on damages. The verdict form which the Third District characterized as misleading was specifically agreed to by the DOC. The form is consistent with prior decisions of this Court on special interrogatory verdict forms and published jury instructions. There is nothing to suggest fundamental error on the part of the trial court.

Respectfully submitted,

LISK & ORMOND, P.A.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 4 day of August, 1986 to: Charles F. Mills, Esquire, 6101 S.W. 76th Street, South Miami, Florida 33143.

____
GREGG J. ORMOND, ESQUIRE