IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,016

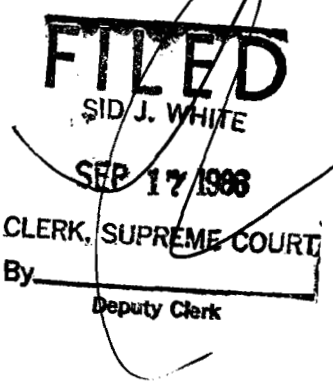
JESSE HILL,

Petitioner,

v.

DEPARTMENT OF CORRECTIONS,
STATE OF FLORIDA,

Respondent.




# PETITIONER'S REPLY BRIEF

Gregg J. Ormond, Esquire
LISK & ORMOND, P.A.
200 Aragon Avenue
Coral Gables, Florida 33134
(305) 446-5500

HAGGARD & KIRKLAND, P.A.
330 Alhambra Circle
Coral Gables, Florida 33134
(305)

Counsel for Petitioner

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## REBUTTAL ARGUMENT

### ISSUE I

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.

It would appear that the DOC has entirely missed the point of the argument contained on this issue in Petitioner's Initial Brief. Perhaps it was not outlined with sufficient clarity. We will, therefore, state it more succinctly below.

There are two types of immunity which form the premise of the question certified by the Third District Court of Appeal to this Court. They are first, the existence of Eleventh Amendment immunity in a state court civil rights action and second, the existence of traditional state common law immunity in a state court federal civil rights action. It is the Petitioner's contention that neither of these immunities is applicable in the case at bar and therefore, this Court does not need to answer the certified question of whether or not there has been a waiver of the immunities.

The Eleventh Amendment to the United States Constitution is a limitation of the judicial power of the United States, i.e., the federal court system. It does not limit the judicial power of the State of Florida, i.e., the state court system.

The DOC states that the 11th Circuit Court of Appeal in Gamble v. Florida Department of Health & Rehabilitative

Services, 779 F.2d 1509 (11th Cir. 1986) concluded that the State of Florida had not waived its Eleventh Amendment immunity by passage of 768.28 of the Florida Statutes (1983). We agree that is the holding of the case. However, we ask rhetorically what bearing it has on the case at bar?

The plaintiff in Gamble filed an action in the United States Federal District Court. The case was appealed to the United States Court of Appeal, a federal court. The Eleventh Circuit ultimately decided that the plaintiff could not maintain his civil rights action in federal court because there had not been a waiver by Florida of its Eleventh Amendment immunity. Whether that decision is correct or incorrect is irrelevant to the case at bar. The case at bar was filed in the 11th Judicial Circuit Court in and for Dade County, Florida. Therefore, whether the State of Florida has waived its Eleventh Amendment immunity and consented to suits in federal court is entirely outside the confines of the case at bar and is not in controversy here. Gamble v. Florida Department of Health & Rehabilitative Services does not therefore aide this Court in resolving the within action.

The First District Court of Appeal's reliance upon Gamble in Spooner v. Department of Corrections, State of Florida, 448 So.2d 897 (Fla. 1st DCA 1986), is similarly misplaced. Inasmuch as Spooner is also before this Court for review, the Court no doubt has had the opportunity to review the record

and see that neither Spooner nor the DOC concerned themselves with the applicability of Eleventh Amendment immunity in arguing that case before either the trial court or the First District. They only addressed whether or not there had been a waiver of Eleventh Amendment immunity without considering its inapplicability to a state court action. Thus, the First District was misguided by the parties in deciding the issues before it. Hopefully, this court will clarify that point in that case as well.

In our initial brief we cited the leading United States Supreme Court case regarding the Eleventh Amendment question.

The DOC's attempt to distinguish Maine v. Thiboutot, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed. 555 (1980), however, falls entirely short of the mark. As the Supreme Court's decision states, Thiboutot and others filed suit in the Superior Court for the State of Maine. They sought relief under Section 1983 for themselves and other plaintiffs similarly situated. The Superior Court granted them relief pursuant to Section 1983. This included both injunctive relief and money damages. The trial court, however, denied their request for attorneys' fees pursuant to Section 1988. The Supreme Court of Maine reversed, stating that the plaintiffs were entitled to their attorneys' fees in addition to the damages awarded pursuant to Section 1983. Maine appealed to the Supreme Court of the United States and it affirmed.

We agree with the DOC that the Supreme Court's reference to the Eleventh Amendment was in the context of an attorneys' fees award under the provisions of 42 U.S.C. Section 1988. However, attorneys' fees were awarded on the basis of the plaintiff having prevailed in the Section 1983 action. When the Supreme Court stated that "no Eleventh Amendment question is present of course where an action is brought in a state court..." while referring to the cost issue, must be construed to encompass the entire action. If the Eleventh Amendment constituted a bar to the Section 1983 action in state court, the Supreme Court would have dismissed the entire case and would have never have addressed the cost issue. Instead, the Court affirmed the case and recognized that the Eleventh Amendment question was not present in state court actions.

With respect to the existence of state common law immunity in a federal civil rights action, we cited the case of Owen v. City of Independence, Missouri, 445 U.S. 621, 100 S.Ct. 1398, 63 L.Ed. 673 (1980). There the court clearly stated that the applicability of state sovereign immunity to a federal right of action was controlled by federal law and that no such immunities would be recognized. The DOC does not address this case. By its silence, we suggest that it recognizes that it cannot avail itself of state common law theories of immunity to a federal cause of action. Perhaps

this is the reason for the DOC's refusal to abandon its misplaced reliance upon the Eleventh Amendment defense.

We also analyzed this issue in the context of Florida law. Thus, we stated in our initial brief that the Florida courts had moved in the direction of a uniform application of sovereign immunity; that it was clear from Owen and others that, the Supreme Court of the United States has held that with respect to municipalities, state common law sovereign immunity was not a defense to a federal civil rights action in either state or federal court. Thus, we argued, this Court should deny the DOC the right to raise sovereign immunity as a defense to this civil rights action.

The DOC counters this argument on page 8 of its brief by claiming that no Florida court has ever held that a state agency does not have common law immunity from a particular cause of action. This is not true. In State Road Department of Florida v. Tharpe, 1 So.2d 868 (Fla. 1941), 146 Fla. 746, the plaintiff, Tharpe, owned a watermill which he and his predecessors in title had operated as a saw mill, grist mill, or shingle mill for more than 70 years. A Florida state agency through its construction of a bridge reduced the capacity of the mill by 50%. Tharpe filed suit and the State defended on the basis of sovereign immunity. The court held as follows:

> Immunity of the State from suit does not afford relief against an unconstitutional statute or

> against a duty imposed on a State officer by statute, nor does it afford a State officer relief for trespassing on the rights of an individual even if he assumes to act under legal authority. It will not relieve the State against any illegal act for depriving a citizen of his property; neither will it be permitted as a plea to defeat the recovery of land or other property wrongfully taken by the State through its officers and held in the name of the State. It will not be permitted as a City of refuge for a State agency which appropriates private property before the value has been fixed and paid.
>
> Section 22 of Article 3 of the Constitution authorizes provision by general law for bringing suit against the State for all liabilities now or hereafter existing, but it has no application to the case at bar, and if it did, it should be read in connection with Section 4 of the Bill of Rights providing that all courts be open in order that every person may seek redress for injury done to his lands, goods, person, or reputation. Tharpe supra at 869. (Emphasis supplied).

While the court in Tharpe was dealing with a property right the reasoning is even more compelling here where the essence of Hill's Section 1983 action was the deprivation of rights guaranteed by the United States Constitution. Surely if Tharpe could maintain an action for damages for the taking of his millrace without due process, then Hill can maintain his action against the DOC for the unconstitutional deprivation of his liberty without due process.

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 II

> 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 has jurisdiction over this cause pursuant to Art. V, Section 3(b)(4), Florida Constitution, which provides that this Court may review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance. Once jurisdiction attaches, the Supreme Court's scope of review extends to the entire opinion and judgment, and not just a single issue certified by the appellate court. Giblin v. City of Coral Gables, 149 So.2d 561 (Fla. 1963); Zirin v. Charles Pfizer & Co., 128 So.2d 594 (Fla. 1961). In Savoie v. State, 422 So.2d 308,312 (Fla. 1982), this Court succinctly stated the rule established in the aforesaid cases:

> We have jurisdiction (direct conflict), and, once this Court has jurisdiction of a cause, it has jurisdiction to consider all issues appropriately raised in the appellate process, as though the case had originally come to this court on appeal.

The rule is exactly the same when jurisdiction attaches as a result of a certified question.

> Although by its decision the District Court of Appeal passed upon three questions of law, only one of them has been certified as occupying the status of a matter of great public interest.

> Nonetheless, we have considered all three questions under the rule of Zirin (citation omitted).

Pan American Bank of Miami v. Allegro, 149 So.2d 45 (Fla. 1963); See Confederation of Can. Life Ins. Co. v. Vega y Armisan, 144 So.2d 805,807 (Fla. 1962) (In this review, wherein the question was certified to us by the district court of appeal,...we are interested in the entire decision of that court and not just the "question" certified).

Thus, this Court has jurisdiction to review the decision in the instant cause which clearly encompasses the matters of law raised at Petitioner's Issue II.

The DOC does not want this Court to review the propriety of the Third District Court of Appeal's decision remanding this case for a new trial. Therefore, the first line of attack is to suggest that this Court does not have jurisdiction to review the entire case. However, as is outlined above, this Court clearly has jurisdiction to consider all of the issues raised in the appellate process. The DOC's second line of attack is to simply ignore the arguments outlined in Hill's initial brief.

We argued that the verdict form contained language virtually identical to that which is found in the model charges and, among others, Florida Standard Jury Instructions 6.1(c). The DOC does not respond. We argued that the DOC in fact submitted Florida Standard Jury Instruction 6.1(c) to the

trial court. The DOC does not respond. We argued that the DOC agreed to the form of the verdict. The DOC does not adequately explain why it agreed to what it now claims to be an erroneous verdict form. We argued that a party may not appeal a jury charge or verdict form unless he objects at trial. The DOC essentially does not respond. We argued that the verdict form did not constitute fundamental error. The DOC does not respond. We argued that Florida law requires that juries be instructed to apportion negligence and determine the full amount of plaintiff's damages without reduction. The DOC does not respond.

We submit that the failure to address any of the aforesaid points constitutes an admission on the DOC's part that Hill is correct as a matter of law on the points submitted. This view is further supported by the DOC's creation of its own "new" issue which it then proceeds to attempt to support.

The DOC claims that the question presented "may also be stated as whether or not the trial court misled the jury so that in the interest of justice, a new trial must be granted." In analyzing this question, one cannot escape the fact that the means by which the trial judge allegedly "misled" the jury was by reading a verdict form which had been reviewed in advance and specifically agreed to by the DOC. The DOC never explains why it should be permitted to agree to a verdict form

at trial and then complain on appeal that it was misleading to the jury.

The DOC recites in its brief the various cases cited by the Third District in its opinion. We do not quarrel with those cases. However, none of those cases involve a party complaining on appeal about a verdict form which was read by the trial court as the behest of the complaining party.

In admitting that it failed to object to the verdict form at trial, the DOC counters on page 11 of its brief that "it had a perfect right to rely upon the statements of the trial court to the jury as contained at the end of the verdict form." In other words, the DOC did not have to object to a verdict form which it claims was misleading simply because the DOC later heard the trial judge read the same verdict form which it had submitted.

Negligence is not a defense to an intentional tort. It was not at the time of trial and it is not today. That has not changed. The verdict form reads exactly the same today as it did on the date of trial. That has not changed. The only thing that potentially has changed is the DOC's understanding of the law of Florida with respect to defenses to intentional torts. However, the fact that the DOC was unaware of the law of Florida cannot "excuse" its failure to object at trial.

Even assuming the issue could be raised on appeal the DOC never explains how the language of the verdict form could have

an effect upon the jury's determination of damages. The verdict form instructed the jury to apportion negligence and not reduce the damage award by any apportionment which they found. We must assume that they followed this instruction. Their verdict thus determines the Plaintiff's damages. There was no possible way (unless we speculate that the jury improperly increased its award to compensate for an anticipated reduction by the trial court) that the verdict form could have had a misleading effect upon their verdict.

Finally, even if we do speculate that the jury improperly increased the award to compensate for an anticipated reduction the Plaintiff should be offered the opportunity to accept a twenty-five (25%) percent reduction rather than forcing a new trial upon him on damages alone. This was the relief sought by the DOC (Appendix page 6) and would clearly obviate the alleged prejudice.

## CONCLUSION

Neither the Eleventh Amendment nor state common law sovereign immunity constitute a bar to the Plaintiff's right to maintain a Section 1983 action in a Florida state court. There is, therefor no valid premise for the certified question. This Court should vacate the Third District's affirmance of the dismissal of the civil rights action with instructions for a new trial on liability on the civil rights count.

The DOC agreed to the form of the verdict which it claims was misleading. However, it failed to establish fundamental error or eplain how the verdict was misleading. This Court is urged to accept jurisdiction of this entire case and reverse the Third District's decision vacating the Final Judgment entered by the trial court.

Respectfully submitted,

LISK & ORMOND, P.A.

By: _____

Gregg J. Ormond, Esquire
200 Aragon Avenue
Coral Gables, Florida 33134
(305) 446-5500

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 15 day of September, 1986 to: Charles F. Mills, Esquire, 6101 S.W. 76th Street, South Miami, Florida 33143.

_____

GREGG J. ORMOND, ESQUIRE