IN THE SUPREME COURT OF THE STATE

OF FLORIDA

CASE NO. 74,406

RABEN PASTAL, a Joint Venture, comprised of RABEN BUILDERS, INC. and PASTAL CONSTRUCTION COMPANY,

Petitioners,

v.

CITY OF COCONUT CREEK, a Florida Municipal Corporation and JAMES COWLEY,

Respondents.

ON CERTIFICATION FROM
THE FOURTH DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONERS

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STATEMENT OF THE CASE AND FACTS

This case is before the Court on certification by the Fourth District Court of Appeal of the following question of great public importance:

> May a municipality be held liable to an owner-developer of a building project under **42** U.S.C. Section **1983** for the wrongful refusal of the municipality's chief building official to withdraw a stop-work order on the project? 14 F.L.W. **1418** (June **14, 1989).**

The facts from which this question arises have never been disputed on appeal. The Chief Building Official of the City of Coconut Creek, James Cowley, refused to lift stop-work orders on two permitted mid-rise buildings being constructed by Raben-Pastal in a large multiphase condominium development. Cowley, who was not a licensed engineer or architect, wrongfully and willfully refused to lift the stop-work orders despite the fact that reputable professional engineers, specifically retained by him to inspect the buildings and supervise modifications, had certified to him that the buildings had been put into full compliance with the Building Code. This unjustified refusal was *so* reprehensible that the jury below found that he violated Petitioners' constitutional rights.[1/] The substantial damages suf-

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1/ The verdict was predicated on **42** U.S.C. Section **1983** which provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or District Court 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....

fered by Petitioners were not the product of mere inadvertence by the Official. On the contrary, in a special interrogatory verdict the jury concluded:

> [The Chief Building Official] intentionally violated and/or misapplied the provisions of the South Florida Building Code or acted arbitrarily, capriciously and unreasonably. (R.1591, 1894).
>
> He knew or should have known that his conduct violated clearly established rights. (R.1591, 1894).

On instructions directing the jury to determine whether Cowley was the final authority for the City as to the lifting of stop-work orders (R.1872),[2/] the jury found that he was the final authority and that his actions accordingly represented "an official policy, custom, or practice of the City" (R.1591, 1894). Under these findings, the jury returned its verdict of 2.5 Million Dollars against the City as well as the Chief Building Official. (R.1591, 1894).

Six months after the jury was discharged, the trial court entered a Judgment N.O.V. in favor of both Cowley and the City on the ground that recovery was precluded by the United States Supreme Court opinion in Parratt v. Taylor, 451 U.S. 527 (1981) (The availability of state damages remedies which will adequately redress losses arising from random unauthorized acts

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2/ "R" refers to the record on appeal, which includes portions of the trial transcript. "T" refers to portions of the trial transcript designated as part of the record on appeal. Plaintiffs' or Defendants' "Ex" refers to the Trial Exhibits. Unless otherwise indicated, all emphasis is supplied.

precludes procedural due process claims under **42** U.S.C. Section **1983).** The trial court also reduced the jury's verdict by setting off against it a **$1,051,000.00** settlement that Raben-Pastal made with certain project professionals.

Petitioners then appealed to the Fourth District. The City did not cross-appeal or in any other manner question the instructions given to the jury or the jury's findings in connection with the issue of municipal liability. The issue of whether Cowley was the final authority for the City of Coconut Creek was simply never pressed during post-trial proceedings or raised on appeal.

In the Fourth District the sole liability issue was whether the trial court was correct in having applied the preclusive doctrine of Parratt v. Taylor. However, instead of deciding the Parratt issue, the Fourth District raised a separate issue regarding Cowley's final authority and concluded (after requiring supplemental briefs while the case was under submission) that a municipality cannot under any circumstances be liable for the unconstitutional actions of its Chief Building Official, basing its determination on a decision of the United States Supreme Court promulgated five months after oral argument, City of St. Louis v. Praprotnik, 485 U.S. **112,** 99 L. Ed.2d 107 **(1988).** After **so** holding, the Fourth District certified the issue to this Court.

Jurisdiction having been conferred by the question certified, Raben-Pastal seeks review of the opinion of the Fourth District on the issue of municipal liability under **Praprotnik,**

preclusion under Parratt and the set-off entered by the trial court. Viewed in the required light, and never disputed on appeal, the record shows the following:

Imposition of the Stop-Work Orders: Building permits for construction of Raben-Pastal's two buildings in a phased development in Coconut Creek were duly issued by the City in early 1981 (R.68-70, P. Ex. 90,91). During construction, small hairline cracks were observed in limited areas of certain unfinished slabs of one of the buildings. Consultations were immediately held by Petitioner with the record architect, record engineer, and record special inspector, and a remedial plan for these deficiencies was developed, filed with the building department, and implemented. (R.111-116). Modifications were also made to the design of the second building so such problems would not be encountered there as well. (R.116-118).

These repairs and change in design, though helpful, did not completely solve the problem. The City of Coconut Creek then retained D.E. Britt and Associates, Inc. ("Britt"), professional engineers, to serve as a special consultant and inspector for the project on the City's behalf. (R.134-137) Around May 5, 1981, Raben-Pastal voluntarily stopped any further structural construction. (R.146) Two weeks later, Britt released a report questioning the load bearing capacity of the unfinished unoccupied buildings. (R.150-153)

On May 27, 1981, a meeting was held between the project engineers, the City's Chief Building Official, Respondent James

Cowley, and Britt to agree upon a repair methodology that, when implemented, would allow construction to proceed. (R.184-186). The next day, Cowley imposed official stop-work orders on both buildings pending implementation of the agreed repairs. (Plaintiffs' Ex. 19). On June 4, 1981, Britt, the City's own inspector/engineer, approved repair plans conforming to the agreed repair methodology. (R.499, Plaintiffs' Ex. 13). The repairs were made between June 4 and June 30, 1981. Britt continuously inspected the repair work while it was in progress (Luten Jan. 7 T. 18), and on July 2, 1981 the senior project engineer in Britt's office, Hank Luten, officially certified to Cowley and the City that the repairs were complete and had been done in compliance with the agreed upon procedures. (R.877, Plaintiffs' Ex. 16).

Cowley's Unjustified Refusal to Lift the Stop-Work Orders: On July 3, 1981, Raben-Pastal formally requested that the City lift the stop-work orders in light of Britt's certification. (R.220-223). Cowley refused. (R.224-225).[3/] This refusal persisted for 143 days on one building and 186 days on the other, halting all phases of the entire project. As a result of Cowley's refusal, sensational newspaper coverage suggested that the unoccupied, unfinished buildings were unsafe or did not comply with the building code. (R.272-73, 494-95; Plaintiffs' Ex. 119-

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3/ His purported basis for not lifting the stop-work orders was Section 201.3 of the South Florida Building Code which provides that before stop-work orders will be withdrawn, arrangements have to be made which comply with the Code and are satisfactory to the building official.

126). Several of these articles reported public comments by Cowley questioning the structural safety of the buildings, despite the fact that Cowley was not an engineer and admittedly had no expertise in such matters. (Cowley Jan. 9 T.6-7). Prospective purchasers of units at the buildings withdrew their reservation deposits, rescinded their contracts, and stopped visiting the project and sales office. (R.279-285,495).

The delays in lifting the stop-work orders and the attendant adverse publicity were caused by Cowley's aberrant conduct in handling the matter. Cowley arbitrarily imposed approximately fifteen illogical conditions before construction could proceed (R.228-38, Plaintiffs' Exs. 40, 43, 57, 72 and 73, Defendants' Ex. 28). These "conditions" included the following unprecedented requirements: (1) that Raben-Pastal and its President personally execute a written indemnity agreement in favor of the City and any future purchasers of building units before the stop-work orders would be lifted; (2) that a new special inspector (licensed professional engineer) had to be selected and was required to certify the soundness of work that had already been inspected and certified as well as future work; (3) that the new inspector would not be provided from the City's own staff and had to be someone with no prior knowledge of the project (therefore five professional engineers, including the engineers the City had previously selected and used, were unacceptable); and (4) that the new inspector could not use any

reports of the over 50 prior inspections done by the licensed engineers during the actual construction. 4/

The supposed basis for Cowley's "conditions" was his speculation that because some problems had been found (albeit corrected) others might exist. (Plaintiffs' Ex. 72, R.262) Such conjecture flew directly in the face of observable facts: the inspection reports (Plaintiffs' Ex. 22); photographs taken during construction uniformly showing that all work was in compliance with plan (Plaintiffs' Ex. 14), and; random exposure of covered work again uniformly showing that cable and steel placement was done according to plan (Plaintiffs' Ex. 16, Luten Jan. 7 T. 27). Furthermore, certifications by independent testing laboratories utilizing state of the art test procedures, including extensive x-rays of the buildings, were arbitrarily rejected (Plaintiffs' Exs. 58-60, 111) and load tests were required even though the City's consultant was of the opinion that they were not necessary (Luten Jan. 7 T. 35) and the City itself had earlier said that such tests would not be required. (Plaintiffs' Ex. 39). In essence, Cowley placed upon Raben-Pastal the virtually impossible burden of disproving his arbitrary speculation concerning the buildings even though no observable conditions

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4/ In addition, after the City's own consultant certified on July 2, 1981 that the agreed upon remedial work had been properly done, Cowley added a new requirement that Raben-Pastal guarantee the future "serviceability" of the building. (Defendants' Ex. 28). However, that term is not defined in the South Florida Building Code and as used by the City's own consultant did not relate to structural or other safety concerns. (Plaintiffs' Ex. 29, Luten Jan. 7 T.21).

supported his guesses and no professional engineer--not even the City's own specially retained outside consultants--concurred.

The City Commission and City Manager Acknowledge and Defer to Cowley's Final Authority: During the time construction was halted due to Cowley's refusal to lift the stop-work orders, Raben-Pastal repeatedly sought relief from the City Manager and City Council. At each juncture, Raben-Pastal was informed that, as provided in the Building Code, Cowley and Cowley alone had final authority over construction within the municipal confines of Coconut Creek (P. Ex. 71; Stewart Jan 9. T. 92; P. Ex. 65, P. Ex. 64, Cochenour Jan. 8 T. 8, Cowley Jan. 13 T. 181-184). As Cowley himself unequivocally stated:

> Q. Mr. Cowley, was there anyone other than yourself in the City of Coconut Creek that established policy and procedure with respect to the administration and enforcement of the South Florida Building Code?
>
> A. No.

(Cowley Jan. 13 T. 184).

The Board of Rules and Appeals Acknowledges and Defers to Cowley's Final Authority: Raben-Pastal also formally requested the Broward County Board of Rules and Appeals to review Cowley's refusal to lift the stop-work orders. Twice the Board rebuffed those requests finding, as vigorously urged by the City Attorney for Coconut Creek, that it lacked any authority whatsoever to interfere with the unlimited discretion imposed in the Chief Building Official by the South Florida Building Code:

Bd. Attorney Robert Ziegler: "under the [South Florida Building] Code the final decision is the Building Official's". (D. Ex. **1,** Tr. p. **93)**

Motion of the Board: Whereas the ultimate responsibility of the job belongs to the building official and the city, . . . I move the Board support the action of the building official. (July 30, **1981** B.R.A. Tr. p. 120 Defendant's Joint Ex. **1)**

City Attorney Paul Stewart: "it's within the Building Department and building official's prerogative and his discretion to determine and make the determinations that we're here about today." (City Attorney, Paul Stewart to Board, Nov. **1982** B.R.A. Def. Joint Ex. **1)**

The Circuit Court Acknowledges and Defers to Cowley's Final **Authority (Mandamus Proceeding):** In its efforts to leave no possible avenue for prompt redress unexplored, Raben-Pastal also sought mandamus in the Circuit Court of Broward County. This avenue was again blocked by the City's assertion that the South Florida Building Code vested broad discretion in the Chief Building Official and that his determination was final and unreviewable by the judiciary. The Court in that proceeding agreed, holding that what conditions would be imposed was strictly up to the Building Official. (Nov. **12** B.R.A. Def. Joint Ex. **1,** p.6)

The Stop-Work Orders are Eventually Lifted: The Chief Building Official finally lifted the stop-work orders on November 2, **1981** and December **15, 1981.** What finally brought Cowley to his senses appears to have been Raben-Pastal's announcement that it was seriously considering demolition of the buildings in light of the extensive delays and Cowley's intractable position (Plaintiffs' Exs. 121-22).

Subsequent Lawsuit and Settlement With Some Defendants: After the stop-work orders were lifted, Raben-Pastal filed suit for the damages it had incurred. This action named as defendants the project architect, project engineer, project special inspector, the Chief Building Official (Cowley), the City, the municipality's engineering consultants (Britt), and the City's Councilmen. The causes of action against the project professionals were for design negligence. The separate cause of action against Cowley, the Councilmen, and the City was predicated on intentional deprivation of vested and constitutionally protected property interests pursuant to 42 U.S.C. Section 1983.

The individual City Councilmen were dismissed as defendants well prior to trial on the basis that under the South Florida Building Code they had no say-so over Cowley's decision not to lift the stop-work orders. As argued by the Councilmen in their motion to dismiss:

> . . . Plaintiff urges the "obligation" of said Defendant Councilmen under the South Florida Building Code to review the actions and activity of the City's Building Official, Defendant JAMES COWLEY. The provisions of the South Florida Building Code . . . does [sic] not establish any duty or obligation on behalf of the Defendant City Councilmen to review the actions of its Building Officials. (Councilmen Motion to Dismiss R.741).

After several unsuccessful attempts by Raben-Pastal to plead around this impediment (R.935), the matter of councilmen liability was appealed. The Fourth District affirmed the dismissal. Raben-Pastal v. City of Coconut Creek, 490 So.2d 975 (Fla. 4th DCA 1986).

The case then proceeded toward trial against two groups of defendants - the project professionals, whose negligence caused the need for repairs prior to July 2, 1981, and the City and Cowley, who were responsible for the post July 2, 1981 damages. Petitioners settled with the project professionals prior to opening statement and the trial continued solely against Cowley and the City.

After trial, the lower court held that Cowley and the City were entitled to a set-off against the Section 1983 verdict in the full amount of the earlier settlement. This $1,051,000.00 set-off was made despite a specific instruction to the jury that they were to exclude damages occurring prior to July 2, 1981 and instead to award against Cowley and the City only "damages which occurred as a result of the wrongful acts, if any, of the Defendants after July 2, 1981." (R.1884-85). A similar instruction was given advising the jury that it was their duty to segment responsibility between the pre July 2 adverse publicity (the fault of the project professionals) and the post July 2 adverse publicity (the fault of Cowley) which critically impaired Raben-Pastal's sales efforts. (R.531). This set-off and *the* Judgment N.O.V. described earlier were affirmed by the Fourth District which certified the cause to this Court.

SUMMARY OF ARGUMENT

The issue of whether the Chief Building Official was the final authority for the City was decided against the City in the trial court and never again raised by the City on appeal. The Fourth District erred by raising for the first time, on its own motion, the new issue five months after the oral argument before it and three years after the jury's decision on the issue.

Having raised it, the Fourth District then proceeded to improperly apply City of St. Louis v. Praprotnik on this issue to the record before it. Praprotnik is a refinement of several cases preceding it which deal with the issue of the degree of authority a municipal official or employee must have before it can be said that the official's actions fairly represent the acts of the municipal corporation in question. Here there can be no question that Coconut Creek's Chief Building Official was not a subordinate but the highest official with final authority in the City as to the lifting of stop-work orders. During the events in question and during trial, each member of the City Council, the City Manager and the City Attorney, repeatedly speaking with precise clarity, pointed to Cowley when asked which official in the City had final authority to set policy in connection with stop work decisions. Cowley did not just implement identifiable policy; he made it.

A review of the applicable provisions of the South Florida Building Code confirms Cowley's final policymaking authority. Under the Code, before a stop-work order can be lifted "arrangements in compliance with the Code and satisfactory

to the building official have to be made." There are absolutely no standards or guidelines in the Code by which the Chief Building Official's "satisfaction" can be measured. Nor does the existence of the Board of Rules and Appeals detract from the conclusion that Cowley had final policymaking authority. The South Florida Building Code limits that Board's review powers to those "matters which are regulated by the Code." The Building Official's "satisfaction" is simply not regulated. Moreover, either because it was aware of this constraint on its review powers or through a longstanding tradition of abstention - a tradition having the force and effect of law - the members of that Board do not purport to review a municipal building officials "satisfaction."

A review of the jury's instructions and the jury's verdict below also confirms the finality of Cowley's actions. In a procedure agreed to by all counsel, the jury was instructed to determine the exact finality question dealt with in Praprotnik. It did so in favor of plaintiff. It was error for the Fourth District to thereafter substitute its judgment for that of the jury on this point. It was doubly error to do so when the City never sought appellate review of the instructions or the jury's finding.

Since Praprotnik does not bar Raben-Pastal claims, the issue not decided by the Fourth District - the applicability of the preclusive doctrine of Parratt v. Taylor, expressly relied upon by the trial judge in granting Judgment N.O.V. - is squarely before this Court. Parratt v. Taylor holds that a Section 1983

claim will not lie (1) if an employee's random and unauthorized acts; (2) violated procedural due process; and (3) if the state provides a damages remedy to fully compensate a plaintiff for resulting losses. Here none of the requisite elements of Parratt is present. Parratt was designed solely to bar garden variety torts under the guise of Section 1983 claims. Parratt does not apply where, as found here by the jury, the deprivation stems from governmental policy and practice rather than a random unauthorized act and constitutes a substantive due process violation. Furthermore, there is no adequate state damages remedy.

On the set-off issue, it was error to set-off sums received for the negligent actions covering an earlier period of time against the sums awarded in the Section 1983 action covering a subsequent period of time. Raben-Pastal settled with the project professionals for the compensable delays that took place prior to July 2, 1981, and for the costs incurred prior to that date in testing and repairing the buildings. The City and Cowley, contrary to their burden under Fla. Stat. § 46.015(2) and § 768.041(7) (1985), never made any showing that any amount paid by the settling defendants was in any respect duplicative of the post July 2nd damages awarded by the jury. Moreover, any potential for overlap in the verdict was removed by detailed instructions given by the Court to the jury which required the jury only to award that portion of the post July 2, 1981 damages caused solely by the City.

In view of the foregoing, the judgment below should be reversed with directions to enter judgment in accordance with the jury's verdict.

ARGUMENT

I. CITY OF ST. LOUIS V. PRAPROTNIK DOES NOT BAR RABEN-PASTAL'S CLAIM

In its decision in Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978), the Supreme Court of the United States held that a mere employer-employee relationship was insufficient to make a municipality financially responsible for the unconstitutional actions of its officials. Something more was required. The actions of the employee had to constitute official government "policy, custom, or practice." It is this "something more" that the Court has periodically addressed during the ten years following Monell.[5/] Following oral argument before the Fourth District, the United States Supreme Court in City of St. Louis v. Praprotnik, 485 U.S. 112, 99 L. Ed.2d 107 (1988) sought to again refine the theory of municipal liability in 42 U.S.C. Section 1983 actions for the conduct of City officials. In Praprotnik, the Supreme Court reiterated that liability will only be imputed to a municipality where the unconstitutional actions are taken by a municipal employee or official with final policymaking authority.[6/]

5/ Owen v. City of Independence, 445 U.S. 622 (1980); Polk County v. Dobson, 454 U.S. 312 (1981); Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981); Oklahoma City v. Tuttle, 471 U.S. 808 (1985); Pembaur v. Cincinnati, 475 U.S. 469 (1986) (Policymaker must have final authority).

6/ A glaring anomoly in the decision under review here is that Praprotnik was utilized by the Fourth District not only to relieve the City of liability, but Cowley as well. Praprotnik does not purport to relieve the actual official

A. THE CHIEF BUILDING OFFICIAL WAS THE FINAL POLICY-MAKER IN THE CITY OF COCONUT CREEK CONCERNING THE LIFTING OF STOP-WORK ORDERS

The nature and extent of James Cowley's final authority, shown by the record here, far overshadows the degree of authority the defendants in Praprotnik possessed. The evidence overwhelmingly supported the jury's finding of municipal liability and shows that the Fourth District's conclusion to the contrary was wrong.

A virtual avalanche of admissions by Cowley as well as other municipal officials supported the verdict. As early as **1980,** Cowley had written to Raben-Pastal to inform it that he alone was in charge of building code matters and was expected to establish policy and procedure in the area. (Cowley Ja. **13** T. **181-184).** His understanding of his authority to establish policy did not waver during trial:

> Q. Mr. Cowley, was there anyone other than yourself in the City of Coconut Creek that established policy and procedure with respect to the administration and enforcement of the South Florida Building Code?
>
> A. No.

(Cowley Ja. **13** T. **184).**

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found guilty of willful unconstitutional acts from liability. The case deals strictly with what circumstances must be present before a municipality will be responsible for such acts. The Fourth District's decision totally vitiates the language of **42** U.S.C. Section **1983** which provides that "Every person who [under color of state law] subjects . . . any citizen . . . to the deprivation of [constitutional rights] shall be liable to the party injured ..."

His authority in the area remained supreme throughout the events leading to this litigation and applied across the board. When the City Manager demanded that Cowley notify him of the reasons for a stop-work order prior to its imposition on any project in the City (Cochenour Ja. 8 T. 25), Cowley responded in writing as follows:

> To: James Cochenour
> From: James Cowley
> Subject: Policy - Work Stoppages, etc.
>
> * * *
>
> The second part (of your request) would relate to stop-work orders, red tags, suspension of permits or any provision, for that matter, concerning the South Florida Building Code. Unfortunately, in this area, the law is quite specific in that the building official is the principal enforcing officer of the Code which precludes explanations or evaluations being required by second or third parties. (Plaintiffs' Ex. 65).7/

The City Council was also without authority to take any action. When Raben-Pastal had earlier sought City Council intervention regarding aspects of its first phase of development, the City Manager formally advised it that no one, including the council, had control or authority over Cowley regarding the building code:

7/ In his quest for advance notice, the City Manager made it quite clear that he was "not by any stretch of the imagination holding [himself] up as a decision maker in these matters. . . ." (Plaintiffs' Ex. 64). The City Manager reemphasized his complete lack of authority during trial when he testified that the South Florida Building Code was not his bailiwick, but Cowley's. (Cochenour Jan. 8 T. 8).

> I am denying this request [to be placed on the City Council Agenda] per South Florida Building Code, Chapter **305.3** which states that any request of this type rests solely with the Building Official at his own discretion.

(Plaintiffs' Ex. **68).** Subsequently, when Raben-Pastal sought action by the City Council on the specific question of the lifting of the stop-work orders, the request was in like manner rebuffed. (Plaintiffs' Ex. **71).**

As the long time City Attorney, Paul Stewart, testified during trial:

> ***Q.*** Who had the ultimate say so on building matter within the City of Coconut Creek in **1981?**
>
> A. Mr. Stewart: As building official, Mr. Cowley had the ultimate authority to make such a decision.

(Stewart Jan. 9 T. 92). The City can hardly be heard to contend otherwise at this late date, particularly after the City Council and City Manager kept those doors firmly locked during the entire period of the events in question.

The Board of Rules and Appeals of Broward County also operated with the firm understanding that the Building Official had ultimate authority. When Raben-Pastal first went before the Board, the Board's long standing attorney, Robert Ziegler, Esq., advised the Board that "under the [South Florida Building] Code the final decision is the Building Official's." (July 30, 1981 B.R.A. Tr. p. **93,** Defendants' Joint Ex. **1).** The resulting motion made at that meeting and passed by the Board confirmed this:

> Whereas the ultimate responsibility of the job belongs to the building official and the City, and since the Board has been previously admonished by the courts for not supporting the building official, I move the Board support the action of the building official. (July 30, 1981 B.R.A. Tr. p. 120 Defendant's Joint Ex.1)

At the brief Board meeting subsequently occurring on November 12, 1981 (after Raben-Pastal had, with much delay and much expense, met some of the arbitrary and needless requirements imposed by Cowley), the City Attorney, Paul Stewart, heatedly reminded the Board of the fact that it had previously decided that only Cowley had final decision-making authority on the issue and that the Board was without authority to act contrary to his wishes. (November 12, 1981 B.R.A. Defendants' Joint Ex. 1).

B. THE FINALITY OF COWLEY'S POLICYMAKING AUTHORITY WAS NEVER QUESTIONED IN THE FOURTH DISTRICT BELOW AND SHOULD NOT HAVE BEEN RAISED BY THE FOURTH DISTRICT ON ITS OWN MOTION

The issue as to the finality of Cowley's policymaking authority was submitted to the jury on the evidence discussed in the preceding section. The jury found that Cowley had final policymaking authority. The City did not cross appeal the instructions to the jury or the jury's special finding on this issue. Nor in any other manner was that finding ever challenged in post-trial proceedings or questioned by respondents during the appeal below. The only liability issue was the applicability of Parratt v. Taylor, which the trial court relied on in entering Judgment N.O.V. Only after the case was on submission did the

Fourth District ask for supplemental briefing because of the ensuing decision in Praprotnik.

It is a well settled maxim that issues will not be entertained that were never raised. Castor v. State, 365 So.2d 701 (Fla. 1978); Dorminey v. State, 324 So.2d 134 (Fla. 1975); Jacques v. Wellington Corporation, 163 So. 718 (Fla. 1938). Allowing issues to be raised in such a fashion manifestly interferes with the prompt, efficient, and fair administration of our judicial system:

> [An appellate] court will not depart from its dispassionate role and become an advocate by second guessing counsel and advancing for him theories and defenses which counsel either intentionally or unintentionally has chosen not to mention. It is the duty of counsel to prepare appellate briefs so as to acquaint the Court with the material facts, the points of law involved, and the legal arguments supporting the positions of the respective parties. (Citations omitted) . . . it is not the function of the Court to rebrief an appeal.

Polyglycoat Corporation v. Hirsh Distributor, Inc., 442 So.2d 958, 960 (Fla. 4th DCA 1984); see, e.g., Bradly v. State 497 So.2d 281 (Fla. 5th DCA 1986) (Alleged errors must be raised clearly and concisely); Lynch v. Tennyson 443 So.2d 107 (Fla. 5th DCA 1984) (Issue raised for first time in reply brief improper).

Not only was the issue of final authority not challenged, submission of the issue to the jury (as opposed to the judge) was never questioned.[8/] Had the Respondents timely done

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8/ The Court in Praprotnik held that the question of final authority should be determined by a judge. Praprotnik, 99 L. Ed.2d at 118.

so, any such deviation in procedure could have been readily cured. Respondents waived this point by not objecting. Castor v. State, 365 So.2d at **703** (Fla. **1978).**

Moreover, any possible concern that the jury may have been misinformed about the precise test it was to apply in determining whether the City was liable for Cowley's unconstitutional actions is alleviated by a review of the instructions given to the jury below. As though the litigants and trial judge had anticipated the refinements subsequently discussed in Praprotnik, the jury was instructed as follows:

> You are therefore instructed to determine whether either the City or the South Florida Building Code delegated the final authority to make decisions regarding stop-work orders to James Cowley.
>
> If so, you must find the City liable for any act of Cowley that you find violated the Plaintiff's constitutional rights.[9/] (R.**1872)**

C. AS A MATTER OF LOCAL LAW, LONGSTANDING CUSTOM, AND RATIFICATION, THE CHIEF BUILDING OFFICIAL - NOT THE CODE OR THE BOARD OF RULES AND APPEALS - MAKES FINAL POLICY REGARDING THE LIFTING OF STOP-WORK ORDERS

Even if this Court were to consider the issue of final authority anew, it should reach the same result as the jury

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9/ The instructions reviewed in Praprotnik, on the other hand, did not discuss the fact that the municipal official's authority had to be final. The verdict of municipal liability in Praprotnik was based on instructions which only asked the jury to determine if the "allegedly unconstitutional act was committed by an official high enough in the government. . . ." Praprotnik, 99 L. Ed.2d at 115.

did. The applicable codes and record show beyond question that both by law and custom, Cowley's authority was final in every sense of the word.

1. Local Law:

Chapter **553,** Florida Statutes, the statute requiring all municipal governments in Florida to adopt a minimum building code such as the South Florida Building Code, does not speak to the particular roles or responsibilities of the Chief Building Official or Board of Rules and Appeals. Nor does the City's Charter deal with building construction. This leaves only the Building Code.

The Building Code itself manifestly does not set policy regarding stop-work orders. While the Code has a myriad of technical engineering standards governing methods and means of construction, there is simply nothing in it indicating under what circumstances stop-work orders may be lifted. The only provision in the Code addressing the lifting of stop-work orders is Sec. **201.3:**

> [Work shall stop] until arrangements, in compliance with the Code and satisfactory to the Building Official, have been made.

Though conceivably "arrangements in compliance with the Code" would include repairing the buildings so that they meet the performance criteria of the Code, there is nothing in the Code which limits "arrangements" to "repairs." Moreover, the conjunctive language of this provision, "and satisfactory to the building official," indicates that the building official may require some-

thing more than that repairs be done. What these additional requirements might consist of is anybody's guess. The Code says absolutely nothing about them. Thus any additional requirements over and above making repairs to bring the buildings up to Code, are left entirely to the discretion of the Building Official. His decisions are not "constrained by policies not of that officials making." Praprotnik, 99 L. Ed.2d at 120. As the jury below found, Cowley's exercise of that vested discretion was pure whim and caprice.

Since there are no policies in the Code setting the parameters under which stop-work orders will be lifted and since admittedly numerous policies were formulated and imposed in this case,[10/] the question then is whether the Board of Rules and Appeals, or Cowley, was the final policymaker. In attempting to answer this question, the Fourth District analogized the St. Louis Civil Service Board discussed in Praprotnik to the Broward Board of Rules and Appeals. This analysis ignores the different roles of these bodies.

In Praprotnik, the conclusion that the Civil Service Board was one of several final policymakers was based on the fact that the St. Louis charter expressly provided for that board to establish policy in the precise area of employment policy being challenged in the case. The St. Louis Civil Service Board was

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10/ These were the 15 additional requirements established by Cowley as conditions to his ever being willing to lift the stop-work orders (infra at p.6). As the City Attorney candidly admitted during the events in question, the conditions imposed by Cowley were not "just a matter of the building code" (July 30, 1981 B.R.A., p.20, Defendants' Joint Ex. 1).

required to "prescribe . . . rules for the administration and enforcement of the provisions of [the Charter article on merit retention] and of any ordinance adopted in pursuance thereof, and not inconsistent therewith." Id. 99 L. Ed.2d at 119. Here there is nothing anywhere in the Code that empowers the Board of Rules and Appeals to prescribe rules.

The Board's lack of authority to set policy in the stop work area is readily apparent when a comparison is made of its duties and the duties of the Unsafe Structures Board. Chapter 202 of the Code creates the Unsafe Structures Board. Chapter 203 creates the Board of Rules and Appeals. With respect to Raben-Pastal's project, Cowley elected not to follow the procedures outlined in Chapter 202 of the Code. Had he proceeded under Chapter 202 there is a full panapoly of protections available to an owner whose buildings are thought to be unsafe. It is the Unsafe Structures Board which must, except in emergency situations, make the decision to demolish in the first instance. Cowley would have had absolutely no authority, on his own, to act.

This is to be contrasted with Section 201.3 (stop-work orders) and Chapter 203. The Board of Rules and Appeals has no delineated responsibility in the area of the lifting of stop-work orders. In general, under Chapter 203, the authority of the Board of Rules and Appeals is limited solely to certain technical aspects of construction regulation, such as the suitability of new materials or alternative construction methods, or the interpretation of certain technical code provisions that, due to the

use of industry jargon and complex engineering calculcations, require specialized expertise. SFBC Chapter 203.[11] As noted earlier, the building official's "satisfaction," under Section 201.3, is not a technical engineering term and is not limited by or defined in the Code in any regard whatsoever.

The Fourth District's opinion implies that Cowley can never be a final policymaker because his decisions are subject to review by the Board of Rules and Appeals. 14 FLW at 273. Here again the opinion of the Fourth District treats the availability of review with much too broad a brush. Cowley's decision not to lift the stop-work orders is not reviewed by a board that has "retained the authority to measure the officials conduct for conformance with their policies." Praprotnik, 99 L. Ed.2d at 120. Though there is no question that many decisions of a municipal building official are subject to review by the Board under Section 203.4(a), the Board's grant of authority is expressly limited to decisions on "matters regulated by the Code".[12] With regard to the lifting of stop-work orders, what

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[11] It also has authority to make advisory recommendations to a city council. SFBC Section 203.4(d). No recommendations touching on the issues in this case were made and it is the law of this case that the council itself had no authority whatsoever to govern Cowley's actions. Raben-Pastal v. City of Coconut Creek, 490 So.2d 975 (Fla. 4th DCA 1986).

[12] Review beyond that to the appellate panel of the Circuit Court is expressly limited to errors of law only. Sec. 203.7 S.F.B.C.

arrangements will be required and when the Building Official should be satisfied is not a matter regulated in any regard whatsoever.

2. Custom Having the Force and Effect of Law and Ratification: In Praprotnik, the Court held that it would be a "different matter" (Id. 99 L. Ed.2d at 122) if the record before it had shown that the St. Louis Employment Review Board as a matter of custom left its decision-making duties to other officials. The case before this Court presents just such different circumstances.

As the Court in Praprotnik emphasized, a de facto custom or usage of delegation of policymaking authority by the official or body legally charged with that responsibility to another official not so authorized by express law makes the delegatee's acts the acts of the City. The Board's actions in the case sub judice were not "simply a matter of going along with a subordinate's decision." As noted in detail in the preceding section of this brief, the Board attorney, who given his many years as the sole attorney for the Board was obviously familiar with how such issues have been customarily handled in the past, advised the Board that the final arbiter of the circumstances under which a stop-work order will be lifted is the municipal building official. The motion passed by the Board at the July hearing to the effect that Cowley and the City had the ultimate authority amply underscores the significance of this custom.

This is also a "different matter" than that before the Court in Praprotnik because of the Board's ratification of Cowley's actions. Even if the Board is the body "charged by law"

with the authority to make municipal policy concerning all aspects of building code enforcement in the City of Coconut Creek including the lifting of stop-work orders, the Board's actions at the July and November, 1981 hearings clearly constituted a "ratification" of Cowley's determination not to lift the stop-work orders. Under Praprotnik, the City remains directly liable and financially responsible:

> If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final.

Id. 99 L. Ed.2d at 120.

Finally, even if the Board is the final policymaker, Cowley's implementation of its policies is sufficient to impose liability on the City. In the recent case of Video International Production Inc. v. Warner-Amex Cable Communications, Inc. et. al and City of Dallas, 858 F.2d 1075 (5th Cir. 1988), the Fifth Circuit Court of Appeal held:

> The combination of the zoning policy decision by the Board and the issuance of the violation notice by the highest City official empowered to execute it, resulted in a policy decision that can be attributed to the City.

Id. at 1087 (citing St. Louis v. Praprotnik, 485 U.S. 112, 99 L.Ed.2d 107 (1988)).

D. IF, AS THE FOURTH DISTRICT'S DECISION IMPLIES, THE PRAPROTNIK REFINEMENTS WERE NOT PROPERLY DEALT WITH DURING TRIAL THEN THE ISSUE OF COWLEY'S FINAL AUTHORITY SHOULD BE REMANDED

If this Court believes, as the decision of the Fourth District implies, that Praprotnik has changed the rules of the

game, then Petitioner has never had a chance to plead and prove its cause against the City under the law that now exists. The litigants in Praprotnik were allowed such an opportunity. Petitioners' are entitled to no less.

There is abundant evidence of record from which a judge, given the Praprotnik guidelines, could, as did the jury below, find that the Board of Rules and Appeals so completely delegated its policymaking responsibilities to Cowley that Cowley was elevated to the position of final authority on stop-work determinations. The jury found that Petitioner was caused substantial damages by an intentional and wilful or arbitrary, capricious, and unreasonable act of government. This wrong should have a remedy.

Often the law is changed or refined. When this happens:

> [D]ue process and precedent mandate that when the rules of the game are changed, the players must be afforded a full and fair opportunity to play by the new regulations. Therefore, the litigants in this action must be allowed, . . . to present further evidence on remand to establish their claims under the law announced in [the new case].

Lee County Branch of NAACP v. City of Opa Locka, 748 F.2d 1473, 1480 n.12 (11th Cir. 1984).

II. PARRATT v. TAYLOR DOES NOT DEPRIVE RABEN-PASTAL OF A SECTION 1983 REMEDY FOR DEPRIVATION OF ITS CONSTITUTIONAL RIGHTS.

A. PARRATT V. TAYLOR APPLIES ONLY TO RANDOM AND UNAUTHORIZED ACTS, NOT AS HERE TO ESTABLISHED POLICY AND PROCEDURE

In the present case, the trial court expressly relied upon the limiting device anchored in the seminal decision of Parratt v. Taylor, **451** U.S. **527 (1981)** when it set aside the jury's verdict. Though Parratt, as a basis for the Judgment N.O.V., was abandoned by Cowley and the City in their answer brief to the Fourth District Court of Appeal, there has yet to be an appellate decision that Parratt is inapplicable. Since, as shown above, Praprotnik does not bar Raben-Pastal's claim, the effect of Parratt on the proceedings below is ripe for this Court's determination.

In Parratt v. Taylor, supra, the Supreme Court answered the seeming trivialization of Section **1983** by holding that a claimant has no federal cause of action for procedural due process (prior notice and a hearing) violations if the state which allegedly infringed upon his property interest provides a constitutionally adequate post-loss remedy to fully compensate the claimant.[13/] Finding that the state of Nebraska provided

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13/ Following the landmark decision in Monroe v. Pape, **365** U.S. **167** (1961), **42** U.S.C. Section **1983** rapidly emerged as the primary instrumentality for redress of unconstitutional acts committed by persons acting under color of state law. Because of the breadth of Section **1983,** the Supreme Court subsequently developed certain doctrines of limitation to contain the vast expanse of the federal remedy and jurisdiction that might otherwise threaten to "make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may be administered by the states." Paul v. Davis, **424** U.S. **693, 701 (1976).**

means ultimately to remedy the random and unauthorized act of its low level state employee who had inadvertantly lost a prisoner's hobby kit (and therefore had no opportunity to provide notice and a hearing), the Court concluded that when any initial deprivation was juxtaposed against overall state procedures that included full compensation, the ultimate result did not offend due process.[14/] The Court, however, made it equally clear that if "deprivations of property were authorized by an established state procedure," the subsequent availability of a state remedy would not avoid the fact of due process infringement. **451** U.S. at **538.**

The distinction in Parratt between random and unauthorized acts on the one hand and the results of the government's own procedure on the other was not isolated dictum. In Logan v. Zimmerman Brush Co., **455** U.S. **422 (1982),** the division between unauthorized acts and established state procedure and policy became settled law. Restricting sharply the force of Parratt v. Taylor, the Court in Logan sustained a Section **1983** claim for procedural due process violations based upon a state official's improper dismissal of a discrimination case and said:

> This argument misses Parratt's point. In Parratt, the court emphasized that it was dealing with "a tortious loss of . . . property as a result of a random and unauthorized

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14/ Nebraska provided a well defined claims procedure to consider and compensate legitimate prisoner claims. Parratt at **544.**

> act by a state employee . . . not a result of some established state procedure."

455 U.S. at 435-36 (quoting Parratt v. Taylor, 451 U.S. at 541).

Thus, unconstitutional deprivations that represent state procedure and practice still deserve and require Section 1983 protection. In the present case, the jury properly found by special verdict that Cowley represented the official policy and custom of the City. (R.1591, 1894). As a result, the dicta of Parratt and the holding of Logan confirm that Petitioners are not relegated to state damages remedies, if any.

Further confirmation that Parratt does not deny Petitioners' claim is found in the recent Supreme Court decision in Pembaur v. City of Cincinnati, 106 S.Ct. 1292 (1986), and in numerous other holdings that recognize the validity of Logan and limit Parratt. In each there is a clear bifurcation of wrongs resulting from random and unauthorized acts and those resulting from government policy. Freeman v. Blair, 793 F.2d 166, 177 (8th Cir. 1986); Sanders v. Kennedy, 794 F.2d 478 (9th Cir. 1986); Patterson v. Coughlin, 761 F.2d 886 (2d Cir. 1985); Piatt v. MacDougall, 773 F.2d 1032 (9th Cir. 1985); Signet Const. Corp. v. Borg, 775 F.2d 486 (2d Cir. 1985); Stana v. School Dist. of Pittsburgh, 775 F.2d 122 (3d Cir. 1985); Augustine v. Doe, 740 F.2d 322 (5th Cir. 1984).

B. PARRATT V. TAYLOR DOES NOT APPLY TO SUBSTANTIVE DUE PROCESS CLAIMS

In addition to overlooking the fact that Petitioners suffered infringement of constitutional rights pursuant to official custom and procedure, the trial court also ignored the

rule that Parratt does not reach claims challenging violations of substantive due process. See, e.g., Gilmere v. City of Atlanta, 774 F.2d 1495 (11th Cir. 1985); McLary v. O'Hare, 786 F.2d 83, 86 n.3 (2d Cir. 1986) ("Parratt is inapplicable to substantive due process"); Rutherford v. City of Berkley, 780 F.2d 1444, 1447 (9th Cir. 1986) ("existence of post deprivation state remedies does not bar a substantive due process claim under Section 1983"). In similar fashion, the Court in Palmer v. Hudson, 697 F.2d 1220, 1222 (4th Cir. 1983), aff'd, 463 U.S. 1206 (1984), held that Parratt does not bar a claim "for an official act which is sufficiently egregious to amount to a violation of this requirement of substantive due process." 697 F.2d at 1222 n.2.

Petitioners' Section 1983 claim before the jury was exclusively premised upon an arbitrary, capricious and unreasonable interference with Petitioners' property rights that was inflicted willfully. (R.1869-71).[15/] Here, the lower court on the basis of the Third Amended Complaint, which in Count One alleged arbitrary and capricious actions by Cowley, instructed the jury to determine whether:

15/ While Petitioners initially advanced a procedural due process claim based on the absence of any hearing before the City imposed the stop-work orders, that theory never reached the jury. (R.1866-94). To the contrary, the trial court ruled that, as a matter of law, the City's failure to provide a prior hearing did not violate procedural due process.

> James Cowley violated Raben-Pastal's constitutional rights by willfully acting in an arbitrary, capricious and unreasonable manner by refusing to lift the stop-work order on or after July 2, 1981.

(R.1871).

Any contention that Respondents' willful, arbitrary, capricious, and unreasonable conduct offended procedural rather than substantive due process flies in the face of overwhelming case law.[16/] Courts uniformly hold that when, irrespective of the sufficiency of procedural safeguards, a trier of fact finds arbitrary and capricious governmental action infringing upon cognizable property interests, a substantive due process violation is established:

> A procedural due process claim alleges that the state has unlawfully interfered with a protected liberty or property interest by failing to provide adequate procedural safeguards. . . .
>
> A substantive due process claim, on the other hand, alleges not that the state procedures are somehow deficient, but that the state's conduct is inherently impermissible regardless of any protective or remedial measure it provides.

16/ In decisions strikingly close to the present facts, the courts have held that a substantive due process violation is committed when a property owner's right to develop his property under building permits was withheld arbitrarily and capriciously. Bateson v. Geisse, 857 F.2d 1300 (9th Cir. 1988) (Substantive due process rights violated where city refused to issue building permit even though all requirements met). Scott v. Greenville County, 716 F.2d 1409 (4th Cir. 1983) (Plaintiff's property interest in his right to develop under building permits was interfered with "by manifest arbitrariness and unfairness.").

Ramos v. Gallo, 596 F. Supp. 833, 837 (D. Mass. 1984); see also Newton v. City of Cambridge, 277 U.S. 183 (1928) (14th Amendment bans governmental interference with property rights when such interference is arbitrary or irrational); Barnett v. Housing Authority of City of Atlanta, 707 F.2d 1571, 1577 (11th Cir. 1983) ("pretextual, arbitrary and capricious" deprivation violates substantive dues process); Scudder v. Town of Greendale, Indiana, 704 F.2d 999 (7th Cir. 1983) (Arbitrary application of valid zoning ordinance actionable under Fourteenth Amendment).

As demonstrated by the record and a review of the applicable decisional law, the verdict for Petitioners resulted from substantive due process violations by Cowley and the City. Under these circumstances, the lower Court was wrong when it applied Parratt, which only addresses Section 1983 claims based on procedural due process deprivations.

C. PARRATT V. TAYLOR IS NOT APPLICABLE BECAUSE AN ADEQUATE STATE REMEDY DOES NOT EXIST IN FLORIDA

The lower court was also wrong when it held that there was an adequate state remedy within the meaning of Parratt v. Taylor.

Through months of briefing and argument before the trial court, no theory of adequate state remedy was disclosed until, well after trial, counsel for the City argued at a hearing that § 768.28 of the Florida Statutes provided Petitioners with an adequate state remedy. (R.1896, 1891). No such remedy, however, exists under that statute. To the contrary, § 768.28

does not affirmatively grant a cause of action; it simply provides a limited waiver of the defense of sovereign immunity. Trianon Park Condominium Ass'n. Inc. v. City of Hialeah, 468 So. 2d 912, 917 (Fla. 1985).

In any event, since the verdict in this cause, this precise question has been unequivocally put to rest. In Corn v. City of Lauderdale Lakes, 816 F.2d 1514 (11th Cir. 1987), the 11th Circuit Court of Appeals expressly considered whether Florida had any state damages remedies whatsoever to redress violations of substantive due process. The Court found that no such remedy exists:

> We know of no cases . . . in which a substantive due process challenge to a [police powers regulation] seeking recovery of damages for the constitutional violation, has been successfully raised in the courts of Florida.

Id. at 1519.[17]/

17/ Moreover, even if such a state law theory could be developed, the Supreme Court analysis in Parratt v. Taylor and in Hudson v. Palmer, 104 S.Ct 3194 (1984), established that the applicability of sovereign immunity in a state like Florida would defeat the constitutional adequacy of any remedy otherwise accessible to the Petitioners. As the jury found below, Petitioners suffered $2.5 million in compensatory damages. The Court in Parratt required full compensation.

III. THE SETTLEMENT WITH THE PROJECT PROFESSIONALS BASED ON THEIR NEGLIGENCE FOR DAMAGES OCCURRING PRIOR TO JULY 2, 1981 SHOULD NOT HAVE BEEN SET-OFF AGAINST THE JURY AWARD AGAINST THE CITY *AND* COWLEY FOR SECTION 1983 VIOLATIONS FOR DAMAGES OCCURRING AFTER JULY 2, 1981.

A. SET-OFF IS NOT AVAILABLE WHERE, AS HERE, THE SETTLING DEFENDANTS WERE NOT JOINTLY AND SEVERALLY LIABLE WITH THE CITY AND COWLEY

The courts below erred in reducing Raben-Pastal's 42 U.S.C. Section 1983 $2.5 million verdict by the $1,051,000 paid by the settling defendants, who had negligently caused the construction defects. Under the Section 1983 decision in Dobson v. Camden, 705 F.2d 759 (5th Cir. 1983), aff'd, 725 F.2d 1003 (5th Cir. 1984) (~~en banc~~), set-off is precluded here as a matter of law because the settling defendants were not jointly and severally liable with the City and Cowley.

In Dobson, plaintiff went to a Denny's restaurant. Restaurant personnel summoned the police when plaintiff spent too much time in the restroom. The police beat plaintiff while at Denny's and thereafter as well. Dobson sued Denny's for false arrest and malicious prosecution, and the police officers and the City of Houston for Section 1983 violations. Denny's settled and the jury returned a verdict against one of the police officers. The trial court held the verdict should be reduced by the prior settlement.

In holding that the settlement paid by Denny's should not have been set-off against the jury verdict against Camden, the police officer, the Fifth Circuit stated:

> There is no joint liability between Denny's and Camden for the particular injuries for which Dobson recovered, for no theory of tort law exists to impose responsibility on Denny's for the excessive force used by Camden.

725 F.2d at 1005.

On the facts in the instant case, there is no legal theory under which the negligent settling defendants could have been held liable for the intentional acts of Cowley and the City committed months later. Likewise, there is no way Cowley and the City could have been liable for causing the construction defects occurring months before their intentional acts. Indeed, these defects were repaired prior to July 2, 1981 and the jury was expressly charged that Cowley and the City could not be held liable for any damages occurring prior to that date.

The trial court and Fourth District were of the opinion that set-off was appropriate since Raben-Pastal's complaint claimed post July 2 damages from the settling defendants. As pointed out in Dobson, the fallacy of this reasoning is that it is the law, and not the pleadings, which creates joint liability. E.g., Robert E. Owen & Associates v. Gyongyosi, 433 So.2d 1023 (Fla. 4th DCA 1983), pet. for rev. denied, 444 So.2d 417 (Fla. 1984); Insurance Company of North America v. Edmondson, 354 So.2d 887 (Fla. 1st DCA 1977).

In Dobson, the reviewing court found as a matter of evidence and law that joint liability did not exist despite the fact that it had been pled. Id. at 1004-05. Looking past Raben-Pastal's allegations, as Dobson mandates, this Court must

conclude that all the defendants were not jointly and severally liable for the post July 2, 1981 damages awarded by the jury. Since the settling defendants were sued for their negligence while the City and Cowley were sued for having months later intentionally violated plaintiff's constitutional rights, Respondents can, at most, argue that they were successive tortfeasors or, as this Court has phrased, "distinct and independent tortfeasors." Stuart v. Hertz, 351 So.2d 703, 705 (Fla. 1977). In Stuart, this Court held that there is no joint liability between successive tortfeasors. Id. at 705.

Additionally, it is universally settled that an unforseeable, willful, malicious or intentional act, such as the unconstitutional deprivation found to have been committed by Cowley, breaks any chain of causation that may have been started by the negligence of the settling defendants. E.g., Lingfelt v. Hanner, 125 So.2d 325, 326-27 (Fla. 3d DCA 1960); accord Sosa v. Coleman, 646 F.2d 991, 993-94 (5th Cir. 1981). In Sosa, the former Fifth Circuit quoted the Restatement (Second) of Torts:

> The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

Nothing in the record even remotely indicates that the settling defendants had any reason to expect that the City and Cowley would refuse to lift the stop-work orders although the repairs were done as directed by the City's outside engineer and construction was ready to resume. The settling defendants recognized the limitation of their liability and each asserted as an affirmative defense the intervening superseding actions of the City and Cowley. (R.688, 789-90, 725, 784).

Thus, there was no joint liability for the damages only awarded against the non-settling defendants. Set-off, therefore, was improper.

B. THE JURY APPORTIONED POST JULY 2 DAMAGES BETWEEN THE CITY AND COWLEY AND THE SETTLING DEFENDANTS AND SEGMENTED CAUSATION SO AS TO MAKE THE APPLICATION OF ANY SET-OFF IMPROPER

It is undisputed that the jury's verdict included nothing for the damages which occurred before July 2, 1981. With respect to post July 2, 1981 damages, the fact of apportionment was methodical and unmistakable.

The trial court first instructed the jury to apportion damages from adverse publicity caused by the negligent settling defendants on the one hand, and the City and Cowley on the other. In allowing into evidence all but a few of the newspaper articles comprising the adverse publicity which damaged Raben-Pastal, the trial court paused to instruct the jury that although it was to consider all of the newspaper articles, if it found for Petitioners, it was to award damages only for the articles appearing after July 2, 1981. (R.531) These later articles

would not have been published but for Cowley's refusal to lift the stop-work orders. (R. **484, 485, 530** and **531).** Secondly, the Court instructed the jury that if it found for Raben-Pastal, it could award damages only for the wrongful and intentional violation of Petitioners' constitutional rights by Cowley and the City after July **2, 1981. (R.1884-85).** Completing the apportionment formula was the special interrogatory verdict form, which insured that any verdict against the City and Cowley would be limited to post July 2, **1981** damages caused by them alone. (R. **1591, 1894).** Thus, the jury awarded no damages caused by the settling defendants, as the only arguable link between their acts and Raben-Pastal's post July 2, **1981** damages - lingering adverse publicity resulting from the settling defendants' negligence - was excluded by the Court's instructions and the special interrogatory verdict form.

In a Section **1983** case virtually indistinguishable from the present case, Wren v. Spurlock, **798** F.2d **1313** (10th Cir. **1986),** the Tenth Circuit Court of Appeals affirmed the denial of set-off where the jury was adequately instructed to award only those damages for plaintiff's mental problems caused by the non-settling defendant. Spurlock claimed set off on the basis that Wren's injury was "indivisible." Id. at **1323.** The trial court ruled against Spurlock's motion, reasoning that the jury was adequately instructed to award only those damages that Spurlock proximately caused. Id. In finding that a reasonable basis for apportionment existed, the Court stated:

> The harm to Wren, . . . is not obviously divisible into those discrete portions attributable to Spurlock and those not so attributable. But that difficulty is not Wren's fault. The courts have been liberal in allowing juries to award damages in situations when the uncertainty of apportionment "arises from the nature of the wrong itself, for which the defendant, and not the plaintiff is responsible."

Id. at **1323.**

In the case at issue, as in Wren, the trial court informed the jury that a settlement had been reached with the settling defendants. (R. **2017-18).** The jury also was told that the City and Cowley were still in the case (R. **2017-18).** As in Wren, the jury later was instructed on the necessity of finding the City and Cowley's conduct to be the sole legal cause of damage to the plaintiffs. (R. **1882-85).** Even assuming that the damage caused by the negligent settling defendants, as opposed to the intentional damage caused by the City and Cowley, was like Wren's mental problems and "not obviously divisible into those discrete portions attributable" to the City and Cowley "and those not so attributable," that difficulty is not Raben-Pastal's fault. Id. Although the jury did apportion post July **2, 1981** damages, any lingering uncertainty "arises from the nature of the wrong itself, for which the defendant[s], and not the plaintiff[s], [are] responsible." Id.[18/]

18/ In a footnote following the foregoing passage, the court also observed that set-off is not allowed when the tortious conduct was intentional. **798** F.2d at **1323** n.4.

The lower court's instructions and rulings, resulting in apportionment of damages, prevented the danger of double recovery by the plaintiff and eliminated the need for set-off. Wren v. Spurlocks, supra; Lapidus v. Citizens Federal S. & L. Ass'n, 389 So.2d 1057, 1058 (Fla. 3rd DCA 1980) (No set-off where record suggests nothing to overcome the presumption that the Court's apportioning instructions were followed). By setting off the entire settlement amount from the post July 2 damages awarded by the jury, Raben-Pastal was wrongfully deprived of any compensation for the extensive delay and repair damages it suffered prior to July 2 due to the settling defendants' negligence.

C. EVEN IF THE JURY DID NOT PRECISELY APPORTION DAMAGES, THE CITY AND COWLEY FAILED TO MEET THEIR BURDEN TO SHOW THAT RABEN-PASTAL SETTLED IN SATISFACTION OF ANY OF THE DAMAGES AWARDED

Set-off is available only to a defendant who "shows the court that the plaintiff . . . has delivered a written release or covenant not to sue to any person . . . in partial satisfaction of the damages sued for." §§ 46.015(2), 768.041(2) Fla. Stat. (1985). Although they had opportunities during and after trial,[19] Respondents simply failed to satisfy the strictly construed criteria of sections 46.015 and 768.041. Because it was

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19 After the verdict was rendered, the City and Cowley were granted leave to take discovery in connection with their Motion for Set-Off. (R. 1960-61). They did not depose any of the settling defendants or take any other discovery concerning the components of the $1,051,000 paid to Raben-Pastal.

their burden and they failed to show that the settlements included money also awarded in the jury's verdict, set-off cannot even be considered. See Maser v. Fioretti, **498** So.2d **568, 570** (Fla. 5th DCA **1986);** Cates v. United States, **451** F.2d **411, 418** (5th Cir. **1971)** ("The burden is on the one claiming duplication to show that damages assessed against him have, in fact and in actuality, been covered in a prior settlement, payment or judgment.").

D. STRONG PUBLIC POLICY REASONS PRECLUDE SET-OFF

Among the principal objectives of Section **1983** is not only adequate compensation to persons injured by deprivation of federal rights but the prevention of abusive power by those acting under color of state law. Robertson v. Wegmann, **436** U.S. **584, 590-91 (1978);** Johnson v. Rogers, **621** F.2d 300 (8th Cir. **1980).** Neither of these objectives would be served by allowing Cowley and the City to benefit from settlements with the negligent settling defendants. To the contrary, the objectives of Section **1983** would be trammeled by setting off monies plainly paid in response to acts of pure negligence, thereby allowing the intentional deprivation of federal rights to escape without full compensation from the wrong doers.

CONCLUSION

Raben-Pastal respectfully requests that this Court reverse the decisions of the courts below with regard to the Judgment N.O.V. and set-off and order that final judgment be entered in favor of Raben-Pastal against James Cowley and the City of Coconut Creek for the full amount of the jury's verdict. In the alternative, this Court should reverse the order granting set-off and remand for further factual findings on the issue of final authority.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I HEREBY CERTIRY that a true and correct copy of the Petitioners' Initial Brief was furnished by mail to ROBERT H. SCHWARTZ, ESQ., of Gunther & Whitakker, P.A., Post Office Box **14608,** Fort Lauderdale, Florida **33301;** IVY A. COWAN, ESQ., Bruce E. Wagner, P.A., **1520** Southeast Third Avenue, Fort Lauderdale, Florida **33316;** MARTIN J. SPERRY, ESQ., **805** East Broward Boulevard, Suite 200, Ft. Lauderdale, Florida **33302;** and STUART WALKER, P.A., Post Office Box **14004,** Fort Lauderdale, Florida **33302** on this 7th day of August, **1989.**

BYRON G. PETERSEN