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

REPLY BRIEF OF PETITIONERS

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STATEMENT OF THE CASE AND FACTS

Respondents' statement of the facts in most particulars is not supported by citations to the record below and as to highly relevant matters is seriously incorrect. A brief response is therefore in order.

Contrary to Respondents' assertion, the trial judge never granted a directed verdict on Raben Pastal's substantive due process claim. Had he, the jury would not have been asked to determine whether Cowley had exercised governmental powers in an arbitrary, capricious, and unreasonable manner. (T. Jury Charge p.6).

Moreover, the suggestion that this case be compared with the situation that occurred in Cocoa Beach is simply an attack on the jury's verdict which went unassailed below. Respondents' emphasis on the fact that the imposition of the stop work orders in the first instance was not legally challenged is similarly misplaced. Though the claim for damages was predicated solely on the failure to lift the stop work orders, the trial court ruled that the facts surrounding the issuance of the stop work orders were properly before the jury in connection with the question of when the stop work orders should have been lifted. These facts - establishing that the buildings were never in any danger whatsoever of collapsing (T. Nov. 26, 1985 (Burns) p. 301, 323, 324) - underscored the egregious nature of the City's refusal to promptly lift the stop work orders.

Nor can any attempt to justify Cowley's actions as simply dealing with a conflict of interest be credited here since the jury below held and found the exact contrary. **As** noted in detail in the Initial Brief, the requirement that a highly qualified inspector be removed was but one of numerous bizarre and senseless conditions imposed arbitrarily. Initial Brief at 6-7.

I. THE QUESTION BEFORE THIS COURT IS OF GREAT PUBLIC IMPORTANCE.

The threat of damage actions has played an important role in curbing both governmental brutality and corruption. Like Damocles' sword, damage actions have done much to make men act properly. If the Federal cause of action is construed by Florida's courts as affording no remedy, officials such as Cowley will be allowed to run rampant and virtually unchecked. Thus, the issues here are of paramount importance: whether, and to what extent, the citizens of Florida will be uncompensated for arbitrary, capricious, and indeed unconstitutional actions at the hands of government.

Any flagrant wrong which goes unredressed in modern society can only be a festering sore in the fabric of decent government. If one man can be destroyed by arbitrary government actions, who will be the next victim and what form will the abuse take? These issues run as deep and are as important as those debated in the Federalist Papers. Respondents sacrifice themselves on the altar of superficiality when they suggest such issues to be unworthy of the Court's consideration.

Respondents contend that the instant case is not of great public importance because no one will ever be as badly mistreated as Raben Pastal.[1/] While Petitioners fervently hope this will be the case, allowing the guilty to go unpunished does not help to reach that desired goal. Intervention by this Court is particularly appropriate since the United States Supreme Court has now made state law the determinant of whether the status of the person engaging in a particular unconstitutional activity is such as to trigger federally imposed municipal liability. This Court should not decline that task. It, after all, is the final authority as to this state's laws.

II. CITY OF ST. LOUIS V. PRAPROTNIK DOES NOT BAR RABEN PASTAL'S CLAIM,

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

Praprotnik requires that, as a matter of custom or express law, the official inflicting the constitutional harm must have final policymaking authority for the municipality to be liable. The record and verdict below fully supports liability under Praprotnik. Respondents do not suggest how, in light of

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1/ The City's suggestion that Cowley's bizarre behavior was an overreaction to the fact that a building in Cocoa Beach, a distant community, had collapsed earlier, does not square with the record. (See Statement of Case and Facts) It took a public announcement by Raben-Pastal that it was going to demolish the buildings to make Cowley backoff. (Plaintiff's Exs. 121-122). It then took six impartial jurors to finally announce loudly and clearly that what Cowley did under the guise of "public welfare" was grossly improper. It is their verdict that must govern the issues before this Court. As the jury knew, the slogan "Remember Cocoa Beach," no matter how often repeated, was and remains a red herring.

the overwhelming record evidence, the Fourth District was justified in rejecting the jury's unappealed conclusion that Cowley was a final policymaker. **As** discussed in the Initial Brief, everyone connected with the City - the City Manager, the City Attorney, the City Council, the Board of Rules and Appeals, and Cowley himself - repeatedly and unequivocally stated that when it came to the issues involving the lifting of stop work orders Cowley and Cowley alone was to make the final decision as he deemed fit. Initial Brief at 16-19.

B. **THE FINALITY OF COWLEY'S POLICYMAKING AUTHORITY WAS NEVER QUESTIONED IN THE FOURTH DISTRICT BELOW.**

It is axiomatic that an issue never raised on appeal by a party may not be considered. Respondents offer no response to this point, and thus tacitly admit that the Praprotnik issue of final authority was never raised by them in the Fourth District. There was an unequivocal waiver. On this ground alone the jury's verdict should be reinstated.

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.

The Fourth District seems to be saying that since construction is regulated in some measure by the South Florida Building Code, no Building Official or Board can have final authority. To suggest that municipal policy is only made in a charter or ordinance is to say that no person ever has final authority. Such, of course, is not the case in the real world, as amply shown by the record here, and the real world is where

42 U.S.C. §1983 operates. In any event, the Fourth District failed to consider the fact that although the Code sets procedure for the imposition of stop work orders, the lifting of stop work orders is not regulated. If all that is required by law to insulate municipalities from liability is an ordinance to the effect that municipal officials be "satisfied," the opportunity for abuse in all areas of governmental involvement is unlimited.

Praprotnik also clearly teaches that the mere right of appeal of a municipal official's decision to a municipal board is not, in and of itself, sufficient to divest the reviewed official of final policymaking authority, thereby avoiding municipal liability. First, there must be meaningful guidelines available against which the municipal official's policies can be measured. Praprotnik, 99 L.Ed.2d at 120. Secondly, the reviewing body must perform its chartered task of review. If there is a custom and practice of leaving the matter to the official, the official becomes the final authority in place and in stead of the Board. Praprotnik, 99 L.Ed.2d at 122. Finally, municipal liability will attach if a Board not only considers the officials' decision but "the basis for it." Praprotnik, 99 L.Ed.2d at 120. In that case, the unconstitutional actions of the official

become the unconstitutional actions of the review board. There has been a ratification.[2/]

Respondents were unable to address any of these pivotal points in their answer brief. The action of the Board of Rules and Appeals below was not a matter of "simply going along with discretionary decisions made by one subordinate." There were no code provisions against which Cowley's "satisfaction" could be measured. (See Initial Brief p. 22-25).[3/] Even if there were, the Board, according to its own pronouncements, did not defer to Cowley - he, not the Board, was, as a matter of custom and practice, considered by the Board to be the final policymaking authority on the issue of when "arrangements" were sufficiently "satisfactory" that stop work orders would be lifted. Moreover, during presentations to the Board, the basis for Cowley's decisions was discussed and debated. Thus, either the Board left the decision to Cowley as they were told by their attorney that

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2/ The fact that the Board of Rules and Appeals is staffed and administered by Broward County may not be raised by the City as a barrier to its liability. Under the South Florida Building Code, Coconut Creek had the option of forming its own Board or utilizing the County Board. It chose the latter procedure. Thus, when the County Board sits to consider a particular matter in a particular municipality, it sits for all intents and purposes as the Board for that particular city. Were it otherwise, Broward County would unwittingly become a defendant in all 42 U.S.C. §1983 actions involving municipal building construction regulation.

3/ Nor, under the circumstances of this case would any such review have been meaningful. There was unchallenged evidence presented to the jury that the Board's Secretary, at the Board's directive, fabricated official Board minutes in order to cover up the actions taken against Raben Pastal. (Plaintiffs Exh. 88).

Board precedent required, or there was a ratification. Either Cowley or the Board had final policymaking authority. In either case, municipal liability attaches. Plunto v. Wallenstein, ___ F. Supp. ___ (E.D. Pa. Aug. 10, 1989) [1989 U.S. Dist. Lex. 95791 (employing ratification doctrine).[4/]

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, for any reason, the Court finds Petitioners' Praprotnik proofs insufficient (and that the issue is properly before this Court), at a minimum Petitioners should have an opportunity to retry their case under the newly declared law. No scholar in the area would claim that Praprotnik did not have a significant impact on 42 U.S.C. §1983 cases. The concept that finality could be found in legislation and that state law was controlling are undeniably new or so significantly different that the Supreme Court chose to emphasize its holding in this respect. Praprotnik, 99 L.Ed.2d at 118.

Respondents cannot have it both ways. If, as they urge, Praprotnik does not represent new law then Respondents may not challenge the jury's finding that Cowley had final policy-

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4/ Respondents' suggestion at p. 17 of their Answer Brief that Cowley was not a final policymaker because court review was available, totally misses the mark. Not only was review from the Board's ratification limited to "questions of law," were the availability of judicial review the benchmark of "final policymaking authority," there would never be a situation where 42 U.S.C. §1983 would be available. No decision of the United States Supreme Court or indeed any other court suggests the theory advanced by Respondents.

making authority. Respondents simply never questioned the propriety of leaving that determination to the jury as opposed to the judge. Nor did they question the instructions submitted to the jury regarding the interplay between Cowley and the Board of Rules and Appeals./ Finally, not once during the appeal to the Fourth District did Respondents complain that, as a matter of law or fact, the City was not liable for Cowley's acts.[6/]

111. PARRATT V. TAYLOR DOES NOT DEPRIVE RABEN PASTAL OF A SECTION 1983 REMEDY FOR DEPRIVATION OF ITS CONSTITUTIONAL RIGHTS.

A. INTRODUCTION.

The law shows beyond question that the doctrine of Parratt v. Taylor, 451 U.S. 527 (1981), the sole ground upon which a directed verdict was granted below, only applies to random and unauthorized acts and is wholly inapplicable when municipal policy and procedures result in the deprivation of a citizen's constitutional rights. Parratt v. Taylor is equally inapplicable to claims based on the denial of substantive due process. Moreover, Parratt is immaterial when the state does not

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5/ Respondents suggestion that a "peremptory" instruction mandated a finding below of municipal liability is false (Answer Brief at 27). The jury was carefully and accurately instructed that they could only impose liability on the City if the South Florida Building Code or the City imposed the final responsibility in Cowley. (T. Jury Charge at p. 7).

6/ Respondents' argument that upon remand, Cowley's liability and damages must be reassessed is mere gamesmanship. No one has ever suggested on appeal, in light of the overwhelming record evidence to the contrary, that Cowley acted constitutionally or that Raben Pastal was not damaged. The sole issues are the preclusion doctrine of Parratt v. Taylor and the interplay between Cowley and the Board of Appeals.

supply an adequate post-deprivation remedy. The City's response is to this last point only.

B. AN ADEQUATE POST DEPRIVATION REMEDY DOES NOT EXIST UNDER FLORIDA LAW.

As discussed above, the availability of an adequate remedy is immaterial in the present case. However, even if the third prong of Parratt were an issue, Respondents were unable to show to the trial court, could not show to the Fourth District, and remain unable to show to this Court any state damages remedy Raben Pastal should have pursued in lieu of its 42 U.S.C. §1983 claim.

Respondents' suggestion that an appeal provided the contemplated remedy is baseless. Damages cannot be awarded by the Board of Rules and Appeals or thereafter by an appellate court on subsequent review. Nor is there any underlying state common law or statutory cause of action available. Florida law does not provide its own damages remedy for arbitrary and capricious governmental actions. Corn v. City of Lauderdale Lakes, 816 F.2d 1514 (11th Cir. 1987) (Neither at Florida common law or by Florida statute are there any procedures to award damages for substantive abuse of regulatory powers).

Even if there were an alternative state remedy, the most that could be recovered in such case is $100,000 under the legislative cap imposed by Florida Statutes §768.28(5) (1988). That statute further provides that there will be no municipal liability of any kind for any act committed in bad faith or for malicious purpose. Id. at §768.28(9)(a). Thus, the suggestion

that an adequate state remedy exists in the context of the case under review here is totally untenable.[7/]

IV. AS THE PRE CONDITIONS TO REMOVING THE STOP WORK ORDERS WERE FINAL, RABEN PASTAL'S 42 U.S.C. (51983 CLAIM WAS RIPE FOR ADJUDICATION.

The purported issue of whether Raben Pastal's claim for damages under 42 U.S.C. 51983 was "ripe" for jury consideration was never discussed by the courts below. Respondents totally misunderstand the scope and import of Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985). Williamson County deals with claims for a permanent taking under Article Five (the just compensation clause) of the United States Constitution. In such a situation, before an action can be maintained under, 42 U.S.C. §1983, the property owner must first invoke state inverse condemnation claims procedures, if available. Raben Pastal's claims, in marked contrast, do not involve a traditional taking since Raben Pastal was eventually allowed to recommence construction and was not denied all beneficial use of its property. Its claims are therefore anchored in the substantive due process protections of the Fourteenth Amendment. See Scott v. Greenville Co., 716 F.2d 1409 (4th Cir. 1983) (substantive due process claim arising from denial of building permit).

7/ Respondents argue, as they did before the trial court, that Florida's statutory waiver of sovereign immunity in some inexplicable fashion actually creates an affirmative right of recovery. No reading of that statute or case law even remotely supports such a contention. Trianon Park Cond. Ass'n. v. City of Hialeah, 468 So.2d 912 (Fla. 1985).

Thus, the claimed lack of ripeness here can have no substance. In the first place, as previously discussed, Raben Pastal had no remedy under Florida law. Even if it did, the exercise of that remedy is not required since the type of substantive due process deprivation presented below is not restricted by concepts of post-deprivation remedies or ripeness. Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1986). Substantive due process claims need only involve governmental action that is final. Greenbriar Ltd. v. City of Alabaster, __ F.2d ____ (11th Cir. Sept. 1, 1989) [1989 U.S. App. Lexis 132451. There can be no question, whether viewed as final action by Cowley or ratification by the Board of Rules and Appeals, that the applicability of Cowley's policies to Raben Pastal's property was final.

V. THE SETTLEMENT FOR NEGLIGENCE DAMAGES OCCURRING PRIOR TO JULY 2, 1981 SHOULD NOT HAVE BEEN SET-OFF AGAINST THE 42 U.S.C. §1983 DAMAGES WHICH OCCURRED AFTER JULY 2, 1981.

The stop-work orders were imposed as a result of the settling defendants' negligence. The stop-work orders should have been lifted on July 2, 1981 because that is when the repairs needed to fully remedy the negligence were completed. The City and Cowley were found by the jury to have violated Raben Pastal's constitutional rights by refusing to lift the stop-work orders after the repairs were completed.

At the trial, the jury was twice instructed to apportion between the damages caused by the negligent settling defendants and the damages later and independently caused at the hands of the City and Cowley. By setting off the damages for negli-

gence against the 42 U.S.C. §1983 damages later caused by the City and Cowley, Raben Pastal was denied all compensation for its substantial pre-July 2, 1981 negligence damages.

Respondents imply (as did the Fourth District) that under Dionese v. City of West Palm Beach, 500 S.2d 1347 (Fla. 1987), had Plaintiff and the settling defendants made a unilateral apportionment pact, the City would not be entitled to a set-off. Surely Respondents cannot be saying that had a written agreement between Raben Pastal and the engineers been signed allocating one (1%) percent of the settlement sum to post-July 2, 1981 injuries, that would be the end of the inquiry. Such a ceremonial ritual cannot be viewed as a judicially sanctioned formality that would preclude any argument for set-off. By the same token, the absence of such a statement does not result in a set-off. It is completely illogical to suggest that Dionese implies that an apportionment pact between settling parties will handcuff the non-settling party by either preserving or cutting off the non-settling party's liability for damages.

The Respondents' other argument that the Plaintiff is stuck with the set-off because it claimed joint and several liability is equally invalid. If pleadings were an appropriate means for determining the propriety of set-off, the settling defendants' affirmative defense of supervening/intervening acts by Cowley would negate Plaintiff's pleading of joint and several liability. Obviously, pleading practices are not a reliable vehicle for determining set-off and should not be judicially sanctioned. Logic suggests no reason why Plaintiff's pleadings

should prevail over Defendants' pleadings on the set-off issue. Substance, not ritualistic litany or pleading practice, should control a determination of this magnitude.

Plainly, there was no double recovery, which is the only substantive vehicle justifying set-off. In fact, there was not even the allowable slight overlap of pre-July 2 and post-July 2, **1981** damages in the jury's verdict because of the two instructions to the jury to apportion damages and limit the verdict to ". . . the amount of damages that it finds to have been caused by the constitutional deprivation . . . ." **(R. 1884-85).** This instruction expressly excluded any damages for the pre-July 2, **1981** negligence damages.

The unwarranted set-off is an outright windfall to the Respondents. It should be reversed.

CONCLUSION

Everyone in the City of Coconut Creek believed, acted, and regarded Cowley as having final policymaking authority - Cowley himself, the City Attorney, the City Manager and the City Commission. When the controversy made its way to the Board of Rules and Appeals, that Board, acting for the municipality, also regarded Cowley as the final arbiter. The City Attorney repeatedly stated to the Board that Cowley was the final authority and his unconstitutional deprivation thus swept through the Board unchecked. When presented with the facts, the jury below found without hesitation what everyone already knew - Cowley was the final policymaker for the City. We, indeed, live in a peculiar world if, as Respondents contend, what everybody knows is not the

case - that somebody else or something else was the final authority which judged Raben Pastal.

The record cries out for a reversal lest one more constitutional deprivation pass unnoticed as the law of the land.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Petitioners' Reply Brief was furnished by mail to ROBERT H. SCHWARTZ, ESQ., 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 PAUL S. STUART, ESQ., STUART & WALKER, P.A., Post Office Box 14004, Fort Lauderdale, Florida 33302 on this 12th day of October, 1989.

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