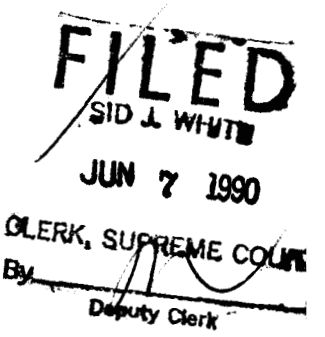
IN THE SUPREME COURT
of the
STATE OF FLORIDA



CASE NO.: 75,375

TOWN OF LAKE CLARKE SHORES,

Appellant,

vs.

ALAN PAGE,

Appellee.

ON APPEAL FROM THE
FOURTH DISTRICT COURT OF APPEALS

INITIAL BRIEF ON BEHALF' OF AMICUS CURIA CITY OF BELLE GLADE, FLORIDA, AND CITY OF DELRAY BEACH, FLORIDA

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STATEMENT OF THE CASE

The City of Belle Glade and the City of Delray Beach adopt the statement of case and facts as set forth by the Town of Lake Clarke Shores.

SUMMARY OF ARGUMENT

Though municipalities are considered persons for purposes of 42 W.S.C. Section 1983, Congress in enacting section 1983 did not intend to override the traditional common law immunity such as sovereign immunity. Municipalities in Florida enjoy the sovereign immunity defense, and the state of Florida has not waived this defense. As such, municipalities may not be sued in Florida state court for violations of the federal civil rights act.

ARGUMENT I

A MUNICIPALITY MAY NOT BE SUED IN FLORIDA STATE COURT FOR VIOLATIONS OF 42 U.S.C. SECTION 1983.

Section One of the Civil Rights Act of 1871 sets forth the vehicle by which a person who acts under the color of state law may be sued for damages for depriving an individual of a federally protected right. Prior to the United States Supreme Court's decision in Monell vs. Department of Social Services 436 U.S. 658, 91 S.Ct. 2018, (1978) the law was clear that a municipal corporation was not considered a person under 42 U.S.C. Section 1983. Monell set forth limited circumstances by which a municipal corporation may be sued for Section 1983 violations. However, the mere fact that a municipality is a person does not subject that municipality to section 1983 suits in state court. The municipality has sovereign immunity which acts a defense in barring all suits against it unless there is a waiver of that immunity. In Florida, Section 768.28 Fla. Stat. (1987) waives sovereign immunity in limited tort actions; however, that statute does not waive sovereign immunity in civil right actions brought in state court against municipalities.

This court had an opportunity to review Section 768.28 and sovereign immuxity as it affects municipalities. In Cauley vs. City of Jacksonville 403 So. 2d 3?9 (Fla. 1981) this court held that municipalities enjoy the same sovereign immunity as provided to any other branch of government.

> "If we were to adopt appellants' view that a different immunity standard should apply to a municipal corporation as opposed to a county government, we would next have to determine which standard to apply when consolidation has occurred, because Duval County and the city of Jacksonville have in fact consolidated.... Our decision that section 768.28

applies to both municipal and county governments eliminates the need for such a determination". Id. at **385-386** (citations omitted).

"It is our decision that, in this state, sovereign immunity should apply equally to all constitutionally authorized governmental entities and not in a disparate manner. We find that Section **768.28** provides a responsible method for this equal application". Id. at **387.**

Therefore, the same result should be obtained when applying sovereign immunity to various branches of government.

Section **768.28** provides that the state, it agencies or subdivisions waives its sovereign immunity for liability for torts "but only to the extent specified in this act". Id. at **768.28** (1). **768.28 (2)** Fla. Stat. **(1987)** states:

"As used in this act, 'state agencies or subdivisions' include the executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties or municipalities."

Therefore a municipality is clearly a state agency or subdivision as defined in the act.

This court has already decided the issue of whether a municipality has waived its sovereign immunity to civil rights action brought in state court. In Hill vs. Department of Corrections **513** So. 2d **129** (Fla. **1987)** this court answered in the negative the following certified question:

"Has the State of Florida, pursuant to Section **768.28,** Florida Statutes (1983), waived its Eleventh Amendment and state common law immunity and consented to suits against the State and its agencies under **42** U.S.C. Section 1983." Id. At **130.**

In discussing the sovereign immunity issue the court states that:

"While Florida is at liberty to waive its immunity from section **1983** actions, it has not done so. The recovery ceilings in Section **768.28** were intended to waive sovereign

immunity for state tort actions, not federal civil rights actions commenced under Section **1983**. Accordingly we answered the certified question in the negative". Id. at **133**.

Therefore applying Hill to the case at bar since the state of Florida has not waived sovereign immunity to Section **1983** actions, for itself and those entities defined in Section **768.28** (2) then a municipality may not be sued in state court for violations of Section **1983**.

The application of the sovereign immunity defense is not solely limited to the state of Florida and its executive departments. In Howlett vs. Rose **537** So. 2d **706** (2nd DCA 1989), rev. den. **545** So. 2d **1367** (Fla. 1989), cert. granted _____ U.S. __ __ (November **13**, 1989), the 2nd District Court of Appeals under the authority of Hill decided that the Defendants, (which include the superintendent of schools for Pinellas County and the school board of Pinellas County) may not be sued in state court for violations of **42** U.S.C. Section **1983**.

> "Thus, to the extent that the actions of the state and its agencies are protected by sovereign immunity, an action pursuant to Section **1983** will not lie in state court. The question of whether that sovereign immunity exists is a question of state law and not federal law". Id. at **707**.
>
> "However, when a section **1983** action is brought in state court, the sole question to be decided on the basis of state law is whether the state has waived its common law sovereign immunity to the extent necessary to allow a Section **1983** action in state court. Hill holds that Florida has not so waived its sovereign immunity.... There is no question under Florida law that agencies of the state, including school boards and municipalities, are the beneficiaries of sovereign immunity." Id. at **708** (emphasis supplied).

Therefore not only are municipalities immune from Section **1983** actions in state court, but the 4th District Court of Appeals erred in distinguishing Howlett and Hill from the case at bar. Under Cauley, supra, municipalities are entitled to the same sovereign

immunity protection as the Department of Corrections and County School Boards. 1

In Lloyd vs. Ellis 520 So. 2d 59 (1st DCA 1988) and Salazar vs. Wille 15 FLW D767 (March 21, 1990), the courts of the state have applied the Hill doctrine to the county sheriffs by holding that they are immune from suit for Section 1983 violations in state court. Eear in mind the sheriff is not an executive department of the state of Florida.

In general, the waiver of sovereign immunity rests with the state legislature. Since this court's Hill decision in 1987, the legislature could have amended Section 768.28 if it disagreed with the decision. To date, the only amendments have been to add the Spaceport Florida Authority as a state agency. See F.S.A. 768.28 (2) (1989) and F.S.A. 786.28 (3) (1989). The implicit assumption is that the legislature has approved of Hill and has no intention of waiving sovereign immunity as it applies to all agencies of government, including municipalities.

In applying the above described principles of law to the case at bar, it appears that the 4th District Court of Appeals erred in not applying Hill and Howlett to the case at bar. Municipalities such as the Town of Clarke Shores and the amicus Cities enjoy the benefit of sovereign immunity. As such the 4th District Court of Appeals erred in not following the precedent of this court as well as that of its sister circuits.

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1 It should be noted that the United States Supreme Courts upcoming decision in Howlett may be dispositive of some of the issues raised in this appeal.

CONCLUSION

Sovereign immunity is like an exclusion in an insurance policy. The policy may provide coverage in case of a loss, but may provide an exclusion of payment if the loss occurs in a certain manner. Here too, 42 U.S.C. Section 1983 provides a remedy against a municipality in limited circumstances. Such is the coverage. Yet there is an exclusion, sovereign immunity. Florida has not waived its sovereign immunity for civil rights for itself, its agencies and subdivisions for civil rights actions brought in state court. The statute and case law clearly include municipalities as an agency. Therefore a municipality may not be sued in state court for a violation of 42 U.S.C. Section 1983.

For all the foregoing reasons the opinion of the 4th District Court of Appeals should be reversed. Municipalities have sovereign immunity for civil rights suits brought in state court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that **a** true and correct copy of the foregoing INITIAL BRIEF has been furnished to ISIDRO M. GARCIA, ESQ., %Joseph A. Vassallo, P.A., Attorney for **Appellee, 3501** South Congress Avenue, Lake Worth, FL **33461;** BERNARD HEEKE, ESQ., Attorney for co-defendant, P.O. Box **2244,** Palm Beach, FL **33480;** MICHAEL DAVIS, ESQ., %Davis, Hoy & Diamond, P.A., Attorneys for Amicus, City of Lake Worth, P.O. Box **3797,** West Palm Beach, FL **33407** RHEA P. GROSSMAN, ESQ., **2710** Douglas Road, Miami, FL 33133-**2728** and KENNETH P. CARMAN, ESQ., **600** W. Hillsboro Blvd., Suite **203,** Deerfield Beach, FL **33441** by U.S. mail this 5th day of JUNE, **1990.**

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