OA 9-4-90

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IN THE SUPREME COURT OF FLORIDA

TOWN OF LAKE CLARKE SHORES,

Petitioner,

vs.

ALAN PAGE,

Respondent.

CASE NO.: 75,375
DCA-4 NO.: 89-1338

JUL 11 1990

CLERK, SUPREME COURT.

By _____ Deputy Clerk

ANSWER BRIEF OF RESPONDENT ALAN PAGE

JOSEPH A. VASSALLO, P.A.
3501 South Congress Avenue
Lake Worth, Florida 33461
Telephone: (407) 964-9455
By: ISIDRO M. GARCIA, ESQUIRE
Counsel for Respondent
Florida Bar No.: 437883

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STATEMENT OF THE CASE AND FACTS

Respondent substantially agrees with petitioner's statement of the case and facts, except where petitioner mischaracterizes the basis of the trial court's decision and the arguments advanced thereto by petitioner's trial counsel. In fact, at the hearing which resulted in judgment on the pleadings for petitioner, Mr. Kenneth Carman argued that dismissal was appropriate based on lack of subject matter jurisdiction; the trial court was so persuaded, and its order reflects that was the basis of its holding. Moreover, in reversing the order of the trial court, the Fourth District did not address the issue of common law immunity, simply because petitioner here never advanced that argument to the trial court and because the trial court decision was not based thereon. However, since the Fourth District's decision, the United States Supreme Court **has** ruled that there is no common law immunity for persons, including municipalities, who are sued pursuant to 42 U.S.C. Section 1983, whether the suit be brought in federal or in state court. Thus, even if petitioner had properly preserved the issue for appellate review, the issue has been decided squarely against it by the highest legal authority in the land.

SUMMARY OF THE *ARGUMENT*

This appeal has been made moot by the recent decision of the United States Supreme Court in Howlett v. Rose, _____ U.S. _____, 4 FLW S 583 (June 15, 1990) which recognized that municipalities, and like entities, are subject to 42 U.S.C. Section 1983 liability for constitutional violations, whether the action is pursued in federal or in state court, and, further, that the State of Florida may not immunize said liability. This important decision corrects the glaring error made by the Second District in Howlett, reported at 537 So.2d 706 (Fla 2nd DCA 1989), and also clarifies this Court's decision in Hill v. Department of Corrections, 513 So.2d 219 (Fla. 1987), from which Howlett was conceived. Despite the mootness, respondent suggests that a decision from this Court clarifying Hill and the limits of its immunity doctrine, repudiating the Second District's Howlett decision, and expressly adopting United States Supreme Court precedent on the issue, would be helpful to practitioners and to courts in our State.

ARGUMENT

The United States Supreme Court has recognized that municipalities , such as petitioner, are subject to suit for violations of constitutional rights pursuant to 42 U.S.C. Section 1983; such suits may properly seek monetary, declaratory, or injunctive relief. Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 690 (1978). Further, when such actions are brought in state, rather than federal court, federal law pre-empts state created immunities. Felder v. Casey, ____ U.S. _____, 108 S. Ct. 2302, 2309-10 (1988). While Felder is controlling, the Supreme Court recently laid to rest any doubt by expressly foreclosing the issue raised by petitioner here: "[t]o the extent that the Florida law of sovereign immunity reflects a substantive disagreement with the extent to which governmental entities should be held liable for their constitutional violations, that disagreement cannot override the dictates of federal law." Howlett v. Rose, U.S._____, 4 FLW S 583, 587 (June 15, 1990). Moreover, "[f]ederal law makes governmental defendants that are not arms of the State, such as municipalities, liable for their constitutional violations." Id. at S 587. Finally, states may **not** exempt persons subject to Section 1983 liability by conveying on them their own immunity since that would nullify federal law, and thereby violate the Supremacy Clause. Id. at S 589.

The trifecta of Monell, Felder and Howlett render petitioner's appeal without basis. Petitioner's reliance on the

Second District's decision in Howlett, at 537 So.2d 706, is, since the United States Supreme Court's repudiation of that case, ill-fated. Further, petitioner's reliance on this Court's decision in Hill v. Department of Corrections, 513 So.2d 129 (Fla. 1987), is, in light of the recent Howlett decision, misplaced. As Justice Stevens wrote for a unanimous Court:

> While the Florida Supreme Court's actual decision in Hill is consistent with the foregoing reasoning, the Court of Appeal's extension of Hill to persons subject by Section 1983 to liability is flatly inconsistent with that reasoning and the holdings in both Martinez and Felder. Federal law makes governmental defendants that are not arms of the state, such as municipalities, liable for their constitutional violations [citations omitted].
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> 4 FLW Fed. at S 587

The Fourth District's decision in this case, reported at 552 So.2d 212 (Fla. 4th DCA 1989), ably confirmed the principles of law expressed by the United States Supreme Court in Monell, Felder and most recently, in Howlett. Although the Hill holding of this Court was ultimately correct, the rationale was not precise, and it, as occurred with the Second District in Howlett and in the case here before the trial court, was employed in a manner that impermissibly discriminated against a federal cause of action. As the United States Supreme Court recognized in reversing the Second District decision in Howlett and limiting Hill:

> The language and reasoning of the State Supreme Court, if not its precise holding, however, went further. That further step was completed by the District Court of Appeal in this case. As it construed the law, Florida has extended absolute immunity from suit not only to the State and its arms but also to municipalities, counties, and school districts who might otherwise be subject to suit under Section 1983 in federal court. That holding raises the concern that the state court may be evading federal law and discriminating against federal causes of action.
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> 4 FLW Fed. S at 585

Although the issue of state court enforcement of federal law has gnawed at the belly of this nation's system of justice since at least the days following the Civil War, particularly in the South, see generally: Foner, Reconstruction: America's Unfinished Revolution (New York, 1988), the issue has now been laid to rest by Howlett:

> Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum -- although both might well be true - but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws 'the supreme law of the land,' and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedures.
>
> Id. at S 585.

To the extent Felder had not already done so, the United States Supreme Court in Howlett disposed of petitioner's argument in its entirety. Howlett makes clear that municipalities, and any like local entity that is not an arm of the State, is subject to suit under 42 U.S.C. Section 1983 for constitutional violations; further, the suit can be brought in state court; finally, federal law pre-empts any immunity Florida would purport to confer on petitioner to void the federally created cause of action.

Petitioner also attempts to argue that it is not a "person" as defined for purposes of 42 U.S.C. Section 1983. Petitioner advises this Court that the Fourth District "failed to recognize" that a municipality must be sued as a "person" to be sued under 42 U.S.C. Section 1983 ("Initial Brief" p. 10). Petitioner is apparently arguing that a municipality, such as it, is not a "person" as that term has come to be defined for Section 1983 actions. The argument is fatuous. The United States Supreme Court has consistently held that a municipality is a "person" for Section 1983 purposes. Monell, supra, 436 U.S. at 689-90; Will v. Michigan Department of State Police, U.S. _____, 109 S. Ct. at 2311. Moreover, petitioner has consistently admitted in each and every Answer it has filed before the trial court that it is a "municipality". Finally, since the United States Supreme Court has held that municipal corporations and similar governmental entities are "persons", a state court entertaining a

Section 1983 action must adhere to that interpretation. Howlett, supra, 4 FLW at S 587.

Petitioner's related argument that its liability under Section 1983 extends only to those acts that can be attributed to official policy, or actions that rise to the level of governmental "custom", it, at best, disingenuous. First, the trial court's ruling was not based on such an argument because such an argument was never raised and may not now be raised on appeal; secondly, although respondent has in earlier pleadings before the Fourth District attempted to educate counsel for petitioner on this issue, to no avail, it must again be repeated that the United States Supreme Court, in defining the contours of municipal liability in Section 1983 cases, has held that policy or custom can arise from a single act which causes the constitutional deprivation. Pembaur v. City of Cincinnati, 475 U.S. 469, 480-81 (1986).

In this case, respondent has alleged, and if given the opportunity, will prove at trial, that petitioner's former chief of police, on the urging of the Town manager, fired respondent for respondent's exercise of his rights of free speech. Said former chief, along with the current chief of police, subsequently conspired, in retaliation for further free speech activities of respondent, to have respondent arrested on a fabricated allegation of impersonating a police officer, a charge ultimately dismissed by the Palm Beach County State Attorney's

office for lack of evidence. Those facts, if proven at trial, are more than sufficient to establish municipal liability under the guidelines of Pembaur, which petitioner's counsel unscrupously has failed to discuss in her Initial Brief, although previously alerted to the holding of said case.

The Initial Brief of Amici City of Belle Glade and City of Delray Beach relies entirely on the Second District's unfortunate misconception of the law in Howlett, supra. Now that the United States Supreme Court has corrected the error, no further response to Amicis' argument is needed or warranted.

The Initial Brief of Amicus City of Lake Worth, although convoluted in its reasoning and unclear in its writing, appears to contend that Florida courts lack subject matter jurisdiction of Section 1983 actions and that the Federal Constitution does not require Florida courts to assume jurisdiction over Section 1983 actions. (Initial Brief, p.5),. Both arguments were ably disposed of long ago by United States Supreme Court precedent.

First, state courts may entertain Section 1983 actions. Maine v. Thiboutot, 448 U.S. 1, 3 n.1 (1980); Martinez v. California, 444 U.S. 277, 283 n.7 (1980). In fact, state courts may, and do, pursuant to the doctrine of concurrent jurisdiction, entertain **any** federal cause of action, as long as Congress has not explicitly or implicitly made federal court jurisdiction exclusive. Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1978). Nothing in the language of Section 1983 suggests that Congress has made federal court jurisdiction exclusive; moreover,

implied exclusivity results only when there is an "unmistakable implication from legislative history, or by a clear imcompatability between state-court jurisdiction and federal interests" [citations omitted]. Id. at 478. Nothing in the legislature history of Section 1983 supports implied exclusivity. Nor is there any incongruity in the state court enforcement of federal constitutional rights: for example, state criminal courts regularly enforce many provisions in the federal Bill of Rights. Our own state constitution opens our courts to every person, for redress of any injury, not only those injuries recognized as actionable by state law. Art. I, Section 21, Florida Constitution.

As to the second point raised by Amicus City of Lake Worth, which is nothing more than the old "state's rights" argument given a legal dressing, the Supremacy Clause of the United States Constitution and Justice Stevens' "three corollaries" in Howlett, supra, refutes it as a sham. First, a state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of a valid excuse; second, "an excuse that is inconsistent with or violates federal law is not a valid excuse: the Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source"; and, thirdly, when a state court refuses jurisdiction because of a neutral state rule regarding the administration of justice, the state court needn't necessarily

assume jurisdiction over the action. Howlett, supra, 4 FLW at S 585-86. Analyzing these three factors with respect to a Section 1983 claim brought in a Florida state court against a local school board, a unanimous Court held: 1." . . .the Florida court's refusal to entertain one discrete category of [Section] 1983 claims, when the court entertains similar state law actions against state defendants, violates the Supremacy Clause," Id. at S 587; 2. no valid excuse for failing to entertain the Section 1983 action was presented, Id. at S 588; and, 3. the state policy at issue there, permitting claims based on state law and construed to prohibit claims based on federal law, "flatly violates the Supremacy Clause." Id. at S 588. In short, Florida courts may not entertain actions similar to Section 1983 claims, and then refuse to entertain Section 1983 actions, because such an arbitrary jurisdictional bar violates the Supremacy Clause.

CONCLUSION

The cases of Monell, Felder and Howlett from the United States Supreme Court expressly and conclusively repudiate petitioner's main argument on appeal. It is now clear beyond the shadow of any plausible argument that: 1. Florida State courts must entertain Section 1983 actions, and, 2. municipalities, and other local political entities, may not claim common law and/or sovereign immunity when attempting to evade liability for constitutional deprivations, because federal law pre-empts any immunity the state may purport to confer. Prior decisions of the

United States Supreme Court also dispose of petitioner's related argument that a municipality is not a "person" for Section 1983 purposes.

Because the law on petitioner's issue has now been made explicitly clear, this Court should affirm the decision of the Fourth District. In addition, respondent respectfully suggests that because the decision for this Court is now so clear, that the Court consider dispensing with oral argument. While petitioner's time and costs for a trip to Tallahassee are furnished by insurance coverage, it would cause respondent great financial hardship to bear the expense of a trip to Tallahassee for his counsel. If the issue raised by petitioner had not been explicitly decided by the United States Supreme Court in favor of respondent, oral argument would, in all likelihood, assist the Court. However, in light of the Howlett decision, oral argument would only serve to amplify the obvious, and the cost would outweigh the benefit.

Respectfully submitted,

JOSEPH A. VASSALLO, P.A.

BY: _____

ISIDRO M. GARCIA, ESQUIRE
Counsel for Respondent
3501 South Congress Avenue
Lake Worth, FL **33461**
(407) 964-9455

Florida Bar No.: **437883**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: BERNARD HEEKE, ESQUIRE, Post Office Box 2244,, Palm Beach, FL 33480; FRED GELSTON, ESQUIRE, Post Office Box 4507, West Palm Beach, FL 33402; KENNETH P. CARMAN, ESQUIRE, 600 West Hillsboro Boulevard, Suite 210, Deerfield Beach, FL 33441; RHEA P. GROSSMAN, P.A., 2710 Douglas Road, Miami, FL 33133-2728 and MICHAEL B. DAVIS, ESQUIRE, Davis, Hoy, Carroll & Isaacs, P.A., Post Office Box 3797, West Palm Beach, FL 33402, this 10th day of July, 1990.

ISIDRO M. GARCIA, ESQUIRE