IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO. _____

ON PETITION FOR REVIEW
FROM THE DISTRICT COURT OF APPEAL,
FOURTH DISTRICT, CASE NO. **89-1338**

CARL VALENTINE, et al.,
TOWN OF LAKE CLARKE SHORES,

Petitioner***(s)***,

vs.

ALAN PAGE,

Respondent.

BRIEF AND APPENDIX OF PETITIONER, TOWN OF LAKE CLARKE SHORES ON JURISDICTION

CARMAN, BEAUCHAMP & SANG, P.A.
600 West Hillsboro Boulevard
Suite 210
Deerfield Beach, Florida **33441**
(305) 426-4401

-and-

RHEA P. GROSSMAN, P.A.
2710 Douglas Road
Miami, Florida **33133-2728**
(305) 448-6692

Counsel for Petitioner,
Town of Lake Clarke Shores

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STATEMENT OF JURISDICTION

The Petitioner, TOWN OF LAKE **CLARKE SHORES,** is seeking to have this Court exercise its discretionary jurisdiction pursuant to Rules 9.030(a)(2)(A)(iv) and 9.120, Florida Rules of Appellate Procedure and Article V, Section 3(B)(4), Florida Constitution.

STATEMENT OF THE CASE AND FACTS

A. Course of Proceedinss:

On August 3, 1987, Respondent filed an Amended Complaint in the Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County, Florida (App.13-20). Petitioner, **TOWN OF** LAKE **CLARKE SHORES,** was a named defendant.

On May 24, 1989, the trial court entered a Partial Judgement on the Pleadings (App.12), dismissing the Petitioner on the authority of Hill V. Dept. of Corrections, 513 So.2d 129 (Fla. 1987) and Howlett V. Rose [Grey, et al.], 537 So.2d 706 (Fla. 2nd DCA 1989).

The Respondent filed an interlocutory appeal and on September 6, 1989, the District Court of Appeal, Fourth District, filed its per curiam opinion reversing and remanding the matter to the trial court (App.1-3).

A timely Motion for Rehearing, Rehearing En Banc, and Motion for Supreme Court Certification was filed (App.4-10). All motions were denied by the appellate court on December 14, 1989 (App.11).

This appeal is taken to review the per curiam opinion dated September 6, 1989.

B. The Facts (as limited to the brief on jurisdiction):

The facts as plead in the Amended Complaint (App.13-20) allege that the Petitioner, TOWN OF LAKE **CLARKE SHORES,** had allowed the Respondent, who was a probationary police officer, through its police chief, and in violation of his First Amendment Rights, to "wrongfully terminate(d) Plaintiff's employment..."

The Petitioner raised the defense of sovereign immunity.

The trial court's Order (App.12) reflected the Petitioner's argument that a municipality such as the TOWN OF LAKE **CLARKE SHORES,** is afforded common law sovereign immunity protections, and Florida Statutes 786.28 (2) does not act as a waiver of that immunity in a federal civil rights action seeking damages for a singular act affecting one individual which is filed against a municipality in a state court.

In reversing the Order of the trial court (App.1-3), the Fourth District Court of Appeal specifically determined:

(1) The trial court had subject matter jurisdiction of 42 U.S.C. 1983 actions - a finding that was never made an issue by this Petitioner;

(2) The cases of Howlett V. Rose, 537 So.2d 706 (Fla. 2nd DCA 1989) and Hill V. Department of Corrections, 513 So.2d 129 (Fla. 1987, cert. denied, ___ U.S. ____, 108 S.Ct. 1024 (1988) "are inapt because they do not concern municipalities; and

(3) Monell v. Department of Social Services of City of New York, 436 U.S. 658, 98 S.Ct. 2018 (1978) allows an individual to

sue a municipality as was done in the case, sub judice.

POINT ON APPEAL
(Jurisdiction)

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, IN THE CASE AT BAR IS IN DIRECT CONFLICT WITH PRESENT FLORIDA AND FEDERAL LAW WHICH GRANTS A MUNICIPALITY COMMON LAW (and STATE STATUTORY) SOVEREIGN IMMUNITY WHEN SUED IN A STATE COURT UNDER THE FEDERAL CIVIL RIGHTS ACT OF 1871, 42 U.S.C. §1983, AND FURTHER REQUIRES, IN ORDER TO WAIVE SOVEREIGN IMMUNITY, THAT THE PLEADINGS AGAINST SAID MUNICIPALITY SET FORTH SUFFICIENT CIRCUMSTANCES TO QUALIFY THE MUNICIPALITY AS A "PERSON"?

SUMMARY OF THE ARGUMENT

In the Per Curiam opinion rendered by the District Court of Appeal, Fourth District, in the case at bar (App.1-3), the Fourth District specifically excluded the Petitioner from relying upon the defense of sovereign immunity when sued in a state court for federal civil rights abuses because it is a municipality and not within the protection of Florida Statutes §786.28(2). This reasoning is in direct conflict with this Court's opinion in Cauley V. City of Jacksonville, 403 So.2d 379 (Fla. 1981).

Second, the opinion rendered herein, directly conflicts with the opinion of Hill V. Dept. of Corrections, 513 So.2d 129 (Fla. 1987) which allows for the waiver of common law sovereign immunity under F.S. 0768.28(1) only "under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant..."

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, IN THE CASE AT BAR IS IN DIRECT CONFLICT WITH PRESENT FLORIDA AND FEDERAL LAW WHICH GRANTS A MUNICIPALITY COMMON LAW (and STATE STATUTORY) SOVEREIGN IMMUNITY WHEN SUED IN A STATE COURT UNDER THE FEDERAL CIVIL RIGHTS ACT OF 1871, 42 U.S.C. §1983, AND FURTHER REQUIRES, IN ORDER TO WAIVE SOVEREIGN IMMUNITY, THAT THE PLEADINGS AGAINST SAID MUNICIPALITY SET FORTH SUFFICIENT CIRCUMSTANCES TO QUALIFY THE MUNICIPALITY AS A "PERSON".

Since the Fourth District's opinion in City of Riviera Beach v. Langevin, **522 So.2d 857** (Fla. 4th DCA 1987), there has been a direct conflict with all other appellate tribunals in this state, as well as the federal interpretation of sovereign immunity and civil rights actions. The opinion (App.1-3) sought to be reviewed in the case at bar is another example of the conflicting philosophy and law with the Fourth District and all other courts.

Florida recognizes that the State, which includes its agencies, subdivisions and municipalities, is protected from liability by common law sovereign immunity when sued in its own state courts. This common law doctrine of sovereign immunity may be waived, by general law, as provided in **013**, Article **10**, Florida Constitution. Cauley v. City of Jacksonville, **403 So.2d 379** (Fla. **1981)**; Gamble v. Florida Department of Health and Rehabilitative Services, **779** So.2d **1509** (11th Cir. **1986).** Florida Statutes §768.28 is a clear and unequivocal waiver of sovereign immunity. The Florida Supreme Court, however, has determined, in responding to a certified question from the Third District Court of Appeal, that Florida Statutes §768.28 does not act as a waiver of common

law sovereign immunity when liability arises under 42 U.S.C. §1983. Hill v. Department of Corrections, State of Florida, 513 So.2d 129 (Fla. 1987).

A corollary to common law sovereign immunity which is applicable and applied when a state (or its agencies, sub-divisions, municipalities, etc.) is sued in the federal courts is the Eleventh Amendment to the U.S. Constitution. The Eleventh Amendment is intended to be an absolute bar to a suit by an individual against a state of its agencies in federal court absent legitimate abrogation of immunity by Congress or waiver of immunity by the state being sued. Gamble v. Fla. Dept. of HRS, 779 F.2d 1509 (11th Cir. 1986).

In light of the above cited cases and philosophy, the Fourth District Court of Appeal has only applied the doctrine of sovereign immunity in civil rights actions wherein the State has been sued under the theory of respondeat superior. See, City of Riviera Beach v. Langevin, 522 So.2d 857 (Fla. 4th DCA 1987), on rehearing, at 522 So.2d at pages 866-868.

The Hill court, 513 So.2d at 131, quoting Ramah Navajo School Board v. Bureau of Revenue, 104 N.M. 302, 720 P.2d 1243 (N.M.App.), cert. denied, ___ U.S. ____, 107 S.Ct. 423 (1986), examined the function of a state court and of a federal court in applying the two distinct concepts of sovereign immunity:

> ...The Eleventh Amendment shields the operation of state governments from intrusions from the federal judiciary while sovereign immunity protects state government affairs from interference by plaintiffs and state courts. [citation omitted] Therefore, when a Section

> 1983 suit is brought in federal court, the court analyzes whether the defendant is a **"person"** within the meaning of Section 1983 or, more meaningfully expressed, whether the Eleventh Amendment bars the suit from being brought against that defendant. Similarly, in Section 1983 actions brought in state courts, the court determines whether sovereign(ty) immunity bars the suit. [citation omitted]

The Second District Court of Appeal simplified the pronouncements of Hill v. Department of Corrections, in its opinion in Howlett v. Rose, 537 So.2d 706 (Fla. 2nd DCA 1989), and which opinion was relied upon by the trial court in its Order (App.1). The Second District stated, 537 So.2d at 707:

> ...The eleventh amendment protects state government from the federal judiciary. Under the eleventh amendment, when a section 1983 action is brought against a state in federal court, the question is whether the defendant qualifies as a **"person"** under the act or is more properly an Eleventh Amendment protected state agency. The determination of that question in that context is a question of federal law. 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.

The Howlett decision conflicts with both the opinions rendered by the Fourth District Court of Appeal in the case at bar and in the case of City of Rivier Beach V. Langevin, 522 So.2d at 866.

In fact, the opinion in the case at bar (App.1-3) specifically distinguishes the Hill and Howlett decisions as not being applicable to **"municipalities".**

CONCLUSION

The Petitioner, TOWN OF LAKE CLARKE SHORES, respectfully urges that there is a direct conflict between the decision of the District Court of Appeal, Fourth District, in the case at bar and the decisions cited herein of this Court, the federal courts, and the other district courts of appeal. Petitioner respectfully prays this Court exercise its discretionary jurisdiction to review the decision of the Fourth District Court of Appeal pursuant to Article V, Section 3(B)(4), Florida Constitution, especially in light of this Court's acceptance of jurisdiction to decide a similar matter in Howlett V. Rose, 537 So.2d 706 (Fla. 2nd DCA 1989), a case specifically distinguished by the Fourth District Court of Appeal in the opinion sought to be reviewed.

Respectfully submitted,

CARMAN, BEAUCHAMP & SANG, P.A.
600 West Hillsboro Boulevard
Suite 210
Deerfield Beach, Florida 33441
(305) 426-4401
-and-
RHEA P. GROSSMAN, P.A.
2710 Douglas Road
Miami, Florida 33133-2728
(305) 448-6692

BY: 
RHEA P. GROSSMAN
Florida Bar #092640

DATED: January 16, 1990.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing JURISDICTIONAL BRIEF AND ATTACHED APPENDIX OF PETITIONER was furnished this 16th day of January, 1990, by U.S. Mail, postage prepaid, to: Isidro M. Garcia, Esq., & Joseph A. Vassallo, P.A., Attorney for Appellant, **3501** South Congress Avenue, Lake Worth, Florida **33461**; Bernard Heeke, Esq., Attorney for co-defendant, Post Office Box **2244**, Palm Beach, Florida **33480**; Fred Gelston, Esq., Attorney for co-defendant, Post Office Box **4507**, West Palm Beach, Florida **33402**.

RHEA P. GROSSMAN