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

AMENDED BRIEF OF RESPONDENT ALAN PAGE (ON JURISDICTION)

JOSEPH A. VASSALLO, P.A.
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Statement of Jurisdiction

Respondent contends that this Court does not have conflict jurisdiction because there is no conflict between the prior decisions of this Court and of other District Courts of Appeal and the decision of the Fourth District Court of Appeal below.

Statement of the Case and Facts

A. Course of Proceedinus:

Respondent substantially agrees with petitioner's representations on the course of proceedings.

B. The Facts

Petitioner glosses over important facts that this Court needs to be appraised of, and makes material misrepresentations on other matters that must be corrected.

Respondent's Amended Complaint is a two count complaint, with the Town named a defendant in each count. Count I alleges that the then police chief of the Town, Carl Valentine, terminated respondent in retaliation for respondent's exercise of his free speech rights, in this case, writing and causing to be published a letter to a local newspaper on a matter of public concern (Petitioner's Appendix, pp.13-16). The basis of the Town's liability is premised on the fact that the Town had delegated the sole authority to terminate police department employees to the chief (Petitioner's Appendix, pp.15-16). Count II is a claim against two individual defendants and the Town for causing respondent to be arrested and prosecuted on fabricated charges of impersonating a police office in retaliation for

further exercise of respondent's First Amendment rights (Petitioner's Appendix, pp.17-20).

The trial court's dismissal, contrary to petitioner's representations, was premised primarily on its erroneous belief that "...there exists no subject matter jurisdiction in State Court to sue a political entity of the State of Florida, be it the State, its agencies, a county, a municipality or an employee acting in his or her official capacity for a cause of action brought pursuant to 42 U.S.C. Section 1983." (Petitioner's Appendix, p.12). As an afterthought, the trial court added that "Florida Statute F.S. [sic] 768.28 has not waived sovereign immunity for the governmental entities encompassed by said Statute." (Petitioner's Appendix, p.12).

Petitioner's counsel also misrepresents that they did not make an issue of the trial court's "subject matter jurisdiction." In fact, the transcript of the hearing leading to dismissal of the Town shows that petitioner's trial counsel, Mr. Kenneth Carman, argued:

> So, being that we are dealing with subject matter jurisdiction which can be raised at any time, we have raised this issue via a motion for judgment on the pleadings. And, it is our position with all due respect, that the Court does not have subject matter jurisdiction to hear these claims.
> (Respondent's Appendix, p.5)

Relying on this argument, from which petitioner first beat a hasty retreat following the adverse ruling by the Fourth District Court of Appeal, the trial court stated at said hearing that:

> ... pursuant to Hill versus the Department of Corrections and the like -- if you would supply the case the other citation. -- that there exists no subject matter jurisdiction for an individual to sue a municipal -- or excuse me, a political entity of the State of Florida, be it the State, County, a municipality or the like, any political entity...
>
> (Respondent's Appendix, p.7)

Petitioner made the same misrepresentation before the Fourth District in its Motion for Rehearing, etc. (Respondent's Appendix, pp. **18-24**). Respondent there corrected the misrepresentation, as he must do again before this Court. (Respondent's Appendix, pp. **25-31**). Although not strictly a matter that addresses this Court's jurisdiction, Respondent believes that in fairness to both the trial court and the Fourth District, petitioner's wilfull or reckless misrepresentations should be exposed.

Summary of the Argument

The decision of the Fourth District Court of Appeal in this case does not conflict with any prior decision of this Court or of any District Court of Appeal. Accordingly, there is no conflict jurisdiction in this Court to hear the appeal. In addition, the Fourth District's decision here is in harmony with United States Supreme Court precedent regarding the viability of claims brought under **42** U.S.C. Section **1983** for monetary relief against municipalities, such as petitioner, Town of Lake Clarke Shores.

ARGUMENT

This Court does not have conflict jurisdiction to hear this appeal because there is no conflict between the decision of the Fourth District Court of Appeal and prior decisions of this Court or those of other District Courts of Appeal.

The sole issue raised by petitioner is whether this Court has conflict jurisdiction pursuant to Rule **9.030(a)(2)(A)(iv),** Florida Rules of Appellate Procedure. Petitioner contends, incorrectly, that the decision of the Fourth District Court of Appeal here, Paae v. Valentine, 552 So.2d 212 (Fla. 4th DCA 1989), conflicts with the prior decision of this Court in Hill v. Department of Corrections, 513 So.2d 129 (Fla. 1987), cert. denied, ____ U.S. ____ , 108 S. Ct. 1024 (1988) and that of the Second District Court of Appeal in Howlett v. Rose, 537 So.2d 706, rev. den., 545 So.2d 1367, cert. uranted, ---U.S.--- (11/13/89). (Respondent's Appendix, p. 32), If in fact there is no conflict between Paae and the holding in Hill and in Howlett, this Court does not have jurisdiction to hear the appeal. Article V, Section 3(B)(3), Florida Constitution.

As the Fourth District Court of Appeal recognized, Hill and Howlett are not applicable to the case at bar. In Hill, this Court decided whether a Section 1983 suit for monetary damages could be brought against the state and one of its aaencies in a Florida state court. 513 So.2d at 131. This Court decided the issue in the negative and held that Section 768.28, Fla. Stat., with respect to the State of Florida, had served to waive

sovereign immunity for tort actions, not for federal civil rights actions brought pursuant to Section 1983. Id. at 133. The holding in Hill is limited to the State of Florida and its agencies, and not to municipalities such as the Town of Lake Clarke Shores. Likewise, the decision of the Second District Court of Appeal in Howlett, now under review by the United States Supreme Court, stands for the proposition that Section 1983 actions for monetary relief against school boards will not lie in state court. The petitioner here, Town of Lake Clarke Shores, is neither a State, an agency of the State nor a school board, hence Hill and Howlett are not applicable and there is no conflict jurisdiction in this Court.

The Fourth District's decision in Paae, and before that in City of Riviera Beach v. Lanaevin, 522 So.2d 857 (Fla. 4th DCA 1987), appeal dismissed sub nom., Darden v. Lanaevin, 536 So.2d 243 (Fla. 1988), both adhere to the entrenched rule of law that "[l]ocal governing bodies... can be sued directly under Section 1983 for monetary, declaratory, or injunctive relief..." Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 690 (1978). The Supreme Court very recently re-affirmed this principle in Will v. Michigan Department of State Police, ___ U.S. ___, 109 S. Ct. 2304 (1989). In Will, the Court decided that a state, or an official of the state acting in his or her official capacity, is not a "person" within the meaning and intent of Section 1983. Id. at 2308. However, Will reaffirmed the principle that a municipality, such as the Town of

Lake Clarke Shores, remains a "person" and is thus subject to Section **1983** suits. Id. at **2311.**

Even if there were conflict jurisdiction in this Court, the United States Supreme Court has rejected the underlying assumption of this Court in Hill, and the explicit statement of the Second District in Howlett, that a governmental entity must consent before a litigant can bring a Section **1983** action against it in a state court. In Felder v. Casey, ___ U.S. ___, **108 S.** Ct. **2302 (1988),** a plaintiff sued the City of Milwaukee and certain members of its police force for violations of his federal constitutional rights. Id. at **2304.** The suit was brought in state court, and the Wisconsin Supreme Court dismissed plaintiff's civil rights claims, holding that plaintiff's failure to comply with Wisconsin's notice-of-claim statute barred the Section **1983** claims. Id. at **2304.** The Supreme Court reversed and held that federal law pre-empted the state law requirement, even for cases pursued in state court. Id. at **2304.** The Court went on to explain that

> a state law that immunizes government conduct otherwise subject to suit under Section **1983** is pre-empted [by federal law], even where the federal civil rights litigation takes place in state court, because the application of the state immunity would thwart the congressional remedy...
>
> Id. at **2307** [citations omitted]

Further, the Court added that

> [t]he decision to subject state subdivisions to liability for

> violations of federal rights ... was a choice that Congress, not the Wisconsin legislature, made, and it is a decision that the state has no authority to override... [s]tates ... may no more condition the federal right to recover for violations of civil rights than bar the right altogether, particularly where those conditions grow out of a waiver of immunity which, however necessary to the assertion of state-created rights against local governments, is entirely irrelevant insofar as the assertion of the federal right is concerned, [citation omitted], and where the purpose and effect of those conditions, when applied in Section **1983** actions, is to control the expense associated with the very litigation Congress has authorized.
>
> Id. at **2309-10.**

Hence, contrary to Hill's underlying assumption, and Howlett's outright declaration, the viability of claims for violations of federal civil rights are not matters for individual states to decide, since federal law pre-empts immunities that would purport to limit or altogether bar the federally created right, even when the claim is asserted in a state court. While this Court's decision in Hill is ultimately correct (since Section **1983** monetary liability cannot be imposed on the State sua State), Howlett's belief (based on what was implicit in Hill) that state law determines the viability of a federal civil rights cause of action in state court, is flatly wrong, which perhaps explains why Howlett is presently being reviewed by the United States Supreme Court.

CONCLUSION

There is no conflict between Paae and this Court's decision in Hill and the Second District's decision in Howlett, since Paae applies to municipalities, long recognized to be subject to Section 1983 monetary liability, while Hill applies to the State qua State and Howlett to a school board. Petitioner's counsel is under the mistaken impression that this Court has accepted jurisdiction to review Howlett, when in fact this Court denied review in that case, and it is the United States Supreme Court which has granted certiorari. Regardless of the erroneous expressions of law in Howlett, this Court acted correctly in denying review in that case since there was no conflict between that case and Lanaevin (when viewed in the light that Howlett applies to a school board and Lanaevin to a municipality). As it did in Howlett, this Court should deny review here for lack of conflict jurisdiction.

Respectfully submitted,

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CERTIF OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by regular U. S. Mail this 6th day of February, 1990 to FRED GELSTON, ESQUIRE, Post Office Box **4507**, **West** Palm Beach, FL **33402**, BERNARD HEEKE, ESQUIRE, Post Office Box **2244**, Palm Beach, FL **33480**, KENNETH P. CARMAN, ESQUIRE, Carman, Beauchamp & Sang, P.A., 600 West Hillsboro Boulevard, Suite **210**, Deerfield Beach, FL **33441** and RHEA P GROSSMAN, ESQUIRE, **2710** Douglas Road, Miami, FL **33133-2728**.

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