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

RESPONSE BRIEF (ON THE MERITS) OF APPELLANT, TOWN OF LAKE CLARKE SHORES

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POINT ON APPEAL

I.

WHETHER A MUNICIPALITY IS ENTITLED TO THE PROTECTIONS OF COMMON LAW IMMUNITY WHEN SUED IN A FLORIDA, STATE COURT FOR FEDERAL CIVIL RIGHTS VIOLATIONS EVEN IN LIGHT OF HOWLETT V. ROSE, 4 FLW Fed. S582 (JUNE 15, 1990)?

SUMMARY OF THE ARGUMENT

TOWN'S common law sovereign immunity affords it protection against "constitutional" claims as alleged in the Amended Complaint in the case at bar. The United States Supreme Court decision in Howlett v. Rose, ___ U.S. ____, 4 FLW Fed. S582 (June 15, 1990) does not moot the issues before this Court nor does it abrogate **TOWN'S** defense of immunity.

It is the contention of Appellant that only if **TOWN** was performing as a "person" as defined in Monell v. Department of Social Services, 436 U.S. 658, 91 S.Ct. 2018 (1978), could **TOWN** be held liable for violations of federal civil rights laws when suit is brought in state court. Appellant disagrees that Howlett interprets "municipality" as being synonymous with "person".

It is the contention of the Amici that the State and its agencies can be sued as "persons" under the Federal Civil Rights Act in federal court, but Florida's courts lack subject matter jurisdiction because of Florida's common law sovereign immunity.

On the other hand, Appellee has put forth the argument that the Howlett court forbids the State of Florida from "immuniz[ing]

such liability" . . . which, Appellant contends, is not the holding nor intent of Howlett.

RESPONSE TO *ARGUMENT*

I.

THE UNITED STATES SUPREME COURT DECISION IN HOWLETT V. ROSE, ___ U.S. ____, 4 FLW Fed. S538 (JUNE 15, 1990) DOES NOT MOOT THE ISSUE PRESENTED TO THIS COURT FOR REVIEW.

Appellee argues that Howlett v. Rose, ___ U.S. ____, 4 FLW Fed. S583 (June 15, 1990) moots this appeal. Nevertheless, Appellee's argument, in itself, gives rise to the conflicting interpretations of the law as applied to actions brought in state court pursuant to claims founded upon 42 U.S.C. §1983, even in light of Howlett.

This Court must still determine:

(1) Whether Florida's courts have subject matter jurisdiction in the light of the argument espoused in the two amici briefs filed herein;

(2) If common law sovereign immunity does not create an absolute bar to federal civil rights actions brought in state courts when a municipality is defined as a "person", what criteria is to be used in determining the definition of "person"; and

(3) Whether, as Appellee contends, Howlett prevents a state court from applying its own common law sovereign immunity protections in barring federal civil rights actions against a

municipality because of Appellee's interpretation that "municipality" and "person" are synonymous.

II.

A MUNICIPALITY IS ENTITLED TO THE PROTECTIONS OF COMMON LAW SOVEREIGN IMMUNITY WHEN SUED IN A STATE COURT FOR FEDERAL CIVIL RIGHTS VIOLATIONS EVEN IN LIGHT OF HOWLETT V. ROSE, 4 FLW Fed. S583 (June 15, 1990).

Appellee's Answer Brief was prepared and filed subsequent to the United States Supreme Court opinion in ~~Howlett~~ v. Rose, 4 FLW Fed. S583 (June 15, 1990). In his brief, Appellee, therefore, relies on Howlett for seeking affirmance of the Fourth District Court of Appeals decision in the case at bar.

Howlett, however, supports the position and argument of Appellant and would still require a reversal of the opinion in Pase v. Valentine, 552 So.2d 212 (Fla. 4th DCA 1989), ~~pet. for~~ review sranted, ___ So.2d (Fla. 1990).

As set forth in Appellant's Initial Brief, TOWN acknowledges that a state court has subject matter jurisdiction over federal civil rights actions brought in state courts. [1]/ TOWN has even acknowledged that upon the existence of specific facts and allegations which would bring a municipality into the definition

[1]/ The amici have propounded a different argument as to subject matter jurisdiction and it is not the intention of Appellant to interfere in anyway with their written or oral argument on this issue.

of "person", the municipality is not afforded the protections of its own state's common law sovereign immunity when sued in state or federal court for federal civil rights violations.

Howlett has not changed these jurisdictional requirements. Although Appellee has argued that Howlett has abrogated all common law immunity protections afforded a municipality the clear language of Howlett reinforces TOWN'S initial argument to the trial court, to the Fourth District Court of Appeals and to this Court.

The Supreme Court affirmed the decision of this Court in Hill v. Department of Corrections, State of Florida, 513 So.2d 129 (Fla. 1987), but, disagreed with the Second District Court of Appeals' decision in Howlett, 537 So.2d 706, which "extended" Hill. Howlett v. Rose, 4 FLW Fed. at S587.

What the Court in Howlett said was "Florida law, as interpreted by the District Court of Appeal, would make all such defendants [municipalities] absolutely immune from liability under the federal statute." Howlett v. Rose, 4 FLW Fed. at S587 . . . and . . . , Howlett prohibits a state from interfering with federal substantive law by applying unconditional and absolute immunity to municipalities which would otherwise be subject to suit in federal courts for violations of 42 U.S.C 01983.

The federal substantive law extending liability to municipalities must be applied in state courts. That law, in no means, grants either federal or state courts absolute jurisdiction to hear civil rights actions brought against a municipality. Even

the Fourth District Court of Appeals attempted in City of Riviera Beach v. Langevin, on rehearing, 522 So.2d at 866, to distinguished the circumstances when a local government is liable for damages claimed under a Section 1983 action brought in a state court, i.e, when a local government is a "person" within the meaning of Title 42 U.S.C §1983. In fact, City of Riviera Beach v. Lansevin attempts to define the circumstances required to qualify a local municipality as a "person" within the meaning of Section 1983 to avoid the prohibitions of the sovereign immunity.

The distinction of when a municipality is a "person" under Section 1983, was made clearer in Little v. City of North Miami, 807 F.2d 962 (11th Cir. 1986). In Little the court explained that Section 1983 created no substantive rights, but provided for a remedy if a party was deprived of his or hers constitutionally protected interests. In providing for this remedy, it was recognized that local governing bodies and local officials in their official capacities could be sued under Section 1983 when a party established that he or she suffered a constitutional deprivation as a result of either "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers'' or a "governmental 'custom' even though such a custom has not received formal approval through the body's official decision making channels." Monell v. Department of Social Services, 436 U.S. 658, 690, 91 S.Ct. 2018, 2036 (1978).

Which now takes this argument full circle to Howlett, 4 FLW Fed. at page S587, which states:

> Since this Court has construed the word "person" in $1983 to exclude States, neither a federal court nor a state court may entertain a $1983 action against such a defendant. Conversely, since the Court has held that municipal corporations and similar governmental entities are "persons", see Monell v. New York City Dept. of Social Services, 436 U.S. 658, 663 (1978); cf. Will, 491 U.S. at ____, n. 9; Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 280-281 (1977), a state court entertaining a $1983 action must adhere to that interpretation. "Municipal defenses - including an assertion of sovereign immunity - to federal right of action are, of course, controlled by federal law." [emphasis added]

That federal law is the requirement that the municipality be defined as a "person" ! It is the Monell court which has set certain guidelines which determine if the actions of a municipality come within the term "person" in order to create liability. Monell, 436 U.S. at 658. The Court delineated only two types of cases (1) when a party is injured due to the implementation of an official policy, or (2) when a party has been injured as a result of government "custom". Conversely, the Court stated that under no circumstances would a local government be held liable on a respondeat superior theory, i.e., a local government could not be sued under Section 1983 simply because an injury had been inflicted by its employee or agent. 436 U.S. at 691.

The Eleventh Circuit in Gilmere v. City of Atlanta, 737 F.2d 894 (11th Cir. 1984), has provided further clarification of the guidelines first enunciated in Monell. Gilmere arose out of an incident of alleged police brutality which Gilmere claimed was a

result of established "custom" of the City of Atlanta. Gilmere charged that the city maintained the customs of encouraging excessive force in police-citizen encounters and improperly selecting training police officers. 737 F.2d at 902. The Gilmere court, in its discussion of the case, refined the concept of custom as applied to actions of local governments. The court stated that "city custom which may serve as the basis for liability may only be created by city 'lawmakers or those whose edicts or acts may fairly be said to represent official policy.'" It was further noted that "[i]solated violations are not the persistent, often repeated, constant violations that constitute custom and policy." 737 F.2d 904.

Finally, and of equal importance, is the need to show that the official policy or custom of a local government comes from and is implemented by an individual who has the final authority or is the ultimate repository of municipal power. Schneider v. City of Atlanta, 628 F.2d 915 (5th Cir. 1980); accord, Williams v. City of Valdosta, 689 F.2d 964 (11th Cir. 1982); Hearn v. City of Gainesville, 688 F.2d 1328 (11th Cir. 1983).

The Fourth District Court of Appeals in the case at bar, failed to recognize that when a municipality is sued for violations of federal civil rights laws in a state court, it is entitled to rely upon its common law sovereign immunity unless the municipality is sued as a "person" as defined by Monell, 436 U.S. 658.

PAGE complains that there was a policy and custom in TOWN which condoned harassment and intimidation when employees and

citizens publicly opposed the views of VALENTINE (Chief of Police of **TOWN** and co-defendant in the trial court). Regardless of the "magic **words**" employed by **PAGE** in his Amended Complaint, there only exists one incident; to wit, **PAGES's** termination from his employment with the **TOWN** because of one publication. The amended complaint ignores the requirements that the **TOWN** can only be held accountable for federal civil rights violations if, in fact, it was sued as a "person" as defined by federal law. Under these instances, **TOWN** is not responsible for its employees under the doctrine of respondeat superior. . . as recognized by the Fourth District Court in the opinion on the rehearing in Riviera Beach, 522 So.2d at 866, and mandated by both Howlett and Monell but not followed in the case sub judice.

Since the Amended Complaint clearly indicates that **TOWN** has not been sued as a "person", **TOWN** has a right to rely upon its common law sovereign immunity and the trial court was correct in its granting **TOWN'S** Motion for Judgment on the Pleadings. Regardless of the underlying reasons for the trial court's Order on **TOWN'S** Motion for Judgment on the Pleadings, as analyzed by the Appellee in his Answer Brief, the result was correct and in line with the present state and federal case law.

CONCLUSION

The Appellant, TOWN OF LAKE CLARKE SHORES, for the reasons, argument and law cited herein and in its Initial Brief, respectfully requests that this Court reverse the opinion of the Fourth District Court of Appeals and direct said Court of Appeals to affirm the Judgment on the Pleadings entered by the trial court in favor of the Appellant, TOWN OF LAKE CLARKE SHORES. Further, Appellant suggests that the oral argument presently set is necessary to all the parties, the two amici who have filed briefs, and this Court because of the importance of the issues presented, albeit, the Appellee has requested this Court dispense with oral argument (page 9 of Appellee's Answer Brief).

Respectfully submitted,

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DATED: July 23, 1990.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE BRIEF (ON THE MERITS) OF APPELLANT was furnished this 23rd day of July, 1990, by U.S. Mail, postage prepaid, to: Isidro M. Garcia, Esq., % Joseph A. Vassallo, P.A., Attorney for Appellee, 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; Michael Davis, Esq., % Davis, Hoy & Diamond, P.A., Attorneys for Amicus Curia (City of Lake Worth), P.O. Box 3797, West Palm Beach, Florida 33407; Stuart M. Silverman, Esq., % Damsel & Gelston, P.A., Attorney for Amicus Curia (City of Belle Glade), 415 5th Street, P.O. Box 4507, West Palm Beach, Fl 33402-4507.

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