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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Defendant-Petitioner,

v.

FAMILY BANK OF HALLANDALE, etc.

Plaintiff-Respondent.

CASE NO. 79,449

ON PETITION FOR REVIEW OF A DECISION
OF THE FIRST DISTRICT COURT OF APPEAL

ANSWER BRIEF OF PLAINTIFF-RESPONDENT

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Statement of the Case

Almost all of the alleged facts set forth in the initial brief of petitioner State of Florida ("the state") are based on materials that were submitted to the circuit court only after the entry of summary judgment. The state never asserted in the circuit court that those materials could or should be considered on the issue of liability. Instead, the state submitted those materials only after the court had adjudged the state liable, and the state relied on those materials only on the issue of whether it was "equitable" to assess pre-trial interest against the state.

So that the facts presented both before and after the summary judgment hearing can be accurately understood, this answer brief includes its own statement of the case.

The Proceedings Below

Respondent Seminole National Bank (which, together with its successor in interest Family Bank of Hallandale, will be referred to in this brief as "the bank" or "the respondent bank") sued the state for failure to honor state warrant number 1413923 in the amount of $16,932. (R.3-6). The bank filed a motion for summary judgment and supporting memorandum (R.49-53) and submitted the affidavit of its president, Carol Owen, establishing the facts on which the bank relied. (R.45-48). The state submitted no affidavits or other evidence in response. Thus the only evidence before the circuit court at the summary judgment hearing was the affidavit of Mr. Owen, which was undisputed.

The circuit court entered summary judgment for the bank and reserved jurisdiction (as agreed by both parties) to consider whether to award pre-judgment interest and costs. (R.64-67). In order to bring this issue back before the court as agreed, the bank moved to amend the judgment to include interest and costs. (R.68-71). The state asserted in response that it would not be "equitable" to award interest against the state under the circumstances at issue (R.72), and the state submitted, for consideration on the interest issue only, the affidavit of Brant Hargrove, a litigation attorney employed by the state, together with various attachments to the affidavit. (R.83-107). The court entered an amended final judgment for the bank in the amount of the warrant plus pre-judgment interest and costs. (R.118-20).[1]

The state appealed. (R.121). The Florida First District Court of Appeal affirmed. 593 So.2d 581 (Fla. 1st DCA 1992).[2] The state petitioned for review based on alleged conflict. This court accepted jurisdiction over three dissents.

The Facts Applicable To The Liability Issue

As the state presumably will admit, the only facts that were properly before the trial court on the issue of liability were those established by the affidavit of Mr. Owen. (R.45-48). His

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[1] Copies of the court's original summary judgment and of the amended summary judgment awarding prejudgment interest are included in the appendix at the end of this brief.

[2] A copy of the First District opinion is included in the appendix at the end of this brief.

affidavit - which was uncontested then and remains uncontested - provides in full:

> 1. I am president of Family Bank of Hallandale ("Family Bank"), which is the successor in interest of Seminole National Bank ("Seminole") in all respects relevant to this lawsuit. I make this affidavit on personal knowledge.
>
> 2. On February 12, 1987, Teds Sheds endorsed to the order of Seminole that certain state warrant number 1413923 in the amount of $16,932.00 dated February 5, 1987. Seminole paid Teds Sheds the face amount of the warrant by crediting the account of Teds Sheds that amount. Seminole took the warrant in good faith and without notice that it was overdue or had been or would be dishonored or of any defense against or claim to the warrant on the part of any person. A true and correct of the warrant is attached to this affidavit.
>
> 3. The state subsequently returned the warrant to Seminole. Family Bank, as the successor in interest of Seminole, is the owner and holder of the warrant. The state has refused to pay Seminole (or Family Bank as its successor in interest) the amount due on the warrant solely on the grounds that the warrant allegedly is not a negotiable instrument so that Seminole (and Family Bank) allegedly could not be holders in due course. Seminole and Family Bank have been unable to recover the amount of the warrant from Teds Sheds. The full amount of the warrant, plus interest, is due and unpaid.
>
> Further affiant sayeth not.

(R.45-46) (emphasis added).[3]

These are the sole facts before this court on the issue of liability (issues one and three in petitioner's initial brief).

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[3] A copy of Mr. Owen's affidavit is included in the appendix at the end of this brief.

The Facts Added Only On The Interest Issue

After the liability issue was resolved, the state submitted Mr. Hargrove's affidavit and attached documents. (R.85-107). Mr. Hargrove was a litigation attorney for the state. (R.83). The affidavit and attached documents provide alleged facts applicable solely to the interest issue (issue two in petitoner's initial brief), as follows.

In two different bid solicitations, the Florida Department of Transportation ("DOT") sought bids for the construction of three "sheds" or "metal buildings" at certain service plazas. (R.92, 95). In each instance the low bid was submitted by "Teds Sheds," which listed its address as 5200 S. St. Rd. 7, Ft. Lauderdale, Florida. (Id.) "Teds Sheds" was not further identified as a corporation, partnership, or fictitious name. (Id.)

In fact, there were two related Florida corporations with names that were similar, but not identical, to "Teds Sheds." One was "Ted's Sheds, Inc.," whose address according to the corporate records of the Florida Secretary of State was 10311 Bonita Beach Road, Bonita Springs, Florida. (R.103, 106-07). The other was "Ted's Sheds of Broward, Inc.," whose address as listed in the Secretary of State records was 3410 South State Road 7, Ft. Lauderdale. (R.103-05). Harold T. Goodrich was the president and registered agent of both "Teds Shed's, Inc." and "Ted's Sheds of Broward, Inc." (R.103, 105, 107). The two corporations also had the same secretary. (Id.)

DOT issued purchase orders for the sheds to "Teds Sheds," showing its address as 5200 S. State Road 7, Ft. Lauderdale. (R.88, 91). DOT's purchase orders - which in effect constituted the parties' contracts - did not further identify "Teds Sheds." (Id.) Thereafter, presumably following receipt of the prescribed sheds by the state, "Ted's Sheds, Inc." submitted two invoices to DOT, one corresponding to each of the two bids. (R.87, 90). The invoices were dated August 8, 1986, and September 4, 1986, respectively, and showed the address of "Ted's Shed's, Inc." as Bonita Beach Road, Bonita Springs, Florida. (Id.)

DOT asserted that the sheds were defective. (R.84). Repairs were made, and DOT authorized payment of the invoices. (R.85). On February 5, 1987, five months after the second of the invoices was submitted, the state issued warrant number 1413923 for $16,932 in payment of both invoices. (R.48). The warrant was payable to the order of "Teds Sheds" and showed an address of 5200 S. State Road 7, Ft. Lauderdale. (Id.) The state apparently mailed the warrant to that address. (R.85).

On February 12, 1987, the warrant was indorsed "Ted's Sheds of Broward, Inc." and deposited at the respondent bank. (R.45, 48). The bank had no knowledge of any alleged dispute or irregularity in the transaction and no knowledge or reason to know that there was more than one "Teds Sheds." (R.45-46). As is uncontested, the bank took the warrant in good faith and without knowledge of any defenses. (Id.) The bank forwarded the warrant

through normal banking channels for payment by the state. (R.46, 48).

Someone purportedly acting for Ted's Sheds, Inc. then contacted DOT and asserted that the warrant had never been received. (R.85). The state issued a second warrant on February 19, 1987, just 14 days following mailing of the first warrant. (R.99). Simultaneously, the state "stopped payment" on the first warrant. (R.46, 85). The second warrant, like the first, was payable to the order of "Teds Sheds," this time with an address of Bonita Beach Road, Bonita Springs, Florida. (R.99).

It must be emphasized: the respondent bank paid full value for the warrant at issue seven days before the state stopped payment of the warrant and issued a second warrant. When the bank paid the first warrant, this appeared to be a normal commercial transaction in every respect; even by calling the state the respondent bank could not have learned otherwise.

Prior to issuing the second warrant, the state apparently made no effort to determine the whereabouts of the first warrant, what had happened to it, or whether it had been negotiated. (R.85). The state apparently did not obtain an indemnity bond (as expressly authorized by Florida law) or even a sworn statement from Mr. Goodrich or anyone else corroborating the assertion that the warrant had not been received. (R.85). Such a sworn statement is mandated by Florida law as a prerequisite to issuance of a duplicate warrant. See Florida Statutes § 17.13(1).

Harold T. Goodrich, the president and registered agent of both "Ted's Sheds of Broward, Inc." and "Ted's Sheds, Inc." (R.103-07), indorsed the second warrant in the name "Ted's Sheds, Inc." and deposited it at another bank. (R.100).

On March 10, 1987, the first warrant was returned unpaid through normal banking channels to the respondent bank on the grounds that payment had been stopped. (R.46, 48). The warrant was not returned for insufficient indorsement. (Id.) The state refused to pay the bank the amount of the warrant on the sole ground that state warrants allegedly are not negotiable instruments and that, solely for this reason, the bank was not a holder in due course. (R.46). No allegation was made that the warrant was improperly indorsed or that Ted's Sheds of Broward, Inc., had not been the proper payee of the warrant. (Id.; see also R.48).

The state apparently has made no effort to recover its funds from Ted's Sheds, Inc., or from Ted's Sheds of Broward, Inc., or from their common president, Mr. Goodrich. (R.85-86). The state apparently has instituted no prosecution of anyone.

Summary of Argument

Chapter 673, Florida Statutes (1985), which is article 3 of the Uniform Commercial Code, sets forth an explicit definition of the "negotiable instruments" to which the Code applies. See § 673.104(1), Florida Statutes (1985). As the state apparently admits, the state warrant at issue comes within this express statutory definition.

By the statute's plain terms, "Any writing" that meets the statutory definition is a negotiable instrument "within this chapter." Other provisions of the statute and the existing caselaw confirm that state warrants were indeed "negotiable instruments" within the meaning of the statute.

The state claims, however, that as a matter of policy state warrants should be exempted from the statute. This is wrong because (i) the legislature resolved the policy issue by enacting chapter 673; this court should follow the law rather than making some independent assessment of purported public policy, and (ii) the better policy, in any event, is to apply the clear, carefully crafted, commercially reasonably provisions of the UCC, on which banks have relied and should continue to be able to rely.

As the state admitted below (and apparently admits here), the bank took the warrant for value, in good faith, and without knowledge of any defenses. The bank was thus a "holder in due course," see § 673.302, Florida Statutes (1985), entitled to recover under § 673.305 notwithstanding the state's claim that it paid the underlying claim by means of the duplicate warrant.

The trial court also properly awarded prejudgment interest. Under Florida law, prejudgment interest is awarded so that a plaintiff is fully compensated for its loss, not as a matter of punishment. This principle is fully applicable to the state, at least where, as here, the state's underlying liability is contractual. See § 673.413, Florida Statutes (1985) (maker is contractually obligated to pay negotiable instrument according to

its tenor). Just as the state has waived immunity from such actions, the state has waived immunity from the award of interest necessary to afford full compensation.

This court should dismiss for lack of jurisdiction or, alternatively, affirm the district court's decision, which in turn affirmed the trial court's judgment.

Argument

I. THE WARRANT AT ISSUE WAS A "NEGOTIABLE INSTRUMENT" UNDER THE UNIFORM COMMERCIAL CODE AS IN EFFECT WHEN THE WARRANT WAS ISSUED; THE RESPONDENT BANK, AS A HOLDER IN DUE COURSE, THUS IS ENTITLED TO PAYMENT ON THE WARRANT

Article 3 of the Uniform Commercial Code (chapter 673, Florida Statutes) governs the rights and obligations of makers, payees, indorsers and holders of commercial paper. The UCC is perhaps the most successful and comprehensive codification of an entire area of law ever undertaken. Part of the reason is that (i) it is vital to have clear rules that banks and others can rely upon in this area, and (ii) courts have recognized this and have faithfully applied the written law.

It is uncontested that the state, as "maker," issued the warrant on which the respondent bank now seeks payment. Under § 673.413, Florida Statutes (1985), entitled "Contract of maker, drawer, and acceptor," a maker "engages that he will pay the instrument according to its tenor." Thus the state was contractually obligated to pay the warrant.

The state has contended, however, that it separately paid for the sheds at issue by means of the duplicate warrant, that the state therefore has a defense as against the original payee, and that the bank has no greater rights than the original payee. The UCC refutes this.[4]

Principally to facilitate the free flow of instruments in commerce and through the banking system, the UCC embraces the concept of the "holder in due course." As defined in § 673.302, Florida Statutes (1985), a "holder in due course" is a "holder" (defined in § 673.202, Florida Statutes (1985), as one who takes an instrument through "negotiation," which occurs when an instrument is delivered "with any necessary indorsement") of an "instrument" (defined in § 673.102(1)(e), Florida Statutes (1985), as a "negotiable instrument") who takes the instrument for value, in good faith, and without notice of any defenses. As is uncontested, § 673.305, Florida Statutes (1985), provides that a holder in due course takes an instrument free from any defenses of the type asserted by the state here.

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[4] The facts also refute this. When the respondent bank accepted the first warrant (giving full value therefor), the state had not stopped payment on that warrant or issued the second warrant. The state negligently issued the second warrant - accepting unsworn and unfounded allegations in a telephone call - seven days later. The state failed to obtain the sworn statement mandated by law as a prerequisite for issuance of a second warrant (or the indemnity bond authorized by law). In short, the first warrant was properly issued and should now be paid; the second warrant was improperly issued, and the loss from the state's improper issuance and honoring of that warrant should not fall on the respondent bank.

The only facts before the court on the summary judgment issue came from the affidavit of Carol Owen stating that "Teds Sheds" had indorsed and deposited the warrant. Until the state submitted, after the summary judgment was entered, an affidavit of DOT litigation counsel, there was no support for any assertion that there existed more than one "Ted's Sheds." Consistent with the bank's understanding, Mr. Owen's affidavit simply referred to "Teds Sheds" as a single entity that had received and deposited the warrant without controversy; nothing in the record gave any hint to the contrary. Based on these facts, the respondent bank was clearly a "holder in due course" of the warrant.

The same is true even under the additional facts proffered by the state solely on the interest issue. The state issued its warrant to "Teds Sheds" of State Road 7, Ft. Lauderdale. The only "Ted's Sheds" registered with the Secretary of State with a Ft. Lauderdale address was "Ted's Sheds of Broward, Inc.," also of State Road 7 (the street number was slightly different). The president of this corporation was the same person who, after the warrant was indorsed and deposited by the corporation, personally indorsed the replacement warrant issued by the state. Nothing in the record, even as submitted after the summary judgment was entered, indicates that the "Teds Sheds" with which the state contracted and the "Ted's Sheds" which received and deposited the

original warrant were not one and the same; they were, at the very least, under common control.[5]

In any event, the state can hardly assert now that the trial court erred in entering summary judgment based on facts never submitted until after the summary judgment was entered, and which the state never relied upon in the trial court on the issue of liability. As is settled, the state cannot properly raise on this appeal any claim that the belatedly-submitted materials precluded

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[5] Moreover, the state bases its position on hearsay information obtained by Mr. Hargrove, a DOT litigation attorney, apparently from Mr. Goodrich, the clear malefactor in this entire episode. Mr. Goodrich provided the information while defrauding the state into issuing a second warrant in payment for the same work. There is no basis for relying on such second-hand information from Mr. Goodrich. And even if, as the state now claims, Ted's Sheds of Broward, Inc. had no authority to indorse the warrant, the state contributed to the making of the unauthorized indorsement by (i) entering a contract with and issuing a warrant to an entity using the partial trade name "Teds Sheds" rather than its full corporate name, (ii) mailing the warrant to a South State Road 7 address in Ft. Lauderdale very similar to the address of Ted's Sheds of Broward, Inc., rather than to the Bonita Springs address shown on the invoice submitted by Ted's Sheds, Inc., (iii) making no effort to determine which entity actually performed the work and was entitled to payment and no effort to determine the actual identity and relationship of the two entities, and (iv) issuing a duplicate warrant without obtaining a sworn statement as statutorily required, see Florida Statutes § 17.13(1), and without attempting to locate the original warrant or preclude its improper negotiation. Having contributed to the making of the allegedly unauthorized indorsement, the state cannot now assert the invalidity of the indorsement against the appellee bank, a holder in due course. See § 673.406, Florida Statutes (1985) (person who by negligence contributes to the making of an unauthorized signature cannot assert the lack of authority as against a holder in due course). The official comments to § 673.406 confirm that the section applies to a maker that mails an instrument to the wrong person having the same name as the payee; the state, under its version of the facts, did this and botched its handling of the matter in additional ways as well. See Uniform Commercial Code Comment 7 to § 3-406, reprinted in 19B Fla. Stat. Ann. § 673.3-406, page 200 (West 1966).

summary judgment; this is an assertion never presented in the circuit court.

The state admitted in the circuit court, and presumably will admit here, that there was nothing the bank reasonably could or should have done to prevent or even discover the fraud by Mr. Goodrich or his companies of which the state now complains. In the court below, the state did not deny that the bank took the warrant for value, in good faith, and without knowledge of any defenses. Thus if the warrant is determined to be a "negotiable instrument," there should be no dispute that the bank is a "holder in due course" as defined in § 673.302, entitled to recover on the warrant under § 673.305. The state now apparently admits this.

The state contends, however, that a state warrant is not a "negotiable instrument" under chapter 673, Florida Statutes (1985), and that the respondent bank therefore did not become a holder in due course. The state is wrong.

Section § 673.104(1), Florida Statutes (1985), defines "negotiable instrument":

> Any writing to be a negotiable instrument within this chapter must:
>
> (a) Be signed by the maker or drawer; and
>
> (b) Contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this chapter; and
>
> (c) Be payable on demand or at a definite time; and
>
> (d) Be payable to order or to bearer.

The state warrant at issue here[6] easily meets these requirements. First, the warrant is signed by Gerald Lewis, Comptroller of Florida.[7] Second, the warrant contains an unconditional order to pay: "Pay Sixteen-Thousand-Nine-Hundred-Thirty-Two and 00/100 to the order of Ted's Sheds." Third, the warrant is payable immediately - that is, on demand. And fourth, the warrant is expressly payable "to order" of the named payee. As the statute plainly says, "Any writing" that meets these criteria is a negotiable instrument "within this chapter"; the warrant is a "writing," meets the criteria, and therefore is a negotiable instrument within chapter 673.

Indeed, the warrant meets the requirements of negotiability just as clearly as - and in the very same language as - any ordinary check. The assertion that a warrant is not a negotiable instrument within the meaning of the Uniform Commercial Code, as in effect at the time at issue, is directly contrary to the Code's plain language.

The state apparently admits (and in any event could not plausibly deny) that the state warrant meets this statutory definition of a negotiable instrument. The state contends,

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[6] The warrant is attached to the affidavit of Carol Owen, included in the appendix at the end of this brief. The warrant is in the original record at R.48.

[7] Mr. Lewis's signature is a facsimile, not an actual handwritten signature. This is, nonetheless, a valid signature. See § 673.401, Florida Statutes (1985) (signature may be made "by any word or mark used in lieu of a written signature"). This conforms with the accepted commercial practice under which many checks are signed by facsimile.

however, that state obligations were not subject to chapter 673, Florida Statues (1985). This is plainly wrong.

First, nothing in § 673.104 or elsewhere in chapter 673, Florida Statutes (1985), gives the slightest hint that the statute is inapplicable to instruments issued by the state. Instead, § 673.104, Florida Statutes (1985) is applicable to "Any writing" that meets its terms. Section 673.103(1), Florida Statutes (1985), spells out the only exceptions:

> 673.103 Limitations on scope of chapter.-
>
> (1) This chapter does not apply to money, documents of title or investment securities.

State warrants are not "money, documents of title or investment securities." By the statute's plain terms, therefore, warrants are not exempt from chapter 673, Florida Statutes (1985).

Second, another provision of chapter 673, Florida Statutes (1985), makes clear that the statute <u>does</u> apply to instruments issued by the government. Section 673.105(1)(g), Florida Statutes (1985), says that an instrument "issued by a government or governmental agency or unit" is not rendered non-negotiable merely because it is payable out of a particular fund. This expressly repudiates the pre-Code view that government obligations payable only from a particular fund were thereby rendered non-negotiable; here, as on many issues, the Code's drafters strongly favored negotiability. The language of § 673.105(1)(g) would be totally superfluous if, as the state contends here, § 673.104(1) did not apply to government instruments

at all. But § 673.104 does apply to government instruments, and the Code thus includes in § 673.105 a provision clarifying the meaning of § 673.104 as applied to government instruments.[8]

Third, this court has expressly held that government warrants meeting the statutory definition of negotiable instruments are indeed negotiable instruments. See Wright v. Board of Public Instruction, 77 So.2d 435, 437-38 (Fla. 1955) (time warrants issued by county school board held to be negotiable instruments under predecessor to UCC, and holder in due course thus takes free of defenses of which it was unaware). The state admits that Wright so holds.[9] Other state courts also have held that state warrants are negotiable instruments under the UCC.[10]

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[8] Money is also a government obligation or instrument. Money, however, is expressly excluded from chapter 673. See § 673.103, Florida Statutes (1985), quoted earlier. Thus when the drafters wanted to exclude government instruments of a particular type from chapter 673, they knew how to do it. See also § 673.104(4), Florida Statutes (1991), discussed infra, which added an exclusion for state warrants that could have been, but was not, included in the UCC as originally adopted.

[9] Although admitting that Wright held that government time warrants are "negotiable instruments," the state contends that time warrants are distinguishable for purposes of negotiability from warrants payable on demand. The statute decisively refutes this attempted distinction. Section § 673.104(1)(c), Florida Statutes (1985), defines a negotiable instrument as one that is "payable on demand or at a definite time"; there is no way to construe that language as applicable to instruments payable at a definite time but not to those payable on demand. Nor is there any conceivable policy basis for the state's attempted distinction.

[10] See, e.g., Sanitary and Improvement District v. Continental Western Corp., 215 Neb. 843, 343 N.W.2d 314, 321 (1983) (warrants meeting express terms of UCC § 3-104 are negotiable instruments; holders in due course take free of defenses under § 3-205); St. James Bank and Trust Co. v. Board of Commissioners, 354 So.2d 233, 234 (Ct. App. La. 1978) (warrants meeting express terms of UCC § 3-

(continued...)

In sum, both the statute itself and the applicable caselaw made clear that government warrants were "negotiable instruments." In asserting the contrary, the state relies on Attorney General Opinion 073-101 (i.e., the state's own lawyer's opinion), which (i) overlooked Wright entirely, (ii) overlooked Florida Statutes § 673.103 entirely, and (iii) misinterpreted the law, as both the circuit and district courts now have concluded.[11]

The attorney general's opinion candidly acknowledged that there was no statutory support for its position but alleged that non-negotiability was nonetheless good "public policy." This is wrong because (i) the best policy concerning commercial instruments is to follow the clear rules so carefully crafted in the UCC, thus promoting the free flow of commercial instruments, precisely as the UCC's drafter's intended; (ii) the state, like every other issuer of commercial paper, can protect itself adequately prior to issuing warrants and other negotiable instruments, while banks and others accepting instruments in good faith ought not have to act at their

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[10](...continued)
104 are negotiable instruments, rejecting pre-UCC holdings to contrary; holder in due course entitled to recover notwithstanding placement of "stop payment" on warrant).

[11] The attorney general opinion also cited Town of Bithlo v. Bank of Commerce, 110 So. 837 (Fla. 1926), as does the state here. Bithlo involved the entirely different situation of a warrant illegally issued totally without authority. The issue was not whether a warrant was a negotiable instrument, but whether anyone could enforce an illegally-obtained instrument that was never properly issued. The UCC continues the pre-Code law, accepted in Bithlo, that such an instrument cannot be enforced. See Florida Statutes § 673.305(2)(b). In the case at bar the warrant was authorized, issued, and regular on its face; Bithlo is simply irrelevant.

peril; and (iii) the state, as much or more than other issuers of commercial paper, can protect itself from losses such as that at issue here by requiring affidavits and indemnity bonds prior to issuing duplicate warrants.[12]

In any event, the public policy choices were made in the UCC, which embraced the concept of the "holder in due course" and made no exception for state warrants. This court should apply the statute as written. State warrants meeting the express statutory definition of "negotiable instruments" were indeed negotiable instruments.

II. THE 1991 AMENDMENT OF THE UCC DOES NOT AFFECT THE STATE'S LIABILITY FOR THIS 1987 TRANSACTION

The state issued and the respondent bank paid full value for the warrant at issue in February 1987. The state nonetheless asserts that the legislature's 1991 amendment of the Uniform Commercial Code defeats the bank's right to recover. The law is

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[12] The only public policy the state has tried to articulate in support of its position is that it ought not be held liable on unauthorized or stolen warrants. The state's contention shows a total misunderstanding of the applicable UCC provisions. Under the UCC, the state is not liable in such circumstances; this is so for reasons unrelated to whether warrants are "negotiable instruments." See § 673.305(2)(b), Florida Statutes (1985) (even a holder in due course is subject to the defense that an instrument was issued illegally or that the obligation of the issuer is a nullity); § 673.202(1), Florida Statutes (1985) (person can be holder - and thus holder in due course - only if he or she acquires instrument by negotiation, defined as transfer with any necessary indorsement; a thief cannot make necessary indorsement, and thus one who takes through thief cannot become holder in due course). The state thus already has all the protection it needs; the well crafted UCC already deals appropriately with the circumstances feared by the state. There simply is no rational policy basis for exempting the state from the clear, uniform, workable rules set forth in the UCC.

settled, however, that the legislature cannot retroactively impair the validity or meaning of a contract or take away vested rights arising from a consummated transaction. See, e.g., Smith v. Department of Insurance, 507 So.2d 1080, 1094-95 (Fla. 1987) (legislative enactment cannot impair rights under existing contract); Thayer v. State, 335 So.2d 815, 817 (Fla. 1976) (act should not be applied retrospectively if this would "interfere with an existing contract [or] destroy a vested right") (quoting Fla. Jur. 2d, Statutes § 151); State v. City of Coral Gables, 72 So.2d 48, 49 (Fla. 1954) ("the law in force at the time the contract is made forms part of the contract"); Carter v. Government Employees Ins. Co., 377 So.2d 242, 243 (Fla. 1st DCA 1979) (statute cannot affect meaning of contract entered prior to adoption of statute, even if legislation states on its face that it is intended to clarify intent of prior law), cert. denied, 389 So.2d 1108 (Fla. 1980); see also Russello v. United States, 464 U.S. 16, 26, 104 S.Ct. 296, 302, 78 L.Ed.2d 17 (1983) ("it is well settled that the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one") (quoting and collecting earlier authorities). The 1991 legislation simply does not affect this case.[13]

What happened here is clear. The trial court ruled - correctly - that the UCC applied to state warrants, in accordance

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[13] Any suggestion that the 1991 legislature's passage of the appellant's proposed UCC change reflects the intent of the 1965 legislature, which adopted verbatim the UCC's drafters' strong preference for negotiability and made no exception for government warrants, would be absurd.

with its plain terms. The court held the state liable on its contract as maker of the warrant at issue.[14] The state, dissatisfied with this result but unable to assert any reasonable legal argument to the contrary, went quietly to the legislature, giving no notice to the bank. The state cited the incorrect attorney general opinion[15] and the inapplicable 1926 Town of Bithlo decision,[16] omitting any reference to the more recent and controlling Wright decision[17] or to the decisions in other states reaching the same result.[18] More significantly, the appellant also

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[14] The trial court found, without objection from the state, that the state's obligation on a warrant is contractual. There can be no reasonable dispute about the contractual nature of the obligation undertaken by the maker of a commercial instrument. See, e.g., J. White & R. Summers, Handbook of the Law under the Uniform Commercial Code § 13-6 at 498 (maker's liability on instrument is contractual). The state now asserts that there was no contract because the parties allegedly had different understandings concerning whether a warrant was a negotiable instrument. This is a bizarre contention; does the state really contend that no contract exists whenever the parties later dispute the legal standards applicable to their agreement? In any event, what matters is that by issuing the warrant the state undertook to pay it, and that the bank took the warrant on the understanding that the state would honor its commitment. It would indeed come as a shock to the commercial establishment - not to mention the bond markets - that the state asserts it has no contractual obligation to pay its duly-issued instruments.

[15] For a discussion of the attorney general opinion, see page 17 supra.

[16] Town of Bithlo v. Bank of Commerce, 110 So. 837 (Fla. 1926). For a discussion of this decision, see page 17 n. 11 supra.

[17] See Wright v. Board of Public Instruction, 77 So.2d 435, 437-38 (Fla. 1955) (government warrants held to be negotiable instruments), discussed at page 16 supra.

[18] See page 16 n. 10 supra.

failed to tell the legislature about the trial court's decision in this case.[19]

A party cannot avoid its contractual liability by persuading the legislature to change the law. The amendment to the UCC may deprive this case of precedential value, but it certainly does not deprive the respondent bank of its contractual right to recover on the warrant it took in good faith for full value in 1987.[20]

The state issued this warrant in 1987. Under the law in effect at that time, the state undertook to pay the warrant, and the respondent bank, by giving full value for the warrant in good faith, became entitled to enforce the state's undertaking. That the state changed the law in 1991 does not defeat the bank's entitlement to payment under the judgment it already had obtained.

III. PREJUDGMENT INTEREST, NECESSARY IN ORDER TO AFFORD FULL COMPENSATION, WAS PROPERLY AWARDED AGAINST THE STATE

The leading case in Florida on a party's obligation to pay prejudgment interest is Argonaut Insurance Co. v. May Plumbing

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[19] The information available to the legislature is set forth in the Senate Staff Analysis and Economic Impact Statement for CS/SB 658 dated April 10, 1991. Appellant presumably will admit that it was the source of this (mis)information.

[20] Because of the clear law rendering the state liable on its contract as maker of the warrant, the bank did not also seek recovery for the state's negligence. In truth, the state botched its handling of this warrant at every turn. See pages 25-26 infra. It would indeed be unjust to hold that the bank's contract rights have been terminated after-the-fact and simultaneously to preclude recovery for negligence solely because the bank, in reliance on its vested contract rights, did not initially present a negligence count.

Co., 474 So.2d 212 (Fla. 1985). As this court explained there, the obligation to pay interest arises not from any notion of punishment or wrongdoing, but simply from the fact that the defendant has been held obligated to compensate the plaintiff. Prejudgment interest is a component of full compensation; the debt is being paid later rather than earlier, and the award of interest recognizes the time value of money. Thus prejudgment interest must be awarded even if the defendant acted in good faith and even if the amount payable is not liquidated until the court resolves the parties' dispute. The court said:

> [N]either the merit of the defense nor the certainty of the amount of loss affects the award of prejudgment interest. Rather, the loss itself is a wrongful deprivation by the defendant of the plaintiff's property. Plaintiff is to be made whole from the date of the loss once a finder of fact has determined the amount of damages and defendant's liability therefor.

474 So.2d at 215; see also Kissimmee Utility Authority v. Better Plastics, Inc., 526 So.2d 46 (Fla. 1988) ("once damages are liquidated, prejudgment interest is considered an element of those damages as a matter of law, and the plaintiff is to be made whole from the date of the loss"); Florida Steel Corp. v. Adaptable Developments, Inc., 503 So.2d 1232, 1236-37 (Fla. 1986).

This line of cases has brought fairness and commercial realism to this area of the law. Perhaps more importantly, these cases also have brought clear, workable rules and consistent results in an area that once was a source of confusion and

unnecessary ancillary litigation. The court ought not recede from this approach.

The state admitted below and presumably will admit here that under these cases a private party held liable on an instrument - as the state was held liable here - would be required to pay prejudgment interest to the plaintiff in precisely the amount awarded by the trial court. The state claims, however, that it is immune or somehow exempt from the payment of interest under the circumstances of this case. This is wrong.

To be sure, the state enjoys sovereign immunity from some claims. It is settled, however, that the state has no immunity from actions for breach of contract. See, e.g., Pan-Am Tobacco Corp. v. Department of Corrections, 471 So.2d 4 (Fla. 1984). The case at bar is an action on the state's contract as maker of the instrument at issue. See Florida Statutes § 673.413(1) ("Contract of maker" is to pay instrument according to its tenor); J. White & R. Summers, Handbook of the Law under the Uniform Commercial Code § 13-6 at 498 (2d ed. 1980) (maker's liability on instrument is contractual). The state no longer asserts, and under Pan-Am could not plausibly assert, that sovereign immunity bars this action.

Just as immunity does not bar the underlying claim, so also immunity does not bar the claim for interest. This court's decisions squarely so hold. See Broward County v. Finlayson, 555 So.2d 1211 (Fla. 1990) (prejudgment interest awarded against county on statutory overtime claim from date plaintiffs first asserted overtime was payable); Treadway v. Terrell, 117 Fla. 838, 158 So.

512 (1935) (prejudgment interest awarded against state on claim for breach of road building contract); Florida Livestock Board v. Gladden, 86 So.2d 812 (Fla. 1956) (interest awarded against state on claim for destruction of cattle, citing Treadway); see also Department of Health and Rehabilitative Services v. Boyd, 525 So.2d 432, 433 (Fla. 1st DCA) (interest awarded against state in action for breach of employment contract; interest "is a relief flowing naturally from a finding of liability and is necessary for complete compensation in such actions"), rev. dismissed, 525 So.2d 877 (Fla. 1988); Dade County v. American Re-Insurance Co., 467 So.2d 414, 418 (Fla. 3d DCA 1985) (affirming award of interest against county in contract action; "The principle is established in Florida that where the state (or any of its subdivisions) can sue or be sued, the state (or subdivision) is impliedly liable for any interest on a claim against it"); Metropolitan Dade County v. Bouterse, Perez & Fabregas Architects Planners, Inc., 463 So.2d 526, 527 (Fla. 3d DCA 1985) (county is liable in contract action for interest from date when payment was due); Brooks v. School Board, 419 So.2d 659, 661-62 (Fla. 5th DCA 1982) (prejudgment interest awarded against school board on claim "in the nature of a contact action").

The state asserts, however, that an award of prejudgment interest against the state, unlike such an award against a private party, depends upon "equitable" considerations. The cases cited by

the state do not support this,[21] and in any event the "equities" here clearly favor the bank, not the state.

The state admitted below that the bank was innocent of any negligence or wrongdoing; as the state admitted, there was no commercially reasonable step the bank could have taken to prevent the fraud that caused this loss. The state asserted, however, that the case was between two "equally innocent" parties. The trial court correctly rejected this assertion.

Far from innocent, the state botched its handling of this matter at every turn. The state issued a purchase order - the parties' contract - to "Teds Sheds," an abbreviated trade name, without further identifying the entity. Following some dispute concerning whether the sheds were defective, the state issued a warrant to "Teds Sheds," the same abbreviated trade name, and the state mailed the warrant to South State Road 7 in Ft. Lauderdale, not to the Bonita Springs address the state now says was proper. Remarkably, the state then issued a second warrant just 14 days later without even attempting to learn the whereabouts of the first warrant, without requiring an indemnity bond, and without even requiring any statement under oath that the original warrant had

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[21] The state relies principally on a case not involving a breach of contract. There the court required the state to pay salary even though the recipient performed no work and the state itself committed no wrong; the recipient was deprived of an elected position by county officials and was held entitled to receive salary from the state (without interest) for the work she did not perform. See Flack v. Graham, 461 So.2d 82 (Fla. 1984). Flack casts no doubt on the many other cases cited in the text above. The broad reading of Flack now espoused by the state was rejected in Broward County v. Finlayson, 555 So.2d 1211 (Fla. 1990).

been lost. In issuing this second warrant without a statement under oath, the state violated the clear mandate of Florida law:

> The Comptroller is required to duplicate any Comptroller's warrants that may have been lost or destroyed, or may hereafter be lost or destroyed, upon the owner thereof or his agent or attorney presenting the Comptroller the statement, under oath, reciting the number, date, and amount of any warrant or the best and most definite description in his knowledge and the circumstances of its loss; if the Comptroller deems it necessary, the owner or his agent or attorney shall file in the office of the Comptroller a surety bond . . . .

(Emphasis added). Had the state taken even minimally prudent steps prior to issuing the second warrant, no loss ever would have occurred.

Thus even if the "equities" had something to do with the interest issue - which they do not - the bank still would be entitled to recover interest here. As this court has held, prejudgment interest is essential to full compensation. This is no less true when the party that is liable is the state. The respondent bank deserves nothing less than the full compensation that would, beyond doubt, be available against any other party that issued and then wrongfully dishonored a commercial instrument.[22]

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[22] The state also asserts that the "equities" preclude an award of prejudgment interest because the appellee bank's prior counsel purportedly did not prosecute the case rapidly enough. In fact, the state took repeated extensions prior to responding to the complaint and finally responded only after the bank moved for entry of default. (See R.7-8, R.12-13, R.22-23). The extensions taken by the state were based partly on illness of counsel (no reason was suggested why other counsel for the state could not have responded) and partly on the unavailability of clerical support. (R.12 ¶ 3). Aside from these delays caused unilaterally by the state, any other delay was the joint responsibility of both sides; the state, no (continued...)

Conclusion

The trial court properly entered summary judgment in favor of the respondent bank and properly awarded prejudgment interest. The district court properly affirmed. This court should dismiss this case for lack of jurisdiction or, alternatively, affirm the judgment of the district court.

Respectfully submitted,

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Attorneys for respondent
Family Bank of Hallandale

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[22](...continued)
less than the bank, could have presented the issues for resolution by summary judgment or filed a notice for trial. The state, however, never sought to expedite the matter. And in any event, the availability of prejudgment interest in this state is a matter of compensation for the loss of use of money, not a matter of punishment; no Florida court has ever suggested that a court should consider on the issue of prejudgment interest the relative haste with which the opposing lawyers pursued the action through the court system.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished by mail this 21st day of September, 1992, to Ms. Kimberly J. Tucker, Assistant Attorney General, The Capitol, LL04, Tallahassee, Florida 32399.

Robert L Hinkley

INDEX TO APPENDIX

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

FAMILY BANK OF HALLANDALE as successor-in-interest to SEMINOLE NATIONAL BANK,

Plaintiff,

v. CASE NO. 88-3654

STATE OF FLORIDA and TEDS SHEDS OF BROWARD, INC.,

Defendants.
_____/

FINAL SUMMARY JUDGMENT

This matter came on for hearing on December 4, 1990, on the motion for summary judgment of plaintiff Family Bank of Hallandale, which is the successor in interest of, and has therefore been substituted for, Seminole National Bank, the original plaintiff. The bank seeks recovery from the State of Florida on a state warrant that was issued to Teds Sheds and deposited at the bank. The state has refused to honor the warrant. The bank asserts it is a holder in due course entitled to payment on the warrant under the Uniform Commercial Code without regard to any defense the state may have as against Teds Sheds. The state asserts (i) that state warrants are not negotiable instruments and that there thus can be no holder in due course, (ii) that the state has sovereign immunity, and (iii)

that the warrant was not properly endorsed. This order constitutes the court's findings of fact and conclusions of law supporting the entry of summary judgment in favor of the bank.

The first issue is whether the state warrant is a negotiable instrument. Florida Statutes § 673.104(1) defines "negotiable instrument" as follows:

> (1) Any writing to be a negotiable instrument within this chapter must:
>
> (a) Be signed by the maker or drawer; and
>
> (b) Contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this chapter; and
>
> (c) Be payable on demand or at a definite time; and
>
> (d) Be payable to order or to bearer.

The warrant at issue (a) was signed by Gerald Lewis, comptroller of Florida, on behalf of the state, (b) contained an unconditional order to pay the face amount thereof and no other promise, order, obligation or power, (c) was payable on demand, and (d) was payable to the order of the designated payee, Teds Sheds. The statutory criteria thus were satisfied.

The state contends, however, that the statutory criteria are inapplicable. This is incorrect. First, nothing in chapter 673 exempts state warrants from its provisions. Instead, § 673.103 lists items to which chapter 673 does not apply without mentioning state warrants. Second, § 673.105(1)(g) addresses the

circumstances under which a promise or order in a government instrument is deemed "unconditional" within the definition of negotiability; this section thus makes clear that government warrants are indeed governed by chapter 673. The warrant meets the statutory definition and thus is a negotiable instrument.

It is unconstested that the bank obtained the state warrant at issue in good faith, for value, and without knowledge of any defense the state may have had. The bank is thus a holder in due course within the definition in Florida Statutes § 673.302, and takes the instrument free of defenses (with exceptions not applicable here) as provided in § 673.305.

The state next claims it has sovereign immunity and that the bank did not comply with the notice provisions of Florida Statutes § 768.28. Those provisions, however, apply to actions in tort. An action on a warrant is an action in contract. See, e.g., Florida Statutes § 673.413. The state has no sovereign immunity from an action on a contract. See, e.g., Pan-Am Tobacco Corp. v. Department of Corrections, 471 So.2d 4, 5 (Fla. 1984).

Finally, the state asserts the warrant was improperly negotiated because the warrant is payable to "Teds Sheds" but the endorsement reads "Teds Sheds of Broward, Inc." This is a valid endorsement under Florida Statutes § 673.401(2), which provides that a signature "is made by use of any name, including any trade or assumed name, upon an instrument, or by any word or mark used

in lieu of a written signature." See also Florida Statutes § 673.203 ("Where an instrument is made payable to a person under a misspelled name or one other than his own he may indorse in that name or his own or both"). Nothing in the record (or for that matter in the explanation asserted by the state in argument, which could not properly be considered in any event) provides any basis for holding this endorsement insufficient.

Accordingly, the bank is entitled to summary judgment. It is therefore

ORDERED AND ADJUDGED that plaintiff Family Bank of Hallandale, as successor in interest of Seminole National Bank, recover from defendant the State of Florida the sum of $16,932.00, as principal. By agreement of the parties, the court reserves jurisdiction to consider whether plaintiff is entitled to recover pre-judgment interest and costs and, if so, to determine their amount.

Ordered at Tallahassee, Florida, this 21st day of December, 1990.

P. Kevin Davey
Circuit Judge

Copies to:
Mr. Robert L. Hinkle
Ms. Kimberly J. Tucker

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

FAMILY BANK OF HALLANDALE as successor-in-interest to SEMINOLE NATIONAL BANK,

Plaintiff,

v. CASE NO. 88-3654

STATE OF FLORIDA and TEDS SHEDS OF BROWARD, INC.,

Defendants.
_____/

AMENDED FINAL JUDGMENT

This matter came on for hearing on Monday, January 14, 1991, on plaintiff's motion to amend the final judgment to include pre-judgment interest and costs. The court had specifically reserved jurisdiction in the original final summary judgment, pursuant to the agreement of the parties, to consider whether pre-judgment interest and costs should be awarded.

Plaintiff contends that a private defendant in an action on an instrument would clearly be liable for pre-judgment interest under Argonaut Insurance Co. v. May Plumbing Co., 474 So.2d 212 (Fla. 1985), and similar cases, which hold that the purpose of pre-judgment interest is to compensate the plaintiff for the time-value of money, not to punish the defendant. Plaintiff contends that pre-judgment interest should also be awarded against the state, consistent with Department of Health and Rehabilitative Services v. Boyd, 525 So.2d 432 (Fla. 1st DCA 1988), and Broward County v.

Finlayson, 555 So.2d 1211 (Fla. 1990). The state concedes that a private defendant would be liable for interest under these circumstances but contends that under Flack v. Graham, 461 So.2d 82 (Fla. 1984), the court should make an equitable determination of whether interest should be awarded against the state. The state contends that both the state and the plaintiff are innocent parties and that, when the state is an equally innocent party, it is not responsible for pre-judgment interest.

I find that pre-judgment interest should be included in the judgment in order to make the plaintiff whole. Without regard to any determination of fault, interest should be awarded in order to provide full compensation for plaintiff's loss.

In addition, I find that equitable principles would not prevent an award of interest against the state under the circumstances here in any event. It is uncontested that the state sent the original warrant to the address on the bid, an address different from that shown on the invoice, and then issued a second warrant without learning the whereabouts of the first warrant. The state thus apparently had the ability to prevent this loss from occurring but failed to do so. In addition, the state may have had, and may still have, the ability to recover the money from Ted's Sheds, which obtained a new warrant based on a stop payment order it placed after a company with the same officers admittedly received and negotiated the first warrant. It is not appropriate to characterize the state and plaintiff as equally innocent parties. Additionally, plaintiff's previous counsel's alleged failure to diligently prosecute this case does not defeat

plaintiff's entitlement to pre-judgment interest against the state during the period May, 1988, through August, 1990.

In order to provide full compensation, plaintiff's judgment will be amended to include pre-judgment interest from March 10, 1987 (the date on which the state caused the warrant to be dishonored and returned to plaintiff) through December 21, 1990 (the date of the original final summary judgment). This totals $7,687.59. Post-judgment interest will accrue after December 21, 1990. Plaintiff also will be awarded costs in the amount of $57.50, without objection. Accordingly, it is

ORDERED AND ADJUDGED that plaintiff Family Bank of Hallandale, as successor in interest of Seminole National Bank, recover from defendant the State of Florida the sum of $16,932.00 as principal, $7,687.59 as pre-judgment interest, and $57.50 as costs, for a total of $24,677.09. Further interest on the judgment will accrue after December 21, 1990.

Ordered at Tallahassee, Florida, this 17th day of January, 1991, nunc pro tunc December 21, 1990.

P. Kevin Davey
Circuit Judge

Copies to:

Mr. Robert L. Hinkle
Ms. Kimberly J. Tucker