IN THE SUPREME COURT
IN AND FOR THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. Case No. 79,449

FAMILY BANK OF HALLANDALE, etc.,

Respondent.

_____/

PETITIONER'S INITIAL BRIEF

On Petition for Review of a Decision
of the First District Court of Appeal

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STATEMENT OF THE CASE AND OF THE FACTS

This case involves a claim by a bank against the State of Florida for recovery of sums disbursed by the bank to a third party on a state warrant. The warrant was fraudulently cashed by the third party. Prior to disbursement of the funds a stop payment had been placed by the State of Florida on the warrant in question. The bank had no knowledge of that stop payment and asserts that it was a "holder in due course" entitled to reimbursement by the State of Florida on the theory that state warrants are negotiable instruments. The State of Florida maintained that state warrants were not negotiable instruments under the Uniform Commercial Code and, thus, the bank was not entitled to repayment of these funds by the people of the State of Florida.

Since initiation of this cause and as a result of the trial court's ruling in this case, the Legislature enacted Section 673.104(4), Florida Statutes. This provision clarifies that state warrants are not negotiable instruments under the Uniform Commercial Code and reaffirms the Legislature's commitment to the sound public policy reasons underlying pre-Code cases by this Court which held that general warrants are not negotiable instruments.

The State of Florida was the defendant below and is the Petitioner in this Court. Family Bank of Hallandale is the successor-in-interest to the plaintiff in the trial court and is the Respondent in this court. Petitioner appealed an order granting summary judgment to the Family Bank of Hallandale and

granting them prejudgment interest on the amount of that judgment. The Supreme Court accepted discretionary jurisdiction in this cause.

References to the trial court record below are designated by "R:" followed by the appropriate page. References to the Appendix of key documents filed with this brief are designated by "A:" followed by the appropriate document and page numbers.

Factual History

The Florida Department of Transportation had a contract with Ted's Sheds, Inc., to obtain buildings for use by that agency. (R: 73, 85; A: 14, p. 2; A: 14, Att.A, p. 2). The Department of Transportation accepted bids for several metal buildings to be used at the Ft. Drum, Canoe Creek, and Snapper Creek service plazas. (R: 73, 85; A: 14, p. 2; A: 14, Att.A, p. 2). "TEDS SHEDS" was awarded the contract on bid #MY2986D1. The address provided for "TEDS SHEDS" during the bidding process was 5200 S. St. Rd. 7, Ft. Lauderdale, 33313. (R: 73, 85; A: 14, p. 2; A: 14, Att.A, p. 2).

The Ft. Drum and Canoe Creek buildings were delivered by Ted's Sheds, Inc. on or about July 29, 1986. (R: 74, 85; A: 14, p. 3; A: 14, Att.A, p. 2). An invoice, dated 9/4/86 (#31556) was received for these buildings, on or about 9/9/86. (R: 74, 85; A: 14, p. 3; A: 14, Att.A, pp. 2, 5-6). The Snapper Creek building was delivered by Ted's Sheds, Inc. on or about July 24, 1986. (R: 74, 85; A: 14, p. 3; A: 14, Att.A, p. 2). An invoice, dated 8/8/86 (#31350) was received for this building, on or about

9/9/86. (R: 74, 85; A: 14, p. 3; A: 14, Att.A, p. 2, 8-9). The address listed on these invoices was:

Ted's Sheds, Inc.
Bonita Beach Road - P.O. Box 249
Bonita Springs, Florida 33923

(R: 74, 85; A: 14, p. 3; A: 14, Att.A, p. 2, 5, 9).

Subsequent to delivery of these buildings, Department of Transportation personnel brought to the attention of Brant Hargrove, counsel for the Department of Transportation, that the buildings delivered by Ted's Sheds, Inc. were defective and had been since the date of delivery. (R: 74, 85; A: 14, p. 3; A: 14, Att.A, p. 2).

Ted's Sheds, Inc. was required to correct the deficiencies in the buildings. (R: 74, 86; A: 14, p. 3; A: 14, Att.A, p. 3). After completion of these repairs, all three buildings were inspected and approved for payment to "TEDS SHEDS" on or about January 23, 1987. (R: 74, 86; A: 14, p. 3; A: 14, Att.A, p. 3). A warrant (#1413923) was issued, on February 5, 1987, in the amount of $16,932.00, made to the order of "TEDS SHEDS". (R: 74, 86; A: 14, p. 3; A: 14, Att.A, p. 3). The warrant was sent to 5200 S. State Rd. 7, Ft. Lauderdale, FL 33314, the address on the original bid. (R: 74, 86; A: 14, p. 3; A: 14, Att.A, p. 3).

Subsequent to February 5, 1987, agents of Ted's Sheds, Inc. contacted Mr. Hargrove and stated that they had not received the warrant. (R: 74, 86; A: 14, p. 3; A: 14, Att.A, p. 3). It was then disclosed that there were two "Ted's Sheds", one in Ft. Lauderdale known as "Ted's Sheds of Broward, Inc. and one in Bonita Springs, known as "Ted's Sheds, Inc." (R: 74-75, 86; A:

14, p. 3-4; A: 14, Att.A, p. 3).[1] Ted's Sheds, Inc. was the corporation which had been awarded bid #MY2086D1 and had performed all work related to purchase order #262494. (R: 75, 86; A: 14, p. 4; A: 14, Att.A, p. 3).

Agents of Ted's Sheds, Inc. requested that the warrant be sent to their Bonita Springs address, listed on the invoices. (R: 75, 86; A: 14, p. 4; A: 14, Att.A, p. 3). Accordingly, a duplicate warrant was requested and a stop payment order was placed by the Comptroller on the original warrant. (R: 75, 86; A: 14, p. 4; A: 14, Att.A, p. 3).

The duplicate warrant (#1526569) was issued, in the amount of $16,932.00, to "TEDS SHEDS" on February 19, 1987, and mailed to: TEDS SHEDS, BONITA BEACH RD., P.O. BOX 249, BONITA SPRINGS, FL 33923. (R: 75, 86-87; A: 14, p. 4; A: 14, Att.A, pp. 3-4, 17-18). Warrant #1526569 was cashed by "Ted's Sheds", by and through its authorized agent Harold T. Goodrich, on February 25, 1987. (R: 75, 87; A: 14, p. 4; A: 14, Att.A, pp. 4, 18).

Meanwhile, on February 12, 1987, the original warrant was presented to Seminole National Bank in Hollywood, Florida. The warrant was endorsed by "Ted's Sheds of Broward, Inc." Seminole National Bank credited its customer, "Teds Sheds of Broward, Inc." with the funds. (R: 3, 48, 77; A: A: 1, p. 1; 9, p. 6; 14, Att.A, p. 3). On March 10, 1987, the Federal Reserve Bank of

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[1] Ted's Sheds, Inc. and Ted's Sheds of Broward, Inc. were separate legal entities, although they shared common corporate officers, at all times relevant to this cause. ((R:77. 111-15). Teds Sheds, Inc. is still an active corportion in Bonita Springs, Florida. (R:77, 111, 114, 115). Ted's Sheds of Broward, Inc. was involuntarily dissolved in November, 1987. (R:77, 111, 112, 113). This suit was initiated in May, 1988, (R:3-6).

Miami returned the warrant to plaintiff indicating that payment was stopped by the State Treasurer. (R: 3, 49; A: 1, p. 1; 9, p. 1, 9 [warrant]).

Case History

Some fourteen months after the original warrant was returned to Seminole National Bank this action was initiated; Ted's Sheds of Broward, Inc. and the State of Florida were named as defendants. (R: 3-6; A: 1). In the intervening time, however, Ted's Sheds of Broward, Inc. was involuntarily dissolved. (R: 76, 111, 112, 113; A: 14, p. 5, Composite Ex.B, pp. 1-3). Counsel for Seminole National Bank, Goodman and Webber, P.A., filed the action in the Seventeenth Judicial Circuit, in and for Broward County, Florida, although venue against the state properly lay within the Second Judicial Circuit, in and for Leon County, Florida. Venue was transferred by order of the Honorable Estella May Moriarty, Circuit Judge in the Seventeenth Judicial Circuit, on September 26, 1988. (R: 1-2; A: 7, p. 1, Ex.A).

On October 4, 1988, Goodman & Webber counsel informed Tom Snellgrove, C.E.O. of Seminole National Bank, that the case had been transferred to the Second Judicial Circuit and that local Tallahassee counsel would have to be retained. (A: 7, p. 1, Ex.B).

On November 23, 1988, the State of Florida served its answer and defenses and a motion for judgment on the pleadings. (R: 33, 40; A: 4, 5). These motions were served on Goodman & Webber, counsel of record for Seminole National Bank. (R: 33, 40; A: 4,

5). Counsel for Petitioner was not informed at that time or any time thereafter that any other firm would represent the interests of Seminole National Bank in the Leon County action. (R: 79; A: 14, p. 7). Goodman & Webber took no further action to prosecute this case. (R: 79; A: 14, p. 7).

On January 11, 1990, the case was dismissed for failure to prosecute by order of the Honorable Charles D. McClure, Chief Judge of the Second Judicial Circuit, in and for Leon County, Florida. (A: 6). On January 30, 1990, Goodman & Webber filed a motion for rehearing on the order of dismissal for failure to prosecute on behalf of Seminole National Bank. (A: 7). No effort was made, however, to schedule a hearing on that motion. On August 15, 1990, Mark Freund of Aurell, Radey, Hinkle & Thomas, filed an amendment to plaintiff/respondent's motion for rehearing on behalf of Family Bank of Hallandale, the successor-in-interest to Seminole National Bank. (A: 8). The case was diligently prosecuted only after the appearance of present counsel for Family Bank of Hallandale. (R: 80; A: 14, p. 8).

On October 11, 1990, Family Bank of Hallandale filed a motion for summary judgment. (A: 9). On October 22, 1990, the trial court vacated the dismissal order and scheduled a hearing for December 4, 1990, on the Respondent's summary judgment motion. (A: 10). That motion was supported by an affidavit from Carol R. Owen, President of Family Bank of Hallandale and a copy of the front and back of warrant #1413923. Ms. Owen's affidavit asserted that "Teds Sheds endorsed [the warrant] to the order of Seminole . . ." (A: 9, p. 6).

On December 3, 1990, the State of Florida served its response in opposition to Family Bank of Hallandale's motion for summary judgment. The State contested Ms. Owen's assertion that "Ted's Sheds endorsed" the warrant, as the warrant, attached as an exhibit to Ms. Owen's affidavit, clearly demonstrated that "Ted's Sheds of Broward, Inc." endorsed it.

Who endorsed the warrant is relevant to an inquiry into whether Respondent is a holder in due course. However, the facts surrounding issuance of the warrant and the stop payment order have no bearing on resolution of the legal issues of negotiability or liability of the State. Regardless of the merit of a stop payment order, if warrants are negotiable instruments, the State is liable to a holder in due course. Conversely, if warrants are not negotiable instruments, the Respondent is not entitled to compensation from the State, regardless of the lack of merit of a stop payment order. Thus, the specific factual circumstances surrounding issuance of the warrant or the stop payment order were not presented by either party during consideration of the legal question of the negotiability of general state warrants by the circuit court in ruling on the motion for summary judgment.

On December 21, 1991, the trial court granted "final" summary judgment to Respondent. The trial court held that:

> 1. Because Chapter 673 does not expressly exempt state warrants from its provisions, state warrants are negotiable (A: 12, p. 2-3);
>
> 2. The bank is a holder in due course (A: 12, p. 3);

> 3. The State is not entitled to sovereign immunity from suit, nor do the provisions of Section 768.28 apply, because an action on a warrant is an action in contract (A: 12, p. 3); and
>
> 4. The endorsement "Ted's Sheds of Broward, Inc." is a valid endorsement under Section 673.401(2), Florida Statutes of an instrument made payable to the order of "TEDS SHEDS" (A: 12, p. 3-4).

In its order granting Respondent's motion for summary judgment, the trial court reserved jurisdiction to determine the equitable question of Respondent's entitlement to prejudgment interest from the State, under the circumstances of this case. (A: 12, p. 4). On January 3, 1991, Respondent moved for amendment of the judgment to include prejudgment interest. (A: 13)

The specific facts surrounding the "stop payment" order were relevant to resolution of this equitable question. Accordingly, Petitioner submitted affidavits and other documents concerning the specific facts underlying the issuance of the warrant and the stop payment order with Petitioner's Response in opposition to the motion for prejudgment interest. (A: 14).

A hearing was held on the motion to amend judgment on January 14, 1991. After argument, the trial court amended judgment to include prejudgment interest and costs. (A: 15). The trial court concluded that:

> . . . [P]re-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 compensation for plaintiff's loss.

> In addition, I find the equitable principles would not prevent an award of interest against the state under the circumstances here in any event. . . .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 . . . 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.

(A: 15, pp. 2-3).

The trial judge signed an amended final judgment order on January 17, 1991, awarding Respondent prejudgment interest. (A: 15). Final judgment was entered by the clerk of the circuit court for Family Bank of Hallandale on January 23, 1991. The State of Florida served a notice of appeal on January 18, 1991. That notice was filed in the Second Judicial Circuit on January 29, 1991. (A: 16).

The State of Florida's initial brief was filed on April 15, 1991. (A: 17) After obtaining an enlargement, Respondent's answer brief was filed on May 28, 1991. (A: 18).

Subsequent to the filing of Respondent's Answer brief, the Governor signed Chapter 92-82, Laws of Florida, into law. This bill amends Section 673.104 by adding subsection (4), which expressly states that "No warrant issued by the Comptroller of the State of Florida directing the Treasurer to pay a sum certain shall be considered a negotiable instrument within the meaning of [Chapter 673]." (A: 22, Attachment "A"). The Senate Staff

Analysis and Economic Impact Statement prepared for the Legislature states that this amendment "clarifies" the question of negotiability of state warrants and cites *Town of Bithlo v. Bank of Commerce*, 110 So. 837 (1926 Fla.) and AGO 073-101, April 2, 1973, *Annual Report of the General*, p. 162, as supporting this amendment. (A: 22, Att. "A").

The State of Florida referenced the amendment of Section 673.104(4) in its reply brief, as the best evidence of legislative intent on the continuing vitality of the public policy underlying the Law Merchant treatment of warrants as non-negotiable instruments. Respondent moved for leave to file a cross reply brief addressing the "retroactive" application of Section 673.104(4) to the warrant at issue in this cause. (A: 20 and 21). Appellee responded to the request to file a cross reply brief with rebuttal to Respondent's retroactivity argument. (A: 22).

Oral argument was heard by the First District Court of Appeal on October 2, 1991. On February 5, 1992, the district court entered an order affirming the circuit court decision in this case. (A:25); *State v. Family Bank of Hallandale*, 593 So.2d 581 (Fla. 1st DCA 1992). Specifically, the district court held in pertinent part that:

> 1. The Legislature turned away from a historic public policy of non-negotiability of warrants, announced through court decisions, and declared the policy of this state to be that government entities may issue negotiable paper that will move freely in commerce, when it enacted chapter 65-254, Laws of Florida (the UCC, Chapter 673, Florida Statutes). According to the First District Court of Appeal, enactment of the

UCC brought state warrants squarely into the class of commercial paper unless the warrants clearly indicated on their face that they were not negotiable. (A: 25, pp. 2-3), *State v. Family Bank of Hallandale*, 593 So.2d at 582; and

2. The trial court's ruling that a prevailing party against the state in an action on a state warrant is entitled to prejudgment interest is correct. (A: 25, p. 2), *State v. Family Bank of Hallandale*, 593 So.2d at 582.

On petition from the State of Florida this court accepted discretionary jurisdiction.

SUMMARY OF THE ARGUMENT

The District Court decision conflicts with prior decisions of this Court and the public policy of this state regarding the negotiability of state warrants. For reasons of public policy, state warrants have traditionally not been considered to be negotiable instruments, even though such warrants may comply with the form prescribed by the Uniform Commercial Code for negotiable instruments.

Prior to the trial court decision in this case, not one single example exists of a general state warrant being treated as a negotiable instrument in Florida. Traditionally, state and municipal warrants were not regarded as negotiable instruments under the law merchant for public policy reasons. The only Florida decisional law on the question of negotiability of warrants are this Court's decisions in *Town of Bithlo v. Bank of Commerce,* 110 So. 837, 838 (Fla. 1926); See also, *Marshall v. State ex rel. Sartain*, 88 Fla. 329, 102 So. 650 (Fla. 1924), in which a warrant was held to be a nonnegotiable order to pay. However, these decisions were entered prior to the adoption of the Uniform Commercial Code.

The only statement of the law on the negotiability of state warrants, after adoption of the Uniform Commercial Code, is an Attorney General's opinion, Op.Atty.Gen., 073-101 (April 2, 1973). That opinion recognized the continued vitality of the public policy underlying this Court's decision in *Town of Bithlo*.

The majority district court decision conflicts with this Court's decision in *Town of Bithlo* in holding that state warrants

are negotiable instruments and in rejecting the public policy underlying that decision. The district court's interpretation of the Uniform Commercial Code to require that state warrants clearly indicate on their face that they are nonnegotiable is unsupported by any authority. See Opinion of District Court, A: 25, p. 2, *State v. Family Bank of Hallandale*, 593 So.2d at 582. Further, the district court's conclusion that the legislature "turned away from a historic policy of non-negotiability" (A: 25, p. 2), *State v. Family Bank of Hallandale*, 593 So.2d at 582, when it enacted the Uniform Commercial Code, is unsupported by any authority.

The assessment of prejudgment interest against the State of Florida, under the circumstances in this case, is contrary to the decisions of this Court which require the consideration of equity in an award of prejudgment interest against the State.

Retrospective application of the district court decision on the negotiability of state warrants to the warrant at issue, coupled with the award of prejudgment interest against the people of Florida, conflicts with prior decisions of the district courts by penalizing the State for relying on Op.Atty.Gen. 073-101 for guidance, pending a contrary court decision.

ARGUMENT

I. The District Court decision conflicts with prior decisions of this Court and the public policy of this state regarding the negotiability of state warrants.

A "warrant" is characterized as a chose in action, payable when funds are available for that purpose. The courts have been careful to distinguish warrants from bonds, generally holding a warrant is a nonnegotiable order to pay while a bond is a negotiable promise to pay. *Town of Bithlo v. Bank of Commerce*, 110 So. 837, 838 (Fla. 1926); accord, 64 Am.Jur.2d *Public Securities and Obligations* §§20-21.

This interpretation of "warrants" was recognized by this Court in *Town of Bithlo v. Bank of Commerce,* 110 So. 837, 838 (Fla. 1926). In *Bithlo*, this Court held in favor of the Town of Bithlo on a claim initiated against it by a bank which was a holder in due course for value of a warrant issued to another party by the town, and later not honored due to illegality not apparent on the face of the warrant.

The *Bithlo* decision was entered prior to the adoption of the Uniform Commercial Code in Florida. *Bithlo* expressly concerned the negotiability of warrants under the law merchant, the predecessor of the Uniform Commercial Code.[2] Traditionally,

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[2] The *Bithlo* decision can be contrasted to the 1955 decision of this Court in *Wright v. Board of Public Instruction*, 77 So. 435, 437-38 (Fla. 1955), a case heavily relied upon by the Respondent. The *Wright* Court held that "time warrants" issued by a county school board were negotiable instruments. The Court cited the Uniform Commercial Code in its decision and held that a holder in due course takes time warrants free of defenses of which it was

(continued on next page).

warrants were not considered negotiable instruments under the law merchant for public policy reasons.

The Uniform Commercial Code expressly provides that the principles of law and equity, including the law merchant, shall supplement the provisions of the U.C.C., unless otherwise required by a particular provision of the Code. See e.g. §671.103, Florida Statutes. Since nothing in the Uniform Commercial Code, as adopted in Florida, expressly requires that state warrants be treated as negotiable instruments, Petitioner submitted to the trial court that the *Bithlo* decision and treatment of warrants under the law merchant remain controlling law.

The trial and district court erroneously interpreted the Uniform Commercial Code to require an express exemption of state warrants in order for such warrants to be treated as nonnegotiable. (A: 12, p. 2 ("[N]othing in chapter 673 exempts state warrants from its provisions"); 25, p. 2-3); *State v. Family Bank of Hallandale*, 593 So.2d at 582. The district court "question[ed] the motivation of the state" for asserting that

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unaware. *Wright* is distinguishable because of the unique differences between "time warrants" and other warrants.

Time warrants are not ordinary warrants used in the payment of claims duly audited and allowed against municipalities and other governmental subdivisions and the State. "Time warrants" are "certificates of indebtedness" and, thus, like bonds are negotiable instruments. See e.g. *Hubert v. City of Vero Beach*, 93 Fla. 323, 326, 112 So. 52 (Fla. 1927) ("Time warrants are 'certificate of indebtedness' within the meaning of the Bond Validating Act").

warrants are not negotiable on public policy grounds. (A: 25, pp. 3-4); *State v. Family Bank of Hallandale*, 593 So.2d at 582.

The district court curiously held that:

> The legislature turned away from a historic public policy of non-negotiability, announced through court decisions, and declared the policy of this state to be that government entities may issue negotiable paper that will move freely in commerce.

(A: 25, pp. 2-3); *State v. Family Bank of Hallandale*, 593 So.2d at 582. The district court offers no citation of authority for its conclusion that the legislature abandoned the public policy underlying the treatment of warrants as non-negotiable. Nor does the district court reconcile this statement with the enactment of §673.104(4) by the Florida Legislature subsequent to the trial court's decision in this case.

Despite the clearly expressed legislative intent that "the Legislature intends to clarify and confirm existing law", through enactment of §673.104(4), regarding the public policy of this state to treat warrants as non-negotiable, the district court rendered its opinion and retroactively applied it to a warrant issued in 1986. See Section 2 of Law 1991, c. 91-216; See also, §673.104(4), Fla. Stat.Ann. (Historical and Statutory Notes). (A: 22, Att.A).

While prospective application of the district court's erroneous decision has been precluded for warrants issued subsequent to the enactment of §673.104(4), the decision has precedential impact on other warrants issued by the State during the period between 1988 and May 29, 1991, on which stop payment orders were issued. Many of these warrants were stolen. The

statute of limitations for many such warrants has not run. The value of such warrants may represent several hundred thousand dollars. No appropriation exists to pay claims for such warrants, just as no appropriation exists to pay for the judgment in this case. For the foregoing reasons, the Court should reverse the trial court and district court opinions in this cause and reaffirm the continued vitality of the public policy reasons underlying this Court's decision in *Town of Bithlo*.

II. The assessment of prejudgment interest against the State of Florida, under the circumstances in this case, is contrary to the decisions of the Court, which require the consideration of equity.

The district court held that "a prevailing party against the state in an action on a state warrant is entitled to prejudgment interest." Opinion, p. 2; *State v. Family Bank of Hallandale*, 593 So.2d at 582. The district court cited *Broward County v. Finlayson*, 555 So.2d 1211 (Fla. 1990); *Argonaut Ins. Co. v. May Plumbing Co.*, 474 So.2d 212 (Fla. 1985); *Department of Health and Rehab. Services v. Boyd*, 525 So.2d 432 (Fla. 1st DCA 1988); *State v. Family Bank of Hallandale*, 593 So.2d at 582. However, none of these cases hold that prejudgment interest should be assessed against the state in all circumstances, regardless of equitable considerations, as suggested by the district court. Indeed, this Court has expressly held that equity must be considered in assessing prejudgment interest against the state, since ultimately it is the people who must pay the cost of such interest. The district court erred by failing to acknowledge that an equitable analysis is required in awarding prejudgment interest against the State.

A. Prejudgment Interest Awards Against the State: Generally

In *Kissimmee Utility Authority v. Better Plastics, Inc.*, 526 So.2d 46, 47 (Fla. 1988), this court held that "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." This general rule is not absolute, however. *Broward County v. Finlayson*, 555 So.2d 1211 (Fla. 1990).

Generally, the government is not liable for interest in the absence of an express statutory provision or stipulation by the government that interest will be paid. *Flack v. Graham*, 461 So.2d 82, 83 (Fla. 1984). Immunity from interest is an attribute of sovereignty, implied by law for the benefit of the state. *Flack v. Graham*, 461 So.2d at 83; *Treadway v. Terrell*, 117 Fla. 838, 158 So. 512 (1935).

The state's immunity from interest can be waived. *Flack v. Graham*, *supra*; *Treadway v. Terrell*, *supra*; *Florida Livestock Board v. Gladden*, 86 So.2d 812 (Fla. 1956); *Brooks v. School Board*, 419 So.2d 659 (Fla. 5th DCA 1982); and *Department of Health and Rehabilitative Services v. Boyd*, 525 So.2d 432 (Fla. 1st DCA 1988). However, a judicial determination regarding interest may depend on equitable considerations. *Broward County v. Finlayson*, 555 So.2d at 1213.

In *Flack v. Graham*, *supra*, the Florida Supreme Court refused to permit recovery of any prejudgment interest, stating that:

> "[I]nterest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to consideration of fairness. It is denied when its exaction would be inequitable."

Flack, 461 So.2d at 84 (quoting *Board of Commissioners of Jackson County v. United States*, 308 U.S. 343, 352, 60 S.Ct. 285, 289, 84 L.Ed. 313 (1939)). The Florida Supreme Court did not recede from this principle of fairness and equity governing in matters of prejudgment interest in *Argonaut Insurance* or *Kissimmee Utility Authority*. *See e.g. Broward County v. Finlayson*, 555 So.2d at 1213.

B. Inequitable to Assess Prejudgment Interest Against the State under the Facts of this Cause

Respondent suggests that "[t]he state's assertion now that it would be 'inequitable' to award prejudgment interest was not addressed by the First District (presumably because baseless on the facts) . . ." (Brief Opposing Jurisdiction by Family Bank of Hallandale, p. 2). However, by failing to address the equitable considerations in this case, the district court's decision conflicts with the decisions of this court on the issue of prejudgment interest.

First, contrary to Respondents assertion, the loss in this cause did not occur as the result of a breach of contract between the parties. Second, the equities in this case do not support an award of prejudgment interest from May 1987, when the case was filed, to the present.

1. There is No Contract Between These Parties

As a componment of its argument against alleged "retroactive" application of Section 673.104(4) to the warrant at issue in this cause, Respondent asserted in its district court,

cross-reply brief that to do so would impair the "1987 contract" between the parties and would deny it the right to recover under that alleged preexisting contract. (A: 21, pp. 1, 3). Likewise, in its brief opposing jurisdiction in this court, Respondent asserts that it is entitled to prejudgment interest, even under an equity theory, because the State allegedly chose "not to honor a contractual obligation." However, no contract has ever existed between the State and Family Bank of Hallandale. Further, no judicial determination was ever requested nor made that such a relationship existed.

Initially, the State asserted "sovereign immunity" as a defense in the circuit court and submitted that the bank was required to comply with the provisions of Section 768.28. The trial court held that:

> 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 [Contract of maker, drawer, and accepter]. 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).

(A: 12, p. 3).

First, nothing in this holding by the court expressly or implicitly suggests that there was a contract between the State of Florida and the Respondent created by the fraudulent presentation of a general state warrant by Ted's Sheds of Broward, Inc. to Seminole National Bank.

The State of Florida had a contractual relationship with Ted's Sheds, Inc. The State of Florida had no contractual relationship with Ted's Sheds of Broward, Inc. or Respondent.

(R: 77, 78, 86, 87; A: 14, pp. 6-7, Att.A, p. 4). The State honored its obligations under its contract with Ted's Sheds, Inc. and Ted's Sheds, Inc. was compensated in full for all work performed for the benefit of state taxpayers. (R: 77, 78, 86, 87; A: 14, pp. 6-7, Att.A, p. 4).

Ted's Sheds of Broward, Inc. fraudulently sought compensation for which it was not entitled by presenting the original warrant to Respondent for payment. (R: 48; A: 9, pp. 6, 9). Ted's Sheds of Broward, Inc. improperly endorsed the warrant made to the order of "TEDS SHEDS". (R: 48; A: 9, pp. 6, 9). Ted's Sheds of Broward, Inc. obtained payment for the warrant from the State, although it had performed no work for the State for which compensation was due. (R: 3, 42, 48, 78, 87; A: 1; 9, pp. 1, 6, 9; 14).

Second, although the Uniform Commercial Code characterizes transactions involving negotiable instruments as "contracts", see e.g. §673.413, the trial court is in error when it states that "An action on a warrant is an action in contract." (A: 12, p. 3). A warrant on the state treasurer authorizing the payment of money in pursuance of an appropriation is not a contract, but is only a license, and is revocable as long as it has not been paid. 81A C.J.S. *States* §242, p. 833.

Finally, assuming, arguendo, that a general state warrant is a negotiable instrument and, thus, contractual in nature; the circuit court never was asked, nor did it answer, the question of whether a contract in fact existed between the State and Respondent in this case. However, a review of the facts reveals that no contract exists.

a. No Meeting of the Minds

In order to form a binding contract, there must be a common or mutual intention of the parties. It is necessary that there be a "meeting of the minds" as to all of the terms of the contract. Without a meeting of the minds of the parties on all essential elements there can be no enforceable contract. In order to form a contract, the parties must have a definite and distinct understanding, common to both, and without doubt or difference. Mutual assent is an absolute condition precedent to formation of a contract. Absent mutual assent, neither the contract nor any of its provisions come into existence. *Gibson v. Courtois*, 539 So.2d 459, 460 (Fla. 1989).

The parties to this transaction had no meeting of the minds on the essential issue of negotiability of state warrants. The State of Florida has consistently relied on *Town of Bithlo, supra*; the 1973 opinion of the Attorney General; and the tradition under the law merchant on the negotiability of general state warrants. Respondent now relies on the *Wright, supra*, decision regarding time warrants as support for its theory that warrants are negotiable. Regardless of the legal correctness of the position of either party, it is clear that no contract existed between them in the absence of agreement on this essential element of the alleged contractual obligation.

The State had a legal right to rely on the legal interpretation provided by the Attorney General of the State of Florida on the question of negotiability of state warrants.

Prior to the date Respondent accepted the fraudulently tendered warrant from Ted's Sheds of Broward, Inc., Respondent was on notice of this opinion by the Attorney General that warrants were not negotiable and it was on notice that there were no cases in Florida treating general state warrants as negotiable instruments, either before or after adoption of the Uniform Commercial Code.

Thus, Respondent took the warrant with notice and knowledge that the State did not consider it a negotiable instrument. The fact that Respondent did not, and does not, agree with the 1973 Attorney General's opinion on negotiability, does not create a contractual obligation, nor does it create a right to have its interpretation of negotiability thrust upon the state. The state never assented to be bound by Respondent's view of the law of negotiability of state warrants. Indeed, the State never had notice or knowledge of the Respondent's disparate view of the law until this suit was filed fourteen months after Respondent cashed the fraudulently presented warrant.

Accordingly, no contract existed between these parties to be impaired by Section 673.104(4), retroactively or otherwise. Respondent is in error in asserting that a contractual relationship or obligation exists in this case.

b. A Contract Would be Against Public Policy

As a general rule, contracts which are contrary to public policy are void and unenforceable. *American Casualty Co. v. Coastal Caisson Drill Co.*, 542 So.2d 957, 958 (Fla. 1989); *Title & Trust Company of Florida v. Parker*, 468 So.2d 520, 523 (Fla. 1st DCA 1985). The contractual obligation asserted by Respondent to exist between the parties in this cause is clearly against the well established public policy of this state. Accordingly, no enforceable contract can exist.

Public policy formed the basis for the treatment of warrants as nonnegotiable under the law merchant. See, generally, Op.Atty.Gen. 073-101, April 2, 1973, citing, 2 Dillon on Municipal Corporations §856 (5th ed. 1911), at 1295. Public policy formed the basis of this Court's decision in *Town of Bithlo, supra*, that municipal warrants are not negotiable instruments. Public policy reasons underlie the 1991 Legislature's enactment of §673.104(4), clarifying that state warrants are not negotiable instruments. Public policy reasons dictate that no enforceable contract exists in the case at bar.

The trial court improperly rejected "public policy" as a basis for declaring state warrants to be nonnegotiable instruments. The Legislature, in response to that decision, amended Section 673.104 to clarify the question of negotiability of state warrants and codify the standard under the law merchant. See, §673.104(4), Florida Statutes.

Respondent seeks to avoid the application of §673.104(4) to the case at bar by asserting the existence of a contractual

obligation which allegedly would be impaired by judicial recognition of this subsequent clarification of legislative intent regarding the negotiability of state warrants under the Uniform Commercial Code. Similarly, Respondent seeks to obtain prejudgment interest, as a matter of right, from the taxpayers of Florida by asserting the existence of a contractual obligation which allegedly was not honored by the State. However, no contract exists between these parties, in fact or by prior judicial determination, and the record and law do not support a finding of the existence of such a contract now.

2. The Equities of this Case

The interest assessed against the State in this case includes interest for periods of delay caused by the Respondent. These delays were caused by filing the case in the wrong venue, opposing a transfer to the proper venue, failure to pay a filing fee in the transfer venue, failure to prosecute the case leading to dismissal for failure to prosecute, failure to schedule hearings on Respondent's own motions, and requests for enlargements of time. Indeed, Respondent has offered no explanation for the fourteen month delay in the initiation of this suit, during which time the corporate entity responsible for Respondent's loss, Ted's Sheds of Broward, Inc., was involuntarily dissolved.

Petitioner asserts that the assessment of prejudgment interest for such periods of delay is inequitable and contrary to this Court's decisions on the assessment of prejudgment interest against the people of the State of Florida.

The trial court found that the State was in the best position to prevent the loss from occurring, and may have had, and may still have, the ability to recover the money from Ted's Sheds. (A: 15, p. 2). However, the Petitioner respectfully submits that Respondent bank was in the best position to prevent its loss, by placing a hold on the account of Ted's Sheds of Broward, Inc. It is particularly odd that no effort to place a hold on that account was apparently made when the warrant was returned by the Federal Reserve Bank in Miami, Florida, on March 10, 1987. Instead, Respondent waited fourteen months to file this action before bringing its loss to the State's attention.

Respondent's delay in asserting its claim rendered the possibility of recovering this money from those responsible for the fraud unlikely. Further, how can it be reasoned that the State could prevent or control the delays in the prosecution of this cause created by Respondent's previous counsel's dilatory litigation practices.

Accordingly, the award of prejudgment interest under the circumstances of this case are inequitable and should be reversed.

III. Retrospective application of the district court decision on the negotiability of state warrants to the warrant at issue in this case conflicts with prior decisions of this Court by denying the state the right to rely on AGO 073-101, pending a contrary court decision.

On April 2, 1973, the Attorney General for the State of Florida issued an opinion regarding the negotiability of state warrants under the Uniform Commercial Code as it relates to a holder in due course. Op.Atty.Gen. 073-101 (April 2, 1973), pp. 161-164. Specifically, the Attorney General was asked:

> 1. Are state warrants in their present form, payable to the order of a named individual, negotiable within the purview of the Uniform Commercial Code? and
>
> 2. Can a holder in due course compel the state to honor an original warrant even though a duplicate warrant had been issued after a stop payment order had been issued to the state treasurer stopping payment on the original warrant?

The Attorney General responded in summary that:

> For reasons of public policy, state warrants are not negotiable instruments even though such warrants may comply with the form prescribed by the Uniform Commercial Code for negotiable instruments. Accordingly, a bona fide purchaser or assignee of a state warrant, for value, is not a holder in due course in the sense of the law merchant so as to cut off inquiries as to the warrant's validity or preclude defenses or setoffs which the state might assert against the original payee of such warrant. But this rule does not affect the rights of such bona fide purchaser or assignee as against the assignor.

That opinion is the only statement of authority regarding the negotiability of warrants issued subsequent to the adoption of the Uniform Commercial Code in Florida. The Comptroller of the State of Florida has relied on this decision in addressing

claims on warrants for eighteen years. Its similarity to the facts of the case at bar are uncanny.

At the time Seminole National Bank cashed the warrant in question, Respondent was on notice that the state did not consider its warrants negotiable, as a result of the publication of this opinion. It has long been recognized by the courts of this state that opinions of the Attorney General, while not legally binding on courts, are persuasive and entitled to great weight in construing Florida Statutes and the law of this state. *Beverly v. Division of Bev. of Dept. of Business Reg.*, 282 So.2d 657, 660 (Fla. 1st DCA 1973); *Richey v. Town of Indian River Shores*, 337 So.2d 410, 414 (Fla. 4th DCA 1976); Fla.Jur.2d, *State of Florida* §§50, 51. The opinions as to the validity or invalidity of a statute are guides for state executive and administrative officers in performing their official duties until superseded by judicial decision. Fla.Jur.2d, *Statutes* §164; Fla.Jur.2d, *State of Florida* §§50, 51.

By retrospectively applying its decision on the negotiability of warrants to a warrant issued in 1986, and then assessing prejudgment interest against the state for judgment on that warrant, the district court penalized the State of Florida for adhering to the only legal opinion of the question of negotiability of state warrants which existed prior to the trial court decision in this case. In the absence of a contrary judicial decision, the State was obligated to resist payment of the claim asserted by Respondent, which had no statutory or case law precedent upon which to rely.

Assessment of prejudgment interest under these circumstances denied the people of Florida, whose interests were being represented by the Comptroller, of the benefit of the Attorney General's opinion on negotiability of warrants. This conflicts with the spirit of district court decisions on the persuasive affect of Attorney General's opinions by penalizing the state for reliance on an opinion regarding the negotiability of state warrants. Accordingly, the lower court rulings should not be afforded retrospective precedential value to apply to the warant at issue in this cause and no prejudgment interest should be awarded.

CONCLUSION

WHEREFORE, for the foregoing reasons, this Court should reverse the lower court decisions in this cause; enter judgment for Petitioner; reaffirm the public policy of this state that state warrants are not, and never have been, negotiable instruments; and deny Respondent prejudgment interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided to **ROBERT L. HINKLE**, Esquire, Aurell, Radey, Hinkle & Thomas, Suite 1000, Monroe Park Tower, 101 North Monroe Street, Tallahassee, FL 32302, this 31st day of August, 1992.

Kimberly J. Tucker
Deputy General Counsel