IN THE SUPREME COURT
IN AND FOR THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

Case No. 79,449
Fla. Bar No. 0516937

FAMILY BANK OF HALLANDALE, etc.,

Respondent.

_____/

PETITIONER'S BRIEF ON JURISDICTION

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

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Kimberly J. Tucker
Deputy General Counsel

Department of Legal Affairs
The Capitol - Suite LL04
Tallahassee, Florida 32399-1050
(904) 487-3852

Counsel for Petitioner
State of Florida

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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. 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. The warrant was fraudulent cashed by the third party.

The State of Florida maintained that state warrants are not negotiable instruments under the Uniform Commercial Code. 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 state 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. Petitioner invokes the discretionary jurisdiction of this Court to reverse the majority decision in the First District Court of Appeal, affirming the trial court's holding.

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. The only decisional law on the question of negotiability of warrants is this Court's decision 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. 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 indicated on their face that they are non-negotiable is unsupported by any authority. See Opinion of District Court, p. 2. Further, the district court's conclusion that the legislature "turned away from a historic policy of non-negotiability" (Opinion, p. 2), 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 the 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 Blitho v. Bank of Commerce, 110 So. 837, 838 (Fla. 1926). In Blitho, this Court held in favor of the Town of Blitho 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.[1] However, the Uniform Commercial Code expressly provides that the principles of law and

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[1] 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 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 'certificates of indebtedness' within the meaning of the Bond Validating Act").

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 submits 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. The district court "question[ed] the motivation of the state" for asserting that warrants are not negotiable on public policy grounds. Opinion, pp. 3-4.

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.

Opinion, pp. 2-3. 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).

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 the present time, on which stop payment orders were issued. Many of these warrants were stolen. The statute of limitations for 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 accept jurisdiction in this case and resolve the conflict between this Court's previous decision in Town of Bithlo and the district court's holding on negotiability of state warrants.

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. 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). 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.

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, determinations 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 considerations 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.

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. 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 transfer to the proper venue, failure to pay a filing fee in the transfer venue, failure to prosecute the case leading to dismissal for failiure to prosecute, failure to schedule

hearings on Respondent's own motions, and requests for enlargement of time. 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.

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 73-073-101, 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. 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. 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, Statutes §164; 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 retrospecitively 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 decision denied the Comptroller the benefit of the Attorney General's opinion. 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 warants.

CONCLUSION

WHEREFORE, for the foregoing reasons, this Court should invoke its discretionary jurisdiction over the appeal of the district court decision in this cause.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Kimberly J. Tucker
Assistant Attorney General
Fla. Bar No. 0516937
Department of Legal Affairs
The Capitol - Suite LL04
Tallahassee, Florida 32399-1050
(904) 487-3852
Counsel for Petitioner
State of Florida

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APPENDIX TO

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Kimberly J. Tucker
Deputy General Counsel
Fla. Bar No. 0516937
Department of Legal Affairs
The Capitol - Suite LL04
Tallahassee, Florida 32399-1050
(904) 487-3852

Counsel for Petitioner
State of Florida

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

STATE OF FLORIDA,)

Appellant,)

v.)

FAMILY BANK OF HALLANDALE)
as successor-in-interest
to Seminole National Bank,)

Appellee.)

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND DISPOSITION THEREOF IF FILED

CASE NO. 91-350

Opinion filed February 5, 1992.

Appeal from the Circuit Court for Leon County.
P. Kevin Davey, Judge.

Robert A. Butterworth, Attorney General; and Kimberly J. Tucker, Assistant Attorney General, Tallahassee, for Appellant.

Robert L. Hinkle, of Aurell, Radey, Hinkle & Thomas, Tallahassee, for Appellee.

BARFIELD, Judge.

In this appeal of a summary judgment favoring a holder for value of a state warrant, we are asked to determine whether state warrants issued prior to the effective date of chapter 91-216, section 1, Laws of Florida, are negotiable instruments, whether the endorsement on the warrant is valid, and whether the holder is entitled to prejudgment interest on the amount of the warrant. We answer all three questions in the affirmative.

There is no dispute here that Family Bank of Hallandale is a holder of the warrant for value in the face amount of the warrant and had no actual notice of any of the state's defenses to payment. The argument of the state that the endorsement on the warrant by the payee was improper has no merit. See Section 673.401(2), Florida Statutes (1987).

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. 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).

The holding of the trial court that the state warrant is a negotiable instrument is also correct, although prior to adoption of the Uniform Commercial Code in Florida, warrants issued by sovereign governmental entities such as the state, counties, school boards and, in some instances, municipalities were non-negotiable. Such non-negotiability was grounded in public policy. Town of Bithlo v. Bank of Commerce, 92 Fla. 975, 110 So. 837 (Fla. 1926); Marshall v. State ex rel. Sartain, 88 Fla. 329, 102 So. 650 (Fla. 1924).

The enactment of chapter 65-254, Laws of Florida, however, brought state warrants squarely into the class of commercial paper unless the warrants clearly indicated on their face that they were not negotiable. 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. The legislature preserved its role as conservator of state tax dollars (and the political subdivisions may do likewise) by continuing and expanding the statutory prerequisites to issuance of warrants.

Commentaries on the Uniform Commercial Code and Florida Code are found following sections 673.104 and 673.105 in Florida Statutes Annotated (1966). The point of those commentaries is that government warrants should be free to flow in commerce, and the government may restrict that flow in a particular instance if it wishes to preserve its defenses. See also, 64 Am. Jur. 2d Public Securities and Obligations § 23 (1972) (The Uniform Commercial Code "permits . . . municipal warrants to be negotiable commercial paper if they are in proper form."). The traditional forms of limitation are to forthrightly print on the face of the document that it is "Not Negotiable." The government may also forego the use of the words "pay to the order of" or "pay to bearer."

One must question the motivation of the state when it issues a warrant "pay to the order of," encodes all the statutorily mandated indicia of compliance with state appropriation and funding laws, turns the warrant loose in commerce and then denies negotiability. The warrant in this case for all purposes except the state's asserted public policy conforms to the definition of

a negotiable instrument in section 673.104(1), Florida Statutes (1965). The summary judgment is therefore AFFIRMED.

WOLF, J., CONCURS. WENTWORTH, Senior Judge, DISSENTS WITH WRITTEN OPINION.

WENTWORTH, S.J., dissenting.

I would reverse the summary judgment for error in its conclusion that Ch. 673, F.S., makes the appellee bank a holder in due course entitled to payment of the state warrant without regard to defenses against the payee Ted's Sheds.[1]

The trial court's reasoning is essentially that the warrant is unconditional and therefore negotiable because "Sec. 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." But the cited provision states only that a government instrument "otherwise unconditional is not made conditional by the fact that the instrument . . . is limited to payment out of a particular fund." (e.s.) It therefore recognizes that government warrants may be otherwise conditional and nonnegotiable. In fact the provision simply incorporates prior decisional law in Florida on the "particular fund" issue. The Supreme Court sitting en banc in Wright v. Bd. Public Instruction, 77 So.2d 435 (Fla. 1955), held that when time warrants lawfully provided that "the full faith, credit and resources of the said Board . . . are pledged," then "a provision for payment from a certain source . . . 'does not render the

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[1] The trial court found that Ted's Sheds, the payee of the warrant here in question, had obtained that new replacement warrant "based on a stop payment order it placed after a company with the same officers admittedly received and negotiated the first warrant."

[instruments] non-negotiable if they are issued as general obligations of the maker.'" (e.s.) 77 So.2d at 437.

The Wright decision does not, as appellee contends, depart from prior decisions which, even absent a particular fund restriction, denied negotiability to government warrants not issued as general obligations of the maker. Town of Bithlo v. Bank of Commerce, 110 So.837 (Fla. 1926); authorities collected A.G.O. 073-101, Annual Report of the Attorney General, State of Florida. Instead of an inadequately explained public policy, those decisions appear to me to be properly grounded on the conditional nature of such warrants under numerous provisions of general law which have remained similar in substance and clearly are not altered by the adoption of Chapter 673.[2] Compare sections 18.02, 215.31, 215.35, 215.43, Florida Statutes (1965), with sections 18.02(1), 215.31, 215.35, 215.43, 216.311(1), 216.331, 216.351, Florida Statutes (1989).

Upon the record in this case I would assume that the warrant in question complied with such provisions as that requiring "All

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Sec. 671.103, F.S., provides:

> 671.103 Supplementary general principles of law applicable.--Unless displaced by the particular provisions of this code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

warrants . . . shall be . . . coded to show the fund, account, purpose and department involved in the issuance." §215.35, Fla.Stat. The conditions reflected by such disclosures are obvious, as well as restrictions stated in the same cited section that "No warrant shall issue until . . . authorized by an appropriation," and in Sec. 215.31 that "no money shall be paid . . . except as appropriated." The public policy doctrines loosely referenced in early decisions may lie in the role of government as the conservator of public funds extracted involuntarily from the people by way of taxation, which funds before collection through taxation cannot be spent by government absent specific authority of the taxpayer. Absent legal authorization to commit the taxing power of government to meet a demand for payment, there is reserved to the government the right to deny payment while asserting defenses it might have against the payee of the instrument.

Chapter 91-216, §1, Laws of Florida, declared and confirmed my conclusions above as to the warrant in this case when it added subsection 673.104(4) to provide "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 this chapter." Although we do not have to address the amendment in this case, I would recognize that the particular language of the amendment references warrants subject

to the statutory conditions listed above and requires careful construction in pari materia with other provisions of the code.[3]

I would reverse and remand for a hearing upon the asserted defenses.

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[3] See Sec. 671.104, F.S., for provision against implied repeal of existing code provisions by amendatory legislation not explicitly specifying sections affected.