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 REPLY BRIEF

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 PL01
Tallahassee, Fl. 32399-1050

Counsel for Petitioner
State of Florida

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SUMMARY OF THE ARGUMENT IN REBUTTAL

There is no dispute that the form of state warrants meets the statutory definition of negotiable instruments under Section 673.104(1). However, that is not the question presented by this case. This case concerns the legal question of whether the Legislature intended state warrants to be treated as negotiable instruments in Florida, after adoption of Chapter 673 and prior to enactment of Section 673.104(4), Florida Statutes (1991). To conclude state warrants were negotiable instruments during this period requires a finding that the Legislature affirmatively abandoned the long standing public policy of this state when it enacted Chapter 673.

For reasons of public policy, state warrants have traditionally not been considered to be negotiable instruments, even though they may comply with the form prescribed for negotiable instruments. Respondent has offered no authority to support the argument that the Florida Legislature intended to turn away from its traditional public policy on the non-negotiability of state warrants when it enacted the U.C.C. Further, Respondent has not produced one single example, pre- or post-enactment of the U.C.C., in which a state warrant in Florida was treated as a negotiable instrument.

In the absence of tangible evidence of a legislative intent to turn away from this public policy at the time of enactment of the U.C.C., the lower court decisions should be overturned as contrary to the prior decision of this court in *Town of Bithlo v. Bank of Commerce*, 110 So. 837 (Fla. 1926) and the public policy of this state.

The facts underlying issuance of the warrant or the stop payment order in this cause are irrelevant to resolution of the legal question of whether state warrants were negotiable instruments in 1986. Respondent's suggestion that the State's challenge of the lower court rulings is based on factual disputes is erroneous. The State asserts that the lower court decisions in this cause should be reversed on legal grounds, as state warrants are not negotiable instruments under the case law and sound public policy of this state.

Section 673.104(4), Fla.Stat. (1991), is the best evidence of legislative intent on the question of whether state warrants are negotiable instruments. Section 673.104(4) expressly exempts state warrants from Chapter 673, although the form of such warrants satisfies the requirements of negotiability. Reference to Section 673.104(4) is appropriate as an indication of legislative intent. Further, because there was no contract between the parties, "retroactive" application of Section 673.104(4) to this case does not constitute an impairment of contract.

In rebutting the State's argument that equity does not support an award of prejudgment interest against the state in this case, Respondent raises new allegations concerning the State's alleged noncompliance with Section 17.13, Fla.Stat. There is no factual record in this case to support, or refute, this assertion. Respondent should not be permitted to raise this assertion now, for the first time in this Court, because of the lack of record support and because this argument did not form the basis of either of the lower court decisions on appeal.

ARGUMENT

Respondent devotes much of its argument in its Answer Brief to arguing against the public policy reasons for treating state warrants as non-negotiable. Respondent states that the conclusion of the Attorney General that treating state warrants as non-negotiable was "good 'public policy' . . . is wrong." Answer Brief, p. 17. However, regardless of the sincerity or merit of Respondent's argument, it is not relevant to the issue presented by the case at bar.

This case involves a legal dispute over what the controlling law in this state was in 1986 on the question of negotiability of state warrants. The only question to be resolved by the lower court was whether the Legislature had abandoned the traditional public policy of treating state warrants as non-negotiable when it adopted Chapter 673, Fla.Stat.

Respondent offers reasons why the legislature should have abandoned that public policy. However, the reasons offered by Respondent beg the actual question before the court of whether the Legislature actually did turn away from this public policy. With enactment of Section 673.104(4), "to clarify and confirm existing law," §673.104(4), Fla.Stat.Ann. (Historical and Statutory Notes), the Legislature's intent to retain the public policy of treating state warrants as negotiable is clear and unequivocal. The lower courts erred in rejecting the public policy outlined in *Town of Bithlo, supra*, and Op.Atty.Gen. 73-101 (April 2, 1973), pp. 161-164. The district court erred in

failing to apply the clarification of legislative intent in Section 673.104(4) to this cause.

I. NEGOTIABILITY IS A LEGAL QUESTION

The question of negotiability of state warrants is a legal question grounded in public policy considerations. While the form of state warrants clearly satisfies the requirements for negotiability, traditionally, warrants have not been treated as negotiable for reasons of public policy.

Respondent asserts that the Legislature abandoned this public policy when it enacted the Uniform Commercial Code, Chapter 673. This same conclusion is asserted by the district court. See *State v. Family Bank of Hallandale*, 593 So.2d 581, 582 (Fla. 1st DCA 1992). However, neither Respondent nor the lower court offers any authority in support of this bald allegation.

Indeed, the only indication of legislative intent presented on the continued viability of this public policy subsequent to enactment of Chapter 673, is the Legislature's effort to "clarify and confirm existing law", through enactment of Section 673.104(4), Fla.Stat. (1991). See Section 2 of c. 91-216, Laws of Florida (1991); See also, §673.104(4), Fla.Stat.Ann. (Historical and Statutory Notes).

Section 673.104(4), makes clear the continued vitality of the public policy in Florida underlying treatment of warrants as non-negotiable.

In the absence of tangible evidence of a legislative intent to turn away from this public policy at the time of enactment of the U.C.C., the lower court decisions should be overturned as contrary to the prior decision of this court in *Town of Bithlo v. Bank of Commerce*, 110 So. 837 (Fla. 1926), and the public policy of this state.

II. FACTS IRRELEVANT TO RESOLUTION OF LEGAL QUESTION PRESENTED

Respondent continues to cite the facts surrounding issuance of the stop payment order in this case and the timing of consideration of those facts by the circuit court as relevant to resolution of the question of negotiability. However, the facts underlying issuance of this warrant and the stop payment order are irrelevant to resolution of the legal question of whether state warrants were negotiable instruments, subsequent to enactment of Chapter 673 and before enactment of Section 673.104(4), Fla.Stat. (1991).

Neither side presented the facts surrounding issuance of this warrant to the trial court, because the question to be resolved was purely legal: were state warrants negotiable instruments under the law of Florida in 1987?

If the answer to that query is yes, the state is liable to Respondent as a holder in due course. If the answer is no, the Respondent cannot look to the state, but rather should look to those responsible for its loss, for reimbursement. This is true regardless of the reasons for the stop payment or their merit, or lack thereof.

Thus, Respondent's continued reference to the timing of consideration of these facts by the trial court is meritless. The state is not, as suggested by Respondent, asserting "now that the trial court erred in entering summary judgment based on facts never submitted until after the summary judgment was entered . . ." Answer Brief, p. 12. The state respectfully submits that the lower courts erred in granting judgment to Respondent based on the legal conclusion that state warrants were negotiable and that the Legislature abandoned the public policy of non-negotiability when it enacted Chapter 673.

The lower courts erred in finding that the Legislature had turned away from traditional public policy favoring non-negotiability of state warrants. The lower court decisions should be reversed as contrary to this court's decision in *Town of Bithlo*, *supra*, and the sound public policy of this state, as reaffirmed by the Florida Legislature in enacting Section 673.104(4), Fla.Stat. (1991).

III. THE ABSENCE OF A CONTRACT MAKES REFERENCE TO SECTION 673.104(4) APPROPRIATE AND THE ASSESSMENT OF PREJUDGMENT INTEREST INAPPROPRIATE

In both its argument against "retroactive" application of Section 673.104(4) and its argument in favor of assessment of pre-judgment interest against the state, Respondent asserts that there was a contract between it and the State of Florida, which the state breached. Respondent is in error. No contract exists, and Section 673.104(4) is applicable and relevant to the instant cause.

Respondent does not dispute that it was on notice of the state's legal position that state warrants were not negotiable instruments, prior to its acceptance of the warrant at issue in this case. See Op.Atty.Gen 73-101. However, Respondent asserts that it has a contract, despite the parties' obvious disagreement over the character of warrants. Respondent suggests that the state's contention that the parties had no contract because they had no meeting of the minds over this fundamental question is "bizarre". Answer Brief, p. 20, f.n. 14. However, a meeting of the minds is essential for the formation of a contract.

Rather than a mere dispute over "the legal standards applicable to their agreement," Answer Brief, p. 20, f.n. 14, the parties here had no meeting of the minds on the most fundamental aspect of the alleged contract -- the character of state warrants under the negotiability provisions of the U.C.C. Thus, no contract could be formed in the absence of such a meeting of the minds on this fundamental question.

The State of Florida had no contract with Family Bank of Hallandale. In the absence of a valid, contractual relationship between the State of Florida and Respondent, retroactive application of Section 673.104(4), Fla.Stat. to this cause does not constitute an illegal impairment of contract and the assessment of prejudgment interest in this case is inappropriate.

Further, reference to Section 673.104(4), for purposes of indicating the Legislature's intent with respect to the question

of negotiability of state warrants, is appropriate regardless of whether there was a contract between the parties or not. [1]

For the foregoing reasons, the district court decision should be reversed for failing to give proper consideration and weight to clarification of legislative intent on the question of negotiability of state warrants provided by the enactment of Section 673.104(4), Fla.Stat. (1991), and no prejudgment interest should be assessed against the State of Florida.

IV. Relevance of Section 17.13, Fla.Stat.

Respondent attempts to suggest that equity favors the award of prejudgment interest against the state, because of the state's alleged failure to comply with Section 17.13(1), Fla.Stat.[2]

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[1] The lower court determination that the public policy of non-negotiability was abandoned by the Legislature is grounded in the absence of a specific exemption for state warrants in Chapter 673. Enactment of Section 673.104(4), Fla.Stat., makes clear that the lower court's assessment of legislative intent is in error. Accordingly, Section 673.104(4) is the most persuasive evidence available of legislative intent in this cause and should be considered by the court in resolution of this case.

[2] This provision provides that:

> (1) 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, or a bond with securities, to be approved by one of the

Respondent asserts that the State failed to comply with mandatory provisions of Section 17.13, Fla.Stat., regarding issuance of a duplicate warrant, for the first time in its Answer Brief before this Court. Answer Brief, p. 10, f.n. 4; p. 26. Because there is no factual record to support, or refute, this bald allegation, and because consideration of this assertion played no role in the lower courts' determinations on the question of award of prejudgment interest, Respondent should not be permitted to raise this issue for the first time in this Court. *In re Beverly*, 342 So.2d 481, 489 (Fla. 1977); *Silver v. State*, 188 So.2d 300 (Fla. 1966); *Reinhard v. Bliss*, 85 So.2d 131 (Fla. 1956).

Section 17.13, Fla.Stat., deals with the issuance of duplicate warrants by the Comptroller after loss or destruction of the original warrant. The applicability of this provision to the case at bar is questionable, considering the warrant was not known to be lost or destroyed at the time the stop payment order and duplicate warrant were issued. Further, Section 17.13(1), cited by Respondent as controlling, is not the only applicable provision concerning issuance of a duplicate warrant. Section 17.13(2) is also applicable. [3]

> judges of the circuit court or one of the justices of the Supreme Court, in a penalty of not less than twice the amount of any warrants so duplicated, conditioned to indemnify the state and any innocent holders thereof from any damages that may accrue from duplication.

[3] Section 17.13(2) provides that:

> (2) The Comptroller is required to duplicate any Comptroller's warrant that may have been lost or destroyed, or may hereafter

There is no factual evidence in the record to support, or refute, Respondent's bald allegation of noncompliance. Further, the Comptroller would have been required to issue a duplicate warrant under Section 17.13(2), Fla.Stat., with appropriate agency support. In the absence of any record evidence on this question, Respondent should not be permitted to raise this as a point of equity favoring Respondent, when this allegation was not considered by the lower courts.

V. EQUITABLE OMISSIONS BY RESPONDENT

Two assertions contained in Respondent's Answer Brief, in its discussion of the equitable considerations involved in the assessment of prejudgment interest in this cause, raise issues which must be addressed in this reply. The first is Respondent's allegation that the State "admitted below" that there was nothing commercially reasonable the bank could do to prevent this loss. The second is Respondent's implication that the undersigned unreasonably delayed prosecution of this case when she failed to timely file a responsive pleading in this case as a result of illness. The Petitioner disagrees with both of these statements

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> be lost or destroyed, when sent to any payee via any state agency when such warrant is lost or destroyed prior to being received by the payee and provided the director of the state agency to whom the warrant was issued presents to the Comptroller a statement, under oath, reciting the number, date, and circumstances surrounding the loss or destruction of such warrant, and any additional information that the Comptroller shall request in regard to such warrant.

and submits that the statements do not accurately reflect the record in this case.

Respondent asserts that the state admitted below that "the bank was innocent of negligence and wrongdoing" and that "there was no commercially reasonable step the bank could have taken to prevent the fraud that caused the loss." Answer Brief, p. 25. While the state concurs that Respondent and the State of Florida are innocent victims of the fraud committed by Teds Sheds of Broward, Inc., Appendix I, D. 14, p. 6, the State does not concur that there was no commercially reasonable step the bank could have taken to prevent this loss.

The Respondent could have notified the Comptroller of the State of Florida of the fraud when the warrant was returned in February of 1987. The Respondent could have put a hold on the account of Teds Sheds of Broward, Inc. Respondent could have filed a complaint with the State Attorney's Office in Broward County against Teds Sheds of Broward, Inc. Respondent could have timely sought reimbursement from Teds Sheds of Broward, Inc.

Instead, no notice was provided to the Comptroller regarding the fraudulent cashing of this warrant. No hold was apparently placed on the account of Teds Sheds of Broward, Inc. No criminal complaint was filed. No evidence of collection efforts against Teds Sheds of Broward, Inc., by Seminole National, has ever been presented or asserted to have been undertaken. Rather, the only action the Respondent undertook to recover this money was a suit filed, in the wrong venue, against the then-defunct Teds Sheds of Broward, Inc. and State of Florida, through service on the State

Attorney's Office of Broward County, some fifteen (15) months after the return of the warrant to Seminole National Bank.

Respondent offers no citation to the record to support the above-referenced assertion that the State "admitted below" and the Petitioner has been unable to find any such admission. Clearly, Respondent had many commercially reasonable and prudent steps available which may have avoided this loss, ultimately. None were taken. For the reasons stated above, Petitioner disagrees with Respondent's assertion of "admission" on this point.

As for Respondent's allegations of delay by the State, it is regrettable that Respondent should try to use the undersigned's prior illness to advantage here. Because current counsel makes serious and inaccurate representations to this Court regarding the timing of the filing of pleadings not before this Court, the undersigned is compelled to respond. Response is particularly necessary since Respondent seeks prejudgment interest on the grounds that the undersigned improperly delayed filing a responsive pleading in this cause.

Specifically, current counsel grossly misstates the facts when he asserts that "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)." Answer Brief, p. 26, f.n. 22.

The undersigned did miss the deadline for filing a responsive pleading while hospitalized for surgery. Another attorney was supposed to file that response during the

undersigned's absence, but failed to do so. When the omission was discovered, a motion for enlargement was filed on June 27, 1988. (R.7-8). By agreement with counsel for Seminole National Bank, the responsive pleading was filed out-of-time, on August 23, 1988. (R.9-11). A motion to file out-of-time was filed with the motion, noting the Respondent's counsel's agreement to the enlargement. (R.12-13). Subsequently, the State filed an amended motion to dismiss or to strike on August 29, 1988. (R.14-19). After the State filed its amended motion to dismiss or to transfer venue, counsel for Seminole National Bank improperly filed a motion for default and moved to strike the state's motions on August 30, 1988. (R.22-27). A practice for which he was severely admonished by the Honorable Estella Moriarty at the hearing in which she transferred venue to Leon County.

Although current counsel for Respondent was not involved with the above situation, the misrepresentation of the timing of the filing of the responsive pleading and the motion for default, contained in the Answer Brief, cannot be attributed to his lack of involvement at that time. The documents contained in the record before the court are clear as to the dates of filing. The motion for default was filed after the state filed its motion to dismiss or to transfer venue and an amended motion to dismiss or to transfer venue. This is in direct contravention to Respondent's assertion in the Answer Brief that "the state . . . responded only after the bank moved for entry of default." Answer Brief, p. 26, f.n. 22. For this reason, the undersigned

responds to the Respondent's spurious misrepresentations regarding the timing of filing of the State's responsive pleading.

Petitioner believes that disputes and misrepresentations of this ilk are far beneath the dignity of this court; however, because of the seriousness of the implications of Respondent's misstatements, Petitioner is obligated to clear the record on this matter. The court's indulgence is appreciated. The pleadings in question are filed as an Appendix to this reply brief.

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,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Kimberly J. Tucker
Deputy General Counsel
Fla. Bar No. 0516937
Department of Legal Affairs
The Capitol - Suite PL01
Tallahassee, FL 32399-1050
(904) 487-1963
Counsel for Petitioner
State of Florida

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 12th day of October, 1992.

Kimberly J. Tucker
Deputy General Counsel

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT
BROWARD COUNTY, FLORIDA

SEMINOLE NATIONAL BANK, a national banking association,

Plaintiff,

vs. Case No. 88-12633

THE STATE OF FLORIDA and TEDS SHEDS OF BROWARD, INC., a Florida corporation,

Defendants.

_____/

DEFENDANT STATE OF FLORIDA'S MOTION FOR ENLARGEMENT OF TIME

Defendant State of Florida, through undersigned counsel, moves that the court grant it an enlargement of time of twenty (20) days from the date of this motion to file its response in the above-referenced cause. As grounds therefore Defendant State of Florida states as follows:

1. The undersigned counsel was assigned to represent the Defendant State of Florida in this cause on May 20, 1988.

2. On June 1 1988, the undersigned underwent emergency surgery for an internal injury sustained on May 20, 1988.

3. Counsel has been unable to do an adequate investigation of Plaintiff's claims in order to make a timely response in the brief period of time counsel has had since returning to work after recouperating from surgery.

Wherefore, for the foregoing reasons, Defendant State of Florida requests that the court grant it an enlargement of time of twenty (20) days for the date of this motion in which to file a response in the above-referenced case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Kimberly J. Tucker
Assistant Attorney General

Department of Legal Affairs
The Capitol - Suite 1501
Tallahassee, Florida 32399-1050
(904) 488-1573

Counsel for Defendant
State of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **DEFENDANT STATE OF FLORIDA'S MOTION FOR ENLARGEMENT OF TIME** has been provided to **BARRY S. WEBBER**, Esquire, Goodman & Webber, P.A., Post Office Box 8549, Hollywood, Florida 33084, this 27th day of June, 1988.

Kimberly J. Tucker
Assistant Attorney General

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT
BROWARD COUNTY, FLORIDA

SEMINOLE NATIONAL BANK, a national banking association,

Plaintiff,

vs. Case No. 88-12633

THE STATE OF FLORIDA and TEDS SHEDS OF BROWARD, INC., a Florida corporation,

Defendants.

DEFENDANT STATE OF FLORIDA'S
MOTION TO DISMISS TO TRANSFER VENUE

Defendant, through undersigned counsel, moves that the Court transfer venue of the instant cause pursuant to 1.140, Fla.R.Civ.P. (1985). As grounds therefore, Defendant states as follows:

I. BROWARD COUNTY IS NOT THE PROPER VENUE FOR THIS ACTION

1. Section 47.011, Florida Statutes (1985), provides in pertinent part, that:

> [a]ctions shall be brought only in the county where the Defendant resides, where the cause of action accrued, or where the property in litigation is located.

2. The common law venue privilege provides that, absent waiver or exception, "venue in civil actions brought against the state or one of its subdivisions properly lies in the county where the state, agency, or subdivision, maintains its principal headquarters." Carlile v. Game and Fresh Water Fish Commission 354 So.2d 362 (Fla. 1977). This principle has been consistently reaffirmed with few exceptions. See, Florida Public Service Commission v. Triple "A" Enterprises. Inc., 387 So.2d 940 (Fla. 1980); Department of Transportation v. Robinson, 424 So.2d 883

(Fla. 1st DCA 1982); Department of Corrections v. Edwards, 410 So.2d 959 (Fla. 1st DCA 1982); County of Volusia v. Atlantic International Investment Corp., 394 So.2d 477 (Fla. 1st DCA 1981; Southern Gulf utilities v. Mayo, 239 So.2d 146 (Fla. 1st DCA 1969); Department of Transportation v. Bromante, 365 So.2d 388 (Fla. 4th DCA 1978); City of Boca Raton v. Walker, 354 So.2d 440 (Fla. 3d DCA 1978).

The State of Florida has not waived its privilege in the case at bar nor does Plaintiff assert extraordinary circumstances which could provide an exception to the privilege. Cf., Department of Transportation v. Bromante, supra (case could proceed in Broward County as to all defendants except the state agency as to which the venue was improper).

3. Article II, Section 2 of the Florida Constitution states that the seat of government of the State of Florida shall be the City of Tallahassee, in Leon County, Florida. Accordingly, Defendant State of Florida asserts that venue lies in the Second Judicial Circuit, in and for Leon County, Florida.

Wherefore, on the basis of the foregoing authorities, Defendant State of Florida respectfully submits that the Court transfer this action to Leon County, Florida, where venue properly lies.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Kimberly J. Tucker
Assistant Attorney General

Department of Legal Affairs
The Capitol - Suite 1501
Tallahassee, Florida 32399-1050
(904) 488-1573

Counsel for Defendant
State of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO TRANSFER VENUE** has been provided to **BARRY S. WEBBER**, Esquire, Goodman & Webber, P.A., Post Office Box 8549, Hollywood, Florida 33084, this 23rd day of August, 1988.

Kimberly J. Tucker
Assistant Attorney General

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT
BROWARD COUNTY, FLORIDA

SEMINOLE NATIONAL BANK, a national banking association,

Plaintiff,

vs.

Case No. 88-12633

THE STATE OF FLORIDA and TEDS SHEDS OF BROWARD, INC., a Florida corporation,

Defendants.

DEFENDANT STATE OF FLORIDA'S MOTION TO FILE OUT OF TIME

Defendant State of Florida, through undersigned counsel, moves that the court grant it leave to file its Motion to Transfer Venue, out of time. As grounds therefore Defendant State of Florida states as follows:

1. The undersigned counsel was assigned to represent the Defendant State of Florida in this cause on May 20, 1988.

2. On June 1 1988, the undersigned underwent emergency surgery for an internal injury sustained on May 20, 1988. Counsel had relapses of this condition during the latter part of June, beginning of July, and again at the beginning of August.

3. Counsel was unable to do an adequate investigation of Plaintiff's claims in order to make a timely response in the brief periods of time counsel has been at work, particularly since Defendant State of Florida's counsel was without clerical support during this same period of time.

4. Counsel has been in contact with counsel for the Plaintiff regarding the reason for the delay and attempting to assertain the facts underlying Plaintiff's cause of action and

the agencies and agents involved in the events which led to the filing of this Complaint.

5. Counsel for Plaintiff's represented to counsel for the Defendant State of Florida that he had no objection to the granting of a motion to file Defendant's responsive pleading out of time.

Wherefore, for the foregoing reasons, Defendant State of Florida requests that the court grant it leave to file its Motion to Transfer Venue out of time.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Kimberly J. Tucker
Assistant Attorney General

Department of Legal Affairs
The Capitol - Suite 1501
Tallahassee, Florida 32399-1050
(904) 488-1573

Counsel for Defendant
State of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **DEFENDANT STATE OF FLORIDA'S MOTION FOR ENLARGEMENT OF TIME** has been provided to **BARRY S. WEBBER**, Esquire, Goodman & Webber, P.A., Post Office Box 8549, Hollywood, Florida 33084, this 23rd day of August, 1988.

Kimberly J. Tucker
Assistant Attorney General

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT
BROWARD COUNTY, FLORIDA

SEMINOLE NATIONAL BANK, a national banking association,

Plaintiff,

vs. Case No. 88-12633 CU

THE STATE OF FLORIDA and TEDS SHEDS OF BROWARD, INC., a Florida corporation,

Defendants.

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DEFENDANT STATE OF FLORIDA'S AMENDED MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO TRANSFER VENUE

Defendant, through undersigned counsel, moves that the Court dismiss the instant cause for lack of subject matter jurisdiction or, in the alternative, to transfer venue of the instant cause pursuant to 1.140, Fla.R.Civ.P. (1987). As grounds therefore, Defendant states as follows:

I. BROWARD COUNTY IS NOT THE PROPER VENUE FOR THIS ACTION

Section 47.011, Florida Statutes (1985), provides in pertinent part, that:

> [a]ctions shall be brought only in the county where the Defendant resides, where the cause of action accrued, or where the property in litigation is located.

The common law venue privilege provides that, absent waiver or exception, "venue in civil actions brought against the state or one of its subdivisions properly lies in the county where the state, agency, or subdivision, maintains its principal headquarters." Carlile v. Game and Fresh Water Fish Commission 354 So.2d 362 (Fla. 1977). This principle has been consistently reaffirmed with few exceptions. See, Florida Public Service Commission v. Triple "A" Enterprises. Inc., 387 So.2d 940 (Fla.

1980); Department of Transportation v. Robinson, 424 So.2d 883 (Fla. 1st DCA 1982); Department of Corrections v. Edwards, 410 So.2d 959 (Fla. 1st DCA 1982); County of Volusia v. Atlantic International Investment Corp., 394 So.2d 477 (Fla. 1st DCA 1981; Southern Gulf utilities v. Mayo, 239 So.2d 146 (Fla. 1st DCA 1969); Department of Transportation v. Bromante, 365 So.2d 388 (Fla. 4th DCA 1978); City of Boca Raton v. Walker, 354 So.2d 440 (Fla. 3d DCA 1978).

The State of Florida has not waived its privilege in the case at bar nor does Plaintiff assert extraordinary circumstances which could provide an exception to the privilege. Cf., Department of Transportation v. Bromante, supra (case could proceed in Broward County as to all defendants **except** the state agency as to which the venue was improper).

Article II, Section 2 of the Florida Constitution states that the seat of government of the State of Florida shall be the City of Tallahassee, in Leon County, Florida. Accordingly, Defendant State of Florida asserts that venue lies in the Second Judicial Circuit, in and for Leon County, Florida.

Wherefore, on the basis of the foregoing authorities, Defendant State of Florida respectfully submits that the Court dismiss the instant cause, or in the alternative, transfer this action to Leon County, Florida, where venue properly lies.

II. PLAINTIFF HAS FAILED TO COMPLY WITH CONDITIONS PRECEDENT TO SUIT

Although the theory upon which Plaintiff is proceeding is unclear on the face of the Complaint. Assuming, arguendo, that Plaintiff bases its claim upon a tort theory of "negligent issuance of a state warrant," compliance with Section 768.28, Florida Statutes (1985), is a condition precedent to instituting

a cause of action against this Defendant. Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979); Hutchins v. Mills, 363 So.2d 818 (Fla. 1978).

Section 768.28, Florida Statutes, states in relevant part that:

> "(1) In Accordance with s.13, Art. X., State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act."
>
> * * *
>
> "(6)(a) An action may not be instituted on a claim against the state or one of its agencies or subdivisions unless the claimant presents the claim in writing to the appropriate agency, and also, . . . presents such claim in writing to the Department of Insurance, within 3 years after such claim accrues and the Department of Insurance or the appropriate agency denies the claim in writing; . . . . The failure of the Department of Insurance or the appropriate agency to make final disposition of a claim within six months after it is filed shall be deemed a final denial of the claim for purposes of this section.
>
> "(b) For purposes of this section, the requirements of notice to the agency and denial of the claim are conditions precedent to maintaining an action. . ."

(Emphasis supplied)

Notice. - The instant Complaint fails to state a cause of action since Plaintiff fails to allege compliance with the statutory notice provisions set forth by Section 768.28, Florida Statutes (1987). Accordingly, Defendants submit that the Court lacks subject matter jurisdiction over this cause. Commercial Carrier Corp. v. Indian River County, supra; Hutchins v. Mills, supra.

Plaintiff failed to comply with the statutory service of process provisions set forth by Section 768.28, Florida Statutes, which is a condition precedent to maintaining this cause.

Pursuant to Section 768.28(6)(a), Plaintiff has three years from the accrual of his claim to comply with the notice provisions of Section 768.28 in order for the trial court to have subject matter jurisdiction over this cause. As previously noted, Section 768.28(6)(a) requires both timely notice to the Department of Insurance and the appropriate agency and a denial of the claim, in writing, by either the Department of Insurance or the appropriate agency, or the passage of six months without notification of disposition from either party required to be notified, before a claim can properly be filed in the courts. Plaintiff fails to demonstrate that he provided the Defendants with such notice, as required.

The statute providing a limited waiver of the state's sovereign immunity is quite clear and explicit. However, Plaintiff has failed to comply with the requirements of this section in every respect prior to the filing of this lawsuit.

It is a well-established principle in Florida that a statute which is in derogation of the common law, such as Section 768.28, should be strictly construed. Carlile v. Game & Fresh Water Fish Comm'n, 354 So.2d 362 (Fla. 1977); Board of Regents of the State of Florida v. Coffey, 378 So.2d 52 (Fla. 1st DCA 1979); and Lendsay v. Cotton, 123 So.2d 745 (Fla. 3d DCA 1960). Here, Plaintiff has not complied with the requirements of Section 768.28 and thus is not entitled to the benefit of the limited waiver of sovereign immunity provided by the statute.

Statutes which are designed to supersede or modify rights provided by common law must be strictly construed and will not be interpreted so as to displace the common law further than is expressly declared. Arias v. State Farm Fire & Cas. Co., 426 So.2d 1136 (Fla. 1st DCA 1983). See also Carlile v. Game & Fresh Water Fish Comm'n, supra and Bryan v. Landis, 106 Fla. 19, 142 So. 650 (1932). Section 768.28 establishes a limited waiver of

sovereign immunity in certain circumstances but demands compliance with both the requirements of notice and denial of the claim as conditions precedent to maintaining an action.

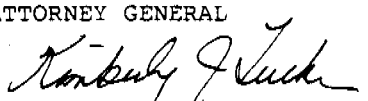
Defendants submit that Plaintiff's failure to comply with the notice requirements of Section 768.28(6)(a) is fatal to his claim.

Passage of Section 768.28 did not constitute a waiver of the State's common law immunity against civil rights actions filed in state courts. Neither did the mere issuance of a state warrant to the entity known as "Teds Sheds."

Wherefore, for the foregoing reasons, Defendant State of Florida respectfully moves to dismiss the instant cause, as it is entitled to judgment as a matter of law.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



Kimberly J. Tucker
Assistant Attorney General

Department of Legal Affairs
The Capitol - Suite 1501
Tallahassee, Florida 32399-1050
(904) 488-1573

Counsel for Defendant
State of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **DEFENDANT STATE OF FLORIDA'S AMENDED MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO TRANSFER VENUE** has been provided to **BARRY S. WEBBER, Esquire**, Goodman & Webber, P.A., 6200 Stirling Road, Davie, Florida 33314, this 29th day of August, 1988.

Kimberly J. Tucker
Assistant Attorney General

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. 88-12633

SEMINOLE NATIONAL BANK, a national banking association,

Plaintiff,

vs.

THE STATE OF FLORIDA and TEDS SHEDS OF BROWARD, INC., a Florida corporation,

Defendants.

PLAINTIFF'S MOTION TO STRIKE DEFENDANT STATE OF FLORIDA'S AMENDED MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO TRANSFER VENUE AND MOTION TO FILE OUT OF TIME

Plaintiff, SEMINOLE NATIONAL BANK, by and through its undersigned counsel and pursuant to Florida Rules of Civil Procedure 1.140, hereby moves this Honorable Court for the entry of an Order striking Defendant's Motion to File Out of Time and Amended Motion to Dismiss, or in the alternative, to Transfer Venue and as grounds therefore states:

1. On or about May 11, 1988, Plaintiff filed the instant action against Defendants, THE STATE OF FLORIDA and TEDS SHEDS OF BROWARD, INC., for money due on a warrant issued by the Defendant, THE STATE OF FLORIDA. On May 17, 1988, Defendant, THE STATE OF FLORIDA, was served with process by serving Michael J. Satz, State Attorney. The response to the Complaint was due June 6th.

2. Subsequent thereto, and some three (3) weeks after the Answer was due, Defendant, THE STATE OF FLORIDA, filed a Motion for Enlargement of Time seeking an additional twenty (20) days to file a response to Plaintiff's Complaint.

3. Thereafter, the undersigned contacted counsel for Defendant, THE STATE OF FLORIDA, and explained to counsel for Defendant that the undersigned was going to move for a default in this cause, and at that time, the undersigned agreed not to file a Motion for Default in exchange for opposing counsel's agreement to file a responsive pleading within five (5) days from our conversation. A copy of a letter confirming the agreement between the parties is attached hereto and made a part hereof as Exhibit "A".

4. On or about August 23, 1988, Defendant, THE STATE OF FLORIDA, served by mail a Motion to File Out of Time as well as a Motion to Dismiss to Transfer Venue. In accordance with the agreement between counsel, Defendant, THE STATE OF FLORIDA, in pledging the public faith, was supposed to file an Answer and Affirmative Defenses to the Complaint. In accordance with Florida Rules of Civil Procedure 1.100(a), pleadings are defined as follows:

> There shall be a complaint . . . and an answer to it; an answer to a counterclaim denominated as such; an answer to a cross-claim if the answer contains a cross-claim; and third party complaint . . . and a third party answer if a third party complaint is served. If an answer or a third party answer contains an affirmative defense and the opposing party seeks to avoid it, he shall file a reply containing the avoidance. No other pleadings shall be allowed.

It is clear, that Defendant, THE STATE OF FLORIDA, breached the public faith by failing to file a responsive pleading to the Complaint filed herein by the Plaintiff.

5. Further, as one of its agruments for the Motion to Dismiss, Defendant asserts that Plaintiff has failed to comply with conditions precedent to this suit.

6. However, Defendant appears to be asserting its own cause of action against itself for negligence. Nowhere in Plaintiff's Complaint does Plaintiff request damages for negligence, rather, Plaintiff is seeking damages for breach of a written agreement that being a negotiable instrument, i.e., state warrant. As a result, Plaintiff is not required to comply with the Florida Statutes Section dealing with Torts.

7. Additionally, 104 days has past since the service of the Complaint upon Defendant, and Defendant has as of the date of this Motion, not filed its Answer and Affirmative Defenses thereto. As a result of the actions of the Defendant, Plaintiff has been prejudiced and the Motions filed herein by Defendant should be stricken.

WHEREFORE, Plaintiff, SEMINOLE NATIONAL BANK, prays that this Honorable Court enter an Order striking Defendant, THE STATE OF FLORIDA'S Motion to File Out of Time and Amended Motion to Dismiss,

or in the alternative, to Transfer Venue and for any other relief that this Court deems proper.

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to: Kimberly Tucker, Assistant Attorney General, Department of Legal Affairs, The Capitol - Suite 1501, Tallahassee, Florida 32399-1050, this 30th day of August, 1988.

Goodman & Webber, P.A.
Attorney for Plaintiff
P.O. Box 8549
Hollywood, Florida 33084
961-3050 (Miami: 624-3676)

By: Eric J. Braunstein
Eric J. Braunstein
Florida Bar No. 703370

GOODMAN & WEBBER
A PROFESSIONAL ASSOCIATION
ATTORNEYS AT LAW
6200 STIRLING ROAD
DAVIE, FLORIDA 33314

MAILING ADDRESS
POST OFFICE BOX 8549
PEMBROKE PINES, FLORIDA 33084-0549

BARRY S. WEBBER
DAVID E. GOODMAN
ERIC J. BRAUNSTEIN

TELEPHONE (305) 961-3050
MIAMI 624-3676
BROWARD TELECOPIER 966-4284
MIAMI TELECOPIER 624-3677

August 22, 1989

Kimberly J. Tucker
Assistant Attorney General
Department of Legal Affairs
The Capitol
Suite 1501
Tallahassee, Florida 32399-1050

Re: Seminole National Bank vs.
The State of Florida, et al.
Broward County Circuit Case No. 88-12632
Our File No. D-1211

Dear Kim:

This is to confirm our telephone conversation of last week, wherein I agreed to extend you the courtesy of an additional five (5) days within which to file your responsive pleading in the above referenced cause. This is to advise that I will proceed towards a Default should I not received a response within the aforementioned five (5) days.

Should you have any further questions in connection with this matter, please feel free to contact me.

Sincerely,

Eric J. Braunstein

EJB/la

EXHIBIT A

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. 88-12633

SEMINOLE NATIONAL BANK, a national banking association,

Plaintiff,

vs.

THE STATE OF FLORIDA and TEDS SHEDS OF BROWARD, INC., a Florida corporation,

Defendants.

MOTION FOR DEFAULT

Plaintiff, SEMINOLE NATIONAL BANK, by and through its undersigned counsel and pursuant to Florida Rules of Civil Procedure 1.500(b), hereby moves this Honorable Court for the entry of an Order of Default against Defendant, THE STATE OF FLORIDA, and as grounds therefor states:

1. On or about May 11, 1988, Plaintiff filed the instant action against the Defendant, THE STATE OF FLORIDA, seeking to recover on a warrant issued by said Defendant.

2. Defendant, THE STATE OF FLORIDA, was served with process on May 17, 1988.

3. Defendant has sought and obtained numerous extensions within which to prepare and file its Answer and/or Affirmative Defenses to the Complaint herein.

4. The undersigned agreed not to file a Motion for Default prior to the instant Motion in return for Defendant's agreement to file a responsive pleading in this cause.

5. As of the date of this Motion, 104 days have past since service of the Complaint upon Defendant, and Defendant has failed to file an Answer thereto.

6. As a result of the above, a Default should be entered against the Defendant for failure to timely file its Answer to the instant action in accordance with applicable Florida Rules of Civil Procedure.

7. As a result of Defendant's failure to file its responsive pleading in this cause, Plaintiff has been prejudice and requests this Court to enter an Order of Default against said Defendant for failure to properly plead.

WHEREFORE, Plaintiff, SEMINOLE NATIONAL BANK, prays that this Honorable Court enter an Order of Default against the Defendant, THE STATE OF FLORIDA, for failure to plead or otherwise defend as required by the Florida Rules of Civil Procedure and for any other relief that this Court deems proper.

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to: Kimberly Tucker, Assistant Attorney General, Department of Legal Affairs, The Capitol - Suite 1501, Tallahassee, Florida 32399-1050, this 30th day of August, 1988.

Goodman & Webber, P.A.
Attorney for Plaintiff
P.O. Box 8549
Hollywood, Florida 33084
961-3050 (Miami: 624-3676)

By: Eric J. Braunstein
Eric J. Braunstein
Florida Bar No. 703370