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**IN THE SUPREME COURT OF THE STATE OF FLORIDA**

DONALD G. RESHNA,

Petitioner,

v.

KATIE TUCKER,

Respondent.

_____/

CASE NO. 83,597



**********

ON REVIEW FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT

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# BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF FLORIDA, INC. ON BEHALF OF PETITIONER

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## TABLE OF CONTENTS

## TABLE OF CITATION

STATUTES



OTHER

## SUMMARY OF THE ARGUMENT

Two years ago, the Florida Supreme Court in Traylor v. State, 596 So. 2d 957 (Fla. 1992) proclaimed the critical importance of Florida's Declaration of Rights. Traylor breathed new life into our constitutional protections by holding that "[w]hen called upon to decide matters of fundamental rights, Florida state courts are bound under federalist principles to give primacy to our state Constitution and to give independent legal import to every phrase and clause contained therein." Id. at 962. The primacy this Court is compelled to afford to Florida's Constitution must extend to allowing parties to recover damages for deprivation of our fundamental constitutional right of privacy.

There are compelling and authoritative reasons for permitting suits for damages for violations of Florida's state constitutional right of privacy. See, Art. I, § 23, Fla. Const. The first and most obvious is that without adequate compensation for its violation, the privacy right would be rendered meaningless. This result would be in direct contravention of the fundamental importance Floridians have accorded this vital constitutional right. The courts of this State have already recognized that relief must be granted to those whose Florida constitutional rights have been violated when there is no statute which grants such relief. See Schreiner v. McKenzie Tank Lines, Inc., 406 So. 2d 711 (Fla. 1st DCA 1982), aff'd, 432 So. 2d 567 (Fla. 1983).

## ARGUMENT

### POINT I

**A VIOLATION OF THE CONSTITUTIONAL RIGHT OF PRIVACY, ART. I, § 23, BY A GOVERNMENT OFFICIAL GIVES RISE TO A CAUSE OF ACTION FOR DAMAGES CONSEQUENT UPON THE OFFICIAL'S UNCONSTITUTIONAL CONDUCT**

**a. The Schreiner Decision Mandates that Plaintiffs are Entitled to Maintain a Cause of Action for Damages Under the Privacy Provision of the Florida Constitution Even Though No Statute Grants Such a Cause of Action.**

Schreiner v. McKenzie Tank Lines, Inc., 408 So. 2d 711 (Fla. 1st DCA 1982), aff'd, 432 So. 2d 567 (Fla. 1983),[1] held that compensatory relief is available for violations of equal protection under Florida's Declaration of Rights. In Schreiner, the court determined that the Equal Protection provision in the Florida Constitution, which prohibits any deprivation of a right because of "race, religion or physical handicap" is self-executing, meaning that a direct cause of action could be brought and relief could be granted for its violation, even in the absence of implementing legislation. This is because the equal protection "provision of the constitution is quite direct" and therefore needs "no implementing legislation." Id. Similarly, the privacy clause at issue here is "quite direct" and in need of no implementing legislation.

The Schreiner court added that "`A constitutional provision is to be construed in such a manner as to make it meaningful. A

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[1] The Florida Supreme Court's affirmance of the Court of Appeal's decision dealt only with the issue of whether state action was required to invoke one's right under article I, section 2.

construction that nullifies a specific clause will not be given unless absolutely required by the context.'" Id., quoting Plante v. Smathers, 372 So. 2d 933, 936 (Fla. 1979). Because, at the time the Equal Protection amendment was enacted, the only relief available would have been that based on the constitutional provision, Florida citizens must have intended the new clause to be self-enforcing since any other interpretation would "in effect cause the provision to have been null." Id. The court further noted that "[t]his would negate the will of the people in approving this amendment to the constitution, and the will of the people is always the paramount consideration in determining the self-executing nature of a [constitutional] provision." Id., citing Gray v. Bryant, 125 So. 2d 846, 851 (Fla. 1960). Because the clause is self-executing the plaintiff was therefore entitled to damages for its violation. Id.; see also Corum v. University of North Carolina, 413 S.E.2d 276, 289 (N.C. 1992) (right of freedom of speech is self-executing and therefore supports a cause of action for damages); Leger v. Stockton Unified School Dist., 202 Cal. App. 3d 1448, 249 Cal. Rptr. 688, 691 (1988).

Schreiner is strikingly similar to this case. First, the Equal Protection Clause at issue in Schreiner had been recently amended and adopted by Florida voters. Here, Florida voters also recently adopted the Privacy Amendment. Second, while both the amendments to the Equal Protection Clause and the Privacy Clause were approved by popular mandate, no corresponding implementing legislation existed at the time the Schreiner plaintiff, and the

Plaintiff in this action, initiated their respective lawsuits. Because of the close similarity of the cases, the ruling in Schreiner can be applied to this case. Just as the amendment to the Equal Protection Clause would be effectively void if it could not be enforced by plaintiffs seeking damage remedies, so too will the amendment to the Privacy Clause be nullified if plaintiffs cannot seek damages for its violation. Any other interpretation would give free rein to those defendants who wish to harm others by violating their right of privacy. In a high technology age, where private information is so easily accessible and can be used to wreak havoc upon individual citizens, the right of privacy must be vigilantly guarded. However, without any accountability for the damages defendants cause by a privacy violation, there would be little to deter those who do not respect this fundamental right.

Many states besides Florida have allowed a private cause of action for damages under their state constitutions. See, e.g., Fenton v. Groveland Community Servs. Dist., 135 Cal. App. 3d 797, 804-05, 185 Cal. Rptr. 758, 762-64 (1982) (allowing an action for damages under the California Constitution where there is a violation of one's right to work); Walinski v. Morrison & Morrison, 60 Ill. App. 3d 616, 620, 377 N.E.2d 242, 244-45 (1978) (acknowledging action for compensatory and punitive damages for sex discrimination under the Illinois Constitution); Widgeon v. Eastern Shore Hosp. Ctr., 479 A.2d 921, 930 (Md. Ct. App. 1984) (allowing a common-law action for damages under the Maryland Constitution where there has been deprivation of property or an illegal search

or seizure); Phillips v. Youth Dev. Program, Inc., 390 Mass. 652, 658-60, 459 N.E.2d 453, 457-78 (1983) (demonstrating willingness to grant judicial remedy for a due process violation under the Massachusetts Constitution if state action is proven); Smith v. Department of Pub. Health, 428 Mich. 540, 541-42, 410 N.W.2d 749, 751 (1987) (stating willingness to consider claims for damages for certain violations of Michigan Constitution, although declining to do so on the facts presented), aff'd sub nom. Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989); Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 79-80, 389 A.2d 465, 476-78 (1978) (allowing a cause of action under the New Jersey Constitution for sex discrimination); Terranova v. New York, 111 Misc. 2d 1089, 1095-96, 445 N.Y.S.2d 965, 969-70 (N.Y Ct. Cl. 1982) (Finding an unreasonable search and seizure in violation of the New York Constitution and granting damages as a remedy); Hunter v. Port Auth., 277 Pa. Super. 4, 14, 419 A.2d 631, 636 (1980) (allowing a cause of action under the Pennsylvania Constitution when one's right to pursue employment is obstructed); Lloyd v. Stone Harbor, 179 N.J. Super. 496, 532 A.2d 572 (1981). See also Laguna Pub. Co. v. Golden Rain Fount., 131 Cal. App. 3d 816, 182 Cal. Rptr. 813 (Cal. 4th Dist. Ct. App. 1982) (court allowed damages for violations of plaintiff's constitutional free speech rights), appeal dismissed, Golden Rain Found. v. Laguna Pub. Co., 459 U.S. 1192 (1983); Jennifer Friesen, Recovering Damages for State Bills of Rights Claims, 63 Tex. L. Rev. 1269, 1276 (1985).

Some courts have even abandoned the state action requirement

in finding an unconstitutional discrimination in employment by a public utility. Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 24 Cal. 3d 458, 467-72, 595 P.2d 592, 597-600, 156 Cal. Rptr. 14, 19-22 (Cal. 1979); see Friesen, supra, at 1277 ("The possibility of imposing constitutional norms on private sectors is potentially one of the most far-reaching changes in constitutional law to be worked by the state civil rights movement.").

**b. Because there is a Direct Cause of Action under the Privacy Amendment and there is a Fundamental Right of Privacy, There is an Absolute Right to Damages**

The Florida Supreme Court recognized early on that:

> For every actionable injury there is an absolute right to damages; the law recognizes such an injury whenever a legal right is violated. Rights are legal when recognized and protected by law, so every invasion of a legal right threatens the right itself, and to some extent impairs the possessor's enjoyment of it. The logical sequence of finding an invasion is the legal sequence, a legal injury that entitles the injured party to compensation proportioned in amount to the injury.

Winn & Lovett Grocery Co. v. Archer, 126 Fla. 308, 326, 171 So. 214 (1936). Because the Privacy amendment establishes an individual right and imposes a corresponding duty on the government, a traditional common law action for damages logically and legally follows. Similarly, because there is a direct cause of action under the Privacy amendment, i.e., it is self-executing, there is "an absolute right to damages." Id.

Further support for this rule can be found in the principle enunciated in Florida East Coast Ry. Co. v. McRoberts, 111 Fla. 278, 149 So. 631 (1933):

Actual damages are recoverable at law, out of a wrongdoer

> by the injured party as a matter of right. Such damages are recoverable as compensation for the actual loss sustained by such an injured party by reason of the tortfeasor's wrongdoing.

Id. at 281.

The McRoberts court's language speaks in terms of tortfeasors. However, this does not mean it is inapplicable to this case. Appellee's cause of action can be considered one in tort. Fenton, 185 Cal. Rptr. at 762.

> A tort requires that a plaintiff have a legally protected right which, when invaded by the defendant, is compensable by money damages. The civil remedy for constitutional torts is a direct claim by the victim of the official wrongdoing to secure compensation for the denial of his constitutional rights.

Id. (citing Comment, Executive Immunity for Constitutional Torts After Butz v. Economu, 20 Santa Clara L. Rev. 453, 455 fn. omitted (1980)).

Furthermore, the reasoning that justifies the imposition of punitive damages on tortfeasors applies to this case. Punitive damages are imposed depending on the defendant's conduct in causing an injury that is "willful, wanton, or gross," § 768.73, Fla. Stat., "to such an extent that the measured compensation of the plaintiff should have an additional amount added thereto as `smart money' against the defendant, by way of punishment or example as a deterrent to others inclined to commit similar wrongs." Winn, 126 Fla. at 327; see Mercury Motors Exp., Inc. v. Smith, 393 So. 2d 545, 547 (Fla. 1991) ("Punitive damages . . . are imposed as a punishment of the defendant and as a deterrent to others" (citations omitted)).

The special dignity accorded the right of privacy[2] should afford plaintiffs the right to seek punitive damages. If punitive damages are available for injured parties in tort actions, they should be equally available for the deprivation of the fundamental right of privacy. Furthermore, punitive damages will help assure that the right of privacy is not a "nullity to be ignored," Traylor v. State, 596 So. 2d 957, 983 (Fla. 1992) (Kogan, J., concurring in part, dissenting in part), by acting as a deterrent to those inclined to ignore its mandate. Its words are not meaningless. "When the state Constitution creates a fundamental right [such as the right of privacy], that right must be respected." Id. The best way to insure this is to allow punitive damages for its violation.

Other courts have held that plaintiffs can seek both compensatory and punitive damages for violations of their

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[2] In Public Health Trust v. Wons, 541 So. 2d 96 (Fla. 1989), the court found that privacy involves a

> deeply imbedded belief, rooted in our constitutional traditions, that an individual has a fundamental right to be left alone so that he is free to lead his private life according to his own beliefs free from unreasonable governmental interference.

Wons, 541 So. 2d at 98 (quoting with approval Wons v. Public Health Trust, 500 So. 2d 679, 686 (Fla. 3d DCA 1987)). So important is the right of privacy that it is protected by the most exacting standard of judicial review. Winfield v. Division of Pari-Mutual Wagering, 477 So. 2d 544, 547 (Fla. 1978) ("[t]he right of privacy is a fundamental right which we believe demands the compelling state interest standard.") (citing Roe v. Wade, 410 U.S. 113 (1973)). Indeed, privacy is so strong an interest that few governmental infringements of that right have survived judicial scrutiny in this state. In re T.W., 551 So. 2d 1186, 1192 (Fla. 1989) (citing cases).

respective state constitutions. Walinski, 377 N.E. 2d 242 (a woman turned down for a job by a firm that wanted "a male employee" could seek both compensatory and punitive damages for violation of article I, § 17 of the Illinois Constitution which declares a right to be free from discrimination in employment); Richie v. Donnelly, 597 A.2d 432 (Md. 1991) (punitive damages available to plaintiffs whose constitutional rights have been violated, however, actual malice must be shown).

### c. The Bivens Decision Supports Judicial Creation of a Damage Remedy for Privacy Rights in the Absence of Legislative Implementation

That Plaintiffs should have a direct action for damages for violations of the Florida Constitution is bolstered by the landmark decision in Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). Bivens sought damages under the Fourth Amendment, claiming that federal officers conducted an unreasonable search and seizure. Noting the absence of a statutory remedy for violations of federal constitutional rights by federal officials the Supreme Court recognized a cause of action for damage directly under the United States Constitution. Bivens, 403 U.S. at 389.[3] In so holding, the Court recognized the ancient common law rule that damages are normally recoverable for loss of personal rights. "Historically, damages have been regarded as the ordinary remedy for an invasion

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[3] The Court did not find the right to a common-law cause of action under the Constitution unqualified; it identified two situations in which it would not infer a cause of action: when there are "special factors counselling hesitation in the absence of affirmative action by congress," Bivens, 403 U.S. at 396, and when Congress has provided an equally effective remedy. Id. at 397. Neither of these factors apply to this case.

of personal interests in liberty." Id. at 395, citing Nixon v. Condon, 286 U.S. 73 (1932). The Court also cited Marbury v. Madison's maxim that "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury." Bivens, 403 U.S. at 397, quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163, 2 L. Ed. 60 (1803).

The Court has extended the Bivens analysis to other provisions in the Bill of Rights. E.g., Carlson v. Green, 446 U.S. 14, 20-23 91980) (acknowledging a private cause of action for violations of the Eighth Amendment); Davis v. Passman, 442 U.S. 228, 248-49 (1979) (the same for violations of the Fifth Amendment). Lower federal courts further extended Bivens to violations of the Fourteenth Amendment. See Jones v. City of Memphis, 586 F.2d 622, 624 (1978), cert. denied, 440 U.S. 914 (1979).

Because in Florida "`[p]rivacy' has been used interchangeably with the common understanding of the notion of `liberty'," In re Guardianship of Browning, 568 So. 2d 4, 9 (Fla. 1990), and "damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty," Bivens, 403 U.S. at 395 (citations omitted), Bivens supports recognition of damage remedy under the Florida Constitution in the absence of legislative implementation.

**d. Section 874A of the Second Restatement of Torts Authorizes an Independent Legal Basis for a Private Suit for Damages Under Florida's Privacy Clause**

There is a much older body of law generated by state courts which more directly supports judicial creation of a damage remedy

for state constitutional deprivations, even in the absence of legislative implementation. This common-law doctrine is expressed in Restatement of Torts (Second) § 874A which provides:

> When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action.

The Restatement of Torts (Second) used the words "legislative provision" in § 874A to describe the duty-creating element of this tort, but, comment A to the section explains, "legislative provision" includes constitutional provisions as well. The comment also notes that the legislative branch can establish, modify, or abolish remedies for torts. Section 874A addresses the judiciary's power to do so when the legislature has been silent. Courts refer to this common law doctrine either as the "implied cause of action" or the "statutory tort."

Florida's Constitution grants an individual right of privacy without simultaneously specifying a civil remedy for its violation. Further, the purpose of the Privacy Clause is to ensure that constitutional privacy interests are kept intact. In order to assure the effectiveness of the provision, a direct cause of action under the Privacy Clause, with corresponding compensation, must be available. This will deter the disregard of the state constitutional privacy interest through enforced responsibility of lawbreakers.

The majority of state courts which have granted a right to sue for damage for deprivation of state constitutional rights have agreed with the principle expressed in § 874A. Some courts have bolstered the theory with common law rules for the holding in Bivens. In Widgeon v. Eastern Shore Hospital Center, 479 A.2d 921 (Md. Ct. App. 1984), for example, the Maryland Court of Appeals, in recognizing a common law action for damages to remedy violations of state constitutional rights, noted its established doctrine that "where a statute establishes an individual right, imposes a corresponding duty on the government, and fails to provide an express statutory remedy, a traditional common law action will ordinarily lie." Id. at 929. However, it did not need to resort to this doctrine, stating that "there is no need to imply a new right of action because, under the common law, there already exists an action for damages to remedy violations of constitutional rights." Id. Likewise, a Texas appellate court cited § 874A as support for its holding that "the Texas constitution constitutes an independent legal basis for a cause of action claiming an infringement of right of free speech." Jones v. Memorial Hosp. System, 746 S.W.2d 891, 893-94 (Tex. Ct. App. 1988).

Florida should follow the lead of state courts which have granted a right to sue for damages for deprivation of state constitutional rights by basing the right on the principle expressed in § 874A.

**e. Florida Should Follow California's Lead in the Recognition of a Right to Sue for Damages for Violations of Privacy Rights by the State Constitution**

As early as 1931, California permitted a damages action to vindicate an implied constitutional right of privacy. Melvin v. Reid, 112 Cal. App. 285, 291-92, 297 P. 91, 93 (1931). Like Florida, California voters in 1972 adopted an explicit constitutional right of privacy. Cal. Const. art. I, § 1. Significantly, California and Florida are two of only five states that have constitutions in which privacy is both expressly enumerated as an individual right, and placed separately from related protections such as the one against unreasonable search and seizure. Since California's adoption of an express privacy clause, its courts have repeatedly permitted damage suits for its violation, against both public and private defendants. Long Beach City Employees' Ass'n v. City of Long Beach, 41 Cal. App. 3d 937, 944, 719 P.2d 660, 227 Cal. Rptr. 90 (1986) (compelled lie detector tests of public employees); Payton v. City of Santa Clara, 132 Cal. App. 3d 152, 183 Cal. Rptr. 17 (1982) (city employee deprived of privacy when his supervisors posted a notice in an employee workroom that he had been terminated for insubordination and dishonesty); White v. Davis, 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975) (police undercover surveillance of university classes); for cases involving private defendants see e.g., Porten v. University of San Francisco, 64 Cal. App. 3d 825, 134 Cal. Rptr. 839 (1976) (damages awarded to student for private school's improper disclosure of academic records); Cutter v. Brownbridge,

183 Cal. App. 3d 836, 228 Cal. Rptr. 545 (1986) (psychotherapist sued for damages by former client for disclosing details of plaintiff's therapy during judicial hearing on child visitation.) Because Florida is also a leader in the recognition of the importance of the fundamental right to privacy, so too should Florida be a leader in permitting individuals whose privacy rights have been violated to seek compensatory damages.

**CONCLUSION**

For the above and foregoing reasons, this court should affirm the judgment below.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing document were furnished by U.S. mail to Brian S. Duffy, Esq., P.O. Drawer 229, Tallahassee, FL 32302, Richard E. Johnson, Esq., Spriggs & Johnson, 324 West College Ave., Tallahassee, FL 32301, and Gary Gerrard, Esq., 95 Merrick Way, Coral Gables, FL 33134 this 6th day of July, 1994.

James K. Green