IN THE SUPREME COURT OF FLORIDA

CASE NO. 95, 000

ALAN H. SCHREIBER, PUBLIC DEFENDER OF THE 17TH JUDICIAL CIRCUIT OF FLORIDA, AND RICHARD L. JORANDBY, PUBLIC DEFENDER OF THE 15TH JUDICIAL CIRCUIT OF FLORIDA,

Petitioners,

vs.

ROBERT R. ROWE,

Respondent.

APPEAL FROM THE DISTRICT COURT OF THE STATE OF FLORIDA
FOURTH DISTRICT

4TH DCA CASE NO. 97-1997

SUPPLEMENTAL BRIEF ON SOVEREIGN IMMUNITY

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James C. Barry, Esquire

QUESTION PRESENTED

This Petitioner, as Public Defender of the 15th Judicial Circuit of Florida, responds to this Court's request for supplemental briefing on the issue of sovereign immunity. The issue of immunity was not initially raised in this matter at the trial level or on appeal to the District Court of Appeal, Fourth District. The issue was raised in this Petitioner's Answer and Affirmative Defenses filed after the Fourth District Court issued its Mandate, and before this Court granted Petitioner's Motion for Recall of Mandate of District Court, Fourth District, and Motion for Stay of the underlying trial proceedings on November 10, 1999. This Petitioner raised a defense of absolute or qualified immunity barring any legal malpractice claims of Respondent against this Petitioner. The State of Florida now seeks to raise issues of immunity on the grounds that immunity goes to subject matter jurisdiction and may be raised at any time in the litigation. This Petitioner discusses the following question:

> WHETHER A PUBLIC DEFENDER MAY BE LIABLE FOR PROFESSIONAL MALPRACTICE UNDER THE DOCTRINE OF SOVEREIGN IMMUNITY AND THE WAIVER OF SOVEREIGN IMMUNITY PURSUANT TO SECTION 768.28, FLORIDA STATUTES.

ARGUMENT

THE WAIVER OF SOVEREIGN IMMUNITY DOES NOT OPERATE AS A WAIVER OF A PUBLIC DEFENDER'S JUDICIAL IMMUNITY FROM SUIT.

The doctrine of sovereign immunity "flows from the concept that one could not sue the king in his own courts." Cauley v. City of Jacksonville, 403 So. 2d 379, 381 (Fla. 1981). Generally, one injured by the government had no recourse as suit against the government could not be commenced or prosecuted without the government's consent. Id. (citing Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 5 L. Ed. 257 (1821)). The citizens of this state vested in the legislature the right to waive sovereign immunity pursuant to current Article X, Section 13, of the Florida Constitution, which states that "[p]rovision may be made by general law for bringing suit against the state as to all liabilities now existing of hereafter originating." Common law sovereign immunity for the State of Florida, its agencies and subdivisions remained in full effect until 1973 when the legislature enacted section 768.28. See Ch. 73-313, 1, Laws of Fla. Subsequent amendments to this statute reflect the current state of law on sovereign immunity under section 768.28, with pertinent portions recited:

> (1) In a accordance with sec. 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. Actions at law against the state or any of its agencies or subdivisions for injury . . . caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope

> of the employee's office or employment under circumstances in which the state or agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act. . . .
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> . . . .
>
> (2) As used in this act, "state agencies or subdivisions" include the executive departments, the Legislature, the judicial branch (including public defenders), ...
>
> . . . .
>
> (5) The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, ...

The full historical perspective of the origins and permutations of sovereign immunity is traced by this Court in Cauley.

Any waiver of sovereign immunity must come through legislative enactment. State v. Pollack, 745 So. 2d 446 (Fla. 3d DCA 1999); See also Hess v. Metropolitan Dade County, 467 So. 2d 297, 300 (Fla. 1985)(holding that the legislature is the only entity that can provide a waiver of sovereign immunity). In 1984, the Florida legislature extended sovereign immunity to the public defenders, their employee and agents, as evidence by the legislative intent articulated in Chapter 84-29, Laws of Florida, House Bill No. 488. This amendment also included public defenders within the definition of "state agencies or subdivisions" whose immunity the legislature now waived. In reading the Committee on Judiciary Staff Summary on Chapter 84-29, the specific inclusion of the public defender

appears solely as a reaction to Windsor v. Gibson, 424 So. 2d 888 (Fla. 1st DCA 1982). In Windsor, a public defender was not accorded judicial immunity by the First District Court for claims of legal malpractice. The rationale underpinning the first district's opinion in Windsor is faulty in that it failed to consider a public defender as an Article V quasi-judicial officer or the separation of powers doctrine. Nonetheless, the legislature immunized the public defender's office as it had for other state agencies, to eliminate potential personal liability of the public defender and his assistant public defenders and to cap the damages if the waiver resulted in liability against the public defender's office. That act of including the public defender under the sovereign immunity statute, however, did not negate the public defender's entitlement to judicial immunity.

Historically, a sovereign held absolute exemption from all liability, but by the "pruning" of this sovereign immunity doctrine some causes of action have been allowed. Cauley, 403 So. 2d at 384. The waiver pertains solely to claims against the state, its agencies and subdivisions, arising only from tortious conduct characterized as "planning" or "decision making" functions. Cauley, 403 So. 2d at 384; Commerical Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979). This Court has held constitutional that portion of section 768.28 which waives sovereign immunity and establishes a statutory cap for compensatory

recovery against the state. Hess; Cauley; Commercial Carrier. This Court found that section 768.28 related to a permissible legislative objective, was not oppressive in its application, did not violate due process, jury trial or access to the court, and more importantly the statute did not violate separation of powers rule. Cauley, 387.

That statute's validity is premised, in part, upon the doctrine of separation of powers between the legislative and judicial branches of government. Art. II, Sec. 3, Fla. Const. "While the legislature has the authority to waive immunity for those organs of government within its purview, the legislature cannot take actions that would undermine the independence of Florida's judicial and quasi-judicial offices." Office of the State Attorney v. Parrotino, 628 So. 2d 1097, 1099 (Fla. 1993). It has been recognized that judicial and sovereign immunities have existed apart and have independent bases in law and policy. Id. This Court conveyed the heritage of judicial and sovereign immunity in Parrotino:

> It may be true that in its earliest manifestation judicial immunity emanated from the English sovereign's absolute immunity, because early English judges sat at the pleasure and as legal appendages of the Crown. However, in time even England began recognizing that judges held an office that was to an increasing degree distinct from and beyond the Crown's reach. Continuing this same trend, judicial immunity and sovereign immunity completely ceased to be coextensive as conceived in most American states, and in Florida in particular. Article V of the Florida Constitution creates the judicial branch of this state, deliberately separating it from

> and making it coequal to the other branches of government. Article V also creates the office of State Attorney, implying what is obvious - the State Attorneys are quasi-judicial officers.

628 So. 2d at 1099 (citations omitted). Immunity was always deemed to have existed for judicial and quasi-judicial acts, and this immunity remains intact today. Parrotino, 628 So. 2d at 1099; Commercial Carrier, 371 So. 2d at 1016-17. The legislature could not have intended to interfere with the independence of the judicial branch when it enacted section 768.28. Parrotino, 628 So. 2d at 1099. Hence, judicial immunity has not been waived by section 768.28. It also seems obvious, as in Parrotino, that the Public Defenders, created under Article V of the Florida Constitution, are entitled to judicial immunity from legal malpractice claims as quasi-judicial officers.

Alternatively, an analysis under the sovereign immunity statute reaches a similar result as the foregoing. As reiterated by this Court in its prior sovereign immunity discussions, conceptually, the question of applicability of sovereign immunity does not even arise until it is determined that a defendant state agency owes a duty of care to the plaintiff and thus would be liable in the absence of such immunity. See Henderson v. Bowden, 737 So. 2d 532, 535 (Fla. 1999); Kaisner v. Kolb, 543 So. 2d 732, 733 (Fla. 1989)(quoting Williams v. State, 34 Cal. 3d 18, 664 P. 2d 137 (1983)). The waiver of sovereign immunity does not in itself create any new duties of care, thus requiring that a

claimant premise a claim against a state agency on an existing common law or statutory duty applicable to private persons. Kaisner, 543 So. 2d at 733-34; Trianon Park Condominium Ass'n v. City of Hialeah, 468 So. 2d 912, 917 (Fla. 1985). In the instant case, there must be a finding of no liability on the part of the Public Defenders as a matter of law if either (a) no duty of care existed as to Respondent, or (b) the doctrine of sovereign immunity shields his claim of legal malpractice. See Henderson, 737 So. 2d at 535; City of Pinellas Park v. Brown, 604 So. 2d 1222, 1225 (Fla. 1992); Kaisner, 543 So. 2d at 734.

There is no reason to engage in any further analysis of the doctrine of sovereign immunity herein because the "threshold matter" of duty is answered in the negative; the Public Defenders do not owe a duty to Respondent, hence no viable cause of action in tort may be asserted by Mr. Rowe. See Henderson, 737 So. 2d at 535. There is no tort claim because Public Defenders are Article V constitutional officers of the judicial branch under which they are entitled to quasi-judicial immunity for acts committed in the course of their representation of indigent clients.

As discussed above, the waiver of sovereign immunity does not waive judicial immunity for Article V judicial and quasi-judicial officers. Thus the waiver of sovereign immunity has no effect on the Public Defenders, who are entitled to quasi-judicial immunity, as more fully argued by the Solicitor General. This Petitioner

adopts in full the arguments of the State of Florida's Amicus Curiae Brief concerning the applicability of judicial immunity to this case.

CONCLUSION

The legislature's inclusion of public defenders in section 768.28 does not operate to deprive the Public Defenders to judicial immunity in the performance of their constitutionally-derived duties. The decision in the Fourth District Court should be overturned and this action remanded to the trial court with direction to dismiss the Public Defenders from civil suit filed by Respondent, Robert R. Rowe.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to the persons listed below this 2nd day of October, 2000:

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