

IN THE SUPREME COURT OF FLORIDA

JOHN CROCKER, et al.,

CASE NO. 95,148

4th DCA # 98-00633

Petitioners,

vs.

RICHARD PLEASANT, etc., et al.,

Respondents.

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ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

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**PETITIONERS' REPLY BRIEF**

V. LYNN WHITFIELD, ESQ.  
Whitfield & Mosley  
224 Datura Street,  
Suite 918  
P.O. Box 34  
West Palm Beach, FL 33402  
(561) 833-2213  
ATTORNEY FOR PETITIONERS  
Florida Bar No. 314021

DEA ABRAMSCHMITT, ESQ.  
Lakeshore Ofc. Park,  
Suite 224  
2669 Forest Hill Blvd.  
West Palm Beach, FL 33406  
(561) 649-8640  
APPELLATE CO-COUNSEL FOR  
PETITIONERS

Florida Bar No. 84506

**CERTIFICATE OF INTERESTED PERSONS**

Undersigned counsel for the Petitioners hereby certifies that the following is a complete list of persons and entities who have an interest in the outcome of this case:

Dea Abramschmitt, Esq.  
(Appellate Co-Counsel for Petitioners)

Honorable Jennifer D. Bailey  
Associate Judge  
4th DCA  
(Appellate Judge)

Honorable Moses Baker, Jr.  
Circuit Court Judge  
Fifteenth Judicial Circuit  
(Trial Judge)

Board of County Commissioners  
Palm Beach County, Florida  
(Defendant/Respondent)

Patrick Brown, City Attorney, City of  
West Palm Beach by Mayra Rivera-  
Delgado, Esq. Assistant City  
Attorney, and Wayne N. Richards, Esq., Assistant City  
West Palm Attorney (Attorneys for City of  
Beach)

John and Betty Crocker  
(Plaintiffs/Petitioners)

Joel Daves, Mayor of City of West Palm  
Beach  
(Defendant/Respondent)

Denise Dytrych, County Attorney for  
Palm Beach County by Leonard Berger,  
Assistant County Attorney (Attorney  
for Palm Beach County)

Honorable Robert M. Gross  
District Court Judge  
4th DCA  
(Appellate Judge)

Honorable Larry A. Klein  
District Court Judge  
4th DCA  
(Appellate Judge)

Richard Pleasant  
(Defendant)

Don Stephens, Esq.  
(Attorney for Defendant Pleasant)

Robert Weisman, County Administrator,  
Palm Beach County  
(Defendant/Respondent)

V. Lynn Whitfield, Esq.  
(Trial and Appellate Counsel for  
Petitioners)

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**PRELIMINARY STATEMENT**

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for Petitioners hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

## ARGUMENT

**WHETHER THE FOURTH DISTRICT COURT OF APPEAL ERRED BY HOLDING THAT POWELL PRECLUDED A SECTION 1983 CLAIM AND AFFIRMING THE TRIAL COURT'S RULING WHEN POWELL WAS DECIDED PRIOR TO FEDERAL DECISIONS AND WHEN THE ISSUE IN POWELL WAS DISTINCT FROM THE ISSUE AT BAR.**

The City's and County's answer brief, and the amicus curiae brief, all allege that Petitioners have adequate remedies under Florida state law and, thus, do not need to avail themselves of a section 1983 claim. Unfortunately, this allegation is not true. The cases cited in the amicus brief all involve claims of intentional infliction of emotional distress where the tortious conduct went beyond mere negligence. Halpin v. Kraeer Funeral Homes, Inc., 547 So. 2d 973 (Fla. 4th DCA 1989); Kirker v. Orange County, 519 So. 2d 682 (Fla. 5th DCA 1988) (impact rule does not prohibit recovery where wrongful act is so bad that it implies malice or where the want of care or indifference was so egregious that malice is imputed) the impact rule does not apply). However, when the claim is for mental anguish caused by simple *negligent* interference with a dead body, there can be no recovery absent physical injury. Gonzalez v. Metropolitan Dade County, 651 So. 2d 673 (Fla. 1995). The plaintiff in Gonzalez urged the supreme court to recede

from its position that there can be no recovery for mental suffering caused by negligent handling of a dead body in the absence of physical injury (impact rule), but this court refused to do so. Id. at 676. This court held that an action for mental anguish based on negligent handling of a dead human body requires proof of either physical injury or willful or wanton conduct. Id.

In the instant case, the wrongful acts committed by the City and County do not rise to the level of willful or wanton conduct, nor can they be said to imply malice. The City's liability is basically one of respondeat superior, while the County's wrongful conduct involves failure to use reasonable efforts to notify the next of kin prior to burial of the deceased. The claim of mental anguish comprises the bulk of Petitioners' damages, as is usually the case when the claim is for interference with rights involving a corpse. Since Petitioners cannot prove physical injury or willful or malicious conduct on the part of the City or County, they are precluded from bringing a state claim to address their very real damages.

The irony is that if Petitioners could plead and prove willful or malicious action on the part of Officer Pleasant (which would be imputed to the City), the City would then be immune from liability because section 768.28(9)(a), Florida Statutes, only waives sovereign immunity for negligent conduct of its employees. Thus, Petitioners are caught in a "Catch 22" where they must plead and prove willful or malicious conduct to defeat the impact rule, but, by so pleading, ruin their claim against the City because of sovereign immunity. See, e.g., Gonzalez, 651 So. 2d at 676.

Petitioners have already been prevented from bringing a claim against Pleasant individually because, pursuant to section 768.29(9), he is exempt from liability as a government employee. Unless he either "acted outside the course and scope of his employment or in bad faith, or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property", he cannot be held liable. (City's Appendix 2) See generally, Sams v. Oelrich, 717 So. 2d 1044 (Fla. 1st DCA 1998), rev. denied, 725 So. 2d 1109 (Fla. 1998).

In addition to the barriers of the impact rule and sovereign immunity, Florida law has held that law

enforcement agencies owe a duty to the public at large, but not to any particular individual. Laskey v. Martin County Sheriff's Dep't., 708 So. 2d 1013 (Fla. 4th DCA 1998), rev. granted, 718 So. 2d 169 (Fla. 1998). Liability for police agencies can be imposed only where a special relationship exists between the government actor and the tort victim. Id. at 1014. Hence, Florida law does not provide Petitioners with anything approaching an adequate remedy for the wrong done to them through the conduct of the City and County.

The City, in its answer brief, went to great lengths to contradict Petitioners' assertion that Powell did not involve a section 1983 claim, even to including the actual complaints of Powell and White, the plaintiffs in Powell. (City's Appendix 3 and 4) While it is technically true that White's complaint included a section 1983 count, the City has completely missed Petitioners' point. The plaintiffs' complaints could have contained a breach of contract count, too, but that does not mean that the issue before this court would have been whether there had been an offer and acceptance.

As thoroughly explained in Petitioners' initial brief, the primary issue before this court in Powell was whether or not §732.9185 was constitutional. State v. Powell, 497 So. 2d 1188 (Fla. 1986). In so doing, the initial question was whether the statute deprived the claimant of life, liberty or property. U.S. Const. amend. XIV, §1. Of course, this point is also critical in evaluating a section 1983 claim. Respondents challenge Petitioners' statement that this court could have found that there was, in fact, a protected property interest, yet still upheld the statute. If the Respondents are truly mystified on this point, then they do not understand that a constitutional analysis of a state statute involves several steps beyond merely determining whether there has been an infringement on a protected right.

Quite simply, the Fourteenth Amendment does not prohibit *all* deprivations of life, liberty, or property by the state. Parratt v. Taylor, 451 U.S. 527, 536-37, 101 S. Ct. 1908 (1981). Rather, the amendment and its attendant statute (1983) only protect against deprivations *without due process of law*. Id. at 537. In determining whether the deprivation has occurred without due process, and what process is constitutionally due, the courts apply a Mathews

weighing of the various interests involved. Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893 (1976). The relevant factors used to evaluate the adequacy of the procedures afforded by the state include: (1) The importance of the individual interest involved; (2) The value of specific procedural safeguards to that interest; and (3) The governmental interest. Gilbert v. Homar, 520 U.S. 924, 931, 117 S. Ct. 1807 (1997); Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701 (1972). Post-deprivation remedies, including state tort remedies, can provide a means of redress sufficient to satisfy the requirements of procedural due process, especially where it is imperative that the state must take immediate action to protect an interest vital to the welfare of its citizens. Gilbert, 520 U.S. at 930; Parratt, 451 U.S. at 537; The challenged statute, itself, might include provisions adequate to satisfy due process, such as the provision found in section 732.9185, which prevents the removal of the corneas upon a known objection of the deceased's family. See, e.g., Fuller v. Marx, 724 F. 2d 717, 719 (8th Cir. 1984) (there would have been no deprivation of property had plaintiff availed herself of Arkansas statute entitling her to her husband's

organs upon written request). Thus, it is entirely possible that, after weighing the conflicting interests involved, this court could have found that section 732.9185 did infringe upon a protected property right, but the state's interest in acting quickly to secure an interest vital to the welfare of Florida's citizens, and section 732.9185's procedures protecting the next of kin's rights, combined to adequately satisfy whatever due process was constitutionally required. It was not necessary, in deciding Powell, to make a sweeping pronouncement that the next of kin's interest in the corpse of their deceased was not a protected property interest for any purpose.

The City points out that neither the Eighth nor the Fifth Circuit actually stated that they found a constitutionally protected property right in the next of kin's interest in a dead body. However, the very fact that these federal courts, which both involved section 1983 claims, went to the second part of a due process analysis (determining whether the state provided adequate due process) necessarily implies that they found a protected property right. Gilbert, 520 U.S. at 928; Parratt, 451 U.S. at 536. There simply was no need for either court to

examine whether the state provided adequate remedies absent a finding that there was a protected interest involved.

Arnaud v. Odom, 870 F.2d 304 (Fifth Circuit 1989)

("Persuaded that available state *post-deprivation* remedies exist which satisfy *constitutional procedural due process* concerns for any *deprivations of property*. . . ") [emphasis added]; Fuller, 724 F.2d at 719 (finding a quasi-property right, but no unconstitutional invasion because of adequate state remedy).

Finally, recognizing the constitutional nature of a right already afforded Florida residents, such as the "quasi-property" rights in a dead body by the next of kin, is not "creating a new fundamental property right", as the amicus brief claims. As stated in Petitioners' initial brief, these rights have already been established by Florida case law and statutes. The issue is whether, pursuant to federal or state constitutional law, these existing state rights constitute protected property. It is difficult to comprehend why the nature of the property interest would impose a greater duty or burden upon the relevant governmental bodies. Whatever interest the next of kin have in their loved one's corpse, and the government's duties and

obligations in relation to those interests, have already been established. If the ability of a person to bring a section 1983 claim for the mishandling of their next of kin's dead body would somehow make governmental agencies, or others whose job involves handling a dead body, take their duties more seriously and carry them out with more consideration, then perhaps this is not a problem, but a benefit.

The instant facts comprise a very different situation than that found in Powell. If this Court denies them redress under section 1983, Petitioners are left with no remedy at all for the egregious interference with their loved one's remains. This result seems both unjust and improper. Petitioners again urge that this Court, in light of the federal courts' decisions concerning section 1983 claims grounded on an interference with a dead body, recede from its broad language stating there is no protected property interest in a decedent's body.

#### **CONCLUSION**

Based on the foregoing arguments and authorities cited therein, Petitioners respectfully request this Honorable

Court answer the Fourth District's certified question in the negative, reverse the Fourth's decision affirming the trial court's dismissal of Petitioners' claim, and remand with instructions to the trial court to reinstate Petitioners' section 1983 claim of interference with the body of their deceased son.

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing has been furnished by U.S. Mail to Don Stephens, Esq., Olds & Stephens, 711 N. Flagler Drive, West Palm Beach, FL 33401; Mayra Rivera-Delgado, Esq., City Attorney's Office, P.O. Box 3366, West Palm Beach, FL 33402; and Leonard Berger, Esq., County Attorney's Office, 301 North Olive Ave., Suite 601, West Palm Beach, FL 33401, this \_\_\_\_\_ day of July, 1999.

Respectfully submitted,

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V. LYNN WHITFIELD, ESQ.  
Whitfield & Mosley  
224 Datura Street, #918  
P.O. Box 34  
West Palm Beach, FL 33402  
(561) 833-2213  
ATTORNEY FOR PETITIONERS  
Florida Bar No. 314021

---

DEA ABRAMSCHMITT, ESQ.  
Lakeshore Ofc. Park, #224  
2669 Forest Hill Blvd.  
West Palm Beach, FL 33406  
(561) 649-8640  
APPELLATE CO-COUNSEL FOR  
PETITIONERS  
Florida Bar No. 84506