

IN THE SUPREME COURT
of the
STATE OF FLORIDA

CASE NO. 75-375

TOWN OF LAKE CLARKE SHORES,
Appellant,

vs .

ALAN PAGE,
Appellee.

ON APPEAL FROM THE
FOURTH DISTRICT COURT OF APPEALS

INITIAL BRIEF (ON THE MERITS) OF APPELLANT,
TOWN OF LAKE CLARKE SHORES

CARMAN, BEAUCHAMP & SANG, P.A.
600 West Hillsboro Boulevard
Suite 210
Deerfield Beach, Florida 33441
(305) 426-4401

-and-
RHEA P. GROSSMAN, P.A.
2710 Douglas Road
Miami, Florida 33133-2728
(305) 448-6692

Counsel for APPELLANT.

TABLE OF CITATIONS

<u>Cases:</u>	<u>Page(s)</u>
Cauley v. City of Jacksonville, 403 So.2d 379 (Fla. 1981)	5
<u>City of Riviera Beach v. Langevin</u> , 522 So.2d 857 (Fla. 4th DCA 1987)	7, 8
<u>Gilmere v. City of Atlanta</u> , 737 F.2d 894 (11th Cir. 1984)	9
Hearn v. City of Gainesville, 688 F.2d 1328 (11th Cir. 1983)	10
Hill v. Department of Corrections, State of Florida, 513 So.2d 129 (Fla. 1987)	2,6,7,8,10
Howlett v. Rose, 537 So.2d 706 (Fla. 2nd DCA 1989)	2, 8
<u>Little v. City of North Miami</u> , 807 F.2d 962 (11th Cir. 1986)	8
Mendez v. West Flaqler Family Association, 303 So.2d 1 (Fla. 1974)	1
Monell v. Department of Social Services, 436 U.S. 658, 91 S.Ct. 2018, (1978)	9/10
Ramah Navajo School Board v. Bureau of Revenue, 104 N.M. 302, 720 P.2d 1243 (N.M.App.), cert. denied, ___ U.S. ___, 107 S.Ct. 423 (1986)	6
S.L.T. Warehouse Co. v. Webb, 304 So.2d 97 (Fla. 1974)	1
Schneider v. City of Atlanta, 628 F.2d 915 (5th Cir. 1980)	10
Williams v. City of Valdosta, 689 F.2d 964 (11th Cir. 1982)	10
<u>Yellow Freight System, Inc. v. Donnelly</u> , 4 FLW Fed S252 (Case No. 89-421, Opinion filed April 17, 1990), 943 U.S. ___ (1990)	5

TABLE OF CITATIONS
(continued)

<u>Other authorities:</u>	<u>Page(s)</u>
Section 3(b)(4), Article V, Florida Constitution.	1
Section 13, Article 10, Florida Constitution	5
42 U.S.C. §19835,11
Eleventh Amendment, United States Constitution	6,7
Florida Statutes §768.28 (2)	10
Rule 9.110, Florida Rules of Appellate Procedure	1
Rule 9.130(a)(3)(c)(i), Florida Rules of Appellate Procedure	1
Rule 9.030(a)(2)(A)(iv) Florida Rules of Appellate Procedure	1
Rule 9.120, Florida Rules of Appellate Procedure	1

INTRODUCTION

This is an appeal to review a per curiam opinion (App.1-3) of the Fourth District Court of Appeals which reversed a trial court's Order granting this Appellant a Judgment on the Pleadings (App.4).

Appellant, **TOWN OF LAKE CLARKE SHORES**, was one of three defendants in the trial court and the Appellee in the Fourth District Court of Appeals. The Appellant will be referred to as "**TOWN**" throughout this brief. Similarly, Appellee, **ALAN PAGE**, was the plaintiff in the trial court, the Appellant in the Fourth District Court of Appeals and will be referred to as "**PAGE**" in this brief. Any reference to the co-defendants, not parties to this appeal, will be by proper name for clarity.

The symbol "**App.**" will reference the appendix attached to Appellant's brief. ^{1/}

^{1/} There is no record-on-appeal as Appellee, **PAGE**, filed this appeal pursuant to Rule 9.130(a)(3)(c)(1), Florida Rules of Appellate Procedure. Nevertheless, as indicated in the Answer Brief filed by **TOWN** in the Fourth District Court of Appeals, the Order which was the subject of the initial appeal should have been reviewed as a Final Order pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The Amended Complaint (App.5-12) seeks damages, in two counts, pursuant to federal civil rights laws. Appellee, **TOWN**, was named solely in Count I. The Order on the Motion for Partial Judgment on the Pleadings is a final adjudication of all claims against **TOWN**. Compare, Mendez v. West Flagler Family Association, 303 So.2d 1 (Fla. 1974); S.L.T. Warehouse Co. v. Webb, 304 So.2d 97 (Fla. 1974). The Fourth District Court of Appeal indicated in its per curiam opinion that the cause was decided from an appeal of a non-final order (App.1-3). Appellant still maintains that the Order was final as to **TOWN**. Nonetheless, a formal record is not required as the only pertinent pleadings, to wit: the Amended Complaint, Answer and Order are included in the Appendix attached to the Initial Brief of Appellant at page 14, infra.

STATEMENT ON JURISDICTION

This Court has jurisdiction to review the per curiam decision of the Fourth District Court of Appeals (App.1-3) pursuant to Rules 9.030(a)(2)(A)(iv) and 9.120, Florida Rules of Appellate Procedure and Article V, Section 3(B)(4), Florida Constitution.

POINT ON APPEAL

I.

WHETHER A MUNICIPALITY IS ENTITLED TO THE PROTECTIONS OF COMMON LAW IMMUNITY WHEN SUED IN A FLORIDA STATE COURT FOR FEDERAL CIVIL RIGHTS VIOLATIONS?

STATEMENT OF THE CASE AND FACTS

A. Course of Proceedings:

On August 3, 1987, **PAGE** filed an Amended Complaint in the Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County, Florida (App.5-12). **TOWN** was one of three named defendants.

On May 24, 1989, the trial court entered a Partial Judgment on the Pleadings (App.12), in favor of **TOWN** on the authority of Hill v. Dept. of Corrections, 513 So.2d 129 (Fla. 1987) and Howlett v. Rose, 537 So.2d 706 (Fla. 2nd DCA 1989). **PAGE** filed an appeal

from a non-final order ^{2/} and on September 6, 1989, the District Court of Appeal, Fourth District, filed its ~~per curiam~~ opinion reversing and remanding the matter to the trial court for further proceedings against TOWN (App.1-3). Timely motions for rehearing, rehearing en banc, and Supreme Court Certification were filed and denied on December 14, 1989. The mandate from the Fourth District Court of Appeals issued on January 5, 1990.

Notice to Invoke Discretionary Jurisdiction was filed by TOWN on January 8, 1990. Jurisdictional briefs were submitted. On May 11, 1990, this Court entered its Order accepting jurisdiction.

B. The Facts:

PAGE, a probationary law enforcement officer with TOWN, filed suit in Palm Beach County against TOWN for civil rights violations pursuant to Title 42 U.S.C. Section 1983. The Amended Complaint alleged that TOWN wrongfully terminated PAGE for a publication which appeared in a local newspaper, thereby depriving PAGE of his rights pursuant to the First, Fifth and Fourteenth Amendments to the United States Constitution (App.5-12). TOWN filed its Answer to these allegations and affirmatively raised the defense that it was protected from this lawsuit by the doctrine of common law sovereign immunity (App.13-15).

The trial court concurred in TOWN'S assertion that it was afforded common law sovereign immunity protections and that Section

^{2/} See footnote 1, page 1, supra.

768.28, Florida Statutes did not act as a waiver of that immunity in a federal civil rights action filed in a state court. The trial court's decision was reduced to an Order which granted TOWN'S Motion for Judgment on the Pleadings (App.4).

In reversing the Order of the trial court, the Fourth District Court of Appeals specifically determined that (1) municipalities are not afforded the protections of common law immunity; and (2) the state court has subject matter jurisdiction of actions brought pursuant Title 42 U.S.C. Section 1983.

SUMMARY OF THE ARGUMENT

Although state and federal courts have concurrent subject matter jurisdiction to hear actions arising from violations of federal civil rights laws, a municipality, as is the State and its agencies and subdivisions, is afforded immunity from such actions by the Eleventh Amendment in federal courts and Florida's common law sovereign immunity as applied in state court.

TOWN'S common law sovereign immunity affords it protection against "constitutional" claims as alleged in the Amended Complaint in the case at bar. Only if TOWN was performing as a "person" or, if TOWN had otherwise waived its common law sovereign immunity, could TOWN be held liable for violations of federal civil rights laws when suit is brought in state court.

ARGUMENT

I.

A MUNICIPALITY IS ENTITLED TO THE PROTECTIONS OF COMMON LAW SOVEREIGN IMMUNITY WHEN SUED IN A STATE COURT FOR FEDERAL CIVIL RIGHTS VIOLATIONS.

There are two general principles of law relied upon by the Fourth District Court of Appeals with which TOWN is in agreement, i.e., a state court has subject matter jurisdiction over federal civil rights actions brought in state courts, Yellow Freight System, Inc. v. Donnelly, 4 FLW Fed s252 (Case No.89-421, Opinion filed April 17, 1990), 493 U.S. — (1990); and the State of Florida, its agencies and its subdivisions, are protected from liability for such a lawsuit by common law sovereign immunity when sued in its own state courts.

DOES A MUNICIPALITY HAVE COMMON LAW SOVEREIGN IMMUNITY?

Since the common law doctrine of sovereign immunity may only be waived by general law, as provided in §13, Article 10, Florida Constitution, Cauley v. City of Jacksonville, 403 So.2d 379 (Fla. 1981), the question posed by the opinion, sub judice (App.1-3), and for which review is sought, is whether these same protections are afforded a municipality such as TOWN.

Simply, the answer is "Yes". In Cauley, 403 So.2d at 387, this Court set out the prior history and status of sovereign immunity as applied to Florida's municipalities and stated that

since the passage of Section 768.28, Florida Statutes, all local governmental entities are to be treated equally and the past history of a separate doctrine of municipal common law immunity was no longer valid.

Thus, **TOWN** is afforded the same protections of common law sovereign immunity as is the State of Florida.

DOES COMMON LAW SOVEREIGN IMMUNITY ACT AS A DEFENSE TO VIOLATIONS OF FEDERAL CIVIL RIGHTS LAWS BROUGHT IN STATE COURTS?

In the underlying litigation in the case, sub judice, **PAGE** brought suit against **TOWN** for allegations that **PAGE** was fired from his job as a municipal employee because of a "Letter to the Editor" which was authored by **PAGE** and published in the Palm Beach Post (App.). The trial court determined, as a matter of law, that common sovereign immunity protected **TOWN** from any liability arising from the cause of action set forth in **PAGE's** Amended Complaint.

This Court has previously explained the application of common law sovereign immunity as applied to state court actions and the application of the Eleventh Amendment as applied to federal court actions. Hill v. Department of Corrections, State of Florida, 513 So.2d 129 (Fla. 1987). In Hill, 513 So.2d at 131, this Court, quoting Ramah Navajo School Board v. Bureau of Revenue, 104 N.M. 302, 720 P.2d 1243 (N.M.App.), cert. denied, ___ U.S. ___, 107 S.Ct. 423 (1986), held that:

...The Eleventh Amendment shields the operation of state governments from intrusions from the

federal judiciary while sovereign immunity protects state government affairs from interference by plaintiffs and state courts. [citation omitted] Therefore, when a Section 1983 suit is brought in federal court, the court analyzes whether the defendant is a "person" within the meaning of Section 1983 or, more meaningfully expressed, whether the Eleventh Amendment bars the suit from being brought against that defendant. Similarly, in Section 1983 actions brought in state courts, the court determines whether sovereign[ty] immunity bars the suit. [citation omitted]

The Second District Court of Appeal simplified the pronouncements of Hill v. Department of Corrections, in **its** recent opinion in Howlett v. Rose, 537 So.2d 706 (Fla. 2nd DCA 1989), and which opinion was relied upon by the trial court in its Order (App.). The Second District stated, 537 So.2d at 707:

...The eleventh amendment protects state government from the federal judiciary. Under the eleventh amendment, when a section 1983 action is brought against a state in federal court, the question is whether the defendant qualifies as a "person" under the act or is more properly an Eleventh Amendment protected state agency. The determination of that question in that context is a question of federal law. However, when a section 1983 action is brought in state court, the sole question to be decided on the basis of state law is whether the state has waived its common law sovereign immunity.

Common law immunity and immunity derived from the Eleventh Amendment are two distinct concepts. Clearly, commonly law immunity is a valid defense to be relied upon by a municipality when sued in a state court for violations of federal civil rights laws.

WHEN CAN A MUNICIPALITY BE LIABLE FOR DAMAGES ARISING OUT OF VIOLATIONS OF FEDERAL CIVIL RIGHTS LAWS BROUGHT AGAINST IT IN A STATE COURT?

The Fourth District Court of Appeals attempted in City of Riviera Beach v. Langevin, on rehearing, 522 So.2d at 866, to distinguish the circumstances when a local government is liable for damages claimed under a Section 1983 action brought in a state court, i.e. when a local government is a "person" within the meaning of Title 42 U.S.C Section 1983. In fact, City of Riviera Beach v. Langevin attempts to define the circumstances required to qualify a local municipality as a "person" within the meaning of Section 1983 to avoid the prohibitions of the sovereign immunity.

Even so, the Fourth District Court of Appeals totally ignored, in the case sub judice, the analysis made in Riviera Beach, and determined that TOWN'S reliance on Hill v. Department of Corrections, 513 So.2d 129 (Fla. 1987), cert. denied, ___ U.S. 108 S.Ct. 1024, 98 L.Ed.2d 1024 (1988), and Howlett V. Rose, 537 So.2d 706 (Fla. 2nd DCA 1989) was misplaced because "[T]hose cases do not concern municipalities" (App.3).

The distinction of when a municipality was a "person" under Section 1983, was made clearer in Little v. City of North Miami, 807 F.2d 962 (11th Cir. 1986). In Little the court explained that Section 1983 created no substantive rights, but provided for a remedy if a party was deprived of his or hers constitutionally protected interests. In providing for this remedy, it was recognized that local governing bodies and local officials in their official capacities could be sued under Section 1983 when a party established that he or she suffered a constitutional deprivation as a result of either "a policy statement, ordinance, regulation,

or decision officially adopted and promulgated by that body's officers" or a "governmental 'custom' even though such a custom has not received formal approval through the body's official decision making channels." Monell v. Department of Social Services, 436 U.S. 658, 690, 91 S.Ct. 2018, 2036 (1978).

The Monell court set certain guidelines which determine if the actions of a municipality come within the statutory term "person". 436 U.S. at 658. The Court delineated only two types of cases (1) when a party is injured due to the implementation of an official policy, or (2) when a party has been injured as a result of government "custom". Conversely, the Court stated that under no circumstances would a local government be held liable on a respondeat superior theory, i.e., a local government could not be sued under Section 1983 simply because an injury had been inflicted by its employee or agent. 436 U.S. at 691.

The Eleventh Circuit in Gilmer v. City of Atlanta, 737 F.2d 894 (11th Cir. 1984), has provided further clarification of the guidelines first enunciated in Monell. Gilmer arose out of an incident of alleged police brutality which Gilmer claimed was a result of established "custom" of the City of Atlanta. Gilmer charged that the city maintained the customs of encouraging excessive force in police-citizen encounters and improperly selecting training police officers. 737 F.2d at 902. The Gilmer court, in its discussion of the case, refined the concept of custom as applied to actions of local governments. The court stated that "city custom which may serve as the basis for liability may only

be created by city 'lawmakers or those whose edicts or acts may fairly be said to represent official policy.'" It was further noted that "[i]solated violations are not the persistent, often repeated, constant violations that constitute custom and policy." 737 F.2d 904.

Finally, and of equal importance, is the need to show that the official policy or custom of a local government comes from and is implemented by an individual who has the final authority or is the ultimate repository of municipal power. Schneider v. City of Atlanta, 628 F.2d 915 (5th Cir. 1980); accord, Williams v. City of Valdosta, 689 F.2d 964 (11th Cir. 1982); Hearn v. City of Gainesville, 688 F.2d 1328 (11th Cir. 1983).

The Fourth District Court of Appeals in the case at bar, failed to recognize that when a municipality is sued for violations of federal civil rights laws in a state court, it is entitled to rely upon its common law sovereign immunity, unless the immunity is waived, or, unless the municipality is sued as a "person" as defined by Monell, 436 U.S. 658.

DOES SECTION 768.28, FLORIDA STATUTES ACT AS A WAIVER OF COMMON LAW SOVEREIGN IMMUNITY IN CIVIL RIGHTS LITIGATION?

Florida Statutes §768.28 is a clear and unequivocal waiver of sovereign immunity. This Court, however, has determined, in responding to a certified question from the Third District Court of Appeal, that Florida Statutes §768.28 does not act as a waiver of common law sovereign immunity when liability arises under 42

U.S.C. §1983. Hill v. Department of Corrections, State of Florida,
513 So.2d 129 (Fla. 1987).

THE LAW AS APPLIED TO THE CASE AT BAR.

PAGE complains that there was a policy and custom in TOWN which condoned harassment and intimidation when employees and citizens publicly opposed the views of VALENTINE (Chief of Police of TOWN and co-defendant in the trial court). Regardless of the "magic words" employed by PAGE in his Amended Complaint (App.5-12), there only exists one incident; to wit, PAGES's termination from his employment with the TOWN because of one publication. The amended complaint ignores the requirements that the TOWN can only be held accountable for federal civil rights violations if, in fact, it was sued as a "person" as defined by federal law. Under these instances, TOWN is not responsible for its employees under the doctrine of respondeat superior. . . as recognized by the Fourth District Court in the opinion on the rehearing in Riviera Beach, 522 So.2d at 866, but not followed in the case sub judice.

Since the Amended Complaint clearly indicates that TOWN has not been sued as a "person", TOWN has a right to rely upon its common law sovereign immunity and the trial court was correct in its granting TOWN'S Motion for Judgment on the Pleadings.

CONCLUSION

The Appellant, TOWN OF LAKE **CLARKE SHORES**, for the reasons, argument and law cited herein, respectfully requests that this Court reverse the opinion of the Fourth District Court of Appeals and to direct said Court of Appeals to affirm the Judgment on the Pleadings entered by the trial court in favor of the Appellant, TOWN OF **LAKE CLARKE SHORES**.

Respectfully submitted,

CARMAN, BEAUCHAMP & SANG, P.A.
600 West Hillsboro Boulevard
Suite 210
Deerfield Beach, Florida 33441
(305) 426-4401

-and-

RHEA P. GROSSMAN, P.A.
2710 Douglas Road
Miami, Florida 33133-2728
(305) 448-6692

BY:


RHEA P. GROSSMAN
Florida Bar #092640

DATED: May 30, 1990.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing INITIAL BRIEF (ON THE MERITS) OF APPELLANT WITH ATTACHED APPENDIX was furnished this 30th day of May, 1990, by U.S. Mail, postage prepaid, to: Isidro M. Garcia, Esq., & Joseph A. Vassallo, P.A., Attorney for Appellee, 3501 South Congress Avenue, Lake Worth, Florida 33461; Bernard Heeke, Esq., Attorney for co-defendant, Post Office Box 2244, Palm Beach, Florida 33480; Fred Gelston, Esq., Attorney for co-defendant, Post Office Box 4507, West Palm Beach, Florida 33402, Michael Davis, Esq., & Davis, Hoy & Diamond, P.A., Attorneys for Amicus (Status of Amicus not yet determined), P.O. Box 3797, West Palm Beach, Florida 33407.


RHEA P. GROSSMAN