

IN THE SUPREME COURT OF THE STATE OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. SC07-34

L.T. CASE NO. 4D05-2929

KEN SWAN, et al.,

Petitioners,

vs.

ALVERNA BROWN,

Respondent.

BRIEF OF RESPONDENT ON JURISDICTION

EDNA L. CARUSO, P.A.
Suite 3A/Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
Tel: (561) 686-8010
Attorneys for Respondent

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PREFACE

This is a Petition to invoke the Court's discretionary jurisdiction to review the opinion of the Fourth District Court of Appeal, which Petitioners claim directly and expressly conflicts with opinions of this Court and other Florida intermediate appellate courts. The parties will be referred to as they stood in the lower court or by proper name. The following symbol will be used:

(A) - Petitioners'

Appendix

STATEMENT OF THE CASE AND FACTS

Petitioner Swan has improperly included several statements in his Statement of Case and Facts, which are not reflected in the Fourth District's opinion, and which are not true.¹ Those statements

¹ /The Fourth District's decision does not reflect that Brown was "combative" as Petitioner claims, or that "Swan was one of many police and fire and rescue people sued (the named and unnamed Defendants in this total well over 20 individuals - literally everyone present at the scene)."

should be disregarded since this Court has stated that "the only facts relevant to our decision to accept or reject such petitions [based on conflict] are those facts contained within the four corners of the decisions allegedly in conflict. Reaves v. State, 485 So.2d 829, 830 fn. 3 (Fla. 1986).

The proper version of the case and facts, as reflected in the Fourth District's opinion follows (A1-2):

Alverna Brown, as personal representative of her husband Oral Brown's estate, sued several defendants, including the appellees herein who are all employees of the Broward County Fire Rescue Squad, for civil rights violations in connection with Oral Brown's death. Her complaint alleged that Oral Brown suffered a seizure while driving which resulted in a car accident. He was dazed when he exited the vehicle, and the defendants and sheriff's deputies on the scene believed that he might be having a diabetic attack. He was not suspected of any criminal activity. Unable to talk, Brown began to walk away from the scene and did not respond to orders to stop walking. The complaint alleges that the appellees and others began to "violently physically handle and mistreat" Brown, aggressively bringing him to the ground and eventually hog-tying him, placing him face down on the ground. Brown had trouble breathing but was tied face down to a stretcher and was not permitted to turn over. He was

transported to the hospital but was given no medical attention en route. During transport he suffered a grand mal seizure. At the hospital he was declared dead from positional asphyxiation as a result of the hog-tie restraint. As to the appellees, the complaint alleged that at all times they were operating within the course and scope of their employment as fire rescue personnel.

The appellees filed motions to dismiss the complaint alleging that they were entitled to absolute immunity, or in the alternative, qualified immunity. After hearing, the court granted the motion and found that the appellee fire rescue squad employees were entitled to absolute immunity on the basis of section 768.28(9)(a), Florida Statutes, as interpreted by *Hill v. Department of Corrections*, 513 So.2d 129 (Fla. 1987).

The Fourth District reversed the trial court stating

(A2):

The issue presented in this case is whether county fire rescue personnel are absolutely immune from liability under section 1983 of the Civil Rights Act of 1871. We hold that these county employees do not have absolute immunity.

The Fourth District ruled that the trial court had erred in concluding that §768.28, Fla. Stat., provides Swan, a county employee, absolute immunity from liability for §1983 claims. The Fourth

District also ruled that the trial court had erred in relying upon Hill, supra, which the Fourth District ruled was "factually inapplicable," since Hill involved a State agency, whereas this lawsuit "involves members of the Broward Fire Rescue Squad who are County officers or employees" (A2). The Fourth District concluded that the County and its employees are not immune from a §1983 action, even though the State and arms of the State have such immunity, citing Howlett v. Rose, 537 So.2d 706 (Fla. 2nd DCA 1989), reversed, 496 U.S. 356 (1990) (A2-3).

In Howlett, the Second District, based on Hill, had ruled that a county school board and its officials had absolute immunity from a §1983 action. This Court denied review, but the United States Supreme Court granted certiorari and reversed. The latter Court agreed with the ruling in Hill as it applied to the defendant in that case, a State agency which had protection against §1983 claims provided to "States and arms of States" by the Eleventh Amendment's

immunity (A3). The United States Supreme Court in Howlett stated, however, that governmental defendants that were not arms of the State, such as counties, were liable for §1983 claims under the Eleventh Amendment; and that Florida's law of sovereign immunity, §768.28, could not override the dictates of federal law (A4). Therefore, the United States Supreme Court in Howlett, upon which the Fourth District relied in this case, held that §768.28 did not bar a §1983 claim against the county school board (A4-5).

The Fourth District in the present case also pointed out that this Court had relied upon the United States Supreme Court's Howlett decision in Town of Lake Clarke Shores v. Page, 569 So.2d 1256 (Fla. 1990). In Page, this Court held that sovereign immunity, as provided by §768.28, did not bar a §1983 claim against a municipality (A5). The Fourth District also noted that the holding in Howlett had likewise been applied to a county in Arthur v. Hillsborough County Board of Criminal Justice, 563 So.2d 94 (Fla. 2nd DCA

1990), vacated by 498 U.S. 801 (1990), dec. on remand, 588 So.2d 236 (Fla. 2nd DCA 1991).

In Arthur, the Second District had dismissed a §1983 claim against a county based upon its earlier Howlett decision and this Court's Hill decision. The United States Supreme Court granted certiorari, and vacated the Second District's decision, for reconsideration based upon its Howlett decision. On remand, the Second District stated (588 So.2d at 237):

The United States Supreme Court, while approving that ultimate holding in *Hill*, rejected this Court's extension of *Hill* in *Howlett*, 537 So.2d at 706, to provide immunity from §1983 suits, not only to the state and its agencies, but also to municipalities, counties, and school districts.

Finally, the Fourth District in the case *sub judice* cited other Florida, Eleventh Circuit and U.S. Supreme Court decisions, rendered since the United States Supreme Court's Howlett decision, which have held that while Florida counties are political subdivisions, they are **not** arms of the State

for purposes of Eleventh Amendment immunity (A5).

Accordingly, the Fourth District concluded (A5-6):

The law is thus well settled that counties and thus their employees may not claim sovereign immunity to a section 1983 claim. While *Hill* is still good law as to the sovereign immunity of the state and its agencies, *Howlett* establishes that no sovereign immunity is enjoyed by other governmental entities. The trial court thus erred in extending sovereign immunity to the Broward County Fire Squad officers.

Petitioner Swan seeks review of the Fourth District's opinion claiming that it directly and expressly conflicts with Hill. There is no conflict.

SUMMARY OF ARGUMENT

Respondent's argument can be summarized as follows:

1. Section 768.28, Fla. Stat., provides immunity from common law torts, not immunity from §1983 Civil Rights actions filed in State court.

2. The Eleventh Amendment provides immunity to the State, and arms of the State, from a §1983 Civil Rights claim filed in either federal or State court, but a county is not an arm of the State of Florida.

3. Therefore, the Fourth District correctly ruled that Swan, a Broward County Fire Rescue employee, was not entitled to a dismissal, and judgment in his favor, because he does not have immunity from this §1983 Civil Rights action under §768.28, Fla. Stat., or the Eleventh Amendment.

4. There is no conflict between Hill and the Fourth District's decision in this case because Hill involved a State agency, *i.e.*, an arm of the State; whereas, the Fourth District's decision involved an employee of the county, which is not an arm of the State. That difference dictated different results, not a conflict in decisions.

QUESTION PRESENTED

**THE FOURTH DISTRICT'S DECISION DOES NOT
CONFLICT WITH HILL v. DEPARTMENT OF
CORRECTIONS, 513 So.2d 129 (Fla. 1987)**

ARGUMENT

**I. No Conflict Because *Hill*
Cannot Be Extended to a County**

Petitioner claims that in Hill, this Court held that §768.28 did not waive the State of Florida's Eleventh Amendment immunity from suit under 42 U.S.C. §1983. Therefore, Petitioner argues, it stands to reason that he, as a county employee, has immunity from liability under §768.28 for a §1983 claim. Swan's argument is that the State of Florida, as defined in §768.28, includes any Florida governmental entity, and its employees. However, Swan fails to draw the required distinction discussed in Hill between sovereign immunity from liability for common law torts provided by §768.28 to all governmental entities, including counties, versus absolute immunity from §1983 claims provided by the Eleventh Amendment to States and arms of

the State, which does not include counties. For that reason, there is no conflict between Hill and the Fourth District's decision in the present case. Hill involved a State agency, the Department of Corrections, which is an arm of the State of Florida, and therefore has Eleventh Amendment immunity from §1983 actions; whereas, this case involves a county, which has no such immunity. That factual difference dictates the different results in Hill and in this case. There is no conflict.

Swan cites cases which hold that only this Court, not lower Florida courts, can overrule this Court's precedents. Respondent agrees, but here the United States Supreme Court limited the holding in Hill to a State or an arm of the State, concluding that Hill could not be extended to a municipality or county. Even Swan admits that a ruling of this Court can be reversed by the United States Supreme Court, citing State v. J.P., 907 So.2d 1101, 1109 (Fla. 2004). Therefore, it necessarily follows that the United States Supreme Court can limit one of

this Court's rulings. Thus, it is clear that the United States Supreme Court correctly held in Howlett that Hill could only be applied to the State of Florida and arms of the State. For that very reason, this Court itself subsequently ruled in Page, supra, that Hill did not apply to municipalities, and the Second District held in Arthur, supra, that Hill did not apply to counties.

Since Hill, as limited by the United States Supreme Court's Howlett decision, holds that §768.28 does not waive Eleventh Amendment immunity from §1983 claims, and since Eleventh Amendment immunity only applies to the State of Florida and arms of the State, Hill does not conflict with the Fourth District's opinion, which pertains to a county, not an arm of the State. Accordingly, the Fourth District correctly held that Petitioner Swan, a county employee, has no Eleventh Amendment immunity from §1983 claims, and that holding in no way conflicts with Hill.

II. No Conflict Because a County Is Not an Arm of the State of Florida

Petitioner claims that there is contrary authority to the Fourth District's holding that a county is not an arm of the State of Florida. However, Petitioner cites cases which involve political subdivisions of the State, not arms of the State. Petitioner appears to believe that political subdivisions equate to arms of the State, which have Eleventh Amendment immunity, but that is simply wrong. The Eleventh Amendment does not afford protection to political subdivisions, such as counties and municipalities, even though those entities exercise a "slice of state power." Hess v. Port Authority Trans-Hudson Corp., 115 S.Ct. 394, 402 (1994). There is a clear legal distinction in Florida between a political subdivision of the State, which has no Eleventh Amendment immunity, versus an arm of the State, which has Eleventh Amendment immunity. Petitioner ignores that distinction.

CONCLUSION

Based upon the foregoing,
there is no conflict between the Fourth District's
decision and Hill, and therefore this Court lacks
jurisdiction to review the Fourth District's decision.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy
of the foregoing was furnished to: counsel of record on
the attached Service List by U.S. Mail on February 23,
2007.

EDNA L. CARUSO, P.A.
Suite 3A/Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
Tel. (561) 686-8010
Attorneys for Respondent

By: _____
EDNA L. CARUSO
Florida Bar No. 126509

SERVICE LIST

Michael Winer, Esq.

Winer & Associates
Riverwalk Plaza - Suite
2000
333 N. New River Drive
East
Ft. Lauderdale, FL 33301
Co-counsel for Plaintiff

Michael R. Piper, Esq.

Johnson, Anselmo,
Murdock,
Burke & McDuff, P.A.
2455 East Sunrise Blvd.,
Ste. 1000
Ft. Lauderdale, FL 33304
Tel: 954/463-0100
Fax: 954/463-2444
*Counsel for Kenneth
Jenne*

David M. DeMaio, Esq.

Ogletree, Deakins, Nash,
Smoak & Stewart, P.C.
Brickell Bayview Centre
80 SW 8th Street, Suite
1830
Miami, FL 33130
Tel: 305/374-0506
Fax: 305/374-0456
Counsel for Hayes Bowen

Anthony J. Rodriguez, Esq.

Edward G. Labrador, Esq.
Office of the County
Attorney for Broward Co.
115 S. Andrews Avenue,
Suite 423
Ft. Lauderdale, FL 33301
Tel: 954/357-7600
Fax: 954/357-7641
Counsel for Broward County

Mark A. Emanuele, Esq.

Panza, Maurer & Maynard,
P.A.
Bank of America, Third
Floor
3600 N. Federal Highway
Ft. Lauderdale, FL 33308-
6225
Tel: 954/390-0100
Fax: 954/390-7991
*Counsel for Froling &
Loukinnen*

Chris Kleppin, Esq.

Glasser, Boreth, Ceasar &
Kleppin
8751 W. Broward Blvd.,
Suite 105
Plantation, FL 33324
Tel: 954/424-1933
Fax: 954/474-7405
*Appellate counsel for
Swan/Broward Co.*

Michael J. Drahos, Esq.

Fowler White Burnett,
P.A.

1395 Brickell Avenue,
14th Floor

Miami, FL 33131

Tel: 305/789-9259

Fax: 305/789-9201

Counsel for Swap

Shop/Florida Drive-In

CERTIFICATE OF TYPE SIZE & STYLE

Respondent hereby certifies
that the type size and style of the Brief of Respondent
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CARUSO

Bar No. 126509

EDNA L.

Florida