

NO. 05-10187-F

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

STEWART GREENBERG,
Plaintiff/appellant,

v.

JAMES ZINGALE,
FLORIDA DEPARTMENT OF REVENUE, and
FIFTEENTH JUDICIAL CIRCUIT,
Defendants/appellees.

**On Appeal from the United States District Court
for the Southern District of Florida
Case No. 04-80443-CV-KLR**

APPELLANT'S INITIAL BRIEF

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**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Greenberg v. Zingale, et al.
Case No. 05-10187-F

Appellant files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by 11th Cir. R. 26.1.

Charlie Crist Attorney General's Office (Florida)

Edward Fine Judge, Fifteenth Judicial Circuit

Elaine Greenberg Former spouse of Appellant

Stewart Greenberg Appellant/Plaintiff

Valerie J. Martin Attorney General's Office (Florida)

Valentin Rodriguez Appellate Attorney for Plaintiff

Honorable Kenneth Ryskamp United States District Judge

Ann E. Vitunac U.S. Magistrate Judge

James Zingale Defendant (Florida Department of Revenue)

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STATEMENT REGARDING ORAL ARGUMENT

Appellant, Stewart Greenberg, submits that oral argument is not necessary to properly address the constitutional issues briefed in this appeal, as such issues rest squarely on an interpretation of the U.S. Constitution, based on well-established precedent, and thus such argument may not ultimately aid the court in the decision-making process. If the Appellees request oral argument, then Appellant will consent.

STATEMENT OF JURISDICTION

The District Court had jurisdiction of this case pursuant to 28 U.S.C. § 1291, to review this appeal from the final judgment entered by the district court on December 3, 2004. (R1:31). Appellant timely filed his Notice of Appeal pursuant to the extension granted by the district court. (R1:34, 37).

STATEMENT OF THE ISSUES

- I. Whether the District Court Erred in Granting Defendants' Motion to Dismiss the Complaint With Prejudice Where It Failed to Hold an Evidentiary Hearing on Critical Issues Dispositive of the Case.
- II. Whether the District Court Erred in Granting the Motion to Dismiss With Prejudice By Not Applying the Appropriate Strict Scrutiny Analysis to Determine the Constitutionality of Florida's Permanent Alimony Statutes.

STATEMENT OF THE CASE

The Appellant, Stewart Greenberg, was the *pro se* plaintiff in the district court and will be referred to by name, or as Appellant. The Appellees, James Zingale, in his official capacity as Executive Director of the Florida Department of Revenue, the Florida Department of Revenue, and the Fifteenth Judicial Circuit of the State of Florida, will be referred to as Defendants. The record will be noted by the reference to the volume number, document number, and page number(s) of the Record on Appeal as prescribed by the rules of this court. At the time of this appeal, the Clerk of Court had not yet divided the record into volumes, so the undersigned has referred to the entire record as one volume. There was not an evidentiary hearing, so there is no transcript in the Record.

A. Course of Proceedings Below

On May 10, 2004, the Appellant filed a Verified Complaint in the United States District Court, in the Southern District of Florida, which sought a constitutional challenge to Florida's permanent alimony statutes, enumerated in Section 61.08, Florida Statutes, and sought such relief against the Appellees, whom he alleged were designated to enforce the aforementioned alimony statutes. (R1:1). Attached to the Complaint were three exhibits: 1) Chapter 61, Florida Statutes; 2) the Final Judgment of Dissolution of Marriage, and 3) Final Judgment on Remand. (R1:1:Exhibits 1-3).

The Defendants filed a Joint Motion to Dismiss the Verified Complaint, arguing that Appellant had failed to state a cause of action for a variety of reasons. (R1:13).

A Report and Recommendation was issued regarding the Motion to Dismiss, which first delineated the nature of the claims, and then recommended that the counts against Defendant Zingale be dismissed without prejudice, and that the counts against the Fifteenth Judicial Circuit be dismissed with prejudice. (R1:20). The district court entered an Order Adopting in Part the Report and Recommendation, and essentially held that it did not have subject matter jurisdiction over Plaintiff's "as applied" equal protection challenge, and reserving its ruling on Plaintiff's substantive due process and equal protection claims until an additional Report and Recommendation could be entered. (R1:23). No evidentiary hearing was held on any of the issues.

Finally, the Magistrate issued another Report and Recommendation, which recommended that all remaining issues be dismissed. (R1:24). The district court entered a final Order Adopting the Report and Recommendation, effectively granting the Joint Motion to Dismiss the Verified Complaint, and closing the case and denying pending motions as moot. (R1:31). This appeal followed. Appellant notes that this Court may certify to the Florida Supreme Court any constitutional claims relating to state law in this case, pursuant to Article V Section 3 (b) (6), Florida Constitution, and the mandate in *Mosher v Speedstar Div. Of AMCA Internat'l Inc.*, 52 F.3d 913, 916-

917 (11th Cir. 1995).

B. Statement of Facts

The material facts are clearly recited in the Verified Complaint, the Reports and Recommendations, and the Orders entered by the district court. (R1:1, 23, 24, 31). Appellant, Stewart Greenberg, is a 50 year old physician in good health who is a resident of Delray Beach Florida. (R1:1:¶ 80). The former wife, Elaine Greenberg, is a healthy 51 year-old social worker, real estate broker, and teacher, living in Boca Raton, Florida. (R1:1:¶ 81, 87). The detailed facts of their marriage and family are contained in the Verified Complaint, and the attached exhibits. (R1:1:¶ 80-87, Exhibits 1-3). In December, 1998, the parties dissolved their marriage. On April 17, 2000, a Final Order of Dissolution was entered by the Fifteenth Judicial Circuit Court of Florida granting the dissolution and applying § 61.08, Florida Statutes, against the Appellant by awarding permanent alimony from him to Elaine Greenberg. (R1:1:¶ 83-86). Appellant continues to make alimony payments subject to the Court's Amended Final Judgment, entered after a state court appeal, which interprets § 61.08, Florida Statutes, and requires Appellant to make substantial monthly alimony payments. (R1:1:Exhibit 3). On June 6, 2004, civil contempt proceedings were held in the Fifteenth Judicial Circuit regarding Appellant's alimony arrearages, and the removal of those proceedings is currently pending in the district court in an un-related case,

C. Standards of Review

The constitutional issues raised in Points I through III are legal issues ordinarily subject to *de novo* review. The standard of review of a motion to dismiss is also *de novo*. *Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1887 (11th Cir. 2004).

SUMMARY OF THE ARGUMENT

The district court properly acknowledged that there was a right of privacy attached to the imposition of permanent alimony against a divorcee, but improperly dismissed the case because: 1) it failed to hold an evidentiary hearing to determine the necessary facts of the case, and 2) failed to determine, based on that evidence, whether the Defendants could articulate a compelling state interest under the strict scrutiny standard of review to justify the constitutionality of the alimony statutes. *See, generally, Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 929 (1992). Furthermore, the district court erred in its blanket denial of the two distinct claims that the Florida alimony scheme violates the Thirteenth and Fourteenth Amendments to the United States Constitution, because it failed to analyze the effect of the alimony statutes as they were applied to Appellant, and failed to conduct a constitutional analysis of whether the alimony scheme was a form of involuntary

servitude and/or a denial of due process, given the facts of the case.

ARGUMENT AND CITATIONS OF AUTHORITY

I. The District Court Erred in Granting Defendants’ Motion to Dismiss the Complaint With Prejudice Where It Failed to Hold an Evidentiary Hearing on Critical Issues Dispositive of the Case

This Court’s standard of review for a motion to dismiss is *de novo*. *Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1887 (11th Cir. 2004). This Court is required to accept the allegations in the complaint as true and construe them in the “light most favorable to the plaintiff.” *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003). Finally, a “motion to dismiss is granted only when the movant demonstrates ‘beyond doubt that the plaintiff can prove no set of facts in support of his claim which entitle him to relief.’” *Spain*, 363 F.3d at 1187. The district failed to follow these standards when its adopted the two Reports and Recommendations issued by the magistrate. In essence, the primary issue raised by this appeal is that the district court, in making its factual assumptions, failed to accept the facts articulated in the Verified Complaint as true, and also failed to make specific findings of fact regarding whether the Defendants, as representatives of the State, could provide a compelling state interest to justify the alimony statutes and their presumptively invalid application. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S.

833, 929 (1992). Accordingly, this case should be remanded because the proper standard was not applied in determining whether the case should have been dismissed.

II. The District Court Erred in Granting the Motion to Dismiss With Prejudice By Not Applying the Appropriate Strict Scrutiny Analysis to Determine the Constitutionality of Florida's Permanent Alimony Statutes.

Our law affords constitutional protection to *personal decisions relating to marriage*, procreation, contraception, family relationships, child rearing, and education . . . [o]ur precedents ‘have respected the private realm of family life which the state cannot enter.’ These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 859 (1992)

(emphasis added). It is clear that the appropriate analysis of this issue is via strict scrutiny review. The district court found that the challenged permanent alimony sections were encompassed by the umbrella of the Fourteenth Amendment's right of privacy, which protects the zone of personal decisions relating to marriage, i.e. divorce.

The district court found support for that in *Zablocki v. Redhail*, 434 US 374, 384-385 (1978) (citing *Cleveland v Board of Education*, 414, U.S. 632, 639-640, (1974)); *Littlejohn v. Rose*, 786 F.2d 785, 786 (6th Cir. 1985); *Griswold v. Connecticut*, 381

U.S. 479, 486 (1965); and *Carey v. Population Serv. Int'l.*, 431 U.S. 678, 684-685 (1977). Moreover, the district court stated that “[t]he alimony statutes do interfere with one’s decision to exit a marriage...” acknowledging the infringement of the statute on the fundamental liberty interest and right of privacy. Yet, the district court erred, due to a lack of a proper constitutional analysis, by surmising that “... such interference does not rise to a constitutional violation.” (R1:31).

The district court, although having acknowledged the right of privacy, failed to apply the strict scrutiny standard to the statute.

The Court has held that limitations on the right of privacy are permissible only if they survive ‘strict’ constitutional scrutiny - that is, only if the governmental entity imposing the restriction can demonstrate that the limitation is both necessary and narrowly tailored to serve a compelling governmental interest.

Griswold v. Connecticut, 381 U.S. 479, 485 (1965); *Planned Parenthood v. Casey*, 505 U.S. at 929. When the strict scrutiny standard is applied to a statute infringing a liberty interest or a fundamental right the statute is presumptively unconstitutional.

It is well settled that . . . if a law ‘impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional.’ *Harris v. McRae*, 448 U.S. 297, 312 (1980) (quoting *City of Mobile v. Bolden*, 466 U.S. 55, 76 (1980))

Hence, the U.S. Supreme Court has acknowledged that “[r]equiring the State to demonstrate a compelling interest and show that it has adopted the least restrictive

means of achieving that interest is the *most demanding test known* to constitutional law.” *City of Boerne v. Flores* 521 U.S. 507, 534 (1997) (emphasis added).

The plain and simple error in this case is that the district court never required the Appellees to offer a compelling state interest to justify the alimony statutes. Instead, the district court opined, without record evidence, that “the exercise of a state’s police power must be confined to those acts which may *reasonably* be construed as expedient for...” (emphasis added). The district court was only concerned with a reasonable state interest, not a compelling one.

Furthermore, the district court erred in its blanket denial of the two distinct claims that the Florida alimony scheme violates the Thirteenth and Fourteenth Amendments to the United States Constitution, because it failed to analyze the effect of the alimony statutes as they were applied to Appellant, and failed to conduct a constitutional analysis of whether the alimony scheme was a form of involuntary servitude and/or a denial of due process, given the facts of the case. Instead, the district court dismissed these claims in summary fashion without any evidence to support the dismissal. Accordingly, this Court should carefully review the language of the district court’s final order, and determine that the appropriate dismissal standard was not applied. (R1:31). There can be no other conclusion that, at the stage of a

motion to dismiss, the district court improperly made findings without evidence, and did not follow the long standing precedent regarding the determining of privacy interests and whether the State has impermissibly interfered with such interests.

The district court also erroneously relied upon the Florida Supreme Court's holding in *Pacheco v. Pacheco*, 246 So.2d 778, 781 (Fla.1971), which determined that the "protection of the public safety, welfare, and health or morals" was a reasonable state interest to validate the permanent alimony statute. The analysis is starkly different under a federal privacy analysis.

First, the district court erred by misinterpreting a restricting phrase as an all inclusive phrase. In *Pacheco*, the Florida Supreme Court was searching for a legal framework to justify the statutory *restriction* of an award of alimony to an adulterous wife. It founded its justification for the *denial* of alimony in the exercise of the state's police power to protect the public safety, welfare, and health or morals. *Pacheco*, 246 So.2d at 781.

Second and more importantly, the judicially created sweeping exercise of the state's police power to protect the public safety, welfare, and health or morals in the context of personal decisions relating to marriage was eliminated by Floridians in 1980 when they passed Article I Section 23, Right of Privacy to the Florida Constitution:

Right of Privacy.--Every natural person has the right to be let

alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.” Article I Section 23 Florida Constitution

The passage of Florida Constitution Article I Section 23 granted Floridians a more powerful Right to Privacy than that contained in the Federal Constitution.

[The Florida privacy] amendment embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution.

North Florida Women's Health & Counseling Services, Inc. v. State, 866 So. 2d 612 (Fla. 2003). Thirdly, the reliance on *Pacheco* and the other purposes offered by the district court is misplaced because of the Florida Supreme Court's ruling in *Connor v. Southwest Florida Regional Medical Center, Inc.*, 668 So. 2d 175 (Fla. 1995). In that case, the court abrogated the doctrine of necessities finding that neither spouse was responsible for the other's third party debts. The effect of the *Connor* ruling is noted by Justice Overton in his dissent: “[t]he majority's abrogation of the doctrine of necessities appears to shift the policy of the State by, in effect, requiring each spouse to take care of himself or herself.” Hence, *Connor* in essence makes parties in a marriage economic independents, but the Florida alimony scheme, contrary to *Connor*, converts them to economic dependents. For this reason, the district court improperly relied on Florida law to determine whether a compelling state interest had been

provided by the Defendants. More fundamentally, simply relying upon state law precedent does not satisfy the requirement that the State provide a compelling state interest.

Accordingly, this Court should reverse and remand this case back to the district court to give Appellant an opportunity to amend the complaint and proceed to summary judgment so that the factual issues can be properly established for the Record.

CONCLUSION

Based on the foregoing facts and argument, it is clear that the district court imprudently granted the motion to dismiss, and should have instead given Appellant the opportunity to establish a factual record, and should have required that the Defendants provide a compelling state interest justifying the imposing of the Florida alimony statutes.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in F.R.A.P. 32(a)(7)(B). This brief contains 3,287 words, as computed by the Corel WordPerfect 2000 word processing system, and contains Times New Roman, 14 point typeface. The undersigned has also prepared to download the file to the Eleventh Circuit Court of Appeals when permission is received from the Court.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing Initial Brief was served by mail this

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