IN THE SUPREME COURT OF FLORIDA

CITY OF NORTH BAY VILLAGE
and OFFICER J. ORT,

Petitioners,

V.

BART DAVID BRAELOW,

Respondent.

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CITY OF NORTH BAY VILLAGE
and OFFICER J. ORT,

Appellants,

V.

BART DAVID BRAELOW,

Defendant.
* * * * * * * * * * * * * * * * * *

Case No. 67,373

DCA Case No. 84-201

Case No. 67,383

PETITIONERS-APPELLANTS' JURISDICTIONAL
BRIEF IN CONSOLIDATED CASES

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STATEMENT OF THE CASE AND OF THE FACTS

The district court below in an appeal taken to it by the defendants from the trial court was called upon to determine whether in an alleged police brutality case, the involved police officer could be held "personally liable for his negligent conduct occurring in the course of his duties" (See App. 3) under the version of Florida Statute 768.28 (9) which was in effect on the date of the involved incident, November 27, 1979.

The said statutory subsection in effect on that date reads as follows:

> "No officer, employee, or agent of the state or its subdivisions shall be held personally liable in tort for a final judgment which has been rendered against him for any injuries or damages suffered as a result of any act, event, or omission of action in the scope of his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property (emphasis supplied)."

In the adverse final judgment appealed to the district court below, $100,000 was awarded to the plaintiff and against both the employing municipality, City of North Bay Village, and the said police officer, J. Ort, based upon the verdict of the jury (App. 2). In its order on the defendants' post trial motions, the trial court "acknowledged" that under the said Section 768.28 (9), Florida Statutes 1979, the recovery was limited to $50,000 from the city but it held that there was no limitation with respect to recovery by the plaintiff from the police officer (App. 2).

On the appeal from this ruling, the district court below held that under Section 768.28 (5), Florida Statutes 1979, while the city could only be held liable for $50,000, "it (i.e., the city)...indemnifies the officer for that sum of money and he remains liable for the balance. (App. 4)."

On July 2, 1985, which was subsequent to the rendering of the decision in the instant case by the district court below, and subsequent to the entry of the order of the district court below denying the defendants' petition for rehearing, the District Court of Appeal of Florida, First District, rendered its decision in Rice v. Grimes, 10 F.L.W. 1621, in which that court stated, in pertinent part (on page 1622):

> "The 1979 amendment completely deleted the conflicting second sentence relating to indemnification and additionally provided that the employee would have no liability on a judgment entered against him unless the employee acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, and property. By deleting the second sentence relating to indemnification, the legislature eliminated the inconsistency which was the basis of the rulings in Talmadge II and subsequent cases. The elimination of the inconsistent indemnification provision renders the meaning of the statute and the intention of the legislature very clear, i.e., in causes of action accruing from June 6, 1979 to June 30, 1980, public employees have no personal liability on judgments entered against them unless they acted in bad faith or with malicious purpose or with a willful and wanton disregard of human rights, safety and property. Because the cause of action in this appeal accrued on October 22, 1979, the 1979 law applied (emphasis added)."

The defendants filed both a Notice to Invoke Discretionary Jurisdiction and a Notice of Appeal to this Court and these two causes were consolidated.

SUMMARY OF ARGUMENT

The Court should take jurisdiction herein because the decisions, respectively, of the district court below in the instant cause and of the first district court in Rice v. Grimes, expressly and directly conflict with reference to the personal liability vel non under Section 768.28 (9), Florida Statutes 1979, of a governmental employee, etc., for a "within the scope of employment, non-malicious, etc., tort.

The Court should take jurisdiction herein under Art. V, Sect. 3(b)(1), Fla.Const. and under the "Inherency Doctrine" because the district court effectively invalidated that portion of Section 768.28 (9), Florida Statutes 1979, which provides that there is no personal liability thereunder as to a governmental agent or employee who commits a "within the scope of employment" non-malicious type tort.

ARGUMENT

I.

THIS COURT SHOULD TAKE JURISDICTION UNDER ART. V, SECT. 3(b)3, FLA.CONST. IN THIS CAUSE BECAUSE THE DECISION OF THE DISTRICT COURT BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT, AS TO WHETHER UNDER SECT. 768.28 (9), FLORIDA STATUTES, A GOVERNMENTAL EMPLOYEE IS PERSONALLY LIABLE FOR TORTS COMMITTED WITHIN THE SCOPE OF HIS EMPLOYMENT WHICH ARE NOT SHOWN TO BE WITH MALICIOUS PURPOSE OR IN A MANNER EXHIBITING WANTON AND WILLFUL DISREGARD OF HUMAN RIGHTS, SAFETY OR PROPERTY OR IN BAD FAITH.

There can be no question but that the conflict between the two involved district court opinions is direct. In the district court decision in the instant cause, the holding was that the governmental employee was personally liable for his tort under Section 768.28 (9), Florida Statutes 1979, while in the first district court's Rice v. Grimes, supra, the holding was that under the said statutory subsection the governmental employee was not personally liable.

The only question that is really involved is whether the conflicting decisions of the two district courts are "expressly" as well as "directly" conflicting, and that question was settled by this Court in Ford Motor Co. v. Kikis, 401 So.2d 1341 (Fla.1981), in which this Court stated, in pertinent part (at p. 1342):

> "It is not necessary that a district court explicitly identify conflicting district court or supreme court decisions in its opinion in order to create an 'express' conflict under section 3(b)3."

ARGUMENT

THIS COURT SHOULD TAKE JURISDICTION HEREIN UNDER ART. V, 3(b)1, FLA.CONST. AND THROUGH THE "INHERENCY DOCTRINE" BECAUSE THE DISTRICT COURT BELOW INVALIDATED THAT PORTION OF SECT. 768.28 (9), FLORIDA STATUTES 1979, WHICH PROVIDES THAT THERE IS NO PERSONAL LIABILITY THEREUNDER FOR GOVERNMENTAL EMPLOYEES COMMITTING WITHIN THE SCOPE OF EMPLOYMENT TORTS WHICH ARE NOT SHOWN TO BE DONE IN BAD FAITH, WITH MALICIOUS PURPOSE, OR EXHIBITING WANTON AND WILLFUL DISREGARD OF HUMAN RIGHTS, SAFETY, OR PROPERTY.

Art. V, 3(b)1, Fla.Const. mandates review by this Court of district court decisions "declaring invalid" a state statute. This provision, which was added to the Florida Constitution by the 1980 amendments thereto,

In the instant cause, the district court below invalidated part but not all of the involved statutory subsection but it appears clear under the law that a "3(b)1" appeal applies to district court decisions declaring invalid a portion of a statute as well as to district court decisions declaring all of a statute invalid. Simmons v. Div. of Pari-Mutuel Wagerning, etc.,412 So.2d 357 (Fla.1982).

With reference to the question as to whether the action of the district court below in effectively invalidating the "no personal liability for governmental employees" provision of the involved statutory subsection, but without expressly declaring such subsection invalid, invokes the above-described constitutional subsection 3(b)1, the defendants would urge the applicability of the "Inherency Doctrine" enunciated by this Court in Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Auth., 111 So.2d 439 (Fla.1959).

Clearly, the intendment behind the drafting of 3(b)1 was to require this Court to take jurisdiction in appeals from district court decisions invalidating state statutes as distinguished from the discretionary jurisdiction left vesting in this Court to entertain appeals from district court decisions

declaring valid a state statute. See Art. V, Sect. 3(b)(3), Fla.Const. Accordingly, it would frustrate this obvious purpose if the taking of jurisdiction under 3(b)(1) would only be required where the district court expressly declared a statute invalid.

CONCLUSION

Fortthe foregoing reasons, the defendants pray the Court to take jurisdiction in this cause and to consider this cause and to make a determination as to its merits.

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By _____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof was mailed this 5th day of August, 1985, to LAW OFFICES OF FRIEDMAN & MILLER, Attorneys for Plaintiff BART DAVID BRAELOW, 1799 N.E. 164th Street, North Miami Beach, Fla. 33162.

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