IN THE SUPREME COURT OF FLORIDA

CASE NO'S. 67,373 & 67,383

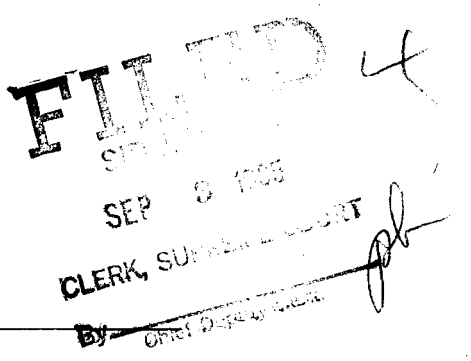
CITY OF NORTH BAY VILLAGE
and OFFICER J. ORT,

Petitioners-Appellants,

vs.

BART DAVID BRAELOW,

Respondent-Appellee.
_____/



RESPONDENT'S BRIEF ON JURISDICTION

ROBERT B. MILLER, ESQ.

Law Offices of Frideman & Miller
1799 N.E. 164 Street
North Miami Beach, Florida 33162
(305) 945-7696

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

The Third District Court of Appeal affirmed a jury verdict and final judgment rendered against a police officer for excessive force used in effectuating an arrest.

The cause of action occurred on November 27, 1979, and the District Court was called upon to construe §768.28(9), Fla.Stat. (1979), which provided:

> "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 added.)

The police officer against whom a final judgment had been rendered was covered under a police professional liability insurance policy (App.52) procured by Petitioner, City of North Bay Village, pursuant to §268.28, Fla.Stat.

Petitioners moved for a rehearing in the District Court, which was denied. Subsequent to the Third District Court of Appeal completing its judicial labor and its decision having become final, the First District Court of Appeal rendered an opinion, on July 2, 1985, in the case of Rice v. Lee, 10 FLW 1621, ____ So.2d ____ (Fla. 1st DCA 1985) (App.24), and Petitioners have requested this Court to exercise its discretionary jurisdiction based upon that decision, despite the fact that it was rendered sub-

sequent to the denial of Petitioners' Motion for Rehearing in the Third District Court of Appeal.

Additionally, notwithstanding the fact that the Third District Court of Appeal did not "declare invalid" any state statute, Petitioners have appealed the decision based upon their contention that such an appeal is nevertheless authorized pursuant to the "inherency doctrine," since the District Court "considered" a state statute.

SUMMARY OF ARGUMENT

Assuming arguendo that there is conflict between the decision below and the decision rendered in Rice v. Lee, supra., (App.24), the conflict did not exist at the time that all judicial labor had been completed in the District Court. At the time that the decision below was rendered, and at the time that Petitioners' Motion for Rehearing was denied, there was no opinion of any other District Court that expressly and directly conflicted with the decision below.

On the merits, there is no conflict between Rice v. Lee and the decision below, since, in the instant cause, there is insurance coverage for the Petitioner police officer, and to that extent the immunities provided by §768.28(9)(1979) were waived pursuant to §268.28, Fla.Stat., to the extent of the available insurance coverage.

The decision below relies upon this Court's opinion in Rupp v. Bryant, 417 So.2d 658 (Fla. 1982) (App.31). In Rupp, the court put the matter to rest by stating:

> "...(w)ith this decision, it should be clear that, for actions commenced between January 1, 1975, the effective date of the original section 768.28, chapter 73-313, Laws of Florida, and June 30, 1980, the effective date of the amendment of section 768.28(9), chapter 80-271, Laws of Florida, suit may be maintained against both the state and the employee or official for the ordinary negligence of the employee or official in carrying out ministerial, though not discretionary, duties in the course of employment for the government, provided there is a special duty to the complainant as reflected in First National Bank v. Filer, 107 Fla. 526, 145 So. 204 (1933), and in Modlin v. City of Miami Beach, 201 So.2d 70 (Fla. 1967)."

It would be a waste of this Court's precious judicial resources for it to revisit this issue one more time, particularly where the decision below only applies to actions that accrued between June 6, 1979, and June 30, 1980.

ARGUMENT

> THE OPINION OF THE DISTRICT COURT DOES NOT DIRECTLY AND EXPRESSLY CONFLICT WITH RICE V. LEE ON THE ISSUE OF WHETHER A FINAL JUDGMENT MAY BE RENDERED AGAINST A POLICE OFFICER FOR EXCESSIVE FORCE USED IN EFFECTUATING AN ARREST, NOR DOES THE DECISION BELOW DECLARE INVALID FLA.STAT. §768.28(9) (1979).

As Petitioners concede, at the time that the decision below was rendered, there was no express nor direct conflict with any decision of any other District Court. Assuming arguendo that the decision in Rice v. Lee (App.24) expressly and directly conflicts with the decision below, it does not create jurisdiction in this Court for this cause since the decision in Rice was rendered after all judicial labor had been completed in the District Court below.

This Court has held that the issue to be decided in a Petition for Conflict Review is whether there is express and direct conflict in the decision of the district court before the Court for review, not whether there is conflict in a prior written opinion which is now cited for authority. Dodi Publishing Company v. Editorial America, S.A., 385 So.2d 1369 (Fla. 1980) (App.11). Similarly, the issue is not whether there is conflict in a subsequently rendered opinion which is now cited for authority.

The decision below merely affirmed a final judgment rendered against the Petitioner, Officer Ort. As noted by the District Court below, Fla.Stat. §768.28(9) (1979) contemplates final judgments being rendered against governmental employees. Nevertheless, it has conflicting language that states that the officer is not personally liable for such judgments. This Court has previously construed what it has called a "familiar friend," §768.28(9), and has determined that the conflicting language in its prior versions meant that public employees were partially indemnified, but not immunized from suit for injuries they inflict in the course of their employment. District School Board of Lake County v. Talmadge, 381 So.2d 698 (Fla. 1980) (App. 3); State Department of Transportation v. Knowles, 402 So.2d 1155 (Fla. 1981) (App.45). In Knowles, this Court noted that the legislature changed the result reached in Talmadge by the enactment of Chapter 80-271, Laws of Florida, but held in that case that the attempt by the legislature to give public employees absolute immunity for all lawsuits then pending in trial or appellate courts constituted an unconstitutional elimination of a vested right.

In Rupp v. Bryant, 417 So.2d 658 (Fla. 1982) (App.31), this Court

began its inquiry by attempting to determine what legal rights were in existence for persons harmed by governmental employees prior to the 1980 amendments to §768.28, Fla.Stat. Rupp, at 661. This Court answered its question by stating:

> "...(w)ith this decision, it should be clear that, for actions commenced between January 1, 1975, the effective date of the original section 768.28, chapter 73-313, Laws of Florida, and June 30, 1980, the effective date of the amendment of section 768.28(9), chapter 80-271, Laws of Florida, suit may be maintained against both the state and the employee or official for the ordinary negligence of the employee or official in carrying out ministerial, though not discretionary, duties in the course of employment for the government, provided there is a special duty to the complainant as reflected in First National Bank v. Filer, 107 Fla. 526, 145 So. 204 (1933), and in Modlin v. City of Miami Beach, 201 So.2d 70 (Fla. 1967)." (Emphasis in original.)

In the decision below, the District Court utilized the criteria set forth in Rupp v. Bryant (App.31) to determine that Respondent had a special and direct interest in Petitioner police officer Ort's performance of his duty, and that the serious personal injury sustained by Respondent constituted special damages. The District Court further noted that at the time of the injuries, the officer was engaged in ministerial duties: he had already made the decision to arrest and was engaged in activities incident to carrying out that decision. The Court concluded that the jury correctly found that Officer Ort had breached a duty owed to Respondent and that while the City could only be held liable for $50,000.00 pursuant to §768.28(5), Fla.Stat. 1979, that the City, "in essence, indemnifies the officer for that sum of money and he remains liable for the balance." State Department of Transportation v. Knowles, 402 So.2d 1155, 1157 (Fla. 1981) (App.45).

By affirming the final judgment rendered against Petitioner Ort, the District Court allowed Respondent to collect his damages from the police professional liability insurance policy (App.52) provided by the Petitioner, City of North Bay Village, pursuant to Fla.Stat. §268.28. §268.28 eliminates the immunity which prevented recovery for existing common law torts committed by the government to the extent of available insurance coverage. Avallone v. Board of County Commissioners of Citrus County, 10 FLW 1031, ____ So.2d ____ (Fla. 5th DCA 1985) (App. 1).

In the decision upon which Petitioners base their claim of conflict jurisdiction, the First District Court of Appeal held as follows:

> "Upon retrial, unless the appellants allege and prove bad faith, malicious purpose, etc., defendant Lee's motion to limit judgment, if renewed, shall be granted. If after retrial a judgment must be entered against defendant Lee, the judgment should specifically provide that there is no personal liability on the part of Lee and that no levy may be made upon her property." (Emphasis added.)

Therefore, the First District Court of Appeal has concluded that a judgment may be rendered against a governmental employee, but that pursuant to its construction of §768.28(9) (1979), the personal property of the governmental employee may not be levied upon. There is nothing inconsistent with this decision and the decision below, since in the instant cause, there will be no levy upon the personal property of Petitioner Ort since there was available insurance coverage pursuant to Fla.Stat. §268.28. Quite simply, the First District reached an issue that was never reached by the court below and there is no direct and express conflict.

As stated by Justice Adkins in Gibson v. Maloney, 231 So.2d 823, 824 (Fla. 1970) (App.12), "(i)t is conflict of decisions, not conflict of

opinions or reasons that supplies jurisdiction for review by certiorari." (Emphasis in original.) Therefore, this Court should decline to take jurisdiction.

There is no language in the opinion of the District Court below which declared Fla.Stat. §768.28(9) (1979) invalid. Contrary to Petitioners' contention that the inherency doctrine applies herein, this Court made it clear in Rojas v. State, 288 So.2d 234 (Fla. 1973) (App.), that while its direct appeals jurisdiction includes cases in which the trial court inherently passes upon the constitutionality of a statute, there is no such jurisdiction where a trial court inherently passes upon a construction of a statute.

This Court has declared similar versions of the statute invalid because of the irreconcilable conflict between the language in the statutory sub-section which assumes that final judgments will be rendered against governmental employees, and the language which states that the governmental employees shall not be personally liable for those judgments. In Talmadge, Knowles, and Rupp, supra, this Court has concluded that the language provides for a means of indemnification. This was the conclusion reached by the District Court below, and there is no jurisdiction over this cause under Article V, 3(b)1, Florida Constitution (1980) (App.50).

CONCLUSION

For the foregoing reasons, Respondent submits that there is no need for this Court to revisit Fla.Stat. §768.28(9) (1979), since the narrow issue reached by the court below has also been reached by this Court in prior decisions and, at the time that the decision below was rendered, the decision upon which Petitioners base their claim for conflict jurisdiction had not even been rendered.

Respectfully submitted,

LAW OFFICES OF FRIEDMAN & MILLER
Attorneys for Respondent
1799 N.E. 164 Street
North Miami Beach, Florida 33162
(305) 945-7696

By: 
ROBERT B. MILLER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed to LEE WEISSENBORN, ESQ., Attorney for Petitioners-Appellants, 235 N.E. 26 Street, Miami, Florida 33137, this 30th day of August, 1985.


ROBERT B. MILLER