O/A 5-7-86

IN THE SUPREME COURT OF FLORIDA

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

CITY OF NORTH BAY VILLAGE and OFFICER J. ORT,

Petitioners-Appellants,

v.

BART DAVID BRAELOW,

Respondent-Appellee.

PETITIONERS' BRIEF ON MERITS

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INTRODUCTION

The parties will be referred to as they stood in the trial court.

The Record on Appeal (which was furnished by the clerk of the trial court to the district court below) will be referred to in this Brief as follows: (R-) except that the trial transcript will be referred to as (T-).

The Appendix filed with the jurisdictional brief heretofore filed in these causes is herewith adopted by reference as the Appendix to this Petitioner's Brief on Merits and reference thereto will be as follows: (A-).

STATEMENT OF THE CASE AND OF THE FACTS

The complaint alleges that on November 27, 1979, Defendant J. Ort, while acting in the scope of his employment as a police officer for the Defendant City of North Bay Village committed acts of police brutality upon the plaintiff.

At the trial, no questions as to whether Defendant Ort was acting within the scope of his employment and/or whether he acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights or safety were submitted to the jury. The only liability issue submitted to the jury was as to "excessive force" (T-427). The jury returned a verdict in the amount of $100,000 in favor of Plaintiff and against both defendants, J. Ort and North Bay Village (R-146). Thereafter the defendants filed a Motion to Conform Judgment to Requirements of Section 768.28, Florida Statutes, and a Motion for a New Trial and/or For Entry of Remittitur Damna (R- 243-246).

The former motion argued that under Section 768.28, Florida Statutes, as that law was in effect on November 27, 1979, the date of the incident giving rise to the lawsuit, the amount of the judgment to be entered against Defendant North Bay Village could not exceed $50,000, and under such statute in effect at that time a governmental employee could not be held personally liable in tort for any act on his part done in the scope of his employment for the involved governmental entity.

The trial court initially entered a final judgment in the amount of $100,00.00 in favor of the plaintiff and against both defendants (R-310). but subsequent thereto it, in effect, amended that final judgment by entering an order "acknowledging" that under the law in effect on November 27, 1979, recovery against Defendant North Bay Village would be limited to $50,000, with there being "no limitation" on the amount which could be recovered against Officer Ort (R-256).

The defendants then took their appeal to the district court below wherein it was contended, inter alia, that the trial court had erred in interpreting Section 768.28(9), Florida Statutes, as that subsection existed on November 27, 1979, as allowing recovery from Officer Ort of the $50,000 of the involved judgment that was above the $50,000 maximum amount which the plaintiff was allowed to recover against the defendant city under the then existent $50,000 cap as prescribed by Section 768.28(5).

The district court affirmed the holding of the trial court and held that the defendant city was itself liable on the first $50,000 of the judgment; that the defendant city indemnified Defendant Ort for the first $50,000; and that Defendant Ort was liable for the second $50,000 (A, 1-5).

The defendants next filed their Notice to Invoke Discretionary Jurisdiction in this Court alleging jurisdiction under Article V, Section 3(b)(3), Constitution of the State of Florida, because of an express and direct conflict between the district court's decision in the instant cause and the holding of the District Court of Appeal of Florida, First District, in Rice v. Lee, 477 So.2d 1009 (Fla. App. 1st DCA 1985) and, in addition, the defendants filed their Notice of Appeal in this Court seeking to invoke the jurisdiction of this Court under Article V, Section 3(b)(1), Constitution of the State of Florida, upon the contention that the aforedescribed decision of the district court below rendered Section 768.28(9), Florida Statutes, 1979, invalid.

This Court thereafter accepted jurisdiction in both cases, which cases are now consolidated.

This brief goes to the merits in both appellate proceedings.

SUMMARY OF THE ARGUMENT

The defendants, City of North Bay Village and former Officer J. Ort, contend that the district and trial courts below erred in holding that where the plaintiff recovered a judgment against both Defendant North Bay Village and its employee, former Officer J. Ort, in the amount of $100,000, for "excessive force" being exercised by the latter upon the plaintiff, allegedly causing personal injuries, and with no finding made by the jury or trial court that Officer Ort either acted without the scope of his employment or in bad faith, or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property, the amount of that judgment against Officer Ort above the then existent $50,000 cap as the allowable recovery against the city, to-wit: an additional $50,000, could be collected from or in behalf of Officer Ort under Section 768.28(9), Florida Statutes, as that statutory subsection existed on November 27, 1979.

ARGUMENT

WHETHER THE TRIAL COURT AND THE DISTRICT COURT BELOW ERRED IN THEIR HOLDINGS THAT UNDER SECTION 768.28(9), FLORIDA STATUTES, 1979, DEFENDANT J. ORT IS LIABLE FOR THAT AMOUNT OF THE JUDGMENT ABOVE THAT AMOUNT WHICH COULD BE COLLECTED AGAINST DEFENDANT CITY OF NORTH BAY VILLAGE UNDER THE THEN EXISTENT $50,000 CAP AS PROVIDED FOR BY SECTION 768.28(5), FLORIDA STATUTES, 1979.

Section 768.28(9), Florida Statutes, as that subsection was in effect on the date of the involved incident, to-wit: November 27, 1979, reads as follows:

> "(9) 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."

Specifically, the said subsection (9) was amended as follows by Chapter 79-139, Laws of Florida, to-wit:

> "Section 9. Subsection (9) of section 768.28, Florida Statutes, is amended to read:
>
> "768.28 Waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusions.--
>
> "(9) 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. ~~Subject to the monetary~~

> limitations-set-forth-in-subsection-(5);-the-state shall-pay-any-monetary-judgment-which-is-rendered in-a-civil-action-personally-against-an-officer, employee,-or-agent-of-the-state-which-arises-as-a result-of-any-act,-event,-or-omission-of-action within-the-scope-of-his-employment-or-function."

Standing alone, Section 768.28(9), Florida Statutes, 1979, is clear and unambiguous on its face and it is therefore only subject to enforcement and not to interpretation and/or construction. State v. Egan, 287 So.2d 1 (Fla. 1973) and 49 Fla.Jur.2d 147 (Statutes, Sect. 111, Ambiguity as prerequisite for construction).

However when the last changes made to Section 768.28(9) occurring before the date of the involved accident, to-wit: November 27, 1979, are studied, it is not only clear as to what Section 768.28(9) means, it is also evident that the Legislature intended that neither the "state" nor the employee thereof were to be liable for the amount of any judgment entered against the "employee" under Section 768.28(9), 1979.

The District Court of Appeal of Florida, First District, in Rice v. Lee, 477 So.2d 1009 (Fla. App. 1st DCA, 1985) reached these conclusions regarding Section 768.28(9), Florida Statutes, 1979, and expressed same as follows:

> "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 supplied).

In Rice, a student and his parents brought a negligence action against the Santa Rosa County School Board, the superintendent of schools, another school board employee, and an insurance company (which presumably afforded the school board, etc., liability coverage) for an incident occurring on October 22, 1979.

The district court in Rice recites that the trial court there had denied "the School Board defendants' motion to limit judgment" as to the "board employee" and that in so ruling the trial court had erroneously relied upon the holdings in Rupp v. Bryant, 417 So.2d 658 (Fla. 1982); State Department of Transportation v. Knowles, 402 So.2d 1155 (Fla. 1981); Kirklan v. State Department of Health and Rehabilitative Services, 424 So.2d 925 (Fla. 1st DCA 1983); and Stillwell v. Thigpen, 426 So.2d 1267 (Fla. 1st DCA 1983).

This reliance by the trial court in Rice was specifically found to have been erroneous by the district court there because the causes of action sued upon in Rupp and Knowles accrued prior to June 6, 1979, the effective date of the 1979 amendments to Section 768.28(9), with the version of that subsection which was applicable to both of those cases reading as follows:

> "No officer, employee, or agent of the state or its subdivisions shall be held personally liable in tort 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. Subject to the monetary limitations set forth in subsection (5), the state shall pay any monetary judgment which is rendered in a civil action personally against an officer, employee, or agent of the state which arises as a result of any act, event, or omission of action within the scope of his employment or function. (Emphasis supplied.)"

The reference to Talmadge II by the court in Rice, supra, is to District School Board of Lake County v. Talmadge, 381 So.2d 698 (Fla. 1980) and as was pointed out in Rice, the holding in Talmadge (which was that under the 1975 version of Section 768.28(9), while the employee could not be held personally liable, the governmental entity would nevertheless be held to indemnify the employee as to the amount of any judgment entered against him) is not applicable to the instant case because of the elimination of the second paragraph of the said involved statutory subsection by the 1979 Legislature, as is indicated by the stricken language in the above-quoted Chapter 79-139 Laws of Florida. It is clear that "Talmadge II" is not applicable to the instant case and it is interesting to note that although Talmadge II was a main case relied upon by the plaintiff in his brief in the district court below, it was not even mentioned by the said district court in its decision entered in the instant cause (A, 1-5); rather, the said district court placed its main reliance in Rupp v. Bryant, 417 So.2d 658. However, the holding in Rupp is just as inapplicable to the instant cause as that in Talmadge II because Rupp, too, dealt with a version of Section 768.28 which is significantly, i.e., significant insofar as this case is concerned, different from the 1979 version of the subsection. Specifically, Rupp dealt with the 1980 version of the subsection, which was enacted into law as a part of Chapter 80-271, Laws of Florida, and which reads, in pertinent part, as follows:

"768.28 Waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusions.--

"(9) No officer, employee, or agent of the state or its subdivisions shall be held personally liable in tort or named as a party defendant in any action ~~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. The exclusive remedy for injury or damages suffered as a result of any act, event or omission of any officer, employee, or agent of the state, or its subdivisions or constitutional officers, shall be by action against the governmental entity, or the head of such entity in his official capacity, or constitutional officer of which the officer, employee or agent is an employee, unless such act or omission was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. The state or its subdivisions shall not be liable in tort for the acts or omissions of an officer, employee, or agent committed while acting outside the course and scope of his employment or committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property."

The school service club hazing ceremony giving rise to the cause of action sued upon in Rupp occurred in October, 1975, but suit was not filed thereon until February 9, 1979. The plaintiffs were the parents of a student who was injured at the above-described hazing ceremony and they brought suit against the school's principal, the faculty advisor for the school service club, and the School Board of Duval County, charging negligence and "gross and reckless negligence" for the alleged failure to monitor the service club's activities.

Initially indicating that it was concerned as to whether the 1980 version of Section 768.28(9) could be applied retroactively so as to relieve state employees, etc., from personal liability for their negligent acts, this Court in Rupp reviewed at length the susceptibility of public employees, agents, etc., to personal liability under the case law, beginning with the English common law rule which "traditionally held public servants accountable for their own torts (p. 662 of Rupp decision)."

This Court then concluded that there was liability on the part of the principal and the faculty advisor under the case law in effect at the time of the happening of the involved incident in October of 1975, and it determined that applying the 1980 version of Section 768.28(9) retroactively so as to bar such liability would deny the plaintiffs due process.

While conceding that "the date of the incident controls the determination of which of the several versions of 768.28(9) applies" in its decision (A-2), the district court below in the instant cause nevertheless substantially relied upon the holding in Rupp that the common or case law there applied to affix liability on the public employee in his own personal stead, but such reliance was clearly misplaced because in the instant case -- unlike in Rupp -- the version of Section 768.28(9) in effect in 1979 altered the common law and clearly and unambiguously asserted that there would be no personal liability on the part of the governmental employee for within the scope of acts of negligence not shown to be performed in bad faith, or with malicious purpose or in a manner exhibiting willful disregard of human rights, safety, or property.

For these reasons, the defendants, City of North Bay Village and former officer J. Ort aver that the district court in Rice correctly ascertained the law while the district court below in this instant cause reached an erroneous conclusion as to the law.

CONCLUSION

Based upon the foregoing, the defendants, City of North Bay Village and former Officer J. Ort, pray the Court to enter its Order providing that Defendant Officer Ort shall not be personally liable for the Judgment entered against him or remanding this cause back to the trial court with directions for the entry of an order so providing or for such other relief as the Court deems appropriate.

Respectfully submitted,

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By _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Petitioner's Brief on Merits was mailed to the Law Offices of Friedman and Miller, 1799 N.E. 164th Street, North Miami Beach, Florida 33162 this 8th day of February, 1986.

By _____
LEE WEISSENBORN