OA 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.

REPLY BRIEF OF PETITIONERS-APPELLANTS

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The plaintiff recites in his Statement of the Case and Facts that the defendants contended at the hearing on the latter's post trial motions held on December 13, 1983 that the 1980 version of the involved Section 768.28(9), Florida Statutes, applied to the instant cause, and that in response thereto, plaintiff's counsel argued that the 1980 version of the statutory subsection could not be applied retroactively and that the 1979 version thereof did not bar the entry of a judgment against Officer Ort (PB 2). In response thereto, the defendants would simply reply to such contention by pointing out that while defendants' counsel did at the aforedescribed hearing on December 13, 1983 comment that the 1980 statutory subsection would also bar recovery by the plaintiff against Officer Ort, the plaintiff's Motion to Conform Judgment to Requirements of Section 768.28, Florida Statutes, argued solely that the version of the said statutory subsection in effect on the date of the incident giving rise to the cause, to-wit: November 27, 1979, was governing and that under such subsection Defendant Ort could not be held personally liable (R 243-244). Further, the defendants would also additionally point out that except for the comment defendants' counsel made regarding the 1980 version of the statutory subsection, the entire tenor of his argument at the December 13, 1983 hearing involved the applicability of the 1979 version of the subsection (R 288-309).

The first point expressly argued in behalf of the plaintiff, which point clearly is in support of the above-described contention of plaintiff's counsel that at the December 13, 1983 hearing, defendants' counsel was urging the applicability of the 1980 statutory subsection, etc., is that Section 768.28(9), Florida Statutes (1980), cannot be applied retroactively so as to deprive plaintiff of his alleged right to obtain a judgment against Officer Ort individually.

The defendants are not here arguing the question of the retroactivity of the 1980 version of Section 768.28(9) and either the plaintiff is intentionally attempting to put the defendants in the posture of so arguing or he -- the plaintiff -- simply refuses to accept the reality that the defendants have been urging the applicability of the 1979 version of Section 768.28(9) since their counsel filed the Motion to Conform Judgment in the trial court (R 243-244; DMB 1-10).

Further attesting to the incorrectness of the claim of the plaintiff that the defendants are urging a retroactive application of the 1980 statutory subsection is the following pertinent language of the district court below in its decision herein, to-wit:

> "In this appeal the city raises the identical three points asserted below, i.e., that section 768.28(9), Florida Statutes (1979) bars recovery against the officer, that it was reversible error to exclude from the jury instructions the three criminal statutes, and that the verdict was excessive" (Emphasis supplied)(R 493).

Since the defendants are not urging a retroactive application of the 1980 version of the involved statutory subsection, they see no need to here respond to the references made by the plaintiff to District School Board of Lake County v. Talmadge, 381 So.2d 698 (Fla. 1980) and State Department of Transportation v. Knowles, 402 So.2d 1155 (Fla. 1981) in support of his contention that Section 768.28(9), Florida Statutes (1980) should not be retroactively applied to the incident giving rise to this cause.

However, a direct response is here clearly in order to the plaintiff's argument in this proceeding that Section 768.28(9), Florida Statutes (1979), contains no restriction upon plaintiff's right to obtain a judgment against Officer Ort individually (PB 8). To support this thesis, the plaintiff argues that "as in the 1975 version of 768.28(9), Florida Statutes, the 1979 version would make no sense if interpreted so as to immunize public employees

from suit since its express language limits such employee's liability once a final judgment has been rendered against him" (PB 9).

The 1975 version of Section 768.28(9), Florida Statutes, reads as follows:

> "(9) 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 ommission of action within the scope of his employment or function" (Emphasis supplied).

The 1979 version of Section 768.28(9) reads thusly:

> "(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 and willful disregard of human rights, safety, or property."

The last legislative change made to Section 768.28(9) made prior to the 1979 incident giving rise to this cause was contained in Chapter 79-139, Laws of Florida, and reads as follows:

> "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.~~"

The differences between these two versions of the involved statutory subsection are thus readily apparent. First, under the 1979 law the governmental employee cannot be held personally liable, etc., even if a final judgment is entered against him. The 1975 law does not refer to what obtains if a judgment is entered against the employee. But more importantly, under the 1979 law, but not under the 1975 law, there is no provision requiring the "state" to pay any monetary judgment up to the limits of the state's liability for the "within the scope of employment" acts of the employee.

So for the plaintiff to argue that the same result should be reached in this dispute under either the 1975 or the 1979 versions of the subsection is ludicrous in the extreme.

Likewise the holding in Rupp v. Bryant, 417 So.2d 658 (Fla. 1982) is inapplicable here. As was pointed out in the defendants' main brief herein (at pp. 7-9 thereof), the Rupp holding was that the 1980 version of Section 768.28(9) could not be applied retroactively to a 1975 incident so as to relieve state employees from personal liability for their negligent acts. The 1980 version of Section 768.28(9) is set forth in full as it was enacted in the defendants' main brief herein (at p. 8 thereof), and it is clearly and significantly different from both the 1975 and the 1979 versions of the subsection.

Thereafter the plaintiff argues herein that since the Court in its opinions in Rupp, supra, and Knowles, supra, did not mention the 1979 version of Section 768.28(9), that must mean that " . . . the 1979 did not materially change the statute and did not affect the question of immunity as decided in Talmadge" (PB 10). Furthermore, regarding the holding in Talmadge, supra, the defendants would disagree with the plaintiff that Talmadge might stand for the proposition that there was no grant of legislative immunity to public employees in Florida until the enactment of Chapter 80-271, which contained the 1980 version of the involved statutory subsection.

Regarding the opinion in Rice v. Lee, 477 So.2d 1009 (Fla. 1st DCA 1985), the plaintiff appears in this proceeding to be contending that the Legislature must not have intended in its enactment of the 1979 act, etc., "to pass curative legislation" because at the time it did not have "the benefit of Talmadge" (PB 11). The defendants would respond to this by simply observing that the intent of the 1979 Legislature is easily ascertainable by looking at the above-quoted Section 9 of Chapter 79-139, Laws of Florida. Succinctly stated, the underlined and stricken language tell the tale as to that intent.

The reference to the defendant city having a policy of liability insurance in effect commencing November 1, 1979 (PB 12) was simply a shot in the dark in behalf of the plaintiff in this proceeding with no argument being made in connection therewith except that it allegedly logically follows that since the city purchased such insurance, it must not have thought its employees were immune (PB 12). Obviously, had the defendant city been of this opinion, etc., such would still not alter the state of the law on the involved point since the state of mind of a litigant does not determine the meaning of the law.

The last argument of the plaintiff as to why the trial court was allegedly correct in denying the defendants' Motion to Conform Judgment is that under "the two issue rule", Officer Ort waived his right to object to the verdict and judgment rendered against him since there was evidence to support a finding by the jury that Officer Ort had acted in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights (PB 13).

The so-called "two issue rule" -- as it is pointed out in the plaintiff's brief herein (at p. 14 thereof) -- was judicially enunciated as representing the law in Florida by this Court in Colonial Stores, Inc. v. Scarborough, 355 So.2d 1181 (Fla. 1977). In that case, the jury received separate instructions (presumably from the defendant store) with respect to false imprisonment and malicious prosecution counts but the petitioner (i.e., the defendant store) failed to request a special verdict as to each count and to object to the submission of a general verdict. This Court analyzed the law in this area in Colonial Stores and held that it would follow that line of (out of state) cases which hold that reversal is improper where no error is found as to one of two or more issues submitted to the jury, as the appellant necessarily would thereby be unable to demonstrate prejudice. Thus the "two issue rule" has subsequently been upheld in several subsequent cases but those cases also make clear that for the rule to apply, there must be more than two issues submitted to the jury and one of them must be able to stand because it is without error.

In Landry v. Hornstein, 462 So.2d 844 (Fla. 3d DCA 1985) the two "issues" submitted to the jury were interference with a business relationship and wrongful exclusion. In Landry the court said, in pertinent part (at p. 847):

> "Under the 'two issue rule', where two or more determinative issues are resolved by a general verdict, affirmance is appropriate when either ground is sustained."

But a closer examination of the "two issue rule" and of the instant cause reveals that that rule is not determinative here because only one issue was submitted to the jury in this case, to-wit: was there excessive force on the part of Officer Ort (T 445).

The defendants submit that the rule that does lie in this case is a much more basic one, i.e., the "burden of proof" rule. The term "burden of proof" in its strict sense denotes the duty of establishing the truth of a given proposition or issue by such quantity of evidence as the law demands in the case in which that issue arises. 23 Fla. Jur.2d 90 (Evidence and Witnesses, Sect. 63. Furthermore, it is elemental that at the trial the burden of proof rests on the plaintiff to establish by competent evidence each material fact essential to recovery. Smith's Bakery, Inc. v. Jernigan, 134 So.2d 519 (Fla. 1st DCA 1961).

In the instant case, the plaintiff here asserts:

> "The trial court granted plaintiff's motion to amend his pleadings to conform to the evidence introduced at trial. The jury could easily have found based upon the evidence, that Officer Ort did act in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights and safety. Defendants did not request an interrogatory verdict form so as to require the jury to specify whether or not it had made such a finding" (PB 13).

The defendants believe that the plaintiff has gotten the proverbial horse before the cart in this argument. It is the plaintiff who seeks to recover damages from the defendants. In order to be eligible to do so under the law existing on the date of the incident, the plaintiff, inter alia, had to estab-

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lish, i.e., prove, by the greater weight of the evidence, that Officer Ort (who concededly -- by the plaintiff -- was acting within the scope of his employment for the defendant city [R 1-3; 166-169]) was guilty of acting in bad faith or with malicious purposes or in a manner exhibiting wanton and willful disregard of human rights, safety or property. Proof of at least one of these elements is a condition precedent to the plaintiff being able to recover money damages against Officer Ort. It was therefore the plaintiff's burden under these circumstances to request the special interrogatory verdict and the defendants aver that he cannot now make his situation in this regard whole by speculating upon what the jury could have found. Furthermore, neither can the plaintiff supply the nexus by reciting from the record evidence as to "the severity of the beating" (PB 13), for it is respectfully submitted that neither is it the role of the appellate court to supply this necessary nexus and thereby invade the province of the jury, particularly since it was the contention of plaintiff's counsel at the jury charge conference "that there's an issue of negligence in this case" (T 450).

CONCLUSION

For the foregoing reasons, the defendants again urge the Court to enter its Order providing that Officer Ort is not to be held personally liable for the judgment entered against him and that defendant North Bay Village is not to be held liable for any part of the judgment as it is against Officer Ort, and/or remanding this cause to the courts below, or simply to the trial court, with directions for the entry of an order or orders so providing, or for the granting of such other relief to them as the Court deems necessary.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellants' Reply Brief was mailed this 25th day of March, 1986, to Robert B. Miller, Esquire, Law Offices of Friedman & Miller, 1799 N.E. 164th Street, North Miami Beach, Florida 33162.

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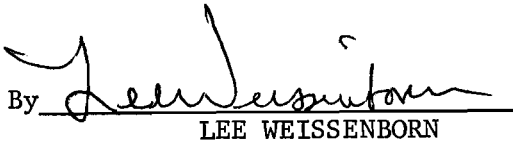
By 
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