OA 12-6-95

FILED
SID J. WHITE
OCT 30 1995
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

SUPREME COURT OF FLORIDA

CASE NO. 85,695

MORRIS H. McGHEE, II,

Petitioner,

vs.

VOLUSIA COUNTY, etc., et al.,

Respondents.

_____/

ON DISCRETIONARY REVIEW
FROM THE FLORIDA DISTRICT COURT OF APPEAL
FIFTH DISTRICT

AMICUS CURIAE BRIEF

submitted by
FLORIDA ASSOCIATION OF COUNTIES, INC.

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INTRODUCTORY STATEMENT

Pursuant to Rule 9.370, Florida Rules of Appellate Procedure, the Florida Association of Counties, Inc. (FAC), a not-for-profit corporation comprised of all 67 counties of the State of Florida, files this brief as amicus curiae in support of the County of Volusia's (the County's) position that the trial court did not err when it granted the County's motion for summary judgment, nor did the 5th DCA err in affirming the trial court's order via its 5-3 en banc decision in McGhee v. Volusia County, 654 So.2d 157 (Fla. 5th DCA 1995).

STATEMENT OF THE CASE AND OF THE FACTS

Pursuant to Rule 9.210(c), Florida Rules of Appellate Procedure, FAC provides no additional statement of the case and of the facts, and accepts the "Statement of the Case and of the Facts" as presented by Volusia County in its "Respondent's Answer Brief on the Merits" filed with this Court.

QUESTION PRESENTED

> Under section 768.28, Florida Statutes, what is the correct test a court must apply in determining whether an employer is entitled to summary judgment on the issue of its liability in tort for the acts of its employees?

SUMMARY OF ARGUMENT

Given the undisputed facts of the case on review before this Court, FAC agrees with the County of Volusia that, as a matter of law, the County was entitled to summary judgment on the question of whether the County was liable in tort for the acts of one of its employees under § 768.28(9)(a), Florida Statutes, because the 5th DCA majority applied the correct legal test to arrive at its decision. Therefore, FAC urges this Court, as a matter of public policy, (1) to allow the affirmance of summary judgment in favor of the County to stand and (2) to approve the "purpose to serve" test articulated by the majority as the basis whereby a state court is permitted to either grant or deny a motion for summary judgment.

ARGUMENT

AS A MATTER OF PUBLIC POLICY, THE TEST EMPLOYED BY THE FIFTH DISTRICT COURT OF APPEAL IN ITS EN BANC DECISION AFFIRMING SUMMARY JUDGMENT IN FAVOR OF VOLUSIA COUNTY IS THE CORRECT TEST BECAUSE IT REACHED THE CORRECT RESULT FOR THE CORRECT REASONS.

In affirming summary judgment in favor of Volusia County on the question of whether the County was liable for the tortious conduct of one of its employees under the provisions of § 768.28, Florida Statutes, the 5th DCA en banc panel split 5-3 over whether summary judgment was appropriate, given the facts of the case. The majority employed a one-step test (derived from the rule of law set forth in Columbia by the Sea, Inc. v. Petty, 157 So.2d 190 (Fla. 2d DCA 1963)) to determine if the trial court acted appropriately. The minority argued that had the 3-part test set forth in Craft v. John Sirounis and Sons, Inc., 575 So.2d 795 (Fla. 4th DCA 1991), been employed, the trial court would have been reversed.[1]

The test employed by the majority is as follows:

> The applicable test to determine the liability of the County for the act of its employee in striking the plaintiff is simply this: can it reasonably be said that the action of the employee, even though unauthorized, was activated in some way by a purpose to serve the County [emphasis added]? If the answer is no, then the County is not liable as a

[1]FAC respectfully suggests that a comparison of the Columbia and Craft tests shows that Craft is merely and expansion of Columbia, and if the first two components of Craft were to be eliminated, what remained would be the test applied by the 5th DCA's en banc majority in McGhee.

> matter of law and was entitled to the summary judgment it obtained.

McGhee v. Volusia County, 654 So.2d 157, 158 (Fla. 5th DCA 1995).

After discussing the application of the "purpose to serve" test to the undisputed facts in the case under review, the majority concluded that the trial judge was correct in finding that the facts of the case clearly showed that the alleged battering "was not activated, in whole or in part, by any purpose of Hernlen [the employee] to serve the County." McGhee at 158.

The 3-part test endorsed by the minority precludes a trial court from relieving an employer of liability for the torts committed by an employee under § 768.28, Florida Statutes, if the facts show that the employee's conduct (1) was the type of conduct which the employee was hired to perform, (2) the conduct occurred substantially within the time and space limits authorized or required by the work to be performed, and (3) the conduct was activated at least in part by a purpose to serve the employer. McGhee at 161.

After reciting the facts relied on by the trial judge and to which the minority acknowledged adherence, and after applying the Craft test to those facts, the minority concluded that summary judgment in favor of Volusia County was "inappropriate" because:

> the beating occurred in the sheriff's department offices within the courthouse while appellant was under arrest and handcuffed, and during the time in which the deputy was filling out appellant's paperwork. ... [and] in the instant case, the officer's conduct appears to have been the type of conduct which he was hired to perform, it occurred substantially within the time and space

> limits authorized or required by the work to be performed, and it appears to have been activated at least in part by a purpose to serve the employer.

McGhee at 163.

However, FAC respectfully suggests that the minority's conclusion that summary judgment in favor of Volusia County was "inappropriate" was not warranted under the requirements of Craft. The record relied on by the trial judge clearly established that Volusia County deputy sheriffs are not authorized to use force to subdue citizens who are merely "verbalizing" after they have been arrested and handcuffed. Therefore, the first requirement of Craft -- that the employee's conduct be "the type of conduct which the employee is hired to perform" -- cannot be met, thereby precluding the ultimate conclusion that the employee was acting within the scope of his employment when he allegedly beat Mr. McGhee.

Even if the first requirement of Craft had been met, nowhere in the minority opinion is there an assertion that there was any evidence which showed that the employee's conduct met the third requirement of Craft, i.e., that the deputy sheriff's conduct "was activated at least in part by a purpose to serve the employer." The minority appears to have simply disagreed with the reasonableness of the trial judge's finding and concluded that this disagreement created a factual question which had to be submitted to a jury for resolution. However, as the majority pointed out in the closing paragraph of its opinion, under Craft, the fact that the offending employee was on duty at the time of

the alleged incident and that the offended party was in the custody of his employer, "cannot, standing alone, create a jury issue as to scope of employment under the waiver of sovereign immunity statute ...." McGhee at 159.

Based on the foregoing analysis, FAC respectfully asserts that, as a matter of public policy, the en banc majority's approach used to decide whether to affirm or reverse the trial court's order granting summary judgment in favor of Volusia County was correct because sound and well-established principles of law and justice were employed to arrive at a decision which is just and fair to the parties in this particular case, and which will afford that same degree of justice and fairness to all who will come before Florida's courts in the future.

CONCLUSION

FAC respectfully submits that the facts of this case show that the test employed by the 5th DCA's en banc majority accurately identified the critical issue and provided the means for reaching a judicially sound result. Consequently, FAC asks this Court, as a matter of public policy, to approve the en banc majority's methodology and the result derived therefrom, and to approve this methodology for use in future litigation.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amicus Curiae Brief submitted on behalf of the Florida Association of Counties, Inc. was furnished to the following on October 30, 1995, via U.S. Mail:

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