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SUPREME COURT OF FLORIDA

CASE NO. 85,695

FILED
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OCT 9 1995
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

MORRIS H. McGHEE, II,

Petitioner,

vs.

VOLUSIA COUNTY, etc., et al.,

Respondents.
_____/

BRIEF OF AMICUS CURIAE, ACADEMY OF FLORIDA TRIAL LAWYERS

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STATEMENT OF THE CASE AND FACTS

This is an appeal from a summary judgment in favor of the county. The plaintiff contended that he was beaten by a sheriff's deputy while in custody. The trial court granted summary judgment for the county. A panel of the Fifth District reversed, but the court *en banc* reinstated the summary judgment.

Amicus adopts the statement of facts appearing in the *en banc* opinion below, as elaborated upon by the dissent.

Amicus believes that the following facts are most significant.

The plaintiff, Morris McGhee, was arrested by deputy Hernlen and brought to the Sheriff's office in the Volusia County courthouse. Nobody else was there. McGhee, handcuffed, was sitting at a table with the deputy while the deputy did paperwork and asked McGhee questions. During the questioning and paperwork, McGhee complained about his treatment at the hands of deputies and told the deputy not to set foot in his shop. The deputy asked if McGhee was threatening him, then lunged at McGhee and beat him.

QUESTION PRESENTED

> May a jury find a county liable in tort for the beating of a handcuffed arrestee by a deputy sheriff while the arrestee was in custody, where the deputy beat the arrestee in response to the arrestee's comments to the deputy during processing?

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SUMMARY OF THE ARGUMENT

The plaintiff was beaten by a deputy while he was in custody, in handcuffs, in the sheriff's office. The beating came while the deputy was processing the plaintiff and questioning him, and the plaintiff became verbally abusive. The last thing the plaintiff said before the beating was that the deputy was no longer welcome in his shop. But that statement was preceded by the plaintiff's lengthy verbal castigation of the sheriff's office and deputies, and what could be perceived as a challenge to their authority.

While the facts are undisputed, the inferences to be drawn from them are not. The questions presented by this case are questions that should be answered by a jury.

The questions are whether the deputy abused the power of his office, and whether he acted, at least in part, out of a desire to serve the interests of his employer as he perceived those interests.

A jury should be allowed to determine whether the deputy abused his power and acted, at least in part, out of a desire to serve what he believed to be the interests of the sheriff's office. A jury could find that were it not for McGhee's challenge to the authority of the sheriff's office, the deputy would not have beaten McGhee.

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ARGUMENT

A JURY SHOULD BE ALLOWED TO DECIDE WHETHER A COUNTY IS LIABLE IN TORT FOR THE BEATING OF A HANDCUFFED ARRESTEE BY A DEPUTY SHERIFF WHILE THE ARRESTEE WAS IN CUSTODY, WHERE THE DEPUTY BEAT THE ARRESTEE IN RESPONSE TO THE ARRESTEE'S COMMENTS TO THE DEPUTY DURING PROCESSING.

This case presents a classic jury question: whether the deputy was acting solely in his own interest, or at least in part in what he perceived to be the interest of his employer. While the plaintiff's testimony about the beating by the deputy is not in dispute, the inferences to be drawn from that testimony must be resolved by a jury.

The pertinent section of the sovereign immunity statute, §768.28(9)(a), waives sovereign immunity for most torts by government employees, unless the act was committed "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." In addition, §30.07, Florida Statutes, provides that deputies "shall have the same power as the sheriff appointing them, and for the neglect and default of whom in the execution of their office the sheriff shall be responsible."

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Whether this case is analyzed under the sovereign immunity statute, or in light of §30.07, decades of established case law require that this case be decided by a jury.

It has long been the law in Florida that a sheriff, in his official capacity, is liable for acts of his deputy that constitute an abuse of a deputy's authority.[1] Swenson v. Cahoon, 152 So. 203 (Fla. 1934). The distinction maintained by the courts for the sheriff's liability is similar to the "course and scope of employment" distinction made in the usual principal-agent situation. It is "the distinction between the abuse and the usurpation of the power imposed in a deputy sheriff." 152 So. at 204. The sheriff is liable for the deputy's abuse of power, but not for the deputy's usurpation of power.

This Court in Swenson illustrated when the sheriff may be held liable for the actions of a deputy. The Court pointed out that arresting a person without legal authority would be a *usurpation* of power, for which the sheriff would not be liable. But mistreating the arrested person while he was in custody would be an *abuse* of power, and the sheriff would be liable for it. 152 So. at 205. That is what happened here.

Similarly, under a traditional principal-agent analysis, a jury is permitted to decide that an employee was acting within the course and scope of his employment if the employee's action was activated in some way by a purpose to serve his employer.

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[1] The sheriff is considered an integral part of the county for purposes of the sovereign immunity statute. Beard v. Hambrick, 396 So.2d 708 (Fla. 1981)

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Columbia by the Sea, Inc. v. Petty, 157 So.2d 190, 194 (Fla. 2d DCA 1963).

In the present case, Mr. McGhee contends that the deputy beat him while he was handcuffed and in custody, during booking and questioning, after the deputy became angry at McGhee's complaints about his treatment at the hands of deputies. "It is not impossible to attribute the anger, assault and battery to overzealousness in the protection of what he envisioned as his employer's interest." Columbia by the Sea, 157 So.2d at 194.

It would not be any great leap for a jury to infer that the deputy believed it was in his employer's interest to subdue Mr. McGhee and to defend the sheriff's office against McGhee's verbal attacks.

A deputy sheriff is required to be a "conservator of the peace" and to "apprehend ... any person disturbing the peace, and carry him before the proper judicial officer ..." §30.15(1)(e), (g), Florida Statutes. Moreover, the deputy, like all law enforcement officers, is charged with the duty to take care of a person in the officer's custody. Kaisner v. Kolb, 543 So.2d 732, 734 (Fla. 1989); Dept. of Health & Rehab. Services v. Whaley, 574 So.2d 100 (Fla. 1991). It was during the course of carrying out those duties that the deputy attacked McGhee. The deputy had apprehended McGhee, had him in custody, and was processing him.

How an arrest is carried out is an operational act. City of Pinellas Park v. Brown, 604 So.2d 1222, 1226 (Fla. 1992). Negligently carrying out the arrest can give rise to tort

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liability. Id. Accord, e.g., Woodall v. City of Miami Beach, 599 So.2d 231 (Fla. 3d DCA 1992) (city could be liable for officer's tortious conduct in arresting and imprisoning the plaintiff and for the use of force in doing so). However, the fact that the tort was intentional does not preclude liability of the sovereign.

In City of Miami v. Simpson, 172 So.2d 435 (Fla. 1965), this Court recognized a city's liability for an intentional tort committed by a police officer in the course of his employment. As the dissent noted below, "intentional" is not the equivalent of "malicious", "willful" or "wanton". Consequently, the mere fact that an officer's tort is intentional does not take it outside the waiver of sovereign immunity in §768.28(9)(a). Thus, in Richardson v. City of Pompano Beach, 511 So.2d 1121 (Fla. 4th DCA 1987), rev. denied, 519 So.2d 986 (Fla. 1988), the Fourth District held that a city could be liable for intentional torts of an employee committed in course of arrest. See also, e.g., Sequine v. City of Miami, 627 So.2d 14, 19 n.3 (Fla. 3d DCA 1993) (recognizing that tort actions for brutality or excessive force by police officers "have long been allowed under our tort law.")

The facts in Maybin v. Thompson, 514 So.2d 1129 (Fla. 2d DCA 1987), are similar to those in the present case. In Maybin, the plaintiff and his family went to the police station to inquire about the arrest of the plaintiff's brothers. Inside, they got into an argument with an officer and were told by another officer to leave. They went to their car, where three officers followed them. One officer pulled out his nightstick and asked to see

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plaintiff's license. He then ordered the plaintiff to put his hands on the car. Someone knocked the nightstick out of the officer's hand, and all three officers then attacked the plaintiff.

The court reversed a summary judgment in favor of the city, holding that there was a genuine issue of material fact as to whether the officer was acting at least in part within the scope of his employment and in the interest of the city.

Part of the job of a law enforcement officer is to preserve the authority of his office. McGhee's challenge to the deputy was not just a personal challenge, but a challenge to the authority of his office. A jury reasonably could attribute the deputy's attack on McGhee, at least in part, to "overzealousness in the protection of what he envisioned as" the interest of his employer and the authority of the Sheriff's office.

The court below usurped the function of the jury by concluding from the undisputed facts that the deputy's sole motive could only have been to further his own interests and nothing else. By isolating the last statement made by McGhee prior to the beating -- that the deputy was no longer welcome in his shop -- the court ignored the context of the entire conversation, in which McGhee castigated the sheriff's department for its mistreatment of him.

A jury might be entitled to put aside those statements and determine that the sole motivation was the personal one. But that is not the function of the court.

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CONCLUSION

Were it not for the power of the office, the deputy could not have beaten McGhee as he sat in the sheriff's office in handcuffs. Were it not for McGhee's challenge to the power of the office, a jury could find that the deputy would not have beaten McGhee. This Court should apply the law as it has been established for decades. The summary judgment should be reversed and the case remanded for determination by a jury.

Recent events-- atypical but highly publicized -- have placed in jeopardy the confidence much of the public has reposed in law enforcement officers. That confidence can best be bolstered, not by limiting the government's responsibility for the acts of its law enforcement officers, but by holding the government accountable when its officers abuse their power.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been provided by U.S. Mail to: Tura Schnelby Broughton, Esquire, Assistant County Attorney, 123 W. Indiana Avenue, Deland, FL 32720-4613 and Marcia K. Lippincott, Esquire, 1235 North Orange Avenue, Suite 201, Orlando, FL 32804 this 2nd day of ~~September~~ October, 1995.

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