IN THE SUPREME COURT
OF THE STATE OF FLORIDA

MORRIS H. MCGHEE, II,

Petitioner,

CASE NO. 85,695

vs.

VOLUSIA COUNTY, a
Political Subdivision of
the State of Florida,

Respondent.
_____/

**DISCRETIONARY PROCEEDINGS
TO REVIEW A DECISION OF THE DISTRICT COURT
OF APPEAL OF FLORIDA, FIFTH DISTRICT**

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

In this Answer Brief, to be consistent with Plaintiff/Petitioner's Initial Brief, the Plaintiff/Petitioner will be referred to as the Plaintiff or McGhee. The Defendant/Respondent will be referred to as Defendant or County. George Tracy Hernlen, an individually named Defendant below, but not party to the instant appeal, will be referred to as Hernlen.

Any references to the Record on Appeal from the Trial Court will be designated by the letter "R" followed by the appropriate page number. Any references to the transcript of the hearing on the Motion for Summary Judgment will be designated by the letters "TR" followed by the appropriate page number. Any reference to Record on Appeal from the Fifth District Court of Appeal will be designated by the letters "R5" followed by the appropriate page number. Any references to the Appendix of the Petitioner will be designated by the letter "A" followed by the appropriate page number. Any references to the Appendix of the Respondent will be designated by the letter "RA" followed by the appropriate page number. All references to the Petitioner's Brief on Merits will be designated by the letter "PBM" followed by the appropriate page number.

STATEMENT OF THE CASE AND OF THE FACTS

Defendant, County of Volusia, agrees in part with Plaintiff's Statement of the Facts and of the Case. The Defendant has specified with particularity errors or omissions below.

A. STATEMENT OF CASE

In addition to Plaintiff's Statement of the Case, the Defendant would add the following:

The Complaint filed September 13, 1991, accused George Tracy Hernlen, individually, of becoming enraged at Plaintiff and forcefully and maliciously kicking and beating the Plaintiff while the Plaintiff was handcuffed on the floor of the district office of the Sheriff's Department and claimed that Hernlen's conduct was beyond the standard tolerated by a civilized society and was wanton, reckless and malicious. (R.p.3, paragraph 16) Plaintiff filed a three count Amended Complaint and served the same on the County of Volusia on February 2, 1993. (R.p.15)

In Count I of the Amended Complaint, the Plaintiff continued to maintain the same federally derived claim of the original complaint against Hernlen, individually. (R. p.18). In Count II Plaintiff alleged liability of the County pursuant to Florida Statutes 768.28 (1989) for the **post-arrest** civil assault and battery by Deputy Sheriff Hernlen upon the Plaintiff by beating and kicking Plaintiff while Plaintiff lay on the floor in handcuffs. (R.p.19). Count II omits allegations that Hernlen

became enraged at McGhee and does not allege maliciousness. Count III asserted a respondeat superior theory that the County had deprived Plaintiff of his Constitutional rights and adopted the identical allegations directed against Hernlen, individually. (R.p.21)

The County responded to Count II by filing both an Answer and Affirmative Defenses (February 4, 1993)(R.pp. 23-26) and an Amended Answer and Affirmative Defenses (March 26, 1993)(R. pp.30-35). The County admitted that Hernlen was employed by it as a deputy sheriff and that he was on duty when he **arrested** Plaintiff, but the County indicated it was without otherwise knowledge of the alleged beating described by Plaintiff. (R.p.32, Paragraph 10). The County affirmatively asserted that Hernlen acted in good faith and a reasonable manner **only** in the **apprehension and arrest** of McGhee. (R. p.35, Paragraph 16) The County admitted that Section 1306 of the Volusia County Home Rule Charter requires Volusia County to be named as the party defendant in actions against a county employee so long as the employee is acting within the course and scope of his employment and not within the exception to be found in Section 768.28(9)(a). The County admitted it would be liable for any negligent acts or omissions of its employees which occur in the course and scope of their employment **if** an exception articulated in Section 768.28(9)(a), Florida Statutes, is not applicable. (R. p.34, Paragraph 11)[1]

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[1]This Paragraph is to correct any inference to be drawn by the second paragraph of the Plaintiff's Statement of the Case that

On February 17, 1993, the County filed a Motion to Dismiss Count III (R. pp.27-29) based upon Plaintiff's failure to allege custom, policy, and practice of this Defendant as being the cause of Plaintiff's Constitutional deprivation. The Plaintiff voluntarily dismissed Count III against the County of Volusia. (April 8, 1993) (R. p.36)

The County filed a **Motion for Summary Judgment** as to Count II on or about June 28, 1993, (R. pp.57-83) in which the **County acknowledged that it might be a proper party in some cases involving intentional acts of sheriff's deputies but not in the instant case** (R.p.63, ¶11). The Motion was argued before the trial court on September 10, 1993. (TR) At the hearing, **Plaintiff's counsel** filed a Memorandum of Law (R. pp. 88-104) and verbally **acknowledged** that **there was no dispute with the material facts** as stated by the County's counsel and set forth in the County's Motion for Final Summary Judgment (TR. p.7, lines 24-25; RA-2). **Plaintiff's counsel argued that** the **County could not prevail because** "...an examination of the complaint...reveals **no allegations of willful and wanton behavior against the county..." and** the **determination** of **County statutory sovereign immunity** under Section 768.28(9)(a), Florida Statutes, was **always an issue for the jury** despite the absence of disputed material facts. (TR. pp.14-15; RA-2)

Ironically, at the hearing of September 10, 1995,

Defendant did not raise the sovereign immunity waiver exceptions of Section 768.28(9)(a), Florida Statutes.

Plaintiff's counsel served the County's counsel with **Plaintiff's Motion for Partial Summary Judgment** in which Plaintiff's counsel **claimed McGhee was entitled to** a partial summary judgment **finding that Hernlen was acting in the course and scope of his employment under Section 768.28(9)(a), Florida Statutes, when Hernlen attacked McGhee.** (R. pp. 84-85; RA-3). Plaintiff's Motion stated, **"As grounds** therefore [sic], the Plaintiff would show there is **no dispute as to the fact** that the alleged attack occurred while Plaintiff was in the custody and control of a uniformed paid officer of the Volusia County Sheriff's Department who was interrogating him in furtherance of official police business." (R. pp. 84-85)(RA-3)(emphasis supplied). **THERE WAS NO REFERENCE TO THE ALLEGED REASONABLE INFERENCES NOW RAISED BEFORE THIS COURT OR SUGGESTION THAT THERE WERE CONTROVERTED FACT QUESTIONS FOR A JURY TO DECIDE.** Id.

The trial judge signed the Order granting Defendant's Motion For Final Summary Judgment on October 28, 1993. (R. p.109) and entered the Order denying Plaintiff's Motion for Partial Summary Judgment on November 10, 1993. (R. p.110; RA-4). The Final Summary Judgment in favor of the County of Volusia, was rendered on December 20, 1993. (R.p.111-121; RA-1)

Plaintiff appealed to the Fifth District Court of Appeal and Plaintiff's Initial Brief framed two arguments:

> I. The trial court erred in granting Final Summary Judgment for the defendant County of Volusia on the grounds that its employee Hernlen was acting outside the scope of employment when and if he assaulted and battered the Plaintiff.

> II. The trial court erred in granting Final Summary Judgment on the alternative ground that the County employee Hernlen, if he assaulted and battered the Plaintiff, was acting in bad faith, with malicious purpose or in wanton disregard of the Plaintiff's Rights.

Both arguments were grounded on the proposition that Florida law provides that in the absence of any allegations of malice, the issue of whether the provisions of Florida Statutes 768.28(9) should apply is a jury question.

The panel originally assigned to this case reversed the trial court 2-1. Upon Rehearing en banc, the Fifth District upheld the trial court's Final Summary Judgment saying:

> The alleged battering was not activated in whole or in part, by any purpose of Hernlen to serve the County. It had nothing to do with furthering the arrest of McGhee, any investigation of facts pertaining to that arrest, completing an arrest report, booking McGhee into jail or any other County purpose. (R5, p.33; RA-5).
>
> ...
>
> The facts relied upon by the appellant -- Hernlen was on duty at the time of the incident and McGhee was in custody -- cannot, standing alone, create a jury issue as to scope of employment under the waiver of sovereign immunity statute, Section 768.28, Florida Statutes... See Craft v. Sirounis and Sons, Inc., 575 So.2d 795 (Fla. 4th DCA 1991). (R5, p.35; RS-5).

B. STATEMENT OF FACTS

The County adopts all the "facts" considered by the trial court, incorporated in the Final Summary Judgment (R.111-121; RA 1) and was affirmed by the Fifth District Court of Appeal en banc.

(R5, pp. 31-46; RA-5). From the Final Summary Judgment, the Defendant would highlight the description of the events by the Plaintiff. (R.pp.112-113; RA-1,p.2-3).

FROM DEPOSITION OF MORRIS H. "BUBBA" MCGHEE

(a) **Page 60, line 23**

> Question: Now, after Deputy Sheriff Hernlen arrested you and took you to the district office in DeLand, the office you described as underneath the courthouse, what is the next thing you remember after going into the office?
>
> Answer: Him turning this table around and him sitting--he would be sitting, like, at this end, and he told me to sit right here, and he started doing some paperwork in front of him, and I would be facing north there, and he would be facing east.
>
> Question: okay. Just a regular office?
>
> Answer: Just a table and had a telephone hanging behind him...

(b) **Page 62, Line 7**

> Answer: I believe he might have asked me some questions. I could be wrong, but I just remember him filling out some paperwork. I guess processing me or something.

(c) **Page 62, Lines 10 through 23**

> Question: Did you have conversations with him?
>
> Answer: Just that we--he would ask me stuff, and then I said something back, and then I can remember telling him, you know, all your buddies or all you all come in my dad's saw shop and to Mr. McGhee and me, you are, like, hey, buddy-buddy and stuff like that, like force and then when they come in there, they are all good buddies and all like this, but when I get pulled over, I am a piece of dirt on the road. I told him that's how it is. I said you don't need to step foot in my

saw shop. You don't need to come in the door. You are not welcome. And he said you are threatening me? And he stands up and he lunges right at me and grabbed me and said you are threatening me? And then he just went crazy on me, started kicking me.

SUMMARY OF ARGUMENT

A political subdivision of Florida may only be sued in tort if the claimant can show that the political subdivision has waived its sovereign immunity in accordance with the provisions of Section 768.28, Florida Statutes.

The Statutes exclusive remedy is a suit against the governmental entity unless the Plaintiff alleges that the government's employee was outside the course and scope of his employment or acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. Without such allegations the government's employee accused of the tort cannot even be named as a party to the suit. Nevertheless, in litigation solely against the government, if the evidence meets one or more of the exemptive criteria and raises the sovereign immunity shield, the government cannot be found liable for the tort of the employee.

Both Plaintiff, McGhee, and Defendant, County, sought Final Summary Judgment against each other. In their respective motions both parties claimed no genuine issue of material fact concerning the threshhold question of whether Deputy Hernlen was in the course and scope of his employment. In addition, the County raised the alternative exemptions to the waiver of sovereign immunity that Hernlen's conduct exhibited bad faith, malicious purpose and/or wanton and willful disregard of human rights, safety and property. In the Final Summary Judgment, the trial court found that Hernlen was not in the course and scope of his employment.

On appeal, Florida law precludes McGhee from raising genuine disputed material fact issues on the question of whether Hernlen was in the course and scope of his employment because McGhee asserted no such genuine dispute of material facts or inference in his own Motion for Partial Summary Judgment. On this basis, the decision of the Fifth District to uphold the Final Summary Judgment should be affirmed as the trial court properly applied Florida law to those facts.

Additionally, the court ruled that even if the court had found Hernlen to be within the course and scope of his employment, the evidence proved that Hernlen's actions were committed in bad faith; with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety or property. This finding is not appealed by the Plaintiff, and the Final Summary Judgment can lawfully be affirmed by this Court on this basis.

Even if Plaintiff were not estopped to argue that disputed material facts create a jury issue in this case, the verbal exchange between McGhee and Hernlen is void of any legally permissible reasonable inference that Hernlen either beat McGhee to preserve either his authority as a law enforcement officer or the authority of the Sheriff of Volusia County. To find Hernlen was reacting to preserve either authority requires the stacking of multiple inferences. One may not make an inference on an inference without each preceding inference being the exclusive inference to be drawn from the facts.

To draw the inference that Hernlen was preserving his

authority as a police officer, this Court must infer Hernlen did not know McGhee before the arrest; Hernlen's trips to the saw shop had any relationship to Hernlen's employment as a deputy sheriff by Volusia County; and that the verbal notice that Hernlen was not welcome to come to the saw shop required Hernlen to beat McGhee to be taken seriously as a law enforcement officer at the saw shop or to finish the McGhee arrest paperwork.

To draw the inference that Hernlen's physically combative reaction was motivated in part by serving the interest of Volusia County protecting the authority of the sheriff's office, this Court must infer that Hernlen's buddies were all law enforcement officers and employed by Volusia County; that visits to the McGhee Saw Shop by Hernlen's buddies had some connection to law enforcement duties as Volusia County deputies; and that verbal notice that Hernlen was not welcome to come to the saw shop required Hernlen to beat McGhee for Hernlen's buddies to be taken seriously as law enforcement officers at the saw shop; and that any of the foregoing inferences relate in any way to Hernlen's being able to finish McGhee's arrest paperwork.

None of these inferences are supported by the record.

The Fifth District Court of Appeal was correct to affirm the Final Summary Judgment and to find that Hernlen was outside the course and scope of his employment based upon the evidence before the trial court.

ARGUMENT

ISSUES PRESENTED

I. THE EN BANC DECISION OF THE FIFTH DISTRICT COURT OF APPEAL WAS PROPERLY ENTERED AFFIRMING THE FINAL SUMMARY JUDGMENT IN FAVOR OF VOLUSIA COUNTY

The en banc decision of the Fifth District Court of Appeal affirming the Final Summary Judgment in McGhee v. Volusia County, 654 So.2d 157 (Fla. 5th DCA 1995), was correct and should be affirmed. The Appellate Court reviewed the factual findings in the Final Summary Judgment and Plaintiff's stipulations. Taking these "facts" as true and viewing them in the light most favorable to the Plaintiff, the majority of the en banc Court found the dispute and the beating were purely personal and not within the course and scope of Hernlen's employment (R5 p.33-35; See also, R5 p.36; RA5, pp.33-35 and 36). The Fifth District Court correctly determined that:

> The facts relied upon by the appellant -- Hernlen was on duty at the time of the incident and McGhee was in custody -- cannot, standing alone, create a jury issue as to scope of employment under the waiver of sovereign immunity statute, Section 768.28, Florida Statutes... See Craft v. Sirounis and Sons, Inc., 575 So.2d 795 (Fla. 4th DCA 1991). To hold that a jury issue is created simply because Hernlen was on duty and McGhee in custody at the time of the incident would constitute a judicial imposition of strict liability upon the state and its subdivisions, contrary to the waiver statute itself. Id. at 35.

With that finding the en banc Court did not deem it necessary to analyze the other exceptions to government liability

set forth in Section 768.28(9)(a), Florida Statutes (1989), which were alternative findings of the trial court in the appealed Final Summary Judgment. Id.

Plaintiff sought this Court's discretionary review asserting conflict of the McGhee decision with other district court cases: Hennagan v. Department of Highway Safety, 467 So.2d 748 (Fla. 1st DCA 1985); and Maybin v. Thompson, 514 So.2d 1129 (Fla. 2d DCA 1987). Plaintiff also claimed conflict with this Court's decision in Moore v. Morris, 475 So.2d 666 (Fla. 1985).

In the Brief on the Merits, Plaintiff and the Amicus Curiae do not maintain the earlier reasoning by Plaintiff in his appeal to the Fifth District Court that in the absence of any allegations of malice, a jury question is created every time Section 768.28(9)(a), Florida Statutes, is applied to the facts of a case to decide whether a governmental entity or its employee is liable for an employee's tort.[2]

Both Merit Briefs have limited the argument to the conflict asserted between the McGhee case and Moore. Both Merit Briefs used Maybin to bolster the Moore analysis rather than to support the district conflict argument. Neither Merit Brief

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[2]Section 768.28(9)(a), Florida Statutes, provides that a government employee may not even be named in a lawsuit without one of the following allegations: the employee was outside the course and scope of his employment or the employee 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) To adopt Plaintiff's argument would deny a government (unlike other litigants) the right to seek summary judgment under the Florida Rules of Civil Procedure.

asserts that reversal of the Final Summary Judgment is necessitated by the case of Hennagan v. Department of Highway Safety and Motor Vehicles, 467 So.2d 748 (Fla. 1st DCA 1985). Neither Merit Brief even cites the case. Plaintiff's abandonment of Hennagan to establish Hernlen's being in the course and scope of his employment effectively abandons the conflict argument articulated by Judge Dauksch in his dissent (R5 pp.41-45 and RA5) and rebutted by Judge Griffin in her special concurrence.[3] (R5, p.36 and RA5). Having abandoned Hennagan, the Plaintiff offers Columbia By The Sea, Inc. v. Petty, 157 So.2d 190 (Fla. 2d DCA 1963) as support for the reasonable inference conflict argument. (PBM p.7-8).

Plaintiff claims under Moore, Maybin, and Columbia By The Sea, that the trial judge and the en banc majority failed to draw every reasonable inference in favor of McGhee. Plaintiff claims this failure resulted in an erroneous entry of Final Summary Judgment for the County because the reasonable inferences create a controverted fact issue for a jury. The reasonable inferences which Plaintiff and Amicus claim create the controverted fact issue is as follows: Hernlen's attack on McGhee can be viewed either as motivated by purely personal reasons or can be viewed as motivated to serve the interest of the County by protecting both the authority of the office of the Sheriff (PBM p.8) and Hernlen's authority as a police officer from perceived threats by Mr. McGhee.

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[3]Should Plaintiff argue otherwise and this Court concur, Defendant for judicial economy adopts its argument regarding Hennagan in its Jurisdictional Brief.

(PBM p.10). McGhee's own description of the verbal exchange between Hernlen and himself which resulted in the physical beating totally subverts this argument.

BY FILING HIS MOTION FOR PARTIAL SUMMARY JUDGMENT, PLAINTIFF HAS WAIVED ANY ARGUMENT THAT THERE ARE GENUINE ISSUES OF MATERIAL FACT BASED UPON CONTROVERTED INFERENCES RE: WHETHER HERNLEN WAS ACTING IN THE COURSE AND SCOPE OF HIS EMPLOYMENT

McGhee's Second Amended Complaint claimed the County was liable for damages to McGhee caused by Hernlen's civil assault and battery under Section 768.28, Florida Statutes (1989) and Hernlen's deprivation of McGhee's constitutional rights under 42 U.S.C. Section 1983. Plaintiff dismissed the federally derived count presumably because he could not prove that his constitutional deprivation resulted from a custom, policy, or practice of the County which is an essential element to be proved to prevail on a claim against a governmental entity under 42 U.S.C. Section 1983. Plaintiff's Amended Complaint against the County was predicated upon a theory of respondeat superior, not negligent hire, negligent retention, or negligent supervision. That being so, the sole focus of this Court should be upon the reasonable meaning of the verbal exchange between McGhee and Hernlen which resulted in the alleged physical beating. This exchange must be viewed in the context of the legislative waiver of sovereign immunity for the State of Florida and its political subdivisions.

Section 768.28, Florida Statutes (1989), is the only vehicle by which Plaintiff may sue the County in tort under Florida law. That statute's purpose is clearly a "limited waiver" of

sovereign immunity.[4] One limitation on the waiver is the provision of mutually exclusive alternative remedies for a Plaintiff who claims tortious conduct by a government employee.[5] The County of Volusia may not be held liable in tort for the acts or omissions of an employee if:

(1) Such acts or omissions are committed while the employee is acting outside the course and scope of his/her employment; or

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[4]Section 768.28(1), Florida Statutes, Waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusions. (1) In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act.

[5]Section 768.28(9)(a), Florida Statutes, in pertinent part states: No ... employee, ... shall be held personally liable in tort or named as a party defendant ... 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 ... shall be by action against the governmental entity, ... 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. See also, Rupp v. Bryant, 417 So.2d 658, 669-670 N.30 (Fla. 1982); Beard v. Hambrick, 396 So.2d 708 (Fla. 1981); Craft v. John Sirounis & Sons, Inc., 575 So.2d 795 (Fla. 4th DCA 1991); Hutchinson v. Miller, 548 So.2d 883 (Fla. 5th DCA 1989); Kirker v. Orange County, 519 So.2d 682 (Fla. 5th DCA 1988); City of North Bay Village v. Braelow, 498 So.2d 417, 418 (1986); Rice v. Lee, 477 So.2d 1009 (Fla. 1st DCA 1985); Stephenson v. School Board of Polk County, 467 So.2d 1112 (Fla. 2d DCA 1985); Willis v. Dade County School Board, 411 So.2d 245 (Fla. 3d DCA 1982).

(2) Such acts or omissions are committed while the employee is in the course and scope of his/her employment and the material facts establish:

(a) Such acts or omissions are committed in bad faith; or

(b) Such acts or omissions are committed with malicious purpose; or

(c) Such acts or omissions are committed in a manner exhibiting wanton and willful disregard of human rights, safety or property.

Plaintiff filed a Motion for Summary Judgment claiming there were undisputed facts which established Hernlen was acting in the course and scope of his employment when he allegedly attacked McGhee. The trial court denied Plaintiff's Motion but entered Final Summary Judgment for Defendant which included a finding that Hernlen was not in the course and scope of his employment. The trial judge also made the alternative finding that even if he found Hernlen in the course and scope of his employment, Hernlen acted in bad faith, or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.[6] On appeal, Plaintiff ignores the alternative finding of

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[6]The enraged actions of Hernlen over McGhee's saying Hernlen was not welcome in the saw shop and not to come there again have all the trappings of bad faith and malicious purpose. Assuming that intent is a requirement of bad faith or malicious purpose and that a court cannot determine intent based upon action, the third alternative requires an analysis of the manner exhibited by the employee not the employee's intent. Even if the trial court's findings based on bad faith or malicious purpose were erroneous, the facts as related by McGhee support a finding that Hernlen's acts were committed in a manner exhibiting wanton and willful

the trial judge but these findings are sufficient for Volusia County to be shielded by sovereign immunity under Section 768.28, Florida Statutes. Plaintiff argues that there are two reasonable inferences[7] which may be drawn from the material facts and that those inferences create a jury question. The question the Plaintiff claims must be decided by the jury under these controverted inferences is whether Hernlen was in the course and scope of his employment when Hernlen attacked McGhee.

The general rule is that concessions made during a Motion for Summary Judgment cannot be carried over by the opponent against the movant, (West Shore Restaurant Corp. v. Turk, 101 So.2d 123 (Fla. 1958)); but Plaintiff falls into the exception established by this Court in Geiser v. Permacrete, Inc., 90 So.2d 610 (Fla. 1956). The Geiser exception prevents a party who, on summary judgment has asserted no genuine issue of material fact, from taking a contrary position on appeal by asserting the existence of genuine issues of material fact on the same issue. In Geiser, this

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disregard of human rights, safety or property. Affirming the Final Summary Judgment on this third alternative is sufficient for the County to prevail. See Cohen v. Mohawk, Inc., 137 So.2d 222 (Fla. 1962). See also, Williams v. City of Minneola, 619 So.2d 983 (Fla. 5th DCA 1993)(construing willful and wanton conduct under section 768.28(9)(a) as being the same reckless conduct in reliance upon Bryant v. School Board of Duval County, 399 So.2d 417, 423 (Fla. 1st DCA 1981), affirmed in part, reversed in part on other grounds, Rupp v. Bryant, 417 So.2d 658 (Fla. 1982).

[7]"An inference is a deduction of fact that the fact finder in his discretion may logically draw from another fact or group of facts that are found to exist or are otherwise established in the action." Law Revision Council Note - 1976 to Section 90.301, Florida Statutes (1989).

Court affirmed the summary judgments in which the appellees had obtained determination of the validity and priority of their liens based on allegations of no genuine issues of material facts. Id. at 613. The same appellees then claimed the trial court should not have determined the validity of the appellant's note and mortgage because there were controverted questions of fact. Id. This Honorable Court found the appellees' argument to be without merit. Id. See also, Scavella v. School Board of Dade County, 363 So.2d 1095, 1099 (Fla. 1978); Wilmo On the Bluffs, Inc. v. CSX Transportation, 559 So.2d 294 (Fla. 1st DCA 1990); Murvel v. Jupiter Corporation, 274 So.2d 550, 551 (Fla. 3d DCA 1978); Board of Public Instruction of Dade County v. Fred Howland, Inc., 243 So.2d 221 (Fla.3d DCA 1970); Wilson v. Milligan, 147 So.2d 618 (Fla. 2d DCA 1962).

Since Plaintiff's Motion for Partial Summary Judgment claimed no dispute of material fact regarding the issue of whether Hernlen was in the course and scope of his employment and the Defendant asserted no dispute of material fact on that same question, the court needed only to rule as a matter of law on the material facts. Both sides agree that Hernlen was on duty in uniform when Plaintiff says the attack occurred. The trial court ruled that Hernlen was not in the course and scope of his employment. Plaintiff's position that there are controverted facts on the issue of whether Hernlen was in the course and scope of his employment is contrary to the law established by Geiser and its progeny. Plaintiff should not prevail on this argument and the

decision of the Fifth District Court of Appeal to uphold the Final Summary Judgment should be affirmed.

ASSUMING ARGUENDO THAT PLAINTIFF DID NOT MOVE FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF WHETHER HERNLEN WAS IN THE COURSE AND SCOPE OF HIS EMPLOYMENT, THERE ARE NO CONFLICTING REASONABLE INFERENCES WHICH CREATE A GENUINE ISSUE OF MATERIAL FACT REQUIRING SUBMISSION TO A JURY ON THAT ISSUE

According to Plaintiff's testimony, the following occurred between the two men with no one else present. (R.113-116) McGhee was handcuffed and sitting at a table while Hernlen completed the arrest report and prepared to arrange for McGhee to be transported to jail. Id. at 114. McGhee complained to Hernlen that when he and/or his buddies came to McGhee's father's saw shop they were all "buddy buddy" with McGhee and his father, but in law enforcement situations Hernlen treated McGhee like dirt. Id. There is no identification in this record of Hernlen's buddies by name, profession, or employer. Id.

Plaintiff said, "**You** don't need to set a foot in my saw shop. **You** don't need to come in the door. **You** are not welcome." Id. (emphasis added) After these statements by McGhee, Hernlen turned away from the paperwork and said, "you are threatening **me**? (emphasis added) Hernlen stood up and he lunged right at McGhee and grabbed him saying, "you are threatening **me**?" (emphasis added) Then Hernlen "just went crazy" and started kicking McGhee, (Id.) who started crying, begging [Hernlen] to quit. Id.at 115. Hernlen said, "What are you? A big pussy? That's all you are." Id.

Hernlen "just kept on and kept on" kicking McGhee. Id.

Hernlen lunged at McGhee and grabbed McGhee by his throat. Id. McGhee hit the floor unable to cover his back because he was handcuffed. Id. Wearing boots, Hernlen kicked McGhee as hard as he could. McGhee lay on the floor; he couldn't get back up. Id. Hernlen kicked McGhee all in his back, up to the back of his head. Id. Hernlen landed blows to the back of McGhee's head, behind McGhee's ears and to McGhee's lower back and ribs. Id. During this time, Hernlen continued to scream at McGhee calling him a "pussy." Id. at 116. Finally, Hernlen sat McGhee against the wall while Hernlen made a telephone call. Id. After the phone call Hernlen helped McGhee to his feet. Id.

On these facts the en banc majority of the Fifth District Court of Appeal found there were no conflicting material facts and sustained the Final Summary Judgment by the trial court on the finding that Hernlen was outside the course and scope of his employment. (R5, pp. 31-35; RA-5). Judge Cobb opined for the majority that:

> The applicable test to determine liability of the County for the action of the employee 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? Id. at p.33; Id.

The en banc Court answered this question in the negative stating:

> The alleged battering was not activated in whole or in part, by any purpose of Hernlen to serve the County. It had nothing to do with furthering the arrest of McGhee, any investigation of facts pertaining to that arrest, completing an arrest report, booking McGhee into jail or any other County purpose. Id.

The en banc majority relied on two cases Columbia By the Sea, Inc. v. Petty, 157 So.2d 190 (Fla. 2d DCA 1963); and Craft v. John Sirounis and Sons, Inc., 575 So.2d 795 (Fla. 4th DCA 1991). Id. pp. 33-35; Id.

Judge Cobb focused on the underlying issue of the case, whether governmental entities should be precluded from using the Summary Judgment procedure to determine entitlement to sovereign immunity under Section 768.28(9)(a), Florida Statutes. Citing, with approval, Craft v. John Sirounis and Sons, Inc., 575 So.2d 795 (Fla. 4th DCA 1991), the Court answered the question affirmatively, stating: "The facts relied upon by Appellant...Hernlen was on duty at the time of the incident and McGhee was in custody-- cannot, standing alone, create a jury issue as to scope of employment under the waiver of sovereign immunity statutes, Section 768.28, Florida Statutes." (R5, p.35; RA5)

In Craft, the Fourth District Court of Appeals upheld summary judgment entered in favor of the City of Deerfield Beach and the City of Ft. Lauderdale on the issue that a police officer was not in the course and scope of his employment under Section 768.28(9)(a)(1989), Florida Statutes. Id. This version of Section 768.28(9)(a) Florida Statutes is the same as the statute applicable in the instant case.

Plaintiff Craft was drinking in a Pompano Beach bar and became involved in a bar room brawl with four off duty police officers. Craft at 796. Craft filed an affidavit that one of the officers used his authority as a police officer to keep the bar

security officer from interfering in the beating. The Craft Court also relied upon the officers affidavits which said they were on duty 24 hours a day. Id. The cities relied on affidavits from their respective police chiefs that the officers were not on duty or acting for their respective cities at the time of the incident. Id.

The Fourth District found that the trial court had properly determined that the conduct of the officers was outside the scope of their employment under a three pronged test. For conduct to be within course and scope of employment, the test requires that the conduct:

(1) be the type of conduct the employee is hired to perform;

(2) occur substantially within the time and space limits authorized or required by the work to be performed; **and**

(3) be activated at least in part by a purpose to serve the employer. Id.

Under the analysis of the Craft court, McGhee's testimony establishes only the second prong; i.e. Hernlen was on duty as a sheriff's deputy during the time the incident occurred.[8] The material facts or reasonable inference therefrom of this case do not fulfill the requirements of the first and third prongs of the

[8]This is the sole criteria asserted by Plaintiff to the trial court and the Fifth District.

Craft test.

In the verbal exchange between the two men, it is clear from McGhee's testimony that Hernlen reacted personally[9] to McGhee's declaration that "**You** don't need to set foot in my saw shop. **You** don't need to come in the door. **You** are not welcome." Hernlen's response focused on himself alone as twice he questioned, "you are threatening **me**?" Then Hernlen "just went crazy" and beat McGhee. There is no reasonable inference on these facts that Hernlen was protecting or preserving the office of the Sheriff or his authority as a law enforcement officer.

Captain Leonard Davis who is the head of the law enforcement services division testified that there is a distinction between force used in an arrest and force used after the arrest has

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[9]At Page 3 of Plaintiff's Jurisdictional Brief, even Plaintiff argued that "Mr. McGhee made personal comments to Deputy Hernlen" which Plaintiff suggests Hernlen "perceived" as a challenge to his authority as a police officer." (emphasis added) Plaintiff now contends in the Merits Brief there is no record evidence to support that Hernlen and McGhee had met before the date of this incident when McGhee was arrested. (PBM p.8). At page 8, Plaintiff recites an expurgated version of McGhee's testimony. "...all your buddies or all you all come in my dad's saw shop and ... you are, like, ... they are all good buddies and all like this, but when I get pulled over, I am a piece of dirt on the road. I told him that's how it is. I said you don't need to step foot in my saw shop. You don't need to come in the door. You are not welcome..." Although this version has a different connotation than the original, Plaintiff retains the original words "all your buddies or all you all come in my dad's saw shop. In this context "all you all" must include Hernlen. Taking this language in the context of the unedited version reveals, "all your buddies or all you all come in my dad's saw shop and to Mr. McGhee and me you are, like hey, buddy-buddy and stuff like that." Plaintiff's version of this same area of the text can be read to say, "all your buddies or all you all come in my dad's saw shop and you (Hernlen) are like they (your buddies) are, all good buddies and all like this..."

been effected. Captain Davis said, "If he is just verbalizing, then normally there isn't any force used if he is already arrested and handcuffed.... If somebody is trying to arrest him and he is verbalizing it would be proper to use force." (R. Court Reporter, p.9, lines 18-20).

The first prong of the Craft test provides that the employee conduct must be the type of conduct the employee is hired to perform. While deputies are hired with the expectation that writing arrest reports is as a customary duty of their employment, there is no evidence that the County included in that customary duty the beating of a noncombative but verbalizing handcuffed prisoner. Surely there is no reasonable inference that the County hired a deputy for a job in which the deputy's conduct is expected to include beating a prisoner simply because the prisoner tells the deputy not to come into the prisoner's business at some nebulous time in the future.

The third prong of the Craft test requires the conduct to be activated at least in part by a purpose to serve the employer. McGhee was under arrest, handcuffed, and seated in the district office in the DeLand Courthouse. McGhee had answered questions posed by Hernlen without incident. Hernlen was completing the arrest paperwork. At that time McGhee complained about the fact that Hernlen was not being "buddy buddy" in this situation like Hernlen was in the McGhee Saw Shop and told Hernlen not come into the McGhee Saw Shop in the future. Denial of entry to the saw shop in the future posed no threat to Hernlen's carrying out his

duty as a deputy to complete the documents associated with McGhee's arrest. Hernlen turned from the paperwork that he could and should have finished to beat McGhee. Without a doubt, under Plaintiff's facts, the deputy turned away from the business of Volusia County and engaged in a personal physical attack upon McGhee and this conduct gives rise to the County's sovereign immunity.

Columbia By the Sea, Inc. v. Petty, the other case cited by the en banc majority to uphold the Final Summary Judgment is advanced by Plaintiff in support of reversing the en banc decision. Plaintiff claims factual similarity with the case at bar establishes a reasonable inference that Hernlen was in the course and scope of his employment. In the Columbia By the Sea case Menendez was employed as a maîtred' by Columbia when Menendez struck Petty, a Columbia restaurant patron. Petty sued Columbia claiming that Menendez was trying to collect the restaurant's bill when Petty was struck and that Menendez was in the course and scope of his employment with Columbia. Columbia appealed the jury verdict finding Menendez within the course and scope of his employment and rendering Columbia liable for damages awarded the injured Petty. Columbia claimed error by the trial court in refusing to direct a verdict for it on the issue of course and scope.

The Second District reviewed the evidence presented to the jury before the Motion for Directed Verdict. Columbia argued that Menendez was outside the course and scope of his employment the moment Menendez gave the Columbia bill to the motel clerk to be added to the motel bill. The battery of Petty which followed was

separate and distinct from Menendez' employment with Columbia and was personal. Petty responded that Menendez was attempting to force Petty to pay the restaurant's bill and had threatened violence before following Petty to the motel adjoining the restaurant.

The Second District found the heated argument arose at the employer's business over payment of the employer's bill and that the personal name calling and threats arose at the restaurant and continued to the motel. Affirming the trial court's denial of Columbia's Motion for Directed Verdict, the Second District found conflicting direct evidence and reasonable inferences from that evidence to create a question of whether Menendez was in the course and cope of his employment with Columbia at the time Menendez struck Petty.

Unlike the Plaintiff in Columbia by the Sea, Plaintiff McGhee asks this Court to derive an inference from inference from inference. Before this Court can conclude a reasonable inference that Hernlen was preserving his authority as a police officer, this Court must infer Hernlen did not know McGhee before the arrest; Hernlen's trips to the saw shop had any relationship to Hernlen's employment as a deputy sheriff by Volusia County; and that the verbal notice that Hernlen was not welcome to come to the saw shop required Hernlen to beat McGhee to be taken seriously as a law enforcement officer at the saw shop or to be able to finish the McGhee arrest paperwork.

None of these inferences are supported by the record.

Before this Court can conclude a reasonable inference that Hernlen's physically combative reaction was motivated in part by serving the interest of Volusia County in protecting Hernlen's authority as a law enforcement officer and protecting the authority of the sheriff's office,[10] this Court must infer that Hernlen's buddies were all law enforcement officers and employed by Volusia County; that visits to the McGhee Saw Shop by Hernlen's buddies had some connection to law enforcement duties as Volusia County deputies; and that verbal notice that Hernlen was not welcome to come to the saw shop required Hernlen to beat McGhee for Hernlen's buddies to be taken seriously as law enforcement officers at the saw shop and that any of the foregoing "inferences" relate in any way to Hernlen being able to finish McGhee's arrest paperwork.

Generally, a fact cannot be established by placing inference upon inference; however, if the first inference is established to the exclusion of any other reasonable inference, it can support a further inference. Barcello v. Rubin, 578 So.2d 58 (Fla. 4th DCA 1991); Thee v. Manor Pines, 235 So.2d 64 (Fla. 4th DCA 1970). That Hernlen's buddies were law enforcement officers employed by Volusia County is no more reasonable than the inferences that his buddies were law enforcement officers employed

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[10]The position of Sheriff of Volusia County is not a constitutional office. The Sheriff of Volusia County is an elected Director of the Department of Public Safety and derives his powers through the Home Rule Charter of the County of Volusia.(Sp. Acts, 70-966, Art. XVI, Sec.601.1(2); Sec. 602; Sec. 602.1). For this reason, the County of Volusia was named as the Defendant in this suit rather than the current Sheriff of Volusia County. (Sp. Acts, Ch. 70-966, Art. XIII, Sec. 1306).

by other agencies or that his buddies were not law enforcement officers at all. Similarly, there is no reasonable inference exclusive to all others that anyone came into the saw shop for law enforcement purpose or other purpose related to Volusia County. The test used by the Second District in Columbia by the Sea is essentially the same as the third prong of the Craft test established by the Fourth District. For the same reasons discussed by Defendant in its analysis of the Craft decision and by Judge Cobb in his discussion of Columbia By the Sea, the Plaintiff's argument based on Columbia By the Sea must fail.

Plaintiff also relies on Maybin v. Thompson, 514 So.2d 1129 (Fla. 2d DCA 1987), to support reversal of the en banc decision and the Final Summary Judgment. In Maybin the Second District Court of Appeal reversed a Summary Judgment granted to the City of Ft. Myers. Maybin at 1131. Dale Aubrey Maybin had sued the City and the individual police officer, Thompson. The count against the City did not include the exclusionary language which exempts municipal liability for tortious conduct.

The only testimony before the Court at the time the court granted summary judgment was the testimony of Maybin.

> "According to Maybin's deposition in the record, Maybin, his father, and two girls went to the Fort Myers police station to inquire about the arrest of Maybin's two brothers. Inside the station, the group got into an argument with a police officer. Officer Thompson overheard the conversation and in effect told Maybin and friends that it would be best for them to leave. The four then left the police station and walked across the street to their automobile. While Maybin was unlocking the car, Officer Thompson and two other police

> officers approached them. According to Maybin, Thompson pulled out his nightstick or blackjack and asked to see Maybin's driver's license. Maybin handed Officer Thompson the license. Thompson told him he was very close to going to jail, and ordered Maybin to put his hands on the car. Someone knocked the nightstick out of Thompson's hand. Thompson then grabbed Maybin's arm, twisted it and all three officers jumped on him. Maybin was arrested, and charged with disorderly conduct and resisting arrest without force and violence."

The Second District opined: "[Maybin's deposition] indicates that Thompson was acting in the course and scope of his employment and in the interest of the city at least in requesting Maybin's license.... Because the court made no specific finding that would trigger operation of the sovereign immunity statute, we cannot say with certainty that there was no question of material fact and that the Defendant City was entitled to judgment as a matter of law." Maybin at 1130-1131. Without such findings, the Maybin Court was unable to say there was not a jury issue. Unlike the summary judgment in Maybin, the McGhee Final Summary Judgment under review contains specific factual findings analyzed against the sovereign immunity statute.

Plaintiff contends that the evidence in Maybin supports the inference that Thompson served the interest of his government employer by attacking Maybin to protect and preserve his authority and thus, may be used as authority for finding such an inference in the instant case. The Second District's opinion **neither discussed nor relied upon such an inference. The Court simply pointed to Thompson's request for Maybin's license as the fact giving rise to**

the jury question. The Second District did not articulate a finding that Maybin was acting to protect and preserve his authority as a law enforcement officer. Even if the Court had done so, the facts of Maybin are inapposite to the facts of McGhee.

The County's Motion for Final Summary Judgment was properly granted as a matter of law on undisputed material facts. Holl v. Talcott, 191 So.2d 40 (Fla. 1966). This Court should affirm the decision of the en banc majority to uphold the Final Summary Judgment in favor of the County of Volusia entered by the trial court.

CONCLUSION

The County of Volusia is entitled to the shield of sovereign immunity under Section 768.28(9)(a), Florida Statutes (1989). It is clear from the Record on Appeal that there were no issues of material fact presented to the trial court by either McGhee or the County on the issue of whether Hernlen was in the course and scope of his employment and that the trial court properly entered Final Summary Judgment in favor of the County. As a matter of law, the en banc majority of the Fifth District Court of Appeal was correct to affirm the trial court. Based on the Citations of Authority and Legal Argument herein, the County of Volusia respectfully requests this Honorable Court to affirm the decision of the Fifth District Court of Appeal to uphold Volusia County's Final Summary Judgment and by so doing affirm the right of a governmental entity to use the procedure of summary judgment as a method for establishing that its sovereign immunity has not been waived.

Respectfully submitted,

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FL BAR NO. 231290

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Respondent's Answer Brief and the Appendix to Respondent's Answer Brief has been provided via Federal Express Mail this 27th day of October, 1995, to Elizabeth J. Hawthorne Faiella, Esq., 200 West Wellborn Avenue, Winter Park, FL 32789; Marcia K. Lippincott, Esq., 1235 North Orange Avenue, Suite 201, Orlando, FL 32804; Roy Wasson, Esq., 44 West Flagler Street, Suite 402, Miami, FL 33130; and to Barbara Green, Esq., 999 Ponce DeLeon Blvd., Suite 1000, Coral Gables, FL 33134.

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