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App reg

FILED

SID J. WHITE

OCT 9 1995

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

MORRIS H. McGHEE, II

Petitioner,

vs.

Case No. 85,695

VOLUSIA COUNTY, a political
subdivision of the State of
Florida, et. al.,

Respondents.

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

PETITIONERS' INITIAL BRIEF ON MERITS

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Argument

**SUMMARY JUDGMENT PRINCIPLES REQUIRE
THAT A JURY DETERMINE WHETHER A DEPUTY
SHERIFF ACTED WITHIN HIS SCOPE OF
EMPLOYMENT WHEN HE ASSAULTED AN
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STATEMENT OF CASE

On September 13, 1991, Plaintiff, Morris H. McGhee, II, instituted this action against Defendant, George Tracy Hernlen, in the Seventh Judicial Circuit in and for Volusia County. [R. 1-4] Volusia County was added as a defendant by an Amended Complaint filed January 29, 1993. [R. 15-22] The Amended Complaint charged Defendant Volusia County with responsibility for the beating of Plaintiff by Deputy Hernlen while in the custody. [R. 15-22]

The Defendants answered. [R. 23-26, 30-35] Defendant Volusia County admitted that Defendant Hernlen was employed as a Deputy Sheriff and was on duty when he arrested Plaintiff. [R. 32] As an affirmative defense, the Defendant County claimed that the Defendant Deputy acted in good faith and in a reasonable manner in the arrest of Plaintiff. The Defendant County did not allege that the Defendant Deputy acted in bad faith, with malicious purpose, or in wanton disregard of the Plaintiff's rights. [R. 34]

On June 28, 1993 the Defendant County moved for summary judgment. [R. 37-54] The Honorable C. McFerrin Smith, III, entered Final Summary Judgment for the Defendant County on December 22, 1993. [R. 111-121] The Plaintiff timely filed his Notice of Appeal to the Fifth District Court of Appeal on June 14, 1994. [R. 122-123] A three judge panel of the Fifth District reversed this summary judgment by a two to one decision. [*McGhee v. Volusia County*, 19 Fla. Law Weekly D2240 (Fla. 5th DCA 1994)] The matter was reconsidered by the Fifth District Court of Appeal *en banc* upon motion by the Defendant County. On April 7, 1995, by a five to three

vote, the Fifth District issued its Order on Motion for Rehearing En Banc affirming the summary judgment for the Defendant County. [*McGhee v. Volusia County*, 20 Fla. Law Weekly D853 (Fla. 5th DCA 1995)]

The Plaintiff filed his Notice to Invoke Discretionary Jurisdiction on May 8, 1995. Briefs on Jurisdiction were submitted and on September 6, 1995 this Honorable Court entered its Order accepting jurisdiction, and these proceedings ensued.

STATEMENT OF FACTS

Defendant, George Tracy Hernlen, was on duty as a Volusia County Deputy Sheriff at the time of the incident in question. [R. 116] Plaintiff Morris McGhee was arrested by Deputy Hernlen and in custody at the Sheriff's office. [R. 116] Plaintiff McGhee was in handcuffs and Deputy Hernlen was in the process of booking the Plaintiff. [R. 114]

At that point the Plaintiff testified that Deputy Hernlen physically attacked him. The Plaintiff described the incident as follows:

"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."

[McGhee Deposition, page 62, lines 10 through 23; R. 114]

"Question: What did you say when that happened?"

Answer: Shoot, I started crying, begging him to quit. He said, 'What are you? A big pussy? That's all you are.' He just kept on and kept on, and there wasn't nobody around that could help me."

[McGhee Deposition, page 62, line 24 through 25, page 63, line 3; R. 114]

"Question: All right. Where did he hit you?"

Answer: He kicked me. He grabbed me by my throat and lunged me backwards, and I hit the floor, and I am handcuffed so I can't cover my back. He is kicking me as hard as he can with his, whatever, boots on."

[McGhee Deposition, page 63, line 4 through 8; R. 114]

SUMMARY OF ARGUMENT

A jury trial cannot be denied where the undisputed evidence is susceptible of conflicting reasonable inferences. Yet, that is exactly what happened when the trial court entered summary judgment for Volusia County and the Fifth District Court of Appeal affirmed. The constitutional right to jury trial must be restored to this Plaintiff.

A Volusia County Deputy arrested and handcuffed the Plaintiff, and took him to the Sheriff's Office. During the booking process, the Plaintiff complained and made further comments. In response, the Deputy attacked the Plaintiff. It is certainly reasonable to infer from these facts that the Deputy perceived these remarks as a challenge to the authority of the Sheriff and acted, at least in part, to protect and preserve the authority of the Sheriff. The Plaintiff is entitled to have this matter resolved by a jury.

ARGUMENT

SUMMARY JUDGMENT PRINCIPLES REQUIRE THAT A JURY DETERMINE WHETHER A DEPUTY SHERIFF ACTED WITHIN HIS SCOPE OF EMPLOYMENT WHEN HE ASSAULTED AN ARRESTED PERSON DURING THE BOOKING PROCESS.

This Court has repeatedly proclaimed that every reasonable inference must be drawn in favor of the party against whom a summary judgment is sought. *Moore v. Morris*, 475 So. 2d 666 (Fla. 1985). Nevertheless, this most basic and well-recognized principle was violated by the summary judgment entered in this case and by the approval of that judgment by the *en banc* opinion of the Fifth District Court of Appeal. Reversal in this case is required to preserve this fundamental principle.

Volusia County was charged in this action with responsibility for the actions of Deputy Sheriff Hernlen in beating Plaintiff Morris McGhee. The Defendant County claimed immunity pursuant to Florida Statutes §768.28(9)(a). The County argued that the actions of the Deputy were committed outside his scope of employment because no deputy is hired to beat a nonviolent, handcuffed prisoner. Summary judgment was granted and approved on this basis.

Florida Statutes §768.28(9)(a) provides an exception to the general waiver of sovereign immunity for torts committed by government employees. If an act is 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" the government is immune from liability.

The landmark case of *Columbia By the Sea, Inc. v. Petty*, 157 So. 2d 190 (Fla. 2d DCA 1963) sets forth the accepted test for scope of employment: was the act motivated, at least in part, by a purpose to serve the employer. A review of the facts of *Columbia By the Sea* assist in understanding that test. Ray Petty was a customer in the restaurant, Columbia By the Sea. A dispute arose concerning Petty's bill. The maitre 'd, Jose Menendez, was called. Petty left without paying the bill. Menendez followed and gave the bill to the motel manager to put on Petty's account. Both Petty and Menendez became increasingly angry. Menendez asked Petty to step outside. Petty made a sweeping motion toward Menendez and called him a "bastard." Menendez struck Petty on the back of the head with an ashtray.

Petty's action against the restaurant was submitted to a jury who returned a verdict for Petty. The restaurant appealed claiming that it was entitled to judgment as a matter of law. The Second District Court of Appeal affirmed, stating as follows:

"Upon consideration of all the testimony, the conflicting statements as to facts and the varying inferences and conclusions possible, it would seem the question was one best submitted to a jury..."

Although there is a cogent and persuasive argument that Menendez acted for personal reasons entirely divorced from his duties and responsibilities as maitre 'd, it is not impossible to attribute the anger, assault and battery to overzealousness in the protection of what he envisioned as his employer's interests."

[157 So. 2d at p. 194]

The beating which took place in the Volusia County Sheriff's office was committed by an on-duty deputy sheriff who was engaged in the process of booking the Plaintiff. The Plaintiff was in custody, under arrest, and in handcuffs. [R. 114-116] The Plaintiff complained to the Deputy that:

"... 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..."

[McGhee Deposition, page 62, lines 10 through 23; R. 114]

Next, the Plaintiff testified that the Deputy said, "*... are you threatening me?*", and then the Deputy stood and proceeded to beat the Plaintiff, Morris McGhee. [McGhee Deposition, page 62, lines 10 through 23; R. 114]

In considering the remarks by Plaintiff McGhee it should be noted that McGhee's reference to "you" does not necessarily mean the individual, Deputy Hernlen. Rather, it is equally reasonable to infer that McGhee's reference to "you" means sheriff's deputies, in general. There is no evidence in the record that Plaintiff McGhee and Deputy Hernlen had met before the arrest. In addition, as in *Columbia*, it is reasonable to infer that Deputy Hernlen's actions were, at least partially, motivated by the purpose of serving the Sheriff. Deputy Hernlen's actions can be viewed as actions motivated to protect the authority of the office of the Sheriff from the perceived threats of Mr. McGhee.

The case of *Maybin v. Thompson*, 514 So. 2d 1129 (Fla. 2d DCA 1987) is similar to *McGhee*. Maybin and several friends went to the Fort Myers police station to check on the arrest of Maybin's brothers. The group argued with a police officer inside the station. Officer Thompson told the group to leave and the group followed these instructions. While Maybin was unlocking his car, Officer Thompson and two other officers approached. Thompson pulled out his night stick and asked to see Maybin's driver's license. He told Maybin that he was close to going to jail and ordered him to put his hands on the car. Someone knocked the nightstick out of Thompson's hands, Thompson grabbed Maybin and all three officers attacked him.

Maybin sued Officer Thompson and the City of Fort Myers for the damages resulting from this attack. The trial court granted summary judgment for the City of Fort Myers finding that the City was immune from suit. The Second District Court of Appeal reversed finding that there was sufficient evidence in the record to find that Thompson was acting within his scope of employment as a police officer.

The evidence in *Maybin* supports the inference that Officer Thompson acted, at least in part, to serve his employer. When the nightstick was knocked from Thompson's hand, it is reasonable to infer that he viewed that action as a challenge to his authority as a police officer, and attacked Maybin to protect and preserve his authority.

And in this case, the evidence supports the inference that Deputy Hernlen acted, at least in part, to serve his employer. When Hernlen heard the comments of Mr. McGhee, it is reasonable to infer that he viewed those comments as a challenge to his authority as a police officer, and attacked Mr. McGhee to protect and preserve his authority. Accordingly, the summary judgment entered for the Defendant Volusia County must be reversed.

CONCLUSION

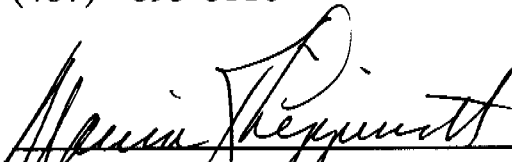
For the reasons stated herein, Petitioner, Morris McGhee II, respectfully requests this Honorable to reverse the decision of the Fifth District Court of Appeal.

RESPECTFULLY SUBMITTED this 4th day of October, 1995.

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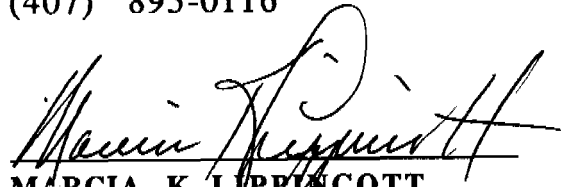
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 4th day of October, 1995 to: TURA L. BROUGHTON, ASST. CTY. ATTORNEY, Vol. Cty. Legal Dept., 123 W. Indiana Ave., Deland, FL 32720-4613 and to BARBARA GREEN, ESQUIRE, 999 Ponce DeLeon Blvd., Suite 1000, Coral Gables, Florida 33134.

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