IN THE SUPREME COURT
OF THE STATE OF FLORIDA

MORRIS H. McGHEE, II

Petitioner,

vs.

Case No. 85,695

VOLUSIA COUNTY, a policital 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' BRIEF ON JURISDICTION

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STATEMENT OF CASE

On April 7, 1995 the Fifth District issued its Order on Motion for Rehearing *En Banc*, vacating the original panel decision and substituting a new opinion. [A. 1-16] This opinion affirmed a final summary judgment rendered in favor of Volusia County in this action for personal injury against the County and its employee, Deputy Hernlen, and against the Plaintiff, Morris H. McGhee II. [A. 1-5]

On May 8, 1995 the Plaintiff McGhee filed with the Fifth District Court of Appeal his Notice to Invoke Discretionary Jurisdiction based upon express and direct decisional conflict and these proceedings ensued.

STATEMENT OF FACTS

While on duty as a Volusia County Deputy Sheriff, George Hernlen arrested Morris McGhee. Deputy Hernlen transported Mr. McGhee to the Sheriff's office in Deland, Florida. During the booking process, Mr. McGhee complained that when Sheriff's deputies came to his Dad's saw shop, they visited and acted friendly, and then when he was pulled over, he was treated like "a piece of dirt on the road." So, Mr. McGhee told Deputy Hernlen that he was no longer welcome at the saw shop. [A. 2]

Deputy Hernlen asked whether Mr. McGhee was threatening him. The Deputy stood up, grabbed Mr. McGhee, "went crazy", and started kicking Mr. McGhee. Mr. McGhee began crying, begging the Deputy to quit. The Deputy stated "What are you? A big pussy? That's all you are!" And Deputy Hernlen continued to kick Mr. McGhee. [A. 2]

The Fifth District Court of Appeal affirmed the entry of summary judgment for the County finding that as a matter of law, the act of Deputy Hernlen in striking Mr. McGhee was not motivated in some way by a purpose to serve his employer. [A. 1-5]

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal has found that a deputy sheriff who strikes a person in custody during the booking process is outside his scope of employment as a matter of law. This decision expressly and directly conflicts with decisions of this Court as to general summary judgment principles and with decisions of the First and Second District Courts of Appeal dealing with the scope of employment issue.

Mr. McGhee made personal comments to Deputy Hernlen during the booking process which Hernlen interpreted as a threat. [A. 2] The Fifth District Court of Appeal incorrectly found that the only reasonable inference which could be drawn was that Deputy Hernlen was acting totally for his own purposes. Why isn't it reasonable to find that the Deputy perceived the comments as a threat or challenge to his authority as a police officer, and that, his actions were taken, at least in part, to serve his employer?

This decision undermines the confidence of the people in the responsibility of law enforcement and violates the basic principles of summary judgment. The attention of this Honorable Court is warranted.

ARGUMENT

I. THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL THAT A DEPUTY SHERIFF WHO STRIKES A PERSON IN CUSTODY DURING THE BOOKING PROCESS IS OUTSIDE HIS SCOPE OF EMPLOYMENT, AS A MATTER OF LAW, EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THE FIRST AND SECOND DISTRICT COURTS OF APPEAL.

The original panel decision in this case reversed the summary final judgment for Defendants. Judge Cobb, who wrote the dissenting opinion to this panel decision, also authored the majority *en banc* opinion which vacated the panel decision, substituted a new opinion, and affirmed summary judgment for Defendants. In his original dissent, Judge Cobb acknowledged conflict with ***Hennagan v. Dept. of Highway Safety and Vehicles***, 467 So. 2d 748 (Fla. 1st DCA 19850 when he stated *"[t]hat holding is simply wrong and should be rejected by this court."* [***McGhee v. Volusia County***, 19 Fla. Law Weekly D2240 (Fla. 5th DCA 1994) (Cobb, J., dissenting)] Although the majority *en banc* opinion avoids a discussion of ***Hennagan***, it is discussed by Judge Dauksch in the dissenting opinion and conflict noted. [A. 6]

In ***Hennagan***, the plaintiff alleged in her complaint that a uniformed highway patrol officer stopped her as she was walking home from grade school, told her she was under suspicion for theft, it would be necessary to search her person and she must get in his car. The complaint charged that there was no probable cause of any of the trooper's actions. In addition, the plaintiff alleged that the trooper drove her to an obscure location, removed portions of her

clothing and performed an illegal search and touching of her body and did sexually abuse and molest her.

The First District Court of Appeal held that the alleged factual situation could not, as a matter of law, by found to be outside the trooper's scope of employment. [467 So. 2d at p. 750) ***Hennagan*** and the case at bar are in conflict.

The same is true for the case at bar and ***Maybin v. Thompson***, 514 So. 2d 1129 (Fla. 2d DCA 1987). ***Maybin*** reversed a summary judgment for the governmental defendant finding that the record raised a factual issue regarding the issue of whether Officer Thompson was acting within the scope of his employment as a police officer. Maybin's deposition showed that Maybin and others went to the Fort Myers police station to inquire about the arrest of Maybin's two brothers. The group got into an argument with a police officer inside the station. Officer Thompson overheard the argument and told the group it would be best to leave. The group left and walked to their car. While Maybin was unlocking the car, Officer Thompson and two other officers approached. According to Maybin, Officer Thompson pulled out his nightstick and asked to see Maybin's driver's license. Maybin handed Officer Thompson the license. Thompson 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 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. A jury trial on these charges resulted in a directed verdict of acquittal by the trial judge.

There is no more basis to find Deputy Hernlen's actions to be outside his scope of employment as a matter of law than Officer Thompson's in ***Maybin***. The decisions are in conflict. There is a basis to find in ***Maybin*** that Officer Thompson believed that his authority as a police officer was being challenged when the nightstick was knocked from his hand and that his actions were taken at least in part to serve the interests of his employer, i.e. maintaining his authority as a police officer. Similarly, in the case at bar, there is a basis to find that Deputy Hernlen believed that his authority as a police officer was being challenged in that he perceived Mr. McGhee's comments as a threat and as a challenge to his authority as a police officer and that his actions were taken at least in part to serve the interests of his employer. The decisions are in conflict.

II. THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL THAT THERE IS NO REASONABLE INFERENCE FROM THE FACTS WHICH PREVENTS THE ENTRY OF SUMMARY JUDGMENT EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT.

Every reasonable inference must be drawn from the facts against the summary judgment movant and in favor of the non-moving party and the case must be resolved by a jury. [***Moore v. Morris***, 475 So. 2d 666 (Fla. 1985)] The case at bar conflicts with this principle

It is certainly reasonable that Deputy Hernlen may have acted, at least in part, to maintain his authority as a Deputy Sheriff. By affirming summary judgment, the Fifth District Court of Appeal failed to apply appropriate summary judgment principles.

CONCLUSION

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

RESPECTFULLY SUBMITTED this 18th day of May, 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 18th day of May, 1995 to: TURA L. BROUGHTON, ASST. CTY. ATTORNEY, Vol. Cty. Legal Dept., 123 W. Indiana Ave., Deland, FL 32720-4613.

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Appendix

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1995

MORRIS H. McGHEE, II,

Appellant,

v.

VOLUSIA COUNTY, a political subdivision of the STATE OF FLORIDA, et al.,

Appellees.

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

CASE NO.: 94-140

Opinion filed April 7, 1995

Appeal from the Circuit Court for Volusia County, C. McFerrin Smith, Judge.

Elizabeth H. Faiella, of Elizabeth H. Faiella, P.A., Winter Park, for Appellant.

Tura Schnebly Broughton, Assistant County Attorney, DeLand, for Appellees.

ON MOTION FOR REHEARING EN BANC

COBB, J.

We have reconsidered this case en banc pursuant to a motion by the appellee, Volusia County, and we hereby vacate the original panel decision and substitute this opinion therefor.

McGhee appeals from a final summary judgment rendered in favor of Volusia County in this action for personal injury against the County and its employee, Deputy

Hernlen , who allegedly battered McGhee.

The incident arose after Hernlen arrested McGhee in regard to an altercation at a restaurant in Astor, Florida. Hernlen transported McGhee to an office in DeLand, Florida. According to the deposition testimony of McGhee, he was booked and then the following incident transpired:

> Q. Did you have conversations with (Hernlen)?
>
> A. (Appellant). 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.
>
> Q. What did you say when that happened?
>
> A. 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.

Based upon McGhee's version of the incident the trial court found that the County could not be liable pursuant to the provisions of section 768.28, Florida Statutes (1989) for the reason that "the ultimate facts advanced by the plaintiff through pleadings and deposition testimony would show that an employee of a governmental entity was

outside the course and scope of his employment or acted in bad faith or in a manner exhibiting wanton and willful disregard of human rights, safety or property."

We agree with the trial judge. 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? If the answer to that question is no, then the County is not liable as a matter of law and was entitled to the summary judgment it obtained. The appellant does not dispute that this is the applicable legal test -- and there is no dispute as to the facts for summary judgment purposes. They are as asserted by the sworn deposition testimony of the plaintiff, which is quoted above.

It is clear from the deposition testimony of the plaintiff himself, Morris McGhee, that his version of the incident was that Officer Hernlen, in response to McGhee's statement that Hernlen was no longer welcome at the McGhee saw shop, attacked him. 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.

The applicable rule of law is set forth in the landmark case of Columbia By the Sea, Inc. v. Petty, 157 So. 2d 190 (Fla. 2d DCA 1963). In Petty, the issue was whether or not one Jose Menendez, the maitre d' of a restaurant, was acting within the scope

of his employment with the restaurant when he committed an assault and battery upon Ray Petty, a patron of the restaurant. There was testimony that Menendez struck Petty while attempting to force him to pay his restaurant bill. This was enough, said the Second District, to create a jury issue as to whether Menendez was acting within the scope of his employment at the time of the assault, thus imputing liability to his employer, the restaurant. The opinion of Judge Allen, writing for the Second District majority, stated:

> 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.
>
> It is noted that Menendez followed Petty to his motel, continuing the argument that originated in appellant's restaurant, ordering the motel clerk to put the bill on appellee's account, which was apparently in furtherance of his employer's interest.

157 So. 2d at 194.

It is clear from the opinion that had the physical altercation between Menendez and Petty erupted solely from a personal dispute between the two men, having nothing to do with an attempt by Menendez to collect money from Petty for the restaurant, there would have been no liability on the part of the restaurant. That reasoning, as applied to the instant case, supports the summary judgment for Volusia County entered by the trial court.

The case of Richardson v. City of Pompano Beach, 511 So. 2d 1121 (Fla. 4th DCA 1987), rev. denied, 519 So. 2d 986 (Fla. 1988), which is relied upon by the

appellant, dealt with the sufficiency of pleadings, not summary judgment. The sole issue there was whether or not a municipality was automatically immunized from all intentional torts by reason of section 768.28(9)(a), Florida Statutes. That is not the issue in the instant case.

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. John 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.

AFFIRMED.

HARRIS, CJ., SHARP, W. and GOSHORN, JJ., concur.
GRIFFIN, J., concurs and concurs specially, with opinion.
DAUKSCH, J., dissents, with opinion, in which PETERSON and THOMPSON, JJ., concur.

GRIFFIN, J., concurring specially. 94-140

I write only to respond to footnote one of the dissent which suggests the *en banc* majority has attempted to duck a conflict. This is not so. The case of *Hennagan v. Department of Highway Safety and Motor Vehicles*, 467 So. 2d 748 (Fla. 1st DCA 1985), is both procedurally and factually different from the present case. The issue under consideration in *Hennagan* was whether the lower court erred in dismissing with prejudice claims of negligence, false imprisonment, unlawful search, and invasion of privacy on the ground that the state employee's actions were, as a matter of law, outside the course and scope of his employment. In that case, the complaint alleged that the employee, while acting under his authority as a state highway patrol officer, advised the plaintiff that she was under suspicion for theft, that it would be necessary to search her person and that she should enter his vehicle. He subsequently removed portions of her clothing, performed an illegal search in touching her body and sexually abused and molested her. As is made clear by the portion of the *Hennagan* opinion quoted in the dissent, the First District Court of Appeal found that, under the allegations of the complaint, it was not impossible to attribute the trooper's actions, at least in part, to misfeasance and/or overzealousness in the performance of his official duties. The *Hennagan* court even suggested that the case might not survive the "more stringent test of summary judgment."

Here, after the development of a full record, the evidence showed without dispute that Hernlen's beating of McGhee was animated purely by a personal dispute between two people who knew each other. The *en banc* majority has no desire and no need to quarrel with *Hennagan*.

DAUKSCH, J., dissents.

I respectfully dissent.

The following is the substance of the original majority opinion, to which I adhere.

This is an appeal from a summary judgment in a suit against the county for alleged personal injuries inflicted by a deputy sheriff against appellant.

The alleged facts are that appellant was arrested, handcuffed and taken in by a deputy sheriff. While performing booking or other paperwork functions the deputy became angered by appellant's abusive orations and accusations directed at him. The deputy beat up appellant. Appellant sued and the trial judge said the county, as employer of the deputy, was not liable because of governmental immunity.

At common law in England, and for a long time after the establishment of our republic, the king and the government were immune from civil liability for torts against the citizenry. Under our state constitution, section 31, Article X, the legislature has the power to waive sovereign immunity in such fashion as it deems right. By enacting section 768.28(9)(a), Florida Statutes (1993), the legislature did waive sovereign immunity in cases such as this, with the proviso that

> 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.

In his well-reasoned and persuasive judgment the trial judge recited the pertinent facts and found as a matter of law that the county was not liable for the alleged actions of the deputy. Following are abstracted pertinent portions of the judgment.

6. Plaintiff concurred with the "facts" presented by Defendant, COUNTY OF VOLUSIA, in its written Motion for Final Summary Judgment and supporting oral argument. Those "facts" were gleaned from the deposition testimony of Plaintiff, Morris H. McGhee, II:

(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**

Questions: 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.

(d) **Page 62, Line 24 through 25 - Page 63, Line 3**

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.

(e) **Page 63, Line 4 through Line 8**

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.

(f) **Page 63, Line 9 through Line 17**

Question: Did you have your hands cuffed in front of you or behind you?

Answer: Yeah. In the front of me.

Question: And you were laying on the floor?

Answer: Yes. I was laying on the floor. I couldn't get back up. He was kicking me until--

Question: Where did he kick you?

Answer: He kicked me all in my back. He kicked up in here. He put his foot kicking--

(g) **Page 63, Line 19 through 25 and Page 64, Line 1 through Line 2**

Answer: Up to the back of my head. Blows to the back of my head.

Question: Your neck?

Answer: Yes, sir. More up on my head behind my ears, rather.

Question: Directly in back.

Answer: Yeah.

Question: Your upper back?

Answer: No, sir. It was my lower back and ribs.

(h) **Page 64, Line 3 through Line 7**

Question: What did he say to you while he was doing that?

Answer: Just called me, like I said, a pussy and cry--just hollering and screaming stuff like that. I was begging.

Question: He was hollering out loud?

Answer: Yeah. He was hollering out loud.

(i) **Page 64, Line 8 through 11**

Question: Did anybody else come by, come by to see what was going on?

Answer: There was nobody else around. It was

just me and him.

(j) **Page 64, Line 22 through 25, Page 65, Line 1**

Question: Did he pick you up off the floor?

Answer: Up against the wall. Helped me get up against the wall, and I am handcuffed, sitting there crying, and then later on, after he got off the telephone, he helped me get up.

7. The Court finds for the purpose of the Final Summary Judgment in favor of the County of Volusia that the undisputed material facts are the hereinbefore recited "facts" of the deposition testimony of Plaintiff, Morris H. McGhee, II, and the following:

(a) George Tracy Hernlen was on duty as a Volusia County Deputy Sheriff at the time Plaintiff testified the incident occurred and that Deputy Hernlen arrested Plaintiff and had Plaintiff in custody and handcuffed in the deputy's room, awaiting transport to a Volusia County Correctional institution.

(b) No deputy is hired to beat a nonviolent prisoner in handcuffs.

(c) Under the "facts" of Plaintiff's testimony the deputy turned away from the business of the employer when the deputy stopped his paperwork and turned upon the Plaintiff to beat him in response to Plaintiff's verbal taunting.

(d) There was no business of the County which George Tracy Hernlen could have been advancing when he stopped processing the prisoner's paperwork and started beating the handcuffed prisoner.

It is my considered opinion that the statute was not meant to exempt the county from liability for torts committed by their employees if such were done while in the ordinary

performance of other, proper, duties. That is to say, this deputy was performing his usual functions in a usual time, place and manner until he became enraged and set upon appellant. Conduct is only within the "scope of employment" within the meaning of the sovereign immunity statute if it is the type of conduct which the employee is hired to perform, it occurs substantially within the time and space limits authorized or required by the work to be performed, and conduct is activated at least in part by a purpose to serve the employer. Craft v. John Sirounis and Sons, Inc., 575 So. 2d 795 (Fla. 4th DCA 1991). When differing inferences may be drawn concerning whether an employee is operating within the scope of employment, the question is generally for the jury. See Weiss v. Jacobson, 62 So. 2d 904 (Fla. 1953).

I have considered the case of Hennagan v. Dep't of Highway Safety and Vehicles, 467 So. 2d 748 (Fla. 1st DCA 1985).[1] In that case a minor, alleging that she had been sexually abused by a highway patrolman after having been stopped on the pretext that she was under suspicion for theft, brought an action against the Department of Highway Safety and Motor Vehicles alleging negligence, false imprisonment, unlawful search, and invasion of privacy. The trial court dismissed Counts I through IV (negligence, false imprisonment, unlawful search, and invasion of privacy) with prejudice, on the grounds that the officer's actions were outside the course and scope of his employment. Final summary judgment was entered in favor of the Department of Highway Safety, and the plaintiff

[1] Interestingly the majority en banc opinion has ignored this case, perhaps because it is in conflict with the case at bar, as acknowledged by the author of this en banc decision, who wrote the dissent in the panel decision. That dissent said "That holding is simply wrong and should be rejected by this court." McGhee v. Volusia County, 19 Fla. L. Weekly D2240 (Fla. 5th DCA Oct. 21, 1994) (Cobb, J., dissenting).

appealed. The district court reversed and held that the complaint alleged actions by the highway patrolman which might have been undertaken, in whole or in part, within the scope of his employment to further the Department's interests, and those allegations sufficiently stated causes of action against the Department. The court found that although the complaint alleged a number of actions which could be found to exceed authority but not be outside the scope of employment as that term has been interpreted in the private and public sectors, that conduct could be within the scope of employment, even if unauthorized, if it is of the same general nature as that authorized or is incidental to the conduct authorized. Id. at 750. The court went on to explain:

> In the instant case, it cannot be said, as a matter of law, that the acts alleged were or were not done in furtherance of Trooper Jones's duties to apprehend a shoplifting suspect. That the acts of Jones resulted in a criminal offense does not preclude a determination that the acts were initiated in the course and scope of his employment and to serve the interests of the employer. 2 Fla.Jur.2d *Agency and Employment* § 220. Conduct is within the scope of employment if it occurs substantially within authorized time and space limits, and it is activated at least in part by a purpose to serve the master. The purpose of the employee's act, rather than the method of performance thereof, is said to be the important consideration. 2 Fla.Jur.2d *Agency and Employment* § 213.
>
> This court, in *Roux Laboratories*, [379 So. 2d 451 (Fla. 1st DCA 1980)] at 453, quoted with approval from *Columbia by the Sea, Inc. v. Petty*, 157 So. 2d 190, 194 (Fla. 2d DCA 1963):
>
> "Although there is a cogent and persuasive argument that Menendez [employee] acted for personal reasons entirely divorced from his duties and responsibilities as maitre'd, (sic) 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."

> Likewise, it is not impossible to attribute the alleged actions of Trooper Jones, at least in part, to misfeasance and/or overzealousness in the performance of his official duties. On the more stringent test of summary judgment or trial, these matters may be resolved adversely to plaintiff, but the allegations of the complaint are sufficient to withstand motion to dismiss.

Id. at 751.

In Richardson v. City of Pompano Beach, 511 So. 2d 1121 (Fla. 4th DCA 1987), rev. den., 519 So. 2d 986 (Fla. 1988), a plaintiff brought an action against the city seeking damages for a police officer's use of excessive force, false arrest and detention. The trial court granted the city's motion to dismiss claims against the city and the plaintiff appealed. The district court reversed, holding that section 768.28(9)(a) did not immunize the city from liability for intentional torts alleged to be committed by a police officer in the course and scope of his employment, which did not involve bad faith or malicious purpose, and were not committed in a manner exhibiting wanton and willful disregard of human rights, safety or property. The court explained:

> The city believes, as did the trial judge, that intentional torts are within the pale of governmental immunity because it equates the word "intentional" with the words "wanton and willful." We believe that the juxtaposition of the latter words with the remainder of the phrase "wanton and willful disregard" connotes conduct much more reprehensible and unacceptable than mere intentional conduct. . .
>
> The second amended complaint in question here alleges that the tortious acts occurred while the officer was acting within the scope of his employment and there are no allegations of bad faith, malicious purpose, or wanton and willful disregard of human rights, safety or property. Furthermore, the intentional torts involved herein do not inherently or necessarily involve those elements which would activate

immunity.

Id. at 1123-1124. See also Maybin v. Thompson, 514 So. 2d 1129 (Fla. 2d DCA 1987) (issue of material fact as to whether officer was acting within scope of his employment as police officer precluded summary judgment in arrestee's action alleging assault and battery, false arrest and imprisonment).

In considering the motion for summary judgment, the trial court found that Deputy Hernlen was on duty at the time of the incident, that the deputy turned away from the business of the employer when he stopped his paperwork to beat the appellant, and that "there was no business of the county which George Tracy Hernlen could have been advancing when he stopped processing the prisoner's paperwork and started beating the handcuffed prisoner." However, 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. Although the sovereign immunity statute immunizes governmental entities from suit where their employees are acting outside the scope of their employment, 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. Because there would appear to be sufficient evidence to raise the factual issue of whether Deputy Hernlen was acting within the scope of his employment, summary judgment is inappropriate. See Woodall v. City of Miami Beach, 599 So. 2d 231 (Fla. 3d DCA 1992) (city not liable for any misconduct in initial encounter between bank customer

and plain clothes police officer concerning their respective places in teller's line where officer was cashing personal check, since officer was acting only for personal reasons and motivations; however, jury question was presented as to liability of municipality for allegedly tortious conduct in later arrest and imprisonment of plaintiff and use of force in doing so); cf. Craft v. John Sirounis and Sons, Inc., supra (participation of off-duty police officers in barroom brawl was not within scope of their employment, nor was their action in the interest of cities which employed them, and thus sovereign immunity statute precludes bar patron's negligence suit against cities).

Because summary judgment is inappropriate for this personal injury case, it should be reversed.

PETERSON and THOMPSON, JJ., concur.