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 BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

All references to the Record on Appeal will be designated by the letter "R" followed by the appropriate page number. All 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. All references to the Appendix of the Petitioner will be designated by the letter "A" followed by the appropriate page number. All 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 Jurisdiction will be designated by the letter "PB" followed by the appropriate page number.

STATEMENT OF THE CASE AND OF THE FACTS

A. STATEMENT OF THE CASE

In addition to the Petitioner's Statement of the Case, Respondent would add the following:

The Complaint filed September 13, 1991, accused George Tracy Hernlen, individually, of forcefully and maliciously kicking and beating the Plaintiff while the Plaintiff was handcuffed on the floor of the 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 on the County of Volusia on February 2, 1993.

In Count I of the Amended Complaint, the Plaintiff continued to maintain a federally derived claim against Defendant George Tracy Hernlen, individually, and the allegations in paragraph 17 remained unchanged from paragraph 16 of the original complaint. (R. p.18) In Count II Plaintiff alleged liability of the County of Volusia pursuant to Section 768.28, Florida Statutes (1989), for the post-arrest acts of Deputy Sheriff George Tracy Hernlen claiming he committed a civil assault and battery upon the Plaintiff by beating and kicking Plaintiff while Plaintiff lay on the floor in handcuffs. (R. p.19) Count III asserted that the County of Volusia had deprived Plaintiff of his Constitutional rights adopting the language of Paragraph 17 of the count against

Defendant Hernlen, individually. (R. p.21), but on April 8, 1993, the Plaintiff voluntarily dismissed Count III. (R. p.36)

The County of Volusia filed a Motion for Summary Judgment as to Count II on or about June 28, 1993, (R. pp.57-83) Plaintiff acknowledged at the summary judgment hearing of September 10, 1993, that there was no dispute with the material facts as stated by Defendant's counsel and set forth in the County's Motion for Final Summary Judgment. (TR. p.7, lines 24-25). The Final Summary Judgment in favor of Defendant, County of Volusia, was entered December 20, 1993. (R. pp.111-121) and Plaintiff appealed timely.

B. STATEMENT OF FACTS

While the Respondent, Volusia County, cannot disagree with the Petitioner's Statement of Facts as far as it goes, the Respondent does disagree with the inference which might be drawn from omissions of Petitioner as to the flavor of the alleged confrontation. The Respondent would offer the "facts" of Petitioner's testimony as considered by the trial court and incorporated in the Final Summary Judgment (RA 1)which was affirmed by the Fifth District Court of Appeal en banc. (A)

According to Petitioner the following occurred between the two men with no one else present. (RA 1, 3-6) Petitioner was handcuffed and sitting at a table while Deputy Hernlen (hereafter Hernlen) completed the arrest report and prepared to arrange for Petitioner to be transported to jail.

Petitioner complained that Hernlen came to the saw shop off duty and was "buddy buddy" with Petitioner but was not "buddy buddy" when Petitioner breaks the law. Petitioner 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."

After Petitioner told Hernlen he was no longer welcome in the McGhee Saw Shop, Hernlen turned away from his paperwork and said, "you are threatening me? Hernlen stood up and he lunged right at Petitioner and grabbed him saying, "you are threatening me?" Then he "just went crazy" and started kicking Petitioner, who started crying, begging Hernlen to quit. Hernlen said, "What are you? A big pussy? That's all you are."

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

SUMMARY OF ARGUMENT

The en banc decision of the Fifth District Court of Appeal affirming the Final Summary Judgment in the McGhee case does not create a conflict with this Court's decisions or those of other district courts of appeal. In McGhee, the appellate court analyzed a full record and relied upon undisputed material facts to which Petitioner had stipulated.

On the "facts" of Petitioner the dispute and the beating were purely personal. he 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... 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. (citation omitted)

The McGhee decision is totally consistent with Florida case and statutory law; therefore, jurisdiction should be denied.

ARGUMENT I

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 AND THAT DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH DECISIONS OF THE FIRST AND SECOND DISTRICT COURTS OF APPEAL AS A MATTER OF LAW

Petitioner asserts conflict with the following cases: Hennagan v. Department of Highway Safety, 467 So.2d 748 (Fla. 1st DCA 1985); and Maybin v. Thompson, 514 So.2d 1129 (Fla. 2nd DCA 1987.

Hennagan

The Petitioner points to Judge Dauksch en banc dissent as supporting Petitioner's claim creating conflict based upon Hennagan and points to the lack of discussion of Hennagan in the majority opinion authored by Judge Cobb. (P.B. 4) Judge Dauksch argues Judge Cobb recognized the conflict in his dissent from the original panel's decision, vacated en banc. (A1) The concurring opinion of Judge Griffin was written solely to address the inapplicability of the Hennagan case to the instant case and the lack of conflict with the same. (A6) Judge Griffin opined that Hennagan was procedurally different and construed an earlier and distinctly different version of Florida Statutes Section 768.28. Id. The Respondent agrees with Judge Griffin.

The Hennagan case arose as a suit against the Department of Highway Safety based upon an alleged sexual molestation of

Ada Elizabeth Hennagan by Florida Highway Patrolman, Willie Thomas Jones. Counts I through IV, (alleging negligence, false imprisonment, unlawful search, and invasion of privacy), and Count VI (alleging a sexual battery) were dismissed with prejudice on the grounds that Jones' actions were, as a matter of law, outside the course and scope of his employment. Final summary judgment was entered in favor of the Department of Highway Safety and Motor Vehicles on the counts alleging false arrest and negligent hiring. The Plaintiff appealed the dismissal of Counts I through Count IV and the Final Summary Judgment regarding the Count of false arrest. Hennagan at 749.

The First District Court of Appeal upheld the Summary Judgment and reversed the trial court's granting of the Motion to Dismiss regarding Counts I through IV. Hennagan at 751. The Court did not analyze evidence for those counts dismissed by the trial court and specifically stated it could not determine whether the actions alleged were or were not in the course and scope of employment. Furthermore, the Court did not state that Summary Judgment is an inappropriate procedural tool by which to analyze cases brought pursuant to Florida Statutes Section 768.28 but rather specifically stated that the more stringent test of Summary Judgment might well be resolved adversely to Plaintiff. Hennagan at p.751.

There is no conflict between the decision of the Hennagan or McGhee Courts. As stated succinctly by Judge Griffin, "after development of a full record," the beating of

"Petitioner" was "initiated 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." (A6)

Maybin

In the second case offered by Petitioner, Maybin v. Thompson, 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 which indicated that Thompson was in the course and scope of his employment with the City when after pulling out his night stick, Thompson asked to see Maybin's drivers license. Maybin at 1130.

The Second District opined: "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 1131. Without such findings, the Maybin Court was unable to say there was not a jury issue. The opinion did not say or infer that Summary Judgment would not be appropriate procedurally if the Final Summary Judgment was drawn more precisely showing

no dispute of material fact and entitlement as a matter of law. In the instant case there is no dispute of material fact and the Final Summary Judgment is factually and legally specific.

Maybin and McGhee do not conflict factually or legally. In Maybin, Thompson pulled a night stick, asked for a driver's license, had his night stick dislodged from his hand and proceeded with a physical altercation and arrest of Maybin. In McGhee, Petitioner was under arrest, handcuffed, seated and verbally disputing Hernlen's right to return to the McGhee Saw Shop. Hernlen turned from the paperwork that he could and should have finished and the beating ensued.

The precipitating remarks by arrested and handcuffed Petitioner relate specifically to Hernlen coming into the saw shop off duty and being "buddy buddy" with Petitioner and Petitioner's father but not being "buddy buddy" when Petitioner breaks the law. For this reason Petitioner says "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." (RA-1, 4).

Clearly Hernlen's coming to the saw shop was personal. Clearer still is that the denial of entry to the saw shop in the future was personal and posed no threat to Hernlen currently carrying out his duties as a deputy. There is no conflict and jurisdiction should be denied.

ARGUMENT II

II. THE EN BANC DECISION OF THE FIFTH DISTRICT COURT OF APPEAL WAS PROPERLY ENTERED AFFIRMING THE FINAL SUMMARY JUDGMENT IN FAVOR OF VOLUSIA COUNTY DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH DECISIONS OF THIS COURT.

In Argument II, Petitioner presents an argument not heretofore raised before the trial court or the Fifth District Court of Appeal. Petitioner asserts conflict with this Court's decision in Moore v. Morris, 475 So.2d 666 (Fla. 1985) claiming that the Fifth District Court of Appeal failed to apply appropriate summary judgment principles by ignoring or missing a reasonable inference that Deputy Hernlen may have acted in part to maintain his authority as a Deputy Sheriff. While Petitioner's counsel stipulated there was no dispute of material facts, Petitioner argues this "reasonable inference" creates a jury issue.

Without factual analysis, Respondent assumes that Petitioner adopts Page 6 of Argument I of his Maybin analysis that "...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 Respondent adopts its argument on Page 7 of Argument I. There is no reasonable inference, no conflict issue and jurisdiction should be denied.

CONCLUSION

Based on the Citations of Authority and legal argument herein, Respondent, VOLUSIA COUNTY, respectfully requests this Honorable Court to deny jurisdiction and affirm the decision of the Fifth District Court of Appeal en banc.

Respectfully submitted this 7th day of June, 1995.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been provided by U.S. Mail this 7th day of June, 1995, to Petitioner, MORRIS H. McGHEE, II, c/o: Elizabeth J. Hawthorne Faiella, Esq., 200 West Wellborn Avenue, Winter Park, FL 32789; and to Marcia K. Lippincott, P.A., 1235 North Orange Avenue, Suite 201, Orlando, FL 32804.

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APPENDIX

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO. 91-4368-CI-DL-H

MORRIS H. McGHEE, II,

Plaintiff/Counter-Defendant

vs.

VOLUSIA COUNTY, a political subdivision of the State of Florida,
Defendant, and

GEORGE TRACY HERNLEN, Individually,

Defendant/Counter-Plaintiff

FINAL SUMMARY JUDGMENT
RE: SECOND AMENDED COMPLAINT

THIS CAUSE CAME on to be heard on the Motion for Final Summary Judgment filed by the County of Volusia against Plaintiff's Amended Complaint and this Court having heard the oral argument of both counsel for Plaintiff and Defendant, County of Volusia, having received and reviewed the Memoranda of Law from both Plaintiff and Defendant, County of Volusia, having received and reviewed the depositions, answers to interrogatories and admissions on file and being otherwise fully advised in these premises, this Court makes the following findings:

1. On September 13, 1991, Plaintiff, MORRIS H. MCGHEE, II, filed suit against George Tracy Hernlen, individually, alleging that the Defendant had violated his Constitutional rights. The

action was brought pursuant to Title 42 U.S.C. Section 1983. In that Complaint and with the facts as asserted by Plaintiff in his deposition, Defendant Hernlen was accused in Paragraph 16 of forcefully and maliciously kicking and beating the Plaintiff while the Plaintiff was handcuffed on the floor of the office of the Sheriff's Department and that such conduct was beyond the standard tolerated by a civilized society and was wanton, reckless and malicious. Discovery ensued and the matter was noticed as ready for trial by Plaintiff on June 9, 1992. This Court set the Pretrial Conference for October 6, 1992.

2. On January 14, 1993, this Honorable Court entered its Order on Plaintiff's Motion to Amend Complaint and to Remove Cause from Trial docket. Plaintiff filed a three count Amended Complaint adding the County of Volusia as a party defendant. The amended complaint was served on the County of Volusia on February 2, 1993.

3. In Count I of the Amended Complaint, Plaintiff continued to maintain a federally derived claim against Defendant George Tracy Hernlen, individually and the allegations in Paragraph 17 remain unchanged from Paragraph 16 of the original complaint. Count II and Count III of the Amended Complaint were directed solely against the County of Volusia. Pursuant to Florida Statutes 768.28 (1989), Count II alleged liability of the County of Volusia for the acts of Deputy Sheriff George Tracy Hernlen when he committed a civil assault and battery upon the Plaintiff through the use of excessive force by beating and kicking Plaintiff while Plaintiff lay on the floor in handcuffs. Count III asserted that

the County of Volusia had deprived Plaintiff of his Constitutional rights and in Paragraph 24 adopted the language of Paragraph 17 of the federally derived Count against Defendant Hernlen, individually. On April 8, 1993, the Plaintiff voluntarily dismissed Count III against the County of Volusia.

4. There is no dispute of any material fact between Plaintiff and Defendant, County of Volusia for purposes of this Final Summary Judgment as to Plaintiff's testimony set forth below.

5. The County of Volusia is entitled to a Final Summary Judgment as a matter of law as to Count II of Plaintiff's Amended Complaint which is the only County directed against the County of Volusia.

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) <u>Page 60, line 23</u>

> 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.

(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.

8. Based on these undisputed material facts, this Court finds as a matter of law:

(a) Florida Statutes 768.28(9)(a)(1989) is the vehicle by which Plaintiff sues the County of Volusia.

(b) Section 768.28(9), Florida Statutes (1989) states as follows:

> No officer, employee, or agent of the State or of any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of his employment or function, 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. However, such officer, employee, or agent shall be considered an adverse witness in a tort action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of his employment or function. The exclusive remedy for injury or damage suffered as a result of an act, event, or omission of any officer, employee, or agent of the State or any of its subdivisions or constitutional officers shall be by action against the governmental entity, or the head of such entity in its official capacity, or the constitutional officer of which the officer, employee, or agent is an employee, 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. <u>The state or its subdivisions shall not be liable in tort for the acts or omissions of an officer,</u>

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.

(c) That statute's purpose is clear. It provides mutually exclusive alternative remedies for a Plaintiff who claims tortious conduct by a government employee. The County of Volusia may not be held liable in tort for the acts or omissions of a deputy sheriff if such acts or omissions are committed:

> (1) While the deputy sheriff is acting outside the course and scope of his employment; or
>
> (2) are committed in bad faith; or
>
> (3) are committed with malicious purpose; or
>
> (4) are committed in a manner exhibiting wanton and willful disregard of human rights, safety or property.

(d) Pursuant to the Florida Statute 768.28(9)(1989), the County of Volusia should not have been named as a Defendant where it is alleged and 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. The County

of Volusia is not the proper Defendant upon Plaintiff's claimed facts which have been accepted as undisputed material facts for purpose of the Final Summary Judgment.

(e) The actions by George Tracy Hernlen to which Plaintiff testified would establish that George Tracy Hernlen was outside the course and scope of his employment and give rise to sovereign immunity for the County of Volusia.

(f) Even if this Court found that George Tracy Hernlen was in the course and scope of his employment, the acts of George Tracy Hernlen to which Plaintiff has testified are acts which fall within the other provisions of Fla. Stat 768.28(9)(a) (1989) which give immunity to the County of Volusia; to wit:

> (1) The actions by George Tracy Hernlen to which Plaintiff testified would establish that George Tracy Hernlen acted in bad faith and give rise to sovereign immunity for the County of Volusia. See Section 5(c)(2) hereof.
>
> (2) The actions by George Tracy Hernlen to which Plaintiff testified would establish that George Tracy Hernlen acted with malicious purpose and give rise to

sovereign immunity for the County of Volusia. See Section 5(c)(3) hereof.

(3) The actions by George Tracy Hernlen to which Plaintiff testified would establish that George Tracy Hernlen acted in a manner exhibiting wanton and willful disregard of human rights, safety and property and give rise to sovereign immunity for the County of Volusia. See Section 5(c)(4) hereof.

(g) The County of Volusia is not liable for acts of a deputy sheriff outside the course and scope of employment. The County of Volusia is also not liable for the acts of a deputy sheriff even if the deputy is in the course and scope of his employment if the undisputed material facts show one or more of the factors set forth as 5(c)(2), 5(c)(3), or 5(c)(4) hereinabove. 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. Braslow, 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. 2nd DCA 1985); Willis v. Dade County School Board, 411 So.2d 245 (Fla. 3rd DCA 1982).

THEREFORE, it is ORDERED AND ADJUDGED:

1. That the Defendant, County of Volusia's Motion for Final Summary Judgment is hereby granted.

2. The Plaintiff, MORRIS H. McGHEE, II, shall take nothing by this action and Defendant, COUNTY OF VOLUSIA, shall go hence without day.

3. This Court reserves jurisdiction to consider an application for attorneys' fees by Defendant, COUNTY OF VOLUSIA, and to tax costs against Plaintiffs.

DONE AND ORDERED in Chambers at DeLand, Volusia County, Florida, this 20 day of December, 1993.

C. McFerrin Smith III
CIRCUIT COURT JUDGE

cc: Elizabeth Hawthorne Faiella, Esq.
Charles Tindell, Esq.
Tura Schnebly Broughton, Esq.

APPENDIX

RE: HENNAGAN

Sections 768.28(1) and (9), Florida Statutes (1977) provided:

> (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. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act.
>
> (9) No officer, employee, or agent of the State or of any of its subdivisions shall be held personally liable in tort for any injuries or damages suffered as a result of any act, event, or omission of action in the scope of his employment or function, 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. Subject to the monetary limitations set forth in subsection (5), the state shall pay any monetary judgment which is rendered in a civil action personally against an officer, employee, or agent of the state which arises as a result of any act, event, or omission of action within the scope of his employment or function.[1]

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[1] Under the 1977 Statute, the government was liable so long as the act, event, or omission of action was within the scope of the employment or function of the employee. The employee could be held liable only for acts or omissions within the scope of his employment if he acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety or property. At that time both employee and government could be sued and the remedy was not a mutually exclusive alternative. The government was jointly and severally liable for the acts of its employees regardless of the employee's intent or

Section 768.28(1) and (9)(a), Florida Statutes (1989), stated:

> (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. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act. Any such action may be brought in the county where the property in litigation is located or, if the affected agency or subdivision has an office in such county for the transaction of its customary business, where the cause of action accrued.
>
> (9)(a) No officer, employee, or agent of the State or of any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of his employment or function, 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. However, such officer, employee, or agent shall be considered an adverse witness in a tort action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of his employment or function. The exclusive remedy for injury or damage suffered as a result of an act, event, or omission of any officer, employee, or agent of the State or any of its subdivisions or constitutional officers shall be by action against the governmental entity, or the head of such entity in

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purpose.

its official capacity, or the constitutional officer of which the officer, employee, or agent is an employee, 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.[2]

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[2]The government will not be liable if the employee is outside the course and scope of employment. If the employee is determined to be within the course and scope of employment; however, that is not completely determinative. An employee may be found to be within the course and scope of his employment and the government will still not be liable if the conduct falls within the exemptions. There has been an elimination of joint and several liability between government and employee.