IN THE SUPREME COURT
OF THE STATE OF FLORIDA

MORRIS H. McGHEE, II

Petitioner,

vs.

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

Respondents.

Case No. 85,695

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

PETITIONER'S REPLY BRIEF ON MERITS

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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.

Volusia County argues that the summary judgment entered in its favor should be affirmed for the following reasons: 1) Plaintiff has waived any argument that there are genuine issues of material fact because Plaintiff also moved for summary judgment. [Respondent's Answer Brief at pp. 14-19]; 2) there are no conflicting reasonable inferences which create a genuine issue of material fact [Respondent's Answer Brief at pp. 19-30]; and 3) Deputy Hernlen's conduct was committed in bad faith, with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety or property such that the County is immune from suit as a matter of law. [Respondent's Answer Brief at pp. 2, 8-9] This brief will respond to these arguments and will establish that the summary judgment entered for Volusia County must be reversed.

It is generally recognized in Florida and throughout the United States that cross motions for summary judgment do not prevent the losing party from appealing. [***West Shore Restaurant Corp. v. Turk***, 101 So. 2d 123 (Fla. 1958); "Proper procedure and cause of action by trial court, where both parties move for summary judgment," 36 ***ALR 2d*** 881 (1954); 73 ***Am. Jur. 2d*** Summary Judgment §30 pp. 258-759 (1974)]

The Defendant County claims that there is a narrow exception established in ***Geiser v. Permacrete, Inc.***, 90 So. 2d 610 (Fla. 1956) which applies in this case. ***Geiser*** involved the validity and priority of several liens on real property. The appellant Geisers were the assignees of a third mortgage on real property. The appellees claimed liens on the same property pursuant to the Mechanics Lien Law to be superior to the appellants' mortgage. By summary judgment, the trial court found appellants' third mortgage to be valid, the assignment to appellants to be proper, but that the mortgage of appellants was inferior to the liens of appellees. Both sides appealed.

On cross appeal the appellees contended that the trial court should not have determined the third mortgage and note held by appellants to be valid because there were controverted questions of fact requiring trial by the court. This Court rejected that argument because the appellees specifically requested the trial court to resolve the matters at issue based on the existing record. [90 So. 2d at p. 613] Thus, the ***Geiser*** ruling was not based upon the cross motions for summary judgment. Rather, the ***Geiser*** ruling was based upon the fact that the parties waived the right to proceed to trial and specifically requested judicial resolution of all issues based on the existing record.

Wright, Miller and Kane have provided the following instructive comments regarding cross motions for summary judgment under Federal Rule 56:

> *There are basically three reasons why cross-motions under Rule 56 do not necessarily indicate that the case is*

ripe for final resolution and the entry of judgment. First, the determination whether a genuine issue concerning a material fact exists is itself a question of law that must be decided by the court. It does not depend upon what either or both of the parties may have thought about the matter.

Second, a party may argue that no issue exists in the hope that his legal theory will be accepted, but at the same time he may maintain that there is a genuine factual dispute in the event his theory is rejected or his opponent's is adopted. It should be remembered that a party moving for summary judgment concedes the absence of a factual issue and the truth of the non moving party's allegations only for purposes of his own motion. It follows that the legal theories the movant advances in support of his motion and his assertion that there is no issue of material fact may not be used against him when the court rules on his adversary's motion...

The third reason that cross-motions must be considered separately and should not be interpreted necessarily to mean that judgment should be entered on one of them is that each party, as a movant for summary judgment, bears the burden of establishing that no genuine issue of material fact exists and that he is entitled to a judgment as a matter of law. The fact that one party fails to satisfy that burden on his own Rule 56 motion does not automatically indicate that the opposing party has satisfied his burden and should be granted summary judgment on the other motion. The court must rule on each party's motion on an individual and separate basis, determining, in each case, whether a judgment may be entered in accordance with the Rule 56 standard. Both motions must be denied if the court finds that there is a genuine issue of material fact.
[Wright, Miller and Kane, 10A ***Federal Practice and Procedure***, §2720 pp. 19-24 (1974)]

In addition, Wright, Miller and Kane also point to the basis for this Court's rulings in ***Geiser*** and ***Scavella v. School Board of Dade County***, 363 So. 2d 1095 (Fla. 1978) as follows:

> *... it should be noted that when the court is ruling on cross-motions, the facts sometimes become fully developed at the hearing on the motions. When this occurs in a non jury case the court may proceed to decide the factual issues and render a judgment on the merits without any further delay if it is clear that there is nothing else to be offered by the parties and there is no prejudice in the court proceeding in this fashion. As a practical matter, of course, this procedure amounts to a trial of the action and technically is not a disposition by summary judgment.*
> [Wright, Miller and Kane, 10A ***Federal Practice and Procedure***, §2720 pp. 26-17 (1974)]

The case at bar is unlike ***Geiser*** and ***Scavella***. First, Morris McGhee is entitled to a trial by jury, whereas ***Geiser*** and ***Scavella*** were non jury cases. Second, the Plaintiff McGhee did not request the trial court to resolve factual disputes. Rather, Plaintiff McGhee simply requested summary judgment provided the trial court found Plaintiff to be so entitled.

Even ***assuming arguendo*** that ***Geiser*** and ***Scavella*** are interpreted to hold that a party who moves for summary judgment on a specific question and loses, waives the right to appeal, any such ruling should now be rejected. First, such an exception makes no sense. Why should a motion for summary judgment directed towards a specific question be construed to waive the right to appeal, whereas a motion directed to the entire case would not? There is no logical basis for this distinction.

In addition, as explained by Wright, Miller and Kane, a party who moves for summary judgment concedes the absence of factual issues ***only*** for the purposes of his own motion. And also, even if the actions of a cross summary judgment movant can be viewed as

inconsistent with an appeal, a party is estopped from taking inconsistent positions only where he has been successful. [***Olin's Inc. v. Avis Rental Car System of Florida,*** 104 So. 2d 508, 517 (Fla. 1958); ***Palm Beach County v. Boca Development***, 485 So. 2d 449, 451 (Fla. 4th DCA 1986)] Plaintiff McGhee was not successful below and there are no special circumstances reflected in this record which would support a ruling that the Plaintif has waived his right to appeal or that he should be estopped from proceeding. It should also be noted that the "***Geiser*** exception" was not previously raised by Defendant County and was not relied upon by either the trial court or the Fifth District Court of Appeal.

Second, the Defendant County claims that Plaintiff McGhee asks this Court to improperly stack inferences in order to find it reasonable that Deputy Hernlan's actions were at least partially motivated by the purpose of serving the Sheriff. [Respondent's Answer Brief at pp. 26-30] The Defendant totally misunderstands this matter, or it deliberately attempts to confuse.

There is no evidence in the record that Plaintiff McGhee and Deputy Hernlen had ever met before the arrest. Rather, the trial court and the Fifth District Court of Appeal have so concluded at the Defendant's urging, based solely on Plaintiff McGhee's use of the term "you" and "you all". This conclusion is improper to reach on summary judgment.

The terms "you" and "you all" might mean a specific person, e.g. Deputy Hernlen, **or**, it might refere to a category - e.g. Deputy Sheriffs. There is no basis in the existing record to find that either

interpretation is unreasonable. Therefore, conflicting reasonable inferences exist.

Moreover, even ***assuming arguendo*** that the comments of Plaintiff McGhee can only be viewed as a personal attack on Deputy Hernlen, it would still be possible for a jury to find that Deputy Hernlen perceived these comments as a challenge to the authority of his office, and acted, at least in part, to serve the interests of that office.

Next, both the Amicus, Florida Association of Counties, Inc. and the Defendant County, attempt to select limited excerpts of the testimony of Captain Leonard Davis to support their argument that Deputy Hernlen was not acting within the scope of his employment because the beating of Plaintiff McGhee was not the type of conduct which the employee was hired to perform. [Amicus Brief, Florida Association of Counties, Inc. and Respondent's Answer Brief at pp. 23-25]

First, Deputy Hernlen was obviously hired to use force during the course of his duties. Volusia County armed him with a uniform, badge, nightstick and gun. Second, Captain Davis never expressly testified that Deputy Hernlen acted improperly in using force against Plaintiff McGhee.

Rather, Captain Davis testified as follows:

> *Q: What's the policy toward using force against prisoners once they're handcuffed?*
>
> *A: You use whatever force is necessary to effect the arrest.*

Q. Once they have been arrested and then handcuffed what amount of force is proper then?

A: I don't know what the situation is. There are different circumstances when a guy could still be out of control when he is handcuffed.

Q: What amount of force is proper in the face of verbal threats?

A: Well if he is just verbalizing then normally there isn't any force used if he is already arrested and handcuffed.

Q: It would be contrary to the department policy to use force in the face of verbal provacation, is that right?

A: All depends what the circumstances are. If somebody is trying to arrest him and he is verbalizing it would be proper to use force.

[Deposition Leonard Davis at p. 9]

The summary judgment entered for Defendant Volusia County cannot be excused on this basis. Deputy Hernlen was hired by Volusia County and specifically clothed with the trappings of the lawful use of force, e.g. uniform, badge, nightstick and gun. Thus, the first prong of the ***Craft***[1] test is satisfied. The act in question is the type of conduct the employee was hired to perform.

The last argument raised by the Defendant County is that the summary judgment was proper on the alternative basis that Deputy Hernlen's conduct was committed in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of

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[1] ***Craft v. John Sirounis and Sons,Inc.***, 595 So.2d 795 (Fla. 4th DCA 1991).

human rights, safety or property and the County is immune from suit. [Respondent's Answer Brief at pp. 2, 8-9]

In considering this point, it is important to note that the bad faith exceptions to governmental liability found in Florida Statutes §768.28(9)(a) are affirmative defenses which must be pleaded. [***City of Fort Lauderdale v. Todaro***, 632 So. 2d 655 (Fla. 4th DCA 1994)] The Defendant County did not plead that Deputy Hernlen acted in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety or property as an affirmative defense. [R. 30-35]

The Defendant County contends that this issue was raised by paragraph 11 of their Answer. [R. 33] However, a review of the entire Answer and Affirmative Defenses of the Defendant County establishes that the County failed to plead facts which constitute any of the bad faith exceptions to governmental liability pursuant to Florida Statutes §768.28(9)(a). [R. 30-35]

Alternatively, there is no basis in this record to support the bad faith defenses. This section does not immunize governmental entities from intentional torts. [***Richardson v. City of Pompano Beach***, 511 So. 2d 1121 (Fla. 4th DCA 1987); ***Maybin v. Thompson***, 514 So. 2d 1129 (Fla. 2d DCA 1987)] Rather much more is required. For example, see ***Kirker v. Orange County***, 519 So. 2d 682 (Fla. 5th DCA 1988) where it was alleged that a medical examiner removed the eyes of a deceased child against the express objections of the mother and then attempted to cover up the removal by falsifying the autopsy report. Even if properly raised, this issue is an

issue which must be resolved by the jury. [See e.g. ***Richardson*** and ***Maybin***, *supra*]

There is no argument which has or can be advanced which makes the entry of summary judgment against Plaintiff McGhee proper. A jury must determine whether Defendant Volusia County is legally responsible for Deputy Hernlen's attack. Reversal is mandated.

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 21st day of November, 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 21st day of November, 1995 to: TURA L. BROUGHTON, ASST. CTY. ATTORNEY, Vol. Cty. Legal Dept., 123 W. Indiana Ave., Deland, FL 32720-4613; WILLIAM PAUL HUEY, ESQUIRE and WILLIAM J. ROBERTS, ESQUIRE, Roberts and Eagan, P.A., 217 South Adams Street, Tallahassee, FL 32301; ROY WASSON, Esquire, 44 West Flagler St., Suite 402, Miami, FL 33130 and to BARBARA GREEN, ESQUIRE, 999 Ponce DeLeon Blvd., Suite 1000, Coral Gables, Florida 33134.

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