

0/a 5-7-86

IN THE SUPREME COURT OF FLORIDA  
CASE NO'S. 67,373 & 67,383

CITY OF NORTH BAY VILLAGE  
and OFFICER J. ORT,

Petitioners-Appellants,

vs.

BART DAVID BRAELOW,

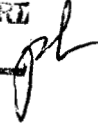
Respondent-Appellee.

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M.D. WHITE

MAR 10 1986

CLERK, SUPREME COURT

By   
Chief Deputy Clerk

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ANSWER BRIEF OF BART DAVID BRAELOW,  
RESPONDENT/APPELLEE

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## INTRODUCTION

This Answer Brief is submitted on behalf of Bart David Braelow, Respondent/Appellee.

In the lower court action, Respondent/Appellee was the plaintiff and Petitioners/Appellants were the defendants. The parties will be referred to herein as they stood before the lower court.

The symbol "R" followed by a page number will be used to refer to the record on appeal. The symbol "T" followed by a page number will be used to refer to the trial transcript.

All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Plaintiff, Bart David Braelow, filed two separate actions against the defendant, City of North Bay Village and Officer J. Ort, seeking damages for personal injuries suffered on November 27, 1979, as a result of a battery committed upon him by Officer Ort while Officer Ort was acting within the course and scope of his employment with the City of North Bay Village. The actions were consolidated and came to trial under Circuit Court Case Number 80-12922 (R 1-3; 166-169; 188).

At trial, the plaintiff offered evidence to show that Officer Ort used excessive force in effectuating the arrest of plaintiff. Plaintiff also offered evidence to show Officer Ort had acted in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights and safety (T 361-374; 167-178; 202-210; 244-253; 271-272).

At the close of plaintiff's case in chief, the trial court granted his motion to amend the pleadings to conform to the evidence adduced at trial (T 426). The jury was instructed that Officer Ort could only be held liable if they found that he had exceeded the amount of force reasonably necessary in arresting the plaintiff (R 147-164). No request was made for a special interrogatory verdict form that would have required the jury to determine such issues as whether or not Officer Ort had acted in bad faith, or with malicious purpose, or in a manner exhibiting willful and wanton disregard of human rights, safety, or property (T 435-437). Rather, a simple verdict form was submitted to the jury (R 146).

The jury returned at the close of the trial with a verdict against

both defendants in the amount of \$100,000.00 (R 146). Subsequently, defendants filed a post trial motion to conform the judgment to the requirements of §768.28(9), Fla.Stat. (1980). Defendants' motion to conform judgment was based upon defendants' contention that Fla.Stat. §768.28 prohibited the court from entering any judgment against defendant, Ort, and from entering a judgment against the City of North Bay Village in excess of \$50,000.00 (R 243-244).

Defendants' motion came before the court on December 13, 1983. At that time, Officer Ort argued that Fla.Stat. §768.28 was amended in 1980, and that under the 1980 version, Officer Ort could not be held personally liable and should not even have been named as a party defendant in the action under the circumstances of this case (R 299-301). Plaintiff responded by arguing that the 1980 version of Fla.Stat. §768.28 could not be applied retroactively, and that the 1979 version of the statute did not bar entry of a judgment against Officer Ort (R 300-306).

At the hearing, the court concluded that the existence of a liability insurance policy which provided coverage for Officer Ort's actions in the instant case, rendered moot the question of how the plaintiff was to collect on his judgment against Officer Ort (R 298-300). The Police Professional Liability Insurance Policy, purchased by the City of North Bay Village for the benefit of Officer Ort, provided \$500,000.00 per person in liability insurance and covered claims for false arrest, bodily injury including assault and battery, and names as insured under the policy all individual officers of the City of North Bay Village Police Department (R 266).

On January 3, 1984, the trial court entered an order denying defendants' motion to conform judgment. In its order, the court acknowledged that the law applicable to this cause of action provided for a limitation on any recovery against the City of North Bay Village to the extent of \$50,000.00. In its order, the court noted that there was no limitation upon the amount of recovery by the plaintiff against Officer Ort (R 256).

Defendants appealed to the Third District Court of Appeal, and for the first time argued that the 1979 version of §768.28(9), Fla.Stat., as opposed to the 1980 version, applied to this case. Defendants argued that under §768.28(9), Fla.Stat. (1979), plaintiff was not entitled to a judgment against Officer Ort in this action.

The District Court affirmed the ruling of the trial court in conforming the judgment by limiting the City's liability to \$50,000.00 while not imposing any limits upon the liability of Officer Ort pursuant to the judgment entered against him (R 495).

Defendants filed a notice to invoke discretionary jurisdiction of this Court, contending that the opinion of the Third District Court of Appeal expressly and directly conflicted with the opinion of the First District Court of Appeal in Rice v. Lee, 477 So.2d 1009 (Fla. 1st DCA 1985). The Rice opinion was rendered shortly after the Third District Court of Appeal denied defendants' petition for rehearing in the District Court (R 497). Defendants also filed a Notice of Appeal in this Court seeking to invoke the jurisdiction of this Court based upon defendants' contention that the decision of the Third District Court of Appeal in this matter inherently declared §768.28(9), Fla.Stat., 1979, to be invalid.

This Court accepted jurisdiction in both cases and has consolidated them for purposes of this proceeding.

## SUMMARY OF ARGUMENT

Section 768.28(9), Fla.Stat. (1979) is substantially similar to §768.28(9), Fla.Stat. (1975). Both versions of the statute make reference to final judgments being rendered against public employees for simple acts of negligence while at the same time stating that the public employees shall not be held personally liable in tort for those judgments. This inconsistency was addressed by this Court in the Talmadge opinion, where it was held that the 1975 version of the statute partially indemnified public employees, but did not immunize them from suit for acts of ordinary negligence.

In both Rupp and Knowles, this Court has had occasion to review the legislative history of §768.28(9), and has on both occasions determined that the first grant of immunity to public employees occurred when the legislature enacted §768.28(9), Fla.Stat. (1980). Knowles held that the 1980 version of the statute cannot be applied retroactively to causes of action accruing prior to the statute's effective date.

Sufficient evidence was offered at trial for a jury to have concluded that Officer Ort acted in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights. Since defendants failed to request an interrogatory verdict form requiring the jury to specifically address that issue, there is no way to know on appeal whether or not the jury determined that issue in favor of plaintiff. Under the two-issue rule, it is presumed that the jury did determine that issue in favor of plaintiff, in which case, even under the construction of §768.28(9), Fla.Stat. (1979) urged by Officer Ort, the judgment rendered against Officer Ort is valid.

ARGUMENT

THE COURT BELOW WAS CORRECT IN DENYING  
DEFENDANTS' MOTION TO CONFORM JUDGMENT.

- A. §768.28(9), Fla.Stat.(1980) cannot be applied retroactively so as to deprive plaintiff of his right to obtain a judgment against Officer Ort individually.

A meaningful analysis of §768.28(9), Fla.Stat. (1979) cannot be made without first examining the statute's legislative history from 1975 until 1980. The predecessor to the 1979 version of the statute was Fla.Stat. §768.28(9) (1975). That version provides:

"No officer, employee, or agent of the state or 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."

This Court construed this sub-section in District School Board of Lake County v. Talmadge, 381 So.2d 698 (Fla. 1980), and held that public employees were partially indemnified, but not immunized from suit for injuries they inflicted in the course of their employment under this provision. This Court noted that while part of §768.28(9) stated that "no...employee shall be held personally liable in tort...", there was other language in the statute discussing the state's obligation to pay "any mone-

tary judgment which is rendered in a civil action personally against an...employee...." Since it would be impossible for judgments to be rendered personally against public employees if §768.28(9), Fla.Stat. (1975) immunized those employees from suit, the statute would make no sense if interpreted to so immunize those employees. The Talmadge court therefore concluded that §768.28(9), Fla.Stat. (1975) merely addressed the extent to which the state would be liable for the torts of public employees. Noting that the legislative intent behind §768.28 (1975) was to waive sovereign immunity on a broad basis in order to provide more adequate compensation for victims of governmental torts, the Talmadge decision was intended to enhance that legislative objective. This Court also noted in Talmadge that its interpretation harmonized §768.28(9), Fla.Stat. (1975) with other related statutes providing for the defense of certain lawsuits against public employees, noting that those statutes would also be rendered meaningless if §768.28(9) were interpreted so as to immunize public employees from suit in most instances.

In response to the Talmadge decision, the legislature promptly enacted Chapter 80-271, Laws of Florida, and provided public employees with immunity from suit for their tortious acts under most circumstances. As amended, §768.28(9) provided:

"(9) No...employee...of the state...shall be held personally liable in tort or named as a party defendant in any action...unless such...employee...acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. The exclusive remedy for injury or damages suffered as a result of any act...of any...employee...of the state... shall be by action against the governmental entity...unless such act or omission was committed in bad faith or with

malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property...."

While the legislature endeavored to give its amendment retroactive effect, this Court ruled, in State Department of Transportation v. Knowles, 402 So.2d 1155 (Fla. 1981), that the statute could not constitutionally be applied retroactively and that, therefore, the law in effect upon the accrual of a cause of action against a public employee must govern.

In the trial court, defendants argued that Fla.Stat. §768.28 (1980) applied so as to entitle defendants to have the judgment conformed in accordance with their motion (R 300-301). Since Fla.Stat. §768.28, as amended by Chapter 80-271, Laws of Florida, was the first statutory grant of immunity to Florida public employees, and was not in effect on November 27, 1979, when plaintiff's cause of action against Officer Ort accrued, §768.28 Fla.Stat. (1980) cannot be applied to deprive plaintiff of his right to obtain a judgment against Officer Ort.

B. §768.28(9), Fla.Stat.(1979) contains no restriction upon plaintiff's right to obtain a judgment against Officer Ort individually.

§768.28(9), Fla.Stat. (1979) is no more a grant of immunity to public employees than was the version of the statute construed by this Court in Talmadge. The 1979 version provides:

"(9) No...employee...of the state...shall be held personally liable in tort for a final judgment which has been rendered against him...unless such...employee...acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property."

Like its predecessor, Chapter 79-139 contemplated final judgments

being rendered against public employees. As in the 1975 version of §768.28(9), Fla.Stat., the 1979 version would make no sense if interpreted so as to immunize public employees from suit since its express language limits such employee's liability once a final judgment has been rendered against him. Clearly no final judgment could be rendered against a public employee under §768.28(9), Fla.Stat. (1979) if that statute were to immunize said employee from suit. The statute does not prohibit public employees being named as defendants in simple negligence actions, even where no bad faith or malicious purpose appears, nor does the statute prohibit final judgments being entered against public employees under those circumstances. Its language merely limits the liability of public employees for final judgments rendered against them, and it is therefore apparent that the statute contemplates that public employees will be named in lawsuits where no allegations of bad faith or malicious purpose have been made.

In Rupp v. Bryant, 417 So.2d 658 (Fla. 1982), this Court was required to determine what legal rights were in existence for persons harmed by governmental employees prior to the 1980 amendments to §768.28(9), Fla.Stat. Rupp, at 661. This Court determined the status of those rights as follows:

"...(w)ith this decision, it should be clear that, for actions commenced between January 1, 1975, the effective date of the original section of 768.28, Chapter 73-313, Laws of Florida, and June 30, 1980, the effective date of the amendment of §768.28(9), Chapter 80-271, Laws of Florida, suit may be maintained against both the state and the employee or official for the ordinary negligence of the employee or official in carrying out ministerial, though not discretionary, duties in the course of employment for the government, provided there is a special duty to the complainant as reflected in First National Bank v.

Filer, 107 Fla. 526, 145 So. 204 (1933), and in Modlin v. City of Miami Beach, 201 So.2d 70 (Fla. 1967)."

In the decision below, the District Court utilized the criteria set forth in Rupp v. Bryant, supra., to determine that plaintiff had a special and direct interest in Officer Ort's performance of his duties as a police officer, and that the serious personal injuries sustained by Braelow constituted special damages. The District Court further noted that at the time of the incident, Officer Ort was engaged in ministerial duties: he had already made the decision to arrest and was engaged in activities incident to carrying out that decision. The court below concluded that the jury had found that Officer Ort had breached the duty owed to Braelow and, pursuant to Rupp, supra., §768.28(9) (1979) did not prohibit the entry of a judgment against Officer Ort pursuant to the jury's finding (R 492-496).

It is significant to note that this Court made no mention of §768.28(9), Fla.Stat. (1979) in the Rupp opinion. This Court also failed to mention that version of the statute in State Department of Transportation v. Knowles, 402 So.2d 1155 (Fla. 1981). It is submitted that the lack of discussion of the 1979 version of the statute in Rupp or Knowles was due to the fact that the 1979 amendment did not materially change the statute and certainly did not affect the question of immunity of public employees as decided in Talmadge. As noted by this Court in Talmadge, the grant of immunity to public employees would need to be clearly expressed by the legislature, since such an immunity would be in derogation of common law. This was not done until the enactment of Chapter 80-271.

In fact, the legislature enacted Chapter 80-271, Laws of Florida, in response to this Court's decision in Talmadge. It was not until 1980,

when the Talmadge decision was rendered, that the legislature was put on notice that if it wanted to immunize public employees from suit, it would have to enact legislation clearly expressing that goal. Obviously, without the benefit of the Talmadge decision, the legislature in 1979 had no reason to pass curative legislation. It was not until the enactment of Chapter 80-271 that the Florida legislature amended §768.28(9) by substituting the phrase "or named as a party defendant in any action" for the phrase "for a final judgment which has been rendered against him." The statute for the first time specified that a public employee could not be named as a party defendant in any action unless there were allegations of bad faith or malicious purpose. For the first time, the statute no longer contemplated final judgments being rendered against public employees for ministerial negligence.

The analysis of §768.28(9), Fla.Stat. (1979) by the First District Court of Appeal in Rice v. Lee, 477 So.2d 1009 (Fla. 1st DCA 1985) is flawed. The 1979 amendments to the statute do not clearly appear to be a reaction to the District Court ruling in Talmadge v. District School Board of Lake County, 355 So.2d 502 (Fla. 2nd DCA 1978). The 1979 amendments did not remove the reference to final judgments which have been rendered against public employees. Therefore, the same inconsistency dealt with by the Talmadge court appears in the 1979 version of the statute in the sense that, on the one hand, the statute contemplates final judgments being rendered against employees for ministerial negligence, while on the other hand, the statute purports to limit those public employees' personal liability for those final judgments. While the Rice court attached a great deal of importance to the fact that the 1979 amendment deleted the provision relating to

indemnification of public employees by the state for judgments rendered against them, the deletion does not, in fact, eliminate the inconsistency common to the 1975 and 1979 versions of the statute as discussed above. This Court's ruling in Talmadge, supra, with regard to the 1975 statute, should apply to the 1979 statute. The Rice court ignored this Court's analysis of the legislative history of the statute, and further ignored the policy bases discussed by this Court in Talmadge that bolstered this Court's holding that all versions of §768.28(9), Fla.Stat., prior to the 1980 amendments failed to render public employees immune from judgments for ministerial negligence. This Court should disapprove the decision in Rice, supra.

It is significant to note that §286.28, Fla.Stat. (1979) provides for the purchase of insurance for public employees covering liability for damages on account of operations within the state. This statute clearly contemplates judgments being entered against public employees acting within the scope of their employment, and is in harmony with §768.28(9), Fla.Stat. (1979) in that it fulfills the remedial purpose of providing compensation for victims of governmental torts. The construction of §768.28(9), Fla.Stat. (1979) urged by defendants would render §286.28, Fla.Stat. (1979) to be meaningless to the extent that it would be authorizing liability insurance for employees covering acts already immunized from suit.

Additionally, the Police Professional Liability Policy purchased by the City of North Bay Village which was in effect commencing November 1, 1979, would be a peculiar investment in light of the City's argument that the employees for which it had purchased insurance were immune from suits of the nature for which the policy expressly provided coverage (R 266).

C. Under the two-issue rule, Officer Ort has waived his right to object to the verdict and judgment rendered against him since there was evidence to support a finding by the jury that he acted in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights.

Ample evidence was introduced at trial to show that Officer Ort acted in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights and safety. The evidence demonstrated that, without provocation, Officer Ort had repeatedly struck the plaintiff about the face while Mr. Braelow was handcuffed, knocking him down to the ground a number of times. The severity of the beating sustained by Mr. Braelow was such that three of his teeth were broken, five fillings were fractured, he sustained a black eye, lacerations, a concussion, and a fracture to his knee. (T 361-374; 167-178; 202-210; 244-253; 272-272). The trial court granted plaintiff's motion to amend his pleadings to conform to the evidence introduced at trial. The jury could easily have found, based upon the evidence, that Officer Ort did act in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights and safety. Defendants did not request an interrogatory verdict form so as to require the jury to specify whether or not it had made such a finding. The jury returned a simple verdict form showing only that it had found both defendants to be liable to the plaintiff, and that Braelow had sustained \$100,000.00 in damages.

The two-issue rule is a rule of policy designed to simplify the work of trial courts and to limit the scope of proceedings on review. The

rule applies in situations where a general verdict has been returned, making it impossible to ascertain the issues upon which the verdict was founded. Where the trier of fact could properly have found for a party as to one issue, the presumption on appeal is that all issues were decided in favor of the prevailing party and the judgment will be affirmed. Colonial Stores, Inc. v. Scarborough, 355 So.2d 1181 (Fla. 1977).

Under the two issue rule, the jury could have found that Officer Ort acted in bad faith, with malicious purpose, or in a manner exhibiting willful and wanton disregard of human rights and safety. By failing to offer a special interrogatory verdict form, Officer Ort is unable to establish that he has been prejudiced by the trial court's ruling concerning his motion to conform the judgment. Even under the construction of §768.28(9), Fla.Stat. (1979) urged by Officer Ort, the jury properly could have found him personally liable by virtue of his bad faith, malice, or wanton and willful disregard of the plaintiff's safety. Officer Ort's complaint as to the application of §768.28(9), Fla.Stat. (1979) to the judgment rendered against him should be foreclosed for this reason.

CONCLUSION

Based upon the aforementioned arguments and authorities, it is respectfully submitted that the decision of the Third District Court of Appeal should be affirmed.

Respectfully submitted,

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By:   
ROBERT B. MILLER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed to LEE WEISSENBORN, ESQ., Attorney for Petitioners-Appellants, 235 N.E. 26 Street, Miami, Florida 33137, this 5th day of March, 1986.

  
ROBERT B. MILLER