DOCKET NO. SC-2024-0263

IN THE SUPREME COURT OF ALABAMA

JAMES E. UNDERWOOD, BRADEN MILES,

Petitioners,

v.

John Long,

Respondent.

ON PETITION FOR WRIT OF MANDAMUS TO THE CIRCUIT COURT OF WALKER COUNTY, ALABAMA

(Case No. CV-19-900131.00, Hon. Doug Farris, Presiding)

PETITIONERS' REPLY TO RESPONDENT'S ANSWER TO PETITION FOR WRIT OF MANDAMUS

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ORAL ARGUMENT REQUESTED

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ARGUMENT

I. THE RESPONDENT'S FAILURE TO ADDRESS BOTH WHETHER THE SIXTH EXCEPTION APPLIES TO CONSTITUTIONALLY ENUMERATED OFFICERS AND THE LIMITATION ON THE SIXTH EXCEPTION EXPRESSLY CONTAINED IN *EX PARTE MOULTON* IS FATAL TO RESPONDENT'S POSITION ON APPEAL

The Respondent's Answer and Brief is nonresponsive to the primary issue raised in this appeal: whether the "sixth exception" to State immunity, first held applicable to State officers and employees by this Court in *Ex parte Moulton*, 116 So. 3d 1119, 1141 (Ala. 2013), likewise applies to constitutionally enumerated executive officers of the State of Alabama under Art. V, § 112.[1] Instead of addressing the issue, Respondent's brief avoids any discussion regarding the effect Alabama sheriffs' status as constitutionally enumerated officers has on this Court's holding regarding the "sixth exception" in *Ex parte Moulton*. Likewise, Respondent's brief avoids any discussion regarding the adverse effect applying *Ex parte Moulton* to sheriffs would have on other Art. V,

[1] The only instance where the Respondent mentions Art. V, § 112 discusses the reason sheriffs were included as members of the executive department under Art. V, § 112. (Resp. Br. at 23-24.) Irrespective of the reason, it does not change the fact that sheriffs are constitutionally enumerated executive officers of the State or that a constitutional amendment would be required to change sheriffs' status.

§ 112 constitutional officers, including the governor, lieutenant governor, attorney general, state auditor, secretary of state, and state treasurer.[2]

Instead, the Respondent's brief, throughout, make casual use of terms such as "state officer" or "state official" when arguing that *Ex parte Moulton* should apply to sheriffs as though there is no legal distinction between state officials whose offices are create by virtue of statute and constitutionally enumerated officers. Simply put, Respondent's brief fails to recognize that while all constitutionally enumerated officers are state officers, not all (very few actually) state officers are constitutional officers. Thus, Respondent's discussion and application of cases upon which he primarily relies where the sixth exception was applied to statutorily created state officials rather than constitutional officers, such as *Ex parte Moulton* and *Ex parte Pinkard*, 373 So. 3d 192 (Ala. 2022), are immaterial to the issue before this Court.

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[2] It is perhaps worth nothing that the Respondent's first sentence in his argument stating that the Petitioners have argued they are entitled to absolute immunity "merely because they wore a badge," (Resp. Br. at 4), is facile and disingenuous. At best, Respondent fails to understand Petitioners' legal argument differentiating immunity applicable to constitutionally enumerated officers versus immunity for statutorily created officials. Otherwise, Respondent has intentionally misrepresented the Petitioners' argument.

Perhaps even more detrimental to the Respondent's position on appeal is the failure to account for the limitation on the sixth exception to State immunity that is expressly contained in the *Ex parte Moulton* opinion. As expressly stated in the opinion, this Court recognized a sixth exception to State immunity applicable to "actions for damages brought against State officials in their individual capacity where it is alleged that they had acted fraudulently, in bad faith, beyond their authority, or in a mistaken interpretation of law, subject to the limitation that the action not be, in effect, one against the State." *Ex parte Moulton*, 116 So. 3d at 1141 (emphasis added). Relevant to that express limitation, this Court has repeatedly held that "an action against a sheriff—or deputy sheriff—for damages arising out of the performance of his duties is essentially a suit against the state. *Ex parte Davis*, 930 So. 2d 497, 499 (Ala. 2005) (emphasis added); *see also Ex parte Blankenship*, 893 So.2d at 305 (same); *King v. Colbert County*, 620 So. 2d 623, 626 (Ala. 1993) ("a suit against a sheriff is essentially a suit against the state"); *Parker v. Amerson*, 519 So. 2d 442, 446 (Ala. 1987) ("This Court has specifically held that a suit against a sheriff is essentially a suit against the state and thus not maintainable").

While the terms "in effect," as used in *Moulton*, and "essentially," as used in cases involving State immunity as applied to sheriffs and deputies, obviously, are not identical, both terms convey the idea of a practical impact or significance. Nevertheless, the clear intent of limitation to the sixth exception as set out in *Ex parte Moulton* is intended to bar the application of the sixth exception to suits for damages against the state. Given this Court's well-established precedent, in *Ex parte Davis*, *Ex parte Blankenship*, *King*, and *Parker*, that suits against sheriffs and deputies are suits against the state, *Ex parte Moulton*'s limitation prevents the application of the sixth exception onto constitutionally enumerated state officials.

The effect of *Ex parte Moulton*'s limitation on the sixth exception is significant. The federal district court opinions cited in the Respondent's brief as holding that the "sixth exception" applied to sheriffs and deputies all relied upon the same erroneous interpretation of *Ex parte Moulton* as asserted by the Respondent in this case.[3] Thus, for the purposes of this

[3] In all likelihood the Respondent's position regarding the application of Ex parte Moulton to sheriffs, likely, is attributable to the federal court's interpretation of Moulton.

appeal, the federal court opinions cited by the Respondent lack even persuasive authority.

II. THE COMPLAINT ESTABLISHES THAT MILES AND UNDERWOOD WERE ACTING WITHIN THE LINE AND SCOPE OF THEIR EMPLOYMENT.

As an initial matter, the Respondent points out that the complaint does not expressly allege that Deputy Miles and Sheriff Underwood were "acting within the line and scope of their employment." (Resp. Br. at 5-6.) While technically correct, the absence of an express allegation is inconsequential when the complaint's fact-based allegations are sufficient to support the conclusion that Miles and Underwood were acting within the line and scope of their employment at the time of the incident giving rise to this lawsuit. This is no different conceptually than the summary judgment standard where factual evidence would be applied to support the conclusion rather than fact-based allegations in a motion to dismiss. As set out below, the fact-based allegations show that both Miles and Underwood were acting with the line and scope of their employment.

The complaint establishes that Deputy Miles was acting within the scope of his employment as a Walker County deputy sheriff, as the express allegations state the following:

> Defendant Braden Miles was, at all times relevant to this complaint, a Deputy Sheriff for the Walker County Sheriff's Office. As a deputy sheriff, Miles was assigned to the patrol division and responsible for the performance of law enforcement duties.
> . . . .
>
> [W]hile patrolling Rural [sic] Walker County, Deputy Miles attempted to stop a suspect riding a motorcycle believed to be stolen who committed a traffic violation.
>
> The suspect refused to stop and accelerated quickly to speeds in excess of 100 mph and Deputy Long activated his lights and siren and pursued the suspect in hot pursuit.

(Compl. ¶¶ 6, 9, 10.) (emphasis added). The aforementioned allegations establish not only that Miles was a deputy sheriff at all times relevant to the complaint, but also that Miles was specifically assigned to the patrol division, and at the time of the incident, engaged in the act of patrolling the county. Miles at this point was performing the duty specifically assigned to him: patrol. Thus, he was acting within the scope of his employment.

Next, the allegations show that the motorcyclist committed a traffic violation and was riding a motorcycle suspected of having been stolen.

The allegations then show that motorcyclist attempted to allude Miles, which is a violation of the criminal code under Ala. Code § 13A-10-52. The motorcyclists engaging Miles in a highspeed pursuit, a potential felony, for what would have otherwise been a mere traffic violation, provided probable cause that the motorcyclist stole or was at least aware the bike was stolen. Thus, Miles' attempting to stop and then pursuing the motorcyclist fell within Alabama sheriffs' mandatory duty to "ferret out crime, apprehend and arrest criminals under Ala. Code § 36-22-3(4), which this Court has recognized "authorizes the sheriff to entrust the performance of those duties to a deputy sheriff." *Ex parte Davis*, 930 So. 2d 497, 501 (Ala. 2005). Thus, these actions relate to sheriffs' statutory duty to ferret out crime, likewise, well within Miles' employment as a deputy sheriff.

Notably, the complaint does not actually allege that Miles' actions exceeded the scope of his employment as a deputy sheriff or that his actions exceeded his discretionary authority to engage in a high-speed pursuit. Instead, the allegations fault Miles' decisions during the pursuit. "Rather than calling for a roadblock or assistance, Deputy Miles gave chase over a nine (9) mile stretch of winding and narrow county road,

while reaching speeds of 115 mph." (Compl. ¶ 11.) Similarly, the allegations fault Miles for his decision to continue rather than call off the pursuit as follows:

> During the chase, Deputy Miles had ample time to reflect upon his actions and carefully weigh the risks and dangers of traveling at such a high rate of speed, on a narrow and winding road, with limited lines of sight, to himself, the fleeing suspect, and an innocent bystander who may come in contact with the suspect or Miles in hot pursuit.
>
> Rather than break off the pursuit, Miles deliberately and recklessly continues to give chase in disregard of the perceived and known dangers to himself, the fleeing suspect and any innocent bystander.

(Compl. ¶¶ 12, 13.) Notably, these allegations fail to show that these decisions exceeded the scope of Miles' employment. Given that the complaint faults Sheriff Underwood for failing to have better policies and procedures related to highspeed pursuits, the allegations cannot show Miles exceeded the scope of his discretion by continuing to pursuit the criminal suspect.

Accordingly, the Respondent asserts that Miles exceeded the scope of his employment as his decision to continue rather than discontinue the pursuit violated. Ala. Code § 32-5A-7. Under § 32-5A-7, drivers of emergency vehicles responding to emergencies are granted permission to

disregard certain rules of the road such as posted speed limits, provided they use the appropriate visual and audible signals. Since it was specifically alleged that Miles engaged his lights and siren, the Respondent cannot argue that Miles violated § 32-5A-7(c). Instead, the Respondent focuses on § 32-5A-7(d), which states "[t]he foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others." Notably, the "protections" referenced in § 32-5A-7(d), which may not be provided, derive from the earlier subjections of § 32-5A-7. Clearly, if the protections are provided in a statute, such as § 32-5A-7, the protections can be withdrawn via statute. As already stated multiple times in the Petitioners' briefs, State immunity applicable to Alabama sheriffs and deputies is constitutional. Obviously, Ala. Code § 32-5A-7(d) is a statutory, and it is a well-established principle of law that constitutional law has precedence over statutory law. Thus, the Respondent cannot use statutory authority under § 32-5A-7 to overcome the Petitioners' constitutionally based entitlement to State immunity.

"As Sheriff, Underwood was the final policymaker for Walker County Sheriff's Office, and as such, his acts were the official policy and custom of the Walker County Sheriff's Office." (App. 3, Compl. ¶ 5.) Notably, the allegations of the complaint show that Sheriff Underwood did not personally participate in the highspeed pursuit. Thus, any liability for Underwood's actions, for the purposes of this lawsuit, can only derive from his duties as policymaker. Since Underwood has authority to create policies and procedures for the Sheriff's Office only by virtue of his status as Sheriff, the act of creating policies and procedures can only arise within the scope of Underwood's employment as sheriff. Thus, contrary to the Respondent's assertions otherwise, Miles and Underwood are entitled to State immunity as the allegations demonstrate their alleged acts fell within the line and scope of their employment.

s/Fred L. Clements, Jr.
OF COUNSEL

CERTIFICATE OF COMPLIANCE

In accordance with Ala. R. App. Procedure 21(d) 32(a), the font used in this petition is set in Century Schoolbook 14 with justified margins and is within the word limit of 3,000 words. The word count beginning and ending with the section entitled Argument contains 2,003 words.

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CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing Reply has been filed using ACIS and I have served the following via electronic mail on July 16, 2024:

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I hereby certify that the above and foregoing Petition will be placed in the U. S. Mail, postage prepaid, on the 16th day of July 2024 to the following:

Honorable Hugh D. Farris, Jr.
Fourteenth Judicial Circuit Court
Walker County Courthouse
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s/Fred L. Clements, Jr.
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