No.: 1200658

In the SUPREME COURT OF ALABAMA

EX PARTE GREG PINKARD

(In re: RONNIE TAYLOR

v.

ALLSTATE PROPERTY & CASUALTY INSURANCE COMPANY C/O CT CORP., et al.)

On a Petition for A Writ of Mandamus to

JUDGE TALMAGE LEE CARTER of the Marion County Circuit Court in case number: CV-2018-900089.00

PETITIONER'S RESPONSE TO ANSWER BRIEF OF RESPONDENT

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STATEMENT WHY THE WRIT SHOULD ISSUE

I. Sovereign immunity requires dismissal of Taylor's claims against Pinkard.

This Court has repeatedly held that "State officers and employees 'are immune from suit when the action against them is, in effect, one against the State,'" and that an action "is, in effect, one against the State when the duty allegedly breached is owed solely because of the officer or employee's official position." Ex parte Cooper, No. 1200269, 2021 WL 4471018, at *1 (Ala. Sept. 30, 2021) (quoting Barnhart v. Ingalls, 275 So. 3d 1112, 1122 (Ala. 2018)). Taylor's claims against Pinkard fit this bill, and thus should be dismissed under Section 14 of the Alabama Constitution.

Taylor (at 29) spends all of two sentences arguing that this Court's precedent does not control his case. His main argument is a bold one, asking the Court to resolve this mandamus petition by overruling numerous precedents. Taylor contends that Barnhart is inconsistent with Ex parte Cranman, 792 So. 2d 392 (Ala. 2000) and Wright v. Cleburne County Hospital Board, Inc., 255 So. 3d 186 (Ala. 2017). But Barnhart is consistent with Cranman and Wright and is rooted in this

Court's prior precedent. Taylor's arguments for overhauling the Court's State immunity precedent all fail.

First, Cranman and Wright are consistent with Barnhart, so Taylor's stare decisis argument fails at the outset. Cranman reformulated the immunity analysis for individual-capacity claims against State officials. See Cranman, 792 So. 2d at 405. It did not address the same issue addressed by Barnhart, i.e., the test for whether a claim against a State official is an individual- or an official-capacity claim. Wright held that with respect to the damages cap for suits against local government entities under Alabama Code § 11-93-2, the terms "line and scope of employment" were not synonymous with "official capacity." 255 So. 3d at 191-92. But conduct within the line and scope of employment is a broader category that includes both individual and official-capacity claims. Barnhart addressed whether claims against State officials that indisputably involved conduct within the line and scope of employment were individual- or official-capacity claims. Moreover, Wright provides no basis to overrule Barnhart because it was a plurality opinion whereas Barnhart is binding precedent.

Second, Taylor's argument that Barnhart effectively abolished individual-capacity claims against State officials and introduced a test unrooted in this Court's prior precedent is meritless. Ex parte Moulton, 116 So. 3d 1119 (Ala. 2013), provides the definitive statement on exceptions to sovereign immunity, and its "sixth" exception includes a limited class of individual-capacity claims against State officials. 116 So. 3d at 1131-32, 1141-42. Taylor nowhere cites Moulton, yet his stare decisis argument is essentially that Barnhart eliminated the sixth exception to sovereign immunity Moulton recognized.

Moulton's own discussion of the sixth exception for individual-capacity claims demonstrates the balance Barnhart sought to uphold:

> This Court has recognized that a state officer or employee may not escape individual tort liability by arguing that his mere status as a state official cloaks him with the state's constitutional immunity. Clearly, a state officer or employee is not protected by § 14 when he acts willfully, maliciously, illegally, fraudulently, in bad faith, beyond his authority, or under a mistaken interpretation of the law. However, actions against State officials or agents in their individual capacities are not without limits. State officers and employees, in their official capacities and individually, also are absolutely immune from suit when the action is, in effect, one against the State. In addition, as discussed in further detail below, a State official or agent may be

> entitled to State-agent immunity pursuant to *Ex parte Cranman*, 792 So. 2d 392 (Ala. 2000), as to actions asserted against him or her in his or her individual capacity.

116 So. 3d at 1141 (internal quotations and citations omitted) (emphasis added). Just as a State official cannot claim sovereign immunity based on his mere status as a government official, "[t]he prohibition of Section 14 cannot be circumvented by suing the official or agent individually." Milton v. Espey, 356 So. 2d 1201, 1202 (Ala. 1978). Moulton thus formally restated the sixth exception to sovereign immunity as follows: "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." Moulton, 116 So. 3d at 1141 (emphasis added).

Under Moulton, merely calling a claim an individual-capacity one does not make it so. Otherwise, § 14's prohibition could be circumvented by money damages suits challenging official conduct that were in effect against the State so long as they were declared to be individual-capacity

claims. But identifying when a claim is "in effect, one against the State" requires a legal standard, which is what Barnhart addressed.

Barnhart fell within this well-established framework when it revisited the factors relevant to whether a claim against a State official was an individual- or official-capacity claim. Far from indicating a departure from precedent, Barnhart noted Milton's "general rule" that individual-capacity claims cannot be used to circumvent § 14 was balanced with Moulton's sixth exception recognizing individual-capacity damages claims. Barnhart, 275 So. 3d at 1125. While the standard for distinguishing the type of claim asserted was to look to "the nature of the action and the relief sought," prior precedent "focused on the damages being sought, on occasion to the exclusion of other factors." Id. at 1126.

Rather than focusing exclusively on the source of payment for the damages, Barnhart refocused the inquiry on the nature of the claim asserted. Id. The State officials who allegedly breached their duty to provide employees statutory benefits owed those duties "only because of the positions the Commission officers held" and were thus "acting only in their official capacities." Put differently, they "had no duties in their

individual capacities to give effect to the benefit statutes; rather, any duties they had in that regard existed solely because of their official positions in which they acted for the State." Id. Under this test, the purported individual-capacity claims were official-capacity claims barred by sovereign immunity.

Contrary to Taylor's assertion, the source-of-duty rule adopted in Barnhart is not novel. In Milton, this Court concluded that a university administrator, in hiring the plaintiff, "was acting in his official capacity as an agent of the University" and "was merely the conduit through which the University contracted with Milton." 356 So. 2d at 1202. In Moulton, the Court applied the newly-formulated sixth exception to sovereign immunity to the plaintiff's claim that he had been terminated without due process. 116 So. 3d at 1142. Since "the petitioners were acting in their official capacities in deciding to eliminate the position of chief of staff based on financial and organizational concerns," the individual-capacity claims were effectively against the State and barred by sovereign immunity. Id. Barnhart thus made explicit what was already implicit in Milton and Moulton—a suit against a State official

for breach of a duty existing solely because of his official position is, in effect, against the State.

Taylor acknowledges that he is asking this Court not only to overrule Barnhart, but also to overrule Ex parte Cooper, __ So. 3d __, 2021 WL 4471018 (Ala. 2021); Meadows v. Shaver, __ So. 3d __, 2020 WL 6815066 (Ala. 2020); Anthony v. Datcher, 321 So. 3d 643 (Ala. 2020) and all other cases applying its holding. The Court should decline this invitation.

Barnhart makes clear that the relevant inquiry is whether the claim is substantively against the State, not whether the plaintiff seeks damages only against the State official's personal assets. The State can act only through its officials and employees, and a plaintiff should not be able hale them into court for purely official conduct based solely on the plaintiff's declaration that he will seek only their personal funds. Taylor's argument against Barnhart is really a disagreement with sovereign immunity itself, and that can be changed only by amendment to the Alabama Constitution of 1901.

Taylor's cursory argument that Barnhart's analysis is inapplicable to Pinkard's conduct merits little reply. Taylor asserts claims against

Pinkard for malicious prosecution and defamation. But Pinkard's investigation of the fire on Taylor's property, and his subsequent communication of the results of his investigation that form the basis of the defamation claim, resulted in breaches of duty that exist solely because of his position as a State deputy fire marshal. See Ala. Code §§ 36-19-2(6) (authorizing fire marshals to suppress arson and investigate the cause of fires); 36-19-5 (requiring investigation into fires in which property is destroyed and to report suspicious fires to State fire marshal); 36-19-17, 36-19-19 (fire marshals may take testimony on oath in investigations or summon witnesses); 36-19-18 (fire marshal may charge individuals with offenses and provide all information to district attorney); 36-19-24 (requiring fire insurance companies to report suspicious fires to fire marshal); 36-19-41, 36-19-42 (requiring insurance companies to cooperate with fire investigations). Pinkard is thus entitled to § 14 immunity from all of Taylor's claims.

II. Any claims asserted against Pinkard that are not barred by sovereign immunity are barred by State-agent immunity.

Even assuming Taylor asserts individual-capacity claims against Pinkard under the sixth exception to sovereign immunity recognized in

Moulton, Pinkard has State-agent immunity from these claims. See Moulton, 116 So. 3d at 1141. Taylor admits that Pinkard satisfied his initial burden of showing that his conduct fell within one of Cranman's categories. (Ans. at 10); see also Cranman, 792 So. 2d at 405 (stating category 4 applies to "exercising judgment in the enforcement of the criminal laws of the State."). The burden thus shifts to Taylor to present "substantial evidence" that Pinkard acted "willfully, maliciously, fraudulently, in bad faith, beyond his or her authority, or under a mistaken interpretation of law." Ex parte City of Montgomery, 272 So. 3d 155, 160-61 (Ala. 2018).

Taylor argues he has presented substantial evidence of the exceptions for willful, malicious, fraudulent, or bad faith conduct by Pinkard. (Ans. at 10). But these exceptions require Taylor to show more than a mere lack of probable cause by Pinkard. See Ex parte Tuscaloosa Cty., 796 So. 2d 1100, 1107 (Ala. 2000). Rather, Taylor must present substantial evidence of conduct "so egregious as to amount to willful or malicious conduct or conduct engaged in bad faith, by, for example, showing that the defendant had a personal ill will against the [plaintiff] and that he maliciously or in bad faith arrested him solely for purposes

of harassment." Id. (internal quotation and citation omitted). Taylor carries a heavy burden for these exceptions since "poor judgment or wanton misconduct, an aggravated form of negligence, does not rise to the level of willfulness and maliciousness necessary to put the State agent beyond the immunity recognized in Cranman." Ex parte City of Montgomery, 272 So. 3d at 168 (internal quotation and citation omitted).

Taylor presents four examples of Pinkard's supposedly malicious conduct from the record, none of which constitutes substantial evidence either individually or cumulatively. But before addressing these examples, Pinkard restates that he had no knowledge of Taylor prior to receiving a report of a suspicious fire from Assurance Group insurance adjuster Tommy Pennington. (Att. Y, Ex. J). Pinkard investigated the fire pursuant to his statutory duty as a deputy fire marshal and communicated his conclusion that Taylor had illegally maintained a fire on his property to the district attorney. The undisputed facts show, as a general matter, that Pinkard had no prior knowledge of or ill-will towards Taylor.

First, Taylor argues Pinkard submitted a report to the district attorney falsely stating that Taylor "admitted" he threw a burn barrel onto the structure fire. (Ans. at 11). Taylor cites to an affidavit of an assistant district attorney attaching a copy of Pinkard's Fire Scene Investigation Report that she says she relied on in deciding whether to present the case to the grand jury. (Att. Z, Ex. I, Tab A). The statement appears in the "Conclusion" section of Pinkard's report and states that Taylor "also admitted to adding the barrel onto the structure with extra fuel items to burn maintaining the fire and destroying evidence." (Id.). Taylor does not present substantial evidence that this statement was an intentional lie.

Pinkard stated in his deposition that his basis for claiming Taylor admitted to moving the burn barrel was Taylor's own admission in his recorded interview that he had moved the burn barrel. (Att. Y, Ex. P at 168, 170). Pinkard stated to Taylor in the recorded interview that pictures of the burn barrels showed they had fresh burns. (Id., p. 164). This indicated to Pinkard that Taylor had moved the barrels closer to the house when it was on fire to continue burning the house down. When Pinkard asked Taylor, "why would there be fresh burns in the

barrels that you threw in there on the side," Taylor responded only, "I was fixing to clean it up, to be honest with you." (Id.). Pinkard acknowledged Taylor did not expressly admit one way or the other whether he moved the burn barrel onto the structure while it was still burning. (Id., p. 170). But the conclusion in his Fire Scene Investigation Report was just that—a conclusion, not an intentional lie.

Taylor also argues Pinkard knew there was no "fire" when the Taylors arrived at their home and that Taylor reported the fire to the fire department, sheriff, and power company. But Taylor admitted the fire was still "smoldering" when he arrived at the property. (Att. Y, Ex. C at 68, Ex. 3 at 6, Ex. F. at 44). Taylor, a former firefighter who had responded to over 100 fires, never asked the Haleyville Fire Department to dispatch a truck to extinguish the fire but only requested a report. (Att. Y, Ex. F at 56; Att. Z, Ex. G—Plaintiff's Ex. 12). These facts, the location of the burn barrel, and Taylor's financial incentive to maintain the fire led Pinkard to conclude Taylor had maintained the fire and destroyed evidence. Pinkard's inference in the Conclusion section of his report to the district attorney based on this information, even if mistaken, is not substantial evidence of "personal

ill will" against Taylor or that Pinkard contributed to a prosecution "solely for purposes of harassment." Ex parte Tuscaloosa Cty., 796 So. 2d at 1107 (internal quotation and citation omitted).

Second, Taylor argues Pinkard was acting maliciously and in bad faith based on the "abusive" and "malicious" language used during his interview with Taylor. (Ans. at 12). Pinkard's quoted statements and raised voice at times on the audio recording are not substantial evidence of malice. The purpose of Pinkard's interview, taken as a whole, was clearly to investigate the circumstances of the fire and allow Taylor to explain his side of the story. Courts have expressly acknowledged that "subtle forms of psychological manipulation, such as trickery or deception by the police," are insufficient to render a statement involuntary. Jackson v. State, 836 So. 2d 915, 933 (Ala. Crim. App. 1999). If Pinkard's sometimes aggressive questioning of Taylor is sufficient to meet the high bar of the willful and malicious exception to State-agent immunity, then commonly accepted law enforcement interview tactics would be prohibited due to fear of personal liability.

Third, Taylor argues Pinkard was willful and malicious when he communicated with Allstate and the Haleyville Fire Department, which

resulted in the cancelation of an insurance payment and Taylor's suspension from the fire department. (Ans. at 13). But Pinkard's communication with the insurance companies is required by Alabama law and an unavoidable feature of investigating suspicious fires. See Ala. Code §§ 36-19-24 (requiring fire insurance companies to report suspicious fires to fire marshal); 36-19-41, -42 (requiring insurance companies to cooperate with fire investigations). Pinkard also updated the insurance companies on the status of the investigation when contacted because they were listed as victims in the case. (Att. Y, Ex. J at 2). The fire department suspended Taylor after Pinkard notified the fire chief of Taylor's indictment. (Id. at 4). Indeed, Pinkard would have been negligent if he had not communicated to the fire department that one of its volunteer firefighters had been indicted for arson.

Fourth, and finally, Taylor argues Pinkard was willful and malicious by failing to follow NFPA Standards 921 and 1033. Taylor argued below that Pinkard's alleged failure to follow NFPA Standards deprived him of immunity under the "beyond authority" exception for failing to "discharge duties pursuant to detailed rules or regulations, such as those stated on a checklist." Ex parte Kennedy, 992 So. 2d 1276,

1282-83 (Ala. 2008). As Pinkard has argued, the NFPA Standards cannot show he acted "beyond authority" because they are nonmandatory guidelines only, they are highly discretionary, and he did not violate them. (Pet. at 18-19). Taylor abandons his "beyond authority" argument and now argues Pinkard's alleged failure to follow NFPA Standards is substantial evidence he was willful and malicious. But this is an even weaker argument for an exception to State-agent immunity. Taylor fails to present substantial evidence that Pinkard was willful and malicious based on failing to follow nonmandatory, discretionary guidelines.

In sum, Taylor fails to carry his burden of presenting substantial evidence that Pinkard's conduct was willful, malicious, fraudulent, or in bad faith so as to deprive him of State-agent immunity. At best, Taylor has shown that Pinkard's conclusion at the end of his investigation was incorrect. But this is exactly the kind of discretionary action State-agent immunity is intended to protect to avoid chilling law enforcement officers' investigations. Taylor has failed to meet the high bar for showing evidence of "personal ill will" against him or an investigation

"solely for purposes of harassment." Ex parte Tuscaloosa Cty., 796 So. 2d at 1107 (internal quotation and citation omitted).

CONCLUSION

The trial court erroneously denied Pinkard's motion for summary judgment on sovereign and State-agent immunity grounds. Pinkard's mandamus petition is thus due to be GRANTED.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Alabama Rule of Appellate Procedure 32(d), I hereby certify that I have complied with the font and word limitations outlined in Alabama Rules of Appellate Procedure 32(a)(7) and 32(b)(3). The font of this Petition is Century Schoolbook 14. The word count (excluding items listed in Alabama Rule of Appellate Procedure 32(c)) is 2,997.

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I hereby certify that I have on December 22, 2021, served a copy of the foregoing on the following, by placing same in the United States Mail, postage prepaid and properly addressed as follows:

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