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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2016-2017

1151310

Ex parte City of Homewood et al.

PETITION FOR WRIT OF MANDAMUS

(In re: Bria Mines

v.

City of Homewood et al.)

(Jefferson Circuit Court, CV-15-904768)

STUART, Justice.

Officer J.C. Clifton and Officer Jason Davis, law-enforcement officers for the City of Homewood, and the City of

Homewood petition this Court for a writ of mandamus directing the Jefferson Circuit Court to enter a summary judgment in their favor on the ground of immunity. We grant the petition and issue the writ.

Facts and Procedural History

In December 14, 2013, Officer Clifton and Officer Davis were dispatched to the Babies "R" Us specialty retail store located in the Wildwood Shopping Center in response to a shoplifting incident involving Bristinia Fuller and Bria Mines. When the officers arrived, they learned that Fuller and Mines were leaving the parking lot of the store in a vehicle being driven by Fuller. Officer Clifton and Officer Davis, driving separate patrol cars, attempted to stop the vehicle. Instead of stopping, Fuller eluded the officers by speeding through the parking area and onto Lakeshore Drive. The officers pursued. Fuller continued speeding on Lakeshore Drive and ran through multiple red traffic lights before losing control of her vehicle while attempting to turn onto Oxmoor Road. Fuller's vehicle struck a light pole and a vehicle stopped at the intersection. Fuller was killed and Mines was seriously injured.

On December 13, 2015, Mines sued Officer Clifton and Officer Davis, both in their official and individual capacities; Homewood; and others not before this Court in the petition.[1] Mines alleged that she was injured as a result of the negligent, reckless, and/or wanton conduct of the officers and Homewood during the officers' pursuit of Fuller's vehicle. She also alleged that Homewood was vicariously liable for the officers' conduct and was negligent in hiring and supervising the officers. Mines served interrogatories with the complaint.

On March 11, 2016, Homewood, Officer Clifton, and Officer Davis moved to dismiss the claims against them on the bases that Homewood was statutorily immune from the wantonness claim, see § 11-47-190, Ala. Code 1975; that the claim alleging negligent training and supervision against Homewood was not a cognizable claim, see Ott v. City of Mobile, 169 F. Supp. 2d 1301 (S.D. Ala. 2001); that Alabama does not recognize an independent cause of action for liability arising out of a law-enforcement officer's pursuit of a criminal

[1]The others were Fuller's estate and ACCC Insurance Company. The claim against ACCC was dismissed on April 8, 2016.

suspect, see Ex parte Brown, 182 So. 3d 495 (Ala. 2015), Gooden v. City of Talladega, 966 So. 2d 232 (Ala. 2007), and Doran v. City of Madison, 519 So. 2d 1308 (Ala. 1988); that the officers are entitled to peace-officer immunity (§ 6-5-640, Ala. Code 1975); that the officers are entitled to State-agent immunity, see Ex parte Hayles, 852 So. 2d 117 (Ala. 2002), and Hollis v. City of Brighton, 950 So. 2d 300 (Ala. 2006); and that all of Mines's claims are barred by Fuller's intervening criminal acts, see Gooden, supra, and Prill v. Marrone, 23 So. 3d 1 (Ala. 2009).

Homewood, Officer Clifton, and Officer Davis attached to the motion to dismiss a copy of a video recording of the pursuit and Fuller's accident made by the dashboard camera in Officer Clifton's vehicle. The video recording indicates that the officers were engaged in a high-speed pursuit of Fuller's vehicle, that Officer Clifton was driving the lead vehicle in pursuit of Fuller's vehicle, that Fuller was driving recklessly, and that, as Mines stated in her complaint, "Fuller lost control of the vehicle while attempting to turn onto Oxmoor Road [and] struck a pole and another vehicle." The video recording shows Officer Clifton slowing his vehicle

at times during the pursuit to safely negotiate the traffic and shows that, although law-enforcement vehicles were pursuing Fuller's vehicle, no law-enforcement vehicle made contact with Fuller's vehicle during the pursuit. Indeed, the video recording establishes unequivocally that no law-enforcement vehicle was near Fuller's vehicle when Fuller attempted to turn onto Oxmoor Road and struck a light pole and another vehicle.

On May 9, 2016, Mines filed her opposition to the motion to dismiss, maintaining that because Homewood, Officer Clifton, and Officer Davis had relied on matters outside the pleadings in their motion, the motion to dismiss had been converted to a summary-judgment motion. She argued that because the motion had been converted to a summary-judgment motion she needed a reasonable opportunity to discover evidence and to respond. Mines did not attach an affidavit proffering what she expected discovery to reveal, and she did not challenge the authenticity of the video recording.

On July 6, 2016, the trial court conducted a hearing on the motion to dismiss.

On August 4, 2016, Mines moved the trial court to order Homewood, Officer Clifton, and Officer Davis to answer the interrogatories she had served with her complaint.[2]

On August 10, 2016, the trial court ordered:

> "This matter comes before the court on the defendants' motion to dismiss under Rule 12(b)(6) of the Ala. R. Civ. P. Since the defendants request that this court consider matters outside the pleadings, the court will treat this motion as a motion for summary judgment under Rule 56 of the Ala. R. Civ. P..
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> "Is therefore ORDERED, ADJUDGED, and DECREED that the defendants' motion for summary judgment is hereby DENIED.
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> "Both parties are hereby informed that the court will again entertain those issues presented in the defendants' motion after the discovery phase of this litigation, upon the filing of a properly crafted motion."

On August 19, 2016, Homewood, Officer Clifton, and Officer Davis moved the trial court to alter, amend, or vacate the order denying their motion, arguing that the trial court erred in not entering a summary judgment in their favor because, they said, they were entitled to immunity from liability as a matter of law and that, in light of the video recording, discovery would not establish otherwise. They

[2]Mines did not attach a copy of the interrogatories to her response to the petition for the writ of mandamus.

pointed out that Mines did not identify what specific discovery was necessary to respond to any of the grounds asserted in their motion. On September 13, 2016, the trial court conducted a hearing on the motion to alter, amend, or vacate. Mines argued that additional discovery was needed but again did not state what evidence she expected discovery to reveal that would create a genuine issue of material fact with regard to the issue of immunity.

On September 21, 2016, Homewood, Officer Clifton, and Officer Davis timely petitioned this Court for a writ of mandamus directing the trial court to vacate its order denying their motion for a summary judgment and to enter a summary judgment in their favor. On January 8, 2017, Mines filed her response to the petition.

Standard of Review

"'"This Court has stated:

> "'"'"While the general rule is that the denial of a motion for summary judgment is not reviewable, the exception is that the denial of a motion grounded on a claim of immunity is reviewable by petition for writ of

> mandamus. Ex parte Purvis, 689 So. 2d 794 (Ala. 1996)....
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> "'"'"...."'
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> "'"Ex parte Turner, 840 So. 2d 132, 135 (Ala. 2002)(quoting Ex parte Rizk, 791 So. 2d 911, 912-13 (Ala. 2000)). A writ of mandamus is an extraordinary remedy available only when the petitioner can demonstrate: '"(1) a clear legal right to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) the properly invoked jurisdiction of the court."' Ex parte Nall, 879 So. 2d 541, 543 (Ala. 2003)(quoting Ex parte BOC Group, Inc., 823 So. 2d 1270, 1272 (Ala. 2001))."
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> "'Ex parte Yancey, 8 So. 3d 299, 303-04 (Ala. 2008).'

"Ex parte Jones, 52 So. 3d 475, 478-79 (Ala. 2010).

> "'In reviewing a trial court's ruling on a motion for a summary judgment, we apply the same standard the trial court applied initially in granting or denying the motion. Ex parte Alfa Mut. Gen. Ins. Co., 742 So. 2d 182, 184 (Ala. 1999).
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> "'"The principles of law applicable to a motion for summary judgment are well settled. To grant such a motion,

> the trial court must determine that the evidence does not create a genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Rule 56(c)(3), Ala. R. Civ. P. When the movant makes a prima facie showing that those two conditions are satisfied, the burden shifts to the nonmovant to present 'substantial evidence' creating a genuine issue of material fact."
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> "'742 So. 2d at 184. "[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989).'
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> "Swan v. City of Hueytown, 920 So. 2d 1075, 1077-78 (Ala. 2005)."

Ex parte Brown, 182 So. 3d 495, 502 (Ala. 2015).

Discussion

Officer Clifton and Officer Davis contend that the trial court erred in refusing to enter a summary judgment in their favor because, they say, at the time of the accident they were acting as agents of the State, that none of the exceptions to State-agent immunity apply, and that, therefore, they are

entitled to immunity from suit by Mines, pursuant to § 6-5-338(a), Ala. Code 1975.

In Ex parte City of Midfield, 161 So. 3d 1158, 1163-64 (Ala. 2014), this Court recognized:

> "'Section 6-5-338(a)[, Ala. Code 1975,] provides:
>
> > "'"Every peace officer, except constables, who is employed or appointed pursuant to the Constitution or statutes of this state ... and whose duties prescribed by law, or by the lawful terms of their employment or appointment, include the enforcement of, or the investigation and reporting of violations of, the criminal laws of this state, and who is empowered by the laws of this state to execute warrants, to arrest and to take into custody persons who violate, or who are lawfully charged by warrant, indictment, or other lawful process, with violations of, the criminal laws of this state, shall at all times be deemed to be officers of this state, and as such shall have immunity from tort liability arising out of his or her conduct in performance of any discretionary function within the line and scope of his or her law enforcement duties."
>
> "'The restatement of State-agent immunity as set out by this Court in Ex parte

Cranman, [792 So. 2d 392 (Ala. 2000)], governs the determination of whether a peace officer is entitled to immunity under § 6-5-338(a). Ex parte City of Tuskegee, 932 So. 2d 895, 904 (Ala. 2005). This Court, in Cranman, stated the test for State-agent immunity as follows:

> "'"A State agent shall be immune from civil liability in his or her personal capacity when the conduct made the basis of the claim against the agent is based upon the agent's
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> "'"....
>
> "'"(4) exercising judgment in the enforcement of the criminal laws of the State, including, but not limited to, law-enforcement officers' arresting or attempting to arrest persons; ...
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> "'"....
>
> "'"Notwithstanding anything to the contrary in the foregoing statement of the rule, a State agent shall not be immune from civil liability in his or her personal capacity
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> "'"(1) when the Constitution or laws of the United States, or the Constitution of this State, or laws,

> rules, or regulations of this State enacted or promulgated for the purpose of regulating the activities of a governmental agency require otherwise; or
>
> "'"(2) when the State agent acts willfully, maliciously, fraudulently, in bad faith, beyond his or her authority, or under a mistaken interpretation of the law."

"'Cranman, 792 So. 2d at 405. Because the scope of immunity for law-enforcement officers set forth in § 6-5-338(a) was broader than category (4) of the restatement adopted in Cranman, this Court, in Hollis v. City of Brighton, 950 So. 2d 300, 309 (Ala. 2006), expanded and modified category (4) of the Cranman test to read as follows:

> "'"'A State agent shall be immune from civil liability in his or her personal capacity when the conduct made the basis of the claim against the agent is based upon the agent's
>
> "'"....
>
> "'"'(4) exercising judgment in the enforcement of the criminal laws of the State, including, but

> not limited to, law-enforcement officers' arresting or attempting to arrest persons, or serving as peace officers under circumstances entitling such officers to immunity pursuant to § 6-5-338(a), Ala. Code 1975.'"

"'Hollis, 950 So. 2d at 309. Additionally:

> "'"'This Court has established a "burden-shifting" process when a party raises the defense of State-agent immunity.' Ex parte Estate of Reynolds, 946 So. 2d 450, 452 (Ala. 2006). A State agent asserting State-agent immunity 'bears the burden of demonstrating that the plaintiff's claims arise from a function that would entitle the State agent to immunity.' 946 So. 2d at 452. Should the State agent make such a showing, the burden then shifts to the plaintiff to show that one of the two categories of exceptions to State-agent immunity recognized in Cranman is applicable. ..."'

"Ex parte City of Montgomery, 99 So. 3d at 291-94 (quoting Ex parte Kennedy, 992 So. 2d 1276, 1282-83 (Ala. 2008))."

Thus, for Officer Clifton and Officer Davis to demonstrate that they are entitled to immunity from Mines's

claims against them in their official and individual capacities, they must establish (1) that they were peace officers (2) performing law-enforcement duties at the time of the accident and (3) exercising judgment and discretion. If they can do so, the burden then shifts to Mines to show that one of the Cranman exceptions applies. If Mines does not satisfy this burden, then the officers are entitled to immunity.

With regard to the first two factors to determine immunity, the materials before us establish that it is undisputed that Officer Clifton and Officer Davis were employed as law-enforcement officers by Homewood; therefore, they are "peace officers" for the purposes of § 6-5-338(a), Ala. Code 1975. Additionally, the parties agree that Officer Clifton and Officer Davis were performing law-enforcement duties at the time of the accident. Therefore, no genuine issue of fact exists as to the first two factors.

With regard to the third-factor determining immunity -- whether the officers were exercising proper judgment and discretion -- in Hollis v. City of Brighton, 950 So. 2d 300, 309 (Ala. 2006), this Court held that arresting or attempting

to arrest an individual is a discretionary function. It is undisputed that Officer Clifton and Officer Davis pursued Fuller's vehicle in an attempt to arrest Fuller and Mines for allegedly shoplifting. Additionally, the video recording establishes that the officers were engaged in a high-speed pursuit of Fuller's vehicle, that Fuller was driving recklessly, that no law-enforcement vehicle made any contact with Fuller's vehicle during the pursuit, and that no law-enforcement vehicle was near Fuller's vehicle when Fuller attempted to turn onto Oxmoor Road and struck a light pole and another vehicle. The video recording demonstrates that the officers were exercising discretion and judgment during the pursuit of Fuller's vehicle. See Doran v. City of Madison, 519 So. 2d 1308, 1314 (Ala. 1998)(quoting Madison v. Weldon, 446 So. 2d 21, 28 (Ala. 1984), quoting in turn City of Miami v. Horne, 198 So. 2d 10, 13 (Fla. 1967))("'"The rule governing the conduct of [a] police [officer] in pursuit of an escaping offender is that he must operate his vehicle with due care and in doing so he is not responsible for the acts of the offender. Although pursuit may contribute to the reckless driving of the pursued, the officer is not obliged to allow

him to escape."' (Emphasis added.)"). Therefore, Officer Clifton and Officer Davis satisfied their burden of showing the third-factor for immunity.

Because the materials submitted by the officers established that they qualified for immunity, the burden then shifted to Mines to show that one of the two Cranman exceptions to immunity applied.

In her complaint, Mines alleged that Officer Clifton and Officer Davis

> "acted beyond their authority as police officers employed by [Homewood], in derogation of and/or under a mistaken interpretation of the laws enacted and/or promulgated for the purpose of regulating the boundaries of permissible activities of law enforcement personnel in the manner in which they allowed the police cruisers to pursue the vehicle driven by [Fuller] and also occupied by [Mines]."

Mines offered nothing to refute the evidence of the officers' appropriate conduct captured by the dashboard camera of the police vehicle, nor did Mines proffer any facts in her complaint to contradict the facts developed in the pleadings.

Instead of addressing the merits of the summary-judgment motion, that is, refuting the evidence of the officers' appropriate conduct captured on the dashboard camera, Mines made the conclusory argument that, because the officers had

not responded to her requests for discovery, she needed time to gather evidence before addressing the motion. In effect, Mines moved, pursuant to Rule 56(f), Ala. R. Civ. P., for a continuance to permit discovery of evidence to oppose the motion. Mines did not support her motion with an affidavit proffering any facts she expected from the requested discovery that would contradict the facts developed and show that a genuine issue of material fact existed with regard to whether the officers were entitled to immunity.

In Reeves v. Porter, 521 So. 2d 963 (Ala. 1988), this Court addressed the propriety of a trial court entering a summary judgment for the defendants before the defendants had complied with discovery requests, stating:

> "The mere pendency of discovery does not bar summary judgment. If the trial court from the evidence before it, or the appellate court from the record, can ascertain that the matter subject to production was crucial to the non-moving party's case (Parrish v. Board of Commissioners of Alabama State Bar, 533 F.2d 942 (5th Cir. 1976)) or that the answers to the interrogatories were crucial to the non-moving party's case (Noble v. McManus, 504 So. 2d 248 (Ala. 1987)), then it is error for the trial court to grant summary judgment before the items have been produced or the answers given. However, the burden of showing that these items are crucial is upon the non-moving party. He can do so by complying with Rule 56(f), Ala. R. Civ. P., Water View Developments, Inc. v. Eureka, Inc., 512 So. 2d

> 916 (Ala. 1987). Rule 56(f) provides: 'Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.'[3] A pending motion to compel production (Parrish, supra) and a motion to compel answers to interrogatories, which has been granted (Noble, supra) when the evidence before the court clearly shows that the evidence sought is crucial to the non-moving party's case, have been held sufficient compliance with Rule 56(f). However, when no such crucial evidence would be supplied by the production or by the answers to the interrogatories, it is not error for the trial court to grant summary judgment with discovery pending. Wallace v. Brownell Pontiac-GMC Co., 703 F.2d 525 (11th Cir. 1983); Noble v. McManus, supra. In Wallace, Judge Kravitch noted: 'Most, if not all, cases involving a Rule 56(f) issue will be factually dissimilar. For this very reason, a blanket rule would be inappropriate.' 703 [F.]2d at 528. The burden is upon the non-moving party to comply with Rule 56(f) or to prove that the matter sought by discovery is or may be crucial to the non-moving party's case...."

521 So. 2d at 965 (emphasis added).

Here, in light of the caselaw with regard to immunity and law-enforcement-officer pursuit of a suspect and the evidence presented in the video recording, Mines's argument that additional discovery is required before she can address the

[3]Rule 56(f), Ala. R. Civ. P., was amended effective August 1, 1992, and no longer reads exactly as quoted here.

summary-judgment motion is not supported by the record and is unpersuasive. Mines did not attach an affidavit to her opposition to the summary-judgment motion explaining what she expected the requested discovery to reveal with regard to her contention that the officers were not entitled to immunity and why the discovery was crucial to her ability to oppose the officers' immunity argument. For example, Mines did not assert that the requested discovery will demonstrate that Officer Clifton and Officer Davis did not act as "reasonably prudent emergency driver[s] exercising [their] discretion under the prevailing circumstances" Blackwood v. City of Hanceville, 936 So. 2d 495, 507 (Ala. 2006), or that the discovery would show that the officers were acting "willfully, maliciously, fraudulently, in bad faith, beyond his or her authority, or under a mistaken interpretation of the law," Ex parte Cranman, 792 So. 2d 392, 405 (Ala. 2000). To the extent that Mines may have asserted that additional discovery will show that Officer Clifton and Officer Davis "caused" Fuller to lose control of her vehicle, the video quite clearly establishes otherwise. The video recording demonstrates that the officers were exercising due care in the operation of

their vehicles and were not responsible for Fuller's actions. Doran, supra. In light of the evidence presented in the video recording, Mines cannot demonstrate through additional discovery that a genuine issue of material fact exists with regard to the immunity of Officer Clifton and Officer Davis.

The trial court had before it evidence that clearly showed the accident and the surrounding circumstances. Additionally, the evidence clearly showed that the officers were engaged in conduct that qualifies for immunity and that the officers were not the proximate cause of Mines's injuries. Mines did not refute this evidence, nor did she proffer any evidence indicating that additional discovery would challenge the officers' immunity defense. Therefore, the trial court erred in denying Officer Clifton and Officer Davis's summary-judgment motion based on immunity.

Likewise, the materials before us demonstrate that Homewood is entitled to immunity. Section 6-5-338(b), Ala. Code 1975, provides that the immunity enjoyed by peace officers extends to "governmental units or agencies authorized to appoint peace officers." See also Ex parte City of Gadsden, 781 So.2d 936 (Ala. 2000)(holding that because the

officer's decision to pursue the suspect was a discretionary act entitled to immunity, the plain language of § 6-5-338(b), Ala. Code 1975, extended that immunity to the municipality that employed the officer). Accordingly, because Officer Clifton and Officer Davis were engaged in a discretionary act entitling them to immunity from Mines's suit, Homewood, the municipality that employed them, is also entitled to immunity from Mines's suit.

Conclusion

Officer Clifton and Officer Davis have established that they are entitled to immunity as to Mines's claims against them in both their official and individual capacities. Moreover, because Officer Clifton and Officer Davis are entitled to immunity, Homewood is also entitled to immunity. Officer Clifton, Officer Davis, and Homewood have demonstrated a clear, legal right to a summary judgment in their favor. Therefore, we grant their petition and issue the writ, directing the trial court to enter a summary judgment for Officer Clifton, Officer Davis, and Homewood.

PETITION GRANTED; WRIT ISSUED.

Bolin, Parker, Murdock, Shaw, Main, Wise, and Bryan, JJ., concur.