UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 21-1685

DANA HARRISON, ET AL,
PLAINTIFFS - APPELLEES

V.

BRODIE FAUGHN, ET AL,
DEFENDANTS - APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

THE HON. BETH DEERE
UNITED STATES MAGISTRATE JUDGE

APPELLEES' BRIEF

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SUMMARY OF THE CASE

Appellees believe that Defendants' motives are so obviously apparent and contrary to police procedures that oral argument is not warranted.

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- *Parrish v. Ball*, 594 F.3d 993 (8th Cir. 2010)

II. The District Court correctly denied qualified immunity to officer Faughn on Christa Hess' claim.

- *Faughn v. Kennedy*, 2019 Ark. App. 570
- *Parrish v. Ball*, 594 F.3d 993 (8th Cir. 2010)
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III. The District Court correctly denied qualified immunity to officer Faughn, to Mayor Stacey and Chief Sanders.

- *Williams v. Jackson*, 600 F.3d 1007, 1010, 2010 U.S. App. LEXIS 6172, *1

STATEMENT OF THE CASE

Plaintiffs have quite different versions of the facts cited by Defendants, and therefore filed a response to Defendants' "Statement of Undisputed Facts" at **App 93-99**:

a. James O'Hara

Defendants' statement of the case is basically accurate, but omits salient facts that the lower court considered. Among those facts are that Faughn immediately displayed anger, began cursing, and misconstrued something O'Hara said to his dog, enraging him further. Faughn later reported to O'Hara's police chief (in Cherry Valley, AR) that O'Hara had appeared under the influence of something, but never tested him or had him breathe into a breathalyzer. That report cost O'Hara his job, and an attempt was made jointly by Faughn and the chief to de-certify O'Hara as a police officer.

b. Christa Hess

Once more, Defendants have reported only cherry-picked facts and omitted information that were considered by the lower court. They neglect to mention that the officer Faughn may have had an

ulterior motive in his dealings with Mrs. Hess, and reasonably could have arranged for another officer to stop her, so he could then have her arrested. Also, Mrs. Hess informed the officers that she had had a recent surgery to her leg and was very unsteady on it. **App 131, 132** Further, although Mrs. Hess cooperated in the "drug investigation" by urinating in a cup, no test results were ever adduced, the evidence was supposedly and mysteriously lost by police, causing her to lose her driving privileges for nearly a year.

c. Chief Sanders and Mayor Stacey

In their Statement of the Case, Defendants state that "Appellees now assert that Attorney Carter Dooley served Mayor Stacey, Chief Sanders, and the Wynne City Council with complaints**."** **Supp. App. 136-169**, **App. 097**, **P. 7, Appellants' brief**. In weighing on Defendants' motion, the lower court considered that allegation in the light most favorable to Plaintiffs, and obviously concluded that those officials did in fact receive the complaints. If the delivery of those complaints is indeed in question, the facts surrounding whether they put officials on notice of misconduct is

a jury issue. Whether Faughn actually adhered to police standards set out in Defendants' brief, or whether officers who reviewed the tapes of his alleged misdeeds are credible witnesses are also matters for the fact-finder.

Appellees do not agree that oral argument is necessary.

SUMMARY OF THE ARGUMENT

The District Court correctly decided all issues put before it in Appellants' summary judgment argument. As previously noted, important factual details are omitted in this brief which were considered by the District Court. There is ample cause to believe that officer Faughn, rather than performing his duties as a reasonable police officer, enjoyed asserting his authority by stopping and arresting citizens for his own sexual desires (Christa Hess), to bully a fellow officer (O'Hara), to confiscate drugs that never make it to the evidence room (Dana Harrison) and to crack open the heads of those who he apprehends for parole violations (Willard). That these were not the acts of a reasonable officer was clear to the lower court, but is ultimately for a jury to decide.

ARGUMENT

A. Introduction

Qualified immunity is sometimes called "good faith immunity." *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S. Ct. 2727 (1982). It is on that principle that the viability of this case rests. By its denial of Appellants' summary judgment motion, the lower court correctly decided that whether this officer's motives were in good faith is a genuine issue of fact. As to the city officials, the sheer number of complaints—the majority of which have never been dealt with by city officials—indicate that these officials have clearly shirked their responsibility.

Plaintiffs do not quarrel with the law as set forth in the majority of cases cited by Defendants (most of which, however, have nothing to do with the facts of this case). This case must be decided on factual allegations, most of which are contested by Defendants, as to: (a) whether this officer was acting in good faith (or due to an ulterior motive); and (b) whether Wynne city officials' acts or failures to act were reasonable. Indeed, in a recent Court of Appeals case the opinion written by Judge Switzer adroitly notes that qualified immunity "sits near the law/fact divide." *Faughn v. Kennedy*, 2019 Ark. App. 570, review denied by *Faughn v. Kennedy*, 2020

Ark. LEXIS 111 (Ark. March 19, 2020). Just last week Justice Thomas, in a concurring opinion in *Hoggard v. Rhodes* wrote that "our qualified immunity jurisprudence stands on shaky ground." 2021 U.S. LEXIS 3587 *; __ S.Ct. __; 2021 WL 2742809. And as is clear from the cases, the plaintiff's assertions are taken as true in resisting a motion for summary judgment.

Qualified immunity is only available when the actor is acting as a "reasonable officer." Here, Appellees have alleged that Faughn—who was training Eskridge—was acting on ulterior purposes (basically, a power trip--and not as a reasonably objective officer). The question here is: *Would an objectively reasonable officer have known not to do (the thing alleged)? Parrish v. Ball*, 594 F.3d 993 (8th Cir. 2010), *Sexton v. Martin*, 210 F.3d 905 (8th Cir 2000). The lower court applied this correct standard, and found, after assessing the case in the light most favorable to the Plaintiffs, that this issue presented a question of fact.

B. The failure of Defendants' constitutional arguments.

To escape the brazen misconduct of these officers, the defense focuses narrowly on the initial stops alone. Since most traffic stops are authorized by broadly interpreted rules, Defendants make no mention of their egregious motives for making those stops. One doesn't have to read much

(e.g., the 12 complaints and the Court of Appeals decision) about Faughn to conclude that he considers himself a one-man vigilante force. The District Court no doubt believed that it was likely that something other than altruistic police service seemed to be Faughn's aim. Appellants have omitted all of Faughn's bad conduct, no doubt because his stops simply cannot be justified as legitimate police work.

Although the District Court in fact dismissed several of Plaintiffs' causes of action, the Court realized that the crux of Plaintiff's lawsuit was not so much a question of whether the traffic stops executed by Defendant Faughn were constitutional; it is whether those stops were executed for ulterior purposes, and therefore maliciously.[1] Plaintiffs showed the lower court that a myriad of complaints had been lodged with city officials, and nothing had been done. **Supp. App. 135-179**. Defendants have only chosen to appeal two of the existing five (5) Plaintiffs' cases, in an attempt to justify stops on constitutional grounds, but ignoring the real crux of the cases, i.e., unwarranted abuse by an unhinged officer.

[1] Similar to the good faith principle in federal decisions, "malice" is a consideration under the Arkansas Civil Rights Act, Ark. Code Ann. § 19-10-305 (ACRA) in considering whether an officer is entitled to immunity. Although this case is not filed under ACRA, Plaintiffs contend that the principle still applies in this 42 USC §1983 action.

C. The factual issues in conflict.

Following are three of the synopses of the cases, demonstrating why summary judgment is improper here:

Christa Hess. Officer Faughn happened upon Mrs. Hess in a private office and began ogling her. A bystander said: "could he have peeled his eyeballs off you long enough to talk to the guy he was here to see?" **App124**. Later, he texted her that she "was looking good." **App 129**. He began sitting in his police cruiser outside her home, showing up at the same stores where she was shopping, and in her words: "creeping me out." **App 121**. Sexual interest was also charged by complainant Stephanie Sturgeon. **App 145, 147.**

Plaintiff's counsel intend to question Faughn and his fellow officer Aaron Mears whether it was merely coincidence that Mears left the restaurant ahead of Faughn, following her, stopping her, and immediately calling Faughn to the scene so he could speed there, pat her on the butt, (**App 121)** and arrest her for use of drugs that never found their way into a courtroom. Hess was unable to walk in a manner acceptable to the officers, because of recent surgery and installation of a plate following an automobile crash. **App 131, 132**.

Such conduct is clearly an exercise of power beyond the scope of proper law enforcement procedures. With no evidence against Hess of anything illegal, Faughn repeatedly obtained court continuances, keeping Mrs. Hess from driving to her job as a nurse (or for any purpose…she ultimately lost her job). There was never a trial, and the case was finally dismissed.

Oddly enough, before Faughn's fellow lunch-mate Aaron Mears stopped Mrs. Hess for having a taillight out, neither knew that she'd had her taillights replaced the day before. **App 130.** Faughn had to know it was improper to treat Mrs. Hess as he did. The passage of Title VII made sexual harassment illegal.

Dana Harrison. Ms. Harrison was pulled over for a crack in her windshield (a small crack, on the passenger side), was asked by Faughn "When is the last time you used?" **Supp App 145** Then, without a body camera being engaged, Defendant Eskridge body-searched her. Eskridge touched her on her genitals (which she called her "V-Jay") leaving Faughn to steal 37 of 50 her prescribed hydrocodone pills. **Supp App. 145, 155.** Faughn showed his mindset when, having cleared Harrison of any wrongdoing, he told her to

"get the fuck where you're going and if I see you again I'll take you to jail for DUI/ drugs." **Supp App 145** Our laws against theft are firmly established.

Jamie O'Hara. Faughn's improper motive for stopping O'Hara (himself a police officer in another town) should not so much be evaluated by this Court as to whether his license plate light was bright enough to be seen (a photo of the working light was viewed by the lower court) but by Faughn's initial statement to O'Hara: *"I know you're a f--g cop in Cherry Valley"* which certainly sounds like a personal challenge and exercise of superior authority. A reasonable jury could conclude that (a) the license plate's lamp was sufficiently bright enough that O'Hara should never have been stopped, and (b) that Faughn's initial challenge was unnecessarily bombastic. It is highly unlikely that an officer who is objectively performing a legitimate stop would start a conversation like that.

After not arresting O'Hara for anything, Faughn went on to report to O'Hara's chief that O'Hara needed to lose his certification as an officer. Faughn and the chief then proceeded to force a hearing before the Arkansas Law Enforcement Training Academy where

O'Hara's certification as a police officer was at risk. O'Hara won at the hearing and maintained his certification. **App 107** It is firmly established that false swearing or charging another officer without cause are wrong.

Shane Willard. Mr. Willard, an admitted parolee, was clubbed over the head without warning, not knowing who was chasing him at night. **App 8** The constitution's 8th Amendment against "cruel and unusual punishment," our battery statutes, and 42 U.S.C. §1983 itself are known prohibitions against such excessive force on a mere parole stop.

D. The Wynne Decision-Makers are not entitled to Qualified Immunity.

The numerous complaints that were made to the mayor, the chief, and the City Council are far from isolated ones. **App 138-143** An estimated nine (9) were presented to those three entities. **Supp App 10**, **App 133-178**. Neither the mayor nor the chief acknowledged any more than "several." **App 6, 76**. Defendants now argue that because Faughn's fellow officers viewed the body camera footage and approved of his actions, that Defendants have been completely absolved of their duties to supervise.

One must question: "Have police supervisors now taken over the role of jurors?" The credibility of those reviewing officers is squarely in play.

The current case of *Faughn, et al v. Kennedy, et al*, 2019 Ark. App. 570, 590 S.W. 3d 188, (review denied by the Arkansas Supreme Court in an unpublished opinion) brings the complaints against Faughn to an even dozen. *Kennedy* was the very first incident to alert city officials to Faughn's questionable tactics. Their tacit compliance became a "municipal custom" with each new occurrence. *Kennedy* is a "must-read," because Faughn's hair-trigger temper, violent tactics, and Wynne's ready compliance with police abuse against its citizens are on full display there. The *Kennedy* incident occurred January 16, 2016 and preceded all of the other events complained of in **App 133-178**. Both Mayor Stacey and Chief Sanders were deposed in *Kennedy* on April 19, 2018 (App 15, paragraph 4 D.) By then, at least nine of the 11 other complaints had been made (see dates on each complaint... they extend from 9/21/16 to 12/6/17). Defendant Sanders testified that (A) he had no idea how many complaints had been made against Faughn, (B) that the number of complaints was not enough to be concerned about, **Supp App 10** and (C) that the officer assigned to review the complaints had never reported to him about any discussion he'd ever

had with Faughn. **Supp App 67**. Sanders also agreed that if such conduct as was alleged in the complaints were true, that officer would be "out of control." **Supp App 103, l. 11**. With multiple complaints having been filed, City officials can hardly complain that they weren't aware of the problem. *Williams v. Jackson*, 600 F.3d 1007, 1010, 2010 U.S. App. LEXIS 6712, *1. A jury should decide whether they confronted the problem properly. For officials to now suggest that all twelve incidents passed muster strains credulity and begs for a trial by 12.

CONCLUSION

IN SUMMARY, under the facts of this case, none of the defendants are entitled to qualified immunity, least of all city officials who took so many troubling complaints against Faughn in such cavalier fashion.

Respectfully submitted,

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   Dated: August ____, 2021.

/s/ B. Michael Easley
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Attorney for the Appellees

Dated: August ___, 2021

CERTIFICATE OF SERVICE

Pursuant to 8th Cir. R. 28A(h)(2), I hereby certify that the foregoing brief was scanned for viruses and is virus-free.

I further certify that a true and correct copy of the foregoing brief was served upon the following parties of record via CM/ECF and U. S. Mail, postage prepaid on this _____ day of August, 2021, after being submitted for review and accepted by the Court:

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