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120 MAP 2016

IN THE

SUPREME COURT OF PENNSYLVANIA

120 MAP 2016

John Doe 1, John Doe 2, John Doe 3 and Jane Doe 1,

Appellees

v.

Franklin County, Franklin County Sheriff's Office, Franklin County Sheriff Dane Anthony and Employee John/Jane Does,

Appellants

Brief of Appellees

Appeal from the Order of the Commonwealth Court at No. 1634 CD 2015, dated May 20, 2016, reversing in part and affirming in part the Order of the Franklin County Court of Common Pleas, Civil Division, at No. 2014-4623, dated August 13, 2015 (exited August 17, 2015) and remanding.

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I. SUMMARY OF ARGUMENT

Appellants are not entitled to immunity under the doctrine of "high public official immunity." First, high public official immunity was seemingly abolished by this Court's decision *Ayala v. Phila. Bd. of Pub. Educ.* and if it was not, this Court's decision in *Ayala* supports its abolishment, as it is a common law immunity where "no public policy considerations presently justify its retention." In the alternative, it is unconstitutional, pursuant to Article 1, Sections 11, 20 of the Pennsylvania Constitution and this Court's binding precedent, as it has not been enacted by the General Assembly. Third, even if high public official immunity were constitutional, this Court has only seemingly held that it exists in relation to defamation. Lastly, even if this Court were to hold that high public official immunity is constitutional and constitutes a defense to actions beyond defamation, it is inapplicable to Section 6111(i), as the General Assembly provided for a specific cause of action against those who could constitute high public officials (*e.g.* sheriffs and chiefs of police) since the sheriff, generally,[1] is the individual to receive and possess the confidential information, pursuant to 18 Pa.C.S. § 6109(b).

[1] Appellees utilize the word "generally" because in every county, other than Philadelphia, the applicant is required to apply for his/her license to carry firearms with the sheriff of his/her county, pursuant to 18 Pa.C.S. § 6109(b). However, for those applicants who reside in Philadelphia, they are required to apply with the chief of police of Philadelphia.

II. ARGUMENT [2]

A. This Court Should Abolish High Public Official Immunity As It Did With The Common Law Doctrines Of Governmental And Sovereign Immunity, If It Was Not Already Abolished Under *Ayala v. Phila. Bd. of Pub. Educ.*

This Court, recognizing that the common law doctrines of governmental and sovereign immunity were devoid of any justification and that "it is clear that no public policy considerations presently justify [their] retention", abolished them in the mid-1970s. *Ayala v. Phila. Bd. of Pub. Educ.*, 453 Pa. 584, 587, 592, 305 A.2d 877, 878, 881 (1973); *Mayle v. Pa. Dep't of Highways*, 479 Pa. 384, 406, 388 A.2d 709, 720 (1978).

In fact, this Court declared in *Ayala*, that "[i]t is fundamental to our common law system that one may seek redress for every substantial wrong … Appellee offers no reason – and we are unable to discern one – for permitting governmental units to escape the effect of this fundamental principle." 453 Pa. at 594. This Court continued:

> As we have stated many times before, today cities and states are active and virile creatures capable of inflicting great harm, and their civil liability should be co-extensive. Even though a governmental entity does not profit

[2] Dissatisfied with this Court's denial of their request for allocatur relative to other issues, Appellants devote a significant portion of their brief to issues outside the scope of this Court's limited grant of allocatur. Appellants' Brief pp. 14 – 15 n. 5, 16 n. 7, 19 n. 8, 9, 20. This should not be countenanced by this Court and Appellees respectfully invite the Court to issue an Order finding that the appeal was improvidently granted or otherwise dismissing Appellants' appeal, as a result.

> from its projects, the taxpaying public nevertheless does, and it is the taxpaying public, which should pay for governmental maladministration. If the city operates or maintains injury-inducing activities or conditions, the harm thus caused should be viewed as a part of the normal and proper costs of public administration and not as a diversion of public funds. The city is a far better loss-distributing agency than the innocent and injured victim.

Id. at 594-95.

Moreover and directly contrary to Appellants' arguments, this Court declared that "[e]qually unpersuasive is the argument … that immunity is required because governmental units lack funds from which claims could be paid" and noted its "disagreement with the assumption that the payment of claims is not a proper governmental function." *Id.* at 596-597 (citations omitted). Even more directly on point, this Court declared:

> where governmental immunity has had the effect of encouraging laxness and a disregard of potential harm, exposure of the government to liability for its torts will have the effect of increasing governmental care and concern for the welfare of those who might be injured by its actions … The 'prophylactic' factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer. When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm. Not infrequently one reason for imposing liability is the deliberate purpose of providing that incentive.

Id. at 599 (citations omitted).

As discussed at length *infra*, just like the governmental and sovereign immunity reviewed by this Court in *Ayala* and *Mayle*, high public official immunity is a common law doctrine, not legislatively enacted. Although high

public official immunity would seemingly have been abrogated by this Court's decision in *Ayala* in abolishing governmental immunity, to the extent it still exists, as a remnant of an "archaic and artificial distinction between tortious conduct arising out of the exercise of a proprietary function and tortious conduct arising out of exercise of a governmental function" [3] for which "no public policy considerations presently justify," [4] this Court should hold that high public official immunity is abolished in the Commonwealth. [5]

B. High Public Official Immunity is Inapplicable to 18 Pa.C.S. § 6111(i) or in the Alternative, Unconstitutional

In the alternative, for the foregoing reasons, Appellees contend that pursuant to Article 1, Sections 11, 20 of the Pennsylvania Constitution and this Court's holding in *Carroll v. County of York*, 496 Pa. 363, 366 (Pa. 1981), high public official immunity is unconstitutional as it was judicially, not legislatively, enacted. Furthermore, Appellees contend that even absent their constitutional challenge, high public official immunity was abrogated by 18 Pa.C.S. § 6111(i). In the event

[3] *Id.* at 592.

[4] *Id.* at 587.

[5] As Appellees anticipate that Appellants will additionally attempt to argue in a reply brief that if the Court finds that high public official immunity was not already abolished and it abolishes it in relation to this matter that the decision should not apply to this instant case, Appellees respectfully invite the Court's attention to the *Ayala* Court's refusal to grant such a request and the legions of case law cited to by the *Ayala* Court in rejecting such a request. *See*, Ayala, 453 Pa. at 607, n. 10.

this Court does not declare high public official immunity abolished, although Appellees believe that this Court should resolve whether high public official immunity is constitutional, it is understood that this Court, under the doctrine of constitutional avoidance, will only likely resolve the constitutionality of high public official immunity, if Appellees are not entitled to relief on the non-constitutional grounds. [6] Accordingly, Appellees will first address that high public official immunity is inapplicable to Section 6111(i) and thereafter, address the unconstitutionality of high public official immunity.

i. High Public Official Is Inapplicable In This Matter

As set-forth *infra*, high public official immunity is inapplicable to this matter, as this Court has only seemingly extended high public official immunity to the tort of defamation and even if it were to extend to torts beyond defamation, 18 Pa.C.S. § 6111(i) provides an explicit right to sue a sheriff or chief of police, who discloses confidential license to carry firearms applicant information, especially in light of the fact that the sheriff or chief of police is the individual to receive and

[6] *See*, *In re "B"*, 482 Pa. 471, 394 A.2d 419, 421-22 (Pa. 1978)(declaring, "when faced with an issue raising both constitutional and non-constitutional questions, we will make a determination on non-constitutional grounds, and avoid the constitutional question if possible").

possess the confidential information.[7]

1. High Public Official Immunity only Applies to the Tort of Defamation

Initially, it is important to note that this Court has only seemingly extended high official immunity to the tort of defamation. *Lindner v. Mollan*, 544 Pa. 487, 490 (1996)(*holding* that it "exempts a high public official from all civil suits for damages *arising out of false defamatory statements* and even from statements or actions motivated by malice, provided the statements are made or the actions are taken in the course of the official's duties or powers and within the scope of his authority, or as it is sometimes expressed, within his jurisdiction.") (*quoting Matson v. Margiotti*, 371 Pa. 188, 194 (1952))(emphasis added). [8]

Even if high public official immunity extends beyond the tort of defamation, it "rests upon the … idea, that conduct which otherwise would be actionable is to escape liability *because the defendant is acting in furtherance of some interest of*

[7] In every county, other than Philadelphia, the applicant is required to apply for his/her license to carry firearms with the sheriff of his/her county, pursuant to 18 Pa.C.S. § 6109(b). However, for those applicants who reside in Philadelphia, they are required to apply with the chief of police of Philadelphia.

[8] Appellees acknowledge that this Court's pronouncement in *Durham v. McElynn*, 565 Pa. 163, 165, 772 A.2d 68, 69 (2001) that "[i]t has long been held that high public officials are immune from suits seeking damages for actions taken or statements made in the course of their official duties" could be interpreted to be a determination that high public official immunity applies as a defense beyond the tort of defamation, even though the quoted language cites to *Linder* as the basis for the proposition.

social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation." *Montgomery v. City of Philadelphia*, 392 Pa. 178, 181 (1958)(emphasis added). The Commonwealth Court previously held in *Dillon v. City of Erie*, 83 A.3d 467, 474 (Pa. Cmwlth. Ct. 2014) that it is *not* in the public interest for public officials to violate the law – "Moreover, 'the argument that a violation of law can be a benefit to the public is without merit'." In this vein, this Court in *Pa. Pub. Util. Com. v. Israel*, 356 Pa. 400, 410, 52 A.2d 317, 322 (1947) held that "[w]hen the Legislature declares certain conduct to be unlawful it is tantamount in law to calling it injurious to the public. For one to continue such unlawful conduct constitutes irreparable injury."

In relation to this matter, the repeated violations of Sections 6111(i) cannot be seen as acting in furtherance of social import. In fact, they can only be seen as just the opposite – injurious to the public. The disclosure of information, which the General Assembly declared important and private enough not only to require it to be confidential but to also provide criminal [9] and civil [10] liability for breach of its

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[9] 18 Pa.C.S. § 6111(g)(3.1) provides, in pertinent part: "Any person … who knowingly and intentionally obtains or furnishes information collected or maintained pursuant to section 6109 for any purpose other than compliance with this chapter or who knowingly or intentionally disseminates, publishes or otherwise makes available such information to any person other than the subject of the information commits a felony of the third degree."

[10] 18 Pa.C.S. § 6111(i) provides, in pertinent part: "**Confidentiality.** — All information provided by the … applicant, including, but not limited to, the … applicant's name or identity, furnished by … any applicant for a license to carry a firearm as provided by section 6109 shall be confidential and not subject to public disclosure. In addition to any other sanction or penalty

confidentiality or disclosure, cannot possibly survive any analysis which would pit the actions of the Sheriff against acting in furtherance of some interest of social import. Moreover, disclosing confidential information that indicates an individual has firearms or *may* have firearms, which could be obtained by a criminal element, is a far cry from acting in furtherance of an interest of social import.[11] In fact, if a criminal element were alerted to this information, it would result in just the opposite, placing the applicant whose information was disclosed at risk of assault, robbery, home invasion, *etc.* and the general public at risk *should* one of those firearms be stolen. One must be cognizant of the fact, as acknowledged by the Commonwealth Court in *Times Publ'g Co.*, that applicants are frequently victims of abuse, judges, prosecutors and law enforcement officers. 633 A.2d at 1237.

Even if, *arguendo*, this Court were to find that the Appellee Sheriff was acting in furtherance of some interest of social importance, he *still would not* be entitled to immunity as the General Assembly included specific language in

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imposed by this chapter, any person, … State or local governmental agency or department that violates this subsection shall be liable in civil damages in the amount of $ 1,000 per occurrence or three times the actual damages incurred as a result of the violation, whichever is greater, as well as reasonable attorney fees."

[11] The Commonwealth Court in *Times Publ'g Co.*, 633 A.2d 1233,1237 (Pa. Cmwlth. Ct. 1993), *appeal denied*, 538 Pa. 618 (1994), declared, "disclosure of the licensees' address would make public the address of for example abuse victims who apply for a gun permit as well as judges, prosecutors, parole and probation officers and others in law enforcement who are licensed to carry firearms and necessarily take precautions to shield information about their address. The possibility that individuals could obtain the address of such individuals poses a threat to their personal security, and given the inherent dangers associated with possession of firearms, disclosure of the licensees' address is 'intrinsically harmful' and should therefore be precluded"

Section 6111(i) that provides *no* exemptions and utilizes all-encompassing words like "any person" and "local governmental agency," which are inclusive of the Sheriff.

2. The General Assembly Sought to Abrogate any Immunity when it Enacted Section 6111(i)

When the General Assembly enacted Section 6111(i), it included language, which specifically provided for liability of public officials, state or government agencies and departments. Section 6111(i) states, in pertinent part:

> All information provided by the … applicant, including, but not limited to, the … applicant's name or identity, furnished by … any applicant for a license to carry a firearm as provided by section 6109 shall be confidential and not subject to public disclosure. In addition to any other sanction or penalty imposed by this chapter, **any person**, licensed dealer, **State or local governmental agency or department** that violates this subsection **shall be liable** in civil damages in the amount of $1,000 per occurrence or three times the actual damages incurred as a result of the violation, whichever is greater, as well as reasonable attorney fees. (Emphasis added).

In fact, confirming the General Assembly's intent and understanding that the disclosure limitations found in Section 6111(i) apply to *everyone*, including law

enforcement officers,[12] it drafted an exception for law enforcement personnel to make inquiries to the Firearm License Validation System regarding the validity of any license to carry firearms, when acting within the scope of their official duties. Section 6109(l) provides:

> **Firearms License Validation System.—**
>
> (1) *Notwithstanding any other law regarding the confidentiality of information*, inquiries to the Firearms License Validation System regarding the validity of any Pennsylvania license to carry a firearm may only be made by law enforcement personnel acting within the scope of their official duties.
>
> …
>
> (4) Responses to inquiries by law enforcement personnel outside this Commonwealth shall be limited to the name of the licensee, the validity of the license and any information which may be provided to a criminal justice agency pursuant to Chapter 91 (relating to criminal history record information). (emphasis added).

Accordingly, the General Assembly was *acutely* aware and intended that Section 6111(i) apply to everyone, even law enforcement officers, including the county sheriffs, and local governmental agencies and departments, unless explicitly exempted under Section 6109(l).

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[12] A sheriff is a law enforcement officer, pursuant to 18 Pa.C.S. § 6102 (*defining* "Law enforcement officer" as "[a]ny person employed by any police department or organization of the Commonwealth or political subdivision thereof who is empowered to effect an arrest with or without warrant and who is authorized to carry a firearm in the performance of that person's duties.") Moreover, a sheriff is a county officer, pursuant to Article 9, Section 4 of the Pennsylvania Constitution.

In turning specifically to the Sherriff, the Commonwealth Court in *Gardner v. Jenkins*, 541 A.2d 406, 408 (Pa. Cmwlth. Ct. 1988) previously held that a county sheriff is a local governmental agency, pursuant to 2 Pa.C.S. § 101,[13] and Article 9, Section 4 of the Pennsylvania Constitution provides that a sheriff is a county officer.

Further, pursuant to Section 6109, except within Philadelphia, the applicant's county sheriff is the issuing authority for a license to carry firearms and to whom the license to carry firearms application must be submitted.[14] As such and given that the confidential license to carry firearms applicant information is being provided to the Sheriff and exists only within the sheriff's control, it can only be concluded that the General Assembly included county sheriffs and all other public officials with access to or whom come into the possession of the confidential information. To hold otherwise, would be to eviscerate Section 6111(i), as the only "person" or "local governmental agency," outside of Philadelphia, under Section 6109 with an applicant's confidential license to carry firearms information and with the ability to initially disclose it, is the county sheriff. If the General

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[13] The definition of a governmental agency in Section 101 declares that it includes "any *officer* or agency of any such political subdivision or local authority." (emphasis added).

[14] *See*, Section 6109(b) declaring, "An individual who is 21 years of age or older may apply to a sheriff for a license to carry a firearm concealed on or about his person or in a vehicle within this Commonwealth. If the applicant is a resident of this Commonwealth, he shall make application with the sheriff of the county in which he resides or, if a resident of a city of the first class, with the chief of police of that city."

Assembly desired to exempt county sheriffs, it was *acutely* aware, as evidenced by Section 6109(l), as to how to draft an exception.

Moreover, the General Assembly would not have included the words "any person" in the statute if it did not intend for any such persons, whether acting in their official capacity or not, to be liable. *See*, *Keystone Aerial Surveys, Inc. v. Pennsylvania Property & Cas. Ins. Guar. Ass'n.*, 777 A.2d 84, 90 (Pa. Super. Ct. 2001) (*holding* "Our goal in statutory interpretation is to 'ascertain and effectuate the intention of the General Assembly,' and we strive to give effect to all provisions in a statute….In so doing, we must begin with a presumption that our legislature did not intend any statutory language to exist as mere surplusage. Accordingly, whenever possible, courts must construe a statute so as to give effect to every word contained therein."); *Walker v. Eleby*, 577 Pa. 104, 123 (2004) ("The clearest indication of legislative intent is generally the plain language of the statute."); 1 Pa.C.S. § 1921(b) (Providing that "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."); 1 Pa.C.S. § 1922 (Providing for presumption that "the General Assembly intends the entire statute to be effective and certain").

Accordingly, Section 6111(i) provides for a cause of action against a sheriff, as a sheriff is both a "local governmental agency" and a "person."

3. Even if, *arguendo*, the Sheriff was Immune from Financial Liability, He would still be Subject to the Requests for Declaratory and Injunctive Relief

While Appellants devote a significant portion of their brief to contending that "sheriffs should not be burdened with monstrous litigation and damage exposure," they fail to advise the Court that Appellees have not merely requested monetary damages but also declarative and injunctive relief relative to the Appellants', inclusive of the Sheriff's, conduct. Compl., Count VII, ¶¶ 99-102, 104; Prayer for Relief, ¶¶ 2-3, 6-7. As neither this Court nor any appellate court in Pennsylvania has ruled that high public official immunity precludes declaratory and injunctive relief by a court, Appellants' argument is a red herring, as the Sheriff will continue to be involved in this litigation, at a minimum, in relation to the declaratory and injunctive requests.

Surely, Appellants and *Amicus* cannot contend that a high public official is immune from any corrective action by the judiciary, which would completely eviscerate Article 1, Sections 11, 20, discussed *infra*, and completely erode the checks and balances of the United States and Pennsylvania Constitutions.

* * *

Therefore, as high public official immunity is inapplicable to this matter, this Court should affirm the Commonwealth Court's decision and remand this case

back to the trial court for further proceedings consistent with this Court's and the Commonwealth Court's decisions.

ii. High Public Official Immunity Is Unconstitutional

Contrary to Appellants' prior contention,[15] high public official immunity is violative of Article 1, Sections 11, 20 of the Pennsylvania Constitution, especially in light of the fact that Article 1, Section 11, as acknowledged by this Court, only permits *legislatively* enacted immunity and high public official immunity is common law.

Article 1, Section 20 of the Pennsylvania Constitution provides:

> The citizens have a right in a peaceable manner to assemble together for their common good, and to apply to those invested with the powers of government for redress of grievances or other proper purposes, by petition, address or remonstrance.

Article 1, Section 11, of the Pennsylvania Constitution also provides:

> All courts shall be open, and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay.

For these reasons, Appellees contend that high official immunity is not constitutional as it prevents a blanket redress of grievances against certain governmental officials, especially in light of the fact that it was not enacted in

[15] Appellees anticipate that Appellants will again make this argument in their reply brief.

compliance with the Pennsylvania Constitution. In this vein, it is extremely important to note that, unlike the other two current types of immunity pertaining to public employees and entities (sovereign and governmental immunity) pursuant to the Political Subdivision Tort Claims Act ("PSTCA"), high public official immunity is not legislatively, but rather judicially, created.

This Court in analyzing the PSTCA found that the Pennsylvania Constitution authorized the immunity for political subdivisions under the PSTCA through Article 1, Section 11, because it specifically declares that "[s]uits may be brought against the Commonwealth in such manner and in such cases *as the Legislature may by law direct*." *Carroll*, 496 Pa. at 366-67 (1981)(*further declaring*, "the conferring of tort immunity upon political subdivisions is within the scope of the Legislature's authority pursuant to Article I, Section 11.") (emphasis added). More recently, in *Dorsey v. Redman*, 626 Pa. 195, 202 (Pa. 2014), this Court reaffirmed that that *only* the General Assembly is empowered by the Commonwealth's Constitution to, "determine the matter in which the government shall be immune." This Court continued, "our Court has recognized that the Legislature is the exclusive body with authority to confer immunity upon political subdivisions." *Id*. (*citing City of Phila. v. Gray,* 534 Pa. 467, 474 (Pa.

1993)). In this vein, as argued by Appellees before the Commonwealth Court,[16] setting aside the General Assembly's pronouncement of liability in this context, high public official immunity is unconstitutional, pursuant to Article I, Section 11, as the General Assembly never enacted high public official immunity; rather, it is a judicially created immunity.

Therefore, this Court should find that high public official immunity is unconstitutional and hold that Appellant Sheriff is not entitled to claim high public official immunity.

III. CONCLUSION

For the foregoing reasons, Appellees respectfully request that this Court affirm the Commonwealth Court's decision, declare high public official immunity abolished, and remand this case back to the trial court for further proceedings consistent with this Court's and the Commonwealth Court's decisions. In the alternative, Appellees respectfully request that this Court find that high public official immunity was abrogated by Section 6111(i) or is unconstitutional and

[16] *See*, Opinion at 29 fn. 17. Consistent with this Court's decision in *In re "B"*, 482 Pa. 4, 477 (1978), the Commonwealth Court did not reach this argument, since it found that high public official immunity did not apply, pursuant to language in Section 6111(i). This Court in In re "B" declared that "when faced with an issue raising both constitutional and non-constitutional questions, we will make a determination on non-constitutional grounds, and avoid the constitutional question if possible." *Id.*

remand this case back to the trial court for further proceedings consistent with this Court's and the Commonwealth Court's decisions.

Respectfully Submitted,

Date: February 2, 2017

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Word Count Certification

I certify that this brief complies with the word count limit, as it does not exceed 14,000 words. This certificate is based on the word count of the word processing system – Microsoft Word – used to prepare the brief, which reflects that there are 4,160 words wherein.

Joshua Prince, Esq.