IN THE COURT OF APPEALS

STATE OF GEORGIA

NICHOLAS LEE NICHOLS,	:	Appeal No. A07A0148
Appellant-Defendant,	:	
v.	:	
JAMES ANTHONY PRATHER,	:	
Appellee-Plaintiff.	:	

NOTICE OF APPEARANCE

COMES NOW the Georgia Trial Lawyers Association and, pursuant to Rule 42 of the Rules of the Supreme Court of the State of Georgia, gives notice of its appearance in this action as Amicus Curiae, pursuant to its Constitution and authorized by its Executive Committee, and respectfully prays that this Honorable Court consider the written arguments submitted by the Georgia Trial Lawyers Association on behalf of its members and clients. In support thereof, the Georgia Trial Lawyers Association shows that it is a voluntary organization comprised of approximately 2,000 trial lawyers licensed to practice in this State whose clients have an interest in this Court's ruling on the important issues presently before it.

Over the years, the Georgia Trial Lawyers Association has consistently appeared

as Amicus Curiae in various matters presented before Georgia's state and federal courts. The intent of the Georgia Trial lawyers Association is not to support the appellant or appellee as Amicus Curiae. Rather, the Georgia Trial Lawyers Association desires and attempts to aid the Court to a proper resolution of this case by seeing that the law is correctly and thoroughly followed.

Respectfully submitted by the Georgia Trial Lawyers Association on this the 2nd day of January, 2007.

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BRIEF OF THE GEORGIA TRIAL LAWYERS ASSOCIATION AS AMICUS CURIAE

COMES NOW the Georgia Trial Lawyers Association (GTLA) and hereby submits its brief as amicus curiae, showing the Court as follows:

GTLA suggests that the decision of the trial court should be affirmed insofar as it declines summary judgment and declines to discharge the sheriff of Pickens County from potential liability. Specifically, GTLA will argue that (1) county sheriffs in Georgia are not state employees and are not covered by the immunities extended to the state of Georgia and state employees; and (2) the sheriff's sovereign immunity was waived by the county's purchase of insurance.

Fundamentally, Amicus asserts that this case is controlled by *Gilbert v Richardson*, 264 Ga. 744 (1994). That decision, which is binding upon this Court, held that (1) Georgia sheriffs are county officers, sharing in the county's sovereign immunity for purposes of state law tort claims; and (2) in the context of automobile related claims, that immunity is statutorily waived by the county's purchase of insurance covering vehicles used by the sheriff.

But there is a reason why *Gilbert* is of even more obvious relevance to this case: it answers the precise question posed by Appellants. *Gilbert* holds in

particular that when a county deputy sheriff is sued for motor vehicle negligence, the sheriff also may be sued, and is not protected by any immunity to the extent the county has purchased insurance. Nothing has changed since *Gilbert*. No relevant statutory or constitutional provision has been superseded or amended in any way which would impact its holding. The Supreme Court has not revisited *Gilbert*, nor should it in the case at bar.

Nonetheless, Appellants suggest that this Court should revisit *Gilbert* on the basis of intervening decisions of the federal Eleventh Circuit Court of Appeals and this Court—decisions which relate to policymaker liability under federal civil rights law and not to *respondeat superior* liability under state tort law. Amicus will show that *Gilbert* always was and remains good law.

I. SHERIFFS ARE COUNTY OFFICERS UNDER GEORGIA LAW

A. Georgia Law Holds that County Sheriffs Are County Officers.

The Georgia Constitution explicitly labels county sheriffs as county officers. Ga. Const. 1983, Art. 9, §1, ¶3(a). County voters elect the sheriff. His budget comes from the county. The amount of that budget is set by the county (subject to a requirement of minimum support). All money to support that budget comes from local taxes and from fines, fees and forfeitures to the county. The sheriff and his

deputy, the vehicle driver in this case, received their paychecks direct from the county. In short, the sheriff is a county official.

The Georgia courts have reaffirmed that principle often. For purposes of this case, *Gilbert v Richardson,* 264 Ga. 744 (1994), is the most obvious and striking example. Still other decisions reach the same result. "[A] sheriff is a county officer." *Black v. Catoosa Cty. Sch. Dist.*, 213 Ga. App. 534, 535 (1994) (barring deputy for that reason from holding other county office); see also *Carter v. Veal*, 42 Ga. App. 88 (1930) (other county officer could not become county deputy sheriff).

As recently as this fall, two judges of this Court reiterated that a sheriff "is not a state official, but a county official." *Freeman v. Barnes*, ___ Ga. App. ___(2) [No. A06A1627, Nov. 9, 2006]. It is simply too late to argue otherwise.

B. Decisions Under 42 U.S.C. §1983 Are Not to the Contrary.

Appellants try to argue that the entire map of public officer responsibility in Georgia has been changed by three (3) decisions which have nothing to do with the Georgia law of public officer responsibility. Specifically, Appellants invoke *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003) (en banc); *Grech v. Clayton County*, 335 F3d 1326 (11th Cir. 2003) (en banc); and *Brown v. Dorsey*, 276 Ga. App. 851 (2005). None of the decisions comes close to the result Appellants seek.

Georgia sheriffs are county officers. Appellants' decisions are four steps removed from showing otherwise. First, 42 U.S.C. §1983 is a federal statute, embodying federal policies. Second, the purposes of Section 1983 liability are unrelated to the purposes of state liability. Third, Appellants' decisions do not purport to make Georgia sheriffs officers of the state (as opposed to the county); those cases hold only that for federal law purposes, sheriffs sometimes act for the state. Finally, those decisions make clear that even their inquiry is a case-by-case analysis; thus even though sheriffs may from time to time act for the state, they remain at their core county officials.

1. The Cases Cited by Appellants Concern Federal Liability Only.

42 U.S.C. §1983 was adopted during Reconstruction in 1868, as a federal civil rights statute designed to control state official conduct. Its central purpose clearly intrudes upon and is at odds with state governmental authority. At the same time, this very intrusion calls for sensitivity and respect in its application. Precisely because the hand of federal authority should not lie too heavily upon the states and state and local officials, the federal law of section 1983 incorporates many unique limitations which are foreign to Georgia's law of officer liability.

2. Section 1983's Doctrines and Policies Are Irrelevant to this Case.

Not only do the decisions cited by Appellants deal with federal rather than state law, they also deal with notions and doctrines which have no place in Georgia law. This is demonstrably true of all three cases they cite.

Grech v. Clayton County and *Brown v. Dorsey* posed the question whether, on the facts of each case, a county would be liable under Section 1983 for the acts of its sheriff. In each case, the court held that the sheriff (or his department) was not acting for the county. But that very inquiry betrays the difference between section 1983 law and state law. Plaintiff seeks and may seek to attach respondeat superior liability under Georgia law. The federal law is exactly the contrary. Under Section 1983, "[m]unicipalities and other local government entities … may not be held liable on a *respondeat superior* theory; instead, it is only when the execution of its policy or custom inflicts the subject injury that liability can attach to the entity under § 1983. To make this showing, a plaintiff must prove that, through a deliberate and official policy, the local governmental entity was the moving force behind the constitutional tort." *Brown v. Dorsey*, 276 Ga. App. 851, 853 (2005) (citations omitted). Those showings are simply irrelevant to Plaintiff's *respondeat*

superior claims.

Manders v. Lee is even farther afield from the issues in this case. *Manders* deals with whether the sheriff, under some circumstances, might claim for Section 1983 purposes the protection of the unique federal immunity provided by the Eleventh Amendment, which has no state law analogue and could have none. That Amendment protects the various states from having to respond to federal claims like Section 1983 claims. It has nothing whatever to do with liability on state law claims.

In sum, *Grech*, *Manders* and *Brown* offer no lessons for this case.

3. Appellant's Cases Do Not Hold that Sheriffs Are State Officials.

Ignoring the particularized federal context of these decisions, Appellants further would have this Court believe that *Grech*, *Manders* and *Brown* make Georgia sheriffs state officials for all purposes. They do no such thing. Those decisions hold only that the sheriff may act for the state in some circumstances for purposes of determining whether the county may be held liable for the unconstitutional acts of sheriffs and their deputies under Section 1983. Indeed,

those cases make crystal clear that they are not adopting any universal rule, but only outlining an functional analysis that must be made on the facts of each individual case brought under federal civil rights law. *Brown v. Dorsey* quoted *McMillian v. Monroe County*, 520 U. S. 781, 785 (1997), for the proposition that "whether [the] sheriff acts for county or state is not an 'all or nothing' proposition." 276 Ga. App. at 856 n. 32. See also *Manders,* 338 F.3d at 1328 ("[we] need not answer and do not answer today whether Sheriff Peterson wears a 'state hat' for any other functions he performs. We conclude only that he does as to the limited functions at issue in this case."); *Brown v. Dorsey*, 276 Ga. App. at 856 ("the question of whether the sheriff has final policymaking authority for the County for § 1983 purposes must be examined in light of the particular function at issue") (citations omitted).

Thus it is abundantly clear that the federal law based decisions in *Grech*, *Manders* and *Brown* did not rewrite state law and convert Georgia sheriffs wholesale into state officers, as Appellants contend. Quite the opposite, those decisions hold only that for Section 1983 purposes, the sheriff sometimes may act for the state.

4. Appellant's Cases Leave Sheriffs as County Officers.

If county sheriffs act for the state only sometimes (for purposes of section 1983 liability), then where is their primary duty and responsibility? By now the answer is obvious: county sheriffs are part of the county. "Although Walker County is not a named defendant in this action, Millard was sued in his capacity as Walker County Sheriff. Accordingly, the claims are, in essence, claims against Walker County." *Gilbert v. Richardson*, 264 Ga. 744, 746, n. 4 (1994).

Appellant's cases do not disagree.

Thus Appellants' arguments would require this Court to take four (4) huge and unprecedented steps. Appellants propose to transpose a federal law designed for unique purposes into state law and thereby transform state law. They propose to extend to state law specific doctrines from section 1983 which have no relation to official liability under state law. They propose to make a universal rule out of what *Grech*, *Manders* and *Brown* expressly declare to be a case-by-case analysis. And they would swallow up the county sheriff's county role and responsibility, a step never suggested in any of Appellants' decisions.

C. Despite Their Limited Autonomy, Sheriffs Are County Officers.

Appellants offer a spate of other arguments in an attempt to show that county sheriffs are officers not of the county but of the state. To use another metaphor, they try to cobble together pieces to create a whole that just does not fit together. But even the pieces fail in their purpose.

Appellants' most strenuous argument is that because county sheriffs have some measure of independence from the county commission, they must be independent of the county also. Indeed, they point out that the interests of the sheriff and the commission can be at loggerheads and result in litigation. *See, e.g.*, *Chaffin v. Calhoun*, 262 Ga. 202 (1992); Hill *v. Clayton County Bd. of Comm'rs*, ___ Ga. App. ___ [No. A06A1406, Nov. 29, 2006]. Appellants leap from these realities to two unfounded conclusions: first, that the county sheriff is somehow separate from the county which he serves; and second, that he is part of another entity altogether – namely the state.

A recent Georgia Supreme Court decision both dramatizes and belies Appellants' claims. In *Perdue v. Baker*, 277 Ga. 1 (2003), the Supreme Court of Georgia held that the state Attorney General, like the sheriff, is not always beholden to the chief executive in his jurisdiction. Like the sheriff, the Attorney General has

a sphere of independent authority, in which he simply cannot be told what to do.

According to Appellants' arguments, this independence would make the Attorney General into a non-state officer. Just like Appellants' hypothetical sheriff, he would stand outside of the government to which he is nominally attached, because he is not always answerable to and cannot be controlled by the highest executive. But the fallacy in the argument is immediately apparent. No one has suggested, and no one would suggest, that the Attorney General has lost his status as a state official merely because the Supreme Court has recognized explicitly that his office is partially independent. Much less would anyone suggest that his office belongs to some *other* government because of his measure of independence. The Attorney General's office co-exists as part of state government, even though the holder of that office stands supreme on some issues. In the same way, the sheriff and his department are a part of the county, even though in some respects the county sheriff may not be controlled by the county commission.

Appellants also argue that county sheriffs should be considered state officers because the state provides them certain supports, most obviously training. But such supportive functions do not convert sheriffs into state officers. Once again, an example may help. The FBI and perhaps other federal agencies sometimes offer

training to local law enforcement. Suppose the federal government chose to impose mandatory and exclusive training by a federal agency upon all sheriff's personnel. Would that new step convert every sheriff and every deputy into a federal official? Of course not.

More meaningfully, Appellants suggest that certain controls exercised by the state perforce transform county sheriffs into state officials. But as the concurring judges in *Grech* and the dissenters in *Manders* make clear, the state's control is incomplete. The state simply does not control every aspect of the sheriff's office, as it does with the offices of state government (with the notable exception of the Law Department). State law merely defines and limits the sheriff's authority and some of his duties. The state imposes little day-to-day control. *Cf. Grech* (sheriff answerable to special demands of statewide data system).

Appellants also argue that "[s]heriffs in Georgia derive their power and authority from the State of Georgia." (Appellants' Supplemental Brief at 3). But this argument goes too far. Counties and other political subdivisions similarly "derive their power and authority from the State of Georgia." Indeed, they are created by and owe their very existence to the state. Yet this reality does not make counties into state agencies. By the same token, sheriffs are not state officials

simply because the state creates and defines their office.

If we cobble all these pieces together, does the picture change? Is the county sheriff mysteriously recreated as a state officer merely because of "the level of the state's involvement?" (*See* Appellant's Supplemental Brief at 6). The question answers itself. The state can and does create the office of sheriff, define many of its parameters, delegate some of the sheriff's powers, and provide training to assist in the performance of his duties, all without transforming the office of county sheriff into a state role for every purpose. *See* Grech, Manders and *Brown*.

II. COUNTY INSURANCE WAIVED THE SHERIFF'S IMMUNITY.

Just as the federal civil rights decisions cited by Appellants did nothing to alter the traditional status of the sheriff and his deputies under Georgia tort law, there is no reason to depart from the repeated prior rulings of our Supreme Court in the context of a county's statutory waiver of sovereign immunity via its purchase of liability insurance for county-owned vehicles under O.C.G.A. §33-24-51. *Gilbert v. Richardson*, 264 Ga. 744, 452 S.E.2d 476 (1994); *Cameron v. Lang,* 274 Ga. 122, 549 S.E.2d 341 (2001).

In *Gilbert v. Richardson*, the Supreme Court held that a deputy sheriff is an employee of the sheriff, but the sheriff is entitled to the benefit of the county's

sovereign immunity except to the extent waived by the county's purchase of automobile liability insurance under O.C.G.A. §33-24-51. Following *Gilbert*, this Court held in *Standard v. Hobbs*, 263 Ga. App. 873, 878, 589 S.E.2d 634, 638 (2003) that a suit against a deputy sheriff in his official capacity is tantamount to suit against the county, and that sovereign immunity for the deputy's negligence in operating a county vehicle was waived to the extent of the county's insurance irrespective of the fact that the plaintiff had not named either the sheriff or the county as a defendant other than through the official capacity designation in the way the case was styled and pled. *Accord Ward v. Allstate Ins. Co.,* 265 Ga. App. 603, 604, 595 S.E.2d 97, 99 (2004). By comparison, the Plaintiff in the case at bar named both the county and the sheriff as Defendants.

Because the sheriff is a county official under Georgia law, the Supreme Court has made it clear that the sheriff is entitled to the same sovereign immunity as the county, and that by the same token, the sheriff's sovereign immunity is waived in the same manner as the county's when the county provides insurance for the sheriff's vehicles. *Gilbert*, 264 Ga. 744, 452 S.E. 2d 476; *Cameron,* 264 Ga. 122, 549 S.E.2d 341. Accordingly, the sheriff is liable under *respondeat superior* for the torts of his deputies to the extent that the liability is covered by the county's

automobile insurance:

> Since deputy sheriffs are employed by the sheriff rather than the county, sheriffs may be liable in their official capacity for a deputy's negligence in performing an official function. … Because [the sheriff] is being sued in his official capacity, he is entitled to the benefit of Walker County's sovereign immunity defense. Since, however, the county has waived sovereign immunity to the extent of its liability insurance coverage, [Sheriff] Millard's sovereign immunity defense is likewise waived to that extent.

264 Ga. at 754, 452 S.E. 2d at 484. The Court of Appeals has followed the same approach:

> …[S]heriffs frequently may be held liable for the negligence of their deputies under a *respondeat superior* theory; " 'since deputy sheriffs are employed by the sheriff rather than the county, sheriffs may be liable in their official capacity for a deputy's negligence in performing an official function.' " *Brown v. Jackson,* 221 Ga. App. 200, 201(2), 470 S.E.2d 786. The sheriff and not the county is liable for the misconduct of his deputies. *Id.*; *Wayne County v. Herrin,* 210 Ga.App. 747, 751(3), 437 S.E.2d 793. In this case, the sheriff who was sued in his official capacity is immune from liability; he is insulated from liability by the defense of sovereign immunity, and that immunity has not been waived in this case. Compare *Woodard,* supra (unless sovereign immunity is waived that defense bars claims against the county, its commissioners, and its two employees in their official capacity).

Coffey v. Brooks County, 231 Ga. App. 886, 892-893, 500 S.E.2d 341, 348 (1998).

Accordingly, the status of the deputy as an employee of the sheriff rather than the county makes no difference. The sovereign immunity of the county flows to the deputies through the sheriff as a county officer, and so does the waiver of

immunity when automobile insurance is purchased. Because suit against the sheriff in his official capacity is no different than a suit against the county itself, the county's insurance will be on the hook for the claim whether suit is filed against the county, the sheriff, or—as the plaintiff did in this case—both.

At the time of the subject incident, a county's purchase of insurance was purely discretionary, but recent changes in the law shed additional light on the intent of the Legislature in this context. O.C.G.A. §33-24-51 has since been amended to add provisions requiring counties to maintain minimum levels of insurance coverage in accordance with O.C.G.A. §36-92-2, which became effective in 2005.[1] This new code section requires insurance on all vehicles "owned by the local government entity," including counties in the definition of "local government entity" but excluding school districts, and making no mention of whether sheriffs are either included are excluded from that definition. Since the Legislature is presumed to act with knowledge of the law, it can be presumed that the Legislature was satisfied with the state of the law as interpreted by the Supreme Court, and that it intended for *Gilbert* and its progeny to continue governing the relationship

[1] For accidents occurring in the year 2007, the required minimum coverage limit is $250,000 per person for bodily injury. O.C.G.A. §36-92-2(a)(2).

between counties and sheriffs under this statutory scheme. *State v. Katchwalla*, 274 Ga. 886, 561 S.E.2d 403 (2002).

Recent changes in the way sheriffs are viewed for purposes of federal civil rights law under *Manders, Grech* and *Brown*, supra, have had no impact upon long-settled Georgia tort law, and contrary to the current status of sheriffs in Section 1983 cases, there has never been any suggestion in Georgia law that a deputy sheriff who drives a county-owned and county-insured vehicle is acting as an employee of the state for purposes of tort liability. Indeed, the State Tort Claims Act does not include sheriffs or deputy sheriffs in its definition of "state officer or employee" (which is broad enough to include foster parents and foster children) under O.C.G.A. §50-21-22(7), and since there would be no rational basis for providing coverage for state troopers, correctional officers, and GBI agents but not sheriffs and their deputies if they were in fact state employees, the only logical conclusion is that the General Assembly intended for sheriffs and their deputies to continue to be classified as county employees for purposes of state tort liability, which is precisely why Pickens County insures them. This conclusion is consistent with both the Supreme Court's ruling in *Gilbert* that an official capacity suit against the sheriff is essentially a suit against the county, 264 Ga. at 746, and

the express terms of the Georgia Tort Claims Act (GTCA) excluding counties from its reach. O.C.G.A. §50-21-22(5).

This Court is bound by the Supreme Court's decision in *Gilbert* and its progeny. If the Appellant's position were to be adopted by the Supreme Court and *Gilbert* were to be reversed, it would eviscerate not only the intent of the Legislature under O.C.G.A. §33-24-51 but also the intent of the counties and insurance companies who have contracted for decades to provide automobile liability coverage for sheriffs and their deputies. Although Appellant urges a strict construction of this statute because it is in derogation of common law, it would violate a cardinal rule of construction if the statute were construed so strictly as to render its provisions meaningless and defeat its essential purpose—that is, to enable counties to insure their vehicles and to waive sovereign immunity to the extent of such insurance. *See, generally*, *Echols v. Thomas,* 265 Ga. 474, 475, 458 S.E.2d 100 (1995). Accordingly, the Sheriff of Pickens County is subject to potential liability for the negligence of his deputy to the extent of the automobile liability insurance provided by Pickens County.

CONCLUSION

The Georgia Trial Lawyers Association, as *amicus curiae*, respectfully

requests that the decision of the trial court be AFFIRMED.

This _____ day of January, 2007.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the within and foregoing **NOTICE OF APPEARANCE** and **BRIEF OF THE GEORGIA TRIAL LAWYERS ASSOCIATION AS AMICUS CURIAE** was furnished to

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