IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 21-0395

L.B.,
Plaintiff-Appellant,
v.
UNITED STATES OF AMERICA, et al.
Defendants-Appellees.

PLAINTIFF-APPELLANT'S REPLY BRIEF

On Certified Question from the
United States Court of Appeals for the Ninth Circuit Cause No. 20-35514

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TABLE OF CONTENTS

TABLE OF AUTHORITIES
CASES

STATUTES & REGULATIONS

OTHER AUTHORITIES

I. INTRODUCTION

In her Opening Brief, Plaintiff-Appellant L.B. addressed the specific certified question concerning law enforcement officers posed by the Ninth Circuit and accepted by this Court. Thus, L.B. asked this Court to answer the Ninth Circuit's certified question in the affirmative and rule that under Montana law, law enforcement officers who use their authority as on-duty officers to sexually assault members of the public act within the course and scope of their employment.

In response, the government criticizes the Ninth Circuit in the formulation of its certified question and argues the Ninth Circuit has misconstrued the test for liability under the FTCA. The certified question as formulated by the Ninth Circuit asks whether "law-enforcement officers act within the course and scope of their employment when they use their authority as on-duty officers to sexually assault members of the public." The federal government argues that this question necessarily implicates a "public" entity, since a law-enforcement officer would be employed by a public entity, not a "private person," and therefore answering the question would be an advisory opinion and would not be dispositive of the issue in this case – which is whether Officer Bullcoming was acting in the course and scope of his employment when he sexually assaulted L.B. The federal government attempts to recast the certified question by suggesting the better question before the Court is whether under Montana law, "employees of private employers who

misuse their authority to commit sexual assault act within the scope of employment." Govt brief at 10.

The government then argues that the answer to this reformulated question in this case is "No," because Officer Bullcoming's sexual assault of L.B. was not "serving his employer's interests," thus the assault was not within the scope of his employment under Montana law.

L.B. believes that this Court can simply answer the Ninth Circuit's certified question by responding in the affirmative, and that sufficient "like circumstances" exist with private entities to show the same liability for the federal government as for a private person. A thorough analysis of existing Montana law pertinent to Officer Bullcoming's sexual assault of L.B. demonstrates that the assault was committed in the course and scope of Officer Bullcoming's employment. Thus, should this Court choose a more specific formulation and response to the certified question, L.B. suggests an appropriate answer is, "Officer Bullcoming acted within the course and scope of his employment when he used the authority of his position to sexually assault L.B."

Should the Court choose to reformulate the certified question for a more general application, as recommended by the federal government, L.B. suggests the following: "When an employer provides an employee with power or authority over other persons, and the employee uses that power or authority to sexually assault a

person, is the sexual assault in the course and scope of employment under Montana law?" This Court's answer to such a certified question is "yes" based on this Court's holdings in *Keller*, *Kornec,* and *Brenden*.

Because Montana has adopted in full Restatement (Second) of Agency §214, non-federal employers are liable for the sexual assaults of their employees under the non-delegable duty doctrine. L.B. asks this Court to even the playing field so that the federal government is also liable for the sexual assaults of its employees in Montana.

II. ARGUMENT

A. The Certified Question.

Under the FTCA, the United States is only liable "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." *Xue Lu v. Powell*, 621 F.3d 944, 947 (9th Cir. 2010)(quoting 28 U.S.C. §1346(b)). "According to the statute governing the liability of the United States, the United States is liable 'in the same manner and to the same extent as a private individual under like circumstances.' 28 U.S.C. §2674. 'Like circumstances' are not 'identical circumstances.' Congress did not require a claimant to point to a private person performing a governmental function." *Id.*

The federal government suggests that this Court's answer to the Ninth Circuit's certified question would only be an advisory opinion and would not be dispositive of the issues in this case, because an affirmative or negative answer to the question would not answer whether the federal government would be liable to the same extent as a private person, since the answer would only be relevant to public entities that employ law-enforcement officers. The federal government suggests that the better question before the Court is whether under Montana law, "employees of private employers who misuse their authority to commit sexual assault act within the scope of employment." Govt brief at 10.

The certified question does not have to be read so narrowly, as the government suggests, since there are private law-enforcement officers – including, for example, private security officers, working in Montana who have authority to detain people. As the Ninth Circuit has described, "like circumstances" are not "identical circumstances." *Xue Lu*, 621 F.3d at 947-48 ("Analogy not identity of circumstance is key.") Private security officers carry firearms and wear badges, similar to municipal law-enforcement officers, and use the authority of their office to detain people. Thus, there is sufficient analogy to provide a basis for a dispositive answer to the certified question. It is completely common for department store security officers, for example, to monitor store customers and detain store customers for searches and questioning, thus the analogy and nexus to

private parties provides sufficient "like circumstances" to allow the certified question as posed to provide a determinative outcome in this case.

Regardless, should this Court choose to reformulate the question as the federal government suggests, the answer must still be "yes." L.B. suggests a more apt formulation of the question is, "When an employer provides an employee with power or authority over other persons, and the employee uses that power or authority to sexually assault a person, is the sexual assault in the course and scope of employment?" The answer must be yes, and the employer is liable.

B. Officer Bullcoming acted within the course and scope of his employment as a BIA police officer when he sexually assaulted L.B., therefore the federal government is liable under the FTCA.

Parties here agree that under 28 U.S.C. §2680 and the United States Supreme Court's *Millbrook* decision, the federal government is subject to suit under the FTCA for Officer Bullcoming's conduct, and can be liable under the doctrine of *respondeat superior* as long as Officer Bullcoming's acts or omissions giving rise to the claim occurred while Officer Bullcoming was "acting within the scope of his office or employment." *Millbrook v. United States*, 569 U.S. 50, 55 (2013)(citing 28 U.S.C. §1346(b)(1)).

The determination of liability under the FTCA is controlled by the law of the place where the allegedly tortious acts occurred, thus Montana law applies in this case. 28 U.S.C. §1346(b). Under Montana law, "a master is liable for the torts of

his servant if committed within the scope of his employment," even if the acts are "willful and malicious." *Kornec v. Mike Horse Mining and Milling Co.*, 180 P.2d 252, 256 (Mont. 1947). "An act, although forbidden or done in a forbidden manner, may be within the scope of employment." *Id.* (quoting Restatement of Agency §230). Even though an employer might not be liable for the act of the employee if that act was considered in isolation, when the act "is so connected with and immediately grows out of another act of the servant imputable to the master, [] both acts are treated as one indivisible tort," and the employer is liable for the act of the employee. *Id.* "The fact that an agent in acting for his principal may deviate from express instructions or even act in utter disobedience thereof does not generally relieve the principal of liability if the acts were in furtherance of or incidental to the employment for which the agent was expressly or impliedly engaged." *Keller v. Safeway Stores*, 108 P.2d 605, 611 (Mont. 1940).

To determine whether conduct is incidental to the authorized conduct, courts look to "(a) whether or not the act is one commonly done by such servants; (b) the time, place and purpose of the act; … (f) whether or not the master has reason to expect that such an act will be done; and … (i) the extent of departure from the normal method of accomplishing an authorized result." *Id.* (citing Restatement of Agency §229).

"[D]epending on the circumstances, an employer may be vicariously liable in respondeat superior for negligent, willful, and malicious acts of employees committed within the scope of their employment." *Brenden v. City of Billings,* 2020 MT 72, ¶16 (citing *Kornec*, 180 P.2d at 256, and *Keller*, 108 P.2d at 611). "When a servant in carrying out his assigned duties makes an assault on a third party as a result of a quarrel which arose as a consequence of his performance of the task imposed and at the time and place of performance of the duties he was employed to do, then the master is liable." *Kornec*, 180 P.2d at 157. "The test of the defendant company's liability is not whether the assault was committed in accordance with the master's instructions but whether the act complained of arose out of and was committed in prosecution of the task the servant was performing for his master," and "the employment must be one which is likely to bring a servant into conflict with others." *Id.* (citing Restatement of Agency §245).

Even if an employer did not authorize the tortious conduct of the employee, or the employee was disobedient or disregarded the employer's instructions, it does not preclude a finding that the employee was acting in the employer's interest. *Brenden,* 2020 MT ¶16. Even though an employee's main motive may be self-interest, it does not preclude an employee's act from being in the scope of employment "if the employee was motivated by any purpose or intent to serve the employer's interest 'to any appreciable extent'" *Id.* ¶17 (citing Restatement

(Second) of Agency §236 cmt b). "[A] dual or mixed motive does not preclude a finding that the employee was acting in furtherance of the employer's interest unless the employee was engaged in "an independent course of conduct not intended ... to serve *any* purpose of the employer." *Id.* ¶17 (citing Restatement (Third) of Agency §7.07(2) cmt b).

The federal government, relying on *Maguire v. State*, 835 P.2d 755, 757 (Mont. 1992), argues that "there is no evidentiary basis upon which a rational factfinder could find that Bullcoming's sexual assault was motivated by anything but his own sexual gratification." Govt brief at 16. As a preliminary matter, the government's assertions that the "magistrate's finding that Bullcoming 'raped L.B. solely for his own personal benefit,' ER45, is not in dispute," and that this is an "agreed fact," are disingenuous and wrong. *See* Govt brief at 10 n.3; 16. L.B. appealed the district court findings and rulings and L.B. argued strenuously before the Ninth Circuit that Officer Bullcoming's motivations included the policing purposes of control and intimidation. *See, e.g.*, dkt#9 at 24, 29. There is no basis in the record for the magistrate judge's finding that Officer Bullcoming sexually assaulted L.B. solely for his personal benefit. Officer Bullcoming never made such an admission. All Officer Bullcoming admitted was that he had non-consensual sex with L.B. The magistrate judge and the federal government speculate that his motivation was *solely* sexual gratification, yet experts who have studied policing

have concluded that sexual assaults by law enforcement officers also serve the purposes of intimidation and control. *See* L.B.'s Opening Brief at 11-13 (*citing* Stacie Hahn, *To Protect and to Serve: Municipal Vicarious Liability for a Sexual Assault Committed by a Police Officer*, 18 Sw. U. L. Rev. 583, 595 (1989); Cara Trombadore, *Police Officer Sexual Misconduct: An Urgent Call to Action in a Context Disproportionately Threatening Women of Color*, 32 Harv. J. Racial & Ethnic Just. 153 (Spring 2016)). Thus, contrary to the federal government's conclusory arguments, a rational factfinder could certainly find that Officer Bullcoming sexually assaulted L.B. to exert control over her and to intimidate her, two purposes inherently tied to his policing function.[1]

The federal government relies primarily on *Maguire v. State*, 835 P.2d 755, 757 (Mont. 1992) to argue that sexual assault is not in the course and scope of

[1] The government, citing the magistrate judge's finding, argues that it "cannot reasonably be argued that Bullcoming raped L.B. for the benefit of the BIA." Govt brief at 17. Unlike several other Native American reservations in Montana, the Northern Cheyenne Reservation does not have its own police force. Law enforcement on the reservation is provided by the BIA. The BIA police force has long had a contentious relationship with the tribe and tribal members, and the tribe has sued the BIA in an attempt to remove BIA law enforcement and to take over law enforcement on the reservation. *See, e.g.,* <https://missoulian.com/news/state-and-regional/northern-cheyenne-tribe-sues-feds-over-law-enforcement-contract/article_e1e3ba49-df53-5db9-adeb-180b02f3fac7.html> . It certainly benefits an outside police force, like the BIA, to intimidate citizens with sexual acts to keep citizens submissive and to enhance the BIA's control and power. *See, e.g.,* Martha Chamallas, *Vicarious Liability in Torts: The Sex Exception*, 48 Valparaiso L. Rev. 152, 163-70 (Fall 2013)(attribution error to focus on sexual perpetrator's desires rather than the features of the job that facilitate the assault).

employment. Citing *Kornec*, but without analysis of Restatement of Agency §229 or §230, the *Maguire* Court determined that, "It is clear this rape was outside the scope of [the employee's] employment." *Id*. at 758. As discussed in L.B.'s Opening Brief, this Court's analysis in *Maguire* was not focused on whether the rape was within the scope of the employee's job, rather, the Court's analysis in *Maguire* concerned the applicability of the non-delegable duty exception to the *respondeat superior* doctrine stated in Restatement (Second) of Agency §214. This Court declined to adopt §214 in *Maguire*, stating that "such a major change to the *respondeat superior* doctrine is best left to the legislature." *Id*. at 759.

Without waiting for the legislature, this Court subsequently *did* adopt Restatement (Second) of Agency §214 in *Paull v. Park County*, 218 P.3d 1198, 1205 (Mont. 2009).[2] Thus, current Montana law supports liability of an employer under §214's nondelegable duty exception to the *respondeat superior* doctrine.

The federal government – trying to cling to the tacitly overruled *Maguire*

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[2] *Amici* Montana Association of Counties and Montana League of Cities and Towns have waded into this appeal not for the purposes of attempting to give the Court guidance in answering the certified question, but rather attempting to have this Court overrule its *Paull* decision and reinstate *Maguire* as the law. In violation of Rules 8 and 12, Mont. R. App. P., *amici* attempt to supplement the record by attaching the opinions of a retired law enforcement officer. The Court should strike and not consider such undisclosed "expert" opinions which are not part of the record. Moreover, given that *Paull* has been the law in Montana for over a decade, the Court should give little weight to *amici's* boogeyman arguments that the sky will fall if employers are held responsible for the conduct of on-duty law enforcement officers.

decision – argues that L.B. "vastly overread" this Court's holding in *Paull*. *See* Govt brief at 33 n.14. In *Paull*, this Court adopted §214 in full *with no limitation*. *Paull*, 218 P.3d at 1205. There is nothing to "overread": the non-delegable duty doctrine of §214 has applied in Montana since 2009. As Judge Christensen determined in *Smith v. Ripley*, 446 F.Supp.3d. 683 (D. Mont. 2020), the non-delegable duty doctrine of §214 adopted by this Court resulted in the government's liability for the sexual assault by its employee, even though Judge Christensen found that "[r]ape is outside the scope of employment" under *Maguire*. *Id*. at 691-92. *See also Shepherd v. National Railroad Passenger Corp.*, 2018 WL 5312199 (D. Mont. Aug. 15, 2018)(Amtrak liable for its employee's sexual assault of passenger).

However, because Officer Bullcoming was a federal officer and this case is being prosecuted under the FTCA, the nondelegable duty exception does not apply. Thus the question posed to this Court by the Ninth Circuit is whether on-duty law enforcement officers who use the power of their positions to sexually assault citizens are acting in the course and scope of their employment under Montana law. As discussed above, the federal government suggests a more general question to assure that the private party provision of the FTCA is met by an answer of this Court, and L.B. offers a reformulation that would apply to all federal employees. This Court can also limit the question specifically to whether Officer Bullcoming's

sexual assault of L.B. was within the scope of his employment as a police officer. If this Court determines that the act was within the scope of employment, then the federal government is liable for the acts of its employee under the FTCA.

Regardless of the formulation of the question, here, this Court must find that a review of the §229 factors discussed in *Keller*, *Kornec,* and *Brenden* determines Officer Bullcoming's sexual assault was incidental to his authorized policing conduct and the federal government is liable for Officer Bullcoming's sexual assault of L.B. First, "(a) whether or not the act is one commonly done by such servants," assaults by police officers on members of the public are not uncommon, and sexual assaults by police officers are also not uncommon. *See* L.B. Opening Brief at 11-13. Police officers outfit themselves for conflict before they step out in public by wearing protective armor and carrying weapons like firearms, batons, and tasers. Police not uncommonly use these tools to intimidate and control members of the public, and police expect to come into conflict regularly with members of the public. Sexual assault is just one expression of an intimidation and control tactic. *See id*.

Second, "(b) the time, place and purpose of the act," weighs heavily in favor of a finding that the assault was incidental to Officer Bullcoming's policing activities. The only reason Officer Bullcoming walked into L.B.'s house in the middle of the night was to act as a police officer responding to a police call to

enforce an ordinance. Officer Bullcoming's position as a law enforcement officer placed him in a position of power and authority over L.B. and Officer Bullcoming used that position of power to sexually assault L.B.

Third, "(f) whether or not the master has reason to expect that such an act will be done," police departments expect their officers to come into conflict with members of the public, and outfit and arm police officers with that expectation. Police departments expect that their officers will assault and intimidate members of the public in the course of their everyday duties, and sexual assault is just another intimidation tool available to police officers. Indeed, the circumstances of the rape here, with Bullcoming telling L.B. repeatedly "something has to be done," before she asked, "sex?" indicates that Bullcoming was using sex as a form of intimidation.

Finally, "(i) the extent of departure from the normal method of accomplishing an authorized result." As discussed in the academic articles cited in L.B.'s Opening Brief, sexual assault by police officers is not uncommon. Rape is not solely for the self-gratification of the rapist; it is part and parcel of an expression of domination and intimidation and contributes directly to the purposes of law enforcement. As discussed in L.B.'s Opening Brief and briefs of *amici*, intimidation and control play significant roles in policing.

Kornec makes clear that foreseeability and a nexus between the employee's authorized conduct and misuse thereof are absolutely integral parts of agency analysis under Montana law. "The test of the defendant company's liability is not whether the assault was committed in accordance with the master's instructions but whether the act complained of arose out of and was committed in prosecution of the task the servant was performing for his master," and "the employment must be one which is likely to bring a servant into conflict with others." *Id.* (citing Restatement of Agency §245). *Kornec*, 180 P.2d at 257. Here, policing is employment that is certainly "likely to bring the servant into conflict with others" and the assault committed by Officer Bullcoming was "committed in the prosecution of the task" he was performing for his employer. Moreover, "an act, though forbidden or done in a forbidden manner may be within the scope of employment." *Id.* at 256. It is not the "illegal, malicious, unauthorized" act that is "required to be within the scope of employment, or the authority of the servant, or in furtherance of the master's business" because the employer is still liable if the act of the servant "is so connected with and immediately grows out of another act of the servant imputable to the master, that both acts are treated as one indivisible tort, which, for the purposes of the master's liability, takes its color and quality from the earlier act." *Id*.

The only reason Officer Bullcoming was at L.B.'s house in the middle of the night was to act in his official capacity as a police officer. The act of the sexual assault "grew out of" that authorized act. Officer Bullcoming noted that L.B. had been drinking alcohol and administered a breathalyzer test. These were acts of policing. The consequences of a positive breathalyzer test for L.B. were severe: losing her job and her children. It was within his policing activity for Officer Bullcoming to arrest L.B. and take her to jail. Even if there was an element of self-interest in Officer Bullcoming's sexual assault of L.B., the sexual assault still served the policing purpose of control, intimidation, and domination. *See Brenden* ¶17 (Officer Bullcoming was acting in the scope of employment because he was "motivated by any purpose or intent to serve the employer's interest 'to any appreciable extent'").

The sexual assault Officer Bullcoming perpetrated grew out of his investigation and policing activity. That fact is not in dispute, and under *Kornec*, *Keller*, and *Brenden*, this Court must rule that the sexual assault was within the scope of Officer Bullcoming's employment as a law enforcement officer. Officer Bullcoming's conduct could not have happened but for the law enforcement position and authority he held and the law enforcement activities he was conducting. Thus, based on a straightforward examination of established Montana law, this Court should rule that Officer Bullcoming was acting in the course and

scope of his employment as a police officer, and the federal government would then be liable for his sexual assault. This would address L.B.'s unique situation and would be based on application of existing Montana law as set out by *Kornec*, *Keller*, and *Brenden.*

Should the Court choose to reformulate the certified question along the lines suggested by the federal government, L.B. suggests the following formulation and answer: "When an employer provides an employee with power or authority over other persons, and the employee uses that power or authority to sexually assault a person, is the sexual assault in the course and scope of employment?" The answer must be yes, and the employer must be liable because the employer provides the nexus of power to the employee. This would apply to all federal employees, not just law enforcement officers, and would provide Montana victims of sexual assault by federal employees with the same remedy as victims of sexual assault by state or private employees, since §214 already applies to state and private actors.

III. CONCLUSION

This Court must rule that employees who use the power of their position to sexually assault members of the public are acting in the course and scope of their employment under Montana law so that all victims of sexual violence in Montana have the same remedy.

Respectfully submitted February 10, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify this Reply Brief is printed with a proportionately spaced Time New Roman typeface in 14 point font, is double spaced, and the word count calculated by the word processing software is 3967 words, excluding tables and certificates.

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