APPEAL

1. Common law writ of certiorari – The time limit to file the writ is jurisdictional – Filing for the writ beyond the date established by statute denies the court of subject matter jurisdiction – Plaintiff filed to file the appeal in a timely manner denying the court of subject mater jurisdiction – Letter filed by plaintiff with the court all but acknowledged that it was not an appropriate appeal, but rather ask for more time to file the appeal – Case was dismissed

REBECCA BYRD v. CLARKSVILLE-MONTGOMERY COUNTY SCHOOL SYSTEM
COURT OF APPEALS No. M2023-01210-COA-R3-CV Filed June 28, 2024

"A tenured teacher sought judicial review of her reprimand and one-day suspension. The chancery court modified the discipline imposed by the director of schools. Because we conclude that the teacher did not timely petition for judicial review, we vacate the judgment with instructions to dismiss for lack of subject matter jurisdiction."

"The Clarksville-Montgomery County School System began investigating the actions of tenured teacher Rebecca Byrd after employees in its technology department expressed concerns that she may have violated the Family Educational Rights and Privacy Act ('FERPA'). *See* 20 U.S.C. § 1232g(b). Those concerns stemmed from a website Mrs. Byrd hoped to create as a better method for communicating with students and parents. To create the website, she enlisted the aid of her husband, a trained computer programmer, which potentially gave him access to student information protected by FERPA. Because of this, the school system issued a written reprimand and suspended Ms. Byrd for one day without pay for 'neglect of duty.' *See* Tenn. Code Ann. § 49-5-501(8) (2023) (defining 'neglect of duty')."

"Mrs. Byrd requested a conference with the Director of Schools. *See id.* § 49-5-512(d) (2023) (outlining the procedure for appealing a disciplinary suspension of three days or less that is not made in anticipation of dismissal). At the conference, Mrs. Byrd, who was represented by legal counsel, provided rebuttal information and denied certain of the allegations made against her. In her written decision following the conference, the Director of Schools conceded that Mrs. Byrd's intent in disclosing student information might not have been malicious and expressed appreciation for Mrs. Byrd's commitment to her students. Even so, the director upheld the original punishment."

"On May 4, 2022, the Montgomery County Chancery Court Clerk and Master received a letter from Mrs. Byrd. Attached to the letter were the letter of reprimand and suspension, the letter from the director upholding the punishment, and an email from the Tennessee State Board of Education. In her letter, Mrs. Byrd explained that she had received the director's final decision on April 6, 2022. And she acknowledged that, to appeal that decision, she 'must file within 30 days to the Montgomery Chancery Court under TCA § 49-5-513, [. . .] which is May 04, 2022.' Mrs. Byrd wrote, '[u]nfortunately, I was unable to secure coun[se]l within that time frame (was left hanging with no response for two weeks by a law firm after meeting in person).' She went on to 'officially request[] an emergency extension to allow the union representative to help . . . best represent [her] side of the story, which has been completely ignored by [the school system] thus far.' Because preparation of an appropriate appeal would 'require at least 2 [m]onths,' she 'request[ed] that the deadline for submitting the appeal be extended by 61 days, to July 06, 2022.' Mrs. Byrd closed by asking the court to '[p]lease let us know if [it] can accommodate this request.'"

"The clerk's office treated Mrs. Byrd's letter and attachments as a petition for a writ of certiorari, set a hearing date nearly two months out, and provided a summons. *See id.* §§ 49-5-512(d)(5), -513 (2023) (specifying that a tenured teacher who is suspended may appeal a director's decision by petition for a writ of certiorari)." …

"Mrs. Byrd moved for summary judgment. She argued that the school system failed to prove the charges because the information she provided to her husband was not protected by FERPA. The school system responded to the motion for summary judgment, but it also filed a second motion to dismiss. Among other grounds, the motion asserted that the chancery court lacked subject matter jurisdiction because Mrs. Byrd 'never filed a Petition for writ of certiorari (or any other type of Complaint) commencing an action . . . within the applicable 30-day limitation period.' *See* TENN. R. CIV. P. 12.02(1)."

"Ultimately, after a hearing, the court determined that the school system's discipline was disproportionate and ordered substitute discipline. It found 'that the record demonstrate[d] that Mrs. Byrd, in an effort to innovate and improve her communication with students and parents, committed, at the worst, a minor technical violation of FERPA.' And 'given Mrs. Byrd's noble intentions and the lack of actual harm, the ambiguity of the [school system's] FERPA policy, as well as there being no evidence of any prior discipline of Mrs. Byrd, that the discipline or 'punishment' of one day suspended without pay[] simply d[id] not 'fit the crime.'' So the court concluded that, 'rather than a one-day suspension without pay, Mrs. Byrd should be issued a written letter of reprimand.' It also ordered that 'Mrs. Byrd should be required to complete some additional FERPA training and instruction in such an amount and nature as deemed appropriate by the Director of Schools, although not to exceed 4 hours.'"

"On appeal, the school system raises issues with the denial of its motions to dismiss and the chancery court's review and modification of the discipline. First, the school system asserts that the court lacked subject matter jurisdiction because of Ms. Byrd's failure to initiate the action within the time frame required by the Tennessee Teacher Tenure Act. Second, it asserts the case should have been dismissed based upon insufficient service of process. Finally, it asserts the court erred in the admission of certain evidence and by applying the wrong standard of review at the final hearing."

"We conclude the first issue is dispositive. Subject matter jurisdiction is 'the power of a court to adjudicate cases of the general class to which the proceedings in question belong.' *Est. of Brown*, 402 S.W.3d 193, 198 (Tenn. 2013)." …

"By enacting the Teacher Tenure Act, the Tennessee legislature constructed a procedural framework for teacher discipline. *See Lemon v. Williamson Cnty. Schs.*, 618 S.W.3d 1, 15-16 (Tenn. 2021). A tenured teacher 'who is . . . suspended by action of the director' may obtain judicial review by filing a petition for writ of certiorari within thirty days of the director's decision. Tenn. Code Ann. § 49-5-513(a)-(b). The petition must be filed in 'the chancery court of the county where the teacher is employed' and name a defendant. *Id.* And it must include a statement of 'the issues involved in the cause, the substance of the order of the board, or the respects in which the petitioner claims the order of the board is erroneous' along with a request for the court's review. Id."

"After reviewing Mrs. Byrd's unsworn letter and its attachments, we conclude that it failed to satisfy the requirements of a petition under Tennessee Code Annotated § 49-5-513. The letter requested an extension of the statutory time limit, not judicial review. *See Brundage v. Cumberland Cnty.*, 357 S.W.3d 361, 371 (Tenn. 2011) (explaining that 'courts should give effect to the substance of a pleading'). In the letter, Mrs. Byrd all but acknowledged that it was not 'an appropriate appeal' and that she '[would not] have an appeal ready to file' by the statutory deadline. So she 'officially request[ed] an emergency extension' and asked for a new deadline. She closed her letter by asking the court if it could accommodate her requested extension. And she signed the letter following the statement: 'This Request to Extend a Proposal Deadline Date is executed and agreed to by.'"

"In the context of the Teacher Tenure Act, the required petition for a writ of certiorari is comparable to a notice of appeal. *Cf. Schering-Plough Healthcare Prods., Inc. v. State Bd. of Equalization*, 999 S.W.2d 773, 776 (Tenn. 1999) (comparing a petition for judicial review of a final decision of an administrative agency in a contested case to a notice of appeal). And the thirty-day time limitation for filing the petition is jurisdictional. *Cf. id.* at 777. Because Mrs. Byrd did not file a petition complying

with Tennessee Code Annotated § 49-5-513(b) within thirty days of receipt of notice of the disciplinary decision, the chancery court lacked subject matter jurisdiction over the case."

2. Common law writ of certiorari - Local boards are administrative bodies whose decisions are subject to judicial review by petition for common law writ of certiorari - A petition for writ of certiorari is not a vehicle which allows the courts to consider the intrinsic correctness of the conclusions of the administrative decision maker - When reviewing such petitions, courts may not (1) inquire into the intrinsic correctness of the lower tribunal's decision, (2) reweigh the evidence, or (3) substitute their judgment for that of the lower tribunal - Court is limited to determining whether the board exceeded its jurisdiction, followed an unlawful procedure, acted illegally, arbitrarily, or fraudulently, or acted without material evidence to support its decision - When reviewing the sufficiency of the evidence, courts are limited to determining whether there is substantial and material evidence in the administrative record. - Courts should not apply this standard mechanically: Instead, the court should review the record carefully to determine whether the administrative agency's decision is supported by such relevant evidence as a rational mind might accept to support a rational conclusion - The court need not reweigh the evidence, and the agency's decision need not be supported by a preponderance of the evidence - The evidence will be sufficient if it furnishes a reasonably sound factual basis for the decision being reviewed -Petitioners have the burden to prove that the Board followed an unlawful procedure by treating the appeal for a variance from the Fire Marshal's enforcement as an appeal for a variance from the Fire Marshal's interpretation

ROBERT MADDEN ET AL. v. METROPOLITAN BOARD OF FIRE AND BUILDING CODE APPEALS OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE
COURT OF APPEALS No. M2023-00113-COA-R3-CV Filed April 11, 2024

"This case concerns the denial of a variance by the Board of Fire and Building Code Appeals of the Metropolitan Government of Nashville and Davidson County, Tennessee ('the Board'). Landowners applied for a building permit to construct an auto repair shop on undeveloped property. The local fire code required new buildings of this type and size to have, *inter alia*, a water source that could supply 180,000 gallons at 1,500 gallons per minute for two hours. The property at issue did not have the requisite water supply. Thus, as a variance to the fire code, the landowners proposed to construct a 20,000-gallon water tank on the property and to install a 'dry' fire suppression system inside the building. When their plan was rejected by the fire marshal, the landowners appealed to the Board and asked for approval of a variance. The Board denied the variance request, citing concerns over the safety of people, including firefighters and first responders. The owners then petitioned for a writ of certiorari, arguing that the Board misapplied the law by failing to consider whether strict enforcement of the fire code would result in 'manifest injustice.' Finding that the Board failed to distinguish the landowners' request for a variance from an appeal, the trial court vacated the Board's ruling and remanded the matter to the Board for review of the variance request. This appeal followed. For the reasons set forth below, we respectfully disagree with the trial court's conclusion, reverse its judgment, and remand with instructions to affirm the decision of the Board."

"Robert and Dannette Madden ('Petitioners') own and operate RDR AutoWorks, LLC, an automotive repair shop. The business is currently located at 108 Old Trinity Lane in Nashville, Tennessee. In 2019, Petitioners bought property located at 4788 Jennie Brown Lane in Nashville with the plan to construct a new 5,000-square-foot steel building to relocate their business. The property is undeveloped, zoned for industrial use, and lies in the Urban Services District of Nashville."

"In 2020, Petitioners applied for a building permit from the Metropolitan Government of Nashville and Davidson County, Tennessee ('Metro'). At the time, the Metropolitan Fire Prevention Code ('the Fire

Code') required all building premises to have 'an approved water supply capable of supplying the required fire flow for fire protection.' *See* Int'l Fire Code § 507.1–2 (Int'l Code Council 2012) (emphasis omitted). Based on their building's size and type, Petitioners needed a water source that could supply 1,500 gallons per minute for two hours—a total of 180,000 gallons. *See id.* § B105."

"Per the Fire Code, water supplies could be in the form of 'reservoirs, pressure tanks, elevated tanks, water mains or other fixed systems capable of providing the required fire flow.' *Id.* § 507.1. Petitioners wanted to connect the property to a water main, but the closest was 2,500 feet away, and extending it would cost $280,000. For this reason, Petitioners developed and submitted a fire suppression plan that varied from the Fire Code's requirements: Petitioners proposed a 20,000-gallon water tank outside the building and a 'dry suppression' system inside for chemical fires. Petitioners believed this plan was adequate given the property's location and the planned construction type. Moreover, the arrangement would cost less than $90,000."

"Petitioners' fire suppression plan, was considered and rejected—first by Fire Plan Examiner Jim Rummage and then by Assistant Fire Marshal Joseph Almon, the latter of whom explained his decision via email:

> Based on the minimum fire-flow requirements listed in Appendix B of the 2012 IFC and building construction information provided on the submitted plans, the total capacity required to meet manual fire suppression needs is 180,000 gallons. The proposed 20,000-gallon tank is far short of this capacity.
>
> A reduction in the required fire-flow rate is allowed when the building is protected throughout by an NFPA 13 compliant automatic fire sprinkler system. It would be necessary to consult with a Fire Protection Engineer on the design of the sprinkler system to determine the minimum tank capacity required and [if] any additional equipment, such as pump systems, might be required.
>
> Based on the information above, I concur with Mr. Rummage's evaluation of the requirements and do not support the proposed alternative water supply tank as an equivalent to the requirements listed in the fire code."

Assistant Fire Marshal Almon then gave Petitioners three possible solutions to gain approval:

> 1. Extend water mains to and provide fire hydrant coverage to the property meeting the minimum fire-flow requirement and duration. (1,500 GPM x 2 hours)
> 2. Install an engineer designed NFPA 13 compliant automatic fire sprinkler system with all components necessary to meet system demand and duration.
> 3. [Install an o]n-site tank and accessory components of sufficient size and capacity to meet fire-flow demand as noted in IFC Appendix B Section 105.2."

"Petitioners appealed the Fire Marshal's decision to the Board and asked for a variance on the ground that a 180,000-gallon tank would cost at least $130,000— approximately four times the cost of the proposed 20,000-gallon tank. Petitioners acknowledged that the Fire Code was intended to protect the safety of first responders and the public. Still, they claimed their plan was 'adequate' because the building was to be made mostly of steel, all vehicles would be parked outside while not undergoing repair, and a fire 'wouldn't really spread to anywhere else' because their property was between a highway and a vacant lot. Petitioners added that they had 'plenty of insurance.'"

"After hearing from Petitioners, board members expressed concern about hazardous materials on the property, and they questioned whether Petitioners' plan aligned with the spirit and purpose of the Fire Code. Chairman Rich McCoy noted that the Board was not 'worried about the buildings as much as the people that are in them.' Board members also stated that the fire department knew what it needed to fight a fire. In the end, the Board unanimously voted to deny Petitioners' variance request. The Board

sent Petitioners written notice of the denial, stating, 'Based on the minimum fire-flow requirements listed in Appendix B of the 2012 IFC and building construction information provided on submitted plans, the total capacity required to meet manual fire suppression needs is 180,000 gallons.'"

"Petitioners then filed a petition for a writ of certiorari in the Davidson County Circuit Court. Petitioners asserted that the Board did not apply the correct standard of review because it did not consider whether enforcement of the Fire Code would result in 'manifest injustice.' The Board filed the administrative record, including a transcript of the proceedings before the Board. Thereafter, Petitioners filed their brief, and then the Board filed its brief. The trial court held a hearing on the merits on October 5, 2022, during which no other evidence was introduced."

"The trial court held that the Board failed to fulfill its duties because it 'simply decided whether it would override [the Fire Marshal]'s determination of whether Petitioners met the [Fire Code] requirements' rather than 'whether strict enforcement of the [Fire] Code would result in 'manifest injustice.'' In its final order, the court distinguished between 'a variance pursuant to Metro Code § 2.80.080' and 'an appeal of the [fire marshal's] decision, pursuant to Metro Code § 2.80.090':

> Petitioners' use of language directly from Metro Code § 2.80.080, indicates Petitioners intended the Board to decide the appeal under the review standard it would apply to an applicant seeking a variance.
>
> In this Court's view, it is reasonably deduced from the record that Petitioners desired and sought a variance pursuant to Metro Code § 2.80.080. It is not equally clear, however, the Board also understood this to be the case. The record lacks any indication the Board made a distinction between an appeal of the decision of Asst. Fire Marshal Almon, pursuant to Metro Code § 2.80.090, and a request for a variance, pursuant to Metro Code § 2.80.080, in its deliberations. The Board makes no mention of the language in Metro Code § 2.80.080. Specifically, the Board does not mention 'manifest justice' or 'spirit and purpose' of the Code in any manner, and the word 'variance' is never used by the Board.
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> . . . .
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> From the record, it appears the Board simply decided whether it would override Asst. Fire Marshal Almon's determination of whether Petitioners met the 2012 IFC requirements. The Board's task was broader than that, however. Because Petitioners were seeking a variance, the Board was obligated to consider whether strict enforcement of the Code would result in 'manifest injustice.' Thus, this Court holds the Board's decision relies upon a misrepresentation and/or misapplication of legal standards for a variance, amounting to illegal, arbitrary, and/or fraudulent action."

"On this basis, the trial court granted the writ and remanded the matter to the Board 'for review of the Petitioner's request for a variance, pursuant to Metro Code § 2.80.080.'"

"Local boards are administrative bodies whose decisions are subject to judicial review by petition for common law writ of certiorari. *See Harding Acad. v. Metro. Gov't of Nashville & Davidson Cnty.*, 222 S.W.3d 359, 363 (Tenn. 2007). A petition for writ of certiorari is 'not a vehicle which allows the courts to consider the intrinsic correctness of the conclusions of the administrative decision maker.' *State ex rel. Moore & Assocs., Inc . v. West*, 246 S.W.3d 569, 574 (Tenn. Ct. App. 2005). Thus, when reviewing such petitions, 'courts may not (1) inquire into the intrinsic correctness of the lower tribunal's decision, (2) reweigh the evidence, or (3) substitute their judgment for that of the lower tribunal.' *Id.* (citations omitted). We are limited to 'determining whether the board exceeded its jurisdiction, followed an unlawful procedure, acted illegally, arbitrarily, or fraudulently, or acted without material evidence to support its decision.' *Harding Academy*, 222 S.W.3d at 363."

"When reviewing the sufficiency of the evidence, courts are limited to determining whether there is 'substantial and material evidence' in the administrative record. *Harding Academy*, 222 S.W.3d at 363. But, as we have explained before, courts should not apply this standard mechanically:

> [A] reviewing court should not apply [the] 'substantial and material evidence' test mechanically. Instead, the court should review the record carefully to determine whether the administrative agency's decision is supported by 'such relevant evidence as a rational mind might accept to support a rational conclusion.' The court need not reweigh the evidence, and the agency's decision need not be supported by a preponderance of the evidence. The evidence will be sufficient if it furnishes a reasonably sound factual basis for the decision being reviewed.

Jackson Mobilphone Co., v. Tennessee Pub. Serv. Comm'n, 876 S.W.2d 106, 110 (Tenn. Ct. App. 1993) (citations omitted) (quoting *Clay Cnty. Manor, Inc. v. State, Dep't of Health & Env't*, 849 S.W.2d 755, 759 (Tenn. 1993); *S. Ry. Co. v. State Bd. of Equalization*, 682 S.W.2d 196, 199 (Tenn. 1984))."

"Illegal, arbitrary, or fraudulent actions include (1) failing to follow minimum standards of due process; (2) misrepresenting or misapplying legal standards; (3) basing a decision on ulterior motives; and (4) violating applicable constitutional standards. *Hoover, Inc. v. Metro Bd. of Zoning Appeals*, 924 S.W.2d 900, 905 (Tenn. Ct. App. 1996). We review the Board's application of law de novo with no presumption of correctness. *See Harding Academy*, 222 S.W.3d at 363."

"While findings of fact promote an understanding of the basis of a board's decision, administrative bodies such as the Board do not have to make specific findings of fact unless a statute or ordinance requires them. *See Moore v. Metro. Bd. of Zoning Appeals*, 205 S.W.3d 429, 436 (Tenn. Ct. App. 2006) (citing *Weaver v. Knox Cnty. Bd. of Zoning Appeals*, 122 S.W.3d 781, 785 (Tenn. Ct. App. 2003)). And there was no requirement for the Board to make findings of fact in this case."

"Petitioners maintain that the Board erred because it did not consider whether strict application of the Fire Code would be manifestly unjust. For its part, the Board contends that it did not have to consider that issue because it determined that the requested variance was contrary to 'the spirit and purposes' of the Fire Code."

"Under Chapter 2.08 of the Metro Code, landowners may appeal to the Board when the Fire Marshal rejects 'the mode or manner of construction proposed to be followed or materials to be used in the erection or alteration of a building or structure.' Metro Code § 2.080.80 (Dec. 2019).3 As is relevant here, § 2.080.80 allows landowners to appeal a decision of the Fire Marshal when 'an equally good or more desirable form of construction can be employed in any specific case.' *Id.* Furthermore, **Chapter 2.08 grants the Board authority to 'vary** the application of any provision of [the Fire Code] to any particular case,' **but only if it finds that 'strict enforcement' would** (1) '**do manifest injustice' and** (2) '**be contrary to the spirit and purposes of [the Fire Code] or public interest**.' *See id.* § 2.08.090 (emphasis added)."

"Here, it is clear from the Board members' questions and stated concerns about the safety of the firefighters, first responders, and others who may be exposed to a fire at Petitioners' property, that the Board found that Petitioners had not proven that strict enforcement would be contrary to the spirit and purposes of the Fire Code or public interest."

"As the parties asking for a variance, Petitioners had the burden to persuade the Board enforcement would 'do manifest injustice'; and (3) that strict enforcement would 'be contrary to the spirit and purposes of [the Fire Code] or public interest.' *See id.* § 2.8.080–090. But Petitioners did not develop an argument or present any evidence to show that enforcement of the Fire Code here would be contrary to its spirit and purposes or public interest. *See id.* Instead, they argued that **allowing** the variance would **not be** contrary to the purpose of the Fire Code or public interest."

"The Board was not persuaded by this argument for obvious reasons. At the prescribed rate of 1,500 gallons per minute, Petitioners' 20,000-gallon tank would last just over 13 minutes. Yet Petitioners reasoned that this system was 'adequate' because their property was located between a vacant lot and a highway in an industrial part of town. Petitioners even pointed out that they had 'plenty of insurance.' In other words, if it burned, let it burn."

"However, multiple board members noted that the Fire Code's purpose is to protect not only buildings but also people including firefighters and first responders. These comments indicate that the Board found Petitioners' plan inconsistent with the spirit and purpose of the Fire Code, and we agree."

"In closing, we wish to address the primary concern of the trial court. That is whether the Board recognized that Petitioners were requesting a 'variance' from strict enforcement of the Fire Code rather than 'appealing' from the Fire Marshal's interpretation of the Fire Code."

"As an initial matter, we note that Chapter 2.80 of the Metro Code provides only one procedural mechanism for relief from an adverse decision of the Fire Marshal—whether based on an alleged misinterpretation of the Fire Code, an alleged misapplication of the Fire Code, or the principal that another form of construction would be equally as good or more desirable[.]" …

"… Petitioners have the burden to prove that the Board followed an unlawful procedure by treating the appeal for a variance from the Fire Marshal's enforcement as an appeal for a variance from the Fire Marshal's interpretation. *See Heyne v. Metro. Nashville Bd. of Pub. Educ.*, 380 S.W.3d 715, 729–30 (Tenn. 2012) (stating that parties using a common law writ of certiorari to challenge an administrative decision have the burden of presenting evidence showing that the officials, *inter alia*, 'followed an unlawful procedure'). And we find that Petitioners failed to establish that the Board followed an unlawful procedure by treating the hearing appeal as one for a variance from the interpretation of the Fire Marshal. In our view, the transcript from the hearing before the Board reveals that the Board knew that it was considering an appeal for a variance from the Fire Marshal's strict enforcement of the Fire Code rather than an appeal from the Fire Marshal's interpretation of the Fire Code because the Board asked questions to determine whether the variance proposed satisfied the elements of Metro Code § 2.80.080 and, particularly, whether strict enforcement would be contrary to the Fire Code's spirit and purposes. *See* Int'l Fire Code § 101 (Int'l Code Council 2012)." …

3. Title VII – Retaliation claim – Plaintiff failed to disclose the claim in a chapter 7 bankruptcy - Judicial estoppel claim by defendant - Appeals Court can consider a judicial estoppel claim *sua sponte* - This Court's *sua sponte* authority to consider judicial estoppel does not and cannot change the statutory mandate of our jurisdiction. Instead, parties must await a final, appealable order from the district court before they can assert judicial estoppel to the appeals court - Because the only appealable order before the appeals court is the district court's reinstatement order, this court can consider only defendant's argument that this order should be judicially estopped, and reserve for a later day the question of the applicability of judicial estoppel to McGruder's other claims, should the parties choose to pursue such arguments - Against this backdrop, the reinstatement order is not barred by judicial estoppel - As opposed to plaintiff's claims for money damages, a claim for reinstatement likely would not have been relevant to the bankruptcy court's determination of the proper disposition of plaintiff's debts - The omission of the reinstatement claim did not erroneously minimize plaintiff's assets, given that Chapter 7 creditors are paid with pre-petition assets, making plaintiff's future earnings not pertinent to the proceedings - Barring the reinstatement order would therefore not serve the purpose of judicial estoppel - Since there is no need to extend judicial estoppel so far past its stated goals, judicial estoppel does not bar plaintiff's reinstatement - District court did not abuse its discretion in ordering plaintiff's reinstatement even considering the hostility that exist

DR. EUNA MCGRUDER v. METROPOLITAN GOVERNMENT OF NASHVILLE & DAVIDSON COUNTY, TENNESSEE dba Metropolitan Nashville Public Schools
SIXTH CIRCUIT COURT OF APPEALS No. 22-5761 Decided and Filed: April 17, 2024

"In 2017, Plaintiff Euna McGruder sued Defendant Metropolitan Government of Nashville and Davidson County ('Metro Nashville') in United States District Court for retaliation under Title VII, 42 U.S.C. § 2000, *et seq*. In 2021, a jury awarded McGruder $260,000 for her claim, and the district court ordered Metro Nashville to reinstate her to her previous position. Metro Nashville appeals the district court's reinstatement order and argues that the entirety of McGruder's claims—including the jury award—should be barred by judicial estoppel due to her failure to disclose her cause of action against Metro Nashville when she filed for Chapter 7 bankruptcy in 2018. However, this Court lacks jurisdiction to consider Metro Nashville's judicial estoppel claims as applied to non-final, non-appealable orders that are not before this Court. And the district court did not abuse its discretion in ordering McGruder's reinstatement, which, as an equitable remedy, is not barred by judicial estoppel. For the reasons set forth below, we **AFFIRM** the district court's reinstatement order and otherwise **DISMISS** Metro Nashville's appeal for lack of jurisdiction."

"Until her termination, Dr. Euna McGruder served as the Executive Officer of Priority Schools for the Nashville public school system, operated by Metro Nashville. After McGruder investigated allegations of racial discrimination at a Nashville middle school, Metro Nashville fired her in January 2016. In 2017, McGruder sued Metro Nashville, alleging that her termination constituted illegal retaliation in violation of Title VII."

"Meanwhile, on June 28, 2018, after filing the instant Title VII suit, McGruder filed for Chapter 7 bankruptcy in Atlanta, Georgia, her residence at the time. McGruder did not disclose in her bankruptcy filing that she had a pending cause of action against a third party that could result in money damages. The potential proceeds of McGruder's Title VII claim were therefore not counted as part of her bankruptcy estate. McGruder claims that she made her bankruptcy counsel aware of her Title VII suit and that counsel never informed her that she should disclose the suit to the bankruptcy court. The bankruptcy judge discharged all of McGruder's debts, which amounted to over $100,000."

"In December 2021, McGruder's retaliation claim proceeded to trial in the U.S. District Court for the Middle District of Tennessee. A jury found in her favor and awarded her $260,000 in compensatory damages and $0 in back pay. In post-trial motions, McGruder moved to amend the judgment to award her back pay, due to the jury's failure to award any back pay despite her successful retaliation claim, and requested payment of attorneys' fees. The district court granted the motion for attorneys' fees, set aside the $0 award for back pay, and ordered a new trial on back pay. McGruder also requested reinstatement to her Metro Nashville job, which the district court ordered as an equitable remedy. Metro Nashville timely appealed the district court's order awarding McGruder reinstatement, and moved to stay the order pending appeal."

"Shortly after filing its notice of appeal of the reinstatement order, Metro Nashville discovered that McGruder had failed to disclose the existence of her Title VII claim to the bankruptcy court. In a motion to revise the district court's previous orders granting relief to McGruder, Metro Nashville urged the district court to invoke the doctrine of judicial estoppel to dismiss McGruder's case with prejudice. It argued that McGruder's omission amounted to a manifest injustice against the bankruptcy proceedings as well as an abuse of the judicial process. In response, McGruder argued that her mistake was inadvertent and that the district court 'should not enforce this equitable doctrine to allow Metro to escape all . . . accountability.' R. 128, Page ID #2530. After Metro Nashville filed its motion to dismiss, McGruder also informed the bankruptcy estate of her claim against Metro Nashville. McGruder averred that she has requested that the bankruptcy proceedings be reopened and that the trustee appear in the present action 'even if it costs her all or a substantial portion of the remaining available monetary remedy.' *Id.* at Page ID #2545."

"The district court concluded that it could not exercise jurisdiction over Metro Nashville's judicial estoppel claim, given that Metro Nashville's earlier notice of appeal had divested the court of jurisdiction over the case. Finding that Metro Nashville's judicial estoppel claim raised a serious legal

question, the district court granted Metro Nashville's motion to stay the reinstatement order pending appeal."

"This Court 'must satisfy itself that appellate jurisdiction exists to hear the appeal.' *United States v. Michigan*, 134 F.3d 745, 748 (6th Cir. 1998) (per curiam). First, we consider McGruder's argument that we lack jurisdiction to review the judicial estoppel claim because Metro Nashville did not include the claim in its notice of appeal. A notice of appeal must 'designate the judgment—or the appealable order—from which the appeal is taken.' Fed. R. App. P. 3(c)(1)(B). '[A] court of appeals has jurisdiction only over the areas of a judgment specified in the notice of appeal as being appealed.' *JGR, Inc. v. Thomasville Furniture Indus., Inc.*, 550 F.3d 529, 532 (6th Cir. 2008). The purpose of this jurisdictional requirement is 'to ensure that the [notice of appeal] provides sufficient notice to other parties and the courts' of what will be raised on appeal. *Smith v. Barry*, 502 U.S. 244, 248 (1992)."

"McGruder is correct that the notice of appeal does not encompass any arguments Metro Nashville made in the district court about judicial estoppel. In fact, the notice of appeal could not do so as Metro Nashville filed its motion to dismiss on judicial estoppel grounds *after* it filed its notice of appeal. However, despite its omission from the notice of appeal, we find for two reasons that this Court has jurisdiction to consider Metro Nashville's judicial estoppel argument—though, as discussed below, not in its entirety. First, the general concern regarding notice to appellees is not applicable in this case, where Metro Nashville raised its judicial estoppel claim in the district court, and McGruder responded to that motion. Therefore, McGruder had clear notice of Metro Nashville's judicial estoppel claim, and was aware that this claim could arise on appeal as well."

"Second, this Court can consider a judicial estoppel claim *sua sponte*." …

"Although neither party raises the issue, we must also consider whether we can exercise jurisdiction over Metro Nashville's judicial estoppel arguments as they relate to non-final orders from the district court. This Court, with limited exceptions, has jurisdiction only over appeals of final orders. 28 U.S.C. § 1291. Metro Nashville's appeal of the reinstatement order falls within one of the few exceptions to this rule. 28 U.S.C. § 1292(a)(1) (recognizing appellate jurisdiction over interlocutory orders granting injunctive relief). But that is the only issue over which we have jurisdiction in this appeal. The other claims that Metro Nashville urges this Court to judicially estop—including the jury award for monetary damages, the imminent back pay trial, and the district court's order awarding attorneys' fees—are not final, appealable orders before this Court. Metro Nashville appears to have implicitly conceded as much below, acknowledging in its motion to dismiss McGruder's claims that 'no final order has been entered in this case.' R. 126, Page ID #2516. Nor do the other claims, unlike the reinstatement order, fall within a statutory exception to the final order doctrine. Under these circumstances, we lack jurisdiction to apply judicial estoppel against claims not properly before us."

"In so holding, we acknowledge the bounds of our jurisdiction. Accepting Metro Nashville's arguments—indeed, even considering them—would require this Court to assert jurisdiction over non-final orders, something we are statutorily prohibited from doing with few exceptions, none applicable to anything other than the reinstatement order in this case. 28 U.S.C. § 1291. And this Court's *sua sponte* authority to consider judicial estoppel does not and cannot change the statutory mandate of our jurisdiction. Instead, parties must await a final, appealable order from the district court before they can assert judicial estoppel before us. Because the only appealable order before us in this case is the district court's reinstatement order, we consider only Metro Nashville's argument that this order should be judicially estopped, and reserve for a later day the question of the applicability of judicial estoppel to McGruder's other claims, should the parties choose to pursue such arguments."

"Though we leave the decision of whether to apply judicial estoppel to McGruder's jury award and imminent backpay trial to the district court to consider in the first instance, we take heed of McGruder's arguments that judicially estopping her claims at this juncture potentially risks awarding Metro Nashville—which a jury has found to have violated federal law—an unearned windfall. *See* Wright

& Miller, 18B Fed. Prac. & Proc. Juris. § 4477.9 (3d ed.) ('Allowing this windfall undermines enforcement of the substantive law."

"Having satisfied ourselves that we have jurisdiction over Metro Nashville's judicial estoppel arguments only as applied to the reinstatement order, we now turn to the propriety of that order and whether it should be judicially estopped. Metro Nashville challenges the district court's order reinstating McGruder to her former post at Metro Nashville, arguing that (1) judicial estoppel should bar the reinstatement order, and (2) the reinstatement order was improper as a matter of law. However, we hold that judicial estoppel need not be applied to claims of equitable relief not disclosed in prior bankruptcy proceedings. Additionally, we find that, on the merits, the district court did not abuse its discretion in granting McGruder's reinstatement."

"…Judicially estopping McGruder's reinstatement would not serve the goals of the doctrine. … Courts have generally applied judicial estoppel against claims that debtors fail to disclose in their bankruptcy filings to prevent debtors from disclaiming causes of action in order to minimize their assets in bankruptcy proceedings. *See Lewis v. Weyerhaeuser Co.*, 141 F. App'x 420, 428 (6th Cir. 2005); *Davis v. Dist. of Columbia*, 925 F.3d 1240, 1255–56 (D.C. Cir. 2019). But this justification extends only to disclosures that might materially alter the bankruptcy proceedings, and therefore does not apply to claims for injunctive relief. *See* Wright & Miller, 18B Fed. Prac. & Proc. Juris. § 4477.9 (3d ed.) ('The theory is that an injunction does not generate funds that can be distributed to creditors.'); *see also Barger v. City of Cartersville*, 348 F.3d 1289, 1297 (11th Cir. 2003) ('[The plaintiff's] claim for injunctive relief (*i.e.* her request for reinstatement) would have added nothing of value to the bankruptcy estate even if she properly disclosed it.'), *overruled on other grounds by Slater v. United States Steel Corp.*, 871 F.3d 1174 (11th Cir. 2017)."

"Against this backdrop, the reinstatement order is not barred by judicial estoppel. As opposed to McGruder's claims for money damages, a claim for reinstatement likely would not have been relevant to the bankruptcy court's determination of the proper disposition of McGruder's debts. The omission of the reinstatement claim did not erroneously minimize McGruder's assets, given that Chapter 7 creditors are paid with pre-petition assets, making McGruder's future earnings not pertinent to the proceedings. Barring the reinstatement order would therefore not serve the purpose of judicial estoppel. This is true despite Metro Nashville's claim that reinstatement requires it to pay McGruder future wages, rendering the reinstatement a form of monetary relief. However, by that standard, judicial estoppel could bar any injunctive relief that happens to entail some financial benefit to the claimant—which includes most injunctive relief. We do not see the need to extend judicial estoppel so far past its stated goals. Therefore, we conclude that judicial estoppel does not bar McGruder's reinstatement."

"Metro Nashville argues that the district court abused its discretion in awarding McGruder reinstatement in two ways: (1) the trial evidence and the district court's own statements foreclose reinstatement as a remedy and (2) reinstatement is improper where it would require displacing a third party who has since taken the job and where there is hostility between the parties. Both arguments are unavailing."

"Turning to Metro Nashville's first claim that the district court's reinstatement order contradicts the factual record established at trial, we find that the district court made no error. To be sure, the district court at trial expressed concern about the then-hypothetical reinstatement because someone else was performing McGruder's former role and because there may be hostility between the parties. However, the district court also noted that it would reserve ruling on the reinstatement issue until after the jury had returned its verdict. And none of the district court's statements at trial prevented it from later granting a motion for reinstatement. Metro Nashville's concern with the district court's trial statements does not overcome the presumption that victims of Title VII violations are entitled to reinstatement."

"Second, Metro Nashville argues that a district court abuses its discretion in ordering reinstatement where such reinstatement would entail displacement and where there is hostility between the parties. But Metro Nashville cites no case in which this Court has reversed a reinstatement order because those conditions were present. Instead, it cites two cases that are either silent on the issue or favor McGruder's position." …

"Contrary to Metro Nashville's arguments, this Court has not established the categorical rule imagined by Metro Nashville that those conditions automatically preclude reinstatement, and with good reason. Such a rule could encourage employers who are accused of Title VII violations to replace employees whom they may have unlawfully fired and to litigate in a hostile manner to prevent a potential reinstatement order. And so strictly limiting reinstatement would effectively foreclose it as a remedy for Title VII plaintiffs. *Cf. Reeves v. Claiborne Cnty. Bd. of Educ.*, 828 F.2d 1096, 1102 (5th Cir. 1987) ('If the existence of a replacement constituted a complete defense against reinstatement, then reinstatement could be effectively blocked in every case merely by hiring an innocent third party after the retaliatory purpose was achieved. Thus, the deterrent effect of the remedy of reinstatement would be rendered a nullity.'); *Taylor v. Teletype Corp.*, 648 F.2d 1129, 1138–39 (8th Cir. 1981) ('To deny reinstatement to a victim of discrimination merely because of the hostility engendered by the prosecution of a discrimination suit would frustrate the make-whole purpose of Title VII.'). This Court's precedent favors reinstatement in cases such as this one. Therefore, the district court did not abuse its discretion in ordering McGruder's reinstatement."

4. Law of the case doctrine – An appellate court's final decision in a case establishes the law of the case when a case is remanded for further proceedings - This law of the case is binding on the trial court during the remanded proceedings and is also binding on the appellate courts should a second appeal be taken after the trial court enters a judgment in response to the remand order - While the doctrine applies only to issues that were actually decided by the court, explicitly or implicitly, it does not apply to dicta -. The law of the case doctrine is neither a constitutional mandate nor an inflexible limit on the adjudicatory power of the courts - Instead, it is a longstanding discretionary rule of judicial practice

See also GTLA - On remand the trial court heard the testimony of expert witnesses – The law of the case was that the city did not have constructive notice of the defect in the sidewalk - The doctrine does not necessarily apply: (1) when the evidence offered at a trial or hearing following the remand is substantially different from the evidence in the earlier proceeding; (2) when the prior decision was clearly erroneous and would result in manifest injustice if allowed to stand; or (3) when the prior decision is contrary to a change in the controlling law which has occurred between the first and second appeal - To determine the applicability of the law of the case doctrine here, we must examine what was decided by the court in *Mitchell I*. After an extended discussion of the evidence regarding constructive notice, this Court stated: We conclude here that the evidence before this Court preponderates in favor of the trial court's finding that the City had no constructive notice of the unsafe condition of the sidewalk - page 152.

RUTH MITCHELL v. CITY OF FRANKLIN, TENNESSEE
COURT OF APPEALS No. M2023-00736-COA-R3-CV Filed May 2, 2024

"This is the second appeal in this personal injury matter involving the plaintiff's injury from an uneven sidewalk owned by the defendant city. In the first appeal, this Court remanded for the trial court to consider expert testimony that had been erroneously excluded by the trial court. On remand, the trial court heard expert testimony on the issue of the city's maintenance and inspection of its sidewalks. Because the evidence on remand did not include any new evidence regarding the length of time that the sidewalk defect had existed, we have concluded that the issues raised by the plaintiff in this appeal are pretermitted by the law of the case doctrine."

"This is a personal injury suit filed by Ruth Mitchell against the City of Franklin in March 2019 for injuries sustained when, on June 3, 2018, she tripped and fell on an uneven sidewalk owned and

controlled by the City. The complaint alleged that her fall was the result of 'an abrupt change in elevation caused by a raised portion of the sidewalk.' Ms. Mitchell asserted that the City breached the following duties owed to her: 'a duty to maintain its property in a safe condition; to inspect its property to discover unsafe conditions; to take corrective measures to remove or repair unsafe conditions which could be remedied; and to warn of conditions which could not, as a practical matter, be removed or repaired.' The City denied fault and raised the defense of comparative fault as well as defenses under the Governmental Tort Liability Act."

"After the parties completed discovery, in November 2020, the City filed a motion for summary judgment, and Ms. Mitchell filed a motion for partial summary judgment. In a memorandum and order entered on February 3, 2021, the trial court ruled on both motions. On the City's motion, the court ruled that the City was entitled to summary judgment only as to the applicability of the exceptions to the removal of the City's immunity at Tenn. Code Ann. § 29-20-205(1) (regarding the exercise of a discretionary function) and § 29-20-205(4) (regarding failure to inspect or negligent inspection). Thus, Ms. Mitchell could not proceed on a theory of removal of immunity under those provisions. The trial court denied the City's motion for summary judgment with respect the removal of the City's immunity under Tenn. Code Ann. § 29-20-203 (regarding negligence based on a defective, unsafe, or dangerous condition of which the City had actual or constructive notice). The court denied Ms. Mitchell's motion for partial summary judgment on the issue of liability."

"Prior to trial, the City filed a motion in limine to exclude the testimony of David Johnson, Ms. Mitchell's proposed expert witness. In ruling on the motion, the trial court found that Mr. Johnson was qualified to offer expert testimony on sidewalk safety. The court went on, however, to grant the City's motion to exclude certain portions of Mr. Johnson's testimony: (1) testimony in reliance upon a certain photograph 'depicting an allegedly similar elevated sidewalk' and (2) testimony 'regarding the City's sidewalk maintenance standards.'"

"The case was heard in a bench trial over two days in June 2021. Ms. Mitchell presented testimony from a number of witnesses: Barry Johnson, facility manager for the church adjoining the sidewalk where Ms. Mitchell fell; a church member who assisted Ms. Mitchell after the fall; two of Ms. Mitchell's friends; Ms. Mitchell's daughter; Ms. Mitchell; Margaret Martin, a city alderman and church member; David Johnson, an expert witness; Doug Pratt, a City road inspector; Steve Grubb, director of the City's street department; and Tim Napier, a risk management specialist for the City. For purposes of this appeal, we will examine the testimony of Barry Johnson, the church's facility manager, and of the plaintiff's expert, David Johnson."

"Barry Johnson, the plaintiff's first witness, began working at the church in 2012. He testified that, in late 2012, he 'noticed that the sidewalks around were in pretty bad shape.' In particular, he observed that there were cracked and uneven places in the sidewalks around the church and was concerned about the possibility of someone falling and injuring themselves. Mr. Johnson testified that he initially spoke with Jim Maxwell, a church member who worked for the City, and Mr. Maxwell referred him to Brad Wilson, a church member and City employee. According to Mr. Johnson, Mr. Wilson advised him to 'go to the permit office and tell the lady that was there, and she will make a note of it and let somebody know.' A few days later, Mr. Johnson testified, he went to the permit office and spoke to a woman who appeared to be in charge. Mr. Johnson further testified: 'I just explained to her who I was, what I did, and what we thought could be a problem. And she said she would let somebody know.' In particular, he notified the City employee that 'the sidewalks were messed up from Church Street down to Cummins.'"

"Mr. Johnson also testified that the tree near the scene of Ms. Mitchell's fall had been removed in 'probably 2015, 2016.' He stated that, after the removal of the tree, he could not tell by looking that the condition of the sidewalk changed. Mr. Johnson estimated that the sidewalk elevation at the accident site after the removal of the tree was 'an inch or two,' but he 'never did actually measure it.'"

"Ms. Mitchell submitted David Johnson as a safety expert, and the court found him qualified as an expert in the field of human factors engineering. Mr. Johnson testified that, under the applicable standards for safe walking surfaces, '[y]ou can have a vertical change in elevation up to a quarter of an inch that can be untreated.' A change in elevation exceeding a quarter of an inch and less than an inch must be ground down or beveled to a more gradual slope. If the change is greater than one inch, the sidewalk slab must be replaced. Mr. Johnson had gone to the site of Ms. Mitchell's fall and taken measurements. Mr. Johnson estimated the change in elevation prior to the fall to have been slightly over an inch."

"When plaintiff's counsel began asking Mr. Johnson whether the City's sidewalk inspection practices6 were consistent with federal standards, defense counsel objected and the trial court sustained the objection. The court stated that plaintiff's counsel could make an offer of proof outside the presence of the court."

"According to Mr. Johnson, the degree of vertical elevation of the portion of the sidewalk at issue presented a trip hazard. There followed a colloquy between the court and Mr. Johnson as to how long the sidewalk had been in that condition (with a height differential between a quarter of an inch and an inch). Mr. Johnson was not able to give an exact point when the hazard began. Looking at Google Street View images from 2010 to 2018, the expert opined that the expansion joint (where the elevation was greatest) looked the same as when Ms. Mitchell fell. Mr. Johnson stated that he could look at the photographs and see that the elevation was more than a quarter of an inch because, otherwise, the hazard probably would not be visible on the photos. He noted that, in the photographs, there was 'significantly more shadowing effect [at the accident site as compared to the other pictured expansion joints] due to the vertical change in elevation between the two concrete slabs.' Mr. Johnson also cited the testimony of Barry Johnson, whose observations began in 2012."

"the trial court questioned Mr. Johnson about the probable cause of the sidewalk elevation. The court asked Mr. Johnson whether a storm water drain shown in the photographs could have contributed to the width of the expansion joint at the accident site, and Mr. Johnson stated, 'I wouldn't think so.' In addition, the court pointed to 'a place where some concrete has been dislodged from some sort of impact.' Mr. Johnson testified that tree roots underneath the sidewalk had probably pushed the sidewalk up at the accident site."

"Plaintiff's counsel asked Mr. Johnson whether the City would have known about the trip hazard created by the sidewalk elevation if the City performed periodic inspections."

"After defense counsel objected7 in light of the court's ruling on the motion in limine, plaintiff's counsel reworded the question to be 'whether or not the change in elevation was known to be unsafe by the City of Franklin, not whether they knew of this condition.' Mr. Johnson responded that it was the City's practice to grind down elevations exceeding a quarter of an inch. Plaintiff's counsel then pursued a different line of questioning."

"The only defense witness in this case was John (Brad) Wilson, the City's facilities manager. Mr. Wilson denied speaking with Mr. Johnson regarding the condition of the sidewalks until after Ms. Mitchell's fall."

"In a memorandum and order entered on July 13, 2021, the trial court considered the testimony of Barry Johnson that he had reported the poor condition of the sidewalks on both sides of the church to the City in 2012. The trial court found Mr. Wilson more credible than Mr. Johnson and concluded that Mr. Johnson did not report the sidewalk conditions to the City in 2012. The court further relied upon the absence of any City record of a complaint concerning the sidewalks around the church until Ms. Mitchell's fall. Even if Mr. Johnson did advise the City that the sidewalks around the church were 'in pretty bad shape,' the court found such information 'insufficient to put the City on actual notice of an elevation distance of between ¼ inch and one inch at the expansion joint' at the specific spot where Ms. Mitchell fell."

"On the issue of constructive notice, the trial court found that 'the record does not support a finding by a preponderance of the evidence that the vertical offset has existed for such a length of time that constructive notice should be presumed.' As to the Google photos entered into evidence, the court concluded: 'While the expansion joint between the two slabs is clearly visible in the photographs it is impossible to tell from the photographs whether one of the slabs is higher than the other, and if so, by how much.' The court found Mr. Johnson's measurement of the vertical displacement of the sidewalk to be unreliable and therefore rejected 'his opinions based on that measurement' as unreliable and not of substantial assistance to the court in determining the facts."

"The trial court also rejected Ms. Mitchell's argument that, 'because the two sidewalk slabs were displaced by the growth of a root from a tree planted by the City, the City created or caused the dangerous condition and should be deemed to have constructive knowledge of the resulting gap.' The court dismissed the Google Street View photograph showing a tree growing a few feet from the expansion joint because '[n]o witness was able to authenticate the reliability of the date on the photograph' and because the tree was removed before Ms. Mitchell's injury. The trial court found that 'there is no evidence in this record confirming that the vertical displacement of the slab in question was caused by a tree root.' The court noted that there was also evidence of a storm water drain under the expansion joint at issue and that part of the sidewalk 'was chipped away as a result of some sort of impact.'"

"The court ruled that Ms. Mitchell had failed to prove that the City had actual or constructive notice of the defect in the sidewalk and that, therefore, the City's immunity was not removed. Thus, the court entered judgment in favor of the City. Ms. Mitchell appealed."

"Three days after filing her notice of appeal, Ms. Mitchell submitted to the trial court an offer of proof, which consisted of an affidavit of the expert witness, David Johnson. In his affidavit, Mr. Johnson reiterated his opinion that the sidewalk where Ms. Mitchell fell 'was in an unsafe and unreasonably dangerous condition at the time of her fall.' He further testified, in pertinent part, as follows:

> … 33. The condition which resulted in Ms. Mitchell's fall and injury existed in a dangerous condition for at least five to six years prior to this incident. Had the City of Franklin performed any periodic inspection of the sidewalk during that time, it would have discovered the condition and been able to repair it prior to Ms. Mitchell being injured.

The City filed a motion to quash the offer of proof, and the trial court denied the motion."

"In *Mitchell v. City of Franklin*, No. M2021-00877-COA-R3-CV, 2022 WL 4841912 (Tenn. Ct. App. Oct. 4, 2022) ('*Mitchell I*'), this Court affirmed in part and vacated in part the trial court's decision.9 Ms. Mitchell did not challenge the trial court's ruling on the issue of actual notice, so the appeal concerned only the question of constructive notice. *Mitchell I*, 2022 WL 4841912, at *5. This Court identified three ways or theories to establish constructive notice and determined that two were potentially applicable in the present case: the passage of time theory and the common occurrence theory. *Id.* at *6-7. Under the passage of time theory, the question was whether the trial court erred in 'concluding that there was no support in the record for a finding that the vertical offset of the sidewalk had existed for such a sufficient length of time that constructive notice should be presumed.' *Id.* at *7. This Court disagreed with the trial court's conclusion that that it was 'impossible' to tell from the Google photographs whether one of the sidewalk slabs was higher than the other but concluded that 'it is still difficult to determine how much of a change in elevation was present at that point in time [when the photographs were taken] or if that change in elevation even exceeded a quarter-inch.' *Id.* at *8."

"In *Mitchell I*, this Court also analyzed the evidence applicable to a separate argument under the passage of time theory: that the condition of the sidewalk was caused by tree roots, that the condition became static when the tree was removed (prior to the fall), and that 'therefore the condition was

present for a period of time without being inspected or repaired by the City.' *Id.* at *10. The appellate court concluded that, '[d]espite the testimony regarding the tree and its removal, it was still unclear at what point in time the change in elevation became unsafe.' *Id.* at *11. Furthermore, the court noted, there was also 'evidence in the record that the condition of the sidewalk might not have been caused by the adjacent tree's roots.' *Id.* This Court, therefore, concluded that Ms. Mitchell's argument under the passage of time theory was not supported by the evidence. *Id.*"

"This Court also concluded that Ms. Mitchell failed to prove constructive notice under the common occurrence theory. *Id.* at *12. We find it unnecessary to summarize this portion of *Mitchell I* because the common occurrence theory10 is not argued in the present appeal. In sum, the trial court determined that 'the evidence before this Court preponderates in favor of the trial court's finding that the City had no constructive notice of the unsafe condition of the sidewalk.' *Id.* at *13."

"After agreeing with the trial court's ultimate decision, this Court went on the decide the evidentiary issues on appeal: whether the trial court erred in excluding (1) the testimony of the expert, David Johnson, with respect to the City's maintenance and inspection of its sidewalks, and (2) an exemplar photograph depicting the condition of another section of the sidewalk near the church for the purpose of demonstrating the condition of the section where Ms. Mitchell fell before it was remediated by the City. *Id.* at *4. With respect to the exemplar photograph, the court found no abuse of discretion. With respect to the other evidentiary issue, the Court found that, under *Hawks v. City of Westmoreland*, 960 S.W.2d 10, 16 (Tenn. 1997), the trial court misapplied the law and, therefore, abused its discretion in excluding Mr. Johnson's testimony on maintenance and inspection."

"Because of this evidentiary error, this Court vacated and remanded for the trial court to consider the testimony of Mr. Johnson 'concerning the maintenance and inspection of the City's sidewalks.' *Id.* at *18. This Court instructed the trial court as follows:

> Given that we have already concluded that Ms. Mitchell failed to prove constructive notice with the evidence before us, we remand with the limited instruction to consider the testimony of the human factors engineer as it pertains to the City's maintenance and inspection of the sidewalks.

Id.

"On remand, the trial court heard further testimony from Mr. Johnson. Mr. Johnson testified that, to ensure the safety of its sidewalks, a city had to 'inspect and maintain those sidewalks.' He was then asked to describe and explain 'what a sidewalk inspection program would look like starting with the sidewalk inventory and going through the actual periodic inspections.' Mr. Johnson agreed that a city's inspection program should include records on the sidewalks' construction and their maintenance and inspection history. He then went on to describe the City's actual sidewalk inspections. Mr. Johnson testified that he had reviewed the City's sidewalk and maintenance inspection program, which he described as a 'complaint-based program,' meaning that the City relied on the public to make a complaint before the City would inspect or repair a defect. Further, according to Mr. Johnson, the City did not have an inventory of its sidewalks or any records of maintenance or inspections. In Mr. Johnson's opinion, in order to be safe and efficacious, 'the program would need to be proactive, meaning that you identify and make repairs before someone gets hurt.' Further, Mr. Johnson testified, such a proactive program would require regular periodic inspections."

"Mr. Johnson opined that '[m]ost municipalities the size of Franklin would do an annual inspection' and that, with approximately 300 miles of sidewalk, the City could feasibly perform annual inspections. Plaintiff's counsel then asked Mr. Johnson whether, if the City had an inspection program in place, the City would have found the sidewalk defect that caused Ms. Mitchell's fall. Mr. Johnson opined:

> Yes. So the condition existed for at least six or seven years, according to testimony from Mr. Johnson, according to Google street views, which shows the – appears the

> same condition beginning from October 2011, same condition is also present just prior to Ms. Mitchell's fall in June of 2018. You can look at the street views each year all the way up until Ms. Mitchell's fall, and that condition appears to be the same.

"Mr. Johnson testified that the Google Street View photographs were the types of documents a safety engineer would rely upon in determining how long a condition had been present. He stated that the Google photographs were consistent with known events, including the cutting down of the tree in 2016." …

"On cross-examination, defense counsel emphasized the trial court's previous rulings regarding the reliability of the photographs and witness testimony in determining how long the sidewalk defect had existed. Mr. Johnson admitted that, if the length of time that the condition had existed was not established, one could not know whether an inspection program would have remedied the condition."

"In an order entered on April 20, 2023, the trial court found that Mr. Johnson's 'opinions were not based upon reliable evidence' and that he 'failed to establish that the City's inspection program placed the City on constructive notice of the defect on the sidewalk where Ms. Mitchell fell.' The trial court determined that, as to the only issue remaining to be determined on remand, Ms. Mitchell failed 'to carry her burden of proof with respect to the 'failure to inspect' theory of constructive notice.' The court, therefore, entered judgment in favor of the City. Ms. Mitchell appeals from the trial court's final order."

"Ms. Mitchell frames the overall issue on appeal to be whether the evidence preponderates against the trial court's finding that the City of Franklin had no constructive notice of the unsafe condition of the sidewalk. She further identifies sub-issues, which we restate as follows: (1) whether the trial court erred in finding that Ms. Mitchell failed to prove that the vertical offset of the sidewalk had existed for a sufficient length of time that constructive notice should be presumed; (2) whether the trial court erred in finding that Ms. Mitchell failed to prove that an adjacent tree's roots caused the uplifting of the sidewalk; and (3) whether the trial court erred in failing to find that the City of Franklin's failure to inspect the sidewalk placed the City on constructive notice of the defect in the sidewalk where Ms. Mitchell fell."

"The City's first issue is whether the arguments made by Ms. Mitchell are pretermitted by the law of the case doctrine. If we find that Ms. Mitchell's arguments are not pretermitted, the City asserts (1) that the evidence confirms the trial court's conclusion that the City did not have constructive notice of the condition of the sidewalk in question and (2) that, on limited remand, the trial court correctly determined that immunity for the City was not removed."

"We must first address the City's position that Ms. Mitchell's arguments on appeal are pretermitted by the law of the case doctrine. Ms. Mitchell did not address this issue in her original brief or file a reply brief; thus, we do not have the benefit of her arguments on the issue."

"Our Supreme Court has described the doctrine of the law of the case as follows:

> An appellate court's final decision in a case establishes the 'law of the case' when a case is remanded for further proceedings. This 'law of the case' is binding on the trial court during the remanded proceedings and is also binding on the appellate courts should a second appeal be taken after the trial court enters a judgment in response to the remand order. *Memphis Publ'g Co. v. Tenn. Petroleum Underground Storage Tank Bd.*, 975 S.W.2d 303, 306 (Tenn. 1998). While the doctrine applies only to issues that were actually decided by the court, explicitly or implicitly, it does not apply to dicta. *Memphis Publ'g Co. v. Tenn. Petroleum Underground Storage Tank Bd.*, 975 S.W.2d at 306; *Ladd ex rel. Ladd v. Honda Motor Co.*, 939 S.W.2d 83, 90 (Tenn. Ct. App. 1996).

> The 'law of the case' doctrine is neither a constitutional mandate nor an inflexible limit on the adjudicatory power of the courts. Instead, it is 'a longstanding discretionary rule of judicial practice,' *Memphis Publ'g Co. v. Tenn. Petroleum Underground Storage Tank Bd.*, 975 S.W.2d at 306; *Orlando Residence, Ltd. v. Nashville Lodging Co.*, 213 S.W.3d 855, 861 (Tenn. Ct. App. 2006), reflecting the commonsense recognition that issues previously litigated and decided by a court of competent jurisdiction need not be revisited. *In re Estate of Boote*, 265 S.W.3d 402, 413 (Tenn. Ct. App. 2007); *Ladd ex rel. Ladd v. Honda Motor Co.*, 939 S.W.2d at 90. Adhering to the 'law of the case' doctrine promotes finality and efficiency in litigation, ensures consistent results in the same proceeding, and assures that lower courts follow the decision of higher courts. *State v. Jefferson*, 31 S.W.3d 558,
>
> 561 (Tenn. 2000); *Harrison v. Laursen*, 128 S.W.3d 204, 208 (Tenn. Ct. App. 2003).
>
> As salutary as the 'law of the case' doctrine may be, it does not erect an absolute bar to the renewed consideration of earlier-decided issues. The doctrine does not necessarily apply: (1) when the evidence offered at a trial or hearing following the remand is substantially different from the evidence in the earlier proceeding; (2) when the prior decision was clearly erroneous and would result in manifest injustice if allowed to stand; or (3) when the prior decision is contrary to a change in the controlling law which has occurred between the first and second appeal. *Memphis Publ'g Co. v. Tenn. Petroleum Underground Storage Tank Bd.*, 975 S.W.2d at 306; *In re Estate of Boote*, 265 S.W.3d at 413.

Gray's Disposal Co., Inc. v. Metro. Govt. of Nashville, 318 S.W.3d 342, 348 (Tenn. 2010)."

To determine the applicability of the law of the case doctrine here, we must examine what was decided by the court in *Mitchell I*. After an extended discussion of the evidence regarding constructive notice, this Court stated: 'We conclude here that the evidence before this Court preponderates in favor of the trial court's finding that the City had no constructive notice of the unsafe condition of the sidewalk.' *Mitchell I*, 2022 WL 4841912, at *13. The court then ruled on the evidentiary issues on appeal and concluded that the trial court had erred in excluding the testimony of the expert witness, Mr. Johnson, regarding 'the maintenance and inspection of the City's sidewalks.' *Id.* at *18. The court went on to explain:

> It is difficult to ascertain what the substance of the actual testimony would have been in this case. The record contains only an affidavit by the human factors engineer and no proffered cross-examination. As such, we cannot discern whether the excluded testimony of the human factors engineer would have provided proof of constructive notice.
>
> Therefore, we vacate and remand for the trial court to consider the testimony of the human factors engineer concerning the maintenance and inspection of the City's sidewalks. Given that we have already concluded that Ms. Mitchell failed to prove constructive notice with the evidence before us, we remand with the limited instruction to consider the testimony of the human factors engineer as it pertains to the City's maintenance and inspection of its sidewalks.

Id."

"We must conclude that Ms. Mitchell's arguments on appeal regarding constructive notice are pretermitted by the law of the case from *Mitchell I*. Only one of the three exceptions to the doctrine arguably applies here: 'when the evidence offered at a trial or hearing following the remand is substantially different from the evidence in the earlier proceeding.' *Gray's Disposal*, 318 S.W.3d at 348. On remand in this case, all of the evidence relied upon by the expert witness to support his

conclusion regarding the length of time the defect had existed was before the trial court at the original hearing and rejected by the trial court as unreliable or insufficient. The evidence offered on remand regarding the length of time the sidewalk defect had existed was not 'substantially different' from in the first proceeding. As Mr. Johnson acknowledged on cross-examination, a reasonable inspection policy has no effect without proof of the length of time the defect existed. In *Mitchell I*, this Court affirmed the trial court's decision on constructive notice based upon the evidence before it, and that decision pretermits the issues presented by Ms. Mitchell in this second appeal."

5. **Trial court granted a motion to rescind a tax sale with respect to a particular parcel Case remanded to trial court to enter an order containing sufficient findings of fact and conclusions of law reflecting the basis for its decision - To the extent that a constitutional challenge is raised, the trial court should also determine on remand whether notice must be provided to the Tennessee Attorney General pursuant to Tennessee Rule of Civil Procedure 24.04**

SHELBY COUNTY v. DELINQUENT TAXPAYERS 2018 (BLIGHT AUTHORITY OF MEMPHIS)
COURT OF APPEALS No. W2023-00446-COA-R3-CV Filed May 3, 2024

MEMORANDUM OPINION

Please note this is a Memorandum Opinion. Pursuant to Rule 10 of the Rules of the Court of Appeals of Tennessee, "When a case is decided by memorandum opinion it shall be designated 'MEMORANDUM OPINION', shall not be published, and shall not be cited or relied on for any reason in any unrelated case."

"In this appeal, the trial court granted a motion to rescind a tax sale with respect to a particular parcel. We vacate the trial court's order and remand for the trial court to enter an order containing sufficient findings of fact and conclusions of law reflecting the basis for its decision. To the extent that a constitutional challenge is raised, the trial court should also determine on remand whether notice must be provided to the Tennessee Attorney General pursuant to Tennessee Rule of Civil Procedure 24.04."

"This appeal arises from a delinquent tax sale. The original complaint for collection of delinquent taxes was filed by Shelby County in March 2020.2 On June 29, 2022, the chancery court entered a decree confirming the sale of a parcel at 1059 North Dunlap. On September 7, 2022, the Shelby County Delinquent Tax Attorney filed a motion to rescind the tax sale of this parcel. The motion simply stated that 'since the sale of this parcel, attorney for the Plaintiffs/Movants [Shelby County] has determined that a error occurred and that this parcel should not have been sold.' Thus, Shelby County asked the court to rescind the sale, divest title out of the buyer, Steve Lockwood, and vest title back in the name of the original owner."

"On February 23, 2023, the chancery court entered an order rescinding the tax sale of the subject parcel." …

"The chancery court's order found that 'as a result of the preemptive bid that the owner(s) of this parcel were deprived of the fair market value of the parcel.' It also noted Shelby County's *argument* that the preemptive bid process was 'unlawful and unconstitutional,' citing a recent case from the Sixth Circuit. Beyond that, however, the chancery court gave no explanation for its decision to rescind the tax sale. As it is, we are left to wonder about the basis for the chancery court's decision."

"Tennessee Rule of Civil Procedure 52.01 provides that '[i]n all actions tried upon the facts without a jury, the court shall find the facts specially and shall state separately its conclusions of law and direct the entry of the appropriate judgment.' 'There is no brightline test by which to assess the sufficiency of factual findings, but the findings of fact must include as much of the subsidiary facts as is necessary to disclose to the reviewing court the steps by which the trial court reached its ultimate conclusion on each factual issue.' *Lovlace v. Copley*, 418 S.W.3d 1, 35 (Tenn. 2013) (quotation omitted). … 'Generally, the appropriate remedy when a trial court fails to make appropriate findings of fact and conclusions of law pursuant to Rule 52.01 is to 'vacate the trial court's judgment and remand the cause to the trial court for written findings of fact and conclusions of law.'' *Manning v. Manning*, 474 S.W.3d

252, 260 (Tenn. Ct. App. 2015) (quoting *Lake v. Haynes*, No. W2010-00294-COA-R3-CV, 2011 WL 2361563, at *1 (Tenn. Ct. App. June 9, 2011)).”

“We ‘remanded for entry of an order setting forth the appropriate legal standard and reasons in support of the trial court’s decision.’ *Id. See also Matter of Conservatorship of Tapp*,No. W2021-00718-COA-R3-CV, 2023 WL 1957540, at *5 n.2 (Tenn. Ct. App. Feb. 13, 2023) (quoting *Crenshaw v. Kado*, No. E2020-00282-COA-R3-CV, 2021 WL 2473820, at *6 (Tenn. Ct. App. June 17, 2021)) (‘[A] trial court’s failure to provide any legal basis for its dismissal o[n] a Rule 12.02 motion to dismiss can hamper this Court’s ability to review the dismissal on appeal.’); *Howard v. Howard*, No. E2022-01385-COA-R3-CV, 2023 WL 6465223, at *4 (Tenn. Ct. App. Oct. 4, 2023) (quoting *Parimore v. Parimore*, No. W2016-01188-COA-R3-CV, 2017 WL 657771, at *4 (Tenn. Ct. App. Feb. 17, 2017)) (‘We concede that the express language of Rule 60.02 places no affirmative duty on the trial court to make findings of fact or conclusions of law in disposing of a Rule 60.02 motion. However, this Court has previously indicated that, with respect to a Rule 60.02 motion, we are ‘unable to adequately review’ a trial court’s discretionary decision and provide the appropriate amount of deference to that decision when the trial court fails to make appropriate findings of fact and conclusions of law.’).”

We note that both parties on appeal interpret the trial court’s order as holding that the preemptive bid process utilized in this case pursuant to Tennessee Code Annotated section 13-30-110(f)(1) and (2) was unconstitutional. However, we must be ‘mindful of the well-settled principle not to decide constitutional challenges unless the resolution of that question ‘is absolutely necessary to determining the issues in the case and adjudicating the rights of the parties.’’ *Mansell v. Bridgestone Firestone N. Am. Tire, LLC*, No. M2010-02093-SC-R3-WC, 2011 WL 3758562, at *4 (Tenn. Aug. 25, 2011) (quoting *Waters v. Farr*, 291 S.W.3d 873, 882 (Tenn. 2009)).”

“During oral argument before this Court, members of the panel also questioned the attorneys regarding whether the Tennessee Attorney General received notice of any constitutional challenge in this case, and counsel confirmed the Attorney General did not. As a result, on remand, the trial court must also consider the applicability of Tennessee Rule of Civil Procedure 24.04. *See In re Adoption of E.N.R.*, 42 S.W.3d 26, 33 (Tenn. 2001) (explaining that where the Rule applies, ‘the *court* is required, pursuant to Tenn. R. Civ. P. 24.04, to ensure that notice of the constitutional challenge has been provided to the Office of the Attorney General,’ as ‘the trial court sits as gatekeeper to inquire whether notice has been provided to the Attorney General by the challenger and to suspend proceeding on the constitutional challenge until such notice has been provided and a response from the Attorney General received’). In addition, Blight Authority of Memphis may present any arguments pertaining to Tennessee Code Annotated section 20-18-101 on remand.”

CIVIL RIGHTS

1. Appeal – Qualified immunity denied - A district court’s denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable ‘final decision’ within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment - Nonetheless, because defendant’s appeal ultimately turns on questions of fact rather than an issue of law, we do not have jurisdiction to hear this appeal - A district court’s determination that there exists a triable issue of fact *cannot* be appealed on an interlocutory basis, even when that finding arises in the context of an assertion of qualified immunity – Defendant refused to accept plaintiff’s version of the facts on appeal - Where the defendant fails to truly concede the plaintiff’s facts as required by our case law, we cannot exercise jurisdiction over the qualified immunity interlocutory appeal

DESHAWN ANDERSON-SANTOS v. KENT COUNTY, MICHIGAN, DEREK LESHAN, in his individual and official capacity
SIXTH CIRCUIT COURT OF APPEALS No. 23-1259 Decided and Filed February 29, 2024

“Plaintiff DeShawn Anderson-Santos, a juvenile detainee at the Kent County Juvenile Detention Center, suffered a head injury after being pushed by Defendant Derek Leshan, a corrections officer. Anderson-

Santos subsequently brought claims under 42 U.S.C. § 1983, the Fourteenth Amendment, and the Eighth Amendment, against Defendant Leshan. The district court denied Leshan's summary judgment motion, finding that there was a genuine dispute of material fact as to whether Leshan engaged in excessive force in violation of the Eighth Amendment. Therefore, the district court held that Leshan was not entitled to qualified immunity at the summary judgment stage. This interlocutory appeal followed. For the reasons set forth below, we **DISMISS** this appeal for lack of jurisdiction."

"On January 14, 2020, DeShawn Anderson-Santos was detained at the Kent County Juvenile Detention Center following his guilty plea for a crime unrelated to the instant case. At around 2:30 p.m., the detention center was undergoing a shift change. Detainees are supposed to be in their rooms during shift changes. According to Anderson-Santos' deposition, he was in his room when corrections officer Derek Leshan opened his door and pushed Anderson-Santos 'hard,' causing him to fall. R. 62-4, Page ID #270. Anderson-Santos hit his head on the cement base of his bed, and his head bled from a laceration. He also experienced pain and dizziness immediately after hitting his head. He received medical treatment, and complains of migraines, vision problems, and other symptoms to this day."

"Leshan tells a different story. At first, Leshan told the treating nurse that Anderson-Santos stumbled and fell in his room of his own accord. But Leshan later testified that the contact arose when Leshan was attempting to get Anderson-Santos to go to his room. Leshan claimed that the environment 'was a very light mood, it was kind of joking.' R. 62-5, Page ID #291. According to him, the two were 'chest to chest,' with Leshan's hand on Anderson-Santos' shoulder. *Id.* Leshan stated that he was walking Anderson-Santos backwards when Leshan slipped on the 'very slick' floor. *Id.* Then, Anderson-Santos' head accidentally hit the corner of the brick that forms the bottom of the detainees' beds. Leshan testified that he had no reason to have used physical force against Anderson-Santos."

"Jeff Love, a supervisor at the detention center, testified in his deposition that '[Leshan] said that he pushed [Anderson-Santos] backwards and he slipped and fell.' R. 62-6, Page ID #310. And Holly Austin, who investigated the incident on behalf of the Michigan Division of Child Welfare Licensing, testified in her deposition that Anderson-Santos said Leshan 'was trying to play a joke on him by telling him that Mr. Anderson's sweater was ripped at the back of the shoulder and that when Mr. Anderson looked for the rip, Mr. Leshan pushed him on his chest with one hand.' R. 62-9, Page ID #354–55."

"The magistrate judge issued a Report and Recommendation ('R&R') which the district court later adopted in full. The R&R described the various contradictory versions of the ncident. The magistrate judge concluded that a video of the events leading up to the incident corroborated Anderson-Santos', but not Leshan's, earlier account of the fall during the investigation: 'Leshan asked Anderson about his sweater being ripped and pushed Anderson when he looked down, causing him to slip and fall backward.' R. 83, Page ID #866."

"In light of the disputed summary judgment facts, the magistrate judge recommended denying Defendants' summary judgment motion as it applied to Leshan, finding that a genuine dispute of material fact existed as to the level of force Leshan used when pushing Anderson as well as his state of mind while doing so. In particular, the magistrate judge concluded that 'a question of fact remains as to the amount of force that Leshan used. Defendants characterize the push as *de minimis*, while Anderson claims that he 'was pushed hard.'' *Id.* at Page ID #868 (quoting R. 62-4, Page ID #271). Further, the magistrate judge found that 'there is sufficient circumstantial evidence from which a jury could infer that the incident was not a joke.' *Id.* at Page ID #870. The magistrate judge noted that because of these disputes of material fact—which bore directly on the question of whether Anderson-Santos' constitutional rights were violated—Leshan was not entitled to qualified immunity."

"The district court then adopted the R&R in full, over Leshan's objections. Because Leshan had not persuasively challenged the magistrate judge's conclusions that there were genuine issues of material fact, and because the magistrate judge's recommendation of a denial of qualified immunity was based on those genuine factual disputes, the district court held that there was 'no error' in the R&R's qualified immunity determination. R. 87, Page ID #994. Leshan timely appealed."

"Our threshold—and, as it turns out, only—question is whether this case falls within our limited jurisdiction. Leshan asks us to review the district court's denial of his motion for summary judgment, which included his claim of qualified immunity. Typically, denials of summary judgment are not appealable to this Court on an interlocutory basis because they are not final orders over which we have jurisdiction. *See Harrison v. Ash*, 539 F.3d 510, 516 (6th Cir. 2008) (citing 28 U.S.C. § 1291). But the Supreme Court has recognized that 'a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment.' *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). Nonetheless, because Leshan's appeal ultimately turns on questions of fact rather than an issue of law, we do not have jurisdiction to hear this appeal."

A defendant seeking to invoke a qualified immunity defense 'may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial.' *Johnson v. Jones*, 515 U.S. 304, 319–20 (1995). In this case, the district court found there were genuine disputes of material fact regarding (1) whether Leshan used enough force to satisfy the objective prong of the excessive force inquiry, and (2) whether Leshan was 'joking' such that he did not meet the subjective prong of the excessive force inquiry. This disposition normally divests this Court of jurisdiction. *See Gregory v. City of Louisville*, 444 F.3d 725, 742 (6th Cir. 2006) ('[A] district court's determination that there exists a triable issue of fact *cannot* be appealed on an interlocutory basis, even when that finding arises in the context of an assertion of qualified immunity.' (emphasis in original))."

"However, a defendant seeking to challenge a denial of qualified immunity, even a denial based on a genuine dispute of material fact, may invoke our jurisdiction by conceding the plaintiff's version of the facts. *See Berryman v. Rieger*, 150 F.3d 561, 562 (6th Cir. 1998) ('[I]n order for []an interlocutory appeal based on qualified immunity to lie, the defendant must be prepared to overlook any factual dispute and to concede an interpretation of the facts in the light most favorable to the plaintiff's case.'); *see also Moldowan v. City of Warren*, 578 F.3d 351, 369–70 (6th Cir. 2009). A defendant who adopts the plaintiff's view can proceed before us by arguing that, even assessing the facts in the light most favorable to the plaintiff, there was no violation of the plaintiff's clearly-established rights. *Berryman*, 150 F.3d at 563."

"Leshan attempts to overcome the factual dispute in this case by, as contemplated by *Berryman* and its progeny, conceding Anderson-Santos' interpretation of the facts and challenging only the district court's legal conclusion that his actions, viewed in the light most favorable to Anderson-Santos, violated Anderson-Santos' clearly-established constitutional rights. But, as we describe below, Leshan only purports to adopt Anderson-Santos' version of the facts. Because a concession in name only is no concession at all, we hold that such concessions are insufficient to invoke our jurisdiction. *Cf. Booher v. N. Ky. Univ. Bd. of Regents*, 163 F.3d 395, 397 (6th Cir. 1998) (requiring an 'unqualified concession' from defendants seeking to invoke this Court's jurisdiction on a qualified immunity appeal)."

"Leshan's professed concessions are as follows: (1) he states that he is 'willing to accept the plaintiff's story,' and (2) he claims to 'accept[] as true Anderson's version of the facts.' Def. Br., ECF No. 9, 12, 14. But Leshan recites a version of the facts that Anderson-Santos does not accept: 'Leshan walked into [Anderson-Santos'] room, jokingly told him to look down at his sweater, and then pushed him 'hard' with one hand to the chest.' *Id.* at 14." …

"These are the exact disputes of material fact—the amount of force Leshan used when he pushed Anderson-Santos and his state of mind in doing so—that the district court relied upon in denying the motion for summary judgment. Leshan, in continuing to argue that there was no clearly-established constitutional violation based on his version of the facts, fails to present us with a legal issue and relegates his claim to a factual dispute over which we cannot exercise jurisdiction. *Berryman*, 150 F.3d at 563. ('A defendant who is denied qualified immunity may file an interlocutory appeal with this Court

only if that appeal involves the abstract or pure legal issue of whether the facts alleged by the plaintiff constitute a violation of clearly established law.' (emphasis added))."

"We have previously denied jurisdiction where, as in this case, the defendant purports to concede the plaintiff's view of the facts but in effect still litigates the factual dispute. Just like the defendants in *Booher*, Leshan states that he is 'willing to concede any disputed facts for the purposes of appeal, but [he] preface[s] that concession with a narrative challenging several of the factual determinations underlying the district court's denial of qualified immunity.' 163 F.3d at 396. Just like the defendant in *Barry v. O'Grady*, Leshan 'applie[s] his own factual conclusions and inferences' to the plaintiff's claims. 895 F.3d 440, 444 (6th Cir. 2018). And just like the defendants in *Berryman*, Leshan 'attempts to persuade us to believe [his] version of the facts.' 150 F.3d at 565. In all three cases, we held that we had no jurisdiction. Because we cannot depart from our well-established precedent, we must similarly decline to find jurisdiction in this case. Where the defendant fails to truly concede the plaintiff's facts as required by our case law, we cannot exercise jurisdiction over the qualified immunity interlocutory appeal."

2. Qualified immunity granted – Constitutional right was not clearly established – No liability of the municipality - There are at least four avenues a plaintiff may take to prove the existence of a municipality's illegal policy or custom - The plaintiff can look to (1) the municipality's legislative enactments or official agency policies; (2) actions taken by officials with final decision-making authority; (3) a policy of inadequate training or supervision; or (4) a custom of tolerance or acquiescence of federal rights violations - Inaction can support municipal liability when: (1) there is a clear and persistent pattern of illegal activity; (2) the municipality has notice or constructive notice of it; (3) the municipality tacitly approves of the illegal activity, such that its deliberate indifference can be said to establish an official policy of inaction; and (4) that policy caused the constitutional deprivation - To succeed on a failure to train claim, a plaintiff must show that: '(1) the training or supervision was inadequate for the tasks performed; (2) the inadequacy was the result of the municipality's deliberate indifference; and (3) the inadequacy was closely related to or actually caused the injury - A showing of deliberate indifference requires that the municipality completely disregarded its duty to train - Typically, that means total inaction in the face of repeated, known, rights violations – Claims arose out of a civil rights claim so the GTLA bars a tort claim – Plaintiff may pursue action against the governmental employee individually

TIMMY LEE MOSIER v. JOSEPH EVANS; CROCKETT COUNTY, TENNESSEE
SIXTH CIRCUIT COURT OF APPEALS No. 23-5189 Decided and Filed: January 9, 2024

"After being arrested for public intoxication, Timmy Mosier resisted being escorted to the booking area of the Crockett County Jail. In response, Crockett County Deputy Joseph Evans pulled Mosier to the ground, which he hit head-first. Mosier brought federal civil-rights and state-law tort claims against Evans and Crockett County. The district court granted the defendants' motion for summary judgment on the civil-rights claims and their partial motion to dismiss the negligence claims. Mosier argues that the district court erred in granting each of those motions. For the reasons below, we AFFIRM in part, REVERSE in part, and REMAND."

"Timmy Mosier spent the evening of March 2, 2019, drinking heavily and smoking marijuana. Deputy Joseph Evans arrested him on suspicion of public intoxication and took him to the Crockett County Jail."

"Mosier was handcuffed, with his hands behind his back, and dressed in overalls and socks when he arrived at the jail. Evans held the strap of Mosier's overalls and walked him toward the booking area. Mosier cursed at Evans and resisted his escort. Mosier turned to face Evans, rather than walking in the direction of the booking area. He walked forward a few steps but then forcefully pivoted away from Evans. Mosier stepped backwards, away from Evans and the booking area and swung his elbow upward toward Evans' arm in an apparent effort to break his grip. Evans, still holding Mosier's overall strap, grabbed it with both hands. Mosier braced himself as Evans pulled him forward by the strap. Evans then

pulled the strap down and toward him, causing Mosier to twist down to the concrete floor, which he hit head-first."

"Evans asked whether Mosier was okay and called for medics. Evans removed Mosier's handcuffs and wiped the blood from Mosier's face. When the medics did not immediately arrive, Evans went to ask for them again. They attended to Mosier within eight minutes of his hitting his head. The medics concluded that Mosier had a concussion and should see a doctor the next day. Evans asked his supervisor, Captain Roy Mosier, whether Timmy Mosier could be taken to the emergency room that night. That request was granted, and Mosier was taken to the hospital where he received treatment for his cuts and fractures to the bones of his face and spine."

"Sherriff Troy Klyce asked Captain Mosier to investigate the incident. Crockett County has a use of force policy that prohibits the use of unnecessary force. Captain Mosier concluded that Evans did not use unnecessary force. Crockett County also requires its officers to complete use-of-force training certified by the Tennessee Peace Officers Standards and Training Commission (POST). Evans had received that training and was POST-certified."

"Mosier sued Evans and Crockett County in Tennessee state court, bringing federal civil-rights and state-law tort claims against each. The defendants removed the suit to federal court. The district court granted the defendants' motion for summary judgment on the civil-rights claims and their partial motion to dismiss the negligence claims."

"The district court granted Evans' motion for summary judgment on Mosier's 42 U.S.C. § 1983 excessive-force and inadequate-medical-care claims based, in part, on qualified immunity. The defense of qualified immunity protects officials when 'their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). When it is asserted, the plaintiff has the burden of showing that the defendant is not entitled to qualified immunity. *Burgess v. Fischer*, 735 F.3d 462, 472 (6th Cir. 2013). Applying qualified immunity requires asking: (1) whether an official violated a statutory or constitutional right and (2) whether that right was clearly established. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). When the answer to either of those questions is 'no,' the other need not be addressed. *Price v. Montgomery County*, 72 F.4th 711, 723 (6th Cir. 2023) (citing *Pearson*, 555 U.S. at 236)."

"The district court concluded that Evans' use of force did not violate Mosier's clearly established rights. We agree. At the time of the events in question, Evans had 'been arrested but ha[d] not yet received a judicial determination of probable cause, either through an arrest warrant or a post-arrest probable cause hearing.' *Colson v. City of Alcoa*, 37 F.4th 1182, 1187 (6th Cir. 2022) (citing *Aldini v. Johnson*, 609 F.3d 858, 866 (6th Cir. 2010)). So the Fourth Amendment governs his claims. *Id.* The operative question is whether the force used was ''objectively reasonable' in light of the facts and circumstances confronting' the officer. *Graham v. Connor*, 490 U.S. 386, 397 (1989) (quoting *Scott v. United States*, 436 U.S. 128, 137–39 (1978))."

"To show that Evans' actions violated his clearly established rights, it is not enough for Mosier to argue that there is a clearly established Fourth Amendment right to be free from excessive force. That defines the right at too high a level of generality. *See Godawa v. Byrd*, 798 F.3d 457, 467 (6th Cir. 2015) (citing *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014)). '[T]he salient question' in evaluating whether a constitutional right is clearly established is whether an official had 'fair warning' that his or her conduct was unconstitutional. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). That means that, at the time of the events in question, the contours of the right must have been sufficiently well-defined that 'every reasonable official' would have understood that his or her actions crossed the constitutional line. *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 5 (2021) (per curiam) (citation omitted). That usually requires a case with 'a fact pattern similar enough' to put the defendant on notice. *Guertin v. State*, 912 F.3d 907, 932 (6th Cir. 2019). Although the case need not be 'directly on point[,] . . . existing precedent must have placed the . . . constitutional question beyond debate.' *Id.* (second alteration in

original) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). '[S]pecificity is especially important' in Fourth Amendment excessive-force cases, where the constitutional boundaries are intensely fact-dependent. *Rivas-Villegas*, 595 U.S. at 6 (alteration in original) (citation omitted)."

"Mosier has not met his burden of identifying a case that should have put Evans 'on notice that his specific conduct was unlawful.' *Id.*; *see Bell v. City of Southfield*, 37 F.4th 362, 367 (6th Cir. 2022). He relies heavily on *Lawler v. City of Taylor*, 268 F. App'x 384 (6th Cir. 2008). But 'a plaintiff cannot point to unpublished decisions to meet' the burden of showing a clearly established right. *See Bell*, 37 F.4th at 367. And, in any event, the facts of *Lawler* do not put Evans' conduct 'beyond debate;' and neither do the facts of *Phelps v. Coy*, 286 F.3d 295 (6th Cir. 2002), the published case on which *Lawler* relied."

"Those cases did not provide Evans fair warning that his conduct was unconstitutional. *See Hope*, 536 U.S. at 741. As the district court found, the video evidence makes clear that Mosier was more aggressive and threatening than either Lawler or Phelps. And Evans' response was less severe. Evans walked Mosier, who was handcuffed, toward the booking area, holding on to the strap of Mosier's overalls. Mosier cursed at Evans and resisted being escorted. Mosier forcefully pivoted away from Evans and the booking area. He then swung his elbow upward toward Evans' arm in an apparent effort to break Evans' grip. On Mosier's telling, Evans responded by 'slinging' Mosier to the ground by his overall strap. Appellant Br. at 3. Mosier's landing on his head was arguably a foreseeable consequence of that maneuver. But Mosier was actively resisting and was not, at the time of the 'slinging,' a 'helpless and incapacitated suspect.' *Phelps*, 286 F.3d at 301–02 (citation omitted). Neither *Phelps* nor *Lawler* clearly establish that Evans' particular use of force was excessive."

"The district court properly granted Evans summary judgment on this claim because Mosier has not met his burden of establishing that Evans violated his clearly established rights. *See Burgess*, 735 F.3d at 472."

"The district court granted Crockett County's motion for summary judgment on Mosier's § 1983 municipal-liability claim because no Crockett County policy or custom caused the alleged violation of Mosier's rights. A municipality is not vicariously liable under § 1983 for the harm caused by its employees. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). To succeed on a § 1983 claim against a municipality, a plaintiff must show that a municipal 'policy or custom' 'actually serves to deprive' the plaintiff of his or her rights. *Gregory v. City of Louisville*, 444 F.3d 725, 752 (6th Cir. 2006). 'There are at least four avenues a plaintiff may take to prove the existence of a municipality's illegal policy or custom. The plaintiff can look to (1) the municipality's legislative enactments or official agency policies; (2) actions taken by officials with final decision-making authority; (3) a policy of inadequate training or supervision; or (4) a custom of tolerance or acquiescence of federal rights violations.' *Thomas v. City of Chattanooga*, 398 F.3d 426, 429 (6th Cir. 2005) (citing *Monell*, 436 U.S. at 694). Mosier starts down a few of those roads, but each is a dead-end."

"Inaction can support municipal liability when: (1) there is a clear and persistent pattern of illegal activity; (2) the municipality has notice or constructive notice of it; (3) the municipality tacitly approves of the illegal activity, such that its deliberate indifference can be said to establish an official policy of inaction; and (4) that policy caused the constitutional deprivation. *See Doe v. Claiborne County*, 103 F.3d 495, 508 (6th Cir. 1996). Mosier presents no argument that there is a pattern of constitutional violations, that the County had notice of that pattern, or that the County was deliberately indifferent to that pattern. *See id.* His inaction theory therefore fails."

"Mosier argues next that Sheriff Klyce ratified Evans' conduct by performing only a cursory investigation of the alleged constitutional violations, and that his ratification is evidence of a policy or custom. It is possible to demonstrate a policy or custom by showing that an official with final decision-making authority ratified the conduct. *See Thomas*, 398 F.3d at 429. Ratification may take the form of a failure to investigate, provided there have been 'multiple earlier inadequate investigations [that] concern comparable claims.' *Pineda v. Hamilton County*, 977 F.3d 483, 495 (6th Cir. 2020) (quoting *Stewart v. City of Memphis*, 788 F. App'x 341, 344 (6th Cir. 2019)). Mosier makes no argument that

Sheriff Klyce failed to investigate comparable claims or even that there were such claims. *See Stewart*, 788 F. App'x at 344; *David v. City of Bellevue*, 706 F. App'x 847, 853 (6th Cir. 2017). His ratification theory therefore fails."

"Finally, Mosier seeks to prove a policy or custom by arguing that Crockett County failed to adequately train Evans. To succeed on a failure to train claim, a plaintiff must show that: '(1) the training or supervision was inadequate for the tasks performed; (2) the inadequacy was the result of the municipality's deliberate indifference; and (3) the inadequacy was closely related to or actually caused the injury.' *Ellis ex rel. Pendergrass v. Cleveland Mun. Sch. Dist.*, 455 F.3d 690, 700 (6th Cir. 2006). A showing of deliberate indifference requires that the municipality 'completely disregarded' its duty to train. *Harris v. City of Saginaw*, 62 F.4th 1028, 1038 (6th Cir. 2023). Typically, that means total inaction in the face of repeated, known, rights violations. *See Shadrick v. Hopkins County*, 805 F.3d 724, 738–39 (6th Cir. 2015). In a 'narrow range of circumstances,' when a rights violation is a 'highly predictable consequence' of inadequate training, repeated rights violations need not be shown. *Id.* at 739 (quoting *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 409 (1997)). But in those cases, the risk of rights violations must be 'so obvious,' and the inadequate training 'so likely' to result in such violations, that the municipality can fairly be described as deliberately indifferent. *City of Canton v. Harris*, 489 U.S. 378, 390 (1989)."

"Crockett County did not fail to train Evans. Evans received use-of-force training approved by POST. Mosier's expert, Patrick Looper, concluded that the training was inadequate. But the district court found that Looper's report failed to point to evidence supporting that conclusion and therefore failed to create a genuine dispute of material fact as to the adequacy of Evans' training. Regardless, there is no dispute as to deliberate indifference. Mosier presents no evidence of prior instances of rights violations, so he can rely only on the narrow highly-predictable-consequence theory. Assuming that there was an obvious risk that excessive force might be used against intoxicated detainees, the County made sure that Evans received use-of-force training. Where a municipality provides training that addresses a purported risk, that 'does not present the same 'highly predictable' constitutional danger.' *Harris*, 62 F.4th at 1039 (quoting *Connick v. Thompson*, 563 U.S. 51, 63 (2011)). In situations like this, where relevant training was given, showing that 'additional training would have been helpful' does not establish municipal liability. *Id.* (citation omitted). Mosier's failure to train claim fails because it alleges no more than that."

"The district court relied on the 'civil-rights exception' to the Tennessee Governmental Tort Liability Act (GTLA) to dismiss Mosier's negligence claims against Evans in both his official and personal capacities and the vicarious liability claim against Crockett County. The court invoked the GTLA's 'discretionary function exception' to dismiss the negligent hiring, training, retention, and supervision claim against Crockett County. The civil-rights exception bars all these claims, save for the personal-capacity claim against Evans."

"What does it mean to arise out of civil rights? The Tennessee Supreme Court has not answered the question, so we must predict what the Tennessee Supreme Court would say. *See Payne v. Novartis Pharmaceuticals Corp.*, 767 F.3d 526, 530 (6th Cir. 2014). We have some relevant data to guide us."

"First, the Tennessee Supreme Court has been clear that the GTLA's waivers of immunity are to be 'strictly construed' 'in favor of the sovereign.' *See Lawson v. Hawkins County*, 661 S.W.3d 54, 60 (Tenn. 2023) (citations omitted). The GTLA 'provides that 'any claim for damages must be brought in strict compliance with the terms of this chapter.'' *Hughes v. Metro. Gov't of Nashville & Davidson Cnty.*, 340 S.W.3d 352, 361 (Tenn. 2011) (quoting Tenn. Code Ann. § 29-20-201(c)). The Tennessee Supreme Court has read this language to say that a 'strict constru[ction]' approach 'has been expressly incorporated into the Act.' *Id.* (quoting *Ezell v. Cockrell*, 902 S.W.2d 394, 399 (Tenn. 1995))."

"Next, we are guided by decisions of the Tennessee Court of Appeals, which are persuasive evidence of what the Tennessee Supreme Court would do. *Borman, LLC v. 18718 Borman, LLC*, 777 F.3d 816, 823

(6th Cir. 2015). Those decisions have construed the GTLA's civil rights exception and lead us to conclude that Mosier's claims 'arise out of civil rights' under the GTLA."

"Start with *Cochran v. Town of Jonesborough*, 586 S.W.3d 909 (Tenn. Ct. App. 2019). There, Cochran sued Officer Peace, who arrested him, and the Town of Jonesborough in federal court, alleging that he had been handcuffed too tightly. *Id.* at 911–12. Cochran brought both a Fourth Amendment excessive-force claim against Peace under § 1983, and a state-law negligence claim against the Town. *Id.* at 912. The negligence claims alleged that the Town had failed to train and supervise Peace and that the Town was vicariously liable for Peace's negligence in handcuffing Cochran. *Id.* The district court granted summary judgment to Peace on the excessive-force claim and declined to exercise supplemental jurisdiction over the negligence claims, dismissing them without prejudice. *Id.* Cochran then refiled the negligence claims in state court. *Id.* The state trial court dismissed the claims, reasoning that the GTLA's civil-rights exception applied because the claims arose 'from the same set of facts upon which [Cochran] alleged that his constitutional and civil rights had been violated.' *Id.* at 913. Cochran appealed."

"The Tennessee Court of Appeals affirmed. 'As an initial matter,' the court rejected the notion that a plaintiff could avoid the civil-rights exception simply by casting his claims as sounding in negligence. *Id.* at 918. The 'plaintiff's characterization of the claims in his complaint is not dispositive.' *Id.* The court then surveyed its prior cases, and concluded that in all but a single, unpublished, decision—*Parker v. Henderson County,* 2010 WL 377044 (Tenn. Ct. App. Feb. 4, 2010)—the Tennessee Court of Appeals had held that the civil-rights exception applied when civil-rights claims and negligence claims were 'based on the same facts.' *See id.* at 915–921. Citing the Tennessee Supreme Court's 'well-established principle that statutes permitting suits against the State must be strictly construed,' the court rejected *Parker*, deciding instead 'to follow the greater weight of authority and embrace the application of [the civil-rights exception] that preserves immunity.' *Id.* at 920–21 (citations omitted). According to that construction, courts must look to the 'gravamen' of the plaintiff's claim—''the substantial point, the real purpose, or the object' of his action'—to determine whether it arises out of civil rights. *Id.* at 918–19 (quoting *Benz-Elliott v. Barrett Enters., LP*, 456 S.W.3d 140, 148 (Tenn. 2015))."

"Applying that standard, the court held that Cochran's claims 'sound[ed] squarely in civil rights.' *Id.* at 919. The 'premise' of Cochran's negligence action was that he had been 'injured by the manner in which Officer Peace handcuffed and arrested' him. *Id.* Although Cochran cast those claims as sounding in 'negligence,' *see id.* at 919 n.3, the essence of the allegations amounted to 'excessive handcuffing,' which, the court noted, is associated with the civil right to be free from excessive force under the Fourth Amendment, *id.* at 919. Thus, 'regardless of how [Cochran] chose to characterize those claims in his state action,' the state-law claims were covered by the civil-rights exception because they 'stem[med] from' civil rights. *Id.*"

"Cochran protested that his claims could not have arisen out of civil rights; after all, the federal court had dismissed his § 1983 claim on the ground that Cochran's right to be free from excessive force had *not* been violated. *Id.* at 919, 920 n.4. The court of appeals was unmoved, noting that '[n]othing in the language' of the GTLA requires a finding that a civil-rights violation 'occurred,' only that the 'injury' be one that 'arises out of . . . civil rights.' *Id.* at 920 (second alteration in original) (citation omitted). Because the alleged 'underlying act of purported negligence' giving rise to Cochran's state law claims was 'aggressive handcuffing,' his claim arose out of civil rights, even though it was filed under the 'guise of negligence.' *Id.* at 920, 921 (citations omitted)."

"In *Siler v. Scott*, the Tennessee Court of Appeals again considered the question and reiterated its holding in *Cochran*. *Siler*, 591 S.W.3d at 97. There, Siler brought a federal civil-rights claim for excessive force against several officers, as well as a state-law negligence claim against Campbell County for its failure to supervise and train the officers. *Id.* at 92, 95. The court of appeals held that *Cochran* 'compelled' it to conclude that the civil-rights exception applied and barred the negligence claim. *Id.* at 97. That was so because, as in *Cochran,* Siler 'alleged violation of his federal civil rights in

his federal action' and '[a] claim of excessive force by law enforcement officers often involves the implication of a civil rights action.' *Id. Siler* is the most recent published Tennessee Court of Appeals decision to address the question."

"*Cochran* and *Siler* hold that an injury arises out of civil rights when a civil-rights violation is the 'gravamen' of the complaint. *See Cochran*, 586 S.W.3d at 918. The Tennessee Court of Appeals has explained that the plaintiff's 'characterization of the claims' does not control; what matters is the claim's 'substantial point' or 'real purpose.' *Id.* at 918–19 (citation omitted). And there need not have been an actual civil-rights violation. *Id.* at 920. Rather, Tennessee courts ask whether the claim is 'based on the same facts' or is sufficiently related to an accepted civil-rights claim. *See id.* at 918–19."

"That standard is consistent with the approach we have taken in our prior cases." …

"The standard announced in *Cochran,* and recognized by this court in cases like *Devereux*, bars Mosier's state-law negligence claims against Evans in his official capacity and against Crockett County. Mosier brought a § 1983 excessive-force claim against Evans and a § 1983 municipal-liability claim, premised on that use of force, against the County. The GTLA, of course, does not bar the federal claims. In addition to his federal claims, Mosier pled state-law claims in the alternative. The state law claims alleged that Evans had been merely negligent in his use of force, that the County was vicariously liable for that negligence, and that the County had been negligent in hiring, training, retaining, and supervising him. Specifically, Mosier alleged that Evans had been negligent in using Mosier's 'overall strap to restrain and move him as it was likely to separate causing [him] harm.' R. 1-2, Complaint, PageID 19. Relatedly, Mosier alleged that Evans was negligent in 'grabbing onto the strap of [Mosier's] overalls as it was foreseeable that the strap could break and result in [Mosier] falling to the ground.' *Id.* at 13. But a separated or broken overall strap is not harmful on its own. It could have caused Mosier harm only because Evans grabbed onto or pulled on it. Evans' purported act of negligence is, thus, based on the same conduct that Mosier alleged constituted excessive-force. Revealingly, Mosier's complaint alleged that Evans was 'negligent in the use of excessive physical force.' *Id.* at 19. The gravamen of Mosier's negligence claims, like Cochran's negligent handcuffing claim, is that Evans applied too much force in controlling Mosier and 'should be held responsible.' *See Cochran*, 586 S.W.3d at 921. Under Tennessee law, that is sufficiently related to a civil-rights claim to be barred by the civil-rights exception, regardless of Mosier's characterization. Mosier's negligence claims against Crockett County are premised on that same use of force, and on the same employment practices that Mosier challenges in his § 1983 claim. The civil-rights exception therefore bars the official capacity claim against Evans; it also bars the vicarious liability claim and the negligent hiring, training, retention, and supervision claims against the County. *See id.* at 913."

"Mosier argues that the civil-rights exception does not apply to these claims because he pled negligence or a civil-rights violation, in the alternative. And the dissent agrees. But *Cochran* forecloses that argument. Cochran, too, pled alternatively in federal court, arguing both that Peace was liable under § 1983 for excessive force and that the Town was vicariously liable under state law for 'the negligence of Officer Peace in the effectuation of the arrest.' *Id.* at 913. But even after Cochran failed to prove his federal claim, the fact of alternative pleading did not stop the civil-rights exception from applying because the plaintiff's characterization of the claims is 'not dispositive.' *Id.* at 918."

"*Nichols v. Metropolitan Nashville Airport Authority*, 2021 WL 1426992 (Tenn. Ct. App. Apr. 15, 2021), illustrates the point. Nichols brought negligence claims against the Airport Authority for injuries he sustained when officers arrested him using an 'arm bar restraint.' *Id.* at *1. Notably, Nichols alleged only 'that the officers negligently assessed the amount of force necessary rather than alleging that they intentionally used excessive force.' *Id.* And he formally pled only negligence claims, never claiming that the officers violated his civil rights. *Id.* The court of appeals still applied the GTLA's civil-rights exception. *Id.* at *4. Looking to Nichols' underlying factual allegations, the court concluded that the 'common thread' was that the airport officers 'used more force than was necessary under the circumstances,' which sounded in civil rights. *Id.* Accordingly, the claims, though described exclusively as negligence, were barred by the civil-rights exception. *Id.* at *5."

"The same rule governs Mosier's negligence claims. Mosier's alternative pleading avers that Evans was negligent in using Mosier's overall strap to 'restrain and move him' because it was likely to separate and cause him harm. R. 1-2, Complaint, PageID 19. But the separated strap caused Mosier harm only because Evans pulled on it, *i.e.*, applied force to it. The dissent disagrees and says that the separated strap could have caused Mosier harm even if Evans had not applied force. Regardless of whether that is hypothetically possible, it is not what Mosier alleges. Mosier complains that the strap was used to 'restrain and move him.' *Id.* Those actions involve force. And in the very next sentence, Mosier alleges that Evans was 'negligent in the use of excessive physical force.' *Id.* The 'gravamen' of Mosier's claims, therefore, is that Evans used too much force. *See Cochran*, 586 S.W.3d at 918. And, under Tennessee law, characterizing that use of force as 'negligence' is not enough to escape the civil-rights exception. *Id.* at 919. The district court properly dismissed Mosier's negligence claims against Evans in his official capacity and against Crockett County because they are barred by the GTLA's civil-rights exception."

"That leaves Mosier's state-law negligence claim against Evans in his personal capacity. Mosier now claims that the district court erred in dismissing that claim, arguing that the GTLA's civil-rights exception does not extend to Evans in his personal capacity. His argument has merit. The GTLA 'immunity afforded governmental entities does not extend to the employee.' *Hughes*, 340 S.W.3d at 359 n.3. 'The upshot is that a plaintiff may seek to hold employees personally liable when their governmental employer is immune, at least insofar as the public-duty doctrine or other applicable law would not independently bar the suit.' *Lawson*, 661 S.W.3d at 65. Mosier's claim against Evans in his personal capacity is not barred by the GTLA."

"Evans argues that Mosier forfeited this argument by raising it for the first time on appeal. Whether or not forfeiture occurred below, we would exercise our discretion to excuse it. *See Moody v. United States*, 958 F.3d 485, 493 (6th Cir. 2020) (recognizing our discretion to excuse forfeitures); *Johnson v. Ford Motor Co.*, 13 F.4th 493, 504 (6th Cir. 2021) (exercising discretion to excuse forfeiture over a 'question of law' that 'does not require any further factual development'). We leave to the district court's discretion to decide whether to exercise supplemental jurisdiction over this claim, mindful of the fact that this is the only claim remaining in the case."

3. Appeal – Qualified immunity - Officers failed to sufficiently assert qualified immunity in their motion for summary judgment, and therefore forfeited the defense - For that reason, the court dismissed officers' summary judgment claim for want of jurisdiction - In the alternative, the court held that even if officers did assert qualified immunity, we still would not have jurisdiction over their appeal because they only raised questions of fact instead of questions of law - Officers failed to articulate pure questions of law - An issue is deemed forfeited if it is merely mentioned and not developed – And to raise qualified immunity, the defendants bear the initial burden of coming forward with facts to suggest that they were acting within the scope of their discretionary authority - Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation

WENDY COCKRUN v. BERRIEN COUNTY, MICHIGAN, et al., CELENA HERBERT, Sergeant; HANNAH NOFS, Deputy; MIRANDA BAILEY, Deputy; ABIGAIL PIFER, Deputy; SABRINA LARATTA; KRISTINA HENDERSON, Deputy; BRITTANY ZABEL, Deputy; ANDREA LENEWAY, Deputy; CAROL VAUGHN, Deputy; COREY BURKS, Lieutenant, in their individual and official capacities
SIXTH CIRCUIT COURT OF APPEALS No. 23-1291 Decided and Filed: January 31, 2024

"In this interlocutory appeal from a partial denial of summary judgment, Defendants-Appellants Berrien County Jail officers ('Officers') argue that they properly raised a qualified immunity defense, and that Plaintiff-Appellee Wendy Cockrun's evidence did not create a genuine dispute of material facts to overcome summary judgment. But we do not linger on the merits of the case or the standard of qualified immunity: the issues presented can be answered solely on procedural grounds. We conclude that Officers failed to sufficiently assert qualified immunity in their motion for summary judgment, and therefore forfeited the defense. For that reason, we dismiss Officers' summary

judgment claim for want of jurisdiction. In the alternative, we hold that even if Officers did assert qualified immunity, we still would not have jurisdiction over their appeal because they only raised questions of fact instead of questions of law."

"Cockrun was an inmate at the Berrien County Jail in Michigan. In her amended complaint, she alleged that she was sexually assaulted by her roommate, Inmate Brooks, on multiple occasions; that she reported the assaults to Officers, who, in violation of her Eighth Amendment rights, failed to protect her from Brooks; and that, in retaliation for her complaints and in violation of her First Amendment rights, Officers placed her in administrative segregation. She also alleged that Officers violated her Fourteenth Amendment due process interest in personal security and asserted a *Monell* claim against the county. In their answer, Officers denied all allegations. They also noted that Cockrun's claims may be barred, in whole or in part, by qualified immunity."

"Officers moved for summary judgment. Their brief in support of their motion for summary judgment included the following three mentions of qualified immunity:

> All Defendants deny the allegations in Plaintiff's Complaint and have asserted multiple Affirmative Defenses including qualified immunity. More detailed factual information will be provided to the Court in the appropriate Argument sections of this Brief.
>
> As to the subjective component, the Individual Defendants are aware that for purposes of this Motion and any subsequent appeal on the qualified immunity pled by each of the Defendants, they must be willing to concede the most favorable view of the facts to the Plaintiff.
>
> In this case, each of the Defendants is asserting a qualified immunity defense. In those circumstances, the District Court should consider whether each individual Defendant had a sufficiently culpable state of mind. . . . Each officer's circumstance is entitled to separate analysis.

Officers provided no further discussion of qualified immunity."

"In its opinion and order on Officers' motion for summary judgment, the district court adopted the magistrate judge's report and recommendation granting in part and denying in part Officers' motion for summary judgment. It found Officers waived their qualified immunity defense because they raised it in only 'a perfunctory manner, unaccompanied by some effort at developed argumentation.' *McPherson v. Kelsey*, 125 F.3d 989, 995-96 (6th Cir. 1997) (citation omitted).**1** The district court pointed out that Officers 'failed to cite the legal standard for qualified immunity and did not address the elements of qualified immunity as they relate to each' Officer's actions. It declined to ''put flesh on [the] bones' of Defendants' merely skeletal assertion of qualified immunity.' *Id.* at 996."

"Officers allege that the district court erred in concluding that they failed to raise qualified immunity and accuse the district court of mischaracterizing the burden of proof with respect to qualified immunity. But the burden of proof of qualified immunity has little to do with the issue before us. Rather, at issue is Officers' failure to raise a developed qualified immunity argument before the district court."

"Officers claim that their three mentions of qualified immunity were enough to raise the issue. But 'an issue is deemed forfeited . . . if it is merely mentioned and not developed.' *United States v. Clark*, 469 F.3d 568, 569-70 (6th Cir. 2006); *see also United States v. Sandridge*, 385 F.3d 1032, 1035-36 (6th Cir. 2004) ('It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to . . . put flesh on its bones.') (internal quotations and citation omitted). And to raise qualified immunity, the '[d]efendants bear the initial burden of coming forward with facts to suggest that they were acting within the scope of their discretionary authority.' *Rich v. City of Mayfield Heights*, 955 F.2d 1092, 1095 (6th Cir. 1992). We have previously instructed district courts to 'withhold

judgment on issues not fully developed by the briefs or in the record. Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.' *Sandridge*, 385 F.3d at 1035 (quoting *Popovich v. Cuyahoga Cnty. Ct. of Common Pleas*, 276 F.3d 808, 823 (6th Cir. 2002) (Ryan, J. concurring in part and dissenting in part)). Because Officers only mentioned qualified immunity in their motion for summary judgment in a perfunctory manner, devoid of applied facts or developed argumentation, they forfeited qualified immunity."

"Officers alternatively argue that we may still choose to consider their forfeited qualified immunity argument because to do otherwise would be a miscarriage of justice. Although we have discretion to consider a forfeited argument when not doing so would produce a plain miscarriage of justice, we have rarely exercised such discretion. *Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 552 (6th Cir. 2008). This case, where Officers failed to show any cause for their failure to develop their qualified immunity argument, is not a compelling candidate for exercising that discretion."

"Accordingly, we affirm the district court's conclusion that Officers forfeited qualified immunity by failing to develop the argument in their motion for summary judgment. Because Officers forfeited qualified immunity, their interlocutory appeal is simply a summary judgment argument over which we do not have jurisdiction. *See Mitchell v. Forsyth*, 472 U.S. at 530, 525 (holding that federal appellate courts have jurisdiction to hear interlocutory appeals challenging the denial of qualified immunity if the challenge raises legal questions)."

"Officers next ask us to conclude that there exists no genuine dispute of material fact as to Cockrun's First and Eighth Amendment claims. Even if Officers had not forfeited qualified immunity, we still would not have jurisdiction to consider this question in an interlocutory appeal. 'The Supreme Court has clearly held that a district court's determination that there exists a triable issue of fact cannot be appealed on an interlocutory basis, even when that finding arises in the context of an assertion of qualified immunity.' *Gregory*, 444 F.3d at 742 (citing *Johnson v. Jones*, 515 U.S. 304, 313 (1995) ('[A] defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial.'))."

"Officers point out that this court *does* have jurisdiction over pure questions of law. *See Moldowan v. City of Warren*, 578 F.3d 351, 369 (6th Cir. 2009). While true, this point does not get Officers far, because Officers only present questions of fact. For instance, in the Statement of Issues, they assert that the district court 'erred when it found a genuine issue of material fact . . . based on Plaintiff's inconsistent, self-serving deposition testimony and pleadings.' And in their brief, they argue that the district court 'erred when it determined that Plaintiff raised evidence to create a genuine issue of material fact such that a reasonable juror could find in her favor.'" …

"In their reply, Officers argue that the district court's characterization of the basis for its ruling is not dispositive, and that we may exercise jurisdiction over the appeal to the extent it raises questions of law. *See Moldowan*, 578 F.3d at 371. But there are two issues with this argument: First, once again, Officers can point to no pure question of law for us to resolve. Even if we assume Officers properly raised qualified immunity below and on appeal, their argument still boils down to disputing the facts underlying Cockrun's claims—which, again, this court cannot visit on interlocutory appeal."

"Second, it is clear that the district court's holding on these claims was focused on whether the record set forth genuine issues of fact for trial. In discussing Cockrun's First Amendment claim, the district court held that summary judgment 'must be denied because genuine issues of material fact exist as to Defendants' reasons for placing Plaintiff in administrative lockdown. The district court rightly characterized this dispute about Officers' true motivation as a fact question and not a law question. And in discussing her Eighth Amendment claim, the district court held that '[v]iewing the evidence in the light most favorable to Plaintiff, the court concludes that reasonable jurors could find that [Officers] were aware that Plaintiff faced a substantial risk of serious harm and disregarded that risk by

failing to take reasonable measures to abate it.' Despite Officers' suggestion, the decision could not be characterized as raising questions of law. *Moldowan*, 578 F.3d at 371."

"Our jurisdiction ends once a defendant's argument 'drifts from the purely legal into the factual realm and begins contesting what really happened.' *Berryman*, 150 F.3d at 564-65. In their exhaustive merits-based arguments, Officers have drifted well into the factual realm. We therefore lack jurisdiction for two reasons: because of the forfeiture issue at the outset, and because aside from the forfeiture problem, Officers failed to articulate pure questions of law."

4. Excessive force claim – Qualified immunity granted – Officers had probable cause to arrest plaintiff - An officer must identify only a substantial chance that a suspect has committed a crime under all the circumstances that the officer confronted - Because this test requires far less than the reasonable-doubt standard necessary for a conviction at trial, the police can have probable cause even if it turns out that the suspect did not commit a crime – Officers at the jail did not use excessive force

KELLIE FARRIS v. OAKLAND COUNTY, MICHIGAN; DEPUTY MARK BOWERING, DEPUTY ERIN VINCENT, DEPUTY JASON MILLER, DEPUTY NOAH HOLLAND, DEPUTY MARK GANEY, DEPUTY JAMES FITZPATRICK, DEPUTY ROSS OGANS, DEPUTY JOSHUA WURFEL; DEPUTY SERGEANT ZACHARY JORDAN; DEPUTY KIMBERLY MICHAL; OFFICER BRANDY MENDICINO; OFFICER JASON WINBORN
SIXTH CIRCUIT COURT OF APPEALS No. 23-1739 Decided and Filed: March 22, 2024

"Kellie Farris called 911 asserting that another woman had damaged her car. Two sheriff's deputies ended up arresting Farris instead. After they drove Farris to jail, she alleges that other deputies used excessive force when pulling her out of the vehicle, transporting her to a cell, and removing her clothes. Farris brought federal and state claims against the deputies and their county employer. But the deputies had probable cause for her arrest. And they could reasonably conclude that her suicidal actions necessitated their minimal force. So we agree with the district court that Farris's claims cannot survive summary judgment. We affirm."

"On March 31, 2019, Farris lived with her two young children at a home in Pontiac, Michigan. A single mother, Farris was also two-months pregnant. Antwuan Kyles, the father of Farris's son, was dating Danniqua Franklin at this time. The three were friends. But Farris and Franklin had gotten into an argument over the phone. Franklin showed up at Farris's home and started threatening her, leading Farris to tell Franklin to get out. Franklin left. Farris then went looking for Kyles, allegedly because he would not answer his phone."

"She drove to a nearby home where Kyles's mother lived. Franklin and Kyles were both there. After Franklin and Farris got into an altercation outside this home, Farris called 911. Deputies Brandy Mendicino and Jason Winborn with the Oakland County Sheriff's Office arrived on the scene. Both women told the deputies that Franklin had kicked and dented Farris's car. The deputies also saw the damage. But the two women conveyed different stories about the reason for Franklin's actions."

"We start with Franklin's account. She told the officers that, once Farris got to the home, Farris called Franklin from her car and asked Franklin to step 'outside' so they could talk. Arrest Rep., R.27-2, PageID 222, 226. As Franklin walked toward Farris's car, Farris allegedly started driving at Franklin to run her over. Franklin 'kicked the grill' of the car. *Id.*, PageID 222. Farris then got out of the car and threatened to stab Franklin while waving a knife (which may have been scissors). Franklin walked away. But Farris drove at her again, so Franklin kicked the car a second time. Despite Farris's conduct, Franklin disavowed wanting to prosecute her and suggested that the two 'would end up being okay' in a day or so. *Id.*"

"Farris had a different recollection. She claimed that when she arrived at the home, Franklin ran 'up on [her] car' 'talking crazy.' Farris Dep., R.36-2, PageID 399. Unprovoked, Franklin kicked Farris's car twice. Farris backed her car away, called 911, and remained in the car until the police arrived. Farris

denied having a knife but showed scissors to the deputies. Yet she also claimed that she had not threatened Franklin with a weapon."

"The deputies found no other witnesses. They tried to interview Kyles, but he did not cooperate. And nobody else had been outside due to the cold Michigan weather."

"The deputies thus asked Farris if they could search her car. She consented. They found two pairs of scissors in the center console and a pocketknife wedged in between the sunroof and its visor. The deputies questioned Farris about how Franklin could have known about the knife if Farris had not waved it at her. Farris responded that Franklin knew as a general matter that she kept it 'for protection.' Mendicino Dep., R.27-3, PageID 242."

"The deputies found Franklin more credible than Farris because of Farris's failure to disclose the knife. Before taking any action, though, Mendicino called a supervisor. The supervisor recommended that they arrest Farris because it would 'solve the problem and hopefully it will stop them from doing this kind of dumb shit in the future.' Patrol Video, at 40:22–:27. Mendicino made the final decision to arrest Farris on the ground that she had committed a felonious assault (an assault with a weapon). Winborn handcuffed Farris, placed her in the backseat of his vehicle, and left for the Oakland County jail."

"On the way there, Farris started to strangle herself by 'wrapping her head around' her seatbelt, and she also began to make 'a gurgling sound.' Winborn Dep., R.27-4, PageID 251. Winborn stopped the vehicle, unwrapped the seatbelt, and alerted others. Farris suggested that she wanted to kill herself. Other deputies and paramedics soon arrived to help. They decided to have Mendicino sit in the backseat with Farris. Farris continued trying to harm herself, but Mendicino kept her secure for the rest of the trip."

"Given Farris's risky conduct, a 'cell extraction team' prepared to take her into custody when she got to the jail. This team included, among others, Deputies Joshua Wurfel, Ross Ogans, James Fitzpatrick, and Kimberly Michal."

"Winborn parked his vehicle in the jail's sally port. Farris then saw a 'bunch of officers' emerge and shout at her to get out of the car. Farris Dep., R.36-2, PageID 407. Pregnant, handcuffed, and hampered by a bad right knee, Farris alleges that she could not exit quickly. Fitzpatrick saw her with a 'seatbelt wrapped around her neck' while Winborn was trying to control her. Fitzpatrick Dep., R.27-7, PageID 270. So Fitzpatrick and Ogans immediately removed her from Winborn's vehicle."

"Standing next to the vehicle, deputies put Farris in the 'escort position' that the extraction team uses to conduct a 'custody search' on uncooperative arrestees. *Id.*, PageID 272–73. A deputy puts the palm of one hand on an arrestee's chin and the other hand on the back of the arrestee's head, while others bend the arrestee over at the waist. In this case, Deputy Ogans put his hands on Farris's head. According to Farris, he at some point started 'squeezing' her throat. Farris Dep., R.36-2, PageID 408–09. Another officer pushed up on her arms, forcing her to bend down. The deputies also used a spit hood (which was more like a mask than a hood) to cover her mouth and part of her nose."

"A deputy recorded the encounter. The video shows Farris falling and landing on her knees after about 30 seconds in this escort position. Both before and after this fall, she repeatedly lifted her right leg. Farris suggested that her bad 'knee gave out.' *Id.*, PageID 407. But the deputies believed that she was trying to 'kick' them and that she had gone 'deadweight' to impede their ability to control her. Case Rep., R.27-5, PageID 260. A deputy yelled for her to 'stand up' after the fall, and she complied. CET Video, at 0:57–1:02. Throughout this time, Farris screamed that she could not breathe and that Ogans should get his hand off her face or nose. But the deputies kept her in this position for 'a minute or two' while Deputy Michal, a female officer, searched her. Wurfel Tr., R.27-9, PageID 281."

"Farris noted that she was pregnant during the pat-down. So the deputies brought out a wheelchair for her to use. As deputies wheeled her to a cell, Deputy Wurfel kept her head up by cupping her chin with

the palm of one hand. Another deputy wrapped a blanket around her and the seatback of the wheelchair so she could not fall forward."

"As they traveled through the jail, Farris repeatedly demanded that Wurfel remove his hands from her face or nose and stated that she could not breathe. About a minute along the path, she also struggled to get out. Once the deputies restrained her and got moving again, one of them asked if she had 'been here before.' CET Video, at 4:41–:43. She said yes. She then asked if the deputy holding her face could get his hand off her 'throat' but immediately corrected herself: 'I mean on my chin, on my chin.' *Id.* at 4:45–:47. The deputy speaking with her simultaneously explained that the officer's hand was not on her throat and that he was 'holding your chin.' *Id.* at 4:47–:48. She admitted to him that she had been 'trying to kill' herself, so he concluded that she was 'currently suicidal.' *Id.* at 5:00, 5:17–:19."

"When they reached the cell, the deputies pulled her out of the wheelchair by unraveling the blanket and putting her in the same escort position. They walked her to her cell as she was bent over at the waist with her head down and her arms raised behind her back."

"Once inside the cell, the deputies stood Farris against the back wall. Deputy Michal told her that they would 'need your clothing' and asked if she would cooperate. *Id.* at 6:53–7:03. Farris responded that she did not feel comfortable taking her clothes off in front of the male deputies. One of the deputies removed her handcuffs to allow her to change and three male deputies exited the cell, leaving only Deputy Michal and another female deputy with Farris. But the male deputy who had been videoing the encounter remained outside the cell, still recording Farris with his phone. So Farris continued to refuse to change. The three male deputies reentered and handcuffed her again. As male deputies held Farris, Michal took off her pants and cut her shirt to remove it."

"The deputies uncuffed Farris, removed the spit hood, and left her in the cell alone. Given Farris's suicidal state, they gave her a suicide blanket rather than clothes. A nurse looking into the cell opined that she had no injuries and medically cleared her, but the jail placed her on 'active suicide watch.' Case Report, R.27-5, PageID 261."

"The next day, the county prosecutor decided not to pursue any charges against Farris. The jail released her. Later that day, however, she tragically suffered a miscarriage. Farris brought a slew of federal and state claims against the deputies and Oakland County. The district court granted summary judgment to all defendants. *See Farris v. Oakland County*, __ F. Supp. 3d __, 2023 WL 4933928, at *6–12 (E.D. Mich. Aug. 2, 2023). We review its decision de novo. *See Gambrel v. Knox County*, 25 F.4th 391, 399 (6th Cir. 2022)."

"On appeal, Farris raises Fourth Amendment claims under 42 U.S.C. § 1983 against the arresting deputies and the deputies at the jail. She also argues that Oakland County had an unconstitutional policy of inadequately training its deputies under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978). These claims all fall short."

"Farris alleges that two sets of deputies committed two distinct 'unreasonable . . . seizures' within the meaning of the Fourth Amendment. U.S. Const. amend. IV. She alleges that Mendicino and Winborn unreasonably seized her because they lacked probable cause for the arrest. And she alleges that the deputies at the jail unreasonably seized her because they used excessive force."

"All the deputies respond with a qualified-immunity defense." …

"… Farris has not identified any case that would have 'clearly established' the illegality of the deputies' limited force."

"Farris first argues that Deputies Mendicino and Winborn unlawfully arrested her. The Fourth Amendment permits police officers to arrest a suspect without a warrant as long the officers have probable cause to believe that the suspect has committed a felony. *See United States v. Watson*, 423

U.S. 411, 414–24 (1976). This probable-cause test, the Supreme Court has repeatedly explained, does not set 'a high bar.' *Wesby*, 583 U.S. at 57 (quoting *Kaley v. United States*, 571 U.S. 320, 338 (2014)). An officer must identify only a 'substantial chance' that a suspect has committed a crime under all the circumstances that the officer confronted. *Illinois v. Gates*, 462 U.S. 213, 243–44 n.13 (1983); *United States v. Baker*, 976 F.3d 636, 645–46 (6th Cir. 2020). Because this test requires far less than the reasonable-doubt standard necessary for a conviction at trial, the police can have probable cause even if it turns out that the suspect did not commit a crime. *See Fisher v. Jordan*, 91 F.4th 419, 425 (6th Cir. 2024)."

"Mendicino and Winborn lawfully arrested Farris under these standards. They had a 'reasonable ground' to conclude that she committed a felonious assault (that is, an assault with a dangerous weapon). *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (citation omitted); *see* Mich. Comp. Laws Ann. § 750.82(1). We have long held that eyewitness testimony alone can provide probable cause for an arrest if the officers have no reason to believe that the witness intentionally lied or mistakenly recalled the events. *See Brown v. Knapp*, 75 F.4th 638, 647–48 (6th Cir. 2023); *Ahlers v. Schebil*, 188 F.3d 365, 370 (6th Cir. 1999). And here, Franklin told the deputies that Farris had tried to hit her with her car and threatened to 'stab' her with a knife (which, again, could have been scissors). Arrest Rep., R.27-2, PageID 222. Unlike an anonymous tipster, Franklin also signed a written statement confirming this account. *Id.*, PageID 226–27. And the knife and scissors found in Farris's car corroborated Franklin's story. *See United States v. Jones*, 953 F.3d 433, 438 (6th Cir. 2020)."

"To be sure, the deputies also knew that Farris denied Franklin's accusation and claimed that Franklin had been the aggressor. But the deputies did not have a duty to credit Farris's account over Franklin's. *See Fisher*, 91 F.4th at 425; *Criss v. City of Kent*, 867 F.2d 259, 263 (6th Cir. 1988). They instead reasonably decided that Farris had the greater credibility problems because she first denied having a knife in her car. They also could reasonably view Farris as the aggressor because she seemingly followed Franklin to the home of Kyles's mother."

"Farris also points to the supervisor's statements that her arrest would 'solve [a] problem' and stop her from doing 'dumb shit' again. *Id.* at 40:22–:27. According to Farris, these statements suggest that the deputies arrested her for reasons unrelated to the charged crime. This argument misunderstands the law. When evaluating whether officers have probable cause, we consider only the encounter's objective facts—not the officers' subjective motives. *See Whren v. United States*, 517 U.S. 806, 813 (1996). Because the objective facts gave the deputies probable cause to arrest Farris for felonious assault, their actual reasons for this arrest are beside the point. *See Criss*, 867 F.2d at 262."

"Farris next argues that the deputies at the jail used excessive force when they took her from Winborn's vehicle to her cell. The Fourth Amendment's ban on unreasonable seizures bars police officers from using excessive force when making an arrest. *See Graham v. Connor*, 490 U.S. 386, 394 (1989). And this Fourth Amendment ban continues to apply when correctional officers book an arrestee into a jail. *See Aldini v. Johnson*, 609 F.3d 858, 864–67 (6th Cir. 2010); *see also Manuel v. City of Joliet*, 580 U.S. 357, 364–69 (2017)."

"To decide whether officers used excessive force, we must balance their safety interests in using the force against an arrestee's liberty interest in avoiding it. *See Graham*, 490 U.S. at 396[.]" …

"In this qualified-immunity context, moreover, plaintiffs must show that an officer violated a 'clearly established' right against excessive force. *Rivas-Villegas*, 595 U.S. at 5 (quoting *White v. Pauly*, 580 U.S. 73, 78–79 (2017) (per curiam)). A claimed right qualifies as 'clearly established' only if it would have been sufficiently clear to any reasonable officer that the challenged conduct violated the right. *See id.*; *Gambrel*, 25 F.4th at 403. And because the excessive-force test depends on each case's unique facts, plaintiffs generally must identify the alleged 'clearly established' right with specificity. *Rivas-Villegas*, 595 U.S. at 6. Except in obvious cases, for example, they cannot rely on the general right against excessive force. *See id.* Instead, they must identify analogous caselaw clearly establishing that an officer's specific force violated the Fourth Amendment under the circumstances. *See id.*"

"Courts must assess each challenged use of force independently. *See Gambrel*, 25 F.4th at 400. Here, Farris alleges that the deputies used excessive force in four ways: (1) by 'forcibly' pulling her 'from the vehicle'; (2) by putting 'a spit hood' over her head; (3) by putting pressure on her 'head, face, and neck region'; and (4) by 'stripping' off her clothes. Appellant's Br. 32–33. But our cases would not have clearly established the excessive nature of any of these actions."

"*Removal from Vehicle*. Farris first argues that the deputies used excessive force by forcibly removing her from Winborn's vehicle without waiting for her to get out on her own. Yet our caselaw would have allowed 'reasonable' officers to believe that they should immediately remove Farris. *Rivas-Villegas*, 595 U.S. at 5 (citation omitted). She had repeatedly tried to strangle herself with a seatbelt in the vehicle—so much so that Winborn had to stop and wait for Mendicino to sit next to Farris on the way to the jail. And when Farris reached the jail's sally port, the initial deputy who approached her car door saw her with the seatbelt 'wrapped around her neck at least once.' Fitzpatrick Dep., R.27-7, PageID 270. This deputy could reasonably conclude that he should quickly extract her from this dangerous situation. *See Hoogland*, 2022 WL 1773416, at *4; *Cabaniss v. City of Riverside*, 231 F. App'x 407, 413–14 (6th Cir. 2007); *Monday v. Oullette*, 118 F.3d 1099, 1104 (6th Cir. 1997)."

"*Spit Hood*. Farris next claims that the deputies used excessive force by putting a spit hood on her head. But she identifies no case that would have barred the deputies from temporarily covering her mouth and nose under the circumstances. We have suggested that the short-term use of 'spit hoods' (like other modest uses of force) 'have their legitimate place.' *Jennings v. Fuller*, 659 F. App'x 867, 871 (6th Cir. 2016). Most obviously, officers may use spit hoods on inmates who have *already* spat at them. *See Crossett v. Emmet County*, 2020 WL 8969795, at *4 (6th Cir. Nov. 12, 2020) (order); *see also Williams v. Haure*, 2022 WL 1056085, at *1–2 (7th Cir. Apr. 8, 2022) (order); *Hanson as Tr. For Layton v. Best*, 915 F.3d 543, 546–47 (8th Cir. 2019). Yet little caselaw analyzes when officers may put them on others. *Cf. Allen v. Rivera*, 626 F. App'x 710, 712 (9th Cir. 2015) (mem.). This lack of precedent dooms Farris's claim. Her case does not contain the type of 'obvious' facts that would alert any reasonable officer that the spit hood was excessive. *Rivas-Villegas*, 595 U.S. at 6. To the contrary, reasonable officers could believe that the Fourth Amendment permitted them to temporarily use a spit hood as a preemptive measure on an 'uncooperative' detainee like Farris. Fitzpatrick Dep., R.27-7, PageID 267."

"Pressure on Head. Farris also claims that the deputies who held her head used excessive force. Yet again, she identifies no cases clearly establishing that their conduct violated the Fourth Amendment. The deputies could instead believe they used the force necessary to safely 'effect' the arrest and place Farris in a cell under the circumstances. *Graham*, 490 U.S. at 396. One of the deputies explained that the cell extraction team often uses an 'escort position' to help control an 'uncooperative' and 'unmanageable' arrestee so that the deputies can both search and move the arrestee. Fitzpatrick Dep., R.27-7, PageID 272–73. This position requires a deputy to cup an arrestee's chin with one hand and rest the other hand on the back of the arrestee's head. *Id.*, PageID 273. The deputies could reasonably conclude that Farris's conduct warranted this technique. Before she even reached the jail, she had acted combatively by trying to wrap her head around a seatbelt. When she got out of the vehicle, she then dropped to her knees and repeatedly lifted her leg. Although Farris now says that she engaged in this conduct because of her bad knee, 'a reasonable officer on the scene' could believe that she was trying to kick the deputies and refusing to stand up to evade their control. *Graham*, 490 U.S. at 396."

"… Farris's suicidal and uncooperative conduct gave the officers legitimate reasons for the minor force they employed, and our precedent would not have clearly established its illegality."

"*Removal of Clothes*. Farris lastly argues that the deputies used excessive force when they 'strip searched' her. For a final time, however, Farris does not identify any cases that would have alerted the deputies that their conduct violated the Fourth Amendment. At the outset, she does not dispute that the deputies had both security reasons (to assure she had no contraband) and safety reasons (to remove anything that she could harm herself with) for taking her personal clothes. *See Florence v. Bd.*

of Chosen Freeholders of Cnty. of Burlington, 566 U.S. 318, 330–38 (2012); *Williams v. City of Cleveland*, 907 F.3d 924, 934–37 (6th Cir. 2018); *Peters v. Risdal*, 786 F.3d 1095, 1097 (8th Cir. 2015). She thus does not claim that the officers engaged in this conduct to, say, 'harass or humiliate' her. *Cf. Stoudemire v. Mich. Dep't of Corrs.*, 705 F.3d 560, 571 (6th Cir. 2013). Instead, Farris complains about two other aspects of this part of the encounter: Deputy Michal, a female deputy, physically removed her clothes (rather than let Farris take them off herself) and the male deputies remained in the cell when Michal did so."

"Our caselaw does not clearly establish that the deputies violated the Fourth Amendment for either reason. *Cf. Sumpter v. Wayne County*, 868 F.3d 473, 480–88 (6th Cir. 2017)." …

"… Farris cites no caselaw that would have prohibited the male deputies from assisting Deputy Michal under the facts of this case. To be sure, our precedent might suggest that a jail policy would raise constitutional concerns if it unnecessarily gave opposite-sex guards the unrestricted ability to view naked detainees. *See Kent v. Johnson*, 821 F.2d 1220, 1226–28 (6th Cir. 1987). *But cf. Letcher v. Turner*, 968 F.2d 508, 510 (5th Cir. 1992) (per curiam); *Timm v. Gunter*, 917 F.2d 1093, 1099–1102 (8th Cir. 1990). Yet nothing of the sort occurred here. The search arose from the case's exigent circumstances: the need for opposite-sex deputies to physically control an uncooperative and suicidal arrestee so that a female deputy could remove her street clothes. If anything, the existing caselaw on this topic would justify the deputies' actions. *See Peters*, 786 F.3d at 1098; *see also Cookish v. Powell*, 945 F.2d 441, 445–49 (1st Cir. 1991) (per curiam); *cf. Mills v. City of Barbourville*, 389 F.3d 568, 579 (6th Cir. 2004)."

"Farris next tries to hold Oakland County liable for the allegedly unlawful arrest and excessive force. But § 1983 does not permit her to hold the county vicariously liable for its deputies' actions. *See Monell*, 436 U.S. at 694. Rather, she must show that a county 'policy' or 'custom' drove the alleged Fourth Amendment violations. *Gambrel*, 25 F.4th at 408. She cannot do so for either her unlawful-arrest claim or her excessive-force claim."

"Her excessive-force claim requires more discussion. She relies on a failure-to-train theory to hold Oakland County liable on this claim. *See Connick v. Thompson*, 563 U.S. 51, 60 (2011). If a county has an unofficial policy of failing to adequately train officers on a type of force, a plaintiff might show that this policy caused the officers to use that force excessively in a specific case. *See Gambrel*, 25 F.4th at 408. But this theory has 'demanding elements.' *Id.* (citing *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 405 (1997)). Among other things, a county must have acted with 'deliberate indifference' to whether the inadequate training would lead its deputies to use excessive force. *Id.* To prove this deliberate indifference, a plaintiff typically must show that the county's officers have engaged in a 'pattern' of excessive force that proper training would have prevented. *Connick*, 563 U.S. at 62. In 'rare' situations, though, it might be 'patently obvious' that a lack of a specific type of training would lead officers to use excessive force. *Id.* at 64. In such a situation, even the single unconstitutional action in the plaintiff's own case might suffice to establish the county's deliberate indifference. *Id.*; *Gambrel*, 25 F.4th at 408."

"Here, Farris argues that Oakland County has failed to train its officers about when they should use spit hoods on detainees (especially pregnant women). Yet, even if Farris has shown an inadequacy in the county's training, she has fallen short of establishing its deliberate indifference. Farris does not attempt to prove that the deputies have followed a 'pattern' of unconstitutionally using spit hoods. *Plinton v. County of Summit*, 540 F.3d 459, 464 (6th Cir. 2008). And she has not shown that the need to train the officers on this precise practice should have been so 'obvious' that the use of a spit hood on Farris alone could establish the county's deliberate indifference. *Connick*, 563 U.S. at 64. Most notably, Farris identifies no other training defects. To the contrary, the county's use-of-force policy makes clear that the deputies must 'receive annual Use of Force training.' Policies, R.36-13, PageID 536; *cf. Ouza v. City of Dearborn Heights*, 969 F.3d 265, 288–89 (6th Cir. 2020). The county thus could reasonably conclude that this general training on the need to employ only 'objectively reasonable'

force would adequately convey when officers should use spit hoods. Policies, R.36-13, PageID 532; *cf. Gambrel*, 25 F.4th at 410."

"Farris lastly argues that the county's 'change-out' policy (which allows opposite-sex deputies to help remove an arrestee's personal clothes when necessary) violates Michigan's strip-search law. But again, it is not obvious that a 'change out' equals a 'strip search.' And this state-law issue is irrelevant to this Fourth Amendment claim anyway. *See Moore*, 553 U.S. at 168–76."

5. Jail suicide – Qualified immunity granted based on standards of law at the time of the event – The law has changed since this event – Standard at the time of the event was based on an officer's subjective belief that there was a strong likelihood that an immate would commit suicide – Plaintiff did not present facts that a reasonable jury could conclude under the that standard that any of the defendants violated the prisoner's civil rights - Our conclusion that Lawler's father cannot hold the officers liable under § 1983's qualified-immunity test says nothing about whether he could have held them liable under today's standards - It also 'says nothing about whether the officers' conduct was proper as a matter of good policy - Nothing the court says here bars Tennessee or its jail administrators from holding correctional officers to more demanding standards of conduct as a matter of state law

JERRY LAWLER, as father, next friend, and personal representative/administrator of the estate of Brian Christopher Lawler, Deceased v. HARDEMAN COUNTY, TENNESSEE, ELLEN FUTRELL; WILLIAM GONZALEZ; JUDY WIGGINS
SIXTH CIRCUIT COURT OF APPEALS No. 22-5898 Decided and Filed February 16, 2024

"The doctrine of qualified immunity insulates public officials from liability under 42 U.S.C. § 1983 unless the caselaw existing at the time of their actions clearly established that they violated the Constitution. There often will not be much difference between the then-existing law and the current law. As this case shows, however, this distinction can sometimes matter."

"In July 2018, Brian Lawler tragically committed suicide at a county jail. To hold officers liable for failing to prevent a pretrial detainee's death at that time, our caselaw required proof that the officers *subjectively believed* that there was a strong likelihood the inmate would commit suicide. *See Grabow v. County of Macomb*, 580 F. App'x 300, 307–09 (6th Cir. 2014). Today, however, our court would hold officers liable if they *recklessly overlooked* a pretrial detainee's strong likelihood of suicide—even if they did not subjectively recognize it. *See Helphenstine v. Lewis County*, 60 F.4th 305, 316–17 (6th Cir. 2023). When denying qualified immunity to the officers sued in this case, the district court held that a reasonable jury could find that they 'recklessly disregarded' the strong risk that Lawler would commit suicide. But that standard governs today; it did not govern when Lawler committed suicide in 2018. And when we apply the correct test, the evidence shows that the officers did not subjectively believe that Lawler was likely to take his life. We thus reverse the district court's denial of qualified immunity to the officers."

"Brian Lawler spent many years in the wrestling business. He wrestled both with World Wrestling Entertainment and with other independent companies. But he eventually landed on hard times after suffering injuries and struggling with addictions."

"Around 1:00 a.m. on July 7, 2018, a sheriff's deputy stopped Lawler for traffic infractions in Hardeman County, Tennessee. Lawler was driving on a suspended license, and the deputy suspected that he was impaired. The deputy thus arrested Lawler and took him to the Hardeman County Jail."

"Later that morning, Sergeant Ellen Futrell booked Lawler into the county jail. Jail policies required her to complete a medical-screening form. Futrell completed this form by asking Lawler questions and recording his answers on her computer. During this screening, Lawler stated that he suffered from bipolar disorder and that he had been prescribed medication for this condition. He also disclosed that

he was taking oxycodone and Xanax and had experienced withdrawals in the past from his drug and alcohol abuse. He added that he had once suffered a head injury that required hospitalization."

"The screening form separately evaluates an inmate's suicide risk. One compound question asks: 'Have you attempted suicide in the past? If yes, how long ago? If 2 Yrs or less call crisis.' Form, R.90-7, PageID 1345. In response to this inquiry, Lawler admitted that he had attempted suicide. Futrell thus originally typed 'Yes' in response to the question, which led the jail's computer system to automatically place Lawler on suicide watch. But Futrell soon learned that Lawler's attempt had occurred more than two years ago. According to Futrell, Lawler (who was 46 years old) said that he had attempted suicide 'in his 20s, when he was young and experimenting.' Futrell Dep., R.92-6, PageID 2200. She thus changed the answer to 'No' in the computer system, which took Lawler off suicide watch. The form's next question then directed Futrell to ask: 'Are you currently thinking about suicide?' Form, R.90-7, PageID 1345. Lawler answered 'No.' *Id.* Ultimately, Futrell chose not to record Lawler's prior suicide attempt anywhere on the form because he did not appear suicidal."

"Two days later, Nurse Jill Shearon evaluated Lawler. Lawler again disavowed any desire to harm himself. And Shearon also concluded that he was not suicidal."

"Unable to post bond, Lawler remained in jail for weeks. Near the start of his detention, he told jail staff that he had fallen out of his cell's top bunk and injured his knees. Nurse Shearon gave him ibuprofen in response to this incident and on a few other occasions. But Lawler repeatedly complained that jail staff often failed to provide him with his daily over-the-counter medications to manage his chronic knee pain."

"On Saturday, July 28, Lawler got into a fight with another inmate. He suffered a substantial cut that started on his forehead above his left eye and ran down past the inside of his eyebrow. Lawler demanded to go to the hospital. The record contains conflicting evidence about his reason. Some evidence suggests that he claimed to have a concussion. Other evidence suggests that he claimed to need plastic surgery to prevent a scar."

"Nurse Shearon did not work on the weekends. Officer Judy Wiggins called her about Lawler's cut around 11:00 a.m., suggesting that he 'may need stitches.' Shearon Dep., R.92-11, PageID 2722. Shearon asked Wiggins to text her a picture of the injury. After reviewing the photo, Shearon did not believe it looked all that bad. She instructed Wiggins to clean and bandage the wound. Yet Lawler refused to accept care from Wiggins."

"As a result, Shearon made a special trip to the jail shortly before noon to treat Lawler. After confirming that he did not need to go to the hospital, she cleaned the cut and put butterfly closures on it. Still, she did not want Lawler returned to the jail's 'general population' until Monday. Shearon Dep., R.92-11, PageID 2692. She instructed Wiggins to place him in an intake cell so that the officers could 'watch him closer because of the laceration.' *Id.* Shearon, though, did not identify any specific intake cell. She then left."

"Wiggins placed Lawler in Cell 90 around noon. To walk to that cell, one had to get buzzed through a secure door into the sally port and turn to the right. The sally port otherwise led straight back to another secure door that opened into a large garage for vehicles. Cell 90's door had a vertically long but narrow window. Given the cell's isolated location and narrow window, staff members could not see Lawler from the intake area's central desk unless he stood in front of the door. According to Wiggins, she had to put Lawler in this 'cell of last resort' because they were holding juveniles in other intake cells. Wiggins Dep., R.92-16, PageID 3129–30."

"Lawler disliked Cell 90. He 'ranted and raved' over the next six and a half hours. *Id.*, PageID 3099. Lawler yelled that he wanted to go to the hospital or back to his pod. He also asked Wiggins to call his father so that he could try to obtain bail money. And he repeatedly kicked and hit his cell door. According to Wiggins, Lawler's temperamental nature represented a 'drastic change' from his mood

during her prior interactions with him. *Id.*, PageID 3141, 3189. Despite his loud and repeated outbursts, Wiggins did not alert Nurse Shearon or anyone else about his conduct. Nor did she try to calm Lawler or meet his demands."

"That evening, some correctional officers made a taco dinner near the end of their shift. Around 6:30 p.m., Officer William Gonzalez volunteered to clean up the mess and take out the trash. To get to the outside dumpster, Gonzalez needed to walk through the sally port and garage. He decided to look in on Lawler while passing Cell 90. Gonzalez viewed that task as part of his duties even if it did not correspond with an officially scheduled 'check.' He also liked to 'interact with' Lawler, a well-known wrestler. Gonzalez Dep., R.92-37, PageID 4413. Lawler had always been 'upbeat' and 'happy' during their interactions. *Id.*, PageID 4377, 4418, 4421."

"Gonzalez thus peered into Cell 90 as he walked to the dumpster. The cell contained a concrete bench that, from Gonzalez's perspective at the narrow window, ran across its left wall. Made of cinder blocks, this bench rose about two feet from the floor. Lawler appeared to be standing on the corner of the bench to the left of the cell door with his back against the front wall. Gonzalez could not see Lawler's face because he had a towel draped over his head and neck. When Gonzalez knocked, Lawler did not move."

"Rather than wait for a reaction, Gonzalez finished taking the trash out through the garage. According to Gonzalez, inmates 'commonly' stood on the corner of the bench closest to the cell door to hide from onlookers. *Id.*, PageID 4447, 4462–63. Gonzalez also knew that inmates regularly put towels around their necks or heads (although he had not seen Lawler do so before). And inmates often did not answer when staff knocked on their cell doors. So Gonzalez thought that an 'upset' Lawler was simply trying to hide from passersby because he was 'famous' and had a cut on his face. *Id.*, PageID 4408, 4413, 4438."

"Gonzalez took the trash out and returned to Cell 90 about one minute later. Lawler was in the same position. Gonzalez knocked again, but Lawler again did not respond. So Gonzalez knocked a third time more loudly. When Lawler still did not respond, Gonzalez called out to Wiggins (who was at the intake desk): 'Miss Judy, come out here. I think we need to go in this cell.' Wiggins Dep., R.92-16, PageID 3209. An inmate in a neighboring cell allegedly overheard Gonzalez tell Wiggins that Lawler was not 'moving or nothing.' Jones Dep., R.92-5, PageID 2124."

"Wiggins replied that she had just checked on Lawler. No more than 10 to 15 minutes had passed between when she had seen Lawler alive and when they entered his cell. According to the neighboring inmate, Wiggins also said that Lawler was 'probably faking' because '[h]e's a good actor[.]' *Id.*, PageID 2124–25. The inmate opined that '[m]aybe three to four' minutes went by between when he heard this comment and when he heard the officers in the cell. *Id.*, PageID 2126."

"Wiggins alerted staff to open the cell door as she walked to the cell. Once inside, the officers realized that Lawler had hanged himself. Except for those on suicide watch, inmates may keep their own shoes. Lawler had used the shoestrings from his New Balance gym shoes to fashion a makeshift noose. He had gotten up on the bench and tied the shoestrings to a large bolt protruding an inch or so out of the top of the cell's front wall to the left of the cell door. Lawler had then wrapped the shoestrings around his neck. The shoestrings were holding his weight, and his feet were to the side of (but level with) the concrete bench. With his back against the front wall, Lawler faced the back of his cell. And he still had the towel over his head."

"Wiggins screamed for another officer to bring scissors so that they could cut the shoestrings. In the meantime, she tried to hold Lawler up by his legs to relieve the pressure on his neck. After receiving the scissors from another officer, Gonzalez quickly cut the shoestrings. Lawler and Wiggins tumbled to the floor because she could not hold his full weight. The officers laid him on his back, began CPR, and called for an ambulance. EMTs took Lawler to the hospital, but he died the next day."

"To overcome the Officers' qualified-immunity defense, Lawler's father must establish two things. *See id.* at 399. He first must prove that the Officers violated the Constitution. He then must prove that the governing caselaw 'clearly established' the violation. *See District of Columbia v. Wesby*, 583 U.S. 48, 62–63 (2018); *Beck v. Hamblen County*, 969 F.3d 592, 598 (6th Cir. 2020). We may address these two requirements in the order that best suits the case. *See Beck*, 969 F.3d at 598–99 (citing *Pearson v. Callahan*, 555 U.S. 223, 236 (2009)). Here, given that the controlling legal rules have recently changed, we find it easiest to resolve the Officers' appeal by jumping immediately to the 'clearly established' requirement. We need not (and do not) decide whether the Officers violated today's legal rules because Lawler's father has not shown that they violated the rules in place when Lawler committed suicide. Qualified immunity thus insulates the Officers from this damages suit."

"Under this framework, we must identify the rules that governed in July 2018 when Lawler took his life. This inquiry starts by identifying the constitutional right at issue. Lawler was a pretrial detainee at the time of his death, meaning that a court had yet to try or punish him. Lawler's father thus cannot invoke the Eighth Amendment right against 'cruel and unusual punishments' because that right kicks in only after a conviction. U.S. Const. amend. VIII; *see Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979). Still, pretrial detainees like Lawler do have a Fourteenth Amendment right not to be 'deprive[d]' of their 'life' 'without due process of law.' U.S. Const. amend. XIV, § 1. And the Supreme Court has long held that the Due Process Clause offers protections to pretrial detainees that at least match those afforded convicted prisoners under the Eighth Amendment. *See County of Sacramento v. Lewis*, 523 U.S. 833, 849–50 (1998)."

"Having identified the right, we next must identify the claim at issue. This case implicates the legal rules that apply to claims that jail staff violated the Due Process Clause by failing to protect pretrial detainees from harm. These types of claims can arise in a variety of circumstances. Sometimes, a correctional officer might fail to protect the detainee from violence by other inmates. *Cf. Farmer v. Brennan*, 511 U.S. 825, 830 (1994). Other times, a prison doctor might fail to treat the detainee for a harmful medical condition. *Cf. Estelle v. Gamble*, 429 U.S. 97, 102–06 (1976). At still other times, jail staff might fail to thwart a detainee's suicide. *Cf. Downard ex rel. Downard v. Martin*, 968 F.3d 594, 598–99 (6th Cir. 2020)."

"In the Eighth Amendment context, the Supreme Court has held that the failure to protect prisoners from harm violates the ban on cruel and unusual punishment only if the prisoners prove both objective and subjective elements. *See Farmer*, 511 U.S. at 834." …

"Should these Eighth Amendment rules for failure-to-protect claims by prisoners extend to similar claims by pretrial detainees under the Due Process Clause? For years, we answered 'yes' to this question. *See Richmond v. Huq*, 885 F.3d 928, 937 (6th Cir. 2018); *Richko v. Wayne County*, 819 F.3d 907, 915 (6th Cir. 2016); *Napier v. Madison County*, 238 F.3d 739, 742 (6th Cir. 2001); *Barber v. City of Salem*, 953 F.2d 232, 235 (6th Cir. 1992)."

"But the ground underlying our traditional approach began to shift in 2015 when the Supreme Court decided *Kingsley v. Hendrickson*, 576 U.S. 389 (2015). That case concerned an excessive-force claim (not a failure-to-protect claim). *See id.* at 392–93. In the Eighth Amendment context, excessive-force claims also have objective and subjective components. *See Johnson v. Sootsman*, 79 F.4th 608, 615–16 (6th Cir. 2023). But the subjective element demands more than deliberate indifference. A correctional officer's use of force against a prisoner violates the Eighth Amendment only if the officer acted 'maliciously and sadistically to cause harm.' *Id.* at 616 (quoting *Wilkins v. Gaddy*, 559 U.S. 34, 37 (2010) (per curiam)). In *Kingsley*, the Court refused to extend this demanding Eighth Amendment test to a pretrial detainee's excessive-force claim. 576 U.S. at 400–02. The Court instead held that the Due Process Clause required pretrial detainees to show only that the force 'was objectively unreasonable.' *Id.* at 397."

"In the ensuing years, circuit courts disagreed over whether *Kingsley*'s decision to jettison the Eighth Amendment's subjective element for a pretrial detainee's excessive-force claim also modified the

subjective element for a pretrial detainee's failure-to-protect claim. *See Beck*, 969 F.3d at 601. In 2021, we sided with the courts that extended *Kingsley* to this failure-to-protect context. *See Brawner v. Scott County*, 14 F.4th 585, 591–97 (6th Cir. 2021). After initial disagreement over what *Brawner* required, we settled on a test that reduced *Farmer*'s subjective element from 'actual knowledge to recklessness.' *Helphenstine v. Lewis County*, 60 F.4th 305, 316 (6th Cir. 2023); *cf. Trozzi v. Lake County*, 29 F.4th 745, 757–58 (6th Cir. 2022). Today, officers can face liability even if they did not *actually know* of a risk of harm to a pretrial detainee. Pretrial detainees need only prove that the officers *recklessly disregarded* a risk so obvious that they either knew or should have known of it. *See Helphenstine*, 60 F.4th at 317."

"What do these recent legal changes mean for the claims here? The changes do not affect our resolution because Lawler's father must overcome qualified immunity's 'clearly established' prong. Our recent cases that depart from *Farmer* in this pretrial-detainee context came out between 2021 and 2023. Because they postdate Lawler's suicide, they do not clearly establish anything 'at the time' the Officers acted. *Kenjoh Outdoor*, 23 F.4th at 694. Admittedly, the Supreme Court decided *Kingsley* before Lawler took his life. But *Kingsley*, a decision about excessive force, did not clearly apply to this failure-to-protect context. The circuit split about *Kingsley*'s scope confirms this point. *See Beck*, 969 F.3d at 601. In short, our older decisions applying *Farmer* to the claims of pretrial detainees provide the only clearly established law in 2018."

"This difference matters. To be sure, the district court suggested that it need not decide whether *Brawner* modified *Farmer* because Lawler's father had created a genuine dispute of fact even under *Farmer*'s more demanding test. *See Lawler*, 2022 WL 4587171, at *4–5. But the court actually invoked *Brawner*'s more lenient test in all but name when applying the law to the facts. It reasoned that a jury could find that the Officers had '*recklessly* disregarded' a significant risk that Lawler would take his life. *Id.* at *5–6 (emphasis added). *Farmer*, however, requires the Officers to have '*consciously*' (not recklessly) disregarded that risk. 511 U.S. at 839 (emphasis added). That is, they must have 'draw[n] the inference' that the risk existed. *Id.* at 837. The district court thus applied the wrong law to deny the Officers qualified immunity."

"Given the date of the conduct at issue, we instead must apply *Farmer*'s standards."

"*Objective Element*. *Farmer*'s objective element generally requires inmates to show that they faced a 'substantial risk of serious harm' before they suffered an injury. 511 U.S. at 834. When this substantial risk of serious harm arises from a physical or mental impairment, the Court has added that 'serious medical needs' can satisfy this objective element. *Estelle*, 429 U.S. at 104; *see Phillips v. Tangilag*, 14 F.4th 524, 534 (6th Cir. 2021)."

"Adapting these standards to the suicide context, our cases have held that death by suicide amounts to a serious harm—indeed, the most serious of harms. *See Barber*, 953 F.2d at 239–40. Yet what facts create a 'substantial risk' that inmates will suffer this harm? *Farmer*, 511 U.S. at 834. We have repeatedly stated that the estates of deceased inmates can satisfy this element by showing that the inmates suffered from 'psychological needs' that led them to have 'suicidal tendencies.' *Horn v. Madison Cnty. Fiscal Ct.*, 22 F.3d 653, 660 (6th Cir. 1994); *see, e.g.*, *Baker-Schneider v. Napoleon*, 769 F. App'x 189, 192 (6th Cir. 2019); *Nallani v. Wayne County*, 665 F. App'x 498, 507 (6th Cir. 2016); *Broughton v. Premier Health Care Servs.*, 656 F. App'x 54, 56 (6th Cir. 2016); *Bonner-Turner v. City of Ecorse*, 627 F. App'x 400, 407–08 (6th Cir. 2015); *Jerauld ex rel. Robinson v. Carl*, 405 F. App'x 970, 975 (6th Cir. 2010); *Cooper v. County of Washtenaw*, 222 F. App'x 459, 465 (6th Cir. 2007); *Linden v. Washtenaw County*, 167 F. App'x 410, 416 (6th Cir. 2006); *Comstock v. McCrary*, 273 F.3d 693, 703–04 (6th Cir. 2001)."

"At the same time, we have yet to clarify what we mean by 'suicidal tendencies' or what types of words or actions qualify. Some cases suggest that an inmate's pre-suicide statements and conduct must reveal an objectively 'strong likelihood' that the inmate would try to commit suicide."

"*Subjective Element*. Most of our cases addressing inmate suicides instead turn on *Farmer*'s subjective element. This element requires an inmate to prove that an officer knew of the facts creating the substantial risk of serious harm. *Farmer*, 511 U.S. at 837. As noted, moreover, the inmate must also prove that the officer believed that this substantial risk existed. *Id.* And even if an officer knows of the substantial risk, the inmate must lastly show that the officer 'responded' to the risk in an unreasonable way. *Id.* at 844; *see Beck*, 969 F.3d at 601–02."

"This framework creates a 'demanding' test when an estate of a deceased inmate challenges an officer's failure to prevent a suicide. *Galloway*, 518 F. App'x at 335. After all, inmates often take their lives 'without warning,' so jail staff will find it 'difficult' to identify the inmates who pose substantial suicide risks. *Andrews v. Wayne County*, 957 F.3d 714, 717 (6th Cir. 2020) (quoting *Gray v. City of Detroit*, 399 F.3d 612, 616 (6th Cir. 2005)). To account for this unpredictability, we have held that an estate must prove more than that an officer knew of a '*possibility*' or 'even a *likelihood*' of the suicide. *Downard*, 968 F.3d at 601 (quoting *Galloway*, 518 F. App'x at 336). Rather, the officer must have believed that a 'strong likelihood' existed that the inmate would commit suicide. *Barber*, 953 F.2d at 240; *see Downard*, 968 F.3d at 601."

"How can an estate make this showing? Because the question concerns an officer's state of mind, an estate can prove this factual issue 'in the usual ways' that plaintiffs try to show a defendant's mindset in other contexts—with either direct or circumstantial evidence. *Farmer*, 511 U.S. at 842; *cf. Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99–100 (2003). In rare situations, direct evidence might show that a defendant knew an inmate would try to commit suicide. A jail doctor, for example, might have diagnosed the inmate as suicidal. *See Comstock*, 273 F.3d at 704; *see also Galloway*, 518 F. App'x at 333–34; *Perez*, 466 F.3d at 425; *Linden*, 167 F. App'x at 427."

"The facts of many other cases, by contrast, have fallen short. We, for instance, granted summary judgment to an officer even though she knew that the deceased inmate seemed despondent. *Downard*, 968 F.3d at 601–02; *see also Baker-Schneider*, 769 F. App'x at 193–94. Likewise, we granted summary judgment to medical staff even though they knew that the deceased inmate had been suffering from drug withdrawals and refusing medication and meals. *See Broughton*, 656 F. App'x at 57–58; *see also Stewart*, 821 F. App'x at 571–72; *Grabow*, 580 F. App'x at 310–11. And we granted summary judgment to a jail doctor who knew of an inmate's prior attempt to harm himself and recent suicidal thoughts because the inmate had said that he no longer felt suicidal. *See Nallani*, 665 F. App'x at 507–08; *see also Mantell*, 612 F. App'x at 303, 306–07; *Starcher v. Corr. Med. Sys., Inc.*, 7 F. App'x 459, 465 (6th Cir. 2001)."

"Under these clearly established rules, qualified immunity shields the Officers from liability here. We opt not to resolve the objective element given the uncertainty in our caselaw on what it requires. Nevertheless, Lawler's father lacks evidence from which a reasonable jury could find that the Officers believed there was a strong likelihood that Lawler would take his life. Section 1983 permits Lawler's father to hold each of the three Officers liable only for his or her own conduct, not for the conduct of the others under a vicarious-liability theory. *See Jane Doe v. Jackson Loc. Sch. Dist. Bd. of Educ.*, 954 F.3d 925, 934 (6th Cir. 2020). We thus will consider the evidence about each Officer's state of mind in turn. *See Stewart*, 821 F. App'x at 570."

"No reasonable jury could find that Futrell subjectively concluded that Lawler was strongly likely to kill himself. *See Downard*, 968 F.3d at 601. To begin with, Lawler's father has cited no direct evidence that Futrell believed that Lawler posed a significant suicide risk. To the contrary, the direct evidence all points in the opposite direction. Futrell interacted with Lawler only once when booking him into the jail weeks before his suicide. After speaking to him during that intake process, she decided that 'suicide wasn't on his mind' based on his 'demeanor and how [he was] talking[.]' Futrell Dep., R.92-6, PageID 2201, 2218. She thus testified to her belief that Lawler was not suicidal."

"We reach the same conclusion for Officer Wiggins. Until Wiggins saw Lawler hanging in Cell 90, no reasonable jury could find that she believed that Lawler was strongly likely to kill himself. *See*

Downard, 968 F.3d at 601. As with Futrell, Lawler's father has identified no direct evidence that Wiggins harbored the required state of mind. Rather, she testified that she never believed that Lawler would commit suicide because he always acted with 'bravado' and self-confidence around the jail staff. Wiggins Dep., R.92-16, PageID 3153."

"*Farmer*'s demanding state-of-mind requirement also forecloses the claim against Officer Gonzalez. According to Lawler's father, a jury could find *both* that Gonzalez believed that Lawler was committing suicide when he first looked into Cell 90 *and* that he responded unreasonably by continuing to take out the trash. For a third time, however, Lawler's father lacks direct evidence of Gonzalez's subjective knowledge. Generally, Gonzalez testified that '[s]uicide . . . never came to [his] mind when' he saw Lawler because Lawler was an 'outspoken guy' who 'liked to entertain.' Gonzalez Dep., R.92-37, PageID 4418. More specifically, he testified that he did not believe an 'emergency' existed when he peered into Cell 90. *Id.*, PageID 4436, 4447."

"According to Gonzalez's undisputed testimony, 'reasons unrelated to self-harm concerns' also could have explained Lawler's odd conduct. *Galloway*, 518 F. App'x at 336. Gonzalez thought that Lawler was simply 'upset from the altercation that had happened.' Gonzalez Dep., R.92-37, PageID 4438. In fact, the record is undisputed that it was 'common' for inmates to stand in the 'corner' of their cells if the inmates were 'angry' when officers came by. *Id.*, PageID 4447, 4462–63. It was also a 'trend' in the jail for inmates to put towels around their necks or heads. *Id.*, PageID 4409. And while Lawler had always seemed 'upbeat' when speaking with Gonzalez in the past, Gonzalez assumed that his earlier 'altercation' with the other inmate had left him in a dour mood. *Id.*, PageID 4421–22."

"Our conclusion that Lawler's father cannot hold the Officers liable under § 1983's qualified-immunity test says nothing about whether he could have held them liable under today's standards. It also 'says nothing about whether [the Officers'] conduct was proper as a matter of good policy.' *Johnson*, 79 F.4th at 622. And nothing we say here bars Tennessee or its jail administrators from holding correctional officers to more demanding standards of conduct as a matter of state law. *Cf*. *Farmer*, 511 U.S. at 837–38. But Lawler's father lacks the type of evidence that we have traditionally required to meet the stringent constitutional test that applied when Lawler tragically committed suicide. We thus reverse the district court's denial of qualified immunity to the Officers and remand for further proceedings consistent with this opinion."

6. Excessive force claim and failure to intervene claim – Plaintiff plead guilty to resisting arrest and then sued the officers involved and the municipality - Appeals court did not have jurisdiction in the interlocutory appeal to consider whether the claim conflicts with the plea of guilty to resisting arrest – Judicial estoppel claims fails - Our cases ask three questions when deciding whether a court should judicially estop a party (1) has the party taken a position in the current case that is clearly inconsistent with a position the party took in an earlier case, (2) did the earlier position prevail in the prior case and so create a perception that the prior court or the current court has been misled, and (3), would this flip-flopping give the party an unfair advantage or impose an unfair detriment on the other side? - Recent cases typically require a court to answer all three questions in the affirmative before estopping a party from taking the position in the second case - Factual basis to the plea of resisting was not inconsistent with this claim of excessive force – Duty to intervene – This court has long followed a two-part test to hold officers liable for failing to stop excessive force (1). An officer must have observed the force or had reason to know a colleague would use it and (2) the officer must have had both the opportunity and the means to stop it – At one extreme generally, an officer without forewarning generally will not have the ability to stop a colleague's force if the force continues for ten seconds or less, and at the other extreme an officer generally can stop ongoing force that lasts for a minute or more - A few other factors have been considered by the court including did the force continue unabated or occur at discrete moments, what were the observing officers doing during the encounter, did prior statements reveal the risk of force or did it come without warning

KAMEL CHANEY-SNELL v. ANDREW YOUNG; ANDREW TEICHOW

SIXTH CIRCUIT COURT OF APPEALS Nos. 22-1990/1992 Decided and Filed: April 15, 2024

"Deputy Andrew Young and Officer Andrew Teichow arrested Kamel Chaney-Snell during a search of his girlfriend's house. Chaney-Snell pleaded guilty to attempting to resist their arrest. But he now claims that, after he peacefully surrendered, Young punched him in the face and one of the officers kneed him in the back and dragged him across the floor. Chaney-Snell sued Young and Teichow under 42 U.S.C. § 1983, alleging excessive force and failure-to-intervene claims. The district court denied qualified immunity to both officers."

"Their appeals raise three questions. Question One: Must we accept Chaney-Snell's claim that Young gratuitously punched him despite Chaney-Snell's guilty plea for attempting to resist arrest? Young answers 'no' on the ground that Chaney-Snell's claim conflicts with his conviction. See Heck v. Humphrey, 512 U.S. 477, 486–87 (1994). At the least, Young argues, judicial estoppel bars Chaney-Snell's claim because it also conflicts with his admissions at his plea hearing. But we lack jurisdiction over Young's Heck claim, and his judicial-estoppel claim fails on the merits."

"Question Two: Does the Fourth Amendment allow officers to use unnecessary force on arrestees if the force qualifies as 'de minimis'? Young and Teichow concede that, under Chaney-Snell's allegations, one of them gratuitously kneed him in the back and dragged him on the floor. They nevertheless argue that this force falls below the minimum level required for an excessive-force claim. But our cases have long held that gratuitous force violates the Fourth Amendment even if the force is minor and causes no serious injury. And these cases comport with the common-law backdrop against which the Fourth and Fourteenth Amendments were enacted."

"Question Three: Has Chaney-Snell established a 'failure to intervene' theory of liability? Chaney-Snell seeks to hold the officer who did not employ the challenged force liable for failing to prevent it. Even under his allegations, however, this officer did not have a realistic opportunity to stop each of the quick and discrete actions. And while the district court decided to treat all of the actions as a single continuous use of force, our caselaw does not clearly establish that decision. Qualified immunity thus protects the officers from Chaney-Snell's failure-to-intervene claims."

"All told, we affirm in part, reverse in part, and dismiss in part for lack of jurisdiction."

"Chaney-Snell often stayed at his girlfriend's home in Port Huron, Michigan. In 2018, he began selling drugs from this home without his girlfriend's permission. These drug deals drew the attention of a drug task force operating in St. Clair County. A confidential informant working with the task force bought drugs from Chaney-Snell at his girlfriend's home in early 2019. That February, a task-force officer obtained a warrant to search her house."

"The task force executed the warrant on the evening of February 6. Deputy Young and Officer Teichow, two task-force members, participated in this search. The Port Huron Police Department had assigned Teichow to the task force, and the St. Clair County Sheriff's Department had assigned Young."

"At the time of the search, Chaney-Snell was at his girlfriend's home alone because she had gone to work. The parties tell drastically different stories of how Young and Teichow arrested Chaney-Snell while securing this home."

"We begin with the officers' account. According to Young and Teichow, an officer knocked on the front door and announced their presence. Nobody answered. So another officer rammed open the door. Young entered first, followed by Teichow. They encountered a second locked door because the homeowner had split the home into two units. Young kicked in the door. Officers then flooded the house shouting 'sheriff's department, search warrant, get on the ground.' Young Dep., R.30-7, PageID 726."

"As Young and Teichow made it to the dining area, they spotted Chaney-Snell in the living room. The officers screamed for him to 'get on the ground,' but he fled to a bedroom. Teichow Dep., R.30-6, PageID 697; Young Dep., R.30-7, PageID 727. The officers pursued him."

"When they entered the bedroom, they saw Chaney-Snell concealing himself in a closet. Chaney-Snell had his back to the officers, so they told him to show his hands. He did not comply. Young ran toward the closet while holstering his firearm. He pushed Chaney-Snell into the wall and onto the ground to handcuff him. When using this force, Young placed one hand on Chaney-Snell's back and the other on his face. Chaney-Snell hit the ground on the left side of his face and stomach. Young fell on top of him. But Chaney-Snell continued to struggle. Young struck Chaney-Snell with his knee a few times to get Chaney-Snell to place his arms behind his back. The officers then handcuffed him. Young patted Chaney-Snell down, and the officers walked him to a bed to sit on."

"Chaney-Snell recalls things differently. He did not hear the officers announce their presence because he was in a bedroom listening to 'loud' music on his headphones. Chaney-Snell Dep., R.30-4, PageID 568. But Chaney-Snell thought he heard a 'bang' when Young kicked open the second door. Id. The noise led Chaney-Snell to take off his headphones and stand up."

"At that time, two officers ran into the bedroom and shouted 'show me your hands.' Id., PageID 572. Chaney-Snell immediately raised his hands. Yet he says that an officer punched him in the left eye without warning. So Chaney-Snell covered his face and failed to comply with additional requests to raise his hands. But he eventually put them up again. The same officer then sucker punched him a second time in the same spot. Chaney-Snell fell to the ground. He recalls putting up no resistance as the officers handcuffed him. Right after they restrained him, Chaney-Snell could feel an officer kneeing him in the back using his full weight. An officer next dragged him across the bedroom floor by his ankles. The officers picked Chaney-Snell up, strip-searched him, and put him on the bed."

"Once Chaney-Snell made it to the bed, the parties' stories reconverge. The officers acknowledged that Chaney-Snell had an injury on his left eye and a rug burn on his right shoulder. Teichow added that Chaney-Snell said that 'he was having a hard time breathing' and asked for his asthma inhaler. Teichow Dep., R.30-6, PageID 702. Another officer gave ChaneySnell 'three puffs' from this inhaler. Chaney-Snell Dep., R.30-4, PageID 576. Paramedics checked on him, and an officer drove him to jail. A jail nurse sent Chaney-Snell to the hospital."

The hospital took several CT scans. Scans of Chaney-Snell's back and head showed no injuries, but an eye scan revealed what a doctor diagnosed as a 'minimal nondisplaced blowout fracture' to his left orbital bones. Records, R.35-7, PageID 1032. The doctor recommended that Chaney-Snell take Tylenol for any pain and discharged him."

"Chaney-Snell's encounter with Young and Teichow produced both criminal and civil proceedings. The State of Michigan criminally charged Chaney-Snell with possessing cocaine and resisting the officers. Chaney-Snell entered a plea agreement. As part of the deal, he agreed to plead guilty to the drug count and to attempting to resist the officers. At his plea hearing, he conceded that Young and Teichow had given him 'verbal commands to show them [his] hands' and that he had 'failed to comply' with their 'lawful' orders. Plea Tr., R.30-8, PageID 764–65. The state court accepted his plea. It sentenced him to six months' imprisonment."

"With his criminal proceedings behind him, Chaney-Snell pursued this civil case under 42 U.S.C. § 1983. He sued Deputy Young and his employer (St. Clair County), as well as Officer Teichow and his employer (the City of Port Huron). Chaney-Snell could not identify which officer did what. But he alleged that one officer used excessive force and that the other failed to intervene to stop this force, both in violation of the Fourth Amendment. He also asserted claims against St. Clair County and the City of Port Huron under Monell v. Department of Social Services, 436 U.S. 658 (1978)."

“All defendants moved for summary judgment. Discovery identified Young as the only officer who could have punched Chaney-Snell. But Young asked the district court to reject this allegation. He argued that the ‘Heck doctrine’ barred the claim because it contradicted Chaney-Snell’s conviction. See Heck, 512 U.S. at 486–87. He also argued that judicial estoppel barred the claim because it conflicted with Chaney-Snell’s admissions in open court. The district court disagreed. See Chaney-Snell v. Young, 2022 WL 4667942, at *3–4 (E.D. Mich. Sept. 30, 2022).”

“The district court also rejected Young’s and Teichow’s requests for qualified immunity. It held that Young would have violated clearly established law if he had punched a non-resisting Chaney-Snell. Id. at *5. It next turned to Chaney-Snell’s claim that, after he was restrained, an officer kneed him in the back and dragged him across the floor. Id. If true, the court held, this conduct also violated clearly established law. Id. The court separately held that the officer who did not use the force could face liability on a ‘failure to intervene theory.’ Id. But it granted summary judgment to the county and city on Chaney-Snell’s *Monell* claims. Id. at *6.”

“Deputy Young and Officer Teichow appealed. Their appeals require us to consider the three questions that we highlighted at the outset. We will address them in the same order.”

“*A. Question One: Must we accept Chaney-Snell’s testimony that Young gratuitously punched him despite Chaney-Snell’s conviction for attempting to resist arrest?*”

“While disputing Chaney-Snell’s factual allegations, Deputy Young recognizes that we generally must accept them at this stage. To his credit, Young also concedes that he would have violated clearly established law under Chaney-Snell’s facts. Still, Young argues that Chaney-Snell’s conviction for attempting to resist arrest allows us to reject his claim that Young punched him in the face. To support this theory, Young relies on the ‘Heck doctrine’ and judicial estoppel. But our interlocutory jurisdiction does not extend to his Heck claim. And his estoppel claim fails because Chaney-Snell has adequately reconciled his statements across the two cases.”
“
The *Heck* doctrine addresses a common situation: Criminal defendants often get convicted of a crime and then seek damages under § 1983 on the ground that public officials violated the Constitution while investigating or prosecuting the crime. What happens if a defendant’s damages suit under § 1983 would, if successful, ‘necessarily imply the invalidity of his conviction’? *Nance v. Ward*, 597 U.S. 159, 167 (2022) (quoting *Heck*, 512 U.S. at 487). In that event, *Heck* held, a criminal defendant must overturn the conviction on direct appeal or in habeas before seeking civil damages under § 1983. 512 U.S. at 486–87. The Court also offered an example of when this ‘*Heck* bar’ would apply: A defendant found guilty of resisting ‘a lawful arrest’ could not claim in a § 1983 suit that an officer’s excessive force had rendered the arrest unlawful unless a court vacated the resisting-arrest conviction. *Id*. at 486 n.6.”

We have since turned *Heck*’s example into a holding. See *Hayward v. Cleveland Clinic Found.*, 759 F.3d 601, 608–13 (6th Cir. 2014). In *Hayward*, a defendant pleaded guilty to violating an Ohio resisting-arrest law. *Id*. at 606. He then brought an excessive-force claim under § 1983. *Id*. We held that *Heck* barred this claim because the Ohio law allowed defendants to avoid guilt if officers used excessive force when effecting their arrests. *Id*. at 611–12. So a claim that officers used excessive force during an arrest implied the invalidity of the resistingarrest conviction. *Id*.

“… In 2012, the Michigan Supreme Court overruled the state decision (*Ventura*) on which Schreiber relied for its conclusion. *See People v. Moreno*, 814 N.W.2d 624, 625 (Mich. 2012). *Moreno* held that the resisting-arrest statute required prosecutors to prove that the police had made a lawful arrest. *See id*. at 626–34. Given *Moreno*, Young argues, the claim that he used excessive force to arrest Chaney-Snell implies the invalidity of Chaney-Snell’s conviction. And while we have favorably cited *Schreiber* in two unpublished opinions after *Moreno*, neither identified *Moreno*’s change in law or discussed how it affects our *Heck* analysis. See *Sevenski v. Artfitch*, 2022 WL 2826818, at *5 n.4 (6th Cir. July 20, 2022); *Ruemenapp v. Oscoda Township*, 739 F. App’x 804, 809–10 (6th Cir. 2018).”

"Young raises an important question about the scope of *Heck* that warrants a reasoned answer at the proper time. But we can provide that answer only in an appeal where we have jurisdiction to consider the issue. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–102 (1998). And we lack jurisdiction to address the argument now."

"Start with the jurisdictional basics. With a few exceptions, Congress has granted circuit courts jurisdiction to review only 'final decisions of the district courts[.]' 28 U.S.C. § 1291. The phrase 'final decisions' generally covers only those orders that end the litigation. *See Hall v. Hall*, 584 U.S. 59, 64 (2018). Young does not argue that the district court's order denying summary judgment meets this usual definition. To the contrary, the court set the case for trial."

"… [W]e can give 'meaningful review' to the district court's denial of qualified immunity without addressing its *Heck* ruling. *Swint*, 514 U.S. at 51. Unlike an appealable decision that relies on an earlier unappealable order, *see Chambers*, 145 F.3d at 797, the district court's qualified-immunity denial did not adopt any part of its *Heck* reasoning. That fact should not come as a surprise because the *Heck* inquiry and the qualified-immunity inquiry follow 'separate and distinct legal standards.' *Summers*, 368 F.3d at 889–90."

"The great weight of authority confirms our conclusion. Many courts hold that they lack jurisdiction over *Heck* claims in qualified-immunity appeals." …

"Indeed, a *Heck* ruling for Young would conflict with the qualified-immunity ruling he seeks. When *Heck* bars a § 1983 claim against an officer, the court should dismiss the claim without prejudice so that the § 1983 plaintiff may refile the suit if a court later invalidates the prior conviction. *See Johnson v. Rogers*, 944 F.3d 966, 968 (7th Cir. 2019); *Wheeler v. Dayton Police Dep't*, 807 F.3d 764, 767 (6th Cir. 2015); *Amaker v. Weiner*, 179 F.3d 48, 52 (2d Cir. 1999). When qualified immunity bars a § 1983 claim, the court should dismiss the claim with prejudice to any later refiling. *See Johnson*, 944 F.3d at 968." …

"… Whatever *Heck*'s nature, we hold only that we lack pendent appellate jurisdiction over Young's *Heck* claim under our traditional standards for deciding whether that jurisdiction exists.

"Deputy Young next relies on judicial estoppel to bar Chaney-Snell's claim that Young punched him after he surrendered. Judicial estoppel bars litigants from 'playing fast and loose with the courts' by asserting one position in one case and the opposite position in a later case. *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (citation omitted); *Mirando v. U.S. Dep't of Treasury*, 766 F.3d 540, 545 (6th Cir. 2014). This doctrine applies, Young asserts, because Chaney-Snell's admissions in his criminal case conflict with his statements in this civil suit."

"… Young's judicial-estoppel claim fails on the merits. Our cases ask three questions when deciding whether a court should judicially estop a party. See *Mirando*, 766 F.3d at 545. First, has the party taken a position in the current case that is 'clearly inconsistent' with a position the party took in an earlier case? *Id.* (quoting *New Hampshire*, 532 U.S. at 750). Second, did the earlier position prevail in the prior case and so create a perception that the prior court or the current court has been misled? *See id.* And third, would this flip-flopping give the party an 'unfair advantage' or impose an 'unfair detriment' on the other side? *Id.* (quoting *New Hampshire*, 532 U.S. at 751). Although courts have discretion when deciding whether to invoke judicial estoppel, *New Hampshire*, 532 U.S. at 750, our recent cases typically require a court to answer all three questions in the affirmative before estopping a party from taking the position in the second case. Compare *Shufeldt v. Baker, Donelson, Bearman, Caldwell & Berkowitz, PC*, 855 F. App'x 239, 243–47 (6th Cir. 2021), and *In re Berge*, 953 F.3d 907, 922 (6th Cir. 2020), with *Han v. Hankook Tire Co.*, 799 F. App'x 347, 349–50 (6th Cir. 2020), and *Mirando*, 766 F.3d at 546–48.

"In this case, our analysis can begin (and end) with the first factor, which requires a party to have taken 'clearly inconsistent' positions. *New Hampshire*, 532 U.S. at 750 (citation omitted). For shifting claims to satisfy this factor, a party must have made two impossible-to reconcile statements. Judicial estoppel does not apply if the party can explain why its current position comports with a (perhaps ambiguous) prior position. See *Butler v. United Healthcare of Tenn., Inc.*, 764 F.3d 563, 570 (6th Cir. 2014); *Lorillard Tobacco Co. v. Chester, Willcox & Saxbe, LLP*, 546 F.3d 752, 758 (6th Cir. 2008); *Griffith v. Wal-Mart Stores, Inc.*, 135 F.3d 376, 382 (6th Cir. 1998)."

"Young cannot satisfy this test because Chaney-Snell's testimony in this § 1983 case does not plainly contradict the perfunctory admissions he made when pleading guilty. See *New Hampshire*, 532 U.S. at 750. Start with his criminal case. During his plea colloquy, Chaney-Snell pleaded guilty to 'attempted resisting and obstructing a police officer[.]' Plea Tr., R.30-8, PageID 760, 763. He then admitted 'what [he] did that [made him] guilty' of this crime. Id., PageID 764. Chaney-Snell conceded that 'at some point' after Young and Teichow entered his girlfriend's house, he was 'given some verbal commands to show them [his] hands[.]' Id., PageID 765. And he conceded that he 'failed to comply with . . . the lawful command of' one of the officers. *Id.*"

"Now turn to this § 1983 case. During his deposition, Chaney-Snell admitted that he heard the officers shout 'show me your hands' when they confronted him. Chaney-Snell Dep., R.30-4, PageID 571–72. He next claimed that he raised his hands but that Young punched him. Id., PageID 573. This force led Chaney-Snell to put his hands down, so the officers demanded that he 'put [his] hands up' again. *Id.* He conceded that he disobeyed this second command and that the officers had to give the same order more than once. *Id.* When he admitted at his plea hearing that he did not follow the officers' commands, Chaney-Snell suggested at his deposition that he was referring to this point in the encounter. *Id.*, PageID 571–73, 605–06."

"While tension might exist between Chaney-Snell's statements across the two cases, he has reconciled them enough to avoid a 'clearly inconsistent' finding. *See Lorillard Tobacco*, 546 F.3d at 758. At his plea hearing, he admitted both that the officers at 'some' unidentified 'point' told him to show his hands and that he 'failed to comply with . . . the lawful command of' one of the officers. Plea Tr., R.30-8, PageID 765. At his deposition, he clarified that this point occurred after Young had punched him and when the officers were shouting for him to raise his hands a 'second time.' Chaney-Snell Dep., R.30-4, PageID 605. 'Regardless of the merits of' Chaney-Snell's allegations in this civil case, they reconcile his statements across the two cases. *Lorillard Tobacco*, 546 F.3d at 758. And while Chaney-Snell might 'find it difficult to convince a jury' that he would plead guilty to resisting arrest in light of Young's alleged actions, we do not assess his credibility at this stage. *Gambrel*, 25 F.4th at 404; see *Schreiber*, 596 F.3d at 333."

"*B. Question Two: Does the Fourth Amendment permit officers to use unnecessary force on arrestees if the force qualifies as 'de minimis*?"

"Unable to rebut Chaney-Snell's allegations about the punches, Deputy Young turns to Chaney-Snell's allegations that an officer kneed him in the back and dragged him across the floor. Young does not assert that *Heck* bars these uses of force, presumably because they allegedly occurred after the officers arrested him. *See Hayward*, 759 F.3d at 611–12. Rather, Young and Officer Teichow both argue that the district court wrongly denied them qualified immunity even accepting Chaney-Snell's allegations. The Supreme Court's caselaw leaves no doubt that we have jurisdiction over this qualified-immunity issue. *See Plumhoff v. Rickard*, 572 U.S. 765, 771–73 (2014). Even so, neither the Fourth Amendment nor our caselaw support their position."

"To defeat the officers' qualified-immunity defense, Chaney-Snell 'must prove two things.' *Gambrel*, 25 F.4th at 399. He first must show that the officers violated the Fourth Amendment. *Id.* He then must show that our law clearly established this violation at the time of his arrest. *Id.*

"The officers raise a unique qualified-immunity defense to sidestep our caselaw. We have repeatedly held that the police violate the Fourth Amendment if they use 'gratuitous' force on an arrestee who has surrendered and poses no threat. *Gambrel*, 25 F.4th at 402 (quoting *Shreve v. Jessamine Cnty. Fiscal Ct.*, 453 F.3d 681, 688 (6th Cir. 2006[.] ... Because we must accept Chaney-Snell's allegations that he had peaceably surrendered before he was kneed and dragged, the officers do not challenge his claim that they used 'gratuitous' force. *Morrison*, 583 F.3d at 407 (citation omitted)."

"Rather, they argue that they did not violate the Fourth Amendment for a different reason: because ''the Constitution is not concerned'' with the 'de minimis level of force' that ChaneySnell alleges. Young Appellant's Br. 30 (quoting *Hanson v. Madison Cnty. Det. Ctr.*, 736 F. App'x 521, 530 (6th Cir. 2018)). Under the officers' proposed rule, the Fourth Amendment exempts gratuitous force that falls below a minimum threshold. They further claim that Chaney-Snell's alleged force (kneeing and dragging an arrestee) does not reach the required level."

"This claim lacks merit. For starters, the officers propose a broad-brush rule that de minimis force falls outside the *entire Constitution*. But this case involves a *specific constitutional provision*: the Fourth Amendment. That amendment does not expressly distinguish de minimis force from major force. It instead gives 'the people' a 'right' 'to be secure in their persons . . . against unreasonable . . . seizures[.]' U.S. Const. amend. IV. All agree that the officers 'seized' Chaney-Snell when they successfully arrested him. *See Torres v. Madrid*, 592 U.S. 306, 311–18 (2021)."

"As a result, the officers' proposed de minimis rule turns on the word 'unreasonable.' When interpreting this adjective, the Supreme Court has sometimes looked to the common-law rules governing police conduct. *See Lange v. California*, 141 S. Ct. 2011, 2022 (2021). But when the Court has found no 'precise guidance' in history, it has turned to a balancing of the interests at stake. *Riley v. California*, 573 U.S. 373, 385–86 (2014). Either way, the officers' rule falls short."

"… The Supreme Court typically follows its balancing approach when analyzing excessive-force claims, so we begin there. *See Graham v. Connor*, 490 U.S. 386, 396 (1989); *Tennessee v. Garner*, 471 U.S. 1, 7–8 (1985). This approach requires courts to weigh an officer's reasons for the force against an arrestee's interest in avoiding it. *See Phelps*, 286 F.3d at 301. Courts must undertake this balancing 'from the perspective 'of a reasonable officer'' who knows that dangerous encounters often require 'split-second' decisions. *Plumhoff*, 572 U.S. at 775 (quoting *Graham*, 490 U.S. at 396–97). And courts must engage in an objective review of all the circumstances, not a subjective review of an officer's motives. *See Graham*, 490 U.S. at 397."

"This balance of interests favors Chaney-Snell under his factual allegations. First consider the public interests of Young and Teichow. The officers undoubtedly had important safety concerns that justified detaining Chaney-Snell during the search of his girlfriend's home. *See Muehler v. Mena*, 544 U.S. 93, 98 (2005). And their right to detain Chaney-Snell gave them the subsidiary right to use the 'physical coercion or threat thereof' required to 'effect' his detention. *Graham*, 490 U.S. at 396. Yet, under the version of events that we must accept, the officers had already detained Chaney-Snell when Young kneed him in the back and an officer dragged him across the floor. The officers thus have not identified any 'legitimate government interest' for these additional uses of force. *Morrison*, 583 F.3d at 404."

"Now consider Chaney-Snell's private interests. Admittedly, he alleges that this modest force caused minor injuries: an asthma attack from the kneeing and a rug burn from the dragging. But we have 'never imposed a *de minimis* injury' exception to our longstanding rule that the use of gratuitous force on an incapacitated arrestee renders a seizure unreasonable. *Reed*, 80 F.4th at 750. To the contrary, we have consistently rejected claims that officers could escape liability for similar levels of force on the ground that it caused minor injuries. *See Miller*, 606 F.3d at 253– 54; *Ingram v. City of Columbus*, 185 F.3d 579, 597 (6th Cir. 1999). Two examples prove this point. We have held that an officer used excessive force when he repeatedly pushed a detained woman's face into the ground to prevent her from talking, even though this force caused just a 'minor scratch[.]' *Morrison*, 583 F.3d at 406–07. And we have held that an officer used excessive force when he slapped a detained high-school student for

talking back to the officer, without considering whether the slap caused any injury. *Pigram*, 199 F. App'x at 511, 513–14."

"This case should be no different. Even if we could describe the force that Chaney-Snell alleges as a 'marginal intrusion,' *Mena*, 544 U.S. at 99, it was an intrusion all the same. And Teichow and Young point to no interest on the other side to counterbalance this intrusion. Under Chaney-Snell's alleged facts, then, the balance has a clear winner."

"… In sum, no matter how we approach this question, Young and Teichow have not shown that the force alleged in this case fell into a de minimis exception to our traditional rule that the Fourth Amendment bars the use of gratuitous force on neutralized arrestees."

"The officers' contrary arguments do not change things. They first point out that ''[n]ot every push or shove, even if it may later seem unnecessary in the peace of the judge's chambers,' violates the Fourth Amendment.' *Graham*, 490 U.S. at 396 (citation omitted). According to Young and Teichow, this sentence from Graham excludes minor force like a 'push' or 'shove' from the Fourth Amendment's reach. Not so. The Court was merely clarifying that judges should give officers leeway over whether force was necessary; it was not holding that judges should give officers a free pass to wield unnecessary force that falls below some threshold."

"… To begin with, our cases have 'clearly established that an officer may not use additional gratuitous force once a suspect has been neutralized.' *Morrison*, 583 F.3d at 408 (citation omitted); *Shreve*, 453 F.3d at 688. We have stated this legal rule at a specific-enough level of generality for purposes of this case because 'the unlawfulness' of the gratuitous force that Chaney-Snell alleges 'follow[s] immediately from [our] conclusion that [the rule is] firmly established.' *Wesby*, 583 U.S. at 64 (citation omitted). In addition, our cases addressing similar levels of force put Young and Teichow 'on notice' that the alleged conduct violated the Fourth Amendment. *Rivas-Villegas*, 595 U.S. at 6. As one example, *Morrison*—the case in which an officer pushed an arrestee's 'face into the ground' and caused a 'minor scratch'—unambiguously shows that minor force causing a minor injury can violate the Fourth Amendment. 583 F.3d at 406, 408; *see Miller*, 606 F.3d at 252–54."

C. Question Three: Has Chaney-Snell established a 'failure to intervene' theory of liability?

"Officer Teichow lastly argues that qualified immunity protects him from the claim that he failed to stop Deputy Young from punching Chaney-Snell in the face and kneeing him in the back. And because the record leaves unclear which officer dragged Chaney-Snell, Young and Teichow both seek qualified immunity for the claim that they failed to stop this final use of force. This argument fares better than their others. A reasonable officer could have believed that these fleeting uses of force did not last long enough to trigger any duty to intervene. So Chaney-Snell's claims fail at step two of the qualified-immunity analysis."

"Since *Bruner v. Dunaway*, 684 F.2d 422 (6th Cir. 1982) (per curiam), however, we have held that an officer who fails to intervene to prevent another officer's excessive force can face liability for that force under § 1983. *Id.* at 425–26; *see Goodwin v. City of Painesville*, 781 F.3d 314, 328–29 (6th Cir. 2015); *Durham v. Nu'Man*, 97 F.3d 862, 866–68 (6th Cir. 1996). That said, our cases leave the source of this failure-to-intervene theory unclear. Two possible sources exist. On the one hand, a constitutional amendment might enshrine this duty to intervene in our fundamental charter. But which amendment? The Fourth Amendment protects only against 'unreasonable' 'seizures'; its text does not obviously cover the failure to stop such seizures."

"Perhaps one day we will have to identify the source of this failure-to-intervene claim when deciding its proper scope. Cf. White v. Goforth, 2023 WL 3546527, at *3 (6th Cir. May 18, 2023). But today is not the day. Whatever the claim's source, we have long followed a two-part test to hold officers liable for failing to stop excessive force. *Turner v. Scott*, 119 F.3d 425, 429 (6th Cir. 1997). An officer must have

'observed' the force 'or had reason to know' a colleague would use it. *Id.* And the officer must have 'had both the opportunity and the means' to stop it. *Id.*"

"The parties debate only the second part of our test here. To establish that part, a plaintiff generally must show that the primary wrongdoer used the force for a 'long enough' time that the observing officer had a realistic chance to end it. *Pelton v. Perdue*, 731 F. App'x 418, 426 (6th Cir. 2018). How long is 'long enough'? Our caselaw offers guidance at the extremes."

"At one extreme, an officer without forewarning generally will not have the ability to stop a colleague's force if the force continues for 'ten seconds or less[.]' *Pineda*, 977 F.3d at 493 (quoting *Alexander v. Carter ex rel. Byrd*, 733 F. App'x 256, 265 (6th Cir. 2018)). So officers could not face liability for a colleague's quick blow to the head or shove into a wall. *See id.* at 487, 493; *Turner*, 119 F.3d at 427, 429–30; *Bonner-Turner v. City of Ecorse*, 627 F. App'x 400, 403–04, 412 (6th Cir. 2015); *Amerson v. Waterford Township*, 562 F. App'x 484, 487, 489–90 (6th Cir. 2014). Officers also could not face liability for a colleague's 'takedown' that lasted no 'more than ten seconds[.]' *Burgess*, 735 F.3d at 475–76; *see LaPlante v. City of Battle Creek*, 30 F.4th 572, 582 (6th Cir. 2022); *Pelton*, 731 F. App'x at 426. They could not face liability for a colleague's decision to tase or shoot a suspect when this force ended in seconds. *See Pennington v. Terry*, 644 F. App'x 533, 548 (6th Cir. 2016); *Kowolonek v. Moore*, 463 F. App'x 531, 539 (6th Cir. 2012); *Murray-Ruhl v. Passinault*, 246 F. App'x 338, 347–48 (6th Cir. 2007). And they could not face liability for a colleague's decision to drive a police car into a suspect in 'six to seven seconds.' *Ontha v. Rutherford County*, 222 F. App'x 498, 506–07 (6th Cir. 2007)."

"At the other extreme, an officer generally can stop ongoing force that lasts for a minute or more. So officers could face liability when they watched colleagues continuously beat a suspect for anywhere from 90 seconds to 10 minutes. *Grinnell v. City of Taylor*, 2022 WL 1562291, at *6–7 (6th Cir. May 18, 2022); Durham, 97 F.3d at 868; *see Parnell v City of Detroit*, 786 F. App'x 43, 45–46, 51–52 (6th Cir. 2019); *McHenry v. Chadwick*, 896 F.2d 184, 186, 188 (6th Cir. 1990). They could face liability when they saw a colleague kneel on a suspect's back for over a minute. *See Kulpa ex rel. Kulpa v. Cantea*, 708 F. App'x 846, 849, 854 (6th Cir. 2017); *Laury v. Rodriguez*, 659 F. App'x 837, 847–48 (6th Cir. 2016). And they could face liability when they witnessed a colleague choking a suspect or pinning him against a car for many minutes. *See Brigg v. Miles*, 2017 WL 2174252, at *3–4 (6th Cir. Mar. 6, 2017) (order); *Ortiz ex rel. Ortiz v. Kazimer*, 811 F.3d 848, 851, 853 (6th Cir. 2016)."

"Our decision in *Goodwin* sits between these poles. There, officers entered a home to arrest a suspect. 781 F.3d at 319. One of them fired a taser at him. *Id.* Falling to the ground, the suspect began to convulse as the taser's 'current ran through him.' *Id.* The officer nevertheless kept the taser activated for 21 seconds. *Id.* During this time, other officers merely tried to handcuff the convulsing suspect without asking their colleague to stop. *Id.* And after the colleague finally ended the first tasing, he tased the suspect for another five seconds. *Id.* We held that the observing officers could have done something to end the 'prolonged' 21-second tasing. Id. at 328–29."

"Aside from the length of the force, we have considered a few other data-points to decide whether an officer could have prevented it. For example, did the force continue unabated or occur at 'discrete' moments? *Well v. City of Dearborn Heights*, 538 F. App'x 631, 634–35, 640 (6th Cir. 2013). Plaintiffs will have a more difficult time showing that an officer could have put an end to short and distinct episodes as compared to 'ongoing conduct.' *Compare Barton v. City of Lincoln Park*, 726 F. App'x 361, 366–67 (6th Cir. 2018), with *Goodwin*, 781 F.3d at 328–29. Next, what were the observing officers doing during the encounter? Plaintiffs will also have a more difficult time showing that officers could have ended force if they were distracted by other duties rather than merely looking on. *Compare Wright v. City of Euclid*, 962 F.3d 852, 872 (6th Cir. 2020), and *Smith v. City of Troy*, 874 F.3d 938, 945–46 (6th Cir. 2017) (per curiam), *with Kulpa*, 708 F. App'x at 849, 854. Lastly, did prior statements reveal the risk of force or did it come without warning? Plaintiffs will have an easier time holding officers liable for a short use of force if the officer who engaged in it signaled an intent to do so ahead of time.

Compare Kent v. Oakland County, 810 F.3d 384, 388–89, 397 (6th Cir. 2016), *with Amerson*, 562 F. App'x at 489–90."

"Chaney-Snell alleges three failure-to-intervene claims: (a) that Teichow should have stopped Young from punching him; (b) that Teichow should have stopped Young from kneeing him; and (c) that one officer should have stopped the other from dragging him. Qualified immunity protects the officers from all three claims because a reasonable officer could believe that each incident ended too quickly to trigger 'a duty to intercede.' *Barton*, 726 F. App'x at 367."

"*a. Punches*. To start, Teichow lacked an opportunity to stop Young from hitting ChaneySnell twice in the face. Our cases leave no doubt about this result for the first punch. Young threw that punch 'quickly and without any forewarning.' *Amerson*, 562 F. App'x at 490."

"We reach the same result for the second punch. To be sure, Chaney-Snell testified that this punch came more than an 'instant' after the first (although he could not 'put a definite time' on the interlude). Chaney-Snell Dep., R.30-4, PageID 613. This factual allegation distinguishes our cases holding that an officer could not have stopped two blows in rapid succession. See *Amerson*, 562 F. App'x at 489–90. But the allegation also shows that Young did not employ 'ongoing' force. *Barton*, 726 F. App'x at 367 (citation omitted). And unlike in *Goodwin*, Chaney-Snell conceded that Young himself had immediately 'stopped' the force after the first punch. Chaney-Snell Dep., R.30-4, PageID 608. So the second punch came just as much out of the blue as the first one. Young said nothing to suggest that he might punch Chaney-Snell a second time. *Cf. Kent*, 810 F.3d at 388–89. He merely asked Chaney-Snell two more times to put up his hands. Chaney-Snell Dep., R.30-4, PageID 608, 613. Chaney-Snell thus conceded that he did not 'think' Young would 'punch [him] for a second time' if he reraised his hands and that he had 'no idea' this strike would occur. Id., PageID 609, 613. If even Chaney-Snell could not predict that Young would use this additional force, how could Teichow both 'perceive what' was about to happen and 'intercede to stop it'? *Barton*, 726 F. App'x at 366. ChaneySnell does not say."

b. Kneeing. The record likewise shows that a reasonable officer could have concluded that Young did not leave his knee in Chaney-Snell's back long enough to require Teichow to intervene. When Chaney-Snell fell to the ground following the second punch, Chaney-Snell alleges, he 'put [his] hands behind [his] back' and the officers handcuffed him. Chaney-Snell Dep., R.30-4, PageID 575, 609. Immediately after the handcuffing, an officer (Young) allegedly 'had his knee' in Chaney-Snell's back putting pressure on Chaney-Snell with his 'body weight[.]' Id., PageID 575. Chaney-Snell told this officer that he could not 'breathe' and was 'about to run out of breath' due to his asthma. Id., PageID 577–78. The officer got up at some point. Id., PageID 575."

"For present purposes, the key question concerns the length of this 'kneeing.' No reasonable jury could find that it continued for anything more than the 'ten seconds' that we have found insufficient to allow another officer to intervene. **Alexander**, 733 F. App'x at 265." …

c. Dragging. The same timing issue dooms Chaney-Snell's final claim. After Young got off Chaney-Snell's back, Chaney-Snell alleges, 'somebody grabbed' him by the 'ankles' and 'dragged' him on his 'right shoulder.' Chaney-Snell Dep., R.30-4, PageID 575. Chaney-Snell estimated that the wrongdoer dragged him from the foot of the bed to the doorway of the small bedroom—far 'enough for [his] arm to scrape' against the carpet. Id., PageID 611. While Chaney-Snell could not put 'an amount of seconds' on this dragging, he conceded it was 'quick[.]' Id., PageID 613. Given the bedroom's small size and Chaney-Snell's concession, no reasonable jury could find that the blameworthy officer dragged him for more than a few feet over a few seconds. In these circumstances, a reasonable officer could have concluded for a final time that the officer lacked enough time to intercede to stop the force. See *Alexander*, 733 F. App'x at 265."

"If each use of force happened so fast, how could the district court deny qualified immunity on these failure-to-intervene claims? Its decision rested on a legal error about qualified immunity's second step.

The court treated all the challenged actions (the two punches, the kneeing, and the dragging) as one 'ongoing' use of force rather than as 'discrete' episodes. *Wells*, 538 F. App'x at 640. The court thus relied on the length of the entire encounter to conclude that the observing officer (primarily Teichow) had a 'long enough' time to prevent seemingly all the applications of force. *Pelton*, 731 F. App'x at 426; *see Chaney-Snell*, 2022 WL 4667942, at *5. Yet the only case on which it relied to combine the separate actions in this way—*Goodwin*—considered the continuous use of a taser for 21 seconds. *Chaney-Snell*, 2022 WL 4667942, at *5; *see Goodwin*, 781 F.3d at 329. This case, by contrast, involves different types of 'fleeting' acts. *Wells*, 538 F. App'x at 640. When should a court treat distinct acts at different times as a single episode of continuous force? Perhaps the answer should depend on whether Young's earlier actions (say, the two punches) sufficed to alert a reasonable officer that Young might engage in other types of force (say, the dragging) when completing the arrest. In the end, though, we need not answer this question. Because *Goodwin*'s facts do not resemble this case's facts, Chaney-Snell has identified no 'clearly established Fourth Amendment' law that compelled the district court's conclusion. *White*, 2023 WL 3546527, at *6. So the officers are entitled to qualified immunity. *See id.*; *Barton*, 726 F. App'x at 367."

7. Qualified immunity denied - Plaintiff was released from prison following a habeas corpus petition - plaintiff sued defendant detective fabrication of evidence, malicious prosecution and failure to produce exculpatory evidence as required by *Brady* - Jury could find detective fabricated evidence - Claims stemming from a plaintiff's seizure and continued detention based on purportedly false or fabricated evidence presented by law enforcement fall under the broad umbrella of malicious prosecution and are rooted in the protections afforded by the Fourth Amendment - Such claims require a plaintiff to prove that: (1) the defendant made, influenced, or participated in the decision to prosecute the plaintiff; (2) there was no probable cause for the prosecution; (3) as a consequence of the legal proceedings, the plaintiff suffered a deprivation of liberty apart from the initial arrest; and (4) the criminal proceeding was resolved in the plaintiff's favor -And while actual malice is not required to succeed on a malicious prosecution claim, a defendant must have made deliberate or reckless falsehoods; mere negligence will not create liability - The fact that an officer did not make the decision to prosecute does not per se absolve the officer from liability - Liability, for instance, extends to an officer who included falsehoods in his investigatory materials, knowing that prosecutorial reliance is likely, where those materials actually influenced the prosecutor's ultimate decision to bring charges - City was dismissed by plaintiff prior to hearing

HATTIE TANNER v. DAVID A. WALTERS
SIXTH CIRCUIT COURT OF APPEALS No. 22-1963 Decided and Filed: April 15, 2024

"After serving seventeen years in prison for murder, Plaintiff Hattie Tanner gained her freedom when this court granted her habeas relief and set aside her conviction, finding that it lacked sufficient evidentiary support. Once released from custody, Tanner filed a lawsuit under 42 U.S.C. § 1983 against Defendant David Walters, a since-retired police detective who she says violated her constitutional rights by falsifying investigation reports and testifying falsely to obtain her wrongful conviction. Walters moved for summary judgment based on qualified immunity, which the district court granted in part and denied in part. Specifically, the district court found that Tanner's claims for fabrication of evidence and malicious prosecution should proceed to trial. Walters now appeals the district court's partial denial of his motion. For the reasons that follow, we AFFIRM."

"The facts underlying Tanner's murder conviction were well documented in this court's prior decision granting her habeas relief. *See Tanner v. Yukins*, 867 F.3d 661, 663 (6th Cir. 2017). Here, we limit our discussion to the facts pertinent to the issues raised in this appeal. In the early morning hours of March 22, 1995, Sharon Watson was fatally stabbed at Barney's Bar and Grill in Calhoun County, Michigan. *Id.*; *see also People v. Tanner*, 660 N.W.2d 746, 751 (Mich. Ct. App. 2003). Watson was a bartender at Barney's who was attacked during an apparent robbery. *Tanner*, 867 F.3d at 663. Walters, who was then employed by the Battle Creek Police Department ('BCPD'), was the lead detective assigned to Watson's murder. He investigated Tanner, Dion Paav, and Robert Cady as primary suspects for Watson's

death. *Id.* at 664. As part of his investigation, Walters interviewed Tanner twice within a couple of months of the murder."

"*First Tanner Interview*. Walters first questioned Tanner on May 24, 1995, in an investigation room at the police department. Walters recorded the interview and later completed a summary report about it. The transcript of the interview indicates that many of Tanner's words were inaudible. In addition to equipment issues the detective bureau was experiencing at the time, there is some indication that Tanner spoke in a manner and speed that may have been difficult to understand. Despite these hurdles, Walters understood Tanner well enough to engage her in dialogue for at least half an hour."

"The following is a summary of the pertinent parts of the May 24 interview. Tanner stated toward the beginning of the interview that she had not been to Barney's in about three years. She relayed that Cady, her long-time friend, had visited her home in the hours leading up to the murder. She and Cady decided to drive around in Cady's car to search for drugs. After about 30 minutes of driving, their search paid off and they returned to Tanner's home to get high. Tanner relayed that Cady later left her home to go cash a check for money to buy more drugs. Walters then repeatedly asked Tanner whether she rode in the car with Cady that night to cash the check. Consistent with her later trial testimony on this point, Tanner maintained that she did not."

"During the interview, Walters also showed Tanner a picture of the murder weapon and asked if she had seen it before. Tanner responded that she was not sure but thought it 'look[ed] like one of [her] knives.' (R. 93-6, PageID 783). Walters asked Tanner if it was her knife and she indicated that it was not. He then asked if she '[c]ould . . . have ever had a knife like that,' and Tanner responded that she 'used to have something like that (INAUDIBLE) in [her] back pocket.' (*Id.* at 784). A short time later, Walters asked Tanner whether she killed Watson. Tanner denied doing so and stated that she did not 'even know her' or 'what [Watson] look[ed] like.' (*Id.*)."

"At the end of the interview, Walters also asked Tanner if he would find her fingerprints on the knife he had shown her or in Barney's and she responded, 'No.' (*Id.* at 786). Tanner explained that someone had called and told her about the murder the night it happened, but that she was not aware that it had just happened or even where it occurred."

"*Second Tanner Interview*. Walters interviewed Tanner again about two weeks later, on June 7, 1995. This time, Walters talked to Tanner while he and another BCPD detective, David Adams, drove her to a scheduled polygraph examination. Walters did not tape this interview or ask Tanner to provide a written statement afterwards. He did, however, summarize his account of the interview in a report titled, 'Investigation Notes.' According to Walters's investigation notes, Tanner told him and Adams that she remembered admitting, during the May 24 interview, that she owned the murder weapon. His investigation notes also indicate that Tanner said the officers would find both her fingerprints and Paav's on the knife because they had used it about a week before Watson's murder to do drugs together. Walters also wrote that Tanner stated she was certain the knife was hers based on the way it was filed and chipped because she would sharpen her knives that way to clean her drug paraphernalia and do small home repairs. After speaking with Walters for over two hours, Tanner submitted to a polygraph examination the results of which led the polygraph examiner to opine that Tanner was not being truthful. Relevant here, none of Tanner's answers to the five 'test' questions central to the investigation matched Walters's recounting of her statements from the second interview. Rather, Tanner answered each of the five central polygraph questions with responses consistent with her recorded and transcribed interview responses from May 24, 1995."

"Former Prosecutor Declines to Charge Tanner. As the investigation progressed, in June 1995, Tanner's former cellmate from the county jail, Constance Roberts, told police that Tanner had admitted to her that she was at Barney's the night leading to the murder. And a few months later, in September 1995, the police crime lab reported that Tanner was 'included in the population of possible donors to the blood stain detected on the bar sink' near the crime scene. (R. 93-7, PageID 798). Walters attached the lab report to an arrest warrant request he submitted to the prosecutor's office; the chief assistant

prosecutor at the time declined the request due to insufficient evidence. Walters's investigation notes span from June to October of 1995. In 1997, he was promoted to sergeant and was no longer assigned to the Watson murder investigation team."

"*New Prosecutor Charges Tanner*. By 2000, a new prosecutor had taken office, and after reviewing the Watson murder file, he authorized charges against Tanner. Michigan's Tenth District Court for the County of Calhoun held a preliminary examination hearing ('P.E.') to determine whether there was probable cause to order Tanner bound over for trial. Cady testified at the P.E. that he drove to Barney's that night, but Tanner stayed home. Walters testified about his involvement in the investigation, including his two interviews with Tanner. His testimony about the May 24 interview differed in important ways from the interview transcript. For instance, Walters testified that Tanner admitted during the May 24 interview that she owned the murder weapon and that she described why and how it was chipped. He also testified that Tanner admitted during the June 7 interview that she had gone to the bar with Cady on the night Watson was killed and that her fingerprints would likely be found on the murder weapon because she had used it a week before the murder to do drugs."

"The prosecution argued that it had established probable cause. The state district court agreed[.] …

"*Tanner Is Convicted and Released*. Tanner was tried in the Calhoun County Circuit Court and convicted by a jury in November 2000. *Tanner*, 867 F.3d at 662, 670. After an unsuccessful state court appeal, Tanner filed a federal habeas petition in the Eastern District of Michigan which was denied. *Tanner v. Yukins*, No. 04-CV-71155-DT, 2005 WL 2994353 (E.D. Mich. Nov. 7, 2005). This court reversed and remanded with directions to set aside Tanner's conviction, finding that her conviction lacked sufficient evidentiary support. *Tanner*, 867 F.3d at 674."

"Tanner filed this lawsuit pursuant to 42 U.S.C. § 1983 against Walters, alleging violations of her constitutional rights premised on his fabrication of evidence, malicious prosecution, and failure to produce exculpatory evidence as required by *Brady v. Maryland*, 373 U.S. 83 (1963). She also named the City of Battle Creek as a defendant, but subsequently stipulated to the City's dismissal. Walters moved for summary judgment as to each claim based on qualified immunity. The district court granted Walters summary judgment on the *Brady* claim but denied the motion as to Tanner's claims for fabrication of evidence and malicious prosecution. Walters timely appealed."

"We review de novo a district court's denial of summary judgment on qualified immunity grounds. *See Adams v. Blount Cnty.*, 946 F.3d 940, 947 (6th Cir. 2020). Government officials performing discretionary functions are entitled to qualified immunity from civil liability 'when their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'' *King v. Harwood*, 852 F.3d 568, 582 (6th Cir. 2017) (quoting *White v. Pauly*, 580 U.S. 73, 78–79 (2017)). To determine whether an officer is entitled to qualified immunity, we employ a two-part inquiry which asks: '(1) whether the facts, when taken in the light most favorable to the party asserting the injury, show the officer's conduct violated a constitutional right; and (2) whether the right violated was clearly established such 'that a reasonable official would understand that what he is doing violates that right.'' *Mullins v. Cyranek*, 805 F.3d 760, 765 (6th Cir. 2015) (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)). The court may consider the questions in whichever order it concludes makes the most sense. *Pearson v. Callahan*, 555 U.S. 223, 227 (2009). 'When a defendant invokes qualified immunity in a motion for summary judgment, the plaintiff must offer sufficient evidence to create a genuine dispute of fact that the defendant violated a clearly established right.' *Folks v. Petit*, 676 F. App'x 567, 569 (6th Cir. 2017) (citing *DiLuzio v. Vill. of Yorkville*, 796 F.3d 604, 608–09 (6th Cir. 2015))."

"… [W]e 'may overlook a factual disagreement if a defendant, despite disputing a plaintiff's version of the story, is 'willing to concede the most favorable view of the facts to the plaintiff for purposes of the appeal.'' *Adams*, 946 F.3d at 948 (quoting *Barry v. O'Grady*, 895 F.3d 440, 443 (6th Cir. 2018)). We may also review factual determinations that are 'blatantly contradicted by the record, so that no reasonable jury could believe [them].' *Id.* (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007))."

"As set forth below, this interlocutory appeal presents both legal and factual disputes. We limit our review to purely legal issues within our appellate jurisdiction.

"*Fabrication of Evidence*. For purposes of this appeal, Walters concedes the view of the facts most favorable to Tanner. That is, he accepts Tanner's assertions that he (1) included false information in his reports describing his investigative interviews with her; and (2) testified falsely about her statements to him at her preliminary examination hearing. Walters nevertheless maintains that the district court wrongly denied him summary judgment on Tanner's fabrication-of-evidence claim. He argues that Tanner is required to do more than come forward with evidence contradicting his testimony and written statements to establish fabrication of evidence; she must first establish that he intentionally or recklessly misrepresented her statements pursuant to *Sykes v. Anderson*, 625 F.3d 294 (6th Cir. 2010). And to satisfy this first requirement, according to Walters, Tanner must make a 'substantial showing' of the requisite intent or recklessness to prevail. He draws this 'substantial showing' requirement from the court's jurisprudence relating to § 1983 claims for unlawful arrest under the Fourth Amendment where the arrest is based on false statements by law enforcement officers. *Sykes*, 625 F.3d at 305. In such cases, we have employed the rationale underlying the Supreme Court's decision in *Franks v. Delaware*, which requires a hearing at the defendant's request if the defendant can make a substantial preliminary showing that an officer included a 'deliberate falsity' or with 'reckless disregard for the truth' included a false statement in a search warrant affidavit that was necessary to the finding of probable cause. 438 U.S. 154, 171–72 (1978)."

"Walters' argument fails for at least two reasons. First, Walters overstates the showing necessary for Tanner's claim. Purposefulness is not an element of a standalone fabrication-of-evidence claim. Rather, a plaintiff must show that the defendant 'knowingly fabricated evidence against [a plaintiff], and [that] there is a reasonable likelihood that the false evidence could have affected the judgment of the jury.' *Mills v. Barnard*, 869 F.3d 473, 484 (6th Cir. 2017) (alterations in original) (quoting *Stemler v. City of Florence*, 126 F.3d 856, 872 (6th Cir. 1997)). Such claims are rooted in the Due Process Clause of the Fourteenth Amendment, so they are understandably focused on the adjudicative process—in particular, the potential effect of knowingly fabricated evidence on the trier of fact—not on the purpose of the publisher of such statements. *See Anderson v. Knox Cnty.*, No. 22-5280, 2023 WL 4536078, at *8 (6th Cir. July 13, 2023) (distinguishing fabrication-of-evidence claims from malicious prosecution claims and acknowledging that the former violates a defendant's right to a fair trial as guaranteed by the Fourteenth Amendment's Due Process Clause). Second, we have not previously required a 'substantial showing' of intent for such claims. Instead, any mention of intentional conduct—what we sometimes refer to as 'deliberate falsehood'—or the 'substantial showing' standard appears in instances where false information is 'material to the finding of *probable cause*.' *See Vakilian v. Shaw*, 335 F.3d 509, 517 (6th Cir. 2003) (emphasis added). Because a stand-alone fabrication-of-evidence claim can survive without regard to probable cause, it follows that such a showing is unnecessary. *See France v. Lucas*, 836 F.3d 612, 629 (6th Cir. 2016) ('A plaintiff does not need to show that the government lacked probable cause to prevail on a fabrication of evidence claim.' (citing *Stemler*, 126 F.3d at 872)). Thus, Walters's argument premised on the requirement for such a showing for a fabrication of evidence claim lacks merit."

"Here, Tanner says Walters's statements that she told him: (1) the knife belonged to her; (2) her fingerprints would be found on the knife; (3) she knew it was her knife because of the chip in it; (4) she was at Barney's on the night in question; and (5) she 'could do something' like the murder if the victim 'gave her a hard time' were fabrications. (ECF 21, Appellee's Br. 11). The transcript of the May 24 interview supports her claim of falsity as none of the challenged statements appear in the transcript. Indeed, the transcript reflects that Tanner denied that the knife was hers and that she denied traveling to Barney's on the night of the murder. In view of Walters's concession that we may construe all facts and make all reasonable inferences in the light most favorable to Tanner, we disregard Walters's assertion that he possessed no 'information that contradicted' his version of events. (ECF 17, Appellant's Br. 20). And when we credit Tanner's account that she never made any of the statements at issue, Walters's testimony and notes about his interview stating otherwise strongly suggest that he

knowingly fabricated the statements. Because a reasonable jury could reach the same conclusion, Walters is not entitled to qualified immunity on Tanner's fabrication-of-evidence claim."

"Malicious Prosecution. Tanner's malicious prosecution claim is premised on the same facts underlying her claim for fabrication of evidence—that Walters falsified his notes about what she told him and testified falsely about her statements. Walters contends, however, that the claim fails because Tanner cannot show that he 'made, influenced, or participated in the decision to prosecute.' (ECF 17, Appellant's Br. 23 (quoting *Mills*, 869 F.3d at 480))."

"Claims stemming from a plaintiff's seizure and continued detention based on purportedly false or fabricated evidence presented by law enforcement fall under the broad umbrella of malicious prosecution and are rooted in the protections afforded by the Fourth Amendment. *See Gregory v. City of Louisville*, 444 F.3d 725, 747–50 (6th Cir. 2006). Such claims require a plaintiff to prove that: '(1) the defendant made, influenced, or participated in the decision to prosecute the plaintiff; (2) there was no probable cause for the prosecution; (3) as a consequence of the legal proceedings, the plaintiff suffered a deprivation of liberty apart from the initial arrest; and (4) the criminal proceeding was resolved in the plaintiff's favor.' *France*, 836 F.3d at 625 (citing *Sykes*, 625 F.3d at 308–09). And while actual 'malice' is not required to succeed on a malicious prosecution claim, a defendant must have made 'deliberate or reckless falsehoods'; 'mere negligence' will not create liability. *See Johnson v. Moseley*, 790 F.3d 649, 654–55 (6th Cir. 2015). Here, neither party disputes Tanner's satisfaction of the last two elements. But Walters challenges part of the first prong—the decision to prosecute—and the second prong in its entirety."

"The fact that an officer 'did not make the decision to prosecute does not per se absolve [the officer] from liability.' *Sykes*, 625 F.3d at 311 (emphasis omitted). Liability, for instance, 'extends to an officer who included falsehoods in [his] investigatory materials, knowing that prosecutorial reliance is likely, where those materials actually influenced the prosecutor's ultimate decision to bring charges.' *Jones v. City of Elyria*, 947 F.3d 905, 918 (6th Cir. 2020) (citing *Jackson v. City of Cleveland*, 925 F.3d 793, 820–21 (6th Cir. 2019))."

"The district court in this case found that the assistant prosecutor reviewed the case file on Watson's murder and brought it to the attention of the lead prosecutor who authorized charges against Tanner. The district court also found that the assistant prosecutor recalled that Tanner had made some incriminating statements during her interview with Walters and that both he and the lead prosecutor read and discussed Walters's investigatory report before initiating charges against Tanner. Viewing this evidence in the light most favorable to Tanner, the district court concluded that a reasonable jury could find that Walters's investigation report influenced the decision to charge Tanner."

"We agree. First, consider the prosecuting attorney's affidavit. Walters notes that the affidavit does not explicitly include Walters's false statements as one of the reasons for moving forward with the prosecution. But this argument is unpersuasive. Paragraph 5 of the prosecutor's affidavit reads in relevant part:

> My review of the Sharon Watson murder case file did not reveal any involvement by David Walters . . . regarding authorizing charges in this case *other than the interviews he had conducted that were contained within the submitted information*.

(R. 93-27, PageID 889) (emphasis added). The false statements at the center of this appeal include the written statements Walters made about Tanner's alleged incriminating admissions during the interviews he conducted. It follows then, construing the affidavit in the light most favorable to Tanner, that a reasonable jury could find that Walters's false statements influenced the prosecutor's decision to bring charges. *See Sykes*, 625 F.3d at 316. Likewise, a jury reasonably could conclude that Walters's false statements 'were material to the state court's decision to bind the Plaintiff[] over for trial,' *id.* at 313, because the state trial court explicitly stated that Walters's statements were 'credible' and were a 'basis' for its probable cause determination at the preliminary hearing. (R. 100, PageID 1129)."

"Walters next challenges the district court's finding that there remains a triable issue on whether Tanner established a lack of probable cause. First, he contends that the state court's probable cause determination precludes Tanner from relitigating probable cause. Second, he maintains that probable cause existed even without Walters's false statements. Third, he argues that the district court applied the wrong standard in assessing probable cause. Each of these arguments fails."

"The district court found that Tanner presented sufficient evidence to show that the state court relied on Walters's false statements at the P.E. in making its probable cause determination. … [C]onsidering all facts in the light most favorable to Tanner, a reasonable jury could conclude that the state court relied on Walters's false statements for its probable cause determination."

"Walters insists, however, that probable cause to prosecute Tanner still would have existed even if he had not made any false statements and that the district court applied the wrong standard. 'Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed.' *Henry v. United States*, 361 U.S. 98, 102 (1959). To be sure, without Walters's false statements, the prosecutor could have marshaled other evidence, such as Tanner's failed polygraph examination, blood found at the scene matching Tanner's blood type, and a statement from a jailhouse informant that Tanner allegedly admitted she went to Barneys on the night of Watson's murder. Yet, none of this evidence demands a finding of probable cause. A failed polygraph alone is insufficient to support a probable cause determination. *See Tomasik v. Martin*, No. 22-1081, 2023 WL 2137354, at *5 (6th Cir. Feb. 21, 2023). And as to the latter two items, '[m]illions of people share Tanner's blood type,' *Tanner*, 867 F.3d at 673, the crime scene was contaminated prior to collection of the blood sample, and Tanner denied making the statement to the inmate. Taking all facts and making all reasonable inferences in the light most favorable to Tanner, a reasonable jury could find that these facts, without Walters's statements, would not have provided probable cause to prosecute Tanner."

"*Substantial Showing*. Like his argument relating to Tanner's stand-alone fabrication-of-evidence claim, Walters again insists that Tanner must make a 'substantial showing' that he stated a deliberate falsehood or showed reckless disregard for the truth to maintain a § 1983 claim for malicious prosecution. *See Johnson*, 790 F.3d at 654–55. He contends that the district court erred when it denied him qualified immunity because there is no evidence from which a reasonable jury could conclude that he knowingly or recklessly fabricated evidence. Implicit in his argument is an assumption that the district failed to find such a showing. But we do not agree that it did. Even if Walters is correct that Tanner must make a 'substantial showing' in this context, the record here contains sufficient evidence for a jury to find that Tanner has satisfied that standard. *See Caskey v. Fenton*, No. 22-3100, 2022 WL 16964963, at *8 (6th Cir. Nov. 16, 2022) (cautioning against 'misconstru[ing] the height of [the substantial showing] requirement,' which can be met by 'an offer of proof' (quotation omitted)). In *Butler v. City of Detroit*, we stated that '[a] plaintiff shows substantial evidence of deliberate falsehood or reckless disregard when, for example, he presents proof that at the time the officer swore out the affidavit, she knew of or possessed information that contradicted the sworn assertions.' 936 F.3d 410, 419 (6th Cir. 2019). We reasoned that 'such a showing gets the § 1983 plaintiff past the qualified-immunity hurdle because it shows that no reasonable officer with access to the contradictory information would have sworn out such an affidavit.' *Id.* (citing *Vakilian*, 335 F.3d 509). Here, looking at the transcript and audio of the May 24 interview and making all reasonable inferences in the light most favorable to Tanner, Tanner has presented evidence that Walters possessed information that contradicted his statements. Even though Walters did not have the transcript of his interview when he testified at the probable cause hearing, he knew that the audio of the interview existed because he recorded it himself. A reasonable jury could find by a substantial showing that Walters made his statements in a deliberate falsehood or with reckless disregard for the truth. His claim of qualified immunity, therefore, fails."

8. Excessive force claim - Qualified immunity granted - Plaintiff ran from the police after being detained due to an outstanding warrant – Officer fired a taser in pursuit of plaintiff – Plaintiff

failed to allege a violation of clearly established law - Nonbinding opinions are never enough to clearly establish a point of law - There are circumstances in which nonlethal force would be reasonable but lethal force excessive - So plaintiff can't clearly establish that using tasers is excessive by noting that it would have been unreasonable for the officer to shoot at him with a gun

JORDEN BROWN v. SAMUEL GILES, in his individual capacity; ERIC SPURLOCK, in his individual and official capacities; VILLAGE OF COAL GROVE, OHIO; BILL MURPHY, in his official capacity as Village of Coal Grove Chief of Police
SIXTH CIRCUIT COURT OF APPEALS No. 23-3142 Decided and Filed: March 5, 2024

"When Jorden Brown fled from police, Officer Samuel Giles tased him. The district court dismissed Brown's excessive force claims against Officer Giles, the police chief, and the municipality. We affirm."

"Jorden Brown, struggling with addiction and homelessness, showed up outside his mother's workplace. He hoped she would give him money and a place to stay. Instead, she asked police for assistance, knowing Brown had a warrant out for his arrest."

"Officer Samuel Giles responded to the call. Brown gave Officer Giles a fake name and denied knowledge of the warrant. While the two spoke, Officer Giles repeatedly told Brown to stay put. Brown promised, 'I ain't going to run on you.' R. 1-1, at 19:02:40. But the moment Officer Giles stepped away to take a phone call, Brown bolted."

"Officer Giles pursued and, mid-stride, fired his taser. One probe hit Brown's head, and the other hit his back. Brown fell and hit his head on the ground. While handcuffing him, Officer Giles held the taser against Brown in case he continued to resist."

"Brown suffered injuries from the fall. So he sued Officer Giles, the police chief, and the municipality under 42 U.S.C. § 1983. He alleges Officer Giles violated his Fourth Amendment rights by using excessive force and that department policies or customs enabled the violation. Brown attached bodycam footage of the event to his complaint."

"The defendants moved to dismiss. In a thorough opinion, the district court determined that Brown failed to allege a violation of clearly established law. Brown now appeals."

"First, Brown alleges that Officer Giles used excessive force by tasing him as he fled. Officer Giles argues he's entitled to qualified immunity. To overcome that immunity, Brown must show it's clearly established that tasing him in this particular context was excessive. *See Pearson v. Callahan*, 555 U.S. 223, 232 (2009). And that means he must produce an on-point, binding case. *Bell v. City of Southfield,* 37 F.4th 362, 367 (6th Cir. 2022). He can't."

"At the outset, Brown runs into trouble because we've held that it's reasonable for officers to tase fleeing suspects. *See Perez v. Simpson*, 83 F.4th 1029, 1031 (6th Cir. 2023); *see also Hagans v. Franklin Cnty. Sheriff's Off.*, 695 F.3d 505, 509–10 (6th Cir. 2012). So the fact that Officer Giles tased him isn't enough to establish excessive force."

"Moreover, several of the opinions Brown identifies aren't binding. *Cockrell v. City of Cincinnati*, 468 F. App'x 491, 499 (6th Cir. 2012) (Cole, J., concurring); *Peabody v. Perry Twp.*, No. 10-CV-1078 (EAS), 2013 WL 1327026, at *8 (S.D. Ohio Mar. 29, 2013). Nonbinding opinions are never enough to clearly establish a point of law. *Bell*, 37 F.4th at 367. So these cases don't help Brown's argument."

"Brown cites one published, in-circuit case, but that opinion concerns lethal force. *See Sample v. Bailey*, 409 F.3d 689, 693, 696–97 (6th Cir. 2005) (gun). Tasers typically aren't lethal. *See Gambrel v. Knox Cnty.*, 25 F.4th 391, 401 (6th Cir. 2022). And in the context of clearly establishing a constitutional right, this difference matters. That's for good reason: there are circumstances in which nonlethal force

would be reasonable but lethal force excessive. So Brown can't 'clearly establish' that using tasers is excessive by noting that it would have been unreasonable for Officer Giles to shoot at him with a gun. *White v. Pauly*, 580 U.S. 73, 79 (2017) (per curiam)."

"Trying to sidestep this problem, Brown argues that Officer Giles's taser use was particularly dangerous. Brown emphasizes that Officer Giles didn't just tase him in the back. One probe hit his head, and heads are uniquely sensitive to injury. We doubt that this difference matters in the context of a mid-chase decision to tase a fleeing suspect. It's difficult to imagine how a sprinting officer could aim his taser precisely enough to (1) hit a suspect with both taser probes while (2) ensuring that neither probe hits the suspect's head. It's even harder to imagine that the Fourth Amendment requires such a feat. That's precisely why we defer to the 'split-second' decisions of officers in fast-paced, complex situations. *Mullins v. Cyranek*, 805 F.3d 760, 765–66 (6th Cir. 2015) (quoting *Graham*, 490 U.S. at 397). "

"But even if the head-body distinction mattered, Brown still can't prevail because he doesn't have a binding opinion saying that the distinction matters. Brown points to only one unpublished, out-of-circuit opinion that discusses the danger of head tasings. *Wilson v. City of Lafayette*, 510 F. App'x 775, 778–80 (10th Cir. 2013). As already explained, that's not enough to meet his burden. *Marsh v. Arn*, 937 F.2d 1056, 1069 (6th Cir. 1991), *abrogated on other grounds by Farmer v. Brennan*, 511 U.S. 825 (1994). Officers in our circuit aren't expected to stay abreast of the varying and ever-changing law of other circuits—especially not unpublished opinions that have no precedential value."

"What about Officer Giles's second alleged use of excessive force? Brown alleges that Officer Giles continued to tase him after he had been incapacitated. If true, this would be excessive force. *Brown v. Chapman*, 814 F.3d 447, 461 (6th Cir. 2016). And normally, Brown would need only to allege those facts to survive a motion to dismiss. *Kottmyer v. Maas*, 436 F.3d 684, 688 (6th Cir. 2006). But Brown didn't just describe the incident. He also provided the court with video footage of the incident and mentioned that footage throughout his complaint. In this context, we don't need to accept as true any allegation 'blatantly contradicted' by the video. *Scott v. Harris*, 550 U.S. 372, 380 (2007). This dooms Brown's claim."

"The video shows that Officer Giles tased Brown only once. As Brown notes, Officer Giles held the taser against him after he was incapacitated. But as the video makes clear, Officer Giles didn't use it. Active tasers—including the model Officer Giles used—make noises in both probe and drive-stun mode. R. 1, Pg. ID 7 (Axon X26 taser); *see, e.g.*, *Wade v. Fresno Police Dept.*, No. 09-CV-0599 (AWI), 2012 WL 253252, at *7 & n.15 (E.D. Cal. Jan. 25, 2012) (noting noise from an X26 taser before a 'contact' tase). Indeed, we hear the taser sound in the video—but only once, and not when Officer Giles holds the taser against Brown. The lack of noise 'utterly discredit[s]' Brown's claim. *Scott*, 550 U.S. at 380."
"Qualified immunity gives police officers immunity from suit 'at the earliest possible stage.' *Bell*, 37 F.4th at 364. Officer Giles appropriately raised qualified immunity at the motion to dismiss stage. Thus, he is entitled to qualified immunity now."

9. Section 1983 claim - Failure to train - There is no dispute that 'a governmental entity can be held liable under section 1983 for its failure to properly train and supervise its employees - However, a municipality can be liable under section 1983 only if there is some underlying constitutional violation for which it could be held responsible - To hold the board liable under section 1983 for this claim, Appellants are required to establish two essential elements: (1) that the Board negligently trained or supervised Coach Root; and (2) that this inadequate training or supervision caused a violation of Tyler's rights - There was no constitutional violation found, so school system cannot be liable under section 1983

See also GTLA – Assault and battery - A governmental entity may not be held vicariously liable for an assault and battery committed by its employee, as the general removal of immunity under the section 29-20-205 addresses only negligent acts or omissions - A governmental entity *may* be liable for an injury caused by its employee's assault and battery *if* there is also a showing of some negligence by the entity itself - Although the intentional torts exception does not include assault and battery, it does include civil rights violations - Consequently, this

Court has previously held that where the underlying acts which a plaintiff alleges to be negligent are predicated on intentional tortious conduct involving the violation of the plaintiff's civil rights' by government employees, the civil rights exception in section 29-20-205(2)' is applicable - Thus, even where a complaint couches the claims contained therein as negligent training and supervision claims, if the gravamen of the claim involves a violation of civil rights, then immunity is preserved - The immunity offered by section 29-20-205 is broad, preserving immunity for negligence claims so long as the injury arises out of civil rights – page 152.

LISA KELLEY ET AL. v. NATHANIEL ROOT ET AL.
COURT OF APPEALS No. W2022-01625-COA-R3-CV Filed January 29, 2024

"The mother of a high school student involved in an altercation with the opposing basketball team's coach appeals the trial court's grant of summary judgment to the coach and the county board of education. Because the video footage of the altercation is open to more than one interpretation, a genuine dispute of material fact remains as to the intention behind the coach's contact with the student and summary judgment is reversed as to the state law assault and battery claims against the coach. The grant of summary judgment as to the remaining claims against both the coach and the board is affirmed."

"On March 8, 2019, Plaintiff/Appellant Lisa Kelley filed a complaint in the McNairy County Circuit Court ('the trial court') for herself and her minor son, Tyler Kelley (together with Ms. Kelley, as represented by Ms. Kelley as next friend in this lawsuit, 'Appellants'). The complaint described a February 2019 fight that broke out at the end of a high school basketball game between Adamsville High School and Scotts Hill High School. Tyler, then age fourteen, was serving as a manager for the Scotts Hill team and Ms. Kelley was also in attendance. According to the complaint, Tyler was in the process of separating participants in the fight when Defendant/Appellee Nathaniel Root, coach for the Adamsville team, 'became an active participant in this fight and forcefully punched Tyler, without provocation.' Tyler was allegedly thrown off balance, toppling over into the courtside bleachers and 'bang[ing] his face against these bleachers resulting in a temporary loss of consciousness and serious injuries that required medical attention including a trip to the emergency room, a CT scan, and a visit to his orthodontist to repair some of the damage done to his teeth.' Ms. Kelley, standing nearby, 'had a close-up view of her son's head hitting the bleachers and the resulting injury, including a mouthful of so much blood that she could not see his teeth[,]' which image and trauma resulted in 'such mental distress that she regularly experience[d] panic attacks and . . . severe loss of sleep[.]'"

"The complaint raised four causes of action on behalf of Tyler: (1) under 42 U.S.C. section 1983 against Coach Root, in his individual capacity and his official capacity as an employee of Defendant/Appellee the McNairy County Board of Education ('the Board'),for assaulting and battering Tyler while employed by a public agency; (2) under 42 U.S.C. section 1983 against the Board for failing to properly train and supervise Coach Root; (3) assault and battery against both Coach Root and the Board; and (4) negligence against the Board and Defendant the Tennessee Secondary Schools Athletic Association ('the TSSAA') for failing to properly supervise and train game officials in how to properly handle fights at sporting events. A claim for intentional infliction of emotional distress ('IIED') was raised on behalf of Ms. Kelley against Coach Root and the Board. The complaint also sought punitive damages against Coach Root and the Board based on the 'malicious, intentional, and reckless nature' of the alleged assault and battery. All claims against the TSSAA were subsequently dismissed by stipulation. Both remaining defendants filed motions to dismiss."

"Coach Root filed a motion for summary judgment on May 13, 2022, relying primarily on Tyler's deposition testimony and video footage of the altercation. The motion argued that Coach Root's behavior was neither 'brutal or offensive' enough to shock the conscious, outrageous or extreme enough to be intolerable by civilized society, nor intended to harm or frighten Tyler or Ms. Kelley. Instead, Coach Root only 'intended to de-escalate the altercation between students and players and to protect both his players and himself from physical harm.'"

"The Board filed its own motion for summary judgment on May 16, 2022. First, the Board argued that it retained sovereign immunity under the Tennessee Governmental Tort Liability Act ('the GTLA').

Second, the Board asserted that Appellants failed to present proof of prior fights at a sporting event within the school district or Coach Root's alleged history of anger management and aggression sufficient to establish any deliberate indifference or failure to train by the Board. Similarly, the lack of prior fights at sporting events prevented a finding that the instant incident was foreseeable."

"… Before responding to the Board's substantive claims, Appellants clarified which claims against the Board remained. Appellants explained that they had not contested the Board's earlier motion to dismiss the claims of negligence and IIED, and had conceded that they were not entitled to punitive damages based on negligence or section 1983. Accordingly, although all of the originally pleaded claims against Coach Root remained, the only remaining claims against the Board were (1) under section 1983 'for the assault and battery against Tyler Kelley as the governmental entity that employed [Coach] Root'; (2) under section 1983 for failure to train and supervise Coach Root; (3) assault and battery; and (4) punitive damages on the assault and battery claim. As to the merits of the motion, Appellants argued that fights at high school sporting events are foreseeable and the Board acted with deliberate indifference by failing to train Coach Root on how to deal with such incidents. Moreover, the Board did not argue that Coach Root was acting outside the scope of his employment and the GTLA does not provide immunity for the intentional torts of assault and battery committed by an employee where the employer's negligent failure to supervise was also pleaded. And because the Board could be held liable for Coach Root's assault and battery, so too could it be liable for punitive damages associated with those claims."

"By order of November 3, 2022, the trial court granted summary judgment for both Coach Root and the Board. The trial court found that Coach Root's actions 'in no way demonstrated 'an intent to harm,' nor did they 'shock the conscience.' Instead, the proof establishes that [Coach] Root acted in order only to protect his player and himself from harm.' Similarly, the trial court ruled that 'the undisputed facts show that [Coach] Root never had any intent to harm Tyler or to cause Tyler any apprehension of potential harm' and that

> the proof shows that after realizing Tyler's punch likely intended for an Adamsville player was about to strike him, [Coach] Root used his arm to block the punch and protect himself. And [Coach Root] raising his arm to protect his player and himself from being punched resulted in a reasonable contact necessary to accomplish a legitimate, official purpose of a head coach protecting his player and himself from imminent harm.

The trial court also found that Coach Root's conduct did 'not come close to the requisite outrageous conduct necessary to set forth an [IIED] claim.'"

"Next, the trial court found that Appellants' section 1983 claim that the Board was vicariously liable for the assault and battery allegedly committed by Coach Root necessarily failed because no assault and battery occurred. Moreover, the trial court found that, under the GTLA, a governmental entity cannot be held liable for an assault and battery by its employee without some direct negligence by the entity and Appellants had already conceded that the GTLA's 'civil rights' exception prevented them from holding the Board liable for negligence. Thus, their state law assault and battery claim also failed and Appellants were not entitled to either compensatory or punitive damages on the claim. Finally, as the undisputed facts showed that the instant fight was the only such incident to occur within the school district and there was no evidence that Coach Root had a history of anger management issues, the trial court found that Appellants' section 1983 failure to train or supervise claim also failed."

"The trial court's dismissal of the claims against Coach Root primarily focused on two essential elements: the intention behind the contact and the offensive or outrageous nature of the contact. Finding that there was no dispute as to these material facts, the trial court determined that no genuine issue remained for trial on any of Appellants' claims."

"We first address those claims where the trial court's dismissal hinged on a determination of intent: assault and battery. Assault occurs when 'a defendant intends to create an apprehension of harm in the

plaintiff[.]' ***Hughes v. Metro. Gov't of Nashville & Davidson Cnty.***, 340 S.W.3d 352, 371 (Tenn. 2011) (holding that the plaintiff committed the intentional tort of assault when, even though engaged in horseplay, the defendant 'intended to frighten' the plaintiff). In contrast, '[t]his Court has defined the tort of battery as an intentional act that causes an unpermitted, harmful or offensive bodily contact.' ***Spearman v. Shelby Cnty. Bd. of Educ.***, 637 S.W.3d 719, 734 (Tenn. Ct. App. 2021) (internal quotations omitted) (quoting ***Lacy v. Hallmark Volkswagen Inc. of Rivergate***, No. M2016-02366-COA-R3-CV, 2017 WL 2929502, at *4 (Tenn. Ct. App. July 10, 2017)). What is identical, however, among the two torts is the element of some form of intentionality. Thus, while assault and battery have differing elements, if Appellants fail to establish intentional conduct, both claims must fail."

"Beginning with the battery claim, the trial court's grant of summary judgment rested on its determination that Coach Root did not intend to cause Tyler any harm. On appeal, the parties disagree as to whether this conclusion can be drawn from the undisputed facts in the record. Coach Root asserts that the video evidence presents undisputed proof that he did not intend to harm Tyler. Appellants assert that to draw such a conclusion requires a weighing of the evidence that is inappropriate at the summary judgment stage of litigation. Respectfully, both the parties and the trial court miss the mark as to what is required by the intent element of battery under Tennessee law. Specifically, Appellants were not required to prove that Coach Root intended to cause harm to Tyler, but only that Coach Root intended to do the act that caused unpermitted contact with Tyler that resulted in harm or offense. *See* ***Stafford v. Jackson County***, No. M2016-01883-COA-R3-CV, 2017 WL 3332268, at *5 (Tenn. Ct. App. Aug. 4, 2017) ('[A] battery claim requires proof that the defendant intentionally committed an act that resulted in a harmful or offensive contact with the plaintiff.' (citing ***Cary v. Arrowsmith***, 777 S.W.2d 8, 21 (Tenn. Ct. App. 1989) (defining a battery as 'an unpermitted touching of the plaintiff by the defendant or by some object set in motion by the defendant'))). In other words, '[t]he intent required for a battery is not an intent to cause harm. It is an *intent to do the act* that causes the harm.' ***Lacy***, 2017 WL 2929502, at *4 n.5 (emphasis added) (quoting 8 Tenn. Prac. Pattern Jury Instr. T.P.I.-Civ. 8.02 (2014)); *cf.* Nancy J. Moore, *Intent and Consent in the Tort of Battery: Confusion and Controversy*, 61 Am. U. L. Rev. 1585, 1588 (2012) (comparing 'single intent' definitions of battery, like that in Tennessee, requiring only 'that the defendant intends a bodily contact that turns out to be either harmful or offensive' to 'dual intent' definitions that require 'both intent to cause a bodily contact and intent to cause either harm or offense'). So whether Coach Root intended to cause Tyler harm is immaterial, as Coach Root has never asserted that he did not intend to make contact with Tyler.3 Indeed, the video footage in the record clearly shows that Coach Root voluntarily made contact with Tyler. And Coach Root essentially admits that he intended contact with Tyler, but only in an effort to protect his players. So then, in the absence of any demonstrated defenses, discussed *infra*, Coach Root failed to negate the intent element of Appellants' battery claim and the trial court erred in dismissing the claim on this basis."

"As to the assault claim, the trial court similarly held that Appellants failed to establish that Coach Root intended to cause Tyler an apprehension of harm. Coach Root contends that this ruling was correct in light of the undisputed facts, pointing in particular to his deposition testimony and the various video recordings of the incident that are in the record. Coach Root also focuses on the agreed fact that he did not punch Tyler or hit Tyler in the face, as well as Tyler's admission that he initiated the altercation with the Adamsville player and was attempting to re-engage that player prior to the contact with Coach Root. Coach Root insists that these facts prove that his intent was only to protect himself and his player from Tyler's incoming punch."

"On the other hand, Appellants argue that the reasonable inferences we must draw in their favor indicate that Coach Root intended to cause a fear of harm in Tyler. They explain that Coach Root 'charging headlong' into the fray directly toward Tyler with both arms raised indicates a singling out of Tyler beyond that meant to protect the Adamsville player. Appellants also argue that this behavior by an adult can be reasonably inferred as intended to create an apprehension of harm in a high school student. Appellants compare the level of force used by Coach Root to move his player to that used to move Tyler, arguing that a reasonable implication of this difference is that Coach Root had the ability to use less force but intentionally used more violent treatment with Tyler."

"It is not for us to determine which of these interpretations is correct. Instead, in considering whether Coach Root has met his burden at the summary judgment stage, we must determine whether a genuine issue remains as to the material fact of his intent. Only if, after considering the evidence in the light most favorable to Appellants, discarding all countervailing evidence, and drawing all reasonable inferences in favor of Appellants, a reasonable jury could only come to one conclusion is summary judgment appropriate." …

"The video footage in the record confirms many of the facts agreed to by the parties." …

"… The question here is instead one of Coach Root's state of mind and the intention behind his intervention in the altercation between Tyler and the Adamsville player. In this case, we are unable to conclude that the video footage provides only one clear answer to these questions. And 'Tennessee courts have cautioned that when the dispositive issue requires a determination of state of mind, 'the jury should be given an opportunity to observe the demeanor, during direct and cross-examination, of the witnesses whose states of mind are at issue.'' ***TWB Architects, Inc.***, 578 S.W.3d at 892 (quoting ***McDowell v. Moore***, 863 S.W.2d 418, 421 (Tenn. Ct. App. 1992)); *see also* ***Knapp v. Holiday Inns, Inc.***, 682 S.W.2d 936 (Tenn. Ct. App. 1984) (noting that courts construing the federal summary judgment rules 'consistently hold that summary judgments should not be granted in cases where the outcome hinges squarely upon the state of mind, intent, or credibility of the witnesses' (citations omitted))."

"… [B]oth parties argue that the video footage supports their interpretation of Coach Root's intent. Accordingly, there remains a genuine dispute as to this material fact. Simply put, differing conclusions may be drawn from the evidence in the record and summary judgment as to Coach Root's intent is not proper at this juncture."

"Regardless of his claimed lack of intent to cause Tyler apprehension of harm, Coach Root argues that his statutory right to protect his player from Tyler's incoming punch serves as a defense to both the assault and the battery claims. Indeed, Tennessee Code Annotated section 38-2-101 states that '[l]awful resistance to the commission of a public offense may be made by the party about to be injured, or by others.' A third party to the offense, 'in aid or defense of the person about to be injured, may make resistance sufficient to prevent the offense.' Tenn. Code Ann. § 38-2-103. Coach Root asserts that his involvement in the altercation was in line with his duty to protect his players. The trial court found that Coach Root 'raising his arm to protect his player and himself from being punched resulted in reasonable contact necessary to accomplish a legitimate, official purpose of a head coach protecting his player and himself from imminent harm.' Appellants disagree, highlighting that Coach Root was able to 'gently mov[e] his player out of the way' such that his 'violently striking' Tyler instead contradicts Coach Root's assertion that he was de-escalating the fight between the two children. Again, Appellants argue, relying on Coach Root's interpretation of the altercation—namely, that his contact with Tyler was a reasonable amount of force, meant only to prevent the offense against his player—would require raising inferences in favor of the moving party. It can certainly also be argued that the fact that three adults intervened after Coach Root's contact with Tyler contradicts the finding that his behavior was reasonable. So then, a dispute similarly remains as to the reasonableness of Coach Root's behavior in relation to Tyler's attack against the Adamsville player."

"It is clear that the parties 'disagree about the inferences and conclusions to be drawn from the facts,' and this Court is 'ill-equipped to weigh the evidence or to substitute its judgment for that of the trier of fact.' ***CAO Holdings, Inc. v. Trost***, 333 S.W.3d 73, 87 (Tenn. 2010)). There are facts in the record to both support and undermine a conclusion that Coach Root did not intend to create an apprehension of harm in Tyler, and that his conduct was reasonable in relation to the threat Tyler posed to the Adamsville player. *See* ***Brooks Cotton Co.***, 381 S.W.3d at 429. Therefore, we conclude that the existence of genuine issues involving the inferences to be drawn from the facts in this case should have prevented the trial court from granting summary judgment as to the claims of assault and battery against Coach Root."

"… The trial court's grant of summary judgment as to Appellants' section 1983 and IIED claims against Coach Root is therefore affirmed."

"Appellants have stated two claims against the Board under section 1983: one for the assault and battery allegedly committed by Coach Root, and one for the Board's alleged failure to train and supervise Coach Root. The trial court found that the first of these claims must fail as a matter of law in part because the Board could not be held vicariously liable under section 1983 for any assault and battery committed by Coach Root. Appellants donot address this aspect of the order granting summary judgment in their appellate brief, so this issue is waived. *See* ***Adkins v. Bluegrass Ests., Inc.***, 360 S.W.3d 404, 415 (Tenn. Ct. App. 2011) ('If a party does not adequately brief an issue on appeal, the issue is waived.' (citing ***Childress v. Union Realty Co.***, 97 S.W.3d 573, 578 (Tenn. Ct. App. 2002)). Moreover, it is well settled that 'a local government may not be sued under [section] 1983 for an injury inflicted solely by its employees or agents.' ***Monell v. Dep't of Soc. Servs. Of N.Y.***, 436 U.S. 658, 694, 98 S. Ct. 2018, 2037, 56 L. Ed. 2d 611 (1978); *see also* ***Jackson v. Thomas***, No. M2010-01242-COA-R3-CV, 2011 WL 1049804, at *4 (Tenn. Ct. App. Mar. 23, 2011) ('There is no respondeat superior liability under § 1983, therefore, a county cannot be liable for an injury inflicted solely by its employees or agents.' (citing ***Lee v. Knox Cnty. Sheriff's Off.***, No.: 3:05-CV-571, 2006 WL 8443012, *6 (E.D. Tenn. Oct. 31, 2006))). Accordingly, we affirm the trial court's grant of summary judgment as to the assault and battery claim against the Board under section 1983."

"As to Appellants' second claim, there is no dispute that 'a governmental entity can be held liable under [section] 1983 for its failure to properly train and supervise its employees.' ***Cochran v. Town of Jonesborough***, 586 S.W.3d 909, 918 (Tenn. Ct. App. 2019) (quoting ***Hale v. Randolph***, No. 1:02-CV-334, 2004 WL 1854179, at *46, *51 (E.D. Tenn. Jan. 30, 2004)). However, 'a municipality can be liable under [section] 1983 only if there is some underlying constitutional violation for which it could be held responsible.' ***Stiles ex rel. D.S. v. Grainger County***, 819 F.3d 834, 856 (6th Cir. 2016) (citing ***McQueen v. Beecher Cmty. Sch.***, 433 F.3d 460, 471 (6th Cir. 2006) (noting that '[w]here . . . a municipality's liability is alleged on the basis of the unconstitutional actions of its employees, it is necessary to show that the employees inflicted a constitutional harm' (citation omitted))). 'Absent a violation of [the plaintiff's] constitutional rights by a municipal employee, [the plaintiff] cannot state a claim against the municipality.' ***Hubbard v. Gross***, 199 F. App'x 433, 442 (6th Cir. 2006). Thus, to hold the Board liable under section 1983 for this claim, Appellants are required to establish two essential elements: (1) that the Board negligently trained or supervised Coach Root; and (2) that this inadequate training or supervision caused a violation of Tyler's rights. *Cf.* ***Gambrel v. Knox County***, 25 F.4th 391, 408 (6th Cir. 2022) ('*First*, a municipality must have acted with 'deliberate indifference' to the fact that its inadequate training or supervision would lead its agents to violate constitutional rights. . . . *Second*, a municipality's improper training or supervision must have 'actually caused' the plaintiff's injury.' (first quoting ***Brown***, 520 U.S. at 405; and then quoting ***Connick v. Thompson***, 563 U.S. 51, 70, 131 S. Ct. 1350, 179 L. Ed. 2d 417 (2011))."

"As discussed above, Appellants have waived their argument regarding the trial court's grant of summary judgment as to their section 1983 claim against Coach Root, which necessarily included a determination that no reasonable jury could conclude that Coach Root violated Tyler's constitutional rights. Consequently, because there is no underlying constitutional violation, the Board cannot be held liable for its allegedly inadequate training or supervision." …

"Appellants' final claim against the Board is vicarious liability for the alleged assault and battery committed by Coach Root. The Board relies on the GTLA in arguing that it cannot be held liable for Coach Root's alleged misconduct. The GTLA provides, in relevant part, that 'all governmental entities shall be immune from suit for any injury which may result from the activities of such governmental entities wherein such governmental entities are engaged in the exercise and discharge of any of their functions, governmental or proprietary.' Tenn. Code Ann. § 29-20-201(a); *see also* ***Limbaugh v. Coffee Med. Ctr.***, 59 S.W.3d 73, 79 (Tenn. 2001) ('[T]he General Assembly enacted the Tennessee Governmental Tort Liability Act . . . to codify the general common law rule that all governmental entities shall be immune from suit[.]')." …

"The framing of section 29-20-205 is perhaps not the epitome of clarity, but as relevant to this case, a governmental entity *may not* be held vicariously liable for an assault and battery committed by its employee, as the general removal of immunity under the section addresses only negligent acts or omissions. But because assault and battery are not included within those intentional torts for which immunity is expressly retained within section 29-20-205(2), a governmental entity *may* be liable for an injury caused by its employee's assault and battery *if* there is also a showing of some negligence by the entity itself. *See* ***Hughes v. Metro. Gov't of Nashville & Davidson Cnty.***, 340 S.W.3d 352, 368 (Tenn. 2011) ('Since 2001, the Court of Appeals has correctly interpreted ***Limbaugh*** to mean that 'the GTLA does not allow plaintiffs to hold governmental entities vicariously liable for intentional torts not exempted under section 29-20-205(2), but rather requires a direct showing [of] negligence on the part of the governmental entity.'' (quoting ***Pendleton v. Metro. Gov't of Nashville & Davidson Cnty.***, No. M2004-01910-COA-R3-CV, 2005 WL 2138240, at *3 (Tenn. Ct. App. Sept. 1, 2005))). Therefore, Appellants argue, the Board may be held liable for the assault and battery allegedly committed by Coach Root upon a showing of the Board's negligent failure to train and supervise."

"The Board emphasizes that here, however, another aspect of section 29-20-205(2) allows the Board to retain immunity from this allegation of negligence. Although the intentional torts exception does not include assault and battery, it does include civil rights violations. Consequently, this Court has previously held that where the 'underlying acts which [a plaintiff] alleges to be negligent are . . . predicated on intentional tortious conduct involving the violation of [the plaintiff's] civil rights' by government employees, the ''civil rights' exception in [section] 29-20-205(2)' is applicable. ***Jackson***, 2011 WL 1049804, at *7 (quoting ***Campbell v. Anderson County***, 695 F. Supp. 2d 764, 778 (E.D. Tenn. 2010)). Thus, 'even where a complaint couches the claims contained therein as negligent training and supervision claims, if the gravamen of the claim involves a violation of civil rights, then immunity is preserved.' ***Merolla v. Wilson County***, No. M2018-00919-COA-R3-CV, 2019 WL 1934829, at *4 (Tenn. Ct. App. May 1, 2019) (citing ***Cochran***, 586 S.W.3d at 919); *see also* ***Jackson***, 2011 WL 1049804, at *6 (noting that the term 'civil rights' in section 29-20-205(2) has been construed 'as including claims arising under the federal civil rights laws and the U.S. Constitution' (citation omitted))."

"From our review, the thrust of Appellants' claims against the Board is that its inadequate training led to a violation of Tyler's constitutional right to bodily integrity by Coach Root. To be sure, in their response to the Board's motion to dismiss and subsequent motion for summary judgment, Appellants conceded that the GTLA provided immunity for their claims of negligence against the Board on the basis of the 'civil rights' exception. And while this count of the complaint involves only allegations of negligent training and supervision related to Coach Root's assault and battery, it arose from the same set of facts upon which Appellants alleged that Tyler's constitutional rights had been violated within their section 1983 claims. Thus, this claim falls within the ambit of 'civil rights' under section 29-20-205(2). *See* ***Cochran***, 586 S.W.3d at 920 (exception applied to negligent training and supervision claim based on facts underlying section 1983 claim); ***Merolla***, 2019 WL 1934829, at *6 (exception applied to negligence claim based on facts underlying section 1983 claim); ***Lankford v. City of Hendersonville***, No. M2016-02041-COA-R3-CV, 2018 WL 1559971, at *10 (Tenn. Ct. App. Mar. 29, 2018) (same); ***Jackson***, 2011 WL 1049804, at *7 (exception applied to negligent supervision and negligent infliction of emotional distress claims based on facts underlying section 1983 claim); *see also* ***Howard v. Knox County***, No. 3:15-CV-6-TAV-CCS, 2016 WL 9455169, at *11 (E.D. Tenn. Sept. 7, 2016) (exception applied to negligent hiring and training claim based on facts underlying section 1983 claim,) *aff'd*, 695 F. App'x 107 (6th Cir. 2017); ***Johnson v. City of Memphis***, 617 F.3d 864 (6th Cir. 2010) (exception applied to negligence claim based on facts underlying section 1983 claim); ***Partee v. City of Memphis***, 449 F. App'x 444, 448 (6th Cir. 2011) (same, but not addressing whether same facts underlaid separate negligent hiring claim for exception to apply because jury found no underlying constitutional violation)."

"That Appellants were not successful on their civil rights claims does not impact the Board's retention of immunity. 'Nothing in the language of section 29-20-205(2) indicates that there must be an express finding that a civil rights violation occurred in order for the exception to apply.' ***Cochran***, 586 S.W.3d

at 920 (finding no 'indicat[ion] [in the cases it cited] that section 29-20-205(2) requires the claimant to be successful in his or her civil rights claim in order for the civil rights exception to apply to corresponding state law claims'). Instead, the immunity offered by section 29-20-205 is broad, preserving immunity for negligence claims so long as the 'injury arises out of . . . civil rights.' Tenn. Code Ann. § 29-20-205(2). Importantly, our holding today is in keeping with the well established principle that 'statutes permitting suits against the State must be strictly construed.' ***Moreno v. City of Clarksville***, 479 S.W.3d 795, 809–10 (Tenn. 2015); *see also* ***Limbaugh***, 59 S.W.3d at 83 ('[A]s the legislature created [the GTLA] in derogation of the common law . . . the Act must be strictly construed.')."

"Moreover, the trial court provided three reasons for its dismissal of the assault and battery claim against the Board: (1) that a governmental entity cannot be held vicariously liable for an assault and battery committed by its employee; (2) that no assault and battery was committed by Coach Root; and (3) that Appellants had previously conceded that they were not entitled to bring a negligence action against the Board. This concession was made pursuant to the Board's motion to dismiss wherein it relied upon the 'civil rights' exception to section 29-20-205 in arguing that its immunity was preserved. Yet, in their brief, Appellants focus on the fact that the 'intentional torts' exception does not include assault and battery, without addressing that the exception does include injuries involving violations of civil rights. Nor do Appellants respond to the Board's assertion that it retains immunity under the 'civil rights' exception for the negligence element necessary to hold it liable for the assault and battery in their reply brief. Generally, when an alternative ground for a trial court's ruling is not addressed on appeal, the trial court's decision must be affirmed. ***Hatfield v. Allenbrooke Nursing & Rehab. Ctr., LLC***, No. W2017-00957-COA-R3-CV, 2018 WL 3740565, at *8 (Tenn. Ct. App. Aug. 6, 2018) ('Because the individual defendants . . . failed to challenge one of the alternative grounds for denying the motion to dismiss for lack of personal jurisdiction, the trial court's decision must be affirmed.' (citing ***Duckworth Pathology Grp., Inc. v. Reg'l Med. Ctr. at Memphis***, No. W2012-02607-COA-R3-CV, 2014 WL 1514602 (Tenn. Ct. App. Apr. 17, 2014))). We therefore conclude that the Board had immunity from suit under the civil rights exception to the GTLA, and the trial court's grant of summary judgment is affirmed as to the assault and battery claim. The dismissal of Appellants' claim for punitive damages as to the assault and battery claim is also affirmed."

10. Municipal liability - A municipality cannot be held liable under § 1983 simply because it employs a tortfeasor, nor can it be liable for an injury inflicted solely by its employees or agents - A plaintiff asserting a municipal liability claim under *Monell* must connect the employee's conduct to a municipal policy or custom - To do so, a plaintiff must demonstrate one of the following: (1) the existence of an illegal official policy or legislative enactment; (2) that an official with final decision making authority ratified illegal actions; (3) the existence of a policy of inadequate training or supervision; or (4) the existence of a custom of tolerance or acquiescence of federal rights violations - A plaintiff then must also demonstrate that, through its *deliberate* conduct, the municipality was the moving force behind the injury alleged – Based on the concession made by plaintiff's attorney in oral argument the court determined that plaintiff had abandoned the appeal – In this case plaintiff alleged a failure-to-screen which was a single hiring decision so the plaintiff must show that this officer was highly likely to inflict the particular injury suffered by the plaintiff – To prevent municipal liability for a hiring decision from collapsing into *respondeat superior* liability, the plaintiff alleging failure to screen must show that the decisionmaker was deliberately indifferent to the known or obvious consequence of the hiring decision and that the link between the applicant's background and the specific constitutional violation was sufficiently strong - Simply choosing not to inquire into an applicant's background does not amount to deliberate indifference - Plaintiff was required to plead facts plausibly alleging that a known or obvious consequence of the hiring decision was that *this* officer was highly likely to inflict the *particular* injury suffered by the plaintiff (being held at gunpoint following an

unconstitutional stop) Allegations of issues, concerns about the office demeanor and professionalism, and his failure to complete a training program fall short of plausibly linking the danger of hiring the officer to plaintiff being held at gunpoint by the officer following an unconstitutional stop - More specifically, the mere fact that the officer may have been likely—even exceedingly likely—to commit unconstitutional conduct in general would not have put the city on notice that the officer would commit the specific constitutional violation here

ILYA KOVALCHUK v. CITY OF DECHERD, TENNESSEE and MATHEW WARD
SIXTH CIRCUIT COURT OF APPEALS No. 23-5229 Decided and Filed: March 18, 2024

"Defendant Matthew Ward, then an off-duty police officer for the City of Decherd, stopped plaintiff Ilya Kovalchuk, waved his police badge, and held Kovalchuk at gunpoint without any justification. Kovalchuk alleges that Ward violated his Fourth Amendment rights and that the City's failure to investigate Ward's background before hiring him caused Kovalchuk's injuries. Finding that Kovalchuk failed to adequately plead allegations supporting municipal liability, the district court dismissed the claims against the City. We affirm."

"The complaint alleges the following: Kovalchuk was driving his vehicle when Ward began driving 'erratically' behind him and ordered him to pull over. Kovalchuk complied and exited his vehicle. Ward displayed his City of Decherd Police Department badge, pointed his handgun at Kovalchuk, and ordered him to get on the ground. Kovalchuk pleaded with Ward to put down the gun because Ward 'was not on duty and was outside of his jurisdiction.' In response, Ward screamed that he 'was always on duty.' Bystanders witnessing the altercation called the Rutherford County Sheriff's Department. Sheriff's deputies arrested Ward, and he was charged with aggravated assault. Kovalchuk alleges that he has 'suffered severe emotional damage and mental anguish' following this incident."

"When Chief Ross Peterson hired Ward, Chief Peterson ordered an investigator 'not to consult [Ward's] references or previous employment.' Had the investigator done so, Chief Peterson would have learned that, while employed at the Fort Walton Beach Police Department, Ward had 'to resign due to concerns about his demeanor and professionalism as well as failing to complete [the department's] training program in its entirety.' Chief Peterson also would have discovered that Ward had unspecified 'issues' with another police department in Alabama prior to those with Fort Walton Beach. Although Kovalchuk pleads that a background check 'would have revealed these red flags and prevented' the incident at issue, he alleges neither that a thorough background investigation would have changed Chief Peterson's hiring decision nor that Ward had violent tendencies."

"After the incident, Kovalchuk commenced this 42 U.S.C. § 1983 action against Ward and the City, alleging numerous federal civil rights and state-law claims. Following the district court's entry of a default judgment against Ward and the parties' stipulation dismissing many of Kovalchuk's claims, only his municipal liability claims against the City under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), remained. The City moved to dismiss those claims under Federal Rule of Civil Procedure 12(b)(6), and the district court granted the motion. Kovalchuk timely appealed."

"A municipality cannot be held liable under § 1983 simply because it employs a tortfeasor, nor can it be liable 'for an injury inflicted solely by its employees or agents.' *Monell*, 436 U.S. at 694; *see also Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 403 (1997) ('We have consistently refused to hold municipalities liable under a theory of *respondeat superior*.'). Instead, a municipality may be held liable 'only for '[its] *own* illegal acts.'' *Connick v. Thompson*, 563 U.S. 51, 60 (2011) (quoting *Pembaur v. Cincinnati*, 475 U.S. 469, 479 (1986)). A plaintiff asserting a municipal liability claim under *Monell* 'must connect the employee's conduct to a municipal 'policy' or 'custom.'' *Gambrel v. Knox Cnty.*, 25 F.4th 391, 408 (6th Cir. 2022) (quoting *Brown*, 520 U.S. at 403). To do so, a plaintiff must demonstrate one of the following: '(1) the existence of an illegal official policy or legislative enactment; (2) that an official with final decision making authority ratified illegal actions; (3) the existence of a policy of inadequate training or supervision; or (4) the existence of a custom of

tolerance or acquiescence of federal rights violations.' *Burgess v. Fischer*, 735 F.3d 462, 478 (6th Cir. 2013). A plaintiff then 'must also demonstrate that, through its *deliberate* conduct, the municipality was the 'moving force' behind the injury alleged.' *Brown*, 520 U.S. at 404"

"At issue here is the district court's dismissal of three *Monell* claims: (1) failure to train, (2) failure to supervise, and (3) failure to screen. At oral argument, however, Kovalchuk's lawyer conceded that the complaint was deficient on all counts:

Failure to train

> THE COURT: Isn't that fatal to your failure-to-train claim, if you don't know what training [Ward] received? I mean, how can you allege plausibly that [the City is] liable for failure to train when you don't know what training he had?
> PLAINTIFF'S COUNSEL: We don't know what training he had because we don't know when he was hired, and we don't know what training he missed in Fort Walton. I have to admit, I think the training theory is gone.

Oral Arg. at 19:53–20:18.

Failure to supervise

> THE COURT: How about the failure-to-supervise claim, is that gone too?
> PLAINTIFF'S COUNSEL: I think that's gone. I truly do.

Id. at 20:22–20:28."

Failure to screen

> PLAINTIFF'S COUNSEL: Yes, I read *Twombly*, and you are correct. That's what it says. And I realize that that is why [the complaint] to some extent is deficient. . . . So all I'm saying is this, is it plausible that Mr. Ward's background, if it had been checked would have shown that, in fact, he was not a proper officer to hire? We think yes.
> THE COURT: Not a proper officer, that it's highly likely that he would have engaged in this 1983 violative conduct.
> PLAINTIFF'S COUNSEL: And we think discovery would show that, your honor.
> THE COURT: So you basically admit to me that your complaint doesn't have the facts in there that you really need.
> PLAINTIFF'S COUNSEL: We don't and can't until we have discovery.

Id. at 11:33–12:41; *see also id.* at 9:15–29. Kovalchuk has therefore abandoned his appeal. *See, e.g.*, *Deane Hill Country Club, Inc. v. City of Knoxville*, 379 F.2d 321, 323 (6th Cir. 1967) ('This latter contention was abandoned by plaintiff at oral argument before this court and it therefore will not be considered.'); *cf. United States v. Duval*, 742 F.3d 246, 255 (6th Cir. 2014) ('The Duvals have waived review of this issue by conceding at oral argument that *Marcinkewciz* controls and forecloses their arguments.')."

"These concessions aside, because Kovalchuk's appeal and oral argument focused mainly on his failure-to-screen claim, we highlight further why this claim was not plausibly pleaded. For such a claim, a plaintiff must plead sufficient facts supporting the conclusion 'that a municipal [hiring] decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision.' *Brown*, 520 U.S. at 411. Unlike failure-to-train claims, which typically involve a pattern of unconstitutional conduct to establish deliberate indifference, *Burgess*, 735 F.3d at 478, failure-to-screen claims usually rest—as Kovalchuk's does here—on a single hiring decision, *Brown*, 510 U.S. at 408–10."

"For a 'single hiring decision' by a municipal decisionmaker that resulted in a constitutional violation, which 'can be a 'policy' that triggers municipal liability,' there exists a 'particular danger that a municipality will be held liable for an injury not directly caused by a deliberate action attributable to the municipality itself.' *Id.* at 404, 410; *see also Siler v. Webber*, 443 F. App'x 50, 55 (6th Cir. 2011) (explaining the 'potential pattern exception' created in *Brown*). To mitigate this danger, the Supreme Court in *Brown* set forth a stringent test: 'To prevent municipal liability for a hiring decision from collapsing into *respondeat superior* liability,' the plaintiff alleging failure to screen must show that the decisionmaker was deliberately indifferent to the 'known or obvious consequence' of the hiring decision and that the link between the applicant's background and the specific constitutional violation was sufficiently strong. 520 U.S. at 410–12. Simply choosing not to inquire into an applicant's background does not amount to deliberate indifference. *See id.* at 411. 'Only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right can the official's failure to adequately scrutinize the applicant's background constitute 'deliberate indifference.'' *Id.* As for the causation element of deliberate indifference, establishing that a hiring decision would likely result in any constitutional injury is insufficient to impose municipal liability. *Id.* at 412. Instead, the plaintiff must show that '*this* officer was highly likely to inflict the *particular* injury suffered by the plaintiff.' *Id.*"

"*Brown* highlights how this exceedingly rigorous standard operates. There, a police officer seriously injured Jill Brown during a traffic stop, and she sought to hold the municipality liable for his use of excessive force. *Id.* at 399–401. Like Kovalchuk, Brown asserted that, had the municipality sufficiently investigated the officer's background—he 'had a record of driving infractions and had pleaded guilty to various driving-related and other misdemeanors, including assault and battery, resisting arrest, and public drunkenness'—it would not have hired the officer and therefore her alleged constitutional injuries would not have occurred. *Id.* at 401. That record, the Supreme Court concluded, was 'inadequate' to hold the county liable:

> The fact that [the officer] had pleaded guilty to traffic offenses and other misdemeanors may well have made him an extremely poor candidate for reserve deputy. Had [the hiring official] fully reviewed [the officer's] record, he might have come to precisely that conclusion. But unless he would necessarily have reached that decision *because* [the officer's] use of excessive force would have been a plainly obvious consequence of the hiring decision, [the] inadequate scrutiny of [the officer's] record cannot constitute 'deliberate indifference' to [Brown's] federally protected right to be free from a use of excessive force.

Id. at 413–14."

"Similar to *Brown*, the central question here is whether Chief Peterson's failure to adequately screen Ward's background was the moving force behind Ward's unconstitutional misconduct, and, as a result, Kovalchuk's injury.**3** According to the complaint, Chief Peterson, acting as 'the final policymaker for the Decherd Police Department' and 'as an agent for the City of Decherd,' made the 'deliberate choice to hire and retain' Ward even though he 'should have known' that Ward was 'unfit to be a police officer and to possess a deadly service weapon.' Chief Peterson 'ordered' his investigator not to consult Ward's background, which would have revealed that Ward's previous employer, the Fort Walton Beach Police Department, asked him to resign due to 'concerns about his demeanor and professionalism,' that Ward had failed to complete a training program at this previous employer, and that Ward had 'issues' during his employment with another police department in Alabama."

"These ambiguous allegations, which merely allude to negligent hiring by the City, do not establish the necessary causal link for Kovalchuk's deliberate-indifference claim. Kovalchuk was required to plead facts plausibly alleging that a 'known or obvious consequence' of the hiring decision was that '*this* officer' (Ward) 'was highly likely to inflict the *particular* injury suffered by the plaintiff' (being held at gunpoint following an unconstitutional stop). *See id.* at 410, 412. Allegations of 'issues,' 'concerns

about [Ward's] demeanor and professionalism,' and his 'fail[ure] to complete [a] training program' fall short of plausibly linking the danger of hiring Ward to Kovalchuk being held at gunpoint by Ward following an unconstitutional stop. *See id.* at 411–12. More specifically, the mere fact that Ward may have been likely—even exceedingly likely—to commit unconstitutional conduct in general would not have put the City on notice that Ward would commit the 'specific constitutional violation' here. *Id.* at 410–11 ('The fact that inadequate scrutiny of an applicant's background would make a violation of rights more *likely* cannot alone give rise to an inference that a policymaker's failure to scrutinize the record of a particular applicant produced a specific constitutional violation.'). The same can be said regarding Ward's predisposition to violence—that alone is insufficient under *Brown*. Based simply on the broad allegations in the complaint, Kovalchuk's failure-to-screen claim is not plausible. The district court did not err in dismissing this claim."

"Kovalchuk contends that discovery would reveal more specific information on Ward's background, and in turn, that he was highly likely to engage in the particular conduct at issue. But a plaintiff cannot use discovery to bridge the gap between a deficient pleading and the possibility that a claim might survive upon further investigation. *See New Albany Tractor, Inc. v. Louisville Tractor, Inc.*, 650 F.3d 1046, 1051 (6th Cir. 2011) ('[A] plaintiff may not use the discovery process to obtain the[] [necessary] facts after filing suit.'). Put simply, a plaintiff is 'not entitled to discovery' to determine whether a claim can survive past the pleading stage. *See, e.g.*, *Iqbal*, 556 U.S. at 686; *accord Estate of Barney v. PNC Bank, Nat'l Ass'n*, 714 F.3d 920, 929 (6th Cir. 2013) ('[U]nder *Iqbal*, a complaint cannot survive a motion to dismiss—and plaintiffs cannot get discovery—unless the complaint shows that the defendant's wrongdoing is plausible, not just possible.'); *Patterson v. Novartis Pharms. Corp.*, 451 F. App'x 495, 498 (6th Cir. 2011) ('The Supreme Court's decisions in *Twombly* and *Iqbal* do not permit a plaintiff to proceed past the pleading stage and take discovery in order to cure a defect in a complaint.').4 Kovalchuk cannot rely on speculation about what may be learned during discovery to defeat the City's motion to dismiss."

"Ward's conduct here was egregious, and he undeniably victimized Kovalchuk. No citizen should ever have to face being unconstitutionally seized, let alone by an off-duty police officer who brandishes a firearm in an apparent incident of road rage. While we are sympathetic to Kovalchuk's plight, the pitfall in his case is his attempt to hold *the City* liable for *Ward's* misconduct. Ward's unconstitutional actions are not automatically attributable to the City, even if the City negligently hired Ward. To find otherwise would require us to contradict Supreme Court precedent by permitting the City to potentially be liable for its employee's actions via respondeat superior. *See Brown*, 520 U.S. at 410. And while adequately pleading a municipal liability claim without the benefit of discovery may be difficult, that task is hardly new. *See Iqbal*, 556 U.S. at 686. Perhaps Kovalchuk could have moved to file an amended complaint after further investigating his claims or in response to the City's motion to dismiss. But he did not, and we must analyze the allegations in the complaint before us, which deficiently pleaded a failure-to-screen claim."

CLASS ACTION

1. Attorney sent solicitation letters to members of a proposed class, which class had not been approved by the district court - District court issued a protective order preventing further communication by the attorney with prospective class members - There was no class certified by the court - The Supreme Court has held that attorney communications with potential clients is attorney speech and, as such, is accorded a measure of First Amendment protection - The district court was mistaken when it found, in the protective order, that potential members of the proposed class were represented by class counsel after the court's preliminary approval of the class in its Rule 23(e)(1) order - That order did not create a class - Even after certification, class counsel do not possess a traditional attorney-client relationship with absent class members - Upon entry of the district court's 23(e)(1) order, lass counsel' was only plaintiffs' counsel—because the only people that counsel represented then (and now) were the named plaintiffs themselves - Communications with potential class members, then, were not communications with persons already represented by another lawyer - The district court's entry of its Rule 23(e)(1) order

therefore was not a valid ground on which to restrict those communications - The importance of truthful, non-misleading information for members of a proposed (or actual) class is increased when, as here, the named parties propose a class-wide settlement - A lawyer's truthful, non-misleading criticisms of a proposed settlement are not a valid reason to proscribe his communications with members of a proposed (or actual) class

WAYSIDE CHURCH, an Illinois, Not-For-Profit (Ecclesiastical) Corporation, individually and on behalf of a class of all others similarly situated; HENDERSON HODGENS, Van Buren County, individually and on behalf of a class of all others similarly situated, et al. v. VAN BUREN COUNTY, MICHIGAN, in its individual Michigan municipal capacity and on behalf of a class of all other Michigan counties similarly situated, et al
SIXTH CIRCUIT COURT OF APPEALS No. 23-1471 Decided and Filed: June 6, 2024

"In putative class actions, a class comes into existence only when the court actually certifies one in an order entered under Civil Rule 23(c). Before then, the potential members of the putative class are merely that—and lawyers other than putative class counsel are generally free to communicate truthful, non-misleading information to those potential class members. But a lawyer may lose that freedom if, in making those communications, the lawyer violates ethical rules."

"At issue here is a protective order in which the district court barred Visser and Associates, PLLC ('Visser'), from communicating with potential class members in a putative class action that is now pending before the court. Visser's communications with members of the potential class were not misleading. But Visser solicited named plaintiffs, in violation of an ethical rule, and later misled the court itself. For those reasons, we affirm the district court's order."

"Wayside Church owned a summer camp in Western Michigan, until Van Buren County foreclosed on it in satisfaction of a $16,750 tax debt. The County then sold the property for $206,000 without refunding to Wayside any of the difference. Wayside brought this putative class action in 2014, claiming that the County had taken its property—in violation of the federal Constitution's Takings Clause—to the extent the summer camp had been worth more than Wayside's tax debt. A divided panel of our court held that—under the Supreme Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)—Wayside was required to pursue that claim in state court rather than federal. *See Wayside Church v. Van Buren Cnty.*, 847 F.3d 812, 815 (6th Cir. 2017). In *Knick v. Township of Scott, Pennsylvania*, 588 U.S. 180 (2019), however, the Supreme Court overruled *Williamson County*. That eventually revived litigation of this case (and many others like it) in federal court."

"On October 13, 2022, our court held that, when the government takes absolute title to property in satisfaction of a tax obligation, the government effects a taking to the extent the property is worth more than the taxes and penalties owed. *Hall v. Meisner*, 51 F.4th 185, 196 (6th Cir. 2022). We applied that holding to precisely the scheme (under the Michigan General Property Tax Act) at issue here. Seven months later, the Supreme Court unanimously agreed with our holding. *See Tyler v. Hennepin Cnty.*, 598 U.S. 631, 647 (2023)."

"In January 2023—about three months after our decision in *Hall*—the plaintiffs in this litigation filed an amended complaint that named as defendants 43 counties in the Western District of Michigan. In addition, as to every such county, the amended complaint included a named plaintiff whose property had been taken by the county and then sold for an amount greater than the plaintiff's tax debt (pursuant to the same Michigan statutory scheme that we had found unconstitutional in *Hall*)." …

"In March 2023, the plaintiffs filed an 'unopposed motion for preliminary approval' of a 'proposed class action settlement' between the plaintiffs and defendant counties. Under that proposed settlement, the counties would retain 20 percent of the 'surplus' they had taken from each property owner, and plaintiffs' counsel would take another 16 percent of that surplus. That would leave each property owner with 64 cents of each dollar taken from her by a defendant county. In that motion, the plaintiffs

asked that the court 'conditionally' certify the proposed class and 'preliminarily' approve the proposed settlement, for purposes of sending notice of the proposed settlement to the proposed class. *See* Fed. R. Civ. P. 23(e)(1)."

"In December 2022, Visser and Associates PLLC learned of the proposed settlement and moved to intervene on behalf of 'numerous parties'—some of whom Visser was apparently representing in individual takings suits against counties in the Western District of Michigan. Those 'parties' sought to intervene in this case (by way of Visser's motion) because, they argued, 'the *Wayside* plaintiffs cannot fully represent or protect' their 'interest in seeking unpaid just compensation.' The district court denied the motion, noting that it was 'utterly devoid of any analysis' as to Civil Rule 24, which governs intervention of non-parties."

"Around the same time, Visser began sending solicitation letters to property owners who it thought might have takings claims against counties in the Western District of Michigan. The letters addressed the property owners by name and identified precisely the amount of money the county had retained (as a 'surplus' beyond the tax debt) following the sale of their property. The letters also said that Visser was currently 'engaging in litigation and collection efforts' to 'recover funds the county wrongfully withheld,' and encouraged the recipients to contact Visser if they were 'interested in pursuing a claim.' Some of the people who received those letters contacted Visser, which then sent them an 'Authority to Represent' agreement. And some of those people then signed and returned the agreement to Visser, thereby retaining Visser as counsel. Others did not."

"Meanwhile, on March 24, 2023, the district court preliminarily approved the proposed settlement and conditionally certified the proposed class (the 'Rule 23(e)(1) order'). The court's order required that notice of the proposed settlement be sent to members of the proposed class within 45 days (*i.e.*, by May 8), and said that any 'putative Class member wishing to be excluded from the Settlement Class' should provide notice to that effect within 120 days of the court's order (*i.e.*, by July 22). The court's order also appointed Fink Bressack, James Shek, and Lewis, Reed & Allen PC as class counsel."

"Five days later, the plaintiffs moved for the district court to enter a 'protective order' barring Visser from 'soliciting or otherwise communicating with class members.' In support, the plaintiffs cited the solicitation letters that Visser had sent to named plaintiffs, and argued that those letters were both misleading and intended to undermine 'the class' (though none had actually been certified in the case). The plaintiffs also asserted that, in violation of Rule 4.2(a) of the Michigan Rules of Professional Conduct, Visser had sent letters to several named plaintiffs—who (unlike potential members of the putative class) were actually parties in the case and represented by class counsel. That rule bars attorneys from communicating 'about the subject of the representation with a person whom' they know 'to be represented in the matter[.]' Mich. R. Pro. Conduct 4.2(a)."

"In response, Visser said it had sent the solicitation letters to the named plaintiffs 'inadvertently.' Visser also told the court it would not engage in any 'further solicitations' of potential class members."

"During the show-cause hearing on May 8, 2023, class counsel produced a 'follow-up' letter that Visser had sent to a potential class member, Christen McKinney, six days before—which was almost three weeks after Visser told the district court it had stopped soliciting members of the putative class. The court gave Visser ample opportunity to explain all of its relevant actions, with the court engaging with counsel for each side throughout. At the hearing's end, the court concluded as follows:

> The issue for today, and the rifle shot, if you will, of the show cause order was contact with named parties by the Visser law firm. I appreciate the argument regarding the contours of the rule, but based on direct and circumstantial evidence, the Court concludes that the rule was violated[.]

A week later, on May 15, the court issued two orders. In the first, the court formally reprimanded Visser for violating Rule 4.2 of the Michigan Rules of Professional Conduct, finding that Visser had 'knowingly' communicated with certain 'named plaintiffs.'"

"The second order was the 'protective order' at issue here. In that order, the district court enjoined Visser from 'soliciting and communicating with, in any form, class members that had not retained Visser before March 24, 2023'—the day the court conditionally certified the class and preliminarily approved the settlement agreement."

"In *Gulf Oil v. Bernard*, 452 U.S. 89, 99 (1981), the Supreme Court 'consider[ed] the authority of district courts under the Federal Rules [of Civil Procedure] to impose sweeping limitations' on communications to class members. There (unlike here) the district court had already certified a class. The Supreme Court stated that 'a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties.' *Id.* at 100. 'But this discretion is not unlimited[.]' *Id.* … In the years since *Gulf Oil*, the Supreme Court has held that attorney communications with potential clients is attorney speech and, as such, 'is accorded a measure of First Amendment protection.' *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995)."

"That leaves the protective order's substance, and specifically the question whether the court's reasons for its restrictions on Visser's communications with potential class members were valid. The first such reason—as the court put it—was that the court imposed those restrictions pursuant to 'its duty to restrict communications that threaten the interference with the proper administration of a class action.' Specifically, the court stated, potential class members (like McKinney) were 'represented by class counsel' after the court's 'preliminary approval of the class' in its Rule 23(e)(1) order. The court added that the 'language of [the letter to McKinney] is concerning[,]' in part because 'it appears to undermine the class settlement agreement.'"

"… As one district court aptly put it: 'preliminary approval of a class action settlement is at most a determination that there is what might be termed probable cause to submit the proposal to class members and hold a full-scale hearing as to its fairness.' *In re Outer Banks Power Outage Litig.*, No. 4:17-CV-141, 2018 WL 2050141, at *3 (E.D.N.C. May 2, 2018) (cleaned up). Thus, a Rule 23(e)(1) order is a determination whether to send notice of a proposed settlement to a proposed class."

"What a Rule 23(e)(1) order does not do is actually certify a proposed class. Certification is governed by Rule 23(a) and (b), which recite detailed requirements for class certification." …

"The district court was therefore mistaken when it found, in the protective order, that potential members of the proposed class were 'represented by class counsel' after the court's 'preliminary approval of the class' in its Rule 23(e)(1) order. That order did not create a class. In that order the court did not determine whether the people described in the proposed class definition could, as a group, satisfy the requirements of Rule 23(a) and (b); nor, when the order was entered, had any of those people yet had an opportunity to decide whether to remain in the proposed class. (That instead is what the provision of notice allows them to do.) Moreover, even after certification, 'class counsel do not possess a traditional attorney-client relationship with absent class members.' *Community Bank*, 418 F.3d at 313; *see also, e.g.*, *Dry Max*, 724 F.3d at 718 (characterizing the relationship as fiduciary); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tanks Prods. Liab. Litig.*, 55 F.3d 768, 788 (3d Cir. 1995) (same). Thus, upon entry of the district court's 23(e)(1) order, 'class counsel' was only plaintiffs' counsel—because the only people that counsel represented then (and now) were the named plaintiffs themselves. Communications with potential class members, then, were not communications with persons already represented by another lawyer. The district court's entry of its Rule 23(e)(1) order therefore was not a valid ground on which to restrict those communications. *See Fox*, 35 F.4th at 1050 ('There is nothing inherently abusive about engaging clients who later end up members of a class')."

"Nor were Visser's communications with potential class members improper on the ground that they 'appear[ed] to undermine the class settlement agreement.' To the contrary, some proposed settlements should be undermined, *see, e.g.*, *Dry Max*, 724 F.3d at 721; and every proposed settlement should be subject to scrutiny before the court finally approves it. As the Third Circuit observed in *Community Bank*, 'the Supreme Court, as well as this court, has commented on the importance of ensuring that class members make an informed decision whether to remain in a prospective class.' 418 F.3d at 313 n.30 (citing *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 549 (1974)). And as we said in *Fox* (where a class had already been certified), 'class members should decide for themselves whether they want to opt out.' 35 F.4th at 1050."

"The importance of truthful, non-misleading information for members of a proposed (or actual) class is increased when, as here, the named parties propose a class-wide settlement."…

"Moreover, the reality is that, once class counsel has reached agreement with the defendant, counsel has every incentive to obtain judicial approval of that agreement. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 852 & n.30 (1999). By contrast, lawyers other than class counsel are well-situated—by knowledge and incentives alike—to point out to potential class members why their recovery is too low or class counsel's fees too high."

"To be clear, none of these observations are meant to imply that any of these dangers manifested in the proposed settlement here. Whether they did is beyond the scope of this appeal."

"What is relevant here is that, for all these reasons, a lawyer's truthful, non-misleading criticisms of a proposed settlement are not a valid reason to proscribe his communications with members of a proposed (or actual) class. And here the district court found that Visser's communications to potential class members were not misleading. The content of those communications therefore was not a valid reason to proscribe them."

"Yet the district court had additional reasons for the restrictions it imposed on Visser in its protective order. Specifically, the court entered the protective order in large part because it found that Visser had solicited seven named plaintiffs in violation of Michigan Rule of Professional Conduct 4.2(a). In doing so, the district court specifically rejected Visser's assertion that it had sent those letters 'inadvertently'—finding instead that Visser had 'knowingly' solicited those named plaintiffs."

"Visser's ethical violation and lack of candor—in its interactions with the district court itself, no less—gave the court good reason to think that Visser's conduct 'pose[d] a serious threat to the fairness of the litigation process' and to the 'administration of justice generally.' *Id.* at 1047. That a district court must narrowly tailor its restrictions on speech to members of a proposed class, *id.*, does not mean it must allow a demonstrably untrustworthy speaker to keep speaking to them. The court's discretion, instead, allows for a one-strike policy toward lawyers whose actions violate ethical rules. Such was the case here. On this record, the district court did not abuse its discretion when it concluded that Visser's conduct reflected a 'likelihood of serious abuses' justifying the restrictions imposed in the protective order. *Gulf Oil*, 452 U.S. at 104."

"The district court's protective order—as clarified by the district court and narrowed by our prior order—is affirmed."

CONSTITUTIONAL LAW (U.S.)

1. First Amendment - Billboards - Strict scrutiny applies - The exemption of public service signs from the requirements in the ordinance is content based and a subject of a strict scrutiny - Village must then go further when implementing the ordinances, by inquiring into whether the content displayed on an off-premises sign meets the criteria of the public-service exemption - This cannot be done in a content-neutral fashion - The threshold inquiry of the public-service exemption—whether the content of a given sign serves a public service—is laden with the types of

content-based and value-judgment determinations that call for strict scrutiny under the First Amendment - As a matter of aesthetics, public-service signs that can utilize variable messaging create the same problem as other outdoor advertising signs - In other words, outdoor advertising signs utilizing variable messaging are no greater an eyesore, yet are banned from doing so - So, too, for safety: the Village has offered no reason to believe that outdoor advertising signs pose a greater threat to safety than do public-service signs - When a municipality promulgates exceptions to a general prohibition that meaningfully undermine its stated goals, it leaves appreciable damage to those supposedly vital interests

NORTON OUTDOOR ADVERTISING, INC. v. VILLAGE OF ST. BERNARD, OHIO; GERALD L. STOKER, Building Commissioner, BOARD OF ZONING APPEALS, Village of St. Bernard, Ohio
SIXTH CIRCUIT COURT OF APPEALS No. 23-3623 Decided and Filed: April 19, 2024

"Like many municipalities, the Village of St. Bernard ('Village') regulates billboards and other signs displayed within the Village limits. Norton Outdoor Advertising ('Norton') has operated billboards within the Village for decades. The Village recently revoked one of Norton's permits, however, after Norton constructed two variable-message signs. The relevant Village ordinance regulates signs based principally on whether what is being advertised is located on or off the premises of the sign. Under controlling Supreme Court precedent, this is a permissible, content-neutral means of regulation. But the Village's ordinance also has an exemption that functions beyond this on- and off-premises dichotomy. And that exemption is content based. Accordingly, the Village ordinance must satisfy strict scrutiny. Because the Village ordinance is not narrowly tailored to fulfill a compelling interest, it cannot stand as written. The parties and the district court, however, have yet to consider whether the unconstitutional provision is severable. Accordingly, we REVERSE the district court's judgment and REMAND for proceedings consistent with this opinion."

"The Village regulates signs and billboards via two chapters of its code: Chapter 711 and Chapter 1185. Chapter 1185 pertains to 'signs.' As a threshold matter, a sign is 'any writing, pictorial representation, emblem, flag or any other figure or similar character which is a structure or part thereof or is attached to or painted on or in any means represented on a building or structure; and is used to announce, direct attention to, or advertise; and is visible from outside a building.' R. 1-1 (Ordinances, Ch. 1185.001(a)) (Page ID #43). This definition includes billboards but excludes 'the flag, pennant, or insignia of any nation, state, city or other political unit, or any political, educational, charitable, philanthropic, civic, professional, religious or like campaign, drive, movement or event.' *Id.* (Page ID #43–44)."

"Chapter 1185 then identifies two further categories: advertising signs and business signs. An advertising sign 'directs attention to a business, commodity, service or entertainment conducted, sold or offered elsewhere than on the premises where displayed or only incidentally on the premises.' *Id.*, Ch. 1185.001(c) (Page ID #44). A business sign accomplishes the same but does so on the premises where the activity is located. *Id.*, Ch. 1185.001(d) (Page ID #44). The parties agree that these two categories essentially refer to those advertising a subject matter that is 'on-premises,' and those advertising the same 'off-premises.' Appellant Br. at 8; Appellee Br. at 7. One must receive a permit before installing or erecting any sign, *id.*, Ch. 1185.002 (Page ID #44), but different rules otherwise pertain to advertising and business signs and to signs that do not fall into one of these two categories, *see, e.g.*, *id.*, Chs. 1185.01, 1185.02 (Page ID #44). As far as '[e]xpressway [a]dvertising' is concerned, Chapter 1185.01(c) directs readers to Chapter 711 for 'definition, rules, regulations and penalties.'"

"Chapter 711 is titled '[e]xpressway [a]dvertising.' Chapter 711.01 contains the Village's statement of intent for promulgating rules 'regulating outdoor advertising signs,' including reducing motorists' distractions, improving highway safety, protecting emergency responders, maintaining and improving property values, and reducing 'visual blight.' *Id.*, Ch. 711.01(a–e) (Page ID #41). The chapter then defines '[o]utdoor [a]dvertising [s]ign,' as 'any outdoor sign, display, device, figure, painting, drawing, message, placard, poster, billboard, or any other contrivance designed, intended, or used to advertise or to give information in the nature of advertising, or any part thereof, the advertising or informative

contents of which are visible from the main traveled way of any highway on the Interstate system or primary system in this Village.' *Id.*, Ch. 711.02(a) (Page ID #41). Exempted from this definition are '[s]igns primarily intended to promote the sale of goods, products, services, or events on the same premises as the sign'; public traffic signs; signs located on property for sale; and '[p]ublic service signs which disclose information such as time or weather.' *Id.*, Ch. 711.02(a)(1–4) (Page ID #41). Outdoor advertising signs are subject to a variety of rules and regulations, but relevant here, they may not use '[m]ultiple message or variable message' displays, *id.*, Ch. 711.07(e) (Page ID #43), which are essentially digital signs that can rotate through displayed messages, *id.*, Ch. 711.02(l), (m) (Page ID #41)."

"Norton sells and leases billboard space to third parties who 'engage in political speech, social speech, public service speech, other forms of non-commercial speech, or commercial speech.' R.1 (Compl. ¶¶ 14, 18) (Page ID #5–6). Norton operates nine outdoor advertising signs in the Village, some of which are digital billboards. *Id.* ¶¶ 17, 51 (Page ID #6, 14–15). Since the 1970s, Norton has operated a sign in the Village at 130 West Ross Avenue. *Id.* ¶ 76 (Page ID #21). Norton applied for and received a permit from the Village to convert two static sign faces at 130 West Ross Avenue to 'digital display faces.' *Id.* ¶¶ 76–79 (Page ID #21–22). After Norton completed construction of the updated faces, however, the Village revoked the permit, citing Chapter 711.07(e)'s ban on '[m]ultiple message or variable message outdoor advertising signs.' *Id.* ¶ 80 (Page ID #22); *see also* R. 38-3 (Not. of Non-Compliance at 1–2) (Page ID #1501–02) (letter from Gerald Stoker to Steve Knapp stating that Norton received a permit to construct only an LED billboard, not a variable-message sign, and that its sign violated Chapter 711.07(e))."

"Norton sued the Village on April 30, 2020, alleging that the Village's ordinances are unconstitutional for a variety of reasons. *See generally*, R.1 (Compl. ¶¶ 1–179) (Page ID #1–40). Between September 10, 2021, and September 13, 2021, both parties cross-moved for summary judgment. *See* R. 37 (Norton Mot. Summ. J.) (Page ID #1433–34); R. 38 (Village Mot. Summ. J.) (Page ID #1456–57). On February 16, 2022, the magistrate judge stayed the case pending the Supreme Court's resolution of *City of Austin v. Reagan National Advertising of Austin, LLC*, 596 U.S. 61 (2022), because 'a decision [was] expected to be issued in the near future that [was] highly likely to have a dispositive effect on the issues presented.' R. 46 (February 16, 2022 Order at 1) (Page ID #1662)."

"After the Supreme Court decided *Austin*, the parties filed supplemental briefing addressing its import. *See* R. 49 (Village Suppl. Br.) (Page ID #1669–90); R. 50 (Norton Suppl. Br.) (Page ID #1691–1708). On June 16, 2022, the magistrate judge issued a report and recommendation, recommending that the district court grant the Village's motion for summary judgment. R. 51 (R. & R. at 1) (Page ID #1709). The magistrate judge found that Norton lacked standing to challenge any provisions of the ordinances other than Chapter 711.07(e) and accompanying provisions, *id.* at 9–20 (Page ID #1717–28); that the provisions for which Norton had standing to challenge are content-neutral regulations under *Austin*, *id.* at 10–12 (Page ID #1718–20); and that the regulations satisfied intermediate scrutiny, *id.* at 20–27 (Page ID #1728–35). Norton filed objections to the magistrate judge's report but did not object to the standing findings. R. 54 (Norton Objs.) (Page ID #1910–54); *see also* R. 63 (July 20, 2023 Order at 4 n.1) (Page ID #2149)."

"Because the Village's regulations are not narrowly tailored to serve its stated interests, the sign ordinance cannot stand as written."

"Whether Chapter 1185 bears on this dispute turns on statutory interpretation. From the outset, the parties disagree on what the definition of 'sign' means in Chapter 1185. The Village suggests that what is exempted from the definition of 'sign'—'the flag, pennant, or insignia of any nation, state, city or other political unit, or any political, educational, charitable, philanthropic, civic, professional, religious or like campaign, drive, movement or event' in Chapter 1185.001(a)—refers to 'the type of sign, *not its content*.' R. 38 (Village Mot. Summ. J. at 12) (Page ID #1471); *see also* Appellee Br. at 27 (arguing that Norton's contentions 'are an unsupported attempt to twist regulations irrelevant to this appeal'). In essence, the Village contends that, even if Chapter 1185 applied to this case, it is irrelevant because Norton has not indicated that it wishes to post a physical flag. Norton, on the other

hand, claims that this definition of 'sign' is a broad content-based regulation that effectively exempts from all regulation promotion of content related to 'current nation[s], religious organizations, or political action.' Appellant Br. at 37."

"Further, the parties disagree on whether Chapter 1185 even applies to this dispute. The Village argues that Chapters 1185 and 711 do not operate in tandem but instead apply to entirely different subject matters. Its view is that Chapter 1185 pertains to all types of signs, whereas Chapter 711, from which the principal regulation at issue in this case originates, pertains to an entirely different category of highway-adjacent signs that display commercial speech. R. 38 (Village Mot. Summ. J. at 9–10, 12–13) (Page ID #1468–69, 1471–72). Accordingly, Chapter 711 is the only source of the regulations and definitions relevant to this case, because 'outdoor advertising signs' in Chapter 711 are not a subset of 'signs' in Chapter 1185. Because the Village argued both that (1) the definition of signs in Chapter 1185 is substantially narrower than the reading urged by Norton; and (2) Chapters 711 and 1185 operate independently, the Village contended in the district court that Norton lacked standing to challenge the definition of 'signs' in Chapter 1185. *See, e.g.*, *id.* at 12 n.4 (Page ID #1471)."

"Norton views the two chapters quite differently. On Norton's reading, Chapters 1185 and 711 must be read together, such that Chapter 711 enumerates a subset of signs covered by Chapter 1185. Thus, we would look to Chapter 1185 first to understand its basic definitions and categorization of signs and then turn to Chapter 711 for rules pertaining to a particular subset of signs: those located near an expressway. From this scheme comes what Norton refers to as 'three tiers of speakers.' Appellant Reply at 5. The first tier is excluded from all regulation, either by operation of the exclusions in the definition of sign in Chapter 1185, or by the exemptions to the definition of 'outdoor advertising sign' in Chapter 711. *Id.* at 5–6. The second and third tiers of speakers are on-premises and off-premises signs as defined in Chapter 1185, a subset of which are 'outdoor advertising signs,' the most highly regulated category of signs. *Id.* at 6–7. Although Norton's briefing is replete with myriad examples of the signs it believes are exempt from regulation under this scheme, its clearest example includes 'signs promoting a current nation, religious organizations, or political action.' Appellant Br. at 37. Because, according to Norton, these messages are exempt from regulation, the regulations are 'irrefutably content based.' *Id.*"

"Norton's arguments miss the mark. First and foremost, Norton failed to object to the magistrate judge's finding that Norton lacks standing to challenge the definition of 'sign' in Chapter 1185, because the Village has sought to enforce only Chapter 711.07(e) by revoking Norton's permit. R. 51 (R. & R. at 17–18) (Page ID #1725–26); R. 63 (July 20, 2023 Order at 4 n.1) (Page ID #2149) (noting that Norton failed to object to the magistrate judge's standing analysis). Norton failed even to raise this issue in its opening brief on appeal, and its response in reply after the Village called attention to the forfeiture is beside the point. *See* Appellant Reply at 14–16 (arguing that Norton did not forfeit any arguments because 'Norton raised the issue of content-discrimination up-front in its objections'). These two failures, one below and one on appeal, end Norton's challenge to Chapter 1185 before it can begin." …

"More basically, Norton's standing to challenge Chapter 1185 poses a redressability problem. Norton fails to explain how Chapter 1185, rather than Chapter 711, is the source of its injury. Norton does not deny that its proposed sign falls into the definition of 'outdoor advertising sign' in Chapter 711. And its complained-of injury—denial of the ability to build a variable-message sign—stems from a regulation in Chapter 711, not Chapter 1185. Accordingly, even if we were to find that the definition of 'sign' in Chapter 1185 is not content neutral, it is unclear how striking down that part of the ordinances would redress Norton's injury. *See Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343, 350 (6th Cir. 2007)[.]" …

"At bottom, the level of scrutiny applicable to Chapter 711 and its regulations pertaining to outdoor advertising signs hinges on whether this case is more akin to *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), or *City of Austin v. Reagan National Advertising of Austin, LLC*, 596 U.S. 61 (2022). Norton contends that this case is akin to *Reed*, mandating application of strict scrutiny, whereas the Village

argues that *Austin* controls. Because Chapter 711 contains a content-based exemption, we must apply strict scrutiny."

"In *Reed*, the Court held that a town sign ordinance included content-based regulations, and thus applied strict scrutiny and struck down the ordinance. 576 U.S. at 159." …

"The town ordinance in *Reed* was 'content based on its face.' *Id.* The restrictions 'depend[ed] entirely on the communicative content of the sign.' *Id.* In so holding, the Court rejected the government's argument that a 'content-neutral justification' for different treatment could otherwise save a law that is content based on its face. *Id.* at 165; *see also id.* at 166–67 (explaining that the government's motive is relevant only if the law is content neutral on its face). The Court also explained that a law need not discriminate among viewpoints—a 'more blatant' form of content regulation—in order to be content based, *id.* at 168–69 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)); rather, regulations that differentiate among subject matters, or prohibit discussion of a topic altogether, are also content based, *id.* at 169. Ultimately, the Court in *Reed* applied strict scrutiny and struck down the ordinance, holding that it was not narrowly tailored because it was underinclusive. *Id.* at 172."

"*Austin*, however, clarified that *Reed*'s import is somewhat circumscribed. The City of Austin prohibited construction of 'off-premises signs'—those advertising goods or services not sold or provided on the same location as the sign. 596 U.S. at 66. The Fifth Circuit, applying *Thomas v. Bright*, 937 F.3d 721 (6th Cir. 2019), held that the ordinance was a content-based restriction, because administering the regulation necessitated reading the content of a given sign to determine what it advertised. *Austin*, 596 U.S. at 68–69. The Court found this reading of *Reed* to be 'too extreme,' because administering the regulation 'require[d] an examination of speech only in service of drawing neutral, location-based lines.' *Id.* at 69. In other words, the regulation was 'agnostic as to content,' even if one needed to examine the sign to determine whether it was an on- or off-premises advertisement. *Id.*; *see also id.* at 71 ('Unlike the sign code at issue in *Reed*, however, the City's provisions at issue here do not single out any topic or subject matter for differential treatment.'). This was a location-based, rather than content-based, determination. *Id.* Because strict scrutiny did not apply, the Court remanded the case for a determination of whether the ordinance passed intermediate scrutiny. *Id.* at 76–77."

"On appeal, Norton makes no serious argument that Chapter 711's different treatment for on- versus off-premises signs calls for application of strict scrutiny. Nor could it. *Austin* plainly holds that a regulation that does nothing more than differentiate between on- and off-premises signs is content neutral, even if one must read the content of the sign to determine whether it is an on- or off-premises sign. 596 U.S. at 69–72. Instead, the thrust of Norton's argument is that *Austin* simply does not speak to an ordinance like the Village's, which Norton contends is a series of 'content-based regulations layered upon the on/off-premises dichotomy.' Appellant Br. at 26."

"… Norton uncovers a problem in the very last exemption to Chapter 711: the different treatment for '[p]ublic service signs.' Chapter 711 does not define a public-service sign but states that displays of 'information such as time or weather' fall within the definition, so long as such signs are not used to advertise goods, products, services, or events. R. 1-1 (Ordinances, Ch. 711.02(a)(4)) (Page ID #41). Gerald Stoker, the contractor that the Village hired to review permit applications, testified that public-service signs potentially sweep in a range of signs, including signs encouraging people to receive COVID-19 shots or those telling drivers to buckle their seatbelts. R. 32 (Stoker Dep. at 147:16–148:8) (Page ID #801–02). The Village contends that this provision cannot be content based because the public-service exemption does not pertain to advertising. Appellee Br. at 31. The magistrate judge concluded that the public-service exemption does not lead to heightened scrutiny because the regulations of outdoor advertising signs are aimed at commercial speech. R. 51 (R. & R. at 12) (Page ID #1720). Before addressing the problem posed by the exemption, we reject both the Village's and the magistrate judge's understandings of the ordinance."

"The magistrate judge's view of Chapter 711 is belied by the provision's plain terms. And the Village does not argue on appeal that the definition of 'outdoor advertising sign' in Chapter 711 regulates only commercial speech. Although 'outdoor *advertising* sign' suggests that commercial messages are primarily at issue, nothing in its definition explicitly excludes non-commercial messages. Nor does the Village dispute that Norton advertises and promotes both commercial and non-commercial content. Still, Norton is nonetheless subject to Chapter 711's ban on variable-message signs. In these respects, Chapter 711 is similar to the ordinance at issue in *Austin*. 596 U.S. at 68–69 n.3 (explaining that the at-issue provisions 'admit of no exception for noncommercial speech'); *see also Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1268–69 n.15 (11th Cir. 2005) (declining to analyze sign code under standards applicable to commercial speech because code 'applie[d] without distinction to signs bearing commercial and noncommercial messages')."

"Likewise, the Village's attempt to write the public-service exemption out of the ordinance contradicts the exemption's terms. The definition of 'outdoor advertising sign' and the exemption do not perfectly line up, contrary to the Village's view. Outdoor advertising signs encompass any possible off-premises signs (read together with the on-premises exemptions) because they are defined as signs 'used to advertise or to give information in the nature of advertising.' By its plain meaning, 'advertising' covers a wide set of messages beyond simply displaying commercial messages. *See Advertising*, MERRIAM-WEBSTER.COM, https://perma.cc/9LGE-Q8MT (last accessed March 22, 2024) (defining advertising as 'the action of calling something to the attention of the public especially by paid announcements'); *Lone Star Sec. & Video, Inc. v. City of Los Angeles*, 827 F.3d 1192, 1199 (9th Cir. 2016) (construing 'advertising' as 'the activity of displaying a message to the public, not to any particular content that may be displayed'). This understanding is consistent with that of Gerald Stoker. R. 32 (Stoker Dep. at 139:17–25) (Page ID #793). The public-service-sign exemption, on the other hand, is more limited with respect to its references to advertising, stating that a public-service sign cannot be 'used to advertise or promote *goods, products, services, or events*.' R. 1-1 (Ordinances, Ch. 711.02(a)(4)) (Page ID #41) (emphasis added). Because this definition is more limited, there is a universe of signs that would be encompassed by the definition of outdoor advertising sign that is exempted by operation of the public-service-sign definition."

"Therein lies the problem. To exempt this universe of signs from the regulations pertaining to outdoor advertising signs, we must inherently look to the content of the signs. Namely, we must consider (1) whether a sign fulfills a '[p]ublic service' by 'disclos[ing] information such as time or weather'; and (2) whether a sign nonetheless 'advertise[s] or promote[s] goods, products, services, or events.' Because the public-service-sign exemption is just that—an exemption—its operation means that the definition of outdoor advertising sign is also content based. Although this scheme is not nearly as stratified or complex as the ordinance at issue in *Reed*, which prescribed different rules and regulations for twenty-three different categories of speech, 576 U.S. at 159, it cannot be administered by being 'agnostic as to content,' *Austin*, 596 U.S. at 69. No doubt, the Village is correct that much of the work of the work of Chapter 711 is accomplished in an entirely content-neutral way: by simply inquiring whether a sign pertains to activities on- or off-premises. Still, the Village must then go further when implementing the ordinances, by inquiring into whether the content displayed on an off-premises sign meets the criteria of the public-service exemption. This cannot be done in a content-neutral fashion."

"One can easily envision signs that are exempted from regulation based on their content. A private individual or company could operate a variable-message sign to encourage drivers not to litter, but likely could not do the same to encourage the citizens of the Village to attend the high school softball game (an 'event'). Likewise, a 'click it or ticket' message encouraging seat-belt use could be displayed on changing digital billboards, but not a message encouraging citizens to be familiar with the proper uses for naloxone (a 'good' or 'product'). And a public-health organization might be able to post a flashing sign encouraging drivers to stay up to date on their vaccines, but the local pharmacy may be barred from doing so by encouraging drivers to receive the flu shot at its closest location. More basically, the threshold inquiry of the public-service exemption—whether the content of a given sign serves a 'public service'—is laden with the types of content-based and value-judgment determinations that call for strict scrutiny under the First Amendment. *See Reed*, 576 U.S. at 171 ('A regulation that

targets a sign because it conveys an idea about a specific event is no less content based than a regulation that targets a sign because it conveys some other idea.'); *id.* at 170 (explaining that an ordinance that requires determining whether a sign is 'designed to influence the outcome of an election' or simply 'communicating a message . . . for noncommercial purposes' is content based); *Int'l Outdoor, Inc. v. City of Troy*, 974 F.3d 690, 707–08 (6th Cir. 2020) (an ordinance is a content-based regulation if it 'regulate[s] both commercial and non-commercial speech but treat[s] them differently, requiring [the jurisdiction] to consider the content of the message before deciding which treatment it should be afforded'); *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 473 (6th Cir. 2016) ('The *Reed* Court held that strict scrutiny is the appropriate level of review when a law governs any 'specific subject matter . . . even if it does not discriminate among viewpoints within that subject matter.'' (quoting *Reed*, 576 U.S. at 169))."

"In this context, content-based regulations, whether they elevate or denigrate certain speech, mandate application of strict scrutiny. Although perhaps overlooked at first glance, the public-service exemption in the Village's code elevates certain speech over other speech. To determine whether a sign displays the favored speech, we must inherently consider its content. For this reason, Chapter 711 is a content-based regulation subject to strict scrutiny"

"The district court erroneously found that Chapter 711 is content neutral, and thus applied only intermediate scrutiny. But the public-service exemption operates to make Chapter 711 a content-based law subject to strict scrutiny. Because the Village cannot satisfy this demanding standard, Chapter 711 cannot stand as written."

"The requirements of strict scrutiny are familiar: unless a law 'furthers a compelling interest and is narrowly tailored to achieve that interest,' it must be struck down. *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010)). To withstand this level of scrutiny, the Village bears the burden of showing that its interests—namely aesthetics and traffic safety, Appellee Br. at 51—are compelling and that Chapter 711 is a narrowly tailored means to achieving these ends. Only a 'rare case . . . survives strict scrutiny.' *Susan B. Anthony List*, 814 F.3d at 474 (internal quotation marks omitted)."

"Unsurprisingly, Chapter 711 fails. Just as in *Reed*, we need examine only the tailoring here to hold that Chapter 711 does not satisfy strict scrutiny. And like the ordinance in *Reed*, Chapter 711 is 'hopelessly underinclusive.' 576 U.S. at 171. As a matter of aesthetics, public-service signs that can utilize variable messaging 'create the same problem' as other outdoor advertising signs. *Id.* at 172. In other words, outdoor advertising signs utilizing variable messaging 'are 'no greater an eyesore,'' yet are banned from doing so. *Id.* (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 425 (1993)). So, too, for safety: The Village 'has offered no reason to believe that [outdoor advertising signs] pose a greater threat to safety than do' public-service signs. *Id.* When a municipality promulgates exceptions to a general prohibition that meaningfully undermine its stated goals, 'it leaves appreciable damage to [those] supposedly vital interest[s].' *Id.* (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002)). Such appreciable damage leads to the ineluctable conclusion that the municipality has failed to tailor narrowly its regulations to accomplish its supposedly compelling interests. In other words, it fails to meet the demands of strict-scrutiny review."

2. First and Eleventh Amendments - Retaliation claim - State actor is not entitled to 11th Amendment immunity – University police officer was suspended without pay for comments made to the press that the department ignored a student's claim of sexual assault by a professor - The Eleventh Amendment prohibits suits against states unless they consent to be sued or Congress, pursuant to a valid exercise of its power, unequivocally expresses its intent to abrogate sovereign immunity - The doctrine of sovereign immunity extends to entities acting on behalf of the state, as well as to state officers acting in their official capacity – This court has previously held that the University of Michigan is a state agency and is therefore entitled to claim sovereign immunity - Sovereign immunity precludes suits against states and their entities or officers for monetary damages or retrospective relief but permits claims for prospective relief when brought against

state officers in their official capacities – This court has held that expunging disciplinary records is, as a practical matter, prospective relief – Looking to the bottom line in the court's Eleventh Amendment jurisprudence, granting plaintiff his requested relief would incur expenses that are, at most, minimal and ancillary to plaintiff's main goals of preventing future discrimination and retaliation and removing negative disciplinary entries from his record - The district court did not err in denying the Defendants' motion for summary judgment based on sovereign immunity - Qualified immunity denied as law was clearly established that there is no doubt that there is a clearly established constitutional right to speak, even as a government employee, on a matter of public concern regarding issues outside of one's day-to-day job responsibilities, absent a showing that *Pickering* balancing favors the government's particular interest in promoting efficiency or public safety - To determine whether a public employee like plaintiff has engaged in private protected speech, we engage in a three-part inquiry: (1) was the relevant speech on a matter of public concern; (2) was the employee's speech made pursuant to their official duties; and (3) did the employee's interest in speaking, on balance, outweigh the government's interest in promoting an efficient workplace and providing public services (*Pickering* balancing test) - Statements reporting instances of maladministration, to authorities both within and outside of an employee's chain of command, constitute speech on a matter of public concern - Officer's speech was a matter of public concern and was not part of his job duties - Public safety employers do not have a greater weight placed on their interests in order and discipline than other employers have in their institutional interests – Police administrator do not have any greater interest in regulating employee speech to promote their force's efficiency than does any other government employer

WILLIAM ELLIOTT ASHFORD v. UNIVERSITY OF MICHIGAN; UNIVERSITY OF MICHIGAN-DEARBORN; GARY GORSKI; JEFFREY EVANS
SIXTH CIRCUIT COURT OF APPEALS No. 22-2057 Decided and Filed: January 9, 2024

"In late 2019, William Ashford ('Ashford'), a police officer employed by the University of Michigan-Dearborn ('UM-D'), spoke with a reporter at *The Detroit Times* about his concerns that the UM-D police department was mishandling a student's allegation that one of her professors had sexually assaulted her. After his supervisors at the University, including then-Vice Chancellor Jeffrey Evans ('Evans') and UM-D Police Chief Gary Gorski ('Gorski'), learned that he had taken his thoughts about the case to the media, they launched an inquiry into his actions in November 2019. At the conclusion of their investigation, UM-D suspended Ashford for ten days without pay. Ashford sued UM-D, the University of Michigan, Evans (in his individual and official capacities) and Gorski (in his individual and official capacities), bringing a 42 U.S.C. § 1983 First Amendment claim that he had been unconstitutionally retaliated against for engaging in protected speech. Ashford sought to have the suspension removed from his employment record, as well as monetary damages."

"The defendants argued in a motion for summary judgment that Ashford's suit against the university and its officers in their official capacities was barred by Eleventh Amendment sovereign immunity, and that the officers in their individual capacities were entitled to qualified immunity. The district court denied their motion with respect to both sovereign and qualified immunity. In this interlocutory appeal, the defendants ask this court to reverse the district court's decision. We AFFIRM the district court's ruling on sovereign and qualified immunity."

"Ashford started working for UM-D as a police officer on May 22, 2017. R. 23-18 (Ashford Offer Letter at 1) (Page ID #1133). He had previously worked at the Detroit Police Department since 1995 and had been a detective in the sex-crimes unit since June 2015. R. 26-3 (Ashford Resume at 1) (Page ID #1247). After a probationary year with UM-D, Ashford received full university benefits, as well as a copy of the department's collective bargaining agreement, which included the discrimination and harassment policy, the standard of conduct policy, and the professional standards investigation ('PSI') policy. R. 23-2 (Ashford Dep. at 69– No. 22-2057 *Ashford v. Univ. of Mich. et al.* Page 370) (Page ID #249–50). UM-D never provided him with any formal training about nondiscrimination, non-harassment, or nonretaliation, and he was not aware of the specific policies in place regarding public statements, endorsements, and/or appearances by UM-D employees. *Id.* at 74 (Page ID #254). Other than the

discipline at issue in this case, Ashford has not received any other formal discipline from UM-D. *Id.* at 88 (Page ID #268).

On February 28, 2019, a UM-D student reported to the UM-D Police Department that Professor Jay Stasser ('Stasser') had sexually assaulted her on February 25, 2019, and had requested oral sex in exchange for a grade adjustment. R. 26-8 (Email—Info. on UM Dearborn CSC) (Page ID #1374); R. 23-8 (Case Report at 3) (Page ID #1078). On March 1, 2019, Deputy Chief Timothy Wiley ('Wiley') gave Ashford an overview of the situation involving Stasser. R. 23-2 (Ashford Dep. at 108) (Page ID #288). Ashford asked if they had interviewed the victim, and Wiley told him that they did not take statements from victims, because it can 'come back to haunt [the department] in court.' *Id.* at 109 (Page ID #289). Wiley informed Ashford that then-Captain (now-Deputy Chief) James Knittel ('Knittel') and Officer Fred Thompson ('Thompson') were going to interview Stasser at his home. *Id.* Ashford advised that an interview like that should be done in a controlled atmosphere, although it does not appear that Wiley heeded his advice. *Id.* at 109–10 (Page ID #289–90)."

"Ashford was not brought onto the case, because Wiley wanted to avoid 'too many chefs in the kitchen.' *Id.* Ashford also had not been involved in any other sexual-assault cases on UM-D's campus, nor did he have knowledge of the 'usual procedures' that the UM-D Police Department followed in such cases. *Id.* at 110–11 (Page ID #290–91). He was not asked 'at any point' to play any role in the investigation against Stasser. *Id.* at 111 (Page ID #291). He did know that the UM-D Police interviewed Stasser, who admitted to engaging in 'inappropriate sexual contact' (fellatio that Stasser 'deemed to be consensual'). *Id.* Knittel, Thompson, and a University of Michigan-Ann Arbor officer conducted the interview. *Id.* at 112 (Page ID #292)."

"Ashford believed that the UM-D Police Department would be the lead on the sexual-assault case against Stasser, based on their 'investigative efforts' and obtaining of search warrants. *Id.* at 116 (Page ID #296). In May 2019, at the UM-D Police Department's annual training in Ann Arbor, Wiley and Knittel announced that the 'case was closed and . . . a warrant was submitted to the prosecutor's office.' *Id.* at 116–17, 122 (Page ID #296–97, 302). Ashford testified that this announcement 'led [him] to believe they handled the investigation,' and, by submitting the warrant package to the Wayne County Prosecutor's Office ('WCPO'), that the University had in fact completed the investigation. *Id.* at 117 (Page ID #297). The UM-D Police Department's Clery log**2** reflected that the case's status as of August 27, 2019 (Case No. 19-047) was 'Closed-Ref to WCPO.' R. 26-14 (Clery Log Aug. 2019) (Page ID #1518)."

"At some point after the May 2019 meeting, Ashford began to worry that the UM-D Police Department was not doing anything with the information and evidence that they had collected in this case. On September 4, 2019, he spoke with Assistant Prosecuting Attorney David Champine ('Champine'), who heads the WCPO's sexual-assault unit. R. 23-2 (Ashford Dep. at 141–42) (Page ID #321–22). At this point, Champine informed Ashford that he had never received a warrant package from UM-D's police department regarding this sexual-assault case. *Id.* Immediately after speaking with Champine, Ashford brought his concerns to Gorski. *Id.* at 143 (Page ID #323). Gorski was relatively new to the department and had not been chief at the time of the sexual assault or at the time of the meeting where Wiley and Knittel reported that the matter had been referred to WCPO. *Id.* at 168–69 (Page ID #348–49). During this conversation, Ashford asked Gorski about any agreement between the UM-D and City of Dearborn police departments, and Gorski told him there was 'no such agreement' and that each entity handled its own cases. *Id.* at 143 (Page ID #323). Gorski also confirmed he had a 'case update' from Knittel 'informing him that the case was closed and submitted to' the WCPO. *Id.* at 143–44 (Page ID #323–24). Ashford expressed his concerns that the sexual-assault statistic would not be 'reported accurately' at this time based on what the Clery log reflected, *id.* at 145 (Page ID #325), and told Gorski that he believed Knittel was part of a 'coverup,' R. 23-4 (Gorski Dep. at 56) (Page ID #605)."

"Shortly after this September 4, 2019 meeting between Gorski and Ashford, Gorski told Ashford he had spoken with Knittel, who had acknowledged that the warrant was not with the WCPO. R. 23-2 (Ashford Dep. at 152) (Page ID #332). Gorski testified that when he looked into the issue, he found that the evidence was 'turned over to the Dearborn Police Department, and that they were the lead,' and that

they were waiting for DNA results. R. 23-4 (Gorski Dep. at 62) (Page ID #611). This struck Ashford as odd, because he did not think they needed to wait for the DNA results when Stasser had already admitted to the sexual contact and other evidence had been collected. R. 23-2 (Ashford Dep. at 152–53) (Page ID #332–33). On September 10, 2019, Ashford went to Alana Dillard-Slaughter in the UM-D human resources department with his concerns. *Id.* at 154 (Page ID #334). On or around September 16, 2019, he also sent an anonymous letter to the University of Michigan Board of Regents, in hopes that it would 'stoke the fires' and make them address the matter. *Id.* at 165 (Page ID #345). He did not receive any follow-up from the Board of Regents. *Id.* at 171–72 (Page ID #351–52). Additionally, on October 24, 2019, Ashford sent an email to the WCPO, expressing his concerns that nearly six months had passed since the assault had occurred and no warrant had been submitted yet. R. 27-28 (Ashford Letter to WCPO) (Page ID #2118–20)."

"At some point between September 4, 2019, and October 11, 2019, an undisclosed person contacted George Hunter ('Hunter'), a reporter for *The Detroit News*, about the Stasser case. R. 23-2 (Ashford Dep. at 172–73) (Page ID #352–53). On October 11, 2019, Hunter submitted a Michigan Freedom of Information Act ('FOIA') request to the University of Michigan for: (1) information about Jay Stasser; and (2) 'all University of Michigan-Dearborn Cleary [sic] logs for 2019.' R. 26-25 (Hunter FOIA Request) (Page ID #1585). On or around October 16, 2019, and after Hunter had submitted his FOIA request, Gorski instructed Knittel to change the status of the Stasser case in UM-D's Clery log to 'open investigation' by both the UM-D Police Department and the Dearborn police. R. 23-4 (Gorski Dep. at 133–34) (Page ID #682–83); R. 26-26 (Clery Log Oct. 18, 2019) (Page ID #1587). Ashford claims that it 'should have never been changed' and was updated only because he had brought it to their attention by speaking with Gorski, Alana Dillard-Slaughter, the Board of Regents, and the WCPO. R. 23-2 (Ashford Dep. at 186–87) (Page ID #366–67). On October 25, 2019, the WCPO received a warrant request on the case—nearly two months after Ashford had brought his concerns to Gorski. R. 23-4 (Gorski Dep. at 215–16) (Page ID #764–65)."

"In late October 2019, Hunter, having already spoken with the undisclosed individual, contacted Ashford and asked to speak with him. R. 23-2 (Ashford Dep. at 172–74) (Page ID #352–54). Ashford provided Hunter with the date the case was reported, the log (that was ultimately published in the paper), the letter that Ashford had submitted to the Board of Regents, along with other information about the case (including information that Ashford states 'could not be attained by the public,' although he goes on to say that he did not provide Hunter with the witness interview reports or the investigative file, and that there was 'nothing . . . in that police report' that the public could not get). *Id.* at 174–76 (Page ID #354–56)."

"On November 3, 2019, Hunter published an article in *The Detroit News*, reporting that a staffer had accused UM-D of attempting to cover up a student's claims that they were sexually assaulted by a UM-D professor. R. 27-23 (*The Detroit News* Article) (Page ID #2102–09). The article does not identify Stasser, the student, or Ashford by name or any other features. *Id.* On November 4, 2019, Ashford met with Gorski and acknowledged that he had been the person who provided the information to the paper. R. 23-2 (Ashford Dep. at 195–98) (Page ID #375–78). During this meeting, Gorski also told Ashford that they needed to 'circle [their] wagons around the university,' because it could not look like the university had an 'unsafe campus environment.' *Id.* at 197 (Page ID #377). Gorski told Ashford that his job was not in jeopardy. *Id.* at 201 (Page ID #380). Gorski also asked Ashford to prepare a memo with more specifics, but the UM-D union representative informed Gorski that he first would have to perform a PSI investigation. R. 23-4 (Gorski Dep. at 164–65) (Page ID #713–14). Gorski contacted the University's Division of Public Safety and Security Administration Unit, and concluded on November 6, 2019 that the 'best way to move forward' would be to initiate a PSI process. R. 26-34 (Discussion with Oesterle and Ede) (Page ID #1622). On November 25, 2019, Gorski submitted his complaint against Ashford for 'divulg[ing] information obtained from an open UMD . . . investigation' that was 'not authorized to be released.' R. 26-35 (Compl. Against Ashford) (Page ID #1624). Ashford received notice of the PSI the same day. R. 26-36 (Ashford PSI Notice) (Page ID #1626)."

"Chief Robert Neumann ('Neumann') from the University of Michigan-Ann Arbor Police Department conducted Ashford's PSI, R. 27-37 (PSI Narrative Summ.) (Page ID #2155–76), and submitted his final report to Gorski, *see* R. 23-7 (Final Disposition of PSI, Jan. 29, 2020) (Page ID #1034–35). Gorski sustained the allegation that Ashford had violated the UM-D Department of Police and Public Safety Policy for the Standards of Conduct by making statements that could 'be interpreted as intending to have an adverse effect upon department morale, discipline, operation . . . , or perception of the public,' and '[d]ivulg[ing] . . . information gained by reason of [his] position for anything other than its official authorized purpose.' *Id.* at 1 (Page ID #1034). That same day, Ashford had a meeting with Gorski, Alana Dillard-Slaughter, and Wayne Bierbower, at which they informed him that the allegations were sustained. R. 23-2 (Ashford Dep. at 211–12) (Page ID #391–92). He was given a ten-day Disciplinary Layoff without pay, R. 23-7 (Final Disposition of PSI, Jan. 29, 2020) (Page ID #1034–35), during which his UM-D email privileges and access to the office were suspended, *id.* (Notice of Disciplinary Layoff, Jan. 29, 2020) (Page ID #1033). Others had recommended termination. R. 23-4 (Gorski Dep. at 194–95) (Page ID #743–44). Ashford served out his suspension and continues to work at the UM-D Police Department."

"Ashford sued the University of Michigan-Dearborn and University of Michigan (collectively, 'the University'), Gorski, and Evans (who was serving as Vice Chancellor during the relevant time period, but has since left that post), the latter two in both their individual and official capacities." …

"The Defendants filed a motion for summary judgment on all of Ashford's claims. R. 22 (Def. Mot. Summ. J.) (Page ID #131). Relevant on appeal, the Defendants argued: (1) that Ashford's claims against the University, and the university officers in their official capacities, are barred by sovereign immunity; and (2) that Gorski and Evans have qualified immunity for the claims against them in their individual capacities. *Id.* at 12, 14 (Page ID #155, 157). The district court found that sovereign immunity does not bar Ashford's claim, because he seeks prospective relief from the appropriate parties (the University and the university officials in their official capacities). *Ashford v. Univ. of Mich.*, 635 F. Supp. 3d 593, 600 (E.D. Mich. 2022). In their argument that Gorski and Evans are entitled to qualified immunity, the Defendants asserted that Ashford had not specifically alleged that Gorski and Evans were involved in retaliating against him and had not sufficiently established that they had violated his clearly established constitutional rights. R. 22 (Def. Mot. Summ. J. at 14–15) (Page ID #157–58). The district court noted that Gorski and Evans had both testified about their involvement with or knowledge of Ashford's investigation and suspension, stated that there was at least 'a factual question about whether their direct actions were sufficiently connected to [Ashford's] discipline,' and concluded that the court could not find Gorski and Evans were entitled to qualified immunity because their actions clearly violated Ashford's well-established constitutional right to free speech. *Ashford*, 635 F. Supp. 3d at 603. The University, Gorski, and Evans now bring an interlocutory appeal of the district court's denial of sovereign and qualified immunity."

"The Eleventh Amendment prohibits suits against states unless they consent to be sued or Congress, pursuant to a valid exercise of its power, unequivocally expresses its intent to abrogate sovereign immunity. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98–99 (1984); *Morgan v. Bd. of Prof. Resp. of the Sup. Ct. of Tenn.*, 63 F.4th 510, 515 (6th Cir. 2023). The doctrine of sovereign immunity extends to entities acting on behalf of the state, as well as to state officers acting in their official capacity. *Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (per curiam); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). We have previously held that the University of Michigan is a state agency and is therefore entitled to claim sovereign immunity. *Estate of Ritter by Ritter v. Univ. of Mich.*, 851 F.2d 846, 851 (6th Cir. 1988)."

"Sovereign immunity precludes suits against states and their entities or officers for monetary damages or retrospective relief but permits claims for prospective relief when brought against state officers in their official capacities. *Ex parte Young*, 209 U.S. 123, 159–60 (1908); *Edelman v. Jordan*, 415 U.S. 651, 668 (1974). '[T]he bottom line' in determining if sovereign immunity bars a suit is whether granting the relief being sought would 'impose a liability which must be paid from public funds in the state

treasury.' *Thomson v. Harmony*, 65 F.3d 1314, 1320 (6th Cir. 1995) (quoting *Edelman*, 415 U.S. at 663)."

"Here, Ashford is suing Gorski and Evans (state actors) in their official capacities for an injunction against future retaliation and discrimination and for an expungement of his record. Gorski and Evans claim that sovereign immunity precludes Ashford from prevailing on this claim, because he seeks retrospective relief."

"We have held that expunging disciplinary records is, as a practical matter, prospective relief. *See Morgan*, 63 F.4th at 516–17; *Wolfel v. Morris*, 972 F.2d 712, 719 (6th Cir. 1992). In this part of his claim, Ashford does not seek monetary damages or any type of retrospective relief. Rather, he requests an injunction against any future retaliation and discrimination, and for all discipline related to the claims in this case to be removed from his record at a job he continues to hold. He alleges that he has been instructed that 'further behaviors of this nature' will result in escalating discipline, including termination, R. 1 (Compl. at ¶ 83) (Page ID #16), indicating that, without relief, the constitutional violation alleged will continue to affect him at his place of work. Looking to the 'bottom line' in our Eleventh Amendment jurisprudence, granting Ashford his requested relief would incur expenses that are, at most, 'minimal and ancillary' to Ashford's main goals of preventing future discrimination and retaliation and removing negative disciplinary entries from his record. *Thomson*, 65 F.3d at 1320–21. The district court did not err in denying the Defendants' motion for summary judgment based on sovereign immunity."

"…On appeal, however, Gorski and Evans also argue that they are entitled to qualified immunity because penalizing Ashford for his actions did not violate clearly established law. Appellants Br. at 21–23. Because addressing this issue will not require us to resolve any genuine dispute of material fact, we have jurisdiction to consider this purely legal question, and we do so below. *See, e.g.*, *United Pet Supply, Inc. v. City of Chattanooga*, 768 F.3d 464, 472 (6th Cir. 2014) (stating that even when an individual raises impermissible disputes of fact, if they 'also raise[] the purely legal issue of whether the plaintiff's facts show that [an individual] violated clearly established law, 'then there is an issue over which this court has jurisdiction[]'' (quoting *Quigley v. Tuong Vinh Thai*, 707 F.3d 675, 680 (6th Cir. 2013)))."

"Before turning to our qualified-immunity analysis, we must determine: (1) whether Ashford engaged in protected speech as a private citizen when he spoke with *The Detroit News*; and (2) whether a reasonable jury could find that he was retaliated against for doing so."

"To determine whether a public employee like Ashford has engaged in private protected speech, we engage in a three-part inquiry: (1) was the relevant speech on a matter of public concern; (2) was the employee's speech made pursuant to their official duties; and (3) did the employee's interest in speaking, on balance, outweigh the government's interest in promoting an efficient workplace and providing public services ('*Pickering*' balancing). *DeCrane v. Eckart*, 12 F.4th 586, 594 (6th Cir. 2021). Applying these three factors to Ashford's speech to *The Detroit News*, we conclude that our precedent clearly establishes that speech like Ashford's constitutes protected speech."

"Determining whether speech was on a matter of public concern requires us to examine its 'content, form, and context.' *Connick v. Myers*, 461 U.S. 138, 147–48 (1983). We have held that statements reporting 'instances of maladministration, to authorities both within and outside of [an employee's] chain of command[,]' constitute speech on a matter of public concern. *Buddenberg v. Weisdack*, 939 F.3d 732, 739 (6th Cir. 2019). Within the public's interest in the government's effectiveness, how police departments operate is an 'obvious[]' public concern. *Solomon v. Royal Oak Township*, 842 F.2d 862, 865 (6th Cir. 1988) (citing *McMurphy v. City of Flushing*, 802 F.2d 191, 196 (6th Cir. 1986)). We have noted in the past that a public employee 'simply respond[ing] to questions regarding an existing controversy,' rather than soliciting the media's attention, can serve as a strong indicator that their speech was on a matter of public concern. *Matulin v. Village of Lodi*, 862 F.2d 609, 613 (6th Cir. 1988)."

"Ashford's speech to Hunter was about Ashford's perception that the UM-D Police Department was covering up a UM-D student's sexual-assault allegations against one of her professors. This type of speech, concerning a police department's apparent mishandling of a sexual-assault case, falls squarely within what we have deemed a matter of public concern. Ashford also did not actively reach out to a news outlet. Rather, he agreed to speak with reporter Hunter after an unnamed individual gave Ashford's information to Hunter, and Hunter in turn called Ashford to see if he would be willing to talk about the matter. The content and context of the speech suggest that Ashford's speech to *The Detroit News* was about a matter of public concern. *See Buddenberg*, 939 F.3d at 739."

"Employee speech made on a matter of public concern is still unprotected if it was 'made pursuant to [an employee's] official responsibilities.' *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006). Whether speech falls within a public employee's official duties does not turn solely on whether the speech contained information they obtained as a result of their employment, *Lane v. Franks*, 573 U.S. 228, 239–40 (2014), but depends primarily on whether the speech is 'ordinarily within the scope of an employee's duties,' *Boulton v. Swanson*, 795 F.3d 526, 533–34 (6th Cir. 2015) (quoting *Lane*, 573 U.S. at 240). To determine whether speech was made pursuant to a public employee's ordinary job duties, we look to factors like the speech's 'impetus,' setting, audience, and general subject matter. *Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 546 (6th Cir. 2007)."

"Speech made outside an individual's chain of command is less likely to be within an employee's ordinary job responsibilities, as is speech that an employee's ordinary job responsibilities would not require them to make. *Buddenberg*, 939 F.3d at 740 (stating that an individual who reported employee conduct outside of her chain of command when her ordinary duties did not require her to do so was 'less likely to be [speaking] within' the scope of her ordinary job responsibilities); *Westmoreland v. Sutherland*, 662 F.3d 714, 716, 719–20, 722 (6th Cir. 2011) (noting that a firefighter's speech was not made 'pursuant to a task that was within the scope of his official duties,' but rather 'as a citizen on a matter of public concern,' when he spoke as an expert while out of uniform and off-duty at a town meeting about the city's decision to cut funding for certain safety devices). Conversely, we have viewed internal escalations of concerns or grievances as insufficient to establish private speech when the speech directly relates to or otherwise concerns an employee's day-to-day duties. *Mayhew v. Town of Smyrna*, 856 F.3d 456, 464–65 (6th Cir. 2017) (emphasizing that an individual's job description required them to report certain situations and accidents to management in finding that his reporting of misconduct up his chain of command was speech within the scope of his ordinary responsibilities); *Haynes v. City of Circleville*, 474 F.3d 357, 364 (6th Cir. 2007) (ruling that a handler for the police department's canine unit spoke pursuant to his official duties when he submitted an internal memo solely to his supervisor, criticizing cutbacks in canine training)."

"In Ashford's case, he was hired by the UM-D Police Department as a general police officer. Although he had experience on a sex-crimes unit from his time with the Dearborn Police Department, R. 26-3 (Ashford Resume) (Page ID #1247), UM-D did not hire him as any type of specialist in that area. His job duties also never involved liaising or otherwise interacting with the media, reporters, or individuals outside of the UM-D Police Department (and, in fact, he stated he never received training in this area). *See* R. 23-18 (Ashford Offer Letter) (Page ID #1133); R. 23-2 (Ashford Dep. at 74, 228) (Page ID #254, 408) (stating, in part, that he decided to speak with Hunter because his attempts to bring the investigation's failures to his supervisors' attention were unsuccessful, and his duty as a civilian had stepped in). At no point was Ashford brought in to work on the Stasser case, nor was he involved in any other way. R. 23-7 (PSI Follow-Up, Interview of Ashford, Dec. 11, 2019 at 2) (Page ID #1053). The greatest exposures Ashford had to the case before he brought his concerns to Gorski were receiving information from Wiley that the matter existed on March 1, 2019, and hearing the update in May 2019 that the case was 'closed.' At the point that Ashford agreed to speak with *The Detroit News*, his audience was not his supervisors at UM-D, but the general public—and he was speaking about the police department's efficiency, an issue that we have identified as one of great public interest. *See Solomon*, 842 F.2d at 865; *McMurphy*, 802 F.2d at 196."

"In their motion for summary judgment and on appeal, Gorski and Evans focused their attention on the fact that Ashford was speaking about information that 'owed its existence to his professional responsibilities and role as a DPS police officer.' R. 22 (Def. Mot. Summ. J. at 18) (Page ID #161); Appellants Reply Br. at 9. However, *Lane v. Franks* makes clear that this is not dispositive of whether speech was made within the scope of employment. 573 U.S. at 240. On appeal, Gorski and Evans make no additional argument that Ashford was put on or otherwise involved with the investigation, nor do they assert that his ordinary job responsibilities included speaking with the media, reporters, or other external actors. In fact, they allege in their brief that Ashford 'did not, at any point, play a role in the Investigation,' and instead 'inserted himself into the Investigation.' Appellants Br. at 9–10."…

"Finally, we must weigh whether Ashford's interest in speaking with the media about his concerns outweighs 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' *Buddenberg*, 939 F.3d at 739 (quoting *Mayhew*, 856 F.3d at 462). Here, Gorski and Evans claim that 'police departments have 'an interest in maintaining an effective police force, free from internal division,'' quoting our unpublished opinion in *Graham v. City of Mentor*, 118 F. App'x 27, 30 (6th Cir. 2004). Appellants Reply Br. at 11. However, we have also stated that 'public safety employers [do not] have a greater weight placed on their interests in order and discipline than other employers have in their institutional interests.' *Mosholder v. Barnhardt*, 679 F.3d 443, 451 (6th Cir. 2012). Gorski and Evans do not, pursuant to our precedent, have any greater interest in regulating employee speech to promote their force's efficiency than does any other government employer."

"Ashford has an interest in engaging in speech on matters of public concern, and the public additionally has an interest in hearing speech about how their police departments are handling cases. *See, e.g.*, *Myers v. City of Centerville*, 41 F.4th 746, 760–61 (6th Cir. 2022). No one in the UM-D Police Department reported that 'their morale was adversely affected' by Ashford's actions. R. 23-4 (Gorski Dep. at 201) (Page ID #750). Nor did anyone say that Ashford talking with Hunter 'had an adverse effect upon Departmental discipline or operation.' *Id.* at 201–02 (Page ID #750–51). Absent a significantly stronger showing by Gorski and Evans that Ashford's speech has burdened the UM-D Police Department, *Pickering* balancing supports Ashford's free speech interests."

"The evidence on summary judgment suggests that Ashford's speech was on a matter of public concern, was not made pursuant to his official or day-to-day duties, and was not shown to disrupt any important governmental interests. Gorski and Evans do little to argue that Ashford's speech was not protected, other than alleging that this right was not clearly established at the time Ashford spoke to Hunter, Appellants Br. at 21–23, which we address in further detail below."

"In light of the showing that Ashford engaged in protected speech as a private citizen when he spoke with Hunter, we now turn to whether he has sufficiently established that he was retaliated against for doing so. Making a prima facie case of retaliation requires showing that: '(1) [Ashford] engaged in constitutionally protected speech or conduct; (2) an adverse action was taken against him that would deter a person of ordinary firmness from continuing to engage in that conduct; [and] (3) there is a causal connection between elements one and two—that is, the adverse action was motivated at least in part by his protected conduct.' *Dye v. Off. of the Racing Comm'n*, 702 F.3d 286, 294 (6th Cir. 2012) (quoting *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 255 (6th Cir. 2006)). Once the prima facie case is made out, the burden shifts to the defendants to show, by a preponderance of the evidence, that Ashford would have been suspended even if he had not spoken with Hunter. *Id.*"

"Ashford engaged in constitutionally protected speech in talking with *The Detroit News*. As a result, UM-D subjected him to an investigation and ultimately suspended him for ten days without pay. R. 23-7 (Notice of Disciplinary Layoff) (Page ID #1033). Ashford has expressed the belief that he faced 'the threat that [he] would be terminated if [he] continued this matter or took it any further than what they did.' R. 23-2 (Ashford Dep. at 227) (Page ID #407). On appeal, Gorski and Evans do not contest that Ashford received a suspension. A person of 'ordinary firmness' would view a ten-day suspension without pay as an adverse action that deters future, similar speech. *See Dye*, 702 F.3d at 304 ('The

lack of a steady income . . . could certainly chill or silence a person of ordinary firmness.')); *see also Benison v. Ross*, 765 F.3d 649, 660 (6th Cir. 2014) (stating that penalties that ''impose[] a . . . financial burden' on the plaintiffs' constitute adverse action (quoting *Dye*, 702 F.3d at 304)). Finally, there is a sufficient causal link between Ashford's protected conduct and his suspension, given the fact that the PSI's Final Disposition cites Ashford speaking with *The Detroit News* as the support for UM-D's decision to suspend him. R. 23-7 (Final Disposition of PSI) (Page ID #1034)."

"The burden then shifts to Gorski and Evans to show by a preponderance of the evidence that they would have suspended Ashford without pay regardless of whether he had spoken to Hunter. Gorski and Evans fall well short of carrying this burden, because they concede on appeal that Ashford's suspension was motivated by his speaking with Hunter. *See* Appellants Br. at 21–24; *see also* R. 23-7 (Final Disposition of PSI) (Page ID #1034). Because Ashford has made a sufficient showing that he engaged in protected speech and was penalized for doing so, a jury could find in his favor on his retaliation claims."

"In their motion for summary judgment, Gorski and Evans made little effort to connect the facts in the record to our two-pronged test for qualified immunity. *See* R. 22 (Def. Mot. Summ. J. at 14–15) (Page ID #157–58). Although they argued that Ashford's speech was not constitutionally protected, addressing *Saucier*'s first prong, they did not appear to relate this argument to qualified immunity's second step: whether a reasonable officer would have known that retaliation in this context would violate clearly established law. *Id.* at 15–20 (Page ID #158–63); *see Saucier*, 533 U.S. at 202. On appeal, they do little more than assert that in this very specific context (a police officer receiving a ten-day suspension without pay for 'violat[ing] department policy by leaking confidential information about an active investigation and by refusing to comply with an order from a superior officer'), Gorski and Evans 'acted reasonably in believing that' Ashford had not engaged in protected speech. Appellants Br. at 22; *see also* Appellants Reply Br. at 8–9. Given the Defendants' scant treatment of this issue, both before the district court and now on appeal, we hold that they forfeited the argument that our precedent had not clearly established that Ashford was engaging in constitutionally protected speech."

"Even if this argument were not forfeited, though, there is no doubt that there is a clearly established constitutional right to speak, even as a government employee, on a matter of public concern regarding issues outside of one's day-to-day job responsibilities, absent a showing that *Pickering* balancing favors the government's particular interest in promoting efficiency or public safety. *Buddenberg*, 939 F.3d at 739–40 (finding speech alleging 'public corruption . . . [and] not within [the employee's] ordinary job responsibilities' was 'protected by the First Amendment' when ''the relevant government entity [did not have] an adequate justification for treating the employee differently from any other member of the general public'' (quoting *Garcetti*, 547 U.S. at 418)); *Westmoreland*, 662 F.3d at 718–19." …

"Viewing the facts in the light most favorable to Ashford, as the non-moving party, Ashford has shown that he was engaging in protected speech when he spoke to Hunter about the UM-D's missteps in handling a sexual-assault case. Reasonable officers should have known that penalizing him for doing so would violate his First Amendment rights. Because Ashford's rights were clearly established at the time he was suspended without pay, we hold that the officers involved in his suspension are not shielded by qualified immunity."

3. First Amendment – This is a case of poor pleadings – No First Amendment violation shown by the complaint and defendant failed to plead the qualified immunity defense - If the First Amendment protects past speech, employees must establish two other well-known elements to prove a retaliation claim under § 1983, (1) they must show that their employer took a harmful adverse action against them—meaning one that would deter the average employee from speaking, and (2) they must show that their protected past speech at least partially motivated this harmful action - Section 1983 bars plaintiffs from holding one official liable for another's actions, so plaintiffs must show that each sued official engaged in unlawful conduct – Lumping all the actors together treats them as a single actor - This strategy might forfeit § 1983 claims if it requires the court to scour the record to identify how a jury could find a defendant liable based on that

defendant's acts - The filing of the operative complaint fixes the controversy as of that date, and federal courts will not consider post-complaint factual developments - To decide whether the First Amendment protects past speech, the Supreme Court proceeds in two steps - At step one, the Court's doctrine protects past speech only if the speech survives two bright-line rules (1) Employees must speak as private citizens, not as part of their official job duties, and (2) they must speak on a topic of public concern, not personal concern - If the speech passes these two tests, the Supreme Court engages in a balance of interests at the second step - Even if employees speak off the clock on a matter of public concern, the employer can punish them for their speech if its interests in its operations outweigh the employees' interests in speaking - Freedom of association - When considering whether state action violates this right of expressive association, our cases ask three questions: (1) can the identified group seek freedom-of-association protection because its members associate partly to express a message, (2) does the challenged state action significantly burden the group's ability to spread its message, and (3) does this burden on speech outweigh any governmental interests justifying the burden

SHANNON M. BLICK v. ANN ARBOR PUBLIC SCHOOL DISTRICT; ANN ARBOR BOARD OF EDUCATION; SHONTA A. LANGFORD; DAWN LINDEN; JEANICE KERR SWIFT
SIXTH CIRCUIT COURT OF APPEALS No. 23-1523 Decided and Filed: June 27, 2024

"For years, Shannon Blick successfully served as a well-liked principal of an elementary school in the Ann Arbor Public School District. In 2019, however, the school district placed her on paid leave to investigate her role in a custodian's over-billing scheme. The leave lasted two years, and the school district then terminated Blick's contract. Blick brought this suit while still on leave. She alleged that various officials violated her freedoms of speech and association under the First Amendment. She also brought race-discrimination, due-process, and conspiracy claims against these officials. The district court rejected Blick's First Amendment claims at the summary-judgment stage, and it dismissed the other claims on the pleadings."

"Blick renews all claims on appeal. Although we find some of the district court's reasoning open to debate, Blick has not shown a reversible error. She argues that the school district violated the First Amendment by imposing a prior restraint that barred her from speaking during her leave and by taking harmful actions against her in retaliation for her speech. But her lawyers leave us in the dark about what she *wanted* to say (for purposes of her 'prior restraint' claim) or what she *did* say (for purposes of her 'retaliation' claim). Blick also relies on adverse actions (such as the termination of her contract) that occurred after she filed her operative complaint. But we cannot consider these later events because her lawyers did not file a supplemental pleading to bring them into the case. And Blick's opening brief merely regurgitates much of her response to the school district's motion to dismiss. By doing so, it ignores several grounds on which the district court relied to dismiss Blick's claims. This 'cut-and-paste' briefing strategy thus does not preserve Blick's challenges to much of the district court's motion-to-dismiss decision. We affirm."

"In September 2013, Blick became the principal of Lawton Elementary School in Ann Arbor, Michigan. Over the next several school years, the Ann Arbor Public School District consistently evaluated Blick as a 'Highly Effective' principal. Blick Aff., R.64-2, PageID 1903. From 2013 through 2018, she also had a spotless record without any formal or informal discipline."

But things changed during the 2018–2019 school year. At the end of the prior year, the school district promoted Lawton's assistant principal to a position at a different school. According to Blick, the district selected the assistant principal's replacement, Taneia Giles, in an unusual way because it did not seek input from Blick or anyone else in the Lawton community. Dawn Linden, the Executive Director of Elementary Education, allegedly told Blick that the district gave Giles, an African American, this position because the district feared losing 'a minority administrator.' Am. Compl., R.14, PageID 97. Giles also allegedly 'coveted' Blick's position as principal. *Id.*, PageID 92."

"In February 2019, Blick and Giles learned from an assistant that Lawton had nearly exhausted the funds in a lunchroom account that the school used to pay lunch-period supervisors. Blick investigated where this money had gone. She had previously assigned Willie Johnson, a Lawton custodian, to serve as a lunch-period supervisor. Blick discovered that Johnson had been obtaining excessive wages by fraudulently entering four hours on his timesheet for this one hour of lunch work. Even worse, at the start of the 2018–2019 school year, the school district had tasked Blick with formally approving all employee timesheets (including Johnson's). Blick realized that, since this administrative change, she had been mistakenly approving Johnson's timesheets without noticing the excessive entries."

"Blick and Giles decided to jointly raise this issue with Linden. According to Blick, however, Giles went behind her back to inform Linden on her own. Linden, and the school district's HR Executive Director, Shonta Langford, opened an investigation. At first, they obtained Blick's help. Blick interviewed Johnson, who claimed that he had billed the extra hours because of other work at the school. But security cameras proved that Johnson lied. The school district fired him at Blick's request."

"But this personnel action did not end the matter. The investigation eventually implicated Blick in Johnson's fraud. The assistant who discovered the depleted school account told Linden and Langford that she had flagged Johnson's excessive timesheets to Blick in the past but that Blick had ignored her concerns. Giles also offered a reason why Blick might have done nothing. Johnson's former supervisor had told her that Johnson and Blick were having 'a sexual relationship.' Giles Dep., R.61-2, PageID 1272. According to Blick, Giles made this false allegation (and accused Blick of assisting Johnson's fraud) because of her desire to become Lawton's principal. Giles had also made other allegedly false claims against Blick at the start of the school year. Nevertheless, Linden and Langford separately interviewed Johnson's former supervisor, who reiterated that Johnson had said that he and Blick were in 'a romantic relationship.' Langford Dep., R.61-7, PageID 1399."

"Due to Blick's potential involvement, Linden and Langford placed her on administrative leave on April 25. Blick received full pay and benefits during her leave. In Langford's letter recording this action, she instructed Blick 'not to contact any students, parents, or staff regarding this matter' or to 'enter' school district property. Letter, R.61-20, PageID 1697." …

"In early May, Linden instructed Blick to attend a 'follow up interview' with her and Langford about 'the ongoing investigation.' Email, R.61-33, PageID 1779. At this meeting, Langford confronted Blick with the allegations of her affair with Johnson. Blick, who was happily married, 'began hyperventilating and became emotional.' Blick Dep., R.61-5, PageID 1322. She adamantly denied the claim. Linden then switched topics. She told Blick that a group of Lawton parents planned to 'rally' others to attend a school-board meeting on May 8 as a show of support for Blick. *Id.*, PageID 1326. But if the parents publicized the matter, Linden warned, a reporter who regularly attended these meetings might acquire Blick's personnel file. So Linden asked her to persuade these parents not to attend the meeting. Although Linden did not order Blick to call the parents, Linden 'implied' that the 'sex claims' in her 'file' would come out if Blick did not make the calls. *Id.*, PageID 1327, 1343. Blick successfully persuaded the primary parent to cancel the planned show of support."

"The investigation dragged on for months. Frustrated by its slow pace, Blick sued while still on paid leave in July 2019. Four days later, Linden reported the fraud allegations against Johnson to the Ann Arbor Police Department. She implicated Blick to the police. School officials chose to delay any personnel action against Blick until the police issued their findings. As far as the record reveals, the department took many months to complete its investigation. In February 2020, the police found that Blick and Johnson had 'engaged in a common scheme to defraud' the school district of about $25,187.77. Rep., R.61-15, PageID 1649. They recommended criminal charges. Prosecutors charged Johnson, and he later pleaded guilty. But they did not charge Blick."

"Over this period, Blick alleges that school officials took many harmful actions against her. To list a few examples, Blick claims that officials barred her from attending some of her children's school events, including her daughter's choir concert and a graduation ceremony at which her son sang. She

also alleged that the officials did not allow her to coach her children's soccer team. And she alleges that officials barred her from speaking with anyone in the Lawton community about anything, not just the investigation."

"After the criminal proceedings ended, Langford reopened the district's investigation of Blick. In March 2021, Langford notified her that the school board might decline to renew her administrative contract because of her failure to 'properly safeguard' school funds. Letter, R.61-48, PageID 1835. Langford told Blick that she had a right to meet with the board. Blick spoke at a board meeting the next month. The board still declined to renew her contract. The contract expired in June 2021. Two months later, though, the district reassigned Blick to an educational role as an online teacher for first graders in its 'Virtual Village.'"

"Blick's lawsuit remained pending over this two-year period. She sued, among others, the school district, the district's superintendent, its deputy superintendent for human resources, Linden, Langford, and Giles under 42 U.S.C. § 1983 and other federal and state laws. In her amended complaint, Blick alleged that the school officials violated the First Amendment by prohibiting her from speaking to—and associating with—the Lawton community during her leave. She also alleged that school officials retaliated against her when she opted to speak. Apart from her First Amendment claims, she alleged that school officials discriminated against her because she is white in violation of the Equal Protection Clause, Title VII, and Michigan's Elliott-Larsen Civil Rights Act. And she alleged that the officials violated the Due Process Clause by failing to give her a hearing before placing her on leave. Lastly, she alleged that the officials engaged in a civil conspiracy to violate her rights."

"On appeal, Blick primarily renews her First Amendment claims under 42 U.S.C. § 1983. She argues that various school officials violated her freedoms of speech and association."

"In litigating these claims, each side has missed important aspects of § 1983 or federal civil procedure. Three overlooked issues affect the nature of our review, so we flag them now. Issue One: Section 1983 bars plaintiffs from holding one official liable for another's actions, so plaintiffs must show that each sued official engaged in unlawful conduct. *See Jane Doe v. Jackson Loc. Sch. Dist. Bd. of Educ.*, 954 F.3d 925, 934–35 (6th Cir. 2020). Yet Blick's briefing repeatedly lumps all 'Appellees' together and treats them as a single actor. We caution litigants that this strategy might forfeit § 1983 claims if it requires us to scour the record to identify how a jury could find a defendant liable based on that defendant's acts. *Cf. Dibrell v. City of Knoxville*, 984 F.3d 1156, 1163 (6th Cir. 2021). We need not impose this rule here, though, because Blick's claims fail even if we treat all the defendants as a single actor (whom we will call the 'School District')."

"Issue Two: The filing of the operative complaint 'fixes the controversy' as of that date, and federal courts will not consider post-complaint factual developments. *El-Khali v. Usen*, 2021 WL 4621828, at *4 (6th Cir. Oct. 7, 2021) (citation omitted); *cf. Davis v. Echo Valley Condo. Ass'n*, 945 F.3d 483, 496 (6th Cir. 2019). So plaintiffs should file a 'supplemental' complaint under Federal Rule of Civil Procedure 15(d) if they seek to raise a 'transaction, occurrence, or event that happened after the date of the pleading to be supplemented.' Fed. R. Civ. P. 15(d); 6A Charles A. Wright et al., *Federal Practice & Procedure* § 1504, at 253–54 (3d ed. 2010). Blick's counsel ignored this rule. They filed her operative complaint on October 22, 2019. But they challenge many of the School District's later actions, including its continued suspension of Blick and refusal to renew her contract in 2021. Because Blick did not file a supplemental complaint, she may not challenge these actions in this suit. *See El-Khali*, 2021 WL 4621828, at *4."

"Issue Three: Section 1983 has a qualified-immunity defense that limits a plaintiff's ability to obtain damages from state officials. Plaintiffs must prove not just that the officials violated the Constitution but also that all reasonable people would have recognized that their conduct violated the law. *See District of Columbia v. Wesby*, 583 U.S. 48, 62–63 (2018). Yet defense counsel did not raise a qualified-immunity defense for any of the school officials that Blick sued either in the district court or on

appeal. We thus will not rely on qualified immunity to resolve Blick's claims. *See Summe v. Kenton Cnty. Clerk's Off.*, 604 F.3d 257, 269–70 (6th Cir. 2010)."

"In sum, we will ignore § 1983's normal defendant-by-defendant approach to liability because it makes no difference in this case. We will limit our review to the events that happened before October 22, 2019. And we will consider only the First Amendment questions on the merits, not any qualified-immunity defense that might have been raised. With this understanding, we turn to Blick's freedom-of-speech and freedom-of-association claims."

"Courts recognize both 'prior restraint' claims and 'retaliation' claims under the Free Speech Clause. *Baar v. Jefferson Cnty. Bd. of Educ.*, 311 F. App'x 817, 821 (6th Cir. 2009); *see Barone v. City of Springfield*, 902 F.3d 1091, 1098, 1101–02 (9th Cir. 2018); *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1182 (10th Cir. 2010); *Fairley v. Andrews*, 578 F.3d 518, 525 (7th Cir. 2009). Blick raises both types of claims. She says that the School District restricted her ability to speak when it placed her on leave. And she says that the District punished her when she nevertheless chose to speak. We start by differentiating these two free-speech theories before applying this law to Blick's claims."

"*Retaliation*. Most often, a public employer disciplines employees for their *past* speech on the ground that the speech hindered the employer's operations. *See Bennett v. Metro. Gov't of Nashville & Davidson Cnty.*, 977 F.3d 530, 533–36 (6th Cir. 2020); *Gillis v. Miller*, 845 F.3d 677, 681–83 (6th Cir. 2017)." …

"To decide whether the First Amendment protects past speech, the Supreme Court 'proceed[s] in two steps.' *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 527 (2022). At step one, the Court's doctrine protects past speech only if the speech survives two bright-line rules. Employees must speak as private citizens, not as part of their 'official' job duties. *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006). And they must speak on a topic of 'public concern,' not personal concern. *Connick v. Myers*, 461 U.S. 138, 146 (1983). If the speech passes these two tests, the Supreme Court engages in a 'balance' of interests at the second step. *Pickering*, 391 U.S. at 568. Even if employees speak off the clock on a matter of public concern, the employer can punish them for their speech if its interests in its operations outweigh the employees' interests in speaking. *See Kennedy*, 597 U.S. at 528."

"If the First Amendment protects past speech, employees must establish two other well-known elements to prove a retaliation claim under § 1983. They must show that their employer took a harmful 'adverse action' against them—meaning one that would deter the average employee from speaking. *Myers v. City of Centerville*, 41 F.4th 746, 759 (6th Cir. 2022) (citation omitted). And they must show that their protected past speech at least partially 'motivated' this harmful action. *Id.* (citation omitted). If an employee satisfies these second and third elements, employers can avoid liability by proving that they would have taken the same harmful action even if the employee had not spoken. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *see also Lemaster v. Lawrence County*, 65 F.4th 302, 309–10 (6th Cir. 2023)."

"*Prior Restraint*. Other times, public employers adopt employee-targeted 'prior restraints' on speech by prohibiting employees from speaking about certain topics in the *future* (on the threat of discipline). *Baar*, 311 F. App'x at 821; *see, e.g.*, *Farhat v. Jopke*, 370 F.3d 580, 598 (6th Cir. 2004); *Swartzwelder v. McNeilly*, 297 F.3d 228, 235–36 (3d Cir. 2002) (Alito, J.). In *NTEU*, for example, Congress barred most federal employees from making any speeches or writing any articles for which they would receive compensation. 513 U.S. at 458–59."

"These types of prior restraints on future speech raise two questions that matter here. First, how should courts evaluate whether a prior restraint covers constitutionally protected speech? The Supreme Court has suggested that the government has a 'greater' 'burden' to justify a *broad* restraint reaching many employees and topics. *Id.* at 468; *see Amalgamated Transit Union Local 85 v. Port Auth. of Allegheny Cnty.*, 39 F.4th 95, 104 (3d Cir. 2022); *Milwaukee Police Ass'n v. Jones*, 192 F.3d 742, 749–50

(7th Cir. 1999). But its cases leave unclear how to treat a *narrow* restraint that covers only a few employees. *Cf. Arndt v. Koby*, 309 F.3d 1247, 1252 n.3 (10th Cir. 2002). When assessing such a restraint, our cases have followed the same two-step approach that we use to evaluate past speech. *See Baar*, 311 F. App'x at 821; *see also Whitney v. City of Milan*, 677 F.3d 292, 296 (6th Cir. 2012); *Jackson v. City of Columbus*, 194 F.3d 737, 744–47 (6th Cir. 1999), *abrogated on other grounds by Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002). And because Blick does not argue for stricter scrutiny, we may assume that this usual test applies here."

"Second, apart from showing that the prior restraint covers potentially protected expression, what other 'requirements' must employees establish to prove a prior-restraint claim under § 1983? *Fairley*, 578 F.3d at 525. The answer depends at least in part on the relief that employees seek. Employees typically request injunctions to prohibit enforcement of a challenged restraint. *See, e.g.*, *NTEU*, 513 U.S. at 477–80; *Edgar v. Haines*, 2 F.4th 298, 309 (4th Cir. 2021); *Amalgamated Transit Union*, 39 F.4th at 102–04; *Milwaukee Police Ass'n*, 192 F.3d at 745. That makes sense. These claims challenge limits on *future* speech because employees sue before they speak to avoid the discipline that they might face if they do. *See Swartzwelder*, 297 F.3d at 232–33. Different types of injunctions require different showings. If employees seek a broad injunction through a 'facial' or 'overbreadth' challenge, they must show that the prior restraint has a '*substantial number*' of unconstitutional applications as compared to its 'plainly legitimate sweep.' *Edgar*, 2 F.4th at 313 (citation omitted); *see United States v. Hansen*, 599 U.S. 762, 769–70 (2023); *Graham v. City of Mentor*, 118 F. App'x 27, 31 (6th Cir. 2004). If, by contrast, employees seek a narrow injunction 'as applied' to the speech they wish to convey, they must show that the First Amendment protects that specific speech. *Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 570 (6th Cir. 2012); *cf. Maldonado v. City of Altus*, 433 F.3d 1294, 1310–14 (10th Cir. 2006)."

"What about damages? Unlike employees who challenge a prior restraint on its face, employees who seek 'monetary relief' may not invoke hypothetical applications of the restraint to speech not at issue in the case. *See Davis v. Colerain Township*, 51 F.4th 164, 176 (6th Cir. 2022). They instead may seek damages only for the speech that they sought to convey. *See id.* If they prove that they would have spoken but refrained from doing so because of the prior restraint, some cases suggest that they can seek nominal or general damages for this intangible harm. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 797–802 (2021); *Risdal v. Halford*, 209 F.3d 1071, 1072 (8th Cir. 2000); *Gilpin v. Am. Fed'n of State, Cnty., and Mun. Emps., AFL-CIO*, 875 F.2d 1310, 1314 (7th Cir. 1989); *Walje v. City of Winchester*, 773 F.2d 729, 731–32 (6th Cir. 1985). If, by contrast, they allege a tangible injury, they must show that the prior restraint caused the injury. *See Fairley*, 578 F.3d at 526. Perhaps the employee quit and lost income rather than abide by the restraint. *See id.* Or maybe the employer terminated the employee when she refused to sign a contract that included the restraint. *See Barone*, 902 F.3d at 1101–06."

"Blick pursues both claims on appeal. She argues that the School District violated the First Amendment by imposing a 'prior restraint' on her speech and that it took adverse actions against her in 'retaliation' for her speech. Both claims share a common defect. Blick's briefing on her prior-restraint claim leaves unclear what expression she wanted to convey. And her briefing on her retaliation claim leaves unclear what speech she did say to trigger the alleged adverse actions."

"Prior-Restraint Claim. … According to Blick, the School District broadly barred her from speaking to the 'Lawton community' about *anything*. Appellant's Br. 21. She suggests that it restricted her ability to speak with her children's teachers about their 'education and needs[.]' *Id.* at 25. She also suggests that she could not speak with parents and teachers generally about the 'welfare and educational needs' of Lawton students. *Id.* And she suggests that she could not speak at the school-board meeting when parents sought to show their support for her. *Id.* at 22–23. According to the School District, it narrowly barred Blick from talking with parents, teachers, and students *about the investigation* into Johnson's fraud. As support for this claim, the District notes that the letter placing Blick on leave instructed her 'not to contact any students, parents, or staff regarding this matter.' Letter, R.61-20, PageID 1697. It also highlights evidence that Blick continued to speak with friends (parents and

teachers) about personal matters and with her children's teachers about their education. *Blick*, 674 F. Supp. 3d at 417–19."

The parties next debate whether the prior restraint covered topics that the First Amendment protects. According to Blick, the banned speech about her suspension or the education at Lawton raised public concerns important to the community. Appellant's Br. 25. … And the District argues that the speech limit it imposed on Blick furthered its interest in preventing interference with its 'investigation' under *Pickering* balancing. *Farhat*, 370 F.3d at 598."

"We find these debates beside the point. Blick asks us to evaluate whether the restraint *on its face* covered any *hypothetical* speech that the First Amendment would protect in the abstract. She does not ask us to decide whether the prior restraint violated the First Amendment *as applied* to the *specific* speech that she sought to express. She thus impliedly asserts the type of overbreadth claim that allows courts to consider 'hypotheticals' about a restriction's application to speech not at issue in a case. *Hansen*, 599 U.S. at 783 n.5. But Blick's briefing does not raise—let alone preserve—a 'facial challenge' to the School District's alleged policy of barring staff on leave from communicating with teachers or parents. *Edgar*, 2 F.4th at 313. As far as we can tell, Blick instead seeks only damages at this point—a form of relief that does not permit her to litigate an 'overbreadth' challenge. *See Davis*, 51 F.4th at 176. She may seek damages only for the speech that she sought to convey or the injuries caused by her inability to speak. *See id.*"

"This fact poses a problem for her. She points us to no evidence identifying the speech that she sought to express. Her own briefing proves the point. It relies on speech that other people wanted to convey. Blick notes, for example, that the School District told Lawton staff that the '[r]equest is no contact' after a teacher asked about sending 'supporting texts' to Blick. Cooke Aff., R.64-8, PageID 2255. Blick adds that parents wanted to speak at the school-board meeting to 'rally' support for her. Blick Dep., R.61-5, PageID 1326. But this allegedly squelched speech by *others* does nothing to show that *Blick herself* sought to speak.""

"Without evidence or briefing showing what Blick intended to say, we cannot engage in the 'fact specific' inquiry over whether the First Amendment would have protected her speech. *Hallandale Prof'l Fire Fighters Local 2238 v. City of Hallandale*, 922 F.2d 756, 764 (11th Cir. 1991). Consider a generic example. Governments have an important interest in protecting the integrity of their investigations into potential misconduct. *See Farhat*, 370 F.3d at 598. Whether this interest trumps an employee's interest in speaking likely depends on what the employee wants to say. Did the employee want to speak to potential witnesses to influence their statements about what happened? Or did the employee want to speak to the media to respond to the government's allegedly false claims? The required *Pickering* 'balancing' may come out differently for each type of speech." …

"… Blick's claim has proceeded past the pleading stage. On summary judgment, she had a duty to cite 'specific evidence' creating a genuine issue of material fact that she would have spoken but for the prior restraint. *Rudd v. City of Norton Shores*, 2023 WL 3886404, at *9 (6th Cir. June 8, 2023) (quoting *Boykin v. Fam. Dollar Stores of Mich., LLC*, 3 F.4th 832, 842 (6th Cir. 2021)). Her claim fails because she has not done so."

"Retaliation Claim. Blick alternatively argues that the School District retaliated against her because she spoke in violation of the District's prior restraint." …

"We opt not to resolve Blick's appeal on this ground. The claim fails for a more basic reason. An employee must have engaged in 'protected speech' to establish a First Amendment retaliation claim. *Myers*, 41 F.4th at 759 (citation omitted). What was Blick's 'protected speech'? We have no idea. Her opening brief asserted that she made 'numerous attempts to exercise her First Amendment rights' without identifying any past speech with specificity. Appellant's Br. 35. It then jumped over this protected-speech element on the purported ground that the School District challenged 'only the adverse action and causation elements' of her claim. *Id.* Yet the District's response clarified its view

that Blick could not prove 'the first element of her retaliation claim' because she did not engage in protected speech. Appellee's Br. 35 & n.10. Blick's reply ignored this response. Reply Br. 15–17. She has thus forfeited the argument that she engaged in protected speech because she failed to adequately develop it. *See A.K. v. Durham Sch. Servs., L.P.*, 969 F.3d 625, 631 (6th Cir. 2020). And without protected speech, her retaliation claim fails."

"Apart from her two free-speech claims, Blick also argues that the School District violated the First Amendment by prohibiting her from freely associating with Lawton parents and with her children. The First Amendment right to the 'freedom of speech' protects against not just regulations that directly suppress speech but also those that target activities useful for speaking. *See Lichtenstein*, 83 F.4th at 585. So, for example, a State cannot ban the sale of ink to parties who seek to make 'political pamphlets' criticizing the government. *Id.* (citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011)). The same logic underlies the right to expressive association. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). People often can better disseminate a 'shared point of view' by collaborating with each other to spread it. *Lichtenstein*, 83 F.4th at 602. If the First Amendment did not protect these collaborative efforts, the government could effectively 'silence' speech by indirectly banning those efforts rather than directly banning the speech. *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 68 (2006).

"When considering whether state action violates this right of expressive association, our cases ask three questions. *See Hamilton Cnty. Educ. Ass'n v. Hamilton Cnty. Bd. of Educ.* (*HCEA*), 822 F.3d 831, 840 (6th Cir. 2016). First, can the identified group seek freedom-of-association 'protection' because its members associate partly to express a message? *Miller v. City of Cincinnati*, 622 F.3d 524, 538 (6th Cir. 2010); *see Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648, 655 (2000). Second, does the challenged state action 'significantly burden' the group's ability to spread its message? *Lichtenstein*, 83 F.4th at 602 (quoting *Dale*, 530 U.S. at 653). And third, does this burden on speech outweigh any governmental interests justifying the burden? *See id.*"

"Blick offers two theories to establish each of these elements. But neither theory has merit."

"*Theory One*: Blick argues that the School District violated her right to associate with the 'Lawton parents' who sought to rally to her support at the school-board meeting. Appellant's Br. 31. According to Blick, the School District burdened her right to associate with these parents by threatening that a reporter who would likely attend the board meeting would uncover and disclose the allegations of her affair with Johnson if the parents publicized her leave. *Id.* at 10, 22."

"At the outset, it is not clear that these allegations meet the first element of our freedom-of-association test. She cites no case that has treated an informal and ad hoc group (parents who seek to attend a school-board meeting) as an 'expressive association' entitled to First Amendment protection. *Dale*, 530 U.S. at 648." …

"Even if Blick and the parents could seek freedom-of-association protection, she still must show that the School District's conduct 'significantly burden[ed]' this informal group's ability to express their desired message supporting Blick. *Dale*, 530 U.S. at 653. The types of actions that can significantly burden a group's expression typically fall into two camps. In camp one, the government uses its coercive power to regulate the group. A State might, for example, compel a group to disclose the names of its members or force the group to accept members with whom it does not want to associate. *See NAACP*, 357 U.S. at 451–54; *Dale*, 530 U.S. at 645–47. In camp two, the government denies public benefits to the group. A State might, for example, prohibit the group's members from using its public buildings or deny them public jobs because of the group's expression. *See Healy v. James*, 408 U.S. 169, 181 (1972); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 69 (1990). In short, 'significant' burdens typically involve the government's use of its power or its purse to interfere with a group or its message."

"When burdens have fallen short of these levels, courts have generally found them insignificant. Take our decision in *HCEA*. There, a teachers' union alleged that an assistant superintendent had interfered with its right to expressive association by sending a letter to the union. 822 F.3d at 834. The letter suggested that some of the union's solicitations of members could qualify as unlawfully intimidating. *Id.* The union responded that this claim interfered with its right to associate with prospective members. *Id.* Assuming that the union qualified as a protected association, we held that the mere act of sending this letter did not burden its right to expression association. *Id.* at 840–41 & n.3. The letter did not threaten punishment if the union continued with the challenged statements. *Id.* at 841. It simply suggested that the school board might counter with an official request for a retraction or with its own 'protected expression' in response. *Id.*; *cf. Kesterson v. Kent State Univ.*, 967 F.3d 519, 526 (6th Cir. 2020) (per curiam)."

"Here, the burden that Blick identifies resembles the one we found insufficient in *HCEA* more than those that courts have accepted. Blick admitted that the School District did not 'order' her or the supportive parents to stay silent and avoid the board meeting on threat of civil or criminal punishment. *Lyng v. UAW*, 485 U.S. 360, 366 (1988); Blick Dep., R.61-5, PageID 1327. Nor does she allege that the District threatened to fire her or deny her any other 'significant' public benefits if she associated with the parents. *Royer ex rel. Est. of Royer v. City of Oak Grove*, 374 F.3d 685, 688 (8th Cir. 2004); *Fighting Finest, Inc. v. Bratton*, 95 F.3d 224, 228 (2d Cir. 1996). Rather, the School District allegedly threatened that a reporter might obtain Blick's file through a Freedom of Information Act (FOIA) request and publicly air the allegation that she was having an affair. And while Blick adamantly denies this affair (and we see nothing in the record to support the allegation), she does not claim that the School District lied about the *fact* that the allegation had been made. To the contrary, undisputed evidence shows that Johnson told his boss he was having an affair with Blick. So the threatened nondefamatory '*expression*'—from a third party in the media, no less—did not burden Blick's freedom of association. *HCEA*, 822 F.3d at 841 (emphasis added). Indeed, if we held that lawful counter-speech—let alone a response to a FOIA request—could significantly burden the freedom of expressive association, parties could counterintuitively use their First Amendment rights 'as a weapon to silence' other speech they disliked. *Hous. Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 478–79 (2022)."

"*Theory Two*: Blick next alleges that the School District burdened her right to associate with her children by interfering with her relationship with them after it placed her on leave. She reraises many of the same harmful actions. Among other things, she alleges that the District 'prevented' her from attending a choir concert in which her daughter sang, giving her son allergy medication on school grounds, and coaching her children's soccer team. Appellant's Br. 32."

"This theory has an even more obvious problem: What do these allegations have to do with the First Amendment? Blick's lawyers confuse two types of freedom-of-association claims. Apart from the right to expressive association protected by the First Amendment, the Fourteenth Amendment's Due Process Clause protects certain 'intimate human relationships' from excessive state interference. *Roberts*, 468 U.S. at 617–18; *see Flaskamp v. Dearborn Pub. Schs.*, 385 F.3d 935, 941–42 (6th Cir. 2004). To trigger heightened substantive-due-process scrutiny, however, a state action must impose a 'direct and substantial' interference on family relationships. *See Flaskamp*, 385 F.3d at 942 (citation omitted). Blick's lawyers do not even identify this governing due-process test, let alone attempt to meet it."

"Ultimately, though, we can avoid the merits of this claim. Her counsel's briefing strategy has led her to forfeit it. We have repeatedly rejected appellate challenges to a claim when a party attacks only one of the district court's two independent grounds for denying it. *See, e.g.*, *Brebberman v. City of Maumee*, 2024 WL 1718029, at *2 (6th Cir. Apr. 22, 2024); *City of Taylor Gen. Emps. Ret. Sys. v. Astec Indus.*, 29 F.4th 802, 815 (6th Cir. 2022); *Stewart v. IHT Ins. Agency Grp., LLC*, 990 F.3d 455, 457 (6th Cir. 2021). In that scenario, the party has forfeited any challenge to the unbriefed ground. And we can affirm a district court based on that ground alone. *See Stewart*, 990 F.3d at 457. This logic applies here. The district court rejected Blick's intimate-association claim both because she did not plead the claim in her complaint and because it failed on the merits. *Blick*, 674 F. Supp. 3d at 434–36. But Blick's counsel briefed only the merits and ignored the district court's first pleading rationale. She has thus

forfeited any argument that she adequately alleged her intimate-association claim. *See Stewart*, 990 F.3d at 457."

"We end with an argument that Blick makes for all of her First Amendment claims. She sought to hold not just the individual officials liable on these claims. She also sought to hold the School District (the entity) liable for its alleged 'policy or custom' of violating its employees' First Amendment rights. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). We can make short work of this argument. We have repeatedly held that a plaintiff cannot hold a city liable for an unconstitutional policy unless the policy led to a violation of the plaintiff's *own* rights. *See Farris v. Oakland County*, 96 F.4th 956, 968–69 (6th Cir. 2024); *Dibrell*, 984 F.3d at 1165. Because Blick failed to show that any school officials violated her First Amendment rights, her *Monell* claim against the District necessarily fails too. *See Farris*, 96 F.4th at 968–69."

"This conclusion leaves Blick's three causes of action that the district court dismissed without discovery. The court held that her complaint did not plausibly allege race-discrimination, due-process, and civil-conspiracy claims. Blick renews all three on appeal."

"As relevant here, Title VII makes it illegal for an employer 'to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]' 42 U.S.C. § 2000e-2(a)(1). We have long read the words 'terms, conditions, or privileges of employment' to cover only *materially* 'adverse employment actions.' *White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 795 (6th Cir. 2004) (en banc) (internal quotation omitted), *aff'd*, 548 U.S. 53 (2006); *see Threat v. City of Cleveland*, 6 F.4th 672, 678 (6th Cir. 2021). Like most courts, we have also long held that an employer does not take a materially adverse action when it temporarily suspends an employee with *full pay* while 'timely' investigating the employee's potential misconduct. *White*, 364 F.3d at 803; *Peltier v. United States*, 388 F.3d 984, 988 (6th Cir. 2004); *see Sensabaugh v. Halliburton*, 937 F.3d 621, 628–29 (6th Cir. 2019); *Jackson*, 194 F.3d at 752; *see also Davis v. Legal Servs. Ala., Inc.*, 19 F.4th 1261, 1266–67 (11th Cir. 2021) (per curiam) (citing cases). So the district court dismissed Blick's claim because the School District continued to pay her on leave. *See Blick*, 516 F. Supp. 3d at 721–24."

"A recent Supreme Court decision calls this rationale (and our precedent) into doubt. *See Muldrow v. City of St. Louis*, 144 S. Ct. 967, 974–77 (2024). In *Muldrow*, the Court interpreted Title VII's relevant text (to 'discriminate against' an employee in the 'terms' or 'conditions' of employment) as requiring an employee to prove only that a challenged action caused the employee 'some harm respecting an identifiable term or condition of employment.' *Id.* at 974. The Court added that an action can violate Title VII even if it does not cause a '*significant*' injury to the employee. *Id.* (emphasis added). Applying this test, the Court held that an alleged racially discriminatory transfer qualified as a ''disadvantageous' change in an employment term or condition.' *Id.* (citation omitted). Likewise, one might reasonably argue that a temporary suspension (even with pay) causes 'some harm' and also concerns a 'term or condition' of the job—all that *Muldrow* now requires under Title VII. *Id.*; *see also Milczak v. Gen. Motors, LLC*, 102 F.4th 772, 787 (6th Cir. 2024)."

"But we need not consider whether *Muldrow* has any bearing on this case. On appeal, Blick did not alert us to this decision or challenge our existing precedent that paid leave does not qualify as an adverse action. Rather, she found our precedent 'distinguishable' because she alleged that the School District took harmful actions against her *other* than its decision to place her on paid leave. Appellant's Br. 44. But she did not sufficiently develop any of the theories that she raises (and that are distinct from paid leave) to preserve this claim. *See A.K.*, 969 F.3d at 631."

"All told, Blick did not preserve any challenge to our paid-leave precedent because she sought to distinguish this precedent from her case. But she did not adequately develop any theory independent of her paid leave. *See A.K.*, 969 F.3d at 631. So she has forfeited these other theories. We thus can save *Muldrow*'s effect on our caselaw for another day."

"Blick next challenges the dismissal of her claim that the School District violated due process by failing to give her a hearing before placing her on leave." …

"After the court issued its decision, though, we opined that a public employer's decision to pay an employee during a suspension does not create an automatic 'safe harbor' from all due-process scrutiny. *Kaplan v. Univ. of Louisville*, 10 F.4th 569, 581 n.3 (6th Cir. 2021). That said, Blick still must show that the suspension deprived her of a state-created property interest. *Cf. id.* at 579–80. In that respect, Michigan law suggests that teachers assigned to administrative roles (such as the role of principal) lack state-created tenure rights in those roles. *See* Mich. Comp. Laws § 38.91(7); *see also Ryan v. Aurora City Bd. of Educ.*, 540 F.2d 222, 226–27 (6th Cir. 1976). And Blick's opening brief did not attempt to identify any other 'property' interest that she lost during her the leave."

"But we need not enter this debate because Blick's counsel forfeited this claim too. As we have explained, litigants forfeit a claim if they challenge only one of two independent reasons why a district court rejected it. *See Brebberman*, 2024 WL 1718029, at *2; *Stewart*, 990 F.3d at 457. That rule covers this claim too—with a nuance. Unlike in these other cases, the district court's decision to reject Blick's due-process claim rested on a central proposition: paid leave raises no due-process problem. So Blick's counsel should have known the basis for its decision. Yet counsel ignored this reason in Blick's opening brief. They instead adopted—sometimes word for word—the brief they filed in the district court in response to the motion to dismiss. That brief said nothing about the district court's holding that paying an employee during a suspension satisfies due process. And while counsel belatedly mentioned this issue in Blick's reply brief, that effort came far 'too late.' *Stewart*, 990 F.3d at 457. Because Blick did not timely dispute the district court's categorical rule, we reject her due-process claim on forfeiture grounds alone. *See id.*"

"Blick concludes with a page-and-a-half attempt to overturn the dismissal of her conspiracy claim under § 1983. To prove such a conspiracy, a plaintiff must establish three things. *See Rudd v. City of Norton Shores*, 977 F.3d 503, 517 (6th Cir. 2020); *Hooks v. Hooks*, 771 F.2d 935, 944 (6th Cir. 1985). First, at least two people must have agreed to a 'single plan' to deprive the plaintiff of rights protected by § 1983. *Robertson v. Lucas*, 753 F.3d 606, 622 (6th Cir. 2014) (citation omitted). Second, each alleged coconspirator must have subjectively 'shared' the plan's illegal objective. *Id.* (citation omitted). And third, one of the coconspirators must have taken an 'overt act' to carry out the plan. *Id.* (citation omitted)."

"To get past the pleading stage on a conspiracy claim, a complaint must assert 'specific allegations' that plausibly suggest each of these elements. *Rudd*, 977 F.3d at 511–12, 517; *see Siefert v. Hamilton County*, 951 F.3d 753, 768 (6th Cir. 2020). Conversely, a plaintiff cannot obtain discovery with 'vague and conclusory allegations' of a conspiracy's existence or a defendant's participation in it. *Rudd*, 977 F.3d at 517 (citation omitted); *Bickerstaff v. Lucarelli*, 830 F.3d 388, 401 (6th Cir. 2016); *Fieger v. Cox*, 524 F.3d 770, 776 (6th Cir. 2008) (citation omitted)."

"Here, it is not clear that Blick could allege a plan between two or more people as a matter of law. *See Robertson*, 753 F.3d at 622. Under the so-called 'intracorporate conspiracy doctrine,' individuals acting in their capacities as employees of the same entity (such as a city) cannot conspire with each other. *Jackson v. City of Cleveland*, 925 F.3d 793, 817–19 (6th Cir. 2019). So a plaintiff must show an agreement between these employees and another person. *See Novak v. City of Parma*, 932 F.3d 421, 436–37 (6th Cir. 2019). Yet the individual defendants in this case all worked for the School District. *See Baar*, 311 F. App'x at 826–27."

"But the School District did little to develop this argument. And we need not decide Blick's claim on the intracorporate-conspiracy doctrine because her complaint falls short of pleading a conspiracy claim's second element. When we have held that a complaint plausibly alleged that a defendant agreed to a 'conspiracy's objectives,' we have highlighted the specific allegations connecting that defendant to those objectives. *Rudd*, 977 F.3d at 518–19; *see Novak*, 932 F.3d at 436–37. Blick's

complaint, by contrast, generically alleged that the undifferentiated group of 'Defendants' *collectively* conspired to deprive her of rights. Am. Compl., R.14, PageID 134. The district court correctly explained that the complaint did not even identify the specific defendants who joined this conspiracy—let alone make specific allegations plausibly connecting them to its objectives. *Blick*, 516 F. Supp. 3d at 732. And after the district court identified this problem, Blick's appellate briefing doubled down on the same approach. She continues to treat the defendants as a collective. Her briefing suggests that the 'Appellees' conspired without identifying any of the complaint's allegations plausibly showing that any specific defendant shared the conspiracy's objectives. Appellant's Br. 50. So she has not pleaded this claim with the 'degree of specificity' we require. *Siefert*, 951 F.3d at 768 (citation omitted); *Bickerstaff*, 830 F.3d at 401."

4. First Amendment - Due process - Equal protection – Candidate challenged term limits requirement – Challenges to term-limit laws receive rational basis review - In general, under rational basis review, a defendant has no obligation to produce evidence to sustain the rationality of its actions; its choice is presumptively valid and may be based on rational speculation unsupported by evidence or empirical data - Because the term-limit amendment was supported by multiple legitimate interests, and because plaintiff has not negated the rationality of the amendment in any way, he cannot succeed on his First and Fourteenth Amendment challenge - The term-limit amendment did not violate plaintiffs' due process rights because it does not operate retroactively and does not deprive him of any property or liberty interest protected by the Due Process Clause - It impairs no rights that plaintiff had before enactment because plaintiff never had a right to run for mayor, and it imposes no new liabilities or duties on plaintiff because it merely requires him to refrain from serving as mayor, rather than requiring any affirmative act on his part - The term-limit law only prospectively prohibits plaintiff from running for a fifth term because it draws upon antecedent facts for its operation - Merely considering these prior terms does not make the amendment apply retroactively – No equal protection class of one violation

JAMES R. FOUTS v. WARREN CITY COUNCIL; SONJA BUFFA; ANTHONY FORLINI; CITY OF WARRENELECTION COMMISSION
SIXTH CIRCUIT COURT OF APPEALS No. 23-1826 Decided and Filed: April 2, 2024

"Plaintiff James R. Fouts, the former mayor of Warren, Michigan, appeals the district court's dismissal of his complaint against Defendants Warren City Council, Warren City Election Commission, Anthony G. Forlini, in his capacity as the Macomb County Clerk, and Sonja D. Buffa, in her capacity as the Warren City Clerk. Fouts brought claims under 42 U.S.C. § 1983, alleging that Defendants violated his First, Fifth, and Fourteenth Amendment rights by retroactively applying a new term-limit provision to bar him from running for a fifth term as Warren's mayor. For the reasons set forth below, we **AFFIRM** the district court's dismissal of Fouts' complaint."

"At the time of his complaint, Fouts was serving his fourth term as mayor of Warren, Michigan, having been in office since 2007. In 2020, Warren voters passed an amendment to Warren's city charter that shortened the existing term limits for mayor and brought mayoral term limits in line with term limits for other City offices. Specifically, the amended charter provides that '[a] person shall not be eligible to hold the position of mayor, city council, city clerk or city treasurer for more than the greater of three (3) complete terms or twelve (12) years in that office.' Warren City Charter, § 4.3(d). Despite the new charter amendment, Fouts initiated the process of placing his name on the ballot to run for a fifth term as mayor in the 2023 election."

"In August 2023, Fouts filed the instant case in federal court. He brought claims under 42 U.S.C. § 1983, alleging that Defendants violated his First Amendment rights to free expression and association, his Fifth Amendment right to due process of law, and his Fourteenth Amendment right to equal protection under the law. He sought declaratory relief and monetary damages, and requested that the district court decertify the results of the 2023 mayoral primary election and order a special election that would include Fouts on the 2023 ballot. The City Council and Forlini each moved to dismiss Fouts' complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The district

court found that it had subject matter jurisdiction over Fouts' complaint, but dismissed the complaint in its entirety because it failed to state a claim upon which relief could be granted."

"… Defendants urge us to uphold the district court's dismissal of Fouts' complaint on the merits, and alternatively argue that we should affirm the district court's dismissal of Fouts' complaint based on the principle 'that lower federal courts should ordinarily not alter the election rules on the eve of an election.' *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423, 424 (2020)."

"Because Fouts requests relief tied in part to the 2023 Warren mayoral race—an election that has come and gone—we first consider whether his appeal is moot. Although no party raised this question, we must assure ourselves of our own jurisdiction to hear a case, and, accordingly, may raise the question of mootness *sua sponte*. *Berger v. Cuyahoga Cnty. Bar Ass'n*, 983 F.2d 718, 721 (6th Cir. 1993). A case may become moot at any stage of litigation 'when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'*Graveline v. Benson*, 992 F.3d 524, 533 (6th Cir. 2021) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969))."

"In this case, even if Fouts' prospective relief has been mooted by the occurrence of the 2023 mayoral election, Fouts' request for monetary damages ensures our jurisdiction. A request for monetary damages may continue to present a live controversy, even when a plaintiff's claim for prospective relief is mooted. *See Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 387 (6th Cir. 2005) ('[T]he existence of a damages claim ensures that this dispute is a live one and one over which Article III gives us continuing authority.')."

"… Although the 2023 Warren mayoral election has passed, and although Fouts has not explicitly indicated in his complaint that he seeks to run for a fifth term as mayor in a future election, such an explicit statement is not necessary to show that it is 'reasonable to expect that he will do so.' *Lawrence*, 430 F.3d at 371. Because the term-limit amendment remains valid and applicable to Fouts, and because it is reasonable to believe that he will seek to run for a fifth term in the future if permitted, Fouts' request for declaratory relief likely continues to present a live case or controversy over which we have jurisdiction."

"Fouts first argues that Defendants violated his First Amendment rights to free expression and association by applying the charter amendment to him retroactively and preventing him from running for a fifth term as mayor. A potential candidate for office may bring a challenge to a state term-limit law under the First Amendment, which is made applicable to the states through the Fourteenth Amendment. *See Kowall v. Benson*, 18 F.4th 542, 546–47 (6th Cir. 2021)."

"… Term-limit laws, which only restrict the class of individuals eligible to run for office, do not burden a fundamental right because there is no fundamental right to run for office. *See Kowall*, 18 F.4th at 547; *see also Clements v. Fashing*, 457 U.S. 957, 963 (1982) ('Far from recognizing candidacy as a 'fundamental right,' we have held that the existence of barriers to a candidate's access to the ballot 'does not of itself compel close scrutiny.'') (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)). Accordingly, challenges to term-limit laws receive rational basis review. *See Kowall*, 18 F.4th at 548."

"Fouts argues that his claim mirrors ballot-access challenges that receive heighted scrutiny because we have held that '[f]or ballot-access cases,' the 'hallmark of a severe burden is exclusion or virtual exclusion from the ballot.' *Graveline*, 992 F.3d at 543 (quoting *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 574 (6th Cir. 2016)). Because the term-limit amendment excludes Fouts from the ballot, he claims that a higher level of scrutiny applies to his challenge. This argument is foreclosed by our precedent. *See Kowall*, 18 F.4th at 547–48. Ballot-access cases address the constitutionality of barriers for otherwise qualified candidates to be placed on the ballot, such as candidate signature requirements or early filing deadlines that disproportionately impact minor political parties. *See, e.g.*, *Graveline*, 992 F.3d at 536–37. By contrast, term-limit laws 'operate independently from ballot-access restrictions' because 'they limit which individuals are eligible to hold office.' *Kowall*, 18 F.4th at 547.

However Fouts may phrase his argument, it does not change the fact that he has not challenged a law restricting his fundamental rights."

"Fouts must thus show that the term-limit amendment, as applied to him, has no rational relationship to any legitimate government interest. *See Kowall*, 18 F.4th at 548. In general, under rational basis review, a defendant 'has no obligation to produce evidence to sustain the rationality of its actions; its choice is presumptively valid and 'may be based on rational speculation unsupported by evidence or empirical data.'' *Club Italia Soccer & Sports Org. v. Charter Twp. of Shelby,* 470 F.3d 286, 298 (6th Cir. 2006), *overruled on other grounds as recognized by Davis v. Prison Health Servs.*, 679 F.3d 433, 442 n.3 (6th Cir. 2012) (quotation omitted). However, in this case, the City Council explicitly stated its legitimate interests in proposing the term-limit amendment. Specifically, in the resolution adopting the ballot proposal later submitted to Warren voters, it stated that '[a] governmental system with an equally balanced distribution of power and effective system of checks and balances would be best served by having equal term limits for all elected city offices.' … This provides a rational basis for the term-limit amendment. *See Kowall*, 18 F.4th at 548."

"A plaintiff may show that a government action lacks a rational basis by either negating 'every conceivable basis which might support the government action' or 'by showing that the challenged action was motivated by animus or ill-will.' *Cahoo v. SAS Analytics Inc.*, 912 F.3d 887, 905 (6th Cir. 2019) (quoting *TriHealth, Inc. v. Bd. of Comm'rs, Hamilton Cnty.*, 430 F.3d 783, 788 (6th Cir. 2005))." …

" … Because the term-limit amendment was supported by multiple legitimate interests, and because Fouts has not negated the rationality of the amendment in any way, he cannot succeed on his First and Fourteenth Amendment challenge."

"Fouts also argues that the purported retroactive application of the term-limit amendment to him violates the Fourteenth Amendment's Due Process Clause. Although '[t]he Due Process Clause . . . protects the interests in fair notice and repose that may be compromised by retroactive legislation,' the term-limit amendment did not violate Fouts' due process rights because it does not operate retroactively and does not deprive him of any property or liberty interest protected by the Due Process Clause. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994)."

"'A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law.' *Id.* at 269 (citation omitted). Similarly, 'a statute 'is not made retroactive merely because it draws upon antecedent facts for its operation.'' *Id.* at 269 n.24 (quoting *Cox v. Hart*, 260 U.S. 427, 435 (1922)). Instead, courts 'must ask whether the new provision attaches new legal consequences to events completed before its enactment,' that is, 'whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.' *Id.* at 269–70, 280. Including Fouts' prior terms as mayor when calculating his eligibility under the term-limit amendment does not apply the amendment retroactively under this understanding of retroactivity. Certainly, applying the amendment in this way draws on past actions by Fouts—his prior terms—to assess the term-limit amendment's applicability to him. But it impairs no rights that Fouts had before enactment because Fouts never had a right to run for mayor of Warren. *See Kowall*, 18 F.4th at 547. And it imposes no new liabilities or duties on Fouts because it merely requires him to refrain from serving as mayor, rather than requiring any affirmative act on his part. Instead, the term-limit law only prospectively prohibits Fouts from running for a fifth term 'because it draws upon antecedent facts for its operation.' *Landgraf*, 511 U.S. at 269 n.24. Merely considering these prior terms does not make the amendment apply retroactively."

"… Longstanding Michigan and federal law confirm that there is no property interest in holding public office. *See Taylor v. Beckham*, 178 U.S. 548, 576 (1900) ('The view that public office is not property has been generally entertained in this country.'); *People v. Smith*, 918 N.W.2d 718, 726 (Mich. 2018) ('[T]he law has long been clear that there is no property interest in holding public office.'). Moreover,

Fouts cites no authority for the proposition that he has a liberty interest in running for or holding public office. Given our prior holding that running for public office does not constitute a fundamental right under the Constitution, Fouts similarly has no liberty interest impacted by the term-limit amendment. *See Kowall*, 18 F.4th at 547."

"… Because the term-limit law does not deprive Fouts of any property or liberty interest, even if it could be understood to apply retroactively, it does not violate the Due Process Clause."

"Finally, Fouts claims that the term-limit law as applied to him violates the Fourteenth Amendment's Equal Protection Clause. The Equal Protection Clause prohibits 'governmental discrimination that either (1) burdens a fundamental right, (2) targets a suspect class, or (3) intentionally treats one differently from others similarly situated without any rational basis for the difference.' *Green Genie, Inc. v. City of Detroit*, 63 F.4th 521, 527 (6th Cir. 2023). As stated, the term-limit amendment did not burden Fouts' fundamental rights. Nor does Fouts contend that it targeted a suspect class of citizens. Instead, he argues a 'class of one' theory, requiring him to allege that he was 'intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.' *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam)."

"The first prong of a 'class of one' theory requires proof of intentional discrimination, which, as we have recently clarified, a plaintiff may show through direct or circumstantial evidence. *Green Genie*, 63 F.4th at 527–28. 'Direct evidence is evidence that proves the existence of a fact without requiring any inferences.' *Rowan v. Lockheed Martin Energy Sys., Inc.*, 360 F.3d 544, 548 (6th Cir. 2004). Fouts does not argue that Defendants directly discriminated against him by passing the term-limit amendment, nor does his complaint allege evidence of direct discrimination. Instead, as stated, it contends that the term-limit amendment, in effect, only bars him from office as other city officials could exploit the purported 'loophole' in the amendment by resigning from office before they finish a 'complete' term. Compl., R. 1, Page ID #11. This allegation requires us to make too many inferences to glean the intent of City Council members to qualify as direct evidence."

"Nor has Fouts alleged sufficient circumstantial evidence to show intentional discrimination. He argues that he has identified a similarly situated comparator who Defendants intentionally treated differently, which if true would satisfy the first prong of the 'class of one' claim. *Green Genie*, 63 F.4th at 528. However, a comparator must be 'similarly situated in all relevant respects.' *EJS Props.*, 698 F.3d at 865 (citation omitted). In this case, Fouts claims that a City Council member, Patrick Green, is a sufficiently similar comparator because the term-limit amendment—which also applied to City Council members—applied differently to Green even though he also had served three terms as a Council member. But, as Fouts himself acknowledges, Green did not serve three 'complete' terms on the City Council, but, instead, resigned early from his third term. *See Boike v. Green*, No. 365681, 2023 WL 3588168, at *1 (Mich. Ct. App. May 22, 2023) (per curiam). Because the term-limit amendment bars individuals from holding office only after the *greater* of three complete terms or twelve years, Green was permitted to serve for a fourth term on the City Council. *Id.* By contrast, the term-limit amendment would bar Fouts from running for a fifth term as he had already served more than three complete terms and for more than twelve years. Plainly, then, Fouts and Green are not similarly situated in one of the most relevant respects: whether they meet the criteria for the term-limit amendment to apply."

"Furthermore, even if Fouts had sufficiently alleged that Defendants intentionally discriminated against him by proposing and enforcing the term-limit amendment to bar him from running for office, as stated, the term-limit amendment clearly passes rational basis review. Accordingly, Fouts has failed to state a claim under the Equal Protection Clause."

5. First Amendment – Prior restraint on speech – Court order nonparty grandfather not discuss case against his son with his granddaughter – Nonparty grandfather file a writ of certiorari on the order of the trial court - A writ of certiorari is an order from a superior court to an inferior tribunal to send up a complete record for review, so that the reviewing court can ascertain whether the

inferior tribunal has exceeded its jurisdiction or acted illegally, fraudulently, or arbitrarily - Where a petitioner alleges that the trial court has acted without legal authority and‘there is no other plain, speedy, or adequate remedy, a writ of certiorari may be warranted – Strict scrunity applies - There was no specific finding of danger to the child in this case - Instead, the trial court appears to have based its decision to restrict petitioner’s speech simply on its subjective view about what children should or should not hear - That will not suffice - A trial court’s personal opinion is not a basis for restricting a person’s constitutional right to free speech

PATRICK M. MALONE v. JAMES WILLIAM ROSE, ET AL.
COURT OF APPEALS No. M2023-01453-COA-WR-CV Filed March 26, 2024

“This matter concerns prior restraint on speech. Patrick M. Malone (‘Father’) is a party to an action in the Chancery Court for Williamson County (‘the Trial Court’) against maternal grandparents James William Rose and Jennie Adams Rose (‘Respondents’) concerning Father’s minor child, Rosie (‘the Child’). Father’s father, Michael P. Malone (‘Petitioner’), testified voluntarily at a hearing on Father’s motion to set bail pending appeal of Father’s convictions for criminal contempt. In two written orders, the Trial Court ordered Petitioner not to discuss the legal proceedings of Father’s case with the Child. Petitioner, a non-party, filed a petition for writ of certiorari in this Court seeking reversal of the Trial Court’s orders against him as he contends they were improper. We granted the petition. The Trial Court’s restrictions lack an adequate evidentiary basis. In addition, the Trial Court erred in abridging Petitioner’s constitutional right to free speech when Petitioner is a non-party who lacked the benefit of notice or a hearing. We reverse the provisions of the Trial Court’s orders dated August 15, 2023 and August 17, 2023 restraining Petitioner from discussing the legal proceedings of Father’s case with the Child.”

“In this matter, Petitioner asserts that his right to free speech was unlawfully abridged by the Trial Court. Father and Respondents were engaged in litigation concerning the Child. Petitioner, a non-party, voluntarily testified at the June 9, 2023 hearing on Father’s motion to set bail pending appeal of Father’s convictions for criminal contempt. During the hearing, the Trial Court ordered Petitioner not to discuss the legal proceedings of Father’s case with the Child.” …

“‘On August 7, 2023, Father moved for the Trial Court to recuse. In the meantime, on August 15, 2023, the Trial Court entered an order which stated as relevant: ‘It is further ORDERED, ADJUDGED, and DECREED that Paternal Grandfather and Father shall be, and are hereby, prohibited from speaking to the minor child about these legal proceedings, as that topic is an adult issue.’ On August 17, 2023, a nearly identical order was entered by the Trial Court except this time there was an explanatory footnote stating:

> This Order was lost in the shuffle of appellate filings following the June 9, 2023, hearing in which this Court denied bond. Since the June 9, 2023, hearing, the Court of Appeals entered an Order requiring that bond be set. In compliance with the Court of Appeals’ Order, on June 22, 2023, another hearing was held and this Court set bond with strict bond conditions. The Order resulting from the hearing on June 22, 2023, regarding Father’s bond remains in effect. This Order from the June 9, 2023, hearing is now being entered for the sake of a complete record, and so there is a written Order reflecting that Father and Paternal Grandfather are under a Court Order not to discuss these proceedings with the child.”

“In September 2023, the Trial Court denied Father’s motion to recuse. In October 2023, Petitioner filed a petition for writ of certiorari in this Court. In November 2023, we granted the petition.”

“This matter reaches us by means of a petition for writ of certiorari. ‘A writ of certiorari is an order from a superior court to an inferior tribunal to send up a complete record for review, so that the reviewing court can ascertain whether the inferior tribunal has exceeded its jurisdiction or acted illegally, fraudulently, or arbitrarily.’ *State v. Lane*, 254 S.W.3d 349, 354 (Tenn. 2008). Where a

petitioner alleges that the trial court has acted without legal authority and 'there is no other plain, speedy, or adequate remedy,' a writ of certiorari may be warranted. Tenn. Code Ann. § 27-8-101; *State v. Adler*, 92 S.W.3d 397, 401 (Tenn. 2002), *superseded on other grounds by statute,* Act of May 8, 2003, ch. 175, 2003 Pub. Acts 292 (codified as amended at Tenn. Code Ann. § 40-32-101), *as recognized in State v. Rowland*, 520 S.W.3d 542, 545 (Tenn. 2017)."

"The present matter concerns prior restraint on speech. This Court has previously discussed prior restraint as follows:

> An impermissible 'prior restraint' exists when the exercise of First Amendment rights depends upon prior approval of public officials. *Déjà vu of Nashville, Inc. v. Metro. Gov't of Nashville and Davidson Cnty.*, 274 F.3d 377, 400 (6th Cir. 2001), *cert. denied* 535 U.S. 1073, 122 S.Ct. 1952, 152 L.Ed.2d 855 (2002). A system creating prior restraints bears a heavy presumption against its constitutional validity. *Id.* (citing *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965)). In the context of protected speech, ' 'prior restraint' is a label used in constitutional law to describe administrative or judicial orders that forbid a communication when issued in advance of the time that the communication is to occur: Governmental action constitutes a prior restraint when it is directed to suppressing speech because of its content before the speech is communicated.' 2 J. Thomas McCarthy, *Rights of Publicity and Privacy* § 11:24 Injunctions–Prior Restraint Rule (2d ed.). Accordingly, the First Amendment of the United States Constitution, and Article I, Section 19 of the Tennessee Constitution, provide broad protections to prevent the abridgment of a person's right to freedom of speech. These protections require the application of strict scrutiny review when a court is presented with the question of whether a person's fundamental rights, such as freedom of speech, have been infringed. *See generally San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 16, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). Strict scrutiny requires that the restraint on speech be 'narrowly tailored to serve a compelling governmental interest.' *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009).

In re Conservatorship of Turner, No. M2013-01665-COA-R3-CV, 2014 WL 1901115, at *8 (Tenn. Ct. App. May 9, 2014), *no appl. perm. appeal filed*."

"In *Gider v. Hubbell*, No. M2016-00032-COA-R3-JV, 2017 WL 1178260 (Tenn. Ct. App. March 29, 2017), *no appl. perm. appeal filed*, a relevant precedent addressing prior restraint on speech in a domestic relations setting, father filed a petition against mother to modify the permanent parenting plan concerning their minor child. *Id.* at *1. The trial court granted father's petition and, as relevant, enjoined mother not to reference father on social media; not to make disparaging remarks about father to the child or others in the child's presence; and not to discuss the custody proceedings or other 'adult-only' issues with the child. *Id.* at *5. At the hearing, certain evidence had been presented concerning the effect of mother's communications with the child. *Id.* at *4. Andrea Woodard, the child's school principal, testified that the child had 'discussed the fact that Mother had shared details of the custody battle and other sensitive topics' with the child. *Id.* Ms. Woodard said that the child exhibited a 'high level of anger' and 'physically lashed out against her peers' leading Ms. Woodard to speak to mother about some topics being inappropriate to discuss with children. *Id.* In addition, Tricia Reynolds, a CASA volunteer, stated that 'Mother discussed matters with [the child] that were inappropriate and that could have a negative psychological impact on the child.' *Id.* In fact, mother's inability to control what she said to the child was Ms. Reynolds' 'greatest concern.' *Id.* Mother appealed the trial court's judgment, including the speech restrictions, to this Court. *Id.* at *5."

"On appeal, we held as pertinent that '[u]nder these facts, it is entirely proper for the juvenile court to restrict Mother from making disparaging and clearly defamatory remarks about Father online or to the child or in the presence of the child.' *Gider*, 2017 WL 1178260, at *12. We stated further that '[i]n light of their adverse effect on [the child], the record also supports restricting Mother's communication

to the child about the court proceedings and other topics specifically identified in the order. The demonstrated harm outweighs Mother's free speech rights.' *Id.* However, we held that certain of the trial court's restrictions on mother's speech went too far. *Id.* We stated:

> [C]ertain of the restrictions placed on Mother's communications were overbroad or vague. The prohibition against any mention of Father by Mother on social media would prohibit even the most benign reference to Father. And the prohibition against Mother discussing 'adult-only issues' with her child leaves a reasonable basis for doubt as to what topics, beyond those specifically mentioned in the order, Mother may not discuss. Consequently, we modify the juvenile court's injunction to remove the prohibitions against 1) any reference by Mother to 'Father at all on social media' or 2) discussions of 'adult-only issues' beyond those topics specifically referenced in the injunction. Our ruling, however, does not preclude the juvenile court from expanding its injunction in the future to cover additional topics provided the restraints on Mother are supported by adequate factual findings and are narrowly tailored to limit the prohibited speech.

Id. at *12."

"Thus, Respondents are correct so far as it goes that Tennessee law has countenanced, at least in a limited fashion, some restrictions on speech in domestic relations casesinvolving children. Nevertheless, these restrictions must be narrowly drawn. A number ofcritical distinctions exist between *Gider*, for example, and the case at bar. In *Gider*, the individual being restrained was the child's mother and a party to the case. Here, Petitioner is a non-party who voluntarily showed up to testify at the hearing. In *Gider*, we emphasized the necessity of adequate factual findings and that the restraints on speech be narrowly tailored to limit the prohibited speech. As Petitioner points out, there was no specific finding of danger to the Child in this case. Instead, the Trial Court appears to have based its decision to restrict Petitioner's speech simply on its subjective view about what children should or should not hear. That will not suffice. A trial court's personal opinion is not a basis for restricting a person's constitutional right to free speech. In *Gider*, the trial court heard evidence that the mother's remarks had an adverse impact on the child. *Gider*, 2017 WL 1178260, at *4. By contrast, here, there is no such evidence or corresponding factual findings to justify the Trial Court's prior restraint orders against Petitioner discussing the legal proceedings with the Child. Absent any such specific findings, the Trial Court's prior restraint orders are based merely on the Trial Court's subjective beliefs, which cannot outweigh Petitioner's First Amendment rights."

"Beyond the lack of evidentiary support or factual findings to support the prior restraints, Petitioner is not even a party to the underlying action. He was a voluntary witness at a hearing on a motion to set bail. Respondents argue that trial courts have wide discretion under Tenn. R. Civ. P. 65.07 to issue injunctions. In response, Petitioner points out that Rule 65.07 contemplates injunctions issued upon application. No application was made here; the Trial Court just decided on its own that Petitioner, a non-party, should not talk to the Child about the legal proceedings including telling the Child where her father was. Petitioner lacked any notice or meaningful opportunity to respond. Crucially, he also lacked the benefit of a hearing. Despite these circumstances, the Trial Court entered orders restraining Petitioner's speech, one of the most serious actions a court can take. It is little wonder that Respondents concede they have found no authority for such a proposition. Rule 65.07 is of no avail to Respondents here, and the Trial Court's prior restraint orders do not pass constitutional muster. We conclude that the Trial Court erred in restraining Petitioner from talking to the Child about the legal proceedings. Petitioner's other issues are pretermitted. We reverse the provisions in the Trial Court's orders dated August 15, 2023 and August 17, 2023 restraining Petitioner's speech."

6. First Amendment – Standing – Plaintiff pre-enforcement challenge to state law that prohibiting displaying a photograph of an individual's ballot – Plaintiff had Article III standing to bring the action – Although the law had not been enforced against the plaintiff she can establish an imminent injury in fact under the First Amendment by demonstrating (1) an intent to engage in 'expression that the Free Speech Clause arguably protects, (2) that this expression is arguably

prohibited by Ohio's ballot laws, and (3) that there exists a credible threat of enforcement for engaging in that expression

ALISON KAREEM v. CUYAHOGA COUNTY BOARD OF ELECTIONS; FRANK LAROSE, Ohio Secretary of State; MICHAEL C. O'MALLEY, Cuyahoga County Prosecuting Attorney
SIXTH CIRCUIT COURT OF APPEALS No. 23-3330 Decided and Filed: March 14, 2024

"Plaintiff Alison Kareem appeals the district court's grant of summary judgment to Defendants Ohio Secretary of State Frank LaRose, the Cuyahoga County Board of Elections, and Cuyahoga County Prosecuting Attorney Michael C. O'Malley. Kareem sued Defendants on the grounds that two state election laws, Ohio Rev. Code §§ 3501.35(A)(4) and 3599.20, violated her free speech rights under the First Amendment by prohibiting her from displaying her marked ballot to others. The district court granted Defendants' motions for summary judgment because it concluded that Kareem lacked Article III standing. For the reasons set forth below, we **REVERSE** the district court's order and **REMAND** for further proceedings in accordance with this opinion."

"On October 20, 2020, while voting in the November 2020 general election, Plaintiff Alison Kareem took a photograph with her marked ballot, colloquially referred to as a 'ballot selfie.' According to Kareem, she wished to display this photograph online to mobilize support for her preferred candidates. However, she did not display the photograph, nor has she displayed any ballot photographs in subsequent elections, because of Ohio laws that prohibit the display of marked ballots. 'If state law did not prohibit the posting or publication of a ballot selfie,' Kareem states that she 'would have posted on-line and disseminated the ballot selfie from October 2020' and 'taken, posted, and disseminated a ballot selfie at subsequent elections.' Kareem Decl., R. 28, Page ID #570."

"The state laws to which Kareem refers are Ohio Rev. Code § 3501.35(A)(4) and Ohio Rev. Code § 3599.20, both of which carry a potential term of imprisonment. Section 3501.35(A)(4) prohibits '[e]xhibit[ing]' a 'ballot which the elector intends to cast.' Ohio Rev. Code. § 3501.35(A)(4). A violation is a first-degree misdemeanor, *see id.* § 3599.40, and is punishable by up to six months' imprisonment, *see id.* § 2929.24. Section 3599.20 prohibits an elector from 'allow[ing] the elector's ballot to be seen by another' with the 'apparent intent[]' to reveal 'how the elector is about to vote.' *Id.* § 3599.20. A violation of § 3599.20 is a felony in the fifth degree, *id.*, which is punishable by up to twelve months' imprisonment, *id.* § 2929.14(A)(5)."

"On October 30, 2020, Kareem filed a complaint against Ohio Secretary of State Frank LaRose, as well as the Cuyahoga County Board of Elections and Cuyahoga County Prosecuting Attorney Michael C. O'Malley, claiming that Ohio Rev. Code § 3501.35(A)(4) and Ohio Rev. Code § 3599.20 restricted her core political speech in violation of the First Amendment. For this alleged harm, Kareem sought declaratory relief, injunctive relief, and nominal damages."

"Subsequently, both Kareem and Defendants moved for summary judgment on various grounds. Among other possible grounds for summary judgment, Defendants argued in their motions that Kareem lacked standing. Without reaching the merits of Kareem's claim, the district court agreed that Kareem lacked standing and granted Defendants' motions for summary judgment on this basis. Kareem filed a timely notice of appeal on April 18, 2023, and she now argues that this Court should reverse the grant of summary judgment to Defendants and remand to the district court for further proceedings."

"The sole issue on appeal is Article III standing, which requires a plaintiff to 'have suffered an 'injury in fact,'' that was caused by 'the conduct complained of,' and which 'a favorable decision' is likely to redress. *Id.* at 560–61 (citations omitted). The injury in fact requirement establishes a plaintiff's 'personal stake in the outcome of the controversy.' *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). Accordingly, the injury must be 'actual or imminent,' rather than ''conjectural' or 'hypothetical.'' *Id.* (quoting *Lujan*, 504 U.S. at 560)."

"Defendants' primary argument is that Kareem cannot establish an imminent injury to her free speech rights based on Ohio's ballot laws. Although these laws have not been enforced against Kareem, the Supreme Court has emphasized that a law need not be enforced against a speaker to pose a threat to her speech. *See id.* Instead, Kareem can establish an imminent injury in fact under the First Amendment by demonstrating (1) an intent to engage in 'expression that the Free Speech Clause arguably protects,' (2) that this expression is arguably prohibited by Ohio's ballot laws, and (3) that there exists a 'credible threat of enforcement' for engaging in that expression. *See Fischer v. Thomas*, 52 F.4th 303, 307 (6th Cir. 2022) (per curiam) (citing *Driehaus*, 573 U.S. at 159, 162)."

"Only the third of the requirements to establish an imminent injury in fact is meaningfully at issue in this case. On appeal, Defendants do not dispute that displaying a photograph of a marked ballot is prohibited by Ohio's laws—in fact, they have publicly said that the laws cover as much. Likewise, it is at least arguable that the display of a photograph of a marked ballot is a form of political expression that implicates free speech interests. And Kareem submitted a declaration stating that she took just such a photograph during the 2020 general election, which she wished to display, and the same as to similar photographs in subsequent elections. Her ability to establish an injury in fact therefore turns on whether she can demonstrate that her decision not to display her marked ballots is based on a credible threat that Ohio's ballot prohibitions could be enforced against her."

"This is not the first time we have considered the credible-threat standard. In *McKay v. Federspiel*, our Court discussed cases in which plaintiffs had demonstrated a sufficiently credible threat of enforcement to establish an injury under the First Amendment's Free Speech Clause. 823 F.3d 862, 869 (6th Cir. 2016). We observed that while allegations of 'a subjective chill' alone were not enough to establish a credible threat of enforcement, prior cases have taken into account 'some combination of' a 'history of past enforcement against the plaintiff[] or others,' 'enforcement warning letters,' 'an attribute of the challenged statute that makes enforcement easier or more likely,' and 'a defendant's refusal to disavow enforcement of the challenged statute against a particular plaintiff.' *Id.*"

"In subsequent cases, we have stressed that these 'factors are not exhaustive, nor must each be established.' *Online Merchs. Guild v. Cameron*, 995 F.3d 540, 550 (6th Cir. 2021). Because these factors are not exhaustive, any analysis must also be guided by certain general considerations that pre-enforcement challenges raise in the First Amendment context. In particular, because 'self-censorship' is 'a harm that can be realized even without an actual prosecution,' the rationale for pre-enforcement challenges applies with particular force to the First Amendment. *See Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988). At the same time, this Court must be wary of permitting pre-enforcement suits based only on 'subjective apprehension and a personal (self-imposed) unwillingness to communicate,' which lack the sufficiently adverse interests necessary to establish standing. *See Morrison v. Bd. of Educ. of Boyd Cnty.*, 521 F.3d 602, 610 (6th Cir. 2008) (citation omitted)."

"With these principles in mind, we turn to Kareem's case. She argues that there is a credible threat of enforcement of Ohio's ballot laws for several reasons. She notes that Defendants have refused to disavow the prohibition against displaying marked ballots. Far from that, she emphasizes that Defendants have repeatedly advised the public that the display of marked ballots is illegal. Additionally, she argues that in at least one instance, Defendants have invoked these laws to order an individual to remove a marked ballot from display. Based on this, she contends that her fear of enforcement is not 'imaginary,' *Driehaus*, 573 U.S. at 160 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979)), and that her unwillingness to display her marked ballot is not 'self-imposed,' *Morrison*, 521 F.3d at 610 (citation omitted). We address each argument in turn."

"This Court has previously pointed to 'a defendant's refusal to disavow' a law to determine whether there exists a credible threat of enforcement. *McKay*, 823 F.3d at 869. Kareem argues that rather than disavow Ohio's ballot laws, Defendants have instead done the exact opposite: They have warned voters a number of times that displaying a marked ballot is illegal under Ohio law."

"Several pieces of evidence support Kareem's argument. In 2016, the Cuyahoga County Board of Elections cautioned voters via social media that '[w]e love seeing all the voter pride, but know it is illegal in OH to post a picture of your voted ballot!' Ex. 3 to Perlatti Dep., R. 26-1, Page ID #431. Additionally, the Ohio Secretary of State has communicated the message to election officials overseeing polling locations, who were instructed that ballot prohibitions, such as those against 'showing a voted ballot,' are 'punishable as a misdemeanor or felony.' Ex. 4 to Perlatti Dep., R. 26-1, Page ID #432. And from 2016 to 2020, when Board representatives were interviewed by the media, they time and again told voters that posting photos of their marked ballots was against the law."

"In comparable cases, this Court has concluded that plaintiffs credibly feared enforcement. In *Platt v. Board of Commissioners on Grievances & Discipline of the Ohio Supreme Court*, we held that a prospective state judicial candidate had standing to bring a pre-enforcement challenge to campaign restrictions under the First Amendment. 769 F.3d 447, 452 (6th Cir. 2014). We determined that the candidate's 'asserted fear [was] credible' because the campaign restrictions clearly prohibited the activities in which he sought to engage. *Id.* We also found that his fear was bolstered by the state's refusal to disavow enforcement, as well as the fact that individuals could bring grievances to the attention of the disciplinary board. *Id.* (citations omitted). Similarly, in *Green Party of Tennessee v. Hargett*, we concluded that the plaintiffs had standing to bring a pre-enforcement challenge to a law requiring political parties to submit a 'loyalty oath' affidavit. 791 F.3d 684, 695–96 (6th Cir. 2015). Although the 'defendants ha[d] not enforced or threatened to enforce this statute against' *any* political party, we determined that it carried a sufficiently credible threat of enforcement to establish a free speech harm since the state 'ha[d] not explicitly disavowed enforcing [the law] in the future.' *Id.* at 696; *cf. Babbitt*, 442 U.S. at 302 (concluding that a set of plaintiffs had standing to bring a pre-enforcement challenge because their 'fear of criminal prosecution' was not 'imaginary or wholly speculative' and the 'State ha[d] not disavowed' the law). Given that, it was reasonable for the plaintiffs to fear violating the law. By that same logic, Kareem's fear of enforcement is credible since Ohio's ballot laws clearly prohibit her from displaying her marked ballots. And her case goes further than either *Platt* or *Hargett* with respect to disavowal: Defendants in this case have not only failed to disavow enforcement, they have also publicly *doubled down* on the ballot prohibitions. In light of such messaging, a voter like Kareem would understandably fear posting a ballot photograph."

"… Viewing this evidence in the light most favorable to Kareem, as we must at the summary judgment stage, the Board has not rejected the likelihood of enforcement. *See Huckaby*, 636 F.3d at 216."

"Kareem points to additional evidence supporting a credible threat of enforcement. She alleges at least one past instance of enforcement by Defendants, as well as a possible second instance. Although past enforcement is not necessary to establish a credible threat of enforcement, it 'is good evidence that the threat of enforcement is not chimerical.' *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1049 (6th Cir. 2015) (quoting *Driehaus*, 573 U.S. at 164). Therefore, some evidence of past enforcement, along with allegations of a subjective chilling of speech, has been sufficient to establish an injury in fact under the First Amendment. *See McKay*, 823 F.3d at 869."

"Kareem first points to an instance of enforcement by the Cuyahoga County Board of Elections. In that instance, the former director of the County Board, who remained in his post until 2019, told an individual to take down a ballot photograph that had been posted online. In response to the director's order, the individual removed the ballot photograph from display."

"… However, a directive by an official can establish a credible threat of enforcement because it 'initiates the formal [enforcement] process, which itself is chilling.' *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 765 (6th Cir. 2019). This very instance illustrates the point. The enforcement process did not need to proceed further precisely because the Board's directive coerced the individual to remove the ballot from display. Having been ordered to remove the photograph, the individual complied, thereby chilling potential expression."

"In other cases, a more extensive history of past enforcement might be required. But, in this case, we are mindful that a 'lack of discipline . . . could just as well indicate that speech has already been chilled.' *Schlissel*, 939 F.3d at 766. That point applies with particular force to the laws Kareem challenges, which punish the display of a marked ballot with up to twelve months' imprisonment. *See* Ohio Rev. Code § 2929.14(A)(5)."

"Under these terms, deciding not to display a ballot photograph may appear to a voter to be a modest price to pay to avoid criminal punishment. Yet that 'modest' trade may be driving Kareem and others to forego constitutionally protected expression. Kareem's pre-enforcement challenge is particularly appropriate in such a scenario. *See Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003) (noting that a criminal statute challenged under the First Amendment may have a particularly latent threat of enforcement 'when the gains are slight' since 'most people are frightened' of the punitive costs); *see also MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007) (noting that Article III jurisdiction over a pre-enforcement challenge may be proper where 'the threat-eliminating behavior was effectively coerced'). Along with the other factors discussed above, the punishment for displaying a ballot photograph contributes to the credibility of Kareem's fear."

"We need not decide whether any of these factors alone would be sufficient to establish an injury in fact. The point is only that combined do they contribute to a sufficiently credible threat of enforcement in Kareem's case. On this record, an individual deciding whether to display a photograph of his or her marked ballot must do so in light of the following: a law that punishes revealing one's marked ballot with imprisonment, repeated statements by Defendants that posting photographs of a marked ballot is illegal, no evidence that Defendants have publicly disavowed these statements, and at least one past instance in which the Board has ordered an individual to remove a ballot from display. Under these circumstances, Kareem demonstrates more than a 'subjective apprehension and a personal (self-imposed) unwillingness' to post a ballot photograph. *Morrison*, 521 F.3d at 610 (citation omitted). Therefore, she has alleged an injury in fact at the summary judgment stage."

"Defendants do not address in their appellate briefing whether Kareem satisfies the causation and redressability elements of standing. We find that she does. She can establish causation because the alleged violation of her First Amendment rights is 'fairly traceable' to each of the three defendants, *see Wuliger v. Mfrs. Life Ins. Co.*, 567 F.3d 787, 793 (6th Cir. 2009) (citation omitted), all of whom play a role in enforcing the ballot display prohibitions. *See* Ohio Rev. Code § 3501.05(N)(1) (delineating Ohio Secretary of State's and county prosecuting attorney's roles); *id.* § 3501.11(J) (explaining the Board of Election's role in investigating violations of Ohio's election laws). The same is true for redressability, since the relief Kareem has requested is substantially likely to remedy her alleged injury. *See Davis v. Detroit Pub. Schs. Cmty. Dist.*, 899 F.3d 437, 443 (6th Cir. 2018) (quoting *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000)). Her request for nominal damages redresses her alleged retrospective harm, *see Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021), and her request for injunctive and declaratory relief redresses her alleged prospective harm in future elections. Based on this, Kareem has standing to bring her suit."

"This is to say nothing of the merits of Kareem's case. Whether the display of a ballot photograph is protected by the First Amendment will be for the district court to decide. We simply conclude that Kareem should have her day in court."

7. Fourth Amendment – There was probable cause to arrest the plaintiff - Probable cause is not a high bar, it requires more than a reasonable suspicion but less than a preponderance of the evidence, far less than guilt beyond a reasonable doubt - Because probable cause requires much less evidence than is sufficient to establish guilt beyond reasonable doubt, the mere fact that plaintiff lived at and owned the site of the grow operation was likely enough to arrest her - Probable cause does not require conclusive proof; and does not require that officers possess evidence sufficient to establish a prima facie case at trial - There must be enough evidence for the officers to have concluded that there was a probability or substantial chance that plaintiff

constructively possessed the illegal quantity of marijuana in the garage, a low bar the officers easily cleared

LESLIE FISHER v RANDALL JORDAN, MATTHEW RICE, and JOHN TRAFELET, Michigan State Police SIXTH CIRCUIT COURT OF APPEALS No. 23-1246 Decided and Filed: January 18, 2024

"Leslie and Steven Fisher were arrested after officers executed a search warrant and discovered marijuana growing in the Fishers' garage. A state court eventually dismissed all charges against Leslie. She then sued the arresting officers in federal court, claiming that their decision to arrest her violated the federal constitution as well as state law. The district court granted summary judgment to the officers. Because defendants had probable cause to arrest Leslie, we affirm."

"Steven and Leslie Fisher, husband and wife, resided in a single-family home they co-owned in Shepherd, Michigan. The property included a detached garage located just a few steps from the house. The Fishers also owned a workshop located down the street from their home."

"Michigan state officers suspected that the Fishers' property was being used to grow and possibly sell marijuana. A tipster told Officer Randall Jordan that Steven was growing marijuana at the Fishers' residence and processing the marijuana into THC wax at the Fishers' workshop. The tipster claimed to have seen THC wax inside the shop, providing Jordan with what the officer believed to be an 'extremely accurate' description of the wax. Over the ensuing three weeks, officers discovered marijuana stems, wax paper, and what they suspected to be THC wax in trash from the Fishers' residence."

"Suspecting illegal drug activity, Jordan obtained a warrant to search the Fishers' house, detached garage, and workshop. Under Officer John Trafelet's command, a team of officers knocked on the Fishers' door and announced their presence. When no one answered, Trafelet ordered forced entry, and the officers began their search. They discovered 29.9 grams of marijuana in Leslie's bedroom, stored in a nightstand and a minifridge. Elsewhere in the residence, officers found marijuana seeds, six firearms (two handguns and four long guns), body armor, jewelry, and nearly $4,000 in cash. In the garage, officers found a trove of items signifying drug production: over 25 pounds of marijuana, 67 marijuana plants, 5 drying racks, 12 growing lights, 10 growing 'amps,' a digital scale, and other paraphernalia used to grow and process marijuana. And in the workshop down the street, officers discovered an additional six pounds of marijuana and THC wax and equipment used to cultivate the drug and convert it into wax."

"As the search was underway, Jordan along with Officer Matthew Rice questioned the Fishers. During those interviews, the couple presented the officers their Michigan Medical Marijuana Cards, meaning the Fishers, collectively, were authorized to possess 24 plants and five ounces (approximately 142 grams) of marijuana. *See* Mich. Comp. Laws § 333.26424(a) (2016). Steven admitted that he began the grow operation two years earlier and that his efforts yielded several pounds of marijuana annually, which he stored in the garage. According to the officers, Steven explained that he had tried to sell his marijuana overages but could not find a buyer, a statement Steven later denied."

"As for Leslie, she admitted to smoking marijuana grown by Steven. She also admitted that she knew Steven was growing marijuana in their garage. But she denied ever entering the garage during the two-year growing operation. She likewise claimed not to know how much marijuana Steven was growing, nor what he did 'at his shop.'"

"The officers had reason to doubt Leslie's story. The Fishers used electronic keypad locks to secure both the house and the garage. And, as explained by Steven, the code to enter the house was the same as the one used for entering the garage. As a result, at the time of the search, the officers believed that Leslie could access the garage. (Six years later, in her deposition testimony, Leslie denied ever knowing that the electronic key codes to the garage and the house were the same.)"

"The officers eventually decided to arrest Leslie and Steven. The next day, a state prosecutor charged Leslie with four crimes, including possession of processed marijuana with intent to deliver. Jordan signed the criminal complaint as the witness supporting the charges. The Isabella County District Court found probable cause and bound over Leslie to the county Circuit Court. The Circuit Court, however, eventually dismissed the charges, a decision the government did not appeal."

"Leslie then filed this federal lawsuit against Jordan, Rice, and Trafelet alleging that her arrest violated federal and state law. Invoking qualified immunity in response to the federal claims—arrest and prosecution without probable cause, under 42 U.S.C. § 1983—and governmental immunity as to the state claims—false arrest, false imprisonment, and malicious prosecution—the officers moved for summary judgment. Concluding that the officers had probable cause to arrest Leslie, the district court awarded them summary judgment on all claims. Leslie timely appealed."

"Federal law governing arrests has deep roots, tracing back, in earnest, to the adoption of the Fourth Amendment. That Amendment familiarly protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' U.S. CONST. amend. IV. An arrest has long been considered a 'seizure.' *California v. Hodari D.*, 499 U.S. 621, 624–25 (1991). Taking the constitutional text at its word, then, if Leslie's arrest was 'unreasonable,' it ran afoul of the Amendment's command. *Wesby*, 583 U.S. at 56."

"How do we go about determining if a warrantless arrest was reasonable? Precedent here is longstanding as well. In a sense, the court's job is straightforward: we evaluate whether there was probable cause to believe that the suspect committed a crime or was in the process of committing a crime. *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004). But that task is not always an easy one. For unlike more bright-line legal principles, probable cause is a 'fluid concept,' one that is 'not readily, or even usefully, reduced to a neat set of legal rules.' *Illinois v. Gates*, 462 U.S. 213, 232 (1983). At bottom, assessing probable cause depends on an evaluation of the events leading up to the arrest. From that pre-arrest backdrop, we ask whether an objectively reasonable officer would conclude that there is a 'probability or substantial chance of criminal activity,' thereby justifying an arrest. *Wesby*, 583 U.S. at 57 (citation omitted)."

"In making that assessment, we operate with the understanding that '[p]robable cause is not a high bar.' *Id.* (quoting *Kaley v. United States*, 571 U.S. 320, 338 (2014)). It requires more than a reasonable suspicion but less than a preponderance of the evidence—and far less than guilt beyond a reasonable doubt. *See United States v. McCallister*, 39 F.4th 368, 374 (6th Cir. 2022). A 'reasonable ground for belief of guilt' is sufficient. *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (citation omitted). For example, an officer is under no obligation to give any credence to a suspect's story or forgo arrest pending further investigation if the initially discovered facts support probable cause. *Criss v. City of Kent*, 867 F.2d 259, 263 (6th Cir. 1988). Nor do officers need proof conclusively showing that the suspect committed the crime. *Id.* at 262. Likewise, a valid arrest 'is not vitiated if the suspect is later found innocent.' *Id.*; *see also Manley v. Paramount's Kings Island*, 299 F. App'x 524, 530–531 (6th Cir. 2008) (per curiam) (noting that a state court's later decision to dismiss charges does not preclude a finding that the officers had probable cause to arrest)."

"Whether the officers had probable cause to arrest Leslie is a question of federal law. But because the officers arrested her on suspicion of a state crime, we also consider Michigan law to understand the elements of that offense. *See Leonard v. Robinson*, 477 F.3d 347, 354 (6th Cir. 2007). All parties agree that the relevant crime in this case is possession of at least 5,000 grams of marijuana with the intent to distribute. Mich. Comp. Laws § 333.7401(2)(d)(ii) (2016). That being the case, today's inquiry is whether, after reviewing the facts leading up to Leslie's arrest in her favor, there was no fair probability that she had committed that crime. Answering that question requires us to consider whether there was probable cause to infer possession of marijuana, as well as probable cause to infer an intent to distribute. On balance, we agree with the district court that Leslie's arrest did not violate the Fourth Amendment."

"Start with the question of whether it was unreasonable to suspect that Leslie likely possessed an illegal quantity of marijuana. The answer, to our minds, is no. In Michigan, possession may be actual or constructive. Even if a defendant does not literally possess illegal drugs, in other words, she can still be guilty of constructive possession if she knows that drugs are present and has the right to exercise control over them. *People v. Wolfe*, 489 N.W.2d 748, 753 (Mich. 1992); *People v. Williams*, 707 N.W.2d 624, 628 (Mich. Ct. App. 2005). Here, officers found a legally permissible amount of marijuana in Leslie's bedroom along with another 25 pounds in the Fishers' garage. And they were asked to believe that Leslie generally knew about her husband's grow operation yet had no idea of its scope nor ever entered the garage for two years as she slept just feet away."

"Several facts created a 'probability or substantial chance' that Leslie knew about the marijuana in the garage, had the right to exercise control over it, and therefore constructively possessed it. *Wesby*, 583 U.S. at 57 (citation omitted). First, Leslie admitted to using marijuana produced in the growing operation in the garage. 'Common sense' indicates that someone possessing a small quantity of drugs also had access to the larger quantities of the drugs stored elsewhere in their residence. *See United States v. Jones*, 952 F.3d 153, 159 (4th Cir. 2020) (holding that officers had probable cause to suspect that a defendant possessed more than a single 'smoldering marijuana joint' in a kitchen trash can). As Leslie admitted to using the marijuana found in the house, it would be reasonable to suspect that she had access to the larger quantities found in the garage. Second, as we have recognized under federal possession law, demonstrating that the defendant is the sole occupant of a residence is sufficient to convict her for constructive possession of contraband found there. *See United States v. Latimer*, 16 F.4th 222, 225 (6th Cir. 2021) (citing *United States v. Hill*, 142 F.3d 305, 312 (6th Cir. 1998)); *cf. People v. Hardiman*, 646 N.W.2d 158, 161, 166 (Mich. 2002) (holding that circumstantial evidence that the defendant resided in an apartment was sufficient to uphold a conviction for constructive possession). And when multiple individuals occupy a home, proof of residence combined with 'an additional statement or circumstance to connect the defendant to [the] contraband' can sustain a conviction. *Latimer*, 16 F.4th at 225–26 (noting that the 'quantum of [additional] evidence' is 'minimal' (citation omitted)). Because probable cause requires 'much less evidence [than is] sufficient to establish guilt beyond reasonable doubt,' the mere fact that Leslie lived at and owned the site of the grow operation was likely enough to arrest her. *United States v. Strickland*, 144 F.3d 412, 416 (6th Cir. 1998); *see also People v. White*, No. 341939, 2019 WL 637306, at *3 (Mich. Ct. App. Feb. 14, 2019) (holding that officers had probable cause to arrest a defendant upon finding marijuana in his home)."

"True, most of the drugs were found in the garage. But '[a] garage' like the one here 'is part of a house.' *United States v. Bell*, 766 F.3d 634, 637 (6th Cir. 2014); *cf. Daughenbaugh v. City of Tiffin*, 150 F.3d 594, 600 (6th Cir. 1998) (concluding, in the context of the reach of the Fourth Amendment's reasonable expectation of privacy, that a home's detached garage is a part of the home itself). And the officers believed that Leslie knew the code needed to access her garage, as it was the same one needed to enter the house. Taking all of this together, the officers could reach the 'common-sense conclusion[]' that Leslie knew about the activities in the garage and had the right to control the marijuana grown there. *Gates*, 462 U.S. at 231 (citation omitted)."

"What is more, additional facts indicated that Leslie knew the garage housed a grow operation created for more than legal, medical purposes. The house was filled with signs of drug trafficking. For example, officers found four long guns, two pistols, body armor, jewelry, almost $4,000 in cash, and the marijuana that Leslie admitted came from the garage. From this evidence, it is reasonable to conclude that Leslie was at least complicit in a 'common enterprise' to illegally distribute drugs. *Pringle*, 540 U.S. at 373; *see United States v. Ramos*, No. 20-6158, 2021 WL 5647786, at *3 (6th Cir. Dec. 1, 2021) (holding that it was 'not clearly improbable' that the defendant possessed a firearm during drug trafficking after finding 'drugs in the residence along with storage and packing materials, body armor, handguns, and an assault-type weapon')."

"Perhaps, as Leslie suggests, there was no direct evidence that she had entered the garage since the grow operation began. But probable cause does not require conclusive proof; it 'does not require that [officers] possess evidence sufficient to establish a prima facie case at trial.' *Strickland*, 144 F.3d at

416; *United States v. Torres-Ramos*, 536 F.3d 542, 555 (6th Cir. 2008). Rather, there must be enough evidence for the officers to have concluded that there was a 'probability or substantial chance' that Leslie constructively possessed the illegal quantity of marijuana in the garage, a low bar the officers easily cleared. *Wesby*, 583 U.S. at 57; *see also Pringle*, 540 U.S. at 372 (holding that officers had probable cause to arrest an occupant of a car even in the absence of direct evidence indicating that he knew there was cocaine inside the vehicle)."

"Even then, says Leslie, no reasonable officer would have believed that she exercised control over the marijuana in the garage because she did not know the garage keycode. Here, the story is a bit nuanced. After the arresting officers arrived, Steven voluntarily gave them the code to the garage and told them that it was the same as the code to the house. And it is undisputed that Leslie knew the code to the house. Citing her deposition testimony, Leslie now claims that she told the officers that she did not know the identical garage code. But nothing in her deposition (taken six years after her arrest) leads us to believe that Leslie denied knowing the garage code on the day of her arrest. Regardless, even if Leslie did deny knowing the garage code on the day of her arrest, the officers were under no obligation to accept her explanation, especially when her story was not easy to believe. Holding that a suspect can defeat probable cause by asserting that she did not know she could access her own property feels akin to 'allow[ing] every suspect, guilty or innocent, to avoid arrest simply by claiming 'it wasn't me.'' *Criss*, 867 F.2d at 263. The officers reasonably concluded there was a 'probability' that Leslie possessed the marijuana in the garage. This is all that probable cause requires."

"Because there was probable cause to believe Leslie possessed the marijuana in the garage, it follows that the officers had probable cause to suspect her intent to distribute. Under Michigan's Medical Marihuana Act, Mich. Comp. Laws § 333.26424(a) (2016), the Fishers collectively could legally possess 24 plants and five ounces of marijuana. They well exceeded those limits. Inside the garage, officers recovered 67 marijuana plants and about 400 ounces (25 pounds) of marijuana. Any reasonable officer would suspect that an individual possessing such a large quantity of illegal drugs intended to sell them. *See United States v. Sadler*, 24 F.4th 515, 550–51 (6th Cir. 2022), *cert. denied sub nom. Tempo v. United States*, 143 S. Ct. 169 (2022) (noting that intent to deliver illegal drugs can be inferred from their quantity and packaging); *United States v. Williams*, 473 F. App'x 481, 486 (6th Cir. 2012) (same, applying Michigan law)."

"… The sheer quantity of marijuana in the Fishers' garage supported probable cause to infer intent to distribute. Based on this undisputed fact alone, the officers had probable cause to arrest. So too for Leslie's contention that whether she possessed THC wax in her upstairs bedroom is a disputed fact. Citing Leslie's own deposition testimony, the district court noted that she admitted to having THC wax inside her house. In the end, the specific location of the wax, bedroom or otherwise, is immaterial to the question of whether the officers had probable cause."

"The district court also concluded that defendants were entitled to governmental immunity from Leslie's state law claims. Governmental immunity, an affirmative defense under Michigan law, shares some similarities with the federal qualified immunity doctrine. Like the relationship between qualified immunity and federal constitutional claims, Michigan's governmental immunity doctrine shields government employees from certain forms of state tort liability. *Peterson v. Heymes*, 931 F.3d 546, 557 (6th Cir. 2019). Although governmental immunity differs in some respects from qualified immunity, probable cause is dispositive under both paradigms. *See Odom v. Wayne County*, 760 N.W.2d 217, 228–29 (Mich. 2008) (holding that an officer is entitled to governmental immunity from false arrest and false imprisonment suits if he had probable cause)."

"Decisive here, then, is the fact that the probable cause analysis for federal Fourth Amendment claims 'is essentially the same under Michigan law.' *Hinchman v. Moore*, 312 F.3d 198, 204 (6th Cir. 2002) ('Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.' (quoting *People v. Champion*, 549 N.W.2d 849, 860 (Mich. 1996))). As already explained, the officers had probable cause

to suspect that Leslie possessed an illegal quantity of marijuana with the intent to distribute. Accordingly, the officers are entitled to governmental immunity from Leslie's state law claims."

8. Fourth Amendment Excessive force and 14th Amendment Right to adequate medical care - Qualified immunity denied - Fatal shooting by officer - Officer Bowers used deadly force, shooting Mr. Heeter five times with an assault rifle. That was unconstitutional unless Officer Bowers had probable cause to believe Mr. Heeter posed a significant threat of death or serious physical injury to the officers in the room - Since a jury could find a reasonable officer would not have perceived Mr. Heeter to pose a deadly threat, Officer Bowers is not entitled to summary judgment on the excessive force claim - The mere failure of a citizen—not arrested for any crime—to follow the officer's commands' does not give the officer probable cause to use *deadly* force against him - any officer would have known it violated the Constitution to shoot a suicidal individual that had moved slightly, even if the person held a gun in their pocket or could grab a gun within reach - The due process clause of the Fourteenth Amendment requires government officials to provide adequate medical care to pretrial detainees and others in their custody who are not serving a sentence and that includes a person who, like the deceased, has been injured while being apprehended by the police - As deceased lay face down, bleeding from multiple gunshot wounds, it was unreasonable for Officer Bowers to stand idle—even for a few minutes and even while paramedics were on their way—rather than administer the first aid he was trained to provide - As a matter of common sense and precedent, there is no bright-line rule that officers never have to provide care after calling for help - The Court has never held that calling for a paramedic always terminates a police officer's constitutional obligations to a pretrial detainee—irrespective of the time it will take for help to arrive, how urgently help is needed, how the officer has been trained, or even how easy it would be for the officer to help

KAREN HEETER, as administrator of the estate of Bill G. Heeter, deceased; JONATHAN HEETER, individually and as heir to the estate of Bill G. Heeter, deceased; STEPHANIE HEETER, individually and as heir to the estate of Bill G. Heeter, deceased; BRANDON HEETER, individually and as heir to the estate of Bill G. Heeter, deceased v. KENNETH BOWERS, individually and in his capacity as an employee of the City of Columbus, Ohio; COLUMBUS POLICE Department
SIXTH CIRCUIT COURT OF APPEALS No. 23-3296 Decided and Filed: February 1, 2024

"On the morning of November 21, 2018, the day before Thanksgiving, Bill Heeter told his wife Karen he was about to commit suicide. Mr. Heeter's brother called the police to stop him. At about 10:05 a.m., officers began to arrive at the family's Columbus, Ohio home. They spotted Mr. Heeter through his kitchen window—he was sitting at a table smoking a cigarette, with one hand on his pistol. He told the officers he'd put his gun away if they left. At approximately 10:15 a.m., a group of officers entered the house with their weapons drawn. At 10:17 a.m., Officer Kenneth Bowers fired five rounds from his M16 service rifle into Mr. Heeter's chest. At 10:57 a.m., Mr. Heeter was pronounced dead at the hospital. Police bodycam footage captured almost everything that happened. It shows that a police sergeant called the paramedics. It also shows that Officer Bowers did not administer first aid or otherwise try to help Mr. Heeter while waiting for the paramedics to arrive, even though Mr. Heeter was audibly and visibly alive, hemorrhaging blood, and struggling to breathe."

"The Heeters' three children and their mother (as the representative of Mr. Heeter's estate) sued Officer Bowers and the Columbus Police Department (a subdivision of the City of Columbus) for civil rights violations under 42 U.S.C. § 1983 and for violations of state tort law. Officer Bowers and the City asserted that qualified immunity and Ohio statutes meant they could not be sued. Based on careful review of the video, the district court granted the defendants immunity from some claims but denied others."

"The two constitutional claims against Officer Bowers that survived qualified immunity in the district court are the central focus of this appeal. *First*, the Heeters claim that Officer Bowers used excessive force in violation of the Fourth Amendment when he shot and killed Mr. Heeter. *Second*, the Heeters claim that Officer Bowers violated Mr. Heeter's Fourteenth Amendment right to adequate medical care

while in police custody because he stood idle after the paramedics were called, rather than provide the emergency first aid Mr. Heeter obviously needed"

"We conclude, contrary to the Heeters' motion to dismiss this appeal, that we have jurisdiction to review both claims. On the merits, we affirm the district court's denial of state-law immunity and qualified immunity as to Officer Bowers in his individual capacity, so the Heeters' constitutional and state-law claims against him may proceed to trial. But, just as the district court held that the City was entitled to summary judgment on the federal claims, the City was also entitled to summary judgment on the state-law claims because of an Ohio municipal immunity statute. We reverse solely on the issue of municipal immunity for the City, and otherwise affirm."

"Bill and Karen Heeter lived together in the Franklinton neighborhood of Columbus, Ohio with their three children: twenty-one-year-old Jonathan, nineteen-year-old Jennifer, and seventeen-year-old Brandon."

"Kenneth Bowers is an officer with the Columbus Police Department, and in November of 2018 had just completed his twenty-first year of service. Through the course of his career, Officer Bowers received training in basic first aid, de-escalation, interacting with persons in mental health crises, and crisis intervention. The other officers most relevant to the appeal are Sergeant Steven Redding, Officer Linda Gibson, and Officer Robert Bruce."

"Around 9:00 a.m. on November 21, 2018, either Ms. Heeter or Mr. Heeter's brother called Franklin County 911 Dispatch because Mr. Heeter was threatening to jump in front of a bus. Sergeant Redding and several other officers drove to the Heeters' house in response to this call. On the scene, Ms. Heeter told the officers that Mr. Heeter had attempted suicide before, and that he had threatened to shoot himself the prior evening but that she had been able to get his gun away from him. When the officers couldn't locate Mr. Heeter, they left."

"About an hour later, Mr. Heeter's brother called 911, reporting that Mr. Heeter was back in the house, armed with a gun, threatening to shoot himself, and in need of 'someone to talk him down before he gets hurt.' Dispatch Log, R. 21-3, PageID 153. About two minutes into the call, the brother started to cry and told the dispatcher, 'Please don't shoot him.' *Id.*"

"The footage from three of the responding officers' body-worn cameras depicts much of the police response to this second call. *See* Bowers Footage, R. 21-2; Bruce Footage, R. 21-7; Redding Footage, R. 21-12. Officer Bowers, Sergeant Redding, Officer Bruce, and Officer Gibson arrived at the scene in quick succession. They knew from the 911 dispatch report that Mr. Heeter was armed, suicidal, and sitting in his dining room. They also knew that Mr. Heeter had not threatened to harm anyone else in the home."

"Officer Bowers arrived first. He unracked his M16 service rifle, exited his police cruiser, then armed and aimed his rifle as he walked towards the Heeter residence. The other officers approached with their handguns holstered. After the officers surveyed the house for a few minutes, Ms. Heeter announced herself and walked out of the house onto the front porch. She told the officers that the couple's three children along with her niece (twenty-six-year-old Brittany) were upstairs and in the basement of the home. She also confirmed to the officers that Mr. Heeter was still sitting at the dining table alone and said he 'would put the gun up if you guys just leave.' Redding Footage, 2:45–3:15. Officer Bowers responded, 'We can't take that chance—we're going home tonight, okay?' *Id.*"

"After Ms. Heeter walked out to the street, Sergeant Redding and Officers Bowers, Bruce, and Gibson approached the front door of the home, through which they could see Mr. Heeter seated at the dining table and smoking a cigarette. A handful of officers, including Gibson and Bruce, clustered with Bowers by the front door. Sergeant Redding stationed himself near a window on the porch where he could see Mr. Heeter more fully, and from there he relayed his view of Mr. Heeter to the officers at the front door. He relayed that Mr. Heeter had a gun in his right hand pointed down at the floor. The officers

repeatedly ordered Mr. Heeter to drop his gun and exit the house with his hands up so they could get him help. Mr. Heeter occasionally responded by asking the officers to leave and telling them he'd put his gun away if they did."

"After several minutes, Mr. Heeter stood up from the table and moved into the corner. In response to this movement, Sergeant Redding ordered Mr. Heeter again to put the gun down and come outside, warning him that he would be shot if he aimed his gun at the officers. Sergeant Redding then relayed to the other officers that Mr. Heeter had put his gun on the table and said, 'You guys ready? We're gonna move in and take him before he gets that.' Bruce Footage at 9:45–10:10.

"Officers Bowers, Bruce, and Gibson then walked quickly into the home with weapons drawn, stopping so they stood in the archway to the dining room. Officer Bowers stood with his rifle aimed at Mr. Heeter. Sergeant Redding and a handful of other officers followed and stood behind. Mr. Heeter side-stepped so he better faced the officers. The officers in the archway tried for about a minute to persuade Mr. Heeter to drop his gun and raise his hands. Mr. Heeter stood still with his hands in his pockets."

"Mr. Heeter largely remained silent as the officers instructed him several times to walk away from the table with his hands up. After some time, Mr. Heeter said, 'You know, you guys are really starting to piss me off.' Redding Footage at 10:45–10:50. An officer responded, 'Just show us your hands, we'll get you some help.' *Id.* at 10:50–11:11. Mr. Heeter replied, 'I don't want no help . . . I just want you guys to just go out, I'll put my gun up, and I won't touch it no more.' *Id.* One officer responded, 'No, it doesn't work that way, Bill,' and another chimed in, expressing that they did not want anyone to get hurt. *Id.* Mr. Heeter stood with his hands in his pockets for the entirety of this exchange."

"The bodycam footage of the moments that followed is partially obscured—we can see the left side of Mr. Heeter's body, including his left hand. And while Sergeant Redding told the officers he saw Mr. Heeter put his gun onto the table, the video does not definitively resolve where the gun was: the Heeters' two black cats and other scattered objects obscure a clear view of the table."

"We can see from the footage that Mr. Heeter took one or two side-steps to his left. As Mr. Heeter began these movements, Officer Bowers asked, 'Where's the gun? I see the cat.' Bruce Footage at 11:25–11:40. Mr. Heeter took his left hand out of his pants pockets and started to move his torso toward the floor with nothing in his left hand. We cannot see his right hand. As he moved slightly, an officer started to say 'Bill—.' *Id.* Officer Bowers then pulled the trigger of his M16 rifle and delivered five shots to Mr. Heeter's chest in quick succession. Mr. Heeter immediately collapsed to the floor face down."

"Immediately after the shooting, Sergeant Redding said that Officer Bowers 'had point.' Bruce Footage at 11:30–13:00. Then, about 25 seconds after the shooting, Sergeant Redding radioed to report the shooting and call for paramedics. Meanwhile, Officer Bowers walked up to Mr. Heeter—who was still collapsed face down on the floor—and asked him to show his hands. Mr. Heeter didn't move. Officer Bowers then ordered Officer Bruce to handcuff Mr. Heeter, but said that before he did, he should put on protective rubber gloves. After retrieving and donning his gloves, Officer Bruce pulled Mr. Heeter's hands behind his back to cuff him. As he did, Mr. Heeter began to audibly moan. Blood had pooled on the floor below Mr. Heeter and had gotten on his hands. Meanwhile, Officer Bowers continued to command Mr. Heeter to show the officers his hands. "

"The bodycam footage then shows Officer Bowers engaged in largely non-verbal communications with the other officers in the room. We can see they made eye contact and exchanged various hand signals in silence. Office Bruce gave Officer Bowers a thumbs up, seeming to ask if he was okay. At one point, Officer Bowers appears to have been reenacting how he shot Mr. Heeter, as he raises his rifle again. At other points, Officer Bowers walked in and out of the room, then stood with his hand on his hip in the corner. No one was attending to Mr. Heeter, who was bleeding profusely and struggling to breathe."

"After several minutes, Sergeant Redding confirmed that Officer Bowers was the only officer 'involved' in the shooting. Bruce Footage at 12:30–14:25; Redding Footage at 12:20–14:30. Sergeant Redding said that Officer Bowers 'saved everybody,' and Officer Bruce reassured Officer Bowers, 'Don't even think about it.' *Id.* Sergeant Redding then instructed Officer Bowers to leave the room; he quickly complied. When Officer Bowers left the room, about three minutes had passed since he shot Mr. Heeter. The other officers then approached Mr. Heeter and heard him cough and gasp for air. So much blood had accumulated below his head and body in this time that Officer Bruce suggested Sergeant Redding pull Mr. Heeter's nose out of the puddle so he could breathe."

"The paramedics appeared about eight-and-a-half minutes after the shooting. Mr. Heeter remained cuffed. Once they arrived, the medics immediately turned Mr. Heeter onto his back. After they detected electrical activity in Mr. Heeter's heart, they began to administer CPR. The paramedics transported Mr. Heeter to the hospital, where he was pronounced dead at 10:57 a.m."

"Ms. Heeter (in her capacity as the administrator of Mr. Heeter's estate), along with Jonathan, Stephanie, and Brandon (as individuals and heirs to the estate), brought this action in the Franklin County Court of Common Pleas against Officer Bowers in his individual and official capacities and the Columbus Police Department" …

"Officer Bowers and the Columbus Police Department removed the case to the United States District Court for the Southern District of Ohio. The defendants moved for summary judgment, arguing they were entitled to qualified immunity on the federal claims and statutory immunity on the state-law claims. Officer Bowers's defense rested largely on his own affidavit, in which he asserted that he shot Mr. Heeter because he perceived Mr. Heeter's 'tone of voice to be very cold and somewhat angry,' he had 'his right hand and fingers formed in a 'grip,' as if he was holding or grabbing the butt of a pistol,' and he then 'quickly pulled his right hand from his pocket' and 'quickly stepped forward while bending at the waist or crouching.' Bowers Aff., R. 21-1, PageID 144–46 ¶¶ 26, 29–30. He claims this caused him to be 'in fear for [his] life and the lives of the other officers at that moment.' *Id.* at PageID 146 ¶ 30."

"The district court denied summary judgment on the excessive force, adequate medical care, and state-law claims against Officer Bowers in his individual capacity." …

"We review de novo the district court's order denying Officer Bowers summary judgment on his qualified immunity defense. *See Helphenstine v. Lewis Cnty.*, 60 F.4th 305, 314 (6th Cir. 2023). A public official is entitled to qualified immunity at summary judgment when, viewing the facts in the light most favorable to the plaintiff, the challenged conduct did not violate 'clearly established . . . constitutional rights of which a reasonable person would have known.' *Jackson v. City of Cleveland*, 64 F.4th 736, 745 (6th Cir. 2023) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)) (cleaned up). The official is entitled to summary judgment unless a 'genuine dispute of material fact' precludes the defense. Fed. R. Civ. P. 56(a); *see Wilkerson v. City of Akron*, 906 F.3d 477, 481 (6th Cir. 2018). Once the official has asserted a qualified immunity defense, the plaintiff must show that (1) the official violated his constitutional rights, and (2) at the time of the violation, it was 'clearly established' that the officer's conduct would violate the Constitution. *Palma v. Johns*, 27 F.4th 419, 428 (6th Cir. 2023). We may answer those questions 'in any order.' *Jackson*, 64 F.4th at 745."

"At issue on appeal are the two constitutional claims that survived qualified immunity in the district court: (1) that Officer Bowers violated Mr. Heeter's Fourth Amendment right by using excessive force; (2) that Officer Bowers violated Mr. Heeter's Fourteenth Amendment right to receive adequate medical care while detained. We first address our appellate jurisdiction, then evaluate each claim separately."

"… When a defendant official is entitled to qualified immunity (or Ohio statutory immunity), it means they are entitled to not stand trial for their actions. *Id.* at 771–72; Ohio Rev. Code § 2744.02(C). A summary-judgment order denying this immunity from suit is essentially a final order as to that entitlement. That denial is separate enough from the underlying merits to warrant immediate appeal

under the collateral order doctrine. *Plumhoff*, 572 U.S. at 771–72; *see also Mitchell v. Forsyth*, 472 U.S. 511, 527–30 (1985). At least for some appeals."

"We have jurisdiction to review these interlocutory decisions 'only to the extent' the appeal 'turns on an issue of law.' *Adams*, 946 F.3d at 948; *Johnson v. Jones*, 515 U.S. 304, 313 (1995) (quoting *Mitchell*, 472 U.S. at 530) (emphasis omitted). We have no power of review where the officer's appeal is based on a quarrel with the plaintiff's record-supported facts, which the district court must adopt at summary judgment. *E.g.*, *Perez v. Simpson*, 83 F.4th 1029, 1031 (6th Cir. 2023) ('[I]n this appeal, the facts are everything. So we lack jurisdiction.')."

"This fact-law distinction stems from the Supreme Court's decision in *Johnson v. Jones*, 515 U.S. 304 (1995). In *Johnson*, the Court considered an appeal of officers sued for using excessive force. *Id.* at 307. Some of the officers argued they were entitled to summary judgment because they weren't even present when the force was used. *Id.* at 307–08. The district court disagreed: there was 'potential liability' under the plaintiff's story that 'the three officers stood by and allowed others to beat the plaintiff,' and the record contained 'sufficient circumstantial evidence' that a jury could believe that story was true. *Id.* at 308 (cleaned up). On appeal, because the officers continued to fight the facts and would not accept the district court's view of the record, the Seventh Circuit dismissed the case for lack of appellate jurisdiction. *Id.* at 313. The Supreme Court affirmed, holding that our appellate jurisdiction to review qualified immunity denials does not extend to disputes about 'evidence sufficiency,' which ask us to determine 'which facts a party may, or may not, be able to prove at trial.' *Id.* We may only review the 'purely legal' issue of whether the facts 'support a claim of violation of clearly established law.' *Id.* (quoting *Mitchell*, 472 U.S. at 528 n.9)."

"Deciphering whether an officer's appeal challenges 'evidence sufficiency' or is 'purely legal' sounds much easier than it often is. *Johnson*, 515 U.S. at 313 (quoting *Mitchell*, 472 U.S. at 528 n.9). In part, that is because 'it is impossible to know which 'clearly established' rules of law to consult unless you know what is going on.' *Elliott v. Thomas*, 937 F.2d 338, 342 (7th Cir. 1991) (cleaned up). Indeed, our review of summary judgment decisions outside the qualified immunity context—which we review de novo as 'legal' determinations—frequently entails entwined questions of fact and law and whether the district court properly construed the record as Rule 56 dictates. *See, e.g.*, *United States v. Francis*, 170 F.3d 546, 549 (6th Cir. 1999)."

"… [W]e conclude that we have jurisdiction to review both constitutional claims Officer Bowers appeals. Here, the bodycam footage accurately depicts most of the relevant events. We may view the facts 'in the light depicted by the videotape' and use it to ensure the district court properly constructed the factual record. *Latits v. Phillips*, 878 F.3d 541, 544 (6th Cir. 2017) (quoting *Scott*, 550 U.S. at 381). And the video resolves many of the factual disputes. *Cf. Scott*, 550 U.S. at 381 (using video to resolve disputed facts and reject district court's factual determinations on interlocutory qualified immunity review); *Rudlaff v. Gillispie*, 791 F.3d 638, 639, 642 (6th Cir. 2015) (same); *LaPlante*, 30 F.4th at 576 n.8 (using video to resolve disputed fact). As we will discuss, it allows us to reject Officer Bowers's contention that the factual determinations underlying the district court's excessive force decision were 'blatantly contradicted by the record,' as they were in *Scott v. Harris*. Opp'n Mot. Dismiss App. at 3, 5, 10 (quoting *Scott*, 550 U.S. at 380). It also gives us a clear view of what happened after Officer Bowers shot Mr. Heeter, thus providing an uncontroverted set of facts for the Fourteenth Amendment medical-care claim."

"Because we can conduct our legal analysis based on the video and the undisputed facts, this appeal is not about 'evidence sufficiency.' *See Johnson*, 515 U.S. at 313. … The question for us to answer was: What happened? Here, on the other hand, we know what happened because we can watch the video."

"For the singular contested fact we cannot discern from the video—the location of the gun—Officer Bowers is willing to accept for purposes of appeal the district court's determination that, viewing the record in the light most favorable to the Heeters, a jury could find it was on the table. To the extent this factual dispute was 'crucial' to Officer Bowers's appeal, his concession allows us to resolve the

legal issues he has raised—which are the bases of our interlocutory appellate jurisdiction—while allowing the parties to keep their factual disputes on ice for potential resolution at trial. *Adams*, 946 F.3d at 948, 951; *see also Mehra*, 186 F.3d at 690 (finding jurisdiction when the defendants 'admitted' to the plaintiff's facts 'for purposes of this appeal'). Indeed, Officer Bowers argues he is entitled to qualified immunity under either version of the facts—if the gun was in Mr. Heeter's pocket or on the table. He's wrong, but the video and this concession mean we have jurisdiction over both of Officer Bowers's claims because we can set aside factual quarrels and determine whether he violated clearly established law. That question is 'the precise scope of our appellate jurisdiction on interlocutory appeal from a denial of qualified immunity.' *Ouza v. City of Dearborn Heights*, 969 F.3d 265, 277–78 (6th Cir. 2020). We therefore proceed to the merits."

"Our 'first step' in reviewing the constitutionality of Officer Bowers's use of force is 'to determine the relevant facts' for our analysis. *Scott*, 550 U.S. at 378. As we mentioned earlier, Officer Bowers argues that our general *Johnson*-based rule that we do not review the facts on interlocutory appeal does not apply here because the district court's construction of the facts was so 'blatantly contradicted by the record' that we should use his version of the facts instead. Opp'n Mot. Dismiss App. at 5, 10 (quoting *Scott*, 550 U.S. at 378). Specifically, he challenges the district court's conclusion that there were genuine factual questions as to whether Mr. Heeter lunged at the officers or whether 'the gun was in Mr. Heeter's pocket or on the table.' Appellant Br. at 23–24. Officer Bowers says that the record conclusively establishes that Mr. Heeter was lunging at him while pulling a gun out of his pocket. The record belies both assertions."

"We easily dismiss the assertion that Mr. Heeter lunged at the officers just by watching the video. The part of Mr. Heeter's body that is visible in the footage made a slight downward movement towards the floor, not an abrupt lunge towards the officers. From watching this footage, a reasonable jury could believe that it was not a lunge or other threatening movement. We don't need more to reject Officer Bowers's construction, but we have more from a fellow officer who testified that Mr. Heeter 'made a movement, like he was going to lean forward.' Gibson Aff., R. 21-8, PageID 178 ¶ 12. Not that he lunged."

"Likewise, the district court properly determined a jury could find that Mr. Heeter was not pulling a gun out of his pocket or aiming it at the officers. The officers entered the Heeter residence specifically because Sergeant Redding told them Mr. Heeter had put his gun down on the dining table. After that, the video doesn't show where Mr. Heeter's gun was; it certainly does not show the outline of a gun in Mr. Heeter's pocket, as Officer Bowers claims it does. It just shows Mr. Heeter standing with his hands in his pockets. None of the other officers affirmed that they saw an outline of a gun in Mr. Heeter's pocket or that they saw him holding a gun. All of these facts support, rather than contradict, the district court's construction of the record."

"Moreover, we reject Officer Bowers's assertion that we must accept uncritically all the allegations in his affidavit because the video does not show the right side of Mr. Heeter's body and there is no other affidavit (for instance, from the deceased) to contradict his. To do so would sidestep our obligation to construe 'gaps or uncertainties' in the videos in the Heeters' favor. *Latits*, 878 F.3d at 544. While we sometimes credit police affidavits when nothing contradicts them, even on review of a denial of summary judgment, *e.g.*, *Chappell v. City of Cleveland*, 585 F.3d 901, 904–05 (6th Cir. 2009), here the bodycam footage is enough to call Officer Bowers's allegations into question. In a sense, the bodycam footage takes the place of what would in happier circumstances be testimony of Mr. Heeter. *See Adams*, 946 F.3d at 949. 'In cases where the witness most likely to contradict the officer's testimony is dead,' we will not 'simply accept' the officer's 'self-serving account.' *Id.* (quoting *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994)) (alteration omitted). Had Mr. Heeter survived the shooting, he might have been able to explain his actions and perhaps contradict the defendants' assertion that he was reaching for hisgun. *See Jefferson v. Lewis*, 594 F.3d 454, 461–62 (6th Cir. 2010) (affirming denial of summary judgment when the plaintiff lived to contradict the police officer's version of the events before the shooting)."

"It is true that, following *Scott*, we have used video footage to depart from the district court's factfinding when reviewing denials of qualified immunity. *See Rudlaff*, 791 F.3d at 639–40. But Officer Bowers's argument asks us to flip *Scott* on its head to use self-serving affidavits to contradict (or, at best, fill holes) in a video. We reject such a challenge and conduct our legal analysis with the record as shown in the video and as construed by the district court in the Heeters' favor. "

"We next determine whether a reasonable jury could find Officer Bowers violated Mr. Heeter's Fourth Amendment rights by using excessive force. The Fourth Amendment prohibits officers from using more force than is 'objectively reasonable' under the circumstances. *Palma*, 27 F.4th at 428 (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989)) (cleaned up). Officer Bowers used deadly force, shooting Mr. Heeter five times with an assault rifle. That was unconstitutional unless Officer Bowers had 'probable cause to believe' Mr. Heeter 'posed a significant threat of death or serious physical injury' to the officers in the room. *Thomas v. City of Columbus*, 854 F.3d 361, 365 (6th Cir. 2017) (quoting *Tennessee v. Garner*, 471 U.S. 1, 3 (1985)) (alteration omitted). We evaluate Officer Bowers's actions from the perspective of a reasonable officer in his position, recognizing that he made the 'split-second' decision to shoot Mr. Heeter without the benefit of hindsight. *Raimey*, 77 F.4th at 448 (citation omitted). In making our determination, we may consider why the officers were called to the Heeter residence as well as whether Mr. Heeter's words or actions show he resisted, disobeyed, or otherwise acted aggressively towards the officers. *See Palma*, 27 F.4th at 432; *Wilkerson*, 906 F.3d at 482."

"Consider what we can see from the video: The officers knew they had been called to the home because Mr. Heeter was suicidal and armed. When they arrived, Mr. Heeter was sitting alone at a table smoking a cigarette. While there may have been a concern of self-harm, Mr. Heeter did not tell the officers in his home he intended to shoot his family or any of the officers. While not dispositive, that Mr. Heeter had not acted aggressively towards the officers and had not committed a crime suggests the use of deadly force against him was unreasonable. *See Palma*, 27 F.4th at 432–33, 434–35."

"Eventually, Mr. Heeter put his gun down and asked the officers to leave. A group of officers then walked inside with their guns drawn; Officer Bowers had his large assault rifle at his shoulder. In response, Mr. Heeter stood up and took a few steps toward the wall to retreat from the officers. Just after an officer asked him to 'show us your hands,' Mr. Heeter began to take his hands out of his pockets and started some sort of movement toward the ground. Redding Footage at 10:50–11:11. It was at this moment that Bowers shot Mr. Heeter."

"A jury could find these actions would indicate to a reasonable officer that Mr. Heeter was not threatening to the officers in the room; indeed, they could indicate that Mr. Heeter was beginning to comply with officer instructions. One of the officers reacted to Mr. Heeter's movements by starting to talk to him; his words got cut off by the five shots from Officer Bowers's rifle. And none of the other officers fired their weapons. Since a jury could find a reasonable officer would not have perceived Mr. Heeter to pose a deadly threat, Officer Bowers is not entitled to summary judgment on the excessive force claim. *See Campbell v. Cheatham Cnty. Sheriff's Dep't*, 47 F.4th 468, 480 (6th Cir. 2022)."

"Officer Bowers's various counterarguments are unavailing. *First*, Officer Bowers asks us to focus on the parts of the video which show Mr. Heeter was not following the officers' commands to exit the house, to put his gun down, or to raise his hands. Mr. Heeter's disobedience and words of frustration that the group of armed officers in his home were 'really starting to piss [him] off' indicated that the situation was tense. Redding Footage at 10:45–10:50. But 'the mere failure of a citizen—not arrested for any crime—to follow the officer's commands' does not give the officer probable cause to use *deadly* force against him. *Palma*, 27 F.4th at 434 (quoting *Smith v. City of Troy*, 874 F.3d 938, 945 (6th Cir. 2017)) (cleaned up)."

"*Second*, Officer Bowers argues that it was reasonable under the circumstances to think Mr. Heeter's gun was on his person, regardless of whether that was true. He emphasizes that our precedent sometimes excuses an officer who has misperceived a suspect to pose an immediate threat of serious harm, especially when, as here, the suspect is just a few feet from the officers and could quickly raise

and fire a weapon. *See Thomas*, 854 F.3d at 366. The video shows that Bowers did not have a full view of the table—it was obscured by clutter and the Heeters' two black cats. So, whether the gun was in Mr. Heeter's pocket or on the adjacent table, Officer Bowers emphasizes that it was in reach."

"While it may have been reasonable for Officer Bowers to believe the weapon was within reach, whether it was also reasonable for him to believe Mr. Heeter would *use* his weapon against the officers is a different—and critical—question. That's because, as we have repeatedly stressed, an officer does not have probable cause to use deadly force against a suspect just because he is armed. *Palma*, 27 F.4th at 443; *Thomas*, 854 F.3d at 366. Something else about the situation must have reasonably indicated to Officer Bowers not only that Mr. Heeter was armed, but that he planned to shoot the officers or otherwise posed a serious threat to their safety. *Campbell*, 47 F.4th at 480. Here, Officer Bowers hasn't shown that, viewing the facts in the light most favorable to the plaintiffs, it was 'objectively reasonable' for him to have 'failed . . . to properly assess the reality of the situation.' *Floyd v. City of Detroit*, 518 F.3d 398, 408 (6th Cir. 2008) (alteration omitted). To be sure, he may try to get a jury to agree with him. But on these summary-judgment facts, it was unreasonable for Officer Bowers to mistake a slight movement from a suicidal man who had not expressed an intent to harm anyone else as a threat of serious or deadly harm."

"*Third*, Officer Bowers asserts that, as a matter of law, we cannot consider the fact that the other officers did not fire their weapons. Not so. Officer Bowers cites to *Jordan v. Howard*, but in that case we determined the conduct of another officer was irrelevant because that officer had a different perspective from the ones who fired the shots. 987 F.3d 537, 547 (6th Cir. 2021). This situation more closely tracks *Brandenburg v. Cureton*, which involved three officers who stood in close proximity to each other. 882 F.2d 211, 215 (6th Cir. 1989). We reasoned there that given the similar perspectives of the three officers, 'the jury might reasonably consider why the two other officers did not fire shots if it was quite obvious that they were being threatened with imminent bodily harm.' *Id.* So too here. As the body camera footage depicts, Officer Bowers stood nearly shoulder-to-shoulder with two other officers. That neither thought it appropriate to fire at Mr. Heeter cuts against Officer Bowers's assertion that he reasonably perceived an imminent threat."

"The next step of the qualified immunity analysis asks us to determine whether the law was clearly established at the time of the violation. We ask whether any reasonable officer on that November morning would have objectively and 'clearly understood that he was under an affirmative duty to have refrained from' using deadly force against Mr. Heeter." …

"Officer Bowers would have known Mr. Heeter had 'a clearly established right not to be shot' unless he posed a threat of serious or deadly harm to the officers in his home. *Mullins v. Cyranek*, 805 F.3d 760, 765 (6th Cir. 2015). He concedes as much. But it was also clearly established in November 2018 that, even if Mr. Heeter was armed and had disobeyed the officers' commands, these facts do not alone amount to a threat of serious or deadly harm. *See Thomas*, 854 F.3d at 366; *City of Troy*, 874 F.3d at 945 (explaining that it is 'well-established' that 'a non-violent, non-resisting, or only passively resisting suspect who is not under arrest has a right to be free from an officer's use of force'). In short, any officer would have known it violated the Constitution to shoot a suicidal individual that had moved slightly, even if the person held a gun in their pocket or could grab a gun within reach. Officer Bowers is therefore not entitled to qualified immunity on the excessive force claim."

"We next turn to the Heeters' claim that Officer Bowers violated Mr. Heeter's Fourteenth Amendment right to adequate medical care while in police custody. The bodycam footage shows the disturbing aftermath of the shooting—Mr. Heeter bleeding profusely, struggling to breathe, and moaning in distress. Despite his training, Officer Bowers did not provide any first aid in the minutes after the shooting and before he was dismissed from the scene. Based on the bodycam footage, the district court concluded that Officer Bowers was not entitled to immunity on this claim. We apply the two-step qualified immunity analysis and again, we affirm."

"The due process clause of the Fourteenth Amendment requires government officials to provide adequate medical care to pretrial detainees and others in their custody who are not serving a sentence. *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983). That includes a person who, like Mr. Heeter, has been 'injured while being apprehended by the police.' *Id.* To prevail on this claim, the Heeters must show that (1) Mr. Heeter 'had a sufficiently serious medical need' and (2) Officer Bowers recklessly disregarded 'an unjustifiably high risk of harm that is either known or so obvious that it should be known.' *Helphenstine*, 60 F.4th at 317 (cleaned up). These requirements are known as the 'objective' and 'subjective' components of the claim, respectively. *E.g.*, *Hicks v. Scott*, 958 F.3d 421, 438 (6th Cir. 2020)." …

"*Objective Component*. For the objective component, the plaintiffs must demonstrate a 'serious medical need,' which we identify by asking if the injury was so obvious that anyone would understand it posed a 'substantial risk of serious harm' without medical intervention. *Hicks*, 958 F.3d at 438 (quoting *Blackmore*, 390 F.3d at 899). The parties agree Mr. Heeter's gunshot injuries were so obvious that anyone would recognize his need for medical care."

"*Subjective Component*. For the subjective component, the plaintiffs must address the officer's mental state and responsive actions. They must show that the officer either *knew* the risk of harm and disregarded it, or that they '*recklessly disregarded* a risk so obvious that they . . . should have known of it.' *Lawler ex rel. Lawler v. Hardeman Cnty.*, 93 F.4th 919, 927 (6th Cir. 2024) (citing *Helphenstine*, 60 F.4th at 317). The plaintiffs must also prove that the officer ''responded' to the risk in an unreasonable way.' *Id.* at 929 (quoting *Farmer v. Brennan*, 511 U.S. 825, 844 (1994) and citing *Beck v. Hamblen Cnty.*, 969 F.3d 592, 600 (6th Cir. 2020))."

"… For a Fourteenth Amendment claim, as the Heeters assert, we no longer require that the officer *knew* the risk of harm from failure to provide medical care; an officer is still liable for *recklessly* disregarding the risk. *Lawler*, 93 F.4th at 927 (citing *Helphenstine*, 60 F.4th at 317)." …

"The question we face, then, turns not on whether Officer Bowers knew or should have known the risk to Mr. Heeter, but instead on whether he 'responded reasonably' to the risk. *Farmer*, 511 U.S. at 844. He didn't. As Mr. Heeter lay face down, bleeding from multiple gunshot wounds, it was unreasonable for Officer Bowers to stand idle—even for a few minutes and even while paramedics were on their way—rather than administer the first aid he was trained to provide."

"Our court has repeatedly held that officers violate a pretrial detainee's right to adequate medical care when, despite knowing of an emergent risk of harm, they stand idle and fail to provide immediately necessary medical care that they have been trained to administer. In *Jones v. City of Cincinnati*, a police sergeant arrived at a scene to find a detainee lying face down and not breathing; other responding officers had subdued and asphyxiated him. 521 F.3d 555, 558 (6th Cir. 2008). The sergeant called the paramedics but didn't do anything else. *Id.* We denied the sergeant qualified immunity because he did not provide medical care or even remove the detainee's handcuffs to facilitate medical care. *Id.* at 560. Likewise, we denied qualified immunity to police officers—three of whom were trained emergency medical technicians—when they discovered that a detainee they had subdued was not breathing. *Est. of Owensby v. City of Cincinnati*, 414 F.3d 596, 600–01, 603 (6th Cir. 2005). They discussed his injuries, waited for their supervisors, and 'made no attempt to summon or provide any medical care until several minutes later.' *Id.* In *Heflin v. Stewart County*, we considered the constitutional obligation of a jail deputy who encountered a detainee hanging from a makeshift noose in his cell; the deputy called for paramedics but didn't cut down the detainee or try to help him in any way, as he had been trained to do. 958 F.2d 709, 711–12, 717 (6th Cir. 1992). Thinking the detainee was dead, the deputy stood in the cell waiting for paramedics for several minutes. *Id.* We denied qualified immunity. *Id.*"

"To apply this law here, we consider what Officer Bowers would have known in the moments after the shooting. Mr. Heeter had just suffered multiple rifle wounds at close range, so Officer Bowers knew Mr. Heeter was in critical condition and required immediate medical care. He knew that Sergeant Redding

had called the paramedics and that other officers were attending to the public safety duties of the scene. It is undisputed he had the training to provide Mr. Heeter with basic first aid while the paramedics were on the way. With that in mind, a reasonable jury could believe that Officer Bowers knew that Mr. Heeter's massive bleeding required attention right away, within minutes or seconds. The police department's Use of Force Manual even states the first priority after a suspect has been shot is to 'Cause any needed medical aid to be rendered.' R. 21-4, PageID 164. Accepting these facts, as we must, Officer Bowers had a Fourteenth Amendment duty to provide Mr. Heeter with basic first aid while the ambulance was en route."

"Instead, Officer Bowers's first decision was to order Officer Bruce to handcuff Mr. Heeter. He told Officer Bruce to put gloves on to avoid touching Mr. Heeter's blood, suggesting he thought that Mr. Heeter was not so dangerous as to require immediate restraint. Officer Bowers heard Mr. Heeter moan as Officer Bruce started to pull his arms behind his back. Despite seeing Mr. Heeter's obvious injuries, Officer Bowers continued to command Bruce to handcuff Mr. Heeter and to loudly order, 'Bill, give me your hands.' Bruce Footage at 11:52–12:40; Bowers Footage at 12:45–13:00. The bodycam footage shows Bowers looked at Mr. Heeter's body. It also shows Mr. Heeter hemorrhaging blood. Officer Bowers would have seen the pool of blood too."

"… Despite his training and police department policy, Officer Bowers did not even try to provide Mr. Heeter first aid as he lay moaning and bleeding and as his breathing became increasingly labored. The district court was therefore correct in finding Officer Bowers violated the Constitution when he 'knowingly left a mortally wounded suspect lying face down on the ground while handcuffed without administering aid during the critical moments following injury.' Op. & Order, R. 37, PageID 350."

"In response, the defendants tell us there is a bright-line rule that after summoning the paramedics, officers have no further duty to provide medical care to pretrial detainees. Citing *Stevens-Rucker v. City of Columbus*, they contend that Officer Bowers responded reasonably because he knew the paramedics had been called, and the Constitution 'does not require [an] officer to intervene personally' or 'exhaust[] every medical option' so long as they call for care and do not delay it from reaching the suspect. 739 F. App'x 834, 846 (6th Cir. 2018); *see also Wilkerson*, 906 F.3d at 483 ('When police injure a person while apprehending him, they generally satisfy the Fourteenth Amendment by summoning medical care and not intentionally or recklessly delaying his access to it.'). To the extent we suggested in *Stevens-Rucker* and other cases that officers do not have to 'intervene personally' when they believe medical aid is en route, it was because there we accepted or presumed that the officers reasonably believed 'their individual intervention would not have helped.' 739 F. App'x at 846; *see also Hicks*, 958 F.3d at 439–40 (granting qualified immunity to officer who rejected another's offer to provide first aid to suspect that was shot because the officer reasonably would have thought the suspect's 'lifeless' body was beyond help). That is not the case here. Given Mr. Heeter's moans and labored breathing, it was clear he was still alive, and a jury could conclude that a reasonable officer trained in basic first aid would have tried to use that training to help Mr. Heeter. Officer Bowers overreads our fact-bound cases."

"As a matter of common sense and precedent, there is no bright-line rule that officers never have to provide care after calling for help. We have never held that calling for a paramedic always terminates a police officer's constitutional obligations to a pretrial detainee—irrespective of the time it will take for help to arrive, how urgently help is needed, how the officer has been trained, or even how easy it would be for the officer to help. Under the defendants' view, a trained correctional officer has no obligation to administer the Heimlich maneuver to help a choking inmate, and a prison guard has no obligation to cut down a detainee who has attempted suicide by hanging."

"That's not just contrary to *Heflin*, but to myriad other precedents where we've held that calling the paramedics does not guarantee an officer qualified immunity from like Fourteenth Amendment claims." …

"Beyond arguing for a bright-line rule, Officer Bowers relies upon several other cases where the responding officers did not provide emergency medical care and we concluded that they did not violate the Fourteenth Amendment. But in those cases, the officers were busy protecting themselves or the public; they weren't standing idle like Officer Bowers." …

"To summarize, it is undisputed that Officer Bowers focused on ordering an officer to handcuff Mr. Heeter, then stood idle as Mr. Heeter bled out, moaned, and struggled to breathe. A reasonable jury could find that Mr. Heeter's critical injury called for immediate first aid before professional paramedics arrived, and that Officer Bowers—trained in first aid and unoccupied by police duties—could and should have rendered that care. Therefore, a reasonable jury could find Officer Bowers violated Mr. Heeter's Fourteenth Amendment right to adequate medical care."

"The Supreme Court established in 1983 that an officer has an obligation under the Due Process Clause to provide adequate medical care to suspects shot during apprehension. *City of Revere*, 463 U.S. at 244. As discussed above, the standard applicable in November 2018 required a plaintiff to show an officer knowingly and deliberately disregarded a detainee's risk of harm in order to prevail on an adequate medical care claim. *Richko v. Wayne Cnty.*, 819 F.3d 907, 915 (6th Cir. 2016). Since at least 2005, we applied the rule to officers who engaged in banal chatter as a suspect they had asphyxiated sat without breathing. *Owensby*, 414 F.3d at 603. Since at least 2008, it was clear that a police officer who calls paramedics for a critically injured suspect violates the Constitution when he can safely attend to the suspect's obvious injuries, but instead does nothing. *Jones*, 521 F.3d at 558, 560; *see also Heflin*, 958 F.2d at 714–15. Officer Bowers's conduct fits squarely within this precedent; from these rules it 'follow[s] immediately' that he violated the Constitution. *Beck*, 969 F.3d at 599 (quotation omitted). He is therefore not entitled to qualified immunity on the adequate medical care claim."

"For 'fair notice,' we look to analogous cases (and sometimes, common sense). *Brosseau*, 543 U.S. at 599 (citation omitted). Based on the law in November 2018, the 'unlawfulness of doing nothing to attempt to save' Mr. Heeter's 'life would have been apparent to a reasonable officer' in Officer Bowers's position. *Heflin*, 958 F.2d at 717. As the district court concluded, Officer Bowers is therefore not entitled to qualified immunity on this claim."

9. Fourth Amendment - Qualified immunity denied and granted in part – Traffic stop – Since there was a dispute of material facts a jury could conclude that officers lack probable cause to make the traffic stop so summary judgment was not appropriate - This circuit has denied summary judgment based on conflicting evidence as to whether drivers committed the traffic violations that formed the bases for subsequent stops - By the time of the 2019 stop, this circuit recognized the right to be free from a traffic stop unsupported by probable cause as clearly established - Excessive force claim - The reasonableness of a use of force is assessed from the perspective of a reasonable officer on the scene without the benefit of 20/20 vision of hindsight - This inquiry entails consideration of the totality of the circumstances, including, but not limited to: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight - Jury could find plaintiff did not actively resist arrest so excessive force claim survives summary judgment – Take down of plaintiff during the arrest - Officers granted qualified immunity on the use of the take down of plaintiff - There is no clearly established principle that prevents officers from taking individuals to the ground during an investigatory detention who have acted aggressively, failed to follow an officer's commands, and whose actions suggest they were trying to flee. - Because the district court's partial denial of the City and Department's motion for summary judgment is not a final decision for purposes of appeal, and because the City and Department's appeal does not entail a claim inextricably intertwined with another claim properly before this court, we lack jurisdiction to assess King's *Monell* claim - A *Monell* claim is inextricably intertwine' with a qualified immunity appeal properly before this court if the resolution of the qualified immunity appeal necessarily resolves the *Monell* appeal

THURMAN KING v. CITY OF ROCKFORD, MICHIGAN; ROCKFORD DEPARTMENT OF PUBLIC SAFETY; ZACHARY ABBATE and JASON BRADLEY, Officers, in their individual capacities
SIXTH CIRCUIT COURT OF APPEALS No. 22-2038 Decided and Filed: March 28, 2024

"Thurman King sued Officers Zachary Abbate and Jason Bradley, the City of Rockford ('City'), the Rockford Public Safety Department ('Department'), and other municipal officers (collectively, 'defendants') under 42 U.S.C. § 1983 and state law for events arising out of a 2019 traffic stop. The district court granted partial summary judgment in favor of defendants, but denied their motion for summary judgment on qualified and governmental immunity grounds for King's federal and state tort claims against Abbate and Bradley, and denied their motion as to King's *Monell* claim against the City and Department. Defendants appealed this denial. On review, we affirm in part, and reverse in part, the district court's denial of qualified and governmental immunity to Abbate and Bradley. We dismiss the City and Department's appeal for lack of appellate jurisdiction."

"On the night of March 20, 2019, Officer Zachary Abbate, then a Rockford Department of Public Safety officer, pulled Thurman King over, leading to the physical altercation and arrest that underpin the current appeal. King was driving his fiancée's car home from work around 11:00 p.m. when he passed Abbate's patrol car. Abbate then drove behind King and noticed that King's license plate light was out, in violation of Michigan law. Dash camera footage captured the following course of events, which were also the subject of testimony."

"According to King, he came to a complete stop at a stop sign after approaching an intersection. The dash camera footage appears to support this view. Abbate, on the other hand, testified that King rolled through the stop sign, also a violation of Michigan law. Other than what he perceived as an incomplete stop, Abbate saw 'no evidence of [King] driving erratically.' DE 64-2, Abbate Dep. Tr., Page ID 338."

"Abbate initiated his patrol car lights shortly thereafter as King turned onto another street. King, who happened to live on that street, continued to drive for a short distance before using his turn signal and pulling into his driveway. Approximately thirteen seconds passed between when Abbate initiated his patrol lights and when King pulled into his driveway. Upon pulling into his driveway, King exited his vehicle without waiting for Abbate's command to do so. As King got out, Abbate yelled for King to show his hands, and King complied."

"Abbate then admonished King for failing to stop at the stop sign and observed that he smelled marijuana on King's breath. King disputed these accusations. King admitted that he had smoked earlier in the day, but he explained that he hadn't smoked in more than six hours and could not possibly smell like marijuana. Unbeknownst to Abbate, however, King had an unlit joint in his pants pocket at the time. At some point in the interaction, Abbate requested that King submit to a chemical test. King refused."

"At this point, the parties' accounts diverge. Abbate alleges that King was 'loud,' 'yelling,' and 'argumentative' while Abbate ordered him to stay at the rear of his vehicle, in view of the dash camera. *Id.* at Page ID 343–44. Abbate further testified that King walked away from him multiple times, forcing Abbate to grab King's arm to 'maintain control and prevent him from fleeing.' *Id.* at Page ID 344. King disputes that he walked away from Abbate, saying only that he may have taken 'a step towards the house' while calling out to his fiancée, Michelle, who was inside at the time. DE 69-2, King Dep. Tr., Page ID 441–42. Video footage shows King and Abbate arguing, with Abbate attempting to grab King's arm, and King taking a step away and turning toward his house while continuing to yell for his fiancée. Abbate then directed King to step back toward the rear of the vehicle and put his hands behind his back, and King complied. But when King turned to again call out to Michelle, Abbate swung King around, grabbed the back of his coat, and threw him onto the pavement."

"After the takedown maneuver, King and Abbate moved outside of the view of the dash camera. King recalled Abbate 'screaming' at this point and eventually maneuvering King into handcuffs while King cried out in pain. *Id.* at Page ID 443. At some point Officer Jason Bradley showed up, and King alleges

that the officers pinned him to the ground and knelt on his back. King testified that he 'wasn't resisting' while on the ground, as he 'couldn't even move' if he tried. *Id.* King repeatedly alerted officers that he was having trouble breathing, to which Bradley responded that if King can talk, he can breathe."

"After getting King off the ground and into the squad car, Abbate and Bradley noticed an abrasion above King's eye and requested medical personnel to assess the wound. Officers then searched the car King was driving and found a closed, half-full bottle of alcohol on the floorboard of the vehicle. The officers charged King with one felony count of obstructing a police officer, and two misdemeanor counts: operating a vehicle while intoxicated and possessing an open container of alcohol in a vehicle. The officers did not ticket King for an inoperable license plate light or a failure to stop."

"The officers then transported King to Kent County Jail, where he remained in custody overnight, received further medical attention, and underwent a blood test. The blood test revealed no alcohol and a negligible amount of THC, reportedly 'equal to 0.001 alcohol,' in King's system. DE 69-4, Toxicology Report, Page ID 454–55. Upon his release the next day, King went to the emergency room and was diagnosed with a left elbow sprain, head injury, abrasion, and neck strain. King testified that he examined his fiancée's license plate light that same day and found it functional and unobstructed. Ultimately, King pled not guilty to all charges, and a Kent County prosecutor *nolle prosequied* the charges on July 2, 2019."

"At the time of King's stop, the police department enforced a policy that required officers to conduct a minimum of two traffic stops during each ten-hour shift. The Department posted each officer's stop numbers at the end of every month. Roughly one month before King's stop, Department leadership reprimanded Abbate for failing to meet 'the mandatory minimum expectations for traffic stops'—Abbate fell one stop short of his monthly quota for December 2018. DE 69-1, RDPS Counseling Mem., Page ID 428. Leadership warned that it would closely monitor Abbate's performance 'over the next several months.' *Id.* After Department leadership again informed Abbate of his deficient stop numbers for June 2019, Abbate resigned."

"Qualified immunity shields officers from civil liability when their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (quoting *White v. Pauly*, 580 U.S. 73, 78–79 (2017) (per curiam)). For a right to be clearly established, '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.' *Feathers v. Aey*, 319 F.3d 843, 848 (6th Cir. 2003) (quoting *Russo v. City of Cincinnati*, 953 F.2d 1036, 1042 (6th Cir. 1992)). While a case need not be directly on point for a right to be clearly established at the time of the violation, 'existing precedent must have placed the statutory or constitutional question beyond debate.' *Kisela*, 137 S. Ct. at 1152 (quoting *White*, 580 U.S. at 79). Qualified immunity therefore protects 'all but the plainly incompetent or those who knowingly violate the law.' *White*, 580 U.S. at 79 (quoting *Mullenix v. Luna*, 577 U.S. 7, 12 (2015)). In this context, summary judgment is thus appropriate unless the evidence 'viewed in the light most favorable to the plaintiff, would permit a reasonable juror to find that: (1) the defendant violated a constitutional right; and (2) the right was clearly established.' *Kovacic v. Cuyahoga Dep't of Child. & Fam. Servs.*, 724 F.3d 687, 695 (6th Cir. 2013) (quoting *Morrison v. Bd. of Trustees*, 583 F.3d 394, 400 (6th Cir. 2009))."

"The Fourth Amendment guarantees the right 'to be secure . . . against unreasonable searches and seizures.' U.S. Const. amend. IV. Consistent with the Fourth Amendment, '[a] police officer may stop a motorist when he possesses probable cause of a civil infraction or has reasonable suspicion of criminal activity.' *United States v. Pacheco*, 841 F.3d 384, 390 (6th Cir. 2016) (citing *United States v. Lyons*, 687 F.3d 754, 763 (6th Cir. 2012)). Under either the reasonable suspicion or probable cause standard, the record demonstrates a genuine dispute of material fact as to the lawfulness of King's stop, rendering summary judgment inappropriate."

"Probable cause exists if the 'facts and circumstances within the officer's knowledge [] are sufficient to warrant a prudent person . . . in believing . . . that the suspect committed, is committing, or is about to commit an offense.' *Smith v. City of Wyoming*, 821 F.3d 697, 715 (6th Cir. 2016) (alteration in original) (quoting *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979)). Probable cause may be supported by 'less than prima facie proof but more than mere suspicion.' *United States v. Blair*, 524 F.3d 740, 748 (6th Cir. 2008)."

"Defendants take issue with the district court's determination that a reasonable jury could find that Abbate lacked probable cause to stop King. Although Abbate claimed to observe King commit two traffic violations before he initiated the stop, the district court found that 'a reasonable juror could conclude that neither observation is supported by the dashboard camera footage.' DE 74, Op. and Order, Page ID 645–46. While defendants are correct that Abbate could possess probable cause absent an actual violation of the law by King, *see United States v. Collazo*, 818 F.3d 247, 254 (6th Cir. 2016), defendants incorrectly argue that the district court's determination that the quality of King's stop was 'not conclusive' entitles Abbate to the benefit of the doubt. CA6 R. 38, Appellants' Reply Br., at 8. Defendants' assertion runs contrary to the legal standard at the summary judgment phase, which requires the court to view 'uncertainties left by the video[] in the light most favorable to the [non-moving] Plaintiff.' *Latits*, 878 F.3d at 544; *see Godawa v. Byrd*, 798 F.3d 457, 463 (6th Cir. 2015) (accepting Plaintiffs' version of the facts where the video did 'not clearly contradict Plaintiffs' version of events'). As the district court noted, '[a] reasonable juror could find that the light was operating and that [King] came to a complete stop.' DE 74, Op. and Order, Page ID 646; *see Godawa*, 798 F.3d at 463. Thus, the district court correctly held that if a jury determines that King committed no traffic violation and Abbate 'lacked any objective basis' for the traffic stop, Abbate fails to establish probable cause or reasonable suspicion. *Campbell v. Mack*, 777 F. App'x 122, 131–32 (6th Cir. 2019)."

"Defendants' citation to *United States v. Ferguson*, 8 F.3d 385 (6th Cir. 1993) is also unavailing. The court in *Ferguson* found probable cause where an officer testified that he stopped a car for failing to have a visible license plate, even though it was later determined that the vehicle had a license tag lying on the back shelf of the car. 8 F.3d at 392. The court deemed the presence of the tag inside the car irrelevant 'because the ordinance makes it an offense to drive without a 'visible' license plate, and the vehicle did not have a visible license plate.' *Id.* This is distinguishable from the case at hand, where King's testimony that the license plate light was operable and unobstructed, paired with the ambiguity left open by the video, call into question whether King's license plate light was operable and visible, and thus whether Abbate had grounds for believing there was such a violation."

"In support of King's argument and the district court's findings, this circuit has denied summary judgment based on conflicting evidence as to whether drivers committed the traffic violations that formed the bases for subsequent stops. *See Brown v. Chapman*, 814 F.3d 447, 457–58 (6th Cir. 2016); *Campbell*, 777 F. App'x at 131–32." …

"… As in *Campbell* and *Brown*, King presented evidence supporting his contention that he came to a complete stop at the stop sign and that his license plate light was operable and visible. The district court determined that the video showed King's vehicle 'stopping at the stop sign,' although the quality of the stop was inconclusive. DE 74, Op. and Order, Page ID 635–36. Therefore, the video does not clearly contradict King's version of events and instead calls into dispute Abbate's deposition testimony that King rolled through the stop sign. The video can accordingly support a finding by a reasonable jury that King stopped for several seconds. Likewise, King's testimony about the operational light the day after his arrest and the video footage dispute Abbate's observation that the license plate light was inoperable. *See Brown*, 814 F.3d at 458. So, under King's version of events, a reasonable jury could find that King came to a complete stop the night in question and that his license plate light was fully operable and unobstructed. A reasonable jury could therefore find that Abbate 'lacked any objective basis' for believing that King violated Michigan law, rendering the stop unconstitutional. *Campbell*, 777 F. App'x at 132."

"And by the time of the 2019 stop, this circuit recognized the right to be free from a traffic stop unsupported by probable cause as clearly established." …

"The Fourth Amendment's guarantee against unreasonable seizures encompasses a protection against use of excessive, or unreasonable, force 'in the context of an arrest or investigatory stop.' *Graham v. Connor*, 490 U.S. 386, 394 (1989). The reasonableness of a use of force is assessed from the perspective of a reasonable officer on the scene without the benefit of '20/20 vision of hindsight.' *Id.* at 396–97. This inquiry entails consideration of the totality of the circumstances, including, but not limited to: (1) 'the severity of the crime at issue;' (2) 'whether the suspect poses an immediate threat to the safety of the officers or others;' and (3) whether the suspect 'is actively resisting arrest or attempting to evade arrest by flight.' *Id.* at 396 (citing *Tennessee v. Garner*, 471 U.S. 8–9 (1985)). In interactions involving multiple uses of force, like here, we 'analyze[] the subject event in segments' to assess the reasonableness of an officer's actions. *Barton v. Martin*, 949 F.3d 938, 952 (6th Cir. 2020) (quoting *Morrison*, 583 F.3d at 401)."

"Although not presented in the clearest manner, King alleged facts sufficient to plausibly state an excessive force claim. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Defendants are correct that King did not characterize any claim as an excessive force claim in his complaint. Nevertheless, he alleged facts supporting such a claim, and the record reveals that King developed his excessive force argument so as to adequately allow the district court to make a summary judgment determination." …

"The district court analyzed both uses of force—Abbate's takedown and Abbate and Bradley subsequently kneeling on King's back—together as a single excessive force claim. Although consecutive uses of force can sometimes be analyzed together, *see Moser v. Etowah Police Dep't*, 27 F.4th 1148, 1152–53 (6th Cir. 2022), combined analysis was inappropriate on the facts of this case: because the first use of force is captured by the dash camera footage, while the second occurs out of frame, some of the disputes of material fact that preclude summary judgment on the second use of force do not exist as to the recorded takedown. We therefore analyze the reasonableness of the takedown and kneeling on the ground separately. *See Barton*, 949 F.3d at 952 (6th Cir. 2020)."

"*Severity of Crimes.* The first *Graham* factor weighs against the reasonableness of the takedown maneuver even assuming that, in addition to the minor traffic violations, probable cause emerged during the stop to believe that King drove under the influence and otherwise resisted arrest. 'Conduct that is not a violent or serious crime does not permit an officer to use increased force absent other factors.' *Vanderhoef v. Dixon*, 938 F.3d 277, 278 (6th Cir. 2022). At the outset, King's suspected traffic violations fall 'within the lowest rung of unlawful activity,' *id.*, which 'counsel[s] against the use of force exerted.' *Shumate v. City of Adrian*, 44 F.4th 427, 442 (6th Cir. 2022). And although tensions then escalated during the stop, 'there was minimal (if any) connotation of violence' presented by King's behavior. *See Shumate*, 44 F.4th at 441. Thus, because King was not suspected of particularly serious crimes or crimes involving violence, the first *Graham* factor weighs in favor of King. *See Harris v. City of Circleville*, 583 F.3d 356, 366 (6th Cir. 2009) (weighing the first *Graham* factor in favor of the plaintiff, who was suspected of speeding, DUI, and failure to appear in court)."

"*Immediate Threat to Officers or Others.* The second *Graham* factor also weighs in favor of King. While defendants emphasize the reasonableness of Abbate's safety concerns in light of King's failure to immediately pull over, his noncompliance with commands, and his continued yelling during the interaction, a reasonable jury could find that King's conduct did not pose an immediate threat that justified a takedown. Indeed, the district court found that 'the record supports that [King] was not verbally or physically hostile to Officer Abbate.' DE 74, Op. and Order, Page ID 649. Although King may have been loud and argumentative, a reasonable jury could otherwise find him 'non-threatening,' indicating that the takedown was unreasonable to maintain control of the situation. *Id.* (quoting *Shumate*, 44 F.4th at 446). This view is supported by this circuit's published case law." …

"To be sure, a reasonable officer would not know that 'Michelle' was King's fiancée, and King pulled over shortly, rather than immediately, after Abbate initiated his lights, but since King did not otherwise threaten Abbate, did not indicate he was armed, and was suspected of relatively minor offenses, this factor weighs against the reasonableness of force. *See id.* at 444–46[.]" …

"Active Resistance or Attempt to Evade Arrest. The parties primarily dispute whether King actively resisted arrest." …

"Active resistance 'can be characterized by physical force, a show of force, or verbal hostility coupled with failure to comply with police orders.' *Jackson v. Washtenaw Cnty.*, 678 F. App'x 302, 306 (6th Cir. 2017) (citing *Goodwin v. City of Painesville*, 781 F.3d 314, 323 (6th Cir. 2015)); *Rudlaff*, 791 F.3d at 641. Mere passive resistance, in contrast, entails a 'lack of physical resistance or verbal antagonism.' *Jackson*, 678 F. App'x at 306; *Eldridge v. City of Warren*, 533 F. App'x 529, 535 (6th Cir. 2013). This circuit has elaborated that 'a failure to present one's arms to an officer upon request without more' constitutes passive resistance at most, but 'a physical struggle to maintain control of one's limbs while being placed in handcuffs can be active resistance.' *Jackson*, 678 F. App'x at 307; *cf. Shumate*, 44 F.4th at 448–49 (determining that a reasonable juror could find plaintiff merely passively resisting when he pulled his arms back to avoid officer's handcuffs and later failed to provide his hands from beneath his body on the ground)."

"On one end of the spectrum, this court has deemed the application of force unreasonable against a non-compliant suspect who lacked any 'outward manifestation' that 'suggested volitional and conscious defiance' toward the officer. *Eldridge*, 533 F. App'x at 533–34." …

"On the other end of the spectrum, we have deemed tasers, knee strikes, and other force necessary to subdue suspects justified where the suspects repeatedly refused to comply and physically resisted arrest. *See, e.g., Earnest v. Genesee Cnty.*, 841 F. App'x 957, 960–61 (6th Cir. 2021) (deeming force reasonable when intoxicated suspect attempted to strike medical personnel and refused to put his hands behind his back). In *Rudlaff v. Gillispie*, for example, we deemed reasonable the use of a knee strike and taser to subdue a driver who was verbally defiant, swung or jerked his arms toward an officer, and locked up his body to avoid being handcuffed. 791 F.3d at 641–44. Similarly, we have upheld the reasonableness of an officer's taser use against a continuously uncooperative and erratic subject even absent suspicion of a crime. *See Caie v. W. Bloomfield Twp.*, 485 F. App'x 92, 94–97 (6th Cir. 2012) (concerning suicidal individual who had threatened to fight officers, remained agitated and uncooperative, and refused to move his arms from beneath his body to be handcuffed)."

"Viewing the facts as presented by the dash camera footage and making all reasonable inferences in favor of King, a reasonable jury could find that King did not actively resist arrest. First, while King was 'argumentative' and noncompliant, he was not verbally 'hostile' toward Abbate. DE 74. Op. and Order, Page ID 648–49; *see Laury v. Rodriguez*, 659 F. App'x 837, 843 (6th Cir. 2016) (distinguishing between rude and threatening content); *Shumate*, 44 F.4th at 448. And although the video depicts King turning his body away from Abbate, it does not show King being physically hostile or using force against Abbate. *See Lustig v. Mondeau*, 211 F. App'x 364, 369–70 (6th Cir. 2006) (deeming officer's twisting of restrained suspect's arm excessive as suspect remained agitated and yelling); *cf. Rudlaff*, 791 F.3d at 640. To this end, the footage depicts King showing Abbate his hands, returning to the rear of his vehicle, and even putting his hands behind his back for Abbate to apply handcuffs moments before the takedown. The footage is not clear as to whether Abbate then let go of King's arm to initiate a takedown while King had his hands behind his back, or whether King turned to get his arm out from Abbate's grip and step back toward his house. A jury could even interpret King's movement to indicate compliance with Abbate's arrest efforts. *See LaPlante*, 30 F.4th at 580–81 (noting that a reasonable jury could find plaintiff's lifting of his hands in the air as the officer attempted to handcuff him to signify surrender rather than continued noncompliance)."

"On the other hand, the dash camera footage also demonstrates that King did more than merely failing to present his hands for arrest or otherwise comply with Abbate's commands to remain at the rear of

the vehicle. The footage shows King pulling away from Abbate's grasp and stepping toward his house, attempting to free his arm, and turning his body away from Abbate as Abbate tried to grab him. This behavior thus rises above the mere noncompliance with commands present in the cases cited by King. *See Sevenski v. Artfitch*, Nos. 21-1391/1402, 2022 WL 2826818, *4–5 (6th Cir. Jul. 20, 2022) (deeming takedown excessive where, under plaintiff's version of events, plaintiff held his hands above his head and merely failed to comply with command to return to his vehicle before takedown); *Ruemenapp v. Oscoda Twp.*, 739 F. App'x 804, 811–13 (6th Cir. 2018) (finding force excessive where, under plaintiff's version of events, he merely inquired about the basis of his arrest before officer pushed and pinned him against a wall, causing him to lose consciousness)."

"Accordingly, King's conduct runs close to the line distinguishing passive resistance from active. Because King's conduct 'does not fit cleanly within' our existing excessive force case law, King cannot overcome the clearly established hurdle of qualified immunity. *Rudlaff*, 791 F.3d at 644 (quoting *Cockrell v. City of Cincinnati*, 468, F. App'x 491, 496 (6th Cir. 2012))."

"Under the circumstances faced by Abbate, we cannot say that 'every reasonable official would have understood' that King's behavior did not rise to active resistance and thus that the takedown violated the Fourth Amendment. *Zakora v. Chrisman*, 44 F.4th 452, 465 (6th Cir. 2022) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). While officers may not use a takedown against a generally compliant suspect, *see LaPlante*, 30 F.4th at 583, '[t]here is no clearly established principle that prevents officers from taking individuals to the ground during an investigatory detention who have acted aggressively, failed to follow an officer's commands, and whose actions suggest they were trying to flee.' *Parsons v. City of Ann Arbor*, No. 22-1338, 2023 WL 3413898, at *3 (6th Cir. May 12, 2023); *see Rudlaff*, 791 F.3d at 643–44 (emphasizing that minimal resistance still constitutes resistance). Cases deeming levels of force similar to Abbate's takedown unconstitutional tend not to entail physical resistance, such as the pulling and turning demonstrated by King as he and Abbate paced near the rear of his vehicle. *See Parsons*, 2023 WL 3413898, at *3 (summarizing case law). The district court accordingly erred in denying qualified immunity for Abbate's takedown maneuver."

"Although Abbate was entitled to qualified immunity for his use of a takedown maneuver, the district court correctly determined that a genuine dispute of material fact precludes summary judgment as to the reasonableness of Abbate and/or Bradley's application of a knee on King's back after the takedown. In this circuit, 'an officer may not use additional gratuitous force once a suspect has been neutralized.' *Morrison*, 583 F.3d at 408 (quoting *Alkhateeb v. Charter Twp. of Waterford*, 190 F. App'x 443, 452 (6th Cir. 2006)). The parties dispute whether King presented resistance to Abbate and Bradley's attempts to handcuff him after the takedown, and thus whether King was effectively neutralized in this position."

"Taking King's testimony as true, one or both officers applied pressure or a knee to King's back while he was nonresistant, and potentially already handcuffed on the driveway. During this time, King repeatedly warned officers that he was having trouble breathing. Because the entire interaction between King, Abbate, and Bradley on the ground occurs outside the view of the dash camera footage, the record does not resolve this dispute.7 Accordingly, because Abbate and Bradley's liability for their conduct on the ground turns on which version of the facts one believes, we affirm the district court's denial of summary judgment on this issue. *See Pouillon v. City of Owosso*, 206 F.3d 711, 715 (6th Cir. 2000)."

"And prior to 2019, this circuit had clearly established that 'applying pressure to the back of a prone suspect who no longer resists arrest and poses no flight risk is an objectively unreasonable use of force.' *Martin v. City of Broadview Heights*, 712 F.3d 951, 961 (6th Cir. 2013) (citing *Champion*, 380 F.3d at 901); *cf. Morrison*, 583 F.3d at 408. Thus, we affirm the denial of qualified immunity as to Abbate and Bradley for this claim."

"Defendants City of Rockford and Rockford Department of Public Safety appeal the district court's partial denial of summary judgment on King's *Monell* claim, alleging that because the individual

officers committed no underlying constitutional violation, King's *Monell* claim cannot stand. But because the district court's partial denial of the City and Department's motion for summary judgment is not a final decision for purposes of appeal, and because the City and Department's appeal does not entail a claim inextricably intertwined with another claim properly before this court, we lack jurisdiction to assess King's *Monell* claim."

"A *Monell* claim is 'inextricably intertwined' with a qualified immunity appeal properly before this court if the resolution of the qualified immunity appeal necessarily resolves the *Monell* appeal. *Martin*, 712 F.3d at 963 (quoting *Mattox v. City of Forest Park*, 183 F.3d 515, 524 (6th Cir. 1999))." …

"In turn, because a jury could reasonably conclude that Abbate committed a constitutional violation by stopping King without probable cause, we lack pendent jurisdiction to consider the City and Department's appeal of King's *Monell* claim regarding the Department's stop policy."

10. Fourteenth Amendment – Due process - Fitness for duty evaluation – Summary judgment for defendants upheld – Plaintiff was a maintenance worker whose position for reclassified to a lower pay – Plaintiff made statements to co-workers about killing those responsible for the reclassification – Plaintiff claims requirement to attend fitness for duty exam violated ADA and due process – Plaintiff specifically argued that he had a right to refuse his fitness-for-duty evaluations under the Due Process Clause and that Defendants deprived him of this right without any process – Plaintiff did not demonstrate a violation of his federal statutory or constitutional rights – A plaintiff's procedural due process rights are violated when (1) he is deprived (2) of a constitutionally protected interest in life, liberty, or property (3) through state action and (4) the deprivation occurs without adequate process - Under the Americans with Disabilities Act, fitness-for-duty evaluations must be job-related, consistent with business necessity, and based on evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job – The ability to refuse medical treatment is indeed protected by the Due Process Clause - Plaintiff was not forced to accept any treatment - The evaluations sought to collect information from plaintiff and render a conclusion based on that information, rather than order him to make particular treatment decisions – Plaintiff was not required to attend counseling, nor was counseling made a condition of his employment - The sole issue plaintiff briefed and which he asked the court to decide is whether his fitness-for-duty evaluations violated his procedural due process rights under the Constitution - In the Sixth Circuit, legitimate requests for medical information do not constitute an invasion of the right to privacy

JEFFREY CAPEN v. SAGINAW COUNTY, MICHIGAN; ROBERT V. BELLEMAN
SIXTH CIRCUIT COURT OF APPEALS No. 23-1665 Decided and Filed: June 5, 2024

"Plaintiff Jeffrey Capen, a former employee of Saginaw County, Michigan, appeals the district court's grant of summary judgment to Defendants Saginaw County and Robert V. Belleman. After Defendants scheduled Capen for two fitness-for-duty evaluations, Capen brought suit under 42 U.S.C. § 1983, arguing that the fitness-for-duty evaluations violated his procedural due process rights under the Fourteenth Amendment. The district court granted Defendants' motion for summary judgment, concluding that Capen lacked a constitutionally protected interest, that he received the process he was due, and that Defendant Belleman was entitled to qualified immunity. For the reasons set forth below, we **AFFIRM** the district court's grant of summary judgment to Defendants."

"From 2007 to 2021, Capen was employed as a maintenance worker in the Saginaw County Maintenance Department. During the period preceding this lawsuit, Capen worked under the supervision of Annette Taylor, who was the Maintenance Department's interim director."

"Also at this time, several Saginaw County departments, including the Maintenance Department, were overseen by Defendant Robert V. Belleman, who was the Controller and Chief Administrative Officer of Saginaw County. In 2020, Belleman implemented a series of job cuts throughout the County, which resulted in Capen's reclassification to a lower-paying job in October 2020."

"In December 2020, Nicholas Cooper, a co-worker of Capen's, reported that Capen had threatened to kill Annette Taylor and employees working in the Controller's Office. According to Cooper, on November 18, 2020, Capen told him that he could not wait for Taylor to leave her role as interim director and that Capen stated 'fuck that bitch' regarding Taylor and 'fuck them motherfuckers in the Controller Office.' *See* Cooper Statement, R. 22-2, Page ID #165. Capen then allegedly stated that 'it would not surprise [him] if they all ended up dead.' *Id.* Cooper claims that he responded, 'Come on Jeff you do not mean that,' after which Capen allegedly said, 'Fuck that Nick I could do it. I mean it I could!' *Id.* Capen denies making any of the above statements."

"On December 6, 2020, Cooper reported this conversation to Taylor, and on December 9, 2020, Cooper submitted a written complaint to Saginaw County detailing Capen's alleged statements."

"Cooper's written complaint was reviewed by Belleman, who in consultation with the County's legal counsel made the decision to schedule Capen for a 'fitness-for-duty' evaluation with a psychologist. At the direction of the County's undersheriff, Belleman also reached out to local law enforcement to have Capen criminally investigated."

"Belleman met with Capen on December 14, 2020, to inform Capen that he had been scheduled for a fitness-for-duty evaluation and advised Capen that he had been placed on paid administrative leave. Belleman also gave Capen a letter that Capen opened after the meeting, which stated that Capen's administrative leave was 'pending completion of an investigation into the statements of violence [he] made.' 12/14/2020 Letter re Leave, R. 22-6, Page ID #196. The letter also stated, 'You must make yourself available to assist with the investigation and any County request during this paid administrative leave. Your lack of cooperation could result in this paid administrative leave being converted to an unpaid leave of absence.' *Id.* A second letter that Capen received from Belleman that day notified him that his fitness-for-duty evaluation was scheduled for the next day, December 15, at Saginaw Psychological Services, and that the evaluation was '[d]ue to a conversation [he] had with a co-worker on November 18, 2020.' 12/14/2020 Scheduling Letter, R. 22-5, Page ID #193. The second letter further stated that '[i]t is mandatory that you appear for this appointment. Should you have any questions or concerns, please feel free to contact [Belleman] immediately.' *Id.*"

"The following day, Capen appeared for his fitness-for-duty evaluation, which was administered by licensed psychologist Mark Zaroff, Ph.D. In a report following the evaluation, Dr. Zaroff stated that Capen had obvious tremors in his hands, complained of 'significant memory problems,' told Dr. Zaroff that he could not 'independently maintain written records of activities,' 'relie[d] on colleagues to remind him what has been done during the day,' and had been recently diagnosed with brain lesions. Zaroff Report, R. 22-8, Page ID #264–65. Based on the above, Dr. Zaroff concluded that Capen was unable 'to perform the work described in [his] current job description' and that his 'neurological condition [may] ha[ve] caused personality change and/or reduced his overall ability to inhibit responses,' and recommended a full neuropsychological evaluation. *Id.* at Page ID #265. Dr. Zaroff also stated that because Capen's 'current neurological condition may be affecting decision making, impulse control, and personality,' he likely did make the statements of violence that Cooper reported and that 'the risk level would be considered moderate and should be taken seriously.' *Id.* at Page ID #266."

"On February 1, 2021, Belleman sent Capen a letter conveying Dr. Zaroff's opinion that Capen was unable to perform his current work and his recommendation for an additional evaluation. The letter also requested that Capen apply for short-term disability leave, asked Capen to release his medical records to the County, and requested the contact information for Capen's primary-care doctor and treating neurologist. Capen's counsel then sent Belleman a letter requesting that Capen be returned to work and advising the County that it had violated Capen's rights under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* Capen also gave the County a physician's note stating that 'Pt is seen here today. Can return to his normal duties at work.' Physician's Note, R. 25-18, Page ID #508."

"On August 26, 2021, the County's counsel sent Capen's counsel a letter directing Capen to 'participate in [an] interactive process' pursuant to the Americans with Disabilities Act and its Michigan counterpart, the Persons with Disabilities Civil Rights Act, M.C.L. § 37.1101 *et seq*. 8/26/2021 Letter, R. 25-20, Page ID #512. According to the letter, Dr. Zaroff's findings revealed that Capen 'm[ight] be unable to perform his current job duties with or without an accommodation.' *Id*. To determine 'the potential reasonable accommodations available' to Capen, the County set an 'interactive process' meeting for September 8, 2021 to take place in the Saginaw County Controller's Office. *Id*. Because an '[e]mployee has a duty to cooperate' in the interactive process, the letter also advised Capen that his 'refusal to participate in the interactive process w[ould] constitute abandonment of his position.'**2** *Id*. at Page ID #512–13."

"On October 19, 2021, Capen filed this lawsuit against Saginaw County and Belleman under 42 U.S.C. § 1983, alleging a violation of his procedural rights under the Due Process Clause of the Fourteenth Amendment. Capen specifically argued that he had a right to refuse his fitness-for-duty evaluations under the Due Process Clause and that Defendants deprived him of this right without any process. Defendants subsequently moved for summary judgment on the grounds that Capen had failed to show a constitutional violation, that Belleman was entitled to qualified immunity, and that municipal liability was improper with respect to Saginaw County."

"The district court granted Defendants' motion for summary judgment. The district court concluded that Capen had failed to demonstrate a procedural due process violation both because he lacked a protected interest and because he was afforded adequate process, defeating his claims against Belleman and Saginaw County. The district court also determined that because any right Capen asserted was not clearly established, Belleman was entitled to qualified immunity. After the district court entered judgment for Defendants on July 20, 2023, Capen timely appealed."

"Capen argues that Defendant Belleman, a government official, and Defendant Saginaw County, a municipality, violated his constitutional rights, for which he seeks damages. A government official is shielded by qualified immunity from a suit for damages unless the plaintiff is able to demonstrate that the government official violated the plaintiff's federal statutory or constitutional rights and that such rights were 'clearly established' at the time of the violation. *See Reed v. Campbell County*, 80 F.4th 734, 742 (6th Cir. 2023) (citation omitted). A municipality, in contrast to an individual government officer, is not protected by qualified immunity. *Hart v. Hillsdale County*, 973 F.3d 627, 645 (6th Cir. 2020). However, because '§ 1983 does not impose *respondeat superior* liability on municipalities,' a plaintiff must demonstrate that the municipality contributed directly to the alleged violation of the plaintiff's rights through the municipality's policies or customs. *See Smith v. City of Troy*, 874 F.3d 938, 946 (6th Cir. 2017)."

"A common requirement for both municipal and individual liability under 42 U.S.C. § 1983 is that a plaintiff's rights under a federal statute or the U.S. Constitution must have been violated. We begin and end our analysis with this requirement because Capen has not demonstrated a violation of his federal statutory or constitutional rights. Capen asserts that Defendants violated his constitutional rights under the Due Process Clause of the Fourteenth Amendment, which prohibits states from 'depriv[ing] any person of life, liberty, or property, without due process of law.' U.S. Const. amend. XIV, § 1. Although the Due Process Clause has both substantive and procedural components, Capen raises only a procedural due process challenge. *See EJS Props., LLC v. City of Toledo*, 698 F.3d 845, 855 (6th Cir. 2012). A plaintiff's procedural due process rights are violated when (1) he is deprived (2) of a constitutionally protected interest in life, liberty, or property (3) through state action and (4) the deprivation occurs without adequate process. *Daily Servs., LLC v. Valentino*, 756 F.3d 893, 904 (6th Cir. 2014)."

"Capen specifically argues that under the Due Process Clause, he possesses a constitutionally protected interest in refusing his fitness-for-duty evaluations. … [U]nder the Americans with Disabilities Act, fitness-for-duty evaluations must be 'job-related,' 'consistent with business necessity,' and based on evidence 'that could cause a reasonable person to inquire as to whether an employee is still capable of

performing his job.' *See Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804, 811 (6th Cir. 1999) (citation omitted). But whether fitness-for-duty evaluations trigger constitutional protections, and specifically implicate the Due Process Clause as Capen argues, is a distinct consideration."

"Our Court does not appear to have directly addressed whether fitness-for-duty evaluations implicate the protections of the Due Process Clause. However, the decisions of other circuits offer helpful guidance. Our sister circuits have recognized that a fitness-for-duty evaluation may trigger the protections of the Due Process Clause if it deprives a government employee of a constitutionally protected property interest in his or her employment by resulting in the employee's placement on unpaid leave or termination." …

"Capen does not argue that he has a protected property interest in his employment, that he experienced stigma as a result of his evaluations, or that his right to privacy was violated, unlike in the cases of our sister circuits. Instead, Capen's sole argument on appeal is that that the Due Process Clause's guarantee of liberty protects an individual's ability to refuse unwanted medical treatment, and that this protection extends to his ability to refuse his fitness-for-duty evaluations. However, the liberty interest in refusing medical treatment does not protect Capen's ability to refuse the fitness-for-duty evaluations at issue in this case."

"The ability to refuse medical treatment is indeed protected by the Due Process Clause. The Supreme Court said so in *Cruzan ex rel. Cruzan v. Director, Missouri Department of Health*, when it declared that competent individuals 'ha[ve] a constitutionally protected liberty interest in refusing unwanted medical treatment.' 497 U.S. 261, 278 (1990). But we find it significant that Capen was not forced to accept any treatment, the very core of the right the Supreme Court identified in *Cruzan*. Capen attended a brief psychological evaluation and was scheduled for a second psychological evaluation, neither of which required him to receive a particular course of treatment. Instead, the purpose of the evaluations appeared to be descriptive. The evaluations sought to collect information from Capen and render a conclusion based on that information, rather than order him to make particular treatment decisions. While Dr. Zaroff's report summarizing the first evaluation recommended that Capen seek individual counseling because of the stress he was under, nothing in the record suggests that this was anything but a recommendation. Capen was not required to attend counseling, nor was counseling made a condition of Capen's employment. Capen was therefore not forced to seek what we would commonly understand to be treatment. *Cf. Washington v. Harper*, 494 U.S. 210, 221–22 (1990) (concluding that the forcible administration of a drug implicated a liberty interest); *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905) (assuming that compulsory vaccination implicated a liberty interest); *Vitek v. Jones*, 445 U.S. 480, 494 (1980) (holding that involuntary psychiatric and behavioral-modification treatment while committed to a hospital implicated a liberty interest)."

"Additionally, the Supreme Court has declared that the right to refuse unwanted medical treatment—the only right on which Capen rests his argument—is based 'on well-established, traditional rights to bodily integrity and freedom from unwanted touching.' *Vacco v. Quill*, 521 U.S. 793, 807 (1997). Capen's psychological evaluations to determine whether he was competent to perform his work, while no doubt personal, do not involve comparable intrusions. The fitness-for-duty evaluation Capen attended involved meeting with a psychologist to perform two standardized written and verbal tests that looked at his memory, comprehension, reading, writing, and drawing abilities. Capen does not point to any violation of his person caused by this evaluation or the second evaluation for which he was scheduled, nor did these limited evaluations encroach on his rights in an analogous manner. From this record, Capen has failed to show that his evaluations implicate the right to refuse treatment."

"The right to refuse medical treatment therefore does not vest Capen with a protected interest in this case. Although Capen does not raise these arguments, we also observe that the record does not appear to suggest that Capen's fitness-for-duty evaluations deprived him of a property interest in his employment without due process. Capen's collective bargaining agreement provided that he could be terminated only for 'just cause,' which would bestow on him a property interest in his continued

employment. *See Singfield v. Akron Metro. Hous. Auth.*, 389 F.3d 555, 566 (6th Cir. 2004). However, Capen's termination was not caused by his fitness-for-duty evaluations."

"The letter setting the interactive-process meeting plainly stated that 'Capen's refusal to participate in the interactive process w[ould] constitute abandonment of his position.' 8/26/2021 Letter, R. 25-20, Page ID #513. It is undisputed that Capen failed to attend this meeting, did not offer any excuses for his absence, and did not attempt to reschedule the meeting. His decision not to attend the interactive-process meeting was therefore the cause of his termination, not his fitness-for-duty evaluations.

Whether the County's possible treatment of Capen as disabled or whether its handling of the interactive process complied with the Americans with Disabilities Act is not before us because Capen does not bring a claim under the Act. Also not before us is the issue of whether the proposed mandatory interactive-process meeting deprived Capen of a property interest in his employment without due process. The sole issue Capen has briefed and which he asks us to decide is whether his fitness-for-duty evaluations violated his procedural due process rights under the Constitution."

" In this Circuit, 'legitimate requests for medical information do not constitute an invasion of the right to privacy.' *Gutierrez v. Lynch*, 826 F.2d 1534, 1539 (6th Cir. 1987); *see also Whalen v. Roe*, 429 U.S. 589, 606 (1977) (Brennan, J., concurring) (explaining that narrowly disseminated medical information requested by a public health official 'with a legitimate interest in the information' would not be 'generally regarded as an invasion of privacy,' but that contrary circumstances could 'implicate constitutionally protected privacy rights'). The County appeared to have a legitimate interest in seeking medical information in connection with Capen's fitness-for-duty evaluations. It did not arbitrarily subject Capen to a fitness-for-duty evaluation, but acted upon specific allegations that Capen had threatened violence, which had been reported to a supervisor and then reiterated in a formal written submission."

"Even when affording due consideration to Capen's rights as an employee, the County had a countervailing duty and responsibility to protect the interests, well-being, and safety of employees and others in the workplace against threats of violence or the potentiality of violence from other employees. There is nothing on the record of this case to suggest that the employer acted unreasonably in carrying out its responsibilities in that regard."

"The only right that Capen claims Defendants violated—his ability to refuse his fitness-for-duty evaluations under the circumstances present here—does not furnish to him a protected interest under the Due Process Clause. *See Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008). We do not address whether or the extent to which an employee may refuse fitness-for-duty evaluations under circumstances not presented in this case. Suffice it to say that compelling circumstances existed in the instant case which justified and supported the County's decision to require the fitness-for-duty evaluations."

CONSTITUTIONAL LAW (Tennessee)

1. Fifty-Dollar penalty clause - While acknowledging that remedial measures naturally have some aspect of deterrence, the Tennessee Supreme Court determined that when the *predominant* purposes served by the judicially imposed penalty are to provide general and specific deterrence and to ensure overall future compliance with the law, then the monetary penalty should be deemed as serving punitive purposes, which brings it into conflict with the Fifty-Dollar Clause - Under the circumstances of the present case sanctioning Ms. Reguli based upon her anticipated speech regarding a public record transgresses the legal bounds of permissible Rule 11 sanctions

See also - SANCTIONS – Pro se attorney litigant made false statements in the law suit for public records – Lawyers are not free to knowingly make false statements simply because the statement is made in a petition under the Public Records Act – Sanctions for file in the public records conclusion were not proper – A citizen's reason for wishing to review a public record is immaterial – County did not disclose that the records requested did not exist - Reguli did not failed to make inadequate inquiry prior to filing a petition - Where a citizen requesting a record is

informed in her denial letter/form that non-existence of the records requested is a basis upon which a public records request could be denied in general but that is not the basis for denial of her request and instead the reason that her public records request is being denied is some other unrelated reason, the citizen is entitled to proceed in filing her statutorily authorized petition with an understanding that the basis of denial is what the government has asserted it to be and not what the government has not asserted it to be - Absent the citizen knowing the records do not exist, where the custodian impliedly indicates the records exist and denial is instead on another basis, a citizen is not subject to sanctions under Rule 11 for failing to inquire further whether the records exist prior to filing a statutorily authorized petition under the Public Records Act - Preemptive sanctioning of speech that has not yet been uttered also raises serious questions related to constitutional safeguards against prior restraints upon speech - Under the circumstances of the present case sanctioning Ms. Reguli based upon her anticipated speech regarding a public record transgresses the legal bounds of permissible Rule 11 sanctions - page 185.

CONNIE REGULI v. ROGERS ANDERSON AS MAYOR OF WILLIAMSON COUNTY, TENNESSEE
COURT OF APPEALS No. M2022-00705-COA-R3-CV Filed April 22, 2024

"What began as a public records request ended with the trial court imposing sanctions upon the requester for violations of Rule 11 of the Tennessee Rules of Civil Procedure. The trial court concluded that the public records requester violated Rule 11 by including a false statement and deceptive exhibit in her Public Records Act Petition, by failing to conduct an adequate inquiry before filing her Petition, and by having an improper purpose in connection with her anticipated speech regarding any public records that she might obtain via the Public Records Act. The trial court imposed multiple sanctions upon the requester including a $5,000 penalty, a requirement to associate counsel in any future pro se filing within the judicial district, and a dismissal with prejudice of her Petition. We conclude the trial court properly determined the requester violated Rule 11 by including a false statement and deceptive exhibit in her Petition. Given the context of the Public Records Act, we conclude, however, that the trial court erred with regard to its conclusion that the requester made an inadequate inquiry prior to filing her Petition and had an improper purpose in connection with the requester's anticipated use of any documents she obtained. We also conclude the monetary penalty imposed by the trial court violates the Fifty-Dollar Fine Clause of the Tennessee Constitution. Because of our other findings, we vacate the trial court's imposition of all three sanctions, and remand for determination of an appropriate sanction in light of our decision."

"What began as a public records request ended with an imposition of Rule 11 sanctions upon the requester. A challenge to these sanctions stands at the epicenter of this appeal. Appellant Connie Reguli requested Williamson County public records. She was seeking public records that would reveal the extent of the County's expenditures, if any, related to the legal defense of a former County employee in civil and criminal proceedings stemming from allegations of a sexual assault by the former employee in 2013 at a County juvenile detention center. Specifically, Ms. Reguli sought public records related to the County's expenditures on the defense of Mr. Juan Cruz, who had worked for the County as a detention monitor. For a number of years, Ms. Reguli represented the alleged victim, J.H., in civil cases in federal and state courts against Mr. Cruz in connection with his alleged sexual assault of J.H. These suits, which also addressed other mistreatment of J.H., also named as defendants Williamson County, County employees Betsy Adgent (Director of Juvenile Services) and Steve McMahon (Juvenile Detention Center Supervisor), and Williamson County Juvenile Court Judge Sharon Guffee."

"The civil suits raised multiple concerns related to the alleged mistreatment of J.H. at the Williamson County juvenile detention facility in 2013. J.H., who was fourteen at the time of alleged conduct giving rise to the litigation, suffers from Pediatric Autoimmune Neuropsychiatric Disorder Associated with Streptococcal Infections ('PANDAS'). J.H. alleged that he was placed in solitary confinement for an excessive period of time, did not receive adequate medical and mental health services, and was sexually assaulted by a juvenile detention center employee. The alleged sexual assault resulted in criminal charges being brought against Mr. Cruz, who was acquitted following a trial."

"Civil litigation, however, also proceeded. Ms. Reguli, on behalf of J.H., filed suit in federal court alleging civil rights violations, *J.H., by next friend Betty H[.] v. Williamson County, Tennessee*, No. 3-14-cv-02356 (M.D. Tenn.) ('the Federal Civil Rights Case'), and in state court setting forth tort claims,

Betty H[.], as Conservator of J.H. v. Williamson County and Juan Cruz, Williamson County Circuit Court, Case No. 2014-CV-588 ('the State Tort Case'). In both cases, suit was brought against Mr. Cruz and Williamson County; Williamson County was dismissed from both suits. *See generally J.H. v. Williamson Cnty., Tenn.*, 951 F.3d 709 (6th Cir. 2020); *Betty H. v. Williamson Cnty.*, No. M-2022-00300-COA-R3-CV, 2023 WL 5193537 (Tenn. Ct. App. Aug. 14, 2023)."

"In February 2022, Ms. Reguli filed a public records request that would become the genesis of this appeal. Therein, she sought the employment records of the Williamson County Juvenile Court Judge Sharon Guffee, whom suit had been brought against as part of the litigation. She also sought the following:

> From December 1, 2013 to date: Attorney fees and legal expenses, experts, court reporters, transcripts, paid for Juan Cruz from December 1, 2013 to date, including but not limited to payments for criminal defense to any attorneys, expert, investigator, or other person in the Case of State v. Juan Cruz, the original indictment having been executed in or about July 2014; including but not limited to payments to Attorneys Karl Pulley, Raquel Abel, Kelli Haas, Jacques Cabell, and any other expert, investigator, legal assistants, or other persons for the defense of Juan Cruz in [the State Tort Case] and [the Federal Civil Rights Case]."

"Responding to Ms. Reguli's public records request, Mr. Cruz filed a motion in the Federal Civil Rights Case seeking a protective order to prohibit the disclosure of the billing records, classifying those records as protected materials pursuant to attorney-client privilege and the work product doctrine. Mr. Cruz also raised concerns in his motion regarding how Ms. Reguli may put the public records to use with regard to seeking to defund his defense through public advocacy in opposition to the County covering his legal expenses, and he requested an admonishment of Ms. Reguli for her inflammatory extrajudicial comments regarding him and the case. Ms. Reguli and J.H.'s mother had previously complained publicly and privately to County elected officials about the County paying for Mr. Cruz's defense, which they believed to be an unnecessary and improper expenditure of public funds. Ms. Reguli filed in federal court a response in opposition to Mr. Cruz's motion for a protective order."

"In March 2022, the County produced a redacted employment file of Judge Guffee. The County, however, denied Ms. Reguli's open records request insofar as it related to its expenditures on the defense of Mr. Cruz. The County's stated basis for denial in a letter written to Ms. Reguli was: 'We are currently unable to provide the requested information due to the motion for protective order filed in the Federal case. Please see attached denial form.' On the form accompanying the denial letter, the marked basis for denial is: 'Your request has been denied pursuant to the following law: . . . Court Case: J.H., by Conservator Betty H[.] v. Williamson County, et al. Motion for protective order filed February 21, 2022. The request is denied until the motion for protective order is heard.'"

"The form provided by the County is a standard form that lists a variety of potential reasons for denial of public records request. Noticeably not marked on the form accompanying the denial letter is the box appearing next to the reason 'The records do not exist.' Accordingly, the County indicated that non-existence of the records was not the basis for denial of the records she had requested. In addition to the form, there is no indication in the written denial letter sent to Ms. Reguli that the records she requested did not exist. Nor is there any indication in the letter or on the form that some of the records she requested exist and others do not."

"Having received the County's denial, Ms. Reguli promptly filed in March 2022, citing the Tennessee Public Records Act, a *Petition for Show Cause Order and Compel the Production of Public Records on Williamson County* ('Petition'). In her Petition, Ms. Reguli noted that she had 'sought to obtain records of invoices and payments county taxpayers made for the criminal and civil defense of Juan Cruz' and that the County had denied her access to these public records. Ms. Reguli noted the County's basis for denial of her request and provided as exhibits to her Petition, among others, the County's denial letter

and accompanying denial form as well Mr. Cruz's motion for a protective order and his memorandum in support thereof."

"Ms. Reguli also asserted in her Petition the following:

> 1. The petitioner, Connie Reguli, is a citizen of Williamson County and an attorney licensed to practice law in the State of Tennessee. I am also the attorney of record for J.H. who is the plaintiff in two civil lawsuits. Case 3:14-2356 is a federal civil rights action and Case 2014CV- 588 is a state court tort case. In both cases, Williamson County was a named defendant but has been released from the cases on separate grounds. These cases arose from the abusive and neglectful treatment of J.H. in the Williamson County detention center in the winter of 2013. Fourteen-year-old J.H. was placed in solitary confinement and was assaulted by a Williamson County employee. The Sixth Circuit Court found that holding J.H. in solitary confinement was excessive punishment and violated his constitutional right as a pre-trial detainee. The perpetrator of the assault was Juan Cruz, a Williamson County employee."

"The case referenced by Ms. Reguli, *J.H. v. Williamson Cnty., Tenn.*, 951 F.3d 709 (6th Cir. 2020), is a published decision of the United States Court of Appeals for the Sixth Circuit. In her Petition, Ms. Reguli did not include the reporter citation for the decision, a copy of the full reported decision, or pages from the published decision, but she instead included four pages taken from the slip opinion of the case as an exhibit."

"In opposition to Ms. Reguli's Petition, the County filed its *Answer to Petition for Show Cause Order and to Compel the Production of Public Records by Williamson County* ('Answer'). Therein, for the first time, the County indicated that any expenditure records provided to Ms. Reguli would be limited to records related to expenditures on Mr. Cruz's defense in the civil cases. The County indicated that it did not fund Mr. Cruz's criminal defense; accordingly, no records existed of County expenditures related to Mr. Cruz's criminal defense: 'While Petitioner sought these records for both Mr. Cruz's criminal and civil cases, any response would necessarily be limited to the civil cases, as no funding was provided by Williamson County for counsel to participate in Mr. Cruz's criminal defense.' The County added that '[t]o the best of [the] County's knowledge, Mr. Cruz retained and paid his criminal attorney.' The trial court, however, suggested during a subsequent hearing that Mr. Cruz's criminal defense was instead paid for by the State. The record is clear that Mr. Cruz's criminal defense was not paid for by the County, but there is ambiguity in the record as to whether his defense in the criminal case was privately paid for or covered by the State."

"In its Answer, the County rejected Ms. Reguli's characterization of the Sixth Circuit decision in J.H.'s case. In doing so, the County stated the following:

> Williamson County denies that the Sixth Circuit Court of Appeals found that J.H.'s actual conditions of confinement violated his constitutional rights. Rather, the Sixth Circuit held that, at the summary judgment stage, taking all of Plaintiff s allegations as true, the allegations made by Plaintiff in that case, if proven, would constitute excessive punishment and would potentially violate his constitutional rights as a pre-trial detainee. Because the Court granted the Motion for Summary Judgment, a factfinder has not ever weighed the credibility of those allegations.

"The County also raised concerns regarding Ms. Reguli's 'public lobby' in opposition to the County's funding of Mr. Cruz's defense in the civil cases against him. Turning to its legal basis in opposition to Ms. Reguli's Petition, the County indicated in its Answer that Mr. Cruz has asked the United States District Court for the Middle District to intervene and put a stop to Petitioner's interference with his ability to fund a defense by precluding Petitioner from obtaining any information about the fees incurred in his defense. Williamson County has not refused to produce the records, but rather has

simply indicated that it is appropriate to defer any production until such time as the U.S. District Court can act. To do otherwise leaves Mr. Cruz without a remedy."

"The County conceded that '[o]rdinarily, Williamson County would respond to any request for attorney invoices by providing an estimate for the cost of copying the invoices and redacting attorney work product and attorney-client privileged information.' In the present case, however, based upon the pending motion for a protective order in the Federal Civil Rights Case, what the County expressly sought in its Answer to Ms. Reguli's Petition before the trial court was delay: 'Williamson County simply seeks to give the Middle District Court an opportunity to consider Mr. Cruz's request before producing the records in question.' The County did not seek sanctions against Ms. Reguli under Tennessee Rule of Civil Procedure 11; the County did not argue in its Answer that Ms. Reguli had violated Rule 11. The County also did not argue that in the absence of a protective order being issued by the federal court, there was any legal basis upon which Ms. Reguli's Petition should be denied."

"This case was assigned to Twenty-First Judicial District Circuit Judge Joseph Woodruff. The trial court held a hearing in March 2022 on Ms. Reguli's petition. At the hearing, the trial court judge disclosed that he had recently received a campaign message from Ms. Reguli, who was a candidate for Juvenile Court Judge, that discussed the Federal Civil Rights Case and the State Tort Case. The trial court judge indicated that he did not think that the campaign mailer warranted recusal, but he stated that he would hear any concerns raised by the parties. At the time, neither party voiced any concerns or suggested recusal was needed. At the hearing, the trial court judge indicated his view that Ms. Reguli's Petition may have violated Rule 11 of the Tennessee Rules of Civil Procedure. In noting concerns during the hearing on Ms. Reguli's Petition, the trial court primarily focused upon the seeming falsity of Ms. Reguli's statement in her Petition related to the Sixth Circuit's decision and Ms. Reguli having sought records related to the County's expenditures on Mr. Cruz's criminal defense. With regard to the former, the trial court indicated that Ms. Reguli appeared to have falsely represented the Sixth Circuit's decision. With regard to the latter, the trial court observed that there were no public records as to the County's expenditures upon Mr. Cruz's criminal defense because the County had not paid for his criminal defense."

"… In the context of this hearing upon Ms. Reguli's Petition, the purpose of the County's questions appeared to be focused on establishing the need for delay in releasing the public records. In its Answer, the County had sought delay to allow the federal court to consider Mr. Cruz's motion for a protective order. The theory undergirding the County's questions appeared to be that delay was needed because Ms. Reguli could not be relied upon to honor a later issuance of a protective order by the federal court. The trial court questioned Ms. Reguli in relation to her failure to review the complete original record from the criminal case prior to those records having been expunged. The trial court suggested that Ms. Reguli should have familiarized herself fully with the original records from the criminal case prior to the records being expunged. Ms. Reguli conceded that she had not done so."

"Following the hearing, the trial court issued an Order providing written notice of potential Rule 11 violations to Ms. Reguli in connection with the filing of her Petition. Therein, the trial court stated that Ms. Reguli appeared to be involved in a public campaign to argue to the County's elected officials and voters that the County should not provide funding for Mr. Cruz's defense. The trial court indicated that failure to fund Mr. Cruz's defense would be contrary to the true interests of the County while being favorable to Ms. Reguli's client J.H. Additionally, the trial court expressed concerns about deceptive public statements from Ms. Reguli regarding the defense of Mr. Cruz that could taint a jury pool and undermine the County's actual interests. In addressing potential Rule 11 violations, the trial court also noted that Ms. Reguli's Petition appeared to contain a false statement in setting forth the finding of the Sixth Circuit in J.H.'s litigation. The trial court observed that what Ms. Reguli said was a finding of the Sixth Circuit in J.H.'s case was not actually the Sixth Circuit's finding. Furthermore, the trial court indicated that there were no records as to the County's funding Mr. Cruz's criminal defense because the County had not funded Mr. Cruz's criminal defense. The trial court stated that this reality could have been discovered by a reasonable inquiry prior to filing her Petition. Finally, the trial court set a

hearing date related to addressing whether Ms. Reguli had violated Rule 11 and, if so, to determine appropriate sanctions."

In the same Order, the trial court also addressed the substance of Ms. Reguli's Petition. The trial court found the County's argument for delay persuasive. In ruling in the County's favor, the trial court stated the following:

> [T]he objection raised by the County to the immediate release of the records is SUSTAINED, pending a ruling on the motion for a protective order currently pending before the United States District Court for the Middle District of Tennessee, after which time the County shall make the records available to the extent of the protective order."

"In the wake of the trial court sustaining the County's request for delay in order to allow the federal court to rule upon Mr. Cruz's protective order motion and the trial court providing notice to Ms. Reguli of potential Rule 11 violations, Ms. Reguli sought recusal of the trial court judge. She filed multiple documents in connection therewith. Ms. Reguli submitted her first recusal motion on April 11, 2022. This motion was based upon the trial court judge having previously recused himself in a criminal case in which Ms. Reguli was the defendant without offering an explanation." …

"The trial court entered an order denying Ms. Reguli's motion for recusal on April 20, 2022. In doing so, the judge noted that a recusal motion is not the proper vehicle to request that an order be set aside; rather, Ms. Reguli should have filed a motion to alter or amend in accordance with the Tennessee Rules of Civil Procedure. Addressing her argument for recusal, the trial court further noted that Rule of Judicial Conduct 2.11(A) provides a non-exclusive list of reasons for a trial court judge to recuse. This point from the trial court was made in response to a presumption set forth in Ms. Reguli's motion for recusal. Ms. Reguli had asserted that, because the trial court judge recused himself from the criminal case without stating a reason for doing so, it should be presumed that the reason for his recusal must be personal bias or prejudice against her. In response, the trial court stated that '[f]or Ms. Reguli to pick one item off that non-exclusive list, and conclude it must be the reason for the court's action, is a leap of logic that lands nowhere.' Additionally, Judge Woodruff concluded that he was not required to disclose his reason for recusal in the criminal case, and indicated that the reason for recusal in the criminal case did not warrant recusal in the present matter. Additionally, the trial court also found Ms. Reguli's motion for recusal to be untimely and subject to denial on that basis."

"After the denial of her motion to recuse, Ms. Reguli filed two additional documents related to recusal, both of which she styled as declarations. On April 22, 2022, Ms. Regulifiled a declaration in support of her previous motion for recusal. In her declaration, Ms. Reguli stated that she observed Judge Woodruff in the courtroom at her criminal trial for facilitation of custodial interference and two counts of accessory after the fact, *see State v. Reguli*, No. M2022-00143-CCA-R3-CD, 2024 WL 913212 (Tenn. Crim. App. Mar. 4, 2024), during portions of the proceedings on April 19 and 20. In addition, Ms. Reguli asserted that the trial court judge opened an email sent to him from Ms. Reguli's campaign, which she indicated was sent to all registered Republican voters in Williamson County. The trial court judge had previously noted receipt of a campaign mailer from Ms. Reguli bringing it to the attention of the parties at an earlier hearing and indicating that he did not think that it warranted recusal. No contemporaneous concerns related to recusal were raised by either Ms. Reguli or the County. In her later filing, Ms. Reguli asserts that the trial court judge should have excluded himself from Ms. Reguli's campaign emails by utilizing the unsubscribe option on the email. Ms. Reguli filed a second declaration on April 23, 2022, again in support of recusal. In the second declaration, Ms. Reguli pointed to comments made by an adult son of the trial court judge about the upcoming Rule 11 hearing scheduled for April 26, 2022. She suggested that the trial court judge was improperly providing information to his son."

"The trial court noted two procedural failings with regard to what it considered to be a second motion for recusal. Notably, '[t]he Second Declaration does not contain any of the required assurances of good

faith and purpose required by Section 1.01 of Rule 10B. Moreover, it is filed less than ten days before the next scheduled hearing in this case which is the Rule 11.03 show cause hearing set for Tuesday, April 26, 2022.' The trial court also addressed the merits of Ms. Reguli's argument for recusal, which the judge found to be lacking. The trial court judge acknowledged his presence in the courtroom at Ms. Reguli's criminal trial. The judge stated that he went to the trial for two purposes: (1) to see how the timing of the trial was progressing because he would also be presiding over a companion case and (2) to hear the verdict announced by the jury. The trial court judge indicated the comments his son made were all related to information found in public records. The trial court judge noted that the information was readily available from public sources, including newspaper articles, the Tennessee Board of Professional Responsibility website, and the clerk's office. The trial court found that '[f]or Ms. Reguli to conclude, as she does, that [the judge's son] received non-public information about the upcoming Rule 11 hearing from the undersigned is an inference with no factual support.' The trial court determined that none of the reasons advanced by Ms. Reguli required recusal and, therefore, denied recusal again."

"Between the trial court's March hearing on Ms. Reguli's Petition and its April hearing related to Rule 11 sanctions, the federal court overseeing the Federal Civil Rights Case issued an order denying Mr. Cruz's motion for a protective order. The federal court did, however, conclude that Ms. Reguli had been violating Local Rule 83.04 of the United States District Court for the Middle District of Tennessee3 through her extrajudicial statements about Mr. Cruz. The federal court admonished Ms. Reguli, as Mr. Cruz had requested, for her extrajudicial statements in violation of Local Rule 83.04 and ordered Ms. Reguli to abide thereby going forward. In accordance with Local Rule 83.04, the federal court directed Ms. Reguli to desist in public comments from referring to Mr. Cruz as a 'pedo,' 'pedophile,' 'rapist,' and 'pervert.' Ms. Reguli was also directed to desist in publicly commenting on the evidence in J.H.'s civil suit against Mr. Cruz."

"Addressing the federal court's decision during the course of the hearing on the possible Rule 11 violations and sanctions, the County represented to the trial court the following: '[W]e have taken the position that the Protective Order has been resolved and therefore, we have, pursuant to statute, sent Ms. Reguli a letter saying we can redact those records and provide them within 30 days, if she pays the cost as per statute.' In other words, the legal basis for the County's opposition to providing redacted versions of the public records requested by Ms. Reguli had been eliminated as a result of the federal court's decision. The trial court expressly agreed that the County's approach in the wake of the federal court decision as to the motion for a protective order was in accordance with its prior Order following the hearing upon Ms. Reguli's Petition."

"The trial court afforded the parties an opportunity at the April hearing on the potential Rule 11 violations and sanctions to present further evidence and argument. The additional evidence presented was less substantial than the testimony at the initial March hearing, addressed above. At the direction of the trial court, the County also presented evidence as to its costs of addressing Ms. Reguli's Public Records request. The trial court also questioned Ms. Reguli regarding past Rule 11 sanctions imposed upon her and whether she had complied with the terms thereof."

"After the hearing, the trial court ultimately concluded that Ms. Reguli had violated Rule 11 and imposed sanctions. The trial court found that Ms. Reguli filed the Petition for an improper purpose, made false allegations, and did not conduct a reasonable investigation into the veracity of her assertion that the County had paid for Mr. Cruz's criminal legal defense. Among the critical findings of the trial court were the following:

> 2. The Petition was presented in part for the improper purpose of (i) harassing the Williamson County Government, and one or more public officials including the sitting juvenile court judge, and (ii) pressuring Williamson County to cease or deny further payments for insurance defense counsel currently being provided to Juan Cruz, under a reservation of rights, and (iii) thereby obtaining an unfair advantage over the County in

> the pending state court civil action, Betty H[.], as Conservator of J. H. v. Williamson County & Juan Cruz, Williamson County Circuit Court, Case No. 2014-CV-588. …
> 6. With respect to the untrue allegation about the 6th Circuit making a finding regarding J.H. being held in solitary confinement in violation of his rights, Ms. Reguli compounded her Rule 11.02 violation by fabricating a materially misleading exhibit to the Petition. This exhibit was deceptively composed for the purpose of ostensibly corroborating the untrue allegation.
> 7. With respect to the allegation that Williamson County paid for the criminal defense of Juan Cruz, Ms. Reguli had six years available to her, within which even the most rudimentary, informal investigation would have disclosed that the allegation had no evidentiary support."

"Addressing what would constitute an adequate informal investigation of the funding of Mr. Cruz's criminal defense, the trial court suggested Ms. Reguli should have familiarized herself with the original criminal file prior to its expungement, inquired informally of the firm that represents the County, and examined the County budget."

"Having concluded that Ms. Reguli violated Rule 11, the trial court imposed sanctions. The trial court imposed three distinct sanctions. For the first sanction, the trial court dismissed Ms. Reguli's Public Records Act Petition with prejudice. The County had conceded, and the trial court confirmed, that Ms. Reguli would have been entitled to the redacted records upon paying the costs under the terms of the trial court's previous Order prior to this dismissal. For the second sanction, the trial court noted that because the County had not sought Rule 11 sanctions that it could not reimburse the County for any legal expenses. The trial court instead imposed what it characterized as a 'financial penalty.' Relying on the County's testimony from the Rule 11 hearing regarding its costs incurred in response to Ms. Reguli's Petition as a benchmark, the trial court ordered Ms. Reguli 'to pay a penalty to the Chancery Court of Williamson County, Tennessee in the total amount of $5,000.' … As for the third sanction, the trial court ordered that 'upon entry of this order, in all civil actions in the 21st Judicial District in which Ms. Reguli is a self-represented party, Ms. Reguli shall engage, at her expense, associate counsel, licensed to practice law in Tennessee, for the limited purpose of ensuring compliance with Rule 11.02.'"

"Ms. Reguli filed a motion to alter or amend the trial court's Order imposing sanctions, and she set the motion for a hearing. However, Ms. Reguli did not follow the procedure set forth in the Local Rules for Twenty-First Judicial District, which provide thatit is in a trial court judge's discretion to set any hearings on motions to alter or amend, and instead set a hearing on her motion unilaterally. The trial court denied Ms. Reguli's motion. In doing so, the trial rejected her arguments and declined to afford Ms. Reguli, who had failed to comply with the Local Rules, a hearing upon her motion."

"Ms. Reguli appeals from the trial court's imposition of sanctions for violations ofRule 11. On appeal before this court, Ms. Reguli asserts that the trial court erred by (1) failing to recuse, (2) issuing Rule 11 sanctions for conduct that Ms. Reguli argues did not violate Rule 11, (3) dismissing her Public Records Act Petition, (4) by imposing fines that violate the United States and Tennessee Constitutions, (5) by imposing sanctions that deny her access to the Courts, and (6) by denying her motion to alter or amend without holding a hearing thereupon. The County contends that the trial court did not err and argues in support of the trial court's declining to recuse as well as its imposition of sanctions."

"On appeal, Ms. Reguli argues the trial court judge should have recused himself. In reviewing Ms. Reguli's briefing on this matter, there are multiple deficiencies in Ms. Reguli's arguments. The most foundational problem is that Ms. Reguli has failed to develop and support an argument in opposition to the procedural grounds noted by the trial court in denying her motions to recuse. The trial court found procedural defects with both motions including untimeliness as to the first motion and defects as to the required assurances of good faith and purpose as well as improper timing of her second motion. While these were not the only bases for the trial court's ruling, having also found her contentions to be lacking on the merits, they are an independent bases for the trial court's decision." …

"Ms. Reguli fails to develop and support an argument that the trial court erred with regard to the procedural bases of its decision. Where an independent alternative ground for the ruling is unchallenged on appeal, a reasonable course for an appellate court is simply to affirm the trial court's ruling. *See Ramos*, 2023 WL 1776243, at *4. That is precisely what we do in the present case, affirming the trial court's denial of Ms. Reguli's motions to recuse."

"There are two core actions by Ms. Reguli that the trial court found to be in contravention of Rule 11.02 of the Tennessee Rules of Civil Procedure and warranting of sanctions. One action relates to a false statement in her Public Records Act Petition and a related deceptive exhibit attached to her Petition. The second core action that formed a basis for sanction is Ms. Reguli's act of filing a Petition seeking public records. The trial court concluded that the Petition was filed with inadequate inquiry having been done prior to filing and that the Petition was filed for an improper purpose in relation to how Ms. Reguli would make improper use of any public records she obtained." …

"We turn first to the trial court's finding of sanctionable conduct in relation to Ms. Reguli's assertion of a false statement in her Petition and the accompanying deceptive exhibit. … [I]t is apparent that the trial court regarded her actions as purposefully misrepresenting the Sixth Circuit's decision. We note that the trial court expressly concluded that the exhibit in support of the false statement was 'deceptively composed.'

"Ms. Reguli argues the trial court erred in determining that she violated Tennessee Rule of Civil Procedure 11.02(3) by making a false statement regarding the Sixth Circuit's decision and by crafting a misleading exhibit in furtherance of the false statement in her Petition. Ms. Reguli argues that the allegedly false statement regarding the Sixth Circuit decision was not, in fact, false but instead a reasonable interpretation of the opinion. She further contends that the purportedly false statement that caused concern for the trial court was immaterial and that the trial court judge erred by determining the false statement was a 'fundamental predicate' of her petition."

"We begin with the latter argument. Ms. Reguli argues on appeal that the trial court 'ruled that the sentence in question was used as a 'fundamental predicate' of the petition.' She argues '[t]his is an error of law.' Ms. Reguli proceeds in her appellate brief to address the meaning of the term 'fundamental predicate' and to contend that the reference to the Sixth Circuit decision was not actually a 'fundamental predicate' for her petition. Accordingly, she contends the trial court erred in ruling that her statement was a 'fundamental predicate.'"

"Our review of the record reveals, however, that the 'fundamental predicate' language which is characterized by Ms. Reguli as a ruling of the trial court appeared not as part of the trial court's ruling but instead in a question the trial court judge asked Ms. Reguli regarding the purpose of why she placed a false statement regarding the Sixth Circuit decision in her Petition. The trial court judge asked Ms. Reguli the following:

> So coming back to that statement in paragraph one of the petition, I take it from reading the petition that that establishes sort of a fundamental predicate for the purposes of this request; am I right about that?

After Ms. Reguli disagreed with this description, the trial court judge noted that she had put the statement regarding the Sixth Circuit opinion into her Petition for 'some purpose.'"

"The irony is not lost on us that, as part of her argument the trial court erred by concluding she misrepresented a decision of the Sixth Circuit, Ms. Reguli represented to this court that language employed in a question from the trial court judge during a hearing was instead a ruling of the trial court. Given that the trial court did not actually rule that her statement was a 'fundamental predicate' to her petition, the trial court certainly did not err by ruling that her statement was a 'fundamental predicate' to her petition."

"The trial court did, however, determine that the exhibit that Ms. Reguli prepared was 'materially misleading,' a conclusion to which Ms. Reguli objects. She asserts that the Sixth Circuit's decision was of no consequence to her public records Petition. She argues, therefore, that the trial court erred in characterizing her purported misrepresentation as material. In Ms. Reguli's view, Rule 11 is inapplicable because her allegedly false statement was not a false statement as to a matter material to determining whether her Petition under the Public Records Act should be granted. Ms. Reguli, however, provides no authority to support her proposition that a knowingly false statement in a filing before a trial court that is not material does not violate Rule 11. She has implicitly left the researching and exploration of this legal question *entirely* to this court; we decline the invitation and instead conclude that this argument is waived." …

"Ms. Reguli argues that her interpretation of the Sixth Circuit's decision was reasonable and that there was nothing improper with regard to her characterization of the decision." …

"The context in which the case arose before the Sixth Circuit was an appeal of a partial grant of summary judgment awarded by a federal district court. *J.H. v. Williamson Cnty., Tenn.*, 951 F.3d 709, 715-16 (6th Cir. 2020). In considering the appeal, the Sixth Circuit noted that '[u]nder the first prong of our qualified immunity analysis, we ask 'whether [J.H.]'s allegations, *if true*, establish a constitutional violation.'' *Id.* at 717 (emphasis in original). In setting forth its holding, the Sixth Circuit expressly returned to this qualification of its decision: 'We therefore hold that, *assuming J.H.'s allegations to be true*, his Fourteenth Amendment substantive due process rights were violated when he was held in solitary confinement from November 17 to December 8, 2013.' *Id.* at 720 (emphasis added)."

"In referencing this decision, Ms. Reguli did not in her Petition or as exhibit thereto provide the published opinion of the Sixth Circuit or a citation to the Sixth Circuit's opinion. Ms. Reguli instead created an exhibit in which she provided four pages drawn from the slip opinion rather than the published opinion. The pages provided by Ms. Reguli did not include language indicating that the appeal before the Sixth Circuit was taken in the context of a partial summary judgment awarded by a federal district court to a number of the defendants in the case. The pages provided did not include portions of the opinion indicating that the Sixth Circuit had ultimately upheld the grant of partial summary judgment to these defendants. The pages provided did not include the Sixth Circuit's express indication that its analysis was addressed to answering the legal questions presented *if* the facts asserted by J.H. were *true*. The pages provided in the exhibit also did not include the Sixth Circuit's express indication that its holding was predicated upon 'assuming J.H.'s allegations to be true.' Reviewing the exhibit Ms. Reguli provided, we see no possible way for the trial court to be able to glean directly from the exhibit itself the existence of critical limitations on the Sixth Circuit's decision that run contrary to Ms. Reguli's characterization thereof. Additionally, the sentence in which the Sixth Circuit expressly sets forth its 'holding' with such limitation begins a mere ten words after the final portion of the opinion provided by Ms. Reguli as an exhibit to the trial court cuts off. Furthermore, in the published opinion in the Federal Reporter, 951 F.3d 709 (6th Cir. 2020), the above referenced '*if true*' limitation appears on page 717 which also includes portions of the opinion that Ms. Reguli did provide as part of her exhibit. However, with using the slip opinion instead, the '*if true*' limitation language appears on another page from the content Ms. Reguli provided in support of her description of the Sixth Circuit's decision. In other words, by using the slip opinion rather than the published version, Ms. Reguli's exhibit supported her characterization of the Sixth Circuit's decision by avoiding revealing this critical limitation."

"As noted above, the trial court judge concluded that Ms. Reguli made a false statement in her representation of the Sixth Circuit's decision in J.H.'s case and presented an exhibit that she crafted in a deceptive manner to further this false statement. Ms. Reguli insists that her reading was reasonable. We cannot agree with Ms. Reguli that she simply presented a reasonable reading of the Sixth Circuit's decision of a case that she had litigated. The Sixth Circuit did not, in fact, find that J.H.'s constitutional rights were violated. The Sixth Circuit found that ***if*** the facts were as J.H. alleged, which had not yet been determined and was disputed, then J.H.'s constitutional rights were violated. Hearing

testimony and considering the matter before it, the trial court determined Ms. Reguli's actions were deceptive. In other words, the trial court did not find the statement in the Petition to be a simple mistake or even aggressive lawyering within professional bounds. From our review of the record, we conclude that the trial court did not err in its conclusion that Ms. Reguli set forth in her Petition a false statement or in its conclusion that the exhibit was crafted in such a manner to deceptively advance this false statement. We find no error in the trial court's conclusion that these actions violated Rule 11."

"While the first core action forming a basis for sanctions in the present case related to the above-discussed false statement, the second core action that the trial court found sanctionable emerged from the act of Ms. Reguli filing the Petition at all. The trial court concluded that Ms. Reguli did not make an adequate inquiry before filing and the Petition had an improper purpose. Her sanctionable action was the act of filing the Petition under these circumstances."

"With regard to the false statement issue addressed above, it is of no consequence that the false statement was made in the context of a petition under the Public Records Act, rather than, for example, a tort or property suit or any number of other types of actions. Lawyers are not free to knowingly make false statements in their filings to the trial court simply because the statement is made in a petition under the Public Records Act. An assertion to the contrary is nonsensical. However, with regard to sanctions related to the reasonableness of her inquiry prior to filing and her likely use of any public records she acquires as the bases for sanction, Ms. Reguli has the better argument. The sanctions emerging from the act of filing of the Petition itself, given the sanctionable aspects identified by the trial court and the circumstances of the present case, are inseparable from the context of the filing being a Public Records Act Petition. It is that context and the complexity generated thereby that reveals and forms the basis for the trial court's error in sanctioning Ms. Reguli for the filing of her Petition."

"The Public Records Act allows for inspection of public records by 'any citizen of this state.' Tenn. Code Ann. § 10-7-503(a)(2)(A). Where his or her request has been in whole or in part denied, '[a]ny citizen of Tennessee . . . shall be entitled to petition for access to any such record and to obtain judicial review of the actions taken to deny the access.' Tenn. Code Ann. § 10-7-505(a). This court has indicated that a citizen's 'motive or reason for wishing to review' a public record is 'immaterial.' *Kersey v. Bratcher*, 253 S.W.3d 625, 629 (Tenn. Ct. App. 2007). In the absence of express statutory limitations to the contrary, state courts in other jurisdictions, addressing their respective state's public records laws, share this understanding. *See*, *e.g.*, *Hopkins v. City of Brinkley*, 432 S.W.3d 609, 616 (Ark. 2014) (indicating that the Arkansas Freedom of Information Act 'does not direct itself to the motivation of the person who seeks public records')[.] …

"We do raise one general note of caution before delving into the particulars of this matter in the present case. Application of Rule 11 sanctions to a requester of public records appears to be rare in state and federal courts." …

"Turning to the particulars of the present case, insofar as she asked for public records as to County expenditures related to the criminal defense of Mr. Cruz, the trial court concluded that Ms. Reguli did not conduct an adequate inquiry prior to filing. The trial court concluded that if she had conducted an adequate inquiry Ms. Reguli would have learned that there were no such expenses prior to filing her Petition. The court found no such records existed because the County did not, in fact, pay for Mr. Cruz's criminal defense. With regard to the adequacy of her pre-Petition inquiry, we note that the County denied Ms. Reguli's public records request, but significantly, the County did not do so based upon the non-existence of such records but instead based upon another unrelated ground."

"When denying a request for public records from a citizen of the State of Tennessee, Tennessee law requires that the custodian of the public records shall '[d]eny the request in writing or by completing a records request response form developed by the office of open records counsel.' Tenn. Code Ann. § 10-

7-503(a)(2)(B)(ii). Whichever approach is taken, '[t]he response ***shall*** include the basis for the denial.' *Id.* (emphasis added)."

"The County's stated basis for denial in a letter written to Ms. Reguli was, 'We are currently unable to provide the requested information due to the motion for protective order filed in the Federal case. Please see attached denial form.' On the form accompanying the denial letter, the marked basis for denial is 'Your request has been denied pursuant to the following law: . . . Court Case: J.H., by Conservator Betty H[.] v. Williamson County, et al. Motion for protective order filed February 21, 2022. The request is denied until the motion for protective order is heard.' In seeking a protective order in the Federal Civil Rights Case, Mr. Cruz had raised concerns regarding how Ms. Reguli may put public records to use. Ms. Reguli referenced this motion and included a copy thereof as an exhibit to her Petition. We note that despite referencing Ms. Reguli's public records Petition and raising concerns about Ms. Reguli's campaign against the County funding his defense, Mr. Cruz did not in his motion for protective order or supporting memorandum provide any indication that he did not receive funding from the County related to his criminal defense."

"What is noticeably not marked on the form provided to Ms. Reguli from the County explaining the basis for denial of her request is the box appearing next to the reason 'The records do not exist.' In other words, the form sets forth among the potential bases for denial of public records that the records do not exist, along with other potential reasons, but that box was not marked by the County when fulfilling its statutory duty to set forth the basis for denial of Ms. Reguli's request. Accordingly, the County indicated that nonexistence of the records was not the basis for denial of the records she requested. In addition to the form, there is no indication in the written denial letter sent to Ms. Reguli that the records she requested did not exist. Nor is there any indication in the letter or on the form that some records exist and others do not. To the contrary, the language of the form provided to Ms. Reguli is most reasonably read as indicating the records exist, but they cannot be provided *currently* because of the pending motion for a protective order. At a minimum, the County's communication indicates that non-existence of the records can be a basis for denial of private records requests in general but that it is not the basis of denial of Ms. Reguli's public records request. The first time the County actually informed Ms. Reguli that there were no such records because the County did not pay anything toward Mr. Cruz's criminal defense was in its Answer to her Petition. In the view of the trial court, Ms. Reguli's sanctionable conduct had already occurred by this point by filing her Petition."

"Under the circumstances of the present case including the sanctioned conduct being the filing of a petition under the Public Records Act, we conclude that the trial court erred in finding that the deficiencies in Ms. Reguli's inquiry prior to filing were such that they rose to the level of being sanctionable. Under Rule 11.02, the inquiry required before filing must be 'reasonable under the circumstances.' Tenn. R. Civ. P. 11.02. There were a number of circumstances that gave rise to Ms. Reguli's inaccurate belief that the County might have provided some measure of funding for Mr. Cruz's criminal defense." …

"Regarding the inquiry that Ms. Reguli should have made, the trial court suggested Ms. Reguli should have, prior to filing her Petition, reviewed the full original file from the criminal case, examined the County budget, and also informally contacted the law firm that represents the County. While the file in Mr. Cruz's criminal case had been expunged, the trial court judge suggested that Ms. Reguli should have reviewed the public record files from the criminal case prior to expungement. Review prior to expungement of a record that was expunged prior to the public records request requires anticipation of a subsequent filing of a petition under the Public Records Act. We do not understand the Public Records Act to require a party to take anticipatory actions months or even years before a public records request so that he or she will know whether the public records actually exist with the potential consequence of failure to do so being Rule 11 sanctions."

"In further addressing the inquiry that Ms. Reguli should have made, the trial court also suggested that Ms. Reguli should have contacted the law firm involved in representing the County to determine if any funds had been expended on Mr. Cruz's criminal defense by the County prior to filing her Petition. The

firm, however, is the same firm that handles public records requests on behalf of the County and that had already responded to Ms. Reguli's public records request without indicating that the records as to County expenditures for Mr. Cruz's criminal defense did not exist." …

"Ultimately, it is the denial letter and accompanying form that are key to our conclusion that the trial court erred with regard to imposing sanctions based upon failure to conduct a reasonable inquiry prior to filing her Petition. As noted above, the context of the Public Records Act is important in this case. Under the Public Records Act, there is a statutory duty upon the government to provide the basis for denial. Tenn. Code Ann. § 10-7-503(a)(2)(B)(ii). Citizens are, then, afforded a right to petition should their request for public records be denied in whole or in part. Tenn. Code Ann. § 10-7-505(a). Where a citizen requesting a record is informed in her denial letter/form that non-existence of the records requested is a basis upon which a public records request could be denied in general but that is not the basis for denial of her request and instead the reason that her public records request is being denied is some other unrelated reason, the citizen is entitled to proceed in filing her statutorily authorized petition with an understanding that the basis of denial is what the government has asserted it to be and not what the government has not asserted it to be. Absent the citizen knowing the records do not exist, where the custodian impliedly indicates the records exist and denial is instead on another basis, a citizen is not subject to sanctions under Rule 11 for failing to inquire further whether the records exist prior to filing a statutorily authorized petition under the Public Records Act. A contrary approach threatens to undermine the structure and operation of the Public Records Act, chilling the pursuit of public records and the transparency in government produced thereby."

"The trial court's finding of sanctionable conduct was also predicated upon Ms. Reguli filing her petition for an 'improper purpose' under Tennessee Rule of Civil Procedure 11.02(1). In reviewing the record and the trial court's order, there is a degree of uncertainty with regard to how precisely the trial court is applying the 'improper purpose' limitation in the present case. We think the better understanding of the trial court's ruling, and the one that maintains a connection between the Petition, the filing of which Ms. Reguli is being punished for, and the 'improper purpose' identified by the trial court, is that the improper purpose is the anticipated improper use of the public records that Ms. Reguli would obtain if her Petition succeeded."

"Read in this light, the trial court determined that Ms. Reguli, who was trying to obtain expenditure amounts paid by the County for Mr. Cruz's defense, would use this information to further her ongoing argument against the continued funding of Mr. Cruz's defense by the County." …

"The language of Tennessee Rule of Civil Procedure 11.02(1) sets forth a limitation on filings for an 'improper purpose' and notes as illustrations thereof 'such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.' There is no requirement of frivolousness under Rule 11.02 in Tennessee as a gateway to finding 'improper purpose.' Accordingly, while a filing being meritorious or a complaint being well-founded certainly does not support a finding of improper purpose, they do not create a protective shield barring a finding of improper purpose under Rule 11.02 in Tennessee. *See*, *e.g.*, *Andrews v. Bible*, 812 S.W.2d 284, 287 (Tenn. 1991) (emphasis added) (stating that '[t]he certification which results from the attorney's signature on a motion, pleading, or other document is directed at the three substantive prongs of Rule 11: its factual basis, its legal basis, ***and its legitimate purpose***'); *Hooker v. Sundquist*, 107 S.W.3d 532, 535 (Tenn. Ct. App. 2002) (emphasis added) (indicating that '[w]hen an attorney signs a motion, document, or other paper submitted to the court, he certifies to the court that he has read it, that he has reasonably inquired into the facts and law it asserts, that he believes it is well-grounded in both fact and law, ***and that he is acting without improper motive***' (footnote omitted)). This variance between Tennessee and other jurisdictions is supportive of the trial court's ruling, but the critical question remains what constitutes an improper purpose."

"Interpreting language similar to Tennessee Rule of Civil Procedure 11.02, a number of state and federal courts have explored precisely that question -- what constitutes an improper purpose for purposes of their respective versions of Rule 11. North Carolina courts, interpreting language similar to

Tennessee's Rule 11, have repeatedly described an improper purpose in terms of a pleading being filed for 'any purpose other than one to vindicate rights . . . or to put claims of right to a proper test.' *See*, *e.g.*, *Jonna v. Yaramada*, 848 S.E.2d 33, 47 (N.C. Ct. App. 2020) (quoting *Mack v. Moore*, 418 S.E.2d 685, 689 (1992))." …

"Mixed motive cases can arise involving a mixture of proper and improper purposes. In such circumstances, the United States Court of Appeals for the Second Circuit concluded that '[a] party should not be penalized for or deterred from seeking and obtaining warranted judicial relief merely because one of his multiple purposes in seeking that relief may have been improper.' *Sussman v. Bank of Israel*, 56 F.3d 450, 459 (2d Cir. 1995)." …

"In the present case, Ms. Reguli requested public records, as was her right as a citizen. *See* Tenn. Code Ann. § 10-7-503(a)(2)(A). She was denied on a basis that she did not believe to be lawful, and she filed her Petition as authorized by statute in Tennessee to obtain the public records that she had been denied. *See* Tenn. Code Ann. § 10-7-505(a).

There does not appear to be any dispute that Ms. Reguli was genuinely seeking to obtain these public records and that she filed her Petition in order to obtain public records that she had been denied in accordance with an express statutory authorization to do precisely that. *See id.* In a conventional analysis of improper purpose, Ms. Reguli filing to obtain the relief she sought in her Petition would in and of itself appear to indicate that Ms. Reguli's purpose was not improper. The trial court's concern does not appear to be that Ms. Reguli filed her Petition without actually caring about whether she obtained the records or was not trying to obtain the records but instead was trying to harass, delay, or increase the cost of litigation. *See* Tenn. R. Civ. P. 11.02(1). It is instead the anticipated use to which Ms. Reguli intended to put these public records, should she prevail in her Petition, that formed the basis for the trial court's conclusion that Ms. Reguli's Petition had an improper purpose. In reaching a determination that the anticipated use of the public records rendered the purpose of filing the Petition improper, the trial court moved from the center of what constitutes an improper purpose under Rule 11.02(1)."

"The question then becomes whether in doing so the trial court reached beyond the permissible boundaries of Rule 11.02(1). In considering that question, we turn to the matter of Ms. Reguli's anticipated use of information in the public records, information regarding the amount of public expenditures on the defense of Mr. Cruz by the County. The anticipated misuse of the public records that concerned the trial court was Ms. Reguli's anticipated use of the public records as further ammunition in her public discourse in opposition to such funding. It appears that the trial court was especially concerned with Ms. Reguli speaking to elected officials and voters regarding what she believes to be a misuse of public funds in paying for Mr. Cruz's defense."

"With regard to concerns about usage, the testimony before the trial court raised serious questions about how Ms. Reguli handles materials under seal and whether she has previously disseminated materials under seal publicly. Insofar as the trial court's decisionmay be related to a concern about disclosure of documents under seal, Ms. Reguli is not seeking to gain access to records under seal via her Petition. She is not gaining access to the records based on her status as an attorney in the course of litigation. The records she is seeking are public records. *See* Tenn. Code Ann. § 10-7-503(a)(1)(A). Any citizen of the State of Tennessee has a right to access these records. *See* Tenn. Code Ann. § 10-7-503(a)(2)(A). In fact, any citizen denied access to public records either in whole or in part has a statutory right to petition for access to the records, *see* Tenn. Code Ann. § 10-7-505(a), precisely the act which Ms. Reguli has been sanctioned for pursuing. As a general matter, making publicly available documents that the public has a right to access under the Public Records Act is not a sanctionable improper purpose of the filing of a petition under the Public Records Act."

"Preemptively sanctioning Ms. Reguli because of her anticipated use of documents available to the public under the Public Records Act in communicating with public officials regarding her disapproval of certain public expenditures raises serious problems with running afoul of the Public Records Act. As

noted above, this court has indicated that a citizen's 'motive or reason for wishing to review' a public record is 'immaterial.' *Kersey*, 253 S.W.3d at 629." …

"Preemptive sanctioning of speech that has not yet been uttered also raises serious questions related to constitutional safeguards against prior restraints upon speech. Ms. Reguli is being sanctioned with denial of access to a document that all other Tennesseecitizens can obtain based upon what it is anticipated that she will say after the public records are in her possession. She is also being sanctioned, including a monetary penalty, for speech that she has not yet uttered. The United States Supreme Court has observed that 'prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.' *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Prior restraints are prohibitions upon 'speech before the speech is uttered or otherwise disseminated.' *McCarthy v. Fuller*, 810 F.3d 456, 461 (7th Cir. 2015). 'Courts generally presume that restraining speech before it is uttered violates the First Amendment, even when the speaker can be punished for the speech after it is made.' Christina M. Mulligan, *Perfect Enforcement of Law: When to Limit and When to Use Technology*, 14 RICH. J.L. & TECH. 13, 45 (2008). With regard to public records, 'attempting to dictate how a requester uses a public record could run afoul of First Amendment prohibitions against the 'prior restraint' of speech.' Frank D. LoMonte, *Copyright versus the Right to Copy: The Civic Danger of Allowing Intellectual Property Law to Override State Freedom of Information Law*, 53 LOY. U. CHI. L.J. 159, 181 (2021)." …

"There are also serious questions that arise related to the constitutional right to petition in connection with the trial court's sanctioning Ms. Reguli based upon her anticipated speech. The anticipated speech that gave rise to the trial court's concern involved Ms. Reguli speaking to elected officials in opposition to continuing public expenditures in support of Mr. Cruz's defense, which she believed to be improper, immoral, and unwarranted expenditure of public funds. Article I, section 23 of the Tennessee Constitution states that

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

The First Amendment to the United States Constitution, as applied to the states via the Fourteenth Amendment, similarly protects the right 'to petition the Government for a redress of grievances.' Sanctioning Ms. Reguli for speech to public officials in opposition to existing government expenditures raises serious questions in relation to the right to petition. As with prior restraints, we do not reach a conclusion as to whether the trial court's sanction order violated these constitutional safeguards; rather, we note these constitutional safeguards would require careful consideration when imposing a sanction in such circumstances."

"Here, the action for which Ms. Reguli is subject to sanction is the act of filing a petition under the Public Records Act. The context of this matter, a Petition under the Public Records Act as well as the nature of speech being directed towards public officials regarding what Ms. Reguli believes to be improper governmental expenditures, and the timing, prior to the speech actually being uttered, significantly exacerbate the complexities of an already complex case."

"The circumstances and context create at least six complications with imposing sanctions based upon Ms. Reguli's anticipated speech regarding any public records that she might obtain. One, courts should be particularly cautious about the dangers of imposing sanctions in public records cases because of concerns about chilling the vindication of citizens' rights to access public records and, thereby, reducing the transparency of government. Two, Ms. Reguli's Petition was filed in order to obtain records to which she was denied access and to which she believed herself to have a legal right under Tennessee law. In other words, she was seeking through her Petition to vindicate her right to the public records. In general, this is the definition of a proper purpose, and there does not appear to be any dispute that Ms. Reguli genuinely wanted to obtain these public records which she reasonably believed

she had a legal right to access. Three, the act of filing of the Petition itself was done with the goal of obtaining the relief sought and not done to harass, delay, or increase costs. The improper purpose identified by the trial court instead arose in relation to the anticipated use to which Ms. Reguli would put the public records if she prevailed in this litigation, that is, after obtaining the relief that she sought. Application of the Rule 11 improper purpose limitation in these circumstances stretches beyond the center of the Rule's restriction."

"Four, sanctioning in connection with the anticipated use of public records runs squarely into the Public Records Act, which as a general matter is unconcerned with the use to which the requester is going put the public records after having acquired them. In this vein, this court has suggested that even inquiring into the requester's motive in seeking public records is improper, yet Ms. Reguli is being sanctioned for her ultimate intended use. Five, sanctions imposed for speech not yet uttered raise serious questions in relation to prior restraints upon speech that were not addressed by the trial court. Six, sanctions for anticipated speech that involves raising grievances before elected officials about public expenditures that one believes to be improper and unwarranted raises serious questions as to the right to petition that were not addressed by the trial court."

"Ultimately, we conclude that under the circumstances of the present case sanctioning Ms. Reguli based upon her anticipated speech regarding a public record transgresses the legal bounds of permissible Rule 11 sanctions. Therefore, while affirming the trial court's findings of sanctionable conduct as to the false statement in her Petition, we conclude the trial court erred in imposing sanctions based upon Ms. Reguli's act of filing her Petition under the Public Records Act."

"Among the sanctions imposed by the trial court for Ms. Reguli's violation of Rule 11 of the Tennessee Rules of Civil Procedure is a $5,000 penalty. Ms. Reguli challenges the $5,000 penalty, arguing that it violates the Fifty-Dollar Fine Clause of Article VI, Section 14 of the Tennessee Constitution. 'Issues of constitutional interpretation are questions of law, which we review de novo without any presumption of correctness given to the legal conclusions of the courts below.' *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 836 (Tenn. 2008)."

"The Tennessee Supreme Court has ruled that the Fifty-Dollar Fine Clause 'applies only to the judicial branch of government,' *Barrett*, 284 S.W.3d at 789-90, and has noted that its 'jurisprudence consistently has affirmed that the clause is intended to limit only the power of the judiciary.' *Id.* at 788." …

"Not all monetary assessments imposed by trial courts are subject to the limitations of the Fifty-Dollar Fine Clause. *City of Chattanooga*, 54 S.W.3d at 259 (stating that 'the restriction on imposing 'fines' contained in Article VI, section 14 does not prevent a courtfrom imposing any monetary assessment in excess of fifty-dollars'). The Tennessee Supreme Court has identified the original public meaning of the term 'fine' in the Fifty-Dollar Fine Clause to be 'a payment to a sovereign as a punishment for some offense.' *Id.* (quoting *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal*, 492 U.S. 257, 265, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989)). The Tennessee Supreme Court has also indicated that this constitutional provision applies to monetary assessments where 'either the intended purpose or the actual purpose or effect of the monetary assessment is to serve as a punitive measure.' *Id.* at 251. The line of demarcation between constitutionally fair and foul turns upon the remedial versus punitive nature of the monetary assessment. *Barrett*, 284 S.W.3d at 789 (noting that the test developed by the Tennessee Supreme Court 'focuses on the distinction between punitive and remedial monetary penalties'); *Town of Nolensville v. King*, 151 S.W.3d 427, 433 (Tenn. 2004) ('We stress that our holding today . . . applies only to *punitive* monetary sanctions and preserves . . . power to impose *remedial* monetary assessments')."

"Truly remedial purposes of a monetary assessment 'include those that (1) compensate for loss; (2) reimburse for expenses; (3) disgorge 'ill-gotten' gains; (4) provide restitution for harm; and (5) ensure compliance with an order or directive, either through the execution of a bond, or . . . through a prospectively coercive fine.' *City of Chattanooga*, 54 S.W.3d at 270. While acknowledging that

remedial measures naturally have some aspect of deterrence, the Tennessee Supreme Court determined that 'when the *predominant* purposes served by' the judicially imposed 'penalty are to provide general and specific deterrence and to ensure overall future compliance with the law, then the monetary penalty should be deemed as serving punitive purposes,' which brings it into conflict with the Fifty-Dollar Clause. *Id.* The Tennessee Supreme Court emphasized this point, reiterating 'that if the predominant 'remedial' purpose served by a monetary sanction is ensuring deterrence against future wrongdoing, then the sanction more properly appears to be punitive in actual purpose or effect.' *Id.* at 270 n.22."

"Here, the trial court ordered Ms. Reguli 'to pay a penalty to the Chancery Court of Williamson County, Tennessee in the total amount of $5,000.' The trial court expressly indicated its reason for the imposition of this penalty was 'to deter repetition of comparable conduct.'" …

"Reflecting upon the inclusion of monetary figures in constitutions in the context of fluctuations of price and value, the Tennessee Supreme Court, therefore, observed that "[h]ad the delegates to the Constitutional Convention of 1796 known that the provision would survive unchanged for more than 200 years, they likely would not have included a precise monetary figure. Nonetheless, this Court is constrained to uphold the plain language of the Tennessee Constitution." *Id.* at 433-34. Under the circumstances of the present case sanctioning Ms. Reguli based upon her anticipated speech regarding a public record transgresses the legal bounds of permissible Rule 11 sanctions."

GTLA

1. On remand the trial court heard the testimony of expert witnesses – The law of the case was that the city did not have constructive notice of the defect in the sidewalk - The doctrine does not necessarily apply: (1) when the evidence offered at a trial or hearing following the remand is substantially different from the evidence in the earlier proceeding; (2) when the prior decision was clearly erroneous and would result in manifest injustice if allowed to stand; or (3) when the prior decision is contrary to a change in the controlling law which has occurred between the first and second appeal - To determine the applicability of the law of the case doctrine here, we must examine what was decided by the court in *Mitchell I*. After an extended discussion of the evidence regarding constructive notice, this Court stated: We conclude here that the evidence before this Court preponderates in favor of the trial court's finding that the City had no constructive notice of the unsafe condition of the sidewalk

RUTH MITCHELL v. CITY OF FRANKLIN, TENNESSEE
COURT OF APPEALS No. M2023-00736-COA-R3-CV Filed May 2, 2024

See APPEALS -Law of the case doctrine – An appellate court's final decision in a case establishes the law of the case when a case is remanded for further proceedings - This law of the case is binding on the trial court during the remanded proceedings and is also binding on the appellate courts should a second appeal be taken after the trial court enters a judgment in response to the remand order - While the doctrine applies only to issues that were actually decided by the court, explicitly or implicitly, it does not apply to dicta -. The law of the case doctrine is neither a constitutional mandate nor an inflexible limit on the adjudicatory power of the courts - Instead, it is a longstanding discretionary rule of judicial practice – page 11.

2. Assault and battery - A governmental entity may not be held vicariously liable for an assault and battery committed by its employee, as the general removal of immunity under the section 29-20-205 addresses only negligent acts or omissions - A governmental entity *may* be liable for an injury caused by its employee's assault and battery *if* there is also a showing of some negligence by the entity itself - Although the intentional torts exception does not include assault and battery, it does include civil rights violations - Consequently, this Court has previously held that where the underlying acts which a plaintiff alleges to be negligent are predicated on intentional tortious conduct involving the violation of the

plaintiff's civil rights' by government employees, the civil rights exception in section 29-20-205(2) is applicable - Thus, even where a complaint couches the claims contained therein as negligent training and supervision claims, if the gravamen of the claim involves a violation of civil rights, then immunity is preserved - The immunity offered by section 29-20-205 is broad, preserving immunity for negligence claims so long as the 'injury arises out of civil rights

LISA KELLEY ET AL. v. NATHANIEL ROOT ET AL.
COURT OF APPEALS No. W2022-01625-COA-R3-CV Filed January 29, 2024

See CIVIL RIGHTS - Section 1983 claim – Failure to train – There is no dispute that 'a governmental entity can be held liable under section 1983 for its failure to properly train and supervise its employees - However, a municipality can be liable under section 1983 only if there is some underlying constitutional violation for which it could be held responsible - To hold the board liable under section 1983 for this claim, Appellants are required to establish two essential elements: (1) that the Board negligently trained or supervised Coach Root; and (2) that this inadequate training or supervision caused a violation of Tyler's rights - There was no constitutional violation found, so school system cannot be liable under section 1983 – page 60.

3. Pedestrian crossing the street at a place other than a cross walk - In addition to the typical elements of a negligence claim, a plaintiff pursuing a claim for negligent hiring and retention must show that the employer knew, or should have known, that the employee was unfit for their job - No evidence that city employee was unfit for his job - Allocation of fault - The court found that the evidence preponderates in favor of a finding that Ms. Easley was at least 50% at fault for the incident at issue - For the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect - Section 55-8-135 of the Tennessee Code Annotated states that every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection *shall yield the right-of-way* to all vehicles upon the roadway - Ms. Easley failed to yield the right of way to Mr. Haynie, stepped into a significantly trafficked roadway between two vehicles without taking proper notice of her surroundings, and did so despite a nearby available stoplight and crosswalk - Remarkably, Ms. Easley attempted to pass in front of Mr. Haynie even though she was unsure if he could see her - In light of the foregoing, we conclude that the evidence preponderates against the trial court's determination that Ms. Easley is only 10% at fault - Veritably, the evidence demonstrates considerably more fault on the part of Ms. Easley, and as such, we conclude that Ms. Easley is, at least, 50% at fault in this matter

SANDRA EASLEY v. CITY OF MEMPHIS
COURT OF APPEALS **No. W2023-00437-COA-R3-CV Filed May 1, 2024**

"This is an appeal of a Governmental Tort Liability Act case and concerns a judgment received by the plaintiff, who stepped off of a curb in the middle of the block, not at the crosswalk, and was struck by a city-owned vehicle while attempting to cross between two stopped vehicles when the light changed. Having reviewed the record transmitted to us on appeal, we reverse the trial court's judgment that the city defendant is liable for the negligent hiring and retention of its employee because the record fails to show that evidence was introduced at trial in support of this claim. Moreover, we reverse the trial court's allocation of fault, concluding that the evidence preponderates in favor of a finding that the plaintiff is at least 50% at fault. Because the plaintiff is accordingly barred from obtaining a recovery, we dismiss the case."

"This appeal concerns a negligence action filed by the Appellee, Sandra Easley, as a result of an incident in which an employee of the City of Memphis ('the City'), Paul Haynie, struck Ms. Easley with a city-owned pickup truck that he was operating. The incident occurred on December 8, 2017, when Ms. Easley stepped off the curb between two stopped vehicles in an attempt to cross A.W. Willis Avenue, near the intersection with North Main Street. As the light changed from red to green, the driver of the City vehicle took his foot off the brake, and as the vehicle began to move, Ms. Easley was

struck by the right front bumper. Approximately forty feet from where Ms. Easley stepped off the curb, there was a stoplight and a crosswalk. The fact that Ms. Easley attempted to cross the street approximately forty feet from the nearby crosswalk is undisputed. In connection with this incident, Ms. Easley was ticketed for attempting to cross the street outside of the crosswalk."

"Following the incident, Ms. Easley was taken to Methodist North Hospital via ambulance. The Prehospital Care Report prepared by the transporting emergency unit noted 'an abrasion to the lower left leg below the knee[.]' The ambulance delivered Ms. Easley to 'ER Non-Emergent,' where her hip and knee underwent X-ray imaging. The imaging did not reveal any fractures. Ms. Easley was provided pain medication, as well as treatment to lower her blood pressure, before being discharged."

"On December 12, 2017, Ms. Easley returned to the Methodist North Hospital emergency room. The associated medical records described Ms. Easley's chief complaint as 'involved in a [motor vehicle crash] 4 days ago, here because she needs more time off work[.]' She underwent a CT scan of her left knee, the report of which reflected no evidence of fracture and little evidence of trauma. Ms. Easley's leg was bandaged, and she was given more pain medication. The treating physician did not provide a referral to physical therapy but instructed Ms. Easley to follow up with her primary care physician."

"On December 18, 2017, Ms. Easley sought physical therapy at Healthone, a medical practice located in Memphis, Tennessee. Healthone's records reflected that Ms. Easley was referred to its practice by her lawyers, not a physician. Subsequently, a nurse practitioner associated with Healthone referred Ms. Easley to two separate imaging centers to receive magnetic resonance imaging ('MRI') of her back and left leg. According to Ms. Easley's testifying but non-treating physician, Dr. Apurva Dalal, the results of these two MRIs were 'normal.'"

"On October 18, 2018, Ms. Easley filed her complaint against Mr. Haynie and the
City. She alleged negligence on the part of Mr. Haynie, asserting the City would be vicariously liable, while also alleging that the City had been directly negligent in hiring, supervising, and training Mr. Haynie."

"When Ms. Easley testified at trial, she initially contended that Mr. Haynie had stopped to permit a group of people and her to cross the street; however, she later testified that Mr. Haynie had stopped for a red light. Nevertheless, Ms. Easley testified that she was attempting to cross behind the other group of people but did not make it to the 'middle ways of the truck' driven by Mr. Haynie before she was struck. She claimed the impact occurred on her waist area and that she landed on the right side of her body."

"Concerning the actions of Mr. Haynie, Ms. Easley testified that he was looking at his phone while stopped at the red light. When asked if Mr. Haynie was 'looking forward,' she stated that she was not sure where he was looking, but also added the following: 'I was watching him as I attempted to cross the road.' Ms. Easley did not offer testimony as to whether she saw Mr. Haynie begin to move the truck before the impact."

"Ms. Easley testified that, after the impact, she was knocked to the ground, but that she stood back up and walked to a Shell gas station nearby to where she had initially attempted to cross. She further stated that Mr. Haynie exited the truck and that he was on his phone. She testified that she asked Mr. Haynie if he knew that he struck her with the truck, but claimed that he 'didn't say anything' in response. According to Ms. Easley, she then called 911."

"In his cross-examination of Ms. Easley, the attorney for the City asked Ms. Easley whether her testimony concerning her two weeks of absence from work was accurate. Ms. Easley responded that it was actually one week. When further inquiry was made into the status of her health, Ms. Easley confirmed that none of her scans had demonstrated a broken bone. Furthermore, Ms. Easley stated that Methodist North did not prescribe physical therapy; rather, she acknowledged that it was her lawyers who instructed her to go to physical therapy."

"Before Ms. Easley closed her proof, Mr. Haynie's response to an interrogatory she had propounded to him during this litigation was read into the record, 2 in which Mr. Haynie had stated in pertinent part as follows: 'Shortly before the incident, I was heading west on A.W. Willis Avenue. I was stopped behind two vehicles at the light . . . . When the light turned green, the two vehicles in front of me began to move. As I [let] my foot off the brake of the vehicle, the plaintiff suddenly and without warning walked into my truck.'"

"The City called one witness, Mr. Haynie, in its defense. Mr. Haynie testified he was stopped in the curb lane of A.W. Willis Avenue, heading west, in the moments immediately before the incident. He also stated that he was stopped because of a red light, not to let anybody cross the street. In characterizing the incident itself, Mr. Haynie testified that, '[w]hen the light turned green, I let my foot off the brake, Ms. Easley stepped into my truck.' He further testified that Ms. Easley 'simultaneously' stepped off the curb when he released the brake. As to Ms. Easley's allegation that he was on his cell phone while operating the vehicle, he denied using his cell phone until after exiting the vehicle and speaking with Ms. Easley, after which he used his phone to dial 911."

"In the resulting judgment following trial, the trial court found the City liable for Mr. Haynie's action of having struck Ms. Easley as she was attempting to cross the street. It further found that Mr. Haynie failed to yield the right of way to Ms. Easley, and that he failed to pay proper attention while driving when he struck her."

"The trial court found that Ms. Easley's injuries were serious and required emergency treatment at Methodist North Hospital, diagnostic treatment, and physical therapy. The court determined that Ms. Easley incurred $22,432.95 in medical special damages, and that these bills were reasonable per Ms. Easley's expert witness, Dr. Apurva Dalal. As for other damages, the trial court found that Ms. Easley incurred $525.00 for a week's lost wages and awarded her an additional $67,307.85 for pain and suffering as well as loss of enjoyment of life. In support of the damages for pain and suffering, the court noted that Ms. Easley needed to be on crutches for a month and endured 'a long and arduous treatment to recover from her injuries.' The total sum of the court's award to Ms. Easley amounted to $106,580.06. The trial court found at one place in its written order that the City was 90% at fault in this matter, while attributing 10% of the fault to Ms. Easley. Of further note, the trial court found as part of its judgment that the City had 'committed negligence in the negligent hiring and retention of Paul Haynie.'"

"We begin our substantive discussion by pointing to several points of confusion that the trial court's final order has generated. The final order on appeal contemplates two separate claims of negligence alleged by Ms. Easley. The first claim alleges negligence on the part of Mr. Haynie, for which the City is vicariously liable. The second claim alleges a direct claim of negligence on the part of the City for the negligent hiring, supervision, and training of Mr. Haynie."…

"Here, the trial court found that the City was both directly negligent for the 'negligent hiring and retention' of Mr. Haynie and vicariously liable for the negligence of Mr. Haynie as the driver. In this circumstance, the trial court should have apportioned fault among Mr. Haynie, the City, and Ms. Easley, because the City is, at least per certain conclusions appearing in the trial court's order, both directly and indirectly liable to Ms. Easley. And yet, the oral ruling finds Mr. Haynie 90% at fault for his negligent operation of a motor vehicle, holding the City vicariously liable, and Ms. Easley 10% at fault for crossing outside of a crosswalk, without determining the apportionment of fault to the City for the negligent hiring claim. However, in the immediate text appearing in the subsequent written order, the court does not attribute any percentage of fault directly to Mr. Haynie; instead, it attributes 90% liability directly to the City. Compounding the confusion related to this matter, the oral ruling is itself incorporated by reference into the written order. In this case, we cannot discern a coherent apportionment of fault as to Mr. Haynie or the City with respect to the trial court's findings of negligence. Clearly in our view, in light of the particular findings of negligence made therein, the trial court's final judgment fails to completely and correctly apportion fault among the parties."

"Aside from the confusion and internal inconsistency that is connected to the trial court's order, we note that the record in this case does not even support the conclusion that the City was independently negligent in relation to a claim for, as found by the trial court, 'negligent hiring and retention.' Of note, in addition to the typical elements of a negligence claim, a plaintiff pursuing a claim for negligent hiring and retention must show that the employer knew, or should have known, that the employee was unfit for their job. *Brown v. Mapco Express, Inc.*, 393 S.W.3d 696, 703 (Tenn. Ct. App. 2012). We cannot find any evidence in the record demonstrating that the City knew or should have knownthat Mr. Haynie was unfit for his job. The trial court's written order simply states that the City 'committed negligence in the hiring and retention of Paul Haynie[,]' without providing any findings of fact that would appropriately support such a conclusion. Frustratingly, the court's oral ruling, which was incorporated into the final order by reference, fails to shed any further light, simply stating as follows: 'The Court also finds if the City of Memphis knew or exercised . . . due diligence in a reasonable inquiry [it] should have known of Paul A. Haynie's ability to drive in an illegal, unlawful, negligent and reckless manner.' The trial court fails to point to any evidence introduced at trial supporting this finding, nor could it have done so."

"Indeed, upon our review of the record, we cannot discern where *any* evidence of Mr. Haynie's alleged unfitness was ever introduced during the trial. In keeping with our observation, the City's brief argues, correctly, that no evidence was ever advanced at trial in support of a claim for negligent hiring or retention. Indeed, it is unclear this claim was even meaningfully pursued by Ms. Easley, outside of merely including it in her pleadings. Because there is a complete lack of evidence supporting any claim for negligent hiring or retention, we conclude that the trial court's ruling in Ms. Easley's favor on that issue must be reversed."

"As touched on earlier, the trial court's order admits of much confusion concerning the actors supposedly at fault in connection with the incident and the specific apportionment of fault among those actors in relation to same. Moreover, through our disposition above, we have held there was not a basis to hold the City independently at fault by way of a claim for negligent hiring or retention. In any event, we note that, through its first issue on appeal, the City has challenged the trial court's apportionment of fault by specifically asserting that the court erred in deciding Ms. Easley was less than 50% at fault for the incident. Having reviewed the record transmitted to us on appeal, we agree with the City. Indeed, having reviewed the evidence pertaining to the alleged fault of Mr. Haynie and the alleged fault of Ms. Easley, we agree that the evidence preponderates in favor of a finding that Ms. Easley was at least 50% at fault for the incident at issue. Although, no doubt, the trial court is accorded considerable latitude in apportioning fault among parties, the appellate courts have had occasion to modify these percentages when the evidence preponderates against the allocation of fault. 'For the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect.' *Hardeman Cnty. v. McIntyre*, 420 S.W.3d 742, 749 (Tenn. Ct. App. 2013) (citing *Watson v. Watson*, 196 S.W.3d 695, 701 (Tenn. Ct. App. 2005))."

"Turning to the case at hand, we conclude that the preponderance of the evidence demonstrates Ms. Easley is certainly more than 10% at fault for the incident; in fact, as previewed earlier, and discussed below, the evidence clearly preponderates in favor of a finding that she is at least 50% at fault. In reaching this conclusion, we note that it is undisputed that Ms. Easley attempted to cross the street, between two vehicles, approximately forty feet from a crosswalk and stoplight, and that she would not have been struck by the City's truck without attempting to cross in such a fashion. Section 55-8-135 of the Tennessee Code Annotated states that '[e]very pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection *shall yield the right-of-way* to all vehicles upon the roadway.' Tenn. Code Ann. § 55-8-135(a) (emphasis added). Ms. Easley does not dispute she attempted to cross A.W. Willis Avenue approximately forty feet from a nearby crosswalk and that she received a ticket for doing so. Although the trial court's final order concluded that Mr. Haynie failed to yield the right of way to Ms. Easley, we have noted in a previous opinion that, 'it must be said as a matter of law that one crossing a street 42 feet from . . . a crosswalk is not within it and, consequently, does not have the right of way over vehicles.' *Seahorn v. Karr*, 242

S.W.2d 331, 334 (Tenn. Ct. App. 1951). As such, we conclude that Ms. Easley failed to yield the right of way to Mr. Haynie, in violation of section 55-8-135 of the Tennessee Code Annotated. With this in mind, it is evident that the premise from which the trial court viewed the actions in this case was misguided. Ms. Easley simply, as a matter of law, did not have the right of way."

"Here, Ms. Easley stepped onto a busy street that was populated by numerous vehicles. Although Ms. Easley testified to looking to her left at Mr. Haynie, she offered conflicting testimony about whether Mr. Haynie was stopped to let pedestrians pass in front of him or if he was stopped because the light was red. Although she claimed she could observe Mr. Haynie using his phone, she also stated that she could not see where he was looking. This conflicting testimony itself demonstrates that Ms. Easley did not have an adequate awareness of her surroundings when she attempted to cross. Indeed, we find it manifestly certain that a pedestrian exercising ordinary care for her own safety would discern whether a vehicle was stopped to let her pass in front, or at least, that the driver had acknowledged she was attempting to cross in front of him. Certainly such caution should be exercised in a situation where, as here, the pedestrian at issue was otherwise acting to step off the curb between two vehicles, and was doing so outside of any crosswalk. Moreover, Ms. Easley was also apparently unaware that the stoplight had turned green as she was stepping into the street. As a result, we conclude that the circumstances of the instant case demonstrate that Ms. Easley did not exercise ordinary care for her own safety."

"In summary, Ms. Easley failed to yield the right of way to Mr. Haynie, stepped into a significantly trafficked roadway between two vehicles without taking proper notice of her surroundings, and did so despite a nearby available stoplight and crosswalk. Remarkably, Ms. Easley attempted to pass in front of Mr. Haynie even though she was unsure if he could see her. In light of the foregoing, we conclude that the evidence preponderates against the trial court's determination that Ms. Easley is only 10% at fault. Veritably, the evidence demonstrates considerably more fault on the part of Ms. Easley, and as such, we conclude that Ms. Easley is, at least, 50% at fault in this matter. Because our conclusion concerning the allocation of fault bars Ms. Easley from recovering, all other issues raised on appeal, to the extent not addressed herein, are pretermitted."

4. High speed chase by police officer resulted in an accident by the car being chased and a third party injured - An officer's decision to commence or continue a high-speed chase may form the basis of liability in an action brought by a third party who is injured by the fleeing suspect, if the officer's decision was unreasonable - Tto hold a governmental entity liable for negligently initiating or proceeding with a police pursuit, a plaintiff must show that the police officer's decisions were unreasonable - The court must determine whether the officer decision to initiate or continue pursuit was unreasonable - If his actions were unreasonable, they may form the basis of liability against the government under Tennessee Code Annotated section 55-8-108(e) - If the officer's actions were unreasonable and a claim against the government may lie, the court must also consider whether the essential elements of negligence were proven, including proximate cause - The officer could have reasonably interpreted plaintiff's speed of fifty to sixty miles per hour, refusal to pull over, and erratic driving as reckless endangerment and evading arrest—both of which pose a danger to the public beyond a simple traffic violation - Officer violated a police regulation in pursuing the vehicle in the manner that he pursued - However, applicable police regulations are but one factor in the *Haynes* analysis, which is not a black and white test - Rather, the factors are non-exhaustive - Although the officer violation of the police regualtions militates against the County under *Haynes*, this single factor does not carry the day in this particular case; indeed, essentially every other factor weighs in the officer favor - Accordingly, we cannot agree with Appellants that the applicable police regulations factor is dispositive here or that the trial court erred by not weighing this factor most heavily

CAPRICE MCLEMORE ET AL. v. KNOX COUNTY, TENNESSEE
COURT OF APPEALS No. E2022-01754-COA-R3-CV Filed March 27, 2024

"Caprice McLemore, Gary McLemore, Misty Tanner, Barrett Tanner, and McKinley Tanner (together, 'Plaintiffs' or 'Appellants') appeal from the judgment of the trial court dismissing their case against

the defendant, Knox County ('Appellee' or 'the County'). Appellants were injured in a car accident on Clinton Highway after being struck by a vehicle driven by Roy Michael Simmons ('Mr. Simmons'), who was evading a Knox County sheriff's deputy. Plaintiffs filed suit against the County, alleging that it was liable for their injuries arising from the accident. Following a bench trial, the trial court concluded that the deputy pursuing Mr. Simmons did not act unreasonably under the circumstances and that the County was thus not liable for Plaintiffs' injuries. Plaintiffs timely appealed to this Court. Discerning no error, we affirm."

"On September 30, 2016, Knox County Sheriff's Deputy Bernie Lyon ('Officer Lyon') stopped at a red light in his unmarked cruiser at the intersection of Clinton Highway and Beaver Creek Road. While waiting in the left-hand turn lane, Officer Lyon witnessed Mr. Simmons's maroon Taurus run through the red light at an estimated speed of fifty to sixty miles per hour. Unknown to Officer Lyon at the time, Mr. Simmons was driving under the influence of a high concentration of methamphetamine. Charles Miller was riding in Mr. Simmons's passenger seat. Officer Lyon activated his blue lights and followed the Taurus, attempting to pull Mr. Simmons over for a traffic violation."

"Mr. Simmons turned right on Emory Road into a Weigel's parking lot and slowed, as if to stop, before accelerating into a nearby shopping center at thirty to forty miles per hour. Officer Lyon activated his sirens and continued to pursue the vehicle. Mr. Simmons then sped through a Pizza Hut parking lot at forty to fifty miles per hour before pulling back onto Clinton Highway, where his vehicle began fishtailing. As the two cars re-entered Clinton Highway, Officer Lyon contacted dispatch to ask whether the fleeing Taurus was registered or reported as stolen. Depending on the results, Officer Lyon planned to terminate the pursuit and apprehend Mr. Simmons at the address associated with the Taurus. However, the dispatch system was down and Officer Lyon did not receive verification."

"With no further information available, Officer Lyon continued the pursuit onto Clinton Highway with his lights and sirens on. Both vehicles reached a speed of approximately eighty miles per hour. After one mile, Officer Lyon realized he and Mr. Simmons were approaching a particularly dangerous, curvy section of Clinton Highway. Officer Lyon decreased his speed, turned off his sirens, and moved into the right-hand lane, keeping his blue lights on. Officer Lyon could still see Mr. Simmons's vehicle. The pursuit from the Pizza Hut parking lot to the point at which Officer Lyon slowed down and deactivated his sirens lasted approximately one minute and ten seconds."

"Shortly thereafter, Mr. Simmons lost control of his vehicle, crossed over the double yellow lines, and collided with oncoming traffic. Mr. Simmons ultimately crashed into a vehicle containing Appellants Caprice McLemore, Misty Tanner, and McKinley Tanner, all of whom were injured. Mr. Simmons and Mr. Miller were killed in the accident."

"On September 28, 2017, the injured parties brought an action against the County pursuant to the Governmental Tort Liability Act ('GTLA'), alleging that Officer Lyon negligently commenced and continued pursuit of the Taurus, that the pursuit caused the accident, and that Officer Lyon violated the relevant Sheriff's Department policy over the course of the pursuit. They claimed that Officer Lyon should not have pursued Mr. Simmons and that the resulting injuries and damages were caused by Officer Lyon's, and therefore the County's, negligence."

"The trial court held a two-day bench trial commencing on May 10, 2022. Both sides presented several witnesses. Appellants called Dr. Geoffrey Alpert, a criminology and criminal justice professor who researches high-risk police activities. Dr. Alpert testified about a pertinent Knox County Sheriff's Office General Order ('the Order'), which provides that officers in unmarked vehicles may only engage in high-speed pursuits involving felonies or incidents presenting an immediate threat to life or property. The Order also defines 'termination' of a police pursuit as turning off blue lights, disengaging sirens, and stopping the vehicle. Dr. Alpert testified that Officer Lyon violated the Order because he pursued Mr. Simmons in an unmarked police car based only on a traffic violation and failed to properly terminate the pursuit by keeping his blue lights on and failing to stop his vehicle. Dr. Alpert opined

that Officer Lyon should have turned off his lights and brought his vehicle to a stop within fifteen seconds of re-entering Clinton Highway from the Pizza Hut parking lot."

"Officer Lyon, who has forty years of experience as a police officer, testified on behalf of the County. He testified that he planned to terminate the pursuit as soon as he discerned the status of the Taurus from dispatch. Officer Lyon testified that he decided to keep his blue lights on as he slowed down on Clinton Highway to alert other drivers to the danger posed by what Officer Lyon described as Mr. Simmons's reckless driving. The County's Medical Examiner also testified, opining on the high concentration of methamphetamine in Mr. Simmons's system on the day of the accident and noting that this impairment would have affected his ability to drive."

"The trial court held that there was insufficient evidence to establish that the initiation or manner of Officer Lyon's pursuit was unreasonable. While the trial court found that Officer Lyon violated the Order, it accepted Officer Lyon's justifications for pursuing Mr. Simmons and failing to terminate the pursuit exactly as prescribed. The trial court also concluded that Officer Lyon was a credible witness. From Officer Lyon's perspective, the trial court reasoned, Mr. Simmons appeared to commit multiple serious offenses after his initial traffic violation. The trial court attributed the accident to other causes, including Mr. Simmons's intoxication, high speed, the fact that the Taurus had bald tires, and the particularly dangerous stretch of Clinton Highway at which the accident occurred."

"The trial court entered its final judgment on November 17, 2022, and Appellants timely appealed to this Court."

" …[W]e review the trial court's conclusions of law with no presumption of correctness. *Union Carbide Corp.*, 854 S.W.2d at 91."

"First, we must determine if Officer Lyon's decision to commence or continue the pursuit was unreasonable such that the County may be held liable under the GTLA. The GTLA shields public entities such as the County from general civil liability. Tenn. Code Ann. § 29-20-201 (2013). This immunity is removed under certain conditions, including for injuries caused by the negligent operation of motor vehicles 'in the scope of [governmental] employment.' Tenn. Code Ann. § 29-20-202(a) (2013). However, the GTLA provides some special protections for law enforcement. For example, police officers are permitted to disregard certain traffic regulations during a vehicle pursuit, so long as they exercise due regard for public safety. Specifically,

> [t]he fact that law enforcement personnel pursue an actual or suspected violator of a law or ordinance who flees from pursuit shall not render the lawenforcement personnel, or the employers of the law enforcement personnel, liable for injuries to a third party proximately caused by the fleeing party **unless the conduct of the law enforcement personnel was negligent and that negligence was a proximate cause of the injuries to the third party**.

Tenn. Code Ann. § 55-8-108(e) (emphasis added). Section 55-8-108 is 'an exception' to section 29-20-202 'which permits law enforcement and emergency personnel to disregard certain rules of the road in limited circumstances.' *Fawcett v. Adreon*, No. M2000-00940-COA-R3-CV, 2001 WL 950159, at *2 (Tenn. Ct. App. Aug. 21, 2001)."

"Nonetheless, 'an officer's decision to commence or continue a high-speed chase . . . may form the basis of liability in an action brought by a third party who is injured by the fleeing suspect, if the officer's decision was unreasonable.' *Haynes v. Hamilton Cnty.*, 883 S.W.2d 606, 611 (Tenn. 1994). *Haynes* is the seminal Tennessee case regarding civil liability arising from high-speed police chases, and both parties address it in their briefing."

"The *Haynes* Court concluded that to hold a governmental entity liable for negligently initiating or proceeding with a police pursuit, a plaintiff must show that the police officer's decisions were

unreasonable. *See Haynes*, at 611 (footnote omitted) ('The general public has a significant interest in not being subjected to unreasonable risks of injury as the police carry out their duties.'). The Court explained that 'an officer's decision to commence or continue a high-speed chase is encompassed within the statutory term 'conduct' and may form the basis of liability in an action brought by a third party who is injured by the fleeing suspect, if the officer's decision was unreasonable.' *Id.*"

"Under *Haynes*, 'determining whether the decision to initiate or continue pursuit is reasonable' requires weighing 'the risk of injury to innocent third parties . . . against the interest in apprehending suspects.' *Id.* The non-exclusive factors for this analysis include: 'the speed and area of the pursuit, weather and road conditions, the presence or absence of pedestrians and other traffic, alternative methods of apprehension, applicable police regulations, and the danger posed to the public by the suspect being pursued.' *Id.* Importantly, police conduct 'should be viewed in light of how a reasonably prudent police officer would respond under the circumstances, and not judged with the perfect vision afforded by hindsight.' *Id.*"

"After articulating the factor test, the *Haynes* Court went on to explain that all negligence claims require proof of: '(1) a duty of care owed by the defendant to the plaintiff; (2) conduct falling below the applicable standard of care amounting to a breach of that duty; (3) an injury or loss; (4) causation in fact; and (5) proximate, or legal cause.' *Id.* (citing *Bradshaw v. Daniel*, 854 S.W.2d 865, 869 (Tenn. 1993); *McClenahan v. Cooley*, 806 S.W.2d 767, 774 (Tenn. 1991)). Ultimately, as the trial court had determined that a police officer's conduct in a high-speed chase could not, as a matter of law, be considered the proximate cause of injuries to third parties, the *Haynes* Court remanded the case back to the trial court to proceed to trial. *Id.* at 613."

"We understand *Haynes* as calling for a two-fold analysis. First, applying the nonexclusive factors listed above, we must determine whether Officer Lyon's decision to initiate or continue pursuit was unreasonable. If his actions were unreasonable, they 'may form the basis of liability' against the County under Tennessee Code Annotated section 55-8-108(e). If Officer Lyon's actions were unreasonable and a claim against the County may lie, we must also consider whether the essential elements of negligence were proven, including proximate cause. *See Spurlock v. Jackson Cnty.*, No. M1999-01407-COA-R3-CV, 2000 WL 1231381, at *3 (Tenn. Ct. App. Aug. 31, 2000) (explaining that '[n]ot only must the [*Haynes*] requirements be met but, in Tennessee, no claim for negligence can succeed in the absence of' the essential elements for negligence including proximate cause)."

"Looking first at the non-exclusive *Haynes* factors, we conclude that the trial court correctly applied these factors, and we agree with the outcome reached; specifically, that Officer Lyon did not act unreasonably under the circumstances. The trial court found that on the day of the accident, traffic was light, the weather was clear and sunny, and the roads were dry. The record preponderates in favor of these findings. No pedestrians were present as the vehicles re-entered Clinton Highway, the highest-speed portion of the pursuit. Officer Lyon considered alternate methods of apprehension but could not pursue those alternate methods without information from dispatch, which was down at the time. Officer Lyon testified that he would have terminated the pursuit had he received that information."

"Other *Haynes* factors considered include 'applicable police regulations' and 'danger posed to the public' by the fleeing suspect. *Haynes*, at 611. The trial court found that Officer Lyon violated the Order by pursuing Mr. Simmons for what amounted to a minor traffic offense—running a red light—in an unmarked cruiser and failing to turn off his lights or stop his car to officially terminate the pursuit. However, the trial court determined that this violation of the Order was insufficient to render the pursuit unreasonable given the surrounding circumstances. We agree. Officer Lyon could have reasonably interpreted Mr. Simmons's speed of fifty to sixty miles per hour, refusal to pull over, and erratic driving as reckless endangerment and evading arrest—both of which pose a danger to the public beyond a simple traffic violation. Further, the pursuit itself was limited in time and distance. After re-entering Clinton Highway, Officer Lyon followed Mr. Simmons for approximately one minute and ten seconds over a distance of just one mile before decreasing his speed in anticipation of the upcoming S-

curves. Given the totality of these circumstances, we agree with the trial court that Officer Lyon did not act unreasonably despite his violation of the Order."

"Applicable police regulations are but one factor in the *Haynes* analysis, which is not a black and white test. Rather, the factors are non-exhaustive. *Id.* Although Officer Lyon's violation of the Order militates against the County under *Haynes*, this single factor does not carry the day in this particular case; indeed, essentially every other factor weighs in Officer Lyon's favor. Accordingly, we cannot agree with Appellants that the 'applicable police regulations' factor is dispositive here or that the trial court erred by not weighing this factor most heavily. This is especially true in light of *Haynes*' mandate that we view Officer Lyon's conduct 'in light of how a reasonably prudent police officer would respond under the circumstances, and not judged with the perfect vision afforded by hindsight.' *Id.*"

On appeal, Appellants also argue that the trial court based its ruling that Officer Lyon did not act unreasonably on information unknown to Officer Lyon at the time, namely that Mr. Simmons was driving under the influence of methamphetamine as later determined by the Medical Examiner. While Mr. Simmons's intoxication is most relevant to the evaluation of proximate cause, we find that it was not inappropriately considered in the trial court's application of *Haynes*. Rather, the trial court correctly considered all applicable factors and the surrounding circumstances in its final judgment. Again, considering the totality of the circumstances, we agree with the trial court's finding that Officer Lyon did not act unreasonably in this case."

"Instances in which police officers have been found to have acted unreasonably under *Haynes* and identified as the proximate cause of third-party injuries are rare and distinguishable from this case. In one such instance, a Clarksville police officer followed a black pickup truck upon receiving information from dispatch that such a vehicle had fled the scene of nearby gunshots. *Smith v. Cherry*, No. M2005-01168-COA-R3-CV, 2006 WL 1724629, at *1 (Tenn. Ct. App. June 22, 2006). While the officer was still pursuing the truck, dispatch instructed him to disregard the earlier transmission. *Id.* The officer informed dispatch that he had terminated the pursuit and turned off his lights and siren, but he continued to follow the truck through an apartment complex parking lot. *Id.* After exiting the complex at a high speed, with the officer still close behind, the truck collided with an oncoming motorcycle. *Id.* The trial court found, and this Court affirmed, that the police officer breached his duty of care and was thus negligent. *Id.* at *5. The instant case is distinguishable from *Smith*, where the police officer, contrary to instructions from dispatch, closely followed the fleeing vehicle 'through [a] congested area.' *Id.* Officer Lyon, on the other hand, reduced his speed, pulled into a slower-moving lane of traffic, and turned off his siren, despite a lack of confirmation from dispatch, all out of concern for public safety."

5. Public duty doctrine - Summary judgment standard - When a motion for summary judgment is made, the moving party has the burden of showing that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law - When the party moving for summary judgment does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim, or (2) by demonstrating that the nonmoving party's evidence at the summary judgment stage is insufficient to establish the nonmoving party's claim or defense - The festivalgoers and the public at large were one and the same - Thus, the undisputed evidence shows that the Town owed a duty to the public at large when it designed and implemented the traffic-control plan - Accordingly, the public-duty doctrine applied in this case and would provide the Town with immunity from Appellees' negligence claims absent a special-duty exception - The special-duty exception removes immunity under the public-duty doctrine when, *inter alia*, a public official affirmatively undertakes to protect a plaintiff and the plaintiff relies on that undertaking - Current case law makes clear that the special-duty exception does not apply unless a public employee affirmatively undertakes to protect the plaintiff, *specifically* - For the special-duty exception to apply, the duty must be particular to the *Plaintiffs*, not to a class of individuals of which Plaintiffs happen to be members - No joint venture was created - There is simply no

language in section 29-20-205 to show that the Legislature intended to remove a governmental entity's immunity so it could be held liable for a separate legal entity's negligence

LARRY KING ET AL. v. TOWN OF SELMER, TENNESSEE
COURT OF APPEALS No. W2023-00390-COA-R9-CV Filed January 8, 2024

"In this Tennessee Rule of Appellate Procedure 9 interlocutory appeal, we address whether the trial court erred in denying Appellant Town's motion for summary judgment on Appellees' negligence and joint-venture claims. We conclude that the public-duty doctrine shields the Town from liability, and the special-duty exception does not apply. Furthermore, Appellees' 'joint venture' claims are simply additional negligence claims seeking to hold Appellant Town liable for the alleged negligence of other defendants. Because the Tennessee Legislature has not waived governmental immunity under such circumstances, Appellant Town's immunity was never removed as to the 'joint venture' claims. As such, the trial court erred in denying Appellant Town's motion for summary judgment as to Appellees' negligence and 'joint venture' claims."

"The Rockabilly Highway Revival Festival (the 'Festival') occurs annually in the Town of Selmer, Tennessee (the 'Town,' or 'Appellant'). The events giving rise to this case took place during the 2016 Festival. Although the Town helped organize the Festival, it was not the exclusive manager of the event. Part of the Town's contribution to the Festival was to develop a traffic-control plan, which involved closing certain segments of the streets for pedestrian-only use during the Festival. The traffic-control plan involved placing barricades of barrels and sawhorses across streets that were closed for pedestrian use. The Town had used this traffic-control plan from 2008 through 2015 without issue."

"On June 11, 2016, during the Festival, 91-year-old Aaron Stamey drove his car through the barricades at a speed of at least 45 miles per hour. Mr. Stamey drove his car over 1,000 feet before fatally striking Sherrie Duncan and Michael Johnson who were standing in the pedestrian-only area."

"On June 7, 2017, Larry King, individually and as personal representative of Ms. Duncan's estate, filed a complaint against the Town in the Circuit Court of McNairy County (the 'trial court'). Mr. King's complaint also named several other defendants who are not parties to this appeal. Mr. King alleged that the Town was negligent in its development and implementation of the traffic-control plan. Relevant here, Mr. King alleged that under Tennessee Code Annotated section 29-20-205 of the Governmental Tort Liability Act (the 'GTLA'), discussed *infra*, the Town's immunity was removed, and it was liable for the negligent acts and omissions of its employees. Mr. King further alleged that none of the exceptions under section 29-20-205 applied. On June 9, 2017, BrittanyJohnson, next of kin to Michael L. Johnson (together with Mr. King, 'Appellees'), filed a complaint against the Town in the trial court. Ms. Johnson's allegations were similar to those of Mr. King, discussed above. On July 6, 2021, the trial court consolidated Appellees' cases. On August 27, 2021, Ms. Johnson amended her complaint to include a joint-venture claim, discussed further *infra*. On November 8, 2021, Mr. King amended his complaint to include an identical joint-venture claim."

"On March 31, 2022, the Town filed a motion for summary judgment. Relevant here, the Town argued that it was immune from Appellees' negligence claims under: (1) the GTLA; and (2) the public-duty doctrine, discussed at length *infra*. As to Appellees' jointventure claims, the Town alleged that it was also immune to such claims because: (1) the GTLA provides no exception for joint-venture liability; and (2) even if the GTLA provided such exception, there was no joint-venture established here. On June 14, 2022, Appellees filed a joint response."

"… [T]he trial court denied the Town's motion for summary judgment as to Appellees' negligence and joint-venture claims."

"On November 2, 2022, the Town moved for leave to file an interlocutory appealunder Tennessee Rule of Appellate Procedure Rule 9. On February 6, 2023, Appellees filed a response opposing the Town's motion. By order of March 9, 2023, the trial court granted the Town's motion to seek interlocutory

appeal. On March 16, 2023, the Town filed its application to appeal with this Court. By order of May 22, 2023, this Court granted the Rule 9 appeal and certified the following issues for review:

> 1. Whether the Town is immune under the public duty doctrine ('PDD') from Larry King and Brittany Johnson's negligence claims against the Town?
> 2. Whether the Town is immune under the Tennessee Governmental Tort Liability Act ('GTLA') from Larry King and Brittany Johnson's joint venture claim against the Town?"

"A trial court's decision to grant a motion for summary judgment presents a question of law. Therefore, our review is *de novo* with no presumption of correctness afforded to the trial court's determination. ***Bain v. Wells***, 936 S.W.2d 618, 622 (Tenn. 1997). This Court must make a fresh determination that all requirements of Tennessee Rule of Civil Procedure 56 have been satisfied. ***Abshure v. Methodist Healthcare-Memphis Hosps.***, 325 S.W.3d 98, 103 (Tenn. 2010). When a motion for summary judgment is made, the moving party has the burden of showing that 'there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.' Tenn. R. Civ. P. 56.04. When the party moving for summary judgment does not bear the burden of proof at trial, 'the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim, or (2) by demonstrating that the nonmoving party's evidence at the summary judgment stage is insufficient to establish the nonmoving party's claim or defense.' ***Rye v. Women's Care Center of Memphis, MPLLC***, 477 S.W.3d 235, 264 (Tenn. 2015) (italics omitted)." …

"In addition to the GTLA, the public-duty doctrine provides an affirmative defense that may 'shield[] a public employee from suits for injuries that are caused by the public employee's breach of a duty to the public at large.' ***Ezell v. Cockrell***, 902 S.W.2d 394, 397 (Tenn. 1995). The public-duty doctrine and its special-duty exception, discussed *infra*, survived the GTLA's enactment. ***Chase v. City of Memphis***, 971 S.W.2d 380, 385 (Tenn. 1998). The Tennessee Supreme Court has explained the interplay of the GTLA and the public-duty doctrine, to-wit:

> Courts first look to the GTLA. If immunity is found under the GTLA, a court need not inquire as to whether the public duty doctrine also provides immunity. If, however, the GTLA does not provide immunity, courts may look to the general rule of immunity under the public duty doctrine. If immunity is then found under the public duty doctrine, the next inquiry is whether the special duty exception removes the immunity afforded under the public duty doctrine.
>
> ***
>
> The special duty exception . . . removes the immunity when:
>
> > (1) a public official affirmatively undertakes to protect the plaintiff and the plaintiff relies upon the undertaking;
> > (2) a statute specifically provides for a cause of action against an official or municipality for injuries resulting to a particular class of individuals, of which the plaintiff is a member, from failure to enforce certain laws; or
> > (3) a plaintiff alleges a cause of action involving intent, malice, or reckless misconduct.

Chase, 971 S.W.2d at 385 (citing ***Ezell***, 902 S.W.2d at 402). 'Where the special duty exception is found to apply, it operates to negate the public-duty doctrine defense.' ***Wells v. Hamblen Cnty.***, No. E2004-01968-COA-R3-CV, 2005 WL 2007197, at *4 (Tenn. Ct. App. Aug. 22, 2005) (citing ***Matthews v. Pickett Cnty.***, 996 S.W.2d 162, 165 (Tenn. 1999)). With the foregoing law in mind, we turn to Appellees' claims against the Town."

"In their amended complaints, Appellees alleged that the Town's immunity was removed under Tennessee Code Annotated section 29-20-205, which provides that a governmental entity's immunity is removed 'for injury proximately caused by a negligent act or omission of any employee within the scope of his employment[.]' Tenn. Code Ann. § 29-20-205. There are certain exceptions to this statute, but those exceptions are not at issue in this appeal." …

"The Town's first issue on appeal is whether it is immune from Appellees' negligence claims under the public-duty doctrine. As discussed above, courts do not engage in a public-duty analysis unless immunity is first removed under the GTLA. ***Chase***, 971 S.W.2d at 385. Here, the trial court concluded that there were disputed issues of material fact as to whether the Town was immune under section 29-20-205. Whether the Town maintained its immunity under the GTLA as to Appellees' negligence claims is not at issue in this appeal. 'Under Rule 9 of the Tennessee Rules of Appellate Procedure, the issues in a Rule 9 interlocutory appeal are limited to the questions that are certified by the trial court in its order granting permission for the appeal and also certified by the appellate court in its order granting permission for the appeal.' ***Shaffer v. Memphis Airport Auth.***, No. W2012-00237-COA-R9-CV, 2013 WL 209309, at *3 (Tenn. Ct. App. Jan. 18, 2013) (citing ***In re Bridgestone/Firestone***, 286 S.W.3d 898, 902 (Tenn. Ct. App. 2008)). Accordingly, our analysis is limited to the issues that we have certified for review, and we proceed with our public-duty analysis without analyzing whether the Town's immunity was removed under section 29-20-205."

"The first question we must answer in our public-duty analysis is whether there is a genuine issue of material fact as to whether the Town owed a duty to the public at large when it contributed to Festival operations. Under Tennessee Rule of Civil Procedure Rule 56.03, the party moving for summary judgment must submit a statement of undisputed facts 'to assist the [c]ourt in ascertaining whether there are any material facts in dispute.' Tenn. R. Civ. P. 56.03. The statement is a 'concise statement of the material facts as to which the moving party contends there is no genuine issue for trial.' Tenn. R. Civ. P. 56.03. 'Each fact shall be set forth in a separate, numbered paragraph[, and e[ach] fact shall be supported by a specific citation to the record.' Tenn. R. Civ. P. 56.03.
Relevant here, in its statement of undisputed facts, the Town alleged:

> 8. The Town developed the traffic control plan to protect the public that attended the Festival by closing off the roads to prohibit vehicles from driving into the street.
>
> 9. The Town developed the [traffic-control] plan to protect the public—not just [Ms.] Duncan or [Mr.] Johnson.

As support for these alleged facts, the Town cited Fire Chief Anthony Carr's and Police Chief Neal Burks' deposition testimonies. Turning to Chief Carr's deposition, he testified that the traffic-control plan was in place 'to protect the festivalgoers.' Chief Burks testified that the purpose of blocking off the streets in the traffic-control plan for the Festival was '[f]or the public safety.' Specifically, Chief Burks testified that blocking the streets was important to control the traffic to allow for pedestrians to safely walk in the street and to prevent cars from driving where pedestrians walked."

"… In their response to the Town's statement of undisputed facts, Appellees admitted 'that a traffic control plan was developed to attempt to prohibit vehicles from driving into the street.' However, Appellees disputed 'that the traffic control plan was to protect the public at large.' As support for this contention, Appellees cited *the same portion of Chief Carr's deposition testimony* that the Town cited, *i.e.*, that the traffic-control plan was in place 'to protect the festivalgoers.' Because the parties cited the same line of testimony, there is no factual dispute that the Town created and implemented the traffic-control plan to protect the people who attended the Festival. The dispute arises in the parties' interpretations of the term 'festivalgoers.'"

"Appellees argue that the 'festivalgoers' were a subgroup of people and distinctly separate from the 'public at large.' As such, Appellees argue that the public-duty doctrine does not apply because the Town owed a duty to the festivalgoers only rather than to the public at large. Appellees' argument

presents a distinction without a difference as acknowledged by Appellees themselves in their amended complaints. In his amended complaint, Mr. King pleaded that '[t]he Festival ***was advertised to the general public*** as a fun, family-friendly event.' (Emphasis added). Ms. Johnson also acknowledged the public nature of the Festival in her amended complaint, to-wit:

> The [F]estival grew out of the creation of an outdoor mural celebrating the rockabilly roots of music in the local area. Interest developed to celebrate the rockabilly history of the local area, and a group of like-minded individuals set out to create and put on an outdoor festival, ***open to the public***, to promote Selmer's history and local interest with rockabilly music . . . .'

(Emphasis added). We note the general rule in Tennessee 'that factual statements in pleadings are judicial admissions being conclusive against the pleader in the proceedings in which they are filed unless they have been amended or withdrawn.' ***First Tennessee Bank, N.A. v. Mungan***, 779 S.W.2d 798, 801 (Tenn. Ct. App. 1989). Thus, according to Appellees, the class of people (1) who were invited to the Festival, (2) who could attend the Festival, and (3) whom the Town undertook to protect in its planning of the Festival, was the public at large."

"… Contrary to Appellees' argument, this is precisely the policy behind the public-duty doctrine. As discussed in further detail below, this Court has explained that,

> [i]n Tennessee, it has long been held that a plaintiff must show the existence of a duty particular to him or her, as distinct from a duty owed to the public in general.
>
> > It is settled law in this state that private citizens, as such, cannot maintain an action complaining of the wrongful acts of public officials unless such private citizens aver special interest or a special injury not common to the public generally.
>
> ***Ezell***, 902 S.W.2d at 397, quoting ***Bennett v. Stutts***, 521 S.W.2d 575, 576 (Tenn. 1975). …

As discussed above, there is no dispute that the Town created and implemented the traffic-control plan to protect the people who attended the Festival. Given Appellees' allegations in their amended complaints, the undisputed summary judgment evidence, and the well-established law on the public-duty doctrine, we conclude that the festivalgoers and the public at large were one and the same. Thus, the undisputed evidence shows that the Town owed a duty to the public at large when it designed and implemented the traffic-control plan. Accordingly, the public-duty doctrine applied in this case and would provide the Town with immunity from Appellees' negligence claims absent a special-duty exception, to which we now turn. *See* ***Chase*** 971 S.W.2d at 385."

"The special-duty exception removes immunity under the public-duty doctrine when, *inter alia*, a public official affirmatively undertakes to protect a plaintiff and the plaintiff relies on that undertaking. ***Chase***, 971 S.W.2d at 385 (citing ***Ezell***, 902 S.W.2d at 402). Our current case law makes clear that the special-duty exception does not apply unless a public employee affirmatively undertakes to protect the plaintiff, *specifically*." …

"We recall Appellees' argument that 'the festivalgoers' were a subgroup of people and that the Town undertook to protect this subgroup only, rather than the general public. This Court has rejected such argument before. In ***Holt v. City of Fayetteville***, No. M2014-02573-COA-R3-CV, 2016 WL 1045537, at *1 (Tenn. Ct. App. Mar. 15, 2016), a police officer arrested Misty Shelton and placed her in his police car. Thereafter, Ms. Shelton stole the police car and, while driving at a high rate of speed, collided with the plaintiffs' vehicle. ***Id***. Relevant here, the plaintiffs argued that the special-duty exception applied because 'by placing [Ms.] Shelton in custody, [the police officer] 'narrowed down the scope of his duty of reasonable care from the public at large down to the class of civilians who were then

utilizing roadways' in the City.' ***Id***. at *5. This Court disagreed and concluded that '[f]or the special-duty exception to apply, the duty must be particular to the ***Plaintiffs***, not to a class of individuals of which Plaintiffs happen to be members.' ***Id***. (emphasis added). We also noted that the plaintiffs in ***Holt*** could not show reliance on the actions of the police officer whom they alleged was negligent. ***Id***."

"With the foregoing law in mind, we turn to Appellees' allegations. The allegations in Appellees' amended complaints concerning the special-duty exception differ, so we address them separately. In his amended complaint, Mr. King alleged that '[b]y inviting and in fact encouraging Ms. Duncan to attend the Festival, a special relationship was established between [the Town] and Ms. Duncan,' and that the Town 'undertook to protect [Ms. Duncan] and she relied on that undertaking to her detriment[.]' However, as noted *supra*, Mr. King also alleged that '[t]he Festival was advertised to the general public.' Thus, taking Mr. King's allegations as true and in context, the gravamen of his complaint is that, by inviting and encouraging each member of the public to attend the Festival, the Town established a special relationship with each one of 'the festivalgoers,' *i.e.*, the general public. Absent from Mr. King's pleadings are any allegation that the Town owed a duty specifically to Ms. Duncan. There is nothing in the complaint from which a reasonable person could infer that that the Town, or its representatives, (1) invited Ms. Duncan, *individually*, to attend the Festival, or (2) undertook to protect Ms. Duncan, *specifically*, when she visited the Festival. As such, there can be no inference that Ms. Duncan relied on any protections that were specific to her."

"… Here, there is no such evidence to show that the Town, or the Town's representative, undertook to protect Ms. Duncan, *specifically*, when she attended the Festival, and/or that Ms. Duncan relied on that undertaking for her safety."

"Turning to Ms. Johnson's amended complaint, it wholly failed to allege that either a public official from the Town or the Town itself undertook to protect Mr. Johnson, *specifically*. Rather, she alleged, *inter alia*, that the Town: (1) 'had a duty to maintain public . . . safety'; (2) had a 'non-delegable operational duty to provide for the public safety of attendees at the 2016 [Festival]'; and (3) 'failed to take reasonable precautions to protect the safety of attendees.' On review of Ms. Johnson's amended complaint, she simply alleged that the Town owed a duty to 'the festivalgoers,' *i.e.*, the general public. As such, Ms. Johnson failed to allege any facts from which one could infer that the Town undertook to protect Mr. Johnson, *specifically*, and that Mr. Johnson relied on that undertaking for his safety when he attended the Festival. As discussed *supra*, in order to survive summary judgment, Ms. Johnson had the burden of setting forth specific facts, based in evidence, showing that the Town or its representative undertook to protect Mr. Johnson and that he relied on that undertaking for his safety. ***Rye***, 477 S.W.3d at 265. Ms. Johnson has failed to provide any such evidence. Consequently, she has not met her burden to survive summary judgment."

"Although Appellees argue that the Town established a special relationship with Ms. Duncan and Mr. Johnson, their pleadings and the summary judgment evidence demonstrate otherwise. As noted above, '[t]he special duty exception applies where 'a 'special relationship' exists between the plaintiff and the public employee, which gives rise to a 'special duty' that is more particular than the duty owed by the employee to the public at large.' ***Wells***, 2005 WL 2007197, at *4 (quoting ***Ezell***, 902 S.W.2d at 401). Similar to the plaintiff in ***Ezell***, Appellees failed to allege that the Town or the Town's representative had 'by their actions, affirmatively undertaken to protect' either Ms. Duncan or Mr. Johnson, *specifically*, as opposed to the protection undertaken for the public at large. *See* ***Ezell***, 902 S.W.2d at 403; *see also* ***Kimble v. Dyer Cnty. Tennessee***, No. W2019-02042-COA-R3-CV, 2020 WL 7389381, at *6 (Tenn. Ct. App. Dec. 16, 2020) (concluding that there were no facts alleged in the complaint from which one could infer that a deputy undertook to protect the plaintiff or that the plaintiff relied on anything the deputy said or did). Indeed, Appellees failed to set forth any specific facts in either their amended complaints or at the summary-judgment stage, alleging that, for example, Chief Burks, Chief Carr, or any other representative from the Town had any direct contact with Ms. Duncan or Mr. Johnson much less undertook to protect them. Rather, as indicated by Chief Burks and Chief Carr, in their respective deposition testimonies, the traffic-control plan was developed to protect the festivalgoers, *i.e.*, the public at large, and for general public safety, and was not

implemented specifically for Ms. Duncan's or Mr. Johnson's safety. Accordingly, we conclude that no special-duty exception existed to remove the immunity provided to the Town under the public-duty doctrine. Thus, we conclude that the trial court erred when it denied the Town's motion for summary judgment as to Appellees' negligence claims."

"The next issue for our review is whether the Town is immune under the GTLA from Appellees' joint-venture claims.7 Appellees allege that the Town formed a joint venture with the other Festival defendants when it participated in the planning and operation of the Festival. As we understand it, Appellees' argument is that their joint venture claims are separate contract claims that do not fall under the GTLA, and that, because our Legislature has allowed joint-venture claims against municipalities such as the Town, Appellees' joint-venture claims should be allowed to proceed to trial."

"As discussed, *supra* at III(A), a governmental entity's sovereign immunity is waived only when the Legislature authorizes such waiver. *See* ***Lawson***, 661 S.W.3d at 59. Accordingly, we must determine whether the Legislature has authorized the removal of a governmental entity's immunity under the facts alleged by Appellees. Turning to the amended complaints, Appellees pleaded identical joint-venture claims, to-wit:

> Defendants individually and collectively combined their efforts, property, money, skill and knowledge, among other assets, to create and carry out the 2016 Rockabilly Highway Revival Festival for their joint profit and/or benefit.
>
> ***
>
> ***Defendants engaged in such actions and omissions*** concerning the planning and execution of the 2016 Rockabilly Highway Revival Festival ***to create unreasonable risk of harm to festival attendees***, including Plaintiff's decedent Michael L. Johnson, such that ***Defendants' conduct was negligent, grossly negligent, reckless, and/or wanton***.
>
> ***Defendants' conduct was the direct and/or proximate cause of the severe injuries***, harms, losses and/or wrongful death of Michael L. Johnson.
>
> ***As a direct and proximate cause of the negligence of Defendants***, Plaintiff['s] decedent, Michael L. Johnson, suffered catastrophic pain, anguish, injury, and loss of life, in all its forms, in violation of Tennessee law.

(Emphases added). As the foregoing pleadings show, Appellees did not allege that the Town or any other defendant *breached* an alleged joint-venture, *i.e.*, Appellees have not alleged a contract claim. Rather, the above allegations show that Appellees seek to establish a joint-venture between the Town and the other Festival defendants *to hold the Town liable for the alleged negligence of the other Festival defendants*."

"Appellees' requested damages underscore that Appellees have simply alleged another negligence claim." …

"Although Appellees have endeavored to circumvent the GTLA by arguing that their joint-venture claims are contract claims, as demonstrated *supra*, the amended complaints show that Appellees have simply pleaded additional negligence claims. Thus, we look to the GTLA to determine whether the Legislature has waived the Town's sovereign immunity in this particular circumstance. It is undisputed that the Festival defendants are independent legal entities, *i.e.*, (1) McNairy County, Tennessee; (2) Arts in McNairy County; (3) McNairy County Chamber of Commerce; (4) McNairy County Economic Development Commission, Inc.; (5) Rockabilly Highway Revival Festival; and (6) Rockabilly Highway Revival Festival and Car Show. Appellees cannot hold the Town liable for the alleged negligence of

another legal entity. As discussed above, section 29-20-205 removes governmental immunity 'for injury proximately caused by a negligent act or omission of any employee within the scope of his employment[.]' Tenn. Code Ann. § 29-20-205. While section 29-20-205 makes clear that a governmental entity may be liable for *its employee's* negligent act or omission, the statute does not extend such liability to *a separate legal entity's* negligent act or omission. When applying any statute, a court's duty is to ascertain and fully effectuate the 'legislative intent [of the statute], taking care not to broaden [it] beyond its intended scope . . . .' ***Womack v. Corr. Corp. of Am.***, 448 S.W.3d 362, 366 (Tenn. 2014) (citing ***Shore v. Maple Lane Farms, LLC***, 411 S.W.3d 405, 420 (Tenn. 2013); ***Carter v. Bell***, 279 S.W.3d 560, 564 (Tenn. 2009)). The Tennessee Supreme Court has explained that '[o]ur analysis naturally begins with the words used in the statute,' ***Womack***, 448 S.W.3d at 366 (citing ***Shore***, 411 S.W.3d at 420), and we must interpret those words under their 'natural and ordinary meaning in the context in which they appear and in light of the statute's general purpose.' ***Id.*** (quoting ***Mills v. Fulmarque, Inc.***, 360 S.W.3d 362, 368 (Tenn. 2012)). We also note that, when immunity is removed under the GTLA, 'any claim for damages must be brought in strict compliance with the terms of [the GTLA].' Tenn. Code Ann. § 29-20-201(c). Giving the words in the statute their 'natural and ordinary meaning,' there is simply no language in section 29-20-205 to show that the Legislature intended to remove a governmental entity's immunity so it could be held liable for a separate legal entity's negligence. Because the GTLA does not remove the Town's immunity under these particular facts, the Town's sovereign immunity remains, *see* Tenn. Code Ann. § 29-20-201(a), and it cannot be held liable for the alleged negligent acts or omissions of the other Festival defendants. In short, there is no genuine issue of material fact as to Appellees' 'joint venture' claim, and the Town is entitled to judgment as a matter of law.' Tenn. R. Civ. P. 56.04. Accordingly, we conclude that the trial court erred when it denied the Town's motion for summary judgment as to Appellees' 'joint venture' claims."

IMMUNITY

1. Tort claim against state employee drug agents for accident due to high speed chase – One defendant was acting as a federal employee – The other two defendants were not acting as federal employees and are subject to suit - Individuals are employees of the federal government under the FTCA if they are: (1) officers or employees of any federal agency; or (2) persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation - Under the official capacity clause, a state employee can meet the definition of a federal employee if they can prove that they act[ed] on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation – Two state employees were not under direct control of the federal agency and were not immune from suit - Under the operational plan, the those two state employees were never under direct ATF supervision, so they were not acting on behalf of the ATF - Whether an employee was acting within the scope of their federal employment under the Westfall Act is governed by the agency law of the state in which the incident occurred

JASON LAIBLE, Executor of the estates of Raymond Laible and Gayle Laible; STEVEN KLEIN; MARIBETH KLEIN v. TIMOTHY LANTER; BRETT THOMAS; DONALD SCALF
SIXTH CIRCUIT COURT OF APPEALS No. 22-5496 Decided and Filed January 23, 2024

"In August 2020, the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) and the Cincinnati Police Department (CPD) participated in a joint federal task force to arrest Mason Meyer. While fleeing from CPD officers, Meyer lost control of his vehicle and crashed into a restaurant, killing Gayle and Raymond Laible and severely injuring Steven and Maribeth Klein. The Laibles' estate and the Kleins brought this lawsuit alleging that three CPD officers were negligent in their execution of the high-speed car chase."

"The CPD defendants in this action—Sergeant Donald Scalf, Sergeant Timothy Lanter, and Officer Brett Thomas—allege that they were federal employees immune from common-law tort actions due to their participation in the federal task force to arrest Meyer. The district court denied the officers' motion

for immunity under the Westfall Act, 28 U.S.C. §§ 2679(b)(1), (d)(1), (d)(3). We reverse the district court's denial of immunity for Scalf because he was a federal employee acting within the scope of his employment during the chase. We affirm the district court's denial of immunity as to Lanter and Thomas because neither were federal employees at the time of the incident."

"On August 7, 2020, a federal task force led by the ATF, with the assistance of CPD and the Northern Kentucky Drug Strike Force (NKDSF), executed state warrants to apprehend Mason Meyer in connection with a drug and gun trafficking investigation in Cincinnati, Ohio. Donald Scalf, a CPD sergeant, had been deputized to the ATF since August 2015. Scalf was assigned to surveil Meyer under the ATF's operational plan for the arrest. On the day of the incident, Meyer left his home driving a vehicle containing two other people and a suspected illegal weapon. CPD was to 'conduct a felony traffic stop,' which contemplated pursuit, per its standard operating procedures should Meyer escape an attempted traffic stop. ATF Operational Plan, R. 58-1, PageID 445. CPD Sergeant Timothy Lanter attempted a traffic stop, but Meyer sped off."

"Lanter pursued and requested CPD Officer Brett Thomas's assistance. Thomas responded in a separate vehicle. Scalf supervised the pursuit via radio as a deputized ATF agent and declared himself the Officer-in-Charge (OIC) pursuant to CPD policy. The ATF Resident in Charge (RAC), Frank Occhipinti, assisted Scalf by using cell phone tracking data to confirm that Meyer was in the vehicle. Shortly thereafter, radio communication shifted from a CPD/ATF joint radio channel to a CPD-only channel."

"The officers chased Meyer through parts of Cincinnati, with all three vehicles reaching speeds over 100 miles per hour. Scalf authorized Lanter's and Thomas's continued pursuit of Meyer across the bridge into Covington, Kentucky. Meyer and the CPD vehicles crossed into oncoming lanes of traffic on the bridge and continued the chase through downtown Covington. At one point, Lanter authorized Thomas to drive the wrong way down a one-way street without obtaining clearance from Scalf."

"The chase proceeded across another bridge into Newport, Kentucky. Meyer eventually ran a red light, lost control of the vehicle, and crashed into the sidewalk patio of the restaurant where Raymond and Gayle Laible were dining. The Laibles were directly hit by the vehicle, and Steven and Maribeth Klein, who were walking by, were struck by debris and thrown several yards onto the asphalt. Gayle died on the scene and Raymond was taken to the hospital where he was later pronounced dead. The Kleins experienced multiple, severe injuries. Meyer was taken into custody and charged with two counts of murder, and two counts of endangerment and fleeing from the police."

"The executor of the Laibles' estate and the Kleins filed this lawsuit in August 2021 in Campbell County Circuit Court. The lawsuit alleges personal injury, negligence, wrongful death, and negligent supervision claims against Scalf, Lanter, Thomas, Meyer, and the City of Cincinnati. The officers and City removed the case to federal court. The officers sought certification of Westfall Act immunity from the United States, which limits liability against federal officers for common-law tort actions committed while acting within the scope of their employment, but the United States declined. The officers then filed a petition for the district court to review the denial of certification. The district court denied the petition, concluding that Scalf was not acting within the scope of his employment as an officer detailed to the ATF and that Lanter and Thomas were not federal officers for purposes of the statute. The officers appealed the district court's decision."

"In 1946, Congress passed the Federal Tort Claims Act (FTCA), ''which waived the sovereign immunity of the United States for certain torts committed by federal employees' acting within the scope of their employment.' *Brownback v. King*, 141 S.Ct. 740, 746 (2021) (quoting *FDIC v. Meyer*, 510 U.S. 471, 475–76 (1994)). In 1988, however, Congress passed the Federal Employees Liability Reform and Tort Compensation Act (Westfall Act). *See Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 425–26 (1995). The act immunizes federal employees from individual common-law tort claims that arise while the employee was acting within the scope of their employment and substitutes the United States as the party defendant. 28 U.S.C. §§ 2679(b)(1), (d)(1)."

"The act empowers the Attorney General to certify that an employee was acting within the scope of federal employment at the time the harm occurred. *Id.* at (d)(1). If the Attorney General declines to certify, 'the employee may at any time before trial petition [a federal district] court to find and certify that the employee was acting within the scope of his office or employment.' *Id.* at (d)(3). Then, the district court must determine whether: (1) the employee qualifies as a federal employee; and if so, (2) whether the challenged conduct fell within the scope of federal employment. *Id.* at (b)(1)."

"Individuals are employees of the federal government under the FTCA if they are: (1) 'officers or employees of any federal agency'; or (2) 'persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.' 28 U.S.C. § 2671. These two definitions are commonly referred to as the federal employee clause and the official capacity clause, respectively. *See Talignani v. United States*, 26 F.4th 379, 382 (7th Cir. 2022)."

"First, the federal employee clause defines 'federal agency' as including ''executive departments, the judicial and legislative branches,' and other governmental entities.' *Does 1-10 v. Haaland*, 973 F.3d 591, 597 (6th Cir. 2020) (quoting 28 U.S.C. § 2671). An individual detailed to a federal agency is considered a federal employee for purposes of the FTCA. 5 U.S.C. § 3374(c)(2); *see also Robertson v. Lucas*, 753 F.3d 606, 613–14 n. 3 (6th Cir. 2014) (state and local law enforcement detailed to DEA task force were federal employees for purposes of the Westfall Act); *Petty v. United States*, 80 F. App'x 986, 989 (6th Cir. 2003) (local police officer who was assigned to an FBI-operated task force was a federal employee for purposes of the FTCA)."

"Scalf squarely meets the definition of federal employment as an officer deputized to the ATF at the time of the incident. Scalf 'carried an ATF badge, wore an ATF uniform, attended ATF trainings, worked from an ATF field office, and received pay from the federal government.' Mem. Op. & Order, R. 64, PageID 477."

"Where there is evidence in the record to support the district court's factual finding and the finding was a reasonable construction of the evidence, no clear error has occurred. *United States v. Sands*, 4 F.4th 417, 420 (6th Cir. 2021). Further, the decision to hold an evidentiary hearing is within the discretion of the district court. *Clark v. Warden*, 934 F.3d 483, 497 (6th Cir. 2019). Here, the district court determined that an evidentiary hearing was unnecessary and relied on affidavits from Scalf and Occhipinti affirming Scalf's status as a deputized ATF agent. Because the record supports that Scalf was a federal employee detailed to the ATF at the time of the incident, we are not 'left with the definite and firm conviction that a mistake has been committed.' *United States v. Donadeo*, 910 F.3d 886, 893 (6th Cir. 2018) (quoting *United States v. Charles*, 138 F.3d 257, 262 (6th Cir. 1998)). Therefore, Scalf meets the definition of federal employee under the federal employee clause."

"There is no dispute that Lanter and Thomas were employed by CPD, and do not meet the definition of federal employee under the federal employee clause. Therefore, they can only be considered federal employees if they meet the requirements of the official capacity clause."

"Under the official capacity clause, Lanter and Thomas can meet the definition of a federal employee if they can prove that they 'act[ed] on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.' 28 U.S.C. § 2671. This court has yet to provide guidance on the official capacity clause, and the Supreme Court has addressed the clause's language on only one occasion."

"In *Logue v. United States*, the parents of a federal prisoner who hanged himself while in a county jail brought suit against the United States pursuant to the FTCA for the wrongful death of their son. 412 U.S. 521, 522 (1973). The plaintiffs argued that under the federal employee clause, the county jail was a federal agency, and under the official capacity clause, the jail employees were 'acting on behalf' of the Federal Bureau of Prisons. *Id.* at 526. The Court established that the critical factor in differentiating between federal employees and contractors 'is the authority of the principal to control

the detailed physical performance of the contractor.' *Id.* at 527–28. In other words, where the federal government exercises that level of control over an individual, the definition of federal employee is met. *See id.*"

"The Court concluded that the county jail was a contractor over which the federal government lacked any control, and contractors were explicitly exempted from immunity as non-federal agencies pursuant to the federal employee clause of 28 U.S.C. § 2671. *Id.* at 528–30. Turning to the official capacity clause, the Court acknowledged that the legislative history of the 'acting on behalf of' language within the clause was sparse but appeared 'to cover special situations such as the 'dollar-a-year' man who is in direct service of the Government without pay, or an employee of another employer who is placed under *direct supervision of a federal agency* pursuant to contract *or other arrangement*.' *Id.* at 530–01 (emphasis added); *see also Talignani*, 26 F.4th at 386 (explaining that the official capacity clause was meant to extend immunity to volunteers, special law enforcement, confidential informants, and any other scenarios in which the individual was not a federal employee, nor federal contractor, but still acted on behalf of the federal government in an official capacity). That said, the Court ultimately ruled that the official capacity clause could not serve as an end-run around the ban on federal contractors, and therefore, the jail employees were also not federal employees pursuant to the official capacity clause. *Logue*, 412 U.S. at 531–32."

"*Logue*'s 'control' or 'supervision' test was reinforced a few years later in *United States v. Orleans*. 425 U.S. 807 (1976). There, the Supreme Court concluded that a community action agency subject to substantial federal regulation was not a 'federal agency' and its employees were not federal employees because the federal government lacked the 'power to supervise the[ir] daily operation.' *Id.* at 817–19."

"Under *Logue*'s control test, the district court correctly denied Westfall Act immunity for Lanter and Thomas. Under the operational plan, Lanter and Thomas were never under direct ATF supervision, so they were not 'acting on behalf' of the ATF. *Logue* 412 U.S. at 531. Lanter assisted in the chase because it was CPD's responsibility, as part of the task force, to effectuate a traffic stop when Meyer fled. *See Petty*, 80 F. App'x at 989 (concluding that Detroit police officers assisting an FBI-task force in effectuating a search warrant were not federal officers for purposes of the FTCA). The ATF did not suddenly gain control over Lanter's 'detailed physical performance' during the car chase when Scalf declared himself OIC. *Logue*, 412 U.S. at 527–28. In fact, the ATF operational plan explicitly stated that any car chase would be initiated by CPD officers and conducted pursuant to CPD policy. *See* ATF Operational Plan, R. 58-1, PageID 445 ('Any vehicle pursuits will be initiated and monitored by CPD pursuit policy. ATF will not initiate any pursuits . . . . CPD uniform vehicles will be advised and directed to conduct a traffic stop following CPD policy, ATF will assist as needed.'). Any involvement by Scalf or the ATF, once Lanter began pursuit, was for the purposes of assistance only—not to control, direct, or supervise the chase. The fact that Scalf authorized Lanter to cross into Kentucky does not diminish CPD's control over the rules governing the chase."

"Thomas was an additional step removed from ATF supervision as he only received authorization to join the chase from Lanter. Thomas was at the CPD training facility, in CPD uniform, when Lanter asked him to assist in the chase, and it is unclear whether Thomas knew the ATF was even involved in Meyer's apprehension. Finally, both Lanter and Thomas were investigated for violations of CPD policy and disciplined by CPD. This is further evidence that they acted not on behalf of a federal agency, but on behalf of CPD."

"Therefore, we affirm the district court's denial of immunity to Lanter and Thomas as they are not covered by the federal employee or official capacity clauses. Because Scalf is the only officer who meets the definition of a federal employee, we limit the analysis of step two—whether he was acting within the scope of his federal employment at the time of the incident—to him."

"Whether an employee was acting within the scope of their federal employment under the Westfall Act is governed by the agency law of the state in which the incident occurred. 28 U.S.C. § 1346(b)(1); *see also Dolan v. United States*, 514 F.3d 587, 593 (6th Cir. 2008). Kentucky has adopted the Restatement

(Third) of Agency to define the scope of employment. *Papa John's Int'l., Inc. v. McCoy*, 244 S.W.3d 44, 51 (Ky. 2008). An employee 'acts within the scope of employment when performing work assigned by the employer *or* engaging in a course of conduct subject to the employer's control.' Restatement (Third) of Agency § 7.07(2) (2006) (emphasis added). According to the Kentucky courts, the analysis should focus on the purpose or motive of the employee to determine whether they acted within the scope of their employment. *Papa John's Int'l., Inc.*, 244 S.W.3d at 51. Torts committed to further the employer's business purpose in whole or in part, 'however misguided,' are torts committed within the scope of employment. *Id.* at 52 (internal quotation omitted)."

"The district court erred in concluding that Scalf acted outside the scope of his employment as a deputized ATF agent when he oversaw Meyer's car chase. First, Scalf was assigned to surveil Meyer, and the ATF committed to assisting CPD 'as needed' in effectuating traffic stops. ATF Operational Plan, R. 58-1, PageID 445–46. Scalf did the work assigned to him by the ATF when he surveilled Meyer from afar to assist Lanter and Thomas in effectuating the traffic stop. That Scalf followed CPD procedures and used CPD radio channels when overseeing the car chase does not change the fact that he conducted that activity within the scope of the authority given to him by the ATF under the arrest plan. *See Osborne v. Payne*, 31 S.W.3d 911, 915 (Ky. 2000) ('[T]o be within the scope of [] employment, the conduct must be of the same general nature as that authorized or incidental to the conduct authorized.'). Meyer's apprehension was just as much in furtherance of the ATF's goals as it was of CPD's goals. Given Scalf's unique understanding of CPD policies compared to the other ATF agents involved, it suited the ATF's purposes for him to act as the bridge between the ATF and CPD prior to and during this operation."

"… Meyer had a history of violence, including threatening to shoot law enforcement officers and others, and pistol whipping and holding guns to the heads of people who owed him money for drugs. Second, the day before the car chase CPD and NKDSF were informed by a reliable source that Meyer had an inoperable tumor, causing a terminal illness. As a result, Meyer had little concern for his life or the lives of others, and bragged about killing a man, kidnapping individuals for outstanding drug debts, and intended to shoot at the police and die before being jailed again. Given the potential danger Meyer posed, the ATF operational plan expressly contemplated the possibility of pursuit. Scalf's involvement in overseeing the pursuit was therefore squarely within the scope of the work assigned to him by the ATF."

"Scalf was in the ATF's service the day of the chase, and just because he performed some duties associated with CPD's role does not demand the legal conclusion that Scalf came under CPD control. *See Does 1–10*, 973 F.3d at 598–602 (defining what actions were within the scope of federal employment where defendants were first found to be federal employees). Because Scalf's motivations were meant to further the ATF's mission, the ATF cannot now abandon its responsibility for the alleged torts committed by Scalf within the scope of his employment."

"Scalf meets the requirements for Westfall Act immunity and the United States must be substituted for Scalf in this litigation."

MOOTNESS

1. Party tried to intervene after the case was settled – Court held the party could not intervene as the matter was moot, and plaintiff was not a party to the action – A nonparty does not become a party under Rule 41 as soon as it moves to intervene, rather a nonparty does not become a party until the district court grants the motion to intervene

JONATHAN MOSES; LIBERTY WELLNESS, LLC v. CITY OF PERRY, MICHIGAN
SIXTH CIRCUIT COURT OF APPEALS No. 23-1262 Decided and Filed: January 4, 2024

"Plaintiffs-Appellees Liberty Wellness, LLC and Jonathan Moses sued the City of Perry, Michigan, because the City refused to implement a voter-approved marijuana facility licensing scheme. Appellant

Local Roots Cannabis Company moved to intervene because it had applied for and received a license under the City's alternative licensing regime. But Liberty Wellness and the City settled their dispute and filed a stipulated dismissal before the court ruled on the intervention motion. The parties dismissed the action with prejudice but provided that the district court retained jurisdiction to enforce their settlement agreement. The district court effectively denied Local Roots's motion to intervene as moot given the settlement and dismissal. We agree that the motion was moot and AFFIRM."

"On November 2, 2021, voters of the City of Perry approved an amendment to the city charter. The amendment allowed for eight marijuana facility licenses and regulated license applications. Liberty Wellness submitted two applications in compliance with the amendment in November 2021 and then resubmitted them in July 2022. But the City returned the applications to Liberty Wellness."

"The Perry City Council was less welcoming of marijuana facilities. In a July letter, the City's attorney told Liberty Wellness that the amendment was 'unlawful,' and the City would not enact it. R. 4, Am. Compl., pp. 12–13, PageID 286–87. On September 1, 2022, the City Council enacted ordinances that provided for a single marijuana facility. The City opened up an application process under the ordinances in the fall of 2022 and awarded a conditional marijuana retailer license to the only applicant, Local Roots."

"Liberty Wellness and Jonathan Moses sued the City of Perry in October 2022. Their amended complaint sought declaratory relief that the 2021 amendment was 'valid' and 'binding.' *Id.* at 31, PageID 305. Moses argued that the City violated his 'right to engage in direct democracy' as a voter. *Id.* at 21, PageID 295. Liberty Wellness wanted to operate marijuana establishments in line with the 2021 amendment."

"Local Roots moved to intervene on February 9, 2023. Local Roots claims it did so mere 'days' after learning that the original parties were negotiating a settlement. Appellant Br. at 13. The district court ordered the original parties to respond to the motion by March 10."

"Instead, the original parties settled and dismissed the case before that deadline. On March 3, the district court ordered that '[u]pon the immediate formal filing of a Notice of Settlement or submittal of a proposed Stipulated Order of Dismissal, the current Motion to Intervene (ECF No. 14) will be mooted.' R. 18, Order. That same day, the City filed an answer, the original parties filed a stipulation of dismissal with prejudice, and the district court signed an order dismissing the case with prejudice. Neither the stipulation nor the district court's order provided a way to reopen the case or undo the dismissal."

"The district court retained jurisdiction to enforce the terms of the settlement agreement for three years at the parties' request. Among other things, the settlement agreement required the City to 'enact such ordinances and take such other actions as are necessary to allow an additional conditional marijuana retailer license to be awarded to Liberty.' R. 20, Dismissal, p. 6, PageID 378. The parties stipulated to bar any lawsuits by Plaintiffs against the City arising from the ordinances or the 2021 amendment but not 'an action brought by a party to enforce the terms of this Stipulation and Order, and/or to enforce the terms of the Settlement Agreement.' *Id.* at 2, PageID 374."

"An invalid stipulation of dismissal cannot moot a pending motion to intervene.**2** Local Roots argues the stipulation was invalid because Local Roots did not sign it. A plaintiff may unilaterally dismiss an action only 'before the opposing party serves either an answer or a motion for summary judgment.' Fed. R. Civ. P. 41(a)(1)(A)(i). Otherwise, 'the plaintiff may dismiss an action without a court order by filing . . . a stipulation of dismissal signed by all parties who have appeared.' Fed. R. Civ. P. 41(a)(1)(A)(ii). The City did file an answer, so Liberty Wellness could not dismiss the case without the consent of all 'parties' who had 'appeared.' The City consented to the dismissal; Local Roots did not."

"But a nonparty does not become a 'party' under Rule 41 as soon as it moves to intervene. '[W]hen the term [to intervene] is used in reference to legal proceedings, it covers the right of one to interpose in,

or become a party to, a proceeding already instituted.' *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933 (2009) (second alteration in original) (quoting *Rocca v. Thompson*, 223 U.S. 317, 330 (1912)). So a nonparty does not become a party until the district court grants the motion to intervene. *Robert Ito Farm, Inc. v. County of Maui*, 842 F.3d 681, 687 (9th Cir. 2016) (citing *Eisenstein*, 556 U.S. at 933)."

"Rule 7.1, concerning disclosure statements, also treats 'parties' as separate from those seeking to intervene. Rule 7.1(a)(2) requires 'a party or intervenor' in a diversity action to file a specific disclosure statement. And Rule 7.1(b) requires '[a] party, intervenor, or proposed intervenor' to file its disclosure statement at certain times. The rule's language would be superfluous if 'parties' by default included proposed intervenors. *See Reg'l Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 716 (6th Cir. 2006)."

"Local Roots cites no case to support its position. Instead, it cites the Eastern District of Michigan Local Rules to say that an attorney appears by 'filing a pleading or other paper' in a matter. Appellant Br. at 9 (citing E.D. Mich. LR 83.25(a)). Local Roots argues that it filed 'other papers' when it moved to intervene, so it was a party that had appeared. *Id.* But local rules vary from district to district and do not govern how we interpret the Federal Rules of Civil Procedure. *Cf. Carver v. Bunch*, 946 F.2d 451, 453 (6th Cir. 1991) (stating that local rules cannot conflict with the Federal Rules)."

"Here, the district court did not issue a conditional dismissal order. Consistent with *Kokkonen*, the stipulation specifically permitted a new lawsuit 'brought by a party . . . to enforce the terms of the Settlement Agreement,' and the district court retained jurisdiction to enforce the settlement. R. 20, Dismissal, pp. 2–3, PageID 374–75. But unlike the order in *Midwest Realty*, neither the stipulation nor the court's order identified a condition subsequent that could reopen the whole case and prevent the dismissal from taking effect. The parties dismissed the action with prejudice. And nothing suggests that the dismissal lacks full effect until the district court's ancillary jurisdiction expires in 2026."

"In other words, the original parties stipulated to a final dismissal that was effective immediately, not a conditional dismissal that became effective only later. The district court retained jurisdiction only to enforce the settlement agreement, which Local Roots does not invoke. The dismissal therefore mooted Local Roots's motion to intervene. *See Salem Pointe*, 854 F. App'x at 704."

OPEN RECORDS

1. There was no violation of the public records law since the records were destroyed prior to the request - It does not appear to be necessary under the particular facts presented by this case to assess whether the records of the attorney for were actually subject to disclosure under the Act - Those records were not in existence at the time that the city received the plaintiff's records request - The court's on this matter is limited by the particular facts presented by this case, and our holding is further limited to addressing only what is necessary to resolve plaintiff's present requests for relief - Accordingly, the court did not express an ultimate opinion as to the propriety of the destruction of the investigatory records that occurred before plaintiff's public records request was received, nor did it express an opinion as to whether other consequences might stem, or could have stemmed, from those records' present unavailability - The court merely held that, inasmuch as plaintiff faults the city for failing to disclose itsrecords in connection with his public records request and seeks attorney's fees in relation thereto, his concerns on appeal are respectfully without merit - The case was remanded to consider attorney fees for plaintiff for other records that were requested were not released - The burden of proof for providing a justification for not disclosing the records sought lies with the governmental entity

MARVIN L. MILLER v. CITY OF LAFOLLETTE ET AL.
COURT OF APPEALS No. E2023-00197-COA-R3-CV Filed January 24, 2024

“The genesis of this case lies in the investigation into a city’s police department and subsequent termination of the appellant, a former police department employee. After the appellant was terminated, his counsel sent a public records request to the city, one of the appellees herein, pursuant to the Tennessee Public Records Act. Through this public records request, the city was asked for copies of, among other things, ‘investigative material’ related to the appellant. Although some records were initially produced in response to the public records request, other records were not provided until after litigation was initiated by the appellant in chancery court. Certain ‘investigatory’ records that had formerly been in the possession of an attorney hired by the city to investigate the police department were not ever produced. Although the parties dispute whether such ‘investigatory’ records would be subject to disclosure under the Tennessee Public Records Act, such records had, according to the findings of the chancery court, been destroyed by the time the city received the public records request at issue herein. Upon the conclusion of the trial litigation, the chancery court also found that ‘all requested documents that exist had been provided’ and determined that the city ‘did not willfully refuse to disclose documents and records.’ In light of its determination that the city did not act willfully, the chancery court held that attorney’s fees would not be awarded in this case. For the reasons stated herein, the chancery court’s judgment is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this Opinion.”

“In June 2022, Detective Charles Duff (‘Detective Duff’) submitted a grievance letter to several officials with the City of LaFollette (‘the City’) concerning alleged issues within the City’s police department. The City subsequently hired attorney Celeste Herbert (‘Attorney Herbert’) to conduct an investigation of the police department, and in a letter report dated August 2, 2022, Attorney Herbert found that the conduct of Marvin Miller (‘Mr. Miller’), then a police department employee, had violated certain provisions of the City’s personnel policy. Attorney Herbert’s letter report reflected that she had ‘conducted numerous in-person interviews, telephone interviews and Zoom interviews’ as part of her investigation. The same day that Attorney Herbert’s letter report was issued, the LaFollette City Council voted to terminate Mr. Miller from his employment with the police department.”

“In an August 3, 2022, email addressed to Stan Foust (‘Mr. Foust’), the City Administrator and designated Public Records Request Coordinator, Attorney Herbert wrote that her ‘usual practice is to shred investigation materials at the conclusion of an investigation.’ In connection with this statement, Attorney Herbert requested that Mr. Foust ‘advise if this is acceptable.’ Of note, at the time of Attorney Herbert’s August 3, 2022, email, Mr. Miller had not made the public records request that is at issue herein. In response to Attorney Herbert’s email, Mr. Foust stated that shredding ‘would be fine’ except for the matter of a ‘tracking log.’”

“Counsel representing Mr. Miller thereafter sent both a preservation letter and a public records request to the City, which, according to the trial court’s findings in this case, were not received by the City until August 8, 2022. The preservation letter expressed concern about securing ‘all potentially relevant evidence that may be essential to the appeal or civil process’ pertaining to Mr. Miller’s ‘alleged termination of . . . employment,’ and through the public records request sent to the City pursuant to the Tennessee Public Records Act (‘the TPRA’ or ‘the Act’), Mr. Miller sought to obtain, among other things, ‘[a]ny investigative material related to Marvin L. Miller in the last 6 months.’ Whereas Mr. Foust subsequently produced certain documents pursuant to the public records request, namely, Attorney Herbert’s letter report, Detective Duff’s grievance, the City Council meeting minutes from when Mr. Miller was terminated, the City’s Employee Personnel Policy Handbook, and the City’s Police Officer’s Manual, a dispute regarding Mr. Miller’s public records request would soon materialize.”

“Prior to the onset of the present litigation, in a letter dated August 11, 2022, counsel for Mr. Miller wrote Mr. Foust thanking him for his production of records but also asserting that investigative material such as ‘notes, audio recordings, statements, etc. that were conducted by the City . . . and/or an agent of the City’ had not been provided. In an ensuing petition filed in the Campbell County Chancery Court (‘the trial court’) seeking judicial review of the City’s alleged denial of access to public records, Mr. Miller averred that this letter to Mr. Foust had not been responded to, and he specifically sought access to ‘Records from The Investigation,’ asserting that they were public records ‘because they were

received by the investigator as an agent of the LaFollette City Council.' Within the petition, which invoked the authority of the TPRA and named Mr. Foust and the City as Respondents, Mr. Miller asserted that he had been denied access to other records as well. As part of his concluding prayer for relief, Mr. Miller requested that he be granted an award of costs and attorney's fees under the TPRA."

"In a subsequently filed answer, the City and Mr. Foust submitted that Mr. Miller's 'prayers for relief are without merit and should be denied in full.' Attached to the answer was a letter authored by City Attorney Reid Troutman. That letter, which was dated August 30, 2022, referenced the aforementioned August 11 letter from Mr. Miller's counsel and stated in pertinent part as follows:

> It is the City's position that all of the documentation previously requested has been delivered to you. . . . We were not provided with, nor do we possess, the investigative materials, notes or documents. In fact, we have no knowledge that any such documentation and/or information exists. . . .
>
> Even if said documents did exist, the City would object to the production of said information upon the grounds that said information is attorney work product and is considered confidential under rule 26.02(3)."

"The public records dispute was eventually heard by the trial court over the course of several dates. During the first hearing, Mr. Foust was asked if there was anything in his search that had been responsive to Mr. Miller's records request that was not turned over. Mr. Foust responded, at that time, as follows: 'No, no. If I would have had them, I have no problem of giving anything I've got. I mean I don't know why anybody would think that you would hide anything from them.' When asked if he would provide further records if Mr. Miller's counsel 'wants to add anything to this request,' Mr. Foust replied, 'If it's in my possession, I have no problem giving him anything.' When asked about certain records and whether he had understood the records request as seeking their production, Mr. Foust responded in the negative but expressed his willingness to hand such documents over. One such document, a contract between the City and Attorney Herbert, was handed to Mr. Miller's counsel during the hearing. Regarding another document, the trial court inquired of Mr. Miller's counsel if it was something that he was asking for, to which Mr. Miller's counsel signaled his agreement. The record reflects that Mr. Foust agreed to provide that document."

"Although Mr. Foust showed a willingness to accommodate Mr. Miller, the trial court also found in this case that 'it was clear that Respondents needed to make a more thorough and diligent search for records related to [Mr. Miller's] request.' Subsequent to the first hearing, the City produced additional records after an additional search was conducted, and although it appears that most of these records were not actually responsive to the public records request as drafted, *some* of the belatedly produced documents were in fact responsive per the City's own admission. During the second hearing, Mr. Foust even referenced one record as something that 'should have been initially' produced, and during the third and final hearing, another City official noted that he previously 'didn't search . . . thoroughly.' Although counsel for the City pointed to the fact that the number of responsive documents to the initial request was 'actually very few,'1 it was acknowledged that the City had not done a system-wide search of emails initially and that there had been some records that, although requested, had not been produced until after the onset of this litigation."

"In an ensuing order entered after the proof in this case concluded, the trial court stated that most of the additional information that the City had provided after the onset of litigation was 'not particularly relevant.' The trial court further noted that materials that Attorney Herbert had possessed were not available to be turned over because they had been destroyed. In fact, the trial court found that 'all recordings and documentation relied upon by [Attorney] Herbert in her investigation had been destroyed at the time of receipt of the record requests,' and the court noted that 'the City never received any recordings or documentation from the investigator.' Upon expressly finding that 'all requested documents that exist had been provided,' the court went on to conduct an assessment of the City's willfulness, or lack thereof, in relation to the public records request at issue. As evidenced by

the included discussion on this matter and the trial court's own words, the 'main concern' of the court was in relation to the subject of Attorney Herbert's records. Ultimately, at the end of the included discussion on the matter, the trial court concluded that 'the City did not willfully refuse to disclose documents and records.' The present appeal followed."

"In his brief on appeal, Mr. Miller raises multiple issues for review, all of which ultimately bear on the following two essential questions to be decided in this case: (1) whether the City willfully denied access to the 'investigatory' records of Attorney Herbert and (2) whether the City willfully denied access to other records. Resolution of these questions themselves have a bearing on Mr. Miller's contention that the trial court erred in not awarding him any attorney's fees in connection with his lawsuit. For the specific reasons discussed below, although we discern no error in connection with the trial court's failure to award Mr. Miller attorney's fees in relation to the 'investigatory' records of Attorney Herbert, we conclude that this case should be remanded for further proceedings regarding the question of the City's willfulness, or lack thereof, in relation to other records at issue in this case."

"We turn first to the matter of the 'investigatory' records of Attorney Herbert. Much of the discussion on appeal has surrounded the question of whether such records qualified as public records so as to be potentially subject to disclosure. Although Mr. Miller, of course, has submitted that Attorney Herbert's materials were 'effectively City records,' the City has maintained that they were not. The City has further maintained that Attorney Herbert's materials would, in any event, qualify as 'work product' and therefore be exempt from disclosure. As to this latter proposition from the City, there is no question that the law protects work product from disclosure. *See The Tennessean v. Tenn. Dep't of Pers.*, No. M2005-02578-COA-R3-CV, 2007 WL 1241337, at *10 (Tenn. Ct. App. Apr. 27, 2007) ('[I]t is clear that the . . . work product doctrine provide[s] [an] exception[] to the disclosure requirements of the Act.')."

"As compelling as it could be to explore the questions posed through the above arguments, it does not appear to be necessary under the particular facts presented by this case to assess whether Attorney Herbert's records were actually subject to disclosure under the Act. As it is, under the findings of the trial court, those records were not in existence at the time that the City received Mr. Miller's records request. Very simply, Mr. Miller was not actually denied the 'investigatory' records because there was nothing to disclose. Relatedly, although Mr. Miller's grievance on appeal concerning these 'investigatory' records is clearly lodged in pursuit of an award of attorney's fees, we observe that an award of attorney's fees is available in connection with a trial court's discretionary decision to 'assess all reasonable costs involved in *obtaining the record*.' Tenn. Code Ann. § 10-7-505(g) (emphasis added). Because there was nothing to disclose with respect to the particular universe of records under present examination, there was nothing for Mr. Miller to obtain."

"Importantly, our holding on this matter is limited by the particular facts presented by this case, and our holding is further limited to addressing only what is necessary to resolve Mr. Miller's present requests for relief. Accordingly, we express no ultimate opinion as to the propriety of the destruction of the 'investigatory' records that occurred before Mr. Miller's public records request was received, nor do we express an opinion as to whether other consequences might stem, or could have stemmed, from those records' present unavailability. We merely hold that, inasmuch as Mr. Miller faults the City for failing to disclose Attorney Herbert's records in connection with his public records request and seeks attorney's fees in relation thereto, his concerns on appeal are respectfully without merit. Indeed, assuming arguendo that Attorney Herbert's records would have otherwise been subject to disclosure under the Act had they been in existence, the trial court's findings signal that there was nothing that could be disclosed. Mr. Miller could not obtain the desired records then, nor could he or any other citizen obtain them now pursuant to a public records request."

"Although we thus discern no error in the fact that the trial court did not award Mr. Miller any attorney's fees in relation to the 'investigatory' records of Attorney Herbert, other records were at issue in this case, including some records such as emails that were not produced until after the commencement of litigation but which, even according to the City, were responsive to the initial

public records request. The remaining question thus becomes whether there was any basis to award Mr. Miller attorney's fees concerning any of these other records. As touched on above, the TPRA provides a vehicle to recover attorney's fees through the authority in Tennessee Code Annotated section 10-7-505(g)." …

"Here, insofar as we read it, the order of the trial court does not actually appear to consider whether the City's belated production of certain records responsive to the public records request during the pendency of this litigation amounted to an initial, willful nondisclosure of public records. Indeed, although there is a conclusory statement at the end of the order that 'the City did not willfully refuse to disclose documents and records,' this conclusion immediately follows the discussion included in the trial court's order as to Attorney Herbert's file, which, per the trial court, was its 'main concern.' Although the issue of Attorney Herbert's file has undoubtedly been a central point of contention in this case, this 'main concern' of the trial court is of course not the exclusive concern in the litigation. Indeed, whether there was any willful nondisclosure of records pertaining to Attorney Herbert's file is a separate question from whether there was a willful nondisclosure with respect to certain records that were responsive to the public records request but only disclosed during the course of this litigation. Inasmuch as the order of the trial court does not appear to actually address that question in any direct or tangible way, we vacate the conclusion that 'the City did not willfully refuse to disclose documents and records' but only to the extent that the conclusion might, divorced from the context appearing in the order itself, be considered to somehow broadly relate to records outside of Attorney Herbert's file. Again, the order does not appear to directly address the subject of willfulness outside of the issue of its 'main concern' of Attorney Herbert's file, and we are therefore of the opinion that the case should be remanded to the trial court for a specific consideration of the issue, which is consistent with the direction outlined in the Act. *See* Tenn. Code Ann. § 10-7-505(d) (providing that the trial court, in ruling upon the petition of a party, 'shall render written findings of fact and conclusions of law'). If the trial court determines on remand that the City's failure to initially disclose certain responsive documents was willful, that would be a predicate upon which the trial court could, in its discretion, choose to award Mr. Miller attorney's fees pursuant to the Act. *See* Tenn. Code Ann. § 10-7-505(g) (providing that, upon a determination of willfulness, the court 'may, in its discretion, assess all reasonable costs involved in obtaining the record, including reasonable attorneys' fees, against the nondisclosing governmental entity'); *see also Taylor*, 2017 WL 2984194, at *8 (noting that a finding of willfulness 'does not automatically trigger an award of attorney's fees and other costs')."

"In cases under the Act, the burden of proof for providing a justification for not disclosing the records sought lies with the governmental entity, *see* Tenn. Code Ann. § 10-7-505(c) ('The burden of proof for justification of nondisclosure of records sought shall be upon the official and/or designee of the official of those records and the justification for the nondisclosure must be shown by a preponderance of the evidence.'), and in regards to the willfulness assessment that should be broached by the trial court on remand vis-à-vis those actually responsive records that were not initially produced by the City in this case, we note that we have examined the TPRA willfulness standard in a number of relatively recent decisions, including *Clarke v. City of Memphis*, 473 S.W.3d 285 (Tenn. Ct. App. 2015). … Governmental entities are charged with fostering access to public records under the Act, and '[w]hen a governmental entity is confronted with a public records request, it assumes ultimate responsibility for a faithful and legal administration of the TPRA.' *Taylor*, 2017 WL 2984194, at *8."

"In light of the foregoing discussion, the trial court's judgment is affirmed in part and vacated in part. Although there is no error in the trial court's failure to award attorney's fees relative to records that were formerly in the possession of Attorney Herbert, further consideration by the trial court needs to be given to other records at issue in this litigation. Indeed, inasmuch as the willfulness assessment in the trial court's order only appears to be tied to the trial court's 'main concern' of Attorney Herbert's records, we remand the case to the trial court for the trial court to address the question of the City's willfulness, or lack thereof, in relation to other records at issue in this case, specifically those records that, although responsive to the public records request made by Mr. Miller, were not produced until after the commencement of this litigation. If the trial court determines on remand that the City's failure to initially disclose certain responsive documents was willful, the court then should consider

whether it will, in the exercise of its discretion pursuant to Tennessee Code Annotated section 10-7-505(g), award Mr. Miller his reasonable costs involved in obtaining those records."

POLITICAL QUESTION DOCTRINE

1. In addressing the political question doctrine under the Tennessee Constitution in relation to separation of powers principles, prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question

PARENTS' CHOICE TENNESSEE ET AL. v. JASON GOLDEN, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF WILLIAMSON COUNTY SCHOOLS ET AL.
COURT OF APPEALS No. M2022-01719-COA-R3-CV Filed April 18, 2024

See SCHOOLS - Parents challenged the school curriculum claiming it violated state law pertaining to, among other things, common core and critical race theory –There were a number of issues raised, but trial court dismissed due to a lack of standing and exhausation of remedies – Exhaustion of remedies - Administrative rules and regulations have the force and effect of law in Tennessee No error in the trial court's conclusion that the Department of Education regulations render exhaustion of administrative remedies mandatory for the parents who are bringing complaints regarding the teaching of prohibited concepts in violation of Tennessee Code Annotated Section 49-6-1019 - Court found standing, except for the parents who had left the school district – Court affirmed the trial court's dismissal of the prohibited concepts claim for failure to exhaust administrative remedies, but reversed the dismissal of the Common Core claim and remanded - Plaintiffs have a private right of action - The Tennessee Supreme Court has observed that in determining if a private right of action exists to enforce a statutory requirement a court can find that the legislature created a private right of action in one of two ways: based on the express terms of a statute or by implication through the statute's structure and legislative history - In other words, the private right of action for enforcement of a statute is a legislative creation that is express or implied. - The Tennessee Supreme Court has indicated that the ultimate touchstone for analysis is whether the General Assembly intended for a private right of action to exist - While there is no private right of action created by the Common Core statute, plaintiffs' Common Core claim fits precisely within the contours of a private right of action created by Tennessee Code Annotated section 1-3-121 - Plaintiffs have a private right of action - The Tennessee Supreme Court has observed that in determining if a private right of action exists to enforce a statutory requirement a court can find that the legislature created a private right of action in one of two ways: based on the express terms of a statute or by implication through the statute's structure and legislative history - In other words, the private right of action for enforcement of a statute is a legislative creation that is express or implied. - The Tennessee Supreme Court has indicated that the ultimate touchstone for analysis is whether the General Assembly intended for a private right of action to exist - While there is no private right of action created by the Common Core statute, plaintiffs' Common Core claim fits precisely within the contours of a private right of action created by Tennessee Code Annotated section 1-3-121 - page 186.

RECUSAL

1. Where a bias stems from an extrajudicial source, rather than from events or observations during litigation of a case, it may be sufficient to justify recusal if the judge's behavior raises reasonable questions about the judge's impartiality - If the bias is alleged to stem from events occurring in the course of the litigation of the case, the party seeking recusal has a greater burden to show bias that would require recusal, *i.e.*, that the bias is so pervasive that it is sufficient to

deny the litigant a fair trial - A pervasive bias is one that reflects an utter incapacity to be fair - The court readily conclude that Shelby County has demonstrated pervasive bias to warrant recusal - Some of the statements made by Chancellor Jefferson throughout this litigation could be characterized as mere dissatisfaction, annoyance, or anger toward counsel, the parties, and this case - However, the fact remains that she approached Mr. Gallagher in the common area of the clerk's office, within earshot of numerous employees, in an extremely angry and upset manner, stating that she did not like being threatened and that he and his boss could both "Bring it" - During this same timeframe, however, Mr. Gallagher appeared at a routine court tax docket and addressed the court to obtain a hearing on the Rule 59 motion, but Chancellor Jefferson responded that she was not going to set the Rule 59 motion for a hearing - Mr. Gallagher offered to file a written motion to request a hearing date, but she said she would strike it from the calendar - It was only after Shelby County filed a written motion for a hearing date, and appeared for a hearing on it, that the motion to alter or amend, filed in September, was finally set for a hearing date in March - These inexplicable actions reflect an utter incapacity to be fair

SHELBY COUNTY, TENNESSEE v. DELINQUENT TAXPAYERS 2021
COURT OF APPEALS No. W2024-00504-COA-T10B-CV Filed April 25, 2024

"This is an accelerated interlocutory appeal from the denial of a motion for recusal of the trial judge. After carefully reviewing the record provided by the appellant, we reverse the decision of the trial court denying the motion for recusal and remand for reassignment."

"This case began in May 2023 with the filing of a complaint by Shelby County, Tennessee, for the collection of delinquent personal property taxes for tax year 2021. There were approximately 3,816 defendants identified on exhibit A to the complaint who allegedly owed delinquent taxes. In July 2023, Shelby County filed an 'initial' motion for default judgment, stating that it had mailed a summons and notice to each defendant and was in the process of reviewing and compiling the returns in preparation for filing a supplemental motion for default judgment within the next few weeks. Shelby County asked the court to grant a default judgment as to all defendants who had not filed an answer upon the filing of the supplemental motion. Shelby County also filed a motion for a scheduling order."

"On Friday, August 18, 2023, counsel for Shelby County, Gregory Gallagher, appeared at a hearing before Chancellor Melanie Taylor Jefferson on the motion for a scheduling order. According to Shelby County, Chancellor Jefferson was 'extremely upset' that the case had been assigned to Part I of chancery court, was 'quite emphatic' that she should have been included in the process and setting of any court dates, and indicated that she felt 'disrespected.' Chancellor Jefferson demanded that a meeting take place expeditiously on Monday, August 21, with the other two Shelby County chancellors, the court clerk and its tax sale staff, and the Shelby County Trustee. The record contains the following email that was sent by Chancellor Jefferson to these individuals on Friday, August 18:

> First and foremost, I called this meeting when I discovered a personal property lawsuit with over 5000 cases was filed and assigned to my court room without one discussion with me or any of the other Chancellors. We, not any of the other people listed on this email, dictate how or when this type of undertaking should be implemented. This is a blatant disrespect of my title and my authority.
> With that being said, the issue is how you are going to fix the fact that you have assigned these cases to my Court WITHOUT my consent. I set my own calendar NOT any of you. September 29th and no other day is going tobe used for this endeavor until it is resolved. Further, there is the discussionof assignments. There are three (3) parts to chancery and this massive caseload should have been evenly and fairly distributed. The last conversation I had was regarding the weighted case load and how tax matters are assigned.
> What happens when they start filing Motions to Stay when garnishments for collection of these funds are issued? Call and come to court unannounced with their questions.
> These are the answers I am looking for on Monday.

According to Shelby County, the annual delinquent tax lawsuits have been assigned in the same manner for at least twenty-five years, with the clerk rotating each year the part of the chancery court to which the annual lawsuits are assigned. However, Chancellor Jefferson had only recently assumed the bench, on or about September 1, 2022."

"At the meeting on Monday, August 21, 2023, the court clerk explained that this case could not be divided into three separate cases because it had already been filed as one. According to Shelby County, Chancellor Jefferson again stated that she had been disrespected and indicated that 'it did not matter how many defendants were involved, she was not going to do it.' She was reportedly 'very emphatic' that 'no one could make her' handle the suit without assistance from other chancellors. The other two chancellors ultimately agreed to each hear one-third of the motions, hearings, etc., on the pending lawsuit by interchange. Mr. Gallagher was directed to draft a consent order to that effect to be signed by all three chancellors. The 'Tax Sale Coordinator' for chancery court subsequently split the defendants in this lawsuit into three groups so that the three chancellors could each hear an approximately equal number via interchange.'

"Before the consent order was signed, however, Chancellor Jefferson entered a *sua sponte* order of dismissal of the entire lawsuit on August 29. It simply states:

> THIS MATTER is before the Court upon the Complaint for Collection of Delinquent Taxes and Initial Motion for Default Judgment filed by the plaintiff Shelby County, Tennessee ('Plaintiff''), and the responses thereto of the various defendants. Due to the immense volume of the defendants potentially involved in this case, the Court, acting *sua sponte*, hereby finds that this matter should be dismissed without prejudice to permit the Plaintiff and the Clerk and Master additional time to ensure that hearings related to this matter are properly apportioned across the three (3) Parts of Chancery Court and to ensure the timely and efficient administration of justice in these proceedings. Accordingly, this matter is hereby DISMISSED without prejudice.

Shelby County timely filed a motion to alter or amend or set aside the order. In that motion, Shelby County explained that its staff had expended an overwhelming amount of labor in this case generating and processing the necessary taxpayer lists and required notices. It explained that a summons and notice was sent to each of the three thousand defendants with certified return receipt, and Shelby County had expended numerous hours reviewing and processing the returns. It also pointed out that notices had already been provided to defendants in connection with the pending motion for default judgment. Shelby County claimed that it had spent over $41,000 in printing and mailing costs alone. It noted that these costs and labor expenditures would have to be repeated if the lawsuit was dismissed and refiled, and the County Trustee would have to request additional funds from the County Commission to cover the costs because they were not presently in the County's budget. Additionally, Shelby County noted that any taxes not collected within a statutory collection period become uncollectible, which could result in additional loss of revenue to the County."

"Shelby County also explained, in its motion to alter or amend, that the average number of municipal and county parcels involved in its mass real estate tax lawsuits is over 20,000. Still, Shelby County explained that each suit remains in a single court through the confirmation of the tax sale, and the cases rotate between the three parts of chancery court. Shelby County explained that its Trustee and delinquent tax attorneys chose not to combine the personal property lawsuit with the real estate tax lawsuit but filed it separately to avoid combining so many defendants. The County contended that it had proceeded in accordance with all applicable laws and yet the chancellor had simply dismissed the case based on concerns over docket management. Shelby County noted a local rule requiring refiled cases to be assigned to the same part of chancery court where originally filed, so it questioned what the order of dismissal sought to accomplish in the first place. In conclusion, it asked the chancery court to set a hearing on the motion to alter or amend at its earliest convenience, to grant the motion to

alter or amend and reinstate the lawsuit, and to sign the consent order as agreed during the August 21 meeting allowing the other chancellors to hear the matters by interchange."

"On November 21, 2023, Shelby County filed a written 'Motion for Hearing Date' on its motion to alter or amend. Shelby County then filed a 'Notice of Hearing Date for Motion for Hearing Date,' scheduling the matter to be heard on December 8. On that date, the trial court held a hearing on the motion for a hearing date and set the hearing on the motion to alter or amend for March 14, 2024. During the December 8 hearing, an attorney who appeared on behalf of a defendant indicated that he would speak to Mr. Gallagher in the hallway about the history of the case and why it was dismissed *sua sponte*. Chancellor Jefferson stated that if the attorney felt that Mr. Gallagher's explanation was not complete, then she 'would be happy to make sure he was told the truth about the facts . . . because . . . [Shelby County] and Mr. Gallagher had their story and she had hers.' Around this time, Mr. Gallagher sought assistance from the Senior Criminal Court Judge in Shelby County, Carolyn Wade Blackett, as to how he could amicably resolve the issues with Chancellor Jefferson. Mr. Gallagher admittedly expressed concern about the situation involving the *sua sponte* dismissal and the hearing dates. According to Shelby County, Judge Blackett agreed to speak to Chancellor Jefferson to see if she could assist in obtaining an amicable resolution."

"Days later, on or about December 13, Chancellor Jefferson 'approached' Mr. Gallagher in the common area of the clerk's office and was 'extremely angry and upset.' She began the conversation by stating that she 'did not like being threatened' and then told Mr. Gallagher to 'Bring it.' He 'attempted to calm the situation' and offered to discuss the matter privately in chambers, but Chancellor Jefferson refused. She advised Mr. Gallagher that the Shelby County Trustee, Regina Newman, only had three years left to serve but that Chancellor Jefferson would be around for 'a while.' She then told Mr. Gallagher to tell Ms. Newman, his boss, to 'Bring it.' According to Shelby County, it was very apparent to everyone hearing the conversation that Chancellor Jefferson was extremely angry with Ms. Newman. Chancellor Jefferson also accused Mr. Gallagher of choosing to speak to Judge Blackett 'because Judge Blackett is a black woman.' She also accused Mr. Gallagher of threatening to file a complaint with the Court of the Judiciary but said that if he did 'it would not be the first' and that 'she could handle it.' According to Shelby County, this 'confrontation' was humiliating and held within earshot of numerous employees in the clerk's office."

The very next day, Shelby County was before the chancery court in a real estate tax sale case, and Chancellor Jefferson reversed a former ruling in favor of Shelby County in what Shelby County describes as a clear violation of the applicable statute. According to Shelby County, Chancellor Jefferson 'seemed to almost dare the Shelby County Delinquent Tax Attorney to argue against her ruling.'"

"On March 4, 2024, ten days before the scheduled hearing on the motion to alter or amend, Shelby County filed a motion for recusal. It asked Chancellor Jefferson to recuse herself from any further participation in this annual lawsuit and all court proceedings generated from it. Shelby County asserted that it was clear that Chancellor Jefferson was biased against Shelby County and its counsel and angry at them. Shelby County described the course of events occurring in this lawsuit, including the first hearing at which Chancellor Jefferson was 'visibly upset' and said she felt disrespected; her email stating that there had been a 'blatant disrespect of my title and my authority' by assigning the case to her court without her consent; the meeting in which she repeated her position that she was 'disrespected' and emphatically stated that she was not going to handle the suit without assistance; the *sua sponte* order of dismissal despite the agreement among the chancellors, resulting in significant losses by Shelby County; her refusal to set the motion to alter or amend for a hearing; stating during open court that Shelby County had its story and she had hers; confronting Mr. Gallagher in the clerk's office and telling him and his boss to 'Bring it'; and changing her ruling in a separate case the following day. Shelby County alleged that this course of action left 'little doubt' that Chancellor Jefferson was hostile toward and prejudiced against it and its attorneys. At the very least, Shelby County asserted that these actions gave an appearance of bias. Shelby County noted Tennessee Code Annotated section 67-5-2405(c), which states, 'Suits for the collection of delinquent taxes are to be prosecuted to a

conclusion as soon as practicable, and for this purpose proceedings in respect thereto are to be accorded priority by the court.' Shelby County supported its motion with an affidavit of Shelby County Trustee Regina Newman, who stated that the chancellor's actions had delayed the collection of taxes and created additional unanticipated costs for the County. She believed that Shelby County could not obtain a fair hearing in this case."

On March 14, 2024, Chancellor Jefferson entered an order denying the motion for recusal. At the outset, she explained that the clerk's office assigned this matter 'in its entirety' to Part I of chancery court, which she had presided over since September 1, 2022. Chancellor Jefferson explained that she had 'made it well known that she alone controls the Court's calendar' and that any litigants must obtain hearing dates directly from her. She stated that during the August 18 hearing on the motion for a scheduling order, she 'first comprehended the tremendous burden this lawsuit would potentially impose upon the functionality of the Court and its administration of its other pending matters.' She acknowledged requesting a meeting about the situation and emailing the interested parties with her concerns. She also conceded that during the meeting 'it was agreed' that the matter would be equally split between the three parts of chancery court with two-thirds of the matter being heard by the other chancellors by interchange and a consent order being drafted to that effect."

"'However,' she explained that shortly after the August 21 meeting, she learned that Shelby County had already 'unilaterally and improperly' set its motion for default judgment for hearing on September 29. Chancellor Jefferson stated that she had not been approached about setting the motion for a hearing, despite her longstanding policy, so she was 'astonished to learn that thousands of Defendants had received these Notices commanding them to appear before Part I for hearing.' She stated that she was 'disturbed by the fact that [Shelby County]'s counsel had completely neglected to bring this fact to the Court's attention during the August 21, 2023 meeting.' As a result, she decided that she 'could not simply rely upon the candor of [Shelby County]'s counsel to ensure this matter proceeded in the manner discussed during the August 21, 2023 meeting.' According to Chancellor Jefferson, Mr. Gallagher 'came into the August 21, 2023 meeting with unclean hands' because he had already sent out thousands of notices of the hearing. Chancellor Jefferson said it 'appeared' to her that Shelby County 'intended to go forward with this lawsuit regardless of the outcome of the August 21, 2023 meeting or the prompt execution of the Consent Order agreed to by all the parties present.' For that reason, she had entered the *sua sponte* order of dismissal on August 29."

"Chancellor Jefferson noted that the 'primary basis' for Shelby County's recusal motion appeared to be the conversation that allegedly occurred regarding Mr. Gallagher's consultation with Judge Blackett. Chancellor Jefferson said she had been advised that Mr. Gallagher 'did, in fact, threaten to file a complaint against Chancellor Jefferson with the Board of Judicial Conduct if she did not yield to [Shelby County]'s efforts to forcefully strong arm this lawsuit to a hasty resolution.' Thus, Chancellor Jefferson claimed that any 'reference' she made to that situation was simply 'to confirm to [Shelby County]'s counsel that the Court would steadfastly uphold its obligation to adjudicate matters before it fairly, justly and impartially[.]' She added, '[Shelby County]'s attempt to characterize these comments as forming the basis for recusal only further demonstrates the pattern of overreaching throughout the course of this lawsuit, to which this Court will not yield.'"

"The chancellor also noted Shelby County's reference to a hearing on December 14, 2023, the day after her interaction with Mr. Gallagher, in which she had 'diverged from the historical practice of Chancery Court' on a matter. She acknowledged that chancery courts had historically awarded taxes for the full year to Shelby County out of the excess proceeds due to the former owner at the time of the tax sale. However, she claimed that she 'chose to exercise [her] judicial discretion' to make a different award in that case based on the fact that the former owner had not owned the property for the entire year and should not be penalized with tax obligations for the time period when it was not the owner. Thus, although she admittedly chose to 'diverge from precedent,' she claimed this was an act of an 'impartial tribunal' based on the facts and the law and what the court determined to be the most ethical decision."

"In summary, Chancellor Jefferson characterized the 'crux of the dispute' in this case as being due to '[Shelby County]'s failure to consult the Court before setting matters for hearing in Part I.'" …

"Shelby County timely filed a petition for an accelerated interlocutory appeal before this Court pursuant to Tennessee Supreme Court Rule 10B. This Court entered a stay of all proceedings in the trial court pending further order of this Court. Based on our review, we have determined that neither an answer, additional briefing, nor oral argument is necessary, and we elect to act summarily on the appeal in accordance with Rule 10B, §§ 2.05 and 2.06."

"The Tennessee Supreme Court recently summarized the standards that guide courts in a recusal case:

> 'Tennessee litigants are entitled to have cases resolved by fair and impartial judges.' *Cook v. State*, 606 S.W.3d 247, 253 (Tenn. 2020) (citing *Davis* [*v. Liberty Mut. Ins. Co.*, 38 S.W.3d 560, 564 (Tenn. 2001)]; *see alsoState v. Griffin*, 610 S.W.3d 752, 757-58 (Tenn. 2020). To preserve public confidence in judicial neutrality, judges must be fair and impartial, both in fact and in perception. *Cook*, 606 S.W.3d at 253; *Kinard v. Kinard*, 986 S.W.2d 220, 228 (Tenn. Ct. App. 1998). To these ends, the Tennessee Rules of Judicial Conduct ('RJC') declare that judges must 'act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.' Tenn. Sup. Ct. R. 10, RJC 1.2. Another provision declares that judges 'shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.' *Id.*, RJC 2.2.
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> To act 'impartially' is to act in 'absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.' *Id.*, Terminology. 'A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned.' *Id.*, RJC 2.11(A).
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> Rule of Judicial Conduct 2.11 'incorporates the objective standard Tennessee judges have long used to evaluate recusal motions.' *Cook*, 606 S.W.3d at 255. 'Under this objective test, recusal is required if 'a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality.'' *Id.* (quoting *Davis*, 38 S.W.3d at 564-65).
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> The intermediate appellate courts have explained that the proponent of a recusal motion bears the burden of establishing that recusal is appropriate and that any alleged acts of bias or prejudice arise from extrajudicial sources rather than from events or observations during the litigation of the case. *Tarver v. Tarver*, No. W2022-00343-COA-T10B-CV, 2022 WL 1115016, at *2 (Tenn. Ct. App. Apr. 14, 2022). A trial judge has a duty to serve unless the proponent establishes a factual basis warranting recusal. *Raccoon Mtn. Caverns and Campground, LLC v. Nelson*, No. E2022-00989-COA-T10B-CV, 2022 WL 3100606, at *3 (Tenn. Ct. App. Aug. 4, 2022) (quoting *Rose v. Cookeville Reg'l Med. Ctr.*, No. M2007-02368-COA-R3-CV, 2008 WL 2078056, at *2 (Tenn. Ct. App. May 14, 2008)).
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> Furthermore, rulings adverse to the proponent of a recusal motion are not, standing alone, grounds for recusal. [*State v. Cannon*, 254 S.W.3d 287, 308 (Tenn. 2008)]; *Davis*, 38 S.W.3d at 564; *Duke v. Duke*, 398 S.W.3d 665, 671 (Tenn. Ct. App. 2012). …

Adams v. Dunavant, 674 S.W.3d 871, 878-79 (Tenn. 2023)."

"Here, Shelby County alleges bias. 'Bias is often divided into two types, each of which implicates a different standard for determining whether recusal is warranted.' *C.D.B. v. A.B.*, No. M2018-00532-COA-T10B-CV, 2018 WL 1976119, at *6 (Tenn. Ct. App. Apr. 26, 2018). Specifically, '[t]he source of the

alleged bias alters the burden that the party seeking recusal must bear.' *Schmeeckle v. Hamilton Cnty.*, No. E2023-01533-COA-T10B-CV, 2023 WL 8093111, at *5 (Tenn. Ct. App. Nov. 20, 2023). 'Where a bias stems from an extrajudicial source, rather than from events or observations during litigation of a case, it may be sufficient to justify recusal if the judge's behavior raises 'reasonable questions about the judge's impartiality.' *C.D.B.*, 2018 WL 1976119, at *6 (quoting *Groves v. Ernst-W. Corp.*, No. M2016-01529-COA-T10B-CV, 2016 WL 5181687, at *5 (Tenn. Ct. App. Sept. 16, 2016)). On the other hand, ''[i]f the bias is alleged to stem from events occur[r]ing in the course of the litigation of the case, the party seeking recusal has a greater burden to show bias that would require recusal, *i.e.*, that the bias is so pervasive that it is sufficient to deny the litigant a fair trial.'' *Boren*, 557 S.W.3d at 552 (quoting *Runyon v. Runyon*, No. W2013-02651-COA-T10B-CV, 2014 WL 1285729, at *6 (Tenn. Ct. App. Mar. 31, 2014)). A 'pervasive bias' is one that 'reflect[s] an utter incapacity to be fair.' *Schmeeckle*, 2023 WL 8093111, at *5 (quoting *Groves*, 2016 WL 5181687, at *5). However, '[j]udicial expressions of impatience, dissatisfaction, annoyance, and even anger towards counsel, the parties, or the case, will not ordinarily support a finding of bias or prejudice unless they indicate partiality on the merits of the case.' *Id.* (quoting *Groves*, 2016 WL 5181687, at *5). The term 'extrajudicial' is defined as ''[o]utside court' or 'out-of-court.'' *C.D.B.*, 2018 WL 1976119, at *6 (quoting *Black's Law Dictionary* 665 (9th ed. 2009))."

Applying these standards *de novo* to the facts of this case, we readily conclude that Shelby County has demonstrated pervasive bias to warrant recusal. We acknowledge that some of the statements made by Chancellor Jefferson throughout this litigation could be characterized as mere dissatisfaction, annoyance, or anger toward counsel, the parties, and this case. However, the fact remains that she approached Mr. Gallagher in the common area of the clerk's office, within earshot of numerous employees, in an 'extremely angry and upset' manner, stating that she 'did not like being threatened' and that he and his boss could both 'Bring it.' She also accused Mr. Gallagher of choosing to speak to Judge Blackett because Judge Blackett is a black woman. Notably, in denying the motion for recusal, Chancellor Jefferson did not deny that she made these statements in the course of their conversation. She simply stated that she referenced the situation 'to confirm to [Shelby County]'s counsel that the Court would steadfastly uphold its obligation to adjudicate matters before it fairly, justly and impartially.'"

"During this same timeframe, however, Mr. Gallagher appeared at a routine court tax docket and addressed the court to obtain a hearing on the Rule 59 motion, but Chancellor Jefferson 'responded that she was not going to set the Rule 59 motion for a hearing.' Mr. Gallagher offered to file a written motion to request a hearing date, but she said 'she would strike it from the calendar.' It was only after Shelby County filed a written motion for a hearing date, and appeared for a hearing on *it*, that the motion to alter or amend, filed in September, was finally set for a hearing date in March. These inexplicable actions 'reflect an utter incapacity to be fair.' *Schmeeckle*, 2023 WL 8093111, at *5 (quoting *Groves*, 2016 WL 5181687, at *5)."

SANCTIONS

1. Pro se attorney litigant made false statements in the law suit for public records - Lawyers are not free to knowingly make false statements simply because the statement is made in a petition under the Public Records Act - Sanctions for file in the public records conclusion were not proper - A citizen's reason for wishing to review a public record is immaterial - County did not disclose that the records requested did not exist - Reguli did not failed to make inadequate inquiry prior to filing a petition - Where a citizen requesting a record is informed in her denial letter/form that non-existence of the records requested is a basis upon which a public records request could be denied in general but that is not the basis for denial of her request and instead the reason that her public records request is being denied is some other unrelated reason, the citizen is entitled to proceed in filing her statutorily authorized petition with an understanding that the basis of denial is what the government has asserted it to be and not what the government has not asserted it to be - Absent the citizen knowing the records do not exist, where the custodian impliedly indicates the records exist and denial is instead on another basis, a citizen is not subject to sanctions under

Rule 11 for failing to inquire further whether the records exist prior to filing a statutorily authorized petition under the Public Records Act - Preemptive sanctioning of speech that has not yet been uttered also raises serious questions related to constitutional safeguards against prior restraints upon speech - Under the circumstances of the present case sanctioning Ms. Reguli based upon her anticipated speech regarding a public record transgresses the legal bounds of permissible Rule 11 sanctions

CONNIE REGULI v. ROGERS ANDERSON AS MAYOR OF WILLIAMSON COUNTY, TENNESSEE
COURT OF APPEALS No. M2022-00705-COA-R3-CV Filed April 22, 2024

See CONSTITUTIONAL LAW (Tennessee) - Fifty-Dollar penalty clause - While acknowledging that remedial measures naturally have some aspect of deterrence, the Tennessee Supreme Court determined that when the *predominant* purposes served by the judicially imposed penalty are to provide general and specific deterrence and to ensure overall future compliance with the law, then the monetary penalty should be deemed as serving punitive purposes, which brings it into conflict with the Fifty-Dollar Clause - Under the circumstances of the present case sanctioning Ms. Reguli based upon her anticipated speech regarding a public record transgresses the legal bounds of permissible Rule 11 sanctions, page 136.

SCHOOLS

1. Section 1983 claim – Failure to train – There is no dispute that a governmental entity can be held liable under section 1983 for its failure to properly train and supervise its employees - However, a municipality can be liable under section 1983 only if there is some underlying constitutional violation for which it could be held responsible - To hold the board liable under section 1983 for this claim, Appellants are required to establish two essential elements: (1) that the Board negligently trained or supervised Coach Root; and (2) that this inadequate training or supervision caused a violation of Tyler's rights - There was no constitutional violation found, so school system cannot be liable under section 1983

LISA KELLEY ET AL. v. NATHANIEL ROOT ET AL.
COURT OF APPEALS No. W2022-01625-COA-R3-CV Filed January 29, 2024

See GTLA – Assault and battery - A governmental entity may not be held vicariously liable for an assault and battery committed by its employee, as the general removal of immunity under the section 29-20-205 addresses only negligent acts or omissions - A governmental entity *may* be liable for an injury caused by its employee's assault and battery *if* there is also a showing of some negligence by the entity itself - Although the intentional torts exception does not include assault and battery, it does include civil rights violations - Consequently, this Court has previously held that where the underlying acts which a plaintiff alleges to be negligent are predicated on intentional tortious conduct involving the violation of the plaintiff's civil rights' by government employees, the civil rights exception in section 29-20-205(2) is applicable - Thus, even where a complaint couches the claims contained therein as negligent training and supervision claims, if the gravamen of the claim involves a violation of civil rights, then immunity is preserved - The immunity offered by section 29-20-205 is broad, preserving immunity for negligence claims so long as the 'injury arises out of civil rights, page 152.

2. Parents challenged the school curriculum claiming it violated state law pertaining to, among other things, common core and critical race theory –There were a number of issues raised, but trial court dismissed due to a lack of standing and exhaustion of remedies - Exhaustion of remedies - Administrative rules and regulations have the force and effect of law in Tennessee No error in the trial court's conclusion that the Department of Education regulations render exhaustion of administrative remedies mandatory for the parents who are bringing complaints regarding the teaching of prohibited concepts in violation of Tennessee Code Annotated Section 49-6-1019 - Court found standing, except for the parents who had left the school district - Court affirmed the trial court's dismissal of the prohibited concepts claim for failure to exhaust

administrative remedies, but reversed the dismissal of the Common Core claim and remanded - Plaintiffs have a private right of action - The Tennessee Supreme Court has observed that in determining if a private right of action exists to enforce a statutory requirement a court can find that the legislature created a private right of action in one of two ways: based on the express terms of a statute or by implication through the statute's structure and legislative history - In other words, the private right of action for enforcement of a statute is a legislative creation that is express or implied. - The Tennessee Supreme Court has indicated that the ultimate touchstone for analysis is whether the General Assembly intended for a private right of action to exist - While there is no private right of action created by the Common Core statute, plaintiffs' Common Core claim fits precisely within the contours of a private right of action created by Tennessee Code Annotated section 1-3-121 - Plaintiffs have a private right of action - The Tennessee Supreme Court has observed that in determining if a private right of action exists to enforce a statutory requirement a court can find that the legislature created a private right of action in one of two ways: based on the express terms of a statute or by implication through the statute's structure and legislative history - In other words, the private right of action for enforcement of a statute is a legislative creation that is express or implied. - The Tennessee Supreme Court has indicated that the ultimate touchstone for analysis is whether the General Assembly intended for a private right of action to exist - While there is no private right of action created by the Common Core statute, plaintiffs' Common Core claim fits precisely within the contours of a private right of action created by Tennessee Code Annotated section 1-3-121

See also - POLITICAL QUESTION DOCTRINE - In addressing the political question doctrine under the Tennessee Constitution in relation to separation of powers principles, prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question – page 179

See also – STANDING - For conventional constitutional standing in Tennessee courts, a plaintiff must establish three elements: 1) a distinct and palpable injury; that is, an injury that is not conjectural, hypothetical, or predicated upon an interest that a litigant shares in common with the general public; 2) a causal connection between the alleged injury and the challenged conduct; and 3) the injury must be capable of being redressed by a favorable decision of the court - In general, courts are precluded from adjudicating an action at the instance of one whose rights have not been invaded or infringed - Standing may not be predicated upon an injury to an interest that the plaintiff shares in common with all other citizens - To the extent that the trial court concluded that the parents could not have standing because all Williamson County children were injured by the School Board's actions, which seems to have been the central basis of its decision, it misapplied the generalized grievance limitation on standing - The proper question is not whether many other Williamson County children were injured but instead whether the Parents alleged specific injuries to their children that are sufficient to meet the constitutional demands of constituting an injury for purposes of standing - Plaintiffs are not upset about the violations of Tennessee law in which the children share a generalized grievance with all citizens who may wish to see the School Board adhere to the law. Plaintiffs are instead alleging that their children are personally and actually being directly harmed by the violations of Tennessee law - In the context of the statutory violations alleged, these are not generalized grievances but distinct and palpable injuries – page 198.

PARENTS' CHOICE TENNESSEE ET AL. v. JASON GOLDEN, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF WILLIAMSON COUNTY SCHOOLS ET AL.
COURT OF APPEALS No. M2022-01719-COA-R3-CV Filed April 18, 2024

"Parents, on behalf of their children who are public school students, and an education-focused parents' rights organization brought suit against the Williamson County Board of Education, arguing that the Board's adoption and implementation of a particular curriculum violates Tennessee law. The Plaintiffs argue the curriculum violates a state law restricting the use of Common Core textbooks and instructional materials in public schools and violates another state law that bars the teaching of certain prohibited concepts in public schools. The School Board moved to dismiss. The trial court granted the

motion on two justiciability grounds. The trial court concluded that the parents and the parents' rights organization lacked standing to maintain either claim. The trial court also concluded that the Plaintiffs were required to exhaust administrative remedies with regard to their prohibited concepts claim and had not done so. The Plaintiffs appealed. With the exception of a family that left the county public school system and has not expressed in their pleadings an intent to return, we conclude that trial court erred in finding the Plaintiffs lacked standing. We affirm the trial court's dismissal of the prohibited concepts claim for failure to exhaust administrative remedies. We reverse, however, the dismissal of the Plaintiffs' Common Core claim and remand for further proceedings."

"In 2020, the Williamson County Board of Education adopted the Wit & Wisdom curriculum for Williamson County public schools. This curriculum was implemented by principals and teachers in Williamson County public schools. In July 2022, P.J.L. and J.L., who are the parents of a minor child, and the organization Parents' Choice Tennessee filed suit. They brought suit against Jason Golden, in his official capacity as Superintendent of Williamson County Schools, Dave Allen, in his official capacity as Assistant Superintendent of Teaching Assessment, the Williamson County Board of Education (the 'School Board'), and Penny Schwinn, in her official capacity as Commissioner of Education. An Amended Complaint was filed September 2022. The Amended Complaint added as Plaintiffs C.L., who is the minor child of P.J.L. and J.L., Jennifer Doe and her minor children A.B. and B.B., and Katherine Roe and her minor children C.D. and D.D. The Parents (P.J.L., J.L., Jennifer Doe, and Katherine Roe) brought claims on behalf of their respective children."

"In their Amended Complaint, the Plaintiffs (the Parents on behalf of their children and Parents' Choice) did not seek monetary damages but instead sought declaratory and injunctive relief. The Plaintiffs essentially asserted four violations of law. One, the Plaintiffs asserted that the adoption and implementation of the Wit & Wisdom curriculum violated Tennessee Code Annotated section 49-6-1019, which prohibits the teaching of certain concepts in Tennessee public schools ('Prohibited Concepts Claim'). Two, the Plaintiffs also asserted that adoption and implementation of the Wit & Wisdom curriculum violated the Parents' substantive due process rights to control the upbringing of their children in violation of the Fourteenth Amendment to the United States Constitution ('Constitutional Claim'). Three, the Plaintiffs asserted that through the implementation of the Wit & Wisdom curriculum that the School Board violated the prohibition under Tennessee Code Annotated section 49-6-2206(b)(2)(A)3 on the use of Common Core textbooks and materials ('Common Core Claim'). Four, the Plaintiffs alleged that Commissioner Schwinn violated Tennessee Code Annotated section 49-6-2202(b)(5) by placing Wit & Wisdom, which allegedly is a Common Core curriculum, on the approved list ('Approval List Claim')."

"In their 187-page Amended Complaint, the Plaintiffs examine multiple texts and materials utilized in Williamson County public schools as part of the Wit & Wisdom curriculum. The Plaintiffs address what they assert are the philosophies and goals underlying the curriculum, including asserting that the curriculum teaches critical race theory. The Plaintiffs in their Amended Complaint address how the adoption and implementation of the Wit & Wisdom curriculum adversely impacted the minor children C.L., A.B., B.B., C.D., and D.D. For example, the Plaintiffs asserted that the curriculum caused psychological injuries to the children including anxiety, stress, and race-based guilt. For the latter, the Plaintiffs allege that the curriculum is designed to foster a sense of guilt based upon past actions of other persons who are of the same race. The Plaintiffs contend that the curriculum succeeded in achieving this aim. The Plaintiffs also asserted the curriculum fostered, in violation of Tennessee law, certain values that were contrary to those they endeavor to instill in their children; for example, they allege that the curriculum taught children to judge persons based upon the color of their skin. The Plaintiffs also alleged educational harms in terms of learning regression and lack of educational advancement. For example, some of the children allegedly experienced a diminishment in reading skills in response to the curriculum. The Plaintiffs' Amended Complaint addresses how particular texts and materials impacted particular children and caused these injuries."

"Within a day of filing their extensive Amended Complaint in September 2022, the Plaintiffs non-suited their claims against Commissioner Schwinn. Later that same month, the remaining Defendants, which

included Messrs. Golden and Allen and the School Board, filed a motion to dismiss the Plaintiffs' suit. The Defendants advanced multiple arguments in support of dismissal. One, the Defendants argued that the Plaintiffs lacked standing to bring suit; therefore, the case was non-justiciable. Two, the Defendants argued that the Plaintiffs' suit raised a political question; therefore, the case was non-justiciable. Three, with regard to the Prohibited Concepts Claim, the Defendants argued that the Plaintiffs were required to exhaust administrative remedies and that they had failed to do so. Therefore, they argued, the Prohibited Concepts Claim was non-justiciable. Four, the Defendants argued that neither Tennessee Code Annotated section 49-6-1019 nor Tennessee Code Annotated section 49-6-2206(b)(2)(A), which were the statutory bases for the Plaintiffs' Prohibited Concepts Claim and Common Core Claim respectively, provide a private right of action. Therefore, the Plaintiffs could not maintain their suit which was predicated upon a violation of these statutes by the School Board. Five, the Defendants argued that the Plaintiffs' Constitutional Claim failed because no constitutional right had been violated. Six, the Defendants noted that the Approval List Claim only applied to Commissioner Schwinn and that she had been voluntarily dismissed by the Plaintiffs from the suit. Because the Approval List Claim was neither stated against nor applicable to the remaining Defendants, they sought dismissal. Seven, the Defendants argued that the naming of Messrs. Golden and Allen in their official capacities was redundant because suit was already being brought against the School Board. Accordingly, the Defendants argued that any claims against Messrs. Golden and Allen should be dismissed."

"In November 2022, the Plaintiffs non-suited their claims against Messrs. Golden and Allen." …

"In December 2022, the trial court issued its Memorandum and Opinion, granting the School Board's motion to dismiss based upon the Plaintiffs' case being non-justiciable. In reaching this conclusion, the trial court addressed two justiciability issues. One, the trial court concluded that the Plaintiffs lacked standing. Specifically, the trial court determined that the Parents lacked standing because their children had not suffered any injuries distinct from any other child in the Williamson County public schools. Because its members, the Parents, lacked standing, the trial court concluded that Parents' Choice did not have organizational standing. Two, the trial court also addressed exhaustion of administrative remedies. The trial court noted that the School Board had argued in relation to the Plaintiffs' Prohibited Concepts Claim that the Plaintiffs were required to exhaust their administrative remedies. The trial court agreed with the argument. While only substantively addressing the Prohibited Concepts Claim, the trial court, however, stated in its decision that '[b]ecause these procedures were not exhausted prior to filing suit, as an alternate ruling, the Court also DISMISSES the case on this ground.'"

"The Plaintiffs appealed the dismissal of their suit. They reference three of their claims in their briefing on appeal, their Prohibited Concepts Claim, the Common Core Claim, and the Constitutional Claim. They do not address their Approval List Claim, which has been waived. On appeal, the Plaintiffs argue that their case is justiciable, and the trial court erred in concluding to the contrary. The Plaintiffs argue that the Parents have standing to maintain an action on behalf of their children, who they contend suffered distinct and palpable injuries. Because the Parents have standing, the Plaintiffs contend that Parents' Choice has organizational standing. The Plaintiffs also argue that the exhaustion requirement is not mandatory as to the Parents and that requiring them to exhaust would be futile. In addition to defending the bases of the trial court's grant of dismissal, standing and exhaustion of administrative remedies, the School Board also renews its argument on appeal as to three issues that were not ruled upon by the trial court. One, the School Board argues that the case is non-justiciable under the political question doctrine. Two, the School Board asserts that there is no private right of action to pursue either the Plaintiffs' Prohibited Concepts Claim or Common Core Claim. Three, addressing the Plaintiffs' Constitutional Claim, the School Board contends that the Plaintiffs have not actually asserted a claim for a violation of a constitutional right."

"Before turning our attention to the Plaintiffs' Prohibited Concepts Claim and Common Core Claim, which are the focus of the appeal in this case, we briefly touch upon the Plaintiffs' Constitutional Claim. The Plaintiffs alleged in their Amended Complaint that the School Board's adoption and use of

the Wit & Wisdom curriculum violated the Fourteenth Amendment of the United States Constitution. The School Board argues that the Plaintiffs have not actually asserted a claim for a violation of constitutional rights. The Plaintiffs address this issue in their briefing on appeal. In doing so, however, the Plaintiffs' arguments appear to only actually advance a contention that the School Board violated statutory provisions under the Tennessee Code, rather than alleging an actual constitutional violation by the School Board."

"Attempting to understand the Plaintiffs' Due Process claim and their contention that the trial court's dismissal thereof was in error, members of the court asked multiple questions during the oral argument of this case in November 2023 related to the Constitutional Claim in the Plaintiffs' Amended Complaint. In responding to these questions, the Plaintiffs' waived their Due Process Claim.5 Accordingly, we treat the Constitutional Claim in the Plaintiffs' Amended Complaint as having been waived."

"Turning to the Plaintiffs' remaining claims, the Prohibited Concepts Claim and Common Core Claim, the parties contest justiciability in their briefing, dueling over standing, the political question doctrine, and exhaustion of administrative remedies. *See Norma Faye Pyles Lynch Fam. Purpose LLC v. Putnam Cnty.*, 301 S.W.3d 196, 203 (Tenn. 2009) (listing Tennessee's justiciability doctrines as '(1) the prohibition against advisory opinions, (2) standing, (3) ripeness, (4) mootness, (5) the political question doctrine, and (6) exhaustion of administrative remedies' (footnotes omitted)); *see also West v. Schofield*, 468 S.W.3d 482, 490 (Tenn. 2015) (setting forth the same list)."

"Tennessee's justiciability doctrines have borrowed from, but are not controlled by, federal precedent. 'Despite the differences between the state and federal constitutions, Tennessee courts have consistently found federal precedents to be helpful in addressing issues of justiciability and have adopted many of the significant components of federal jurisprudence.' *Norma Faye Pyles Lynch Fam. Purpose LLC*, 301 S.W.3d at 203 n.3. However, [w]hile federal precedent has been helpful in addressing questions of justiciability, Tennessee courts are not bound by this precedent, and the entirety of the doctrines as applied by federal courts has never been adopted wholesale into Tennessee law root and branch. …

Rutan-Ram v. Tennessee Dep't of Children's Servs., No. M-2022-00998-COA-R3-CV, 2023 WL 5441029, at *6 n.6 (Tenn. Ct. App. Aug. 24, 2023)." …

"The primary basis for the trial court's dismissal of the Plaintiffs' case is the Parents' lack of standing, which it concluded rendered the case non-justiciable. As a result of its conclusion that the Parents did not have standing, the trial court also determined that Parents' Choice lacked organizational standing because its members, the Parents, lacked standing." …

"For conventional constitutional standing in Tennessee courts, a plaintiff must establish three elements:

> 1) a distinct and palpable injury; that is, an injury that is not conjectural, hypothetical, or predicated upon an interest that a litigant shares in commonwith the general public; 2) a causal connection between the alleged injury and the challenged conduct; and 3) the injury must be capable of being redressed by a favorable decision of the court.

Fisher v. Hargett, 604 S.W.3d 381, 396 (Tenn. 2020). The question of whether the Parents have standing in the present case turns upon the adequacy of the allegation of injury to their children. There is no question in the present case that if the injury is sufficient, the allegations of causation and redressability connected therewith are also sufficient."

"To determine whether the Plaintiffs have standing to bring this case, we must examine the particular allegations of their complaint and evaluate whether they are entitled to adjudicate their claims. *Id.*;

Howe v. Haslam, No. M2013-01790-COA-R3-CV, 2014 WL 5698877, at *6 (Tenn. Ct. App. Nov. 4, 2014) (citing *Petty v. Daimler/Chrysler Corp.*, 91 S.W.3d 765, 768 (Tenn. Ct. App. 2002)). The question of whether a party has standing should not be confused with the merits of the claim; accordingly, a weak claim does not equate to a lack of standing. *Metro. Gov't of Nashville & Davidson Cnty. v. Tenn. Dep't of Educ.*, 645 S.W.3d at 148-49. Tennessee courts' standing analysis is instead directed towards determining ''whether a party has a sufficiently personal stake in a matter at issue to warrant a judicial resolution of the dispute,'' barring those whose rights or interests have not been affected from bringing suit. *Metro. Gov't of Nashville v. Bd. of Zoning Appeals of Nashville*, 477 S.W.3d 750, 755 (Tenn. 2015) (quoting *State v. Harrison*, 270 S.W.3d 21, 27-28 (Tenn. 2008)). The stage of the proceedings impacts the extent of the burden imposed upon a plaintiff to establish injury, causation, and redressability. *Metro. Gov't of Nashville & Davidson Cnty. v. Tenn. Dep't of Educ.*, 645 S.W.3d at 149. Where standing is raised via a motion to dismiss, as in the present case, the plaintiffs' 'factual allegations are presumed to be true and are construed in their favor.' *Id.* Furthermore, the Tennessee Supreme Court has rejected the heightened federal plausibility pleading standard of *Twombly* and *Iqbal*, preserving the requirement that parties need only satisfy Tennessee's traditional liberal notice pleading standard. *Webb v. Nashville Area Habitat for Human., Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011)."

"As stated by the Tennessee Supreme Court, '[i]n general, courts are precluded 'from adjudicating an action at the instance of one whose rights have not been invaded or infringed.'' *Fannon v. City of LaFollette*, 329 S.W.3d 418, 424 (Tenn. 2010) (quoting *Am. C.L. Union of Tenn.v. Darnell*, 195 S.W.3d 612, 619 (Tenn. 2006)). Furthermore, '[s]tanding . . . may not be predicated upon an injury to an interest that the plaintiff shares in common with all other citizens.' *ACLU of Tenn. v. Darnell*, 195 S.W.3d at 620." …

"Here, the trial court erred in its application of the generalized grievance concept in two important respects. One, the trial court errantly viewed an injury being suffered by a large number of persons as necessarily meaning that any suit in connection therewith would be a claim based upon a generalized grievance. Two, the trial court failed to consider the Parents' specific allegations of injuries sustained by their children and whether those allegations advanced distinct and palpable injuries sufficient to satisfy the constitutional injury requirements to maintain standing."

"As to the first, the trial court's ruling appears to be grounded in a conclusion that an injury suffered by a large number of persons renders a suit in connection therewith a nonjusticiable suit based upon a generalized grievance. However, '[t]he fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance. The victims' injuries from a mass tort, for example, are widely shared, to be sure, but each individual suffers a particularized harm.' *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 n.7 (2016). Simply stated, 'an injury shared by a large number of people is nonetheless an injury.' *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 793 F.2d 1322, 1324 (D.C. Cir. 1986). A contrary understanding is in error, for '[t]o deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread . . . actions could be questioned by nobody.' *United States v. Students Challenging Regul. Agency Procs. (SCRAP)*, 412 U.S. 669, 688 (1973). To the extent that the trial court concluded that the parents could not have standing because all Williamson County children were injured by the School Board's actions, which seems to have been the central basis of its decision, it misapplied the generalized grievance limitation on standing."

"This does not, however, end our inquiry. The proper question is not whether many other Williamson County children were injured but instead whether the Parents alleged specific injuries to their children that are sufficient to meet the constitutional demands of constituting an injury for purposes of standing." …

"The Amended Complaint contains allegations related to five children. C.L. is the minor child of J.P.L. and P.L. A.B. and B.B. are the minor children of Jennifer Doe. C.D. and D.D. are the minor children of Katherine Roe. Before delving more deeply into this matter, we note that C.L. is differently situated

than the other four children, who were and are students in the Williamson County public schools. C.L.'s parents withdrew him from the Williamson County School System prior to the first grade and placed him in a private school where he has evidently adjusted quite well. We have been cited to no provisions of the Amended Complaint that indicate that C.L.'s parents intend to return C.L. to the County's public schools, nor are we aware of any such provisions in the Amended Complaint. In other words, C.L. is not currently a student in the Williamson County public schools, and the Plaintiffs have not in their Amended Complaint asserted any intent or desire to return him to the Williamson County public schools should the County's alleged illegalities be addressed."

"With regard to the justiciability of claims on behalf of C.L., this is problematic for the Plaintiffs. The Plaintiffs have not crafted an Amended Complaint that seeks damages for past injuries but instead they are focused on prospective relief in the form of a declaratory judgment and injunctive relief. Given the facts as pled by the Plaintiffs, we fail to discern how the Plaintiffs' prospective-focused judicial relief claims on behalf of C.L. are justiciable. Pursuant to the Amended Complaint, C.L. is not a public-school student in Williamson County, and there is no indication in the Amended Complaint of an intent or desire to return to Williamson County public schools should the alleged illegality be removed. This seemingly places C.L. in the generalized grievance category, seeking to require the School Board to follow the cited laws while not actually being affected by that outcome."

"Allegations related to the other four children A.B., B.B., C.D., and D.D. do not present the same complications as C.L. They were and are students in Williamson County public schools. We turn next to considering whether their alleged injuries satisfy the constitutional requirements for an injury for purposes of standing under the Tennessee Constitution."

"Here, the Plaintiffs alleged that each of these children was taught, in violation of Tennessee law, using a Common Core curriculum and a curriculum that taught multiple prohibited concepts. The Plaintiffs in their Amended Complaint addressed both the alleged impact of the curriculum generally and the impact of particular prohibited concepts allegedly being taught. The Plaintiffs' Amended Complaint connected these violations with injuries allegedly suffered by the individual children A.B., B.B., C.D., and D.D. The Plaintiffs alleged that, as result of the School Board's violation of Tennessee law, their children experienced psychological harm including anxiety, stress, and race-based guilt. The Parents also assert that they are trying to imbue their children with certain values which allegedly are being undermined by the use of a Common Core curriculum and the teaching of prohibited concepts in violation of Tennessee law. Additionally, the parents assert that their children's educational development, for example advancement in terms of reading ability, is being harmed by the use of a Common Core curriculum and inclusion of prohibited concepts in violation of Tennessee law. In other words, the Plaintiffs here are not merely alleging that the School Board's curriculum decisions were unwise or even illegal, but instead are alleging that their children experienced actual psychologically harm, had their values undermined, and had their educational advancement hampered by the School Board's use of a Common Core curriculum and by teaching prohibited concepts. These alleged injuries are, according to the Plaintiffs' Amended Complaint, directly related to the alleged illegalities through a curriculum that allegedly teaches prohibited concepts in violation of section 49-6-1019 and adopts a Common Core curriculum in violation of section 49-6-2206(b)(2)(A)."

"The injuries alleged by the Plaintiffs on behalf of their children also appear to be akin to the type of harm that the General Assembly was seeking to prevent through the adoption of these statutory prohibitions. For example, Tennessee Code Annotated section 49-6-1019(a)(6) prohibits LEAs from including in their curriculum the concept that '[a]n individual should feel discomfort, guilt, anguish, or another form of psychological distress solely because of the individual's race or sex.' The Plaintiffs allege the School Board violated this limitation and in doing so has caused their children to experience precisely such race-based guilt. Here, the individual plaintiffs pled particular facts asserting their children's injuries – specifically how certain aspects of the Wit & Wisdom curriculum and the teaching of prohibited concepts injured their children through a combination of psychological harm, undermining the values taught within their family, and hampering their educational development. Under the Amended Complaint, these were not hypothetical or theoretical injuries, but instead actual,

concrete, particularized injuries that have been suffered. That there may be many other children who experienced similar harms does not make the alleged injury any less of a personal injury as to A.B., B.B., C.D., and D.D."

"In other words, the Plaintiffs are not upset about the violations of Tennessee law in which the children share a generalized grievance with all citizens who may wish to see the School Board adhere to the law. The Parents are instead alleging that their children are personally and actually being directly harmed by the violations of Tennessee law. In the context of the statutory violations alleged, these are not generalized grievances but distinct and palpable injuries. The trial court did not address any of these allegations. Having considered the injuries asserted in the Amended Complaint, we conclude that the trial court erred in determining that the Parents lacked standing due to a lack of distinct and palpable injuries."

"We note that our determination in this case is intertwined with the stage of the proceedings – that is, the context of reviewing the trial court's grant of a motion to dismiss based upon lack of standing. We take no view on the question of whether the Plaintiffs' children actually suffered any such injuries. The question before us is not whether the Plaintiffs' children or any other children were actually injured but instead whether, presuming the allegations of the Amended Complaint to be true and construing the allegations in favor of the Plaintiffs, they have adequately alleged injuries sufficient to satisfy the minimum constitutional requirements for an injury for purposes of conventional standing. *See Metro. Gov't of Nashville & Davidson Cnty. v. Tenn. Dep't of Educ*, 645 S.W.3d at 149. Nothing in our ruling prevents the School Board from raising a challenge to Plaintiffs' standing at a later stage of the proceedings based on the further development of facts."

"As for organizational standing, the trial court's basis for dismissing Parents' Choice for lack of organizational standing was predicated upon the lack of standing of its members, the Parents. The trial court's ruling as to organizational standing followed quite reasonably from its analysis of the Parents' standing. *See generally ACLU of Tenn.*, 195 S.W.3d at 626 (noting that to establish organizational standing, an organization must show '(1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit'). However, because the Parent members do have standing, the trial court's basis for finding lack of organizational standing evaporates. Accordingly, we conclude that the trial court erred in determining that Parents' Choice lacked organizational standing."

"The School Board also contends that the Plaintiffs' case is non-justiciable under the political question doctrine. Having determined the Plaintiffs' case to be non-justiciable due to lack of standing, the trial court did not address the School Board's political question argument. In opposition to the School Board's position, which it renewed on appeal before this court, the Plaintiffs argue that the political question doctrine is inapplicable to the present case."

"In addressing the political question doctrine under the Tennessee Constitution in relation to separation of powers principles, this court borrowed the handiwork of the United States Supreme Court in *Baker v. Carr*, embracing its six strands:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Mayhew v. Wilder, 46 S.W.3d 760, 773 (Tenn. Ct. App. 2001) (quoting *Baker*, 369 U.S. at 217). The Tennessee Supreme Court subsequently approved of this court's formulation and embraced the same six strands. *See Bredesen*, 214 S.W.3d at 435."

"The School Board's argument in the present case presses upon the second and third strands of the political question doctrine, with its primary focus on the third. The argument advanced is, essentially, that the General Assembly has afforded to local boards of education and the Tennessee Department of Education broad discretion and authority to make determinations regarding instruction in Tennessee's schools. Accordingly, the Defendant argues Tennessee courts cannot decide whether the statutes adopted by the General Assembly have been violated without making their own policy determinations. In other words, because the policy-making discretion afforded to the local school boards and Tennessee Department of Education is extremely broad, there is no role for judicial review."

"… The Plaintiffs' claims are predicated upon claims of transgression of two statutes in which the General Assembly has addressed what may be taught in Tennessee public schools. The Plaintiffs allege that the School Board violated Tennessee Code Annotated section 49-6-1019, which prohibits teaching of certain enumerated restricted concepts (the Prohibited Concepts Claim), and Tennessee Code Annotated section 49-6-2206(b)(2)(A), which prohibits use of Common Core textbooks and instructional materials and those marketed as Common Core (the Common Core Claim). In alleging that these statutes have been violated, the Plaintiffs are not inherently asking Tennessee courts to make a policy determination as to the substance of what should and should not be taught in Tennessee public school classrooms. The Tennessee General Assembly has already made that determination. The courts are instead being asked to determine whether the School Board transgressed the statutorily imposed prohibitions crafted by the General Assembly. As for discretion afforded, assuming for purposes of argument that the School Board is correct insofar as the zone of discretion afforded to local school boards and the Department of Education is as wide as an ocean, there are still shores where the water comes to an end, and figuring out where the metaphorical ocean and shore meet presents a question of statutory interpretation."

"More than a century ago, addressing separation of powers, the Tennessee Supreme Court observed that '[t]heoretically, the legislative power is the authority to make, order, and repeal, the executive . . . [is the power to] administer and enforce, and the judicial . . . [is the power to] interpret and apply, laws.' *Richardson v. Young*, 125 S.W. 664, 668 (Tenn. 1910). State courts have repeatedly rejected arguments invoking the political question doctrine in a manner that interferes with the judiciary's statutory interpretation role. *See*, *e.g.*, *Moss v. Bd. of Cnty. Comm'rs for Boulder Cnty.*, 411 P.3d 918, 922 (Colo Ct. App. 2015) (citation omitted) ('Interpreting those provisions in no way infringes on the powers and duties of other branches of government. . . . Indeed, statutory interpretation is a question of law that is traditionally within the role of the judiciary to resolve.'); *Office of Hawaiian Affairs. v. Kondo*, 528 P.3d 243, 251 (Haw. 2023) (rejecting a contention the political question doctrine rendered a matter non-justiciable because '[s]tatutory interpretation is the judiciary's forte, central to its mission' and a court engaging in statutory interpretation 'does not intrude on another governmental branch'); *Bedke v. Ellsworth*, 480 P.3d 121, 130 (Idaho 2021) (rejecting an argument for application of the political question doctrine, noting that '[i]nterpreting statutes is a fundamental responsibility of the judiciary'); *N.J. Election Law Enf't Comm'n v. DiVincenzo*, 169 A.3d 1002, 1008 (N.J. App. Div. 2017) ('The question presented here is one of statutory interpretation and does not implicate any of the criteria for a nonjusticiable controversy.'); *Creswick v. Univ. of S.C.*, 862 S.E.2d 706, 708 (S.C. 2021) ('Contrary to the Attorney General's position that this matter presents a political question, we hold this action involves solely a question of statutory interpretation.')."

"The United States Supreme Court has reached the same conclusions as state courts, rejecting invocation of the political question doctrine in a manner that invades the role of the courts in interpreting statutes." …

"We do not doubt that the interpretation of the statutory provisions that the Plaintiffs assert were violated may present challenging questions of interpretation for Tennessee courts, but the presence of a difficult question does not usher out the judiciary via the political question doctrine. There is a qualitative difference between hard questions and political questions. One involves metaphorically rolling up one's sleeves and getting to work as a court; the other involves abandoning the field because the state or federal constitution requires the court to do so. Local boards of education and the Department of Education may be entitled to deference, perhaps even to a significant degree, but the political question doctrine does not provide for deference – it demands total abandonment. There is a chasm between deference and abdication. However challenging the questions raised may ultimately be, it is clear that there are some discernable lines. The Tennessee Supreme Court has stated that the political question doctrine will render a case nonjusticiable only 'in rare cases'; this is not one of them. *See Bredesen*, 214 S.W.3d at 434."

"As an alternative ground for dismissal, the trial court determined the Plaintiffs were required to exhaust their administrative remedies and failed to do so. There is some ambiguity in the trial court's Memorandum and Opinion regarding this ground for dismissal. The trial court stated that '[b]ecause these procedures were not exhausted prior to filing suit, as an alternate ruling, the Court also DISMISSES the case on this ground.' The School Board, however, did not seek dismissal of 'the case' based upon failure to exhaust administrative remedies. While the School Board sought dismissal of the Plaintiffs' Amended Complaint in its entirety on a number of grounds, the School Board only pursued dismissal for failure to exhaust as to Prohibited Concepts Claims. As noted above, the Plaintiffs' Prohibited Concepts Claim asserts a violation of Tennessee Code Annotated section 49-6-1019, which prohibits teaching of certain enumerated restricted concepts, whereas the Plaintiffs' Common Core Claim alleges a violation of Tennessee Code Annotated section 49-6-2206(b)(2)(A), which prohibits use of Common Core textbooks and instructional materials. … On appeal before this court, the School Board only argues in support of trial court's dismissal as to failure to exhaust remedies in relation to the Prohibited Concepts Claim. The School Board does not separately argue that the Common Core Claim is subject to an exhaustion of administrative remedies requirement or argue that the trial court's order dismissed the Common Core Claim. Accordingly, while the trial court's Memorandum and Order states that failure to exhaust was an alternative basis for dismissal of 'the case,' we understand the trial court to have only dismissed the Prohibited Concepts Claim upon this basis and not the Common Core Claim."

"While distinct conceptually from the ripeness doctrine, the requirement of exhaustion of administrative remedies functions as a form of procedural ripeness. Where justiciability concerns of this variety are present, it is not that the parties cannot ever have their case heard by a court; rather, it is that a party who has not exhausted her claims has not yet followed the prerequisite that unlocks the door to her case being heard in court." …

"There are important distinctions between exhaustion of administrative remedies being mandatory as a matter of law and circumstances where exhaustion is required by a court in the exercise of its discretion. The Tennessee Supreme Court has indicated that 'when exhaustion of administrative remedies is required by statute, the failure to do so will deprive the court of subject matter jurisdiction.' *Chattanooga-Hamilton Cnty. Hosp. Auth. v. UnitedHealthcare Plan of the River Valley, Inc.*, 475 S.W.3d 746, 758 (Tenn. 2015); *see also Pickard v. Tenn. Water Quality Control Bd.*, 424 S.W.3d 511, 523 (Tenn. 2013) ('When exhaustion is a clear statutory requirement, 'exhaustion is an absolute prerequisite for relief,' and failure to exhaust administrative remedies will defeat a reviewing court's subject matter jurisdiction.'). Alternatively, in the absence of a legal mandate, 'the exhaustion of the administrative remedies doctrine is a matter of judicial discretion' and subject to review under an abuse of discretion standard. *Ready Mix, USA, LLC v. Jefferson Cnty.*, 380 S.W.3d 52, 64 (Tenn. 2012)."

"In concluding that exhaustion is mandatory in the present case, the trial court drew upon the Department of Education's regulations that were promulgated with the express 'purpose . . . to

effectuate T.C.A. § 49-6-1019.' Tenn. Comp. R. & Regs. 0520-12-04-.01. The trial court determined that, under these regulations, exhaustion of administrative remedies is mandatory."

"The Plaintiffs contend that the regulations are not mandatory upon parents of public school students. We disagree. The regulations promulgated by the Department of Education to effectuate Tennessee Code Annotated section 49-6-1019, the prohibited concepts law, set out a specific and mandatory administrative procedure. Tenn. Comp. R. & Regs. 0520-12-04-.05, entitled 'Reporting and Investigating Prohibited Concepts,' mandates that a complaint about violations of the law must be filed with the LEA or public charter school in which the allegation(s) arose:

> To file a complaint alleging the Prohibited Concepts are being or have been included or promoted in a course of instruction, curriculum and instructional program, or in supplemental instructional materials of an LEA or public charter school, a complainant *must* file a complaint with the LEA or public charter school in which the allegation(s) arose. An eligible complainant may, but is not required to, use the complaint form provided by the LEA or charter school, so long as the complaint contains the information required by Section 0520-12-04-.05(5).

Tenn. Comp. R. & Regs. 0520-12-04-.05(2) (emphasis added)." …

"On appeal, the Plaintiffs argue this regulation is not mandatory as to parents but instead only creates a mandatory procedure for an LEA if parents file a complaint. In support of this contention, the Plaintiffs note that multiple provisions of the regulations related to prohibited concepts impose mandatory duties upon the LEA and not parents. The multitude of mandatory requirements imposed on the LEA under the regulations does not make the imposition of the filing requirements upon parents any less mandatory. 'Complainant' is defined in Section 0520-12-04-.02 as 'a current student of the LEA . . . in which the allegation(s) arose [or] a parent of a current student of the LEA . . . in which the allegation(s) arose . . . .' And, it is complainants who '*must* file a complaint with the LEA or public charter school in which the allegation(s) arose.' Tenn. Comp. R. & Regs. 0520-12-04-.05(2) (emphasis added)."

"We note that 'administrative rules and regulations' have 'the force and effect of law in Tennessee.' *Swift v. Campbell*, 159 S.W.3d 565, 572 (Tenn. Ct. App. 2004). The Plaintiffs have not challenged the administrative regulation. Their argument is limited to the contention that the regulations are not mandatory upon parents seeking to file a complaint regarding the teaching of prohibited concepts but instead are only mandatory upon the LEA should parents file such a complaint. Regarding whether the regulations are mandatory, we consider only the argument advanced by the Plaintiffs. *See Sneed*, 301 S.W.3d at 615 (noting '[i]t is not the role of the courts, trial or appellate, to research or construct a litigant's case or arguments for him or her . . .'). Addressing the argument advanced by the Plaintiffs, we find no error in the trial court's conclusion that the Department of Education regulations render exhaustion of administrative remedies mandatory for the Parents who are bringing complaints regarding the teaching of prohibited concepts in violation of Tennessee Code Annotated Section 49-6-1019."

"The Plaintiffs contend that even if the regulations are mandatory that, nevertheless, an exception is applicable in the present case based upon futility. Tennessee courts have recognized an exception to the requirement to exhaust administrative remedies based upon futility. *See*, *e.g.*, *Bailey*, 303 S.W.3d at 236; *Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.3d 512, 525-26 (Tenn. 2005); *Cantrell v. Walker Die Casting, Inc.*, 121 S.W.3d 391, 396 n. 3 (Tenn. Ct. App. 2003). Unsurprisingly, for a party seeking to avoid having to exhaust administrative remedies where they are mandatory by law, the bar to surmount is high. The Tennessee Supreme Court has indicated that '[t]he standard for adjudging the futility of resorting to the administrative remedies . . . is *whether a clear and positive indication of futility can be made*. A plaintiff *must show that it is certain that his claim will be denied* on appeal, *not merely that he doubts* . . . a different decision.' *Bailey*, 303 S.W.3d at 236 (quoting *Cantrell*, 121 S.W.3d at 396 n.3) (emphasis added). Simply stated, '[t]he futility exception is . . . quite restricted

and has been applied only when resort to administrative remedies is clearly useless.' *Bailey*, 303 S.W.3d at 236 (quoting *Commc'ns Workers of Am. v. AT & T*, 40 F.3d 426, 432 (D.C. Cir. 1994)); *see also Cantrell*, 121 S.W.3d at 396 n.3. The Tennessee Supreme Court has described the showing necessary for demonstrating futility as an administrative process that is 'pointless' and 'a foregone conclusion.' *Bailey*, 303 S.W.3d at 236."

"The Plaintiffs raise four arguments which they place under the umbrella of futility. … The Plaintiffs do not, however, suggest that they have been deprived of access to the administrative process or that information is not publicly available as to how to access the process. Furthermore, the Plaintiffs concede that the LEA has made multiple changes in response to complaints from other parents. While the Plaintiffs' allegations may suggest an uphill path, they do not demonstrate a 'pointless' exercise or a 'foregone conclusion.'"

"… [W]e find no error in the trial court's conclusion that the Plaintiffs' Prohibited Concepts Claim is subject to an exhaustion requirements and dismissal thereof for failure to comply with the mandatory procedure."

"In addition to the aforementioned justiciability doctrines, the School Board also argues that the Plaintiffs' claims should be dismissed because there is no private right of action that has been created to allow for a suit based upon the statutory violations which the Plaintiffs allege. Having concluded that the Plaintiffs lacked standing, the trial court did not address this argument, which the School Board renews on appeal before this court. Given our justiciability based dismissal of the Plaintiffs' Prohibited Concepts Claim for failure to exhaust administrative remedies, we address the private right of action issue solely as to the Plaintiffs' Common Core Claim."

"The Tennessee Supreme Court has observed that in determining if a private right of action exists to enforce a statutory requirement '[a] court can find that the legislature created a private right of action in one of two ways: based on the express terms of a statute or by implication through the statute's structure and legislative history.' *Affordable Constr. Servs., Inc. v. Auto-Owners Ins. Co.*, 621 S.W.3d 693, 696 (Tenn. 2021). In other words, the private right of action for enforcement of a statute is a legislative creation that is express or implied. *See id.* The Tennessee Supreme Court has indicated that the ultimate touchstone for analysis is whether the General Assembly 'intended for a private right of action to exist.' *Id.*"

"The School Board notes that Tennessee Code Annotated section 49-6-2206 does not expressly create a private of right of action and suggests that language therein runs contrary to implying a private right of action. They are correct on both accounts. Tennessee Code Annotated section 49-6-2206 does not expressly create a private right of action and the Code section does not appear to imply the existence of a private right of action. The problems for the School Board, however, is that a private right of action applicable to the Plaintiffs' Common Core Claim is created in Tennessee Code Annotated section 1-3-121."

"Chapter 3 of Title 1 of the Tennessee Code addresses the 'Construction of Statutes.' Tennessee Code Annotated section 1-3-121 provides that

> Notwithstanding any law to the contrary, a cause of action shall exist under this chapter for any affected person who seeks declaratory or injunctive relief in any action brought regarding the legality or constitutionality of a governmental action. A cause of action shall not exist under this chapter to seek damages.

Addressing section 1-3-121, the Tennessee Supreme Court observed that

> The plain meaning of this text expressly recognizes the existence of causes of action 'regarding the legality or constitutionality of a governmental action' that seek declaratory or injunctive relief. Causes of action 'regarding the legality or

> constitutionality of governmental action' must of necessity be brought against governmental entities . . . .

Recipient of Final Expunction Ord. in McNairy Cnty. Cir. Ct. Case No. 3279 v. Rausch, 645 S.W.3d 160, 168 (Tenn. 2022)."

"The plain language of section 1-3-121 creates a private right of action – 'a cause of action shall exist … for any affected person' – when that person seeks declaratory or injunctive relief, not damages, challenging the legality of a governmental action. The plain language specifically dismisses any concern of contradiction with other law in its sweeping pronouncement, '[n]otwithstanding any law to the contrary.' Furthermore, this is not a case in which there is interpretive tension through a more specific negation or denial of a private right of action either with regard Tennessee Code Annotated section 49-6-2206 or the type of claim being advanced by the Plaintiffs."

"The Plaintiffs' Common Core Claim fits precisely within the contours of a private right of action created by Tennessee Code Annotated section 1-3-121. The Plaintiffs are affected persons who are seeking declaratory and injunctive relief, rather than damages, and challenging the legality of a governmental action. Specifically, they are arguing that the School Board violated Tennessee Code Annotated section 49-6-2206(b)(2)(A) by requiring teachers and principals in public schools to use 'textbooks or instructional materials created to align exclusively with the Common Core State Standards or that are marketed as Common Core textbooks or materials.'"

STANDING

1. For conventional constitutional standing in Tennessee courts, a plaintiff must establish three elements: 1) a distinct and palpable injury; that is, an injury that is not conjectural, hypothetical, or predicated upon an interest that a litigant shares in common with the general public; 2) a causal connection between the alleged injury and the challenged conduct; and 3) the injury must be capable of being redressed by a favorable decision of the court - In general, courts are precluded from adjudicating an action at the instance of one whose rights have not been invaded or infringed - Standing may not be predicated upon an injury to an interest that the plaintiff shares in common with all other citizens - To the extent that the trial court concluded that the parents could not have standing because all Williamson County children were injured by the School Board's actions, which seems to have been the central basis of its decision, it misapplied the generalized grievance limitation on standing - The proper question is not whether many other Williamson County children were injured but instead whether the Parents alleged specific injuries to their children that are sufficient to meet the constitutional demands of constituting an injury for purposes of standing - Plaintiffs are not upset about the violations of Tennessee law in which the children share a generalized grievance with all citizens who may wish to see the School Board adhere to the law. Plaintiffs are instead alleging that their children are personally and actually being directly harmed by the violations of Tennessee law - In the context of the statutory violations alleged, these are not generalized grievances but distinct and palpable injuries

PARENTS' CHOICE TENNESSEE ET AL. v. JASON GOLDEN, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF WILLIAMSON COUNTY SCHOOLS ET AL.
COURT OF APPEALS No. M2022-01719-COA-R3-CV Filed April 18, 2024

See SCHOOLS - Parents challenged the school curriculum claiming it violated state law pertaining to, among other things, common core and critical race theory –There were a number of issues raised, but trial court dismissed due to a lack of standing and exhausation of remedies – Exhaustion of remedies - Administrative rules and regulations have the force and effect of law in Tennessee No error in the trial court's conclusion that the Department of Education regulations render exhaustion of administrative remedies mandatory for the parents who are bringing complaints regarding the teaching of prohibited concepts in violation of Tennessee Code Annotated Section 49-6-1019 - Court found standing, except

for the parents who had left the school district – Court affirmed the trial court's dismissal of the prohibited concepts claim for failure to exhaust administrative remedies, but reversed the dismissal of the Common Core claim and remanded - Plaintiffs have a private right of action - The Tennessee Supreme Court has observed that in determining if a private right of action exists to enforce a statutory requirement a court can find that the legislature created a private right of action in one of two ways: based on the express terms of a statute or by implication through the statute's structure and legislative history - In other words, the private right of action for enforcement of a statute is a legislative creation that is express or implied. - The Tennessee Supreme Court has indicated that the ultimate touchstone for analysis is whether the General Assembly intended for a private right of action to exist - While there is no private right of action created by the Common Core statute, plaintiffs' Common Core claim fits precisely within the contours of a private right of action created by Tennessee Code Annotated section 1-3-121 - Plaintiffs have a private right of action - The Tennessee Supreme Court has observed that in determining if a private right of action exists to enforce a statutory requirement a court can find that the legislature created a private right of action in one of two ways: based on the express terms of a statute or by implication through the statute's structure and legislative history - In other words, the private right of action for enforcement of a statute is a legislative creation that is express or implied. - The Tennessee Supreme Court has indicated that the ultimate touchstone for analysis is whether the General Assembly intended for a private right of action to exist - While there is no private right of action created by the Common Core statute, plaintiffs' Common Core claim fits precisely within the contours of a private right of action created by Tennessee Code Annotated section 1-3-121 – page 186.

2. Motion to dismiss – Plaintiff's have standing and case is ripe for judicial review - to establish standing, three elements must be satisfied: 1) a distinct and palpable injury; that is, an injury that is not conjectural, hypothetical, or predicated upon an interest that a litigant shares in common with the general public; 2) a causal connection between the alleged injury and the challenged conduct; and 3) the injury must be capable of being redressed by a favorable decision of the court - Plaintiffs have alleged that, as parents of children in the only two school districts where the ESA Act applies, they are distinctly and palpably injured by the diversion of funds from their districts to private education purposes - Plaintiffs emphasize that it is only Davidson and Shelby County parents and students who are affected thusly - Plaintiffs alleged further that their injury is traceable to the ESA Act's requirement that the funds be diverted - Regarding redressability, Plaintiffs' alleged injury could be redressed judicially in the form of a court order declaring the ESA Act unconstitutional and ordering an injunction against the ESA Act's implementation. Plaintiffs have thus met each of the elements of standing as parents - Plaintiffs have alleged enough at the motion to dismiss stage to establish standing as parents and taxpayers to challenge the constitutionality of the ESA Act for violating the requirement of a single system of public schools mandated by the Education Clause of the Tennessee Constitution

THE METROPOLITAN GOVERNMENT OF NASHVILLE & DAVIDSON COUNTY, ET AL. v. TENNESSEE DEPARTMENT OF EDUCATION, ET AL.
COURT OF APPEALS No. M2022-01786-COA-R3-CV Filed January 10, 2024

"This appeal concerns a lawsuit challenging the Tennessee Education Savings Account Pilot Program, Tenn. Code Ann. § 49-6-2601, *et seq*. ('the ESA Act'). A group of parents and taxpayers from Davidson and Shelby Counties ('Plaintiffs') sued state officials ('State Defendants') in the Chancery Court for Davidson County ('the Trial Court'). In their operative amended complaint, Plaintiffs alleged that the ESA Act violates the Tennessee Constitution and state law by diverting taxpayer funds appropriated for public schools in Davidson and Shelby Counties to private schools, resulting in unique harm to these localities. A group of parents with children eligible for the ESA Act ('Bah Defendants') and another group ('Greater Praise Defendants') (all defendants collectively, 'Defendants') intervened in defense of the ESA Act. Defendants filed motions to dismiss, which the Trial Court granted on grounds that Plaintiffs lack standing and their claims are not ripe for judicial review. In reaching its decision, the Trial Court found that the ESA Act has not caused the affected counties any unequal hardship. Plaintiffs appeal the dismissal of their first, second, and sixth causes of action only. We conclude that the Trial

Court erred by deciding factual disputes over the impact of the ESA Act on Plaintiffs at the motion to dismiss stage. Plaintiffs alleged enough in their amended complaint to establish standing both as parents and taxpayers. Plaintiffs' claims also are ripe for judicial review. We, therefore, reverse the judgment of the Trial Court as to Plaintiffs' first, second, and sixth causes of action and remand for further proceedings consistent with this Opinion."

"This case was disposed of at the motion to dismiss stage on grounds of standing and ripeness. As the Tennessee Supreme Court has explained, '[o]n a motion to dismiss, the Court presumes all factual allegations to be true and construes them in favor of the plaintiff.' *Metro. Gov't of Nashville & Davidson Cnty. v. Tenn. Dep't of Educ.*, 645 S.W.3d 141, 147-48 (Tenn. 2022). This presumption of truth 'is equally true with respect to factual allegations regarding standing.' *Id.* at 148. A trial court's legal conclusions regarding the adequacy of a complaint are reviewed *de novo*. *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011). Thus, we review Plaintiffs' operative amended complaint filed in August 2022 to determine whether Plaintiffs alleged enough to establish standing as taxpayers and/or parents and whether their claims are ripe for judicial review. At this motion to dismiss stage, we must accept Plaintiffs' factual allegations as true and construe them in Plaintiffs' favor."

"Plaintiffs sued State Defendants in the Trial Court challenging the ESA Act. At this motion to dismiss stage, Plaintiffs' factual allegations are the universe of facts we can consider. Given the standard of review, we deem it appropriate to quote substantially from Plaintiffs' amended complaint." …

"… Plaintiffs alleged six causes of action. Plaintiffs have appealed the dismissal of only their first, second, and sixth causes of action, which read as follows:

> **FIRST CAUSE OF ACTION**
> **(Violation of the Education and Equal Protection Clauses**
> **of the Tennessee Constitution)**
> …
>
> **SECOND CAUSE OF ACTION**
> **(Violation of the Requirement of a Single System of Public Schools**
> **Mandated by the Education Clause of the Tennessee Constitution)**
> …
>
> **SIXTH CAUSE OF ACTION**
> **(Violation of the Appropriation of Public Moneys Provisions**
> **of the Tennessee Constitution and T.C.A. § 9-4-601)**
> …

"Defendants filed motions to dismiss and for judgment on the pleadings. In November 2022, the Trial Court ruled 2-1 in favor of Defendants on grounds that Plaintiffs lack standing and that their claims are not ripe. The Trial Court expressly declined to rule on any other grounds." …

"Although not stated exactly as such, Plaintiffs raise the following issues on appeal: 1) whether the Trial Court erred in ruling that Plaintiffs lacked standing to challenge the constitutionality of the ESA Act under the Education and Equal Protection Clauses of the Tennessee Constitution; 2) whether the Trial Court erred in ruling that Plaintiffs lacked standing to challenge the constitutionality of the ESA Act for violating the requirement of a single system of public schools mandated by the Education Clause of the Tennessee Constitution; 3) whether the Trial Court erred in ruling that Plaintiffs lacked standing to challenge the ESA Act for violating the Appropriation of Public Moneys provisions of the Tennessee Constitution and Tenn. Code Ann. § 9-4-601; and 4) whether the Trial Court erred in ruling that Plaintiffs' claims were not ripe."

"The Tennessee Supreme Court has articulated the applicable standard of review as follows:

> The trial court decided the issue of standing on the State's motion to dismiss pursuant to Tennessee Rule of Civil Procedure 12.02(6). The Court reviews the motion to dismiss on the issue of standing de novo with no presumption of correctness. *Effler v. Purdue Pharma, L.P.*, 614 S.W.3d 681, 687 (Tenn. 2020). On a motion to dismiss, the Court presumes all factual allegations to be true and construes them in favor of the plaintiff. *Foster v. Chiles*, 467 S.W.3d 911, 914 (Tenn. 2015). This is equally true with respect to factual allegations regarding standing. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (For the purposes of a challenge to standing '[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim.' (second alteration in original) (internal quotation marks omitted)).

Metro. Gov't, 645 S.W.3d at 147-48 (footnote omitted)."

"Three of the four issues on appeal implicate whether Plaintiffs have standing. The Tennessee Supreme Court has discussed the doctrine of standing, and how a plaintiff establishes standing, as follows:

> …To determine whether standing exists, a court must focus on the party bringing the lawsuit rather than on the merits of the claim. *Fisher v. Hargett*, 604 S.W.3d 381, 396 (Tenn. 2020); *Metro. Air Rsch. Testing Auth., Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 842 S.W.2d 611, 615 (Tenn. Ct. App. 1992); *see also Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 799-800, 135 S.Ct. 2652, 192 L.Ed.2d 704 (2015). The weakness of a claim on the merits must not be confused with a lack of standing. *Ariz. State Legislature*, 576 U.S. at 800, 135 S.Ct. 2652. While standing 'often turns on the nature and source of the claim asserted,' it 'in no way depends on the merits' of the claim. *Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); *see also Fisher*, 604 S.W.3d at 396. Rather, to establish standing, three elements must be satisfied:
>
> > 1) a distinct and palpable injury; that is, an injury that is not conjectural, hypothetical, or predicated upon an interest that a litigant shares in common with the general public; 2) a causal connection between the alleged injury and the challenged conduct; and 3) the injury must be capable of being redressed by a favorable decision of the court.
>
> *Fisher*, 604 S.W.3d at 396 (citing *City of Memphis v. Hargett*, 414 S.W.3d 88, 97 (Tenn. 2013)). In this case, the crux of the controversy involves the first element."

> The plaintiff bears the burden of establishing these elements ' 'by the same degree of evidence' as other matters on which the plaintiff bears the burden of proof.' *ACLU of Tenn. v. Darnell*, 195 S.W.3d 612, 620 (Tenn. 2006) (quoting *Petty v. Daimler/Chrysler Corp.*, 91 S.W.3d 765, 767 (Tenn. Ct. App. 2002)). The degree of evidence depends, of course, upon the stage of litigation at which standing is challenged. *See Petty*, 91 S.W.3d at 767; *see also Lujan*, 504 U.S. at 561, 112 S.Ct. 2130 ('The party invoking federal jurisdiction bears the burden of establishing these elements. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.' (citations omitted)). In this case, Defendants challenged standing through a motion to dismiss. Accordingly, Plaintiffs' factual allegations are presumed to be true and are construed in their favor. *Foster*, 467 S.W.3d at 914; *see also Lujan*, 504 U.S. at 561, 112 S.Ct. 2130.

Metro. Gov't, 645 S.W.3d at 148-49 (footnote omitted)."

"The first of Plaintiffs' issues we address is whether the Trial Court erred in ruling that Plaintiffs lacked standing to challenge the constitutionality of the ESA Act under the Education and Equal Protection Clauses of the Tennessee Constitution. Article I, section 8 of the Tennessee Constitution states: 'That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.' In addition, Article XI, section 8 of the Tennessee Constitution provides, as relevant:

> The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunitie[s], or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law.

Meanwhile, Article XI, Section 12 of the Tennessee Constitution provides: 'The State of Tennessee recognizes the inherent value of education and encourages its support. The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools. The General Assembly may establish and support such postsecondary educational institutions, including public institutions of higher learning, as it determines.' The Tennessee Supreme Court has held that '[t]he constitution, therefore, imposes upon the General Assembly the obligation to maintain and support a system of free public schools that affords substantially equal educational opportunities to all students. The means whereby this obligation is accomplished, is a legislative prerogative.' *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 140-41 (Tenn. 1993)." …

"Here, Plaintiffs have alleged that, as parents of children in the only two school districts where the ESA Act applies, they are distinctly and palpably injured by the diversion of funds from their districts to private education purposes. Plaintiffs emphasize that it is only Davidson and Shelby County parents and students who are affected thusly. Plaintiffs alleged further that their injury is traceable to the ESA Act's requirement that the funds be diverted. Regarding redressability, Plaintiffs' alleged injury could be redressed judicially in the form of a court order declaring the ESA Act unconstitutional and ordering an injunction against the ESA Act's implementation. Plaintiffs have thus met each of the elements of standing as parents."

"Nevertheless, Defendants argue that any harm to Plaintiffs is purely speculative. They contend that, should there ever be any loss of funds in Plaintiffs' districts, such a shortfall would not occur until at least three years after the ESA Act's implementation. In their brief, State Defendants note, among other things, that '[t]he chancery court found that funding from the school improvement fund accounted for any loss of money for the first three fiscal years of the program.'"

"State Defendants are correct in that the Trial Court found that, thus far, there has been no loss of money by the counties or schools at issue. However, Plaintiffs did not allege that. As a matter of fact, Plaintiffs alleged the opposite. Plaintiffs alleged that the ESA Act's purported measures to soften or eliminate loss of funds by the affected districts do not work and that the counties continue to lose funds. Whether that is ultimately proven is not before us as this case is only at the motion to dismiss stage. On a motion to dismiss, the Tennessee Supreme Court has told us quite clearly that courts are required to accept a plaintiff's factual allegations as true and construe them in the non-moving plaintiff's favor, not the moving defendant's favor. At the motion to dismiss stage, a plaintiff's alleged facts are presumed to be true for purposes of the motion and a defendant must assert that, even if everything the plaintiff alleges is true, she still is not entitled to relief or, as in the appeal at bar, she lacks standing.

"By deciding that the school improvement funds accounted for any lost money in the first three years of the program, the Trial Court erroneously resolved a factual dispute at the motion to dismiss stage. In their amended complaint, Plaintiffs set out in great detail their factual allegations why the school improvement funds are not an adequate replacement for the funds their districts lose under the ESA Act. Plaintiffs alleged, for example, that 'if available, [school improvement funds] cannot be used for general operating funds and consequently will not replace the state and local BEP funds diverted from Shelby County Schools and Metro Nashville Public Schools under [the ESA Act].'" …

"We next address whether the Trial Court erred in ruling that Plaintiffs lacked standing to challenge the constitutionality of the ESA Act for violating the requirement of a single system of public schools mandated by the Education Clause of the Tennessee Constitution. As in the previous issue, Plaintiffs assert that they have standing both as parents and taxpayers. With respect to standing as parents, Plaintiffs alleged that their children are harmed by the illegal diversion of funds to support private education at the expense of public education in their districts and nowhere else. Plaintiffs have alleged further that the harm is traceable to the ESA and is redressable by court order. Here again, the merits of Plaintiffs' claim are not at issue. The strength or weakness of the claim is beside the point for purposes of standing at the motion to dismiss stage. The question at this stage is simply whether Plaintiffs have alleged a distinct and palpable injury, a causal connection to the challenged conduct, and that the harm is redressable by court order. We hold that Plaintiffs have done so. Namely, Plaintiffs, as parents of students in the districts allegedly harmed by a diversion of funds under the ESA Act, have alleged that the ESA Act violates the requirement of a single system of public schools in Tennessee. "To hold otherwise at this stage of the proceeding would require us to make factual determinations even though our Supreme Court is clear that would be improper. Plaintiffs have demonstrated standing as parents on this issue."

"With regard to taxpayer standing, Plaintiffs once again assert special injury and specific illegality. Plaintiffs have alleged that as taxpayers in Davidson and Shelby Counties, they are distinctly burdened by an unconstitutional diversion of public funds under the ESA Act. They assert further that the harm is traceable to the ESA and is redressable by court order. Based on their allegations, Plaintiffs have established standing as taxpayers based on a special injury not common to the public at large."

"Plaintiffs also have alleged specific illegality in the form of the ESA Act's diversion of public funds from their districts. The Trial Court failed to treat Plaintiffs' factual allegations as true as the law requires. In addition, for the reasons already discussed, prior demand by Plaintiffs would have been futile based on their factual allegations. We hold that Plaintiffs have alleged enough at the motion to dismiss stage to establish standing as parents and taxpayers to challenge the constitutionality of the ESA Act for violating the requirement of a single system of public schools mandated by the Education Clause of the Tennessee Constitution."

"We next address whether the Trial Court erred in ruling that Plaintiffs lacked standing to challenge the ESA Act for violating the Appropriation of Public Moneys provisions of the Tennessee Constitution and Tenn. Code Ann. § 9-4-601. Article II, section 24 of the Tennessee Constitution states, in relevant part: 'No public money shall be expended except pursuant to appropriations made by law. . . . Any law requiring the expenditure of state funds shall be null and void unless, during the session in which the act receives final passage, an appropriation is made for the estimated first year's funding.' Meanwhile, Tenn. Code Ann. § 9-4-601(a)(1) (West eff. May 16, 2013) provides, as relevant: 'No money shall be drawn from the state treasury except in accordance with appropriations duly authorized by law.' In their amended complaint, Plaintiffs alleged in part that 'TDOE's expenditures for the ClassWallet contract, or any other expenditures for the administration and implementation of the Voucher Law in 2019, without appropriation for the estimated first year's funding of the Voucher Law, render the Voucher Law null and void under Article II, § 24, of the Tennessee Constitution and violate T.C.A. § 9-4-601.'"

TAX SALE

1. Trial court refused to extend the statute of limitations in a tax sale beyond the one year statute of limitations - Mr. Motamedi had constructive notice of the sale - Mr. Motamedi provides no authority, and we have found none, instructing that an order confirming a tax sale must be recorded with a register of deeds immediately upon entry to provide proper notice of a tax sale to a property owner. Rather, this Court has repeatedly held that a tax sale purchaser is assured title and the redemption period begins upon entry of the order with the trial court

CROCKETT COUNTY v. FARHAD MOTAMEDI v. MICHAEL MOORE
COURT OF APPEALS No. W2023-00553-COA-R3-CV March 28, 2024

"This is an appeal from an order denying a petition to set aside a tax sale of unimproved real property. The petitioner had acquired the parcel in 2017 but had failed to update his address with the property assessor and other taxing authorities and had failed to pay taxes associated with the parcel from 2017 through 2021. The taxing authorities, as plaintiffs, commenced a lawsuit to collect the delinquent taxes in 2020. Unable to locate the petitioner for lack of a current address, the taxing authorities sought permission from the trial court to notify the petitioner of the lawsuit through publication in the local newspaper, which the trial court granted. After the time for notice by publication had expired, the taxing authorities sought and were granted default judgment regarding the petitioner's property, and the taxing authorities sold the real property at a delinquent tax sale. The order confirming the tax sale was entered on April 7, 2021, but was not recorded with the local register of deeds until April 26, 2022, after the one-year statutory redemption period had passed. In July and August 2021, the petitioner contacted the taxing authorities to inquire about taxes he owed on the property and traveled to Crockett County to meet with the city and county officials and pay the delinquent taxes. For unknown reasons, the taxing authorities did not inform the petitioner that the real property had been sold at a tax sale earlier that year. The petitioner did not initiate a redemption action and did not file a petition to have the sale set aside at that time. In June 2022, after the one-year redemption period had elapsed and the statute of limitations period for setting aside the tax sale had expired, the petitioner sued to set aside the tax sale, which action the trial court denied as untimely. The petitioner has appealed. Discerning no reversible error, we affirm."

"The petitioner, Farhad Motamedi, appeals the denial of his petition to set aside the delinquent tax sale of certain real property located in the City of Bells, Tennessee, bearing the description 'Tax Map 82, Parcel 014.43' (the 'Property'), by the Chancery Court for Crockett County ('trial court'). On April 24, 2020, the plaintiffs in the tax sale, 'Crockett County and all Municipalities and Taxing Authorities of said County' ('the Taxing Authorities'), filed a petition for the collection of delinquent taxes against numerous defendant property owners. Included with those defendants was Mr. Motamedi, from whom the Taxing Authorities sought payment of delinquent taxes he owed respecting the Property. In the list of defendants included with the petition and all subsequent filings in the lawsuit, Mr. Motamedi's mailing address was included as: '8654 Dena Cove, Cordova, TN 38018.' According to Mr. Motamedi, he was not residing at that address when the petition was filed but had been living and receiving mail at 8592 Prism Cove, Cordova, Tennessee, from the time he acquired the Property in November 2017 to the present."

"In October 2020, the Taxing Authorities moved the trial court for an order dispensing with personal service as to Mr. Motamedi and allowing service by publication in the *Crockett County Times* newspaper pursuant to Tennessee Rule of Civil Procedure 4.05 and Tennessee Code Annotated §§ 21-1-203, 21-1-205, and 67-5-2415. The Taxing Authorities attached to the motion a list of defendants for whom they had been 'unable to obtain personal service,' and Mr. Motamedi's name was among them. The trial court granted the motion and directed the clerk and master to publish a notice and order incorporating the names of the defendants to be served by publication, including Mr. Motamedi, 'in the Crockett County Times newspaper once per week for four (4) consecutive weeks.'"

"On December 10, 2020, after the time for service by publication had ended, the Taxing Authorities moved for default judgment against Mr. Motamedi for failure to pay the delinquent taxes associated

with the Property. Following a hearing conducted on January 11, 2021, during which Mr. Motamedi did not appear, the trial court granted the motion. The Property was subsequently sold at a tax auction to the third-party defendant, Michael Moore. The trial court entered an order confirming the sale on April 7, 2021 and the order was recorded with the Crockett County Register of Deeds on April 13, 2022. On June 28, 2022, Mr. Motamedi filed a petition to set aside the tax sale of the Property pursuant to Tennessee Rule of Civil Procedure 60.02. Mr. Motamedi averred, *inter alia*, that he had 'never received notice of any taxes due nor of any tax sale as required by T.C.A. § 67-5-2502(c)(2).' Mr. Motamedi further averred that in August 2021 he had travelled to Crockett County to determine what taxes he owed concerning the Property and had paid all of those delinquent taxes on that same day. Mr. Motamedi claimed that an employee in the Crockett County Property Tax Assessor's office had accepted his payments and 'told him everything was fine.' Mr. Motamedi alleged that if he had been told by the tax assessor's office 'in July and August of 2021 that the Property had been sold at a tax sale, he would have timely filed a redemption action.' Mr. Motamedi included in the petition an August 2, 2021 email exchange between himself and an employee of the Crockett County Property Tax Assessor wherein Mr. Motamedi learned the assessor did not have his current address. Mr. Motamedi thereupon supplied the employee with his 8592 Prism Cove address."

"The trial court conducted a hearing regarding Mr. Motamedi's petition on October 5, 2022, during which Mr. Motamedi, Mr. Moore, and the Crockett County delinquent tax attorney, Randy Camp, testified. The trial court subsequently entered a fourteen-page order denying Mr. Motamedi's petition on October 17, 2022. In the order, the trial court first determined that Mr. Motamedi's petition was not an action to redeem the Property but instead constituted 'an attack on sale of land' because Mr. Motamedi had filed the petition pursuant to Tennessee Rule of Civil Procedure 60.02(5), which provides a catch-all provision for relief from judgments or orders. The trial court then declined to extend the one-year statute of limitations period for bringing such an action upon determining that Mr. Motamedi had not exercised reasonable due diligence regarding the Property. Specifically, the trial court determined that Mr. Motamedi should have provided the Taxing Authorities with a current address when he first acquired the Property in 2017 and that Mr. Motamedi bore the responsibility for staying abreast of the tax responsibilities and any lawsuits related to the Property. The order confirming the tax sale having been entered on April 7, 2021, the trial court concluded that the limitations period had expired on April 7, 2022, thus barring as untimely Mr. Motamedi's June 2022 petition. Mr. Motamedi timely appealed."

"Mr. Motamedi argues that contrary to the findings of the trial court, he exercised due diligence in discovering that he owed delinquent taxes on the Property and promptly paid those taxes when he learned of them in July and August 2021. Accordingly, Mr. Motamedi contends that the trial court should have extended the one-year statute of limitations for attacking the tax sale. Tennessee Code Annotated § 67-5-2504(d) (West July 1, 2017, to current), which governs proceedings for tax sales of property, provides:

> (1) A suit to invalidate any tax title to land shall be commenced within one (1) year from the date the cause of action accrued, which is the date of the entry of the order confirming the tax sale.
> (2) The statute of limitations to invalidate the sale of any tax title shall be one (1) year as set forth in subdivision (d)(1), except that it may be extended to one (1) year after the plaintiff discovered or with the exercise of reasonable due diligence should have discovered the existence of such cause of action."

"Here, the tax sale of the Property was conducted on March 23, 2021, and the order confirming the tax sale was entered on April 7, 2021. Thus, according to § 67-5- 2504(d)(1), Mr. Motamedi had until April 7, 2022, to file suit to attack the sale of the Property. Mr. Motamedi admits that he filed his petition on June 28, 2022, outside the one-year statute of limitations for filing such a lawsuit. However, he argues that the trial court should have extended the limitations period, pursuant to § 67-5-2401(d)(2), because his actions in bringing the delinquent taxes up to date in August 2021 sufficed to meet the due diligence requirement for extending the limitations period. Mr. Motamedi contends that the various

Taxing Authorities he met with from both the city and county in August 2021 should have informed him then that the Property had already been sold to Mr. Moore at the tax sale in April 2021 but that they failed to do so."

"In its order denying Mr. Motamedi's petition to set aside the tax sale, the trial court first determined that because Mr. Motamedi filed his petition pursuant to Tennessee Rule of Civil Procedure 60, the petition constituted 'an attack on sale of land pursuant to § 67-5-2504 and [was] not a request to redeem the property at issue.'" …

"Mr. Motamedi argues that the trial court 'misanalysed the reasonable diligence requirement' in § 67-5-2504(d)(2) by focusing on his failure to provide the Taxing Authorities with his current address. He contends that although his failure to provide an updated address might have been relevant regarding 'non-receipt of tax bills' or efforts to serve him with process, the trial court's determination that he did not exercise reasonable due diligence was error because the trial court 'totally ignore[d]' the events happening 'after' the tax sale, specifically his payment of taxes owed on the Property in August 2021."

"Mr. Motamedi posits that his belief that his tax obligations had been satisfied was even further cemented in November 2021 when both the City of Bells and Crockett County sent him notices of taxes owed on the Property, which he 'promptly paid,' and when the Crockett County Assessor's Office sent him a '2022 Assessment Change Notice' for the Property informing him that the Property's appraised value had increased. Mr. Motamedi asserts that these actions by the Taxing Authorities 'lulled' him into believing that everything was fine regarding his ownership of the Property and ran contrary to any indication that a tax sale had already taken place in April 2021. Mr. Motamedi avers that had he known about the tax sale, he would have filed an action during the one-year redemption period, *see* Tenn. Code Ann. § 67-5-2701(a)(1)(A) (West April 18, 2019, to current), thus negating any need to file suit to attack the tax sale pursuant to § 67-5-2504(d)."

"We do not agree with Mr. Motamedi that the trial court misanalyzed the reasonable due diligence requirement set forth in § 67-5-2504(d)(2). In deciding not to extend the limitations period, the trial court undertook a thorough analysis of the statutory provisions regarding Mr. Motamedi's affirmative duty, as owner of the Property, to pay real property taxes and to remain informed of any proceeding to enforce tax liens against the Property, as follows:

> Under Tenn. Code Ann. § 67-5-2103, 'the whole proceeding for the enforcement of property tax liens, coming from the assessment to sale for delinquency, shall be a proceeding in rem.' Subsection (b) of that statute states that 'all interested persons shall be deemed to have constructive notice of the proceedings by virtue of the seizure of the parcel occurring upon the filing of a complaint for the purpose of enforcement of the first lien.'
> * * *
> Significantly, Tenn. Code Ann. § 67-5-2103(j) states that 'all interested persons . . . are charged with the knowledge that the Parcel is subject to property taxes, which are required to be paid to the trustee or collector on an annual basis, and which taxes become a first lien on the parcel from January 1st of each year. All interested persons have an affirmative duty to inquire as to the amounts of such taxes and their payments status. Under no circumstances shall a claim that the interested party did not receive a tax bill or any pre-lawsuit notice constitute a valid defense to the enforcement of the lien . . . .' Likewise, Tenn. Code Ann. § 67-5-2502(b) provides that 'it is the responsibility of the property owner to register the property owner's name and address with the assessor of property of the county in which the land lies.'

"The trial court reviewed the respective statutory framework to determine that the proceeding to collect the delinquent taxes owed on the Property initiated by the Taxing Authorities was a proceeding *in rem*. *See* Tenn. Code Ann. § 67-5-2103 (West May 8, 2015, to current). As such, the taxes Mr.

Motamedi owed on the Property became a 'first lien' upon the Property 'from January 1' for each year they were assessed. *See* Tenn. Code Ann. § 67-5-2101(a) (West May 8, 2015, to current). When those taxes became delinquent, the Taxing Authorities were entitled to file a lawsuit for their collection. *See* Tenn. Code Ann. § 67-5-2101(b). Thus, Mr. Motamedi had constructive notice of the proceeding when the complaint for delinquent taxes was filed on April 24, 2020. *See* Tenn. Code Ann. § 67-5-2103(a), (b); *State v. Benner*, 187 S.W.2d 609, 610 (Tenn. 1940) ('[T]ax suits are considered actions *in rem*, and it is usually held that all persons having an interest in the property are deemed to have constructive notice of the claim for taxes.')."

"Moreover, the trial court further determined that Mr. Motamedi bore an affirmative duty to register his 'name and address with the assessor of property of the county in which [the Property] lies.' *See* Tenn. Code Ann. § 67-5-2502(b) (West April 18, 2019, to current). Mr. Motamedi admits that he did not supply this information to the tax assessor until August 2021, several months after the tax sale had already occurred. Mr. Motamedi's payment of taxes owed on the Property after the tax sale notwithstanding, we agree with the trial court's determination that

> the statute of limitations with regard to an attack on sale of land pursuant to Tenn. Code Ann. § 67-5-2504 ran in this case as of April 7, 2022, and that such statute of limitations should not be extended pursuant to Tenn. Code Ann. § 67-5-2504(d)(2), as [Mr. Motamedi] did not exercise reasonable due diligence in discovering the existence of such a cause of action, if any."

"Mr. Motamedi blames his failure to inquire regarding the tax sale of the Property in part on the fact that the order confirming the sale was not recorded with the Crockett County Register of Deeds 'immediately after the order was entered[.]' Mr. Motamedi points to Mr. Camp's testimony during the petition hearing in support of this argument, noting that it was '[Mr. Camp's] understanding that the order confirming the sale should have been recorded immediately' with the register of deeds."

"It is undisputed that the order confirming the tax sale of the Property was not recorded until April 2022, after the redemption period had ended and after the one-year statute of limitations period had elapsed. However, Mr. Motamedi provides no authority, and we have found none, instructing that an order confirming a tax sale must be recorded with a register of deeds immediately upon entry to provide proper notice of a tax sale to a property owner. Rather, this Court has repeatedly held that a tax sale purchaser is assured title and the redemption period begins upon entry of the order with the trial court. *See, e.g.*, *Delinquent. Taxpayers as Shown on 2011 Real Prop. Tax Recs. of Metro. Gov't of Nashville & Davidson Cnty. v. Metro. Gov't of Nashville & Davidson Cnty.*, No. M2015-02450-COA-R3-CV, 2018 WL 3530842, at *4 (Tenn. Ct. App. July 23, 2018)[.]" …

"Moreover, the statutes governing the timeframe for both the redemption and statute of limitations periods base that timing on entry of the order confirming sale, not its recordation with a register of deeds. Regarding the redemption period, Tennessee Code Annotated § 67-5-2701(a)(1)(A) provides:

> Upon entry of an order confirming a sale of a parcel, a right to redeem shall vest in all interested persons. The right to redeem shall be exercised within the time period established by this subsection (a) beginning on the date of the entry of the order confirming the sale, but in no event shall the right to redeem be exercised more than one (1) year from that date. The redemption period of each parcel shall be determined by the court prior to the tax sale of the parcel and may also be stated in the order confirming the sale.

(Emphasis added.) Regarding the one-year statute of limitations period, Tennessee Code Annotated § 67-5-2504(d)(1) provides:

> A suit to invalidate any tax title to land shall be commenced within one (1) year from the date the cause of action accrued, which is the date of the entry of the order confirming the tax sale.

(Emphasis added.) Accordingly, we find Mr. Motamedi's argument that he did not receive proper notice of the tax sale because the order confirming that sale was not recorded until April 2022 to be unavailing. For the above-stated reasons, we decline to overturn the trial court's decision not to extend the statute of limitations period pursuant to Tennessee Code Annotated § 67-5-2504(d)(2)."

"Mr. Motamedi contends that because the record does not contain proof that the summons was returned undeliverable as to him, the Taxing Authorities' service upon him by publication in the local newspaper was ineffective to grant the trial court jurisdiction over him. Mr. Motamedi asserts that the order confirming the tax sale is therefore 'void and ineffective to transfer title,' and the statute of limitations period for contesting thetransfer of title prescribed by Tennessee Code Annotated § 67-5-2504(d) inapplicable to him."

"With reference to the notice requirements for tax sales of property, Tennessee Code Annotated § 67-5-2502 provides generally:

> Notice to parties or others in delinquent tax suits and sales shall be governed by the Tennessee Rules of Civil Procedure, except as modified in this chapter or as they may be inconsistent with the statutory scheme for the collection of delinquent property taxes set out in this chapter[.]
> * * *
> [I]t is the responsibility of the property owner to register the property owner's name and address with the assessor of property of the county in which the land lies.

Significantly, § 67-5-2502 is entitled, 'Notice,' and in its entirety pertains to the proper methods for providing notice of tax lien suits to property owners. We therefore interpret its express provision that it is the 'responsibility of the property owner' to register his or her name and address with the property assessor as placing an affirmative duty on the property owner to facilitate notice by providing a current address where the owner can be reached. As stated above, Mr. Motamedi does not dispute that he failed to update his address with any taxing authority for the Property until approximately August 2021. The trial court was therefore correct when it cited this provision in its order determining that Mr. Motamedi had an 'affirmative duty' to provide current contact information to the taxing authorities and that Mr. Motamedi had not fulfilled that duty."

"Mr. Motamedi further asserts that because the record contains no evidence that service of a summons regarding the tax sale was returned undelivered as to him, such service was 'ineffective to grant the [trial court] jurisdiction over [him].' Mr. Motamedi argues this was in violation of Tennessee Rule of Civil Procedure 4.03(2), which provides that when process is served by mail, 'the original summons[;] an affidavit of the person making service setting forth the person's compliance with the requirements of [Rule 4]; and, the return receipt shall be sent to and filed by the clerk.' However, Mr. Motamedi's assertion ignores the fact that Rule 4.03 only applies in the context of a delinquent tax sale to the extent that it is not 'inconsistent with the statutory scheme for the collection of delinquent property taxes set out in [Chapter 5 – governing property taxes].' *See* Tenn. Code Ann. § 67-5-2502(a)(3)."

"As to Mr. Motamedi's postulate that the trial court did not maintain jurisdiction to award personal judgment against him due to insufficient notice, Tennessee Code Annotated § 67-5-2415(a) (West July 1, 2017, to current) governs the lawful methods for providing notice to property owners in tax lien suits as they relate to a trial court's jurisdiction. The statute provides:

> The court shall have jurisdiction to award personal judgment against an owner upon the claim for the debt upon determining that proper process has been served upon such owner. The court shall have jurisdiction to award a judgment enforcing the [tax] lien

> by a sale of the parcel upon determining that any [of] the following actions have occurred as to each owner:
>
> * * *
>
> (3) That constructive notice by publication pursuant to §§ 21-1-203 [providing that personal service can be dispensed with if a defendant's residence 'is unknown and cannot be ascertained upon diligent inquiry'] and 21-1-204 [outlining the process for service by publication] . . . has been given to . . . unfound . . . owners[.]

Tenn. Code Ann. § 67-5-2415(a). Tennessee Code Annotated § 67-5-2502(c) defines 'diligent effort to give actual notice of the proceedings' as follows:

> (1)(A) [A] reasonable effort to give notice which is reasonably calculated, under all the circumstances and conditions, to apprise interested persons of the pendency of the proceedings in time to afford them an opportunity to prevent the loss of their interest in the parcel. . . . Such effort does not, however, require that an interested person receive actual notice. Nor does it require the plaintiff to search records or sources of information in addition to that information available in the specific offices listed in subdivision (c)(2);
>
> * * *
>
> (2) The delinquent tax attorney shall make a reasonable search of the public records in the offices of the assessor of property, trustee, the register of deeds, and the local office where wills are recorded, seeking to identify and locate all interested persons as to each parcel listed on the county and municipal delinquent tax lists filed in the cause.

(Emphasis added.)"

"Applying these provisions to the instant case, Mr. Camp was not required to search further than the offices of the Taxing Authorities for Mr. Motamedi's contact information, *see* Tenn. Code Ann. § 67-5-2502(c)(2), and Mr. Motamedi readily admits that these offices did not possess his current address prior to August 2021. After searching for Mr. Motamedi and failing to locate his current address, Mr. Camp filed a motion to dispense with personal service as to Mr. Motamedi, which motion included an affidavit outlining the efforts that Mr. Camp had undertaken to notify Mr. Motamedi and the others of the action. According to Mr. Camp's affidavit, these efforts included '[f]or summons unserved by certified mail, researching the county public records for changes in ownership or address including but not limited to the offices of the Trustee, Property Assessor, Clerk & Master and County Clerk and issuance of a new summons if information [was] discovered warranting such[.]' The trial court determined that this search of records described in Mr. Camp's affidavit satisfied the 'diligent efforts to give actual notice' requirements found in § 67-5-2502(c). Accordingly, the trial court granted the motion to dispense with personal service on October 2, 2020. The trial court then ordered Mr. Camp to notify the taxpayers of the tax lien suit by publication in the *Crockett County Times* newspaper 'once per week for four (4) consecutive weeks.' Mr. Motamedi has never questioned the validity of the trial court's order dispensing with personal service, nor has he posited that the constructive notice by publication was executed improperly."

"Upon thorough review, we decline to overturn the trial court's decision to dispense with personal service as to Mr. Motamedi, *see* Tenn. Code Ann. § 21-1-103, and further determine that service by publication upon Mr. Motamedi was proper and conducted according to statutory mandate, *see* Tenn. Code Ann. § 21-1-204. Because Mr. Motamedi was properly afforded constructive notice of the tax lien lawsuit related to the Property, we determine that the trial court possessed jurisdiction over the tax lien action and properly entered the order confirming tax sale of the Property on April 7, 2021. For these reasons, we find Mr. Motamedi's arguments regarding insufficient service of process to be unavailing."

2. Property owner impliedly allowed a person at the property addrees to sign for receipt of service of process for a delinquent tax lawsuit - A person that is impliedly authorized to receive mail on behalf of a delinquent taxpayer is also authorized to sign a certified mail return receipt containing a summons or notice that has been or is to be filed in a tax proceeding - Sending notice of a tax sale to the address provided by the property owner was reasonably calculated to apprise the property owner of the pending tax sale - County was not required to take additional steps to notify Trustee unless it learned that an otherwise reasonably calculated attempt to notify Trustee had failed - The inquiry before the court was whether section 67-5-2502(a)(4), which allows for notice to a delinquent taxpayer to be received and signed for by an individual otherwise authorized to receive mail for the taxpayer, is reasonably calculated to apprise a delinquent taxpayer of an enforcement action brought by the county - Court found that it is and, therefore, that it does not violate the requirements or purposes of constitutional due process - The notice provision for property tax lawsuit while different from other lawsuits does not violate equal protection - Because taxes produce the revenue by which the government operates, the legislature has wide discretion in the adoption of tax measures, and its judgment must be accorded great respect - This deference must also be extended to the methods fixed by the legislature for the collection of such taxes - Administrative convenience and expense in the collection or measurement of the tax' alone is a sufficient justification for treating delinquent taxpayers differently than defendants in other actions - The State has a rational, legitimate interest in effecting service upon delinquent taxpayers in an efficient and cost-effective manner that justifies the distinction between defendants in delinquent tax proceedings and defendants in other legal proceedings - Because section 67-5-2502(a)(4) passes the rational basis test, Trustee's equal protection challenge fails

STATE OF TENNESSEE EX REL. SULLIVAN COUNTY TENNESSEE ET AL. v. AMY S. TOCHEV ET AL.
COURT OF APPEALS No. E2023-00072-COA-R3-CV Filed March 27, 2024

"A taxpayer failed to pay property taxes for a number of years. The county began enforcement proceedings and, following the entry of a default judgment against the taxpayer, the taxpayer's property was ultimately sold at a delinquent tax sale. The purchaser filed a writ of possession to obtain possession of the property from the taxpayer, at which time the taxpayer filed a motion to set aside the default judgment and resulting tax sale. The taxpayer alleged lack of notice concerning the underlying delinquent tax proceedings and violation of her due process and equal protection rights. The trial court denied the taxpayer's motion to set aside, concluding the taxpayer was properly served with notice of the underlying delinquent tax proceedings. We affirm."

"Amy S. Tochev, as Trustee under the Amy Tochev Life Trust Agreement dated May 30, 2003 ('Trustee'), is the former owner of the property identified as Tax Map 046L, Group A, Parcel 013.00 and Tax Map 046L, Group A, Parcel 013.001 in Sullivan County, Tennessee (collectively, the 'Property'). Trustee failed to pay property taxes for 2016, 2017, and 2018, as a result of which, the State of Tennessee ex rel., Sullivan County, Tennessee (the 'County') initiated delinquent tax sale proceedings against Trustee. The Property comprises an improved parcel with a mailing address of 1501 E. Stone Drive in Kingsport, Tennessee and an adjacent unimproved parcel. On the improved parcel is a commercial building that was used as a medical practice by Amy Tochev's husband, a physician, from approximately 2003 until approximately 2016. In 2016, Dr. Tochev discontinued providing routine medical services but continued using the building at 1501 E. Stone Drive to see individuals by appointment. The Tochevs have also resided in Sullivan County, albeit on an unrelated property, since 2001."

"The Tochevs initially purchased the Property jointly in their individual capacities in 2003. The deed granting title to the Tochevs, individually, listed the name and address of the property owners as Dr. Tochev 'and wife, Amy S. Tochev' and listed their home address. That deed also listed the name and address 'of the Person or Entity Responsible for the Payment of the Real Property Tax' as 'Same as property owner[.]' On July 21, 2003, the Tochevs executed a Quitclaim Deed conveying the property to

Trustee. That Quitclaim Deed listed the 'name & address of owner and taxpayer' as Trustee at the 1501 E. Stone Drive address."

"In addition to the tax years at issue in this appeal, Trustee also failed to timely pay taxes on the Property in prior years. In each of those prior cases, summonses and notices were served on Trustee via certified mail addressed to her at 1501 Stone Drive in Kingsport, Tennessee. Various employees of Dr. Tochev's medical practice signed for these certified mail deliveries in 2008, 2013, and 2015. In each of those cases, Trustee ultimately paid the overdue property taxes prior to the confirmation of any sale of the Property."

"The County initiated the first delinquent tax sale proceeding at issue in this appeal against Trustee in the Sullivan County Chancery Court (the 'trial court') on April 2, 2018, for any unpaid taxes for tax years 2007 through 2016 (the '2016 Case'). Two notices and summonses to Trustee were issued in the 2016 Case (the '2016 Summonses') and were sent via certified mail addressed to Trustee at the 1501 Stone Drive address. A return was filed stating that certified mail was delivered on June 18, 2018. The return includes a copy of the certified mail receipt showing that delivery was signed for by Georgia Counts, another employee of Dr. Tochev. The County initiated the second delinquent tax sale proceeding at issue in this appeal against Trustee in the trial court on April 1, 2019, for any unpaid taxes for tax years 2008 through 2017 (the '2017 Case'). Two summonses and notices to Trustee were issued in the 2017 Case; however, there is no return for those summonses in the record. The County initiated the third and final delinquent tax sale proceeding at issue in this appeal against Trustee in the trial court on April 1, 2020, for any unpaid taxes for tax years 2008 through 2018 (the '2018 Case'). Two notices and summonses to Trustee were issued in the 2018 Case and were sent via certified mail addressed to Trustee at the 1501 Stone Drive address. That certified mail was delivered on August 12, 2020, but it is unknown who signed for the delivery as the signature on the certified mail receipt is illegible. However, a box was checked on the certified mail receipt indicating that it was signed for by an agent of the addressee, Trustee."

"On April 2, 2020, the trial court entered an order consolidating the 2016 and 2017 Cases into the 2018 Case. Thereafter, on October 16, 2020, the trial court entered an order granting the County a default judgment against Trustee in the 2018 Case (the 'Default Judgment'). Don Henderson purchased the Property at the December 16, 2020 tax sale conducted by the County, and the trial court entered a final order confirming the sale on December 17, 2020. The Clerk and Master of the trial court issued a Clerk & Master's Tax Deed conveying title of the Property to DH RETENN1, LLC (the 'Purchaser') on January 3, 2022 (the 'Tax Deed')."

"On April 20, 2022, Trustee filed a motion pursuant to Rule 60.02 of the Tennessee Rules of Civil Procedure and an Affidavit of Trustee in support thereof, seeking to set aside the Default Judgment, the subsequent order that the Property be sold, and the Tax Deed. Trustee averred that, on or about March 23, 2022, she 'received in the mail both at 1501 E. Stone Drive, Kingsport, Tennessee, and at her residence' a letter notifying her that the Property had been sold. Trustee further averred that, despite knowing that she had not paid the relevant property taxes, she was unaware, prior to receiving the March 23 letter, that the County had initiated the 2016, 2017, and 2018 Cases against her. Trustee denied signing the certified mail receipt for the notices and summonses issued in the 2018 Case, which were delivered on August 12, 2020, and further denied knowing who signed such receipt. With respect to the 2016 Summonses, which were signed for by Georgia Counts on June 18, 2018, Trustee averred that she had never authorized Ms. Counts – or any other person – to receive mail, or sign for certified mail, on behalf of Trustee or the Trust. She also denied that Ms. Counts actually delivered the mail to her. Trustee acknowledged that the annual property tax statement for the Property had historically been mailed to her at the 1501 E. Stone Drive address, where she had retrieved them, but she stated that she had always believed it to be a mistake that they were delivered there. Trustee argued that she had not been properly served with the summonses and notices pursuant to Rule 4 of the Tennessee Rules of Civil Procedure; therefore, she argued, the trial court did not have personal jurisdiction over her, and the Default Judgment was void, as was the resulting sale of the Property."

"The County argued that Trustee's motion should be denied because Trustee had been properly served in accordance with the requirements of Tennessee Code Annotated section 67-5-2502, and Trustee had not shown by clear and convincing evidence that the person or people who signed for the delivery of the notices and summonses were at that time expressly prohibited in writing from accepting mail for Trustee. Trustee filed a restated Rule 60.02 motion and Affidavit of Trustee in support thereof, wherein she denied that she was properly served pursuant to either Rule 4 or section 67-5-2502. She also argued that section 67-5-2502(a)(3) and (4), as interpreted by the County, violates the Due Process and Equal Protection clauses of the United States and Tennessee Constitutions. Because she was challenging the constitutionality of a Tennessee statute, Trustee served a copy of the restated motion upon the Tennessee Attorney General's office, as required by Tennessee Code Annotated section 29-14-107(b). … Finally, Trustee filed a supplement to her restated motion, wherein she argued that section 67-5-2502 requires that a diligent effort be made to give actual notice of the proceedings and that the County did not make such diligent effort in this case."

"On July 1, 2022, the State of Tennessee filed a memorandum of law defending the constitutionality of section 67-5-2502(a)(3) and (4). The State argued that the challenged provisions do not violate the right to due process because, although the taxpayer in a delinquent tax suit has a heavier burden to challenge the notice received by an agent, notice provided in accordance with the various provisions of section 67-5-2502 is still required to be reasonably calculated to apprise the taxpayer of the suit. The State also argued that the challenged provisions do not violate equal protection because delinquent taxpayers are not similarly situated to defendants in other kinds of lawsuits, at least for notice requirements. Specifically, the State maintained that delinquent taxpayers are delinquent because they have failed to satisfy a previously known tax obligation. Alternatively, the State argued that, even if the classes of defendants are similarly situated, a rational basis exists to treat such classes differently. Further, the State contended that imposing such burden on the defendant, instead of on the taxing authority, is rationally related to the legitimate objective of allowing the taxing authority to proceed on the basis of a receipt of service by an adult physically present on the premises of the subject property."

"Following an evidentiary hearing, the trial court entered an order denying Trustee's restated Rule 60.02 motion on December 20, 2022." …

"A court obtains personal jurisdiction over a party defendant by service of process.' *Turner*, 473 S.W.3d at 271 (citing *Ramsay v. Custer*, 387 S.W.3d 566, 568 (Tenn. Ct. App. 2012)). Typically, such service of process is governed by Rule 4 of the Tennessee Rules of Civil Procedure. However, the Tennessee General Assembly has enacted detailed statutes, codified at Title 67, Chapter 5 of the Tennessee Code Annotated ('Chapter 5'), that 'provide[] for a specific and comprehensive scheme for the collection of delinquent property taxes[.]' Tenn. Code Ann. § 67-5-2103(d)(2). In so doing, the General Assembly expressly determined that '[s]tatutes that are not consistent with the statutory scheme for the collection of delinquent property taxes set out in this chapter should not be applicable to tax proceedings, tax liens, or the enforcement of such tax liens.' *Id.* at 67-5-2103(d)(7). 'This chapter shall be construed liberally in favor of the certainty and finality of property titles transferred pursuant to this chapter.' *Id.* at 67-5-2103(e)."

"'The taxes assessed by the state of Tennessee, a county, or municipality, . . . upon any property of whatever kind, and all penalties, interest, and costs accruing thereon, shall become and remain a first lien upon such property from January 1 of the year for which such taxes are assessed.' *Id.* at 67-5-2101(a). In turn, section 67-5-2415 governs notice to taxpayers of suits to enforce tax liens. It states in relevant part:

> (a) The court shall have jurisdiction to award personal judgment against an owner upon the claim for the debt upon determining that proper process has been served upon such owner. The court shall have jurisdiction to award a judgment enforcing the lien by a sale of the parcel upon determining that any [of] the following actions have occurred as to each owner:

(1) That proper process has been served upon an owner; [or]
(2) That the owner has actual notice of the proceedings by mail or otherwise; . . .
* * *

(c) Notice of the pendency of the proceedings as to a parcel constitutes notice of the pending sale of the parcel and vice versa.
(d) If process is to be served upon a defendant, the defendant does not have to receive a copy of the complaint or exhibits. The plaintiff may in lieu thereof furnish to the defendant a notice identifying the proceedings sufficiently for the defendant to determine the parcel which is subject to the delinquent taxes for which the defendant is being sued.
* * *

(f) Process may be served either by an authorized process server or forwarded by certified or registered mail, return receipt requested, or by any alternative delivery service as authorized by Section 7502 of the Internal Revenue Code (26 U.S.C. § 7502).
(g) The return of the receipt signed by the defendant, spouse, or other person deemed appropriate to receive summons or notice as provided for in the Rules of Civil Procedure, . . . and filed as a part of the record by the clerk shall be evidence of actual notice and shall be grounds for a default judgment. . . .

Tenn. Code Ann. § 67-5-2415. Similarly, section 67-5-2502 governs notice to taxpayers of judicial tax sales. It states in relevant part:

(a) * * *
… 4) A person, who is either expressly or impliedly authorized by another person to receive mail on behalf of the other person, is authorized to sign a receipt on behalf of the other person accepting registered or certified mail or correspondence delivered by an alternative delivery service, containing either a summons, complaint, or summary of the proceeding or a notice that has been or is to be filed in a tax proceeding. In every tax proceeding, the burden of proving by clear and convincing evidence that a person who signed such a receipt for a different person and was, in fact, at that time expressly prohibited in writing from accepting mail for the second person, shall be upon the person challenging the sufficiency of the service or notice.
* * *

(b) It is the responsibility of the property owner to register the property owner's name and address with the assessor of property of the county in which the land lies.

Tenn. Code Ann. § 67-5-2502."

"We turn first to Trustee's arguments with respect to the service actually provided in this case. Two notices and summonses to Trustee were issued in the 2016 Case and were sent to Trustee via a single certified mailing. The certified mail return receipt reflects that the certified mail was addressed to: 'Amy S. Tochev, Trustee, 1501 Stone Dr., Kingsport, TN 37660' and it bears the signature of Georgia Counts. While the return receipt itself does not state the date of delivery, it is attached to a return (the '2016 Return') executed by the attorney who was then serving as the County's delinquent tax attorney, which indicates the certified mail was accepted on June 18, 2018."

"A person that is impliedly authorized to receive mail on behalf of a delinquent taxpayer is also authorized to sign a certified mail return receipt containing a summons ornotice that has been or is to be filed in a tax proceeding. Tenn. Code Ann. § 67-5-2502(a)(4). When the 2016 Summonses arrived, they were signed for by Georgia Counts. As she did before the trial court, Trustee argues on appeal that Georgia Counts was not impliedly authorized by Trustee to receive mail on her behalf; however, after hearing testimony from both Trustee and Ms. Counts, the trial court specifically found that Trustee impliedly authorized people working at Dr. Tochev's medical practice at the subject property to receive mail on her behalf. Implicit in this finding of fact was a finding that the witnesses' testimony was not credible. *See Edmunds v. Delta Partners, L.L.C.*, 403 S.W.3d 812, 824–25 (Tenn. Ct. App. 2012)

(noting that a trial court's finding on credibility may be implied from the manner in which the trial court decided the case even when a trial court does not make an express credibility finding (citing *Richards v. Liberty Mut. Ins. Co.*, 70 S.W.3d 729, 733 (Tenn. 2002)). … 'When the resolution of the issues in a case depends upon the truthfulness of witnesses, the trial judge who has the opportunity to observe the manner and demeanor of the witnesses while testifying is in a far better position than this Court to decide those issues.' *Id.* at 824 (citing *In re Arteria H.*, 326 S.W.3d 167, 176 (Tenn. Ct. App. 2010), *overruled on other grounds*). 'If the trial court's factual determinations are based on its assessment of witness credibility, this Court will not reevaluate that assessment absent clear and convincing evidence to the contrary.' *Id.* quoting *Franklin Cnty. Bd. of Educ. v. Crabtree*, 337 S.W.3d 808, 811 (Tenn. Ct. App. 2010)). With appropriate deference to the trial court's implicit findings on the credibility of Trustee and Ms. Counts, we conclude that the evidence preponderates in favor of the trial court's finding that Trustee impliedly authorized people working at Dr. Tochev's medical practice at the subject property to receive mail on her behalf. Consequently, under these circumstances, we conclude that Ms. Counts, an employee of Dr. Tochev's medical practice, was impliedly authorized to receive mail on behalf of Trustee."

"Because Ms. Counts was impliedly authorized to receive mail on behalf of Trustee, the burden shifted to Trustee to show by clear and convincing evidence that Ms. Counts was expressly prohibited in writing from accepting mail for the Trustee at the time that she signed the certified mail return receipt for the 2016 Summonses. Tenn. Code Ann. § 67-5-2502(a)(4). Trustee offered no such evidence. A certified mail return receipt signed by a 'person deemed appropriate to receive summons or notice as provided for in the Rules of Civil Procedure, . . . and filed as a part of the record by the clerk shall be evidence of actual notice and shall be grounds for a default judgment.' Tenn. Code Ann. § 67-5-2415(g). In turn, Rule 4.04(10) provides that service by mail may be the basis for the entry of a default judgment when the record contains 'a return receipt showing personal acceptance by the defendant or by persons designated by Rule 4.04 *or statute*[.]' Tenn. R. Civ. P. 4.04(10) (emphasis added). As discussed above, under these circumstances section 67-5-2502(a)(4) designated Ms. Counts as an individual authorized to accept the 2016 Summonses on behalf of Trustee. There was no writing expressly prohibiting Ms. Counts from accepting mail for Trustee at the time she signed for the 2016 Summonses; therefore, the certified mail return receipt signed by Ms. Counts provided adequate grounds for a default judgment against Trustee."

"Despite this, Trustee argues that the trial court never gained jurisdiction over her because the record contains no affidavit of service for the 2016 Summonses as required by Rule 4.03(2) of the Tennessee Rules of Civil Procedure. However, Rule 4.03 only applies in a delinquent taxpayer case, such as this one, to the extent it is not 'inconsistent with the statutory scheme for the collection of delinquent property taxes set out in [Chapter 5.]' Tenn. Code Ann. § 67-5-2502(a)(3). Furthermore, this Court must construe Chapter 5 'liberally in favor of the certainty and finality of property titles transferred pursuant to [it].' *Id.* at 67-5-2103(e). This is because '[t]he certainty and finality of the titles to real estate that have been conveyed pursuant to this chapter through the enforcement of tax liens is a necessary prerequisite to the development of improvements thereon[,]' which is one of the express purposes of the statutory scheme. *Id.* at 67-5-2103(d)(5)-(6). Trustee cites no authority suggesting that Rule 4.03 is consistent with Chapter 5, nor did our research reveal any such cases. Instead, Trustee merely relies upon cases discussing the application of Rule 4.03 outside of the context of delinquent tax cases. Conversely, in this case, a strict application of Rule 4.03 would defeat what is otherwise sufficient service of the 2016 Summonses. This result would violate the express mandate from the Tennessee General Assembly that Chapter 5 be construed liberally in favor of finality of the Tax Deed issued to the Purchaser. Therefore, we conclude that Rule 4.03 does not apply in this case. *See* Tenn. Code Ann. § 67-5-2502(a)(3)."

"Trustee argues that the Default Judgment must be set aside as to all tax years unless it can be shown that service upon her was sufficient in each of the three cases. However, Trustee does not cite to any authority that directly supports this argument. Instead, Trustee merely relies upon case law setting forth the general principle that a trial court in a delinquent tax suit does not have jurisdiction over a taxpayer unless the taxpayer is properly served."

"The County responds by pointing out that the caption of the Complaint in the 2018 Case included the language 'DELINQUENT TAX SUIT FOR THE YEARS 2008-2018[,]' and the relief requested by the County included an order of reference 'to ascertain the exact amount of property taxes, interest, penalty, and costs due the [County] from the owners of each parcel, and that the lien for such sum be declared and enforced by the sale of the property assessed, subject only to the statutory right of redemption.' Additionally, the summonses and notices issued to Trustee in the 2018 Case states: 'PLEASE TAKE NOTICE that a lawsuit has been filed against you to enforce the lien securing property taxes owed to Sullivan County, Tennessee for the 2018 tax year *and all prior years, if any*.' (Emphasis added). Finally, the County relies upon section 67-5-2409, which provides in relevant part:

> (a) If any other suits for delinquent taxes are pending against any particular piece of property, such suits shall be consolidated as a matter of right upon the filing of a notice of consolidation on behalf of the complainant. All taxes for which any given piece of property is liable and for which suits are pending may be included in the final decree.
>
> (b) The consolidation shall include into one (1) proceeding all actions to collect and enforce all delinquent taxes owing against the parcel, including delinquent taxes that become delinquent after the original action was filed. . . .

Tenn. Code Ann. § 67-5-2409."

"In Tennessee, a suit is 'pending' once a complaint is filed, even if the defendant has not yet been served. *West v. Vought Aircraft Indus.*, 256 S.W.3d 618, 624–25 (Tenn. 2008). Because the 2016 Case and 2017 Case were each 'pending,' they were properly consolidated into the 2018 Case, regardless of whether Trustee had been properly served in each of the cases. 'Consolidation of the actions to include more recent delinquent taxes owed shall not require the issuance, service, or delivery of additional leading process, summons, or notice to interested persons who were served or notified pursuant to the original complaint in accordance with § 67-5-2415.' Tenn. Code Ann. § 67-5-2409. As we concluded above, Trustee was properly served with leading process in the 2016 Case. Therefore, service of additional leading process upon Trustee was not required in the 2017 and 2018 Cases and, pursuant to section 67-5-2409(a), it was appropriate for the trial court to include the 2016 and 2017 taxes in the final decree entered in the 2018 Case."

"We next turn to Trustee's challenges to the constitutionality of section 67-5-2502(a)(4). As explained by the Tennessee Supreme Court:

> In evaluating the constitutionality of a statute, we begin with the presumption that an act of the General Assembly is constitutional. *See State v. Robinson*, 29 S.W.3d 476, 479 (Tenn. 2000); *Riggs v. Burson*, 941 S.W.2d 44, 51 (Tenn. 1997). We must 'indulge every presumption and resolve every doubt in favor of the statute's constitutionality.' *State v. Taylor*, 70 S.W.3d 717, 721 (Tenn. 2002); *see also Riggs*, 941 S.W.2d at 51; *In re Burson*, 909 S.W.2d 768, 775 (Tenn. 1995). This presumption applies with even greater force when the facial constitutional validity of a statute is challenged. *See In re Burson*, 909 S.W.2d at 775.

Gallaher v. Elam, 104 S.W.3d 455, 459 (Tenn. 2003). Both of Trustee's raised issues regarding the constitutionality of section 67-5-2502(a)(4) are facial challenges."

"First, Trustee argues that 'to the extent that [section] 67-5-2502(a)(4) authorizes service of process of certified mail upon any person who is merely authorized to receive mail on behalf of the defendant, it is surely less reasonably calculated to provide actual notice to the defendant than the other feasible and customary substitutes for personal service of process.' In so arguing, however, Trustee disregards the well-established standard for due process set forth by the United States Supreme Court."

"'Due process does not require that a property owner receive actual notice before the government may take his property.' *Jones v. Flowers*, 547 U.S. 220, 226 (2006) (citing *Dusenbery v. United States*, 534 U.S. 161, 170 (2002)). Rather, the government must simply provide 'notice *reasonably calculated*, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' *Id.* (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)) (emphasis added). 'In tax lien suits, the government must provide 'notice by mail or other means to ensure actual notice . . . if [the party's] name and address are reasonably ascertainable.'' *Wilson v. Blount Cnty.*, 207 S.W.3d 741, 750 (Tenn. 2006) (quoting *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983)). In Tennessee, '[i]t is the responsibility of the property owner to register the property owner's name and address with the assessor of property of the county in which the land lies[,]' and notice of a tax sale may be forwarded to the address provided. Tenn. Code Ann. § 67-5-2502(a)(3), (b). That is precisely what happened in this case. Trustee provided the County with the 1501 E. Stone Drive address, and the County sent the 2016 Summonses to that address."

"Trustee relies heavily upon the Tennessee Supreme Court's decision in *Hall v. Haynes*, 319 S.W.3d 564 (Tenn. 2010), to support her arguments. *Hall* was a medical malpractice case in which the Court analyzed whether process was properly served upon a medical corporation and/or one of its physician employees when the process was served by certified mail directed to the defendants and signed for by 'various employees' of the medical corporation. *Id.* at 567. The Court ultimately held 'that the authority to sign for and receive certified mail does not, on its own, confer the authority to accept service of process.' *Id.* Trustee argues that this holding 'is surely predicated upon the premise that such a procedure would not be reasonably calculated to give the defendant actual notice of the legal proceedings.' Importantly, however, *Hall* was not a delinquent taxpayer case. The decision in *Hall* turned on the Court's interpretation of provisions of the Tennessee Rules of Civil Procedure, not constitutional principles of due process. *See id.* at 582 n.15 (noting that 'the authority to sign for certified mail in the context of determining whether service was adequate under federal due process standards' was 'a question not raised in [that] appeal'). Therefore, *Hall* is not relevant to this analysis."

> "Instead, the decision of the United States Supreme Court in *Dusenbery* is instructive. The *Dusenbery* Court analyzed the adequacy of notice served upon a prisoner and notifying him 'of his right to contest the administrative forfeiture of property seized during the execution of a search warrant for the residence where he was arrested.' *Dusenbery*, 534 U.S. at 163. 'To effect such a forfeiture, the statute required the agency to send written notice of the seizure together with information on the applicable forfeiture procedures to each party who appeared to have an interest in the property.' *Id.* at 164. The Court explained the government's efforts to serve defendant, to-wit:
>
> The FBI sent certified mail addressed to [defendant] at the correctional facility where he was incarcerated. At that facility, prison mailroom staff traveled to the city post office every day to obtain all the mail for the institution, including inmate mail. The staff signed for all certified mail before leaving the post office. Once the mail was transported back to the facility, certified mail was entered in a logbook maintained in the mailroom. A member of the inmate's Unit Team then signed for the certified mail to acknowledge its receipt before removing it from the mailroom, and either a Unit Team member or another staff member distributed the mail to the inmate during the institution's 'mail call.'

Id. at 168–69 (internal citations to record omitted). Although the government could have taken additional efforts to assure that the notice actually reached the defendant who was in its custody, such as escorting the defendant to the post office to sign for the certified mail himself, 'the Due Process Clause does not require such heroic efforts by the Government; it requires only that the Government's

effort be 'reasonably calculated' to apprise a party of the pendency of the action[.]' *Id.* at 170. The Court ultimately held that 'the use of the mail addressed to [defendant] at the penitentiary was clearly acceptable for much the same reason [the United States Supreme Court] ha[s] approved mailed notice in the past.' *Id.* at 172."

"Similarly, in this case, sending notice of a tax sale to the address provided by the property owner was ''reasonably calculated' to apprise the property owner of the pending tax sale.' *Davidson Pabts, LLC v. Worsham*, No. M2014-01061-COA-R3-CV, 2015 WL 4115174, at *6 (Tenn. Ct. App. May 18, 2015), *perm. app. denied* (citing *Wilson*, 207 S.W.3d at 750). 'The [United States] Supreme Court [has] recognized that in order to meet minimum due process requirements, the method of notice need not be fail proof since 'constitutional law, like other mortal contrivances, has to take some chances.'' *Beneficial Tenn., Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, No. M2004-01071-COA-R3-CV, 2006 WL 568250, at *5 (Tenn. Ct. App. Mar. 8, 2006), *perm. app. denied* (quoting *Mullane*, 339 U.S. at 319). Unless 'the government receives new information indicating its initial attempt at notice has failed[,] . . . when the government has attempted to provide notice and 'heard nothing back indicating that anything had gone awry,' the notice is constitutionally sufficient if it was 'reasonably calculated to reach the intended recipient when sent.'' *Davidson Pabts*, 2015 WL 4115174 at *5 (citing *Jones*, 547 U.S. at 226, 229–30). Therefore, contrary to Trustee's contention, the County 'was not required to take additional steps to notify [Trustee] unless it learned that an otherwise reasonably calculated attempt to notify [Trustee] had failed.' *Id.* at *6 (citing *Jones*, 547 U.S. at 226)."

"This Court has previously held that section 67-5-2415(e)(1), which allows for notice to a delinquent taxpayer to be received and signed for by the taxpayer's spouse, 'does not violate the requirements or purposes of due process rights and, therefore, is constitutional[.]' *Pell v. City of Chattanooga*, No. E1999-01712-COA-R3-CV, 2000 WL 567821, at *6 (Tenn. Ct. App. May 9, 2000). The inquiry before us now is whether section 67-5-2502(a)(4), which allows for notice to a delinquent taxpayer to be received and signed for by an individual otherwise authorized to receive mail for the taxpayer, is 'reasonably calculated' to apprise a delinquent taxpayer of an enforcement action brought by the county. We conclude that it is and, therefore, that it does not violate the requirements or purposes of constitutional due process."

"Finally, Trustee argues that section 67-5-2502(a)(4) violates the Equal Protection clauses of the United States and Tennessee Constitutions because it denies defendants in delinquent taxpayer cases the right 'to limit service of process only to someone else authorized to accept service of process for the defendant[.]' However, in doing so, Trustee mischaracterizes section 67-5-2502(a)(4). As stated above, section 67-5-2502(a)(4) designates individuals who are authorized to accept service of process on behalf of delinquent taxpayers – namely, those individuals who are otherwise expressly or impliedly authorized by the taxpayer to receive mail on behalf of the taxpayer. Conversely, in non-delinquent taxpayer cases, 'a person with the authority to sign for and receive certified mail does not, without more, qualify as an agent authorized by appointment to receive service of process on behalf of an individual defendant.' *Hall*, 319 S.W.3d at 581."

"…Although due process provides defendants a fundamental right to notice and an opportunity to be heard, *Mullane*, 339 U.S. at 314, defendants do not have a fundamental right to dictate how that notice is provided to them. *See Gallaher*, 104 S.W.3d at 461 (distinguishing between a parent's fundamental right to care and custody of their child and the parent's duty to support a child for the purposes of an equal protection challenge); *see also Owens v. I.F.P. Corp.*, 374 F.Supp. 1032, 1035 (W.D. Ky. 1974), *aff'd mem.*, 419 U.S. 807 (1974) (concluding that Kentucky's version of Rule 4.04 satisfied due process and therefore did not implicate a fundamental right even though it provided for different forms of service among in-state and out-of-state defendants). Because section 67-5-2502(a)(4) does not implicate any fundamental right, we review it under the rational basis standard. *Thompson v. Ashe*, 250 F.3d 399, 407 (6th Cir. 2001)."

"As the Tennessee Supreme Court has explained:

The equal protection provisions of the federal and state constitutions demand that persons similarly situated be treated alike. *See Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 153 (Tenn. 1993). When applying the rational basis test, we have observed that state legislatures have the initial discretion to determine what is 'different' and what is 'the same' and that they are given considerable latitude in making those determinations. *See Robinson*, 29 S.W.3d at 480 (citing *Tenn. Small Sch. Sys.*, 851 S.W.2d at 153). Our inquiry into legislative choice usually is limited to whether the challenged classifications have a reasonable relationship to a legitimate state interest. *See id.* We have held that under the rational basis test, a statute may discriminate in favor of a certain class, as long as the discrimination is founded upon a reasonable distinction or difference in state policy. *See Castlewood, Inc. v. Anderson County*, 969 S.W.2d 908, 910 (Tenn. 1998).

> . . . It is not necessary that the legislature state a rational basis for this differential treatment. A classification will pass constitutional muster if we can conceive of some rational basis for the distinction. *See Riggs*, 941 S.W.2d at 53 (stating that a statutory classification is rational 'if any state of facts may reasonably be conceived to justify it').

Gallaher, 104 S.W.3d at 461–62. 'Because taxes produce the revenue by which the government operates, the legislature has wide discretion in the adoption of tax measures, and its judgment must be accorded great respect.' *Waters v. Farr*, 291 S.W.3d 873, 903 (Tenn. 2009) (citing *Genesco, Inc. v. Woods*, 578 S.W.2d 639, 641 (Tenn. 1979), *superseded on other grounds by* 1980 Tenn. Pub. Acts 1278 (codified at Tenn. Code Ann. § 67-1-801(a)(2) (2006)). This deference must also be extended to the methods fixed by the legislature for the collection of such taxes. *Id.* at 902 (citing *E. Tenn. Brewing Co. v. Currier*, 150 S.W. 541, 544 (1912))." …

"'Administrative convenience and expense in the collection or measurement of the tax' alone is a sufficient justification for treating delinquent taxpayers differently than defendants in other actions. *See Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495, 511 (1937). Tax enforcement actions commonly involve a large number of delinquent tax parcels, and the General Assembly's judgment in creating a more efficient means of serving process on delinquent taxpayers – while still satisfying constitutional due process requirements – must be respected. Accordingly, we conclude that the State has a rational, legitimate interest in effecting service upon delinquent taxpayers in an efficient and cost-effective manner that justifies the distinction between defendants in delinquent tax proceedings and defendants in other legal proceedings. Because section 67-5-2502(a)(4) passes the rational basis test, Trustee's equal protection challenge fails."

"Finally, Purchaser argues that this appeal is frivolous, contending that all of Trustee's raised issues are waived. ''A frivolous appeal is one that is 'devoid of merit,' or one in which there is little prospect that [an appeal] can ever succeed.'' *Morton v. Morton*, 182 S.W.3d 821, 838 (Tenn. Ct. App. 2005) (quoting *Indus. Dev. Bd. of the City of Tullahoma v. Hancock*, 901 S.W.2d 382, 385 (Tenn. Ct. App. 1995)). Tennessee Code Annotated section 27-1-122 provides:

> When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include, but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.

In the exercise of our discretion, we decline to find this appeal frivolous and further decline to award Purchaser's attorney's fees and costs incurred in this appeal."

TENNESSEE RECREATIONAL USE STATUTE (TRUS)

1. In determining whether a party properly asserted an affirmative defense under § 102 of the TRUS based on the facts of that case, the Tennessee Supreme Court employed a two-pronged

analysis: (1) whether the activity alleged is a recreational activity as defined by the statute; and if so, (2) whether any of the statutory exceptions or limitations to the immunity defense are applicable – The Appeals Court then determined that applying Tennessee Code Annotated §§ 70-7-101 and -105 required a three-step analysis: First, the court must determine whether the party asserting the Tenn. Code Ann. § 70-7-102 defense is a landowner; Second, the court must determine whether the activity in which the injured party was engaged at the time of the injury is a recreational activity; Third, the court must determine whether any of the exceptions in Tenn. Code Ann. § 70-7-104 are applicable to the case – The TRUS expressly provides that land or premises includes any structure located on the land or premises, owned by any governmental entity - Both the pool and the diving board at issue are structure', and it is undisputed that these structures are located on land owned by the city, a governmental entity - Accordingly, a city pool is land or premises under § 101(1)(B) of the TRUS - Water sports include swimming –tthe TRUS applies so that the city was immune from suit for the injury to the plaintiff while diving in a city own pool – The list of recreational activities' in Tenn. Code Ann. § 70-7-102 is neither exclusive nor exhaustive and activities similar to those explicitly enumerated in § 102 may also fall within the purview of the recreational use statute

ROBERT H. BECKHAM ET AL. v. CITY OF WAYNESBORO, TENNESSEE
COURT OF APPEALS No. M2023-00654-COA-R3-CV Filed May 14, 2024

"In this personal injury action, the plaintiff slipped and fell while jumping off of a diving board during a visit to a city owned pool, injuring his knee. Thereafter, the plaintiff sued the city based on negligence to recover for his injuries sustained from the accident and his wife sought damages for a derivative claim for loss of consortium. The city filed an answer, raising the Tennessee Recreational Use Statute (hereinafter 'the TRUS') as an affirmative defense. The city then filed a motion for summary judgment, arguing that it was immune from liability under the TRUS because the city is a 'landowner' as defined by the TRUS, the plaintiff was engaged in a 'recreational activity' listed in the TRUS at the time of the accident, and none of the exceptions or limitations to the TRUS were applicable. The trial court agreed and granted summary judgment in favor of the city. The trial court found that the language of the TRUS is not ambiguous and found that the city was immune from liability under the TRUS because the city pool, which is government-owned property, was being used for recreation at the time of the plaintiff's injury and involved an activity included in the TRUS, 'water sports.' The plaintiffs appeal the trial court's holding that swimming in a city pool is a recreational activity protected under the TRUS. For the reasons stated below, we affirm."

"The City of Waynesboro, Tennessee ('the City'), owns and operates a public pool, which has a diving board. On July 28, 2020, Robert Beckham ('Plaintiff'), visited the city pool to swim with his family. During the visit, Plaintiff went to use the diving board. As he began to jump off of the diving board, Plaintiff slipped, fell, and hit his knee on the board. Two days later, he underwent surgery on his knee for a ruptured quadriceps tendon and torn lateral meniscus."

"On July 15, 2021, Plaintiff and his wife, Ashley Beckham ('Mrs. Beckham'), (collectively 'Plaintiffs') filed a complaint against the City in the Circuit Court for Wayne County, alleging negligence under the Governmental Tort Liability Act. The complaint asserted that the City had a duty to properly maintain the diving board, had actual or constructive notice that the diving board was in a dangerous condition, and failed to fix the diving board or warn Plaintiff of its dangerous condition. The complaint further asserted that the City's sovereign immunity was removed under the Governmental Tort Liability Act, specifically, Tennessee Code Annotated §§ 29-20-204 and 205. Plaintiff sought damages not to exceed $1,375,000 or the limits of all available insurance pursuant to the Governmental Tort Liability Act. Mrs. Beckham also sought damages for loss of services, society, and consortium not to exceed $90,000 or the limits of all available insurance pursuant to the Governmental Tort Liability Act."

"In October 2021, the City filed an answer, denying liability and raising an affirmative defense under the TRUS."

"In September 2022, following a period of discovery, the City filed a motion for summary judgment. The City argued that it was immune as a matter of law under the TRUS because the TRUS 'provides a landowner an affirmative defense from tort liability when an injury occurs on the landowner's property while the injured party was engaged in a recreational activity' and Plaintiff 'was engaged in a recreational activity' in a pool owned by the City at the time of his injury. The City also noted that it, as a governmental entity, is considered a 'landowner' under the language of the TRUS, and that none of the exceptions to immunity under the TRUS applied. The City further argued that, because Plaintiff's negligence claim fails, Mrs. Beckham's derivative loss of consortium claim also fails."

Plaintiffs filed a response to the City's motion for summary judgment. Plaintiffs argued that the affirmative defense contained within the TRUS does not apply to a city pool because the 'recreational activities' delineated in the TRUS, 'involve outdoor recreation activities that require significant amounts of land or water to engage in, such as hunting, fishing, trapping, animal riding, whitewater rafting, canoeing, and hiking[.]' Plaintiffs also argued that the TRUS is ambiguous as to whether a city pool is 'land' or 'premises' covered under the statute. Noting that courts from other states have found public swimming pools to be exempt from the protections of their states' recreational use statutes, Plaintiffs argued that the trial court should similarly find that public swimming pools are exempt from the protections of the TRUS."

"… The court found that the affirmative defense raised by the City under the TRUS was proper, and granted the City's motion for summary judgment."

"The relevant standard of review for summary judgment when the interpretation of a statute is at issue is set forth in *Harris v. Haynes*, 445 S.W.3d 143 (Tenn. 2014) as follows:

> Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Thompson v. Memphis City Schs. Bd. of Educ.,* 395 S.W.3d 616, 622 (Tenn. 2012). The moving party bears the burden of establishing that summary judgment is appropriate as a matter of law, while the court must view the evidence in the light most favorable to the nonmoving party and resolve any genuine issues of material fact in its favor. *Id.* We review a trial court's decision on a motion for summary judgment de novo with no presumption of correctness. *Id.* Issues of statutory construction are also reviewed de novo. *Johnson v. Hopkins,* 432 S.W.3d 840, 844 (Tenn. 2013); *Thompson,* 395 S.W.3d at 622.
>
> When determining the meaning of statutes, we follow the standard rules of statutory construction. Our primary goal 'is to carry out legislative intent without broadening or restricting the statute beyond its intended scope.' *Johnson,* 432 S.W.3d at 848 (quoting *Lind v. Beaman Dodge, Inc.,* 356 S.W.3d 889, 895 (Tenn. 2011)). We presume that every word in a statute has meaning and purpose and that each word's meaning should be given full effect as long as doing so does not frustrate the General Assembly's obvious intention. *Id.* Words ''must be given their natural and ordinary meaning in the context in which they appear and in light of the statute's general purpose.'' *Id.* (quoting *Mills v. Fulmarque, Inc.,* 360 S.W.3d 362, 368 (Tenn.2012)). When a statute's meaning is clear, we ''apply the plain meaning without complicating the task' and enforce the statute as written.'*Id.* (quoting *Lind,* 356 S.W.3d at 895).

Id. at 146."

"A 'landowner' under the TRUS includes 'any governmental entity' and is defined as 'the legal title holder or owner of such land or premises, or the person entitled to immediate possession of the land or premises, and includes any lessee, occupant or any other person in control of the land or premises.' *Pierce v. State*, No. M2020-00533-COAR3CV, 2021 WL 2627509, at *5 (Tenn. Ct. App. June 25, 2021)

(citing Tenn. Code Ann. § 70-7-101(2)(A)–(B)). Unless otherwise required by the context, the TRUS instructs that

> (1)(A) 'Land' or 'premises' means and includes all real property, waters, private ways, trees and any building or structure that might be located on real property, waters and private ways; (B) **'Land' or 'premises' includes** real property, waters, private ways, trees and **any** building or **structure located on the land or premises, owned by any governmental entity**, including, but not limited to, the Tennessee valley authority; and (C) 'Land' or 'premises' does not include the landowner's principal place of residence and any improvements erected for recreational purposes that immediately surround such residence, including, but not limited to, swimming pools, tennis or badminton courts, barbecue or horse shoe pits, jacuzzis, hot tubs or saunas;

Tenn. Code Ann. § 70-7-101(1)(A)–(C) (emphasis added)."

"Under § 102, **a statutory landowner will owe 'no duty of care to keep such land or premises safe for entry or use by others'**, 'nor shall such landowner be required to give any warning of hazardous conditions. . . on such land or premises' for the following recreational activities:

> [H]unting, fishing, trapping, camping, **water sports**, white water rafting, canoeing, hiking, sightseeing, animal riding, bird watching, dog training, boating, caving, fruit and vegetable picking for the participant's own use, nature and historical studies and research, rock climbing, skeet and trap shooting, sporting clays, shooting sports, and target shooting, including archery and shooting range activities, skiing, off-road vehicle riding, and cutting or removing wood for the participant's own use

Tenn. Code Ann. § 70-7-102(a) (emphasis added)."

"In determining whether a party properly asserted an affirmative defense under § 102 of the TRUS based on the facts of that case, our Supreme Court employed a two-pronged analysis: '(1) whether the activity alleged is a recreational activity as defined by the statute; and if so, (2) whether any of the statutory exceptions or limitations to the immunity defense are applicable.' *Parent*, 991 S.W.2d at 243. Four years after the release of the decision in *Parent*, this court concluded that applying Tennessee Code Annotated §§ 70-7-101 and -105 required a three-step analysis:

> First, the court must determine whether the party asserting the Tenn. Code Ann. § 70-7-102 defense is a landowner. Second, the court must determine whether the activity in which the injured party was engaged at the time of the injury is a recreational activity. Third, the court must determine whether any of the exceptions in Tenn. Code Ann. § 70-7-104 are applicable to the case.

Morgan v. State, No. M2002-02496-COA-R3CV, 2004 WL 170352 at *5 (Tenn. Ct. App. Jan. 27, 2004) (citing *Parent*, 991 S.W.2d at 242–43))."

"Then, in 2021, this court explained in *Pierce v. State*, No. M2020-00533-COA-R3-CV, 2021 WL 2627509 (Tenn. Ct. App. June 25, 2021) that the first of the three prongs identified in *Morgan* was fairly implied in *Parent*[.]"…

In accordance with the three-prong test delineated in *Morgan v. State*, we first consider whether the City is a 'landowner' under the TRUS, which necessarily requires that a city owned pool be considered the type of 'land' or 'premises' covered by the TRUS."

"Plaintiffs claim that the TRUS is ambiguous as to whether a city pool is 'land' or 'premises' under §101 of the TRUS. While governmental entities are expressly included as 'landowners' under § 101(2)(B), Plaintiffs note that § 101(1)(C) excludes residential swimming pools and other recreational

improvements that surround a 'landowner's principal place of residence' from the statutory definition of 'land' or 'premises'. Given that governmental entities 'traditionally do not have a 'principal place of residence'', but are considered 'landowners' under the TRUS, Plaintiffs argue that the statute is 'ambiguous as to what constitutes the 'land' or 'premises' of a governmental entity.'" …

"The City argues that the exclusion in 101(1)(C) is limited to swimming pools that 'immediately surround[] a private residence where one actually lives.' Because governmental entities do not have a 'private residence', the City argues that city pools are not included in this exclusion, and that the plain language of the TRUS is unambiguous. The City further argues that it is a 'landowner' under the TRUS because § 101(2)(B) expressly includes 'any governmental entity' in the definition of 'landowner'" …

"As mentioned above, the TRUS expressly provides that ''Land' or 'premises' includes any. . . **structure** located on the land or premises, **owned by any governmental entity**.' Tenn. Code Ann. § 101(1)(B) (emphasis added). Both the pool and the diving board at issue are 'structures', and it is undisputed that these 'structures' are located on land owned by the City, a 'governmental entity'. Accordingly, we find that a city pool is 'land' or 'premises' under § 101(1)(B) of the TRUS."

With regard to § 101(1)(C), only swimming pools 'erected for recreational purposes that immediately surround [a] **residence**' are excluded from the definition of 'land' or 'premises'. This court has interpreted the word 'residence', in the context of the TRUS, to mean 'the place where one actually lives; a house or other abode; a dwelling.' *McCaig v. Whitmore*, No. W2015-00646-COA-R3CV, 2016 WL 693154, at *5 (Tenn. Ct. App. Feb. 22, 2016) (citing *Black's Law Dictionary* 1423 (9th ed. 2009)). The plain language of § 101(1)(C) is clear that this exclusion applies only to swimming pools that surround a 'dwelling', which a governmental entity does not have. Thus, we must apply § 101(1)(C) as written, and find that city pools are not excluded from the statutory definition of 'land' or 'premises'. *See Patterson v. Shelter Mut. Ins. Co.*, No. M2014-01675-COA-R9CV, 2015 WL 5320231, at *6 (Tenn. Ct. App. Sept. 11, 2015) ('This court must abide by the words that the legislature chose to use, and we cannot add words that the General Assembly chose not to include.')."

"Applying the plain meaning of § 101(1), we find that a city pool is 'land' or 'premises' covered by the TRUS. In so finding, we also conclude that the City, as a 'governmental entity' that owns 'such land or premises', is a 'landowner' under § 101(2) of the TRUS."

"Plaintiff contends that he was not engaged in a 'recreational activity' under § 102 because while '[o]ne may argue that [swimming] falls under the definition of 'water sports'', 'the types of activities delineated in Section 102 suggest that it would apply to swimming in lakes, ponds, rivers, streams—not a city pool.' The City contends that Plaintiff was engaged in a 'recreational activity' because 'the plain and ordinary meaning of 'water sports' includes swimming' and 'the list of recreational activities in Tenn. Code Ann. § 70-7-102(a) is non-exhaustive.'"

"As noted by the trial court, our Supreme Court held in *Parent v. State* that the list of 'recreational activities' in § 102 is 'neither exclusive nor exhaustive' and 'activities similar to those explicitly enumerated in § 102 may also fall within the purview of the recreational use statute.' *Parent*, 991 S.W.2d at 243. Here, swimming and diving are activities that are recreational in nature and comparable to several of the activities listed in § 102, and which both fall under the general category of 'water sports'."

"We therefore conclude that both swimming and diving are 'recreational activities' under § 102, and that Plaintiff was engaged in a 'recreational activity' under the TRUS at the time of his injury."

"Our final inquiry is whether any of the exceptions or limitations to the TRUS
articulated in § 104 apply in the instant case. Plaintiff has not argued, at the trial level or on appeal, that any of the § 104 exceptions are applicable here. *See PNC Multifamily Capital Institutional Fund XXVI L.P. v. Mabry*, 402 S.W.3d 654, 660 (Tenn. Ct. App. 2012) (citations omitted) ('It is well settled that issued not raised at the trial level are considered waived on appeal.'); *see also Forbess v. Forbess*,

370 S.W.3d 347, 355 (Tenn. Ct. App. 2011) (citations omitted) ('This court has repeatedly held that a party's failure to cite authority for its argument or to argue the issues in the body of its brief constitute a waive on appeal.'). Therefore, the Plaintiff has waived any argument regarding the applicability of the exceptions enumerated in § 104 to this case."

UNIFORM SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA)

1. An agreement by the parties released plaintiff's claims under the Act – Federal law controls the validity of a release of a federal cause of action - The relevant language here is that Ward agreed to release *any and all claims whatsoever* as to his termination - Those words speak for themselves: to know that the release applied to Ward's USERRA claim, one needed to know only that it was a claim - Whether a particular settlement agreement provides greater benefits than a USERRA claim is for the servicemember to decide - Plaintiff was aware of his USERRA claim and represented by counsel when he entered into the settlement agreement - Plaintiff also testified that the agreement was presented to him on a take it or leave it basis, potentially akin to an adhesion contract; and he testified that he had been out of work for 18 months when he entered into it - On this record, a reasonable jury could find that plaintiff's decision to enter into the agreement reflected a considered decision on his part, or instead that it reflected only desperation - The issue whether plaintiff believed benefits from the settlement agreement outweighed his USERRA claim is therefore one for a jury to decide whether the service member benefited from the waiver – There was a significant dissent in this case

SEDRIC WARD v. SHELBY COUNTY, TENNESSEE
SIXTH CIRCUIT COURT OF APPEALS No.22-6054 Decided and Filed: April 11, 2024

"Sedric Ward is an Army reservist who worked at the Shelby County Jail. The County fired Ward in 2015, but later entered into a settlement agreement in which, as to his termination, Ward expressly released 'any and all claims whatsoever[.]' Yet Ward later brought this suit against the County, asserting a claim under the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301 *et seq.* (USERRA). The question here is whether the settlement agreement was effective to release Ward's claim under the Act. We disagree with the district court's reasoning on that question, so we vacate the court's judgment in favor of Ward."

"Ward has been an Army reservist since 1987. In 1998, he began working for the Shelby County Jail, which is run by the Shelby County Sheriff's Office. Like most reservists, Ward often took leave while deployed and to attend drills and training. Some of that leave was paid by the County. In 2013, the County conducted an audit that allegedly revealed potential instances where employees at the jail had taken paid leave of various kinds—medical, military, family—on fraudulent grounds. Ward was not among the employees whose leave was flagged as suspicious in that audit."

"The Sheriff's Office asked the General Investigations Bureau to conduct a criminal investigation, which—unlike the audit itself—focused solely on leave taken by servicemember employees. As part of that investigation, Agent Jason Valentine told Ward to produce documents supporting the validity of his paid leave during the past several years. Ward had difficulty retrieving those documents but eventually slid some under Valentine's door. Yet the Bureau later issued a report in which it accused multiple servicemembers, including Ward, of taking fraudulent leave—in Ward's case, allegedly, 36 days' worth."

"In November 2014, at the urging of the local district attorney's office, a Tennessee grand jury indicted Ward for theft. He was booked and detained in the same jail in which he worked. The next day, the Sheriff's Office suspended Ward without pay. The Sheriff's Office then conducted its own investigation, during which Eugenia Sumner demanded that Ward produce—within three days—documents supporting his paid leave during the past several years. Ward could not meet that deadline—he testified that doing so was impossible within the military bureaucracy—and the County fired him.

(One of the grounds for his termination was 'disobedience' of Sumner's 'order' to produce those documents by her deadline.)"

"In November 2015, Ward provided the district attorney's office with documents substantiating his attendance at military functions on the dates relevant to his indictment. The district attorney's office moved to dismiss the charges against Ward that same day."

"Ward later appealed his termination to the Shelby County Civil Service Merit Board. During the pendency of that appeal, the County proposed a settlement: namely, if Ward signed a release of all his claims against the County, he could return to work at the Jail in a probationary capacity for six months and receive three weeks of backpay (worth about $2,500) up front. Ward consulted with a lawyer and signed an 'Agreement and General Release' to that effect on August 3, 2016. But a month later—shortly before he was due to return to work—Ward informed the County via email that he had changed his mind and had 'decided not to return to the Sheriff's office.'"

"There matters stood for almost four years, until June 2020, when Ward brought this suit against the County. The parties later filed cross-motions for summary judgment on the question whether Ward had released his USERRA claim in the settlement agreement. The district court denied the County's motion on that ground and granted Ward's, asserting that the release's scope—namely, 'any and all claims whatsoever'—did not reach his USERRA claim. The parties thereafter went to trial, where the jury found in Ward's favor. The district court eventually entered a judgment ordering the County to pay Ward more than $1.5 million. This appeal followed."

"The County argues that it was entitled to summary judgment on the ground that Ward released his claim when he agreed to the August 2016 settlement. We review de novo the district court's denial of summary judgment on that ground. *Levine v. DeJoy*, 64 F.4th 789, 796 (6th Cir. 2023)."

"'Federal law controls the validity of a release of a federal cause of action.' *McClellan v. Midwest Machining, Inc.*, 900 F.3d 297, 302-03 (6th Cir. 2018) (quotation marks omitted). Here, the first question is whether Ward's USERRA claim fell within the scope of the release in the 2016 agreement. We interpret that agreement according to its plain terms. *See Nicklin v. Henderson*, 352 F.3d 1077, 1081 (6th Cir. 2003). The release provision stated in full:

> In consideration for the agreement as set forth in Paragraph 1 and 2 above, Ward agrees: that he will be on probation for 6 months immediately following his re-instatement; to withdraw his appeal of his April 7, 2015 termination before the Shelby County Civil Service Merit Board; and to release the SCSO and its officers, directors, and employees, from any and all claims whatsoever, both known and unknown, both before the Board and before any local, state, or federal agency or court, arising out of his termination from employment on April 7, 2015 and his probation and permanent assignment pursuant to this agreement."

The relevant language here is that Ward agreed to release '*any and all claims whatsoever*' as to his termination. Those words speak for themselves: to know that the release applied to Ward's USERRA claim, one needed to know only that it was a claim."

"The district court was mistaken to conclude otherwise." …

"The district court also cited an opinion from this court as support for the conclusion that Ward's USERRA claim fell outside the scope of his release. Specifically, in *Wysocki v. IBM Corporation*, 607 F.3d 1102 (6th Cir. 2010), the parties disputed whether a release agreement applied to the plaintiff's claim. This is how we described the provision at issue there:

> The language of the Release is broad and, although it did not specifically refer to USERRA by name, it states that Wysocki waives 'all claims, demands, actions or

> liabilities he might have against IBM of whatever kind,' and includes within its scope 'any other federal, state or local law dealing with discrimination in employment including, but not limited to discrimination based on . . . veteran status.'

Id. at 1104 (cleaned up). Later in the opinion, we again referred to the 'veteran status' language in concluding that the release was 'clear and unambiguous[.]' *Id.* at 1108."

"From that discussion, the district court's gloss was that the 'veteran status' language in *Wysocki* 'was crucial to' our decision there. But that reasoning too was mistaken. Releases routinely make their point three or four times rather than once. That in *Wysocki* the court chose to highlight the term 'veteran status'—among all the belts and suspenders the release employed there—did not make that term magic words necessary for release of a USERRA claim. 'The facts of a particular case should not be mistaken for its rule.' *United States ex rel. Owsley v. Fazzi Assocs., Inc.*, 16 F.4th 192, 197 (6th Cir. 2021) (brackets omitted). Nor did the absence of that term create any ambiguity here. The terms of Ward's release agreement patently encompassed his USERRA claim."

"But that does not mean his release was necessarily effective to release that claim. For USERRA itself imposes a second requirement for release of a claim under the Act. Specifically, as applied to a settlement agreement, the Act requires that the agreement 'establish[]' rights that are 'more beneficial' for the servicemember than the ones he gives up. The Act's relevant provisions state in full:

> (a) Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.
> (b) This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.

38 U.S.C. § 4302."

"The district court found this requirement unmet because, the court said, 'three weeks of back-pay and a reinstatement with probation is objectively less beneficial than Plaintiff's rights under USERRA[.]' But § 4302 does not make the courts guardians of servicemembers who choose to settle their USERRA claims. To the contrary, we said in *Wysocki*, servicemembers can 'waive their USERRA rights without unnecessary court interference, *if they believe* that the consideration they will receive . . . is more beneficial than pursuing their rights through the courts[.]' 607 F.3d at 1108 (emphasis added). An individual servicemember knows better than the courts do whether the certainty of a lump-sum payment up front, for example, is 'more beneficial' to him than the possibility of a larger recovery later. Relatedly, a servicemember's ability to settle a USERRA claim 'is both valuable and beneficial[.]' *Id.* And that ability would be diminished if not eliminated if the servicemember's decision was subject to judicial review after the fact."

"Ward, for his part, argues that his settlement agreement was not 'more beneficial' than his USERRA claim because he received more on that claim after trial than he would have under the agreement. But whether an agreement is more beneficial to a servicemember than the released claim, for purposes of § 4302, cannot depend on events occurring after the agreement is executed. As a matter of contract law generally, the parties' respective rights and duties are fixed at the time of contracting. *See, e.g.*, *Adams v. Philip Morris, Inc.*, 67 F.3d 580, 585 (6th Cir. 1995) (scope of a release is evaluated based on the parties' intent at time of signing); *Ellis v. Pauline S. Sprouse Residuary Tr.*, 280 S.W.3d 806, 814 (Tenn. 2009) (after parties sign, courts cannot alter contractual obligations because contract was burdensome or unwise); 11 Williston on Contracts § 30:2 (4th ed.) (a cardinal rule of contract interpretation is that intent is ascertained as of the time when parties signed). And the decision

whether to enter into a settlement agreement, in particular, always involves an assessment of potentialities. Nobody would settle a USERRA claim with a servicemember if he could proceed to litigate the claim and then invalidate the agreement if he fared better in the litigation than in the settlement itself. Ward's argument would help him in this case, but harm nearly everyone else covered by USERRA—by denying them the ability to settle their USERRA claims."

"Thus, whether a particular settlement agreement provides greater benefits than a USERRA claim is for the servicemember to decide. To satisfy § 4302(a), however, the servicemember must make a considered judgment that the agreement is more beneficial to him than his USERRA claim is. Of course—absent 'evidence of mistake, incapacity, fraud, misrepresentation, unconscionability, or duress[,]' *Wysocki*, 607 F.3d at 1108—that a servicemember chose to enter into a settlement agreement can be important evidence that he thought the agreement was worth more to him than the claim. But that determination must depend on the totality of the circumstances, not on the fact of the agreement alone. Here, those circumstances included that Ward was aware of his USERRA claim and represented by counsel when he entered into the settlement agreement. But Ward also testified that the agreement was presented to him on a 'take it or leave it' basis, potentially akin to an adhesion contract; and he testified that he had been out of work for 18 months when he entered into it. On this record, a reasonable jury could find that Ward's decision to enter into the agreement reflected a considered decision on his part, or instead that it reflected only desperation. The issue whether Ward believed benefits from the settlement agreement outweighed his USERRA claim is therefore one for a jury to decide."

ZONING

PERMISSION TO APPEAL HAS BEEN GRANTED BY THE TENNESSEE SUPREME COURT JUNE 27, 2024, SO TINSLEY PROPERTIES, LLC ET AL. v. GRUNDY COUNTY, TENNESSEE IS NOT EFFECTIVE.

1. A distance location requirement for location of a quarry was not a zoning regulation, so it did not have to comply with laws regarding zoning - Substantial effects test - The substantial effects test requires courts to consider both the terms and the effects of the challenged ordinance: The first step requires courts to review the terms of the challenged ordinance and the municipality's comprehensive zoning plan to determine whether the ordinance is so closely related to the zoning plan that it can be fairly characterized as tantamount to zoning; the second step requires the courts to determine whether the challenged ordinance substantially affects the use of the property that is the subject of the litigation - Both parts of the test must be satisfied before a challenged ordinance may be held to be tantamount to zoning

TINSLEY PROPERTIES, LLC ET AL. v. GRUNDY COUNTY, TENNESSEE
COURT OF APPEALS No. M2022-01562-COA-R3-CV Filed February 8, 2024
Perm. App. Granted June 27, 2024

2. Variances - As set out in Tennessee Code Annotated § 13-7-207 the board of zoning appeals can if granted the authority by the city governing body, authorize a variance based on the following circumstances: where, by reason of exceptional narrowness, shallowness or shape of a specific piece of property at the time of the enactment of the zoning regulation, or by reason of exceptional topographic conditions or other extraordinary and exceptional situation or condition of such piece of property the strict application of any regulation enacted under this part and part 3 of this chapter would result in peculiar and exceptional practical difficulties to or exception or undue hardship upon the owner of such property, a board can authorize, upon an appeal relating to the property, a variance from such strict application so as to relieve such difficulties or hardship; provided, that such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan and zoning ordinance - Tennessee Code Annotated § 13-7-207(3) requires a showing of some peculiar physical

characteristic of the subject land in order to grant a variance - Plaintiff has conceded that no such characteristics are present on the subject real property, so the record lacks material evidence to support the BZA's grant of the variance here – Additionally, there was no special exception as allowed by Tennessee Code Annotated § 13-7-207

FRANK REED ET AL. v. TOWN OF LOUISVILLE, TENNESSEE ET AL.
COURT OF APPEALS No. E2023-00438-COA-R3-CV Filed February 20, 2024

"This appeal involves a decision by the Town of Louisville Board of Zoning Appeals ('BZA') that was upheld on review by the Blount County Circuit Court ('trial court'). At its May 5, 2020 hearing, the BZA granted appellee William Mattison's request for a variance to allow him to construct an accessory, non-attached garage on his improved real property, which structure would purportedly exceed the height limit set by town ordinance. The appellants, Frank and Tina Reed, who own property adjacent to Mr.Mattison's property and who had opposed Mr. Mattison's request for a variance, filed a petition for writ of certiorari with the trial court on July 5, 2022, seeking review of the BZA's decision. The trial court conducted hearings on the Reeds' petition in January and February 2023. On February 27, 2023, the trial court entered a final order affirming the BZA's decision to grant a variance to Mr. Mattison. The trial court found that there was a rational basis for the BZA's decision, which was supported by material evidence, and that the BZA had acted within its scope of authority and discretion. The Reeds timely appealed. Determining that there existed no material evidence of any particular characteristic of the real property warranting the grant of a variance, we reverse the trial court's judgment affirming the BZA's decision and vacate the BZA's grant of a variance to Mr. Mattison as illegal and outside the BZA's authority."

"On April 9, 2022, Mr. Mattison filed a residential building permit application with the BZA, seeking to construct a non-attached garage or 'accessory building' on his improved real property located in Louisville, Tennessee. Mr. Mattison stated in the application that the garage would be 2,400 square feet in size and twenty-one feet tall at its highest point. Along with the building permit application, Mr. Mattison sent a letter to the BZA requesting the approval of a height variance for the proposed accessory building. In this letter, Mr. Mattison explained that the building itself would be fourteen feet tall and that the roof would peak at twenty-one feet. He also stated that the building would be the 'same as the existing building that I own, on the adjacent parcel 3302.'"

"The BZA placed Mr. Mattison's request for a variance on the agenda for its May 5, 2022 meeting. Adjacent property owners were notified of Mr. Mattison's request for a variance and the upcoming hearing. The meeting report from the May 5, 2022 BZA meeting reflects that neighboring property owners, including Frank and Tina Reed, Christopher and Brandi Shipwash, and Rita Walker, attended the meeting to speak in opposition to Mr. Mattison's request. Mr. Mattison indicated during the hearing that he had sought the height variance in order to install garage doors that were tall enough to allow for the storage of boats or other items taller than a standard car."

"The hearing transcript from the May 2022 BZA meeting reflects that a contentious debate ensued concerning more than the height variance request. Neighboring property owners who opposed the variance also raised concerns about the lack of upkeep of Mr. Mattison's property, its potential use as a commercial repair facility, and the potential environmental ramifications of such use. In response to these concerns, Mr. Mattison claimed that he was retired and did not operate any type of business on the property in question. At the conclusion of the hearing, the BZA voted by a 3-2 majority to approve the height variance as requested by Mr. Mattison.

On May 11, 2022, the BZA sent a letter to Mr. Mattison approving his request for a variance subject to the following conditions:

> 1. The proposed twenty-one foot height for the accessory building could not be exceeded.

> 2. The location of the building had to be at the corner of Mr. Mattison's parcel 'with 30 foot setback from the Shipwash property line and 20 foot setback from the Reed property line.'
> 3. 'All of Mr. Mattison's vehicles and boats, current and future, dislocated by the construction of the garage, must be properly screened with review and approval required by the Town of Louisville Codes Official.'

"Following the BZA's approval of Mr. Mattison's request, on July 5, 2022, the Reeds filed a petition for writ of certiorari seeking the trial court's review of the BZA's variance approval pursuant to Tennessee Code Annotated §§ 27-8-101, *et seq*. The Reeds asked the trial court to declare the BZA's action illegal, arbitrary, and capricious because the variance was unsupported by material evidence in that 'Mattison did not adequately demonstrate any necessary hardship justifying a variance.' The Reeds also requested that the court issue a judgment finding the BZA's approval of the variance application to be illegal, void, and unenforceable."

"On February 17, 2023, the trial court conducted a final hearing respecting the Reeds' petition. Following the arguments of counsel for the parties, the court took note of the authority vested in the BZA by the Town of Louisville's Zoning Ordinance[.]" …

"… [T]he trial court upheld the BZA's decision, concluding that the Town of Louisville had chosen to 'give the Board of Zoning Appeals in Louisville broader authority than that contained on the face of Tennessee Code Annotated section 13-7-207.3, but within the scope of the broader authority authorized by Tennessee Code Annotated section 13-7-206 and 13-7-207.2[.]' Specifically, the court ruled:

> I am going to find that the Board of Zoning Appeals' authority is broader under the statutes, the interpreting caselaw and the ordinance, the empowering ordinance, than what is stated in Tennessee Code Annotated Section 13-7-207.3, that the Board was acting within its authority, that all of the deferential standards therefore apply, and that the Board of Zoning Appeals had a reasonable basis for its decision, and accordingly, I'm going to uphold the decision of the Louisville Board of Zoning Appeals.

"On February 27, 2023, the trial court entered its final order affirming the BZA's decision to grant the variance to Mr. Mattison. The court found 'that there was a rational basis supported by material evidence for the decision[.]' The court additionally stated that 'the Board of Zoning Appeals acted within the scope of its authority and discretion granted by Tenn. Code Ann. § 13-7-206, Tenn. Code Ann. § 13-7-207, and the Town of Louisville Zoning Ordinance.' The court therefore dismissed the petition for certiorari and affirmed the May 5, 2022 decision of the BZA. The Reeds timely appealed."

"As a threshold issue, Mr. Mattison posits that the grant of a variance was unnecessary in this matter because the subject zoning ordinance did not prohibit the proposed accessory structure. The Town of Louisville Zoning Ordinance ('the Ordinance') provides in pertinent part:

> 11-507. Accessory Building and Use Regulations.
> Buildings and/or uses which are customarily incidental and subordinate in size and function to the principal use of a site are considered to be accessory buildings and/or uses and are permitted on the same lot with a principal use. The establishment of accessory buildings and/or uses shall be subject to the following provisions and other applicable provisions of this ordinance:
> 1. General Provisions.
> a. No accessory structure shall be occupied or used unless the principal structure to which it is accessory is occupied or being used.
> b. lf an accessory building shares a structural wall with a principal building, it shall be deemed to be a part of the principal building and shall comply with the requirements of the ordinance applicable to a principal building, such as setback, height, etc.

> 2. Location.
> a. Residential districts. Except for general farming structures, accessory buildings not exceeding one (1) story or fourteen (14) feet in height, and occupying less than twenty (20) percent of the required rear yard, may be located as close as five (5) feet from the rear property line, except as may be provided for in Chapter 8. No accessory buildings or uses shall be permitted within any required front or side yard, except for perimeter fencing and such items as mail boxes, yard ornaments, and light fixtures, located so as not to create a nuisance or safety hazard to neighboring property or the public.
> * * *
> 11-508. Height and Density.
> No building or structure shall hereafter be erected or altered so as to exceed the height limit, to accommodate or house a greater number of families, to have narrower or smaller front yards or side yards than are required or specified in the regulations herein for the district in which it is located."

"Mr. Mattison asserts that the above provision, specifically Section 11-507(2)(a), 'merely states that the height of the accessory building impacts the setback requirements.' In other words, his postulate is that the fourteen-foot height mentioned is not a maximum. Accordingly, Mr. Mattison argues that not all accessory structures over fourteen feet in height require a variance; rather, only those structures located within a certain proximity to the rear property line would require a variance if greater than fourteen feet in height. In support of his interpretation, Mr. Mattison relies on the permissive nature of the word, 'may,' and the fact that this provision appears under the heading, 'Location.'"

"It is undisputed that Mr. Mattison's property is zoned 'residential.' The Ordinance provides that within a residential zone, '[c]ustomary accessory buildings' are permitted 'subject to the requirements of Section 11-507.' *See* Section 11-701(1)(j). The provision at issue, subsection 2(a) of Section 11-507, specifically states that 'accessory buildings not exceeding one (1) story or fourteen (14) feet in height, and occupying less than twenty (20) percent of the required rear yard, may be located as close as five (5) feet from the rear property line.' Section 11-507 also specifically provides that '[b]uildings and/or uses which are customarily incidental and subordinate in size and function to the principal use of a site are considered to be accessory buildings and/or uses and are permitted on the same lot with a principal use' (emphasis added)."

"Although subsection 2(a) is not a model of clarity, when we consider it within the framework of the Ordinance as a whole and give the words their natural and ordinary meanings, *see Venture*, 585 S.W.3d at 418, we conclude that the proper interpretation would be to require that any accessory building in a residential zone be no more than fourteen feet in height pursuant to subsection 2(a). To interpret subsection 2(a) as Mr. Mattison urges, allowing an accessory building of any height so long as it is located farther than five feet from the rear property line, would run afoul of subsection 2(a)'s stated objective of 'not [] creat[ing] a nuisance or safety hazard to neighboring property or the public.' Moreover, an accessory building of substantial height would likely not be 'subordinate in size' to the principal structure. *See* Section 11-507.

"In further considering the language of Section 11-507, we also apply the statutory interpretation maxim of *expressio unius est exclusio alterius*, which holds that the 'expression of one thing implies the exclusion of others.' *See Northshore Corridor Assoc. v. Knox Cnty.*, 633 S.W.3d 561, 580 (Tenn. Ct. App. 2021) (quoting *Rich v. Tenn. Bd. of Med. Exam'rs*, 350 S.W.3d 919, 927 (Tenn. 2011)). In doing so, we infer that the absence of any other specific height requirement concerning accessory buildings in a residential zone implies that the fourteen-foot height limit is the only height limit applicable to such buildings. *See Rich v. Tenn. Bd. of Med. Exam'rs*, 350 S.W.3d 919, 927 (Tenn. 2011); *Northshore*, 633 S.W.3d at 580. We therefore conclude that the proper interpretation of Section 11-507(2)(a) is that any accessory building must be no more than fourteen feet tall, occupy less than twenty percent of the required rear yard, and be located five feet or more from the rear property line. Inasmuch as Mr.

Mattison's proposed accessory building exceeded this height requirement, a variance or some other relief from the terms of the Ordinance was necessary."

"We further note that Mr. Mattison took the position before the BZA and the trial court that a variance was required because of the Ordinance's height requirement. Mr.Mattison's initial letter to the BZA stated: 'I am requesting a variance on the height of a proposed accessory building . . . .' Based on the record before us, we see no indication that Mr. Mattison has previously adopted the position that the Ordinance did not actually impose a fourteen-foot height limitation. Accordingly, he cannot maintain an inconsistent position on appeal. *See Estate of Schultz v. Munford, Inc.*, 650 S.W.2d 37, 40 (Tenn. Ct. App. 1982) (holding that a party 'cannot take a position on appeal inconsistent with that taken in the trial of the case'); *Price v. Tenn. Prod. & Chem. Corp.*, 385 S.W.2d 301, 307 (Tenn. Ct. App. 1964) ('When a cause is brought up for appellate review, a party cannot assume an attitude inconsistent with, or different from, that taken by him at the trial.'); *Bradley Cnty. v. City of Cleveland*, No. E2012-00634-COA-R3-CV, 2012 WL 5333555, at *8 (Tenn. Ct. App. Oct. 30, 2012) ('A party is not allowed to take one position in the trial court and then take a contrary position on appeal.'). We therefore find Mr. Mattison's argument that he was not required to seek a variance to be unavailing."

"We now turn to the issues raised by the appellants. The Reeds' overarching argument is that judicial review of a variance is limited to review of the record for material evidence concerning unique property characteristics of the land at issue. Upon thorough review, we agree."

"As this Court has previously explained:

> The board of zoning appeals' authority extends only so far as state law permits. *Father Ryan High School v. City of Oak Hill*, 774 S.W.2d 184, 190 (Tenn. Ct. App. 1988). It cannot be extended by the city commission or by implication. State law permits, but does not require, city commissions to empower boards of zoning appeals to perform six functions: (1) making special exceptions [Tenn. Code Ann. §§ 13-7- 206(a), -207(2)]; (2) interpreting zoning maps [Tenn. Code Ann. §§ 13-7- 206(a), -207(2)]; (3) passing upon boundary line disputes [Tenn. Code Ann. § 13-7-206(a)]; (4) authorizing variances [Tenn. Code Ann. § 13-7-207(3)]; (5) deciding other special questions as authorized in the zoning ordinance [Tenn. Code Ann. § 13-7-207(2)]; and (6) deciding appeals from decisions of a municipal building commissioner or 'other administrative official' [Tenn. Code Ann. §§ 13-7-206(b), -207(1)].

Whittemore, 835 S.W.2d at 14."

"The statutory section that provides authority for a board of appeals to grant variances, Tennessee Code Annotated § 13-7-207(3) (2019), states that a board can authorize a variance based on the following circumstances:

> Where, by reason of exceptional narrowness, shallowness or shape of a specific piece of property at the time of the enactment of the zoning regulation, or by reason of exceptional topographic conditions or other extraordinary and exceptional situation or condition of such piece of property, the strict application of any regulation enacted under this part and part 3 of this chapter would result in peculiar and exceptional practical difficulties to or exception or undue hardship upon the owner of such property, [a board can] authorize, upon an appeal relating to the property, a variance from such strict application so as to relieve such difficulties or hardship; provided, that such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan and zoning ordinance.

(Emphasis added.)"

"With regard to the Ordinance, Section 11-207 provides:

> "The Board of Zoning Appeals shall have all of the following powers, as granted by Section 13-7-207 of the Tennessee Code Annotated:
>
> * * *
>
> 3. Variance. To hear and decide applications for variances from the terms of this ordinance, where, by reason of exceptional narrowness, shallowness, or shape of a specific piece of property as a lot of record at the time of adoption of this ordinance a specific hardship exists in meeting the requirements of this ordinance, or where by reason of exceptional topographical conditions or other extraordinary or exceptional situations or conditions of a piece of property, the strict application of the provisions of this ordinance would result in exceptional practical difficulties to or exceptional and undue hardship upon the owner of such property, provided that such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of this ordinance. In granting a variance, the BZA may attach thereto such conditions regarding the location, character, and other features of the proposed building, structure or use as it may deem advisable in furtherance of the purpose of this ordinance. Before any variance is granted it shall be shown that special circumstances are attached to the property which do not generally apply to other property in the neighborhood.

(Emphasis added.) In addition, the definitions section of the Ordinance defines a 'variance' as:

> A modification of the provisions of this ordinance when such modification will not be contrary to the public interest where, owing to conditions peculiar to the property and not the result of the actions of the applicant occurring after the effective date of the ordinance, a literal enforcement of the ordinance would result in unnecessary and undue hardship.

See Section 11-1003 (emphasis added)."

"For many years, this Court has interpreted the above-referenced statutory language and the wording of similar ordinances as requiring a showing of 'peculiar circumstances of the land . . . rather than any hardship personal to or created by an owner' before a variance may be lawfully granted by a board of appeals. *See McClurkan v. Bd. of Zoning Appeals for Metro. Gov't of Nashville & Davidson Cnty.*, 565 S.W.2d 495, 497 (Tenn. Ct. App. 1977) ('[B]oth the statute and ordinance controlling here make characteristics of the land itself the overriding criteria by which the Board is to decide the issue of hardship to an owner.'). *See also Hillsboro-W. End Neighborhood Ass'n, Inc. v. Metro. Bd. of Zoning Appeals, Nashville Davidson Cnty.*, No. 01A01-9406-CH-00282, 1995 WL 79224, at *3 (Tenn. Ct. App. Feb. 24, 1995) (explaining that a variance must be predicated upon a finding that the 'unique features of the lot itself . . . result in hardship to the [owner].'); *Baker v. Bd. of Zoning Appeals of Metro. Gov't of Nashville & Davidson Cnty.*, No. C.A. 88-147-II, 1989 WL 3167, at *5 (Tenn. Ct. App. Jan. 20, 1989) ('Reading the statute and the local zoning regulations together, it is essential that there be proof and a finding that a particular hardship or exceptional practical difficulty is imposed upon the owner by the size, shape or topographical conditions of the property before a variance can be granted.'); *Metro. Historical Comm'n v. Colony Assocs. Joint Venture*, No. 87-319-II, 1988 WL 109234, at *9 (Tenn. Ct. App. Oct. 19, 1988) ('[S]tate statute and local ordinance [concerning the grant of a variance], read together, require proof and finding that a particular hardship (as distinguished from a mere inconvenience or diminution of financial return) is imposed upon the owner by (1) size (2) shape or (3) topographical conditions of the property.')."

"… [B]oth Tennessee Code Annotated § 13-7-207(3) and Section 11-207(3) of the Ordinance require a showing of some peculiar physical characteristic of the subject land in order to grant a variance. Mr. Mattison has conceded that no such characteristics are present on the subject real property. As such,

the record lacks material evidence to support the BZA's grant of the variance here. Rather, the record demonstrates that Mr. Mattison sought a variance so that he could build a taller accessory building with higher garage doors that could accommodate a boat or other motor vehicles. In addition, the BZA made no finding of any particular characteristic of the real property that created a hardship for Mr. Mattison. Instead, any hardship in this matter is clearly 'personal to or created by an owner' and is insufficient to justify the grant of a variance. *See McClurkan*, 565 S.W.2d at 497. Ergo, the BZA acted illegally and outside of its authority in granting the variance. We therefore reverse the trial court's judgment affirming the BZA's decision and vacate the BZA's grant of the variance."

"The appellees contend that the trial court properly determined that other statutory provisions granted the BZA authority to grant relief to Mr. Mattison in this instance. In addition to the power afforded to boards of appeal regarding the grant of a variance, Tennessee Code Annotated § 13-7-207 also provides that a board of appeals can:

> Hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, permit, decision, or refusal made by the municipal building commissioner or any other administrative official in the carrying out or enforcement of any provision of any ordinance enacted pursuant to this part and part 3 of this chapter;
>
> Hear and decide, in accordance with any such ordinance, requests for special exceptions or for interpretation of the map or for decisions upon other special questions upon which such board is authorized by any such ordinance to pass[.]

Tenn. Code Ann. § 13-7-207(1)-(2). Similarly, the Ordinance provides that the BZA can 'hear and decide appeals where it is alleged by the appellant that there is error in any order, or requirement, permit decision, determination or refusal made by the Administrator, building official or other administrative official in the carrying out or enforcement of any provision of this ordinance.' *See* Section 11-207(1). The Ordinance also provides that the BZA may 'make decisions upon any special questions which the [BZA] is authorized to consider under this ordinance, and interpret the zoning map.' *See* Section 11-207(2)."

"Appellees urge that both of these provisions are potentially applicable here because (1) Mr. Mattison was denied a permit to build an accessory building by an administrative official, who was relying on the height limitation in Section 11-507(2)(a), and (2) his request for relief from the height limitation in Section 11-507(2)(a) could qualify as a special question upon which the BZA was authorized to act. The trial court agreed, finding that the BZA had the power to act upon Mr. Mattison's request for relief because the BZA was authorized to 'conduct administrative review of any order or requirement, permit decision, determination or refusal made by an administrative or building official under the zoning ordinance' and because Mr. Mattison's request 'may be a special question.' *See* Tenn. Code Ann. § 13-7-206(b) (2019) (allowing the BZA to hear an appeal from the denial of a building permit); § 13-7-207(1), (2) (detailed above)."

"Although the BZA certainly maintains power and authority to act in the circumstances described in Tennessee Code Annotated § 13-7-207(1)-(2) and Section 11-207(1)-(2) of the Ordinance, those circumstances were not present before the BZA in the case at bar. Here, in his letter to the BZA, Mr. Mattison specifically requested the grant of a variance from the height restriction on accessory buildings in a residential zone imposed by Section 11-507(2)(a). Mr. Mattison did not expressly seek review of an administrative official's decision or the resolution of a special question. Moreover, the meeting report and transcript from the BZA's May 5, 2022 meeting reflect that all discussions and consideration of Mr. Mattison's request concerned the grant of a variance from the Ordinance's height requirement. As this Court has explained, local government 'boards and commissions . . . speak or act officially only through their minutes and records made at duly called meetings.' *See B & B Enters. of Wilson Co., LLC v. City of Lebanon*, No. M2003-00267-COA-R3-CV, 2004 WL 2916141, at *3 (Tenn. Ct. App. Dec. 16, 2004). Finally, the May 11, 2022 letter sent by the BZA to Mr. Mattison explicitly approved his request for a variance subject to certain conditions."

"Having determined that the grant of a variance in this situation was illegal and outside the scope of the BZA's authority, *see Hillsboro*, 1995 WL 79224, at *3, we likewise determine that the trial court erred in affirming the BZA's grant of the variance when there existed no material evidence of any particular characteristic of the real property warranting the grant of a variance. *See Venture Holdings*, 585 S.W.3d at 416-17. We further conclude that the trial court erred by looking beyond the Ordinance's variance procedure in order to affirm the BZA's action in this matter. We therefore reverse the trial court's decision affirming the BZA's grant of a variance, and we vacate the BZA's grant of a variance to Mr. Mattison."

ATTORNEY GENERAL OPINIONS

Opinion No. 24-003
February 15, 2024

Scope of Tenn. Code Ann. § 6-53-110 as Amended by 2023 Tenn. Pub. Acts, ch. 391

Question
Does Tenn. Code Ann. § 6-53-110 as amended by Chapter 391 of the Public Acts of 2023 apply to a home-rule municipality that is divided geographically (as opposed to being divided by population) into three (3) districts and that elects all the members—e.g., five (5) members—of its Board of Commissioners at-large?

Opinion
Tennessee Code Annotated § 6-53-110 as amended by Chapter 391 of the Public Acts of 2023 applies to all municipalities, including home-rule municipalities, that require candidates to be nominated from districts, regardless of the manner in which the municipalities have established their districts.

Opinion No. 24-006
March 15, 2024

Jurisdiction, Authority, and Duties of Constables

Question 1
Do constables have arrest powers throughout the entire State of Tennessee?

Opinion 1
No. Constables cannot exercise governmental power to make arrests throughout the entire State of Tennessee.

Question 2
If a constable is tasked with serving process outside the constable's county, and the constable observes a crime taking place outside the constable's county, does the constable have authority to make the arrest?

Opinion 2
The scenario described in the question cannot arise. Constables lack authority to serve process outside their county.

Question 3
If a constable does not act to "cause the peace of the state to be kept [and] . . . arrest all persons that go in . . . sight armed offensively" or to "apprehend all felons, rioters, or persons riotously assembled," would that violate the constable's oath of office?

Opinion 3

It depends. Constables cannot violate the oath set out in Tenn. Code Ann. § 8-10-108(b) if they lack law enforcement powers or if their failure to act occurs outside their county.

Opinion No. 24-009
June 18, 2024

Maintenance-of-Effort Requirements for Education—Capital Improvements

Question
If a county board of education receives funding for capital improvements from a municipality situated within the county, will the municipal legislative body be required to comply with state maintenance-of-effort obligations in its budget for subsequent years for the county board of education?

Opinion
Likely not. Tennessee's maintenance-of-effort obligations only apply to local education agencies (LEAs) and the specific governmental entities required to fund the LEAs. Furthermore, maintenance-of-effort obligations likely do not apply to capital improvements.